

MILITARY LAW REVIEW

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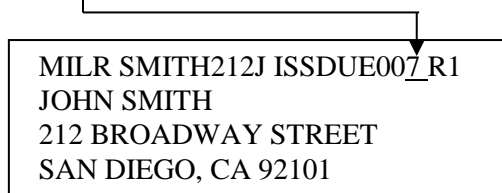
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MILITARY LAW REVIEW

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BUILDING A HOME AWAY FROM HOME: ESTABLISHING OPERATIONAL CONTROL IN A FOREIGN COUNTRY

*Major Clayton J. Cox**

PROVIDE COMFORT started as a fast-moving train. No one knew in advance that they were getting on, how far they were going, or when they would get off. Only a few tasks were well defined, and many were supported with difficulty. None of the units that deployed to Turkey had doctrine, plans, or procedures designed specifically for relief operations. But throughout the world the nature of the crisis had captured everyone's attention. Refugees were suffering and dying, and the situation would worsen if quick action were not taken. The train was accelerating, but no one hesitated to get on.¹

I. Introduction

In early 1991, Turkish and international relief agencies found themselves confronted with a large-scale refugee relief effort, one larger than anyone had anticipated, leaving the world unprepared to respond.² Nearly one million Kurdish refugees huddled in the mountains on the Iraqi

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¹ GORDON W. RUDD, HUMANITARIAN INTERVENTION 56 (2004).

² *Id.* at 36.

side of its border with Turkey, sustaining themselves on only what they could carry when they fled their homes.³ The Gulf War had just ended, and a majority of Americans wanted their troops home as soon as possible.⁴ However, as they witnessed the human suffering broadcast over the airways, they wanted to help these refugees, even if it meant the troops had to stay to assist.⁵

What followed in response was *Operation Provide Comfort*, a humanitarian relief operation initiated by the United States that relied heavily on support from the military forces of thirteen countries.⁶ The timing of the operation, its complexity, its use of military forces, and its proximity to the end of the first Gulf War led to many legal issues, including how to define operational control for purposes of military construction.⁷

Even considering the tragic, unexpected circumstances facing the Kurds, some of the first legal questions and most pressing concerns in the operation dealt with funding—the United States knew it wanted to help, but how would it pay for its activities, such as building a camp for the refugees?⁸ To further complicate that fiscal issue, “[m]ost of the funding questions arose in the early days of the operations before firm guidance was received and additional sources of funds other than [operations and maintenance funds (O&M)] were available.”⁹ Like the Turkish government and the international relief agencies, commanders and their judge advocates did not yet have the answers for the issues posed by this situation.¹⁰

One specific concern was whether certain spending limitations applied to construction projects due to the U.S. military’s participation in Operation Provide Comfort.¹¹ The operation required the construction of

³ *Id.* See also Philip A. Meek, *Operation Provide Comfort: A Case Study in Humanitarian Relief and Foreign Assistance*, 37 A.F. L. Rev. 225 (1994).

⁴ Meek, *supra* note 3, at 225–26.

⁵ *Id.*

⁶ *Id.* at 226.

⁷ *Id.* at 226, 233.

⁸ *Id.* at 228.

⁹ *Id.*

¹⁰ See RUDD, *supra* note 1, at 36.

¹¹ Meek, *supra* note 3, at 232. See also 10 U.S.C. § 2805(d)(1) (1990). At the time, \$200,000 was the O&M limit for unspecified minor military construction. 10 U.S.C. § 2805(d)(1).

housing for Kurdish refugees and allied forces.¹² Military leaders questioned whether this construction constituted “military construction,” which would be subject to spending limitations.¹³ Headquarters for the United States Air Forces in Europe (HQ USAFE) believed that this housing did constitute military construction, which meant a \$200,000 limit per project would apply to using O&M funds.¹⁴ In arriving at this conclusion, HQ USAFE relied on the definition of “military installation” found in 10 U.S.C. § 2801:

“Military installation” means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of a Secretary of a military department or the Secretary of Defense.¹⁵

HQ USAFE’s opinion focused heavily on the physical presence of the U.S. military and the physical control it provided in the camps.¹⁶ One judge advocate reviewing the situation after the fact adamantly agreed with HQ USAFE, stating:

It seems beyond any doubt that these foreign refugee camps and U.S. camps were at a minimum under the operational control of the United States, particularly because U.S. military command structures were in place, U.S. military forces patrolled and ensured security at the camps, and U.S. forces controlled the daily lives of the refugees and all other persons in those camps.¹⁷

On the other hand, United States European Command (EUCOM), hoping to avoid the statutory \$200,000 project limit, asserted that the camps were “strictly humanitarian relief centers, not military facilities and not military installations under U.S. operational control.”¹⁸ Yet, EUCOM did not dispute that the military physically controlled the area but asserted instead that “control over the camps would be exercised in conjunction with the displaced persons themselves” and the U.S. military was waiting

¹² Meek, *supra* note 3, at 232.

¹³ *Id.*

¹⁴ *Id.* at 233.

¹⁵ Military Construction Codification Act, ch. 169, 96 Stat. 153 (1982) (current version at 10 U.S.C. § 2801 (2012)). *See also* Meek, *supra* note 3, at 233.

¹⁶ Meek, *supra* note 3, at 233.

¹⁷ *Id.*

¹⁸ *Id.*

to be replaced in its function by “the United Nations or other international relief organizations as soon as possible.”¹⁹ EUCOM's position reflected the fact that “[a]lthough the U.S. military has conducted humanitarian relief operations abroad throughout history, the Department of State has primary responsibility for foreign humanitarian relief.”²⁰

In the end, the Office of the Secretary of Defense sided with EUCOM, determining that 10 U.S.C. § 2801 did not apply to the refugee camps because the camps “were not military installations under the jurisdiction of [the Department of Defense (DoD)].”²¹ However, was that the correct decision? HQ USAFE and EUCOM, each with its own set of legal advisors, approached operational control from different angles and came to opposite conclusions. Each cited facts that supported their conclusions, with HQ USAFE focusing on the physical presence and police power provided by the U.S. military and EUCOM keying in on the humanitarian relief purpose of the mission.²² Almost twenty years later, the phrase “operational control” remains unclear.

Regardless of whether this exact scenario could repeat itself, operational control needs a clearer definition. With a better definition of operational control, commanders and the legal advisors supporting them will be better prepared to take action toward mission accomplishment instead of arguing about definitions within definitions and which pots of money to use. In an effort to define the phrase “operational control,” Section II will trace back the roots of this requirement and look for guidance in the statute and its legislative history. Section III will then address insights gained from challenges to control over military installations in case law, specifically *United States v. Phisterer*.²³ Finally, Section IV will provide recommended practices to help commanders and their judge advocates determine when operational control exists in both permissive and non-permissive environments.

In the end, the analysis and review will show that judge advocates and commanders should define operational control consistent with 10 U.S.C. § 2801's plain language and Supreme Court case law dealing with military installations, meaning (1) there is a defined geographic area, (2) which the

¹⁹ *Id.*

²⁰ *Id.* at 226.

²¹ *Id.* at 233.

²² *Id.*

²³ *United States v. Phisterer*, 94 U.S. 219 (1876); *See also United States v. Apel*, 571 U.S. 359 (2014).

military intends to use, possess, or control for military purposes, (3) regardless of the duration of that use, possession, or control. By using these criteria to assess whether operational control exists, judge advocates will be ready to take quick action.

II. Congressional Intent — Operational Control

When approaching a fiscal law issue—such as whether operational control exists for military construction purposes—analysis begins with due deference to Congress. After all, “[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,” one of the primary constitutional powers given to the legislature.²⁴ Congress requires that the funds it provides be used only for the purposes for which they were appropriated.²⁵ Therefore, judge advocates owe careful attention to any information or clues received from Congress when evaluating expenditures.

It follows that government agents spending on construction, even during military operations or for humanitarian reasons, must obligate funds in a way that Congress approves. When it comes to the military, Congress has given specific rules for funding military construction.²⁶ It defines military construction as “any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road.”²⁷ In the same statute, Congress also provides a definition for what constitutes a military installation:

The term “military installation” means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control.²⁸

²⁴ U.S. CONST. art. I § 9, cl 7.

²⁵ 31 U.S.C. § 1301(a) (2012).

²⁶ 10 U.S.C. § 2801(a) (2012).

²⁷ *Id.*

²⁸ 10 U.S.C. § 2801(c)(4).

Congress has included the term “operational control” as a requirement for military construction in foreign countries ever since 10 U.S.C. § 2801 became law.²⁹ However, the statute does not define “operational control.”³⁰ This lack of a definition has left judge advocates and commanders struggling to pinpoint how operational control fits in, as exemplified by the disagreement between EUCOM and HQ USAFE during the Kurdish refugee camp situation.³¹

Even though Congress has not specifically defined “operational control,” the intent found in legislative history can help fill this definitional void. Where a term or phrase in a statute is undefined, judge advocates can search for meaning in the materials that Congress created when it formed the law, such as recordings, transcripts, and records from legislative hearings. If those materials contain no such clues, then judge advocates may turn to other legal sources, such as judicial review of similar statutes for guidance. Reviewing the history of 10 U.S.C. § 2801 provides some, although minimal, insight into how “operational control” should be defined.

Although the phrase “operational control” has been part of the statute since Congress passed it into law,³² that particular phrase did not appear until after Congress had considered the bill for several months.³³ The Senate bill³⁴ and an identical House bill³⁵ introduced in December 1981 said nothing about operational control, and neither did a second Senate bill introduced for consideration in February 1982.³⁶

However, in a subsequent House bill introduced for consideration by the Committee on Armed Services in May 1982, the term “operational control” became part of the proposed law for the first time as part of the definition for “military installation.”³⁷ The “military installation” definition in the May 1982 bill is identical to the definition passed into law

²⁹ Military Construction Codification Act, ch. 169, 96 Stat. 153 (1982) (codified as amended at 10 U.S.C. § 2801 (2012)).

³⁰ 10 U.S.C. § 2801(c)(4).

³¹ Meek, *supra* note 3, at 233.

³² Military Construction Codification Act, ch. 169, 96 Stat. 153 (1982) (codified as amended at 10 U.S.C. § 2801 (2012)) [hereinafter Military Construction Codification Act].

³³ S. 1990, 97th Cong. (1981).

³⁴ *Id.*

³⁵ H.R. 5241, 97th Cong. (1981).

³⁶ S. 1990, 97th Cong. (Feb. 2 (legislative day, Jan. 25), 1982).

³⁷ H.R. 6451, 97th Cong. (1982).

in July 1982.³⁸ In 2003, a subsequent amendment added the phrase “without regard to the duration of operational control” at the end of the definition of “military installation.”³⁹

The fact that the operational control requirement appeared in the May 1982 version of the bill after Congress omitted it in prior drafts suggests that something triggered that change as different committees worked on the proposed legislation. Unfortunately, the legislative hearings do not explain why Congress added the term “operational control” to the definition of “military installation.” However, the legislative history hints at one possible reason: mission purpose and responsibility drive who has operational control.⁴⁰

James P. Wade, Jr., then-Acting Under Secretary of Defense, raised this concept—that mission purpose and responsibility are linked to operational control—when he explained why the Air Force was “the focal point for launch and orbital support for space systems.”⁴¹ During hearings on the proposed law, Secretary Wade wrote a letter addressing concerns about the allocation of funding for space operations.⁴² Even though there is no explicit connection between the concern about space operations and Congress requiring that operational control be established in a foreign country for military construction, the points Secretary Wade raised highlight how operational control should be viewed.⁴³

The letter provided by Secretary Wade responded to concerns from the Comptroller General of the United States that the DoD’s Consolidated Space Operations Center lacked adequate planning.⁴⁴ That letter included the following:

We fully recognize that space does have unique aspects and that the support structure is large and expensive to operate. For this reason,

³⁸ Military Construction Codification Act, *supra* note 32.

³⁹ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003).

⁴⁰ See *Military Construction Authorization and Appropriation Fiscal Year 1983 Military Construction Codification Bill: Joint Hearings on S. 2205 and S. 1990 Before the Subcomm. on Military Constr. of the Comm. on Armed Services and the Subcomm. on Military Constr. of the Comm. on Appropriations*, 97th Cong. 457 (1982) [hereinafter *Hearings*] (letter from James P. Wade, Jr., Acting Under Secretary of Defense).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

the Air Force, through Space Division, is the focal point for launch and orbital support for space systems. This “single manager” approach for common support functions is efficient and has been implemented; operational control of space systems is vested in those organizations having direct mission responsibility.

Until such time as a new mission in space mandates the designation of an organization to accomplish that mission, we believe that our present functional approach to management and operation of space systems is appropriate.⁴⁵

In addition to being the only time operational control was mentioned during the hearings,⁴⁶ these two paragraphs provide an example of the DoD’s view of operational control at the time. Per the letter, “operational control” was “vested in those organizations having direct mission responsibility.”⁴⁷ Furthermore, operational control could change whenever a new mission required a new organization for it to function.⁴⁸ In other words, operational control should be determined based on the mission to be accomplished, and operational control should only change if the mission changes first. Purpose—which fundamentally drives the mission—matters, and it directly relates to who has operational control.

Applied to circumstances of Operation Provide Comfort, this purpose-driven, mission-centric view of operational control extracted from the legislative history tends to support EUCOM’s conclusion over HQ USAFE’s when funding the Kurdish refugee camps’ construction. In finding that no military operational control existed, EUCOM focused on why the camps were being built—for humanitarian relief—over who built them and provided physical control in the area at any given time.⁴⁹ EUCOM acknowledge that the military was present, but it characterized the military as a placeholder for those who should be in control: the United Nations or other relief organizations.⁵⁰ In other words, EUCOM let the mission govern operational control.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Meek, *supra* note 3, at 233.

⁵⁰ *Id.*

On the other hand, HQ USAFE applied a rigid, action-centered interpretation of operational control.⁵¹ The purpose and scope of the mission did not carry much weight in HQ USAFE's calculus; because it fell to the U.S. military to build the housing and maintain peace in the area, HQ USAFE concluded that the U.S. military had operational control, even if mission responsibility was actually vested in some other organization, such as the Department of State, the United Nations, or international relief organizations.⁵² Its approach, if followed, would have imposed limitations meant for the military on an operation with a humanitarian relief purpose simply because the military was there and providing support that was immediately required. From its action-centered standpoint, HQ USAFE would have imposed unnecessary limitations on the relief effort by limiting the use of O&M funds to \$200,000 per project.⁵³

In addition to this mission-driven view of operational control, the fact that Congress included the phrase “operational control” within its definition for “military installation” is insightful.⁵⁴ The placement of “operational control” in the definition for “military installation” suggests that military installations in the United States and areas considered under operational control in foreign countries are more similar than different.⁵⁵ These hints from the legislative history and structure of 10 U.S.C. § 2801, however insightful and persuasive, are small and not explicitly linked to why Congress included operational control in the statutory language.⁵⁶ Furthermore, there is no way to know the extent of consideration Congress gave to Secretary Wade’s letter. However, the idea of mission-focused operational control, especially as it relates to military installations, is not solely a factor in legislative history; it is a theme that emerges in judicial rulings as well. With this in mind, the judicial treatment of the operational control of military installations generally provides a solid framework for understanding operational control for purposes of the statute.

III. Judicial Guidance — Military Installations

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 232.

⁵⁴ 10 U.S.C. § 2801(c)(4) (2012).

⁵⁵ *See id.*

⁵⁶ *Hearings, supra* note 40, at 457 (letter from James P. Wade, Jr., Acting Under Secretary of Defense).

In the absence of clear, unambiguous legislative intent in defining operational control, case law involving the treatment of the operational control of military installations provides helpful insight into how judge advocates should interpret operational control. Although the phrase “operational control” found in 10 U.S.C. § 2801 has not been directly addressed, Courts have had occasion to address authority over military installations in the United States when reviewing other statutes.⁵⁷ Such cases help refine the scope of what operational control means for purposes of analysis under 10 U.S.C. § 2801.⁵⁸

A. *Phisterer* — A Geographic Area with a Military Purpose

Phisterer is an 1876 Supreme Court case that delves into the concept of military purpose and further examines when a geographic area should be considered under the military’s operational control.⁵⁹ It supports the conclusion that operational control must involve a certain geographic area that will be used for a military purpose.⁶⁰

The named party in that case, Frederick Phisterer, served as a captain in the United States Army infantry during the 1870s.⁶¹ He received orders to leave his post in Fort Bridger, Wyoming Territory, and return to his home in New York City.⁶² Once there, he was to await orders.⁶³ The captain complied, reporting to the Army that he had arrived in New York and notifying the Army when he later moved to New Jersey.⁶⁴

After his move to New Jersey, the captain sought reimbursement for his mileage from when he travelled from Wyoming to New York.⁶⁵ The Court of Claims paid Captain Phisterer for his mileage, as well as for a separate claim he made relating to quarters.⁶⁶ Captain Phisterer received \$585.20; the Government appealed the decision to the United States Supreme Court.⁶⁷

⁵⁷ See e.g. *United States v. Apel*, 571 U.S. 359 (2014).

⁵⁸ See *id.*; *United States v. Phisterer*, 94 U.S. 219, 220 (1876).

⁵⁹ See *Phisterer*, 94 U.S. at 219.

⁶⁰ See *id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Phisterer v. United States*, 1876 U.S. Ct. Cl. LEXIS 40, 40 (U.S. Ct. Cl. 1876).

⁶⁷ *Id.*

On appeal, the Government argued that the Army was justified in denying reimbursement for the mileage.⁶⁸ The Government supported its appeal by citing section 1117 of the Army Regulations existing at the time, which provided the following: “When officers are permitted to exchange stations or are transferred at their own request from one regiment or company to another, the public will not be put to the expense of their transportation. They must bear it themselves.”⁶⁹ Although the Court did not address how the Government argued this section of regulation, it appears that the Government argued that Captain Phisterer’s home should be considered a military station because that is where the Army sent him while he awaited orders.⁷⁰

Whether or not the Government made that argument, the Court addressed the cited regulation and explained why a military station does not include an individual’s home.⁷¹ In rejecting the overly expansive definition put forth by the Government, the Court stated the following:

[W]e are of the opinion that Captain Phisterer did not make an exchange of stations within the meaning of this regulation. In other words, although he left a military station at Fort Bridger, his home at New York, to which he went, did not become, and is not to be deemed, a military station. In the broadest use of language, no doubt the word “station” means a place or position; and it may be said that wherever a man, in pursuance of orders, stays or remains, he is stationed, and that if he is a military man, such place becomes a military station. This word (station) has a recognized and a different meaning under different circumstances. It is a technical word in church regulations, in the science of ecclesiology, in the civil law, in surveying, in railroad language, and in military science. . . .

A “military station” is merely synonymous with the term “military post,” and means a place where troops are assembled, where military stores, animate or inanimate, are kept or distributed, where military duty is performed or military protection afforded, -- where something,

⁶⁸ *Phisterer*, 94 U.S. at 221.

⁶⁹ *Id.*

⁷⁰ *See id.* at 222.

⁷¹ *Id.*

in short, more or less closely connected with arms or war is kept or is to be done.⁷²

This indicates that a military station, or military installation, is a geographic location that the military intends to use, possess, or control for military purposes, or “something . . . more or less closely connected with arms or war.”⁷³ The physical location of Captain Phisterer’s home and its purpose as a civilian residence separated it from military purposes to the point that it could not qualify as part of a military installation. A civilian home in New York was sufficiently removed from anything “closely connected with arms or war” to distinguish it from being part of a military installation. The fact that it became the ordered residence of “a military man” did not convert it from a non-military area into an area under military control.⁷⁴

The Supreme Court’s ruling in this case squares with EUCOM’s view of the refugee camps. A military connection is not enough—the overall connection to the area needs to be “closely connected with arms or war.”⁷⁵ A civilian residence housing a military member or a refugee camp, even one where military members help temporarily provide police-like security, are simply not sufficiently “connected with arms or war” to be considered military installations or subject to the operational control of the armed forces.⁷⁶ However, what this case does not address is the element of consistency of control, or, in other words, whether a certain duration of control, use, or possession must be established before an area becomes under operational control.

B. *Apel* — Purpose Trumps Duration or Persistence of Control

Phisterer sets the stage and indicates that both control of a military base and operational control of an area in a foreign country require a geographic area that the military intends to use, possess, or control for military purposes.⁷⁷ Another Supreme Court case, *Apel*, expounds further on the need for a clearly defined geographic space and also delves into the

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

interrelation of purpose and the duration or persistence of control.⁷⁸ Providing more insight to what it means to have operational control, *Apel* also supports the idea that the purpose an area serves matters more than how that area is physically controlled.⁷⁹

Where *Phisterer* deals with a captain seeking reimbursement for moving costs,⁸⁰ *Apel* deals with a blood-throwing, antiwar activist named John Dennis Apel.⁸¹ During a protest at Vandenberg Air Force Base, California, in March 2003, Mr. Apel, in protest, elected to throw blood on the sign for the base, which was located outside of an area on the base specifically opened up to allow protesting.⁸² Due to his actions, he received a criminal conviction and a three-year bar from the installation.⁸³ In May 2007, he returned to Vandenberg, trespassed again, received another conviction, and was permanently barred from the base.⁸⁴ As an exception to the barment, Mr. Apel could still traverse the base through Highway 1 and Highway 246, roads over which the Air Force had granted easements to allow the public to traverse the installation.⁸⁵

Despite his criminal convictions, Mr. Apel continued to ignore the commander's order barring him from the installation.⁸⁶ After he continued to violate the barment order, a Magistrate Judge convicted him for trespasses and ordered him to pay \$355.00.⁸⁷ Mr. Apel appealed, eventually obtaining a hearing with the Supreme Court.⁸⁸

At that hearing, Mr. Apel argued that the military had relinquished control over portions of the installation by granting easements to the county, referring to access permitted via Highway 1 and Highway 246.⁸⁹ In support of his argument, he asserted that "military places [such as installations, posts, forts, and yards] have historically been defined as land withdrawn from public use."⁹⁰ He essentially argued that the military's

⁷⁸ *United States v. Apel*, 571 U.S. 359, 364–65 (2014).

⁷⁹ *Id.*

⁸⁰ *Phisterer*, 94 U.S. at 220.

⁸¹ *Apel*, 571 U.S. at 364.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 362, 364.

⁸⁶ *Id.* at 364.

⁸⁷ *Id.*

⁸⁸ *Id.* at 364–65.

⁸⁹ *Id.* at 367.

⁹⁰ *Id.*

limited physical control over certain portions of the installation mattered more than the primary purpose for which the installation existed.⁹¹

The Supreme Court disagreed, indicating that military places have historically been open to the public while still maintaining operational control.⁹² In line with the Court's reasoning in *Phisterer*, the Court upheld the principle that a geographic space is under military control when the military intends to use, possess, or control the area for a military purpose, regardless of whether an easement has been granted or some other lessening of physical control has occurred.⁹³

Furthermore, the Court reasoned that the geographic space's purpose as a military installation mattered more than how the military maintained physical control over certain areas.⁹⁴ As stated by the Court:

The common feature of the places described in §1382 is not that they are used exclusively by the military, but that they have defined boundaries and are subject to the command authority of a military officer. That makes sense, because the Solicitor General has informed us that a military commander's authority is frequently defined by the boundaries of a particular place: When the Department of Defense establishes a base, military commanders assign a military unit to the base, and the commanding officer of the unit becomes the commander of the base.⁹⁵

The Court went on to say,

[W]e decline Apel's invitation to require civilian judges to examine U.S. military sites around the world, parcel by parcel, to determine which have roads, which have fences, and which have a sufficiently important, persistent military purpose. The use-it-or-lose-it rule that Apel proposes would frustrate the administration of military facilities and raise difficult questions for judges, who are not expert in military operations. And it would discourage commanders from opening portions of their bases for the convenience of the public.⁹⁶

⁹¹ *Id.* at 364–67.

⁹² *Id.* at 367.

⁹³ *Id.* at 371.

⁹⁴ *Id.* at 367–68.

⁹⁵ *Id.*

⁹⁶ *Id.* at 372.

In short, opening up certain areas for convenient public use or for protests did not dissolve the true purpose for the area: it was still a military installation with military missions. Purpose is extremely important, and the military's mission, not current or past physical control, determines the limits and bounds of its purposes for the area. As the Court indicated in *Apel*, it would be inappropriate to look into "which [military sites] have a sufficiently important, persistent military purpose."⁹⁷ That is a question for the DoD to decide. Therefore, when it comes to whether the military has operational control of a geographic area, what really counts is how the military intends to use the area and what mission will be accomplished.

Although *Apel* deals with the limiting of physical military control over an area and Operation Provide Comfort deals with an abundance of physical military control, the purpose for controlling the area trumps, not how much or how little physical control the military has exerted. When the United States military built relief camps for Kurdish refugees, "relief operations" best described the activity.⁹⁸ The camps served a humanitarian purpose, not a military mission. The convenient physical presence of troops did not dictate the refugee camps' purpose any more than the lack of physical control over the protest area and the easements granted to the public did in *Apel*. In both cases, the mission's purpose came first when determining whether the military had established operational control, regardless of the level of physical control.

In summary, *Phisterer* and *Apel* provide useful insight into the military's control over U.S. military installations. *Phisterer* establishes that a geographic area should be considered under the military's operational control when it is sufficiently "connected with arms or war."⁹⁹ *Apel* builds on the importance of geography and establishes that the purpose an area serves matters more than how that area is physically controlled.¹⁰⁰ Using these judicial principles, the language and organization of 10 U.S.C. § 2801, and the insight from the legislative history, judge advocates may more fully evaluate the term "operational control."

IV. Evaluating Operational Control

⁹⁷ *Id.*

⁹⁸ RUDD, *supra* note 1, at 56.

⁹⁹ United States v. Phisterer, 94 U.S. 219, 222 (1876).

¹⁰⁰ *Apel*, 571 U.S. at 364–65.

With the statute, the legislative history, and judicial considerations in mind, the definition of operational control becomes clearer. Based on these sources, the following definition seems appropriate: operational control consists of (1) a defined geographic area, (2) which the military intends to use, possess, or control for military purposes, (3) regardless of the duration of that use, possession, or control. Judge advocates should carefully consider each portion of this definition when confronted with whether the military has operational control of an area.

A. A Defined Geographic Area

The first step in determining whether an area is under the operational control of the military is to define the geographic area in question. In *Phisterer*, the Court focused on the location of Captain Phisterer's home, distinguishing it from a barracks or quarters at a military installation.¹⁰¹ In *Apel*, the Court carefully analyzed the boundaries of Vandenberg Air Force Base and the easements traversing the installation, and it even included maps of the installation to support its opinion.¹⁰² During Operation Provide Comfort, the location of the camps constructed by the military should not be overlooked: northern Iraq in proximity to suffering Kurdish refugees attempting to flee to Turkey.¹⁰³ This same level of analysis is crucial to future questions about areas potentially under military operational control.

When addressing whether an area is under operational control in future cases, judge advocates should seek to fully understand that particular geographic area. They should consider where it is located, what exists there, and what will be built there. Through careful attention to these issues, legal advisors will be better prepared to discuss whether the area's geography and its future use are "closely connected with arms or war" and to explain their impact on operational control.¹⁰⁴

B. Military Intent to Use, Possess, or Control for Military Purposes

¹⁰¹ *Phisterer*, 94 U.S. at 222.

¹⁰² *Apel*, 571 U.S. at 359, 374.

¹⁰³ RUDD, *supra* note 1, at 36.

¹⁰⁴ *Phisterer*, 94 U.S. at 222.

After successfully defining the relevant geographic area, the next question is whether the area will be used, possessed, or controlled for military purposes. In other words, what mission is the area supporting? In *Phisterer*, the captain's home may have been an ordered place of residence, but the military had not expressed any intent to use, possess, or control his home.¹⁰⁵ There was nothing about his home that was sufficiently connected to warfighting. In *Apel*, the military's intent to use, possess, and control Vandenberg Air Force Base for military purposes allowed the installation commander to bar Mr. Apel, even though the civilian easements had been granted and certain areas on the installation had been designated as appropriate for protesters.¹⁰⁶ In Operation Provide Comfort, the camp was not under operational military control because the military did not intend to use, possess, or control the area for military purposes. The camp had always been intended for purposes of humanitarian relief.¹⁰⁷ In all these cases, the theme is the same: the intent of the mission drives the determination of operational control.

As future issues arise, legal advisors absolutely must understand the mission purpose. Although understanding the area in question is vital, whether the military has established operational control depends on the mission to be accomplished. As the Air Force highlighted in its brief about Space Operations, "operational control . . . is vested in those organizations having direct mission responsibility."¹⁰⁸ Operational control does not change without a change in the mission.¹⁰⁹

The principle that the mission drives control, and, in turn, that control drives funding, extends beyond just a military context. Per the U.S. Government Accountability Office:

We have dealt with the concept of "necessary expenses" in a vast number of decisions over the decades. If one lesson emerges, it is that the concept is a relative one: it is measured not by reference to an expenditure in a vacuum, but by assessing the relationship of the expenditure to the specific appropriation to be charged or, in the case of several programs funded by a lump-sum appropriation, to the specific program to be served. It should thus be apparent that an item

¹⁰⁵ *Id.*

¹⁰⁶ *Apel*, 571 U.S. at 359.

¹⁰⁷ *Meek*, *supra* note 3, at 233.

¹⁰⁸ *Hearings*, *supra* note 40, at 457 (letter from James P. Wade, Jr., Acting Under Secretary of Defense).

¹⁰⁹ *Id.*

that can be justified under one program or appropriation might be entirely inappropriate under another, depending on the circumstances and statutory authorities involved.¹¹⁰

As stated above, a key to determining purpose is to assess “the relationship of the expenditure . . . to the specific program to be served.”¹¹¹

This focus on purpose is what made the difference between EUCOM and HQ USAFE’s conclusions in Operation Provide Comfort. EUCOM saw the mission for what it was: a humanitarian relief effort.¹¹² HQ USAFE classified the effort by who was involved: military members built the camps and provided security.¹¹³ However, the construction and operation of the camp was not “closely connected with arms or war,”¹¹⁴ making it more like Captain Phisterer’s residence in New York than an officer’s quarter at a fort. As a humanitarian relief effort, the Department of State or international relief organizations should have carried out the mission, not the Armed Forces of the United States.¹¹⁵ Therefore, operational control needed to be vested in those organizations as the effort served their purposes. Already in the area because of a separate, military mission, the U.S. military, in an effort to save lives and prevent terrible human suffering, simply stepped in and carried out those duties until they could be relieved.¹¹⁶ The military’s convenient presence there did not change the nature of the mission or make it military in nature.¹¹⁷ As the mission was not military in nature the appropriate source of funding was not military construction; therefore, military construction funding caps triggered by operational control did not apply.

C. Duration Is Legally Irrelevant, But Pragmatically Important

After carefully considering the location in question and the purpose for its use, the issue of whether operational control exists should be resolved. However, many legal advisors will feel the need to consider the duration of operational control when advising on potential military

¹¹⁰ Refreshments at Award Ceremonies, 65 Comp. Gen. 738, 740 (1986).

¹¹¹ *Id.*

¹¹² Meek, *supra* note 3, at 233.

¹¹³ *Id.*

¹¹⁴ United States v. Phisterer, 94 U.S. 219, 222 (1876).

¹¹⁵ Meek, *supra* note 3, at 226.

¹¹⁶ *Id.* at 233.

¹¹⁷ See United States v. Apel, 571 U.S. 359, 372 (2014).

construction in a foreign country. After all, the DoD includes guidance related to duration in its definition of operational control.¹¹⁸ Nevertheless, as this section will show, Congress does not impose any duration-based requirements when it comes to establishing operational control.¹¹⁹ Due to the difference between the statutory requirement and DoD policy constraints, legal advisors must remember to evaluate the concern of duration as a matter of DoD policy rather than as a congressionally mandated requirement.¹²⁰

When it comes to the duration of operational control, there is no legal requirement that an area be under the control of the U.S. military for a certain amount of time *before* military construction may commence. Congress has also not required that the U.S. military must maintain operational control of the area *after* military construction has already taken place. In fact, the statute defining “military installation” for purposes of military construction simply requires that the area must be “under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control.”¹²¹

Furthermore, the historical context behind the addition of “without regard to the duration of operational control” to 10 U.S.C. § 2801 shows Congress’s desire to imbue the military with speed and flexibility. When President George W. Bush signed Congress’s 2003 amendment to 10 U.S.C. § 2801 into law, his remarks focused on the importance of being “fast and smart and agile” in response to the threats facing our nation.¹²² He highlighted that “threats can emerge suddenly, and so we must always

¹¹⁸ U.S. DEP’T OF DEF., INSTR. 3000.12, MANAGEMENT OF U.S. GLOBAL DEFENSE POSTURE (GDP) para. G.2 (6 May 2016) (C1, 8 May 2017).

¹¹⁹ 10 U.S.C. § 2801(c)(4) (2012).

¹²⁰ The need to better distinguish between law and policy is a current issue across legal disciplines in the military. *See e.g.* Matthew J. Aiesi, *The Jus in Bello of White Phosphorus: Getting the Law Correct*, LAWFARE (Nov. 26, 2019, 8:00 AM), <https://www.lawfareblog.com/jus-bello-white-phosphorus-getting-law-correct> (discussing the need to understand restrictions on the use of white phosphorus “along a legal and policy spectrum”).

¹²¹ 10 U.S.C. § 2801(c)(4) (2012).

¹²² President George W. Bush, Remarks at signing of H.R. 1588, the National Defense Authorization Act for Fiscal Year 2004 (Nov. 24, 2003), <https://georgewbush-whitehouse.archives.gov/news/releases/2003/11/20031124-11.html>. *See also* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003).

be ready.”¹²³ The plain language of the statute and President Bush’s remarks demonstrate that there is no legal requirement that operational control be maintained for a certain amount of time before military construction can take place or after it has been built, thereby providing the military legislative flexibility when it comes to construction.

That said, the concern about the duration of control persists and should not be ignored. Due to the permanence and cost of construction, the duration of the military’s use, possession, and control of the area and construction is a pragmatic consideration that must be accounted for from a policy standpoint—even though the duration of operational control is not a legal requirement. Reflecting this, current DoD military construction policy defines “operational control” as “long-term (i.e., both parties intend for U.S. forces to remain at the location for the foreseeable future). . . .”¹²⁴ Furthermore, concerns about duration could signify that there is an underlying question about purpose that should be carefully scrutinized by judge advocates and their commanders.

The concern about duration will be strongest when the time the U.S. military intends to possess, use, or control an area in a foreign country is short. In addition to going against current policy,¹²⁵ the scope of these concerns ranges from pragmatic considerations to the validity of military intent. The nature of these concerns depends on whether the operational control is in a permissive environment (i.e., with the permission of the host nation) or a non-permissive environment (i.e., the United States has established a presence in another sovereign without that sovereign’s permission).

When in a permissive environment, a short duration of intent to control should lead to additional assessment of the construction’s purpose. The reason for this is construction paid for by military construction funds should truly be for a U.S. military purpose, not as a means to provide a benefit for the host nation.

In the case of operational control in a non-permissive environment, the concern of duration is almost always going to be related to the question of pragmatism, not legality. If the United States has demonstrated the

¹²³ *Id.*

¹²⁴ U.S. DEP’T OF DEF., INSTR. 3000.12, MANAGEMENT OF U.S. GLOBAL DEFENSE POSTURE (GDP) para. G.2 (6 May 2016) (C1, 8 May 2017).

¹²⁵ *Id.*

intent to possess, use, or control a defined geographic area in another nation for military purposes without that sovereign's permission, operational control should be legally satisfied, regardless of the duration of operational control. If military need justifies military construction under those circumstances, the DoD must be ready to adjust its policy and use the flexibility Congress has provided.

V. Conclusion

In summary, the phrase "operational control" in 10 U.S.C. § 2801 needs to be viewed in terms of the mission to be accomplished. Whenever there is (1) a defined geographic area (2) which the military intends to use, possess, or control for a military mission, operational control exists within the military, (3) regardless of the duration of that use, possession, or control. Although military presence and support may be factors in determining whether operational control exists, the real test is mission-driven. If the mission does not maintain a sufficient military nexus, as was the case with the Kurdish relief camps during Operation Provide Comfort, then operational control vests in some other organization. This definition squares with Supreme Court rulings related to military installations. If judge advocates and commanders focus on the mission to be accomplished in a foreign country, they will better determine when operational control vests in the military and where funding for that mission should come from. They will not hesitate to jump into a mission and to help guide it to completion.

FUNDING SURROGATE FORCES IN THE FIGHT AGAINST TERRORISM

MAJOR DANIEL W. HANCOCK, III*

I. Introduction

An hour or so into your new job as a Special Forces Battalion Judge Advocate, the phone rings. It is the new Group Judge Advocate (GJA). You miss his name, if he gave it, as you are scrambling for and forcing open your new, very crisp green book and pulling a pen out of your sleeve. Once you are actually ready to listen, you realize he is already on a roll:

. . . need the status of that African counter-terrorism operation your unit is working through surrogate forces—approval at Bragg was complete weeks ago, so why haven't operations begun? I only worked domestic fiscal law and don't have a strong operational funding background, so explain to me how we're paying this group to fight for us. What's this "P-11 funding" the boss mentioned in my in-brief? There are some notes here from my predecessor—why on earth is a pallet of ammo for this operation stuck in Armenia and why was a pallet of weapons sent to some place in Kentucky? And another thing, I saw a news article before coming here that these guys had summarily executed a half dozen terrorists they had captured. Weren't they vetted? What if they do it again with our guys on-site?

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Once he hangs up, you realize your plans for the morning need to change significantly, so you finish setting up the cappuccino machine, but forgo getting the rest of your office in place.

After a few internet searches yield meager results,¹ you decide to drop by some staff peers' offices to finish your coffee. In the course of your informal research, you realize the GJA was talking about 10 U.S.C. Section 127e, a fiscal authority allowing the United States Special Operations Command (USSOCOM) to spend up to \$100 million annually to provide support to foreign forces, irregular forces, groups, or individuals (hereinafter "surrogate forces")² to support U.S. special operations forces (SOF) in the fight against terrorist enemies.³

Though combatants have spilled a fair amount of blood over the years in Section 127e operations, military attorneys have not yet spilt any ink analyzing the various legal challenges and fiscal requirements inherent in utilizing this authority. The dearth of legal literature on Section 127e and the special operations community's Major Force Program (MFP)-11 budgetary classification has made gaining a basic understanding of this fiscal authority unnecessarily time-consuming and difficult. Thus, this article will enable judge advocates to understand and analyze the full spectrum of fiscal law issues inherent in Section 127e operations while equipping them to identify and respond to the common intertwined budgetary concerns and national security law issues they will simultaneously encounter.

The article divides into two substantive sections. The first focuses on black letter law and theory, and the second considers the actual implementation of Section 127e. The following section discusses as threshold matters the basic foundational authorities of fiscal law such as

¹ References to Section 127e operations rarely appear in the news. However, Section 127e operations in countries including Somalia, Kenya, Tunisia, Niger, Cameroon, Mali, Mauritania, and Libya combating elements of al-Qaeda, al-Shabab, Boko Haram, and the Islamic State in Syria have been unofficially acknowledged by various sources. See Wesley Morgan, *Behind the secret U.S. war in Africa*, POLITICO (July 2, 2018), <https://www.politico.com/story/2018/07/02/secret-war-africa-pentagon-664005>. See also Kyle Rempfer, *Special operations launches 'secret surrogate' missions in new counter-terrorism strategy*, MILITARY TIMES (Feb. 8, 2019), <https://www.militarytimes.com/news/your-army/2019/02/08/fighting-terrorism-may-rely-on-secret-surrogate-forces-going-forward>.

² See Gregory R. Bart, *Special Operations Forces and Responsibility for Surrogates' War Crimes*, 5 HARV. NAT'L SECURITY J. 513, 514 (2014).

³ 10 U.S.C.A. § 127e (West 2019).

the Constitution and several relevant statutes to chronicle why and how Section 127e developed, while also providing an introduction to the MFP-2 and MFP-11 budgetary classifications. The second section then offers an in-depth consideration of the various requirements for planning, staffing, and funding Section 127e operations before concluding with a series of discussions on some of the practical problems posed by Section 127e operations, such as getting supplies into the area of operations and liability for war crimes.

II. The Foundations of Section 127e Operations

As distinct from other areas in which judge advocates frequently practice, fiscal law is inherently restrictive. In other practice areas, judge advocates may fairly ask, “Where does it say the commander cannot do that?” However, the basic principles of fiscal law contained within the Constitution and related statutes frame the question as, “Where does it say that our commander can do this?” Knowing why this latter approach must be the paradigm for fiscal analysis will enable the reader to make the fine distinctions Section 127e operations necessitate regarding proper funding beneficiaries, amounts, and budgetary classifications.

A. The History and Evolution of 10 U.S.C. Section 127e

A proper understanding of 10 U.S.C. Section 127e begins with consideration of its predecessor, the temporary “1208” authority established in 2005. Like many other aspects of the fight against terrorism, Section 1208 traces its origins back to September 11, 2001, when al-Qaeda’s attacks on the Pentagon and the World Trade Center marked the beginning of an era in U.S. military operations where armed non-state actors—often operating from within sovereign nations unwilling and/or unable to prevent their continued existence—would be the primary adversary for the U.S. military.⁴

The first days of operations in Afghanistan in response to the 9/11 attacks revealed a significant gap in SOF capabilities to fulfill their assigned missions without fiscal support from outside the Department of

⁴ See BOB WOODWARD, STATE OF DENIAL 77-83 (2006).

Defense (DoD).⁵ Special operations forces arrived in October 2001 before their conventional counterparts and began to train, assist, and fight with the Northern Alliance rebel group against the Taliban.⁶ However, SOF lacked any fiscal authority to make payments to benefit the Northern Alliance since these Afghans were not U.S. personnel.⁷ Another executive agency, the Central Intelligence Agency (CIA), had to pay the Northern Alliance on behalf of the DoD using its own fiscal authorities.⁸

In response to these developments and to address the evolving nature of U.S. military operations, Congress enacted Section 1208 of the Fiscal Year (FY) 2005 National Defense Authorization Act (NDAA) providing for \$25 million annually through FY 2007 to “provide support to foreign forces, irregular forces, groups or individuals engaged in supporting or facilitating ongoing military operations by United States special operations forces to combat terrorism.”⁹ Over the next twelve years, Congress routinely increased and/or extended this appropriation¹⁰ before codifying it as a permanent annual appropriation of \$100 million in 2016.¹¹ This fiscal authority has generated political consensus through the years and appears to be a tool on which USSOCOM can expect to rely indefinitely as the United States continues to expand its options for fighting terrorism.¹²

⁵ Matthew R. Grant & Todd C. Huntley, *Legal Issues in Special Operations*, in U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE, 565 (Geoffrey S. Corn, Rachel E. VanLandingham & Shane R. Reeves, eds. 2015).

⁶ *Id.*

⁷ *Id.* at 566.

⁸ *Id.*

⁹ Ronald W. Reagan NDAA for FY 2005, Pub. L. No. 108-375, § 1208, 118 Stat. 1811 (2004).

¹⁰ NDAA for FY 2008, Pub. L. No. 110-181, § 1202, 122 Stat. 3 (2008) (extension through FY 2010); Duncan Hunter NDAA for FY 2009, Pub. L. No. 110-417, § 1208, 122 Stat. 4356 (2008) (\$35 million through FY 2013); NDAA for FY 2010, Pub. L. No. 111-84, § 1202, 123 Stat. 2190 (2009) (\$40 million); Ike Skelton NDAA for FY 2011, Pub. L. No. 111-383, § 1201, 124 Stat. 4137 (2011) (\$45 million); NDAA for FY 2012, Pub. L. No. 112-81, § 1203, 125 Stat. 1298 (2011) (\$50 million through FY 2015); Carl Levin and Howard P. “Buck” McKeon NDAA for FY 2015, Pub. L. No. 113-291, § 1208, 128 Stat. 3292 (2014) (\$75 million through FY 2017).

¹¹ NDAA for FY 2017, Pub. L. No. 114-328, § 1203, 130 Stat. 2000 (2016); 10 U.S.C.A. § 127e (West 2019).

¹² The passage of the original Section 1208 authority and its series of extensions through to the final codification of Section 127e spanned two presidential administrations and control of Congress by each party. *See generally* WOODWARD, *supra* note 4; BOB WOODWARD, *OBAMA’S WARS* (2010). The Trump administration’s first National Security Strategy (NSS) and National Defense Strategy (NDS) signaled an intention to continue this overall trend toward flexibility in combatting terrorism. The NSS stated

B. The Constitutional Foundation of Fiscal Law

Fiscal law exemplifies the system of checks and balances that undergird the Constitution. Article I gives Congress the authority to spend money on the necessary functions of government, to include “provid[ing] for the common Defence and general Welfare of the United States”¹³ but later qualifies this power stating that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”¹⁴ These provisions give Congress a firm hold on the government’s purse strings, requiring its assent for any and all spending on behalf of the government.

Equally, the Constitution in Article II provides that the President is the commander-in-chief of the armed forces¹⁵ and therefore responsible for the overall operations of the military, which includes the execution and oversight of the spending necessary to maintain the armed forces. Thus the Constitution separates the power of the purse and the power of the sword: any and all spending by an Article II executive agency such as the DoD must rest upon a statutory basis provided by Congress.

C. Statutes and Policy Affecting Section 127e Operations

The law and policy affecting Section 127e operations are of two types: fiscal law statutes of general applicability to all U.S. government spending as well as specific statutes and policies governing the unique considerations posed by special military operations.

that the United States remained at war with non-state actors espousing extremist Islamic ideologies, expressed our intention to combat jihad at its source, and stated a desire to share responsibility for combatting terrorist enemies with our allies. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (December 2017). The NDS then expanded on these notions to indicate that the U.S. military would work with local partners in the Middle East and elsewhere to combat terrorism. U.S. DEP’T OF DEF., SUMMARY OF THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA (2018). Section 127e, codified just a year earlier, serves as an operational tool for USSOCOM to achieve each of these strategic ends.

¹³ U.S. CONST. art. I, § 8, cl. 1.

¹⁴ U.S. CONST. art. I, § 9, cl. 7. The Supreme Court has made clear that these texts mean exactly what they say: “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” *United States v. MacCollom*, 426 U.S. 317 (1976) (plurality opinion) (citing *Reese v. Walker*, 52 U.S. 272 (1851)).

¹⁵ U.S. CONST. art. II, § 2, cl. 1.

1. Generally Applicable Fiscal Law Statutes

Congress limited Article II executive agencies' discretion in public spending in a series of statutes governing the purpose, time, and amount of each expenditure.¹⁶ We will consider each of these statutes in turn.

The first limiting statute is the Purpose Statute, requiring that every expenditure be made according to the express purpose of the authorization in question.¹⁷ By contrast, in areas where Congress has provided only general language to govern agency appropriations, agencies have discretion to make those acquisitions "necessary" for their statutory missions.¹⁸

The second restrictive statute is the Time Statute limiting the agencies' ability to obligate appropriated funds—that is, to create a legal obligation for the United States to pay for something—to the time period that Congress set for each fund's availability.¹⁹ As a bulwark against the immediate spending of all monies made available, the "Bona Fide Needs Rule" limits agency spending to only those needs actually arising during a fund's period of availability.²⁰

The third statutory constraint, which governs the amount of agency spending, is the Anti-Deficiency Act (ADA).²¹ The ADA prevents agencies from, *inter alia*, obligating funds in advance of an appropriation's effective date, in excess of an appropriation's amount, or in excess of budgetary apportionments and/or formal subdivisions.²²

¹⁶ See 31 U.S.C.A. §§ 1301 (Purpose), 1502 (Time), & 1341-42, 1511-19 (Anti-Deficiency Act) (West 2019).

¹⁷ 31 U.S.C.A. § 1301(a) (West 2019).

¹⁸ For these acquisitions, the Government Accountability Office's "Necessary Expense Doctrine" requires that an expense be logically related to the appropriation or directly contribute to carrying out the function Congress authorized; that the expense cannot be otherwise prohibited by law; and, that the expense cannot be otherwise provided for in a more specific appropriation. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-797SP, PRINCIPLES OF FED. APPROPRIATIONS LAW, at 3-14 through 3-17 (4th ed., rev. 2017).

¹⁹ 31 U.S.C.A. § 1502 (West 2019).

²⁰ See Lieutenant Colonel (Retired) Michael J. Davidson, *Putting the Genie Back in the (Muddy) Bottle: Curing the Potential ADA Violation*, 78 A.F. L. REV. 27, 60 n.197 (2018).

²¹ 31 U.S.C.A. §§ 1341-42, 1511-19 (West 2019).

²² See Davidson, *supra* note 20 at 68.

2. *Statutes with Special Relevance to Section 127e Operations*

United States Special Operations Command, though itself a combatant command, from a fiscal perspective is best understood as a hybrid organization containing aspects of both a geographic combatant command (GCC) and a military service.²³ The Goldwater-Nichols Act of 1986 created an organizational principle by which the individual military services train and equip forces for operational duties as part of a GCC.²⁴ The Future Years Defense Program (FYDP), a DoD-wide budgetary planning process, categorizes the requisite service funding here as MFP-2, General Purposes Forces.²⁵

In 1987, the year following Goldwater-Nichols, the Nunn-Cohen Amendment²⁶ created the ability for USSOCOM to budget for the development and acquisition of “special operations-peculiar” equipment and material, supplies, or services “peculiar to special operations activities.”²⁷ The FYDP categorizes all such “special operations-peculiar” funding as MFP-11.²⁸

The hybrid nature of USSOCOM manifests itself in the interplay between these two streams of funding: the services themselves fund all “service-common” requirements for SOF units through MFP-2 funds,²⁹ whereas USSOCOM’s budget consists solely of MFP-11 funds for expenditure on its special operations-peculiar needs.³⁰ Of particular note here is that MFP-11 is a budgetary classification applicable to all

²³ See Jim Cunningham, USSOCOM Resources: Understanding Major Force Program – 11 Funding, at slide 3 (Oct. 23, 2018) (unpublished PowerPoint presentation) (on file with author) [hereinafter “USSOCOM PowerPoint”].

²⁴ Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986); JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES AT II-11 through II-13 (Mar. 25, 2013) (C1, July 12, 2017) [hereinafter JOINT PUB. 1].

²⁵ ELVIRA N. LOREDO ET AL., RAND, OPTIONS AND AUTHORITIES FOR FUNDING USSOCOM OPERATIONS 46 (2014).

²⁶ National Defense Authorization Act (NDAA) for Fiscal Years (FY) 1988 and 1989, Pub. L. No. 100-180, § 1211, 101 Stat. 1019 (1987).

²⁷ 10 U.S.C.A. § 167(g) (West 2019).

²⁸ See LOREDO ET AL., *supra* note 25, at 46-47.

²⁹ UNITED STATES SPECIAL OPERATIONS COMMAND, WHITE PAPER MAJOR FORCE PROGRAM-11 FUNDING 2 (Sept. 25, 2015) [hereinafter “WHITE PAPER”].

³⁰ Telephone Interview with Mr. Jim Cunningham, Chief, Policy and Funds Control, Special Operations Financial Management, USSOCOM (Jan. 8, 2019) [hereinafter “Mr. Cunningham Interview”].

USSOCOM appropriations,³¹ whether spent for ordinary Operations and Maintenance (O&M), Procurement, or Overseas Contingency Operations (OCO) O&M purposes.

3. Distinguishing Between MFP-2 and MFP-11 Funding

A key task in supporting SOF units is the ability to distinguish between what special operations-peculiar requirements USSOCOM properly funds with MFP-11 funds and what common military requirements the services themselves fund with MFP-2 funds. Delineating between special operations-peculiar and non-special operations-peculiar (otherwise known as “service-common,” but better-labeled as “service-funded”³²) requirements is no easy feat.³³ Service-funded should be the default concept with special operations-peculiar as the exception.³⁴ Service-funded requirements include all standard military items, base operational support (BOS), and supplies/services provided by a service to sustain its own forces—both conventional and SOF.³⁵ Special operations-peculiar requirements are those items and services initially designed by or used by SOF (until adopted by a service), modifications to service-funded items, and items and services specially approved by the USSOCOM commander (CDRUSSOCOM) as critically urgent for immediate accomplishment of a SOF mission.³⁶

³¹ See LOREDO ET AL., *supra* note 25, at 44 (Figure B.1). See also email from Major Allan S. Jackman, Division Chief, Special Mission Activities, Special Operations Financial Management, USSOCOM, to author (Jan. 8, 2019, 16:37 EST) (on file with author).

³² Mr. Cunningham Interview, *supra* note 30. Mr. Cunningham notes thinking of Major Force Program (MFP)-2 and MFP-11 as opposites is improper because they do not always refer to sources of funding for wholly different requirements. Focusing on which entity actually pays the bill is preferable because certain requirements can shift from special operations-peculiar to service-funded over time and because memoranda of understanding between USSOCOM and the services can also alter the general distinction between the types of funding. *Id.*; see also WHITE PAPER, *supra* note 29, at 3.

³³ See generally LOREDO ET AL., *supra* note 25; WHITE PAPER, *supra* note 29.

³⁴ See WHITE PAPER, *supra* note 29, at 2-3; Mr. Cunningham Interview, *supra* note 30.

³⁵ WHITE PAPER, *supra* note 29, at 3. Other examples include initial military training, pay, and housing allowances. USSOCOM PowerPoint, *supra* note 23, at slide 8.

³⁶ WHITE PAPER, *supra* note 29, at 4. See also USSOCOM PowerPoint, *supra* note 23, at slides 7-9. United States Special Operations Command (USSOCOM)’s structure as a joint command can complicate the application of these definitions for two primary reasons. First, the services do not have a uniform definition of “service common” or “service-funded.” LOREDO ET AL., *supra* note 25, at 19. Second, the existence USSOCOM’s separate budget for special operations-peculiar items often incentivizes the respective services to view the general service-funded concept in a limited rather than

D. Analysis of Section 127e

With the legal foundations and history of Section 127e in mind, we are ready to analyze the statute itself. In terms of purpose, a careful reading of Section 127e shows that its purpose for spending appropriated funds is not primarily for the benefit of U.S. armed forces but rather for the benefit of the surrogate—and, by definition, foreign—force.³⁷ This express language regarding foreign beneficiaries is significant because ordinarily the Department of State serves as the government's lead agent for foreign assistance.³⁸ This language abrogates the general rule and makes such DoD spending for foreign benefit consistent with the Purpose Statute.

With regard to time and amount, the permanent codification of 10 U.S.C. Section 127e eliminated the uncertainty inherent in the sporadic reauthorizations of the FY 2005 NDAA's temporary Section 1208.³⁹ Now the express codified purpose of supporting surrogates against terrorism leaves only the perennial fiscal law concerns of keeping spending under the annual cap each fiscal year.⁴⁰

Distinguishing between MFP-2 and MFP-11 funding becomes important when considering the annual limit. Only those costs in Section 127e operations benefitting the surrogate force are MFP-11 special

expansive manner in an effort to steward their own limited resources. WHITE PAPER, *supra* note 29, at 4; Mr. Cunningham Interview, *supra* note 30. Disputes regarding the classification of various requirements are resolved through established processes within the Office of the Secretary of Defense (OSD). WHITE PAPER, *supra* note 29, at 4-5.

³⁷ 10 U.S.C.A. § 127e(a) (West 2019).

³⁸ See 22 U.S.C.A. § 2151(b) (West 2019).

³⁹ NDAA for FY 2017, Pub. L. No. 114-328, § 1203, 130 Stat. 2000 (2016). Each prior iteration of Section 1208 contained a date past which USSOCOM would lose its ability to support foreign entities fighting terrorism and potentially have to discontinue lines of effort in ongoing fights since each iteration was a temporary funding authority. Many subsequent reauthorizations of Section 1208 also increased the annual funding limit, obviating apparent recurring concerns over the annual funding limit. Ronald W. Reagan NDAA for FY 2005, Pub. L. No. 108-375, § 1208, 118 Stat. 1811 (2004) (originally \$25 million through FY 2007); NDAA for FY 2008, Pub. L. No. 110-181, § 1202, 122 Stat. 3 (2008) (extension through FY 2010); Duncan Hunter NDAA for FY 2009, Pub. L. No. 110-417, § 1208, 122 Stat. 4356 (2008) (\$35 million through FY 2013); NDAA for FY 2010, Pub. L. No. 111-84, § 1202, 123 Stat. 2190 (2009) (\$40 million); Ike Skelton NDAA for FY 2011, Pub. L. No. 111-383, § 1201, 124 Stat. 4137 (2011) (\$45 million); NDAA for FY 2012, Pub. L. No. 112-81, § 1203, 125 Stat. 1298 (2011) (\$50 million through FY 2015); Carl Levin and Howard P. "Buck" McKeon NDAA for FY 2015, Pub. L. No. 113-291, § 1208, 128 Stat. 3292 (2014) (\$75 million through FY 2017).

⁴⁰ 10 U.S.C.A. § 127e(a)-(b) (West 2019).

operations-peculiar costs and count against the statutory limit.⁴¹ Costs for the SOF executing unit (EU) working alongside the surrogate force are generally MFP-2 service-funded but never count against the Section 127e limit.⁴²

One area where Section 127e differs from other, similar fiscal authorities allowing the flow of appropriated funds to foreign entities is that the provision of support to surrogate forces under Section 127e is not contingent upon an adequate assessment of the forces' human rights records.⁴³ This process is often referred to as "Leahy Vetting."⁴⁴ The exemption from the Leahy Vetting requirement allows for faster execution of planned Section 127e operations and greater flexibility for commanders in determining which surrogate group(s) to support.

Not to be lost among the fiscal concerns posed by Section 127e are the statute's practical concerns that reveal the need for careful advance planning and constant monitoring of Section 127e operations. The Secretary of Defense, with the concurrence of the local Chief of Mission (COM) (generally the ambassador), is the approval authority and cannot delegate that authority.⁴⁵ The DoD must notify Congress fifteen days before utilizing Section 127e authority.⁴⁶ Finally, the DoD must also submit biannual reports regarding its utilization of Section 127e authority.⁴⁷

Having considered the history and basic legal parameters of 10 U.S.C. Section 127e, we will now assess the many legal implications of executing Section 127e operations.

⁴¹ Mr. Cunningham Interview, *supra* note 30.

⁴² *Id.* The funded-unfunded cost analysis of military construction projects may be a helpful analogue. See U.S. DEP'T OF ARMY, PAM. 420-11, PROJECT DEFINITION AND WORK CLASSIFICATION, Glossary, sec II (Mar. 18, 2010).

⁴³ UNITED STATES SPECIAL OPERATIONS COMMAND, DIR. 525-19, 1208 AUTHORITY – SUPPORT OF SPECIAL OPERATIONS TO COMBAT TERRORISM 4 (Oct. 13, 2016) [hereinafter "USSOCOM DIRECTIVE"].

⁴⁴ 10 U.S.C.A. § 362 (West 2019); See CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, FISCAL LAW DESKBOOK (2018) at page 10-61 [hereinafter "FISCAL LAW DESKBOOK"].

⁴⁵ 10 U.S.C.A. § 127e(a) & (e) (West 2019).

⁴⁶ 10 U.S.C.A. § 127e(d)(1) (West 2019). In exceptional circumstances affecting national security, the Department of Defense (DoD) may wait as much as forty-eight hours after having commenced the Section 127e operation before notifying Congress. *Id.*

⁴⁷ 10 U.S.C.A. § 127e(h) (West 2019).

III. Utilization of Section 127e and the Judge Advocate's Role

In this section we will consider the prerequisite fiscal law analysis for a Section 127e operation, the staffing and approval process for an operation, the proper source of funding for the SOF and surrogate elements in a Section 127e operation, and some practical problems that an operation may pose.

A. Prerequisites for a Section 127e Operation

The basic fiscal requirements that must be met to conduct a military operation are mission authority, funding authority, and proper funds.⁴⁸

1. *Mission Authority and Funding Authority: Distinct Concepts*

Though Section 127e provides the statutory authority to fund surrogate forces, Section 127e by itself does not authorize military operations.⁴⁹ Stated another way, a unit granted funding authority to expend funds pursuant to Section 127e by the Secretary of Defense (SECDEF) must also have an independent mission authority flowing down from the appropriate level of command in order to get “boots on the ground” alongside the surrogate force.⁵⁰

The notion of “mission authority,” assumed by the statutory text,⁵¹ has not been formally defined within military doctrine.⁵² A proposed definition is that “[m]ission authority is the directive or right—provided

⁴⁸ See Major Anthony Lenze, *Are We Allowed to be There? Understanding Mission Authority in the Context of the Fatal Niger Ambush*, ARMY LAW., Iss. 3, 2019, at 37, 39.

⁴⁹ USSOCOM DIRECTIVE, *supra* note 43, at 4.

⁵⁰ See Lenze, *supra* note 48, at 38.

⁵¹ 10 U.S.C.A. § 127e(a) (West 2019) (“The Secretary of Defense may, with the concurrence of the relevant Chief of Mission, expend up to \$100,000,000 during any fiscal year to provide support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating *ongoing military operations by United States special operations forces to combat terrorism*.” Emphasis added.) The reference to “ongoing military operations” presupposes an independent order authorizing such activity. The extension of such order to cover operations including authorized spending under Section 127e represents mission authority in this context.

⁵² Lenze, *supra* note 48, at 38.

through a [combatant commander]—to execute a particular task.”⁵³ This definition would serve as a means to ensure that the proper military authorities from SECDEF down the chain of command have authorized SOF to perform the particular task of funding specified surrogate forces to fight specified terrorist enemies consistent with the general grant of authority to fund surrogate forces against terrorist enemies contained in Section 127e.⁵⁴

Thus the first stage in analyzing a proposed Section 127e operation is to ensure that the EU has authority to perform tasks funded by Section 127e in the area of operations from its GCC. The orders produced by the staffing process for the Section 127e operation should reflect this fact, but judge advocates must always review the orders to make sure mission authority is present.⁵⁵ A failure to secure mission authority prior to executing a mission represents operational risk for a commander, as opposed to fiscal law risk.

2. Funding Authority and Proper Funds

As referenced briefly in the preceding section, funding authority is present once SECDEF approves a proposed Section 127e operation.⁵⁶ The final remaining prerequisite will be to ensure that proper funds are available for the Section 127e operation.⁵⁷ The staffing and approval process, discussed below, functionally links the requirements of obtaining funding authority and ensuring proper funds are available⁵⁸ because SECDEF is the sole approval authority for Section 127e operations.⁵⁹

⁵³ *Id.* “This definition is asserted solely by [Major Lenze] as neither law nor doctrine defines ‘mission authority.’ This definition is consistent with the basic understanding that military orders provide the authority to conduct a mission. Major Michael J. O’Connor, *A Judge Advocate’s Guide to Operational Planning*, ARMY LAW., Sept. 2014, at 5, 27.” *Id.* at n.27.

⁵⁴ *See id.* at 38. Such a definition also operates as yet another mechanism to ensure compliance with the Purpose Statute because it forces an analysis of what the precise legal bases and contours of a proposed operation are. *Id.*

⁵⁵ *Id.* at 41 n.50.

⁵⁶ *See* 10 U.S.C.A. § 127e(a) (West 2019); Lenze, *supra* note 48, at 38.

⁵⁷ Lenze, *supra* note 48, at 39.

⁵⁸ *See* USSOCOM DIRECTIVE, *supra* note 43, at 7 and 20-21, respectively. USSOCOM tracks annual spending pursuant to Section 127e and provides a recommendation to OSD for all proposed Section 127e operations. Thus no request to use the Section 127e funding authority should ever leave USSOCOM without the availability of funds having been validated.

⁵⁹ 10 U.S.C.A. § 127e(a), (e) (West 2019).

Such high-level review also significantly mitigates the fiscal law risks of the Purpose Statute and potential ADA violations as operations begin.

B. Staffing and Approval of Section 127e Operations

The backdrop against which staffing and approval of Section 127e operations plays out is the Unified Command Plan whereby both the relevant GCC and USSOCOM maintain certain responsibilities toward deployed SOF units.⁶⁰ Though the EU for a Section 127e operation reports to the theater special operations command (TSOC) and through the TSOC to USSOCOM, the relevant GCC has operational control over the EU.⁶¹ Thus, both the GCC and USSOCOM process requests for Section 127e funds in parallel.⁶² This fact and SECDEF's non-delegable authority to approve funding pursuant to Section 127e⁶³ can make the staffing and approval process both time-consuming and complex.

The EU will propose to conduct operations pursuant to Section 127e when it wants to utilize operational capabilities and/or individual characteristics that are inorganic to the unit itself.⁶⁴ The EU conducts the initial mission planning to include cost estimates, develops the initial concept of operations (CONOPS),⁶⁵ and begins the initial coordination with the local COM, USSOCOM, and GCC via its TSOC.⁶⁶

The GCC must determine whether the CONOPS falls within the existing scope of its mission authority,⁶⁷ and include a request for

⁶⁰ See JOINT PUB. 1, *supra* note 24 at II-11; Major Ian W. Baldwin, *Advising Special Forces*, ARMY LAW., May 2016, at 8, 9-10.

⁶¹ JOINT CHIEFS OF STAFF, JOINT PUB. 3-05, SPECIAL OPERATIONS at xii-xv (July 26, 2014) [hereinafter JOINT PUB. 3-05]; Baldwin, *supra* note 60 at 9-10.

⁶² USSOCOM DIRECTIVE, *supra* note 43, at 6.

⁶³ 10 U.S.C.A. § 127e(a), (e) (West 2019).

⁶⁴ See USSOCOM DIRECTIVE, *supra* note 43, at 5.

⁶⁵ A verbal or graphic statement that clearly and concisely expresses what the joint force commander intends to accomplish and how it will be done using available resources. JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEP'T OF DEF. DICTIONARY OF MIL. AND ASSOCIATED TERMS 45 (Nov. 8, 2010) (as amended Feb. 15, 2016) [hereinafter JOINT PUB. 1-02].

⁶⁶ *Id.* at 6.

⁶⁷ United States Special Operations Command Directive 525-19 uses "operational authority" for this concept. I use the term "mission authority" in keeping with the earlier discussion in Part III.A.1 because the Directive's use of operational authority is synonymous with my use of mission authority for the purposes of this primer. See USSOCOM DIRECTIVE, *supra* note 43, at 6-7, 16-18.

necessary additional authority, before forwarding the CONOPS with a recommendation to the Joint Staff and the Office of the Secretary of Defense (OSD). Simultaneously, the CONOPS will flow through USSOCOM to OSD with a recommendation as to the availability and advisability of funding the proposed operation. Once the parallel processes converge at OSD, the Assistant Secretary of Defense for Special Operations/Low Intensity Conflict (ASD-SO/LIC) leads the final approval process, to include the required congressional notifications and any necessary coordination with external executive agencies.⁶⁸ Once the J-3⁶⁹ has prepared the proposed order in conjunction with the ASD-SO/LIC, it enters the Secretary of Defense Orders Book and its accompanying process for final approval by SECDEF.⁷⁰

Upon final approval⁷¹ and completion of the ordinary fifteen-day waiting period, the Joint Staff will signal final approval to execute the mission. The Special Operations Command will then release funding and may begin any necessary acquisition activities.⁷²

C. Funding Section 127e Operations

We begin our consideration of the fiscal and budgetary implications of funding Section 127e operations by distinguishing between the funding of the surrogate force and SOF. Understanding the funding for the surrogate forces lays the foundation for the more complex analysis of funding SOF, so our analysis begins there.

1. Funding the Surrogate Force

Section 127e allows for funding of a broad array of surrogate force activities. These activities range from traditional military activities such

⁶⁸ *Id.* at 6-7.

⁶⁹ The operations directorate of the Joint Staff. JOINT PUB. 1-02, *supra* note 65, at A-91.

⁷⁰ See JOINT CHIEFS OF STAFF, JOINT PUB. 3-35, DEPLOYMENT AND REDEPLOYMENT OPERATIONS at II-3 (Jan. 10, 2018); JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF GUIDE 3130, ADAPTIVE PLANNING AND EXECUTION OVERVIEW AND POLICY FRAMEWORK at A-7 (May 29, 2015).

⁷¹ It is important to note at this point that only funds actually approved for expenditure by SECDEF can, if and when spent, count against the \$100 million annual threshold for purposes of the Time Statute and the Anti-Deficiency Act (ADA). Mr. Cunningham Interview, *supra* note 30.

⁷² USSOCOM DIRECTIVE, *supra* note 43, at 7.

acquisition, logistics, and sustainment for irregular and paramilitary forces to salaries, equipment, and incidental costs for recruiting and leveraging informants⁷³—espionage-like purposes for which only the CIA previously had authorization.⁷⁴

The basic fiscal concerns remain important in assessing the funding of surrogate force operations. With regard to purpose, judge advocates should ensure that only those funds spent pursuant to Section 127e benefit the surrogate force.⁷⁵ All funds benefitting the surrogate force are USSOCOM's MFP-11 funds,⁷⁶ a fact that aids the intertwined time and amount considerations. Because SECDEF approves a maximum amount of spending on a particular Section 127e operation during its planning and approval phase,⁷⁷ a significant amount of oversight regarding the annual funding limit exists. The Financial Management section of USSOCOM monitors total spending pursuant to Section 127e throughout the fiscal year.⁷⁸ Each EU is responsible for staying at or below its approved operational funding threshold,⁷⁹ with the implied task of properly accounting for spending that benefits the surrogate force and that spending required by the SOF unit. One fact that simplifies the Purpose Statute analysis and accounting here is that all Section 127e spending is through OCO⁸⁰ O&M funds,⁸¹ eliminating the need to distinguish between OCO O&M and Procurement funds for large purchases.⁸²

⁷³ *Id.* at 8-10.

⁷⁴ Jennifer D. Kibbe, *Conducting Shadow Wars*, 5 J. OF NAT'L SECURITY L. & POL'Y 373, 377 (2012).

⁷⁵ Mr. Cunningham Interview, *supra* note 30.

⁷⁶ *Id.*

⁷⁷ USSOCOM DIRECTIVE, *supra* note 43, at 7.

⁷⁸ *Id.* at 8.

⁷⁹ *See id.* at 14-15.

⁸⁰ *See* USSOCOM PowerPoint, *supra* note 23, at slide 5.

⁸¹ 10 U.S.C.A. § 127e(b) (West 2019).

⁸² Congress allows the DoD discretion regarding the use of Operations and Maintenance (O&M) or Procurement funds for purchases of investment items not exceeding \$250,000. Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. 115-245, § 9010, 132 Stat. 2981 (2018). However, DoD policy ordinarily requires use of Operations and Maintenance funds for such purchases. U.S. DEP'T OF DEF., DoD 7000.14-R, DEP'T OF DEF. FINANCIAL MANAGEMENT REGULATION, vol. 2A, ¶ 010201 (Oct. 2008). This concept is frequently referred to as the "Expense-Investment Threshold." FISCAL LAW DESKBOOK, *supra* note 44, paras. 8-15, 2-7, and 2-8.

2. Funding SOF Operations

To understand the funding of SOF activities during the execution of Section 127e operations, one must remember that the purpose of Section 127e spending is to benefit the surrogate force. That concept is straightforward; the difficulty comes in the fact that all Section 127e expenditures are MFP-11 funds but not all MFP-11 funds are spent pursuant to Section 127e.⁸³

Nearly all SOF needs on Section 127e missions that an ordinary service member would require while deployed such as standard arms/ammo and BOS should be funded by the respective services using MFP-2 funds.⁸⁴ Those special operations-peculiar needs of SOF such as specialized weapons and equipment should be funded by USSOCOM with MFP-11⁸⁵ funds but not charged against the funding cap for the Section 127e operation since that spending does not benefit the surrogate force.⁸⁶ Violations of the Purpose Statute⁸⁷ become a concern if an EU uses MFP-11 funds to acquire service-common needs.⁸⁸ Therefore, judge advocates should check for a memorandum of understanding between USSOCOM and a particular service or a USSOCOM Exception to Policy regarding MFP-11 funds if reviewing a purchase using MFP-11 funds for a need that does not appear to be special operations-peculiar.⁸⁹

Improper classification of various types of spending on SOF in Section 127e operations poses two further risks. The first is accidental creation of possible ADA violations⁹⁰ as well as what may initially appear to be Time

⁸³ Mr. Cunningham Interview, *supra* note 30.

⁸⁴ WHITE PAPER, *supra* note 29, at page 3.

⁸⁵ *Id.*

⁸⁶ Mr. Cunningham Interview, *supra* note 30.

⁸⁷ 31 U.S.C.A. § 1301(a) (West 2019).

⁸⁸ WHITE PAPER, *supra* note 29, at 4; Mr. Cunningham Interview, *supra* note 30. *See also* email from Lieutenant Colonel (Retired) Shelley R. Econom, Chief, Acquisition Law, USSOCOM, to author (Nov. 16, 2018, 09:00 EST) (on file with author) [hereinafter "Mrs. Econom Email"].

⁸⁹ WHITE PAPER, *supra* note 29, at 3-5; USSOCOM PowerPoint, *supra* note 23 at slide 12; *See also* Mrs. Econom Email, *supra* note 88.

⁹⁰ *See* Davidson, *supra* note 20, at 46-52. Lieutenant Colonel (Retired) Davidson contrasts the Department of Justice's Office of Legal Counsel view that only a violation of appropriations statute can constitute an ADA violation and the Government Accountability Office's view, which he advocates as the better view, that any statutory violation implicating agency appropriations can constitute an ADA violation. *Id.* As discussed above, the Major Force Program classifications are budgetary with a basis in the combatant commands' broad authorization statutes (10 U.S.C. §§ 166 & 167) rather

Statute violations⁹¹ if SOF MFP-11 needs are improperly lumped in with those of the surrogate force as Section 127e spending. The second risk is the distortion of USSOCOM spending on a micro-level with rippling effects on USSOCOM's annual budget and relation to the services on a macro-level that occurs when MFP-11 funds are routinely used for service-common needs as a matter of expediency and supposed efficiency.⁹² The role of the judge advocate is thus to have a basic understanding of the interplay between fiscal law and the budgeting process to resolve ambiguities as they arise with an eye toward protecting USSOCOM as the client before Congress and the services as holders of its purse strings.

Before closing this subsection we must note a significant exception to the MFP-2 rule discussed above is that all TSOCs must support newly-deployed SOF units for any and all requirements for the first 15 days of contingency and crisis response operations requiring time-sensitive troop deployments,⁹³ meaning that MFP-11 funds will actually be used for BOS until the appropriate service assumes funding with its MFP-2 funds.

D. Special Considerations in Section 127e Operations

This section will conclude with an overview of some practical problems that Section 127e operations often pose: logistical challenges, potential surrogate war crimes, and finally how Section 127e operations change over time and conclude. Specialized knowledge of these matters is beyond the scope of this primer, but judge advocates familiar with the basic concepts can pose the right questions to the right people in order to glean sufficient detail to keep the commander informed if facing one of these unique situations.

than in actual appropriations, so whether an ADA violation would actually be found would depend on the view adopted by the adjudicator.

⁹¹ Mr. Cunningham Interview, *supra* note 30. Provided that proper funds were and remain available for both special operations forces (SOF) expenses in Overseas Contingency O&M funds and surrogate force expenses in Section 127e funds, no Time Statute violation actually occurs.

⁹² WHITE PAPER, *supra* note 29, at 4; Mr. Cunningham Interview, *supra* note 30. Indeed Mr. Cunningham, the author of the WHITE PAPER noted that over-reliance on MFP-11 funds as an "easy button" was a major reason for USSOCOM's renewed emphasis on proper delineation between MFP-2 and MFP-11 funding starting in approximately mid-2015. *Id.*

⁹³ JOINT PUB. 3-05, *supra* note 61, at xiv and IV-5.

1. *Getting Specialized Equipment to the Right Place*

Moving properly-purchased equipment from the supplier in Location A to Location B where SOF and surrogates need it to execute a Section 127e operation can be daunting. Acquisition program managers at USSOCOM must be intimately familiar with various nations' arms control laws since USSOCOM sources materiel on a worldwide scale to meet operational and timeliness requirements.⁹⁴ Export licenses, overflight/landing permissions⁹⁵ and driving privileges for each affected country⁹⁶ all factor into where equipment is purchased and how it is routed to the site of the Section 127e operation. Another common hurdle associated with purchases of foreign military equipment by the United States is securing an End Use Certificate disclosing the recipient of the equipment.⁹⁷

Additional layers of complexity fall into place when suppliers go bankrupt or lose specialized licenses for manufacturing military hardware, forcing further-increased lead time on SOF units and their surrogates for equipment now effectively stuck abroad.⁹⁸ Some suppliers cannot be trusted with the operational details that would be discernible from an ordinary purchase order, so operational security necessitates that USSOCOM receives many equipment deliveries at a secure facility within the United States for subsequent delivery to the EU and surrogates overseas.⁹⁹

2. *Liability for Surrogates' War Crimes*

While the absence of the Leahy Vetting requirement¹⁰⁰ in Section 127e provides USSOCOM with speed and flexibility in choosing and equipping surrogates, it also increases the risk of funding surrogate forces who do not share our respect for the Law of Armed Conflict (LOAC).¹⁰¹

⁹⁴ Telephone Interview with Lieutenant Colonel (Retired) Shelley R. Econom, Chief, Acquisition Law, USSOCOM (Jan. 11, 2019) [hereinafter "Mrs. Econom Interview"].

⁹⁵ AEY, Inc., ASBCA No. 56470, 18-1 BCA ¶ 18.

⁹⁶ Mrs. Econom Interview, *supra* note 94.

⁹⁷ See U.S. DEP'T OF DEF., DIR. 2040.3, END USE CERTIFICATES (Nov. 14, 1991) (C1, Aug. 31, 2018). This Directive outlines the various approval requirements for executing of an End Use Certificate, according to the type of use and/or transfer restrictions the selling nation desires to impose upon the United States.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ USSOCOM DIRECTIVE, *supra* note 43, at 4.

¹⁰¹ See Bart, *supra* note 2, at 514-15.

Because no scholarly consensus or customary international law addresses liability for surrogates' war crimes,¹⁰² and because seemingly-isolated incidents may have great effects on the international stage, judge advocates must advise their units to maintain sound situational awareness of their surrogates' activities and be prepared to take necessary actions to shield unit members from liability for any war crimes committed by the surrogate force.

The LOAC does not impose a general legal duty for SOF to investigate a Section 127e surrogate's past war crimes or to intervene to stop future ones, but LOAC does impose a general duty for SOF to separate from a surrogate presently committing war crimes and to neither aid nor abet its commission of future war crimes.¹⁰³ In a scenario where SOF were somehow involved in the present commission of a war crime, the types of command responsibility theories applied in Tokyo and Nuremburg are unlikely to apply to Section 127e operations since SOF will generally lack the requirement of "effective control" over the surrogate activities.¹⁰⁴ Without effective control, liability for SOF for a surrogate's war crimes would likely only arise under international law and/or the Uniform Code of Military Justice where the facts indicated that SOF had actual knowledge of the surrogate's intent while providing assistance necessary to the commission of the war crime.¹⁰⁵

Even though the governing law is unclear and individual liability unlikely, SOF still have significant moral, ethical, and practical incentives to prevent surrogate forces from violating the LOAC.¹⁰⁶ In practical terms, judge advocates should advise units who encounter potential LOAC violations by surrogates to report all allegations; make practicable efforts to prevent the commission of a war crime; and, if unsuccessful, cease all support of the surrogate force until ordered otherwise.¹⁰⁷ As part of their duty to provide principled counsel, judge advocates should also remind units prior to commencing Section 127e operations of the moral and

¹⁰² See generally Bart, *supra* note 2.

¹⁰³ Bart, *supra* note 2, at 532-33.

¹⁰⁴ See *id.* at 516-25. While SOF certainly have the ability to influence the surrogate via the provision of funds, the ability to give orders and impose discipline are the critical factors the Law of Armed Conflict requires to establish the facts of a "superior/subordinate" relationship and "effective control" of the surrogate by SOF. *Id.* at 522-23.

¹⁰⁵ *Id.* at 532-33.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

ethical foundations of their nation and services as well as the practical impact their and their surrogates' actions can have on perceived U.S. legitimacy at home and abroad.

3. *Modifying and Concluding Section 127e Operations*

Unanticipated developments often necessitate modifications to Section 127e operational thresholds. The CDRUSSOCOM may approve minor increases in funding for Section 127e operations that remain within the scope of the original mission authority,¹⁰⁸ but significant in-scope funding increases require staffing through OSD and another round of congressional notification with the statutory fifteen-day waiting period prior to execution.¹⁰⁹ Proposed modifications to the scope of a Section 127e operation trigger what amounts to a second iteration of the entire staffing and approval process through the GCC and SOCOM, to include COM concurrence, congressional notification, and the statutory waiting period.¹¹⁰

Section 127e operations end for a variety of reasons. To avoid a Purpose Statute violation, a Section 127e operation must end when the underlying mission authority ends, when SOF lose access to the surrogate force, or the surrogate force ceases supporting U.S. interests in the fight against terrorism.¹¹¹ Upon the full termination of a Section 127e operation, the EU notifies both the GCC and USSOCOM of its conclusion.¹¹²

Once SOF support is no longer required for an operation, Section 127e funding must “off-ramp” or scale back in order to avoid Purpose Statute violations.¹¹³ Often a separate fiscal authority will then “ramp up” in

¹⁰⁸ USSOCOM DIRECTIVE, *supra* note 43, at 16. “Minor increases” are those which do not exceed the lesser of twenty percent of the original amount of funding or \$500,000. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* The following are examples of proposals that would constitute a re-scope of a Section 127e operation: expanding the area of operations to include a new country, transferring a piece of significant military equipment to the surrogate force (if not previously approved), changing the type of supported surrogate force, and/or altering the operational authorities under which the Section 127e operation falls. *Id.*

¹¹¹ See USSOCOM DIRECTIVE, *supra* note 43, at 18.

¹¹² *Id.*

¹¹³ *Id.* at 16-17.

complementary fashion as the SOF elements give way to conventional U.S. troop and/or local support.¹¹⁴

Timing and prior planning are paramount in the off-ramping of Section 127e operations to avoid discontinuities in ongoing operational activities and within the relationships between forces. Judge advocates must pay close attention to the changing allocations of funds during this final phase of Section 127e operations.

IV. Conclusion

After a long, somewhat frustrating yet simultaneously satisfying day of research and phone calls, you are able to answer the GJA's questions. You call him back and, after learning he just completed the Graduate Course, inform him that elements of your battalion are preparing for a Section 127e operation overseas. He was correct that the United States Army Special Operations Command had recommended approval of the CONOPS a few weeks back, but the proposed mission still requires staffing through USSOCOM and the GCC prior to final SECDEF approval—all of which is in progress.

He seems impressed by your explanation of mission authority and the interplay between MFP-2 and MFP-11 funding for all the various aspects of the operation, saying that he too will need to become familiar with those concepts in his new role. As the conversation continues, you are able to ease his concerns about war crimes liability for our Soldiers. He knows the colonel will not be happy that some equipment is stuck in a warehouse overseas because the supplier went bankrupt between purchase and shipping, nor will he be pleased with the delay occasioned by USSOCOM not allowing one of its less-trustworthy suppliers to ship the other equipment directly to the surrogate force. However, he is confident he can now enable the colonel to understand those problems. He starts wrapping up the conversation by praising your ability to integrate several legal disciplines simultaneously to make the fine distinctions this Section 127e operation will require.

¹¹⁴ See Kate Clark, *Update on the Afghan Local Police: Making sure they are armed, trained, paid and exist*, AFGHANISTAN ANALYSTS NETWORK (July 5, 2017), <https://www.afghanistan-analysts.org/update-on-the-afghan-local-police-making-sure-they-are-armed-trained-paid-and-exist> (referencing the role of SOF in the formation of the Afghan Local Police (ALP) and the ALP's subsequent dependence on non-SOF funding and control by Afghanistan's Ministry of Interior).

He ends the conversation with a joke—and seems quite pleased you got it—that at least you and he do not have to worry about potential ADA violations for all this equipment bought for an operation that has not technically been approved yet.

**CONFESSIONS OF A CONVICTED SEX OFFENDER IN
TREATMENT: SHOULD THEY BE ADMISSIBLE AT A
REHEARING?**

MAJOR COLBY P. HOROWITZ*

The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.¹

I. Introduction

In the last three years, there has been a dramatic increase in the number of cases sent back by military appellate courts for a full rehearing on the merits. For comparison, in the ten-year period between 1999 and 2009, the Court of Appeals for the Armed Forces (C.A.A.F.) and the Army Court of Criminal Appeals (A.C.C.A.) sent back ninety-six cases to the trial level for a rehearing.² However, in the less than three year period since June 27, 2016, based on C.A.A.F.'s landmark decision in *United States v. Hills*³

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¹ *McGautha v. California*, 402 U.S. 183, 213 (1971) (internal quotation omitted).

² See Major Grace M.W. Gallagher, *Don't Panic! Rehearings and DuBays Are Not the End of the World*, *ARMY LAW.*, June 2009, at 1, 2.

³ 75 M.J. 350 (C.A.A.F. 2016). *Hills* established the rule that Military Rules of Evidence 413 and 414, which generally allow propensity evidence in sexual offense cases, can only be used for uncharged misconduct and not multiple charged offenses. This is true even for judge alone cases. See *United States v. Hukill*, 76 M.J. 219 (C.A.A.F. 2017).

alone, military appellate courts have overturned sexual offense convictions in at least fifty-one cases, with a rehearing authorized in forty-five of those cases (including child sex offense cases).⁴

A rehearing is defined as “a proceeding ordered by an appellate or reviewing authority on the findings and the sentence or on the sentence only.”⁵ Under Rule for Courts-Martial (RCM) 810, three types of rehearings are authorized. A “rehearing on sentence only” requires a reevaluation of the accused’s sentence based on appellate action, it does not require any new findings.⁶ A “rehearing in full” means that new findings are required for all of the offenses that the accused was convicted of at the original trial.⁷ And a “combined rehearing” involves a situation where some convictions are overturned on appeal, but other convictions are upheld. A combined rehearing proceeds first with a trial on the merits for the overturned convictions, which is then followed by an overall reassessment of the sentence.⁸ Both rehearings in full and combined rehearings involve a new trial on the merits for at least one overturned conviction.⁹

When a rehearing is authorized by a military appellate court, either the same or a different convening authority can order the rehearing.¹⁰ The appellate court generally sends the case back either to the General Court-Martial Convening Authority (GCMCA) that originally convened the

⁴ The cases that have been overturned by *United States v. Hills* are listed in Appendix A. In six of the fifty-one cases, the appellate court did not authorize a rehearing and instead reevaluated the sentence based on the remaining convictions.

⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 810(a)(2)(A) discussion (2019) [hereinafter MCM]. Rehearings are distinguished from other new proceedings like new trials, other trials, and remands.

⁶ *See id.* at R.C.M. 810(a)(2). The accused cannot receive a more severe sentence than what was adjudged at the original trial. *See id.* R.C.M. 801(d).

⁷ *See id.* R.C.M. 810(a)(1); *see also* *United States v. Rosendahl*, 53 M.J. 344, 347 (C.A.A.F. 2000) (explaining that double jeopardy prevents new findings on any offense that the accused was acquitted of at the original trial).

⁸ *See id.* R.C.M. 810(a)(3).

⁹ A convening authority is not required to conduct a rehearing simply because an appellate court has authorized one. *See* Gallagher, *supra* note 2, at 8. Further, sometimes an appellate court does not authorize a rehearing and chooses to reassess the sentence itself. *See e.g.* *United States v. Moynihan*, No. 20130855, 2017 CCA Lexis 743, at *11 (A. Ct. Crim. App. Nov. 30, 2017).

¹⁰ *See e.g.* *United States v. Long*, No. 20150160, 2018 CCA Lexis 512, at *33 (A. Ct. Crim. App. Oct. 26, 2018) (stating that a rehearing can be ordered by the “same or a different convening authority”); *see also* Captain Susan S. Gibson, *Conducting Courts-Martial Rehearings*, ARMY LAW., 1991, at 9.

case, or to the GCMCA where the accused is confined.¹¹ A local Office of the Staff Judge Advocate (OSJA) is normally contacted by the A.C.C.A Clerk notifying the OSJA that it has been selected to conduct the rehearing.¹² The decision of the appellate court triggers the speedy trial clock, and the Government has 120 days after being notified of the decision to conduct the rehearing.¹³ A rehearing can be challenging for an OSJA because the office may have little appellate experience and no prior knowledge of the case.¹⁴ With the speedy trial clock in mind, the OSJA must review a lengthy record of the previous trial, reinvestigate, and prepare the case.¹⁵

Rehearings are not only challenging for the OSJA, and the thought of repeating the trial for a second time is daunting for all parties involved. For the accused, the greatest risk may be that the Government adds new charges to the original charge sheet.¹⁶ In this situation, not only does the accused have to defend against new offenses, but his sentence is no longer capped by what he received at the original trial.¹⁷ The Government also faces many challenges at a rehearing. At least at the outset, prosecutors may be reticent to add an older and unfamiliar case to their workload which will take time away from their other courts-martial.¹⁸ Additionally, evidence may be lost or damaged, key witnesses may be uncooperative or difficult to locate, and the victim must testify and may be cross-examined again while facing the possibility that the accused may be acquitted.¹⁹ But despite these difficulties for the Government, there may be a hidden advantage that prosecutors can use the second time around; powerful evidence that was not available at the original trial but could help lead to a conviction at the rehearing.

¹¹ See Gallagher, *supra* note 2, at 2.

¹² See DAD Notes, *Rehearings: Move 'Em on Out*, ARMY LAW., July 1987, at 32.

¹³ See United States v. McFarlin, 24 M.J. 631, 635 (A.C.M.R. 1987).

¹⁴ See Gallagher, *supra* note 2, at 1.

¹⁵ See *id.*

¹⁶ Notwithstanding the possibility of additional charges, for the accused, a rehearing is usually a good thing. It means that one or more of the accused's convictions were overturned on appeal, and he gets a second chance to be acquitted of these offenses. At the very least, the accused may be entitled to a sentence reassessment which may reduce his sentence. *But see* United States v. Moreno, 63 M.J. 129, 138–139 (C.A.A.F. 2006) (noting that the passage of time, particularly if there is delay in post-trial processing, may hinder the ability to effectively present a defense).

¹⁷ See MCM, *supra* note 5, R.C.M. 810(a)(4), 810(d)(2); *see also* Adams v. Cook, No. 20170581, 2018 CCA Lexis 30, at *8 (A. Ct. Crim. App. Jan. 23, 2018).

¹⁸ See DAD Notes, *supra* note 12, at 32.

¹⁹ See Major Timothy Thomas, *Sometimes, They Come Back! How to Navigate the World of Court-Martial Rehearings*, ARMY LAW., July 2015, at 34, 38–39.

For those convicted of sexual offenses, there are strong incentives to enter sex offender treatment while in confinement. Inmates are unlikely to receive parole and may lose time credits against their sentence if they do not enter treatment.²⁰ Inmates may also lose confinement privileges like visitation rights, work opportunities, and improved living conditions.²¹ But entering sex offender treatment does not come without a cost. If inmates choose to enter treatment, they lose the ability to maintain their innocence.

Almost all sex offender treatment programs require participants to first take responsibility for their crimes, often in writing, as a precondition of treatment.²² This is true for military prisoners who want to enter sex offender treatment at the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas, or the Naval Consolidated Brig.²³ The decision to accept responsibility and enter treatment has practical risks. There is the possibility that incriminating statements made by inmates during sex offender treatment might be used against them at a rehearing if they are successful on appeal. Inmates, and the attorneys who represent and advise them, face the difficult choice of either accepting responsibility and potentially shortening their sentence, or maintaining their innocence and hoping that their appeal will be successful.²⁴

²⁰ See e.g. *United States v. Gonzalez-Gomez*, No. 20121100, 2018 CCA Lexis 109, at *3 (A. Ct. Crim. App. Mar. 1, 2018) (“The Disposition Board and Commander at the USDB did not recommend approval of appellant’s parole request. Among other observations, appellant would not accept responsibility for offenses, which made him ineligible for sex offender treatment.”); see also *Entzi v. Redman*, 485 F.3d 998, 1000–01 (8th Cir. 2007) (“Because of Entzi’s refusal to attend the court-ordered treatment sessions, prison officials suspended performance-based sentence reductions that would have shortened Entzi’s prison term.”).

²¹ See *McKune v. Lile*, 536 U.S. 24, 30–31 (2002).

²² See Jayson Ware & Ruth E. Mann, *How Should “Acceptance of Responsibility” Be Addressed in Sexual Offending Treatment Programs*, 17 *AGGRESSION AND VIOLENT BEHAV.* 279, 280 (2012); Seth A. Grossman, Note, *A Thin Line Between Concurrence and Dissent: Rehabilitating Sex Offenders in the Wake of McKune v. Lile*, 25 *CARDOZO L. REV.* 1111, 1113 (2004) (“Sex offenders present a unique and serious threat to society. Rehabilitating these individuals is a paramount goal of the justice system, and a task that experts almost universally acknowledge to be possible only when the offender accepts responsibility for his past crimes.”).

²³ See *United States v. Coker*, 67 M.J. 571, 576 (C.G. Ct. Crim. App. 2008); see also Tina M. Marin & Deborah L. Bell, *Navy Sex Offender Treatment: Promoting Community Safety*, *CORRECTIONS TODAY*, Dec. 2003, at 84 (“The offender also must admit a degree of responsibility for the confining offense(s) and be willing to discuss his sexually deviant behavior in detail.”).

²⁴ See *United States v. Bolander*, 722 F.3d 199, 223 (4th Cir. 2013) (referring to the choice faced by inmates as a “Hobson’s choice” where there are no good options).

This article argues that incriminating statements made by inmates during prison sex offender treatment should be admissible against them in a subsequent criminal proceeding. The analysis is divided into three primary legal issues: the psychotherapist-patient privilege, the Fifth Amendment right against compelled self-incrimination, and the application of Military Rule of Evidence (MRE) 403's balancing test when the statements are offered at a rehearing. Section II argues that even though the psychotherapist-patient privilege under MRE 513 applies to these statements, enumerated exceptions in the rule and waiver allow the privilege to be pierced. Section III explains why the statements are not improperly compelled self-incrimination, and also makes recommendations for the military confinement system on how to avoid Fifth Amendment issues. Section IV analyzes the probative value of the statements against the danger of unfair prejudice under MRE 403, and also explores the unique danger at a rehearing of alerting the factfinder to the previous overturned conviction. Although the requirements of prison sex offender treatment force inmates to make a difficult choice, there is a compelling argument that those who choose to enter treatment and accept responsibility for their offenses should be held accountable for these incriminating statements at a rehearing if their case is overturned on appeal.

II. The MRE 513 Psychotherapist-Patient Privilege

The first major legal issue when analyzing the admissibility of statements made during prison sex offender treatment is whether these statements are privileged as part of mental health treatment. A privilege prevents the disclosure of communications that could otherwise be discoverable to the parties during a court-martial.²⁵ The Supreme Court established a federal psychotherapist-patient privilege in 1996 to protect the confidentiality of mental health treatment, with the purpose of encouraging full and frank discussions and facilitating effective treatment for those with mental health issues.²⁶ A more limited version of this

²⁵ See *LK v. Acosta*, 76 M.J. 611, 614 (A. Ct. Crim. App. 2017).

²⁶ See *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (“The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.”).

privilege exists for courts-martial as articulated in MRE 513.²⁷ The privilege is more limited in the military system because the goal of encouraging effective mental health treatment must be balanced against military readiness and national security.²⁸ Under MRE 513, a patient has the right to prevent the disclosure of a confidential communication made to a psychotherapist or their assistant if the statement was made for the purpose of diagnosing or treating a mental or emotional condition, subject to seven enumerated exceptions where the privilege does not apply.²⁹ The rule defines the term “psychotherapist” as including clinical social workers and licensed mental health professionals.³⁰ This section analyzes whether the MRE 513 privilege applies to statements of responsibility made by inmates in prison sex offender treatment, and whether any exceptions might make the privilege inapplicable. The MRE 513 analysis is significantly different depending on whether the statements concern sexual offenses committed against adults or against children. For statements about crimes against children, an enumerated exception in the rule likely makes the privilege inapplicable.³¹ For statements about crimes against adults, no enumerated exception applies, and it is necessary to determine whether the inmate has waived the privilege.

A. The Privilege Generally Applies to Statements Made in Sex Offender Treatment

As a preliminary matter, MRE 513 likely applies to statements of responsibility made by inmates during sex offender treatment because these statements are part of the diagnosing and treating process. In fact, one study found that “91% of both residential and community based programs for adult offenders in the United States included ‘offender responsibility’ as a treatment target.”³² The therapeutic purpose behind requiring inmates to take responsibility is the idea that treatment can only be successful after inmates have moved past denial and taken ownership of their crimes.³³ It also allows treatment professionals to effectively

²⁷ See *United States v. Rodriguez*, 54 M.J. 156, 161 (C.A.A.F. 2000) (“When the President promulgated Mil.R.Evid. 513, he did not simply adopt *Jaffee*; rather, he created a limited psychotherapist privilege for the military.”).

²⁸ See *United States v. Jenkins*, 63 M.J. 426, 430 (C.A.A.F. 2006).

²⁹ MCM, *supra* note 5, MIL. R. EVID.513.

³⁰ See *id.* at 513(b)(2).

³¹ See *id.* at 513(d)(2).

³² Ware & Mann, *supra* note 22, at 280.

³³ See *id.*

establish group therapy sessions, because the inmates who have taken responsibility for their crimes and want to receive treatment can be separated from the inmates who deny that they have a problem.³⁴ The people receiving the statements and administering the mental health treatment are clinical psychologists, licensed social workers, and other mental health specialists,³⁵ who would almost certainly be covered under MRE 513. Since the psychotherapist-patient privilege under MRE 513 clearly applies to statements made during sex offender treatment, we must next analyze whether any of the enumerated exceptions apply, or whether the inmates waive the privilege when they enter treatment.

B. The “Child Abuse” Exception Nullifies the Privilege for Child Sex Offenses

Under MRE 513(d), there are seven exceptions listed where the psychotherapist-patient privilege does not exist. Unlike in the civilian federal system where exceptions to privileges are established through case law, exceptions to privileges in the military are explicitly stated in the rules of evidence.³⁶ Previously, there had been eight enumerated exceptions, but the “Constitutional” exception was removed in order to further strengthen the privilege.³⁷ The second exception to MRE 513, known as the “child abuse” exception, states that the psychotherapist-patient privilege does not exist “when the communication is evidence of child abuse or neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse.”³⁸

Thus, the “child abuse” exception actually contains two different exceptions, one based on the content of the communication, and the other based on the offenses on the charge sheet and the relationship between the parties. For the first part of the exception, when the content of the communication is evidence of child abuse, the communication is not privileged in order to allow mental health providers to tell military

³⁴ See UNITED STATES DISCIPLINARY BARRACKS, REG. 15-3, INMATE CLASSIFICATION/DISPOSITION para. 5-1 (7 Nov. 2018).

³⁵ See *Marin & Bell*, *supra* note 23, at 84.

³⁶ See *United States v. Custis*, 65 M.J. 366, 370–371 (C.A.A.F. 2007).

³⁷ See *generally* *J.M. v. Payton-O’Brien*, 76 M.J. 782 (N-M. Ct. Crim. App. 2017) (explaining that the removal of the Constitutional exception strengthened the privilege but the Constitution still applies to the rule).

³⁸ MCM, *supra* note 5, at MIL. R. EVID. 513(d)(2); see also *Lk v. Acosta*, 76 M.J. 611, 618 (A. Ct. Crim. App. 2017).

commanders about child abuse.³⁹ The drafters of the rule made the policy determination that a commander's need to know about child abuse committed by his or her Soldiers is more important than the confidentiality of mental health treatment. The second part of the exception, concerning a proceeding in which one spouse is charged with a crime against a child of either spouse, is more limited. For this exception to apply, there must be a crime against a child victim on the charge sheet, and there must be a marital relationship between the accused and the victim. Additionally, courts have interpreted this part of the exception even more narrowly, finding that it only applies to statements of the accused, and explicitly rejecting it as a way for defense counsel to access the mental health records of children, even though the plain language of the exception is not so limited.⁴⁰

The existence of the "child abuse" exception under MRE 513(d)(2) means that inmates convicted of child sexual offenses may not be protected by the psychotherapist-patient privilege when discussing their crimes in sex offender treatment. When those inmates accept responsibility for their crimes as part of treatment, it is highly likely that the content of their statements will contain evidence of child sexual abuse. Thus, under the first part of the exception alone, an accused's statements accepting responsibility would arguably trigger the exception and the privilege would not apply. The second part of the "child abuse" exception might apply as well in cases where the inmate has offended against his own child or the child of his spouse. However, it is likely unnecessary to reach this analysis since the content-based part of the exception would cover virtually all child sex offenders.

Defense counsel could argue that the "child abuse" exception should not be applied in this situation because there is no imminent risk of harm to children. As mentioned above, part of the rationale behind the exception is that military commanders need to know about child abuse committed by their Soldiers so that they can stop it. For inmates who are incarcerated, they are likely not a current risk to children. However, the defense argument is problematic for two reasons. First, the plain language of the exception does not contain any requirement of future harm or

³⁹ See *Acosta*, 76 M.J. at 617–18 ("the exception allows military mental healthcare providers to communicate to military commanders evidence of child abuse" because the drafters of the rule determined that military commanders have a need for this knowledge to preserve good order and discipline).

⁴⁰ See *id.* at 618–19.

imminent danger. Second, the part of the exception based on “a proceeding in which one spouse is charged with a crime against a child of either spouse”⁴¹ applies to a situation where the accused is already facing a “proceeding” for offenses against children. This part of the exception suggests that the drafters of the rule wanted the “child abuse” exception not just for safety reasons, but as an evidentiary tool. Because of an enumerated exception in the rule, child sex offenders are likely unable to claim the psychotherapist-patient privilege to protect conversations about their past crimes in sex offender treatment.

C. Adult Sexual Offenders Waive the Privilege When They Begin Treatment

Although the “child abuse” exception to the psychotherapist-patient privilege clearly applies to child sex offenders, the more difficult analytical situation is when inmates in treatment accept responsibility for sexual offenses committed against adults. In these cases, it is unlikely that any of the enumerated exceptions apply. The first exception requires that the patient be deceased, which is clearly inapplicable.⁴² The second exception, the “child abuse” exception discussed above, is inapplicable because the crimes do not involve children. The third through sixth exceptions all address situations where there is a tangible risk of future harm. These exceptions state that the privilege does not exist when there is a mandatory reporting requirement, where the therapist believes that the patient may be a danger to himself or others, where the patient is planning a future crime, or where disclosure is necessary to protect “the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission.”⁴³ Although these exceptions seem broad, statements of responsibility made in prison sex offender treatment likely do not trigger these exceptions for two reasons. First, the statements concern past crimes, so there is unlikely to be a future danger. Second, the inmates are confined, so it is unlikely that they pose an imminent threat to anyone.⁴⁴

⁴¹ MCM, *supra* note 5, at MIL. R. EVID. 513(d)(2).

⁴² If the inmate has died in prison after making statements in sex offender treatment, then there would be no need to conduct a rehearing, and the admissibility of the statements at a new trial is irrelevant.

⁴³ MCM, *supra* note 5, at MIL. R. EVID.513(d).

⁴⁴ In *United States v. Jenkins*, the Court held that there was an imminent danger exception to the privilege when an accused was referred by the command to receive a mental health evaluation to determine, among other things, whether he should be placed

The seventh and final exception involves a situation where the accused affirmatively “offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation.”⁴⁵ The accused holds the key to this exception, and can choose whether or not to open the door to statements made in treatment. If statements made in prison sex offender treatment are harmful to the accused, it is unlikely that defense counsel would pursue a trial strategy at the rehearing (like an insanity or lack of mental responsibility defense) that would open the door to these statements.⁴⁶ Because none of the seven enumerated exceptions apply to statements about adult sexual offenses, we must next analyze whether inmates waive the privilege when they enter prison sex offender treatment.

MRE 510 states that a privilege can be waived if the “holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege.”⁴⁷ Rule 513 itself does not address how or under what circumstances the psychotherapist-patient privilege can be waived. Military case law addresses victims who voluntarily waive the psychotherapist-patient privilege during the court-martial process, but it does not address how an accused might waive the privilege prior to entering mental health treatment,⁴⁸ although there is precedent to suggest that an accused waives the privilege if he does not raise the issue at trial.⁴⁹

Military courts tend to broadly construe the waiver of a privilege. Because privileges are not constitutionally required and tend to limit otherwise admissible evidence, military courts have found waiver even in cases where the holder was not aware of the privilege and where the holder failed to take adequate steps to protect confidentiality.⁵⁰ The presence of third parties can break the confidentiality of communications and destroy

in pre-trial confinement. 63 M.J. 426 (C.A.A.F. 2006). Unlike in *Jenkins*, when the accused is already in post-trial confinement, he is likely no longer a danger.

⁴⁵ MCM, *supra* note 5, at MIL. R. EVID.513(d)(7).

⁴⁶ See *United States v. Clark*, 62 M.J. 195, 199 (C.A.A.F. 2005) (“Because Appellant presented an insanity defense, he could not have claimed a psychotherapist-patient privilege under M.R.E. 513.”).

⁴⁷ See MCM, *supra* note 5, at MIL. R. EVID. 510(a).

⁴⁸ See *Payton-O'Brien*, 76 M.J. at 790.

⁴⁹ See *United States v. Demmings*, 46 M.J. 877 (A. Ct. Crim. App. 1997).

⁵⁰ See *United States v. Jasper*, 72 M.J. 276, 280-81 (C.A.A.F. 2013).

a privilege.⁵¹ A privilege can also be nullified when information is disclosed to a third party outside of the privileged relationship.⁵² However, the presence of third parties does not necessarily nullify a privilege if the third parties have a “commonality of interest”, like in a group therapy session where all participants are receiving treatment.⁵³ There is no requirement that a waiver of a privilege be knowing and intelligent.⁵⁴

Many prison sex offender treatment programs require inmates to first sign a form acknowledging that their statements can be disclosed outside of treatment.⁵⁵ Although the forms differ based on the confinement facility, they tend to contain some common provisions. Almost all of the forms have provisions that allow disclosure for safety reasons, and almost all of the forms notify inmates that information they provide can be shared with prison administrators and parole boards. At the Joint Regional Correctional Facility (JRCF) at Fort Leavenworth, for example, inmates must sign JRCF Form 307-1 acknowledging the limits of confidentiality for statements made during sex offender treatment.⁵⁶ This form states that, “[i]nformation disclosed by patients to Army Medical Department health personnel is not privileged communication” and that access to this information “is allowed when required by law, regulation, or judicial proceedings.”⁵⁷ The form goes on to list six examples of the limits of confidentiality, including: disclosure to prison administrators and parole boards, disclosure to prevent harm to the inmate or others, disclosure to protect the security of the facility, disclosure in response to a subpoena

⁵¹ See *United States v. Harpole*, 77 M.J. 231, 235 (C.A.A.F. 2018) (discussing third parties destroying confidentiality in the context of the MRE 514 victim advocate privilege when the third party is only present for “moral support”).

⁵² See *United States v. McElhaney*, 54 M.J. 120, 131-32 (C.A.A.F. 2000).

⁵³ *United States v. Shelton*, 64 M.J. 32, 39 (C.A.A.F. 2006) (discussing the effect of third parties on the clergy privilege); see also *Cavallaro v. United States*, 284 F.3d 236, 250 (1st Cir. 2002) (stating that disclosure to third parties does not nullify the attorney-client privilege when the third parties are agents of the attorney).

⁵⁴ See *id.* at 281.

⁵⁵ See *United States v. Bolander*, 722 F.3d 199, 204 (4th Cir. 2013) (noting that the federal facility at Butner requires inmates to first sign an informed consent form before entering sex offender treatment); *United States v. Wiggins*, No. 6:13-00183, 2014 U.S. Dist. Lexis 23586, at *2 (S.D.W.V. Feb. 25, 2014) (explaining that inmates in West Virginia’s prison sex offender treatment program were first required to sign a form titled “Informed Consent and Statement Regarding Limited Confidentiality”).

⁵⁶ See Joint Regional Correctional Facility, JRCF Form 307-1, Limits of Confidentiality of Directorate of Treatment Programs Information (Aug. 23, 2010).

⁵⁷ *Id.*

related to a legal action or proceeding, and disclosures to other health care professionals or for “clinical investigation purposes.” Inmates at the JRCF must sign this acknowledgment form before entering treatment. It makes sense that treatment information is shared with prison administrators and parole boards. The goal of prison sex offender treatment is not only to treat the inmate, but also to assess individual risk and to determine who is a good candidate for parole. If an inmate is making progress in a sex offender treatment program, he may be a reduced risk to the prison population and a much more attractive candidate for parole.

When inmates sign forms like JRCF Form 307-1, they are affirmatively waiving their psychotherapist-patient privilege. Under MRE 510(a), a person waives a privilege who, “voluntarily discloses or consents to disclosure of any significant part of the matter or communication.” By signing the form, inmates are consenting to the disclosure of information they provide in sex offender treatment. JRCF Form 307-1 explicitly tells inmates that the information they provide is not privileged communication. It also tells them that information they provide can be disclosed to prison officials and parole boards. A waiver of a privilege occurs when information is disclosed to third parties.⁵⁸ In this context, prison officials and parole board members are third parties because they are not licensed mental health professionals and they are not involved in the mental health treatment of the inmate.

D. The Psychotherapist-Patient Privilege Should Not Be a Barrier to Admission for Statements of Responsibility Made in Prison Sex Offender Treatment

As a general rule, the psychotherapist-patient privilege under MRE 513 applies to statements made by inmates in prison sex offender treatment. The inmates are receiving treatment from licensed mental health professionals for the mental condition or disease that led to their crimes. Despite the general applicability of the privilege, it should not be a bar to the admission of statements of responsibility at a rehearing. For those inmates who have been convicted of child sexual offenses, the content of their statements likely triggers the “child abuse” exception which makes the privilege inapplicable. For those inmates who have been

⁵⁸ See *United States v. McElhaney*, 54 M.J. 120, 132 (C.A.A.F. 2000) (“We have held, in harmony with federal civilian law, that communications made in the presence of third parties, or revealed to third parties, are not privileged.”).

convicted of adult sexual offenses, they have likely already waived the privilege prior to entering treatment.

For statements concerning adult sexual offenses, defense counsel can argue that the limited waiver signed at the beginning of treatment should not waive the privilege at a rehearing. In the context of other privileges, military courts have found limited waivers in certain situations. A limited waiver means that the accused is allowing the release of some privileged material, but is not completely waiving a privilege. For example, when an accused raises an ineffective assistance of counsel (IAC) claim on appeal, the accused is partially waiving the attorney-client privilege, but the waiver is limited to the information necessary for defense counsel to respond to the IAC claim.⁵⁹

There are also limited waivers for the privilege against self-incrimination. In a mixed plea case, the accused waives his privilege against self-incrimination during the providence inquiry, but this waiver usually extends only to the offenses to which he is pleading guilty.⁶⁰ Similarly, an accused who chooses to testify in his own defense waives the privilege against self-incrimination only for matters that he testifies about.⁶¹ For example, if there are two offenses on the charge sheet and the accused only testifies about one, he cannot be cross-examined about the other offense because he has not waived his privilege against self-incrimination for that offense.⁶² There is also a federal case which suggests that limited waiver can apply to the psychotherapist-patient privilege, although the case law in this area is not well developed.⁶³

Defense counsel should further argue that the limited waiver signed by their client at the beginning of treatment was not intended to waive the privilege for future criminal proceedings. The waiver serves two primary purposes for the confinement facility. It allows the facility to be notified about a particularly dangerous inmate, and it provides prison administrators with information about whether an inmate should receive

⁵⁹ See *United States v. Gatto*, No. 37246, 2010 CCA Lexis 363, at *29 (A.F. Ct. Crim. App. Oct. 22, 2010).

⁶⁰ See *United States v. Ramelb*, 44 M.J. 625, 630 (A. Ct. Crim. App. 1996).

⁶¹ See *MCM*, *supra* note 5, at MIL. R. EVID. 301(c).

⁶² See *id.*

⁶³ See *Caesar v. Mountanos*, 542 F.2d 1064 (9th Cir. 1976). Although this case recognizes a limited waiver of the psychotherapist-patient privilege, it predates the Supreme Court's decision in *Jaffee* by twenty years, and primarily concerns a dispute over a state statute.

parole or sentence credits. The purpose of the waiver is not to generate additional evidence for the Government on the chance that the inmate's case is overturned on appeal.⁶⁴ Most inmates who sign the waiver likely either want to treat their illness or want to receive a reduced sentence, but it is doubtful that they contemplate the risk they are taking if their case is overturned on appeal. Defense counsel should argue that the waiver signed by their client only allows the limited release of information within the confinement system, and that the waiver does not extend to new judicial proceedings.

Although it is logically compelling, the limited waiver argument likely fails for one major reason. When inmates acknowledge that information they provide in treatment can be shared with prison administrators and parole boards, the inmates are consenting to the disclosure of their statements outside the scope of the psychotherapist-patient relationship. This consent to disclosure to third parties who are not part of the mental health treatment and do not have a "commonality of interest" likely waives the privilege. Prison sex offender treatment offers great potential benefit to inmates.

In addition to treating their mental health problems and beginning the rehabilitation process, inmates who make progress in treatment can earn increased prison privileges and even early release. But the inmates acknowledge, at the outset, that in order to earn these benefits, the information they provide in the program will be shared beyond mental health professionals. If an inmate is successful on appeal and his conviction is overturned, he should not then be permitted to hide behind the MRE 513 privilege to shield his statements, especially considering that he was initially willing to waive this privilege at the beginning of treatment.

III. The Fifth Amendment Prohibition on Compulsory Self-Incrimination

The second major legal issue for incriminating statements made during prison sex offender treatment is whether they violate the Fifth Amendment's prohibition on compelled self-incrimination. The Fifth Amendment states that no person "shall be compelled in any criminal case

⁶⁴ As explained in the next Section, this kind of subterfuge to generate evidence is impermissible and could result in a Fifth Amendment violation.

to be a witness against himself.”⁶⁵ This provision is interpreted to mean that people cannot be forced to answer questions that might incriminate them in future criminal proceedings,⁶⁶ and that people have the “right to remain silent.”⁶⁷ As a general rule, the privilege against self-incrimination is normally not self-executing, meaning that it must be asserted by the person being questioned.⁶⁸ One exception to this rule is the “penalty” cases, where someone is threatened with economic consequences or other harm if they choose to remain silent.⁶⁹ In these cases, it is not necessary to exercise the right to remain silent, because the constitutional violation comes from the threatened penalty. On the other hand, the choice to remain silent can often carry permissible consequences that do not violate the Fifth Amendment.⁷⁰ The central question is whether the potential penalty is severe enough to compel self-incrimination in violation of the Fifth Amendment.⁷¹

A. Analysis of *McKune v. Lile* Plurality, Concurring, and Dissenting Opinions

In 2002, in *McKune v. Lile*, the Supreme Court addressed the issue of whether inmates could be forced to accept responsibility for their crimes as a prerequisite for entering prison sex offender treatment, or whether this amounted to improper compulsion under the Fifth Amendment.⁷² In *McKune*, the defendant refused to enter sex offender treatment in Kansas state prison and argued that the required disclosure of his past crimes was impermissibly compelled self-incrimination.⁷³ In order to enter sex offender treatment, the defendant was required to sign an “Admission of

⁶⁵ U.S. CONST. amend. V.

⁶⁶ See *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984).

⁶⁷ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁶⁸ See *id.* at 428.

⁶⁹ See *id.* at 434.

⁷⁰ See e.g. *Jenkins v. Anderson*, 447 U.S. 231 (1980) (holding that a defendant’s initial silence with police could be used to impeach him when he testified at trial).

⁷¹ See *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) (“These cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized. It is true, as appellant points out, that our earlier cases were concerned with penalties having a substantial economic impact. But the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids.”).

⁷² 536 U.S. 24 (2002).

⁷³ See *id.* at 31.

Responsibility” form where he admitted to his convicted offenses and described all of his sexual history (including uncharged misconduct), and he was required to take a polygraph test to verify the accuracy of his statements.⁷⁴ By refusing to disclose his past crimes and enter treatment, the defendant lost prison privileges like “visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, access to a personal television” and he was even transferred to a maximum-security unit.⁷⁵ The Court held that denying the defendant these privileges based on the refusal to enter treatment did not violate his Fifth Amendment rights. However, the nine justices split three different ways; with a four justice plurality opinion, a four justice dissenting opinion, and with Justice Sandra Day O’Connor’s concurring opinion controlling because it was the narrowest. Below, the plurality, concurring, and dissenting opinions are explained.

1. *The Plurality Opinion*

Justice Anthony Kennedy delivered the plurality opinion and was joined by three other justices. The plurality opinion held that there was no Fifth Amendment violation, and it focused on Kansas’s strong interest in rehabilitating sex offenders versus the reduced constitutional rights of prisoners.⁷⁶ To support the strong governmental interest, using statistics from 1983, Justice Kennedy stated that convicted sex offenders were “much more likely than any other type of offender to be rearrested for a new rape or sexual assault.”⁷⁷ And although he noted that there was some difference of opinion among experts, Justice Kennedy explained that prison officials across the United States believed that an inmate must admit to and confront past crimes as a critical first step of treatment.⁷⁸ In Justice Kennedy’s view, compared to this strong governmental interest, the only thing at stake for the defendant was a relatively miniscule denial of prison

⁷⁴ *See id.* at 30.

⁷⁵ *Id.*

⁷⁶ *See id.* at 36 (“The fact that these consequences are imposed on prisoners, rather than ordinary citizens, moreover, is important in weighing respondent’s constitutional claim.”).

⁷⁷ *Id.* at 33. Although this is a commonly held societal belief, many experts dispute the idea that sexual offenders have a higher recidivism rate than other criminals.

⁷⁸ *See id.* at 29 (“While there appears to be some difference of opinion among experts in the field Kansas officials and officials who administer the United States prison system have made the determination that it is of considerable importance for the program participant to admit having committed the crime for which he is being treated and other past offenses. The first and in many ways most crucial step in the Kansas rehabilitation program thus requires the participant to confront his past crimes so that he can begin to understand his own motivations and weaknesses.”).

privileges. The defendant's refusal to enter sex offender treatment did not result in more severe penalties; it "did not extend his term of incarceration. Nor did his decision affect his eligibility for good-time credits or parole."⁷⁹

The plurality opinion also addressed whether information provided by inmates in prison sex offender treatment could be used against them in a future criminal proceeding. Justice Kennedy explained that Kansas left open the possibility of using information in a future proceeding, however no inmate had ever been charged or prosecuted based on an offense disclosed during treatment.⁸⁰ Even though information was not used in subsequent proceedings, Kansas refused to make the information disclosed during treatment privileged or to provide inmates with immunity for two reasons. First, it helped the inmates understand that their actions had consequences and the threat of additional punishment reinforced the gravity of their crimes.⁸¹ Second, Kansas had a "valid interest in deterrence by keeping open the option to prosecute a particularly dangerous sex offender."⁸² In finding no Fifth Amendment violation in this case, Justice Kennedy focused heavily on the reduced constitutional rights of prisoners in the face of the government's strong need to manage prisons and rehabilitate offenders.⁸³ The plurality opinion did not answer the question of whether inmates could be explicitly denied parole or sentence credits for refusing to take responsibility for their crimes, but it hinted that this might be impermissible.⁸⁴

2. *The Concurring and Controlling Opinion*

Justice O'Connor's concurring and controlling opinion further muddied the waters. She felt that the plurality opinion went too far in reducing the constitutional rights of prisoners, and she rejected the due process test established in *United States v. Sandin* where the government action was only improper if it "impose[d] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."⁸⁵ Although she rejected the test used by the plurality opinion, Justice

⁷⁹ *Id.* at 38.

⁸⁰ *See id.* at 30.

⁸¹ *See id.* at 34.

⁸² *Id.* at 35

⁸³ *See id.* at 37 ("The compulsion inquiry must consider the significant restraints already inherent in prison life and the State's own vital interests in rehabilitation goals and procedures within the prison system.").

⁸⁴ *See supra* note 79 and accompanying text.

⁸⁵ 515 U.S. 472, 484 (1995).

O'Connor declined to offer her own test. Because she believed that the denial of privileges in this case clearly did not amount to compulsion, she felt it was unnecessary to answer the larger constitutional question of how much could be taken from an inmate based on the refusal to incriminate himself.⁸⁶ Justice O'Connor's opinion is controlling because it provides the narrowest rationale that five justices support.⁸⁷ But because her controlling opinion failed to articulate a clear test, it was left for the lower courts to determine how much an inmate could be incentivized or punished based on the refusal to take responsibility and enter sex offender treatment.

3. *The Dissenting Opinion*

The dissenting opinion, authored by Justice John Paul Stevens, felt that the Kansas sex offender treatment program clearly violated the Fifth Amendment's bar on compelled self-incrimination. The dissent argued that the statements of responsibility sought by the program were undoubtedly incriminating and could be used against the inmates in a future proceeding.⁸⁸ After citing to multiple cases that involved improper compelled self-incrimination, the dissent stated that, "[n]one of our opinions contains any suggestion that compulsion should have a different meaning in the prison context."⁸⁹ The dissent also rejected the idea that the loss of privileges in this case was minor, and focused on the myriad ways that the inmate's living conditions and quality of life were reduced by a refusal to incriminate himself.⁹⁰ The dissent recognized that the prison had a valid goal in rehabilitating sex offenders, and even in potentially requiring them to accept responsibility. But there were ways

⁸⁶ See *McKune*, 536 U.S. at 53-54 (O'Connor, J., concurring) ("I find the plurality's failure to set forth a comprehensive theory of the Fifth Amendment privilege against self-incrimination troubling. But because this case indisputably involves burdens rather than benefits, and because I do not believe the penalties assessed against respondent in response to his failure to incriminate himself are compulsive on any reasonable test, I need not resolve this dilemma to make my judgment in this case.").

⁸⁷ See *Marks v. United States*, 430 U.S. 188, 193 (1977). Although the *Marks* rule seems relatively simple on its face, it has proved difficult in many cases for the lower courts to apply. See Kevin M. Lewis, *What Happens When Five Supreme Court Justices Can't Agree?*, CONGRESSIONAL RESEARCH SERVICE (Jun. 4, 2018), <https://fas.org/sgp/crs/misc/LSB10113.pdf>.

⁸⁸ See *McKune*, 536 U.S. at 55 (Stevens, J., dissenting) ("It is undisputed that respondent's statements on the admission of responsibility and sexual history forms could incriminate him in a future prosecution for perjury or any other offense to which he is forced to confess.").

⁸⁹ *Id.* at 58.

⁹⁰ See *id.* at 67 ("What is perfectly clear, however, is that it is the aggregate effect of those penalties that creates compulsion.").

to achieve these goals without violating the 5th Amendment, “[t]he most obvious alternative is to grant participants use immunity.”⁹¹ The dissenting opinion ended with a cautionary statement:

Particularly in a case like this one, in which respondent has protested his innocence all along and is being compelled to confess to a crime that he still insists he did not commit, we ought to ask ourselves, what if this is one of those rare cases in which the jury made a mistake and he is actually innocent?⁹²

B. The Post-*McKune* Absence of Military Case Law

Since the Supreme Court’s decision in *McKune v. Lile*, only two military appellate cases have addressed similar issues. First, just one year after *McKune* in *United States v. McDowell*, the Air Force Court of Criminal Appeals decided whether an inmate at Miramar Naval Brig could be denied certain confinement privileges for refusing to incriminate himself as a condition of entering sex offender treatment.⁹³ In finding no Fifth Amendment violation, the court’s ruling was fairly predictable, given that the privileges denied the inmate in this case were less severe than those upheld in *McKune*.⁹⁴ In *McDowell*, the only consequences the inmate faced for refusing to incriminate himself were that he was not allowed to have a watch or a Walkman radio.⁹⁵ He was still entitled to a plethora of other privileges that improved life in confinement.⁹⁶

Over fifteen years after *McDowell*, the A.C.C.A. decided *United States v. Jessie*, where an inmate was denied visitation rights with his biological children based on his refusal to take responsibility for his convicting offenses and enter prison sex offender treatment.⁹⁷ The inmate asked A.C.C.A. to reduce the length of his sentence based on this alleged constitutional violation. In a divided decision, the majority opinion

⁹¹ *Id.* at 69.

⁹² *Id.* at 71-72.

⁹³ 59 M.J. 662 (A.F. Ct. Crim. App. 2003).

⁹⁴ *See id.* at 665 (“Since the Supreme Court did not find an unconstitutional compulsion under the facts of the *McKune* case, we do not find one here.”).

⁹⁵ *See id.* at 664.

⁹⁶ *See id.* (“the inmate may still be permitted to participate in Yard Call, Gym Call, Library Call, and Movie Call, play table games, use the computers in the dormitory, and make phone calls during designated hours”).

⁹⁷ No. 20160187, 2018 CCA Lexis 609 (A. Ct. Crim. App. Dec. 28, 2018).

declined to address the inmate's claim on the merits, stating that, "[t]his court has no authority to direct change to the policies of military confinement facilities."⁹⁸ The majority opinion stated that this case should be handled by the civilian federal district courts,⁹⁹ and thus failed to conduct any substantive Fifth Amendment analysis. The decision not to address this issue on the merits seems ripe for reconsideration (either by A.C.C.A. itself or a higher court),¹⁰⁰ given a strong dissenting opinion from four judges, and the majority's own statement that, "[o]ur decision today is case specific, and should not be understood as prohibiting or disincentivizing similar (or dissimilar) requests."¹⁰¹

Unfortunately, *McDowell* and *Jessie* are the only cases where military appellate courts have addressed this issue. Because the denial of privileges in *McDowell* was so miniscule, and paled in comparison even to the privileges denied in *McKune*, *McDowell* has very limited precedential value. Similarly, the *Jessie* case has limited precedential value because A.C.C.A. declined to address the Fifth Amendment issue on the merits. Because military appellate courts have never substantively addressed the issue, it is currently unclear what penalties beyond the denial of a watch or a Walkman radio, if any, would cause a military court to find a Fifth Amendment violation. Some of these greater penalties might include the denial of parole, the loss of sentence credits, the revocation of probation and supervised release, or the denial of visitation rights with family members like in the *Jessie* case.

C. The Post-*McKune* Disagreement Among the Federal Circuit Courts

Unlike military appellate courts, federal civilian appellate courts have grappled with the constitutionality of these greater penalties. The problem they face is that Justice O'Connor's controlling opinion in *McKune* failed to articulate a clear legal standard for determining how much can be taken from prisoners based on their refusal to take responsibility. As a result,

⁹⁸ *Id.* at *6.

⁹⁹ See *id.* at *18 ("[T]o the extent that appellant's claims are meritorious, there exists a court that has the authority to order actual (i.e., injunctive) relief. The Tenth Circuit has determined that military prisoners at Fort Leavenworth may file suit in U.S. District Court seeking injunctive and declaratory relief for oppressive prison conditions.").

¹⁰⁰ Army Court of Criminal Appeal's decision in the *Jessie* case is in the process of being appealed higher to Court of Appeals for the Armed Forces. See *United States v. Jessie*, No. 19-0192, 2019 C.A.A.F. Lexis 145 (Feb. 26, 2019).

¹⁰¹ *Id.* at *19.

lower courts have struggled to apply *McKune* outside the specific facts of that case.¹⁰² Despite the confusion and uncertainty, as lower courts have struggled with this issue, some consistent themes and legal principles have emerged.

First, denying inmates certain privileges related to prison living conditions for a refusal to take responsibility and enter sex offender treatment does not violate the Fifth Amendment. This includes privileges like work opportunities and access to entertainment and recreation.¹⁰³ It even includes transferring the inmate to a higher security ward or facility. Because both the plurality and concurring opinions in *McKune* found no issue with withholding these privileges, lower courts have treated this as well settled law.¹⁰⁴ Courts show strong deference to prison administrators when determining what policies and practices should be implemented in their prisons.¹⁰⁵

One penalty that might be more problematic is the denial of an inmate's right to visit with his own biological children, given that the Supreme Court has established a "fundamental liberty interest of natural parents in the care, custody, and management of their child."¹⁰⁶ The Supreme Court has held that some limitations on an inmate's visitation rights are permissible, but it is unclear whether this extends to members of the inmate's immediate family.¹⁰⁷ Visitation rights are an issue for

¹⁰² See *Roman v. Diguglielmo*, 675 F.3d 204, 213 (3d Cir. 2012) ("Thus, in light of the lack of clear consensus from other circuits and because Justice O'Connor's controlling opinion in *McKune* stops short of articulating its own test, we are tasked with the responsibility of distilling the core principles of that decision."); *Ainsworth v. Stanley*, 317 F.3d 1, 4 (1st Cir. 2002) ("The difficulty presented by this interpretive precept is that Justice O'Connor does not purport to lay out any abstract analysis or unifying theory that would prefigure her views regarding the constitutionality of New Hampshire's program. Taken together, the O'Connor and plurality opinions do not clearly foreshadow how the court would decide our case.").

¹⁰³ See e.g. *Aruanno v. Spagnuolo*, 292 Fed. Appx. 184, 186 (3d Cir. 2008).

¹⁰⁴ See *Searcy v. Simmons*, 299 F.3d 1220, 1225 (10th Cir. 2002) ("Had the only consequences Mr. Searcy suffered for his refusal to provide his sexual history been the reduction in his privilege level and a concomitant transfer to a maximum security prison, *McKune* would clearly call for affirming the district court's decision.").

¹⁰⁵ See e.g. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

¹⁰⁶ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

¹⁰⁷ See *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) ("We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners.").

inmates who are convicted of child sex offenses, because confinement facilities will often block all access to children until they make progress in a sex offender treatment program.¹⁰⁸ Until recently, the JRCF at Fort Leavenworth did not allow child sex offenders to have any contact with children (including their own biological children who they did not offend against) without an exception to policy, but they could not get an exception to policy unless they took responsibility for their crimes and entered treatment.¹⁰⁹ The JRCF has recently changed its policy (possibly in response to appellate litigation), but a child sex offender still cannot have contact with children without an individualized assessment of risk.¹¹⁰ However, even for a seemingly severe penalty like blocking an inmate's access to his biological children, courts have still found no Fifth Amendment violation.¹¹¹ Similarly, in the *Jessie* case, the dissenting opinion found a First Amendment violation, but not a Fifth Amendment violation because of the legal framework established by *McKune* and the subsequent decisions of the federal circuit courts.¹¹²

Second, although taking away privileges may be legitimate, the penalties cannot be so severe as to violate the due process standard established in *Sandin*. This standard forbids penalties that constitute “an atypical and significant hardship on the [defendant’s] prison conditions.”¹¹³ It is currently unclear what denial of privileges, if any, would amount to a due process violation under *Sandin*. To date, no court has found a Fifth Amendment violation based solely on a change in prison living conditions. The only other guidance from the courts is that the threatened consequence cannot be so “grave” as to give the inmate no choice but to incriminate himself.¹¹⁴

¹⁰⁸ See *United States v. Jessie*, No. 20160187, 2018 CCA Lexis 609, at *26–29 (A. Ct. Crim. App. Dec. 28, 2018) (Schasberger, J., dissenting).

¹⁰⁹ See *id.*

¹¹⁰ See *id.* at *5.

¹¹¹ See *Wirching v. Colorado*, 360 F.3d 1191 (10th Cir. 2004).

¹¹² See *Jessie*, 2018 CCA Lexis at *26 n. 16 (Schasberger, J., dissenting) (“I would find that appellant’s First Amendment rights were violated. I would not, however, find that the policy violated appellant’s Fifth Amendment rights. . . . Given that courts have found no Fifth Amendment violation in policies that are stricter than the one in question here, I would conclude that appellant’s Fifth Amendment rights were not violated.”).

¹¹³ *Roman v. Diguglielmo*, 675 F.3d 204, 213–214 (3d Cir. 2012).

¹¹⁴ See *id.* at 211 (“Though drawing the distinction between a lawful condition of confinement and a condition that impermissibly encumbers a prisoner’s rights can be challenging, it is a distinction that rests on the difference between merely pressuring or encouraging an inmate to incriminate himself, and compelling him to do so through the threat of consequences so grave as to leave him no choice at all.”) (internal quotation omitted).

One point echoed by most courts is that the threatened penalty cannot be a subterfuge or a surreptitious way for the government to collect additional evidence.¹¹⁵ The penalty for refusing to take responsibility must be related to a legitimate governmental interest. The weaker the government's interest, the more likely there is to be a Fifth Amendment violation.¹¹⁶ Some have argued for the application of the Supreme Court's four-part test in *Turner v. Safley*, which is used to determine if a prison regulation impermissibly infringes on an inmate's exercise of constitutional rights.¹¹⁷ However, in the Fifth Amendment context, most courts seem to apply the *Sandin* due process test, which is much more deferential to prison administrators and much less likely to find a constitutional violation.

Third, speculative consequences are unlikely to rise to the level of a Fifth Amendment violation. The penalties for inmates who refuse to incriminate themselves must be concrete and definite. *United States v. Antelope*, one of the only cases where a court actually found a Fifth Amendment violation, illustrates this point.¹¹⁸ In *Antelope*, both the threat of self-incrimination and the penalty imposed were real and concrete. As part of his sex offender treatment program, the defendant was required to admit to both his charged crimes and uncharged misconduct, and the program often shared patients' admissions with the authorities which led to additional convictions.¹¹⁹ Further, while the defendant was on probation, he repeatedly refused to incriminate himself in treatment, and the government "twice revoked his conditional liberty and sent him to prison."¹²⁰ In this case, the defendant could show that there was an actual threat of future prosecution, and that his silence had real consequences when his freedom was twice taken away.

¹¹⁵ See *Searcy v. Simmons*, 299 F.3d 1220, 1227 (10th Cir. 2002).

¹¹⁶ See *Roman*, 675 F.3d at 213 ("Thus, the statement sought—whether the inmate decides to speak or to remain silent—must be tethered to some independent, legitimate state purpose, such as rehabilitating inmates convicted of certain crimes. The more attenuated the relationship between the two, the greater our concern that the penalty is indicative of a state attempt to wield its power in an impermissible manner.").

¹¹⁷ 482 U.S. 78 (1987). The four parts of this test are: whether the regulation has a valid and rational connection to a legitimate government interest, whether alternative means exist for the inmate to exercise his rights, what impact the regulation has on other inmates and prison resources, and whether there are any reasonable alternatives to the regulation. See *United States v. Jessie*, No. 20160187, 2018 CCA Lexis 609, at *26–27 (Schasberger, J., dissenting).

¹¹⁸ 395 F.3d 1128 (9th Cir. 2005).

¹¹⁹ See *id.* at 1135.

¹²⁰ *Id.* at 1130.

In contrast, many courts have rejected Fifth Amendment claims when the penalty faced by the defendant is unclear or speculative.¹²¹ In *Entzi v. Redmann*, the court rejected a Fifth Amendment claim when the only consequence to the defendant was that he faced a probation revocation hearing, but his probation was not actually revoked.¹²² Similarly, in *United States v. Lara*, the court rejected the defendant's claim because his probation could not have been revoked automatically based on his decision not to incriminate himself.¹²³ Additionally, courts have rejected Fifth Amendment claims where the refusal to self-incriminate is only one factor among many considered when deciding whether to impose a penalty.¹²⁴ When inmates receive administrative due process, like a parole board or probation hearing, before a penalty is imposed, courts are reluctant to find a Fifth Amendment violation.¹²⁵ Unless a defendant can show that a penalty was automatically imposed based solely on his refusal to incriminate himself, he is unlikely to succeed on a Fifth Amendment claim.

Fourth, courts have largely upheld taking away sentence credits based on a refusal to admit responsibility and enter treatment. The premise is that there is no constitutional entitlement to receive a reduced sentence based on good conduct.¹²⁶ The decision to award good conduct credit is normally within the sole discretion of prison administrators.¹²⁷ The same

¹²¹ See *Huschak v. Gray*, 642 F.Supp.2d 1268, 1283 (D. Kan. 2009) (“In sum, the loss of liberty and the risk of incrimination were more concrete and less generalized in *Antelope* than in the case now before the court. For these reasons, the court rejects petitioner's final claim for relief.”).

¹²² 485 F.3d 998, 1002 (8th Cir. 2007); see also *United States v. Lee*, 315 F.3d 206, 212 (3d Cir. 2003) (“There is no evidence that Lee's ability to remain on probation is conditional on his waiving the Fifth Amendment privilege with respect to future criminal prosecution.”).

¹²³ 850 F.3d 686, 692 (4th Cir. 2017); see also *Minnesota v. Murphy*, 465 U.S. 420, 438 (1984) (finding that there was no evidence that defendant's probation would be revoked if he remained silent).

¹²⁴ See *Roman v. Diguglielmo*, 675 F.3d 204, 210 (3d Cir. 2012) (“The record before us is not clear as to the extent to which Roman's refusal to participate in the program was the sole or primary cause of the Board's repeated refusal to grant him parole. In each Board letter, it is listed as one among several reasons for denying him parole.”).

¹²⁵ See *Field v. Fitzgerald*, No. 2:16-cv-97, 2017 U.S. Dist. Lexis 134125, at *16 (N.D.W.V. July 19, 2017) (“If any alleged violation of probation were to occur, Plaintiff would be given the opportunity to appear before the court for a hearing before revocation can occur.”).

¹²⁶ See *Searcy v. Simmons*, 299 F.3d 1220, 1226 (10th Cir. 2002).

¹²⁷ See *Entzi*, 485 F.3d at 1004 (“The North Dakota Department of Corrections has the exclusive discretion to determine whether an offender should be credited with a performance-based sentence reduction.”); see also *Wirsching v. Colorado*, 360 F.3d

is true in the military corrections system. The installation commander of the correctional facility has the authority to determine whether an inmate should forfeit earned good time credit.¹²⁸ Whether an inmate can earn good time credit is collateral to the court-martial process, and it should not be considered by the factfinder when determining an appropriate sentence.¹²⁹ Although it may seem like taking away sentence credit is making an inmate's sentence longer, courts view it as taking away an administrative privilege to which the inmate is not inherently entitled. Thus, courts have not found a Fifth Amendment violation when credit is taken away based on a refusal to take responsibility.

Fifth, courts have even upheld the denial of parole based on an inmate's refusal to take responsibility and enter treatment. Like sentence credits, most courts hold that inmates have no inherent right to parole.¹³⁰ At first glance, the denial of parole may seem like lengthening an inmate's sentence based on a refusal to take responsibility, the type of action that Justice Kennedy warned against in the plurality opinion in *McKune*. However, courts view the denial of parole not as extending an inmate's sentence, but as merely forcing the inmate to serve his full lawful sentence.¹³¹ Thus, the denial of parole is not viewed as a punishment which makes a sentence longer, but as the withholding of a privilege that leaves the inmate in no worse position than when he entered confinement. Sixth, whether an inmate is incarcerated or out of confinement on supervised released is important to the Fifth Amendment analysis. Courts are less likely to find a Fifth Amendment violation for prisoners based on their reduced constitutional rights. For example, the Supreme Court held that a death row inmate's silence at a clemency hearing could be used

1191, 1204 (10th Cir. 2004) ("As in Kansas, the Department of Corrections in Colorado retains discretion in awarding good time credits.").

¹²⁸ See U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 12-5(a) (15 June 2006); see also *United States v. Spaustat*, 57 M.J. 256, 263 (C.A.A.F. 2002) ("The responsibility for determining how much good time credit, if any, will be awarded is an administrative responsibility, vested in the commander of the confinement facility.").

¹²⁹ See *United States v. McNutt*, 62 M.J. 16, 20 (C.A.A.F. 2005).

¹³⁰ See *Roman v. Diguglielmo*, 675 F.3d 204, 214 (3d Cir. 2012) ("Roman has no right or entitlement to parole under Pennsylvania law.").

¹³¹ See *Ainsworth v. Stanley*, 371 F.3d 1, 5 (1st Cir. 2002) ("Since parole involves relief from a penalty that has already been imposed -- the full period of incarceration to which appellants were sentenced -- parole can be considered a 'benefit that the state may condition on completion of the program.'") (internal quotation omitted); see also *Lusik v. Sauer*, No. 13-2627, 2014 U.S. Dist. Lexis 104757, at *11 (E.D.P.A. May 16, 2014) ("The denial of parole also does not lengthen a prisoner's sentence.").

against him when deciding whether to stay his execution.¹³² The decision in that case hinged on the reduced Fifth Amendment rights of prisoners.

In *Antelope*, one of the only cases where a court found a Fifth Amendment violation, the defendant was on supervised release and was sent back to prison for refusing to incriminate himself. Similarly, in *United States v. Von Behren*, the 10th Circuit Court of Appeals found a Fifth Amendment violation where an inmate on supervised release was threatened with a return to prison if he did not answer incriminating questions during a polygraph.¹³³ The court found it particularly significant that the inmate was on supervised release and not incarcerated at the time of questioning.¹³⁴ In the two cases above, the courts viewed the return to confinement from supervised release as extending the inmate's confinement time. In contrast, courts do not view denying parole or revoking sentence credits as lengthening the sentence of someone who is already confined.

In the military, there are at least three ways that an inmate can be released from confinement before the completion of his full sentence. He can earn good time credit, he can be voluntarily paroled, or he can be involuntarily placed on Mandatory Supervised Release (MSR).¹³⁵ Inmates are much more likely to be placed on MSR than they are to be granted parole.¹³⁶ Regardless of whether inmates are granted parole or involuntarily placed on MSR, they must comply with the conditions of their release or they can be returned to confinement.¹³⁷ For convicted sex offenders, one of the conditions of release often includes participating in sex offender treatment on the outside.¹³⁸ Thus, the military may face the same issue where an inmate on supervised release is returned to confinement for refusing to incriminate himself in sex offender treatment.

¹³² See *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 286 (1998).

¹³³ 822 F.3d 1139 (10th Cir. 2016).

¹³⁴ See *id.* at 1148.

¹³⁵ See *Huschak v. Gray*, 642 F. Supp. 2d. 1268, 1273 (D. Kan. 2009).

¹³⁶ See Major T. Campbell Warner, *Going Beyond Article 60*, ARMY LAW., June 2017, at 22 ("In recent years, fewer than two percent of clemency requests have been granted, and parole has been granted on average in less than fifteen percent of cases. In contrast, mandatory supervised release is approved at significantly higher rates, increasing from approximately 46% in fiscal year 2012 to approximately 73% in fiscal year 2016.").

¹³⁷ See *id.*

¹³⁸ See *United States v. Pena*, 64 M.J. 259, 263 (C.A.A.F. 2007).

D. Lessons for the Military to Avoid Fifth Amendment Concerns

Until the Supreme Court decides another case like *McKune* and establishes a clear Fifth Amendment standard for statements of responsibility made during sex offender treatment, there will be differences among the federal circuits and uncertainty in the law. Even with this uncertainty, the military can take certain steps to avoid potentially violating the Fifth Amendment's prohibition on compelled self-incrimination. First, when determining whether to grant or deny parole or sentence credits, the military should use a holistic approach that considers many factors. In other words, parole and sentence credits should not be automatically denied because an inmate refuses to incriminate himself and enter sex offender treatment. Obviously, the refusal of a convicted sex offender to enter treatment is an important factor in determining rehabilitative potential, but it should not be the only factor considered. As long as the military uses a holistic approach, it can avoid the kind of definite and concrete penalty that has caused courts to find a Fifth Amendment violation.¹³⁹ More routine prison privileges, like those involving living conditions, can be revoked automatically if an inmate refuses to enter treatment without creating a Fifth Amendment concern. But because parole and sentence credits directly affect how long an inmate will remain in prison, they should not be automatically revoked based on a refusal to take responsibility.

Second, the military should be more cautious in imposing penalties for those on probation and supervised release. It is problematic to drag people back into prison based on their refusal to incriminate themselves in sex offender treatment. This deprivation of liberty is the kind of concrete harm that causes courts to find a Fifth Amendment violation. Acceptance of responsibility is normally one of the first steps of sex offender treatment. The rationale is that an inmate cannot begin treatment until he has overcome denial and admitted to what he has done. Inmates who have already been granted parole or supervised release are presumably further along on the path to reform. If an inmate is deemed fit to be released back into society, then the determination has been made that the inmate is progressing towards rehabilitation. Eliciting statements of responsibility from inmates on parole and supervised release should be far less important

¹³⁹ See *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 478 (1972) ("It is well established that the privilege protects against real dangers, not remote and speculative possibilities.").

because these inmates should have already accepted responsibility when they began treatment in prison.

Third, military confinement facilities should avoid blanket policies where child sex offenders are banned from having any contact with children until they take responsibility and enter treatment. It is problematic to deny an inmate any contact with his biological children, particularly if he did not offend against those children. As explained above, the Supreme Court has recognized a constitutional right of biological parents to be involved in the lives of their children.¹⁴⁰ If an inmate is denied contact with his biological children solely because he refuses to take responsibility and enter treatment, then the inmate is losing a constitutional right based on the refusal to incriminate himself. This is the type of concrete harm that might constitute improper compulsion under the Fifth Amendment, or even infringe on freedom of association under the First Amendment.¹⁴¹ Although A.C.C.A.'s majority opinion in *Jessie* failed to address this issue on the merits, it invited the inmate to pursue his constitutional claim in federal district court.¹⁴²

Instead of instituting a blanket policy banning child visitation for sex offenders, a better approach (which the JRCF at Fort Leavenworth is already implementing)¹⁴³ involves an individual risk assessment of each inmate. Under this approach, whether or not an inmate is allowed contact with his children depends on his risk level, not solely on whether he has taken responsibility and entered treatment. This avoids the inmate receiving a direct and definite penalty for the refusal to incriminate himself. At the very least, absent a strong risk of danger, confinement facilities should allow inmates some method of maintaining relationships with their biological children. Even if the inmates are not permitted to see their children in person, they should be allowed phone contact, written correspondence, or other means of communication. Providing alternate avenues for inmates to contact their biological children will help the prison's restrictions pass constitutional muster if a court were to apply the test in *Turner v. Safley*.¹⁴⁴

¹⁴⁰ See *supra* note 106 and accompanying text.

¹⁴¹ See *supra* note 112 and accompanying text.

¹⁴² See *United States v. Jessie*, No. 20160187, 2018 CCA Lexis 609, at *18 (A. Ct. Crim. App. Dec. 28, 2018).

¹⁴³ See *id.* at *5.

¹⁴⁴ See *supra* note 117 and accompanying text.

Fourth, requiring statements of responsibility must always be tied to a therapeutic purpose, and can never be subterfuge for collecting incriminating evidence for trial. Law enforcement and prosecutors should have no role in the administration of prison sex offender treatment. Mental health providers should only collect statements of responsibility if they truly believe it is necessary for successful treatment. Courts are very deferential to prison officials as long as their programs advance valid penological purposes, but collecting evidence for prosecution is not a valid purpose. If there is any indication that statements of responsibility are being required to generate incriminating evidence, then courts are much more likely to find a constitutional violation.

IV. The MRE 403 Balancing Test

The third major legal issue concerning incriminating statements made during prison sex offender treatment is whether these statements can survive an MRE 403 balancing test when offered as evidence at a rehearing. Although relevant evidence is generally admissible, MRE 403 states that, “The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence.”¹⁴⁵ The central concern of MRE 403 “is that evidence will be used in a way that distorts rather than aids accurate fact finding.”¹⁴⁶ Trial judges get “wide discretion” in applying MRE 403 and receive significant deference from appellate courts.¹⁴⁷ As long as the trial judge clearly articulates his or her reasoning on the record, the trial judge’s MRE 403 analysis can only be overturned if there is a clear abuse of discretion.¹⁴⁸ Some common types of evidence that trigger MRE 403 are crime scene or injury photographs if they are overly graphic.¹⁴⁹ The balancing test under MRE 403 is also required for uncharged misconduct offered under MRE

¹⁴⁵ See MCM, *supra* note 5, at MIL. R. EVID. 403.

¹⁴⁶ United States v. Stephens, 67 M.J. 233, 236 (C.A.A.F. 2009) (internal quotation omitted).

¹⁴⁷ United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000).

¹⁴⁸ See United States v. Solomon, 72 M.J. 176, 180 (C.A.A.F. 2013).

¹⁴⁹ See United States v. White, 23 M.J. 84, 88 (C.M.A. 1986) (“We turn next to the photographs which appellant claims were cumulative and introduced only to inflame and arouse the passion of the members of the court. This evidentiary ruling is also governed by Mil.R.Evid. 403. It is well-settled that photographs are not admissible for the illegitimate purpose of inflaming or shocking the court-martial.”).

404(b),¹⁵⁰ and for propensity evidence offered under MRE 413 and 414.¹⁵¹ There is limited military appellate precedent, however, on how MRE 403 should be used to evaluate incriminating statements made by the accused. The rule has been used to exclude portions of a confession related to uncharged misconduct because this information could confuse and distract the factfinder.¹⁵² But there is little guidance on how MRE 403 should be used to evaluate the overall reliability and probative value of incriminating statements based on their surrounding circumstances.

A. The Probative Value Versus the Unfair Prejudice of Admitting the Statements

One might argue that statements made during prison sex offender treatment have a low probative value because of the pressures on an inmate to take responsibility. An inmate may only be confessing in the hopes of receiving a reduced sentence or better living conditions, and not because he is actually guilty. For an inmate who is incarcerated for an extended period of time, there is strong pressure to do anything that will lead to an early release. Thus, it may be difficult to tell whether an inmate is accepting responsibility because he is truly guilty and wants to reform, or if he is only admitting guilt to reduce his confinement time.

But the circumstances surrounding these statements should go to the weight of the evidence, not its admissibility. An accused's statement is "always at issue from the moment it is entered into evidence" and "the credibility of an accused's confession is subject to attack."¹⁵³ It is the job of the factfinder to determine the credibility of the accused's confession and how much weight it should receive.¹⁵⁴ The Rules for Courts-Martial specifically allow the Defense to introduce evidence that challenges the voluntariness of a confession, even after the confession has been admitted into evidence.¹⁵⁵

¹⁵⁰ See *e.g.* *United States v. Mirandes-Gonzales*, 26 M.J. 411, 413 (C.M.A. 1988).

¹⁵¹ See *e.g.* *United States v. Berry*, 61 M.J. 91 (C.A.A.F. 2005).

¹⁵² See *United States v. Mack*, 25 M.J. 519, 521-22 (C.M.A. 1987); see also *United States v. Martin*, 20 M.J. 227, 230 (C.M.A. 1985).

¹⁵³ *United States v. Dougherty*, No. 201300060, 2013 CCA Lexis 1072, at *13 (N-M. Ct. Crim. App. Dec. 31, 2013).

¹⁵⁴ See *United States v. Duvall*, 47 M.J. 189, 192 (C.A.A.F. 1997).

¹⁵⁵ See MCM, *supra* note 5, at R.C.M. 304(g) ("If a statement is admitted into evidence, the military judge must permit the defense to present relevant evidence with respect to the voluntariness of the statement and must instruct the members to give such weight to the statement as it deserves under all the circumstances.").

If a trial judge were to exclude incriminating statements of the accused made during prison sex offender treatment under MRE 403, the judge would necessarily be making a determination that the statements are not trustworthy. Military appellate courts have explicitly rejected credibility assessments by the trial judge to exclude evidence under MRE 403, since this should be the province of the factfinder.¹⁵⁶

In the context of MRE 403, unfair prejudice is defined as the “capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.”¹⁵⁷ In a typical sexual assault case, the only two witnesses to the charged misconduct are the victim and the accused. Additionally, the accused is the only one who can provide insight into his own mental state at the time of the offense. This is why statements of the accused are highly probative in sexual assault cases, particularly when the statements go against the accused’s penal interest. To completely exclude these statements would deprive the factfinder of some of the most probative evidence available. Instead of exclusion, a better course of action is to allow the Government to admit these statements, and then allow defense counsel to present all of the mitigating circumstances and pressures on the accused. This allows the factfinder to evaluate all of the information and to decide the appropriate weight of the statements, instead of completely denying them access to the evidence.

B. The Danger of Alerting the Factfinder of the Previous Conviction

One of the greatest risks of unfair prejudice to the accused when admitting a confession made during sex offender treatment is that it will notify the panel at the rehearing that the accused has been previously convicted of the same offense for which they are now deciding. In a close case, a panel member might improperly use the fact that the accused has been previously convicted as a tiebreaker to reach a guilty verdict. In a

¹⁵⁶ See *United States v. Kohlbek*, No. 20160427, 2018 CCA Lexis 177, at *8 (A. Ct. Crim. App. Apr. 12, 2018); see also *United States v. Gonzalez*, 16 M.J. 58, 60 (C.M.A. 1983) (“There is no authority for the proposition impliedly advanced by the Government that Mil. R. Evid. 403, or its Federal counterpart, permits a trial judge to ‘weed out’ evidence on the basis of his or her own view of its credibility. Such a procedure would usurp the function of the fact finder and raise severe due process questions. Nothing could be further from the purpose of Fed. R. Evid. 403.”).

¹⁵⁷ *United States v. Collier*, 67 M.J. 347, 354 (C.A.A.F. 2009) (quoting *Old Chief v. United States*, 519 U.S. 172, 180 (1997)).

rehearing, “evidence of an earlier conviction for the same offense normally would be inadmissible when the conviction had been set aside on appeal.”¹⁵⁸

The goal of a rehearing on the merits is to “place the United States and the accused in the same position as they were at the beginning of the original trial.”¹⁵⁹ After a conviction is overturned and a rehearing is authorized, “no vestiges of the former court-martial should linger” and a rehearing “wipe[s] the slate clean as if no previous conviction and sentence had existed.”¹⁶⁰ At a rehearing, the accused is not bound by the forum selection at the original trial and may choose a different forum.¹⁶¹ The accused is also not bound by previous guilty pleas for convictions that are overturned, and the accused can change his plea to not guilty for these offenses at the retrial.¹⁶²

Rule for Courts-Martial 810 contains various provisions to ensure the fairness of a rehearing. No panel member who served on the original court-martial may serve as a panel member at the rehearing,¹⁶³ although the same military judge may preside over the rehearing even if the original trial was judge alone.¹⁶⁴ The purpose of selecting new panel members is to ensure that they are not influenced by the original proceedings.¹⁶⁵ Additionally, no panel member at the rehearing may examine the record from the previous trial unless permitted by the military judge.¹⁶⁶ For combined rehearsals, the trial proceeds first on the merits for the overturned convictions, with no reference to the convictions that survived appeal until the sentencing proceedings.¹⁶⁷ The purpose of these provisions is to prevent the new panel members from being tainted by the

¹⁵⁸ *United States v. Giles*, 59 M.J. 374, 376 (C.A.A.F. 2004).

¹⁵⁹ *United States v. Staten*, 45 C.M.R. 267, 269 (C.M.A. 1972).

¹⁶⁰ *United States v. Howell*, 75 M.J. 386, 392 (C.A.A.F. 2016) (internal citations omitted).

¹⁶¹ *See MCM*, *supra* note 5, at R.C.M. 801(b)(3).

¹⁶² *See generally* *United States v. Stout*, No. 20120592, 2018 CCA Lexis 174 (A. Ct. Crim. App. Apr. 9, 2018).

¹⁶³ *See MCM*, *supra* note 5, at R.C.M. 801(b)(1); *see also* *United States v. Chandler*, 74 M.J. 674, 684 (A. Ct. Crim. App. 2015) (stating that the military judge had no authority to order a rehearing with the same members).

¹⁶⁴ *See MCM*, *supra* note 5, at R.C.M. 801(b)(2).

¹⁶⁵ *See United States v. Mora*, 26 M.J. 122, 125 (C.M.A. 1988) (explaining that panel members from the original convening order could serve at a new trial after a judge alone mistrial because those panel members were never assembled and had never heard any of the case).

¹⁶⁶ *See MCM*, *supra* note 5, at R.C.M. 801(c).

¹⁶⁷ *See id.* at R.C.M. 810(a)(3).

original trial, whether that involves evidence presented at the original trial or the results from the original trial.

The concern about notifying the panel at a rehearing of previously overturned convictions was thoroughly explored in *United States v. Giles*.¹⁶⁸ In *Giles*, the accused was convicted of two drug offenses at the original trial after she testified in her own defense. After the convictions were overturned on appeal, the Government brought the drug offenses back at a rehearing, but also added a perjury charge based on the accused's testimony at the original trial. Given the nature of the perjury offense and the way that the specification was drafted by the Government, it was impossible to prove the perjury offense without introducing evidence of the prior trial and portions of the previous record.¹⁶⁹ The trial judge denied the Defense's motion to sever the perjury charge from the drug offenses, but the judge did make efforts to limit the prejudicial effect of the previous trial. It became clear that the judge's efforts were not successful after questions were submitted by the panel president during deliberations. The panel president asked if the accused had been previously discharged because he knew that verbatim transcripts of courts-martial (which had been admitted into evidence in this case to support the perjury charge) were only produced in cases resulting in a discharge.¹⁷⁰ He also asked whether double jeopardy applied at this rehearing because the accused was being tried for the same drug offenses as at the original trial.¹⁷¹

On appeal, C.A.A.F. rejected the trial judge's decision not to sever the perjury charge. Noting that military commanders get extensive training and experience in military law, C.A.A.F. explained that, "[t]he questions posed by the president of the court-martial in this case demonstrated that the senior member of the panel had a reasonable basis for concluding that Appellant had been tried, convicted, and sentenced to a discharge for the same drug-related specifications that were now under consideration."¹⁷² Also, because the panel was not informed about the appellate process, the panel had no reason to believe that there was anything defective in the previous convictions. The *Giles* case illustrates the potential problems at a rehearing when information from the original trial is brought in front of the members of the subsequent rehearing.

¹⁶⁸ 59 M.J. 374 (C.A.A.F. 2004).

¹⁶⁹ *See id.* at 376.

¹⁷⁰ *See id.* at 377.

¹⁷¹ *See id.* at 378.

¹⁷² *Id.*

If incriminating statements made during prison sex offender treatment are admitted at a rehearing, there is the potential for similar issues as in the *Giles* case. At the very least, these statements force defense counsel to make a difficult choice. The most effective way to attack these statements is to explain all of the pressures on an inmate to take responsibility and enter sex offender treatment, like losing prison privileges or the possibility for parole. However, by introducing evidence of these pressures, Defense is signaling to the panel that the accused has been previously incarcerated for the same offense that is now being retried. Defense is forced to choose between an uncontested confession of the accused, or alerting the panel that the accused has already been tried and convicted of the same offense.

1. Statements Made During Sex Offender Treatment Should Be Admissible at a Rehearing Because the Government is Allowed to Bring in New Evidence

Although rehearsals must be fair and generally place the accused in the same position as at the start of the original trial, the fact that the rehearing is occurring years later sometimes means that new evidence is available. The Supreme Court has stated that, “[i]t is undeniable, of course, that upon appellate reversal of a conviction the Government is not limited at a new trial to the evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence.”¹⁷³ Statements made during prison sex offender treatment necessarily fall into the category of new evidence not available at the original trial. Without the original trial, the accused would have never been confined and had the opportunity to make these statements. There is one exception to the rule about presenting new evidence at a rehearing. If the appellate court finds that there was insufficient evidence to sustain a conviction, the accused must be acquitted and the Government does not get a second chance to strengthen its case.¹⁷⁴ This exception, however, does not apply to the rehearsals generated by *United States v. Hills*, because these rehearsals were caused by a legal error based on the improper use of evidentiary rules.¹⁷⁵

¹⁷³ *United States v. Shotwell*, 355 U.S. 233, 243 (1957).

¹⁷⁴ *See United States v. Gallagher*, 602 F.2d 1139, 1143 (3d Cir. 1979); *see also Burks v. United States*, 437 U.S. 1 (1978).

¹⁷⁵ *See supra* note 3.

Sometimes the events surrounding the original trial or the appellate process affect the evidence presented at a rehearing. In the murder case of *United States v. Mansfield*, the accused wrote, at the request of his original defense counsel, a “Life Story” which contained incriminating statements in order to support a lack of mental responsibility defense.¹⁷⁶ At the rehearing, the accused’s new defense counsel argued that the Government should not be able to use these incriminating statements because they were tainted by the first trial. They also argued that because the accused’s original representation was so ineffective, it was impossible for him to receive a fair trial at the rehearing. The court rejected this argument, stating that, “counsel treat the appellant’s situation as a two-act play where the scenes in the first act are so important that the play can never be revised to arrive at a different ending before the final curtain. We, on the other hand, view the circumstances as two one-act dramas that, while tangentially connected, need not reach the same conclusion.”¹⁷⁷ The court noted that the decisions made by the accused or the defense counsel at the original trial or during the appellate process might necessarily limit the strategy at a rehearing.¹⁷⁸

Similarly, military courts have held that an accused’s testimony at the first trial can be used against him at a rehearing.¹⁷⁹ This is true even if the testimony might have been influenced by a legal error at the first trial, such as evidence obtained from an illegal search.¹⁸⁰ The Supreme Court has echoed this rule, with the caveat that the accused’s former testimony cannot be used if it was the product of an involuntary or illegal confession.¹⁸¹ The use of an accused’s former testimony is closely analogous to the use of statements made during sex offender treatment. Neither category of statements made by the accused would have been available to the Government without the first overturned trial. However, this does not mean that they should be inadmissible at the rehearing. Although this may place the accused in a worse position, the law generally

¹⁷⁶ 33 M.J. 972 (A.F.C.M.R. 1991).

¹⁷⁷ *Id.* at 984.

¹⁷⁸ *Id.* at 985 (“Any rehearing can limit trial tactics.”).

¹⁷⁹ See *United States v. Wade*, 34 C.M.R. 769, 772 (A.F.B.R. 1963) (“It has been generally held that an accused who has voluntarily taken the stand in his own behalf in a criminal prosecution, testifying without asserting his privilege against self-incrimination, has waived the privilege as to the testimony given so that his confessions or admissions contained in such testimony may be used against him in a subsequent trial of the same case.”).

¹⁸⁰ See *United States v. Rodison*, 15 C.M.R. 466, 467–68 (A.B.R. 1954).

¹⁸¹ See *Harrison v. United States*, 392 U.S. 219, 222 (1968).

allows the Government to hold the accused accountable for his own statements.

2. *The Risk of Unfair Prejudice from the Original Trial Does Not Justify Excluding Statements Made During Sex Offender Treatment*

At a rehearing, it is difficult to avoid all references to the original trial. In *Mansfield*, the court recognized that at a rehearing, references to the original trial were common, but any unfair prejudice could be cured by an instruction to the members at the beginning of the trial.¹⁸² In this case, the instruction given was, “The accused has been tried before. You should not concern yourself with this fact. Your verdict must be based solely on the evidence in the present trial, in accordance with the court's instructions.”¹⁸³ A similar instruction is also given by federal judges at retrials.¹⁸⁴ In fact, even the model script for a contested rehearing from the Military Judges’ Benchbook deliberately tells the panel members that the accused has been tried before.¹⁸⁵

Additionally, the provisions in RCM 810 which prevent reference to the original trial are not without limits. In *United States v. Ruppel*, C.A.A.F. explained that RCM 810 contains procedural rules for rehearings which can be trumped by the Military Rules of Evidence.¹⁸⁶ In *Ruppel*, C.A.A.F. held that, at a combined rehearing, the underlying conduct behind a conviction that survived appeal could be used under MRE 404(b) to show intent to commit offenses which were being retried on the merits.¹⁸⁷ This contradicted the language of RCM 810(a)(3) at the time, which stated that combined rehearings should first proceed on the merits

¹⁸² 33 M.J. 972, 987 (A.F.C.M.R. 1991).

¹⁸³ *Id.*

¹⁸⁴ *See e.g.* *United States v. Hykel*, 461 F.2d 721, 726 (3d Cir. 1972).

¹⁸⁵ U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK, last updated Jan. 7, 2019, available at: <https://www.jagcnet.army.mil/ebb/index.html> (“There has been a prior trial in this case. This is what is known as a ‘rehearing’ and is being conducted because the prior trial was conducted improperly. . . . You will not be told of the results of that prior trial; your duty as court members is to determine whether the accused is guilty of any of the offenses on the flyer, and if guilty, adjudge an appropriate sentence, based only on what legal and competent evidence is presented for your consideration in this trial. The fact that there has been a prior trial is not evidence of guilt, nor is it evidence that you can use for sentencing, if sentencing is required. The fact that there has been a prior trial must be totally disregarded by you.”).

¹⁸⁶ 49 M.J. 247, 250 (C.A.A.F. 1998).

¹⁸⁷ *See id.*

without reference to the offenses being reheard on sentence only.¹⁸⁸ Although the trial judge in this case allowed the underlying conduct under MRE 404(b), “he specifically ordered the Government to refrain on findings from any mention of the fact that appellant had been convicted of that act during the initial proceedings.”¹⁸⁹ This was presumably based on the trial judge’s view that although the panel could hear about the underlying conduct, it was too prejudicial for the panel to hear that the accused had been convicted of this conduct at the previous trial.

A military court went even further in *United States v. Rodriguez*, a case where the accused was convicted of child molestation against two victims at the original trial, but one of the convictions was overturned on appeal.¹⁹⁰ At the combined rehearing, evidence related to the upheld child molestation conviction was allowed on the merits under MRE 414 to show the accused’s propensity to commit the child molestation offense that was being retried. Unlike in *Ruppel*, the Government was not limited to the underlying conduct and could introduce evidence of the accused’s conviction. One reason was that the defense attorney’s opening statement blatantly opened the door to the conviction.¹⁹¹ The defense attorney made the tactical decision to mention the original convictions against both victims, stating on the record that he had “essentially adapted based on the judge’s ruling.”¹⁹² During motions practice prior to the rehearing, the military judge had hinted that Defense could open the door to the conviction from the first trial by attacking the credibility of the MRE 414 victim at the rehearing.¹⁹³ This forced the Defense to make a Hobson’s choice. They could either attack the credibility of the MRE 414 victim and open the door to the accused’s conviction at the first trial, or they could not attack it and allow evidence of child molestation to come in

¹⁸⁸ R.C.M. 810(a)(3) now contains an exception that allows reference to these offenses if allowed by the Military Rules of Evidence, basically adopting the holding in *Ruppel*.

¹⁸⁹ *Ruppel*, 49 M.J. at 249.

¹⁹⁰ No. 9900997, 2007 CCA Lexis 251 (N-M. Ct. Crim. App. July 17, 2007).

¹⁹¹ *See id.* at *12 (“The military judge has instructed you that this is a retrial. . . Well, members what the judge didn’t tell you and what I’m going to tell you now is that at that hearing, at that proceeding, Gunnery Sergeant Rodriguez was found guilty. He was found guilty of committing molestation against [MR] and [JR].”)

¹⁹² *Id.* at *15.

¹⁹³ *See id.* at *9 (“[T]he record of a prior conviction, assuming there’s an otherwise proper purpose for admitting it, is admissible in this court. . . I think the defense is on fair notice that that’s out there, that if they open the door and the government decides to drive the truck through, that they may very well be entitled to. And it would certainly be something that the defense counsel should take into consideration as you’re litigating this case. It does seem to me that it’s very powerful evidence.”).

uncontested. In what was likely an overreaction to this difficult choice, the defense attorney chose to preempt the issue by explaining the entire procedural history of the case in his opening statement, including that the accused had already been convicted of the offense that was now being retried.

The difficult choice that the defense attorney faced in *Rodriguez* is similar to the difficult choices surrounding statements made during sex offender treatment. As explained above, defense attorneys have two undesirable options when facing these statements. The first option is to not attack the circumstances of the confession. Under this option, the panel would only know that the accused made incriminating statements, but not that they were part of a prison sex offender treatment program. This outcome triggers the MRE 403 concern of misleading the factfinder. Without knowing the true circumstances surrounding the incriminating statements, the panel may actually give them more weight than they deserve.

The second option for defense counsel is to conduct a full and vigorous cross-examination of the circumstances surrounding the incriminating statements. The advantage of this option is that the panel is made aware of the many pressures and incentives that might have caused the accused to falsely accept responsibility. This option also has many disadvantages. First, it notifies the panel that the accused has been previously incarcerated, presumably for the misconduct that they are now adjudicating at the rehearing. This creates unfair prejudice because the panel may impermissibly use evidence of the accused's prior conviction and confinement when determining the outcome at the rehearing. Second, it potentially confuses the issues and shifts the focus of the court-martial away from the charged misconduct. It causes a trial within a trial about all of the details surrounding the accused's participation in prison sex offender treatment.¹⁹⁴ Third, it arguably wastes time and could cause undue delay because the focus is shifted away from the merits of the case. But just like in *Rodriguez*, although statements made during sex offender treatment force defense attorneys to make difficult choices, this does not mean that the statements should be excluded.

Similar issues of unfair prejudice also occur at trials for co-conspirators. Just as evidence of an overturned conviction at a rehearing

¹⁹⁴ See *United States v. Solomon*, 72 M.J. 176, 181 (C.A.A.F. 2013) (noting that evidence should be excluded under MRE 403 if it creates a "distracting mini-trial") (internal quotation omitted).

could prejudice the panel, evidence of the conviction of a co-conspirator could prejudice the panel against the accused. Knowing that an accomplice has been convicted might make the panel assume that the accused is also guilty. However, in *United States v. Bell*, C.A.A.F. held that the conviction of a co-conspirator was admissible as impeachment evidence if the co-conspirator testified for the defense.¹⁹⁵ This was still subject to an MRE 403 balancing test, and the dissenting opinion argued that the conviction of the co-conspirator was too unfairly prejudicial to the accused.¹⁹⁶

Unlike civilian juries, which are chosen randomly from the general population, military panels are hand-picked collections of highly intelligent and qualified officers and NCOs. We should trust panels to rationally evaluate evidence, and to follow the instructions of the military trial judge. Panels are fully capable of hearing a confession and all of the surrounding circumstances, and then making a determination on how much weight to afford that confession. If the confession is excluded under MRE 403, the trial judge is withholding probative evidence from the panel, and the judge is substituting his or her own credibility determination for that of the factfinder.

V. Conclusion

When a conviction is overturned on appeal and sent back for a rehearing on the merits, the Government faces significant challenges in proving the case again. This is particularly true for sexual assault cases, which often hinge on witness testimony and credibility. With C.A.A.F.'s decisions in *United States v. Hills* and its progeny, military prosecutors are now frequently facing the daunting prospect of a sexual assault rehearing. Despite the challenges for the Government at a rehearing, there can be some advantages. The Government is not limited to evidence that was available at the original trial, and if new incriminating evidence is discovered, that evidence may be admissible at the rehearing.

An incriminating statement made by an inmate in prison sex offender treatment is powerful evidence that was not available at the original trial. Most sex offender treatment programs require participants to take responsibility for their crimes before they can begin treatment. These

¹⁹⁵ 44 M.J. 403, 407 (C.A.A.F. 1996).

¹⁹⁶ *See id.* at 408 (Everett, J., dissenting).

statements of responsibility are often done in writing, and are often preserved as part of an inmate's confinement record. This incriminating evidence that was not available at the original trial can help even the playing field and counteract the difficulties of re-proving a case years later. But the Government must overcome the three major legal issues addressed in this article before these incriminating statements can be admitted at a rehearing.

First, the Government must show that these statements are not privileged under MRE 513 as part of the psychotherapist-patient privilege. The purpose of MRE 513 is to protect the confidentiality of communications made during mental health treatment, with the goal of encouraging people to seek treatment. On its face, MRE 513 seems to apply to statements made during prison sex offender treatment. However, for statements concerning sexual offenses committed against children, the "child abuse" exception at MRE 513(d)(2) likely makes the privilege inapplicable. For statements concerning adult sexual offenses, the Government can argue that the inmate waived the privilege at the beginning of treatment. Most prison sex offender programs require inmates to sign written waivers of confidentiality before they begin treatment so that their progress can be shared with prison administrators and parole boards. Although Defense should argue that this waiver is limited and should not extend to a rehearing, courts tend to broadly construe waivers because privileges block access to evidence and impede the truth-seeking function of the court-martial.

Second, the Government must show that these statements were not improperly compelled self-incrimination in violation of the Fifth Amendment. Depending on the confinement facility, inmates who refuse to take responsibility and enter treatment face a range of penalties including: decreased living conditions, reduced work opportunities, transfer to a higher security ward, loss of sentence credits, denial of parole, and even revocation of supervised release. At some point, the penalties become so severe that the inmate has no choice but to incriminate himself, which is improper compulsion. Although courts are very deferential to prison administrators and hesitant to find a constitutional violation, this article recommends four strategies for military confinement facilities to avoid Fifth Amendment concerns.

Third, the Government must show that these statements can survive an MRE 403 balancing test when offered at a rehearing. This test balances the probative value of the statements against the danger of unfair

prejudice. The probative value of a confession is usually high, but Defense can argue that the probative value in this situation is diminished because of the pressures on an inmate to confess. The greatest potential for unfair prejudice likely comes from the risk that the factfinder will improperly consider the accused's overturned conviction as evidence that he is guilty. But it is impossible to avoid all references to the previous trial at a rehearing. The military judge can use limiting instructions and other methods to limit the prejudicial effect of the previous trial.

Prison sex offender treatment programs undoubtedly force inmates to make a difficult choice. Inmates must choose between maintaining their innocence and hoping their appeal will be successful, or accepting responsibility for their crimes and enjoying a higher quality of life and the possibility of a reduced sentence. But the criminal justice system often forces people to make difficult choices. An inmate who confesses in order to earn incentives and early release should not be able to take back that confession if he is successful on appeal. If statements of responsibility are admissible at a rehearing, it allows the factfinder to determine their appropriate weight and importance. Instead of completely withholding potentially powerful and highly probative evidence, it trusts the panel or the military judge to use their common sense and judgment. The Defense is free to present all of the circumstances and the pressures on the inmate to confess, and the factfinder can evaluate all of this information when making a determination on how much weight to give the evidence. Allowing incriminating statements made by inmates during sex offender treatment promotes the truth-seeking function of the court-martial and helps combat the practical difficulties of re-proving a sexual assault case at a rehearing.

Appendix A: Cases Overturned by *United States v. Hills*

Name	Citation	Court	Date	Victim	Remedy
U.S. v. Long	2018 CCA Lexis 512	Army CCA	Oct. 26, 2018	Child	Rehearing Authorized
U.S. v. Clark	2018 CCA Lexis 505	Army CCA	Oct. 12, 2018	Adult	Rehearing Authorized
U.S. v. Wall	2018 CCA Lexis 479	Army CCA	Oct. 5, 2018	Adult	Rehearing Authorized
U.S. v. Medellin	2018 CCA Lexis 412	Navy- Marine CCA	Aug. 28, 2018	Child	Rehearing Authorized
U.S. v. Hernandez	2018 CCA Lexis 389	Army CCA	Aug. 10, 2018	Adult	Rehearing Authorized
U.S. v. Rambharose	2018 CCA Lexis 341	Air Force CCA	July 13, 2018	Adult	Rehearing Authorized
U.S. v. Campbell	2018 CCA Lexis 356	Air Force CCA	July 12, 2018	Adult	Rehearing Authorized
U.S. v. Rice	2018 CCA Lexis 339	Air Force CCA	July 11, 2018	Adult	Rehearing Authorized
U.S. v. Gonzalez	2018 CCA Lexis 327	Army CCA	July 3, 2018	Adult	Rehearing Authorized
U.S. v. Williams	77 M.J. 459	CAAF	June 27, 2018	Adult	Rehearing Authorized
U.S. v. Hopkins	2018 CCA Lexis 254	Army CCA	May 25, 2018	Child	Rehearing Authorized
U.S. v. Hoffman	77 MJ 414	CAAF	May 7, 2018	Child	Rehearing Authorized
U.S. v. Berger	2018 CCA Lexis 218	Navy- Marine CCA	May 3, 2018	Adult	Rehearing Authorized
U.S. v. Lightsey	2018 CCA Lexis 220	Air Force CCA	Apr. 30, 2018	Adult	Rehearing Authorized

U.S. Torrealba v.	2018 CCA Lexis 147	Army CCA	Mar. 20, 2018	Adult	Rehearing Authorized
U.S. v. Hill	2018 CCA Lexis 111	Army CCA	Feb. 27, 2018	Adult	Sentence Reassessment (no change)
U.S. Thompson v.	2018 CCA Lexis 91	Army CCA	Feb. 26, 2018	Adult	Rehearing Authorized
U.S. Brown v.	2018 CCA Lexis 88	Army CCA	Feb. 23, 2018	Adult	Rehearing Authorized
U.S. v. Pflug	2018 CCA Lexis 83	Air Force CCA	Feb. 20, 2018	Adult	Rehearing Authorized
U.S. Harris v.	2018 CCA Lexis 80	Army CCA	Feb. 16, 2018	Child	Sentence Reassessment
U.S. Stanton v.	2018 CCA Lexis 70	Air Force CCA	Feb. 7, 2018	Adult	Rehearing Authorized
U.S. Shields v.	77 M.J. 621	Navy-Marine CCA	Jan. 31, 2018	Adult	Rehearing Authorized
U.S. Contreras v.	2018 CCA Lexis 54	Air Force CCA	Jan. 31, 2018	Adult	Rehearing Authorized
U.S.v. Koch	2018 CCA Lexis 34	Army CCA	Jan. 29, 2018	Child	Sentence Reassessment
U.S. v. Elie	2018 CCA Lexis 17	Army CCA	Jan. 16, 2018	Adult	Rehearing Authorized
U.S. Guardado v.	77 M.J. 90	CAAF	Dec. 12, 2017	Child	Rehearing Authorized
U.S. Ramos-Cruz v.	2017 CCA Lexis 759	Army CCA	Dec. 11, 2017	Adult	Rehearing Authorized
U.S. Moynihan v.	2017 CCA Lexis 743	Army CCA	Nov. 30, 2017	Child	Sentence Reassessment
U.S. Degregori v.	2017 CCA Lexis 741	Army CCA	Nov. 30, 2017	Adult	Rehearing Authorized

U.S. Tafoya v.	2017 CCA Lexis 733	Army CCA	Nov. 28, 2017	Adult	Rehearing Authorized
U.S. Reynolds v.	2017 CCA Lexis 731	Army CCA	Nov. 28, 2017	Adult and Child	Sentence Reassessment
U.S. Aguiar-Perez v.	2017 CCA Lexis 732	Army CCA	Nov. 28, 2017	Adult	Rehearing Authorized
U.S. Wilson-Crow v.	2017 CCA Lexis 716	Air Force CCA	Nov. 16, 2017	Adult and Child	Rehearing Authorized
U.S. Morales v.	2017 CCA Lexis 676	Army CCA	Oct. 31, 2017	Adult	Rehearing Authorized
U.S. Covey v.	2017 CCA Lexis 622	Army CCA	Sep. 21, 2017	Adult	Rehearing Authorized
U.S. Prasad v.	2017 CCA Lexis 610	Air Force CCA	Sep. 5, 2017	Adult	Rehearing Authorized
U.S. Santos v.	2017 CCA Lexis 575	Air Force CCA	Aug. 23, 2017	Adult	Rehearing Authorized
U.S. Denson v.	2017 CCA Lexis 564	Army CCA	Aug. 18, 2017	Adult	Rehearing Authorized
U.S. Wiredu v.	2017 CCA Lexis 555	Navy- Marine CCA	Aug. 17, 2017	Adult	Rehearing Authorized
U.S. v. Silva	2017 CCA Lexis 486	Air Force CCA	July 19, 2017	Adult	Rehearing Authorized
U.S. Upshaw v.	2017 CCA Lexis 363	Navy- Marine CCA	May 31, 2017	Adult	Rehearing Authorized
U.S. v. Bass	2017 CCA Lexis 362	Navy- Marine CCA	May 31, 2017	Adult	Rehearing Authorized
U.S. v. Grant	2017 CCA Lexis 357	Army CCA	May 25, 2017	Adult	Rehearing Authorized
U.S. Moore v.	2017 CCA Lexis 191	Army CCA	Mar. 23, 2017	Child	Rehearing Authorized

U.S. Hukill	v.	76 M.J. 219	CAAF	Feb. 28, 2017	Adult	Rehearing Authorized
U.S. Gonzales	v.	2017 CCA Lexis 128	Army CCA	Feb. 22, 2017	Child	Rehearing Authorized
U.S. Henry	v.	76 M.J. 595	Air Force CCA	Feb. 17, 2017	Adult	Rehearing Authorized
U.S. Duarte	v.	2017 CCA Lexis 61	Army CCA	Jan. 30, 2017	Adult	Rehearing Authorized
U.S. Adams	v.	2017 CCA Lexis 6	Army CCA	Jan. 6, 2017	Child	Rehearing Authorized
U.S. Mancini	v.	2016 CCA Lexis 660	Air Force CCA	Nov. 7, 2016	Adult	Rehearing Authorized
U.S. Navarro	v.	2016 CCA Lexis 576	Air Force CCA	Sep. 29, 2016	Child	Sentence Reassessment

LAWS AND LAWYERS: LETHAL AUTONOMOUS WEAPONS
BRING LOAC ISSUES TO THE DESIGN TABLE, AND JUDGE
ADVOCATES NEED TO BE THERE.

MAJOR ANNEMARIE VAZQUEZ*

I believe there is no deep difference between what can be achieved by a biological brain and what can be achieved by a computer. It therefore follows that computers can, in theory, emulate human intelligence — and exceed it.¹

I. Introduction

In August 2017, during a school-year kick-off speech to students in 16,000 schools across Russia, Vladimir Putin announced, “Artificial intelligence [AI] is the future, not only for Russia but for all humankind. Whoever becomes the leader in this sphere will become the ruler of the world.”² Then a year and a half later, Greg Allen, Chief of Strategy and Communications at the Department of Defense’s (DoD) Joint Artificial Intelligence Center (JAIC) reported, “Despite expressing concern on AI arms races, most of China’s leadership sees increased military usage of AI

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¹ Professor Stephen Hawking, Speech at the Leverhulme Centre for the Future of Intelligence, Cambridge (Oct. 19, 2016), <https://www.cam.ac.uk/research/news/the-best-or-worst-thing-to-happen-to-humanity-stephen-hawking-launches-centre-for-the-future-of>.

² Tom Simonite, *For Superpowers, Artificial Intelligence Fuels New Global Arms Race*, WIRED (Aug. 8, 2017 7:00 AM), <https://www.wired.com/story/for-superpowers-artificial-intelligence-fuels-new-global-arms-race>.

as inevitable and is aggressively pursuing it. China already exports armed autonomous platforms and surveillance AI.”³ That same year, Defense Secretary Mark Esper announced on November 5, 2019, that China had exported lethal autonomous drones to the Middle East: “Chinese manufacturers are selling drones advertised as capable of full autonomy, including the ability to conduct lethal targeted strikes.”⁴ In countering Russian and Chinese pursuit, possession, and export of lethal autonomy the 2018 DoD Artificial Intelligence Strategy emphasized:

Our adversaries and competitors are aggressively working to define the future of these powerful technologies according to their interests, values, and societal models. Their investments threaten to erode U.S. military advantage, destabilize the free and open international order, and challenge our values and traditions with respect to human rights and individual liberties.⁵

The “powerful technologies” referred to in DoD’s AI Strategy and the comments made by Esper, Allen, and Putin refer to lethal autonomous weapons (LAWs),⁶ a subset of machines that employ AI. Although there is no internationally agreed-upon definition of LAWs,⁷ the DoD defines them as weapons that “can select and engage targets without further intervention by a human operator.”⁸ These are the “killer robots” referred

³ Gregory C. Allen, *Understanding China’s AI Strategy*, CENTER FOR A NEW AMERICAN SECURITY ¶ 4 (Feb. 6, 2019), <https://www.cnas.org/publications/reports/understanding-chinas-ai-strategy>.

⁴ Patrick Tucker, *SecDef: China is Exporting Killer Robots to the Mideast*, DEFENSE ONE (Nov. 5, 2019), <https://www.defenseone.com/technology/2019/11/secdef-china-exporting-killer-robots-mideast/161100/>.

⁵ SUMMARY OF THE 2018 DEP’T OF DEFENSE ARTIFICIAL INTELLIGENCE STRATEGY 17 (2018) [hereinafter DOD AI STRATEGY].

⁶ For purposes of the discussion, “Lethal Autonomous Weapons” (LAWs) refer to individual weapons and systems of weapons, including hardware and software, and only those with fully autonomous lethal capabilities, *see infra* Section II. References to LAWs exclude cyber weapons and cyber weapon systems.

⁷ Steven Hill & Nadia Marsan, *Artificial Intelligence and Accountability: A Multinational Legal Perspective*, North Atlantic Treaty Organization [NATO] STO-MP-IST-160 (Apr. 16, 2018), <https://www.sto.nato.int/publications/STO%20Meeting%20Proceedings/STO-MP-IST-160/MP-IST-160-PP-4.pdf>; Christopher Ford & Chris Jenks, *The International Discussion Continues: 2016 CCW Experts Meeting on Lethal Autonomous Weapons*, JUST SECURITY (Apr. 20, 2016), <https://www.justsecurity.org/30682/2016-ccw-experts-meeting-laws>.

⁸ U.S. DEP’T OF DEFENSE, DIR. 3000.09, AUTONOMY IN WEAPON SYSTEMS 13 (21 Nov. 2012) (CI, 8 May 2017) [hereinafter DoDD 3000.09]. The lack of an agreed-up definition for LAWs is evident upon closer look at China’s claims of full autonomy in its weapons. The manufacturer of the Blowfish A3 and other Chinese LAWs, Zhuhai Ziyuan

to in the media and by organizations dedicated to banning them.⁹ Though technology for some LAWS exists,¹⁰ and variants of them have been on the battlefield for decades, fully autonomous lethal systems for offensive use have yet to make their battlefield debut.¹¹

In the quest to remain a “leader in this sphere”¹² the United States (U.S.) Congressional and Executive Branches have prioritized research and development of autonomy¹³ for military applications. These priorities are evident in the fiscal year 2020 National Authorization Act (FY20

UAV Company, states that though they can organize in a swarm and identify a target autonomously, they do not shoot until a human commands them to do so. Under the DoD’s definition, such weapons would not be fully autonomous. *See also* Liu Xuanzun, *Chinese Helicopter Drones Capable of Intelligent Swarm Attacks*, GLOBAL TIMES (May 9, 2019 4:28 PM), <http://www.globaltimes.cn/content/1149168.shtml> [hereinafter Xuanzun].

⁹ *See The Case Against Killer Robots*, HUMAN RIGHTS WATCH (Nov. 19, 2012), <https://www.hrw.org/report/2012/11/19/losing-humanity/case-against-killer-robots> [hereinafter *Killer Robots*].

¹⁰ *See, e.g., Tomahawk Cruise Missile*, RAYTHEON, <https://www.raytheon.com/capabilities/products/tomahawk> (last visited Jan. 23, 2019); MILREM ROBOTICS, THEMIS, <https://milremrobotics.com/themis/> (last visited Nov. 20, 2018). *Cf.* PAUL SCHARRE, ARMY OF NONE 129, 266 (2018) [hereinafter SCHARRE, ARMY OF NONE] (Fully autonomous LAWS do not yet exist, but “[a]ll of the tools to build an autonomous weapon that could target people on its own [are] readily available online Trying to contain the software would be pointless.”). Compare to JASON, *Perspectives on Research in Artificial Intelligence and Artificial General Intelligence Relevant to DoD* (Jan. 2017), <https://apps.dtic.mil/dtic/tr/fulltext/u2/1024432.pdf> [hereinafter JASON] wherein a group of scientific experts examined AI for DoD uses and determined “it is not clear that the existing AI paradigm is immediately amenable to any sort of software engineering validation and verification.” *Id.* at 27.

¹¹ *See, e.g., Aegi: The Shield of the Fleet*, LOCKHEED MARTIN, <https://www.lockheedmartin.com/en-us/products/aegis-combat-system.html> (last visited Jan. 11, 2019). For recent achievements in operationalizing autonomy see Jen Judson, *Jumping in to Algorithmic Warfare*, DEFENSE NEWS (Sept 5, 2019) [hereinafter Judson], discussing A3I, a networked system of autonomous capabilities developed by Army’s Future Vertical Lift cross-functional team. *See also* CONG. RESEARCH SERV., R45178, ARTIFICIAL INTELLIGENCE AND NATIONAL SECURITY 18 (last updated Jan. 30, 2019) [hereinafter CRS, AI AND NAT’L SECURITY] (“The U.S. military does not currently have LAWS in its inventory, although there are no legal prohibitions on the development of LAWS.”).

¹² Or “become” a leader in this sphere. Some would argue the United States has lost its lead in the field of artificial intelligence. *See* KAI FU LEE, AI SUPERPOWERS 14-18 (2018); SUMMARY OF THE NAT’L DEF. STRATEGY 3 (2018) [hereinafter NAT’L DEF. STRATEGY]; *but see* Exec. Order No. 13859, 84 Fed. Reg. 31 (Feb. 14, 2019) [hereinafter Exec. Order] (“The United States is the world leader in AI research and development (R&D) and deployment.”).

¹³ Used here, the term autonomy refers to that which uses machine learning. *See infra* Section II.

NDAA), the 2019 National Defense Authorization Act (FY19 NDAA), the President's Executive Order on Maintaining American Leadership in AI, the Pentagon's Third Offset Strategy, the National Defense Strategy, and DoD's AI Strategy.¹⁴ Currently, there are efforts within DoD to facilitate the development of weaponized autonomous platforms, LAWs, capable of operating offensively, beyond human control.¹⁵ At this time, DoD policy, reflected in Department of Defense Directive (DoDD) 3000.09 directs

¹⁴ National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, §§ 221, 222, 133 Stat. 1198 (2019) [hereinafter FY2020 NDAA] (directing "appropriate entities" in the DoD to review domestic and foreign open source publications to understand adversaries' investments in development of AI; and engaging JASON members to advise on matters involving science, technology, and national security, including methods to defeat existential and technologically-amplified threats to national security."); John S. McCain Nat'l Def. Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §§ 238(c)(2)(A)–(B), 238(c)(2)(H), 132 Stat. 1636 (2018) [hereinafter FY2019 NDAA]; Exec. Order, *supra* note 12; Sydney J. Freedberg Jr., *Hagel Lists Key Technologies for US Military; Launches "Offset Strategy,"* BREAKING DEFENSE (Nov. 16, 2014 2:00 PM) (defining Offset Strategy as a "military-industrial term of art for a cluster of technological breakthroughs that can give the United States its edge over potential enemies" and that another example is President Eisenhower's "New" Look" which used technology like stealth and computer networks to offset Soviet superiority in numbers). Former Deputy Secretary of Defense, Bob Work, focused the Third Offset Strategy on, among others, autonomous learning systems and network-enabled autonomous weapons. NAT'L DEF. STRATEGY, *supra* note 12, at 9; Bob Work, Deputy Secretary of Defense, Address Before the Center for a New American Security: The Third U.S. Offset Strategy and its Implications for Partners and Allies (Jan. 28, 2015), <https://www.defense.gov/Newsroom/Speeches/Speech/Article/606641/the-third-us-offset-strategy-and-its-implications-for-partners-and-allies/>; Memorandum from Deputy Sec'y of Army to Chief Management Officer of the Dep't of Defense, et al., subj: Establishment of the Joint Artificial Intelligence Center (June 27, 2018) [hereinafter AI TASK FORCE]; U.S. DEP'T OF ARMY, DIR. 2018-18, ARMY ARTIFICIAL INTELLIGENCE TASK FORCE IN SUPPORT OF THE DEPARTMENT OF DEFENSE JOINT ARTIFICIAL INTELLIGENCE CENTER (2 Oct. 2018) [ARMY DIR. 2018-18]; Yasmin Tadjdeh, *Algorithmic Warfare: Army's AI Task Force Making Strides*, NATIONAL DEFENSE (Oct. 8, 2019) [hereinafter Tadjdeh] (discussing one of AI Task Force's main lines of effort being automated threat recognition and autonomous operational maneuver platforms); see U.S. DEP'T OF DEF., DEFENSE SCIENCE BOARD TASK FORCE REPORT, THE ROLE OF AUTONOMY IN DoD SYSTEMS (June 2012) [hereinafter DSB, ROLE OF AUTONOMY] (strongly encouraging the DoD to address the underutilization of autonomy in unmanned systems).

¹⁵ CRS, AI AND NAT'L SECURITY, *supra* note 11, at 13 ("AI is also being incorporated into . . . lethal autonomous weapon systems."); Will Knight, *Military Artificial Intelligence Can be Easily and Dangerously Fooled*, MIT TECHNOLOGY REV. (Oct. 21, 2019), <https://www.technologyreview.com/s/614497/military-artificial-intelligence-can-be-easily-and-dangerously-fooled/> ("The Department of Defense's proposed \$718 billion budget for 2020 allocates \$927 million for AI and machine learning. Existing projects include the rather mundane (testing whether AI can predict when tanks and trucks need maintenance) as well as things on the leading edge of weapons technology (swarms of drones).").

Combatant Commanders to “integrate autonomous and semiautonomous weapon systems into operational mission planning” and identify how LAWs may satisfy operational needs.¹⁶

So, in a word, LAWs are inescapable. The days of debating whether or not LAWs should be developed are over.¹⁷ Commentators have already shown that fully autonomous lethal weapons are not illegal per se,¹⁸ which is to say that the Law of Armed Conflict (LOAC)¹⁹ does not prohibit their use in all circumstances.²⁰ Barring an agreed-upon prohibition, States are limited by their own policies, like DoDD 3000.09, and the limitations of the technology itself; the popular concern about robots running amok exaggerates their capabilities.²¹ From the United States’ perspective, DoDD 3000.09 requires “appropriate levels of human judgment” over autonomous weapons, including those capable of full autonomy.²²

¹⁶ DoDD 3000.09, *supra* note 8, encl. 4, ¶ 10(d)–(e).

¹⁷ CRS, AI AND NAT’L SECURITY, *supra* note 11, at 19 (“Vice Chairman of the Joint Chiefs of Staff, Gen. Paul Selva stated, “I do not think it is reasonable for us to put robots in charge of whether or not we take a human life.” But he added that because United States adversaries are pursuing LAWs, the United States must identify its vulnerabilities and address them.); *compare to* CAMPAIGN TO STOP KILLER ROBOTS, <https://www.stopkillerrobots.org/learn/> (last visited Nov. 20, 2019) (“Fully autonomous weapons would lack the human judgment necessary to evaluate the proportionality of an attack, distinguish civilian from combatant, and abide by other core principles of the laws of war.”).

¹⁸ Michael N. Schmitt & Jeffrey S. Thurner, *Out of the Loop: Autonomous Weapons Systems and the Law of Armed Conflict*, 4 HARV. NAT’L SEC. J. 231 (2016) [hereinafter Schmitt, *Out of the Loop*] (Expressing confidence that sophisticated states can determine whether use of LAWs in particular contexts complies with IHL); Kenneth Anderson, Daniel Reisner & Matthew Waxman, *Adapting the Law of Armed Conflict to Autonomous Weapon Systems*, 90 INT’L L. STUD. 386, 387 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2477095 [hereinafter Anderson, *Adapting the LOAC*].

¹⁹ Law of War (LOW) and Law of Armed Conflict (LOAC) are used interchangeably here, and refer to the international body of law that applies during an armed conflict.

²⁰ Michael Meier, *Lethal Autonomous Weapons Systems (LAWS): Conducting a Comprehensive Weapons Review*, 30 TEMP. INT’L & COMP. L.J. 119, 126 (2016) [hereinafter Meier, *LAWS Weapons Reviews*]; Charles J. Dunlap et al., *To Ban New Weapons or Regulate Their Use?*, JUST SECURITY (Apr. 3, 2015), <https://www.justsecurity.org/21766/guest-post-ban-weapons-regulate-use/> (Urging against emotionally-driven decisions that lead to “unintended consequences of well-intended [weapon] prohibitions.”); Christopher M. Ford, *Autonomous Weapons and International Law*, 69 S.C. L. REV. 413, 458–459 (2017) [hereinafter Ford, *Autonomous Weapons*].

²¹ Schmitt, *Out of the Loop*, *supra* note 18, at 242.

²² DoDD 3000.09, *supra* note 8, para. 4a (“Autonomous . . . weapon systems shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force.”); For a discussion of how to give meaning to

Though LAWs are not prohibited under the LOAC, and they can operate lawfully, few commentators discuss pragmatic safeguards for ensuring they actually do operate lawfully when put into operation. The existing legal framework for identifying and addressing potential LOAC concerns in weapons systems is ill-suited to the unique nature of autonomous weapon systems, because of:

- *What* we are pursuing;²³
- *Where* we are getting it;²⁴
- *How* we are acquiring it.²⁵

Together, these vulnerabilities set the stage for building risk into LAWs, an already immature and risky technology. While rigorous testing serves a critical role in minimizing these and other risks, it cannot and should not be the cure-all. In a reality where the inevitable trajectory of clashing international interests tosses LAWs into the crucible of armed conflict, the LOAC requires consideration of its tenets during the design of LAWs' "decision-making" models, and in conjunction with those who will be held responsible for employing them: commanders, whose responsibility extends to the foreseeable consequences of their decisions.²⁶ To this end, selected teams of judge advocates and combat-seasoned commanders, tasked as collaborators and issue-spotters, should be

"appropriate levels of human judgment" see Lieutenant Colonel Adam Cook, *Taming Killer Robots*, U.S. AIR FORCE JAG SCHOOL PAPERS, June 2019, at 16, <https://www.airuniversity.af.edu/AUPress/> [hereinafter *Taming Killer Robots*]; see also Karl Chang, *U.S. Delegation Statement on Human-Machine Interaction*, U.S. MISSION IN GENEVA (Aug. 28, 2018) [hereinafter HUMAN-MACHINE INTERACTION].

²³ Meaning, our inability to understand how a LAW's "black box" of deep neural networks work sets them apart from other weapons. See discussion *infra* Section II. See *Taming Killer Robots*, *supra* note 22, at 7, 15 ("[S]imply applying the existing rule of law framework to these fundamentally novel systems is not sufficient to protect against the very real risks . . . Rather additional standards are required.").

²⁴ In that industry is the most likely source of the component technology of LAWs, and this directly affects *when* DoD becomes involved. Because the black box problem arises during design, testing is only partially effective. See *infra* Section II.

²⁵ Referring to our use of rapid acquisition authorities to obtain the technology absorbs risk, rather than limits it. See *infra* Section IV.B.3.

²⁶ See discussion *infra* note 83 regarding commander responsibility; see also DSB, *ROLE OF AUTONOMY*, *supra* note 14, at 31-32 (Visualize challenges to autonomy "through the eyes of three key stakeholders: the commander, the operator, and the developer." The commander struggles with understanding how to incorporate autonomy into missions. For the operator, human-machine collaboration is often overlooked during design. And for the developer, "testing and evaluation have few metrics and test beds for verification and validation.").

involved as early as possible in the design and development process of LAWs' learning models.²⁷ There are no legal barriers for this involvement, and the current regulatory system allows immediate implementation, limited only by industry's willingness to participate.²⁸

In support of this proposition, Section II first defines LAWs, briefly explains the underlying technology, and discusses the "black box" problem, while Section III examines how LAWs' algorithms raise LOAC issues during their development. Section IV describes the current weapons review process and why it is inadequate to mitigate the LOAC issues and risk factors of *what*, *where*, and *how*. Section V explains efforts already in place, where blind spots remain, and what more should be done.

II. Defining Lethal Autonomous Weapons

Autonomy uses artificial intelligence (AI) to mimic human decision-making.²⁹ Though the U.S. Government has no accepted definition of AI,³⁰ Section 238 of the FY19 NDAA defines AI as a system that "performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets."³¹ The DoD further describes autonomous systems as "self-directed toward a goal in that they do not require outside control, but rather are governed by laws and

²⁷ Judge advocates are not the only attorneys well-suited to this task. See discussion *infra* Section V; Brigadier General R. Patrick Huston, *The Future JAG Corps: Understanding the Legal Operating Environment*, ARMY LAW., Iss. 1, 2019, at 2-3 ("[J]udge advocates must be positioned to advise coders and developers to ensure LOAC principles are built into emerging technology."); Major Richard J. Sleesman & Captain Todd C. Huntley, *Lethal Autonomous Weapon Systems*, ARMY LAW., Iss. 1, 2019, at 32, 34 ("Since legal issues are likely to arise in development, not just during the use of the weapon system, judge advocates will need to provide legal advice during the development process.").

²⁸ See *infra*, Part IV.B.2; see generally, Nat'l Security Comm'n on Artificial Intelligence, Interim Rep. 32, 45 (Nov. 2019), <https://www.epic.org/foia/epic-v-ai-commission/AI-Commission-Interim-Report-Nov-2019.pdf> (Discussing challenges and recommendations for DoD's development of artificial intelligence).

²⁹ In 1955, John McCarthy coined the term "artificial intelligence." *John McCarthy, Stanford University 1999 Fellow*, COMPUTER HIST. MUSEUM, <https://www.computerhistory.org/fellowawards/hall/john-mccarthy> (last visited Jan. 28, 2019).

³⁰ CRS, AI AND NAT'L SECURITY, *supra* note 11, at 5.

³¹ FY2019 NDAA, *supra* note 14, § 238.

strategies that direct their behavior.”³² As stated in the introduction, DoD defines LAWs as weapons that “can select and engage targets without further intervention by a human operator.”³³ Upon human deployment, a LAW can identify a target and attack without further human direction, meaning it can operate with a human “out of the loop,”³⁴ which is a particularly useful capability when operating in a swarm, in communications-denied or degraded areas, when the volume of data exceeds human capacity to review and analyze, or when there is not enough reaction time for human decision-making.³⁵

Autonomy is accomplished by algorithms, which are simply “a sequence of instructions telling a computer what to do,” or a set of problem-solving processes and rules.³⁶ These instructions and rules are similar to the decision process a human uses to navigate through traffic to get to work, which can be optimized for different preferred outputs, like the most direct route, the least tolls, the most scenic, or most convenient to a grocery store. Given a decision model, an algorithm predicts the best route. A subcategory of algorithms, called learning algorithms, enable autonomy in LAWs.³⁷ A learning algorithm looks for patterns within

³² U.S. DEP’T OF DEFENSE, UNMANNED SYSTEMS INTEGRATED ROADMAP FISCAL YEAR 2017–2036 17 (2013) [hereinafter DOD ROADMAP].

³³ DoDD 3000.09, *supra* note 8, at 13. The lack of an agreed-up definition for LAWs is evident upon closer look at China’s claims of full autonomy in its weapons. Zhuhai Ziyuan UAV Company, the manufacturer of the Blowfish A3 and other Chinese LAWs, states that, though they can organize in a swarm and identify a target autonomously, they do not shoot until a human commands them to do so. Under the DoD’s definition, such weapons would not be fully autonomous. Xuanzun, *supra* note 8.

³⁴ Autonomy in weapons is best described as a spectrum of independence with humans either “in the loop,” “on the loop,” or “out of the loop.” A human “in the loop” must affirmatively act before the weapon can fire. A human “on the loop” is able to intervene prior to firing, much like a supervisor. A human “out of the loop” cannot intervene once the weapon is deployed. Fully autonomous weapons are unique in their ability to *observe* their situations, *orient* themselves by placing those observations in context in time and space, make *decisions*, and then *act* on them. This is the human decision-making cycle coined by Air Force Military Strategist Colonel John Boyd as the “OODA loop.” John Boyd, *The Essence of Winning and Losing*, DANFORD (June 28, 1995), <http://www.danford.net/boyd/essence.htm>.

³⁵ See CRS, AI AND NAT’L SECURITY, *supra* note 11, at 18.

³⁶ PEDRO DOMINGOS, THE MASTER ALGORITHM: HOW THE QUEST FOR THE ULTIMATE LEARNING MACHINE WILL REMAKE OUR WORLD I (2015) [hereinafter DOMINGOS] (“The simplest algorithm is: flip a switch. The state of one transistor is one bit of information: one if the transistor is on, and zero if it is off.”).

³⁷ Dustin A. Lewis, et al., *War Algorithm Accountability*, HARV. LAW SCH. PROGRAM ON INT’L LAW AND ARMED CONFLICT 10 (2016), https://pilac.law.harvard.edu/war-algorithm-accountability-report/#_ftn58 (A “war algorithm” is “any algorithm that is expressed in

inputs (e.g., facial images gathered by its sensors), makes a prediction, and learns from the outcome, continuously improving.³⁸ Learning algorithms come in different forms and may be referred to as learners, learning systems, agents, or recognizers, depending on the method used to achieve learning and the objective of learning.³⁹ For this discussion, a LAW's apparatus that enables autonomous "decision-making" will be referred to as a learner.⁴⁰ Learners use deep learning and neural networks for unsupervised learning⁴¹ and "mimic the web of neurons in the human

computer code, that is effectuated through a constructed system, and that is capable of operating in relation to armed conflict."); SCHARRE, ARMY OF NONE, *supra* note 4; Yann LeCun, et al., *Deep Learning*, 521 NATURE 436 (2015); Paul Scharre & Michael C. Horowitz, *An Introduction to Autonomy in Weapons Systems* 21 (Ctr. for a New Am. Security, Working Paper, Feb. 2015), <https://www.cnas.org/publications/reports/an-introduction-to-autonomy-in-weapon-systems>. Cf. Chad R. Frost, *Challenges and Opportunities for Autonomous Systems in Space*, in FRONTIERS OF ENGINEERING: REPORTS ON LEADING-EDGE ENGINEERING FROM THE 2010 SYMPOSIUM 89-90 (2011), <https://www.nap.edu/read/13043/chapter/17> ("An *automated system* doesn't make choices for itself – it follows a script . . . in which all possible courses of action have already been made. . . . By contrast, an *autonomous system* does make choices on its own . . . even when encountering uncertainty or unanticipated events.").

³⁸ DOMINGOS, *supra* note 36, at 1-2; *but see* CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION Ch 5 (2016) [hereinafter O'NEIL] (Discussing the "pernicious feedback loop" where a model's outputs reinforce biases embedded within the data given it, unbeknownst to those who rely on its predictions.).

³⁹ RICHARD S. SUTTON & ANDREW G. BARTO, REINFORCEMENT LEARNING: AN INTRODUCTION ¶¶ 1.1-1.3 (2d ed. 2018) [hereinafter SUTTON]; U.S. AIR FORCE OFFICE OF THE CHIEF SCIENTIST, AUTONOMOUS HORIZONS: SYSTEM AUTONOMY IN THE AIR FORCE – A PATH TO THE FUTURE (June 2015), [https://www.af.mil/Portals/1/documents/SECAF/Autonomous Horizons.pdf?timestamp=1435068339702](https://www.af.mil/Portals/1/documents/SECAF/Autonomous_Horizons.pdf?timestamp=1435068339702) [hereinafter AUTONOMOUS HORIZONS]; GOOGLE, GLOSSARY, <https://developers.google.com/machine-learning/glossary/#0> (last visited Jan. 28, 2019) [hereinafter GOOGLE].

⁴⁰ The term *agent* is widely used when referring to a LAW's decision-making entity. "Agent" is itself a term of art suggesting "agency" or an ability to make decisions and be held accountable for them, a responsibility the U.S. reserves for humans. See DoDD 3000.09, *supra* note 8. To avoid confusion with the generic reference to *agent*, the term *learner* is used instead. When referring to "decision-making" capabilities, such capabilities are limited by human coding and training, and so they are similar to, but not the same as, human decisions.

⁴¹ See SUTTON, *supra* note 39. Compare to *supervised learning* whereby an algorithm is given a data set with pre-labeled examples, like a grouping of animal photos with the dogs already labeled. The learner learns what dogs are by comparing future unknown samples to the known samples. In *unsupervised learning*, the learner is given an unlabeled data set and must find the patterns itself. Unsupervised learning is better suited to situations where labeled samples are too voluminous, expensive, and/or time intensive to label or acquire. *Id.* ¶¶ 1.1-1.2; Jason Pontin, *Greedy, Brittle, Opaque, and Shallow: The Downsides to Deep Learning*, WIRED (Feb. 2, 2018, 8:00 AM), <https://www.wired.com/story/greedy-brittle-opaque-and-shallow-the-downsides-to-deep->

brain” by passing data through layers of filters, looking for patterns until it reaches the output layer, which contains the answer.⁴² A programmer sets goals for the learner and may also use reinforcement reward signals to incentivize correct decisions or penalties to deter incorrect decisions, a process called learning or training a model.⁴³ After achieving its goal, the learner stores its experience to strengthen similar decision-making.⁴⁴ Lethal autonomous weapons will likely rely on several different types of learners.⁴⁵ For example, one type, known as recognizers, look for patterns within images to classify and predict what the image depicts.⁴⁶ Consider an example of a lethal autonomous drone trained to target snipers by a programmer unfamiliar with the LOAC. The programmer learning or training its unsupervised recognizer to identify snipers would give the

learning/ [hereinafter Pontin] (suggesting that unsupervised learning offers a path around the limitations of supervised deep learning).

⁴² THOMAS H. CORMEN, ET AL., *INTRODUCTION TO ALGORITHMS* 5 (3d ed. 2009), <https://labs.xjtudlc.com/labs/wldmt/reading%20list/books/Algorithms%20and%20optimization/Introduction%20to%20Algorithms.pdf>; DOMINGOS, *supra* note 36; GOOGLE, *supra* note 39, <https://developers.google.com/machine-learning/glossary/#o> (last visited Jan. 28, 2019); *see also* Cade Metz, *In Two Moves, AlphaGo and Lee Sedol Redefined the Future*, WIRED (Mar. 16, 2016, 7:00 AM), <https://www.wired.com/2016/03/two-moves-alphago-lee-sedol-redefined-future/>. Neural networks may use different types of architectures, and the terminology varies depending on type. CAMERA BASED IMAGE PROCESSING, TUFTS UNIVERSITY (Sept. 26, 2017), <https://sites.tufts.edu/selfdrivingisaac/2017/09/26/camera-based-image-processing/> [hereinafter TUFTS].

⁴³ SUTTON, *supra* note 39; GOOGLE, *supra* note 39; *see also* James Le, *12 Useful Things to Know about Machine Learning*, TOWARDS DATA SCIENCE (Jan 26, 2018), <https://towardsdatascience.com/12-useful-things-to-know-about-machine-learning-487d3104e28> [hereinafter Le] (“Programming, like all engineering, is a lot of work: we have to build everything from scratch. Learning is a more like farming, which lets nature do most of the work. Farmers combine seeds with nutrients to grow crops. Learners combine knowledge with data to grow programs.”).

⁴⁴ Loz Blain, *AI Algorithm Teaches a Car to Drive from Scratch in 20 Minutes*, NEW ATLAS (July 5, 2018), <https://newatlas.com/wayve-autonomous-car-machine-learning-learn-drive/55340/>; U.S. Army Research Laboratory, *Artificial Intelligence Becomes Lifelong Learner with New Framework*, SCIENCE DAILY (May 20, 2019), <https://www.sciencedaily.com/releases/2019/05/190520115635.htm> (Discussing how to avoid “catastrophic loss” in machine learning algorithms by using “backward transfer,” in other words, making the learner remember how it completed previous tasks to help it complete new tasks better.).

⁴⁵ *See, e.g.*, Le, *supra* note 43; discussion *infra* Section IV.B.1.

⁴⁶ *See* Oleksii Kharkovyna, *The A-Z of AI and Machine Learning: Comprehensive Glossary*, TOWARDS DATA SCIENCE (July 8, 2019), <https://towardsdatascience.com/the-a-z-of-ai-and-machine-learning-comprehensive-glossary-fb6f0dd8230>; *see also* Salim Chemlal, *A Comprehensive State-Of-The-Art Image Recognition Tutorial*, TOWARDS DATA SCIENCE (July 3, 2019), <https://towardsdatascience.com/a-comprehensive-state-of-the-art-image-recognition-tutorial-c34c544d0b4>.

drone's software a data set containing images of service members (or combatants, generally), including those exhibiting characteristics associated with snipers. The recognizer would then apply layers of filters to the data to determine what it observed. The recognizer may look for identifying factors like a body in a prone position, camouflaged, motionless, physically isolated from other people, and with a weapon aimed in a particular direction. Each of these features form one layer, or node, and at the output layer, the recognizer would determine whether it was looking at a sniper.⁴⁷ Upon reaching an answer, the recognizer would create a model for image classification of snipers.⁴⁸ It would then continually refine its model as the recognizer encounters more images. Despite our ability to fine-tune a learner's model, employ reinforcement learning with rewards and penalties, and control the data sets used for training, a learner's decision-making remains opaque.

Evaluating a learner's effectiveness and reliability proves difficult in machine learning because the decision-making occurs within its multiple layers of nodes and neural nets. This creates a "black box" scenario where algorithms create hidden algorithms unknown to software and testing engineers.⁴⁹ According to a group of experts, called JASON, tasked with examining AI for DoD uses:

[T]he sheer magnitude, millions or billions of parameters (i.e. weights/biases, etc.), which are learned as part of the training of the net . . . makes it impossible to really understand exactly how the network does

⁴⁷ TUFTS, *supra* note 42; *see, e.g.*, Waymo Self-Driving Car Image Recognition, in Andrew J. Hawkins, *The Google Spinoff has a Head Start in AI, But Can They Maintain the Lead?*, THE VERGE (May 9, 2018), <https://www.theverge.com/2018/5/9/17307156/google-waymo-driverless-cars-deep-learning-neural-net-interview> [hereinafter Hawkins] (Waymo, a Google sister company, trains self-driving cars using "an automated process and human labelers to train its neural nets.").

⁴⁸ One needs little imagination to envision a scenario where a sniper could easily be confused with an injured soldier or civilian hunter. See Section V.A for more discussion on the judge advocate's and commander's roles in refining LAWS' models. *See also* O'NEIL, *supra* note 36, at 18-20 ("A model . . . is nothing more than an abstract representation of some process . . . They tell us what to expect, and they guide our decisions.").

⁴⁹ Unlike the black boxes in airplanes known for protecting data so it can become knowable, the "black box" effect within deep learning algorithms obscures it so the information can never be known. *See* Jeff Phillips, *Testing the Unknown: The Real Problem with Autonomous Vehicles*, ELECTRONIC DESIGN (Aug. 9, 2018), <https://www.electronicdesign.com/automotive/testing-unknown-real-problem-autonomous-vehicles>.

what it does. Thus the response of the network to all possible inputs is unknowable.⁵⁰

Ultimately, not only is testing the network's response to all inputs impossible, but because a learner's decision-making occurs in a black box, evaluators can never know why a learner acts the way it does. "You can't just look inside a deep neural network to see how it works. A network's reasoning is embedded in the behavior of thousands of simulated neurons, arranged into dozens or even hundreds of intricately interconnected layers."⁵¹ The DoD's AI Ethics Principles, which set standards for the use of AI, controls for this limitation.⁵² One of the five principles is that AI is "traceable," meaning technicians can examine how the software reached its conclusions. Explainable AI is just that—traceable and knowable—but its early-stage tools are not yet suited for LAWs.⁵³

And so the black box problem appears irreconcilable with the requirement for "appropriate levels of human judgment" over LAWs.⁵⁴ One may be tempted to suggest rigorous testing will be sufficient but it, too, has limits: "[T]he number of possible input states that such learning systems can be presented with is so large that not only is it impossible to

⁵⁰ JASON, *supra* note 10, at 28; SCHARRE, ARMY OF NONE *supra* note 10, at 149–50 (One of the greatest challenges in fielding LAWs will be testing them).

⁵¹ Will Knight, *The Dark Secret at the Heart of AI*, MIT TECHNOLOGY REV. (Apr. 11, 2017), <https://www.technologyreview.com/s/604087/the-dark-secret-at-the-heart-of-ai/> ("No one really knows how the most advanced algorithms do what they do.")

⁵² Patrick Tucker, *The Pentagon's AI Ethics Draft is Actually Pretty Good*, DEFENSE ONE (Oct. 31, 2019), <https://www.defenseone.com/technology/2019/10/pentagons-ai-ethics-draft-actually-pretty-good/161005/>; *DoD Adopts Ethical Principles for Artificial Intelligence*, U.S. DEP'T OF DEF. (Feb. 24, 2020),

<https://www.defense.gov/Newsroom/Releases/Release/Article/2091996/dod-adopts-ethical-principles-for-artificial-intelligence/>; AUTONOMOUS HORIZONS, *supra* note 39, at 29 ("The logic and behavior of [machine learning] systems can be quite opaque . . . and often the system developers do not fully understand how the autonomy will behave."). Other entities strive to set standards for the use of AI and echo the need for outcome transparency. See, e.g., the Organization for Economic Cooperation and Development's (OECD) Principles on AI, found at <https://www.oecd.org/going-digital/ai/principles/>.

⁵³ Explainability is the algorithms' ability to explain its process and noted the risk that "data training sets could inadvertently introduce errors into a system that might not be immediately recognized or understood by users." CRS, AI AND NAT'L SECURITY, *supra* note 11, at 34.

⁵⁴ Some early-stage tools exist to explain AI, but their effectiveness decreases as the machine learning model's complexity increases. See Tiernan Ray, *IBM Offers Explainable AI Toolkit, but it's Open to Interpretation*, ZDNET (Aug. 10, 2019), <https://www.zdnet.com/article/ibm-offers-explainable-ai-toolkit-but-its-open-to-interpretation/>.

test all of them directly, it is not even possible to test more than an *insignificantly small fraction* of them.”⁵⁵ (emphasis added). If their decision-making models cannot be understood, and cannot be adequately tested, how is a commander to account for the reasonably foreseeable consequences of her decision to use LAWs?⁵⁶ Commanders need not rely on faith alone; the black box has windows.

To resolve the black box problem and our inability to adequately test machine learning models, DoD must continue its quest for explainable AI,⁵⁷ and in the meantime fully exploit the multiple human touch points occurring across the design timeline that offer critical opportunities for human involvement and understanding.⁵⁸ Among them:

- Training decisions, including what data to use;⁵⁹
- Goal selection;⁶⁰
- Choice and weighing of reward and penalty signals;⁶¹
- Evaluation of the learner’s output and its final decision-making model;⁶²
- Adjustments to a learner’s architecture;⁶³

⁵⁵ Alan Backstrom & Ian Henderson, *New Capabilities in Warfare: An Overview of Contemporary Technological Developments and the Associated Legal and Engineering Issues in Article 36 Weapons Reviews*, 886 Int’l Review of the Red Cross 483, 517 (2012).

⁵⁶ U.S. DEP’T OF DEF., DoD LAW OF WAR MANUAL paras. 6.3.1, 6.7.2, *see also* paras. 5.3, 5.3.1, 5.3.2 (Dec. 2016) [hereinafter DoD LOW MANUAL] (“Even when information is imperfect or lacking (as will frequently be the case during armed conflict), commanders and other decision-makers may direct and conduct military operations, so long as they make a good faith assessment of the information that is available to them at that time.”).

⁵⁷ *See* David Gunning, *Explainable Artificial Intelligence (XAI)*, DEF. ADVANCED RESEARCH PROJECTS AGENCY, <https://www.darpa.mil/program/explainable-artificial-intelligence> (last visited Jan. 15, 2019) [hereinafter Gunning].

⁵⁸ M.L. Cummings, *The Human Role in Autonomous Weapons Design and Deployment*, DUKE UNIVERSITY (2014), <https://www.law.upenn.edu/live/files/3884-cummings-the-human-role-in-autonomous-weapons> (last visited Jan. 31, 2019).

⁵⁹ *See* TUFTS, *supra* note 42; Hawkins, *supra* note 47.

⁶⁰ *See* DoD ROADMAP, *supra* note 32, at 46.

⁶¹ SUTTON, *supra* note 39.

⁶² SUTTON, *supra* note 39.

⁶³ Ivan Vasilev, *A Deep Learning Tutorial: From Perceptrons to Deep Network*, TOPTAL, <https://www.toptal.com/machine-learning/an-introduction-to-deep-learning-from-perceptrons-to-deep-networks> (last visited Jan. 31, 2019); Nick McCrea, *An Introduction to Machine Learning Theory and Its Applications: A Visual Tutorial with Examples*, TOPTAL, <https://www.toptal.com/machine-learning/machine-learning-theory->

- Engineering of the machine-operator interface, and how operator adjustments may interact with the learner;⁶⁴
- Integration of recommendations from end users, legal advice and legal reviews into training decisions, goal selection, reinforcement, and evaluation;⁶⁵
- End-user interface options and command decision to employ.

These touch points provide the means for injecting human judgment into a learner even though, when operationalized, a LAW operates fully autonomously, outside human control. In the simplified sniper-targeting drone example above, the drone simply did what its programmer trained it to do by setting reward signals for finding and targeting snipers. The drone's model for making targeting decisions was learner-made, but human-taught. A LAW's decision-making ability is highly dependent upon how its learner's models are programmed and trained,⁶⁶ and so the accuracy and reliability of a LAW's performance is directly tied to the human trainers whose inputs, rewards, goals, and adjustments are knowable at the time of programming. But human insight into the black box is fleeting. Once the human touch point passes, that window closes and the model's neural nets run the show, building off training and additional inputs from the environment around it.⁶⁷ New windows open as humans interact with the model, but determining which input or adjustment led to a particular output becomes nearly impossible.

an-introductory-primer (last visited Jan. 31, 2019); see DoDD 3000.09, *supra* note 8, at 6 (Discussing V&V and T&E).

⁶⁴ Compare DoDD 3000.09, *supra* note 8, at 2-3 (It is DoD's policy for the human-machine interface to: (1) Be readily understandable to trained operators; (2) Provide traceable feedback on system status; and (3) Provide clear procedures for trained operators to activate a deactivate system functions.), with the "black box" problem of hidden layers of decision-making in convolutional neural nets. Pontin, *supra* note 41, and DARPA's project to create explainable AI. See Gunning, *supra* note 57.

⁶⁵ See *infra* Part V.A-B.

⁶⁶ See, e.g., Nancy Gupton, *The Science of Self-Driving Cars*, FRANKLIN INST., <https://www.fi.edu/science-of-self-driving-cars> (last visited Jan. 23, 2019) ("By far the most complex part of self-driving cars, the decision-making of the algorithms, must be able to handle a multitude of simple and complex driving situations flawlessly. . . . The software used to implement these algorithms must be robust and fault-tolerant.").

⁶⁷ Le, *supra* note 43 ("[M]achine learning is not a one-shot process of building a dataset and running a learner, but rather an iterative process of running the learner, analyzing the results, modifying the data and/or the learner, and repeating.").

Leveraging these windows permits appropriate levels of human judgment and enables commander compliance with the LOAC.

III. Algorithms Raise Legal Issues

The United States is bound by the Law of Armed Conflict, which embodies international treaty law and customary international law.⁶⁸ All weapon use must adhere to the LOAC⁶⁹ including fully autonomous lethal weapons,⁷⁰ which is to say it must comply with the principles of military necessity, humanity, proportionality, distinction, and honor.⁷¹ But ensuring LAWs' programming correctly accounts for the LOAC represents the low bar for legality; layered on top of LOAC requirements are operation-specific rules of engagement, policy considerations, human restraint, and international norms. Applying the LOAC tenets to military operations occurs during planning and execution, when a commander (or servicemember) makes real-time determinations as an operational situation unfolds. But autonomy changes that. The "when" in the decision-making process occurs much earlier. The United States has suggested that LOAC issues are tied to the LAWs' programming,⁷²

⁶⁸ U.S. CONST. art. I, § 8; art. II, § 2; art. III; and art. VI; *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International Law is part of our law . . ."); *see, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, art. 63, 1950 U.N.T.S. 32 [hereinafter GC I]; Michael N. Schmitt & Eric W. Widmar, *On Target: Precision and Balance in the Contemporary Law of Targeting*, 7 J. NAT'L SEC. L. & POL'Y 379, 381. Note this article does not discuss domestic law implications.

⁶⁹ U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 4 (9 May 2006) (certified current as of 22 Feb. 2011) [hereinafter DOD LOW PROGRAM]; DOD LOW MANUAL, *supra* note 56, paras. 4.2, 4.4, 6.5.9.2; DoDD 3000.09, *supra* note 8; U.S. WORKING PAPER, AUTONOMY IN WEAPON SYSTEMS (Nov. 10 2017) [hereinafter AUTONOMY IN WEAPON SYSTEMS].

⁷⁰ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 43(2), 50, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. Though not a signatory to AP I, the U.S. recognizes several components as reflective of customary international law, and views weapon reviews as a best practice. Refer to discussion in Part IV.A, *infra*, for further discussion of legal reviews of weapons. *See generally* Schmitt, *Out of the Loop*, *supra* note 18 (An outright ban on LAWs is premature).

⁷¹ DOD LOW MANUAL, *supra* note 56, ch II; AP I, *supra* note 70, pt. IV, § 1, ch. II, arts. 45 and 51(3); Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 13, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

⁷² AUTONOMY IN WEAPON SYSTEMS, *supra* note 69, at 2; *see also* Schmitt, *Out of the Loop*, *supra* note 18, at 273 ("Given the technological advances likely to be embedded in

meaning a learner's training must enable its later use to conform to the LOAC.⁷³

A. Legal Issues Under the Law of Armed Conflict

Among the LOAC issues raised by LAWs are the bedrock principles of distinction and proportionality. Distinction simply means only proper military objectives are made the subject of attack.⁷⁴ A commander using a LAW must reasonably believe that the learner can distinguish between its intended target and those it must avoid. If used to select and engage targets autonomously, the LAW must be able to distinguish between combatants and non-combatants, and between military objectives and civilian objects.⁷⁵ In conflicts where adversaries clearly indicate their military membership, like wearing a recognizable military uniform and openly bearing arms, a particular combatant's targetable status would be readily apparent to a LAW.⁷⁶ But where adversaries and civilians are outwardly indistinguishable, a combatant's targetable status must be determined by other less visible clues, like past behavior and intent. For LAWs, interpreting body language and context pose significant hurdles, though not insurmountable.⁷⁷ Yet, to be used lawfully, a commander must

autonomous weapons . . . [l]awyers conducting the reviews will need to work closely with computer scientists and engineers to obtain a better appreciation for the measures of reliability and the testing and validation methods used on the weapons.”)

⁷³ U.S. WORKING PAPER, HUMAN-MACHINE INTERACTION IN THE DEVELOPMENT, DEPLOYMENT, AND USE OF EMERGING TECHNOLOGIES IN THE AREA OF LETHAL AUTONOMOUS WEAPONS SYSTEMS, para. 31 (Aug. 28, 2018) [hereinafter HUMAN-MACHINE INTERACTION] (“Current artificial intelligence systems often use processes that are opaque to the human operators of the systems. This lack of understandability and transparency hinders trust and accountability and undermines the commander’s ability to use LAWs properly.”). Compounding the transparency problem are biases introduced into the teaching or training of the algorithm. See Ayanna Howard & Jason Borenstein, *The Ugly Truth About Ourselves and Our Robot Creations: The Problem of Bias and Social Inequity*, SCIENCE AND ENGINEERING ETHICS 1521–1536 (Oct. 2018) (Algorithms “find patterns within datasets that reflect implicit biases and, in so doing, emphasize and reinforce these biases as global truth.”). After all, “Models are opinions embedded in mathematics.” O’NEIL, *supra* note 36, at 21.

⁷⁴ DoD LOW MANUAL, *supra* note 56, para. 2.5; AP I, *supra* note 70, pt. IV, § 1, ch. II, arts. 45 and 51(3); AP II, *supra* note 71, art. 13.

⁷⁵ *Id.*

⁷⁶ See TUFTS, *supra* note 42.

⁷⁷ *Killer Robots*, *supra* note 9; Pontin, *supra* note 41 (Determining when civilians may be targeted because they directly participate in hostilities poses additional challenges); Kalev Leetaru, *Why Machine Learning Needs Semantics Not Just Statistics*, FORBES (Jan. 15, 2018, 11:03 AM), <https://www.forbes.com/sites/kalevleetaru/2019/01/15/why->

reasonably believe that a LAW can distinguish between correct and incorrect targets and behave predictably even when circumstances change after the LAW's mission commences. If not, the commander's choice to employ the LAW in that particular circumstance would be unlawful.

To comply with proportionality, a commander must ensure an attack's likely collateral damage is not excessive in relation to the concrete military advantage expected to be gained.⁷⁸ After making a proportionality determination, the commander using his LAW must reasonably believe its effects will conform to his estimation of damage.⁷⁹ But, like the principle of distinction, the LAW's programming and training has been conducted and tested long before the facts of the commander's engagement present themselves. So, the commander must be able to predict with reliability how the LAW will behave. Unlike servicemembers, whose training and decision-making are relatively transparent, LAWs' deep learning models are opaque. The commander cannot know how it was trained or how it will make decisions given situation-specific, real-time facts.⁸⁰

machine-learning-needs-semantics-not-just-statistics/#35673b0377b5 (When humans assess a situation, they do so by finding meaning and interrelationships between the various components while machine learning looks for correlations and patterns); *see also* DOD LOW MANUAL, *supra* note 56, para. 5.8 (Civilians directly participating in hostilities (DPH) forfeit protection from being attacked); NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 70 (2009), <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf> (The U.S. view on what it means to DPH is broader than others' interpretations.).

⁷⁸ DOD LOW MANUAL, *supra* note 56, para. 2.4.1.2. Collateral damage, including civilian death, is permissible so long as it is not "excessive" when balanced against the advantage gained by the underlying attack. *See also* AP I *supra* note 70, art. 51(5)(b) (Reiterating that indiscriminate attacks include those resulting in excessive civilian damage relative to the military advantage).

⁷⁹ "Military advantage" algorithms could shift this calculation to the LAW, presenting a programmer with the added feat of understanding and training a model on highly contextual decisions long before a conflict exists. Proposed solutions include making the collateral damage threshold adjustable, or very conservative. Nevertheless, such algorithms add complexity to an already difficult problem. *See* Schmitt, *Out of the Loop*, *supra* note 18, at 255-57.

⁸⁰ *See* O'NEIL, *supra* note 36, at 20-21 ("[M]odels are, by their very nature, simplifications. No model can include all of the real world's complexity or the nuance of human communication. Inevitably, some important information gets left out . . . A model's blind spots reflect the judgments and priorities of its creators. . . . [M]odels, despite their reputation for impartiality, reflect goals and ideology. . . . Our own values and desires influence our choices, from the data we choose to collect to the questions we ask.").

This disparity can be overcome to an extent with rigorous testing and evaluation and operator training,⁸¹ but ultimately, commander confidence requires well-trained LAWs—training which occurs during design. Thus, experts familiar with advising commanders on LOAC issues in military operations must be present during design to help equip LAWs' learners with lawful and reliable parameters when their models are trained.

The DoD has determined that principles like distinction and proportionality are complicated and weighty enough to assign co-located legal advisors to deployed combat and combat support units.⁸² The DoD also mandated combatant commanders to obtain legal reviews of all plans, policies, directives, and rules of engagement for LOAC compliance.⁸³ In an operational environment, a commander's decision-making is reactive to real time circumstances, informed by battlefield experience and accompanying legal advice and judgment, among other information.⁸⁴ This is in sharp contrast to LAW's decision-making learners, which are trained and tested by human programmers—likely non-DoD.⁸⁵ The

⁸¹ Other forms of algorithms are more transparent but do not offer the problem-solving advantages of deep learning, so testing and evaluation and operator training are critical to overcoming the black-box problem. See DoDD 3000.09, *supra* note 8, para. 4; AUTONOMY IN WEAPON SYSTEMS, *supra* note 69, at 2.

⁸² DoD LOW PROGRAM, *supra* note 69, at 7-8. The LoW Program sets requirements for the military's compliance with the LOAC. To this effect, all levels of command must have qualified legal advisors available to advise on the law of war.

⁸³ DoD LOW PROGRAM, *supra* note 69, para. 5.11.8. This paper does not discuss responsibility or accountability, though generally acknowledges that the U.S. would bear responsibility for LOAC violations caused by use of LAWs. See HUMAN-MACHINE INTERACTION, *supra* note 73, at 8; AUTONOMY IN WEAPON SYSTEMS, *supra* note 69, at 2, 4 (“[P]ersons are responsible for their individual decisions to use weapons with autonomous functions . . . it is for individual human beings . . . to ensure compliance with [the law of war] when employing any weapon or weapons system, including autonomous or semi-autonomous weapons systems.”); DoD LOW MANUAL, *supra* note 56, para. 18.3 (Individual members of the armed forces must comply with the law of war.); Int’l Law Comm’n on the Work of Its Fifty-Third Session, *Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/56/83, arts. 1, 4 (2001) (“Every internationally wrongful act of a State entails the international responsibility of that State.”).

⁸⁴ DoD LOW MANUAL, *supra* note 56, para. 5.3 (Commanders must make good-faith assessments of the information available to them at the time, even if imperfect or lacking.); DoD LOW PROGRAM, *supra* note 69, at 7-8.

⁸⁵ See discussion *infra* Section IV.B.2; see also NAT’L DEF. STRATEGY, *supra* note 12, at 3 (“[M]any technological developments will come from the commercial sector . . .”); Gregory C. Allen & Taniel Chan, *Artificial Intelligence and National Security*, BULLETIN OF THE ATOMIC SCIENTISTS (Feb. 21, 2018) [hereinafter Allen] (“There are multiple Silicon Valley and Chinese companies who each spend more annually on AI R&D than the entire United States government does on R&D for all of mathematics and computer

combat learner's decision-making models evolved and took shape in the hands of engineers long before the commander received it and likely lacked meaningful legal guidance during its training. Thus the key difference between addressing a commander's real-time LOAC challenges, and addressing a LAW's LOAC challenges is not tied to who makes the decisions, but when they are made.

B. Issues Arise During Programming

In November 2017, the U.S. submitted to the Convention on Certain Weapons⁸⁶ Group of Governmental Experts (GGE),⁸⁷ "Weapons that use autonomy in target selection and engagement seem unique in the degree to which they would allow consideration of targeting issues during the weapon's development."⁸⁸ Restated:

[I]f it is possible to program how a weapon will function in a potential combat situation, *it may be appropriate to consider the law of war implications of that programming*. In particular, it may be appropriate for weapon designers and engineers to consider measures to reduce the likelihood that use of the weapon will cause civilian casualties.⁸⁹ (emphasis added)

Such commentary reflects the U.S. view that LAWs must be designed in accordance with the LOAC, not that LAWs must themselves make legal decisions.⁹⁰ To emphasize that point, the U.S. offered that "it might be

science combined."); WORK WITH US, DEF. INNOVATION UNIT, <https://www.diu.mil/work-with-us/companies> (last visited Jan. 24, 2019). Though technology for LAWs will likely come from outside the DoD, the Army Research Lab (ARL) includes in its 2015–2035 research strategy a variety of AI research priorities for use in military operations, ARL, <https://www.arl.army.mil/www/default.cfm?page=2401> (last visited Jan. 11, 2019).

⁸⁶ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW), Nov. 10, 1980, 1342 U.N.T.S. 137, https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxvi-2&chapter=26&lang=en.

⁸⁷ To learn more about the Group of Governmental Experts and its inception by the Fifth Review Conference of the High Contracting Parties to the CCW, see Hayley Evans and Natalie Salmanowitz, *Lethal Autonomous Weapons: Recent Developments*, LAWFARE (Mar. 7, 2019, 3:28 PM), <https://www.lawfareblog.com/lethal-autonomous-weapons-systems-recent-developments>.

⁸⁸ AUTONOMY IN WEAPON SYSTEMS, *supra* note 69, at 4.

⁸⁹ *Id.*, para. 8.

⁹⁰ *Id.*, paras. 11-13.

appropriate to consider whether it is possible to program or build mechanisms into the weapon that would reduce the risk of civilian casualties.”⁹¹ In effect, this means the U.S. acknowledges that, although law of war issues typically arise within a particular military operation in real time, the unique character of autonomy bends the timeline for when such issues should be considered back to the point of programming.

In its August 28, 2018 submission to the GGE, the U.S. again emphasized the need to consider LOAC principles like distinction, proportionality, humanity, and military necessity when deciding whether to “develop or deploy an emerging technology in the area of lethal autonomous weapons systems.”⁹² In its January 2019 report on AI and National Security, the Congressional Research Service (CRS) reported that “domain adaptability” presents challenges for militaries when “systems developed in a civilian environment are transferred to a combat environment,” and that these failures are exacerbated when AI systems are deployed at scale.⁹³ Thus the critical juncture for training an autonomous system’s learners to stay within the bounds of the LOAC lies squarely during design when the goals and parameters that guide a learner’s decisions are set.⁹⁴ The design timeframe varies by the particular aspect of technology being developed, and so determining when a judge advocate’s involvement is timely must consider how the risks associated with autonomy render the current system for reviewing LOAC compliance in weapon systems inadequate.

IV. Current Process for Mitigating LOAC Issues is Inadequate

A. Legal Reviews for Weapons

When an agency contemplates buying a weapon, whether building one from scratch or adapting a commercially available variant, the current process requires at least one legal review and, for developmental weapons, an earlier legal review prior to full-scale engineering.⁹⁵ As outlined in

⁹¹ *Id.*, para. 14.

⁹² HUMAN-MACHINE INTERACTION, *supra* note 73, at 4-6.

⁹³ CRS, AI AND NAT’L SECURITY, *supra* note 11, at 33.

⁹⁴ The term “design” is used generically and not tied to acquisition process definitions.

⁹⁵ AP I, *supra* note 70; DoD LAW OF WAR MANUAL, *supra* note 56, at 337 (Discussing requirement for legal reviews of weapons); U.S. DEP’T OF DEFENSE, DIR. 5000.01, THE DEFENSE ACQUISITION SYSTEM para. E1.1.15 (May 12, 2003) (C2, 31 Aug. 2018) [hereinafter DoDD 5000.01]; U.S. DEP’T OF ARMY REG. 27-53, LEGAL REVIEW OF

DoDD 3000.09, the acquisition of LAWs requires two legal reviews: a preliminary legal review prior to formal development, and another legal review prior to fielding.⁹⁶ But these reviews examine a weapon's legality too narrowly and too belatedly.⁹⁷ Apart from providing "weapons reviews," as they are referred to in shorthand, attorneys scrutinize weapons and weapon systems from many angles, like during an acquisition, for example, but only weapons reviews address potential LOAC concerns.⁹⁸

When conducting a weapons review, the legal advisor receives a requirements document, a general description of the weapon, a description of the mission, the desired terminal ballistic effects of the weapon, along with tests and lab studies, if included.⁹⁹ The attorney's review focuses on if the weapon is "illegal *per se*,"¹⁰⁰ that is, whether the weapon is prohibited for all uses, including when the U.S. has agreed to a prohibition. The review also considers "whether the weapon is 'inherently indiscriminate,' i.e., if the weapon is capable, under any set of circumstances and, in particular, the intended concept of employment, of being used in accordance with the principles of distinction and proportionality."¹⁰¹ Distilled further, if a weapon is not prohibited, if it can be aimed, and if its effects can be limited, it would pass legal review.¹⁰²

WEAPONS AND WEAPON SYSTEMS paras. 6(a), (e) (Sept. 23, 2019) [hereinafter AR 27-53] ("[D]evelopment and procurement of weapons and their intended use in armed conflict shall be consistent with the obligations assumed by the United States Government under all applicable treaties, with customary international law . . .").

⁹⁶ DoDD 3000.09, *supra* note 8. Note that in addition to legal reviews, other types of review may be triggered, but only weapons reviews as discussed herein look at LOAC. See, e.g., U.S. DEP'T OF DEFENSE, DIR. 2060.1, IMPLEMENTATION OF, AND COMPLIANCE WITH, ARMS CONTROL AGREEMENTS (Jan. 9, 2001) (C2, Aug. 31, 2018).

⁹⁷ See also *Taming Killer Robots*, *supra* note 22.

⁹⁸ Army Federal Acquisition Regulation (AFARS) 5101.602-2-90 (*Revised* July 20, 2018) [hereinafter AFARS] (Requires contracting officers to obtain legal reviews and consider advice of legal counsel throughout the acquisition process.). Though the AFARS does not include a list of actions requiring legal review, the Air Force Federal Acquisition Regulation Supplement (AFFARS) does, in 5301.602-2 (*Revised* May 25, 2018). For example, when using or applying unique or unusual contract provisions; when actions are likely to be subject to public scrutiny or receive higher-level agency attention; and when issues dealing with licensing, technical data rights, and patents arise.

⁹⁹ AR 27-53, *supra* note 95, para. 6c(2); see Meier, *LAWs Weapons Reviews*, *supra* note 20.

¹⁰⁰ DoD LoW MANUAL, *supra* note 56, para. 6.2.2 (Questions considered in legal review of weapons); AUTONOMY IN WEAPON SYSTEMS, *supra* note 69, at 2.

¹⁰¹ DoD LoW MANUAL, *supra* note 56, para. 6.2.2 (Questions considered in legal review of weapons); AUTONOMY IN WEAPON SYSTEMS, *supra* note 69, at 2.

¹⁰² Though not discussed here, modifications to the weapons review process could provide another avenue for enhanced legal advisor involvement. For example, weapons

Under DoDD 3000.09, only autonomous weapons that use autonomy in new ways trigger (seemingly) additional requirements.¹⁰³ The drone in the sniper example above would have been subjected to senior official approval before formal development, and senior official approval again before fielding.¹⁰⁴ Although DoDD 3000.09 directs rigorous verification and validation (V&V) and testing and evaluation (T&E), from a legal perspective, none of the enhanced measures mandated by DoDD 3000.09 actually require any additional legal scrutiny beyond that already directed by Army Regulation (AR) 27-53 and DoDD 5000.01 for all weapons.¹⁰⁵ All new weapons, whether autonomous or not, may receive a legal review before full-scale development, and must receive one prior to fielding.¹⁰⁶ This means lethal, fully autonomous weapons used in ways never before seen in combat receive the same level of legal scrutiny as the L5 “Ribbon Gun,” a one-time contender to replace the Army’s tried and true M4 carbine.¹⁰⁷ But lethal autonomous weapons are not M4s; LAWs are

reviews for LAWs could examine how the software works and whether it would run afoul of the requirement for an operator to be able to limit its effects. *Taming Killer Robots*, *supra* note 22; *see* Meier, *LAWS Weapons Reviews*, *supra* note 20.

¹⁰³ DoDD 3000.09, *supra* note 8. Category 4c(1) through 4c(3) weapons are human-supervised, used for self-defense (as opposed to offensive use), or are non-lethal. These categories require no additional legal review beyond that required of DoDD 5000.01 for any weapon. DoDD 3000.09 para. 4d states that autonomous weapons intended for use in a manner that falls outside paragraphs 4c(1)-(3) (e.g., fully autonomous lethal weapons for offensive use) require approval of Under Secretary of Defense for Policy (USD(P)); the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)); and the Combined Joint Chiefs of Staff before formal development and again before fielding in accordance with the guidelines in Encl. 3, DoDD 5000.01, and DoDI 5000.02 (now DoDI 5000.02T). In circular fashion, the level of scrutiny required by Encl. 3, DoDD 5000.01, DoDI 5000.02 and DoDI 5000.02T is no different than for defensive and non-lethal categories of autonomous weapons.

¹⁰⁴ DoDD 3000.09, *supra* note 8, para. 4d, encl. 3, para. 1a(5). The senior official review prior to formal development is intended to “ensure that military, acquisition, legal, and policy expertise is brought to bear before new types of weapons systems are used.” HUMAN-MACHINE INTERACTION, *supra* note 73, at 5. Specifically, the review looks at whether five criteria are satisfied. None of the five criteria raise the legal bar. Instead they only mandate a “preliminary legal review,” which follows the same rules as DoDD 5000.01.

¹⁰⁵ DoDD 5000.01, *supra* note 95, para. E1.1.15 requires legal review of “the intended acquisition of weapons or weapon systems.” *Cf.* paras. 1(a)(5) and 1(b)(6) of DoDD 3000.09, *supra* note 8, encl. 3; AR 27-53, *supra* note 95, para. 8.

¹⁰⁶ AR 27-53, *supra* note 95.

¹⁰⁷ Tom Roeder, *The Army May Have Found its Next Rifle in a Colorado Garage*, THE GAZETTE, *reprinted in* TASK & PURPOSE, <https://taskandpurpose.com/army-rifle-ribbon-gun/> (last visited Dec. 6, 2018). The Forward Defense Munitions L5 can shoot up to five rounds of 6mm caseless ammunition at once triggered by an electromagnetic actuator.

characterized by their software, which receives no scrutiny under the current weapons review process.¹⁰⁸ Even if it did, the gates for weapons reviews occur so late in the acquisition process that any LOAC issues arising during design would long have been set and obscured within a LAW's algorithmic black box.

B. Risk Factors Unique to Lethal Autonomous Weapons

The major risk factors rendering the current process for identifying LOAC compliance concerns fall into three categories: what we are pursuing, where we are getting it, and how we are getting it. The following discussion addresses each.

1. *What we are pursuing.*

As discussed in Section II, the technology that enables autonomy in LAWs presents significant obstacles to understanding how it works, even for the experts who create it. The greatest obstacles to fielding LAWs is the inability to test and evaluate them because combat presents near-infinite possibilities for LAWs' decision-making.¹⁰⁹

The black box problem means we cannot know how a learner's model makes decisions, what biases may be trained into the model, how it set about achieving its goals, how the built-in parameters affected its decision-making, and so on. What limited opportunities exist to observe the structure and contents of the black box, the human touch points, exist when

See FORWARD DEFENSE MUNITIONS, <https://www.fdmunitions.com/> (last visited Nov. 21, 2019).

¹⁰⁸ AR 27-53, *supra* note 95, para. 6(b)(1). Software and computer applications that do not directly or indirectly cause death or inflict injury to persons, facilities, or property are excluded from the definition of weapons or weapon systems, and therefore are not subject to review under AR 27-53.

¹⁰⁹ AUTONOMOUS HORIZONS, *supra* note 39 (Regarding testing complex autonomous systems, "Traditional methods [of testing] fail to address the complexities associated with autonomy software. . . . There are simply too many possible states and combinations of states to be able to exhaustively test each one."); *see also* SCHARRE, ARMY OF NONE, *supra* note 10, at 8 (Bradford Tousley, Director of the Tactical Technology Office, DARPA stating, "[T]he technology for autonomy and the technology for human-machine integration and understanding is going too far surpass our ability to test it."); SCHARRE, ARMY OF NONE, *supra* note 10, at 287 (paraphrasing Christof Heyns, Professor of Human Rights Law, former United Nations Special Rapporteur on extra judicial, summary or arbitrary executions from 2010-2016, "He felt it was impossible for programmers to anticipate ahead of time all of the unique circumstances surrounding a particular use of force, and thus no way for an algorithm to make a fully informed contextual decision.").

the model is trained. For the attorneys conducting weapons reviews, the aperture of these already narrow windows is further constricted by time and distance. Relatively far into the process, the LAW's legal reviewer receives from the developer or acquiring agency a prepared batch of information.¹¹⁰ With only the provided documentation, testing, and lab results, the legal advisor must learn how the LAW operates well enough to opine as to its legality.

Even if weapons reviews examined software capabilities,¹¹¹ the information provided must somehow be comprehensive enough to identify issues buried deep within the learner's model *at the points in time* humans imbued the model with injects of human judgment. The attorneys conducting the weapons reviews are separated by time and distance to such a degree that a written request for a weapons review and accompanying enclosures simply cannot produce a picture of how the model was built. Unless a legal advisor versed in the weapons review process participated at key points in a model's training,¹¹² and could enhance and explain information provided in the request for a weapons review, paper is simply insufficient to capture what must be glimpsed in person.¹¹³

2. *Where we are obtaining the technology.*

Compounding our inability to adequately test LAWs, the research and development of their underlying technology occurs in scattered pockets,

¹¹⁰ Army, Navy, and Air Force weapons reviewers' offices are housed within the Pentagon. Telephone interviews of Michael Meier, Special Assistant for Law of War Matters, U.S. Army Office of The Judge Advocate General (Feb. 5, 2019, Oct. 23, 2019) [hereinafter Interview, Meier]; Telephone interview with Aaron Waldo, Lieutenant Commander, Head of Maritime Law, U.S. Navy (Nov. 19, 2018) [hereinafter Interview, Waldo]; Telephone interview of William Toronto, Major, Chief, Operations and Int'l Law Division, Judge Advocate Office, U.S. Air Force (Dec. 18, 2018) [hereinafter Interview, Toronto].

¹¹¹ See AR 27-53, *supra* note 95, para. 6(b)(1).

¹¹² The recommendation is not persistent shadowing, but rather collaborative involvement at agreed-upon points in time based on the expertise of those involved. See discussion *infra* Section V.

¹¹³ See also Michael C. Horowitz, *The Promise and Peril of Military Applications of Artificial Intelligence*, BULLETIN OF THE ATOMIC SCIENTISTS (Apr. 23, 2018), <https://thebulletin.org/2018/04/the-promise-and-peril-of-military-applications-of-artificial-intelligence/> ("AI systems deployed against each other on the battlefield could generate complex environments that go beyond the ability of one or more systems to comprehend, further accentuating the brittleness of the systems and increasing the potential for accidents and mistakes.").

some within DoD but the vast majority outside DoD.¹¹⁴ A LAW will not arrive to the Pentagon's front steps fully formed and ready for purchase.¹¹⁵ Thus DoD will most likely acquire various AI-enabled component technologies from multiple internal and external sources,¹¹⁶ often without knowing how they may ultimately be used, and then layering those on top of other AI technologies.¹¹⁷ Absent access to the design table, we are limited to testing upon acquisition (or seeking to acquire) the technology.

¹¹⁴ See NAT'L DEF. STRATEGY, *supra* note 12; Allen, *supra* note 85. For example, almost all of the technology for the "Architecture, Automation, Autonomy and Interfaces" capability, or A31, a product of Army Futures Command's (AFC) Future Vertical Lift Cross-Functional Team (CFT), came from small businesses and academia. Judson, *supra* note 11. And, Carnegie Mellon's Robotics Institute and National Robotics Engineering Center has partnered with the AFC's AI Task Force. Tadjdeh, *supra* note 14; Lieutenant Colonel Alan M. Apple, *Government Communication with Industry*, ARMY LAW., Iss. 3, 2019, at 44.

¹¹⁵ See Anderson, *supra* note 18, at 388. And they should not. Though enabling a learner to identify potential targets is too removed from the commander's decision to engage them to amount to an inherently governmental function (IGF) this issue requires more discussion. The notion of an IGF is an evolving one, but at its core sets apart activities that are so completely interwoven with the sovereign nature of the U.S. that they may only be performed by federal government personnel. Included among the list of IGFs is "all combat." Combat is a bright line IGF, but even activities closely associated with an IGF may become one. Programming and training an unsupervised learner to distinguish between combatants and non-combatants inches toward what combat is all about, though falls short of specifically choosing targets. See 10 U.S.C. § 2330a (2012); Policy Letter 11-01, Office of Federal Procurement Policy, subj.: Performance of Inherently Governmental and Critical Functions, app. A, para. 4, app. B, paras. 5-1(a)(2), 5-1(a)(1)(ii)(B) (Sept. 12, 2012); Federal Activities Inventory Reform Act of 1998 (FAIR ACT), Pub. L. No. 105-270, § 5, 112 Stat. 2382 (1998); U.S. DEP'T OF DEF., INSTR. 1100.22, POLICY AND PROCEDURES FOR DETERMINING WORKFORCE MIX (Apr. 12, 2010) (C1, Dec. 1, 2017); see also DoDD 3000.09, *supra* note 8, para. 4d (Requiring high level DoD approval prior to formal development of new autonomous weapon technology.).

¹¹⁶ See JESSE ELLMAN, LISA SAMP, & GABRIEL COLL, CTR. FOR STRATEGIC & INT'L STUDIES, ASSESSING THE THIRD OFFSET STRATEGY 14 (Mar. 2017) [hereinafter ELLMAN].

¹¹⁷ DEFENSE INNOVATION BOARD, AI PRINCIPLES: RECOMMENDATIONS ON THE ETHICAL USE OF ARTIFICIAL INTELLIGENCE BY THE DEPARTMENT OF DEFENSE 37 (Oct. 31, 2019) [hereinafter AI PRINCIPLES] ("While some AI applications will be stand-alone solutions, many of the Department's efforts include layering AI solutions."); GARY SHEFTICK, U.S. ARMY, AI TASK FORCE TAKING GIANT LEAPS FORWARD (Aug. 13, 2019), https://www.army.mil/article/225642/ai_task_force_taking_giant_leaps_forward [hereinafter SHEFTICK] ("While the Army AI Task Force didn't necessarily sponsor that work [on fully autonomous cars and disaster clean-up robots] we're befitting from it. . . . We're not starting from zero. . . . That's what's allowing us to go so fast when it comes time to build out a new sensor package for automated recognition. We're able to put those systems together, because they've already solved those problems."); see also Le, *supra* note 43 ("In the Netflix prize, teams from all over the world competed to build the best video recommender system. As the competition progressed, teams found that they

Even if the technology is generated internally, or is industry-developed and internally refined, convincing researchers, scientists, engineers, and developers that collaborating with an attorney in the early stages of designing a learner is actually *beneficial* may require a colossal culture shift in how the role of the attorney, and attorneys themselves, are viewed. This institutional recoiling could hamper any willingness to identify projects raising possible LOAC issues in order to avoid bringing attorneys into the design process, allowing those projects to slip through the cracks until they arrive at the required weapons review gate, too late for preventative legal involvement. Operating within the status quo, to the extent it excludes judge advocates from the design process, results in a detriment to the effective and lawful use of LAWs.

3. *How we are acquiring the technology.*

As discussed above, fully autonomous lethal weapons do not yet exist, but some capabilities do.¹¹⁸ Over time, machine learning capabilities will be layered together with other autonomous capabilities, and then fitted to a physical platform, punctuated throughout by iterations of testing, modifying, and refining the technology specifically for DoD's needs. Along the way, DoD will look to industry for its technology, expertise, and resources to partner with DoD's own technology, expertise, and resources to create the first LAWs.¹¹⁹ To effectuate this exchange, DoD will follow an acquisition strategy, or combination of strategies. Numerous strategies exist, but the traditional process follows the DoDD 5000-series, starting with DoDD 5000.01.¹²⁰ The "5000-series," for what are now called major capability acquisitions, has been derided as slow, ineffective, expensive, risk-averse, and cumbersome for industry and the DoD alike, making it a less attractive route for rapid development, production, and fielding of emerging technologies like LAWs.¹²¹ If DoD wished to develop a LAW from start to finish on its own, including research, development, testing, and evaluation (RDT&E), prototyping,

obtained the best results by combining their learners with other teams', and merged into larger and larger teams. The winner and runner-up were both stacked ensembles of over 100 learners, and combining the two ensembles further improved the results. Doubtless we will see even larger ones in the future.").

¹¹⁸ SHEFTICK, *supra* note 117; Judson, *supra* note 11; Tadjdeh, *supra* note 14.

¹¹⁹ See discussion *infra* Section IV.B.2.

¹²⁰ See DoDD 5000.01 *supra* note 95.

¹²¹ See Bill Greenwalt, *Build Fast, Effective Acquisition: Avoid the System We've Got*, BREAKING DEFENSE (Apr. 25, 2014), <https://breakingdefense.com/2014/04/build-fast-effective-acquisition-avoid-the-system-weve-got/> (Claiming the acquisition system "is really so bad we just need to figure out how to get around it most of the time. . .").

and full-scale production, it would likely follow the 5000-series framework for a major capability acquisition.¹²² This scenario seems unlikely given that the lion's share of research and development for the LAWs' enabling technology will occur outside DoD's purview.¹²³

Other more flexible pathways exist and that flexibility makes them more attractive for acquiring cutting edge technology. For example, Section 804 of the FY16 NDAA established Middle Tier Acquisitions (MTA) for two categories: rapid prototyping and rapid fielding of emerging military needs.¹²⁴ They are intended to be completed quickly and are therefore exempt from the most cumbersome aspects of the 5000-series.¹²⁵ Rapid prototyping requires operational capability within five years from requirement, and rapid fielding means production within six months and complete fielding within five years of a validated requirement.¹²⁶ Another authority flows from Section 2447d of the FY17

¹²² See U.S. DEP'T OF DEFENSE, INSTR. 5000.02T, OPERATION OF THE DEFENSE ACQUISITION SYSTEM 15 (Jan. 17, 2015) (C5, Oct. 32, 2019) [hereinafter DoDI 5000.02T] (Model 6: Hybrid Program B (Software Dominant)). Effective January 23, 2020, the 2015 version of DoDI 5000.02 was renumbered to DoDI 5000.02T (transition), and remains in effect until content is removed, cancelled, or transitioned to a new issuance, and the new DoDI 5000.02 cancels it. See U.S. DEP'T OF DEFENSE, INSTR. 5000.02, OPERATION OF THE ADAPTIVE ACQUISITION FRAMEWORK 3 (23 Jan. 2020). Other acquisition pathways could feed into a major capability acquisition program at different points. See MOSHE SCHWARTZ, CONG. RESEARCH SERV., RL34026, DEFENSE ACQUISITIONS: HOW DoD ACQUIRES WEAPON SYSTEMS AND RECENT EFFORTS TO REFORM THE PROCESS (2014).

¹²³ See discussion *infra* Section IV.B.2.

¹²⁴ Nat'l Def. Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 804, 129 Stat. 726, 882 (2015) [hereinafter FY2016 NDAA]; see also U.S. DEP'T OF DEFENSE, INSTR. 5000.80, OPERATION OF THE MIDDLE TIER OF ACQUISITION (MTA) (Dec. 30, 2019) [hereinafter DoDI 5000.80]; Daniel E. Schoeni, *Still Too Slow for Cyber Warfare: Why Extension of the Rapid Acquisition Authority and the Special Emergency Procurement Authority to Cyber are Half Measures*, 46 Pub. Cont. L.J. 833, 841 (2017) (Discussing the 2005 NDAA, which empowered the Secretary of Defense to waive any provision of acquisition law or regulation that unnecessarily impedes the rapid acquisition of urgently needed equipment.).

¹²⁵ To streamline the process, MTAs are not subject to the Joint Capabilities Integration and Development System (JCIDS) or the programmatic requirements of DoDI 5000.02 or DoDI 5000.02T. DoDI 5000.80, *supra* note 124; see COMBINED JOINT CHIEFS OF STAFF, INSTR. 5123.01H, CHARTER OF THE JOINT REQUIREMENTS OVERSIGHT COUNCIL (JROC) AND IMPLEMENTATION OF THE JOINT CAPABILITIES INTEGRATION AND DEVELOPMENT SYSTEM (JCIDS) (Aug. 31, 2018) (The purpose of which is to enable the JROC to execute its statutory duties to identify, prioritize, and fill capability gaps.); see generally DoDI 5000.02T, *supra* note 122, para. 5a(4), 5b.

¹²⁶ FY2016 NDAA, *supra* note 124, § 804. For a good snapshot of Section 804 MTA and other streamlined acquisition pathways see Pete Modigliani, et al., *Middle Tier*

NDAA, which permits non-competitive follow-on production contracts or other transactions for prototype projects when the project “addresses a high priority warfighter need or reduces the costs of a weapon system.”¹²⁷ Section 2447d also grants Service Secretaries transfer authority, which means they can transfer available procurement funds to pay for low-rate initial production.¹²⁸

Despite its reputation, the 5000-series has its own efficiencies. Department of Defense Directive 5000.71 enables combatant commands to request processing of urgent operational needs, which means a validated request sees a fielded solution within two years.¹²⁹ This process may be used in conjunction with Section 806 MTA.¹³⁰ Section 806’s Rapid Acquisition Authority (RAA) authority used together with DoDD 5000.71 enables warfighter needs to be fulfilled exceptionally quickly.¹³¹

Acquisition and Other Rapid Acquisition Pathways, MITRE (Mar. 2019), <https://aida.mitre.org/wp-content/uploads/2019/03/Middle-Tier-and-Rapid-Acquisition-Pathways-8-Mar-19.pdf>.

¹²⁷ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 2447d 130 Stat. 2259 (2016) (10 U.S.C. 2447d) [hereinafter FY2017 NDAA] (“Mechanisms to speed deployment of successful weapon system component or technology prototypes”).

¹²⁸ FY2017 NDAA, *supra* note 127, § 2447d(b).

¹²⁹ U.S. DEP’T OF DEFENSE, DIR. 5000.71, RAPID FULFILLMENT OF COMBATANT COMMANDER URGENT OPERATIONAL NEEDS (24 Aug. 2012) (C1, 31 Aug. 2018) (Rapid Fulfillment of Combatant Commander Urgent Operational Needs) [hereinafter DoDD 5000.71]; see also DoDI 5000.02T, *supra* note 122, encl. 13 (Urgent Capability Acquisition); U.S. DEP’T OF DEFENSE, INSTR. 5000.81, URGENT CAPABILITY ACQUISITION (31 Dec. 2019). Contract vehicles may add additional efficiencies to the various available rapid acquisition pathways, like Other Transaction Authority (OTA) under 10 U.S.C. § 2371, Pub. L. No. 85-- 568, 72 Stat. 426 (1958), or industry engagement and streamlining efforts like the Commercial Solutions Opening pilot program authorized in § 879 of FY2017 NDAA, *supra* note 127; and the Small Business Innovation Research Program under 15 U.S.C. § 638; see also U.S. SMALL BUS. ADMIN. OFFICE OF INV. AND INNOVATION, SMALL BUSINESS INNOVATION RESEARCH (SBIR) AND SMALL BUSINESS TECHNOLOGY TRANSFER (STTR) PROGRAM POLICY DIRECTIVE (May 2, 2019), https://www.sbir.gov/sites/default/files/SBIR-STTR_Policy_Directive_2019.pdf [hereinafter SBIR/STTR].

¹³⁰ Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 806(c), as amended (10 U.S.C. 2302 note).

¹³¹ Memorandum from Under Secretary of Defense (Acquisition, Technology and Logistics) to Secretaries of the Military Departments, subj.: Acquisition Actions in Support of Joint Urgent Operational Needs (JUONs) attachment, para. 4 (Mar. 29, 2010) (The goal in using SECDEF’s Rapid Acquisition Authority is to achieve contract award within 15 days.). Two of the 5000-series’ most efficient acquisition pathways, DoDI 5000.02T Model 4, Accelerated Acquisition Program, and DoDD 5000.71/DoDI 5000.81 for Urgent Capability Acquisitions, have very short timelines and lower dollar thresholds, making them unlikely for start-to-finish development of LAWs, though could

Though not an acquisition pathway, the DoD may also pursue and adapt commercial technology derived from Independent Research and Development (IR&D) under 10 U.S.C. § 2372.¹³² Independent Research and Development envisions DoD adapting research and development conducted in the commercial sector for defense purposes.¹³³ Under Section 2372, DoD reimburses contractor expenses for research and development conducted outside of the department's control and without direct DoD funding.¹³⁴ Projects must have potential interest to the DoD, and include those that improve U.S. weapon system superiority and promote development of critical technologies.¹³⁵

With all that flexibility and speed, one may wonder where in the process weapons reviews fall. Each acquisition pathway follows its own procedural rules and allows for varying degrees of overlap with other pathways,¹³⁶ but the only one that dictates when weapons reviews must be conducted is the 5000-series. The 2019 version of Army Regulation (AR) 27-53 contemplates rapid acquisition strategies and acquisition of emerging technology and attempts to bridge the gap by requiring a weapons review pre-development for weapons or weapon systems sought through a rapid acquisition process.¹³⁷ Acknowledging the importance of early reviews, AR 27-53, paragraph 6g requires preliminary legal reviews for pre-acquisition category projects, like advanced concept technology demonstrations, rapid fielding initiatives, and general technology development and maturation projects when the technology is “intended to be used . . . in military operations of any kind.”¹³⁸

be used effectively once the technology matures. DoDI 5000.02T, *supra* note 122, model 4; DoDD 5000.71, *supra* note 129, para. 4.2a; *see generally*, DoDI 5000.81, *supra* note 129.

¹³² 10 U.S.C. § 2372 (1990); Defense Federal Acquisition Regulation Supplement (DFARS) 231.205-18 [hereinafter DFARS].

¹³³ 10 U.S.C. § 2372. Given the private sector's investment in AI research and development, the technology for LAWs will likely come from industry, as opposed to from within the federal government. *See* discussion *supra* notes 85, 114, 117. SBIR/STTR contracts are another variant on how DoD partners with industry to rapidly develop emerging technology. *See* SBIR/STTR, *supra* note 129.

¹³⁴ 10 U.S.C. § 2372; *see also* Federal Acquisition Regulation (FAR) 31.205-18 [hereinafter FAR] (definition of IR&D).

¹³⁵ DFARS, *supra* note 132, 231.205-18.

¹³⁶ *See, e.g.*, DoDI 5000.80, *supra* note 124.

¹³⁷ AR 27-53, *supra* note 95, para. 6h.

¹³⁸ AR 27-53, *supra* note 95, para. 6g.

Refocusing the issue, the 5000-series is the least likely path for acquiring LAWs' technology because it is notoriously slow and rigid, but the governing DoD policy on LAWs, DoDD 3000.09, points to the DoDD 5000-series framework for the timing of weapons reviews within the acquisition process. Yet, as discussed in Section III.B, fluid timing of judge advocate involvement is a crucial element to mitigating LOAC issues. This is problematic.

Because LOAC issues raised by LAWs' algorithms arise when the learners are trained, the current acquisition process, regardless of pathway, renders weapons reviews either too late, too narrow, or too disconnected from the various human touch points that allow consideration of targeting issues during the weapon's development.¹³⁹ Those human touch points offer crucial windows for appropriate levels of human judgment to be incorporated into LAWs' algorithmic models and their training—judgment tempered by legal counsel similar to that which commanders receive during military operations.¹⁴⁰ Fortunately, no regulatory hurdles prevent an enhanced legal advisor role, but hesitancy from industry could.

V. Building on Current Efforts to Address Blind Spots

The current legal framework allows for broadening the scope of judge advocate involvement. The services have taken steps to involve judge advocates earlier on in a weapon's development, even before the weapon or its technology enters the acquisition process. But these efforts are just the first steps and blind spots remain. The following section touches on the permissive character of regulations governing legal advisor involvement, some efforts to expand the scope of current legal advisor

¹³⁹ See also *Killer Robots*, *supra* note 9, citing INT'L COMM. OF THE RED CROSS, A GUIDE TO THE LEGAL REVIEW OF NEW WEAPONS, MEANS AND METHODS OF WARFARE 23, <http://e-brief.icrc.org/wp-content/uploads/2016/09/12-A-Guide-to-the-Legal-Review-of-New-Weapons.pdf> (last visited Jan. 31, 2019) [hereinafter ICRC GUIDANCE] (“[R]eviews should take place at the stage of the conception/design of the weapon . . .”).

¹⁴⁰ This article does not discuss implications of LAWs' creating their own problem-solving algorithms and how LAW's own self-modification may impact the need for review once deployed. The DoD uses agile contracting methods for other software-dependent applications, which allow for continuous iterations of updates and modifications while maintaining operator employability. Judge advocate/commander teams should also participate in that process. See U.S. DIGITAL SERV., DIGITAL SERV. PLAYBOOK, <https://playbook.cio.gov> (last visited Dec. 2, 2019) (Explaining how the U.S. Digital Service approaches software development, and the emphasis on agile practices (play 4)).

involvement, where vulnerabilities remain, and how to use existing resources to address them.

A. Getting the right people in the right place.

Generally, those seeking legal advice in carrying out DoD business may readily obtain it.¹⁴¹ The issue is not a lack of legal advisors but not knowing how to or being unwilling to use them. Figuring out how judge advocates add value during design and training of the LAWs' enabling technology opens doors of possibilities but remains an unanswered question, partially because LAWs' technology only exists in incomplete fragments, and partially because lawyer involvement in the earliest stages only occurs on an ad hoc basis, if at all.¹⁴²

Within the acquisition arena, attorneys play important roles throughout the process, but are not tasked with reviewing LOAC concerns in weapon systems.¹⁴³ For instance, when an acquisition is contemplated, legal advisors located within requiring agencies prepare acquisition packages, provide support to contracting units reviewing proposed solicitations, participate as members of acquisition teams offering legal and non-legal counsel, and offer legal advice to source selection decision authorities.¹⁴⁴ Within the Army, many of those attorneys are not co-

¹⁴¹ See, e.g., OFFICE OF THE GENERAL COUNSEL, <https://www.hhs.gov/about/agencies/ogc/index.html> (last visited Nov. 25, 2019); OFFICE OF THE ARMY GENERAL COUNSEL, <https://ogc.altess.army.mil/> (last visited Nov. 25, 2019); THE ARMY JUDGE ADVOCATE GENERAL'S CORPS, <https://www.goarmy.com/jag/about.html> (last visited Nov. 25, 2019).

¹⁴² Interview, Meier, *supra* note 110; see discussion *infra* note 174, Telephone interview of Graham Todd, Chief, Operations Policy and Planning, Judge Advocate's Office, U.S. Air Force (Dec. 18, 2018) [hereinafter Interview, Todd]; see also, DSB, ROLE OF AUTONOMY, *supra* note 14, at 18 (Recommending that "technologists and designers get direct feedback from the operators, [and] the Military Services should schedule periodic, on-site collaborations that bring together academia, government and not-for-profit labs and industry and military operators to focus on appropriate challenge problems.").

¹⁴³ Responsibility for that rests solely with the Special Assistant for Law of War Matters, U.S. Army Office of The Judge Advocate General (OTJAG).

¹⁴⁴ AFARS, *supra* note 98, 5101.602-2-90. Contracting vehicles are as varied as acquisition pathways. Depending on the type of contract vehicle used, attorneys may be involved more or less. For example, the Other Transaction Authority Guide recommends securing "the early participation of subject matter experts such as legal counsel" when awarding an OTA and throughout the OTA process. OFF. OF UNDER SEC'Y OF DEF. FOR ACQUISITION AND SUSTAINMENT, OTHER TRANSACTION AUTHORITY GUIDE sect. II(D)(1) (Nov. 2018), [https://www.dau.mil/tools/t/Other-Transactions-\(OT\)-Guide](https://www.dau.mil/tools/t/Other-Transactions-(OT)-Guide) [hereinafter OTA Guide]; see, e.g., CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S

located with the agency they support; rather they belong to a contracting support unit (e.g. Contracting Support Brigades), a Staff Judge Advocate's Office, or within Army Material Command. Despite their involvement as legal advisors, these attorneys' roles are not especially intended for spotting design or operational issues associated with the LOAC, and they are not physically co-located in the places most likely to encounter them.¹⁴⁵ Their roles in refining requirements for a LAW would be more concerned with accurately describing what the LAW needs to be able to *do*, not *how* the LAW must do it.¹⁴⁶ An attorney assisting with refining an agency's needed capabilities for a LAW could simply include a requirement for LOAC compliance. But the complexity of translating what that actually means—and threading LOAC compliance through programmer, evaluator, and operator—lends itself poorly to simple insertion as a contractual requirement.¹⁴⁷ Furthermore, downstream attorneys reviewing performance of that requirement are as ill-equipped as the weapons reviewer to spot potential flaws or operational defects in how a programmer trained a model to function within the LOAC. Recent efforts to modernize how the Army acquires emerging technology and advances certain types of technology set the stage for an expanded judge advocate role.

The Army's hub of innovation and cutting-edge research resides within Army Futures Command (AFC), headquartered in Austin, Texas,

LEGAL CTR. & SCH., U.S. ARMY, CONTRACT ATTORNEYS DESKBOOK, at 2-13 to 2-24 (2018) (Sample Contract Review Checklist).

¹⁴⁵ Although the substance of an attorney's legal advice could be affected by the nature of the procurement, and their role could evolve to include spotting potential LOAC issues. See FAR, *supra* note 134, 1.102-3; AFARS, *supra* note 98; see Major Andrew S. Bowne, U.S. Air Force, *Innovation Acquisition Practices in the Age of AI*, ARMY LAW., Iss. 1, 2019, at 75 (discussing different roles acquisitions attorneys can play, including understanding the technical possibilities of AI and the ethical and legal implications of such acquisitions).

¹⁴⁶ As applied to LAWs, this would mean its firing feature would receive legal scrutiny, but not the software programming upon which it operates. See Vincent Boulanin, *SIPRI Insights On Peace And Security No. 2015/1, Implementing Article 36 Weapon Reviews In The Light Of Increasing Autonomy In Weapon Systems 2* (Nov. 2015), <https://www.sipri.org/sites/default/files/files/insight/SIPRIInsight1501.pdf>; DoD LOW MANUAL, *supra* note 56, para. 6.2.2 (Questions considered in legal review of weapons).

¹⁴⁷ Which is not to say it is unimportant. A requiring agency's legal advisors (civilian or uniformed) offer tremendous value in the requirements development phase of LAWs. Though the critical timing for spotting LOAC issues in machine learning models occurs early on, ensuring an agency's requirements adequately capture its needs regarding LOAC compliance is no less significant.

with offices scattered throughout the U.S.¹⁴⁸ Judge advocates and civilian attorneys working within AFC already advise its cross-functional teams (CFTs), CCDC research labs, the Artificial Intelligence Task Force (AI TF) and its Applications Lab.¹⁴⁹ The breadth of legal advice they offer remains in its nascent stages, but could include early issue-spotting across the spectrum of legal topics, including LOAC issues.¹⁵⁰ This is one of the locations within the Army most likely to encounter the technology for LAWs in its earlier stages, either by virtue of the Army's own internal research and development, or resulting from some variety of Army-Industry partnership.¹⁵¹ The judge advocates and civilian attorneys within AFC and its subordinate units may be dispatched outside of AFC, including upon industry request, wherever their presence is needed.¹⁵² The vulnerability resides in the assumption that AFC (and sister service equivalents) is an omniscient entity, when AFC is but one agency within DoD with limited resources and capable of seeing only those projects that fall within its broad reach.

To standardize efforts on this issue, DoD should promulgate a consistent, uniformly applicable policy requiring the employment of judge advocates in service of identifying LOAC issues in LAWs. The judge advocate/commander teams should be situated within AFC but mobile and readily available to whomever needs them. Recalling the sniper-targeting drone example from Section II.B, the programmer unfamiliar with the LOAC would doubtlessly also be unfamiliar with its prohibition on targeting those who are *hors de combat*, meaning they are “out of the

¹⁴⁸ ARMY FUTURES COMMAND, <https://www.army.mil/futures#org-about>. Though there are other pockets of innovation outside of AFC. See, e.g. U.S. ARMY RAPID CAPABILITIES AND CRITICAL TECHNOLOGIES OFFICE, <https://rapidcapabilitiesoffice.army.mil/> (last visited 8 Feb. 2020); DEFENSE DIGITAL SERVICE, <https://dds.mil/> (last visited Feb. 8, 2020).

¹⁴⁹ Interview with Darren Pohlmann, Lieutenant Colonel, Deputy Staff Judge Advocate, Army Futures Command (Nov. 13, 2019) [hereinafter Interview, Pohlmann]. Legal advisors support other federal and non-federal entities conducting research in this area as well, like DARPA and the Massachusetts Institute of Technology (MIT).

¹⁵⁰ *Id.* These attorneys are able to work with the Army's OTJAG's Special Assistant for Law of War Matters, Mr. Michael Meier, who is solely responsible for conducting the Army's weapons reviews.

¹⁵¹ See ARMY FUTURES COMMAND, <https://www.army.mil/futures#org-about> (last visited Nov. 25, 2019) (“Army Futures Command leads a continuous transformation of Army modernization in order to provide future warfighters with the concepts, capabilities and organizational structures they need to dominate a future battlefield.”)

¹⁵² Interview, Pohlmann, *supra* note 149.

fight.”¹⁵³ It takes little imagination to envision a scenario where a sniper exhibits the same qualities as an unconscious soldier lying motionless aside his weapon, a civilian hunter awaiting a clear shot, or a medic rendering aid to a fallen comrade. Each may appear to be laying in a prone position, camouflaged, motionless, isolated, and aiming a weapon in a particular direction, yet only the sniper would be a valid target.

Training a learner’s model to identify the nuances of what makes the sniper’s legal status different—and thus subject to attack—requires both a firm understanding of the law that governs when one is out of the fight and the characteristics, behavior and tactics employed by one who is fairly in it. Put another way, the model must set a sniper apart from a teenager hiding with a paintball gun. The experienced operational commander (or former operator) would understand these characteristics and be able to articulate them so a programmer could train the model to search for and recognize them. The judge advocate versed in dispensing operational advice would complement the commander’s tactical expertise with legal perspective, thus adding dimension and detail to the programmer’s understanding, ergo the model’s understanding, of the LOAC. Lethal autonomous weapons’ models are simply extensions of humans’ prediction and problem-solving models; they both need multiple sources of “expertise” in developing their decision-making. The entity within the Army with attorneys best-situated to team up with commanders and offer their expertise at the critical time is AFC.

While judge advocates offer the advantages of training, experience, and education,¹⁵⁴ they are not the only attorneys able to provide such

¹⁵³ When *hors de combat*, a person must be treated humanely and may not be subject to attack. The phrase is used in Common Article 3 of all four 1949 Geneva Conventions, see e.g., GC I, *supra* note 68, art. (3)(1), though not defined until 1977 in AP I, *supra* note 70, art. 41. The LoW MANUAL defines the following persons as *hors de combat* when they “abstain from any hostile act and do not attempt to escape: persons in the power of an adverse party; persons not yet in custody, who have surrendered; persons rendered unconscious or otherwise incapacitated by wounds, sickness, or shipwreck; and persons parachuting from aircraft in distress.” DoD LoW MANUAL, *supra* note 56, para. 5.9.

¹⁵⁴ Determining which judge advocates, DoD civilian attorneys, and commanders are best suited to advise warrants additional discussion, though being possessed of significant deployment/operational experience applying the LOAC, and familiarity with the concepts of machine learning would be necessary. The FY2020 NDAA directs the Secretary of Defense to develop an education strategy for servicemembers in “relevant occupational fields on matters relating to artificial intelligence.” The curriculum includes topics on software coding, artificial intelligence decisionmaking via machine learning and neural

support. The DoD abounds with highly capable civilian attorneys and those with prior service as judge advocates across all services. Their expertise and experience with military operations and the acquisitions process provides a valuable resource. On the issue of whether the attorney must be conversant in coding, a familiarity with the concepts would be desirable, but the emphasis should be instead on collaborating with the various experts designing the technology, which requires communication and interpersonal skills and a well-rounded support network as much as anything else.¹⁵⁵

B. Doing the right things.

The role of the judge advocate/commander or operator team should be in assisting the engineers, scientists, and programmers build LOAC durability into the deep learning algorithms' architecture, leveraging the human touch points, so that when a commander or operator manipulates the LAWs' various capabilities and constraints, whatever machinations take place within the black box also stay within the bounds of the LOAC.¹⁵⁶ As a practical matter, a LAW is useless unless a commander can reliably control it. Knowing that she or he is accountable for the foreseeable consequences of its behavior, a commander contemplating using a LAW that she or he does not understand, would simply bench it.¹⁵⁷ Outwardly, a commander experiences a model's training through its performance and the LAW's operator interface, which is the means by which the commander "makes informed and appropriate decisions in

networks, and ethical issues. The practice of law should be a "relevant occupational field." FY2020 NDAA, *supra* note 14, § 256.

¹⁵⁵ See e.g., MISSION COMMAND DEVELOPMENT INTEGRATION DIRECTORATE (CDID) BATTLE LAB, <https://usacac.army.mil/organizations/mccoe/cdid> (last visited Nov. 25, 2019), which supports AFC and other agencies.

¹⁵⁶ Le, *supra* note 43 ("There is no sharp frontier between designing learners and learning classifiers; rather, any given piece of knowledge could be encoded in the learner or learned from data. So machine learning projects often wind up having a significant component of learner design, and practitioners need to have some expertise in it.")

¹⁵⁷ DSB, ROLE OF AUTONOMY, *supra* note 14, at 11 ("[A]utonomous systems present a variety of challenges to commanders, operators and developers . . . these challenges can collectively be characterized as a lack of trust that the autonomous functions of a given system will operate as intended in all situations."); see also Michael Meier, *Lethal Autonomous Weapons Systems – Is It the End of the World as We Know It – or Will We Be Just Fine?* in COMPLEX BATTLESPACES: THE LAW OF ARMED CONFLICT AND THE DYNAMICS OF MODERN WARFARE (Christopher M. Ford & Winston S. Williams eds., 2018).

engaging targets.”¹⁵⁸ Thus, the interface provides a critical means for the commander to set mission-specific parameters on the LAW. A recent study by the Combat Capabilities Development Command (CCDC) Army Research Lab (ARL) examined what it takes for a human to trust a robot.¹⁵⁹ The research team found that soldiers reported lower trust after seeing a robot commit an error, even when the robot explained the reasoning behind its decisions. The lack of trust endured, even when the robot made no more errors. The heart of the issue is trust, which means those responsible for designing LAWs’ deep learning models must not only have a keen awareness of commanders’ real-time operational needs but also how to translate those needs through the operator interface into a LOAC-resilient model.¹⁶⁰

To this end, like in the sniper-targeting drone example discussed above, a judge advocate/commander team would provide real-world operational scenarios, offer insights on the interplay between targeting decisions and the LOAC, theater-specific rules of engagement and policy considerations, and explore how different options built into the operator interface could control for varying levels of risk. The team could also assist with ensuring the machine and human share the same objective, and that they are able to adjust in unison as circumstances change.¹⁶¹ Related to this concept is understanding each other’s “lanes” or in other words, the machine and human knowing the limitations of the others’ decision capabilities, and how that may change as objectives change.¹⁶² Integrating operational realities into a learner’s model means they must be taught, and what better teachers than those who bear the responsibility in real life?

¹⁵⁸ DoDD 3000.09, *supra* note 8, para. 4a(3).

¹⁵⁹ ARMY RESEARCH LABORATORY PUBLIC AFFAIRS, WHEN IT COMES TO ROBOTS, RELIABILITY MAY MATTER MORE THAN REASONING (Sept. 25, 2019), https://www.army.mil/article/226681/when_it_comes_to_robots_reliability_may_matter_more_than_reasoning.

¹⁶⁰ See ELLMAN, *supra* note 116, at 16 (Lieutenant General (Ret.) Robert Schmidle, USMC, and former Principal Deputy Director of the Office of Cost Assessment and Program Evaluation (CAPE) emphasized this point: “[I]f you want decision-makers to trust the algorithms you need those decision-makers to be involved in, and capable of understanding, the development of those algorithms, because they are not going to necessarily be involved in the real-time decisions that the algorithms would make.”).

¹⁶¹ CRS, AI AND NAT’L SECURITY, *supra* note 11, at 35 (Referring to the concept of *goal alignment*).

¹⁶² CRS, AI AND NAT’L SECURITY, *supra* note 11, at 35 (Referring to the concept of *task alignment*).

The DoD has mandated legal advice for all operational decision-makers and offers in-theater judge advocates to dispense it, but judge advocates offer more. They bring to the table critical thinking skills and a diversity of thought that is important to the collaborative process, and is exactly what they offer commanders in operational settings.¹⁶³ Viewing the lawyers as teammates as opposed to ivory tower gate keepers maximizes the skill set they possess. Providing the same access for researchers, programmers, and engineers as the military offers operational commanders just means the judge advocate's place of duty changes; their advice is required at the design table, not just while deployed.¹⁶⁴

C. At the right time.

Ensuring the right people are in the right place at the right time hinges on when DoD gets its first opportunity to examine autonomous technology. If the first opportunity comes as part of the acquisition process, the Federal Acquisition Regulation (FAR) and its supplements, applicable to the vast majority of acquisitions, permit early and ongoing legal involvement beyond legal reviews.¹⁶⁵ As discussed above, for developmental weapons or weapon systems, AR 27-53 provides that initial reviews may be made at the earliest possible stage, and pre-acquisition technology projects intended for military use must receive a preliminary legal review.¹⁶⁶

¹⁶³ Telephone Interview with William Gamble, General Counsel, Defense Digital Service (Oct. 3, 2019).

¹⁶⁴ Additional safeguards have been proposed. Meier, *LAWS Weapons Reviews*, *supra* note 20; Ford, *Autonomous Weapons*, *supra* note 20, at 26; *Killer Robots*, *supra* note 9 (recommending involving lawyers early in the development process); ICRC GUIDANCE, *supra* note 139 (suggesting need to conduct reviews during concept and design); Larry Lewis, *Insights for the Third Offset*, CNA (Sept., 2017), https://www.cna.org/CNA_files/PDF/DRM-2017-U-016281-Final.pdf; Larry Lewis *Redefining Human Control*, CNA (Mar. 2018), https://www.cna.org/CNA_files/PDF/DOP-2018-U-017258-Final.pdf.

¹⁶⁵ FAR, *supra* note 134; DFARS, *supra* note 132, 203.170 (discussing legal review pre-award of contract); AFARS, *supra* note 98, 5101.602-2-90.

¹⁶⁶ AR 27-53, *supra* note 95, paras. 6e, 6g. Worth noting, though outside the scope of this discussion, is the requirement to obtain a weapons review if a weapon or weapon system changes after fielding “such that it is no longer the same system or capability described in the legal review request.” This includes substantial changes to its intended use or anticipated effects. *Id.* at para. 6f. This further complicates the black box problem discussed *supra* Section II if para. 6f is interpreted to mean that LAWs must come equipped with a mechanism to determine when its machine learning models have changed to such a degree that they are no longer the same system or capability, or that

The Navy counterpart to AR 27-53, Secretary of the Navy Instruction 5000.2E, requires that potential acquisition or development of weapons receives a legal review during “the program decision process.”¹⁶⁷ The Air Force equivalent, Air Force Instruction 51-401, requires a legal review “at the earliest possible stage in the acquisition process, including the research and development stage.”¹⁶⁸ But in practice, across all services, actual legal advisor involvement more closely aligns with the baseline requirements discussed in Section IV.A,¹⁶⁹ meaning early involvement of legal advisors to spot LOAC issues rarely occurs.

In an effort to integrate judge advocates earlier into the process *pre*-acquisition, the Air Force includes judge advocates as members of cross-functional acquisition teams, advising within an assigned portfolio, like F-15s, Cyberspace, or Intelligence, Surveillance, and Recognizance (ISR).¹⁷⁰ Air Force judge advocates also provide direct legal support to the research labs. Of the ten research lab directorates, three have in-house legal counsel and the remaining satellite locations receive support from a nearby legal office.¹⁷¹ If LOAC-specific issues arise, servicing legal advisors send them through their channels to a single office at the Air Force Judge Advocate’s Office (AF JAO).¹⁷²

In the Navy, the judge advocates performing weapons reviews engage in outreach with program managers, educating them about their responsibilities to get legal reviews and involve legal advisors in the

their intended use changes beyond that described in the initial request for a weapons review.

¹⁶⁷ U.S. DEP’T OF NAVY, SEC’Y OF NAVY INSTR. 5000.2E, DEP’T OF THE NAVY IMPLEMENTATION AND OPERATION OF THE DEFENSE ACQUISITION SYSTEM AND THE JOINT CAPABILITIES INTEGRATION AND DEVELOPMENT SYSTEM 1.6.1 (Sept. 1, 2011) [hereinafter SECNAVINST 5000.2E].

¹⁶⁸ U.S. DEP’T OF AIR FORCE, INSTR. 51-401, THE LAW OF WAR para. 2.5.2.1 (Aug. 3, 2018).

¹⁶⁹ Interview, Meier, *supra* note 110; Interview, Waldo, *supra* note 110; Interview, Toronto, *supra* note 110. Note that the Navy conducts legal reviews for Marine Corps’ weapons. SECNAVINST 5000.2E, *supra* note 167; Telephone interview with Joe Rutigliano, Branch Head, International and Operational Law Branch, Judge Advocate Division, U.S. Marine Corps (Feb. 11, 2019).

¹⁷⁰ Interview of Andrew Bowne, Major, U.S. Air Force, Associate Professor, Contract and Fiscal Law Dep’t, The Judge Advocate Gen.’s Legal Ctr. and Sch., in Charlottesville, Va. (Jan. 27, 2019) [hereinafter Interview, Bowne].

¹⁷¹ Telephone interview with Jonathan Compton, Attorney Advisor, Headquarters, Air Force Research Lab, Wright-Patterson Air Force Base (Dec. 12, 2018).

¹⁷² Telephone interview with Jonathan Compton, Attorney Advisor, Headquarters, Air Force Research Lab, Wright-Patterson Air Force Base (Dec. 12, 2018); Interview, Toronto, *supra* note 96.

acquisition process.¹⁷³ Legal advisors are also physically located in or near some research labs, though their support does not envision addressing LOAC concerns.¹⁷⁴ For all services, unless the researchers, programmers, and engineers know to ask, LOAC issues may well go unnoticed until it is too late to fix them.¹⁷⁵ A DoD policy could change that.

As discussed in Section IV.B.2, DoD's first opportunity to examine autonomous technology will likely arise from outside DoD. This scenario leads to the greatest challenge and most promising solution to mitigating the various risk factors bearing on LAWS and the LOAC: access. Specifically, whether industry is willing to bring DoD into its design process.

The DoD has been directed to engage with industry. In his March 2018 memorandum the Deputy Secretary of Defense encouraged cooperation with industry: "While we must always be mindful of our legal obligations, they do not prevent us from carrying out our critical responsibility to engage with industry."¹⁷⁶ Congress goes beyond encouragement and directs the DoD to "accelerate the development and fielding of artificial intelligence capabilities [and to] ensure engagement with defense and private industries."¹⁷⁷ In Section 238(c)(2)(H) of the FY2019 NDAA, Congress states that designated officials "shall work with appropriate officials to develop appropriate ethical, legal, and other

¹⁷³ Interview, Waldo, *supra* note 110.

¹⁷⁴ *Id.*

¹⁷⁵ Two examples of ad hoc requests for judge advocate support illustrate the need and value added by involving legal advisors early in the research, development, testing, and evaluation process. Example 1: Researcher from an Air Force Research Lab asked about legality of biological research, which required higher level review prior to proceeding. The question only came up because researcher thought to ask. Interview, Toronto, *supra* note 110. Example 2: Scientist at research lab asked for legal support during software development testing. Legal advisor went to lab for a few days, observed, exchanged feedback on designing the algorithms, and how the machine would behave. This request only came up because scientist thought to ask, but the collaborative process was already in place and ongoing between the requirements owner and the lab. Interview, Todd, *supra* note 142.

¹⁷⁶ See Memorandum from Deputy Secretary of Defense to the Secretaries of the Military Departments, et al., subj.: Engaging with Industry (Mar. 2, 2018) [hereinafter Engaging with Industry].

¹⁷⁷ FY2019 NDAA, *supra* note 14, §§ 238(c)(2)(A)-(B), 238(c)(2)(H); Engaging with Industry, *supra* note 176, at 2 ("The Department's policy continues to be that representatives at all levels of the Department have frequent, fair, even, and transparent dialogue with industry on matters of mutual interest . . ."); NAT'L DEF. STRATEGY, *supra* note 12. Other recent initiatives support this endeavor. See AI TASK FORCE, *supra* note 14; DoD AI STRATEGY, *supra* note 5.

policies for the Department governing the development and use of artificial intelligence enabled systems and technologies in operational situations.”¹⁷⁸ (emphasis added). Industry engagement is not only permitted, it is mandated.¹⁷⁹

Though DoD may desire industry engagement, that willingness is not necessarily mutual. Barriers include mistrust of DoD, more lucrative and less cumbersome options elsewhere, resistance to supporting DoD’s mission, lack of awareness about opportunities to work with DoD, and lack of understanding how to access those opportunities.¹⁸⁰ The DoD has taken strides to address the latter four concerns by creating an approachable physical presence in tech hubs like the Army Applications Lab in Capitol Factory, Austin, Texas, SOFWERX in Tampa, Florida, the Air Force’s AFWERX innovation hubs in Washington, D.C., Las Vegas, and Austin, and the AI Lab in Pittsburgh, Pennsylvania. It has also expanded opportunities for quick turnaround payoffs with on-the-spot contracts awarded during industry engagement events, like the Air Force’s Pitch Days, the Navy’s Small Business Innovation and Small Business Technology Transfer (SBIR/STTR) and NavalX, and the Army’s Innovation Days.¹⁸¹ Reverse Industry Days foster transparency and encourage communication by offering industry a chance to share its

¹⁷⁸ FY2019 NDAA, *supra* note 14, § 238(c)(2)(H); *see also* DoD LOW PROGRAM, *supra* note 69; NAT’L DEF. STRATEGY, *supra* note 12 (Prioritizing investment in advanced autonomous systems).

¹⁷⁹ Hesitancy for increased legal advisor participation may stem from ethical objections to DoD members helping private companies develop new technology or for fear of giving one company an unfair competitive advantage over another. 5 C.F.R. § 2635.702 (1997); U.S. DEP’T OF DEF., DIR. 5500.07-R, JOINT ETHICS REGULATION 3-209 (Nov. 17, 2011); FAR, *supra* note 134, 9.505(2)(b), 3.104-4(a) (One of the main principles for avoiding conflicts in acquisitions is preventing unfair competitive advantage . . .”). However, the Office of Federal Procurement Policy’s “myth-busting” series allays such fears. OFFICE OF MGM’T & BUDGET, OFFICE OF FEDERAL PROCUREMENT POLICY, <https://www.whitehouse.gov/omb/management/office-federal-procurement-policy/> (last visited July 8, 2019).

¹⁸⁰ CONG. RESEARCH SERV., R45521, DEP’T OF DEF. USE OF OTHER TRANSACTION AUTHORITY 16 (Feb. 22, 2019); FUTURE OF LIFE INSTITUTE, OPEN LETTER ON AUTONOMOUS WEAPONS (July 28, 2015), <https://futureoflife.org/open-letter-autonomous-weapons/?cn-reloaded=1>.

¹⁸¹ Brenda Marie Rivers, *Will Roper: Air Force Expanding ‘Pitch Day’ Across US*, EXECUTIVE GOV (Mar. 18, 2019), <https://www.executivegov.com/2019/03/will-roper-air-force-expanding-pitch-day-across-us/>; U.S. DEP’T OF THE NAVY, NAVY SBIR/STTR HOME, <https://www.navysbir.com> (last visited Feb. 8, 2020); U.S. DEP’T OF THE NAVY, NAVALX, <https://www.secnnav.navy.mil/agility/Pages/default.aspx> (last visited 8 Feb. 2020); U.S. DEP’T OF THE ARMY, ARMY APPLICATIONS LABORATORY, <https://aal.army.innovationdays/> (last visited Feb. 8, 2020).

practices and lessons learned with the military to improve its processes to secure more industry collaboration.¹⁸²

Pitch Days, Innovation Days, Industry and Reverse Industry Days, flexible acquisition strategies discussed in Section IV.B.3, and ease of access to DoD's storefront-type locations help nudge forward industry-DoD cooperation. But the intractable problem remains; fostering trust within industry that DoD's participation during design does not equate to giving away the crown jewels. For many companies, guarding the inner workings of their processes and technology is the same as guarding the viability of the company itself. Allowing an unknown government employee to observe, poke, prod, and question is simply unthinkable. Overcoming that intransigence means taking consistent, measured steps to incentivize access.

This can and should be accomplished from many angles. Among them, tying design process access to money by making it a condition of contract or other transaction award, with an emphasis on those agreements that entail researching, designing, and developing autonomous capabilities that could later be used in a LAW.¹⁸³ As seen in DoD technology challenges, like the Defense Advanced Research Projects Agency's (DARPA) robotics challenge, commercial start-ups placed a premium in "establishing themselves as the market standard" far and above their own investments in their technology. Commercial firms are willing to trade technology, or access to it, in exchange for notoriety and DoD adoption.¹⁸⁴ Another is to start with small successes, sending judge advocates to participate in isolated lower-threat projects. Judge advocates already

¹⁸² U.S. Air Force District of Washington Contracting Officers, Reverse Industry Day, at slide 2 (Apr. 8, 2019), <https://govtribe.com/opportunity/federal-contract-opportunity/reverse-industry-day-fa701419reverseindustryday#>; U.S. Army Contracting Command Orlando, Reverse Industry Day Engagement, at slides 4-5 (Nov. 14, 2017), https://acc.army.mil/contractingcenters/acc-orl/palt_files/industryref/ReverseIndustryDayEngagementRIDENov2017.pdf.

¹⁸³ Contracting professionals must abide by rules designed to avoid conflicts and unfair competitive advantage. FAR, *supra* note 134, 15.201, 15.306. Additionally, the Defense Trade Secrets Act of 2016, Pub. L. 114-153, 130 Stat. 376 (2016) and Procurement Integrity Act, 41 U.S.C. § 2101 et seq. (2011); FAR, *supra* note 134, 3.104, limit disclosure of protected industry information. Given their current responsibilities and training, judge advocates are especially well-matched to the task of protecting the proprietary information of the companies they engage and ensuing their interactions are "fair, even, and transparent." Engaging with Industry, *supra* note 175, at 2; *see also* Memorandum from The Judge Advocate General to Judge Advocate Legal Services Personnel, subj.: Guidance for Strategic Legal Engagements (Sept. 8, 2016).

¹⁸⁴ ELLMAN, *supra* note 116, at 14.

support industry outreach efforts, as discussed in Section V.A. Literally, they are physically present when private sector innovators hawk their creations hoping for a deal with DoD.¹⁸⁵ Leveraging that presence with training, a strong support network, and a clear objective (access to the design process) advances DoD's interests for early involvement in the design of learners whose future calling may be within a LAW.

Most importantly, DoD needs a clear and consistent policy, announced to all potential industry partners, that its objective in pursuing machine learning autonomy is to actually be able to use it, which means minimizing the risk that vulnerabilities, indiscernible during testing, are smuggled inside the black boxes we buy. And to achieve that, the policy should encourage industry to invite judge advocate/commander teams as collaborators and facilitators as early as possible to identify and prevent possible LOAC issues before they arise. Whenever feasible, when DoD contemplates acquiring machine learning technology, the request for proposals should include a requirement that DoD gets the intellectual property (IP) and data necessary for weapons reviews.¹⁸⁶ The potential contractor and DoD could negotiate a special license for the pertinent data required for the sole and express purpose of conducting weapons reviews, accounting for the need to recertify the license as the learner modifies itself over time.

These efforts could avoid costly delays in later acquisition stages, provide the private developers a means to keep their valuable IP and data rights yet allow DoD the access it needs to help engender trust and reliability for the end user, and prevent mishaps and other operational challenges during operation.¹⁸⁷

VI. Conclusion

The complexity of how LAWs' enabling technology learns, combined with its industry origins and unpredictable uses, and the rapid, risk-

¹⁸⁵ Interview with Melissa Fowler, Major, Acquisitions Program Attorney, U.S. Air Force (Dec. 4, 2019) (Discussing SBIR contracts, and participation as a judge advocate in Pitch Day, Nov. 5, 2019, San Francisco, CA).

¹⁸⁶ Interview with Janet Eberle, Lieutenant Colonel, Special Counsel, SAF/GCQ, U.S. Air Force (Nov. 12, 2019).

¹⁸⁷ See, e.g. DSB, *ROLE OF AUTONOMY*, *supra* note 14, sect. 1.4.3 (Discussing challenges encountered by unmanned systems operators resulting from rapid deployment of prototype and developmental capabilities and the pressures of conflict.).

absorbing acquisition pathways employed to obtain it require adjusting the current process for identifying and addressing potential LOAC issues in weapon systems. Though weapons reviews serve an important and necessary function, and rigorous testing will ferret out many of the problems, they should not be the only safeguards against the unique LOAC issues posed by autonomy in weapon systems. Relying solely on weapons reviews and ad hoc requests for legal support fails to consider how autonomy transforms battlefield LOAC concerns into laboratory LOAC concerns, and ignores the limitations of arms-length legal reviews. Because no legal barriers exist to judge advocates' enhanced participation in the design process, the DoD should take immediate action to incentivize the use of judge advocate/commander teams by commercial developers working on machine learning capabilities, and DoD organizations should be required to request it. Project managers, cross-functional team members, DoD employees engaging with industry, and anyone participating in projects to design machine learning models for DoD applications should be empowered to identify those human touchpoints when a judge advocate should be present. Lethal autonomous weapons will be commanders' tools, intended to assist them achieve mission success, and judge advocates trusted legal advisors. As the military prepares for LAWs to assume their inevitable place in formation, changing the fundamental nature of war,¹⁸⁸ leveraging the judge advocate's historical role as combat advisors is the right place to start.¹⁸⁹

¹⁸⁸ Aaron Mehta, *AI Makes Mattis Question "Fundamental" Beliefs about War*, C4ISRNET (Feb. 17, 2018), <https://www.c4isrnet.com/intel-geoint/2018/02/17/ai-makes-mattis-question-fundamental-beliefs-about-war/>.

¹⁸⁹ FREDERIC L. BORCH, *JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI* (2001).

