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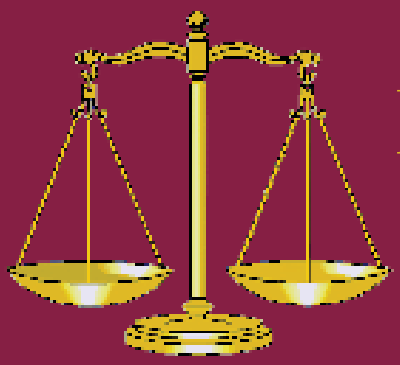

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Articles

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Since its inception in 1958 at The Judge Advocate General's School, U.S. Army, in Charlottesville, Virginia, the *Military Law Review* has encouraged a full and frank discussion of legislative, administrative, and judicial principles through a scholarly examination of the law and emerging legal precepts. In support of that mission, the *Military Law Review* publishes scholarly articles that are relevant to, and materially advance, the practice of law within the military.

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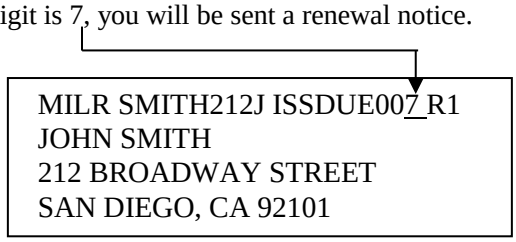

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MILITARY LAW REVIEW

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TARGETING MR. ROBOTO: DISTINGUISHING HUMANITY IN BRAIN-COMPUTER INTERFACES

Commander Guy W. Eden[*]

The body cannot live without the mind.[1]

I. Introduction

Militaries have long recognized the importance of influencing human perception and decision making in warfare.[2] These activities, categorized

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[1] THE MATRIX (Warner Brothers 1999).

[2] Conrad Crane, *The United States Needs An Information Warfare Command: A Historical Examination*, WAR ON THE ROCKS (June 14, 2019),

as information warfare under current United States (U.S.) military doctrine, aim in part at affecting the cognitive processes within the human mind.[3] Yet, activities in information warfare are limited in their ability to have a *direct* effect on the human brain; instead information warfare aims to influence or manipulate the information environment or cyberspace with the goal of having an impact on the human end user.

But consider a situation where the intermediary technology between the influencer and the human consumer allows for direct access to the consumer's brain and cognitive process. Here, information warfare could be conducted directly on the human target. Going a step further, if there was a direct interface between man and machine, would it be possible to do more than simply manipulate information or perception? What if it were possible to cause physical harm, or even kill, through the information environment? One piece of science fiction-feeling technology in existence today that could make this possible is the brain-computer interface (BCI), which enables the human brain to directly interact with a computer or information system.[4]

In his 2014 article on applying international humanitarian law (IHL), otherwise known as the law of armed conflict, to future technology, Eric Jensen notes the importance of anticipating legal stress created by new technology.[5] Jensen then highlights the vital role IHL plays in signaling acceptable state practice in relation to new capabilities and technology. He does this through review of a new weapon's compliance with IHL, both as it is developed and as it is employed during warfare.[6] While such signaling certainly addresses the use of the new technology, it also raises a separate, bedeviling question pertinent to BCI: how do we apply IHL in

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https://warontherocks.com/2019/06/the-united-states-needs-an-information-warfare-command-a-historical-examination/.

[3] JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, INFORMATION OPERATIONS I-1 – I-3 (20 Nov. 2014). *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 100-6, INFORMATION OPERATIONS 2-2 (27 Aug. 1996) This expired Army Field Manual provides a wholistic definition of Information Warfare. This definition fully takes into consideration both the human and technological aspects of Information Operations.

[4] Jerry J. Shih et al., *Brain-Computer Interfaces in Medicine*, 87 MAYO CLINIC PROC. 268, 270-73 (2012), https://www.mayoclinicproceedings.org/article/S0025-6196(12)00123-1/pdf [hereinafter Shih et. al.].

[5] Eric Talbot Jensen, *The Future of the Law of Armed Conflict: Ostriches, Butterflies, and Nanobots*, 35 MICH. J. INT'L L. 253, 256 (2014), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1061&context=mjil [hereinafter Jensen].

[6] *Id.*

the other direction to target this technology once it is militarized and attached to a soldier's brain? On its face, the question appears straightforward—a BCI used by an adversary to further military operations during hostilities should be targetable under IHL. But looking deeper, the incredible vulnerability of the human brain demands a more nuanced discussion.

Highlighting part of the targeting challenge presented by BCI, consider the direct connection and interaction it creates between the brain and a computer.[7] A networked computer, what we understand to be part of cyberspace, has been identified as the BCI's greatest vulnerability.[8] Certainly, such vulnerability would be exploited in a military context. Thus, it is natural to consider how the BCI, and by extension the human brain, fits into our understanding of the man-made domain of cyberspace. Further, after peeling back how a BCI is designed, its different variations, and its battlefield functions, we are presented with several variables affecting application of IHL targeting principles in countering the technology.

Therefore, in the spirit of the forward thinking advocated by Jensen, this article anticipates and assesses the challenges of targeting BCI. Several factors, both external to the IHL regime and within IHL itself, apply to this assessment. These include our conception of cyberspace, consideration of whether a BCI-enhanced brain remains a person or becomes an object for purposes of IHL targeting, and arguments for the expansion of weapons treaties or international human rights law (IHRL) to address BCI. The article concludes that despite BCI furthering the convergence of man and machine and philosophical discomfort over the brain's place in cyberspace, current application of IHL to the cyber domain offers the most effective model to handling the challenge of BCI.

To accomplish the analysis, this article first provides a general discussion and overview of some existing BCI technology, potential military applications, and BCI vulnerabilities. Next, it describes concerns raised in the newer academic field of neuroethics over the development of

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[7] Shih et al., *supra* note 4, at 268, 270-73.

[8] *See* CHAIRMAN, JOINT CHIEFS OF STAFF, JOINT PUB. 3-12, CYBERSPACE OPERATIONS I-1 – I-4 (8 Jun. 2018) (discussing the make-up and components of cyberspace). *See also* Marcello Ienca and Pim Haselager, *Hacking The Brain*: *Brain-Computer Interfacing Technology and The Ethics of Neurosecurity*, 18 ETHICS AND INFO. TECH. 117 (Apr. 16, 2016) [hereinafter Ienca and Haselager].

BCI, including suggestions that international law be modified in response to this technology. Addressing these concerns, the article then argues that our current understanding of IHL's application to targeting through cyberspace applies effectively to BCI. This argument is buttressed by an exploration of BCI's place in the current conception of the warfighting domain of cyberspace, focusing on whether the brain remains a biological system or whether its function in a cyber system changes the brain's status to an object for the purpose of applying IHL targeting principles. Concluding that the best approach is to treat the brain as what it is, a biological portion of human body, allows IHL to apply to targeting BCI without the additional developments in international law advocated by some neuroethicists.

II. Brain-Computer Interface (BCI)

While BCI technology is very real—like many other newer technological breakthroughs—science fiction artists offer insight to the potential, and peril, of the technology as its capability increases and becomes more ubiquitous. For example, consider a world where everyone is equipped with a BCI implanted into their brains that enables access to a pervasive cloud database. This database would be capable of storing recordings of everything that a person sees or hears. In addition, the implant could access and provide unlimited data directly to the brain and be utilized to have a conversation or transact business simply by thinking it. This type of technology forms the background of a recent movie called *Anon*.[9]

While many would see this capability as wonderful, *Anon* provides a glimpse of the dangers this type of technology creates in granting direct access to a person's brain and—by extension—their conscious experience. In the movie, a hacker learns how to manipulate the database and, more importantly, the minds of those who are connected to it. The hacker is able to change what individuals see and hear, at one point causing the protagonist in the film to pull his car into busy traffic after making him perceive the road to be clear. The hacker is also able to manipulate memory—not just in the database, but also what is replayed in people's consciousness. Again, in an effort to harm the protagonist, the hacker

[9] ANON (Netflix 2018).

accesses the database, erases the good memories of the protagonist's dead son, and then replays the protagonist's memory of the day his son was hit by a car in front of him over and over in the protagonist's mind, causing severe mental anguish. The human mind is manipulated through the BCI to alter temporal and spatial perception, to cause mental suffering, and ultimately to commit murder.[10] Thus the movie raises disturbing questions about privacy, the sanctity of the human mind, and malicious use of this technology.

While *Anon* takes place in a distant, cyberpunk future, BCI technology exists today. The technology is nowhere near the point of the seamless, on-demand, bi-directional interface seen in *Anon*, but that has not stopped the Defense Advanced Research Projects Agency (DARPA), academia, and private industry from pursuing this goal.[11] While some of these pursuits simply seek to create the ability for the brain to interface with the internet,[12] many projects have the potential for military application, including remotely controlling military aircraft or robots, mental communication between individuals, and enhanced situational awareness through direct access to data.[13] As this technology is perfected and becomes commonplace, there is little doubt it will be exploited for military advantage.[14]

Against the backdrop of rapidly advancing BCI technology, several moral and ethical questions have been raised in the nascent academic field of neuroethics. Some concerns address the ethical and moral dilemmas faced by researchers and neuroscientists as they develop technology that may have dual-use military application.[15] Other neuroethicists have gone

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[10] *Id.*

[11] *Six Paths to the Nonsurgical Future of Brain-Machine Interfaces*, DEF. ADVANCED RES. PROJECTS AGENCY (May 20, 2019), https://www.darpa.mil/news-events/2019-05-20; *DARPA and the BRAIN Initiative*, DEF. ADVANCED RES. PROJECTS AGENCY https://www.darpa.mil/program/our-research/darpa-and-the-brain-initiative (last visited Apr. 22, 2020) [hereinafter *DARPA*]; Todd Haselton, *Elon Musk: I'm About To Announce A 'Neuralink' Product That Connects Your Brain To Computers*, CNBC (Sept. 11, 2018), https://www.cnbc.com/2018/09/07/elon-musk-discusses-neurolink-on-joe-rogan-podcast.html.

[12] *Id.*

[13] JONATHAN D. MORENO, MIND WARS: BRAIN SCIENCE AND THE MILITARY IN THE 21ST CENTURY 53-59 (2012) [hereinafter MORENO].

[14] Jensen, *supra* note 5, at 256.

[15] *See* MORENO, *supra* note 13, at 185-205; Marcello Ienca et al., *From Healthcare to Warfare and Reverse: How Should We Regulate Dual-Use Neurotechnology?*, 97

further, offering commentary on the adequacy of international law to address their concerns over BCI and other neuroweapons. Neuroethicists taking this approach have raised two specific concerns: whether the existing IHRL regime is adequate in an age where a brain may be directly accessed through the internet or computer, with some advocating for new rights under IHRL,[16] and whether existing weapons treaties are adequate to limit or prevent states from weaponizing this technology.[17]

If adopted as state practice or formalized in international law, this second line of neuroethical advocacy—which directly relates to the application of international law to this technology—has the potential to limit military use of BCI, thus inviting commentary and response from international legal practitioners. To date, the discussion of how militarized BCI—whether utilized for data access and communication or incorporated into weapon systems—will comply with IHL has been limited.[18] Brain-computer interfaces offer their own, stand-alone advantages to militaries and, from unmanned systems to artificial intelligence, may have complementary functions once incorporated into other future weapons.[19] As BCIs' march towards the battlefield appears inevitable, the time is ripe to begin addressing BCI under the lens of IHL.

A. Brain-Computer Interface Technology Generally

NEURON 269-74 (2018), https://www.cell.com/action/showPdf?pii=S0896-6273%2817%2931140-6 [hereinafter Ienca et. al.]; Tim Requarth, *This Is Your Brain. This Is Your Brain as a Weapon*, FOREIGN POLICY (Sept. 2015), https://foreignpolicy.com/2015/09/14/this-is-your-brain-this-is-your-brain-as-a-weapon-darpa-dual-use-neuroscience/ [hereinafter Requarth]; Charles N. Munyon, *Neuroethics of Non-Primary Brain Computer Interface: Focus on Potential Military Applications*, 12 FRONTIERS IN NEUROSCIENCE 696 (Oct. 2018).

[16] Marcello Ienca and Roberto Andorno, *Towards New Human Rights In The Age of Neuroscience and Neurotechnology*, 13 LIFE SCI. SOC'Y. AND POLICY (Apr. 26, 2017), https://lsspjournal.biomedcentral.com/articles/10.1186/s40504-017-0050-1 [hereinafter Ienca and Andorno]; Ellen M. McGee, *Should There Be a Law—Brain Chips: Ethical and Policy Issues*, 24 T. M. COOLEY L. REV. 81 (2007) [hereinafter McGee].

[17] Requarth, *supra* note 15.

[18] Colonel James K. Greer (US Ret.), *Connected Warfare*, MAD SCIENTIST LABORATORY (Jan. 27, 2019), https://madsciblog.tradoc.army.mil/113-connected-warfare/ [hereinafter Greer].

[19] *Id.*

As with any new battlefield innovation, we must first have a basic understanding of the underlying technology prior to considering how IHL applies.[20] First emerging in 1964 when Dr. Grey Walter connected wires to a human brain during surgery,[21] the BCI has made steady advances in conjunction with breakthroughs in neuroscience. The technology has found its primary application within the medical field, but it also harbors great potential in robotics, prosthetics, and interfacing with information systems.[22] A fully capable brain interface with an information system is a goal being pursued by the U.S. Government, other countries, and private industry; and, there are those that believe such technology is inevitable.[23]

Simplistically, a BCI is a device that enables the brain to directly interact with an external information system or computer through technology implanted into a person's brain or worn externally on a person's skull.[24] A BCI reads the electrical signals in a person's brain associated with different functions, which are then communicated to a computer where the signals are decoded and utilized by that computer to accomplish a task or produce a specific output.[25] The output could be the transfer of information or communication,[26] or it could be utilized to control a mechanism—such as a prosthetic or robotic system.[27] It is

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[20] Peter Pascucci, *Distinction and Proportionality in Cyberwar: Virtual Problems with a Real Solution*, 26 MINN. J. INT'L L. 419, 422 (2017), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1256&context=mjil.

[21] Alzbeta Krausova, *Legal Aspects of Brain-Computer Interfaces*, 8 MASARYK U. J.L. & TECH. 199, 200 (2014), https://www.researchgate.net/publication/292846508_Legal_aspects_of_brain-computer_interfaces [hereinafter Krausova].

[22] *Id*. at 200-02.

[23] Adam Piore, *The Surgeon Who Wants to Connect You to the Internet with a Brain Implant*, MIT TECH. REV. (Nov. 30, 2017), https://www.technologyreview.com/s/609232/the-surgeon-who-wants-to-connect-you-to-the-internet-with-a-brain-implant/ [hereinafter Piore].

[24] Shih et al., *supra* note 4, at 268, 270-73.

[25] *Id*.

[26] Linxing Jiang et al., *BrainNet: A Multi-Person Brain-to-Brain Interface for Direct Collaboration Between Brains*, 9 SCIENTIFIC REP. 1 (Apr. 16, 2019), https://www.nature.com/articles/s41598-019-41895-7.pdf.

[27] *Man With Spinal Cord Injury Uses Brain Computer Interface to Move Prosthetic Arm with His Thoughts*, U. OF PITT. MED. CTR. (Oct. 10, 2011), https://www.upmc.com/media/news/BCI-press-release [hereinafter *Brain Computer Interface*]; Patrick Tucker, *It's Now Possible to Telepathically Communicate with a Drone Swarm*, DEFENSE ONE (Sept. 6, 2018),

important to note that BCI should not be confused with voice or muscle-activated devices—BCI are a mechanism allowing for direct communication between the human brain and computer.[28]

A BCI utilizes a cycle allowing for the brain to input information to the system and later receive feedback.[29] The generation phase of the cycle refers to the brain's creation of electrical signals associated with different tasks or actions.[30] These signals are then read in the second, measurement phase of the cycle, which is facilitated either by an implanted intracranial device or sensors worn externally on the skull.[31] Next is the decoding phase, where the measured input from the brain is decoded and classified by a connected computer.[32] Finally, once decoded, the BCI completes the output phase of the cycle.[33] In this phase, the computer executes the brain's intent, whether it be to communicate information or to cause a machine to move.[34] This final phase also provides feedback to the brain on the action.[35]

Neuroscientists are researching both externally worn and implanted devices to facilitate the measurement and output phases of the BCI cycle. Externally worn devices include electroencephalography (EEG) caps which measure the brain's electrical activity through the skull.[36] Internally implanted devices include wired nodes attached directly to the

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https://www.defenseone.com/technology/2018/09/its-now-possible-telepathically-communicate-drone-swarm/151068/ [hereinafter Tucker].

[28] Shih et al., *supra* note 4, at 268.

[29] Ienca and Haselager, *supra* note 8.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *See* Fiona MacDonald, *Direct Brain-to-Brain Connection Has Been Established Between Humans For The Second Time*, SCIENCE ALERT (Nov. 6, 2014), https://www.sciencealert.com/direct-brain-to-brain-connection-has-been-established-between-humans-for-the-second-time [hereinafter MacDonald] (describing the use of an externally worn EEG cap to facilitate the highlighted research).

brain[37] and experimental technology like "neural lace."[38] While each allows the BCI cycle to function, internally implanted devices currently have greater capability.[39]

Brain-computer interfaces first saw application in treatment of various medical conditions. Initial iterations were aimed at helping patients who were "locked-in" paraplegics,[40] then moved to treating patients suffering from epilepsy and Parkinson's disease.[41] These earliest BCI worked in one direction, from the patient's brain to translation by the computer,[42] but the table was set for future innovation.

Brain-computer interfaces have seen application and rapid development in the field of prosthetics. Doctors and neuroscientists have been successful for years in isolating brain patterns associated with movement, enabling the creation of BCI used to control a prosthetic

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[37] Al Emondi, *Neural Engineering System Design (NESD)*, DEF. ADVANCED RES. PROJECTS AGENCY, https://www.darpa.mil/program/neural-engineering-system-design (last visited Apr. 23, 2020) [hereinafter Emondi *NESD*]. This project aims to create an implantable, bi-directional BCI device capable of communicating with one million neurons at a time. This would be a huge step forward for this technology and allow for much greater information flow between the brain and computer system.

[38] Kiki Sanford, *Will This "Neural-Lace" Brain Implant Help Us Compete With AI?*, NAUTILUS (Apr. 4, 2018), http://nautil.us/blog/-will-this-neural-lace-brain-implant-help-us-compete-with-ai; Guosong Hong et al., *Mesh Electronics: A New Paradigm For Tissue-Like Brain Probes*, 50 CURRENT OPINION IN NEUROBIOLOGY 33, 34-36 (2018), http://cml.harvard.edu/assets/Mesh-electronics-a-new-paradigm-for-tissue-like-brain-probes.pdf. Neural-Lace technology is injected by a syringe into the brain, where it unfurls itself and meshes directly with brain tissue. *Id.* By allowing for direct incorporation of interface technology and brain matter, this technology aims to create a much more capable interface with information systems. *Id.*

[39] Al Emondi, *Next-Generation Nonsurgical Neurotechnology*, DEF. ADVANCED RES. PROJECTS AGENCY, https://www.darpa.mil/program/next-generation-nonsurgical-neurotechnology (last visited Apr. 23, 2020) [hereinafter Emondi *Neurotech*].

[40] Krausova, *supra* note 21, at 200; McGee, *supra* note 16, at 85. "Locked-in" patients are those that are conscious, but unable to move or communicate effectively. *Id.* The BCI enables these patients to communicate utilizing only their thoughts, which are then translated by a computer to produce an output. *Id.*

[41] Piore, *supra* note 23. When utilizing BCI to treat patients suffering from epilepsy or Parkinson's disease, a computer monitors electrical activity in the brain to detect oncoming tremors or seizures. *Id.* Once a tremor or seizure event is detected, the computer acts automatically to send electrical signals through the BCI to the brain to terminate the event. *Id.*

[42] Shih et al., *supra* note 4, at 268-69.

limb.[43] As the technology has been refined, bi-directional communication between a brain and BCI has enabled users to feel sensations, such as heat and texture, on the objects the prosthetic limb touches.[44]

Beyond the BCI allowing for interaction between man and machine, BCI has also begun enabling direct communication between human brains as well as cooperative problem solving.[45] It has also shown success in enabling physical control over the movement of laboratory animals,[46] and has recently demonstrated the ability for one human to physically control the movement of another through thought.[47]

The above are but a few highlights of the progress neuroscientists have made in developing BCI technology. Researchers have demonstrated success in electrical interaction with the brain, brain-to-brain communication, collaborative problem solving, and physical control over external systems, animals, and people. Such developments have clear application in military contexts. But, along with military application, BCI

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[43] *Id.* at 269, 271-73; *Brain Computer Interface, supra* note 27.

[44] *In a First, Pitt-UPMC Team Help Paralyzed Man Feel Again Through a Mind-Controlled Robotic Arm*, U. OF PITT. MED. CTR. (Oct. 13, 2016), https://www.upmc.com/media/news/BCI_scitransl-lms.

[45] Jiang et al., *supra* note 26. Researchers at the University of Washington and Carnegie Mellon University demonstrated the ability to network a group of individual's brains to collaboratively accomplish a task. *Id.* In this case the group worked together to place a game of Tetris. *Id.*

[46] Krausova, *supra* note 21, at 202; Seung-Schik Yoo et al., *Non-Invasive Brain-to-Brain Interface (BBI): Establishing Functional Links Between Two Brains*, 8 PLOS ONE 1-8 (Apr. 3, 2013), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0060410&type=printable. Utilizing BCI technology, researchers were able to control the movement of a rat's tail. *Id.*

[47] MacDonald, *supra* note 36; Rajesh P. N. Rao et al., *A Direct Brain-to-Brain Interface in Humans*, PLOS ONE (Nov. 5, 2014), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0111332 (Neuroscientists were able to create a BCI system where one individual could cause another individual to move their hand to push a button. The experiment was centered on a game where they were tasked with defending a city from an incoming rocket attack by firing cannons at the incoming rockets. The catch was these individuals could not actually fire the cannon themselves, a separate group within the BCI system equipped with a cap designed to stimulate their brains held their hands over a firing button. Despite this second group being completely unaware that the game was going on and being located in a separate building, when the individuals in the first group sent the signal to fire through the BCI, the second group's hands moved involuntarily and pressed the fire button with a varying success rate.).

carry inherent vulnerabilities in their systems, exposing the human brains to which they are attached.

B. Military Applications

Neuroscience's potential to impact the future of warfighting and national security has been recognized and invested in for years in the United States. [48] While other government entities—such as the intelligence community—have invested in this research, DARPA has led the charge in defense research into BCI. [49] Invested in heavily during the Obama Administration era, DARPA seeks to expand our understanding of technology utilized to interact directly with the brain through the Brain Research through Advancing Innovative Neurotechnologies (BRAIN) Initiative. [50] Several DARPA sub-projects under the umbrella of the BRAIN Initiative aim to further the military integration of this technology by leveraging partnerships with academia. These projects include seeking to expand the capability and data rate for implantable BCI devices,[51] utilizing BCI to control vehicles such as drone swarms,[52] restoring and

[48] *See* MORENO, *supra* note 13.

[49] *Id.*

[50] *DARPA*, *supra* note 11.

[51] Emondi *NESD*, *supra* note 37.

[52] Tucker, *supra* note 27; Emondi *Neurotech*, *supra* note 39 (Partnering with academia, DARPA was able to demonstrate the ability for individuals to control a swarm of drones utilizing an externally worn BCI device. The drones were under the control of the operator, and could provide feedback through the BCI directly back to the operator's brain. The DARPA led and funded Next-Generation Nonsurgical Neurotechnology (N^3) was utilized in this research. N^3 aims to expand the capability of externally worn BCI so it can be utilized by able bodied individuals to control vehicles or to interact with computers in cyber defense activities.).

enhancing memory,[53] and cooperative intelligence analysis and target selection.[54]

Beyond its stand-alone capabilities, BCI offers complementary capability to developments in artificial intelligence (AI), allowing humans to directly interact with AI systems instead of simply being in or on the loop.[55] Such convergence blurs the line between man and computer, potentially leading to weapons or weapon systems incorporating the unconscious abilities of the brain to maximize the effectiveness and reactiveness of a military system.[56] Such systems could leverage the human brain's superior ability to unconsciously recognize threats, melding them with an AI computer's superior ability to calculate a response.[57] In these weapon systems, the BCI would function by picking up the brain's unconscious recognition of a threat, passing on that information for an automated response from the AI.[58] A conscious human decision would be left out of the equation.[59]

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[53] Tristan McClure-Begley, *Restoring Active Memory (RAM)*, DEF. ADVANCED RES. PROJECTS AGENCY, https://www.darpa.mil/program/restoring-active-memory (last visited Apr. 23, 2018); Robert E. Hampson et al., *Developing A Hippocampal Neural Prosthetic To Facilitate Human Memory Encoding And Recall*, 15 J. NEURAL ENG. 1-15 (Mar. 28, 2018), http://iopscience.iop.org/article/10.1088/1741-2552/aaaed7/pdf (Through the RAM program, DARPA aims to help service members recover their memories after suffering a traumatic brain injury. The associated RAM-Replay project aims to enhance the training of able bodied service members by "uploading" information directly into their brains via BCI technology.).

[54] Adrian Stoica et al., *Multi-Brain Fusion and Applications to Intelligence Analysis*, PROC. OF SPIE—INT'L SOC. FOR OPTICAL ENG. 8756 (May 29, 2013) [hereinafter Stoica] (Multiple intelligence analysts are linked via EEG enabled BCI and review imagery. The research indicates enhanced performance in identifying intelligence and targeting information from these networked analysts.).

[55] Greer, *supra* note 18. *See also* Elon Musk & Neuralink, *An Integrated Brain-Machine Interface Platform With Thousands Of Channels*, 21 J. MED. INTERNET RES. 1-14 (Oct. 31, 2019), https://www.jmir.org/2019/10/e16194/pdf; Alex Knapp, *Elon Musk Sees His Neuralink Merging Your Brain With A.I.*, FORBES (July 17, 2019), https://www.forbes.com/sites/alexknapp/2019/07/17/elon-musk-sees-his-neuralink-merging-your-brain-with-ai/#23925b9a4b07 [hereinafter Knapp] (One stated goal of Neuralink is to eventually facilitate interaction between humans and Artificial Intelligence).

[56] Gregor Noll, *Weaponising Neurotechnology: International Humanitarian Law and The Loss of Language*, 2 LONDON REV. OF INT'L L. 201, 204, 207-208 (Feb. 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2464144 [hereinafter Noll].

[57] *Id.* at 204, 207.

[58] *Id.* at 206-07.

[59] *Id.* at 207.

Significant issues still exist in pursuit of this technology; neuroscience strives to fully understand the way the brain communicates—in essence, its code.[60] Until neuroscientists are able to fully understand this code, the type of BCI that will allow for full integration with AI, computers, and information systems will not be possible.[61] Despite this limitation, the quest for ever more capable BCI drives ahead, opening the door to dangerous vulnerabilities to the BCI and human brain alike.

C. Human Danger Created Through BCI

The direct risk to the human brain created by BCI is caused by BCI's vulnerability to manipulation via cyber means.[62] In essence, once integrated with an information system, a BCI becomes just another node in that system. As P.W. Singer warns, new networked technology rarely incorporates security into its design,[63] and BCI is no different in this regard. Evidence already exists that BCI can be subjected to a cyber-effect or manipulation.

The ability to manipulate implantable medical technology through cyberspace has already been identified as a significant vulnerability. For instance, the Tallinn Manual discusses manipulation of a networked pacemaker using cyber means, causing an effect on an individual's heart.[64] As troubling as it is to be able to manipulate an individual's heart, it is equally—if not more—troubling to be able to manipulate a human brain. This risk is real and has already been demonstrated. A recent Kaspersky Labs report on BCI details vulnerabilities in the systems that interact with and control them.[65] The report highlights the ability to interfere with the software used to control the BCI hardware, creating the ability to steal or

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[60] Piore, *supra* note 23.

[61] *Id.*

[62] Ienca and Haselager, *supra* note 8; Requarth, *supra* note 15.

[63] Peter W. Singer, Senior Fellow, New America, Sommerfield Lecture at The Judge Advocate General's Legal Ctr. and Sch. (Nov. 1, 2018).

[64] NATO COOP. CYBER DEFENCE CENTRE OF EXCELLENCE ET. AL., TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 455 (Michael N. Schmitt ed., 2d ed. 2017) [hereinafter TALLINN MANUAL] (the example in the manual describes manipulation of a pacemaker to cause a series of heart attacks).

[65] *The Memory Market: Preparing For A Future Where Cyberthreats Target Your Past*, KASPERSKY LAB REP. (Oct. 2018), https://media.kaspersky contenthub.com/wp-content/uploads/sites/43/2018/10/29094959/The-Memory-Market-2018_ENG_final.pdf.

manipulate memory, and allowing for direct harm to the individual equipped with the BCI by manipulating the electrical signals sent to their brains.[66]

Additional concerns over this type of manipulation have been growing, leading to speculation on the dire risks possible through manipulation of BCI through cyberspace.[67] For instance, "brain-hacking" encompasses BCI vulnerabilities at several points in the cycle.[68] Such activity has the potential for third-parties to access the private information in an individual's brain and to wrest control of the system or machine the BCI is interacting with from the user.[69] This activity could potentially lead to physical and psychological harm, as well as the user losing their sense of agency or self-determination of their own life.[70]

Similarly, the concept of "brainjacking," raised in 2016, concerns itself with malicious cyber actors gaining access to implanted BCI and causing effects within the brain.[71] The risks are associated with implanted medical devices, and the authors who coined the term are quick to note that it does not refer to any form of mind-control.[72] What brainjacking does conceptualize, however, is a change in the implant's settings, throwing off the electrical signals sent to the brain.[73] This, in turn, could lead to several adverse effects to the individual, including tissue damage, impairment of motor function, modification of impulse control, emotions, or affect, and induction of pain.[74]

Additional threats to this technology include cyber manipulation of BCI code or hardware at any point in the BCI cycle. For example, should a hacker or other cyber actor gain access to the input portion of the cycle,

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66 *Id.*

67 Ienca and Haselager, *supra* note 8.

68 *Id.*

69 *Id.*

70 *Id.*

71 Rich Wordsworth, *Brainjacking: Are Medical Implants The Next Target For Hackers?*, WIRED (Feb. 21, 2017), https://www.wired.co.uk/article/brainjacking-are-medical-implants-the-next-target-of-hackers [hereinafter Wordsworth]; Laurie Pycroft et al., *Brainjacking: Implant Security Issues in Invasive Neuromodulation*, 92 WORLD NEUROSURGERY 454-62 (2016) [hereinafter Pycroft et. al.].

72 Wordsworth, *supra* note 71.

73 *Id.*

74 Pycroft et al., *supra* note 71.

they may be able to extract sensitive or personal information about that individual.[75] If the other phases of the cycle (measurement, decoding, and output) are compromised, more than data is at risk. The intended output or action can be disrupted or terminated, potentially leaving the individual helpless.[76] In the extreme, the BCI cycle can be hijacked, resulting in physical harm to the individual.[77]

These risks highlight several nightmarish, but entirely plausible, scenarios if BCI reaches its full potential. Imagine the ability to manipulate the motor functions of an individual driving a car, causing them to drive off the road. Further, what if the individual is utilizing a BCI to control a weapon system. Could the physical system be hijacked and turned against the individual or their allies? What if there was potential to disrupt the decision making or personalities of individuals in power? Is it possible to send a signal through the internet to a BCI that causes it to damage an individual's brain to the point of permanently disabling or killing them? These are just a few of the possiblities in a future filled with BCI; spawning a nascent ethical discussion concerning the use of this technology and the role the law will have in its regulation.

III. Neuroethics and Proposals for Regulation

The "mind is surely the most salient feature of *Homo sapiens*."[78] It is not surprising then that neuroethicists are alarmed by the prospect of linking man and machine. Most of the neuroethical discussion centers on the moral and ethical dilemmas presented by BCI; but some neuroethicists push further, advocating for modification or expansion of international law protections in response to advances in neurotechnology. The theme across this discussion is the need to protect the brain and—by extension—mind, consciousness, and human agency.

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[75] Ienca and Haselager, *supra* note 8.

[76] *Id.*

[77] *Id.*

[78] Ellen M. McGee and Gerald Q. McGuire Jr., *Becoming Borg to Become Immortal: Regulating Brain Implant Technologies*, 16 CAMBRIDGE Q. HEALTHCARE ETHICS 291, 296 (July 2007).

As a relatively new field in academia, neuroethics aims to advance the discussion of the consequences of new neuroscientific breakthroughs.[79] Identifying the issues presented by BCI, some neuroethicists have focused their attention on government funded dual-use neuroscientific research that furthers BCI and other brain technology, intending to inform scientists that their latest breakthroughs could have military applications.[80] This portion of neuroethics—relating to research and development—bears directly on moral and ethical questions, with the tangential effect of informing development and review of neuroweapons for IHL compliance.[81] While development of IHL compliant neuroweapons will be essential, this branch of neuroethics does not directly address targeting these weapons once they are deemed compliant and make their way to the battlefield.

Others in the field, viewing the incorporation of this technology into everyday life as inevitable, explore the need for additional laws or expansion of our understanding of human rights protections against abuses of this technology.[82] Some have argued for expansion of IHRL in order to address the threats to the brain created by BCI.[83] Others have highlighted the inapplicability of existing treaties, laws, and regulations to neuroweapons.[84]

The primary driver of neuroethicists' concerns regarding BCI is the potential for the technology to be abused; it could be used to physically damage people's brains—for example, to manipulate individual personality, self-determination, and free will.[85] In response, neuroethicists have identified numerous areas that challenge the ethical use of neurotechnology. First and foremost is the concept of informed consent, which deals with whether an individual has adequately been made aware of the risks associated with the technology.[86]

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79 Requarth, *supra* note 15.

80 MORENO, *supra* note 13, at 185-205; Ienca et. al., *supra* note 15, at 269-74.

81 *See* Noll, *supra* note 56 (discussing the development of "neuroweapons.").

82 *See* Ienca and Andorno, *supra* note 16; McGee, *supra* note 16, at 81; Ienca et al., *supra* note 15, at 269-74.

83 Ienca and Andorno, *supra* note 16.

84 *See* McGee, *supra* note 16, at 81; Ienca et al., *supra* note 22, at 269-74; Requarth, *supra* note 15.

85 McGee, *supra* note 16, at; Ienca et al., *supra* note 22, at 269-74.

86 Ienca and Haselager, *supra* note 8.

Informed consent takes on a different dimension when discussing the implantation of BCI or other enhancement technology within service members.[87] The question becomes whether a service member actually has a choice.[88] Given the advances in BCI technology, and the risks to the mental livelihood of the individual highlighted earlier in this article, individuals equipped with BCI may assume significant risk.[89] Consider further that some of the technology highlighted previously allows for the manipulation of the mental state of individuals, or even physical control over them.[90] It is not unreasonable to consider BCI being utilized to manipulate service members' personalities or instincts to make them more efficient at carrying out their duties. Informed consent, while not a protection from the potential manipulation of this technology, still offers some human agency and decision making to individuals in allowing this technology to be connected to their bodies.

Once connected, neuroethicists warn abuses of BCI can lead to degradation of a person's privacy, the ability to be secure in their thoughts, and their mental and physical safety.[91] Neuroethicists have discussed protection of "[a]utonomy, agency, and personhood."[92] Autonomy and agency are essential aspects of being a human being.[93] Brain-computer interfaces or other technology that can be utilized to restrict or even overcome human autonomy or agency strike at this core.[94] Compromise of autonomy and agency can lead to three major ethical issues: removal of the "intention-action" link resulting in psychological distress, generation of "uncertainty about voluntary character" of the individual equipped with the BCI, and risk to Western jurisprudence which is based in the voluntary control over an individual's own actions.[95] The first two issues are risks

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[87] Heather A. Harrison Dinniss and Jann K. Kleffner, *Soldier 2.0: Military Human Enhancement and International Law*, 92 INT'L L. STUD. SER. US NAVAL WAR COL. 432, 452-482 (2016), https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1695&context=ils [hereinafter Dinniss and Kleffner].

[88] *Id.* at 452-55.

[89] Ienca and Haselager, *supra* note 8.

[90] *Id.*

[91] *Id.* Dinniss and Kleffner, *supra* note 87, at 455-68.

[92] Ienca and Haselager, *supra* note 8.

[93] *Id.*

[94] *Id.*

[95] *Id. See also* Stephen E. White, *Brave New World: Neurowarfare and the Limits of International Humanitarian Law*, 41 CORNELL INT'L L. J. 177, 185-205 (2008), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/

to the individual, while the third has societal consequences that may challenge our ability to reach accountability for illegal acts perpetrated by individuals not in control of their own minds or bodies.

It is against this backdrop that neuroethicists have begun suggesting approaches to mitigate against the risks posed by neurotechnology and, specifically, BCI. These approaches include moral and ethical discussions as well as suggested expansion of international law and regulatory regimes that would govern the development and use of the technology.

A. Ethical and Legal Proposals to Address BCI's Risks

Neuroethicists have begun expanding their discussions into areas of international law, to include IHRL and other regulatory regimes such as weapons treaties. Neurotechnology's impact on IHRL "largely remains a *terra incognita*."[96] Yet, as new neurotechnology—including perfected BCI—becomes more ubiquitous, adaptive developments in IHRL are possible.[97] Failure to recognize the concerns presented by BCI, and the possible expansion of IHRL, has the potential to create a gap in the law where arguments can be made for greater application of IHRL to BCI, regardless of context. Further, adaptation of or additional weapons treaties may restrict otherwise IHL-compliant operations against BCI.

1. Neuroethical Approaches

In concluding his book *Mind Wars*, Dr. Jonathan Moreno advocates a role for advisory boards made up of scientists and ethicists to provide input on the development of new neurological dual use technology.[98] The goal of this committee would not be to stifle development of this technology, but rather to highlight the human risks the technology will create—including potential military applications.[99] The goal of this approach is for neuroscientists and other researchers to be completely aware that their

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&httpsredir=1&article=1721&context=cilj&source=post_page (discussing how the function of a BCI may hamper our ability to evaluate personal responsibility or criminal liability for violations of IHL).

[96] Ienca and Andorno, *supra* note 16.

[97] *Id.*

[98] MORENO, *supra* note 13, at 196-205.

[99] *Id.*

latest breakthrough could also be used for purposes they never thought of or intended.[100]

This approach is one shared by many other neuroethicists. Highlighting the reality that government funded research into neurotechnology will lead to dual use applications, ethicists aim to ensure scientists and researchers operating in this field have been fully informed of the consequences of their work.[101] Going further, others have suggested an even more expansive "neurosecurity framework."[102] This framework would consist of three levels: "regulatory intervention, codes of ethical conduct, and awareness-raising activities."[103] The first is a legal consideration and will be discussed later, but the latter two fall into the realm of ethical consideration. The ethical code of conduct would aim to maximize benefit of government- or military-sponsored neuroscientific development while minimizing the risks to individuals and communities.[104] This would include protections like informed consent and the ability to refuse the implantation of neurotechnology without legal repercussions.[105] It would also aim to ensure security measures were incorporated into the technology to provide protection for individuals.[106] The last prong of the neurosecurity framework would take the educational component advocated by Moreno further, to include scientists, researchers, and the public.

2. Advocacy for Legal and Regulatory Expansion

Neuroethicists have also begun openly speaking about expansion of international law and regulatory regimes to protect individuals from the misuse of BCI. These arguments fall under the first prong of the proposed neurosecurity framework discussed above. In spirit, as they highlight many of the horrible possibilities of BCI while noting that the law is inadequate to address these dangers, neuroethical positions reflect the appeal to the "public conscious" found in the Marten's Clause.[107]

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100 *Id*.

101 Requarth, *supra* note 15.

102 Ienca et al., *supra* note 15, at 269-74.

103 *Id*.

104 *Id*.

105 *Id*.

106 *Id*.

107 Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18 1907, 36 Stat. 2227, 1 Bevans 631 (The "Martens Clause" states "Until a more complete

Although these proposals include both international and domestic regulation, the discussion here will be limited to two areas of neuroethical advocacy in international law: the application of IHRL and existing international weapons treaties to neurotechnology. In advocating their positions, neuroethicists' focus is on the threat to the brain, not the use of neurotechnology such as BCI. Thus, as their positions are reviewed, it is pertinent to ask whether neuroethicists seek to ban the technology or to simply outlaw actions or operations that may affect the BCI and—by extension—the brain.

First, in the area of IHRL, many of the neuroethical concerns align with the motivations and protections found in existing customary and IHRL treaty law.[108] However, according to Marcello Ienca and Roberto Andorno, the fit under existing IHRL is not exact.[109] In 2017, they proposed a human rights "normative upgrade" in which they describe, in light of developments in neuroscience, why a series of human rights should be added to existing IHRL.[110] First, and fundamental to Ienca and Andorno, is the right to cognitive liberty.[111] Cognitive liberty is viewed as fundamental and underlying all other mental rights.[112] It includes the right to utilize, or choose not to utilize, neurotechnologies.[113] Cognitive liberty allows for individuals to be free to make "choices about one's own cognitive domain in absence of governmental or non-governmental obstacles, barriers, or prohibitions," to exercise "one's own right to mental

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code of the laws of war has been issued…the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscious.").

[108] Int'l Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ICCPR is the closest corollary to the protections advocated by neuroethicists. ICCPR includes the prohibition of torture or cruel, inhuman, or degrading punishment; the prohibition of slavery; and specific rights allowing for "freedom of thought, conscience and religion" as well as "the right to hold opinions without interference. Many of these rights are also viewed as customary international law through *opinio juris*. Current trends in the applicability of ICCPR reflect its application extraterritorially in situations where a state is exercising control over individuals.).

[109] Ienca and Andorno, *supra* note 16.

[110] *Id.*

[111] *Id.* As proposed, "cognitive liberty" as a fundamental human right require all states to recognize the universal application of this right and prevent states from derogating from adhering to its requirements. *Id.*

[112] *Id.*

[113] *Id.*

integrity," and to have "the possibility of acting in such a way as to take control of one's mental life."[114]

Serving as the foundation for other proposed rights, cognitive liberty supports other additions to IHRL proposed by Ienca and Andorno. These include the rights to mental privacy, mental integrity, and psychological continuity.[115] Mental privacy aims to protect information gleaned from the brain through a BCI.[116] This may include data on an individual from their brain activity to thoughts and memory.[117] Mental integrity references mental and physical damage that can be created through the compromise of the brain through a BCI.[118] Psychological continuity describes behavioral or psychological changes or issues that may result from misuse of BCI.[119] In closing, Ienca and Andorno argue that these rights should be incorporated into the current IHRL regime or become new IHRL rights.[120]

Beyond IHRL, neuroethicists have also been quick to point out that neuroscience and neurotechnology are not contemplated by existing weapons treaties, specifically the Biological Weapons Convention (BWC) or Chemical Weapons Convention (CWC).[121] Since BCI and other neuroweapons use technology and electronic signaling rather than biologic or chemical means, neuroethicists have noted the BWC and CWC are inapplicable to BCI.[122]

Brain-computer interfaces are also not contemplated under the Convention on Certain Conventional Weapons (CCW).[123] In

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114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 Requarth, *supra* note 15.

122 *Id. See also* Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972, 1015 U.N.T.S. 163, 11 I.L.M. 309; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993, 1974 U.N.T.S. 45; 32 I.L.M. 800.

123 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 (and Protocols) (as amended on 21 Dec. 2001), 10 Oct. 1980, 1342 U.N.T.S. 137

consideration of the CCW, it is important to note a potential link between BCI and the ongoing discussions regarding a possible sixth additional protocol to the convention relating to Lawful Autonomous Weapon Systems (LAWS).[124] A stated goal of some BCI development projects is to enable direct interaction between a human brain and AI, the centerpiece technology of LAWS.[125] While beyond the scope of this article, if BCI technology continues on this trajectory, future consideration of its relationship with LAWS may warrant further exploration.

Regardless, in viewing neuroweapons, to include BCI systems, as items requiring international regulation, some have advocated for expansion of the above treaties to include neuroweapons.[126] Others have noted a new treaty may be necessary.[127] Neuroethicists are clearly not confining their discussion to the moral and ethical issues raised by the technology, but they are openly advocating for expansion of international law to regulate the technology. Such expansion, if it occurs and depending on how it develops, could significantly impact the ability to utilize BCI systems or target them during hostilities. Obviously, if weapons treaties are expanded or a new treaty was agreed upon to ban or limit the use of BCI or weapons used against them, the restriction would be apparent to all signatories. More delicate, however, is the interaction between IHRL and IHL during warfare and how expansion of IHRL could also limit options in targeting BCI.

B. Expanded IHRL for BCI and Its Interaction with IHL

Traditionally, IHRL is the body of law addressing how humans are protected from deprivation of their rights by their *state* and "how the

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(As its name suggests, this convention is designed to consider and in certain cases prohibit the use of weapons deemed excessively injurious or that are indiscriminate. The convention has seen five additional protocols which either prohibited or clarified the use of certain weapons. Neuroweapons, including BCI, have not been contemplated by the convention, but due to the BWC and CWC being inapplicable to neuroweapons, the CCW would appear to be a superior mechanism for consideration of these types of weapons.).

124 *See* U.N. Geneva, *Report of the 2019 session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems*, ¶ 17, U.N. DOC. CCW/GGE.1/2019/3 (Sept. 25, 2019).

125 Knapp, *supra* note 55.

126 Requarth, *supra* note 15.

127 *Id.*

individual might encounter other private actors *within* the State."[128] Therefore, IHRL allows for the "notion that the individual has rights on the international stage" and that international law can regulate how a state and an individual interact.[129] Differing from most international law, "IHRL recognizes rights based on an individual's personhood rather than on one's status as a citizen or subject of a State party to a treaty."[130] IHRL covers a multitude of subject areas, including education, parenting, labor, politics, and religion.[131] IHRL's influence on the relationship between an individual and the state is only limited by the scope of how it develops.[132]

IHRL and IHL have been traditionally understood to apply separately of each other.[133] IHRL applies territorially during peacetime, governing the conduct of a state towards its own citizens and individuals under the state's control.[134] IHL applies during wartime, governing the responsibilities states have toward each other in the conduct of hostilities.[135] This position, known as displacement, reflected the long-held international law doctrine of *lex specialis*, which dictates the more specific area of law governs a given situation.[136] Under displacement, IHL is the *lex specialis* governing armed conflict.[137]

However, recent international jurisprudence, opinions of numerous commentators, and burgeoning state practice has shifted the understanding of how IHRL and IHL interact.[138] The current consensus has shifted to a position of convergence where IHRL and IHL apply contemporaneously,

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[128] Naz K. Modirzadeh, *Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 INT'L L. STUD. SER. US NAVAL WAR COL 349, 353 (2010) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1543482 [hereinafter Modirzadeh].

[129] *Id.*

[130] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 45, OPERATIONAL LAW HANDBOOK (2018) [hereinafter OPLAW HANDBOOK].

[131] Modirzadeh *supra* note 128, at 353.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] OPLAW HANDBOOK, *supra* note 130, at 51-52.

[137] *Id.*

[138] WILLIAM H. BOOTHBY, CONFLICT LAW: THE INFLUENCE OF NEW WEAPONS TECHNOLOGY, HUMAN RIGHTS AND EMERGING ACTORS 376-78 (2014) [hereinafter BOOTHBY].

even during armed conflict.[139] In this position, IHL would retain its position as the *lex specialis* governing hostilities; but other areas where IHL may not be specific to the situation, or is inadequate to address the question presented, would possibly allow for IHRL's application during armed conflict.[140]

Convergence's mainstream role in the current understanding of how IHRL and IHL interact has raised questions of how to determine when IHRL's application would be triggered during armed conflict.[141] Several authors have noted the impracticality of asking commanders or service members to make a case-by-case determination of which legal regime applies during a given activity.[142] A more practical suggestion is to divide functions or "broad handfuls" of activities associated with warfare—such as combat operations, logistics, and detention operations—and then make a determination as to which body of law applies to each function.[143] These determinations would apply both in international armed conflict and non-international armed conflict.[144]

Since this article aims to address targeting and engaging BCI, we would appear to be safely in the category of military activities governed by IHL under legal frameworks outlined above. Targeting individuals and military equipment is governed by long established principles for armed conflict under IHL.[145] But BCI offers several other possibilities, such as information operations and intelligence activities, that may not directly implicate IHL's application. Further, some potential capabilities of BCI-enabled weapons, such as a state weaponizing its own citizens or soldiers, have raised questions regarding the applicability of IHL to a state's use of these systems vis-à-vis IHRL.[146] This discussion centers on the applicable

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139 *Id*.

140 *Id*.

141 *Id*. *See also* Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT'L HUMAN. LEGAL STUD. 52, 90-94 (2010).

142 BOOTHBY, *supra* note 138, at 376-78.

143 *Id*.

144 *Id*.

145 *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (establishing the recognized targeting principles of military necessity, distinction, proportionality, and humanity).

146 *See* Noll, *supra* note 56; Dinniss and Kleffner, *supra* note 87, at 455-79.

law to the creation or use of BCI-enabled weapons by one state, not an adversary's targeting of these weapons or the individuals wielding them.

Care should be taken when considering the arguments of proponents of IHRL or other restrictions on the use of neuroweapons, such as neuroethicists, as to the extent of IHRL's applicability to the problem. A clear articulation of IHL's applicability to targeting BCI, addressing the inherent risks to the human brain highlighted by neuroethicists, is imperative to maintaining the distinction between when IHRL's applicability should end and when IHL's should begin.

IV. BCI, the Brain, and Cyberspace

Before addressing the applicability of IHL to BCI, we must first consider its place on the battlefield. While discussing BCI and other neuroweapons, neuroethicists focus on the dangers to the human brain; however, another consistent thread is present in their discussions: the threat is mainly resident in cyberspace. A BCI is part of a networked computer system that happens to incorporate the brain. Further, the brain can function similarly to a computer in a BCI system, raising the question of whether it maintains its status as part of a person or is it now an incorporated object due to its function in the man-made cyber domain. While some recent work has explored this question, this approach may serve to complicate the application of IHL to targeting technology such as BCI. This section explores these questions in the context of the brain's place and status during armed conflict.

A. Cyberspace and the Brain, Briefly

Cyberspace consists of the collection of information nodes (computers, servers, routers, etc.) that allow information systems to communicate with each other.[147] First established as a way for academics to communicate and share research data via computer, the internet has exploded into an indispensable part of human life.[148] Improvements in telecommunications and processing technology has allowed the cyber domain to extend beyond traditional computers and into many other

[147] Pascucci, *supra* note 20, at 423-26.
[148] *Id*.

everyday devices.[149] Our phones, cars, watches, televisions, and even our refrigerators can be connected to the internet, becoming part of the ever increasing cyber domain.[150] The ubiquity of objects connected to the internet makes up what has been referred to as the "Internet of Things (IoT)."[151]

Data flows through the internet in accordance with Transmission Control Protocol/Internet Protocol ("TCP/IP"), the common language of cyberspace.[152] As nodes are added, data is able to flow utilizing TCP/IP to an astoundingly diverse group of devices across the entire globe.[153] A BCI that is attached to a network is designed to utilize this same language, incorporating the technology into IoT.

Traditionally, when discussing cyberspace, a distinction has been made between the natural world and the man-made realm.[154] For example, the Tallinn Manual discusses cyberspace as consisting of three, man-made layers: physical (network components and infrastructure), logical (applications, data, and protocols allowing for connections between devices), and social (individuals and groups engaged in activities within cyberspace).[155] Department of Defense Joint Doctrine contains a similar description of cyberspace, declaring it exists wholly within the information realm and consists of three layers: physical network, logical network, and cyber-persona.[156]

These descriptions confine cyberspace to a man-made construct, and, therefore, a gap exists between humanity and cyberspace. This gap is currently bridged by the typing of our fingers on a keyboard, the information displayed on a screen that is taken in and processed by our

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149 *See* Janna Anderson and Lee Rainie, *The Internet of Things Will Thrive By 2025*, PEW RESEARCH CENTER (2014), http://www.pewinternet.org/2014/05/14/internet-of-things/ [hereinafter Anderson and Rainie].

150 *Id*.

151 *Id*.

152 Pascucci, *supra* note 20, at 423-26 (citing Robert Sanchez, *What is TCP/IP and How Does it Make the Internet Work?*, HOSTINGADVICE.COM (Nov. 17, 2015), http://www.hostingadvice.com/blog/tcpip-make-internet-work/).

153 *Id*.

154 *Id*.

155 TALLINN MANUAL, *supra* note 64, at 12.

156 CHAIRMAN, JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-12, CYBERSPACE OPERATIONS I-1 – I-4 (8 June 2018) [hereinafter CJCSP 3-12].

brains, or other current technology allowing humans to interact with cyberspace.[157] In each, human agency and conscious decision making result in the use of an input device or consumption of information produced by cyberspace. There is a clear separation between man and machine.

Humanity's desire to have greater access to the internet, and the data it contains, will make BCI an attractive option to many. Individuals are looking for ways to do away with external devices, with many implanting chips into their bodies already.[158] Humans are already able to wear cyber nodes and hold them in the palms of their hands in the form of smart phones, watches, and other devices.[159] The next logical step is to take away the intermediate technology and to link the human body directly to the cyber domain.[160] It is likely that individuals will be willing to allow their brains to become accessible to cyberspace in exchange for the convenience and access to the internet made possible by BCI. This is where individuals could suddenly find themselves as part of the IoT.

This future will consist of single actions to interact with an information system—brain to computer.[161] There will be no need to move muscles, type, move a mouse, or give a voice command because the BCI will interpret your intent directly from your brain and input it into the information system.[162] The information system could also send data directly back to the individual's brain without even having to bother with a computer display or other output device.[163] Additionally, the brain itself can be incorporated into the information system to enhance its performance or computing power.[164] In each instance, the interface is direct and, based on the definitions of cyberspace above, could arguably incorporate the brain into the physical and logical layers of cyberspace.[165]

Such incorporation of the brain as a cyber-node immediately creates difficulty. As cyberspace is currently understood to be entirely man-

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157 Shih et al., *supra* note 4.

158 *See* Anderson and Rainie, *supra* note 149.

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.*

163 Ienca and Haselager, *supra* note 8.

164 *See* Noll, *supra* note 56. *See also* Stoica, *supra* note 54.

165 Shih et al., *supra* note 4, at 268; CJCSP 3-12, *supra* note 156.

made,[166] any addition of a biological system would be a dramatic shift. Brain-computer interfaces offer the ability for the brain to act both as a cyber-node and human user; these functions can occur exclusive to each other or simultaneously.[167] At a minimal level, the brain is providing signals unconsciously through the BCI to the computer it is interacting with in order to facilitate the function of the interface.[168] From a purely functional analysis, there are many aspects of the brain's purpose in a BCI system that are associated with data collection and processing, functions that are traditionally considered part of a computer.[169] This line of thinking has led to some speculation on whether BCI, as a human enhancement, objectifies the brain to which it is attached. In a military context, such a transformation could cause the brain to become a means of warfare or weapon— in other words, affecting the application of IHL.

1. Means, Weapon, or Human?

Consideration that the brain could somehow become objectified due to its function in a BCI system is certainly a dramatic shift. This line of thinking is contrary to the humanitarian spirit of IHL[170] and would base the legal analysis of the application of IHL targeting principles as if the brain in a BCI system had become an object. Such a modification would reduce the protections for persons under IHL, in turn supporting the positions of neuroethicists concerned with the human costs surrounding this technology. From a moral and ethical standpoint, this position does not make much sense. But, considering the question through a purely functional standpoint under IHL, analyzing the brain's purpose and function in a BCI system does illuminate instances where it may act as little more than an object. Therefore, consideration of whether a brain could ever become objectified through its function in a BCI system is warranted.

This question revolves around the brain's function in a given BCI system. For purposes of this analysis, BCI can be broken into two categories: those designed to enable information flow to and from the

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166 CJCSP 3-12, *supra* note 156.

167 Ienca and Haselager, *supra* note 8.

168 *Id*.

169 *Id*.

170 U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL, para. 1.3.4 (Dec. 2016) [hereinafter LAW OF WAR MANUAL].

human equipped with BCI, and those designed to be integrated into a physical system. To the first category, the discussion is fairly straightforward. A BCI designed to simply provide information or data to its host, or to store data for later use from its host, is analogous to our understanding of current computer or information systems.[171]

The brain in this first category of systems retains its human agency and intention. The human's intention to access or provide inputs to the information system is the same in current technology, the utility and direct interaction between the brain and information system offered by the BCI is the only distinguishing factor. Similarly, communication with other individuals through a BCI also requires conscious decisions, which would be undertaken non-verbally and facilitated by the BCI technology.[172] Therefore, a brain connected to BCI in this first category, utilized simply for informational and communication purposes, would clearly retain human qualities.

The second category of BCI presents a more significant challenge, as these BCI are designed to control physical systems from a distance.[173] The likely incorporation of BCI into future weapon systems will enable direct control and quicker reaction to potential threats.[174] The military advantages of weapon systems that can move and react more quickly and take decisive action are obvious. The pertinent question under IHL becomes how the brain is designed to interact with such a system.

In a recent paper, Gregor Noll analyzes the role of consciousness and human agency in future weapon systems.[175] The clear advantages of such weapon systems are highlighted, including human superiority to machine in unconsciously recognizing a threat and machine superiority in speed of response.[176] Thus, the potential decisive nature of incorporating both into a BCI weapon systems is laid bare in Noll's discussion by incorporating the best capabilities of man and machine into an automated response.[177] But this decisiveness is only achieved through utilization of the

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171 *See* Shih et al., *supra* note 4; *See also* CJCSP 3-12, *supra* note 156 (allows for a comparison of the functions of BCI to current cyber capability).

172 MacDonald, *supra* note 36.

173 *See supra* note 27.

174 Greer, *supra* note 18; Noll, *supra* note 56.

175 Noll, *supra* note 56..

176 *Id*. at 207.

177 *Id*.

unconscious recognition of the threat by the brain.[178] Noll argues that such weapon systems present a pressing issue for IHL, namely that IHL is built on the conscious human judgment of commanders and those employing weapon systems.[179] Noll highlights that the advantage of BCI weapon systems is lost if a conscious human decision is built into the loop, as it adds time to the decision making chain.[180] Thus, he concludes that excluding a conscious human decision from the loop of these systems is incompatible with IHL as it removes human agency and judgment.[181]

Noll highlights several challenges that will occur when evaluating future BCI weapon systems for compliance under IHL. He also, indirectly, raises the question of what becomes of the brain's status in a weapon system like Noll describes. If the brain is simply there to unconsciously enable the weapon system in execution of its automated or pre-programed function, how is the brain any different from a computer?

Two other recent articles have broached the question of whether the brain in such a BCI could be considered an object. In the first, Heather Dinniss and Jann Kleffner articulate that certain systems, such as prosthetics, could be weapons if they were designed to cause physical harm or damage.[182] The key feature of this argument is the prosthetic weapon being incorporated into the body of an individual, rather than simply being held or being machinery that is operated through physical manipulation by that individual.[183] By extension, this reasoning could apply to the man-made portions of a BCI, especially if the BCI is designed to control a weapon or weapon system. But this analysis stops short of allowing the brain to be considered part of the weapon, instead focusing on the hardware of the prosthetic as the potential weapon.[184]

A complementary article by Rain Livoja and Luke Chircop expands on this analysis, evaluating whether human enhancement technology

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178 *Id*.
179 *Id*. at 210-31.
180 *Id*. at 207.
181 *Id*. at 210-31.
182 Dinniss and Kleffner, *supra* note 87, at 438.
183 *Id*.
184 *Id*.

could cause a warfighter to become a mean, method, or weapon.[185] The article concludes that the BCI equipped individual is not a method of warfare.[186] It does allow for the man-made portions of the BCI system to be considered a mean of warfare, but again does not include the brain.[187] Interestingly, however, when discussing weapons, the authors make a distinction between weapons and weapon systems.[188] Weapons are defined objects designed to cause physical harm or damage, while weapon systems are considered to be all portions of the system allowing for the function of the weapon.[189] The authors conclude with the possibility that a BCI as a whole can be considered a weapon system, leaving the door open for the brain's inclusion as part of the system.[190] This in turn raises the specter that a brain integrated into a weapon system can be treated as an object instead of part of a person.

Although the door is open to considering the brain as part of a weapon system, this line of thought still requires analysis of the brain's role in the weapon system itself. As Noll articulates, the role of the brain can include either unconscious incorporation or allow for conscious human intervention and decision making.[191] A BCI weapon system that incorporates conscious human agency would be similar to a human pulling a trigger or pushing a firing button in a different weapon system. It is not logical to consider the brain in such a system to be part of that weapon system or an object.

But consider systems that utilize the brain unconsciously with no human agency involved. There appears to be some tenuous analysis allowing for consideration of the brain as an object in such weapon systems, since the brain would act like a computer or processor. Taking such a position would be a dramatic shift as part of the human body would become objectified due to its function.

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185 Rain Livoja and Luke Chircop, *Are Enhanced Warfighters Weapons, Means, or Methods of Warfare?*, 94 INT'L L. STUD. SER. US NAVAL WAR COL. 161 (2018), https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1723&context=ils.

186 *Id*. at 183.

187 *Id*. at 179-80.

188 *Id*. at 173-80.

189 *Id*.

190 *Id*. at 180.

191 Noll, *supra* note 56, at 205-07.

Such an analysis is understandable in an era of human enhancement and convergence between man and machine, but is also radical under the traditional place of a person when applying IHL. Even when BCI technology reaches the point of allowing for such capability, taking the approach of assessing the brain's function in a system to determine its status as a person or object for IHL targeting purposes departs from existing norms of simply treating all humans, and their associated parts, as persons.[192] The very basis of IHL is to mitigate human suffering caused by warfare,[193] so any analysis removing an individual's personhood runs contrary to the spirit of IHL.

Persons, whether they are non-combatant civilians or members of an armed force, are clearly different from buildings, vehicles, weapons, and equipment.[194] This difference between people and objects affects the application of the IHL principles of distinction, proportionality, and humanity.[195] Undergoing a functional analysis of a brain in a BCI system to determine whether it is a person or object serves to overcomplicate the matter and is akin to trying to fit a square peg into a round hole. The role of the brain, and conscious human decision making and agency, is a consideration in whether a BCI-enabled weapon system would comply with IHL during a weapons review process. But, for purposes of targeting, the better approach is to treat the brain—conscious or unconscious—as a part of a person, allowing for consistent application of IHL and its targeting principles.

V. Applying IHL to Targeting BCI in the Cyber Domain

Beginning from a position that always treats the brain as part of a person for targeting purposes allows for a clearer step-by-step analysis of targeting BCI through cyberspace. IHL is understood to apply in cyberspace.[196] Adversaries utilizing BCI to interact with cyberspace, as they would use a computer or other device, may be legally targeted under

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[192] LAW OF WAR MANUAL, *supra* note 170, para. 2.5.3. (discussing the IHL principle of distinction, the Law of War Manual cites numerous precedents which broadly refer to persons and objects. At no time is there consideration of whether a part of a person could be considered an object for purposes of analysis under the principle of distinction.).

[193] *Id.* para. 1.3.4.

[194] *Id.* para. 2.5.

[195] *Id.*

[196] TALLINN MANUAL, *supra* note 64, at 375.

IHL through cyberspace;[197] but, significant analysis is required prior to undertaking such an operation. The analysis begins with the threshold question of whether the contemplated operation against a BCI meets the definition of an attack. International Humanitarian Law and its targeting principles apply to attacks against BCI, but operations that fall below the threshold of this definition will require separate consideration. Once an operation is deemed to meet the definition of attack, the next portion of the analysis considers what the target actually is in the BCI system. Is it the BCI hardware, the computer or servers the BCI interacts with, the brain of the individual, or any or all the above? Once the scale of expected effects to a BCI are understood, IHL targeting principles can be applied to determine the legality of the operation. Thus, this framework allows for effects on adversary BCI while also offering protections to the brains of individuals incorporated into the BCI.

A. Cyber Attacks and BCI

The Tallinn Manual offers substantial guidance in determining whether an operation against a BCI could be considered an attack for purposes of applying IHL.[198] The Manual defines an attack as "a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects."[199] The distinction of whether a cyber operation is deemed to be an attack is violence—which is not required to be kinetic violence—expected to cause the effects listed in the definition.[200] The Manual specifically notes non-violent operations, such as psychological operations or espionage, do not qualify as attacks.[201]

By excepting non-violent operations from its definition of attack, the Tallinn Manual creates a category of potential operations against BCI that

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197 *Id.*

198 *Id.* at 415-416. It is important to note the limitations of the Tallinn Manual. While it serves as an important guide in considering cyber operations in the context of international law, containing the collective views of legal experts, it is not a legally binding document.

199 *Id.*

200 *Id.*

201 *Id.* at 415.

do not have associated protections under IHL.[202] Espionage, whether through cyberspace or other means, is certainly an area of concern created by BCI's access to the brain. Neuroethicists highlight these concerns in their discussions of mental privacy.[203] Such concerns are certainly valid, but they are beyond the scope of this paper. Subsequent consideration of legal and regulatory regimes to address espionage activities against BCI is certainly warranted.

The second non-violent category cited by the Tallinn Manual also requires further consideration. The Manual refers to psychological operations as not rising to the level of an attack for the purposes of applying IHL.[204] Psychological operations, also known as Military Information Support Operations in U.S. doctrine, are "operations to convey selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals."[205] These operations focus on target audiences, including adversaries as well as friendly and neutral populations.[206] Thus psychological operations allow for actions to influence the thoughts of large groups of individuals who may not be participants in hostilities.

Brain-computer interfaces offer a direct avenue to individual minds while conducting psychological operations. Again, this exposure is reflected in the concerns of neuroethicists, who discuss IHRL freedoms of thought, expression, and political independence.[207] While psychological operations contemplated by the Tallinn Manual are not regulated under IHL principles, they are not specifically prohibited under international law

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[202] *See* Gary D. Brown, *International Law Applies to Cyber Warfare! Now What?*, 46 SW. L. REV. 355 (Apr. 2017), https://www.swlaw.edu/sites/default/files/2017-08/355%20International%20Law%20Applies%20to%20Cyber%20Warfare-Brown.pdf. This article contains an extensive discussion of cyberspace operations that fall below the threshold of an attack or use of force that would trigger the application of IHL, and the challenging legal considerations associated with these operations. Brain-computer interfaces will place an additional legal consideration and complication on top of the already complex legal considerations surrounding these operations. *Id.*

[203] *See supra* pp. 24-25.

[204] TALLINN MANUAL, *supra* note 64, at 415.

[205] CHAIRMAN, JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-13, INFORMATION OPERATIONS II-9 – II-10 (20 Nov. 2014) [hereinafter CJCSI 3-13].

[206] *Id.*

[207] *See supra* pp. 17-26.

and are viewed as a permissible means of warfare.[208] It is also important to note that psychological operations are aimed to influence a population, not control them.[209] Target audiences of psychological operations maintain the ability to digest the information provided to them and to reach their own conclusion, therefore retaining self-determination and agency over their decisions. Again, as BCI will offer a direct path into the thoughts and minds of individuals, revisiting psychological operations enabled by ever more capable BCI may be warranted.

It is important to note, however, that psychological operations discussed in the Tallinn Manual do not include operations that would result in "mental suffering."[210] The Tallinn Manual specifically includes such operations as attacks, requiring the application of IHL targeting principles.[211] Individualized effects manipulating BCI, such as manipulating memory to create mental anguish or affecting the psychology of the individual, could be counted as an attack for purposes of the Tallinn Manual due to the resultant mental suffering.

So, too, would many of the other conceivable operations against BCI, including actions aimed at killing or injuring the individual connected to the BCI, damage to the BCI hardware, or disabling or hijacking the function of the physical system connected to the BCI. These categories focus on effects of destruction, injury, or damage that manifest themselves outside of cyberspace in the natural world. For operations intended to create such effects, IHL would clearly apply.

But one final category of operations, those solely against data, provides an additional layer of difficulty when considering BCI. Per the Tallinn Manual, operations against data are not per se attacks unless such operations also affect the functionality of a system or cause other effects tantamount to an attack.[212] State practice has yet to establish positions on the status of data,[213] so a potential gap exists in our understanding of IHL's application to cyber operations against data. Brain-computer interface technology may exacerbate the existence of this gap. Humans equipped

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[208] LAW OF WAR MANUAL, *supra* note 170, para. 5.26.1.

[209] *See* CJCSI 3-13, *supra* note 205 (discussing the general concepts of MISO, to include its goals to influence a target audience).

[210] TALLINN MANUAL, *supra* note 64, at 417.

[211] *Id.*

[212] *Id.* at 416-18.

[213] Pascucci, *supra* note 20, at 432, 455.

with BCI will likely become assimilators of information as the BCI grants a person immediate access to data.[214] However, making this data inaccessible—or corrupting it in some way—may not rise to the level of impairing the function of a BCI, but it will certainly impact a human who is accustomed to this data being readily available. As humans become more accustomed to this data access, depriving individuals' access or corrupting the data could result in the negative mental and psychological effects detailed by neuroethicists.[215] Some have suggested solutions to the status of data in cyber operations, including Peter Pascucci's suggestion of allowing data that offers a "definitive military advantage or demonstrable military purpose to qualify as a military objective."[216] Such an approach would resolve the matter for operations against data accessed and utilized by BCI during armed conflict, but this matter has yet to be settled.

Despite certain cyber operations or activities not fitting under the definition of attack, the vast majority of potential operations against BCI through cyberspace would be considered attacks for purposes of applying IHL. The function of a BCI makes it more likely that a cyber operation against the BCI system would be considered an attack due to the brain's incorporation into the system. The brain's incorporation into the system brings it into closer proximity to the cyber effects created by a given operation, increasing the likelihood that such effects could harm the brain or affect the function of the system the brain is interacting with. Therefore, it may be more likely that cyber operations against BCI are deemed attacks, triggering the application of IHL and the protections found in the IHL targeting principles.

B. A Framework for Cyber Operations Against BCI

As highlighted by the neuroethicists, neuroscientists, and computer security professionals, BCI contain cyber vulnerabilities that can be exploited in several ways. William Boothby, addressing how cyber

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[214] *Old Human vs. New Human*, MAD SCIENTIST LABORATORY, U.S. ARMY TRAINING AND DOCTRINE COMMAND (Jan. 31, 2019), https://madsciblog.tradoc.army.mil/117-old-human-vs-new-human/ (summarizing point of view of several futurists that humans, partly through convergence with technology, including implantable technology like BCI, will become assimilators of information instead of traditional learners).

[215] *See supra* pp. 17-26.

[216] Pascucci, *supra* note 20, at 455.

weapons can be employed, notes that any given cyber weapon will have "numerous orders or levels of effect and these must all be considered when weapons law advice is being prepared."[217] Boothby goes on to describe four layers of effects that build on each other: effects on the data contained in the node, network, or computer; the impact the data affects or manipulation has on the computer system; how the performance of the computer system affects the object or facility the computer is attached to; and any injury, damage, or destruction suffered by the persons or objects that rely on the facility.[218] The key to Boothby's framework is that the initial effect that the cyber weapon will actually create is on data. The subsequent effects will be consequent of this initial effect and can be tailored to create the desired end state—whether it simply be data manipulation or physical damage. Finally, Boothby states each cyber weapon must be evaluated separate from the framework to see if it will be indiscriminate.[219]

Boothby's framework is well applied to cyber operations against current information nodes in the cyber domain. However, this framework applied to BCI—while still very usable—may require combining the analysis of the third and fourth layers of effects. This is due to the incorporation—or convergence—of the brain into the information node created by the BCI, making the third and fourth layers indistinguishable from each other. Therefore, for consideration of effects on BCI, it may be more useful to simply consider the effects the cyber weapon would have on the data and hardware in a BCI system, and then any effects on the brain.

Such a framework allows for consideration of both the function and employment of the cyber weapon for compliance under IHL. This, in turn, will allow for specific application of the principle of distinction as the weapon is employed—as the effects will either be targeted at the machine portion of the BCI or at the human brain. It will also allow for easier application of the principle of humanity and, in limited cases, the principle of proportionality.

C. Answering Neuroethical Concerns Through the BCI Targeting Framework

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[217] BOOTHBY, *supra* note 138, at 178-80.

[218] *Id.*

[219] *Id.* at 158.

The above BCI targeting framework complements our understanding of the BCI cycle and its components, both machine and human. From our earlier discussion of the BCI cycle, we know that the measurement, decoding, and output phases are associated with machine or computer systems, while the generation and feedback portions of the cycle are associated with the brain.[220] Starting here, we can apply the framework adapted from Boothby to the BCI targeting problem by examining the intended effects of a given operation and how achievement of these effects will impact each portion of a BCI system.

The threshold question will be what effect a commander is hoping to achieve. Once understood, the cyber weapon can be designed and narrowly tailored to create an effect in specific BCI, as well as specific portions of that BCI's cycle. New cyber weapons designed and employed against BCI will require analysis of whether the weapon is designed to cause undue suffering or superfluous injury, and whether the weapon is indiscriminate.[221] Once deemed compliant, the weapon can be fielded and utilized by the military forces of a state.[222] When the weapon is utilized, it will also require separate analysis under IHL for adherence to all IHL targeting principles to ensure it is being employed lawfully.[223] Additionally, due to the fleeting nature of code and vulnerabilities in the cyber domain, cyber weapons, including those that could eventually be employed against BCI, may require ad hoc or just-in-time development prior to employment.[224] To provide cyber weapons capabilities in fleeting circumstances, cyber weapons may very well be employed against BCI and simultaneously evaluated for compliance with IHL and lawful employment.[225]

The requirement to assess a weapon's compliance with IHL provides initial protections to persons under IHL. This would include the brain in the BCI system, as this analysis would prohibit weapons designed to cause undue suffering or superfluous injury from being fielded.[226] Here, the concerns of neuroethicists regarding the physical and psychological

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220 Ienca and Haselager, *supra* note 8; *see supra* pp. 8-9.
221 BOOTHBY, *supra* note 138, at 158.
222 *Id.* at 176-81.
223 *Id.*
224 *Id.*
225 *Id.*
226 *Id.* at 178-79.

effects of attacks on BCI can be incorporated into the analysis of the weapon's design, highlighting the potential dangers of weapons aimed at creating effects in BCI, aiding in the development of more refined and legally compliant weapons.

Further, a particular attribute of cyber weapons is the ability to scale and tailor effects to individual systems.[227] As cyber weapons will be utilized to target BCI, this same ability to tailor weapons and effects will also be possible, satisfying requirements that these weapons not be indiscriminate. Tailoring a cyber weapon for use against a BCI in a way also provides additional distinction from biological and chemical weapons, which neuroethicists point to as comparable to future neuroweapons.[228] Some methods used to employ biological and chemical weapons, such as simply releasing biological or chemical agents into the atmosphere, are unlawful due to their indiscriminate nature.[229] A tailored cyber weapon directed against a lawfully targetable BCI system does not share this indiscriminate quality.

Turning to employment of a cyber weapon against BCI, recall the discussion of the components of the BCI cycle and how each can be associated with a person or object. Effects aimed at the measurement, decoding, and output phases can be assessed as targeting objects for purposes of the IHL principles, where effects aimed at the generation or feedback phases can be considered operations against a person. The BCI targeting framework could then be applied, evaluating each layer of effects—including those on the human brain. The difference in assessing the human effect, whether intended as a direct effect or a collateral result of the operation, would be dictated by what part of the BCI cycle was targeted. This approach has several advantages. First, it will not require

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[227] *See* BOOTHBY, *supra* note 138, at 179 *citing* Cordula Droege, *Get Off My Cloud: Cyber Warfare, International Humanitarian Law, And The Protection Of Civilians*, 94 INT'L REV. RED CROSS 533 (Jun. 2012). Boothby discusses the ability to limit cyber effects to certain systems, citing the Stuxnet virus as an example. *Id.* While the code of Stuxnet was present on codes around the world, its effects only manifested themselves in the targeted systems in Iran. *Id.* Still, as Cordula Droege notes, Stuxnet highlights the difficulty in preventing the spread of code around the world, even if it is not creating effects on any of the computers infected with the code. *Id.*

[228] Requarth, *supra* note 15.

[229] Jensen, *supra* note 5, at 255-56, *citing* AP I, *supra* note 145, art. 57 (discrimination requires each specific attack, including each weapon system, to be able to differentiate in the attack and only attack intended targets).

a commander to conduct an analysis of the brain's function in a BCI system, adding an additional layer of complication. Second, it allows for clear application of IHL targeting principles to cyber operations against BCI, reinforcing IHL as the lex specialis for military operations during armed conflict and utilizing legal concepts commanders are familiar with. Finally, as the IHL targeting principles incorporate protections for both combatants and non-combatants, application of these principles provide additional mitigation of the concerns raised by neuroethicists in the context of targeting BCI during hostilities.

This final advantage is reinforced by the framework's emphasis on the principle of humanity in operations against BCI. Reviewing the concerns of neuroethicists, all center on the physical and psychological damage that can be done to the human brain by manipulation of BCI. Clearly, the long-term effects of a damaged brain or loss of psychological well-being are horrific. To arbitrarily inflict such injuries would be cruel and would meet the standard of undue suffering or superfluous injury. While the principle of humanity does not guarantee these injuries would not occur, it does aim to require that these types of injuries would only occur in conjunction with a legitimate military operation and use of a weapon in compliance with IHL. This advantage, and the application of the corresponding protections offered by IHL targeting principles, is discussed below.

1. Military Necessity

First formally articulated in the Lieber Code, military necessity has long been recognized as a principle of IHL.[230] Military necessity justifies the use of all measures necessary, not otherwise prohibited by IHL, to bring about the defeat of an enemy.[231] This would include the use of cyber operations or attacks against adversaries equipped with BCI. Such operations would have to be linked to a military requirement, benefit, or objective in order to comply with this principle. This requirement applies to any planned operations against BCI, encompassing both attacks and

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[230] *See generally* Headquarters, U.S. War Dep't, Gen. Order No. 100 art. 14 (Apr. 24, 1863 ("Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."); *see* Hague Convention, *supra* note 107; Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L. L. 213 (Apr. 1998).

[231] LAW OF WAR MANUAL, *supra* note 170, para. 2.2.

non-attacks such as psychological operations.[232] During armed conflict, linking operations to military requirements, benefits, or objectives serves as additional mitigation of the concerns raised by neuroscientists. Many of these concerns pertain to hackers violating mental privacy by stealing information from BCI-equipped individuals, cyber actors hijacking the function of BCI, or effects resulting in harm to individuals. Military necessity would allow for these types of effects to take place during armed conflict, but not in an arbitrary manner. A commander intending to conduct such an operation would have to define their purpose or objective, adding a layer of consideration and protection for individuals equipped with BCI. While not an absolute prohibition, military necessity would require an IHL-compliant justification for all contemplated cyber operations against BCI.

2. Distinction

Distinction is a bedrock principle in IHL, providing additional protection to civilians during hostilities by requiring that attacks only be directed at combatant persons or military objects.[233] Distinguishing between a combatant and non-combatant person is different from distinguishing between military and civilian objects, facilities, or equipment.[234] Generally, when applying the IHL principle of distinction to people, the status of the individual's affiliation with an armed service or group is the primary consideration, with consideration of conduct reserved for determining whether a civilian is directly participating in hostilities.[235] Objects, however, are examined under a separate test, evaluating whether they make an effective contribution to military action

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[232] *Id.* para. 2.2.1.

[233] AP I, *supra* note 145, art. 48 ("In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."); Yoram Dinstein, *The Principle of Cyber War in International Armed Conflicts*, 17 J. CONFLICT & SECURITY L. 261 (2012), https://academic.oup.com/jcsl/article/17/2/261/852776#14763768.

[234] AP I, *supra* note 145 art. 48. This document specifically articulates different requirements to distinguish between persons and objects. These differences are re-enforced by the separate requirements found in Articles 50-56. LAW OF WAR MANUAL, *supra* note 170, para. 2.5.

[235] AP I, *supra* note 145, art. 50 (refers to the definition of combatants found in Article 43 of Protocol I and in Article 4 of the Third Geneva Convention). Article 51(1) and 51(2) re-articulate that the civilian population shall not be the object of attack. *Id.* art. 51.

based on their nature, use, location, or purpose, and then considering the military advantage of destroying, capturing, or neutralizing the object.[236] Additionally, dual use objects, utilized for both military and civilian purposes, are also targetable.[237]

Recall the earlier discussion of the brain's status in a BCI, and the conclusion that the brain should always be treated as a person.[238] This conclusion allows for a clearer analysis of the distinction principle. Effects directed at the measurement, decoding, and output phases of BCI cycle, which are part of the computer or machine portions of the BCI cycle, would be analyzed under the object test for distinction detailed above, while effects directed at the generation and feedback portions of the cycle involving the brain would be analyzed under the person test. Brain-computer interfaces incorporated into adversary military means or weapon systems would be distinguishable as military objects, and the brains connected to, interacting with, and operating these BCI would be distinguishable as combatants, making both targetable. But consider a situation where a civilian BCI is being utilized to carry out an operation, with the civilian unaware that it is taking place or not in control of the activity. This scenario is similar in nature to one involving potential future abilities to tailor biological weapons outlined by Eric Jensen.[239] In that scenario, an unwitting carrier of a biological weapon, known to have access to the eventual target of the pathogen, is infected.[240] The biological weapon is genetically engineered to only affect the target of the attack.[241] The pathogen in the person's system is clearly a weapon and is being utilized to carry out an attack, but the individual carrying the weapon has no idea the weapon is even in their system and, due to the narrow tailoring

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[236] *See* AP I, *supra* note 145, art. 52; Pascucci, *supra* note 20, at 433-39 (Pascucci notes the application of the object test for distinction is not always straight forward. Particularly in analyzing whether a system's nature, location, use, or purpose contributes to military action, Pascucci highlights civilian systems also utilized for military communication and civilian social media being used for a purpose it was not designed for during armed conflict. By extension, care must be taken to assess each BCI system carefully under the distinction of military objects standard.).

[237] *See* Michael N. Schmitt, *The Law of Cyber Warfare: Quo Vadis?*, 25 STAN. L. & POL'Y REV. 269, 298 (June 2014), https://law.stanford.edu/wp-content/uploads/2018/03/schmitt.pdf.

[238] *See supra* pp. 30-39.

[239] Jensen, *supra* note 5, at 254-55.

[240] *Id.*

[241] *Id.*

of the weapon, it has no effect on the individual.[242] This scenario creates significant issues under IHL,[243] including how to treat the unwitting carrier of the weapon. A similar type of latent attack is envisioned in a cyber context in the novel *Ghost Fleet*.[244]

Here, a Chinese government hacker gains access to multiple digital devices owned by civilians in the United States, to include government contractors, to move portions of malicious code into the Defense Intelligence Agency for the purpose of collecting intelligence.[245] While this is not an example of an attack as defined by the Tallinn Manual, since it is a cyber espionage activity,[246] it does highlight the possibility to utilize devices carried by human beings to carry malicious code. Ubiquitous BCI utilized by the public would be the ultimate human-portable technological device. A pervasive BCI technology, such as neural lace,[247] would make it impossible to discount that adversaries would take advantage of its vulnerabilities. Adversaries could embed malicious code on these devices without the individual's awareness, using these individuals to carry the malicious code or cyber attack payload to its target in a combination of the scenarios outlined above. In this particular scenario, care would be required to distinguish between the status of the malicious code riding on the hijacked BCI, the BCI hardware, and the connected brain when undertaking an operation to counter the attack. Distinguishing the human whose BCI had been hijacked as a civilian invokes the protections of the separate IHL principle of proportionality.

3. Proportionality

The principle of proportionality prohibits "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[248] Thus, proportionality requires an attacker to first consider two specific

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242 *Id.*

243 *Id.* at 312.

244 P. W. SINGER & AUGUST COLE, GHOST FLEET: A NOVEL OF THE NEXT WORLD WAR 37-42 (2015).

245 *Id.*

246 *See supra* pp. 41.

247 *See supra* pp. 10.

248 AP I, *supra* note 145, art. 51.

factors related to incidental harm to civilians: causation and foreseeability.[249] Causation relates to whether the expected incidental harm would be caused by the attack.[250] Unlike the requirement that the anticipated military advantage be directly related to the attack, there is no corresponding requirement under causation for incidental harm to civilians or civilian objects.[251] Incidental harm can be caused either as a direct result of an attack or "as a result of a series of steps."[252] Foreseeability considers whether incidental harm to civilians or civilian objects could have been expected as the attack was planned or launched.[253] When applying foreseeability in assessing a potential attack, the legal standard is one of reasonableness.[254] In other words, "what should have been foreseen" based on the information on hand, or that could be reasonably expected to be on hand.[255] Once an attacker determines incidental harm is foreseeable, they must then also consider the likelihood such harm would occur.[256] The likelihood of whether incidental harm will occur assists the attacker in considering the weight to place on the incidental harm in the larger proportionality analysis. After causation and foreseeability have been fully considered, to complete the proportionality analysis, these considerations must be weighed against the anticipated military advantage to be gained by the attack.[257] "[P]roportionality prohibits attacks expected to cause incidental harm that would be 'excessive' in relation to the anticipated concrete and direct military advantage."[258]

Proportionality would initially appear to provide little difficulty in application to BCI. Operations against BCI distinguished as military

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[249] Emanuela-Chiara Gillard, *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment*, CHATHAM HOUSE 13-20 (Dec. 2018), https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incidental-harm-gillard-final.pdf [hereinafter Gillard].

[250] *Id.* at 13-15.

[251] *Id.* at 14.

[252] *Id.* at 18-20; *See also* Pascucci *supra* note 20, at 449-51. Both documents discuss reverberating or "knock-on" effects when applying the principle of proportionality. Specifically, reverberating effects are not directly caused by the attack, but rather are follow on, indirect consequences. *Id.*

[253] Gillard, *supra* note 249, at 15-17.

[254] *Id.* at 16-17.

[255] *Id.*

[256] *Id.* at 16-18.

[257] *Id.* at 20-25.

[258] *Id.* at 21.

objects connected to brains belonging to adversaries could be tailored to limit effects solely to these military targets, essentially making proportionality moot. Further, operations exclusively against military BCI hardware would also seem to leave civilian or collateral effects out of the calculus. But, as detailed in the discussion of distinction, scenarios such as brain-hacking, brainjacking, or involuntary manipulation of civilian BCI could lead to otherwise-civilian BCI hardware being utilized for military purposes.[259] Defending against this threat may require disabling the BCI implanted within the individual or interfering with its functionality—either temporarily or permanently. These effects could create detrimental psychological effects in these civilians envisioned by neuroethicists.[260]

Such a scenario adds to the difficulty in applying the principle of proportionality in cyberspace. While the Tallinn Manual allows that effects resulting in mental suffering can be considered attacks,[261] the suffering in this scenario would be a collateral effect on a civilian brain caused by taking action against malicious code within their BCI. But what manipulation or effect in the hijacked BCI would be required to counter the malicious code? Following the above framework for operations against BCI, the hijacked BCI could be considered a military target as a dual-use object. But, as Peter Pascucci highlights and per the Tallinn Manual operations, that would affect the functionality of the BCI and would be considered attacks; however, open questions remain as to whether simply manipulating data would rise to this standard.[262] This creates a potential scenario where data is manipulated in a civilian's BCI hardware to a level not meeting a clear standard of attack, yet still causing a collateral effect of mental suffering in a civilian brain connected to a BCI.

Mental suffering has traditionally not seen the same level of consideration as loss of civilian life or physical injuries to civilians when

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259 *See supra* pp. 14-17.

260 Ienca and Andorno, *supra* note 16 (discussing the proposed new human rights of mental integrity and psychological continuity, the authors detail how manipulation of a BCI could damage their neural computational and functional abilities, as well as affect their psychological well-being through consequent behavioral changes or perception of the world around them).

261 TALLINN MANUAL, *supra* note 64, at 417.

262 Pascucci, *supra* note 20, at 448.

considering proportionality.[263] Certainly, if an attack on a BCI would cause an incidental civilian death or injury, it would require consideration under proportionality. Yet, due to the challenge in applying causation and foreseeability—as well as difficulty of assessing and quantifying mental harm—mental suffering has not enjoyed the same level of consideration.[264] It is worth consideration that BCI making its way to the battlefield may accelerate concern of mental suffering as an incidental harm under proportionality. There is no severity requirement attached to injuries when considering incidental harm under proportionality.[265] Recognizing that an attack on a BCI could cause harm and mental injury described by neuroethicists could lead to mental suffering and harm taking greater prominence in the proportionality analysis, highlighting the clear applicability of the principle during armed conflict, when non-combatant effects are anticipated. Further, it shows that as circumstances warrant, great care must be given to analyzing the effects a given operation may have on civilians prior to its execution.

4. Humanity

Finally, the principle of humanity serves as the bedrock underlying several other IHL principles.[266] Humanity is also the complementary principle to military necessity, tempering the extent to which military necessity can be utilized to justify military operations.[267] The modern articulation of humanity is found in Article 35 of Protocol I.[268] Specifically, Article 35 notes that a state's ability to employ methods and means of warfare is not unlimited and prohibits the use of "weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."[269]

Adherence to the principle of humanity occurs through two main lines of effort. First, consistent with Article 36 of Protocol I, new weapon systems may be subject to review for compliance with IHL, specifically

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263 Gillard, *supra* note 249, at 32-33.

264 *Id.* at 33.

265 *Id.* at 33-34.

266 LAW OF WAR MANUAL, *supra* note 170, para. 2.3.2 (for example, humanity "animates" safeguards for individuals who fall under the control of an adversary, protections for civilians and civilian objects, and prohibits indiscriminate weapons).

267 *Id.* para. 2.3.1.1.

268 AP I, *supra* note 145, art. 35.

269 *Id.*

its compliance with humanity.[270] Next, when employed, there is an obligation to not cause undue suffering or superfluous injury.[271]

Whether the target is a person or object also affects the application of the principle of humanity. This is due to the nature of the principle and its interaction with the principle of necessity. If it is necessary to engage a target, humanity would only prevent doing so if it was done in a way specifically designed to bring about undue suffering or superfluous injury.[272] Simply engaging a legitimate military target out of military necessity, which may result in the injury or death of combatants, does not violate the principle of humanity.[273]

If a person is a lawful target, it is not a violation of IHL or the principle of humanity to engage and kill them.[274] To illustrate this point in a cyber context, consider the pacemaker scenario described in the Tallinn Manual.[275] Cyber manipulation of a pacemaker to induce cardiac arrest in a lawful target would not be a violation of humanity, but causing a series of heart attacks in order to induce pain and suffering in the target prior to killing them would be a violation of humanity.[276]

Targeting an object creates different considerations under humanity. As an illustration, should a commander determine it necessary to engage a tank, a larger munition would be required than what would be necessary to engage personnel. It is possible, or even likely, that personnel will be inside and operating the tank at the time it was struck. The larger munition could cause the adversaries inside the tank to suffer; but, because it was militarily necessary to engage the tank—and the weapon utilized was designed to destroy the tank, not to cause undue suffering or superfluous injury to the people inside—it would not violate the principle of humanity.

Brain-computer interface hardware presents unique issues in the application of humanity. While applying humanity to implanted

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[270] AP I, *supra* note 145, art. 36; WILLIAM H. BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT 340-352 (2009) [hereinafter BOOTHBY, WEAPONS].

[271] LAW OF WAR MANUAL, *supra* note 170, para. 2.3.

[272] *Id.* para. 2.3.1.1.

[273] *Id.*

[274] *Id.* para. 2.3.1.

[275] TALLINN MANUAL, *supra* note 64, at 455.

[276] *Id.*

technology was contemplated by the Tallinn Manual,[277] the example of the pacemaker did not encompass the type of technology that allows for a biological system to directly interact with the cyber domain, transmit and receive data, or control military objects. Further, the potential for enduring physical, neurological, and psychological effects caused by operations against BCI presents a different dimension to the application of humanity. William Boothby indicates, as time and technological advances move forward, "[c]ultural appreciations as to which injuring mechanisms are respectively acceptable, undesirable, or abhorrent may change, affected in part by medical advance."[278] Boothby's observation is currently manifesting itself through the neuroethical discussions and advocacy surrounding BCI that highlight several of the dangers and damage to individuals' mental well-being that can be caused by attacks on BCI.

It is here that the principle of humanity will both garner outsized consideration in operations against BCI and serve an enabling function for operations against this technology. Humanity's animation of other IHL principles has already been noted in requirements and protections afforded by the principles of military necessity, distinction, and proportionality, affording protection to the brains of individuals connected to BCI. Beyond these IHL requirements directly rooted in humanity, one last layer of protection to the brains of adversaries connected to BCI is added; attacks against BCI, and by extension brains, will not be conducted in a manner designed to cause undue suffering or superfluous injury.

The concept of preventing undue suffering or superfluous injury in the conduct of operations serves the purpose of eliminating unnecessary actions to achieving a necessary military objective.[279] Thus humanity serves as a mechanism to enhance military efficiency and effectiveness.[280] Applying this concept to operations against BCI, a series of examples would serve to illustrate this interplay between military necessity and humanity.

First, consider effects on an adversary's BCI designed to gather data, share information, communicate, or exercise command and control. During armed conflict, denial or disruption of the system would serve a military purpose and would likely have the same effect as denying

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277 *Id.*

278 BOOTHBY, WEAPONS, *supra* note 270, at 68.

279 LAW OF WAR MANUAL, *supra* note 170, para. 2.3.1.1.

280 *Id.*

information to adversaries would have today. Even if effects on this BCI would result in a psychological effect in an adversary, such as loss of confidence, these effects would— arguably— not rise to the level of undue suffering or superfluous injury. Even if they did, the valid military purpose for the operation directed at the BCI would still make the operation compliant with humanity.

But consider scenarios where an operation against BCI erases or manipulates data. Putting aside the debate on the status of data as an object of attack, if the data was associated with a military function during hostilities, an operation against this data would likely not violate humanity for similar reasons as above. If the operation targeted personal data, however, the analysis could shift. Targeting personal data, such as medical records, could manifest in unnecessarily painful physical harm if the wrong treatment was administered. Consider also the *Anon* scenario of manipulating data of painful memories, causing them to be ever present in a person's mind.[281] The result could be significant personal anguish in the targeted individual, which in turn could be considered an operation conducted simply to cause undue suffering.

Now, consider the ability to manipulate the feedback portion of the BCI cycle and how it could affect the electrical signal returning to the brain. As highlighted, this could potentially be utilized to cause physical damage to the brain or create changes in mood and personality. The military necessity of disrupting a commander's ability to make decisions or to exercise control over the battle space is certainly legitimate, but are the lasting effects of such an operation in conformity with humanity if the damage to the commander's mental well-being is permanent?

Moving to BCI designed to exert control over physical systems or individuals, potential to take actions out of conformance with the principle of humanity grow due to the physical dangers an individual may experience. Consider the example of manipulation of a person's bodily movements highlighted earlier. Imagine intelligence exists that an adversary is driving a vehicle and is equipped with a functioning BCI. Would manipulating that adversary to jerk the wheel to drive off a cliff violate humanity? Certainly, the individual would face the dual terror of loss of self-control and impending death due to the manipulation; but, they are a legitimate target.

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[281] *See supra* pp. 4-5.

Similar scenarios endangering individuals can also be envisioned by manipulating weapon systems incorporated into the BCI. An individual utilizing a prosthetic or exoskeleton could have control seized from them, leaving them helpless and along for the ride as the new masters of the machine carry out their will. Targeting these weapon systems would serve some level of military necessity; but, an operation designed to carry out the envisaged effects would certainly have lasting effects on individuals in these systems.

The point of exploring these scenarios is to highlight the balance of military necessity and humanity. Cruelty and wonton violence are not permissible on the battlefield, only operations based on a military necessity that adhere to the other protections under IHL are permissible. Operations against BCI, including those that could result in damage to the brain, can be legally permissible; but, tempered by the ever-vital principle of humanity's protection of the brain, it will require careful application of all IHL principles.

VI. Conclusion

There is no luxury to wait for new technology to come into being before thinking about the challenges the technology will present. This article addresses one of the myriad challenges presented by BCI, fully recognizing that other open questions exist. These include the potential for intelligence collection and activity through BCI, as well as activities outside of armed conflict. While these challenges will require answers, targeting BCI during armed conflict in a manner consistent with existing IHL appears possible through a systemic evaluation of a given operation.

Brain-computer interfaces present the possibility for human beings to become more integrated with machines and computers. While this article approached this integration—or convergence—from the perspective of finding the brain's place in the cyber world, perhaps the better approach would have been to acknowledge that—as some authors contend—cyberspace is not a real place.[282] Focusing simply on operations, effects, and how they manifest in the physical world allows for clearer analysis of

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[282] Robert Dewar, *Cyberspace is a Consensual Hallucination*, 6 POLICY PERSPECTIVES 1 (Apr. 2018), https://www.researchgate.net/publication/325216608_Cyberspace_is_a_Consensual_Hallucination.

the application of IHL and consideration of the concerns of neuroscientists and neuroethicists.

The concerns of neuroethicists reflect in many ways how convergence with technology, and envisioning a separate cyber or technical world, seems to be slowly stripping our humanness away. Our brains are the last great step in this integration, and our neuroethicists have—rightly—sounded the alarm on possible repercussions on the path ahead. The alarm is all about the human, not the machine, a point that should be central in any discussions about such technology. We should therefore be sensitive in our legal analysis to preserving the humanness of persons connected to machines, which will naturally allow for IHL principles—specifically the principle of humanity—to provide protection from the dangers created by man-machine convergence technologies such as BCI.

WHERE THE PERSONAL JURISDICTION ENDS: A BRIGHT-LINE RULE FOR DETERMINING WHEN THE MILITARY LOSES *IN PERSONAM* JURISDICTION

MAJOR SEAN P. MAHARD*

The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds.[1]

I. Introduction

The Court of Appeals for the Armed Forces (CAAF) has struggled with personal jurisdiction for over thirty years. As it most recently acknowledged in *United States v. Christensen*, "the [Uniform Code of Military Justice (UCMJ)] does not state when a servicemember's discharge from the armed forces becomes effective for jurisdictional purposes, and thus does not specifically address when a servicemember is no longer subject to being court-martialed."[2] In fact, it is often difficult to determine the exact moment when *in personam* court-martial jurisdiction ends.[3] The CAAF recognizes as black-letter law that a court-martial loses jurisdiction upon a Soldier's discharge absent some specific "saving

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[1] Reid v. Covert, 354 U.S. 1, 23-24 (1957).

[2] United States v. Christensen, 78 M.J. 1, 4 (C.A.A.F. 2018).

[3] *See id.* at 6 (Maggs, J., concurring) ("In many cases, however, determining when a discharge has occurred is difficult.").

circumstance or statutory authorization."[4] The court has relied on two statutes, 10 U.S.C. §§ 1168(a) and 1169 (2012), to guide its judge-made law in this area.[5] This reliance led to the creation of a three-part test that determines when personal jurisdiction over a service member ends.[6] The court requires (1) "delivery of a valid discharge certificate"; (2) "a final accounting of pay"; and (3) the undergoing of a "clearing process required under appropriate service regulations."[7]

The stakes for correctly articulating the law on this issue are high. After *Christensen*, CAAFlog—a military-justice blog—identified personal jurisdiction as the number four Military Justice Story of 2018 in its annual ranking of headline-making cases, illustrating the intense discussion it generated among the military's legal practitioners.[8] Valid military discharges serve as the line of demarcation from military to civilian status.[9] Since the UCMJ does not define this point exactly, practitioners need clear guidance before expending the significant resources involved in prosecuting and defending a court-martial of an individual whom the military no longer has jurisdiction to prosecute. Nothing less than an individual's liberty is at stake. The CAAF's three-part test has proved challenging for the field as evidenced by the court's frequent foray into this area of the law.[10] This article offers a simple solution: personal jurisdiction ends at 2400 on the date of a valid, approved discharge certificate.

This article consists of four substantive parts. Part II reviews the history and foundation of court-martial jurisdiction, providing a framework for an analysis of the CAAF's law on personal jurisdiction. This portion of the article begins with an overview of military jurisdiction before analyzing the Due Process Clause of the Fifth Amendment and Article I's Make Rules Clause. Both of these constitutional components

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[4] *Id*. at 4 (quoting United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985)).
[5] *See* United States v. King, 27 M.J. 327, 329 (C.M.A. 1989) (citing §§ 1168(a) and 1169).
[6] *See id*. ("We read these statutes as generally requiring that three elements be satisfied to accomplish an early discharge.").
[7] *Id*.
[8] Zachary D. Spilman, *Top Ten Military Justice Stories of 2018 - #4: A New Paradigm for Discharge from Active Duty*, CAAFLOG (Jan. 2, 2019), http://www.caaflog.com/category/year-in-review/top-ten-stories-of-2018/ (characterizing *Christensen* as a "dramatic reversal").
[9] *See* discussion *infra* Part II.
[10] *See* discussion *infra* Part III.

are featured prominently in any understanding of a court-martial's reach. Part II also discusses the relevant Supreme Court precedents, discussing why these decisions underscore a more narrow view of a court-martial's jurisdiction.[11] Ultimately, this section provides the constitutional backdrop of the CAAF's law on court-martial jurisdiction.

Part III analyzes the development of the CAAF's jurisprudence on when personal jurisdiction ends, starting with the court's landmark decision in 1985.[12] This Part analyzes *Howard* and its progeny, focusing on the court's reasoning and analysis of *in personam* jurisdiction. This section also examines the CAAF's most recent retreat from its test in *United States v. Nettles* in 2015 and *Christensen* in 2018.[13] Notably, this article does not address when the military loses *in personam* jurisdiction as a result of court-martial punishment, desertion, or fraudulent separation. These specific areas of personal jurisdiction have spawned their own jurisprudence. Rather, this article focuses on a service member's discharge prior to their expiration of term of service (ETS).[14]

Part IV provides a critical analysis of the CAAF's current three-part test. The test, based on sections 1168(a) and 1169, has proved difficult in practice for the court to apply—as the CAAF seemingly acknowledged in *Nettles* and *Christensen*.[15] Part IV critiques each part of the test,

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[11] *See* discussion *infra* Part II. *See generally* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

[12] *See* United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985) ("Discharges are governed by 10 U.S.C. § 1168(a).").

[13] *See* United States v. Christensen, 78 M.J. 1, 4-5 (C.A.A.F. 2018) (noting that §§ 1168(a) and 1169 serve as guidance and are not binding); United States v. Nettles, 74 M.J. at 291 ("[W]e decline to employ the 10 U.S.C. § 1168(a) framework here.").

[14] Although cases involving court-martial sentences do occasionally implicate the CAAF's three-part test. In *United States v. Watson*, 69 M.J. 415 (C.A.A.F. 2011), the CAAF reversed the Army Court of Criminal Appeals (ACCA), finding the accused had received a valid administrative discharge. This discharge remitted her dismissal, which had not been executed when Human Resources Command approved the administrative discharge. *See id.* at 416 (citing *Steele v. Van Riper*, 50 M.J. 89, 91-92 (C.A.A.F. 1999)) ("A post-trial administrative discharge operates to remit the unexecuted punitive discharge portion of an adjudged court-martial sentence."). The court did apply its three-part test, noting the only issue was "whether the Army issued Appellant a valid discharge certificate." *See id.* at 417.

[15] *See* discussion *infra* Part III.C.

concluding that the CAAF's reliance on personnel statutes is misplaced and inconsistent with the legislative history and purposes of sections 1168(a) and 1169.[16] Overall, the current jurisprudence fails to provide straightforward guidance to the field, and the *Nettles* "reason or policy" gloss fails to adequately address the shortcomings of the test.[17] Consequently, a wholesale change is necessary.

Part V proposes a solution: personal jurisdiction for active-duty service members ends at 2400 on the date of a valid discharge certificate. This bright-line rule construes personal jurisdiction narrowly and provides a workable test for practitioners in the field. The CAAF should acknowledge that *Howard* was a "wrong turn" in its jurisprudence and chart a new way forward.[18] Part V advocates for a simple approach that is not dependent on delivery of a Department of Defense (DD) Form 214, military finance, or clearing a military post—the three elements of the current test. Without the action of Congress or the Service Secretaries, the CAAF should modify the three-part test. The court's case law on valid discharges is robust enough to weed out possible hitches, including fraud, reenlistments, and other potential pitfalls that might stymie a bright-line rule.[19] This article's proposed test would provide judge advocates and commanders the guidance they crave and will eliminate the many issues they face in determining the precise reach of a court-martial.

II. A Limited Court: The Scope of Court-Martial Jurisdiction

A. An Overview of Court-Martial Jurisdiction

Courts-martial are a limited criminal court for service members.[20] Section 8, Article I, of the U.S. Constitution authorizes Congress to regulate the armed forces, which it did in the form of the UCMJ.[21] The

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[16] *See* discussion *infra* Part IV.

[17] *See Nettles*, 74 M.J. at 291 (finding that the requirements of § 1168(a) are not binding).

[18] *See* discussion *infra* Part III.C.

[19] *See* discussion *infra* Part V.

[20] *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 4-2(A), at 201 (9th ed. 2015) ("Courts-martial are solely disciplinary, or penal, in nature.").

[21] *Id.* § 4-1, at 201 ("Congress, with its constitutional mandate, has provided 'jurisdiction' articles in the [UCMJ].").

UCMJ serves as the subject-matter jurisdiction for military tribunals—the laws Soldiers must follow while serving.[22] The UCMJ is not geographically specific; courts-martial have worldwide jurisdiction for offenses service members commit.[23] This feature is critically important since the military's criminal code serves as a disciplinary tool for commanders whose units deploy worldwide in defense of the Nation.[24]

As a "creature of statute," courts-martial depend upon certain jurisdictional hooks to function—none more important than personal jurisdiction.[25] *In personam* jurisdiction boils down to status: is the individual a Soldier or a civilian?[26] For the majority of cases, the answer is clear. At the margins, however, questions can, and do, arise. Jurisdiction attaches once an individual joins the military and transitions from civilian to Soldier.[27] This article does not address jurisdictional inception, which has its own unique jurisprudence from the CAAF.[28] Likewise, wartime operations have raised interesting questions regarding jurisdiction over "persons serving with or accompanying an armed force in the field"; for example, civilian contractors on the battlefield.[29] This article does not tackle that matter.

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[22] FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 2-31.00, at 2-39-40 (4th ed. 2015) ("The test for subject matter jurisdiction in the armed forces today may be simply stated: a service member may be tried for any offense criminalized by the Uniform Code of Military Justice.").

[23] SCHLUETER, *supra* note 20, § 4-2(A), at 201 (noting "the [UCMJ] applies in all places").

[24] *See* Curry v. Sec'y of Army, 595 F.2d 873, 880 (D.C. Cir. 1979) ("The provisions of the UCMJ with respect to court-martial proceedings represent a congressional attempt to accommodate the interests of justice, on the one hand, with the demands for an efficient, well-disciplined military, on the other."); *see also* GILLIGAN & LEDERER, *supra* note 22, § 1-30.00, at 1-5-9 (discussing discipline versus justice in the context of the military-justice system).

[25] *See* SCHLUETER, *supra* note 20, § 4-2(B)-(C), at 201-02 (citing McClaughry v. Deming, 186 U.S. 49 (1902)) (discussing court-martial jurisdiction).

[26] *Id.* § 4-4, at 206 (citing Toth v. Quarles, 350 U.S. 11 (1955)) ("Personal jurisdiction is a question of 'status.'").

[27] *Id.* § 4-5(A)(1), at 207 ("A change of status, from civilian to service member, occurs when an individual enters military service.").

[28] *See id.* § 4-5, at 207-15 (discussing the variety of ways in which a civilian can become a service member).

[29] *See id.* § 4-7, at 220-25 (citing UCMJ art. 2(a)(10) (2016)) (analyzing the limited circumstances when courts-martial have jurisdiction over civilians); Major Aimee M. Bateman, *A Military Practitioner's Guide to the Military Extraterritorial Jurisdiction Act in Contingency Operations*, ARMY LAW., Dec.

Rather, this article focuses on the termination of jurisdiction. This inquiry requires a particular focus since numerous categories of armed-forces personnel exist. The generally accepted rule is that a discharge severs jurisdiction and changes a Soldier's status to that of a civilian.[30] The military courts have carved out different jurisdictional rules for continuing jurisdiction,[31] reenlistments,[32] fraudulent discharges,[33] deserters,[34] retirees,[35] and sentenced prisoners.[36] However, this article cannot delve into the intricacies and nuances of each of those unique categories, including the rather complex jurisdictional web for National Guard and Reserve Component Soldiers.[37] It will certainly touch on those topics when relevant (and, in particular, when case law implicates the specific issue analyzed in this article). This article, however, addresses the best legal test to determine when personal jurisdiction ends for the "early discharge" of an active-duty service member.[38]

2012 at 4, 4-6 (discussing the prosecution of Department of Defense (DoD) civilian contractors under the Military Extraterritorial Jurisdiction Act of 2000).

[30] GILLIGAN & LEDERER, *supra* note 22, § 2-22.10(b)(1), at 2-15 ("Status as an active-duty servicemember, and hence court-martial jurisdiction over such persons, ordinarily terminates with the delivery of a valid discharge certificate or separation order.").

[31] *See* SCHLUETER, *supra* note 20, § 4-8(B), at 226-27 (discussing the nuances of continuing jurisdiction); Martin H. Sitler, *The Court-Martial Cornerstone: Recent Developments in Jurisdiction*, ARMY LAW., Apr. 2000, at 2, 6-8 ("Although an exception to the general rule that a discharge terminates jurisdiction, the concept of continuing jurisdiction applies to a limited situation—post-conviction to sentence execution.").

[32] *See* SCHLUETER, *supra* note 20, § 4-8(D)(2), at 230-31 (discussing reenlistment discharges).

[33] *See* GILLIGAN & LEDERER, *supra* note 22, § 2-22.10(c)(3), at 2-23-24 (noting that a "fraudulently obtained discharge or separation is not a bar to court-martial jurisdiction").

[34] *See id.* § 2-22.10(c)(4), at 2-24-25 (discussing Article 3(c) of the UCMJ).

[35] *See id.* § 2-22.30, at 2-28-33 (discussing jurisdiction over retired personnel).

[36] *See id.* § 2-22.10(c)(2), at 2-23 (explaining that jurisdiction exists over service members sentenced to a discharge as a result of a court-martial conviction).

[37] *See* Tyler J. Harder, *Recent Developments in Jurisdiction: Is This the Dawn of the Year of Jurisdiction?*, ARMY LAW., Apr. 2001, at 2, 7 ("The jurisdictional relationship between the active component, the reserve component, and the National Guard is confusing for many and sometimes can be difficult to apply.").

[38] *See* United States v. Harmon, 63 M.J. 98, 101 (C.A.A.F. 2006) (emphasis added) (citing United States v. King, 27 M.J. 327, 329 (C.M.A. 1989)) ("To effectuate an *early discharge*, there must be: (1) a delivery of a valid discharge

B. Discharges: Winthrop, DD Form 214s, and the Army's Regulations

The military's highest appellate court recognizes as black letter law "that *in personam* jurisdiction over a military person is lost upon his discharge from the service, absent some saving circumstance or statutory authorization."[39] The nuance of "upon his discharge" created a complex maze of case law that resulted in more questions than answers.[40] William Winthrop, the illustrious legal scholar on military law, dedicated a few pages of his famous *Military Law and Precedents* to discharges, through analysis of the Fourth Article of the Articles of War—the military code that served as a precursor to the UCMJ.[41] The Fourth Article commanded that:

> No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field officer of the regiment to which he belongs, or by the commanding officer when no field officer is present; and no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.[42]

Winthrop recognized discharges as "the act of the United States through its official representative," noting that "there should be a delivery to the soldier of the written form in order to give effect to the discharge."[43] Winthrop acknowledged that a service member "shall receive an instrument of discharge in writing, signed by a commanding or other

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certificate; (2) a final accounting of pay; and (3) the undergoing of a 'clearing' process as required under appropriate service regulations to separate the member from military service.").

[39] United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985).

[40] *See* SCHLUETER, *supra* note 20, § 4-8(D), at 230-36 (discussing the exceptions to the general rule for when personal jurisdiction terminates).

[41] William Winthrop, Military Law and Precedents 547-52 (2d ed. 1920).

[42] *Id.* at 547.

[43] *Id*. at 548.

specified officer."[44] This requirement arguably persists to this day in the form of the DD Form 214.[45]

Each Soldier discharged from the service will receive a DD Form 214.[46] Army Regulation (AR) 635-5, *Separation Documents*, governs how to complete the DD Form 214 while AR 635-200, *Active Duty Enlisted Administrative Separations*, dictates how they are issued for enlisted personnel.[47] Army Regulation 635-200 provides that—with a few limited exceptions—"[t]he discharge of a Soldier ... is effective at 2400 on the date of notice of discharge to the Soldier."[48] Army Regulation 600-8-24, *Officer Transfers and Discharges*, governs officer discharges, but does not specify an exact time when discharges become effective.[49] Importantly, AR 635-200 points out that notice to the Soldier of the discharge may be either actual or constructive.[50]

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[44] *Id*.

[45] *See* Dep't of Defense, Form 214, Certificate of Release or Discharge from Active Duty (1 Aug. 2009); DoD Forms Management Program, Certificate of Release or Discharge from Active Duty, EXECUTIVE SERVICES DIRECTORATE, https://www.esd.whs.mil/Directives/forms/dd0001_0499/ (last visited Mar. 14, 2019) (noting that it is a controlled form). It is important to note that officers can receive a DD Form 256A when the characterization of service is honorable; however, "[a] DD Form 214 ... will be furnished as prescribed in AR 635-5 to an officer who is separated from [Active Duty (AD)] after completing 90 calendar days of continuous AD." U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 1-22 (12 Apr. 2006) (RAR 13 Sept. 2011) [hereinafter AR 600-8-24] (discussing the types of discharges for officers); *see also* U.S. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS para. 1-7, 4-1(d) (29 Nov. 2017) [hereinafter AR 135-175] (discussing discharges for Reserve and National Guard Soldiers).

[46] U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 3-1 (19 Dec. 2016) [hereinafter AR 635-200] ("Section 1168, Title 10, United States Code provides that a discharge certificate or certificate of release from active duty will be given to each Soldier of the Army upon discharge from the Service or release from AD.").

[47] *Id*. at para. 3-2 (citing U.S. DEP'T OF ARMY, REG. 635-5, SEPARATION DOCUMENTS (15 Sept. 2000) [hereinafter AR 635-5]) ("Instructions for the completion of the various types of discharge certificates are in AR 635-5. The issuance of discharge certificates is governed by this regulation.").

[48] *Id*. at para. 1-29(a)(1)-(2), (c).

[49] *See* AR 600-8-24, *supra* note 45, para. 1-22 (noting the separate characterizations for an officer's service).

[50] AR 635-200, *supra* note 46, para. 1-29(d) (noting that notice may be either actual or constructive).

Similarly, Winthrop explained that the Fourth Article required delivery of the discharge certificate to the service member, acknowledging that notice could be either personal or constructive.[51] He even distinguished between the types of discharges.[52] He recognized a distinction between discharge by sentence of a court-martial and discharge by order of a military official.[53] The former manifesting a punitive separation from the military while the latter reflected the end of a service member's contract.[54] This article focuses on the latter, but acknowledges *supra* Part II.A that punitive discharges have spawned their own jurisprudence from the military's courts.[55]

In today's armed services, a service member's discharge manifests itself most prominently in the form of the DD Form 214.[56] Winthrop concluded that a "discharge is ... final in detaching the recipient absolutely from the army under the enlistment to which it relates, and, so far, from military jurisdiction and control, and, (thus far also,) remanding him to the status and capacity of a civilian."[57] Thus, a legally effective discharge determines when the military loses personal jurisdiction over a service member.[58]

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[51] WINTHROP, *supra* note 41, at 548.
[52] *Id*. at 549.
[53] *Id*.
[54] *Id*.
[55] *See* discussion *supra* Part.II.A; *see also* Marty Sitler, *The Top Ten Jurisdiction Hits of the 1998 Term: New Developments in Jurisdiction*, ARMY LAW., Apr. 1999, at 2, 6 (discussing United States v. Keels, 48 M.J. 431 (C.A.A.F. 1998)). Sitler notes the holding in *Keels:* that the publication of the court-martial sentence alone does not terminate personal jurisdiction while the appeals process is still pending; rather, the CAAF applied the three-part test to determine the accused was still subject to court-martial jurisdiction. *Id.*
[56] *See* discussion *supra* Part II.B.
[57] WINTHROP, *supra* note 41, at 550.
[58] It is worth noting that there is no "unconditional right to be discharged" upon a Soldier's expiration of her ETS. Smith v. Vanderbush, 47 M.J. 56, 57 (C.A.A.F. 1997) ("As a general matter, members of the armed forces do not have an unconditional right to be discharged upon their ETS."). The military has the authority to retain a Soldier past her ETS. *See id*. at 57-58 (recognizing the military's authority to retain a Soldier past her ETS as a "longstanding feature of military law"). Winthrop acknowledged as much, and the CAAF has held that military status does not end on the date of a Soldier's ETS. *See* United States v. Poole, 30 M.J. 149, 151 (C.M.A. 1990) (holding "that jurisdiction to court-martial a servicemember exists despite delay—even unreasonable delay—

C. The Anchor of Personal Jurisdiction: The Fifth Amendment

Personal jurisdiction reflects a court's inherent power.[59] With respect to courts-martial, this power must be circumspect since the Founders established Article III tribunals to serve the primary judicial role in American society.[60] Article III tribunals contain the full panoply of bill-of-rights protections, something applied differently in courts-martial.[61] Any jurisprudential test that implicates the dividing line between military and civilian status must respect that reality. The following two Parts provide an overview of the foundational law on court-martial jurisdiction, starting with the Due Process Clause of the Fifth Amendment and concluding with the Make Rules Clause of Article I.

The Fifth Amendment commands that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law."[62] This clause constrains a court's power to exercise its authority—or jurisdiction—over an individual.[63] The Due Process Clause "sets the floor for personal jurisdiction, but statutes and other sources provide the

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by the Government in discharging that person at the end of an enlistment"); WINTHROP, *supra* note 41, at 90 (noting that Soldiers may be brought to trial if the command withheld their discharge). The military, therefore, has the ability to exercise court-martial jurisdiction over a service member as long as she occupies the proper status. *See Vanderbush*, 47 M.J. at 58 ("Court-martial jurisdiction exists to try a person as long as that person occupies a status as a person subject to the code." The court is quoting the Rule for Courts-Martial (RCM) 202 discussion.).

[59] *See* SCHLUETER, *supra* note 20, at § 4-1 ("At the very heart of any court-martial lies the requirement of jurisdiction—the power of a court to try and determine a case and to render a valid judgment."); *see also* SUZANNA SHERRY & JAY TIDMARSH, ESSENTIALS CIVIL PROCEDURE 137 (Vicki Been et al. eds., 2007) ("Personal jurisdiction concerns the scope of a court's power to issue a *judgment* that binds a party and is enforceable against that party anywhere in the country.").

[60] *See* United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 19-22 (1955) (emphasizing the importance of "Bill of Rights safeguards" for civilians).

[61] *See* Parker v. Levy, 417 U.S. 733, 758 (1974) (noting that First Amendment protections require "a different application" in the military context).

[62] U.S. CONST. amend. V.

[63] SHERRY & TIDMARSH, *supra* note 59, at 137-38 (discussing the Due Process Clause's limits on a court exercising jurisdiction).

implementation."[64] This central idea "that a court does not have unlimited authority over every person predates the adoption of either the Fifth Amendment or the Fourteenth Amendment."[65] It finds its origins in English common law.[66] As a result, the Supreme Court's "personal jurisdiction jurisprudence has always been anchored in due process."[67]

The Fifth Amendment Grand Jury Indictment Clause specifically excepts cases "arising in the land or naval forces."[68] Consequently, a military court cannot reach beyond its legitimate authority without running afoul of the Constitution's requirement to secure an indictment. This manifests as a prohibition against subjecting civilians to courts-martial absent very specific circumstances.[69] As a result the line of demarcation between military and civilian implicates legitimate constitutional concerns.[70] These concerns should inform the CAAF's three-part test for determining when a court-martial no longer has *in personam* jurisdiction over a service member. The Fifth Amendment is the floor from which the court should begin when determining the line between military and civilian.

D. The Make Rules Clause and Its Relationship to Personal Jurisdiction

The Make Rules Clause of the Constitution grants Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces."[71] This Article I authority permits Congress to pass laws that regulate the armed forces. In the last seventy years, the Supreme Court has "carefully policed the constitutional boundaries of military

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[64] *Id*.
[65] *Id*. at 138.
[66] *See id*. (discussing *in personam* jurisdiction's rich history).
[67] *Id*.
[68] U.S. CONST. amend. V.
[69] *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22 (1955) ("It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians.").
[70] *See* Smith v. Vanderbush, 47 M.J. 56, 59 (C.A.A.F. 1997) (citing *Toth*, 350 U.S. at 23) ("Both the Supreme Court of the United States and this Court have recognized the sensitivity of constitutional and statutory concerns relating to court-martial jurisdiction over civilians.").
[71] U.S. CONST. art. I, § 8, cl. 14.

jurisdiction."[72] The Court has insisted that the military does not have the power to subject civilians to a court-martial except under particular conditions.[73] Moreover, the Court has consistently acknowledged that military jurisdiction must be limited in scope and constrained to its "essential bounds."[74]

The CAAF has recognized the importance of this distinction as well—notably in *Smith v. Vanderbush* in 1997.[75] There, the court rejected the government's invitation to subject a Soldier to continuing jurisdiction after his discharge, and ruled that the military did not have jurisdiction over him.[76] The court acknowledged the constitutional issues concerning the military exercising jurisdiction over civilians and noted "[a] lawful discharge from military service normally terminates the constitutional and statutory power of a court-martial to try such a person."[77] He also recognized the Make Rules Clause did not permit the concept of continuing jurisdiction.[78] Here, the CAAF acknowledged the necessary boundaries and limitations of court-martial jurisdiction.

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[72] Brief for the Petitioner at 12, Larrabee v. United States, *cert. denied*, 139 S.Ct. 1164 (2019) [hereinafter Brief for the Petitioner].

[73] *See Toth*, 350 U.S. at 23 (holding that "the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to '*the least possible power adequate to the end proposed*'")); *see also* Bateman, *supra* note 29, at 4-35 (discussing the prosecution of Dod civilian contractors under the Military Extraterritorial Jurisdiction Act of 2000).

[74] *See* Reid v. Covert, 354 U.S. 1, 23-24 (1957) (discussing the importance of keeping the military subject to civilian control); Brief for the Petitioner, *supra* note 74, at 12 (noting the critical relationship between a military member's status and the Make Rules Clause).

[75] *See* Smith v. Vanderbush, 47 M.J. 56, 59 (C.A.A.F. 1997) (discussing court-martial jurisdiction generally); *see also* United States v. Watson, 69 M.J. 416 (C.A.A.F. 2011) (citing *Vanderbush*, 47 M.J. at 59) ("[W]e review the laws and regulations governing enlistment and separation with sensitivity to the distinction between military and civilian status."). For a full discussion of *Vanderbush*, see Amy Frisk, *The Long Arm of Military Justice: Court-Martial Jurisdiction and the Limits of Power*, ARMY LAW., Apr. 1997, at 5, 6-8 (discussing *Vanderbush*'s implications for practitioners).

[76] *Vanderbush*, 47 M.J. at 61 ("[W]e decline to extend the concept of 'continuing jurisdiction.'").

[77] *Id*. at 59 – The cite to Vanderbush is correct but it looks like this comes from a block quote of Reid, 46 MJ at 238, rather than a cite of Toth (citing *Toth*, 350 U.S. at 20) (discussing the constitutional implications of military jurisdiction).

[78] *Id*. (noting that the *Toth* court "does not authorize extending the concept of continuing jurisdiction").

Personal jurisdiction for the military is a question of status—is the individual a Soldier or a civilian?[79] In 1960, in *Kinsella v. United States ex rel. Singleton*, the Court held the Constitution prevents the military from subjecting a civilian dependent to a court-martial for non-capital offenses.[80] The Court boiled the issue down to "one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces'" of the Make Rules clause.[81] It concluded the Make Rules Clause, when interpreted alongside the Necessary and Proper Clause, did not permit Congress to subject civilian dependents to a court-martial.[82] Justice Clark, writing for the majority, excluded civilians from the power and authority of military courts.[83]

Similarly, three years earlier, in *Reid v. Covert*, the Supreme Court limited the jurisdiction of military courts over civilian dependents in peacetime.[84] In *Reid*, two service members' wives who killed their husbands were subsequently convicted at general courts-martial.[85] The Court reversed their convictions, reasoning, among other things, that the Make Rules Clause did not extend to civilian dependents.[86] Justice Black noted:

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[79] *See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 240-41 (1960) (defining the test for military jurisdiction).

[80] *Id.* at 249 ("We therefore hold that Mrs. Dial is protected by the specific provisions of Article III and the *Fifth* and *Sixth Amendments* and that her prosecution and conviction by court-martial are not constitutionally permissible.").

[81] *Id.* at 240-41. This is not a total prohibition, however, as civilians can be subject to court-martial under particular circumstances.

[82] *Id.* at 248 ("We are therefore constrained to say that since this Court has said that the Necessary and Proper Clause cannot expand Clause 14 so as to include prosecution of civilian dependents for capital crimes, it cannot expand Clause 14 to include prosecution of them for noncapital offenses.").

[83] *Id.* (noting Congress does not have the authority to permit the military to subject civilians to court-martial).

[84] *See* Reid v. Covert, 354 U.S. 1, 5 (1957) (holding that Mrs. Smith and Mrs. Covert "could not constitutionally be tried by military authorities").

[85] *Id.* at 3-5 (describing the offenses of Mrs. Smith and Mrs. Covert).

[86] *Id.* at 19 ("But if the language of [the Make Rules Clause] is given its natural meaning, the power granted does not extend to civilians.").

> By way of contrast the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.[87]

Reid reflected the Court's concern that any broad construction of military jurisdiction could encroach on the "treasured constitutional protections"[88] of civilian courts. The Court noted the dividing line between Soldier and civilian must account for the fact that, as Justice Black poignantly acknowledged, "[s]light encroachments create new boundaries from which legions of power can seek new territory to capture."[89]

In *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the Supreme Court famously circumscribed military jurisdiction.[90] The Court invalidated a statute that permitted the military to try former service members for offenses committed while the Soldier served on active duty.[91] The Court found that Congress did not have the power under Article I of the Constitution to subject discharged service members to trial by court-martial.[92] Justice Black, the majority's author, recognized the "dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution."[93] He reasoned that free countries "restrict military tribunals to the narrowest jurisdiction deemed

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[87] *Id*. at 21.
[88] *Id*.
[89] *Id*. at 39 (arguing against any expansion of court-martial jurisdiction over civilians).
[90] *See* United States ex rel. Toth v. Quarles, 350 U.S. 11, 14 (1955) ("It has never been intimated by this Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions.").
[91] *Id*. at 13 (invalidating the 1950 Act of Congress).
[92] *Id*. at 23 ("We hold that Congress cannot subject civilians like Toth to trial by court-martial.").
[93] *Id*. at 22.

absolutely essential."[94] *Toth* stands for the importance of limiting the scope of military jurisdiction.[95]

The *Toth* Court also emphasized the safeguards afforded civilians in Article III courts compared to military tribunals.[96]

> None of the other reasons suggested by the Government are sufficient to justify a broad construction of the constitutional grant of power to Congress to regulate the armed forces. That provision itself does not empower Congress to deprive people of trials under Bill of Rights safeguards, and we are not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause.[97]

The Court's concerns here reflect the danger in tacking too close to the wind. Congress does not have the constitutional authority to subject civilians to a court-martial (absent certain circumstances). Since Congress has not specified the exact point at which a Soldier becomes a civilian, the CAAF has done so in judicial opinions. Based on the Court's constrained view of military jurisdiction, the CAAF's test should be neither broad nor far-reaching. Rather, its jurisprudence should identify a single point of time when jurisdiction severs, preventing court-martial jurisdiction from lingering over Soldiers and implicating the constitutional concerns discussed here.

III. Personal Jurisdiction at the CAAF: A Winding Road

This Part analyzes the CAAF's current three-part test for determining when *in personam* jurisdiction ends before scrutinizing the most recent cases—*Nettles* and *Christensen*—and discussing their implications for the current state of the law. It charts the CAAF's development of the test with a focus on the most important historical cases, highlighting the significant concurrences and dissents as necessary.

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[94] *Id*.
[95] *See id*. at 23 (noting that court-martial power must be limited).
[96] *See id*. at 19-20 (discussing the differences between military and civilian courts).
[97] *Id*. at 21-22.

A. The United States Court of Military Appeals (CMA) Development of the Three-Part Test

Howard proved a watershed moment in the CMA's (the precursor to the CAAF and a three-judge court) jurisprudence on personal jurisdiction.[98] The issue before the court was whether the military judge at trial correctly ruled that personal jurisdiction over a service member was lost upon delivery of a valid discharge certificate.[99] The court began its opinion by recognizing—as discussed *supra* Part II.B—"*in personam* jurisdiction over a military person [is] lost upon his discharge from the service, absent some saving circumstance or statutory authorization."[100] The court acknowledged a "[d]ischarge is effective upon delivery of the discharge certificate."[101] Judge Cox—who authored the opinion—recognized this rule reflected years of precedent and cited Winthrop's *Military Law and Precedents* as authority.[102]

Prior to *Howard*, the CMA decided *United States v. Scott*, affirming "the armed services have long interpreted discharge statutes to mean that an individual is no longer a member of the armed forces after he receives notice that he has been validly separated."[103] In that case, the court based its argument on its interpretation of 10 U.S.C. § 8811 (1956),[104] which provided that "[a] discharge certificate shall be given to each lawfully inducted or enlisted member of the Air Force upon his discharge."[105] The court ultimately recognized the key provision of this statute and those that

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[98] United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985) (turning to 10 U.S.C. § 1168(a) to determine the requirements of personal jurisdiction); *see* Major Wendy Cox, *Personal Jurisdiction: What Does It Mean for Pay to be "Ready for Delivery" in Accordance with 10 U.S.C. § 1168(a)?*, ARMY LAW., Nov. 2009, at 26, 28-29 (discussing *Howard* and noting that "later courts would interpret exactly what the three elements of 10 U.S.C. § 1168(a) mean").

[99] *Howard*, 20 M.J. at 353.

[100] *Id.* at 354.

[101] *Id.* (citing United States v. Scott, 29 C.M.R. 462 (C.M.A. 1960)).

[102] *Id.* (citing WINTHROP, *supra* note 41, at 548).

[103] Scott, 29 C.M.R. at 464.

[104] Act of Aug. 10, 1956, ch. 1041, 70A Stat. 544, *repealed by* Act of Jan. 2, 1968, 81 Stat. 757, 758.

[105] *See Scott*, 29 C.M.R. at 463 (analyzing the statute).

preceded it was delivery of the discharge certificate to the Soldier.[106] The act of delivery, the court reasoned, severed the Soldier's military status.[107]

The *Howard* court pointed to § 1168(a)—a personnel statute—to determine a service member's discharge date for the purposes of personal jurisdiction.[108] That statute stated:

> A member of an armed force may not be discharged or rleeased [sic] from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative.[109]

Interestingly, the government had urged the CMA "to permit the Secretary of the Army, by regulation, to establish the moment of discharge."[110] But, the CMA rejected the government's proposal and relied on § 1168(a)'s language instead.[111] The court's pivot likely reflected a desire to anchor its decision in a congressional statute rather than an Army regulation. Winthrop had done the same in his analysis of the Fourth Article of the Articles of War, and, as Judge Cox acknowledged, its rule was "based on a long line of historical service precedents…constru[ing] the provisions of the existing congressional statutes."[112]

It is worth noting here that the *Howard* court could have affirmed the military judge's finding that no jurisdiction existed and reversed the Army

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[106] *Id.* ("This statute and its predecessors have long been construed to separate a member of the armed services upon delivery to him of the discharge certificate or other valid notice of the ending of his status.").

[107] *Id.* at 464 ("[W]e conclude that one's military service, with the concomitant jurisdiction to try him by court-martial, ends with the delivery to him of a valid discharge certificate.").

[108] *See Howard*, 20 M.J. at 354 ("Discharges are governed by 10 U.S.C. § 1168(a).").

[109] *Id.*

[110] *See id*. (noting that the court respectfully declined the government's invitation); *see also Scott*, 29 C.M.R. at 465 (Latimer, J., dissenting) (arguing that the Secretary of the Air Force is authorized to set the effective time of the separation orders).

[111] *Howard*, 20 M.J. at 354.

[112] *Id.*; *see* WINTHROP, *supra* note 41, at 547-52 (analyzing the Fourth Article of War).

Court of Military Review without necessarily relying on § 1168(a).[113] In this case, the accused had received his DD Form 214 on the day he was due to depart his military base.[114] The local Criminal Investigative Division (CID) detachment had notified the command later that same day the Soldier was under investigation, prompting the commander to revoke the accused's already delivered DD Form 214.[115] Under long-standing precedent, the delivery of the DD Form 214 effectuated the discharge of the Soldier from the Army.[116] Yet, the *Howard* court took a different approach to reach the same result, relying on § 1168(a), which mandated not only delivery of a discharge certificate but also "final pay or a substantial part of that pay" to the service member (or family representative) to effectuate the discharge.[117] Since the accused had also picked up his pay when he received his DD Form 214, the *Howard* court found no jurisdiction to subject him to a general court-martial.[118] This move ultimately laid the groundwork for the CMA's announcement of a new three-part test in *United States v. King*, 27 M.J. 327 (C.M.A. 1989), four years later.[119]

Judge Sullivan authored the opinion in *King* for the CMA.[120] The issue before the court was whether a court-martial had personal jurisdiction to try the accused for the offense of desertion.[121] The case involved an accused who received a discharge certificate as part of his "request for an early reenlistment."[122] After the accused heard he had been discharged, he refused to complete the reenlistment ceremony and

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[113] *See Howard*, 20 M.J. at 353 (discussing the case's procedural posture).
[114] *Id*.
[115] *Id*. at 354.
[116] *Id.* (citing United States v. Scott, 29 C.M.R. 462 (C.M.A. 1960)) ("Discharge is effective upon delivery of the discharge certificate.").
[117] *See id*. (discussing 10 U.S.C. § 1168(a)'s requirements).
[118] *Id.* at 353, 355.
[119] *See* United States v. King, 27 M.J. 327, 329 (C.M.A. 1989) ("We read these statutes as generally requiring that three elements be satisfied to accomplish an early discharge."); Cox, *supra* note 100, at 29-30 (noting that *King* "established the theoretical framework that is still used to determine whether a military court has personal jurisdiction over an accused").
[120] *Id*. at 327.
[121] *King*, 27 M.J. at 327-28 (stating the granted issue as follows: "Whether the Navy-Marine Corps Court of Military Review erred in finding personal jurisdiction to try appellant for desertion").
[122] *Id*. at 328.

departed his military base.[123] The CMA recognized that "'a discharge effected for the sole purpose of facilitating re-enlistment lacks the purpose of permitting a return to civilian life.'"[124] The court had previously reasoned that a discharge completed with the express purpose of effecting a reenlistment is different from a discharge at the end of a Soldier's term of service.[125] The *King* court held "that no valid discharge occurred under the facts of this case."[126] This could (and, as this author argues, should) have ended the appellate court's inquiry into whether personal jurisdiction existed.[127]

However, much like the *Howard* court, the *King* court announced "Congress has spoken as to what constitutes a valid discharge."[128] It then cited both §§ 1168(a) and 1169.[129] In *Howard*, the CMA had relied on § 1168(a), but the court's reliance on § 1169 was new.[130] Section 1169 provides that:

> No regular enlisted member of an armed force may be discharged before his term of service expires, except—(1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court-martial; or (3) as otherwise provided by law.[131]

The CMA found that these two statutes required three elements be met before the Army lost court-martial jurisdiction: (1) the valid delivery of a discharge certificate; (2) a final accounting of pay and allowances; and (3) compliance with a service's clearing regulations.[132] Judge Sullivan noted

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[123] *Id*. ("Upon hearing [that he was discharged], appellant refused to complete the [re-enlistment] ceremony.").
[124] *Id*. (quoting United States v. Johnson, 20 C.M.R. 36, 40 (C.M.A. 1955)).
[125] *Id*. (citing United States v. Clardy, 13 M.J. 308 (C.M.A. 1982)).
[126] *Id*.
[127] *See* WINTHROP, *supra* note 41, at 550 (noting a discharge can be revoked when the product of "falsehood or fraud").
[128] *See King*, 27 M.J. at 329 (discussing 10 U.S.C. § 1168(a)).
[129] *Id*.
[130] *See id*. (citing § 1168(a)) ("A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative.").
[131] 10 U.S.C. § 1169 (2012).
[132] *King*, 27 M.J. at 329 (discussing the three-part test).

that since the service member did not complete parts two and three of the test, the physical transfer of a discharge certificate to the accused was not enough to sever jurisdiction.[133]

The *King* court's reliance on §§ 1168(a) and 1169 was unnecessary. The accused's discharge through reenlistment did not separate him from the military based on the court's own precedent.[134] Chief Judge Everett's concurrence reflected his own apparent discomfort with this shift: "I do not, however, reach the question of the effect on continued court-martial jurisdiction from a failure to comply with the provisions of 10 U.S.C. §§ 1168(a) and 1169."[135] This qualification arguably indicated that Chief Judge Everett's doubt about the wisdom of relying on these statutes to determine jurisdiction. Judge Sullivan and Judge Cox (who was a part of the majority in *King* and authored *Howard*) set a new precedent for the court on determining when the military loses personal jurisdiction over a service member.

B. The Three-Part Test in Action: *United States v. Hart*

In 1994, the CMA would become the CAAF (a five-member court), and the new court found itself confronting personal jurisdiction in a number of cases.[136] One case worth particular study and attention came in 2008: *United States v. Hart*.[137] Here, the accused had received a valid DD Form 214 but not his final separation pay.[138] Two days after his "effective date of separation," the command revoked his DD Form 214 and "directed

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[133] *Id*. ("The mere physical transfer of the discharge certificate to appellant was not 'delivery' of the discharge as required by law, and, accordingly, court-martial jurisdiction was not lost.").

[134] *See id*. at 328 (quoting United States v. Johnson, 20 C.M.R. 36, 40 (1955)) (noting that "'a discharge effected for the sole purpose of facilitating re-enlistment lacks the purpose of permitting a return to civilian life'").

[135] *Id*. at 330 (Everett, C.J., concurring).

[136] *History*, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, https://www.armfor.uscourts.gov/about.htm (last visited Nov. 28 2018) ("In 1994, Congress gave the Court its current designation, the United States Court of Appeals for the Armed Forces.").

[137] United States v. Hart, 66 M.J. 273 (C.A.A.F. 2008); *see* Cox, *supra* note 100, at 32-33 (discussing *Hart*); Nicholas F. Lancaster, *New Developments in Sixth Amendment Confrontation and Jurisdiction*, ARMY LAW., Feb. 2009, at 18, 26-28 (discussing *Hart*).

[138] *Hart*, 66 M.J. at 273.

the finance office not to take any further action in calculating [his] final pay."[139] The command then preferred charges based on a number of drug offenses the accused had allegedly committed.[140]

The *Hart* court split three to two with Judge Erdmann writing the majority in which Judge Baker and Judge Ryan joined.[141] Chief Judge Effron dissented, joined by Judge Stucky.[142] The majority first recognized as black letter law that a Soldier's discharge severs personal jurisdiction.[143] It then relied on §§ 1168(a) and 1169, which it emphasized it had done "for nearly twenty years."[144] The majority cited both *King* and *Howard* for that claim.[145] Consequently, the *Hart* majority applied the three-part test to determine when personal jurisdiction ends.[146]

The only element of the three-part test at issue in *Hart* was the accused's final accounting of pay and allowances—since he had received a valid DD Form 214 and cleared post.[147] At the trial level, the military judge dove into the Defense Finance and Accounting System's (DFAS) manual and procedures, concluding DFAS "had not yet started" certain "calculations, reconciliations, and authorizations" necessary to calculate the service member's final pay.[148] The majority affirmed the trial judge's determination that the service member's final accounting of pay and allowances were not ready for delivery.[149] As a result, Judge Erdmann held "Hart was not effectively discharged and remained subject to court-martial jurisdiction."[150]

Chief Judge Effron's dissent argued personal jurisdiction did not exist in this case.[151] He pointed to the effective date and delivery of the DD

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[139] *Id*. at 273-74.
[140] *Id*. at 273.
[141] *Id*.
[142] *Id*. at 277 (Effron, C.J., dissenting).
[143] *Id*. at 275.
[144] *See id*. at 275-76 (analyzing both 10 U.S.C. §§ 1168(a) and 1169).
[145] *See id*. at 275 (citing five precedential cases for support of its proposition).
[146] *Id.* at 276.
[147] *See id*. (noting the lower court rulings "hinge on the determination that there was no final accounting of pay").
[148] *Id*. at 274, 277.
[149] *Id*. at 277.
[150] *Id*.
[151] *Id*. (Effron, C.J., dissenting).

Form 214 to Hart in support of his conclusion.[152] The dissent questioned the merit of determining personal jurisdiction based on "a personnel management statute designed to protect servicemembers and their families from the adverse financial consequences of premature separation."[153] Chief Judge Effron worried about the uncertainty the majority opinion created with respect to the effective date of a discharge document.[154] Notably, the dissent distinguished *King*, finding that "the unsettled state of the record require[d] consideration of multiple factors."[155] Finally, Chief Judge Effron argued the court's previous reliance on §§ 1168(a) and 1169 created a "general practice" not a rule.[156]

Hart exposed one of the perils in the majority's reliance on *King*'s three-part test. The *King* test had broadened the scope of court-martial jurisdiction by attaching it to §§ 1168(a) and 1169. The court had strayed from its foundational rule that delivery of a valid discharge certificate severed jurisdiction.[157] Hart had received a valid discharge certificate, but the military subjected him to a court-martial based on DFAS not having his pay ready for delivery.[158] A bureaucratic task had saved jurisdiction for the military and permitted the exercise of its Article I court-martial power.

The military court's jurisprudential history on personal jurisdiction has always been attached to the point of discharge.[159] And Congress does address discharges in both §§ 1168(a) and 1169.[160] But without a clear delineation in the UCMJ for "when a servicemember's discharge from the armed forces becomes effective for jurisdictional purposes," the court must draw a line that is fair, just, workable, and untethered to

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[152] *Id*. at 277-78 (Effron, C.J., dissenting) ("Hart's discharge severed his connection with the armed forces, and terminated his status as a person subject to the Uniform Code of Military Justice (UCMJ).").
[153] *Id*. at 278 (Effron, C.J., dissenting).
[154] *See id*. at 279 (Effron, C.J., dissenting) ("The majority opinion would eliminate the ability of servicemembers and the government to rely on the certainty provided by the effective date set forth in a discharge document.").
[155] *Id*. at 280 (Effron, C.J., dissenting).
[156] *See id*. (Effron, C.J., dissenting) (defining *generally* according to the Merriam-Webster's Collegiate Dictionary).
[157] *See* discussion *supra* Part II.A-B.
[158] *See Hart*, 66 M.J. at 277 (concluding that the accused's failure to receive his final pay meant he was subject to court-martial jurisdiction).
[159] *See* discussion *supra* Part II.B.
[160] *See* discussion *infra* Part IV.A.

congressional statutes that do not speak specifically to court-martial jurisdiction.[161] The next two cases arguably demonstrate the CAAF's struggle to do just that.

C. The CAAF's Retreat from the Three-Part Test in *Nettles* and *Christensen*

The military's highest appellate court started to change course on its personal-jurisdiction jurisprudence in 2015. That year, the CAAF decided *Nettles*—which involved a reservist—and began the court's retreat from the three-part test.[162] Critically, the CAAF found the test was not binding when it went against "reason or policy"—a new gloss on the *King* framework.[163] Then in 2018, the court went even further with *Christensen*, demonstrating its reluctance to continue to apply the three-part test.[164] There, the court encountered another case involving a delay in the delivery of a Soldier's final accounting of pay, but it distinguished *Hart* and held the Army had lost *in personam* jurisdiction.[165]

Judge Stucky delivered the court's opinion in *Nettles*, concluding the Air Force did not retain court-martial jurisdiction over a reservist.[166] The reservist served in the Individual Ready Reserve (IRR).[167] He had been passed over for promotion twice and received notification in March of 2012 that he would be discharged on October 1, 2012.[168] In May of that year, however, the Secretary of the Air Force recalled him to active duty and the command preferred charges.[169] The accused continued to oscillate between periods of active service for his court-martial and service in the IRR.[170] His court-martial eventually convened from January to February

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[161] United States v. Christensen, 78 M.J. 1, 4 (C.A.A.F. 2018).
[162] United States v. Nettles, 74 M.J. 289, 291 (C.A.A.F. 2015) ("[W]e decline to employ the 10 U.S.C. § 1168(a) framework here.").
[163] *See id*. (noting that the §§ 1168(a) and 1169 framework are not binding).
[164] *See Christensen*, 78 M.J. at 4-5 (noting that §§ 1168 and 1169 serve as guidance and are not binding).
[165] *See id*. at 2-3, 5-6 (distinguishing *Hart* and analogizing to *Nettles*).
[166] *Nettles*, 74 M.J. at 293 (concluding that the court-martial did not have jurisdiction over appellant at either his arraignment or trial).
[167] *Id*. at 290.
[168] *Id*.
[169] *Id*.
[170] *Id.*

of 2013 where a panel convicted him.[171] At trial and on appeal, he argued the court lacked *in personam* jurisdiction over him.[172] The military judge and the Air Force Court of Criminal Appeals disagreed, but the CAAF reversed his conviction, concluding the court lacked jurisdiction to try him.[173]

The court applied the three-part test for jurisdiction, noting the only missing element for the accused was "delivery" of his discharge certificate.[174] After reviewing the court's rich delivery jurisprudence, the CAAF concluded that these precedents would lead to the conclusion the Air Force retained personal jurisdiction over the accused.[175] The court, however, declined to follow that precedent or employ the §§ 1168(a) and 1169 framework.[176] Rather, Judge Stucky drew a distinction between a reservist serving in the IRR and an active-duty Soldier, finding the delivery jurisprudence "has been created for active duty personnel" and the prior statutory framework serves only as "guidance."[177]

He then introduced a meta-inquiry into the court's personal-jurisdiction jurisprudence, noting "[the framework's] demands are not binding when we find that they go against reason or policy."[178] This "reason or policy" gloss marked the most significant and critical turning point in the CAAF's jurisprudence on *in personam* jurisdiction since *Howard*.[179] It transformed the CAAF's test on personal jurisdiction, altering it by introducing a discretionary threshold question. Judge Stucky—who had joined Chief Judge Effron's dissent in *Hart*—employed reasoning here that eroded the very foundation of the court's precedent.

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[171] *Id*.
[172] *Id*.
[173] *Id*. at 293.
[174] *Id*. at 290-91 (recognizing the only missing element as delivery).
[175] *See id*. at 291 (discussing the CAAF's case law on delivery of a discharge certificate).
[176] *Id*.
[177] *See id*. (noting that the discharge and delivery cases were for active-duty personnel).
[178] *See id*. (finding that "reason or policy" counseled against employing the statutory framework to determine jurisdiction).
[179] *See id*. (citing United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985)) ("The overarching interest implicated by the law of personal jurisdiction, and especially discharge jurisprudence, is the need—of both service member and service—to know with certainty and finality what the person's military status is and when that status changes.").

The CAAF could have decided *Nettles* by simply drawing a distinction on the basis of the accused's status—reservist versus active-duty. Judge Stucky anchored the *Nettles* decision in 10 U.S.C. § 14505 (2012),[180] holding that "in cases where the accused is not on active duty pursuant to an administrative hold on the date the self-executing order sets for a reservist's discharge, he is not subject to court-martial jurisdiction."[181] With a congressional statute on point to answer when the military lost personal jurisdiction, Judge Stucky did not need to conduct any additional analysis.[182] Why, then, did the court emphasize that the statutory framework is only guidance and can be tossed when it cuts against reason or policy?

Arguably, in response to the previous holdings of *King* and *Hart*, Judge Stucky added this new gloss to prevent unjust results. The court chose to modify its personal-jurisdiction jurisprudence and go further than it needed because of its dissatisfaction with the current state of the law. The court's announcement that the three-part framework is not binding but rather guidance reflected a deep discontent with the reliance on the statutory framework—the foundation of the three-part test; a dissatisfaction that Judge Stucky sought to cure with a new gloss.

The court used this reason-or-policy gloss to reach, arguably, the right result, but at the expense of clarity to trial counsel, defense counsel, and military judges. Ironically, Judge Stucky's opinion highlighted the importance of certainty to military-justice practitioners:

> [Military status] is important for the armed forces both abstractly and concretely: abstractly, because certainty of status indicates who actually *is* in the service and subject to the [UCMJ], and concretely, because such certainty provides clear guideposts for prosecutors and

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[180] 10 U.S.C. § 14505 (2012) ("[A] captain on the reserve active-status list ... who has failed of selection for promotion to the next higher grade for the second time ... shall be separated ... not later than the first day of the seventh month after the month in which the President approves the report of the board which considered the officer for the second time.").

[181] *Nettles*, 74 M.J. at 293.

[182] *See id*. at 292 ("Instead, we think it more appropriate to apply the statute that actually discharged Appellant: 10 U.S.C. § 14505 (2012)").

> commanders when taking actions with a view towards litigation.[183]

Unfortunately, an additional inquiry simply imparts more discretion and ambiguity into practice. Since *Howard*, the court's jurisprudence on this matter has become more convoluted. *In personam* issues only occur at the margins in litigation with typically complex facts; a succinct rule would enable military-justice leaders to advise commanders with confidence as this article advocates for *infra* Part V.

Christensen marked another step away from the three-part test as the court confronted an issue Chief Judge Effron aptly predicted in his dissent in *Hart*.[184] In *Christensen*, a military judge sitting alone convicted the accused of sexual assault.[185] The CAAF granted review of a single issue: Whether the court-martial had jurisdiction over the accused.[186] Similar to *Hart*, the case hinged on a single part of the three-part framework—the accused's final accounting of pay and allowances.[187] Here, the accused had received a valid DD Form 214 and had cleared Fort Stewart, Georgia.[188] Based on a criminal investigation, the chief of justice—the title of the chief prosecutor on a military installation—had contacted DFAS to stop his final accounting of pay and allowances.[189] The military judge concluded that since all three parts of the *Hart* test were not met, the military could exercise jurisdiction over the accused.[190]

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[183] *Id*. at 291.

[184] *See* United States v. Hart, 66 M.J. 273, 279 (C.A.A.F. 2008) (Effron, C.J., dissenting) (noting the "significant potential for delays and mistakes"). In fact, in a footnote, the majority responded directly to Chief Judge Effron's dissent, recognizing that this case did "not involve any delay in the processing of Hart's separation pay." *Id*. at 275 n.5.

[185] United States v. Christensen, 78 M.J. 1, 2 (C.A.A.F. 2018).

[186] *Id*.

[187] *See id*. at 4 ("[T]he *DuBay* military judge focused solely on the 'final accounting of pay.'").

[188] *Id*. at 2-3.

[189] *Id*. at 3.

[190] *Id*. at 4 (noting that the military judge "found that there was no final accounting of pay, and thus there was personal jurisdiction over Appellant").

The CAAF reversed with reasoning that continued to erode the framework the court had relied on for decades.[191] It noted explicitly that both §§ 1168(a) and 1169 "serve as *guidance*—not as *prerequisites*—when it comes to determining whether a discharge has been effectuated for jurisdictional purposes," echoing *Nettles*.[192] The CAAF then found the accused's final accounting of pay and allowances was "not accomplished within a reasonable time frame" and pointed to *Nettles*' reason-or-policy gloss to conclude the court-martial did not have personal jurisdiction over the accused.[193]

Judge Maggs's concurrence in which Judge Ryan joined revealed the court's internal struggle with personal jurisdiction.[194] He noted that the current framework the CAAF has created leaves counsel and judges "with insufficient guidance" and acknowledged "that the Court may have made a wrong turn in *Howard*."[195] Interestingly, Judge Maggs proposed a separate test.[196] First, he would ask whether "an existing statute or regulation specifies when a discharge has occurred."[197] If there is no statute or regulation on point, then he proposed resorting to the three-part test.[198] He argued that AR 635-200, paragraph 1-29(c), would have answered the question in *Christensen*.[199] The regulation provides that a discharge "is effective at 2400 on the date of notice of discharge to the

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[191] *See id*. (quoting United States v. Nettles, 74 M.J. 289, 291 (C.A.A.F. 2015)) ("Importantly, however, we have explicitly held that this guidance 'is not binding when we find that [it] go[es] against reason or policy.'").

[192] *See id*. at 5-6 (emphasis in original) (citing *Nettles*, 74 M.J. at 291) (qualifying the court's reliance on the statutory framework).

[193] *See id*. (drawing a distinction from *Hart* based on the time frame it took DFAS to account for the accused's final pay).

[194] *Id*. at 6-7 (Maggs, J., concurring).

[195] *Id*. at 6 (Maggs, J., concurring).

[196] *Id*. (Maggs, J., concurring) ("[W]e should reconsider our approach for determining when a service member has been discharged for the purposes of terminating court-martial jurisdiction.").

[197] *Id*. (Maggs, J., concurring).

[198] *Id*. (Maggs, J., concurring) ("In a case in which no specific statute or regulation exists, or in the case that the Court concludes that the applicable regulation is invalid, then, and only then, would we need to turn to the judicially created three-part test and considerations of 'reason or policy.'").

[199] *Id*. at 7 (Maggs, J., concurring) ("Only if this regulation were somehow invalid would we need to resort to our judicially created three-part test and its exception.").

Soldier."[200] Although AR 635-200 involves administrative separations, Judge Maggs's test would use its authority as a military regulation to identify when a Soldier is no longer a member of the armed forces and, consequently, no longer subject to court-martial jurisdiction.

This author disagrees with permitting a regulation to dictate the contours of court-martial jurisdiction. First, the CAAF has always been reluctant to permit Service Secretaries through regulations to determine the end of personal jurisdiction for court-martial purposes.[201] Second, it could be dangerous to cede that level of authority to an agency head. Military regulations certainly qualify as law and obligate service members to adhere to their strictures.[202] But that authority is not without bounds.[203] Military courts must have the authority to outline the limits of their own criminal jurisdiction and "to say what the law is."[204]

The other difficulty in depending on statutes, as Judge Maggs proposed, is that it focuses the analysis on the same sources and materials the CAAF currently uses in its three-part test. In most cases, the CAAF will be left with the same statutory framework it has been struggling with for decades in the challenging cases that reach its docket. This reliance can work in specific, limited cases, such as *Nettles*, when there is a statute directly on point. Otherwise, however, it will continue to leave the field with little certainty. A bright-line rule as proposed *infra* Part V would answer the question outright and prevent ambiguity.

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[200] *Id*. (Maggs, J., concurring), *citing* AR 635-200, *supra* note 47, para. 1-29(c); *see* discussion *supra* Part II.B.

[201] *See* United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985) (declining to permit the Secretary of the Army to specify the "moment of discharge").

[202] *See* Standard Oil Co. of Cal. v. Johnson, 316 U.S. 481, 484 (1942) ("War Department regulations have the force of law."); United States v. Eliason, 41 U.S. (16 Pet.) 291, 302 (1842) ("[R]ules and orders publicly promulged [sic] through [the Secretary of War] must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal constitutional authority.").

[203] *See* Burns v. Wilson, 346 U.S. 137, 142 (1953) ("We have held before that [a decision of a military tribunal] does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner.").

[204] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Since Congress has chosen not to specify the precise bounds of court-martial jurisdiction, the CAAF must fill the gap. Congress does have the authority to specify the moment of discharge for personal-jurisdiction purposes in accordance with the Make Rules Clause and Fifth Amendment of the Constitution but has not done so.[205] *Nettles* and *Christensen* illustrate that the current framework is failing to achieve certainty and predictability for the field because it is ambiguous and unworkable.

IV. The CAAF's Three-Part Test: Ambiguous and Unworkable

A. A Misplaced Reliance on 10 U.S.C. §§ 1168(a) and 1169

Howard has now dictated over thirty years of personal-jurisdiction jurisprudence at the CAAF. The reliance Judge Cox placed on §§ 1168(a) and 1169—whether intentionally or not—has created a progeny of precedent that can be difficult to decipher. Part IV.A explains why the military judiciary should no longer rely on those statutes to inform when the armed services lose *in personam* jurisdiction over a Soldier.

By charting the legislative history of both §§ 1168(a) and 1169, this article seeks to highlight the role Congress sought for these statutes in the military. Section 1168(a) first appeared in the Servicemen's Readjustment Act (SRA) of 1944.[206] The SRA's explicit purpose was "[t]o provide Federal Government aid for the readjustment in civilian life of returning World War II veterans."[207] The bill sought to ease the transition for returning veterans to civilian life.[208] Congress marketed the bill as a "comprehensive program" for veterans, focused on their medical, education, training, financial, and employment needs.[209] President

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[205] *See* discussion *supra* Part II.C-D.

[206] *See* United States v. Hart, 66 M.J. 273, 278 (C.A.A.F. 2008) (Effron, C.J., dissenting) (citing Servicemen's Readjustment Act of 1944, Pub L. No. 346, § 104, 58 Stat. 284, 285 (1944)) ("The pertinent legislation originated in World War II as part of the Servicemen's Readjustment Act of 1944.").

[207] Servicemen's Readjustment Act at ch. 268.

[208] *See The G.I. Bill of Rights: An Analysis of the Servicemen's Readjustment Act of 1944*, SOC. SECURITY BULLETIN, (Soc. Sec. Admin., Washington, D.C.) July 1944, at 3 ("A comprehensive program to aid returning veterans ... in a speedy readjustment to civilian life.") [hereinafter SOCIAL SECURITY BULLETIN].

[209] *See id*. at 3-5 (discussing the various benefits available to returning veterans).

Franklin D. Roosevelt signed the law, nicknamed the "G.I. Bill of Rights," on June 22, 1944.[210]

Section 1168(a)'s language could be found in section 104 of the SRA.[211] Section 104 sought to preserve the rights of veterans returning from World War II.[212] The first sentence of section 104 provided that "[n]o person shall be discharged or released from active duty in the armed forces until his certificate of discharge or release from active duty and final pay, or a substantial portion thereof, are ready for delivery to him or to his next of kin or legal representative."[213] This text tracks closely with today's § 1168(a); specifically, the requirement for a final accounting of pay before discharge. The remainder of section 104 reads as follows:

> [A]nd no person shall be discharged or released from active service on account of disability until and unless he has executed a claim for compensation, pension, or hospitalization, to be filed with the Veterans' Administration or has signed a statement that he has had explained to him the right to file such claim: *Provided*, That this section shall not preclude immediate transfer to a veterans' facility for necessary hospital care, nor preclude the discharge of any person who refuses to sign such claim or statement: *And provided further*, That refusal or failure to file a claim shall be without prejudice to any right the veteran may subsequently assert.[214]

As the entire text makes clear, section 104 sought to ensure service members received the compensation and disability benefits they had earned during their service prior to separation.

Section 104's language regarding discharges cannot be read in isolation; the statute sought to protect the rights of service members returning from war. For example, the previous section of the SRA, section

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[210] *Id*. at 3.

[211] *Compare* 10 U.S.C. § 1168(a) (2012) (discussing discharges from the military), *with* Servicemen's Readjustment Act § 104 (discussing discharges from the military).

[212] *See* SOCIAL SECURITY BULLETIN, *supra* note 210, at 3-5 (discussing the "G.I. Bill of Rights").

[213] Servicemen's Readjustment Act § 104.

[214] *Id*.

103, placed Veterans' Affairs officials at military installations for the purpose of advising Soldiers on disability claims.[215] While the subsequent section, section 105, forbid the military from requiring a Soldier to sign any statement detailing "the origin, incurrence, or aggravation of any disease or injury."[216]

Congress codified section 104 of the SRA at 10 U.S.C. § 1168(a) in 1962.[217] The current statute provides that:

> A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative.[218]

Notably, today's statute uses the word *may* in "[a] member ... *may* not be discharged."[219] Section 104 of the SRA used the word *shall*.[220] At first blush, § 1168(a) appears to impose a duty on the government. Under the Mandatory–Permissive canon of semantic interpretation, however, *may* is permissive, defined in *Black's Law Dictionary* as "has discretion to; is permitted to ... possibly will."[221] Even if Congress had used *shall*,

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[215] *Id*. § 103 ("The Administrator of Veterans' Affairs shall have authority to place officials and employees designated by him in such Army and Navy installations as may be deemed advisable for the purpose of adjudicating disability claims of, and giving aid and advice to, members of the Army and Navy who are about to be discharged or released from active service.").

[216] *Id*. § 105 (providing protections for service members during separation).

[217] *See* United States v. Hart, 66 M.J. 273, 278 (C.A.A.F. 2008) (Effron, C.J., dissenting) (citing Servicemen's Readjustment Act § 104) (noting that § 104 of the SRA was re-codified in 1962).

[218] 10 U.S.C. § 1168(a) (2012); *see also* AR 635-200, *supra* note 46, at para. 1-5(f) ("10 USC 1168 stipulates that a discharge certificate or certificate of release from active duty must be given to each Soldier discharged or released from active duty.").

[219] § 1168(a) (emphasis added).

[220] Servicemen's Readjustment Act § 104 ("[A]nd no person shall be discharged or released from active service ...").

[221] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 112 (2012) ("The traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive."); Bryan A. Garner, Garner's Dictionary of Legal Usage 568 (3d ed. 2011) (defining *may*).

Supreme Court precedent would likely construe *shall* as *may*.[222] Consequently, under this textual canon of statutory interpretation, § 1168(a) does not impose a compulsory duty on the government but arguably serves as a "precatory suggestion."[223]

This textual understanding of § 1168(a) is a critical revelation. The CAAF placed significant weight on the statute to help define the exact point of discharge for service members with respect to court-martial jurisdiction.[224] Section 1168(a), however, serves to protect service members from hardship upon separation.[225] This important congressional aim should not influence the dividing jurisdictional line for Soldiers. Armed with this understanding, it makes little sense that a Soldier should remain subject to personal jurisdiction when the government fails to follow the precise prescriptions of § 1168(a).[226] It makes even less sense when the government can use its own neglect (e.g., failure to direct a final accounting of a Soldier's pay and allowances) to court-martial a Soldier

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[222] *See* Railroad Co. v. Hecht, 95 U.S. 168, 170 (1877) ("As against the government, the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest."); *see also* SCALIA & GARNER, *supra* note 223, at 112-15 (discussing the distinction between mandatory and permissive words); GARNER, *supra* note 223, at 568 (noting that *may* can mean *shall* "[b]ut no drafter who means must should consciously use *may* ... [and] drafters' oversights should not be allowed to change the essential meanings of basic words").

[223] *See* Scott v. United States, 436 U.S. 128, 145-46 (1978) (Brennan, J., dissenting) ("In a linguistic *tour de force* the Court converts the mandatory language that the interception 'shall be conducted' to a precatory suggestion."); SCALIA & GARNER, *supra* note 223, at 114 ("*Shall* may be treated as a 'precatory suggestion.'").

[224] *See* United States v. Hart, 66 M.J. 273, 275 (C.A.A.F. 2008) ("The UCMJ itself does not define the exact point in time when discharge occurs, but for nearly twenty years, this court has turned to 10 U.S.C. 1168(a) and 1169 (2000), a personnel statute, for guidance as to what is required to effectuate discharge.").

[225] *See id*. at 278 (Effron, C.J., dissenting) (citing United States v. Keels, 48 M.J. 431, 432 (C.A.A.F. 1998)) ("Section 1168 is a personnel management statute designed to protect service members and their families from the adverse financial consequences of premature separation.").

[226] *See id*. at 279 (Effron, C.J., dissenting) ("If the government fails in its obligation to provide a departing service member with an important benefit for transition to civilian life, the error may be remedied by completing the required paperwork and making the requisite payment to the service member.").

who had received a valid DD 214 as it did in *Hart*.[227] The CAAF's reliance on § 1168(a) has produced problematic results as epitomized in its struggle with the three-part test in *Nettles* and *Christensen*.[228]

Section 1168(a) does not address nor alter the meaning of a DD 214—the document that explicitly transforms an individual's status from military to civilian. The statute requires a "discharge certificate or certificate of release" and "final pay or a substantial part of that pay" prior to discharge from the armed services.[229] A natural reading indicates the military should have both requirements completed prior to discharging a service member. In fact, army regulations and policies require a valid discharge certificate and a final accounting of pay prior to discharge.[230] The onus, therefore, falls on the government to prepare the discharge paperwork and the service member's final pay prior to discharge. It does not follow that the government's failure to comply with these procedures should serve as a bulwark against the Soldier's discharge, subjecting him or her to court-martial jurisdiction.

Section 1168(a) serves as a shield. It requires the armed services to ensure a Soldier receives the benefits he or she earned. Congress never intended § 1168(a) to serve as a sword, subjecting Soldiers who had received a valid DD Form 214 to court-martial jurisdiction based upon the government's failure to follow its own statute. The DD Form 214 or discharge orders represent the official act of the United States through its representative, marking the transformation from Soldier to civilian.[231] This statute does not alter that fact nor, arguably, did Congress intend such a result. A plain reading of § 1168(a) demonstrates Congress did not want Soldiers separated without their pay. It would be odd indeed if Congress intended for DD Forms 214 to be found *ex post* invalid for failure to comply with the statute.

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[227] *See id*. (Effron, C.J., dissenting) ("Although [Defense Finance Accounting Service (DFAS)] undoubtedly endeavors to accomplish these myriad tasks in a timely fashion, there is a significant potential for delays and mistakes, as reflected in the lengthy record of the finance proceedings set forth in the present case.").

[228] *See* discussion *supra* Part III.C.

[229] 10 U.S.C. § 1168(a) (2012).

[230] *See* discussion *supra* Part II.B and *infra* Part IV.C.

[231] *See* discussion *supra* Part II.B.

Section 1169, in relevant part, provides that "[n]o regular enlisted member of an armed force may be discharged before his term of service expires, except (1) as prescribed by the Secretary concerned ... or (3) as otherwise provided by law."[232] This statute seeks uniformity in how the services discharge service members from their ranks prior to the expiration of the Soldier's ETS. It permits Secretaries to prescribe procedures to follow when discharging Soldiers.[233] Importantly, the CAAF points to this statute for the third and final element of its three-part test.[234] It does not, however, alter the meaning or purpose of a DD Form 214.

The CAAF has similarly critiqued the role of the statutory framework in defining the boundaries of personal jurisdiction.[235] Chief Judge Effron's dissent in *Hart* noted that "Section 1168 is a personnel management statute designed to protect service members and their families from the adverse financial consequences of premature separation."[236] He argued that it "d[id] not address jurisdiction ... nor require the government to revoke a discharge."[237] Then-Judge Effron, ten years earlier in *United States v. Keels*, argued that § 1168(a) served "to protect service members from premature separation."[238] These statutes protect Soldiers by ensuring the government provides benefits to the member or the member's Family.[239]

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[232] 10 U.S.C. § 1169 (2012).

[233] *See* AR 635-200, *supra* note 46, para. 1-5(g) ("10 USC 1169 confers broad authority on the Secretary of the Army to order separation of a regular Army (RA) Soldier prior to ETS.").

[234] *See* United States v. King, 27 M.J. 327, 329 (C.M.A. 1989) (citing § 1169) ("Third, appellant must undergo the 'clearing' process required under appropriate service regulations to separate him from military service.").

[235] *See* United States v. Hart, 66 M.J. 273, 277-80 (C.A.A.F. 2008) (Effron, C.J., dissenting) (chronicling the limitations of employing the statutory framework to determine personal jurisdiction).

[236] *Id*. at 278 (Effron, C.J., dissenting).

[237] *Id*. at 279 (Effron, C.J., dissenting).

[238] *See* United States v. Keels, 48 M.J. 431, 432 (C.A.A.F. 1998) (discussing both § 1168(a) and Article 71). The CAAF applied the three-part test in *Keels*. *Id*. at 431-33.

[239] *See id*. at 432 ("Section 1168 ensures that a member will not be separated from the service, thereby depriving the member and the member's family of pay and benefits such as medical care, until both the formal discharge certificate and a substantial part of any pay due are ready for delivery.").

The CAAF should not have relied on these statutes for its personal-jurisdiction jurisprudence without a clear command from Congress to do so. Under the CAAF's precedent prior to *Howard*, delivery of a valid discharge certificate separated a Soldier from the armed forces and ended court-martial jurisdiction.[240] The Presumption Against Change in Common Law canon cautions against an interpretation of a statute that would alter the law without clear direction from Congress.[241] This canon of interpretation commands that "[a] statute will be construed to alter the common law only when that disposition is clear."[242] Here, Congress has not specifically spoken to personal jurisdiction in these statutes—as the CAAF has acknowledged.[243] Yet, the court's reliance on §§ 1168(a) and 1169 arguably alter the military's common-law–like rule.[244] Certainly, discharge statutes and court-martial jurisdiction have been intertwined since Winthrop, but the staple of that jurisprudence is that *in personam* jurisdiction ends upon delivery of a valid DD Form 214.[245] The court should not alter that foundation without express congressional intent.

In sum, the CAAF should not rely on personnel-management statutes for the critical determination of when a court-martial loses jurisdiction over service members.[246] Congress never intended such a result.[247] A Soldier who received a valid DD Form 214 and is then court-martialed raises constitutional due-process concerns that the court can avoid with a more precise test to determine the outer limit of jurisdiction.[248] Moreover, the services can resolve many of the issues §§ 1168(a) and 1169 sought to address by simply issuing a DD Form 214 after a Soldier clears post and

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[240] *See* United States v. Scott, 29 C.M.R. 462, 464 (C.M.A. 1960) (noting that delivery of a valid discharge severed jurisdiction); GILLIGAN & LEDERER, *supra* note 22, § 2-22.10(b)(1), at 2-15 (noting that jurisdiction "ordinarily terminates with the delivery of a valid discharge certificate or separation order").

[241] *See* SCALIA & GARNER, *supra* note 223, at 318-19 ("A fair construction ordinarily disfavors implied change.").

[242] *Id*.

[243] *See* discussion *supra* Part.III.B-C, Part IV.A.

[244] *See Hart*, 66 M.J. at 275-77 (discussing the three-part test).

[245] *See Scott*, 29 C.M.R. at 464 (noting that delivery of a valid discharge severed jurisdiction); GILLIGAN & LEDERER, *supra* note 22, § 2-22.10(b)(1), at 2-15 (noting that jurisdiction "ordinarily terminates with the delivery of a valid discharge certificate or separation order").

[246] *See Hart*, 66 M.J. at 279 (Effron, C.J., dissenting) ("Section 1168 does not address jurisdiction under the UCMJ.").

[247] *See id*. at 278 (Effron, C.J., dissenting) ("The pertinent legislation originated in World War II as part of the Servicemen's Readjustment Act of 1944.").

[248] *See* discussion *supra* Part.II.C-D.

her pay is ready. Even if those tasks are insurmountable, military courts should not permit commanders to use these statutes as a veritable clawback provision of a Soldier's contract.

B. Delivery of a Discharge Certificate and Livery of Seisin

The first part of the CAAF's three-part test requires the delivery of a valid discharge certificate.[249] The delivery portion of this inquiry typically focuses on the commander's intent and the actual physical receipt of the discharge certificate.[250] The CAAF has had to confront both interrelated concepts, generating a flurry of judicial opinions.[251] This Part argues that the physical receipt portion of this inquiry no longer makes sense in the modern-day military.

As discussed *supra* Part III.C, the CAAF walked back the physical-delivery component of its test in *Nettles*, "declin[ing] to apply the physical delivery rule to the reserve components."[252] In support of this distinction the court reasoned that "[t]he law has generally moved beyond imbuing formalistic acts with such significance, and we should not require what amounts to livery of seisin to effectuate a discharge."[253] This reasoning makes sense, and it is not clear why it should only apply to reserve personnel with self-executing orders.[254] This analysis could just as easily apply to an active-duty Soldier.

The requirement to physically deliver a DD Form 214 is an outdated and legally antiquated concept. The DD Form 214 reflects the commander's official action through its representative—irrespective of delivery to the Soldier. Bryan A. Garner defines *livery of seisin* as "the ceremonial procedure at common law by which a grantor conveyed land

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[249] *See* discussion *supra* Part.III.

[250] *See* United States v. Nettles, 74 M.J. 289, 291 (C.A.A.F. 2015) ("First, no delivery can be effective if it is contrary to expressed command intent... . Next, it is strongly suggested that 'delivery' means actual physical receipt.").

[251] *See id*. ("The delivery requirement has generated its own body of jurisprudence ...").

[252] *Id*. at 292.

[253] *Id*.

[254] *See id*. ("Accordingly, in cases of reserve personnel with self-executing discharge orders issued pursuant to statute, it is the effective date of those orders that determines the existence of personal jurisdiction—not physical receipt of a piece of paper.").

to a grantee."[255] That historical legal concept has "ceased to be generally employed."[256] Similarly, the effective moment of discharge for a Soldier should not depend on the physical delivery of the DD Form 214.

Unfortunately, the CAAF's delivery jurisprudence makes it difficult to apply without running afoul of precedent.[257] The important and relevant concept, however, is the command's intent, which could arguably subsume the delivery concept. The CAAF has even recognized as much in a number of its personal-jurisdiction cases. For example, *United States v. Harmon* focused on the commander's intent with respect to the accused's discharge.[258] In that case, the CAAF found the Soldier's discharge became effective at 2359 hours on the date of his discharge certificate.[259] The command placed a legal hold on him prior to that time, which would permit jurisdiction to continue, voiding the discharge document.[260] The issue in the case centered on the fact that a personnel clerk delivered the discharge certificate to the accused the morning of his discharge date before the command had placed a hold on him.[261] Under longstanding precedent, defense claimed that delivery of the discharge certificate terminated jurisdiction.[262]

Judge Crawford, writing for a majority, disagreed that delivery ended the military's jurisdiction.[263] He reasoned that the command intended to discharge the Soldier at 2359, not "some arbitrary point in time when a

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[255] GARNER, *supra* note 223, at 550 (defining *livery of seisin*).

[256] *See id*. (quoting JOSHUA WILLIAMS, PRINCIPLES OF THE LAW OF REAL PROPERTY 100 (2006)) (describing the history of livery of seisin).

[257] *See Nettles*, 74 M.J. at 291 ("Were we to apply the above analysis to the current case ... the result would be clear. The command did not intend for the discharge to take effect.").

[258] *See* United States v. Harmon, 63 M.J. 98, 102 (C.A.A.F. 2006) (pointing out that a crucial consideration is the commander's intent).

[259] *Id*. at 103 (affirming the military judge's ruling).

[260] *Id*. ("Prior to 2359 hours on May 17, 2001, the command placed a legal hold on Appellant. As a result, *in personam* jurisdiction over Appellant was never lost.").

[261] *Id*. at 100 (noting the separations clerk gave the accused his DD Form 214 at 0900).

[262] *See id*. at 101 (citing Smith v. Vanderbush, 47 M.J. 56, 58 (C.A.A.F. 1997)) ("Delivery of a valid discharge can operate as a termination of court-martial *in personam* jurisdiction.").

[263] *Id*. at 102 (reasoning that the DD Form 214 was not yet effective when delivered).

personnel clerk decided to deliver the copies of the DD Form 214."[264] The court essentially concluded the commander's intent matters in determining the effective time of discharge.[265] The time placed on the DD 214 matters even if it is in the middle of the night; it reflects the commander's decision as to the exact moment the Soldier leaves the military. This echoes their prior ruling in 2000, in *United States v. Melanson*, where the court acknowledged:

> Even if a discharge certificate and separation orders are delivered to a member earlier in the day as an administrative convenience for the unit or the service member, the discharge is not effective upon such a delivery unless it is clear that it was intended to be effective at the earlier time.[266]

The court also pointed to the 1994 case of *United States v. Batchelder* to support this claim, where the CAAF found that a personnel clerk's early delivery of a discharge certificate did not "accelerate the discharge event."[267] Thus, the pertinent and relevant inquiry for the validity of a DD Form 214 is the commander's intent, not delivery.

C. Finance Woes

The second part of the CAAF's test requires the delivery of a final accounting of pay and allowances—the part at issue in *Hart* and

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[264] Id.

[265] *See id.* at 101 (citing United States v. Batchelder, 41 M.J. 337, 339 (C.A.A.F. 1974)) ("[T]he discharge authority must have intended the discharge to take effect.").

[266] United States v. Melanson, 53 M.J. 1, 2 (C.A.A.F. 2000) (noting that pursuant to army regulation, discharges normally take effect at 2400 on the date of discharge). For a full discussion of the Army Court of Criminal Appeals' (ACCA's) ruling in *Melanson*, see Sitler, *supra* note 31, at 4-6 ("*Melanson* highlights that the clearing process for an accused stationed overseas may be broader than outprocessing from the local unit; a clearing from the armed forces, in this case repatriation, may be necessary. *Melanson* also reinforces the three prerequisites necessary to satisfy a discharge."). For a full discussion of the CAAF's ruling in *Melanson*, see Harder, *supra* note 37, at 4-6 (focusing on the effective time of the discharge).

[267] Batchelder, 41 M.J. at 339 (noting the command's specified time was the effective time of the discharge).

Christensen.[268] Although the CAAF walked back this requirement in *Christensen*, it is worth articulating some of the limitations of this element as well. Most prominently, this portion of the test poses a significant challenge because it requires commanders and military-justice practitioners to understand and apply the DFAS's complex regulations and procedures uniformly.[269]

Since a service member's final paycheck reflects payment for services rendered, it should not permit the military to maintain court-martial jurisdiction over him or her prior to disbursement.[270] This final pay reflects a Soldier's entitlement. Three of the four military branches have different timeframes for issuing a Soldier's final paycheck (the Air Force and Navy are the same).[271] The DFAS specifies the Army's policy as follows:

> Regular pay is suspended during the month of separation to ensure that no overpayment exists. On the member's Date of Separation (DOS), the servicing finance office will have a payment sent to the member's bank account using the EFT process. From DOS through the next 20 days, the member's pay account will be monitored and additional pay action will be made for the final pay computation as required. Post separation pay audits are conducted regularly and may identify residual payments that are due to the member. If this occurs, DFAS (or in limited instances, the member's servicing finance officer)

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[268] *See* United States v. Christensen, 78 M.J. 1, 4 (C.A.A.F. 2018) (noting "the *DuBay* military judge focused solely on the 'final accounting of pay'"); United States v. Hart, 66 M.J. 273, 274 (C.A.A.F. 2008) ("We agree with the military judge and the United States Air Force Court of Criminal Appeals which concluded that Hart's final pay, or a substantial potion thereof, was not ready for delivery.").

[269] *See* Cox, *supra* note 100, at 30-31 ("Without an understanding of [finance's Standard Operating Procedures (SOPs)], trying to apply the case law interpreting 10 U.S.C. § 1168(a) to a particular case is pointless.").

[270] *See* Barker v. Kansas, 503 U.S. 594, 605 (1992) (holding that "military retirement benefits are to be considered deferred pay for past services").

[271] *Online Customer Service, Separations Pay*, DEFENSE FINANCE AND ACCOUNTING SERVICE (Mar. 18, 2015), https://corpweb1.dfas.mil/askDFAS/welcome.action (follow "Ask Military Pay" hyperlink; then follow "Separations Pay" hyperlink) [hereinafter DFAS] (listing the branches separate timeframes for determining a Soldier's final pay).

> will pay the residual payments via paper check to the address that the service member provided during separation processing.[272]

With respect to the Army, the final paycheck is made on the service member's date of separation.[273] Therefore, the final pay and discharge date should coincide for a service member in the vast majority of separations.

The policy, however, does note that "[f]rom DOS through the next 20 days, the member's pay account will be monitored and additional pay action will be made for the final pay computation as required."[274] With this statement, the DFAS acknowledges that potential adjustments in pay may become necessary post-separation. The DFAS also reveals it conducts post-separation pay audits to determine if residual payments to the Soldier need to be made.[275] This policy strives to ensure service members receive a proper final accounting of pay and allowances, but, under the CAAF's current test, a post-separation pay audit could arguably subject the Soldier to court-martial jurisdiction. That result is at odds with protecting service members from financial hardship and paying them for services rendered.[276]

The CAAF's three-part test has transformed this requirement into a jurisdictional hook that can hold a service member on active-duty and subject him to a court-martial.[277] Yet, "[j]urisdiction to punish rarely, if ever, rests upon such illogical and fortuitous contingencies."[278] That proposition certainly applies here and cautions against a test that stakes

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[272] *Id*.
[273] *Id.*
[274] *Id*.
[275] *Id*.
[276] *See* discussion *supra* Part IV.A.
[277] The CAAF reversed the trial judge's ruling in *Christensen*, finding the court-martial lacked *in personam* jurisdiction, despite the government arguing that *Hart* and the court's three-part test established that the military never lost personal jurisdiction over the accused. *See* United States v. Christensen, 78 M.J. 1, 12 (C.A.A.F. 2018) ("[T]he Government cites our decision in *Hart* as binding precedent and latches onto the argument that Appellant's discharge was not effectuated because a final accounting of pay had not been conducted.").
[278] United States *ex rel*. Hirshberg v. Cooke, 336 U.S. 210, 214 (1949), *superseded by statute*, 10 U.S.C. § 803(a) (1950), *as recognized in* United States v. Hennis, 75 M.J. 796, 807-10 (C.A.A.F. 2016).

court-martial jurisdiction on the DFAS's policy and bureaucracy. The DFAS operates under regulatory considerations that differ significantly from what the CAAF should base *in personam* court-martial jurisdiction upon.

D. Clearing Post: A Bureaucratic Requirement

The CAAF's final element requires the accused to comply with a service's clearing regulations before jurisdiction severs.[279] The CAAF has yet to address this element in a judicial opinion.[280] However, after its holdings in *Christensen* and *Nettles*, it appears unlikely the court would subject an accused to court-martial jurisdiction for a *de minimus* regulatory violation.[281] For example, what if an accused had failed to have his clearing papers stamped at the on-post library? Would jurisdiction remain? The purpose of a service's clearing regulations is to ensure the orderly departure of Soldiers.[282] It should not be a basis (nor was it ever intended) to serve as another prong on which to base *in personam* jurisdiction.

A Soldier's compliance or lack thereof with the clearing procedures articulated in AR 600-8-101, *Personnel Readiness Processing*, should not implicate whether a court-martial retains personal jurisdiction.[283] Chapter 3 of AR 600-8-101 discusses the Army's out-processing program and provides a series of procedures installations must follow when clearing a Soldier.[284] The regulation makes clear the Army should not publish

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[279] *See* United States v. King, 27 M.J. 327, 329 (C.M.A. 1989) (citing 10 U.S.C. § 1169 (2012)) ("Third, appellant must undergo the 'clearing' process required under appropriate service regulations to separate him from military service.").

[280] Zachary D. Spilman, *Opinion Analysis: CAAF Applies a Reason-and-Policy Standard to Determine the Existence of Court-Martial Jurisdiction, in United States v. Christensen*, CAAFLOG (July 11, 2018), http://www.caaflog.com/2018/07/11/opinion-analysis-caaf-applies-a-reason-and-policy-standard-to-determine-the-existence-of-court-martial-jurisdiction-in-united-states-v-christensen/#more-39463 ("That's a repudiation of two parts of the three-part test from *Hart*; the only part that remains (for now) is the completion of the clearing process that is required under service regulations.").

[281] *See* discussion *supra* Part III.C.

[282] *See* U.S. DEP'T OF ARMY, REG. 600-8-101, PERSONNEL READINESS PROCESSING para. 1-5a(2)(b) (6 Mar. 2018) [hereinafter AR 600-8-101] ("Ensures the proper processing of Soldiers ... from active duty status to another status ... .").

[283] *See id*. ch. 3 (discussing out-processing requirements).

[284] *Id*.

separation orders until the Soldier meets all clearance requirements.[285] Interestingly, AR 600-8-101 emphasizes that "[t]he servicing military pay office will not clear Soldiers until all clearance requirements ... are met."[286] Thus, a Soldier must clear post to receive her final pay, and then the Army may issue a DD Form 214.[287] The failure to follow these tasks should not extend personal jurisdiction over the service member, however.

The CAAF has infused multiple bureaucratic control measures into its personal-jurisdiction jurisprudence and created a web of rules to determine whether a Soldier remains subject to court-martial jurisdiction. These internal Army processes are meant to ensure the orderly departure of Soldiers. The delivery of the discharge certificate, the final accounting of pay and allowances, and the clearing of post, all operate to separate a Soldier in a certain manner. If the procedures are followed correctly, the Soldier receives her DD Form 214 afterward.

Commanders almost certainly strive to follow the procedures articulated and discussed here, but *in personam* issues arise at the margins. When those issues manifest, the answer should not be a scrub of the government's actions to determine where it failed in order to subject the Soldier to court-martial jurisdiction. The bureaucracy places an onus on the Soldier and the government to comply, but either's failure to comply should not affect criminal jurisdiction.

V. Proposal: A Bright-Line Rule for Personal Jurisdiction

This article proposes a simple, bright-line rule to determine where the personal jurisdiction ends. Judge Maggs recognized that *Howard* was a "wrong turn" in *Christensen*.[288] As a result, the CAAF should acknowledge that the court should not have relied on §§ 1168(a) and 1169

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[285] *See id*. para. 3-4(m) ("Before any Soldier signs out and departs, a final check will be made to ensure that the Soldier has out-processed properly.").

[286] *Id*. para. 3-2(g).

[287] *See* DFAS, *supra* note 273 ("On the member's Date of Separation (DOS), the servicing finance office will have a payment sent to the member's bank account using the EFT process.").

[288] *See* United States v. Christensen, 78 M.J. 1, 6 (C.A.A.F. 2018) (Maggs, J., concurring) ("These considerations suggest that the Court may have made a wrong turn in *Howard* and that we should reconsider our approach for determining when a service member has been discharged for the purposes of terminating court-martial jurisdiction.").

to determine when personal jurisdiction ends.[289] Even at that time, it did not make sound jurisprudential sense to anchor *in personam* jurisdiction to those statutes. A bright-line rule will provide clarity to the field and avoid costly litigation in the future. The CAAF will need the right case to change course, but it should certainly be something it looks for in a future term's review.[290]

A. What to Do with *Howard*

The threshold issue the CAAF will face is whether to overrule its prior precedent.[291] An appellate court does not take the drastic action of flouting *stare decisis* lightly.[292] Here, however, the CAAF can likely avoid overruling *Howard* and its progeny. As the court recognized most recently in *Christensen*, the statutory framework serves as guidance.[293] Consequently, the court can announce a standard—as proposed *infra* Part V.B—that marks a clear departure from the formalities of the three-part test.

In determining whether to disturb precedent, the CAAF considers "'whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of service members; and the risk of undermining public confidence in the law.'"[294] The court requires a "'special justification'" to reject prior case law.[295] Here, the court's reliance on the statutory framework has proved unworkable and,

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[289] *See* United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985) (turning to § 1168(a) to determine the requirements of personal jurisdiction).

[290] The CAAF can grant petitions for review "on good cause" shown. *See* COURT OF APPEALS FOR THE ARMED FORCES, RULES OF PRACTICE AND PROCEDURE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES r. 4(a)(3) (22 June 2017) (defining the court's jurisdiction).

[291] *See Christensen*, 78 M.J. at 7 (Maggs, J., concurring) ("I leave reconsideration of the Court's long-standing approach to determining when a discharge occurs for the purposes of terminating court-martial jurisdiction for another case.").

[292] *See* GARNER, *supra* note 223, at 841 (defining *stare decisis* as "the doctrine of precedent, under which it is necessary to follow earlier judicial decisions when the same points arise again in litigation").

[293] *See Christensen*, 78 M.J. at 5 (noting the statutory framework "serve[s] as *guidance*—not as *prerequisites*—when it comes to determining whether a discharge has been effectuated for jurisdictional purposes").

[294] United States v. Blanks, 77 M.J. 239, 242 (C.A.A.F. 2018) (quoting United States v. Quick, 74 M.J. 332, 336 (C.A.A.F. 2015)).

[295] *Id.* (quoting Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2409 (2015)).

consequently, hurt practitioners' ability to apply the law uniformly.[296] Fortunately, *Howard* did not rely on Supreme Court precedent or another foundational CAAF case when articulating its rule.[297] The challenges associated with the court's three-part test counsel against continuing with the status quo. As a result, the CAAF should announce a bright-line rule that charts a new way forward for determining when personal jurisdiction over a service member ends.

B. The Bright-Line Rule

This article proposes the following rule: A court-martial loses jurisdiction at 2400 on the effective date of the discharge certificate (e.g., DD Form 214).[298] This simple approach will resolve the majority of jurisdictional questions practitioners and trial judges face. This rule focuses on the DD Form 214 itself, emphasizing the supremacy of the document. Here, a valid DD Form 214 severs jurisdiction. As William Winthrop noted, the discharge certificate is an official act of the United States through its representative—the commander.[299] This rule anchors jurisdiction in a tangible and official document.

The history of *in personam* jurisdiction for the military reveals a reliance on statutes to determine the point of discharge.[300] The precedent prior to *Howard* relied on the delivery of a discharge certificate to terminate jurisdiction.[301] This black-letter law has been a linchpin in personal-jurisdiction jurisprudence for decades and continues to this day as part one of the three-part test.[302] This article's bright-line rule acknowledges the importance of that foundational concept with an important caveat—no delivery requirement.

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[296] *See* discussion *supra* Part IV.
[297] *See* discussion *supra* Part III.A.
[298] Although this bright-line rule reflects paragraph 1-29(a)(1)-(2) and (c) of AR 635-200, its authority does not derive from § 1168(a) but rather the black-letter law that has defined jurisdiction since Winthrop. *See* AR 635-200, *supra* note 46, para. 1-29(a)(1)-(2), (c); discussion *supra* Part II-III.
[299] WINTHROP, *supra* note 41, at 548.
[300] *See* discussion *supra* Part III.A (discussing *Howard* and *Scott*).
[301] *Id.*
[302] *See* discussion *supra* Part III.B-C.

This rule rejects the requirement for physical delivery of the DD Form 214 to effectuate the discharge as an atavistic approach to the law.[303] As Judge Stucky recognized in *Nettles*, there is a rich jurisprudential history at the CAAF regarding the physical delivery of a discharge certificate.[304] In fact, Judge Stucky acknowledged that those cases would have resulted in a finding against the accused in *Nettles* since the military never delivered his discharge paperwork to him.[305] However, he discounted that outdated approach, analogizing it to the property concept of livery of seisin.[306] From a policy perspective, physical delivery should not affect the validity of the discharge certificate. The document stands alone as an official act of the United States.[307] The effective date of the discharge is an objective inquiry, not a subjective one—it should not be based on whether the military delivered the document and the Soldier had actual or constructive knowledge of it.[308]

Under this article's proposed rule, the validity of the DD Form 214 becomes the key question practitioners and courts will have to confront. Fortunately, the CAAF has already answered many of the common issues commanders and military-justice leaders face with such a task.[309] For example, a DD Form 214 produced through fraud would not sever court-martial jurisdiction for a service member.[310]

Another facet of the validity analysis is the commander's intent.[311] Military courts have addressed this issue before, analyzing whether the command took affirmative measures to void the DD Form 214 prior to its

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[303] *See* discussion *supra* Part IV.B.

[304] *See* United States v. Nettles, 74 M.J. 289, 291 (C.A.A.F. 2015) (discussing the CAAF's case law on delivery of a discharge certificate).

[305] *See id*. (noting that the discharge and delivery cases were for active-duty personnel).

[306] *See id*. at 292 (discussing livery of seisin).

[307] *See* discussion *supra* Part II.B.

[308] *See* discussion *supra* Part II.B.

[309] *See* discussion *supra* Part II.A.

[310] *See* GILLIGAN & LEDERER, *supra* note 22, § 2-22.10(c)(3), at 2-23-24 (noting a "fraudulently obtained discharge or separation is not a bar to court-martial jurisdiction").

[311] *See* United States v. Harmon, 63 M.J. 98, 102 (C.A.A.F. 2006) (pointing out that a crucial consideration is the commander's intent).

effective date, for example.[312] Commanders and practitioners can rely on the CAAF's robust case law when these matters arise. In actuality, commander's intent should only matter in rare circumstances with respect to a DD Form 214. The default proposition is that the document is valid and reflects the commander's intent to discharge a Soldier.[313] Certainly, there are exceptions that will apply which would void a discharge certificate. For example, if the commander manifests his or her intent to keep a Soldier on active duty in accordance with an approved method, such as placing a legal hold on him or her, then that could void a DD Form 214.[314]

A primary benefit of this rule is the limited litigation costs associated with determining the validity of a single document. In *United States v. Williams*, the accused received his discharge certificate on the same day his commander placed a valid legal hold on his separation.[315] In this circumstance, "appellant's discharge was properly rescinded and the military had *in personam* jurisdiction."[316] This case illustrates the relative ease with which judges can resolve these issues without a more difficult deep-dive into, for example, pay issues.[317] Thus, the legal foundation and case law already exists to support this article's proposed bright-line rule.

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[312] *See id*. ("Prior to 2359 hours on May 17, 2001, the command placed a legal hold on Appellant. As a result, *in personam* jurisdiction over Appellant was never lost.").

[313] *See* discussion *supra* Part II.B (discussing DD Forms 214).

[314] *See Harmon*, 63 M.J. at 103 ("Prior to 2359 hours on May 17, 2001, the command placed a legal hold on Appellant. As a result, *in personam* jurisdiction over Appellant was never lost."). The crux of the issue in these scenarios will be when the command placed that legal hold (e.g., administrative flag)—before or after the effective date of the DD Form 214. This inquiry (when contested) would certainly involve pre-trial litigation that a military judge would have to resolve in order to find personal jurisdiction over the accused. The fact-finding inquiry would likely involve testimony or sworn statements from the commander and S-1 personnel on the procedures followed for generating the DD Form 214.

[315] United States v. Williams, 53 M.J. 316, 317 (C.A.A.F. 2000); *see* Harder, *supra* note 37, at 6 (discussing *Williams*); Sitler, *supra* note 31, at 6 (noting "*Williams* stresses that the commander's intent to discharge is an important fact to consider when determining the validity of a discharge certificate").

[316] *Williams*, 53 M.J. at 317.

[317] *See* United States v. Hart, 66 M.J. 273, 279 (C.A.A.F. 2008) (Effron, C.J., dissenting) ("Although DFAS undoubtedly endeavors to accomplish these myriad tasks in a timely fashion, there is a significant potential for delays and

C. If There Is No Valid Discharge Certificate, Is There a Congressional Statute on Point?

Another important sub-inquiry of this rule will need to occur in situations when the command never produced a discharge document. In those cases, the CAAF should first look to whether there is a congressional statute that required the service member's discharge. This is a laser-focused review of any congressional statute that speaks specifically to a mandatory discharge of a Soldier. As discussed *supra* Part IV.A, §§ 1168(a) and 1169 do not meet this standard.[318] In contrast, § 14505 would suffice.[319] As the *Nettles* majority recognized, the provisions of § 14505 discharged the reservist prior to jurisdiction attaching for his court-martial.[320] In that case, it is immaterial that the accused did not have a valid discharge certificate because a congressional statute mandated his discharge.[321] In specific instances where Congress has spoken to the discharge, such as § 14505, then the requirement for a certificate is of no matter.

A potential concern with this inquiry is the commander's intent. In *Nettles*, for example, Judge Stucky noted the accused would not have been discharged since it was contrary to the commander's intent and the command never delivered the discharge certificate.[322] Under this inquiry, however, *Nettles*-like facts would not matter. Section 14505's requirements trump the commander's intent. In fact, the CAAF essentially reached the same conclusion in *Nettles*, declining to apply the three-part test in favor of a specific statute.[323] Similarly, Judge Maggs's proposed test from his concurrence in *Christensen* would first ask whether a statute

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mistakes, as reflected in the lengthy record of the finance proceedings set forth in the present case.").

[318] *See* discussion *supra* Part IV.A.

[319] *See* United States v. Nettles, 74 M.J. 289, 292 (C.A.A.F. 2015) ("Instead, we think it more appropriate to apply the statute that actually discharged Appellant: 10 U.S.C. § 14505 (2012).").

[320] *Id*. at 293.

[321] *See* 10 U.S.C. § 14505 (2012) ("[A] captain on the reserve active-status list ... who has failed of selection for promotion to the next higher grade for the second time ... shall be separated ... not later than the first day of the seventh month after the month in which the President approves the report of the board which considered the officer for the second time.").

[322] *See Nettles*, 74 M.J. at 291 (recognizing that applying the traditional framework would result in a finding for the government).

[323] *See id*. ("[W]e decline to employ the 10 U.S.C. § 1168(a) framework here.").

or regulation speaks to the service member's discharge.[324] For reasons discussed *supra* Part III.C, that threshold inquiry has its limitations.[325] But the court's reliance on statutes can make sense in certain specific circumstances.

D. The Benefits of a Bright-Line Rule

A bright-line rule removes gamesmanship from the litigation. Since a Soldier's discharge operates at a single point in time based on the DD Form 214 or discharge certificate, the commander cannot act *ex post* to maintain jurisdiction, such as the case in *Christensen*.[326] The same concerns do not attach *ex ante* because a commander's intent matters prior to the service's issuance of the discharge certificate. Put another way, the Command can cancel or revoke a DD Form 214 up and until it goes into effect. A single standard removes ambiguity from the equation and lessens a commander's discretion with respect to the point of discharge.

A principal concern may be what to do in the absence of a discharge certificate when, for example, self-executing orders sever jurisdiction.[327] This article recognizes that the official document need not simply be a DD Form 214—although that is the most ubiquitous.[328] Military orders can also function as the official act of the United States, severing jurisdiction and transforming a Soldier into a civilian.[329]

Importantly, this proposed rule would not alter the CAAF's case law that discuss the attachment of jurisdiction prior to discharge. As the CAAF has recognized, if the government takes official action against a Soldier prior to his discharge, then jurisdiction does not end when the Soldier's ETS arrives.[330] For example, in *United States v. Smith*, the CMA held in 1978 that the mere writing down of charges did not sufficiently signal the

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[324] *See* discussion *supra* Part III.C.
[325] *Id*.
[326] *See* United States v. Christensen, 78 M.J. 1, 6 (C.A.A.F. 2018) (concluding that the military did not have jurisdiction over the accused).
[327] *See* discussion *supra* Part II.B.
[328] *Id*.
[329] *Id*.
[330] *See* United States v. Smith, 4 M.J. 265, 267 (C.M.A. 1978) (citing United States v. Hutchins, 4 M.J. 190 (C.M.A. 1978)) ("By the very terms of this article, the mere expiration of a period of enlistment, alone, does not alter an individual's status under the Uniform Code.").

government's "intent to impose its legal processes upon the individual."[331] The court recognized that jurisdiction may attach prior to a service member's discharge and then continue until the court-martial concludes.[332] In contrast, in 1982, in *United States v. Self*, the court found that criminal investigators labeling the Soldier as a suspect, interviewing him, and advising him of his legal rights were enough for jurisdiction to attach.[333] In the latter case, the commander's actions voided the self-executing orders, while in the former it did not.

One of the most significant benefits of a bright-line rule is the reduction in information costs for commanders and practitioners. The certainty with which military personnel can operate under this new rule will reduce ambiguity on whether a service member is subject to court-martial jurisdiction. It will also eliminate many of the issues the CAAF has had to confront with its three-part test, including issues surrounding the physical delivery of the discharge certificate to the service member as well as whether the Soldier received his or her final accounting of pay and allowances.[334] The reduction in litigation and resource costs is a worthwhile benefit. The CAAF has been facing *in personam* jurisdiction issues for over thirty years; the time has come to find a solution that is fair, effective, and legally sound.

VI. Conclusion

The hallmark of military jurisdiction has always been a question of a Soldier's status.[335] The answer to this key question marks the dividing line between a Soldier and a civilian. Much is at stake. From a practical standpoint, military commanders and their legal advisors need a clear answer to this question so they can determine when a Soldier is or is not subject to their jurisdiction. From an equity standpoint, military courts

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[331] *Id*.

[332] *Id*. ("[I]f jurisdiction has attached prior to discharge, it continues until termination of the prosecution.").

[333] *See* United States v. Self, 13 M.J. 132, 136, 138 (C.M.A. 1982) ("Jurisdiction having attached by commencement of action with a view to trial—as by apprehension, arrest, confinement, or filing of charges—continues for all purposes of trial, sentence, and punishment.").

[334] *See* discussion *supra* Part IV.B-C.

[335] *See* SCHLUETER, *supra* note 20, § 4-4, at 206 (citing Toth v. Quarles, 350 U.S. 11 (1955)) ("Personal jurisdiction is a question of 'status.'").

should not have the ability to subject discharged Soldiers who have become civilians to trial.[336] Any ambiguity in the answer to this key question subjects civilians to a court-martial that never should have been—as in *Christensen* and *Nettles*.[337]

This article proposes a new way forward for the CAAF on personal jurisdiction. Judge Maggs's concurrence in *Christensen* cut through over thirty years of personal-jurisdiction jurisprudence and acknowledged a harsh reality: *Howard* proved a mistake.[338] The CAAF's reliance on two personnel statutes for its jurisdictional test has proved unworkable for the field and potentially unfair to the accused. Both accused Soldiers in *Christensen* and *Nettles* were subjected to the military-justice process when those courts lacked the power to try them for any offense.[339] The fault does not lie with the trial counsel and military judges—they applied the law as the CAAF had announced it.[340] Consequently, the burden falls to the CAAF to announce a rule that results in less ambiguity and ensures military courts do not subject civilians to a court-martial. A bright-line rule meets this standard and will save the military from expending unnecessary resources in unnecessary prosecutions.

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[336] *See* discussion *supra* Part II.C-D.

[337] *See* United States v. Christensen, 78 M.J. 1, 6 (C.A.A.F. 2018) (concluding that the military did not have jurisdiction over the accused); United States v. Nettles, 74 M.J. 289, 293 (C.A.A.F. 2015) (finding no jurisdiction).

[338] *See Christensen*, 78 M.J. at 6 (Maggs, J., concurring) ("These considerations suggest that the Court may have made a wrong turn in *Howard* and that we should reconsider our approach for determining when a service member has been discharged for the purposes of terminating court-martial jurisdiction.").

[339] *See id*. (concluding the military did not have jurisdiction over the accused); United States v. Nettles, 74 M.J. 289, 293 (C.A.A.F. 2015) (finding no military jurisdiction).

[340] *See Christensen*, 78 M.J. at 5 ("[T]he Government cites our decision in *Hart* as binding precedent and latches onto the argument that Appellant's discharge was not effectuated because a final accounting of pay had not been conducted."); *Nettles*, 74 M.J. at 291 ("Were we to apply the above analysis to the current case (as did the lower courts), the result would be clear. The command did not intend for the discharge to take effect, as the convening authority intended to prevent discharge by placing Appellant on administrative hold. Nor was there physical receipt of the discharge certificate, due to the paper shortage. For the reasons below, though, we decline to employ the 10 U.S.C. § 1168(a) framework here.").

Article III tribunals should be the forum where civilians face federal prosecution.[341] "The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds."[342] The legitimacy of the U.S. court-martial system is at stake when it jumps outside its limits. A simpler approach to determining personal jurisdiction that comports with a narrow conception of military jurisdiction ensures courts-martial remain "within [their] essential bounds."[343] The CAAF is already moving in the right direction as evidenced by *Christensen* and *Nettles*.[344] The final step is only one case away.

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[341] *See* United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 19-22 (1955) (emphasizing the importance of "Bill of Rights safeguards" for civilians).
[342] Reid v. Covert, 354 U.S. 1, 23-24 (1957).
[343] See id.
[344] *See* discussion *supra* Part III.C.

ALEXA, WHOSE FAULT IS IT? AUTONOMOUS WEAPON SYSTEMS INVESTIGATIONS AND THE IMPORTANCE OF A DELIBERATE ACCOUNTABILITY PROCESS

Major Thomas G. Warschefsky[*]

For unto whomsoever much is given, of him shall be much required: and to whom men have committed much, of him they will ask for more.[1]

I. Introduction

A. Hypothetical

It is sometime in the future and the United States (U.S.) military is engaged in a combat operation. During this operation, an Army brigade commander deems it prudent to utilize an autonomous weapon system (AWS)—known as "Weapon X"—to target enemy troops. Weapon X is an aerial platform designed to loiter in a given location while searching for targets, and it is pre-loaded with data to identify and target enemy vehicles, to include armored personnel carriers.[2] On the day in question, the

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[1] *Luke* 12:48 (King James); *see also* Stan Lee & Steve Ditko, *Spiderman*, AMAZING FANTASY 15, at 13 (Marvel Entertainment Aug. 1962) ("In this world, with great power there must also come—great responsibility.").

[2] *See generally HARPY Autonomous Weapon for All Weather*, ISRAEL AEROSPACE INDUSTRIES,

commander authorizes Weapon X to deploy to an area where enemy troops may be operating. Although operated in a "human on the loop" capacity, enemy utilization of electromagnetic warfare has greatly restricted the ability of Weapon X to transmit video feed to the command center.[3] As a result, the Soldiers monitoring Weapon X are only able to receive written target analysis conclusions from Weapon X.

At some point after deployment, Weapon X submits a message to the command center: Weapon X has identified an armored personnel carrier and is prepared to strike the target. The Commander has reason to believe armored personnel carriers may be present in the area and, based on this information, allows Weapon X to continue its strike. The target is destroyed. The team later learns the target was a civilian van, and ten children were killed.

In the aftermath, the higher command initiates an administrative investigation into the incident in accordance with Army Regulation 15-6.[4] This investigation examines the commander and those working with the AWS on the date of the incident. It finds that their actions were appropriate based on the information provided by the AWS. Having looked at their actions, the investigation next turns to the AWS itself.

It is at this point that the investigating officer (IO) has difficulty. Despite valiant efforts, the IO has limited experience in computer programming. No individuals within the combat division have the in-depth experience necessary to examine the AWS's designs. Moreover, the system was developed in a collaborative effort between the United States Defense Advanced Research Projects Agency (DARPA) and a private corporation and, although helpful, neither seems particularly motivated to expeditiously provide assistance, as the investigation is coming from well

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http://www.iai.co.il/2013/36694-16153-en/Business_Areas_Land.aspx (last visited Mar. 14, 2019).

[3] *See* PAUL SCHARRE, ARMY OF NONE: AUTONOMOUS WEAPONS AND THE FUTURE OF WAR 44, 81–82 (2018) (discussing how the option of real-time monitoring of weapon systems is likely to be extremely limited or non-existent if a conflict involving a near-peer with significant capabilities in the electromagnetic spectrum that would allow for disruption of communications links).

[4] *See generally* U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS (1 Apr. 2016) [hereinafter AR 15-6].

outside their organizational chains of command.[5] With nowhere to turn and the deadline approaching, the IO is forced to conclude that although the commander is not responsible for the deaths of the children, she is unable to determine who—or what—is.

B. Background

The idea of artificial intelligence (AI) has existed in popular culture since as early as 1920.[6] While some fictional accounts place AI as a great boon to society, others explore its darker side.[7] Today, what was once reserved for the realm of science fiction has entered our everyday lives. Autonomous robotic vacuums clean our houses,[8] and "smart" thermostats control our living environments.[9] Robotic personal assistants, such as Amazon's "Alexa," listen to our day-to-day lives in order to answer questions, play music, or place orders with online retailers,[10] and AI is being tested to drive our cars and pilot commercial airlines.[11] At the same time, the potential of AI has not escaped the watchful eye of militaries throughout the world.

According to Russian President Vladimir Putin, "The one who becomes the leader in [the AI] sphere will be the ruler of the world. When one party's drones are destroyed by drones of another, [that party] will have no other choice but to surrender."[12] Other world powers have taken

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[5] Both the U.S. C-RAM LPWS and the Israeli Harpy weapon systems were developed in conjunction with private contractors. It is reasonable to assume private business will have heavy involvement in future autonomous weapon systems (AWS) development.

[6] *See, e.g.*, KAREL CAPEK, ROSSUM'S UNIVERSAL ROBOTS (1920).

[7] *See, e.g.*, IROBOT (Davis Entertainment 2004); *see also* THE TERMINATOR (Hemdale 1984); THE MATRIX (Warner Bros. 1999); and THE STAR WARS TRILOGY (Lucasfilm 1977, 1980, 1983).

[8] *See, e.g.*, *Roomba Robot Vacuum*, IROBOT, https://www.irobot.com/for-the-home/vacuuming/roomba (last visited Mar. 14, 2019).

[9] *See, e.g.*, *Nest Learning Thermostat*, NEST, https://nest.com/thermostats/nest-learning-thermostat/overview/ (last visited Mar. 14, 2019).

[10] *See, e.g.*, *Echo and Alexa*, AMAZON, https://www.amazon.com/Amazon-Echo-And-Alexa-Devices/b?ie=UTF8&node= 9818047011 (last visited Mar. 11, 2019).

[11] *See, e.g.*, *Our Mission*, WAYMO, https://waymo.com/mission/ (last visited Mar. 14, 2019) (explaining the mission of an autonomous vehicle company).

[12] Russ. President Vladimir Putin, Address to Students at the Beginning of the 2017 School Year (Sep. 1, 2017).

notice of the huge potential of AI as a warfighting tool and are exploring the role autonomous systems will have in the future of combat. This exploration is not merely conceptual. The United States has developed and implemented the Phalanx series of active defense systems (to include the Counter-Rocket Artillery and Mortar or C-RAM) that demonstrate autonomous capabilities.[13] Israel has operationalized the Harpy autonomous drone utilized to hunt and destroy enemy radar stations.[14] Likewise, Russia has publicized their cultivation of autonomous tanks,[15] and China has recently indicated their intent to explore autonomous drone swarms.[16]

While many have recognized the military advantages offered by AWS, many government and non-governmental organizations have taken a negative view of this emerging technology. This has led to a spirited debate on the morality and legality of AWS, with many organizations calling for outright bans.[17] Although many concerns have not stood up to scrutiny, the concern regarding potential inability to assign human blame for collateral damage remains a primary argument for the ban of AWS.[18] As policies are developed on the national and international levels, this concern over lack of human accountability could severely limit the United States' ability to develop autonomous weapon systems and creates the

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[13] *Counter-Rocket, Artillery, Mortar (C-RAM) Intercept Land-Based Phalanx Weapon System (LPWS)*, U.S. ARMY ACQUISITION SUPPORT CTR., https://asc.army.mil/web/portfolio-item/ms-c-ram_lpws/ (last visited Mar. 14, 2019).

[14] ISRAEL AEROSPACE INDUSTRIES, *supra* note 2.

[15] Daniel Brown, *Russia says it has deployed its Uran-9 robotic tank to Syria—here's what it can do*, BUSINESS INSIDER (May 15, 2018), https://www.businessinsider.com/russia-uran-9-robot-tank-what-can-it-do-syria-2018-5#heres-a-view-from-the-automatic-turret-which-can-detect-and-acquire-targets-on-its-own-up-to-about-four-miles-away-during-the-day-the-operator-however-controls-the-firing-6.

[16] Elsa Kania, *China's Strategic Ambiguity and Shifting Approach to Lethal Autonomous Weapons Systems*, LAWFARE (Apr. 17, 2018), https://www.lawfareblog.com/chinas-strategic-ambiguity-and-shifting-approach-lethal-autonomous-weapons-systems.

[17] *See, e.g.*, *A Growing Global Coalition*, CAMPAIGN TO STOP KILLER ROBOTS, https://www.stopkillerrobots.org/about/ (last visited Mar. 14, 2019) ("The Campaign to Stop Killer Robots is a growing global coalition of 100 international, regional, and national non-governmental organizations...in 54 countries that is working to preemptively ban fully autonomous weapons.") *See also* European Parliament Resolution of 12 September 2018 on Autonomous Weapon Systems, EUR. PARL. DOC. 2018/2752(RSP) (2018) (Adopting "[a]n EU common position on lethal autonomous weapon systems that ensures meaningful human control over the critical functions of weapon systems.").

[18] *See, e.g.*, Tyler D. Evans, *At War with the Robots: Autonomous Weapons Systems and the Martens Claus*e, 41 HOFSTRA L. REV. 697 (2013).

potential to restrict our ability to compete in an ever-changing military environment.[19]

Our ability to use and develop unencumbered AWS requires us to address concerns related to a lack of human accountability in AWS. In order to establish human accountability, we must create a system that allows for efficient and effective investigations into incidents involving AWS and allows for assignment of human responsibility for AWS actions when necessary. After providing a basic understanding of AWS, this article discusses the necessity of accountability within AWS and provides an outline for a deliberate system of responsibility within AWS creation and utilization. This article also identifies the requirement to conduct investigations into AWS incidents and concludes with recommendations for the design and implementation of an AWS investigative system designed to properly assign accountability for AWS incidents.

II. Understanding Artificial Intelligence and Autonomous Weapon Systems

A. Artificial Intelligence and Deep Learning

In order to understand issues within AWS investigations, one must first understand some key facets of programming AI. Generally, programing methodologies for AI fall somewhere within a spectrum of practices.[20] On one side of the spectrum, human programmers manually enter code to create a system of logical "decision trees" that a machine must follow. These designers "thought it made the most sense to build machines that reasoned according to rules and logic, making their inner workings transparent to anyone who cared to examine some code."[21] On the other side of the spectrum are programs that:

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[19] DEF. INNOVATION BD., U.S. DEP'T OF DEF., AI PRINCIPLES: RECOMMENDATIONS ON THE ETHICAL USE OF ARTIFICIAL INTELLIGENCE BY THE DEPARTMENT OF DEFENSE 2, 3 (2019) [hereinafter DIB AI PRINCIPLES], https://media.defense.gov/2019/Oct/31/2002204458/1/1/0/DIB_AI_PRINCIPLES_PRIMARY_DOCUMENT.PDF.

[20] David Gunning, Defense Advanced Research Projects Agency, Explainable Artificial Intelligence (XAI) Program Update, November 2017, at slide 9, 10 (2017) (published PowerPoint presentation), https://www.darpa.mil/attachments /XAIProgramUpdate.pdf.

[21] Will Knight, *The Dark Secret at the Heart of AI*, 120 MIT TECH. REV. 54, 57 (2017).

> [take] inspiration from biology, and [learn] by observing and experiencing. This mean[s] turning computer programming on its head. Instead of a programmer writing the commands to solve a problem, the problem generates its own algorithm based on example data and a desired output. The machine-learning techniques that would later evolve into today's most powerful AI systems followed the latter path: the machine essentially programs itself.[22]

These machine-learning techniques, known as "neural networks" and "deep learning," present serious considerations in investigations of AWS, centering on the idea that "[n]o one really knows how the most advanced algorithms do what they do."[23] "The computers...have programmed themselves, and they do it in ways we cannot understand. Even the engineers who build these apps cannot fully explain their behavior."[24] Thus, while "[a]lgorithmic transparency means you can see how the decision is reached...you can't with [machine-learning] systems because it's not rule-based software."[25] Indeed, this method of programing is unique enough that some experts take effort to distinguish these machine-learning techniques from other AI systems.[26]

B. Autonomous Weapon Systems

In addition to a fundamental understanding of AI, it is important for one to have a basic definition for and understanding of AWS. While the Department of Defense (DoD) defines AWS as "[a] weapon system that, once activated, can select and engage targets without further intervention by a human operator,"[27] this definition is overly simplistic as it fails to

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[22] *Id.*
[23] *Id.* at 55.
[24] *Id.* at 56.
[25] David Meyer, *AI Has a Big Privacy Problem and Europe's New Data Protection Law Is About to Expose It,* FORTUNE (May 25, 2018), http://fortune.com/2018/05/25/ai-machine-learning-privacy-gdpr/ (citation omitted).
[26] DIB AI PRINCIPLES, *supra* note 19, at 5 ("When referring to the wider range of considerations, we use the term artificial intelligence (AI); however, where we specifically address machine learning (ML) systems, we refer to ML.").
[27] U.S. DEP'T OF DEF., DIR. 3000.09, AUTONOMY IN WEAPON SYSTEMS 13 (5 Aug. 2017) [hereinafter DODD 3000.09].

adequately distinguish AWS from automated weapons.[28] For example, anti-tank land mines or naval mines that identify appropriate targets based on weight, infra-red, magnetic, or acoustic signature would be in included in this definition of AWS, despite the fact that they have existed for decades.[29] In fact, the DoD recognizes the weakness in its classification by excluding certain items—including mines—from the definition.[30] This is proper because "[i]n contrast to these purely reactive systems, autonomous weapon systems gather and process data from their environment to reach independent conclusions about how to act."[31] As a result, instead of the DoD definition, a better definition of AWS is "a weapon system that, based on conclusions derived from gathered information and preprogrammed constraints, is capable of independently selecting and engaging targets."[32]

Many authorities further the discussion of autonomous systems by considering three sub-categories of weapons with varying levels of autonomous characteristics.[33] First, "semiautonomous weapon systems" utilize automation for many tasks but still require human interface in the target decision process. Thus, while the weapon system itself may identify and classify targets, a human operator remains in the "kill chain" and human authorization is required prior to firing of the weapon. For this reason, semiautonomous weapon systems are often referred to as "human in the loop" systems.[34] Importantly, many experts on AWS, including the

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[28] Rebecca Crootof, *War Torts: Accountability for Autonomous Weapons*, 164 U. PA. L. REV. 1349, 1367 (2016) [hereinafter Crootof, *War Torts*].

[29] *See, e.g.*, Jon Rabiroff, *U.S. Military Enters New Generation of Sea Mine Warfare*, STARS AND STRIPES (May 9, 2011), https://www.stripes.com/news/u-s-military-enters-new-generation-of-sea-mine-warfare-1.143170. *See also* Anti-Vehicle (Anti-Tank) Mines, Technical Director Geneva International Center for Humanitarian Demining, at slide 18-22 (2002) (published PowerPoint presentation), https://www.gichd.org/fileadmin/GICHD-resources/rec-documents/ERW_AV_AT_Mines.pdf.

[30] DODD 3000.09, *supra* note 27, para. 2b.

[31] Crootof, *War Torts*, *supra* note 28.

[32] Rebecca Crootof, *The Killer Robots Are Here: Legal and Policy Implications*, 36 CARDOZO L. REV. 1837, 1842 (2015).

[33] Crootof, *War Torts*, *supra* note 28. *See also* Michael Press, *Of Robots and Rules: Autonomous Weapons Systems in the Law of Armed Conflict*, 48 GEO. J. OF INT'L L. 1337, 1339–1342 (2017); SCHARRE, *supra* note 3, at 44.

[34] SCHARRE, *supra* note 3, at 44.

DoD, do not include semiautonomous weapon systems in their definition of AWS.[35]

The next category refers to systems that involve human supervision of the weapon but do not require human permission to act. Known as "human on the loop" systems, or "supervised autonomous weapon systems," these systems act largely of their own accord, but in a supervised manner. Although humans monitor these systems and remain available to react in real time should a mishap be identified, their permission is not needed for the AWS to act.[36]

Finally, "fully autonomous weapon systems," or "human off the loop" systems, operate in a manner entirely without human intervention.[37] These systems would be deployed and have the ability to search for, identify, categorize, and carry out an attack without further human involvement.[38]

III. Accountable Artificial Intelligence

A. Accountability Concerns

When fused with deep-learning AI, the concept of AWS leads to many concerns regarding lack of accountability. As the Campaign to Stop Killer Robots contends:

> The use of fully autonomous weapons would create an accountability gap as there is no clarity on who would be legally responsible for a robot's actions: the commander, programmer, manufacturer, or robot itself? Without accountability, these parties would have less incentive to ensure robots did not

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[35] DODD 3000.09, *supra* note 27, at 14 (Defining a semiautonomous weapon system as "[a] weapon system that, once activated, is intended to only engage individual targets or specific target groups that have been selected by a human operator." Fire and Forget munitions are included in this definition.).
[36] SCHARRE, *supra* note 3, at 45.
[37] *Id.* at 46.
[38] *Id.* at 81–82.

> endanger civilians, and victims would be left unsatisfied that someone was punished for the harm they experienced.[39]

While this potential lack of transparency causes distrust for some, those concerns are misplaced. To understand this, one must briefly dissect how the concepts of explainability and responsibility relate to accountability of AWS.

Explainability in AI seeks to solve the problem that "[c]ertain algorithms act as a 'black box,' where it is impossible to determine how the output was produced..."[40] The argument holds that "[b]y exposing the logic behind a decision, explanation can be used to prevent errors and increase trust."[41] Nevertheless, while explainability in AI is an important feature (and one that considerable resources are being leveraged to solve),[42] it is not required to establish accountability. An illustration of this is provided by the widespread use of animals in the military, such as working dogs.[43]

B. (Un)Explainable AI

In many ways, military working dogs act in a semiautonomous or fully autonomous manner.[44] Like AWS, military working dogs possess a significant amount of autonomy but "[t]heir independence is tempered through extensive training; [and] their propensity for unpredictable action

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[39] *The Problem*, CAMPAIGN TO STOP KILLER ROBOTS, https://www.stopkillerrobots.org/learn/#problem (last visited Mar. 14, 2019).

[40] Chamith Fonseka, *Hold Artificial Intelligence Accountable*, HARV. U. SCI. IN THE NEWS (Aug. 28, 2017), http://sitn.hms.harvard.edu/flash/2017/hold-artificial-intelligence-accountable/.

[41] Finale Doshi-Velez & Mason Kortz, *Accountability of AI Under the Law: The Role of Explanation* 2 (Berkman Klein Ctr. Working Grp. on Explanation and the Law, Berkman Klien Ctr. for Internet and Soc'y Working Paper, 2017), http://nrs.harvard.edu/urn-3:HUL.InstRepos:34372584.

[42] *See generally* Gunning, *supra* note 20.

[43] Linda Crippen, *Military Working Dogs: Guardians of the Night*, U.S. ARMY NEWS (May 23, 2011), http://www.army.mil/article/56965/Military_Working_Dogs__Guardians_of_the_ Night.

[44] Major Charles T. Kirchmaier, *Unleashing the Dogs of War: Using Military Working Dogs to Apprehend Enemy Combatants*, ARMY LAW., Oct. 2006, at 4; *see also* Aiden Warren and Alek Hillas, *Lethal Autonomous Weapons Systems: Adapting to the Future of Unmanned Warfare and Unaccountable Robots*, 12 YALE J. OF INT'L AFF. 71, 75–79 (2017).

is addressed through limited use." [45] Despite their autonomous characteristics, the legal analysis of animals in armed conflict is limited to Protocol II of the Convention on Certain Conventional Weapons, which prohibits the use of animal-borne booby-traps or other devices.[46] This should lead one to consider "[w]hat then, would happen if an animal combatant were to take an action that resulted in what seemed to be a serious violation of international humanitarian law?"[47]

To remedy this, some remove explainability from the equation and suggest an analysis based on the responsibility of the human handlers.[48] Indeed, as there are no requirements under international law to attribute explainability for the actions of animals in warfare, examining responsibility of associated humans is a logical method of ensuring accountability.

C. Human Responsibility

Likewise, accountability in AWS should focus less on explainability and more on human responsibility. The assignment of human responsibility can be premised on the fact that just as military working dogs are not truly autonomous since they rely on a handler to operate, AI will never be completely autonomous. Indeed, "[n]o entity—and for that matter, no person—is capable enough to be able to perform competently in every task and situation. On the other hand, even the simplest machine can seem to function 'autonomously' if the task and context are sufficiently constrained." [49] Put differently, "there exist no fully autonomous systems, just as there are no fully autonomous soldiers, sailors, airmen or Marines."[50] Given this understanding, one can begin to envision how AWS responsibility can be established. Much like military

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[45] Rebecca Crootof, *Autonomous Weapons Systems and the Limits of Analogy*, 9 HARV. NAT'L SECURITY J. 51, 78 (2018) [hereinafter Crootof, *Limits of Analogy*].

[46] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and Other Devices (Protocol II) art. 7(1), Oct. 10, 1980 S. TREATY DOC. No 105-1, 2048 U.N.T.S. 133 (amended May 3, 1996). *See also* Crootof, *Limits of Analogy*, *supra* note 46, at 77.

[47] Crootof, *Limits of Analogy*, *supra* note 46, at 77.

[48] Karsten Nowrot, *Animals at War: The Status of 'Animal Soldiers' Under International Humanitarian Law*, 40 HIST. SOC. RES. 128, 142 (2015).

[49] Robert R. Hoffman, *The Seven Deadly Myths of Autonomous Systems*, 28 IEEE INTELLIGENT SYS. 1541, 1545 (2013).

[50] DEF. SCI. BD., U.S. DEP'T OF DEF., TASK FORCE REPORT: THE ROLE OF AUTONOMY IN DOD SYSTEMS 23 (2012), https://fas.org/irp/agency/dod/dsb/autonomy.pdf.

parachute riggers annotate responsibility for each phase of the parachute packing and inspection process,[51] the AWS design and implementation process should annotate and designate human responsibility for the phases of AWS creation and use.[52] In other words, human responsibility for AWS must be *traceable*.[53]

To determine when and where traceable human responsibility may be interjected in AWS, it is helpful to consider the defense acquisition framework, which is utilized for the procurement of defense materials.[54] Under this framework, acquisition of an item follows one of six acquisition pathways, based on the particular item to be procured and the urgency of the need.[55] Although the terminology used for the phases of various acquisition pathways differs, two of the phases discussed in the Major Capability Acquisition pathway provide an outline to discuss traceable human responsibility in AWS that can be translated to other acquisition strategies.

To begin, the Engineering and Manufacturing Development phase of the Major Capability Acquisition pathway offers three opportunities for establishment of responsibility. The first opportunity is when program requirements are set, evaluated, and approved. While establishing formal responsibility during this phase of an acquisition may be unnecessary for traditional weapon systems,[56] AWS program requirements will require much greater detail as they encroach on decisions that have been

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[51] *See generally* U.S. Dep't of Army, DA Form 3912, Army Parachute Log Record (1 June 1979); U.S. DEP'T OF ARMY, REG. 59-4, JOINT AIRDROP INSPECTION RECORDS, MALFUNCTION INVESTIGATIONS, AND ACTIVITY REPORTING {OPNAVINST 4630.24D; AFJ 13 210(I); MCO 13480.1C} (8 Apr. 2008) (RAR 23 June 2009) [hereinafter AR 59-4].

[52] A complete discussion on legalities of imputing civilian contractor liability for potential Law of War violations resulting from AWS use is outside the scope of this paper. This issue could be resolved by ensuring the "persons responsible" for key portions of the AWS acquisition process are members of the military.

[53] DIB AI PRINCIPLES, *supra* note 19, at 8 ("DoD's AI engineering discipline should be sufficiently advanced such that technical experts possess and appropriate understanding of the technology, development process, and operational methods of its AI systems, including transparent and auditable methodologies, data sources, and design procedure and documentation.").

[54] *See generally* U.S. DEP'T OF DEF., DIR. 5000.02, OPERATION OF THE DEFENSE ACQUISITION FRAMEWORK (23 January 2020) [hereinafter DODD 5000.02].

[55] *Id.* at 9.

[56] For example, the requirement that a precision guided munition be able to strike a given location with a high degree of accuracy does not necessitate a complex analysis of the Law of War to be incorporated into the design of the munition.

traditionally made on the battlefield. Specifically, requirements must include the ability for an AWS to comply with law of war principles, such as distinction,[57] proportionality,[58] and military necessity[59] during operations.[60] Because this ability to comply with law of war principles is an essential task, forming the backbone of lawful AWS use, it is critical that responsibility is established for this portion of the AWS procurement process.

The second opportunity for responsibility within the Engineering and Manufacturing Development phase is found in the design and production of the item.[61] At this time of the acquisition process, a designated individual should attest to the accuracy of the computer programming utilized to achieve the specific AWS requirement. As these requirements will include compliance with law of war principles, this person must be able to attest to the accuracy with which the AWS complies with these requirements.

Third, responsibility should be designated in the testing and validation portion of the Engineering and Manufacturing Development phase of the Major Capability Acquisition pathway.[62] While methods of testing weapons systems are generally well established, designating responsibility at this stage will ensure testing and validation utilize the best available

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[57] U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL para. 2.5 (May 2016) [hereinafter LAW OF WAR MANUAL]. *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 3, entered into force December 7, 1978, art. 48, 51(4) [hereinafter Protocol I].

[58] LAW OF WAR MANUAL, *supra* note 57, para.2.4. *See also* Protocol I, art. 51(5)(b).

[59] LAW OF WAR MANUAL, *supra* note 57, para. 2.2

[60] *But see* HUM. RTS. WATCH & INT'L HUM. RTS. CLINIC, HARV. L. SCH., LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS 30–36 (2012) (arguing that it will be impossible for AWS to comply with the Laws of War). It is the author's opinion that these arguments are conclusory and subject to challenge as technology advances. Autonomous weapon systems are likely able to conduct—at a minimum—a conservatively accurate analysis of an engagement that complies with these principles. For example, an AWS could be designed such that it only targets enemy tanks firing in the open, located on the enemy side of the forward line of troops, where there are no living objects within a given safety radius of the target.

[61] DODD 5000.02, *supra* note 54, at 11.

[62] *Id.*

efforts to examine the unique characteristics of an AWS prior to its validation as a weapons system.[63]

Lastly, a system of responsibility must include the final stage of the procurement process: Deployment of the AWS.[64] As with conventional weapons, this phase must assign responsibility for utilization of an AWS to commanders and individual end-users of the item. Although establishing a chain of responsibility along these constructs is arduous, it is necessary to take these deliberate actions in order to ultimately provide the structure to allow accountability of AWS through investigations.

IV. Investigative Considerations

A. Requirement to Investigate

It can be expected that accountability for AWS will be established through investigations, as inquiries into use of force by the U.S. military take place in formal and informal manners on a regular basis. By policy, U.S. military forces must evaluate "the overall effectiveness of employing joint force targeting capabilities during military operations."[65] Known as a "Combat Assessment," these inquiries into the effects of a targeting operation include conducting a Battle Damage Assessment (BDA) which determines, among other things, if a strike resulted in "unintentional or incidental injury or damage to persons or objects that would not be lawful military targets in the circumstances ruling at the time."[66] Unwarranted or unexpected collateral damage identified in the BDA (or identified by other sources such as reports from media) often becomes the driver of follow-on investigations.[67]

Although "[u]nder the current state of IHL (International Humanitarian Law), there is no express requirement placing states under

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[63] *See generally*: U.S. DEP'T OF ARMY, REG. 73-1, TEST AND EVALUATION POLICY (16 Nov. 2016).
[64] DODD 5000.02, *supra* note 54, at 11.
[65] JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING app. D, sec. 1.a (28 Sep. 2018) [hereinafter JP 3-60].
[66] *Id.* app. D, sec. 1.a.5.
[67] U.S. DEP'T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 3.2 (22 Feb. 2011) [hereinafter DODD 2311.01E] (requiring investigation of "[a]ll possible...violation(s) of the law of war, for which there is credible information").

a duty to investigate all strikes resulting in civilian losses,"[68] it is widely accepted that states are required to prevent and prosecute grave breaches of IHL.[69] "In order to discharge the obligation to prosecute those who commit grave breaches, a state must *ipso facto* conduct credible investigations that could, if warranted, lead to prosecutions."[70] Further, some argue that investigations into breaches that amount to less than grave breaches of IHL can "be deduced from articles 1 and 146 of [the Fourth Geneva Convention] as well as from articles 1 and 87(3) of [Additional Protocol] I."[71] This theory is based on the assertion that "IHL creates an obligation to penalize all kinds of breaches and not only those which qualify as grave."[72] The obligation to penalize, when combined with the requirement that "[i]n all circumstances the accused person shall benefit by safeguards of proper trial and defence,"[73] suggests some form of proper and credible investigation must be carried out to account for other than grave breaches of IHL.

In this regard, U.S. policy is clear. The DoD requires all "possible, suspected, or alleged violation[s] of the law of war, for which there is credible information...[be] reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action."[74] Analysis must also determine if incidents are classified as war crimes.[75] Indications of

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[68] Michal Drabik, *A Duty to Investigate Incidents Involving Collateral Damage and the United States Military's Practice*, 22 MINN. J. INT'L L. ONLINE 15, 19 (2013).

[69] *Rule 158 Prosecution of War Crimes*, INT'L COMMITTEE OF THE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158 (last visited Mar. 13, 2019) ("States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects."); *see also How 'grave breaches" are defined in the Geneva Conventions and Additional Protocols*, INT'L COMMITTEE OF THE RED CROSS, https://www.icrc.org/en/doc/resources/documents/faq/5zmgf9.htm (last visited Mar. 13, 2019).

[70] Brendan Groves, *Civil-Military Cooperation in Civilian Casualty Investigations: Lessons Learned from the Azizabad Attack*, 65 A.F. L. Rev. 1, 41 (2010).

[71] Drabik, *supra* note 68, at 19 n. 10.

[72] *Id.*

[73] Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 75 U.N.T.S 287. *See also* Drabik, *supra* note 68, at 19 n. 10.

[74] DODD 2311.01E, *supra* note 67, paras. 3.2, 4.4.

[75] *See* 18 U.S.C. § 2441 (2006) (defining "war crimes" as grave breaches of IHL); *see also* LAW OF WAR MANUAL, *supra* note 57, para. 18.9.5 ("The term 'war crime' has been used in different ways in different contexts. In contemporary parlance, the term 'war crime' is most often used to mean serious violations of the law of war.").

war crimes typically "[require] that higher authorities receiving an initial report request a formal investigation by the cognizant military criminal investigative organization."[76] These organizations consist of trained professional investigators, such as Army Criminal Investigative Command (CID) or Navy Crime Scene Investigators (NCIS), who operate under unique authorities and regulations.[77] In situations that may not rise to the level of war crimes, investigation of reportable incidents is commonly accomplished through the military departments' and services' administrative investigative processes.[78] Both administrative investigations and criminal investigations face unique issues when investigating AWS incidents.

B. Centrally Managed Investigations

To account for unique considerations in AWS investigations, information sharing must be improved. Under current methods of conducting administrative investigations, IOs are appointed, conduct investigations, and their findings and recommendations are approved by an authority who also considers any recommendations they may have.[79] The investigation is then maintained on file for a period of years.[80] While this technique of categorizing and storing information is useful for the less complex situations that might give rise to an administrative investigation, it does not offer the ability for units to readily share problems that are experienced across military formations—let alone amongst military branches.[81] Similarly, military criminal investigations are managed at localized levels, and while information sharing is much more efficient than in administrative investigations,[82] it can be improved upon for purposes of managing information related to AWS investigations.

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[76] LAW OF WAR MANUAL, *supra* note 57, para. 18.13.

[77] *See, e.g.*, U.S. MARINE CORPS, MCTP 10-10F, MILITARY POLICE OPERATIONS para. 4-7 (2 May 2016); *see also* U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES para. 3-3a(6) (9 June 2016).

[78] LAW OF WAR MANUAL, *supra* note 57, para. 18.13.2.

[79] *See, e.g.*, AR 15-6, *supra* note 4, secs. II and III; *see also* DEP'T OF THE NAVY, JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) ch. II (26 June 2012).

[80] AR 15-6, *supra* note 4, para. 3-19 ("The approval authority will keep the original and a digital copy of the final report of proceedings on file for a period of not less than 5 years.").

[81] *See id.* para. 3-19 (discussing filing of investigations at the local level); s*ee also id.* app. C-4, para. b(7) (indicating the approval authority's permission is required to release the investigation outside the organization).

[82] *U.S. Army Crime Records Center*, U.S. ARMY CRIM. INVESTIGATION COMMAND, https://www.cid.army.mil/crc.html (last visited Mar. 13, 2019).

With AWS platforms likely to become ubiquitous across military formations,[83] central management of AWS is key to identifying common issues that may manifest within individual AWS platforms. In turn, this will assist in AWS accountability and traceability by allowing compilation of data from AWS across the military.[84] For example: analysis of multiple false identifications of weather radar stations as anti-aircraft batteries may help AWS designers to explain, and solve, the problem of AWS returning false identifications. While this input- and output-based analysis of AWS is not the single answer, allowing this form of examination is a step toward ensuring accountability of AWS.[85]

Luckily, the concept of centrally managed investigations is not foreign to the U.S. military. While not as technologically in depth as AWS, airdrop operations routinely involve coordination between multiple branches of the military, utilizing aircraft and complex parachute delivery systems.[86] By ensuring "proper analysis to improve existing procedures and technology as rapidly as possible," [87] the services maintain a joint regulation laying out combined duties and responsibilities. Under this joint regulation, the individual services are required to conduct an internal malfunction investigation in the event of a malfunction during an airborne operation.[88] Once complete, these investigations are forwarded to a centralized directorate who publishes "all reported malfunction/incident

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[83] *See, e.g.*, COUNTER ROCKET, ARTILLERY, MORTAR, (C-RAM), https://www.msl.army.mil/Pages/C-RAM/default.html (last visited Mar. 13, 2019) (describing the C-RAM, a defense weapon with autonomous characteristics that has been adapted from the Navy's Phalanx Weapon System).

[84] It is reasonable to assume a certain amount of modularity will occur between AWS and non-weaponized artificial intelligence (AI) items in the military inventory. For example, the computer program operating an autonomous tank may share programing with the computer system operating an autonomous fuel truck. As a result, it would be advantageous to implement centrally managed investigations to all AI platforms.

[85] S. Wachter, S, B. Mittelstadt, B., & L. Floridi, *Transparent, Explainable, and Accountable AI for Robotics*, SCI. ROBOTICS (May 31, 2017), https://discovery.ucl.ac.uk/id/eprint/10038294/1/Wachter_Transparent_explainable_accountable_AI.pdf ("Inscrutability in AI challenges calls for transparency. Mechanisms not reliant on full interpretability, including pre-deployment certification and algorithmic auditing, require further development to ensure transparency and accountability in opaque systems. It remains to be seen whether such "black box" approaches that assess inputs and outputs will comply with legal requirements.").

[86] AR 59-4, *supra* note 51, para. 1-5.

[87] *Id.* para. 1-5.

[88] *Id.* paras. 1-4, 3-3, ch. 4.

activity data for review and analysis during the triannual airdrop malfunction and safety analysis review board meeting."[89]

Investigations into AWS incidents should follow a format similar to airborne malfunction operations. While there is no need for micromanagement of individual service or command investigations, it is important that data on AWS incidents be compiled in a centralized location where it can be appropriately analyzed to allow improvements in AWS design. In addition to improving AWS and increasing explainability of AWS, centrally managed investigations will solve another issue present in AWS investigations by allowing subsequent investigations and incorporation of experts into the AWS investigation process.

C. Incorporating Experts

As demonstrated by the hypothetical at the beginning of this article, traditional investigative methods are not well positioned to examine the complex technology and multiple levels of government and private organizations that will have interplay in AWS incidents. Although current administrative investigative regulations require appointment of IOs "best qualified by reason of their education, training [and] experience...[and allow for appointing authorities to designate] assistant IOs...to provide special technical knowledge..."[90] the sheer complexity of AWS will likely result in the inability of anyone other than a true expert to understand technological questions posed by AWS. For this reason, AWS investigations must allow for the incorporation of technological experts into the investigative process to ensure results are credible and can support accountability by providing a reliable basis for necessary criminal or adverse administrative actions.[91]

While criminal investigations have successfully integrated experts into the investigative process for some time,[92] incorporation of experts into administrative investigations is less common.[93] Fortunately, best

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[89] *Id*. paras. 1-5, 1-6.

[90] AR 15-6, *supra* note 4, para. 2-3.

[91] DoDD 2311.01E, *supra* note 67, paras. 3.2, 4.4; s*ee also* Groves, *supra* note 70.

[92] DEF. FORENSIC SCI. CTR., https://www.cid.army.mil/dfsc-usacil.html (last visited Mar. 13, 2019).

[93] AR 15-6, *supra* note 4, app. C-3, para. 3e(4) (providing the following as the sole guidance on incorporating experts in the investigative process: "It may be necessary or advisable to interview experts having specialized understanding of the subject matter of

practices can be derived from time-tested methods that allow for integration of technically complex concerns into investigative processes such as aircraft accident investigations.

With the invention of powered flight in 1903, complex mechanical and engineering issues quickly became apparent to the public.[94] By 1928, the need for aeronautic accident investigations was recognized, and Congress passed the Air Commerce Act giving the U.S. Department of Commerce the mandate to investigate the causes of aircraft accidents.[95] They do so through the present-day National Transportation Safety Board (NTSB).[96] Today, the NTSB employs approximately 400 full-time employees between its headquarters in Washington, D.C., and four regional field offices.[97] Through combined efforts with the Federal Aviation Administration, the NTSB has successfully conducted more than 132,000 investigations into the complex issues presented by aircraft accidents.[98]

To effectively conduct investigations of aviation incidents (and other public transportation incidents), the NTSB utilizes investigators in "Go Teams" who remain "[o]n call 24 hours a day, 365 days a year...[and are prepared to] travel through the country and to every corner of the world to investigate significant accidents."[99] Importantly, due to the fact that "[a]viation accidents are...usually the culmination of a sequence of events, mistakes, and failures,"[100] the NTSB supplements their own internal experts with a "party system" of investigations.

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the investigation, if the information may be helpful to the appointing authority in making a final determination.").

[94] A BRIEF HISTORY OF THE FAA, https://www.faa.gov/about/history/brief_history/ (last visited Feb. 7, 2019).

[95] HISTORY OF THE NAT'L TRANSP. BD., https://www.ntsb.gov/about/history/Pages/default.aspx (last visited Feb. 7 2019).

[96] *Id.*

[97] NTSB CAREERS, https://www.ntsb.gov/about/employment/Pages/Careers.aspx (last visited Feb. 7, 2019); *see also* FEDERAL AVIATION ADMIN., AVIATION SAFETY WORKFORCE PLAN 2018–2017, at 23 (2018).

[98] HISTORY OF THE NAT'L TRANSP. BD., *supra* note 95.

[99] *Id.*

[100] Clinton V. Oster Jr, et al., *Analyzing Aviation Safety: Problems, challenges, opportunities*, 43 RES. IN TRANSP. ECON. 148, 151 (2013) ("Take a very simple example of an engine failure during takeoff where the crew then fails to take the needed actions to land the plan safely with the result of an accident. Had the engine not failed, there would not have been an accident. Had the crew responded to the engine failure quickly and properly, there would not have been an accident.").

Under this methodology, the NTSB designates federal, state, or local government agencies, as well as organizations or corporations with expertise, to actively participate in the investigation.[101] This results in the NTSB investigative process including smaller working groups comprised of true subject matter experts in various fields relevant to the given investigation.[102] Through the use of internal and external experts, the NTSB is able to effectively investigate complex accident scenarios and arrive at scientifically accurate results.

In order to ensure scientifically sound investigations into complex situations, AWS investigations should incorporate experts into the investigative process in a manner similar to the NTSB. While expert integration may be feasible at the local level in certain situations,[103] the ability to employ and contract with experts in the AI field is best handled at a central location. By establishing central management of AWS investigations, the DoD can build the structure necessary to employ internal experts and coordinate for outside expertise when needed. This, in turn, will inform investigations that comply with international and DoD requirements and provide human accountability for AWS actions.

V. Bringing It Together: An AWS Investigative Model

While there is no need to reinvent the time-tested methods utilized by military services to conduct administrative investigations, the unique factors that present themselves in AWS investigations require a modified process to ensure accountability for AWS is properly established. Adopting the Joint Airdrop Malfunction/Incident Investigation methodology, individual services should be allowed to conduct initial

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101 *The Investigative Process*, NAT'L TRANSP. SAFETY BD., https://www.ntsb.gov/investigations/process/pages/default.aspx (last visited Mar. 14, 2019).

102 *See id.*

103 *See, e.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703(d) (2019) ("When the employment at Government expense of an expert witness or consultant is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment.").

AWS investigations utilizing their respective investigative methods.[104] However, like Joint Airdrop Investigations, the DoD should direct that specific questions be answered at this phase.[105]

First, initial unit-level investigations should address responsibility at the command and end-user level to determine if the utilization of AWS was in compliance with law of war requirements. Because a key driver of this analysis includes the command's understanding of what the AWS should have done, documentation of this expectation is key. Having established the command's expectation of the AWS, initial unit-level investigations should next document the actual actions of the AWS, highlighting any deviation from the expected action. Finally, the initial unit-level investigation should document the outcome from the AWS actions.

Utilizing the hypothetical scenario presented at the beginning of this article as an example, a unit-level investigation would determine the commander appropriately used the AWS, as he believed the AWS had properly identified an enemy vehicle. Investigation would also determine that the AWS misidentified a school bus as an enemy vehicle resulting in the death of civilians. Having reached this conclusion, the AWS investigation would be forwarded to the centrally managed AWS investigation database.

With the end-user analysis complete by the unit, experts at the centrally managed location would then begin to analyze the other stages of responsibility in the AWS creation process. By adopting the NTSB model for utilization and incorporation of experts, AWS investigators would have access to experts from other government agencies and private business to assist with the investigation as needed. Utilizing the facts provided in the unit-level investigation and by conducting analysis of the AWS in question, the experts would attempt to identify the point of failure within the AWS and, if identified, examine why testing and evaluation did not predict and prevent the AWS failure.

With a scientifically accurate investigation complete, investigators would then examine the actions of individuals in designated positions of responsibility during the creation of the AWS. Finally, investigators and

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[104] AR 59-4, *supra* note 51, para. 1-5.
[105] *Id.* app. B.

commanders would be able to examine the accountability of individual persons and, if necessary, take appropriate punitive or administrative actions utilizing existing methods and command structures.

VI. Conclusion

By allowing assignment of human responsibility for AWS actions through efficient and effective investigations, the U.S. military can ensure its ability to use and develop AWS without unnecessary restrictions. Designing actionable solutions to AWS accountability issues will allow the United States to remain competitive in an ever-changing military environment, while simultaneously ensuring that the moral and legal concerns surrounding AWS use are addressed. Although it remains to be seen whether "[t]he one who becomes the leader in this sphere will be the ruler of the world,"[106] one can be certain that AI and AWS offer great power. And "[i]n this world, with great power there must also come—great responsibility."[107]

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[106] Putin, *supra* note 12.

[107] Lee & Ditko, *supra* note 1; s*ee also* Luke 12:48, *supra* note 1.

GIVING THE REFEREE A WHISTLE: INCREASING MILITARY JUSTICE LEGITIMACY BY ALLOWING MILITARY JUDGES TO REJECT PLEA AGREEMENTS WITH PLAINLY UNREASONABLE SENTENCES

MAJOR ADAM WOLRICH*

I. Introduction

This paper recommends legislative and executive modifications to Article 53a, Uniform Code of Military Justice (UCMJ),[1] and Rules for Courts-Martial (RCM) 705[2] and 910[3] (collectively, the "Article 53a Framework") to allow military judges to reject plea agreements with plainly unreasonable sentencing provisions. These modifications would enable military judges to ensure plea agreements result in reasonable, accurate, and consistent sentences. In addition, these modifications would allow military judges to protect the interests of the accused and society.

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[1] UCMJ art. 53a (2019).

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705 (2019) [hereinafter 2019 MCM].

[3] 2019 MCM, *supra* note 2, R.C.M. 910.

The end result of these modifications would be to strengthen a paramount concept in military justice—legitimacy.

Although the proposed modification to the Article 53a Framework would provide military judges with a powerful authority, military judges would likely use that power infrequently—only under exceptional circumstances that reside on the fringes of military justice practice. Nevertheless, the proposed changes are necessary to protect the legitimacy of the military justice system whenever possible.

To demonstrate the importance of the proposed changes to the Article 53a Framework, it is helpful to view plea agreement proceedings from the perspective of military judges. As of January 1, 2019, military judges must sentence the accused in accordance with the sentencing provision of a plea agreement.[4] Additionally, military judges cannot reject the agreed-upon sentence in a plea agreement because they believe the sentence is too high or too low.[5] The following two hypothetical cases reveal how these limitations of military judges' discretion may frustrate military judges' ability to ensure fair, accurate, and reasonable sentences.

In the first hypothetical case, the plea agreement requires the military judge to sentence the accused to several years' confinement. The judge considers the facts of the case, sentences in similar cases (based on the judge's extensive military justice experience as a prosecutor, defense attorney, and on the bench) and the record and character of the accused. The judge thinks the agreed-upon sentence is too high. During sentencing, the defense offers powerful evidence, which convinces the judge that the accused agreed to an unreasonably high sentence. Despite being the most experienced and only neutral criminal law practitioner in the courtroom, there is very little the military judge can do about it.[6] The judge must approve the agreed-upon sentence.

In the second hypothetical case, the military judge believes the government agreed to an unreasonably low sentence: thirty days' confinement for a violent assault. Because the accused has a history of similar violent acts, the judge does not believe this short sentence will

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[4] UCMJ art. 53a (2019); 2019 MCM, *supra* note 2, R.C.M. 705.
[5] 2019 MCM, *supra* note 2, R.C.M. 705, 910.
[6] Military judges may recommend (but not require) suspension of "any portion of the sentence." 2019 MCM, *supra* note 2, R.C.M. 1101(a)(5).

prevent the accused from hurting others upon release from confinment.[7] Rather than deter the accused from committing more misconduct, the short sentence might only serve to make the accused angrier. The accused will shortly rejoin civilian society, where the accused will remain a threat to the public. In other, very similar cases, the judge has seen much higher sentences. In this hypothetical case, as in the first, the military judge must approve the agreed-upon sentence.

In each of these hypothetical cases, the military judge could not prevent the military justice system from producing an unreasonable result—a plainly unreasonable sentence. The judges wanted to stop play, but the Article 53a Framework did not give them a whistle to do so.

To understand how these hypothetical cases represent a new challenge in military justice, Part II of this paper addresses the evolution of guilty pleas in the military. Part II discusses factors that prompted the initial use of guilty pleas, the guilty plea "Legacy System,"[8] key features of the Military Justice Review Group's (MJRG)[9] proposed Article 53a, and, finally, as enacted, Article 53a and the Article 53a Framework.

Next, Part III defines legitimacy and discusses its importance in military justice. Part III also discusses how the Article 53a Framework reduces military judges' discretion during sentencing, which undermines legitimacy in military justice. Part III proposes allowing military judges

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[7] In military courts, there are established considerations for an appropriate sentence. They include, among others, the nature and circumstances of the offense, the history and characteristics of the accused, the impact of the offense on any victim of the offense, and the need for the sentence to promote adequate deterrence of misconduct and protect others from further crimes by the accused. UCMJ art. 56(c) (2019).

[8] The Legacy System, which military justice practitioners also referred to as the "Beat the Deal" system, was the military justice process governing pretrial agreements effective immediately before January 1, 2019.

[9] In 2013, the Secretary of Defense "directed the [Department of Defense] General Counsel to conduct a comprehensive review of the UCMJ and the military justice system with support from military justice experts provided by the military services." MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP: PART I: UCMJ RECOMMENDATIONS 5 (Mar. 25, 2015) [hereinafter MJRG REP.]. This resulted in the establishment of the Military Justice Review Group [hereinafter the MJRG], whose review was "to include an analysis of not only the UCMJ, but also its implementation through the Manual for Courts-Martial and service regulations." *Id.*

to reject plea agreements with plainly unreasonable agreed-upon sentences in order to reduce legitimacy risk, which this paper defines as any perceived or actual reduction of the legitimacy of the military justice system.

Part IV proposes the specific modifications to the Article 53a Framework that would allow military judges to reject plainly unreasonable agreed-upon sentences.

Finally, Section V offers approaches military justice practitioners can consider in order to reduce legitimacy risk in the current Article 53a Framework.

II. The Evolution of Guilty Pleas in the Military

A. The Origin of Guilty Pleas in Military Courts

When the UCMJ was enacted in 1951,[10] plea bargaining did not exist in the military[11] despite the high prevalence of plea bargaining in civilian practice.[12] There were no provisions regarding plea-bargaining or pretrial agreements (PTA) in the Manual for Courts-Martial (MCM), and no guidance concerning negotiated agreements was available for military justice practitioners.[13] At that time, a court-martial meant only a contested trial.

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[10] *See* Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).

[11] "While this may surprise current judge advocates, there was simply no precedent for plea-bargaining in the military in 1950-1951." Colonel Carlton L. Jackson, *Plea-Bargaining in the Military: An Unintended Consequence of the Uniform Code of Military Justice*, 179 MIL. L. REV. 1, 2 (2004).

[12] *Id.* at 15. (noting "pleas of guilty or *nolo contendre* disposed of ninety-four percent of the 33,502 convictions obtained in federal courts in FY 1950" and that "in FY 1951, federal prosecutors again disposed on ninety-four percent of their cases with plea bargaining").

[13] Neither the 1951 nor 1969 *MCM* referred to pretrial agreements and "the scripts provided in the 1958 *Military Justice Handbook* and the 1969 *Military Judges Guide* were cursory at best." Major Mary J. Foreman, *Let's Make a Deal! The Development of Pretrial Agreements in Military Justice Criminal Practice*, 170 MIL. L. REV. 53, 60 (2001). It was not until 1982 that the guilty plea script was formalized in *the Military Judges' Benchbook. Id.* at 53. RCM 705, which authorizes pretrial agreements, did not exist until 1984. *Id*.

However, in 1953, the acting Judge Advocate General of the Army, Major General Franklin P. Shaw, disseminated a letter to all Army Staff Judge Advocates encouraging their use of pretrial agreements.[14] In doing so, "the Army became the first service to officially encourage plea-bargaining."[15] By the end of the 1950s, the Coast Guard and Navy adopted plea-bargaining, followed by the Air Force in 1975.[16]

Major General Shaw's endorsement of pretrial agreements changed the game:

> Major General Shaw's plea bargaining initiative was ingeniously devised and flawlessly executed. Between 23 April 1953 and 31 December 1959, Army judge advocates laid the foundation for contemporary plea-bargaining in the military. By introducing negotiated guilty plea practice to courts-martial, these judge advocates broke ranks with the scorched-earth approach to military justice that had dominated military practice for 175 years. Gone were the days when uncontested courts-martial punished virtually all misconduct. In so doing, they developed a military jurisprudence that favors dispensing the vast majority of misconduct with nonjudicial punishment, administrative separation, and guilty pleas. Thus, staff judge advocates may focus their attention on complex contested trials.[17]

Granted, Major General Shaw's encouragement of plea bargaining was pragmatic.[18] By providing the Army with a practice "commonly employed in all civilian jurisdictions,"[19] and the accused with the ability

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[14] Jackson, *supra* note 11, at 4; Letter from Major General Franklin P. Shaw, the Assistant Judge Advocate General, U.S. Army, to All Staff Judge Advocates (Apr. 23, 1953) (on file with the Judge Advocate General's Legal Center and School Library) [hereinafter MG Shaw Letter].

[15] Jackson, *supra* note 11, at 4.

[16] *Id.*

[17] *Id.* at 43.

[18] *Id.* at 4.

[19] MG Shaw Letter, *supra* note 14.

to get a "break," Major General Shaw catalyzed the use of plea bargaining "to avoid drowning in a sea of litigation."[20]

Initially, pretrial agreements concerned appellate courts due to "three of the greatest dangers" pretrial agreements posed: "first, that an accused may plead guilty without establishing that he is, in fact, guilty; second, that the convening authority may inadvertently usurp the discretion of the court to adjudge a sentence; and third that the pretrial agreement may, in effect, effectively weaken the trial process."[21] Since 1953, however, the law and practice of negotiated guilty pleas in the military have significantly evolved. Although plea bargaining initially "developed as a matter of trial practice,"[22] since the Court of Military Appeals approved the use of pretrial agreements in *United States v. Allen*,[23] extensive appellate decisions have shaped their development and execution.[24]

B. The Legacy System

Until recently, over sixty years of trial practice, policy guidance, and case law manifested itself as the Legacy System. Although the Legacy System ended on January 1, 2019, it is still important that military justice practitioners understand it. The Legacy System embodied decades of judicial-shaping that balanced the administrative efficiency of pretrial agreements, on one hand, and the need to prevent the erosion of the military justice system, on the other. Current military justice practitioners and appellate courts will consider legal precedent from, and processes of, the Legacy System in evaluating whether the Article 53a Framework will continue to maintain this balance.

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[20] Jackson, *supra* note 11, at 2. In 1952, "less than one percent of [the 9,383] general courts-martial convictions were based solely on the accused's pleas," resulting in a "grueling procession contested cases [that was] largely unnecessary given the Army's ninety-five percent conviction rate." *Id*. at 11–12.

[21] Foreman, *supra* note 13, at 58.

[22] Pretrial agreements "initially developed as a matter of trial practice, with no independent legislative or judicial authority." *Id*. at 54.

[23] 25 C.M.R. 8 (C.M.A. 1957) (expressly approving use of pretrial agreements as a means "to avoid the strain and the problems of a trial on the merits" and cautioning that the "agreement cannot transform the trial into an empty ritual").

[24] *See infra* note 28. Although appellate decisions have significantly shaped the practice of negotiating and executing pretrial agreements, the full extent of the appellate courts' contribution exceeds the scope of this paper.

In the Legacy System, an accused entered into a PTA with the convening authority.[25] In the PTA, the accused agreed to plead guilty to some or all charges and specifications.[26] In exchange, the convening authority agreed to limit the military judge's sentence with a sentencing "cap" or quantum. Article 60, UCMJ, gave the convening authority the power to limit the sentence in this way.[27] The Legacy System PTA often also included the accused's agreement to make other concessions, such sentencing by a military judge or agreeing to a stipulation detailing the misconduct.[28]

After the accused and the convening authority entered into a PTA, the military judge conducted guilty plea proceedings. In guilty plea proceedings, a military judge first conducted a providence inquiry to establish the accused was pleading guilty because they were, in fact,

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[25] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705 (2016) [hereinafter 2016 MCM]. A convening authority "includes a commissioned officer in command for the time being and successors in command." 2019 MCM, *supra* note 2, R.C.M. 103(6).

[26] 2016 MCM, *supra* note 25, R.C.M. 910.

[27] Article 60, UCMJ, provided "the authority to approve, disapprove, commute, or suspend the sentence adjudged by a court-martial in whole or in part pursuant to the terms of [a] pretrial agreement." MJRG REP., *supra* note 9, at 481. Article 60, in conjunction with Articles 30 and 34, which provided convening authorities the discretion to dispose of charges "in the interest of justice and discipline," were "the basis of all agreements concerning the disposition of the charges and specifications in a particular manner or to a particular forum in exchange for the accused's plea [of guilty] and other concessions." *Id*.

[28] *Id.* at 483 (citing the following cases: United States v. Thomas, 6 M.J. 573 (A.C.M.R. 1978) (term in pretrial agreement requiring the accused to enter into a stipulation not an illegal collateral condition); United States v. Reynolds, 2 M.J. 887, 888 (A.C.M.R. 1976) (permissible to include provision requiring the accused to testify truthfully in other proceedings); United States v. Dawson, 10 M.J. 142, 150 (C.M.A. 1982) (approving no misconduct provision in plea deal); United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982) (permissible to waive the Article 32 investigation as part of a pretrial agreement); United States v. Schmeltz, 1 M.J. 8 (C.M.A. 1975) (permissible to include term requiring the accused to request trial by judge alone); United States v. Mills, 12 M.J. 1 (C.M.A. 1981) (permissible to require the accused waive production of sentencing witnesses as part of pretrial agreement)).

guilty.[29] Military judges then confirmed the accused understood and agreed to the terms of the PTA.[30] After they found the accused provident and accepted their pleas, military judges conducted sentencing proceedings. During sentencing, the accused could present matters in extenuation and mitigation, and the government could present matters in aggravation.[31] Victims[32] could provide sworn testimony[33] or offer an unsworn statement[34] regarding "victim impact or matters in mitigation."[35] Military judges, at the conclusion of sentencing, announced their sentence. Then, for the first time, military judges reviewed the convening authority's sentencing cap.[36] If the military judge's sentence was less severe than the cap, then the accused "beat the deal" and benefitted from the lower sentence. If, however, the military judge's sentence exceeded the cap, then the accused benefited from the sentencing limitation. Military judges could not "remedy a pretrial agreement [they] perceive[d] as too lenient but [they could make] a clemency recommendation to the Convening Authority to reduce an adjudged sentence."[37] The Legacy System lasted until the Article 53a Framework took effect on January 1, 2019. Before that occurred, the MJRG explored how to improve the Legacy System.

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[29] 2016 MCM, *supra* note 25, R.C.M. 910(e) ("The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea.").

[30] *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-2-6 (10 Sept. 2014) [hereinafter DA PAM. 27-9].

[31] 2016 MCM, *supra* note 25, R.C.M. 1001. Pursuant to RCM 1001, the parties could also introduce evidence of the accused's rehabilitative potential. *Id*.

[32] For the purposes of RCM 1001A, "a 'crime victim' is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty." 2016 MCM, *supra* note 25, R.C.M. 1001A(b)(1).

[33] 2016 MCM, *supra* note 25, R.C.M. 1001A(d).

[34] 2016 MCM, *supra* note 25, R.C.M. 1001A(e).

[35] 2016 MCM, *supra* note 25, R.C.M. 1001A(c).

[36] "To accommodate this, plea agreements [were] divided into two parts: the first part of the agreement contain[ed] the agreement's terms and conditions; the second part contain[ed] the sentence limitations (the 'cap' or 'quantum')." MJRG REP., *supra* note 9, at 483. "The military judge was prohibited from examining [the quantum] until after announcing the adjudged sentence." *Id*. This practice ostensibly prevented "the convening authority's view on an appropriate sentence" from influencing the sentencing authority "in violation of Article 37's prohibition on unlawful command influence." *Id*.

[37] 2016 MCM, *supra* note 25, R.C.M. 1106(d)(3).

C. Article 53a—Plea Agreements: The MJRG's Proposal

The MJRG proposed a new UCMJ article, Article 53a, because the Legacy System did not include an article dedicated to "Plea Agreements."[38] The MJRG intended Article 53a to assume the authority for plea agreements from Article 60 and "provide basic rules concerning" the construction and negotiation of plea agreements, the military judge's determination of whether to accept a plea agreement, and "the operation of plea agreements containing sentence limitations with respect to the military judge's sentencing authority."[39] Under the proposed Article 53a, the military judge must accept an otherwise lawful plea agreement[40] unless the "military judge determines that the proposed sentence is plainly unreasonable."[41] The pertinent text of the proposed Article 53a provides:

> Acceptance of Plea Agreement.—Subject to subsection (c), the military judge of a general or special court-martial shall accept a plea agreement submitted by the parties, except that—(1) in the case of an offense with a sentencing parameter under section 856 of this title (article 5), the military judge may reject a plea agreement that proposes a sentence that is outside the sentencing parameter if the military judge determines that the proposed sentence is plainly unreasonable; and (2) in the case of an offense with no sentencing parameter under section 856 of this title (article 56), the military judge may reject a plea agreement that proposes a sentence if the military judge determines that the proposed sentence is plainly unreasonable.[42]

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[38] MJRG REP., *supra* note 9, at 481.
[39] *Id*.
[40] The MJRG's proposed Article 53a requires the military judge to reject a plea agreement that "(1) contains a provision that has not been accepted by both parties; (2) contains a provision that is not understood by the accused" or (3) subject to certain exceptions, contains a sentencing provision under the mandatory minimum sentence for certain offenses. *Id*. at 489.
[41] *Id*. at 487.
[42] *Id*. at 488-89.

The MJRG proposed the "plainly unreasonable" standard to "ensure military judges are appropriately constrained in their ability to reject sentence agreements" while "providing military judges the authority to reject agreements they determine are unacceptable, consistent with federal civilian practice."[43] In addition, to "better aligning military plea-bargaining practices" with civilian practice, the MJRG intended the plainly unreasonable standard to generate "increased efficiencies and greater bargaining power for" the accused and the convening authority.[44] The plainly unreasonable standard, importantly, would allow military judges to prevent inconsistent and unreasonable results without undermining the increased efficiencies of the improved, more transparent Article 53a plea agreement process. Although Congress enacted much of the proposed Article 53a, it left out certain portions. Specifically, Congress did not adopt the MJRG's proposal to allow military judges to reject plainly unreasonable agreed-upon sentences.

The following section discusses how the enacted Article 53a changed the military justice system and the consequences of Congress not fully adopting the MJRG's proposed Article 53a.

D. The Article 53a Framework

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[43] *Id*. at 487. Significantly, the MJRG proposed Article 53a in connection to the MJRG's proposed modification of Article 56, which would have implemented sentencing parameters "to guide the discretion of the military judge in determining a sentence for each finding of guilty." *Id*. at 503. Sentencing parameters, according to the MJRG, would "establish a more structured sentencing system that draws upon the practice and experience in the civilian sector, including under the U.S. Sentencing Guidelines, while utilizing an approach that reflects that an effective military justice system requires a range of punishments and procedures that have no direct counterpart in civilian criminal trials." *Id*. at 511.

[44] *Id*. at 487.

As enacted, Article 53a[45] and the Article 53a Framework significantly changed the plea agreement system.[46] Article 53a replaced the Legacy

[45] Article 53a in its entirety follows:

> (a) IN GENERAL.— (1) At any time before the announcement of findings under [Article 53, UCMJ], the convening authority and the accused may enter into a plea agreement with respect to such matters as – (A) the manner in which the convening authority will dispose of one or more charges and specifications; and (B) limitations on the sentence that may be adjudged for one or more charges and specifications. (2) The military judge of a general or special court-martial may not participate in discussions between the parties concerning prospective terms of a plea agreement.
> (b) LIMITATION ON ACCEPTANCE OF PLEA AGREEMENTS.—The military judge of a general or special court-martial shall reject a plea agreement that—(1) contains a provision that has not been accepted by both parties; (2) contains a provision that is not understood by the accused; (3) except as provided in subsection (c), contains a provision for a sentence that is less than the mandatory minimum sentence applicable to an offense referred to in section 856(b)(2) of this title (article 56(b)(2)).; (4) is prohibited by law; or (5) is contrary to, or is inconsistent with, a regulation prescribed by the President with respect to the terms, conditions, or other aspects of plea agreements.
> (c) LIMITED CONDITIONS FOR ACCEPTANCE OF PLEA AGREEMENT FOR SENTENCE BELOW MANDATORY MINIMUM FOR CERTAIN OFFENSES.—With respect to an offense referred to in [Article 56(b)(2)]—(1) the military judge may accept a plea agreement that provides for a sentence of bad conduct discharge; and (2) upon recommendation of the trial counsel, in exchange for substantial assistance by the accused in the investigation or prosecution or another person who has committed an offense, the military judge may accept a plea agreement that provides for a sentence that is less than the mandatory minimum sentence for the offense charged.
> (d) BINDING EFFECT OF PLEA AGREEMENT.—Upon acceptance by the military judge of a general or special court-martial, a plea agreement shall bind the parties and the court-martial.

System with a system in which the accused and the convening authority (the "parties") directly negotiate a specific sentence or sentencing range.[47] Consistent with the MJRG's proposed Article 53a, the parties now enter into a plea agreement regarding the "limitations on sentence," which include a minimum sentence, a maximum sentence, or both.[48] The parties' ability to require a military judge to approve their agreed-upon sentence results in a major power shift between military judges and convening authorities.

Under the Legacy System, the parties could not agree to a minimum sentence and military judges were generally allowed to sentence the accused to as little as no punishment.[49] As a result, under the Legacy System, military judges controlled the minimum sentence. Under the Article 53a Framework, however, the parties—notably the convening authority who approves a plea agreement—control the minimum sentence. Thus, the Article 53a Framework increases the convening authority's power while decreasing that of the military judge.

For example, if the parties agree to a definite sentence, i.e. a specific term of confinement, military judges have no sentencing discretion. If the agreed-upon sentence is five years' confinement, the military judge must sentence the accused to five years' confinement. If the agreed-upon sentence is a range, military judges retain some discretion, but they may only adjudge a sentence within the agreed-upon range.

UCMJ art. 53a (2019).

[46] *Id*.; 2019 MCM, *supra* note 2, R.C.M. 705; 2019 MCM, *supra* note 2, R.C.M. 910.

[47] UCMJ art. 53a (2019).

[48] *Id*. Rule for Courts-Martial 705 implements Article 53a and expressly authorizes plea agreements that contain limitations on both the maximum and minimum sentence. 2019 MCM, *supra*, note 2, R.C.M. 705. RCM 910 reinforces that military judges must sentence the accused to the agreed-upon sentence. 2019 MCM, *supra* note 2, R.C.M. 910(f)(5) ("If a plea agreement contains limitations on the punishment that may be imposed, the court-martial . . . shall sentence the accused in accordance with the agreement."). There is no provision in RCM 705 or RCM 910 that authorizes military judges to reject the agreement because they find the sentencing provision to be plainly unreasonable. *See* 2019 MCM, *supra* note 2, R.C.M. 705, 910.

[49] *See* 2016 MCM, *supra* note 25, R.C.M. 1003.

In sum, the Article 53a Framework requires military judges to determine whether plea agreements are lawful[50] but does not allow them to reject plea agreements with agreed-upon sentences that are plainly unreasonable. As discussed in the next section, the complete absence of judicial authority to reject agreed-upon, unreasonable sentences may negatively affect the military justice system by creating legitimacy risk.

III. Giving the Referee a Whistle—Increasing Legitimacy by Allowing Military Judges to Reject Plea Agreements with Plainly Unreasonable Agreed-Upon Sentences

Not allowing military judges to reject plainly unreasonable agreed-upon sentences diminishes the legitimacy of the military justice system. Legitimacy is the "popular acceptance of a government, political regime, or system of governance."[51] Although legitimacy is essential to criminal justice in general, it is even more critical to military justice. Plea agreement proceedings, like all criminal justice processes, are composed of attributes that enhance legitimacy. This Part discusses how the Article 53a Framework impedes these attributes, which include judicial discretion, transparency, accuracy, and consistency, thus undermining the legitimacy of military justice. This Part concludes with a recommendation to allow military judges to reject plainly unreasonable agreed-upon sentences to safeguard legitimacy when, on the fringes of practice, the Article 53a Framework would otherwise permit an unreasonable result.

A. Legitimacy and Criminal Justice

"Legitimacy is an essential feature of an effective system of criminal justice."[52] A system's legitimacy depends on its ability to maintain a

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[50] RCM 705 provides that a term or condition in a plea agreement "shall not be enforced" if the accused did not "freely and voluntarily agree to it" or if it deprives the accused of the right to counsel, to due process, to challenge jurisdiction, to a speedy trial, to complete presentencing proceedings, or to "the complete and effective exercise of post-trial and appellate rights." 2019 MCM, *supra* note 2, R.C.M.705(c).

[51] ENCYCLOPAEDIA BRITANNICA, *legitimacy*, https://www.britannica.com/search?query=legitimacy+ (last visited Dec. 23, 2018).

[52] "In order to maintain authority over those it regulates, a criminal justice system must remain legitimate in the eyes of those people." Note, *Prosecutorial*

popular perception that it is fair and the public should accept it. Popular acceptance is essential because "[w]hen people perceive the criminal process as fair and legitimate, they are more likely to accept its results as accurate and are more likely to obey the substantive laws that the system enforces."[53] Put another way, legitimacy ensures a judicial system can maintain good order and discipline in any context, whether civilian or military. Moreover, legitimacy makes a criminal justice system more effective by securing the trust and cooperation of the community.[54] However, while certain attributes of a criminal justice system increase legitimacy, others diminish it.[55]

First, procedures that ensure accurate results enhance legitimacy.[56] The attribute of accuracy in sentencing means "[i]ndividualized sentencing [that] tailors a sentence to the accused and the particular circumstances of his or her crime."[57] In determining guilt, accuracy reassures participants in the criminal justice process and the public that the system convicts the guilty and exonerates the innocent.

Second, procedures that support consistent results also increase legitimacy. "Consistency in sentencing (similar offenses by similar accused receiving similar sentences) may serve to increase deterrence, predictability, and public confidence in criminal sentences."[58]

Power and the Legitimacy of the Military Justice System, 123 HARV. L. REV. 937, 941 (2010).

[53] *Id*.

[54] *Id*.

[55] *Id*. at 942.

[56] "Procedures that enhance the truth-seeking dimension of criminal adjudication can reassure observers that the system is reaching legitimate results." *Id*.

[57] MJRG REP., *supra* note 9, at 511.

[58] *Id. See* James E. Baker, *Is Military Justice Sentencing on the March? Should it be? And if so, Where should it Head? Court-Martial Sentencing Process, Practice, and Issues*, 27 FED. SENT. R. 72, 72-87 (2014) (addressing issues in military sentencing and summarizing arguments supporting the military's use of sentencing guidelines). According to the then Chief Judge of the United States Court of Appeals for the Armed Forces, "the third rail of the military sentencing debate revolves around the question of sentence consistency—between services and between offenders—and thus, whether the military justice system should include some form of sentencing guidelines." *Id*. at 77. In describing the arguments in support of guidelines, Chief Judge Baker noted, "First, and perhaps foremost, is the argument that in what is supposed to be a uniform system of

Conversely, a judicial system that fails to prevent inconsistent results has the opposite effect and reduces legitimacy. "Disparate treatment of similarly situated defendants . . . can harm popular faith in the criminal justice system."[59] Although consistency and accuracy are arguably "competing goals,"[60] maintaining legitimacy requires both.

Third, procedures that promote transparency enhance the perception of the exercise of legitimate authority. Enabling the community and the defendant to participate in the criminal justice process and "limiting secrecy" create transparency.[61] In sum, attributes of a legitimate criminal justice framework include accuracy, consistency, and transparency.

B. Legitimacy and Military Justice

Legitimacy is especially important in military justice. The history of military justice is, in fact, intertwined with its search for legitimacy—the military justice system has evolved largely in reaction to concerns related to its perceived unfairness.[62] Developed as a mechanism to ensure commanders' authority over their subordinates,[63] the military justice system had historically afforded commanders "virtually unchecked control."[64] Until the end of World War II, military justice had relatively low public visibility and, perhaps as a result, the American public did not question the vast power of commanders. During World War II, however, the military conducted two million courts-martial, resulting in

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military justice, like sentences should be meted out for like offenses regardless of service component or grade." *Id*. at 80. "Second, and related to this first argument, is the concern regarding the disparate treatment between officers, especially senior officers, and enlisted personnel. This is colloquially referred to as 'different spanks for different ranks.'" *Id.* Chief Judge Baker concluded, "a system of justice that is perceived to treat offenders differently based on grade alone will be viewed as a less credible system that one that treats like offenders in like manner, and is perceived to do so." *Id*.

[59] Note, *supra* note 52, at 942.

[60] MJRG REP., *supra* note 9, at 511.

[61] Note, *supra* note 52, at 942–43.

[62] *Id*. at 937.

[63] *Id*. at 939. "Historically, the maintenance of discipline as a means of reinforcing the military's combat function was the primary purpose of military justice." *Id*. (citing *inter alia* United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 17 (1955)).

[64] Note, *supra* note 52, at 940.

approximately 80,000 American Soldiers returning home as felons.[65] Mass public protests followed, which threatened the legitimacy of the military justice system the public believed was too narrowly focused on maintaining discipline.[66] The public's concerns catalyzed the creation of the UCMJ.[67]

In adopting the UCMJ in 1951,[68] Congress sought to address the military justice system's legitimacy problem and "strike a balance between the individual rights of service members and fairness, on the one hand, and the interest in maintaining discipline and command authority, on the other."[69] The Military Justice Act of 1968 further "sought to improve the perceived fairness of courts-martial by creating the position of military judge and requiring that a military judge be detailed for every general court-martial."[70] Despite these significant efforts to enhance military justice's legitimacy, the military justice system remains vulnerable to the public's concerns.[71]

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[65] Randy James, *A Brief History of the Court Martial*, TIME (Nov. 18, 2009), http://content.time.com/time/nation/article/0,8599,1940201,00.html.

[66] Note, *supra* note 52, at 940.

[67] According to Brigadier General Patrick Finnegan:

> The significant changes [in military justice] began after sixteen million citizens served in uniform during World War II and returned to their cities and towns with the correct perception that the military criminal law system may have been related to discipline—arbitrary, swift, and kangaroo-court like at times—but it was not concerned particularly with either fairness or justice. Their concerns ultimately resulted in the Uniform Code of Military Justice, the first major step toward a system based on principles of fairness and justice crucial to our nation and its citizens.

Brigadier General Patrick Finnegan, *Today's Military Advocates: The Challenge of Fulfilling Our Nation's Expectations for a Military Justice System That Is Fair and Just*, 195 MIL. L. REV. 190, 192 (2008).

[68] Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).

[69] Note, *supra* note 52, at 940.

[70] *Id*.

[71] For example, Senator Kirsten Gillibrand's proposed Military Justice Improvement Act would have a transformative effect on the military justice system by moving "the decision over whether to prosecute serious crimes [such as sexual assault]" from commanders "to independent, trained, professional military prosecutors, while leaving uniquely military crimes within the chain of

Although it is necessary to ensure the public—people who are not subject to the jurisdiction of military courts—believes military justice is legitimate, it is also essential to ensure service members share this belief. Military justice is a powerful manifestation, on and off the battlefield, of command authority. Service members who question the fairness of their own justice system may lose respect for command authority. If Soldiers do not believe they will be treated fairly if accused or convicted of a crime, they are less likely to trust the commanders who wield disciplinary authority. If Soldiers do not trust their commanders, they are less likely to follow their orders, which could jeopardize their mission. There is, therefore, a causal relationship between criminal justice processes and the functioning of the military that does not exist, at least to the same degree, in civilian justice systems.[72]

Thus, both the public and service members must believe that military justice is legitimate. Service members must accept the military justice system as legitimate in order for commanders to maintain good order and

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command." *Military Justice Improvement Act: Comprehensive Resource Center for the Military Justice Improvement Act*, https://www.gillibrand.senate.gov/mjia (last visited Jan. 25, 2019). Senator Gillibrand's proposal would address a perceived lack of legitimacy in the military justice system and "remove the systemic fear that survivors of military sexual assault describe in deciding whether to report the crimes committed against them" due to "the bias and inherent conflicts of interest posed by the military chain of command's sole decision-making power over whether cases move forward to a trial." *Id.*

[72] Dissatisfaction with civilian criminal processes is also common. *See, e.g.*, Elias Leight, *Jay-Z, Meek Mill Launch 'The Avengers' of Criminal Justice Reform Organizations*, ROLLING STONE (Jan. 23, 2019), http://www.rollingstone.com/music/music-features/jay-z-meek-mill-reform-alliance-criminal-justice-783228/ (discussing the formation and goals of the Reform Alliance, "a new initiative dedicated to changing an 'illogical law that make no sense,' but rules the lives of the estimated 4.5 million Americans currently on parole or probation."). Nevertheless, dissatisfaction may have a greater, negative effect in the military. For example, "[e]xperiences during [World War II] had revealed that rather than reinforcing discipline, harsh military justice bred resentment among the troops and undermined public confidence." Note, *supra* note 52, at 940. Resentment due to an illegitimate exercise of disciplinary authority, especially in a combat environment, undermines command authority. This is not, however, resentment resulting from the legitimate exercise of authority, which reinforces command authority and deters other misconduct.

discipline. The public must accept the military justice system as legitimate in order to ensure the military justice system continues to exist.

C. Reduced Legitimacy of the Article 53a Framework

1. Reduced Judicial Discretion

In reducing judicial discretion, the Article 53a Framework undermines the legitimacy of military justice. Because there is a positive correlation between legitimacy and judicial discretion, providing more power to military judges increases legitimacy. The following reasons support this conclusion.

First, Congress introduced military judges into the military justice system for the very purpose of addressing legitimacy concerns—the perception of unfairness.[73] Simply put, Congress created the position of military judges as a legitimacy-enhancing tool.

Second, Congress gave military judges, as the impartial, "presiding officer[s] in a court-martial,"[74] the statutory responsibility and authority to "ensur[e] proceedings are conducted in a *fair* and orderly manner."[75] In plea agreement proceedings, military judges reinforce key attributes of legitimacy in several respects.[76] Military judges increase the accuracy of

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[73] *See supra* note 70 and accompanying text.

[74] 2019 MCM, *supra* note 2, R.C.M. 801(a).

[75] 2019 MCM, *supra* note 2, R.C.M. 801(a) discussion (emphasis added).

[76] This paper focuses on legitimacy in plea agreement proceedings. The military justice system, however, has adopted several evidentiary and procedural safeguards that promote fairness in other processes. For example, "because great discretion for the convening authority was consciously built into the military justice system, mechanisms such as the Article 32 investigation were created to provide a more substantive check on that discretion than can be found in the civilian system." Note, *supra* note 52, at 949. Also, the prohibition against unlawful command influence is an important check on the convening authority's actual and perceived improper influence on the judicial process. UCMJ art. 37(a) (2019) ("No authority convening a general, special, or summary court-martial . . . may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding . . ."). This paper does not argue that the Article 53 Framework, in allowing convening authorities to compel military

the adjudicated sentence by ensuring the parties properly apply procedural and evidentiary rules.[77] When they have the discretion to adjudge sentences, military judges' training and experience allow them to ensure their sentences are accurate and consistent. Military judges promote transparency by conducting a rigorous providence inquiry in every guilty plea[78] and marshalling the parties through an elaborate, public sentencing process.[79] Finally, military judges eliminate secrecy, the concern that backroom deals compromise justice, by precluding the application of *sub rosa* agreements.[80] For those reasons, providing more power to military judges increases legitimacy.

However, in the military justice system, it is more precise to consider legitimacy as a function of judicial power relative to that of the convening authority. As the military judge's relative power increases, the greater the system is perceived as legitimate. While empowering the military judge has increased legitimacy in military justice, the historically-perceived unchecked power of convening authorities has had the opposite effect.[81]

Under the Article 53a Framework, military judges continue to preserve legitimacy. They are, however, restrained from doing so fully. Under the Legacy System, military judges could limit convening authorities' power in plea agreement proceedings by adjudging low—or

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judges to adjudicate a specific sentence, in compliance with the law, implicates *unlawful* command influence.

[77] *See, e.g.*, 2019 MCM, *supra* note 2, R.C.M. 1001.

[78] "The civilian system adopts a permissive approach to guilty pleas that primarily serve interests in administrative efficiency. By contrast, the military justice system's more searching inquiry into guilty pleas communicates the greater institutional value that it places on the perceived accuracy of those pleas." Note, *supra* note 52, at 950.

[79] "More elaborate proceedings mitigate the perception that the system treats guilty pleas casually or arbitrarily, creating an enhanced sense of confidence in the system." *Id*. at 952.

[80] Plea agreements are required to contain in writing "[a]ll terms, conditions, and promises between the parties." 2019 MCM, *supra* note 2, R.C.M. 705(e)(2). Military judges confirm the parties' compliance with this requirement during the inquiry concerning the pretrial agreement. *See* DA PAM. 27-9, *supra* note 30, at 21 (advising military judges to ask, "Has anyone made promises to you that are not written into this agreement in an attempt to get you to plead guilty?").

[81] *See supra* notes 66–68 and accompanying text.

even no—punishment notwithstanding the confinement cap.[82] This allowed military judges to prevent excessive sentences. In fact, by adjudging sentences below the confinement cap, military judges signaled they believed convening authorities overestimated the value of cases and sought inaccurate results. This feature of the Legacy System reinforced the fundamental notion of fairness. Military judges' sentences below the quantum signaled to the public that military judges were independent and empowered to diverge from the wishes of convening authorities. On the other hand, military judges' sentences more severe than the quantums reinforced the convening authorities' reasonableness. In each case, the independence of military judges from convening authorities enhanced military justice legitimacy.

However, this type of independence does not exist in the Article 53a Framework. By limiting military judges' discretion in sentencing, the Article 53a Framework invites a perception of systemic, reduced legitimacy. The fact that the Article 53a Framework, at the same time, increases the power of the convening authority—whose great power has historically been vulnerable to legitimacy concerns[83]—increases the legitimacy risk.

2. Military Judges' Diminished Role as Gatekeepers for the Accused

Under the Article 53a Framework, because military judges cannot reject plea agreements with excessively severe sentences, they have a substantially reduced ability to serve as gatekeepers for the accused. Especially because this is a significant change from the Legacy System in which military judges could generally adjudge no punishment, the public may perceive the judges' diminished gatekeeping role as a dilution of the military justice system's fairness. The public may also accurately perceive the convening authorities as wielding the true power in the proceeding—control of the sentence. Military judges' inability to prevent governmental overreaching is perhaps the most salient manifestation of the Article 53a Framework's legitimacy risk.

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[82] *See supra* note 49 and accompanying text.

[83] *See* Note, *supra* note 52, at 946 ("The tremendous power vested in the convening authority is not without negative effects on perceived legitimacy" and "concerns that his vast power might be wielded arbitrarily threaten the perceived fairness of the system.").

On the other hand, some might contend that the Article 53a Framework does not reduce military judges' ability to protect the accused or, in even if it does, the Framework otherwise sufficiently protects the accused. Those arguing the Article 53a Framework generates little or no legitimacy risk would point to the several, remaining procedural safeguards against government overreaching.

Among such safeguards, initially, is the fact the accused still controls whether or not he or she wants to plead guilty. Further, even if the accused decides to plead guilty, they can still decide whether to enter into a plea agreement or agree to a sentence.

Additionally, accused who enter into plea agreements may still offer unsworn statements and request military judges to relax the rules of evidence to facilitate the admission of evidence of extenuation and mitigation.[84] "These various procedures operate in concert to give a convicted servicemember every opportunity to persuade the members (or the judge in a bench trial) to give a light sentence."[85]

Further, those who see little or no risk in the Article 53a Framework will point to the Framework's heightened transparency. Compared to the Legacy System, the Article 53a Framework provides accused with greater predictability concerning the sentences they will receive. The Legacy System aspiration to "beat the deal" was replaced by a contractual term—the agreed-upon sentencing provision—that better informs the accused's decision to plead guilty. This constrains the government against overreaching.

In addition, those who believe the Article 53a Framework sufficiently protects the accused will note the accused has the right to consult an attorney regarding the plea agreement and the agreed-upon sentence. Effectively represented accused with a clear understanding of the plea agreement are unlikely to agree to an unreasonably high sentence. Moreover, military judges will confirm the accused understand that the court cannot deviate from the agreed-upon sentence.[86]

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[84] 2019 MCM, *supra* note 2, R.C.M. 1001.

[85] Colin A. Kisor, Note, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39, 47 (2009).

[86] In a military judge's colloquy with the accused concerning the plea agreement, the military judge should first confirm that the accused agreed to the

Although many will contend that these safeguards eliminate all risk of government overreaching, some might concede that there remains some risk. Those acknowledging risk will point to the remaining fail-safe—clemency action—which, they will argue, eliminates any residual risk of government overreaching causing plainly unreasonable, excessive sentences.[87]

However, most of these safeguards, which effectively prevented unreasonably excessive sentences under the Legacy System, are now virtually meaningless. First, offering an unsworn statement and relaxing the rules of evidence have no effect on agreed-upon, definite sentences, and provide only limited protection for the accused when the agreed-upon sentences are a range.

Second, although competent defense attorneys can usually prevent government overreaching, even the most experienced attorneys make mistakes and convening authorities overreach. When these errors converge, military judges remain the only safeguard for the accused at the trial level.

Third, clemency action is unlikely to correct an unreasonably excessive sentence and, in any event, it is not meant to do so. Although convening authorities might reduce a sentence through clemency action if the defense provides them with new information, this is unlikely to happen often. Under the Article 53a Framework, in order to secure a favorable sentence for their clients, defense counsel should provide the government up front with as much mitigating and extenuating evidence as possible. It is, thus, unlikely in most cases that clemency matters will contain new information sufficient to change convening authorities' minds concerning the same sentences they found appropriate.[88] Moreover, even if the

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sentence. The military judge should then ensure the accused understand that the military judge cannot deviate from the agreed-upon sentence, that the accused nonetheless has the right to full sentencing proceeding, and that, notwithstanding the evidence presented during the sentencing, the military judge will remain bound to adjudge the agreed-upon sentence.

[87] *See* 2019 MCM, *supra* note 2, R.C.M. 1109–10.

[88] Perhaps convening authorities should consider exercising clemency power *more* frequently under the Article 53a Framework than they had under the Legacy System. Because convening authorities agree to sentences before the accused presents sentencing evidence, convening authorities' exercising clemency demonstrate a willingness to revisit their decisions once they possess

convening authority believes clemency is appropriate, clemency action can only provide very limited relief.[89] Finally, clemency authority is not meant to prevent excessive sentences. "Sentence appropriateness involves the judicial function of assuring justice is done and that the accused gets the punishment he deserves. Clemency involves bestowing mercy—treating an accused with less rigor than he deserves."[90]

In sum, the Article 53a Framework still protects the accused by providing them with significant procedural protections. The accused are, however, less protected than they were under the Legacy System. A change to Article 53a allowing military judges to reject agreements with unreasonably excessive agreed-upon sentences would partially restore military judges' ability to protect the accused. In addition to allowing military judges to effectively stop play on the fringes of practice, this change would provide several other advantages.

3. Appellate Risk

Allowing military judges to reject plea agreements with plainly unreasonable agreed-upon sentences would reduce the likelihood of appellate courts taking action on cases due to inappropriately severe sentences.[91] Although appellate courts may defer to the fact the accused

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all pertinent information. This would also encourage defense counsel to engage in meaningful sentencing proceedings and be diligent in their post-trial submissions.

[89] *See* 2019 MCM, *supra* note 2, R.C.M. 1109.

[90] United States v. Healy, 26 M.J. 394, 395 (C.A.A.F. 1988).

[91] The Court of Criminal Appeals "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." UCMJ art. 66(d)(1); *see* Kisor, *supra* note 85, at 52 (noting appellate court independently evaluates sentences); United States v. Joyner, 39 M.J. 965, 966 (A.F.C.M.R. 1994) (finding sentence not inappropriate on review and applying test to determine whether "when viewed as a whole, the approved sentence is inappropriate for this appellant based on the appellant's character and circumstances surrounding the offense"); United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982) ("Sentence appropriateness is determined by the sentencing authority at the trial level, the convening authority or supervisory authority, and

agreed to the sentences they received, appellate courts will nonetheless continue to review sentences. In doing so, appellate courts may find an agreed-upon sentence to be inappropriately severe[92] or disproportionally severe compared to sentences in similar cases.[93] Such an appellate finding could be problematic for the convening authority and the defense.

Initially, an appellate court's finding that an agreed-upon sentence is inappropriately severe might subject the convening authority's judgment to scrutiny and call the defense counsel's competence into question. Additionally, if an appellate court remands the case to the trial court for resentencing, the parties must renegotiate or litigate a previously settled matter. This would reduce the efficiency of the Article 53a Framework. Further, an appellate court's finding that an agreed-upon sentence is inappropriate could unpredictably alter the parties' bargaining power, disrupting current and future negotiations, also reducing efficiency. In a specific case remanded due to an inappropriately severe sentence, the accused would only agree to a less severe sentence. In negotiating other cases, the defense would use the appellate court's decision as leverage to bargain for lower sentences. If negotiations break down, the parties would have to try cases that they otherwise would have resolved through plea agreements. While trying more cases is not, itself, a negative consequence of appellate scrutiny, trying more cases due to the appellate court's perceived undermining of the convening authority's power might be.

However, allowing military judges to reject agreements with plainly unreasonably agreed-upon sentences would reduce concerns of appellate

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the Court of Military Review. Generally, sentence appropriateness should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'") (quoting United States v. Mamaluy, 10 U.S.M.A. 102, 106–07 (1959)); United States v. Humphries, 2010 CCA LEXIS 236, at *10 (A.F. Ct. Crim. App. May. 24, 2010) (sentence excessively severe and remanded for sentence reconsideration).

[92] *Id.*

[93] *Compare Snelling*, 14 M.J. at 267, 268 (stating sentence comparison is an aspect of sentence appropriateness) *with* United States v. Blair, 72 M.J. 720, 723 (A. Ct. Crim. App. 2013) (citing United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999)) (quoting United States v. Ballard, 20 M.J. 282, 293 (C.M.A. 1985)) ("We are not required to engage in sentence comparison with specific cases 'except in those rare instances in which sentence appropriateness can be fairly determines only by reference to disparate sentences adjudged in closely related cases.'").

scrutiny. For several reasons, frontloading the responsibility to military judges to assess sentence reasonableness would reduce the likelihood appellate courts would find agreed-upon sentences inappropriate.

If military judges find agreed-upon sentences unreasonably severe, that is, plainly unreasonable, the appellate courts would likely agree. By serving as a screen for the appellate courts, military judges would increase the efficiency of military justice. Military judges' rejections of agreements would prompt the parties to resolve the cases immediately. Regardless whether the parties renegotiate the case or proceed to a contested court-martial, either option is more efficient than the parties having to litigate the case in the future, for a second time, due to appellate intervention. Litigating the same case twice, alone, is inefficient. Litigating the same case a second time is even more inefficient because witnesses or evidence might not be readily available.

Conversely, if military judges approve the agreed-upon sentences, that is, find them not plainly unreasonable, it is more likely appellate courts will agree than had the military judges merely served as powerless conduits, adjudging pre-determined sentences. This, too, would increase efficiency by reducing the likelihood of appellate action.

Incidentally, allowing military judges to reject plainly unreasonable agreed-upon sentences would also enhance the efficiency of the appellate process. In determining whether to approve agreed-upon sentences, military judges would generate a record supporting their findings that the sentences are appropriate.[94] By creating a road map for the appellate courts that support the reasonableness of approved, agreed-upon sentences, military judges make it easier for the appellate courts to reach the same conclusion.

Finally, every time military judges approve agreed-upon sentences, they provide a protective barrier between the parties and the appellate courts. Even if the appellate courts ultimately determine that approved sentences are inappropriate, the military judges' initial approvals of the agreed-upon sentences support the parties' competence and judgment.

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[94] *See* United States v. Hutchinson, 57 M.J. 231, 234 (C.A.A.F. 2001) ("The power to review the entire record for sentence appropriateness includes the power to consider the allied papers, as well as the record of trial proceedings.").

4. Military Judges as Gatekeepers for Society

In addition to not allowing military judges to reject agreements with unreasonably high agreed-upon sentences, the Article 53a Framework also prevents military judges from rejecting agreed-upon sentences that are unreasonably low. As discussed, not allowing military judges to reject plainly unreasonable *high* sentences reduces the legitimacy of military justice because it concerns the reduction, perceived or actual, of protections afforded to the accused. Not allowing military judges to reject plainly unreasonable *low* agreed-upon sentences in order to protect society, however, also generates legitimacy risk. The key consideration is how the public would perceive military justice if they were aware that military judges cannot reject sentences of minimal confinement for violent or other serious offenses.

Although military judges could not reject PTAs resulting in low sentences (due to low quantums) under the Legacy System,[95] military judges' inability to reject plea agreements with plainly unreasonable low agreed-upon sentences under the Article 53a Framework creates a greater legitimacy risk. Under the Legacy System, military judges could publically adjudge a more severe sentence than the quantum. Thus, the Legacy System allowed military judges—the presiding officers in courts-martial—to inform the public they believed the accused's crimes warranted more punishment than the convening authorities' sentencing caps allowed. Under the Article 53a Framework, however, if military judges disagree with the agreed-upon sentences, they cannot adjudge publically a sentence commensurate with their own views. Current public perception is that the military judge and the convening authority speak with the same voice concerning the appropriateness of a sentence.

[95] In *United States v. Hall*, 26 M.J. 739 (N.M.C.M.R. 1988), the appellate court addressed the military judge's discussion with counsel concerning whether the military judge had the power to reject a pretrial agreement if the quantum was insufficient to protect society. *Id.* at 740. The appellate court confirmed that the military judge had no duty or right to review quantum portion for appropriateness despite the fact that "Federal District Court Judges regularly reject plea agreements which do not adequately protect society." *Id.* at 740–41. In so finding, the appellate court stated, "In the military justice system . . . the convening authority is the party with the discretion to accept or reject the accused's offer and not the trial judge." *Id.* at 742. The appellate court found no support for such an exercise of discretion in appellate case law or the *MCM*, noting that "[t]he list of prohibited terms and conditions [of RCM 705] does not include a sentence limitation which does not adequately protect society." *Id.*

Because members of the public will have no way of knowing whether military judges considered their interests, the public is more likely to question the legitimacy of the court-martial process.

However, allowing military judges to reject unreasonably low sentencing provisions, similar to federal judges,[96] would benefit the military justice system in several respects. Each of these benefits would increase the legitimacy of military justice.

First, allowing military judges to consider public safety would promote the public's confidence in military justice, strengthening their belief that military justice is legitimate. By enabling military judges "to prevent the transfer of criminal adjudication from the public arena [a trial] to the prosecutor's office for the purpose of expediency at the price and confidence in the effectiveness of the criminal justice system,"[97] the military would demonstrate it values public safety over administrative expedience. Additionally, allowing military judges to reject plainly unreasonable low agreed-upon sentences would further increase public confidence by decreasing the public's concerns that the military justice system unjustly "takes care of its own." Giving this authority to military judges, therefore, would increase the legitimacy of military justice

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[96] Rule 11 of the Federal Rules of Criminal Procedure establishes the federal plea agreement procedure. *See* FED. R. CRIM. PROC. 11(c). Upon consideration of the plea agreement, pursuant to Fed. R. Crim. Proc. 11, "the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report." *Id*. *See* United States v. Miller, 722 F.2d 562, 563 (9th Cir. 1983) (noting Rule 11 "also contemplates the rejection of a negotiated plea when the district court believes that the bargain is too lenient, or otherwise not in the public interest."); United States v. Bean, 564 F.2d 700 (5th Cir. 1977) ("A decision that a plea bargain will result in the defendant's receiving too light a sentence under the circumstances of the case is a sound reason for a judge's refusing to accept the agreement.").

[97] United States v. Walker, 2017 U.S. Dist. LEXIS 98233 at *1 (S.D. W. Va. Jun. 26, 2017). In *Walker*, the district court judge stated that "courts should reject a plea agreement upon finding that the plea agreement is not in the public interest" as "[t]here is no justice in bargaining against the people's interest," and in making this determination, courts should consider "the cultural context surrounding the subject criminal conduct," "weigh the public's interest in the adjudication of the criminal conduct," and "consider whether 'community catharsis can occur' without the transparency of a public jury trial." *Id*. at 21–22.

because—certainly as far as the public is concerned—accurate sentences must reflect the public's interest.

Second, allowing military judges to reject plainly unreasonable low agreed-upon sentences will often result in more trials. The transparency and "cathartic" effect of additional public trials[98] would further enhance the legitimacy of military justice.

Third, allowing military judges to reject plainly unreasonable low agreed-upon sentences would harmonize military justice with federal criminal law.[99] Historically, the public has expected that the court-martial process "employ the standards and procedures of the civilian sector."[100] Meeting this expectation—making military justice to the extent possible consistent with federal criminal practice—legitimizes military justice.

On the other hand, the following are two cogent arguments against allowing military judges to reject agreed-upon sentences because military judges believe they are plainly, unreasonably low.

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[98] *Id*.

[99] *See supra* notes 95–96 and accompanying text.

[100] MJRG REP., *supra* note 9, at 91. In conducting its review, the MJRG identified "key considerations to provide operational guidance for [its] analysis and to provide a framework for any MJRG proposals." *Id*. at 90. One key consideration was "Democratic Values," which states:

> History has also demonstrated that in our democratic society, servicemembers, their families, and the public to expect the court-martial process to: employ the standards and procedures of the civilian sector as far as practicable; and counterbalance the limitation of rights available to members of the armed forces and the hierarchical nature of military service with procedures to ensure protection of rights provided under military law.

Id. at 91. Further, among the "guiding principles and operational considerations of the MJRG" was "[w]here they differ with existing military justice practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial of criminal cases in the United States district courts should be incorporated into military justice practice." *Id*. at 89; *see* United States v. Valigura, 54 M.J. 187, 191 (C.A.A.F. 2000) (finding "that Congress intended that, to the extent 'practicable,' trial by court-martial should resemble a criminal trial in a federal district court").

First, military judges exercising this power inappropriately would improperly limit convening authorities' discretion. Convening authorities must generally be able to dispose of cases with relatively low sentences for a variety of reasons, including to maintain good order and discipline, secure a conviction quickly in view of military exigencies, honor the victim's wishes, and to avoid a likely acquittal.[101] It follows Congress should not provide military judges with *unlimited* discretion to second-guess the judgment and power of convening authorities.

For example, in a hypothetical case involving only non-violent, drug-related offenses, a convening authority may agree to a low sentence. It would be improper if the military judge could reject the sentence simply because the judge believes drugs are a more significant threat to good order and discipline than does the convening authority. It is therefore necessary to distinguish between a difference of opinion and convening authorities' objectively unreasonable exercise of judgment.

Setting a standard that allows military judges to reject only plainly unreasonable sentences provides this distinction. The plainly unreasonable standard would reduce the risk of judges inappropriately limiting the judgment of convening authorities by allowing military judges to reject sentences only in exceptional cases.

Second, the accused's ability to reap the benefit of a favorable agreement—no matter how favorable—was an important feature of the Legacy System.[102] Allowing military judges to disapprove agreements benefitting the accused therefore invites the perception that military judges undermine an important protection to which the accused have been accustomed.

5. Empty Rituals

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[101] *See* UCMJ Appendix 2.1 (2019). In all cases, the UCMJ advises convening authorities to consider "interests of justice and good order and discipline," which include "mission-related responsibilities of the command," the effect of the offense on "good order and discipline," "whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial," and the "views of the victim as to disposition." *Id*.

[102] *See supra* note 36 and accompanying text.

The Article 53a Framework also increases the likelihood of sentencing proceedings becoming less meaningful—and possibly empty—rituals.[103] Because sentencing proceedings have limited, if any, effect on agreed-upon sentences, the parties have little to gain by offering sentencing evidence.[104] In fact, offering sentencing evidence might be against the parties' interests. The defense risks both invalidating the plea agreement [105] and needlessly having the accused admit guilt. The government risks generating appellate issues. Since the parties have little to gain and potentially something to lose during sentencing, sentencing will likely be underdeveloped or undeveloped, empty proceedings. Empty proceedings both prevent appellate courts from conducting thorough reviews and reduce the legitimacy of military justice. As a result, without a meaningful incentive to conduct sentencing proceedings, the parties might transform sentencing—historically, a robust and transparent legitimacy-enhancing process—into a shadow of its former self.

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[103] *See* United States v Allen, 25 C.M.R. 8, 11 (C.M.A. 1957) (cautioning against pretrial agreements "transform[ing] the trial into an empty ritual."). In *Allen*, the court underscored the importance of sentencing proceedings, describing them as "an integral part of the court-martial trial." *Id*. A sentencing proceeding devoid of substance prevents a board of review from making "an informed judgment as to the appropriateness of the sentence affirmed by the convening authority." *Id*. at 12.

[104] There are several reasons, however, besides securing a particular sentence to engage in sentencing proceedings. For the accused, sentencing offers an opportunity to demonstrate remorse, apologize to those affected by their crimes, and begin rehabilitation. It is also an opportunity to generate a record sufficient for appellate review of the sentence. For the government, sentencing offers the opportunity to raise awareness of the full effect of the accused's misconduct on the victim and society in order to deter future misconduct. S*ee* DA PAM. 27-9, *supra* note 30, at para. 64 (general deterrence an appropriate sentencing consideration). For victims, sentencing in a guilty plea proceeding offers perhaps the only opportunity to be heard in a public forum. *See* UCMJ art. 6b (2019).

[105] "If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently, or through a lack of understanding of its meaning and effect, a plea of not guilty shall be entered as to the affected charges and specifications." 2019 MCM, *supra* note 2, R.C.M. 910(h)(2).

However, allowing military judges to reject plainly unreasonable agreed-upon sentences could provide the parties with that incentive. If, in determining whether to reject plea agreements due to plainly unreasonable agreed-upon sentences, military judges could consider sentencing evidence, the parties would present sentencing evidence to demonstrate the agreed-upon sentences are reasonable.[106] For this reason, victim input would also remain meaningful.[107] By informing military judges of their support for plea agreements during sentencing, victims would assist both the trial and appellate courts in evaluating the reasonableness of agreed-upon sentences.[108] Thus, allowing military judges to consider sentencing evidence in determining whether to accept agreed-upon sentences would import the Legacy System's legitimacy-enhancing ritualism into the more efficient Article 53a Framework.

6. Accuracy and Consistency

Allowing military judges to reject plea agreements with plainly unreasonable agreed-upon sentences would also enhance sentence accuracy and consistency—other hallmarks of legitimacy.[109]

Of all the participants in the military justice system, military judges generally have the greatest perspective of what constitutes an appropriate

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[106] If, for example, the government offers significant aggravation evidence but the defense fails to provide evidence of extenuation or mitigation, the defense risks the military judge rejecting the agreed-upon sentence as too lenient. On the other hand, if the government fails to provide meaningful sentencing evidence, yet the defense offers powerful evidence of extenuation and mitigation, the government risks the military judge rejecting the agreed-upon sentence as too severe. Both parties would thus have an interest in ensuring military judges have sufficient information to evaluate the agreed-upon sentence.

[107] *See* UCMJ art. 6b (2019).

[108] RCM 705(e)(3)(B) provides that "[w]henever practicable, prior to the convening authority accepting a plea agreement the victim shall be provided an opportunity to submit views concerning the plea agreements terms and conditions . . ." 2019 MCM, *supra* note 2, R.C.M. 705(e)(3)(B). In many cases, however military judge may not be aware of whether victims support a plea agreement until sentencing. In the event victims do not support plea agreements, sentencing proceedings might offer the only opportunity for them to inform the court.

[109] *See supra* notes 56–58 and accompanying text.

sentence in a particular case and the greatest awareness of sentences imposed in similar cases. Because military judges have the superior perspective necessary to identify plainly unreasonable sentences—those which are highly inaccurate (i.e. excessively lenient or severe) or inconsistent—military judges should be allowed to prevent them.[110]

Moreover, once a guilty plea begins, military judges have access to more information than the parties had when they agreed to a sentence. During sentencing proceedings, military judges evaluate all of the evidence, including that which was not previously provided to the convening authority or the defense. Military judges also have the opportunity to determine the weight of the evidence and the credibility of witnesses.

Because military judges have the greatest perspective, knowledge-base, and access to information, they are the most qualified individuals to identify and correct highly inaccurate or inconsistent sentences. Military judges should be allowed—not necessarily to "call the play" and control sentences—but to stop play by rejecting plainly unreasonable agreed-upon sentences when a player is out of bounds. In fact, relying on military judges to do so, especially given the absence of sentencing guidelines, might be the only check against the plainly unreasonable sentences that might occur on the fringes of practice.

7. Cost-Benefit Analysis

Allowing military judges to reject plainly unreasonable agreed-upon sentences would enhance the legitimacy of military justice, but it would do so at a cost. Military judges' rejections of plea agreements could appear to reduce efficiency by requiring additional litigation and introducing uncertainty into negotiations, as well as to undermine the convening authority's power. For the following reasons, however, the benefits of allowing military judges to reject plainly unreasonable agreed-upon sentences outweigh its costs.

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[110] This argument also supports mandating judge-alone sentencing. "A rationale for judge sentencing is avoiding wildly inconsistent results in similar cases. Federal judges are more likely to have the knowledge and experience to assess the 'worth' of a particular criminal case and determine the appropriate amount of confinement." Kisor, *supra* note 85, at 43.

First, allowing military judges to reject agreed-upon sentences minimally limits the power of convening authorities. Because convening authorities generally execute reasonable agreements and military judges usually exercise their discretion appropriately, rejections would occur on the fringes of practice. On the infrequent occasions on which military judges consider rejecting agreed-upon sentences, the judges must follow the plainly unreasonable standard, which is highly deferential to convening authorities. Even if military judges occasionally reject agreed-upon sentences, the long-term effect would be to increase the power of convening authorities. By ensuring the military justice system produces reasonable, accurate, and consistent sentences, military judges increase the legitimacy of military justice. This, in turn, increases the power of convening authorities whose disciplinary authority is derived from military justice's legitimacy.[111]

Second, although allowing military judges to reject agreed-upon sentences would reduce the parties' ability to predict the outcome of the case, this cost is minimal and would not likely affect negotiations. Civilian systems dispose of the vast majority of their cases through plea agreements [112] despite a virtually universal requirement of judicial approval.[113]

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[111] Military judges' rejection of agreed-upon sentences would not be the only instance in which a result that seems inconsistent with the convening authority's intent increases the legitimacy of military justice. Every case referred to a court-martial by a convening authority might end up as an acquittal. An acquittal, however, does not mean the system failed. To the contrary, in many cases, acquittals are the result of the military justice system functioning properly.

[112] "In 2015, only 2.9% of federal defendants went to trial, and, although the state statistics are still being gathered, it may be as low as less than 2%." Jed S. Rakoff, *Constitutional Foundation: Institutional Design and Community Voice: Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It*, 111 NW. U.L. REV. 1429, 1432 (2017).

[113] *See, e.g.*, Ala. R. Crim. P. 14.3b ("the court may accept or reject the [plea] agreement or may defer its decision as to acceptance or rejection until receipt of a presentence report"); Alaska R. Crim. P. 11(e)(1) (court may accept or reject the [plea] agreement, or defer its decision); Ariz. R. Crim. P. 17.4; Ark. R. Crim. P. 25.3(b); Cal. Penal Code § 1192.5 (court's approval of plea not binding); Colo. Crim. P. R. 11(f)(5) ("Notwithstanding the reaching of a plea agreement between the district attorney and defense counsel of defendant, the judge in every case should exercise an independent judgment in deciding whether to grant charge and sentence concessions."); Conn. Practice Book § 39-8; Howard v. State, 458 A.2d 1180, 1185 (Del. 1983) (courts have discretion to reject a plea agreements made pursuant to Del. Super. Ct. Crim. R. 11); Fl. Crim. P. R. 3.172

Third, allowing judges to reject agreed-upon sentences would have little, if any, effect on the efficiency of military justice. Initially, these judicial rejections should be rare. Further, although sentence rejections, in the short run, would require the parties to expend additional effort, in the long run, military judges would likely be saving the parties valuable time, effort, and resources. By addressing red flags, military judges would prevent needless, additional litigation due to appellate reviews of sentence appropriateness.

Thus, the benefits of allowing military judges to reject plainly unreasonable agreed-upon sentences outweigh its costs. In the next Part, this paper proposes specific changes to the Article 53a Framework to allow military judges to exercise this authority.

IV. Proposed Modifications to the Article 53a Framework

Part IV proposes modifying the Article 53a Framework to (1) allow military judges to reject plea agreements due to their sentencing provisions; (2) establish plainly unreasonable as the standard under which military judges may reject such agreements; and (3) provide the procedure under which military judges may exercise this authority. Part IV, specifically, discusses modifications to Article 53a, RCM 705, and RCM 910.

(requiring trial judge concurrence with plea offer or negotiation and allowing plea to be withdrawn if the trial judge does not concur); Ga. Unif. Super. Ct. 33.10 (if trial court intends to reject a plea agreement, trial court must inform defendant that the plea agreement does not bind the trial court, it intends to reject the agreement, the disposition may be less favorable than that contemplated by agreement, and defendant has the right to withdraw his or her guilty plea); Haw. R. Penal. R. Rule 11(f)(1); I.C.R. Rule 11(f)(2) (court may accept, reject, or defer decision as to acceptance or rejection of plea agreement until consideration of presentence report); Ill. Sup. Ct., R. Rule 402(d)(2) (court may withdraw concurrence or conditional concurrence with tentative plea agreement).

A. Article 53a

1. Proposed Modification

This section proposes inserting the following paragraph into Article 53a as paragraph 5(c): "ACCEPTANCE OF PLEA AGREEMENT. – Subject to subsection (b), the military judge of a general or special court-martial shall accept a plea agreement submitted by the parties, except that the military judge may reject a plea agreement when the agreed-upon sentence is plainly unreasonable." Under this proposal, subsection (b) of Article 53a would remain as presently drafted, and the current subsections (c) and (d) would be changed, respectively, to subsections (d) and (e).

2. Discussion

This modification largely adopts the MJRG proposal.[114] The proposed Article 53a would explicitly allow military judges to reject plea agreements due to their sentencing provisions, establishing "plainly unreasonable" as the standard military judges must follow. Allowing military judges to reject plea agreements would provide military judges with a powerful, discretionary authority. However, the plainly unreasonable standard would limit that authority, balancing judicial discretion with the power of the convening authority. This limited discretion, as discussed in Part III, would increase the legitimacy of the military justice system. A more in-depth discussion of aspects of the proposed Article 53a follows.

Initially, the Article 53a this paper proposes establishes that military judges' rejections of plea agreements are an *exception* to the general rule. If enacted, the proposed Article 53a would require military judges to approve lawful plea agreements unless the agreed-upon sentences are plainly unreasonable. Because the intent of the proposed Article 53a is to ensure military judges provide a limited degree of oversight in plea agreements without subjugating the power of the convening authorities, allowing military judges to reject plea agreements only under exceptional circumstances reinforces that they should do so rarely. Moreover, the plainly unreasonable standard is deferential to the convening authority.[115]

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[114] *See supra* note 42.

[115] *See* 2019 MCM, *supra* note 2, R.C.M. 1117(e); *see also* United States v. Hardison, 614 Fed. Appx. 654, 659 (4th Cir. 2015) (citing United States v.

"A sentence is plainly unreasonable if no reasonable sentencing authority would determine such a sentence in view of the record before the sentencing authority at the time the sentence was announced . . ."[116] The plainly unreasonable standard thus further reinforces that rejections should occur only on an exceptional basis.

Alternatively, Congress could enact Article 53a without including any standard. This would provide military judges with even greater discretion than would the Article 53a this paper proposes. The alternative Article 53a would simply read as follows: "Subject to subsection (b), the military judge may reject a plea agreement submitted by the parties." This alternative would more closely resemble Rule 11[117] and state procedural rules governing the acceptance of plea agreements.[118] The plainly unreasonable standard, however, is the better option for military courts for several reasons.

First, the plainly unreasonable standard complements the greater predictability and bargaining power that the Article 53a Framework provides to the parties. In providing the parties with a greater level of confidence that military judges will approve agreed-upon sentences, the plainly unreasonable standard allows the parties to negotiate more efficiently. Efficient negotiations facilitate prompt outcomes, which support convening authorities' ability to maintain good order and discipline.

Thompson, 595 F.3d 544, 548 (4th Cir. 2010)) ("A sentence can only be plainly unreasonable if the sentencing error is 'clear' or 'obvious,' in that the sentence runs afoul of clearly settled law.").

[116] 2019 MCM, *supra* note 2, R.C.M. 1117(e).

[117] *See supra* note 96. The drafters of Rule 11 intended the trial court to possess discretion in accepting plea bargains. "The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such discretion is left to the discretion of the individual trial judge." FED. R. CRIM. P. 11 advisory committee's note to 1974 amendments. *See* United States v. Walker 2017 U.S. Dist. LEXIS 98233 at *6–7 (noting the broad discretion afforded to judges to accept or reject a plea agreement, stating that "[o]ther than granting the court broad discretion to accept or reject a plea agreement, Rule 11 provides no further guidance for the court").

[118] *See supra* note 113.

Second, the fact that the plainly unreasonable standard is deferential to the prosecution, although generally appropriate in any context, [119] is necessary in the military. Military justice prosecutorial choices are often based on operational considerations, many of which have no civilian equivalent. For example, convening authorities might, in agreeing to a sentence in a plea agreement, consider whether a trial requires revealing sensitive or confidential information. Convening authorities might also consider how a trial would affect training or deployment. In short, military judges should afford greater deference to convening authorities in view of the objective and operational realities of military justice. The plainly unreasonable standard supports this deference.

Third, the plainly unreasonable standard invites the same standard for appellate review, which is consistent with both RCM 1117[120] and federal jurisprudence.[121] The appellate service courts' acceptance of the same standard of review would streamline appellate review of sentence appropriateness. Moreover, consistency between military and civilian jurisprudence would allow military justice practitioners to look to federal jurisprudence as persuasive authority.

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[119] "Generally, courts should be wary of second-guessing prosecutorial choices. Courts do not know which charges are best initiated at which time, which allocation of prosecutorial resources is most efficient, or the relative strengths of various cases and charges." United States v. Miller, 722 F.2d 562, 565 (9th Cir. 1983) (citing United States v. Lovasco, 431 U.S. 783, 793-94 (1977); U.S. Ammidown, 497 F.2d 615, 621 (D.C.Cir. 1973); and *see* Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV.L.REV. 1521, 1547 (1981)).

[120] 2019 MCM, *supra* note 2, R.C.M. 1117; *see also* UCMJ art. 56(d) (2019).

[121] In *Gall v. United States*, the Supreme Court ruled that "courts of appeals must review all sentences—whether inside, just outside, or significantly outside the [sentencing] Guidelines—under a deferential abuse of discretion standard." 552 U.S. 38, 41 (2007). The Supreme Court further found that "appellate review of sentencing decisions is limited to determining whether they are 'reasonable.'" *Id*. at 46. In support of this deferential standard, the Supreme Court stated, "The sentencing judge is in a superior position to find facts and judge their import . . . The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." *Id*. at 51. *See* United States v. Bolds, 511 F.3d 568, 573-75 (6th Cir. 2007) (noting "the plainly unreasonable standard of review was drawn directly from 18 U.S.C. § 3742, the appellate review provision in the Sentencing Reform Act" and holding supervised release revocation sentences are to be reviewed "the same way that we review all other sentences—'under a deferential abuse of discretion standard' for reasonableness.").

Fourth, as discussed, the plainly unreasonable standard provides a buffer between the parties and the appellate courts reviewing cases for sentencing appropriateness.[122] Regardless whether the appellate courts find a sentence inappropriate, the military judge's initial approval of the sentence supports the parties' judgment and competence.

B. RCM 705

1. Proposed Changes

This paper proposes adding the following provision to RCM 705(d):[123] "Sentencing Reasonableness. The military judge of a general or special court-martial shall accept a plea agreement submitted by the parties subject to this Rule and RCM subparagraph 910(f)(4)(B), except that the military judge may reject a plea agreement when the agreed-upon sentence is plainly unreasonable."

Additionally, this paper proposes modifying RCM 705(e)(4) to read as follows, with italics indicating the proposed, additional language:

> The accused may withdraw from a plea agreement at any time prior to sentence being announced. If the accused elects to withdraw from the plea agreement after the acceptance of the plea but before the sentence is announced, the military judge shall permit the accused to withdraw only for good cause shown. *The military judge's deferral of accepting a plea agreement until the completion of presentencing proceedings pursuant to R.C.M. 910(f)(6) will constitute good cause*.

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[122] Under the Legacy System, appellate courts reviewed cases for sentence appropriateness even when agreed-upon quantums limited the sentences. *See e.g.*, United States v. Deleon, 2018 CCA LEXIS 557 (N-M. Ct. Crim. App. Dec. 11, 2018) (conducting de novo review pursuant to Article 66(c), UCMJ, of sentence appropriateness of sentence of seven years' confinement where pretrial agreement required suspension of confinement in excess of 60 months). Under the Article 53a Framework, service courts will likely continue conducting such reviews on cases with agreed-upon sentences.

[123] *See* 2019 MCM, *supra* note 2, R.C.M. 705.

2. Discussion

This provision implements the proposed Article 53a and allows military judges to reject plea agreements with plainly unreasonable agreed-upon sentences. This provision, consistent with the proposed Article 53a, reinforces that military judges' rejections of plea agreements should only occur on an exceptional basis.

The proposed additional language of RCM 705(e)(4) provides the accused with the ability to withdraw from plea agreements if military judges refuse to immediately approve agreed-upon sentences. This modification would address the accused's concerns that they risk revealing their entire sentencing case, which might include evidence they would admit in a contested trial, to the government without knowing for a fact whether military judges will approve the agreement.

Finally, this provision should import or refer to RCM 1117's definition of plainly unreasonable.[124] By doing so, this provision would allow military judges to apply the plainly unreasonable standard consistently, while harmonizing military judges' standard of review with that of the appellate courts.

C. RCM 910

1. Proposed Changes

This paper recommends modifying RCM 910(f)(6)[125] to read as follows:

> After the plea agreement inquiry, the military judge shall announce on the record whether the plea is accepted and may announce on the record whether the plea agreement is accepted or defer its decision until the completion of presentencing proceedings. Upon acceptance by the military judge, a plea agreement shall bind the parties and the court-martial.

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[124] *See* 2019 MCM, *supra* note 2, R.C.M. 1117(c)(3).
[125] *See* 2019 MCM, *supra*, note 2, R.C.M. 910.

This paper also recommends modifying RCM 910(f)(7) to include the following language: "The military judge may allow the parties to submit additional evidence if the military judge announces the military judge's intent to reject a plea agreement because the agreed-upon sentence is plainly unreasonable."

2. Discussion

The proposed RCM 910 would allow military judges to access all information presented during sentencing before becoming bound to a plea agreement. Matters in aggravation, mitigation, extenuation, rehabilitative potential, as well as victim input, would permit military judges to make better-informed decisions regarding whether agreed-upon sentences are plainly unreasonable. Although military judges might not always require this information, they should have the option to consider it when necessary. The proposed RCM 910 is modeled after portions of Rule 11 that authorize federal judges to defer acceptance of a plea agreement until they have reviewed the presentencing report.[126] Not only would the proposed RCM 910 allow sentencing proceedings to have the same effect as federal presentence reports, but it would also provide military judges with substantially the same information that is provided to federal judges.[127]

Although the proposed RCM 910 authorizes military judges to defer their decision to accept the plea agreement, it does not permit them to delay acceptance of the plea. Regardless whether military judges approve the plea agreement or defer their decision until the conclusion of sentencing, the parties must begin sentencing in accordance with RCM 1001.[128] The proposed RCM 910, thus, allows military judges to consider

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[126] *See supra* note 96.

[127] Presentence Reports must "identify any factor relevant to . . . the appropriate kind of sentence," the defendant's history and characteristics, including any prior criminal record, financial condition, and "any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment." FED. R. CRIM. P. 32.

[128] 2019 MCM, *supra* note 2, R.C.M. 1001. The government may "present evidence as to any aggravating circumstance directly relating to or resulting from the offenses of which the accused has been found guilty." 2019 MCM, *supra* note 2, R.C.M. 1001(b)(4). Crime victims have a right to be reasonably heard at presentencing proceeding related to offense "of which accused has been found guilty." 2019 MCM, *supra* note 2, R.C.M. 1001(c)(1).

all available information while providing an incentive to the parties to engage in meaningful, robust sentencing proceeding.

The proposed addition to RCM 910(f)(7) would also increase efficiency by allowing the parties to present evidence to address the specific concerns of military judges who indicate that agreed-upon sentences appear plainly unreasonable. This would prevent military judges from surprising the parties by rejecting plea agreements, and allow the parties, effectively, another bite at the apple, which could—if successful—prevent unnecessary, future litigation.

V. Mitigating Legitimacy Risk Under the Article 53a Framework

Part V proposes ways military justice practitioners can reduce legitimacy risk in the current Article 53a Framework.

A. Avoiding Determinate Sentencing Provisions

Although the parties can currently agree to a definite sentence in a plea agreement, they should consider not doing so. Because those agreements completely remove military judges' discretion on sentencing, they create legitimacy risk. The reduced incentive of the parties to engage in meaningful sentencing proceedings enhances this risk. As discussed, sentencing proceedings that cannot affect the sentence might not only be futile, but could also undermine the attorneys' obligation to their clients. Guilty pleas based on an agreed-upon definite sentences would likely resemble the empty rituals that are antithetical to military jurisprudence.

Instead of a definite sentence, the parties should agree to a sentencing range. Sentencing ranges allow military judges to exercise discretion, which enhances proceedings' legitimacy. Sentencing ranges further increase legitimacy by encouraging the parties to engage in meaningful sentencing proceedings, while establishing a sufficient record for review to demonstrate defense counsels' competent representation. Because larger sentencing ranges provide military judges with more discretion, sentencing ranges should not be negligible.

Despite the advantages of sentencing ranges, convening authorities might be reluctant to forgo the opportunity to demand a precise sentence. Although definite sentencing provisions provide the greatest degree of

certainty, sentencing ranges that only impose a minimum sentence (i.e. "no less than") have substantially the same effect. Agreeing to a minimum sentence would meet the intent of most convening authorities while affording discretion to military judges. However, because sentencing ranges that contain only a minimum sentence are less favorable to the defense, the defense would likely negotiate for a lower minimum sentence.

B. Creating a Record

The government can also mitigate the Article 53a Framework's legitimacy risk by building robust records that support the reasonableness of agreed-upon sentences. Trial counsel could, for example, proffer to military judges that the agreed-upon sentences are generally consistent with others across jurisdictions or otherwise accurately represent an appropriate punishment.

Although defense counsel have little incentive to minimize the appellate risk associated with sentencing review—which can provide relief to their clients—they have an interest in establishing a record of their competence. For this reason, defense counsel should also build a record establishing that agreed-upon sentences are reasonable.[129]

[129] There are many scenarios in which defense counsel might advise their clients to agree to sentences that appear severe. However, agreeing to a severe sentence could be the best course of action for the accused. For example, extending litigation may result in the government's case becoming stronger if the government identifies additional witnesses, evidence, or misconduct. A stronger case for the government could result in a higher sentence. Additionally, a sentence following a conviction after a trial could be more severe than the agreed-upon sentence. Explaining to a military judge why a very high agreed upon sentence is not plainly unreasonable might be more challenging for the defense than for the government. Defense counsel generally may not proffer privileged or confidential matters. The defense's record to establish the reasonableness of the agreement should, therefore, be somewhat conclusory. For example, the defense might inform the military judge that they have had extensive conversations with their client concerning the plea agreement and its sentencing provision, that all terms of the plea agreement originated with the defense, and that the defense believes the agreement is in the best interest of their client. The defense may also concur with the government's assertion that the sentence is generally consistent with other, similar cases.

However, even though the government and the defense benefit from creating a record supporting the reasonableness of agreed-upon sentences, it is unclear whether, under the present Article 53a Framework, military judges will permit them to do so. Military judges, given their lack of authority to reject these sentences, have no obligation to allow the parties to create such a record. Military judges might, in fact, consider "reasonableness records" irrelevant and disallow them. On the other hand, military judges anticipating appellate review might encourage the parties to provide the reviewing court as much information as possible. Even if military judges refuse to allow the parties to build a reasonableness record during the courts' acceptance of the guilty plea, the parties should establish reasonableness during sentencing.

C. Providing the Military Judge with Rejection Discretion

The parties may also consider including a provision in plea agreements allowing military judges to reject the agreement if the military judge finds its agreed-upon sentence plainly unreasonable. This provision would provide the advantages discussed in this paper, including a reduced risk of a plainly unreasonable sentence, appellate action, and concerns about military justice's legitimacy. Although convening authorities might be reluctant to allow military judges to reject agreed-upon sentences, convening authorities might nonetheless support these "rejection" provisions in order to avoid unnecessary, future litigation, and in doing so, demonstrate their trust of military judges and the military justice system.

VI. Conclusion

Plea agreements are likely to remain one of the most important processes in military justice. Plea agreements, in fact, might become even more prevalent under the streamlined Article 53a Framework. Allowing military judges to reject only those agreements with plainly unreasonable agreed-upon sentences would result in more accurate and consistent sentences, and meaningful sentencing proceedings that reflect the military's historical priority of ensuring fairness. This would increase the legitimacy of military justice.

One of the military justice system's greatest strengths is its ability to continually reinvent itself, improving and strengthening its processes.[130] This paper does not identify a flaw that represents an existential threat to the legitimacy of military justice. To the contrary, the Article 53a Framework will likely advance military justice in many ways—but the Framework is new and can be improved. Allowing military judges to reject plainly unreasonable agreed-upon sentences would provide the system with a tool to avoid worst-case scenarios that might occur on the fringes of practice. Simply put, if the legitimacy of the military justice system can be safeguarded, even from a remote threat, it should be.

Those who disagree and believe the Article 53a Framework needs no improvement, who insist on convening authorities maintaining all of their disciplinary power at all costs, might consider the adage, "If you're good enough, the referee doesn't matter."[131] It is the convening authorities' job to wield tremendous power responsibly. Military prosecutors and defense attorneys are generally well-trained, experienced professionals. There is, as a result, a very low probability that military judges would have to intervene by rejecting agreements these professionals reach. But on the rare occasions on which military judges believe they must do so, we should let them. Even when referees do not matter, we still give them a whistle.

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[130] "The UCMJ was a crucial step, but it was only the first step, and the history of our system since 1951 has been one of change as military justice and military legal practice adapted to a different armed force and to evolving ideas concerning criminal law procedures." Finnegan, *supra* note 67, at 192-93.

[131] *Jock Stein Quotations*, https://quotetab.com/quotes/by-jock-stein#HPRRWtqkHegA4ykl.97 (last visited Mar. 12, 2019).