THE ARMY LAWYER

Headquarters, Department of the Army

February 2011

ARTICLES

TJAGLCS PRACTICE NOTES

Faculty & Staff, The Judge Advocate General's Legal Center & School

BOOK REVIEWS

CLE NEWS

CURRENT MATERIALS OF INTEREST

Department of the Army Pamphlet 27-50-453

Editor, Captain Madeline Yanford
Assistant Editor, Captain Ronald T. P. Alcala
Assistant Editor, Major Ted Martin
Technical Editor, Charles J. Strong

The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for $45.00 each ($63.00 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Editor and Assistant Editor thank the Adjunct Editors for their invaluable assistance. The Board of Adjunct Editors consists of highly qualified Reserve officers selected for their demonstrated academic excellence and legal research and writing skills. Prospective candidates may send Microsoft Word versions of their resumes, detailing relevant experience, to the Technical Editor at TJAGLCS-Tech-Editor@conus.army.mil.

The Editorial Board of *The Army Lawyer* includes the Chair, Administrative and Civil Law Department; and the Director, Professional Writing Program. The Editorial Board evaluates all material submitted for publication, the decisions of which are subject to final approval by the Dean, The Judge Advocate General's School, U.S. Army. *The Army Lawyer* welcomes articles from all military and civilian authors on topics of interest to military lawyers. Articles should be submitted via electronic mail to TJAGLCS-Tech-Editor@conus.army.mil. Articles should follow *The Bluebook, A Uniform System of Citation* (19th ed. 2010) and the *Military Citation Guide* (TJAGLCS, 15th ed. 2010). No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed on the World Wide Web by registered users at http://www.jagcnet.army.mil/ArmyLawyer.

Address changes for official channels distribution: Provide changes to the Editor, *The Army Lawyer*, The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781, telephone 1-800-552-3978 (press 1 and extension 3396) or electronic mail to TJAGLCS-Tech-Editor@conus.army.mil.

Articles may be cited as: ARMY LAW., [date], at [first page of article], [pincite].

Lore of the Corps

Articles

TJAGLCS Practice Notes

Faculty, The Judge Advocate General's Legal Center & School

Legal Research Note

Book Reviews

Lore of the Corps

"The Largest Murder Trial in the History of the United States": The Houston Riots Courts-Martial of 1917

Fred L. Borch III
Regimental Historian & Archivist

[*Editor's Note: As February is "Black History Month," this Lore of the Corps about African-American Soldiers is both timely and appropriate.*]

On the night of 23 August 1917, about 100 African-American Soldiers assigned to the 24th Infantry Regiment marched from their nearby camp into Houston, Texas. They were armed with Springfield rifles, and were enraged because they believed that one of their fellow Soldiers had been killed by the local police. As the troopers moved through Houston, they fought a running battle with civilians, Houston police officers and elements of other military units stationed in the city. When the riot ended, fifteen white men had been killed. Sixty-three African-American Soldiers believed to be responsible for the riot—and the deaths—were subsequently court-martialed in the "largest murder trial in the history of the United States."[1] While the story of Houston riots trial is worth knowing, the impact of the tragic event on the evolution of the military justice system is what makes it important in our Corps' history.

After America entered World War I in April 1917, a battalion of the all-black 24th Infantry Regiment was sent to Houston, Texas to guard the construction of a new training facility called Camp Logan. While the local white citizens of Houston welcomed the economic prosperity that they believed that Camp Logan would bring to their community, they loudly protested the decision to station African-American Soldiers in Houston. In racially segregated Texas—with its Jim Crow culture—white people did not like the idea of well-armed African-American Soldiers in their midst. Some whites also feared that these troops might bring ideas and attitudes that "would cause local blacks to 'forget their place.'"[2]

From the outset, the Soldiers of the 24th Infantry resented the "Whites Only" signage prevalent in Houston. Several troops also came into conflict with the police, streetcar conductors and other passengers when they refused to sit in the rear of the streetcar. Finally, there were many incidents in which Soldiers took offense at epithets directed at them by white townspeople. The use of the "N-word," in particular infuriated African-American Soldiers who heard it, and the slur "was invariably met by angry responses, outbursts of profanity and threats of vengeance."[3] More than a few Soldiers were arrested or beaten, or both, as a result of these run-ins with local citizens.[4]

Matters came to a head on 23 August, when a white Houston police officer beat two African-American Soldiers in two separate incidents; the second beating occurred when the Soldier-victim was questioning the policeman about the earlier assault. When this second victim did not return to camp, a false rumor began that he had been "shot and killed by a policeman."[5] Although this second victim ultimately did return—proving that he had not been killed—his fellow infantrymen were so upset that they decided to take matters into their own hands.

Despite entreaties from their commander, Major (MAJ) Kneeland S. Snow, to remain in camp and stay calm, about 100 men mutinied and departed for Houston.[6] Having seized their Springfield rifles and some ammunition, the Soldiers' intent was to kill the policeman who had beaten their fellow Soldiers—and as many other policemen as they could locate.

Once inside the city, the infantrymen fought a series of running battles with the Houston police, local citizens and National Guardsmen, before disbanding, slipping out of town, and returning to camp. While the riot had lasted merely two hours, it ultimately left fifteen white citizens dead (including four Houston police officers); some of the dead had been mutilated by bayonets. Eleven other civilian men and women had been seriously injured. Four Soldiers also died. Two were accidentally shot by their fellow Soldiers. A third was killed when he was found hiding under a house after the riots. Finally, the leader of the alleged mutineers, a company acting first sergeant named Vida Henry, apparently took his own life—most likely

[1] THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS 125, at fig.37 (1975) (photograph caption "Largest Murder Trial in the History of the United States").

[2] JOHN MINTON, THE HOUSTON RIOT AND COURTS-MARTIAL OF 1917, at 13 (n.d.). In 1917, municipal legislation in Houston mandated racially separate YMCAs, libraries, and streetcar seating. Some streets also were specified as "whites only" for the watching of parades. GARNA L. CHRISTIAN, BLACK SOLDIERS IN JIM CROW TEXAS 1899–1917, at 145 (1995).

[3] *Id.* at 149.

[4] THE ARMY LAWYER, *supra* note 1, at 126; Transcript of Proceedings of a General Court-Martial at 8, United States v. Robert Tillman et al. (n.d.) (No. 114575).

[5] Transcript of Proceedings of a General Court-Martial at 33, United States v. Robert Tillman et al.

[6] *Id.* at 4.

because he had some idea what faced him and the other Soldiers who had participated in the mutiny and riot.[7]

In the days that followed the Houston riots, Coast Artillery Corps personnel and Soldiers from the 19th Infantry Regiment were deployed to restore order and disarm the suspected mutineers. Those believed to have participated in the mutiny were sent to the stockade at Fort Bliss, Texas to await trial.

A little more than two months later, on 1 November 1917, a general court-martial convened at Fort Sam Houston began hearing evidence against sixty-three Soldiers from the 24th Infantry. All were charged with disobeying a lawful order (to remain in the camp), assault, mutiny, and murder arising out of the Houston riots. The accused—all of whom pleaded not guilty—were represented by a single defense counsel, MAJ Harry H. Grier. At the time he was detailed to the trial, Grier was the Inspector General, 36th Division. While he had taught law at the U.S. Military Academy and almost certainly had considerable experience with courts-martial proceedings, Grier was not a lawyer.[8]

The prosecution was conducted by MAJ Dudley V. Sutphin, a judge advocate in the Army Reserve Corps.[9] Interestingly, there was additional legal oversight of the trial. This is because Major General (MG) John W. Ruckman, who convened the court-martial as the Commander, Southern Department, detailed judge advocate Colonel (COL) John A. Hull to supervise the proceedings to ensure the lawfulness of the court-martial.[10]

The trial lasted twenty-two days, and the court heard 196 witnesses. The most damning evidence against the accused came from the testimony of "a few self-confessed participants who took the stand in exchange for immunity."[11] Grier, the lone defense counsel, despite the inherent conflict presented by representing multiple accused, argued that some of the men should be acquitted because they lacked the *mens rea* required for murder or mutiny. He also insisted that because the prosecution had failed in a number of cases to prove guilt beyond a reasonable doubt, the accused should be found not guilty. Finally, while acknowledging that some of the accused were culpable, Grier blamed the Houston police for failing to cooperate with military authorities to keep the peace between white Houstonians and the African-American Soldiers.[12]

When the trial finished in late November, the court members agreed with the defense and acquitted five of the accused. The remaining Soldiers were not as fortunate: thirteen Soldiers were condemned to death and forty-one men were sentenced to life imprisonment. Only four Soldiers received lesser terms of imprisonment.

The thirteen accused who had been sentenced to death requested that they be shot by firing squad. The court members, however, condemned them to death by hanging and informed the accused on 9 December that they would suffer this ignominious punishment.

Two days later, on the morning of 11 December, the thirteen condemned men were handcuffed, transported by truck to a hastily constructed wooden scaffold, and hanged at sunrise. It was the first mass execution since 1847.

Although the Articles of War permitted these death sentences to be carried out immediately because the United States was at war, the lawfulness of these hangings did not lessen the outcry and criticism that followed. Brigadier General Samuel T. Ansell, then serving as acting Judge Advocate General, was particularly incensed. As he later explained:

> The men were executed immediately upon the termination of the trial and before their records could be forwarded to Washington

---

[7] CHRISTIAN, *supra* note 2, at 153, 172.

[8] Harry Surgisson Grier (1880–1935) graduated from the U.S. Military Academy in 1903 and was commissioned in the infantry. Over the next thirty-two years, he served in a variety of assignments and locations, including two tours in the Philippine Islands, service with Pershing's Punitive Expedition in Mexico, and World War I duty with the American Expeditionary Force (AEF) in France and Germany. Grier also had a tour as an Instructor and Assistant Professor of Law at West Point. "Harry Surgisson Grier," ANNUAL REPORT, ASSEMBLY OF GRADUATES, at 243 (June 11, 1936).

[9] Born in Dayton, Ohio, in October 1875, Sutphin graduated from Yale University in 1897 and received his LL.B. from the University of Cincinnati in 1900. Sutphin then practiced law in Cincinnati. He specialized in trial work and served as a judge of the Superior Court of Cincinnati for a short period. After the United States entered World War I, Sutphin left his civilian law practice to accept a commission as a major (MAJ), Judge Advocate General's Reserve Corps. After a brief period of service at Headquarters, Central Department, Chicago, Illinois, Sutphin was reassigned to San Antonio, Texas, where he served as Trial judge advocate in the Houston Riot court-martial. Sutphin subsequently sailed to France where he served as judge advocate, 83d Division, AEF. In 1919, Sutphin left active duty as a lieutenant colonel and returned to his law practice in Ohio.

[10] Hull served as The Judge Advocate General (TJAG) from 1924 to 1928. Born in Bloomfield, Iowa in 1874, he earned his Ph.D. from the University of Iowa in 1894; a year later, Hull received his law degree from Iowa. During the Spanish-American War and the Philippine Insurrection, Hull served as a Judge Advocate of Volunteers. Then, when he was twenty-six years old, Hull was appointed as a MAJ and judge advocate in the Regular Army. He soon became widely known as the "Boy Major." At the beginning of World War I, Hull was the Judge Advocate, Central Department, Chicago, Illinois. Soon thereafter he was placed on special duty with the Southern Department, where he supervised the prosecution of the Houston Riot courts-martial. In February 1918, then Colonel Hull sailed for France, where he organized and became the Director of the Rents, Requisitions and Claims Service, AEF, located at Tours. He later served as the chief, Finance Bureau, AEF. After returning to the United States in August 1919, Hull served in a variety of assignments in Washington, D.C. before being promoted to major general and TJAG in 1924. After retiring from active duty in 1928, Hull served several years as an associate justice on the Supreme Court of the Philippine Islands.

[11] MINTON, *supra* note 2, at 16.

[12] CHRISTIAN, *supra* note 2, at 162.

> or examined by anybody, and without, so far as I can see, any one of them having had time or opportunity to seek clemency from the source of clemency, if he had been so advised.[13]

Ansell quickly move to prevent any future similar occurrence. General Orders No. 7, promulgated by the War Department on 17 January 1918, prohibited the execution of the sentence in any case involving death before a review and a determination of legality could be done by the Judge Advocate General.[14]

But there was an even more important result: as a result of General Orders No. 7, the Judge Advocate General created a Board of Review with duties "in the nature of an appellate tribunal."[15] The Board was tasked with reviewing records of trial in all serious general courts-martial. While its opinions were advisory only—field commanders ultimately made the decision in courts-martial they had convened—the Board of Review was the first formal appellate structure in the Army. When Congress revised the Articles of War in 1920, it provided the first statutory basis for this review board. This legislative foundation still exists, and is the basis for today's Army Court of Criminal Appeals.

The Houston Riots Courts-Martial of 1917—and a number of other instances of injustice during the World War I era—ultimately led to other far reaching reforms in the military justice system.[16] But the history of those reforms, which culminated in the enactment of the Uniform Code of Military Justice in 1950, is another story for another day.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

https://www.jagcnet.army.mil/8525736A005BE1BE

[13] THE ARMY LAWYER, *supra* note 1, at 127.

[14] As a result of this general orders, the verdicts in two follow-on general courts-martial—involving an additional fifty-four African-American Soldiers who were convicted of rioting in Houston—were reviewed in Washington, D.C. As a result of this review, ten of sixteen death sentences imposed by these follow-on courts-martial were commuted to life imprisonment. By the end of the 1920s, however, all those who had been jailed as a result of the Houston riots courts-martial had been paroled. MINTON, *supra* note 2, at 26.

[15] THE ARMY LAWYER, *supra* note 1, at 130.

[16] *See e.g.*, Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967); Frederick B. Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1989).

Fight for Your Country, Then Fight to Keep Your Children: Military Members May Pay the Price . . . Twice

Major Jeri Hanes[*]

We cannot give the American Soldier too much credit. . . . He deserves everything we can do for him and he deserves all the respect we can show him. . . . The American Soldier is among the greatest assets this country has . . . . They perform their duties magnificently and bravely . . . . And they do it unhesitatingly . . . . When you think of the freedom you enjoy in this country, think of the sacrifices the Soldier has made to keep us free.[1]

I. Introduction

"After Iraq Tour, National Guard Soldier Loses Custody of Son;"[2] "A Soldier's Service Leads to a Custody Battle Back Home;"[3] "Deployed Troops Battle for Child Custody;"[4] "Custody Battles Can Become a Rude 'Welcome Home' for Military Parents."[5] These various media headlines reveal the entirely different battlefield servicemembers face upon return from combat. These headlines are followed by narratives of servicemembers who were the primary physical custodians of their children prior to their mobilization or deployment in support of the War on Terror.[6] Upon their return, each of these military parents found themselves in a fight to bring regain custody of their children to bring them home.[7]

Lieutenant Eva Slusher (previously Eva Crouch)[8] had physical custody of her daughter for six years in accordance with her divorce order, when she was subsequently mobilized for eighteen months with her Kentucky National Guard unit.[9] During her mobilization, Slusher's ex-husband received a temporary order to keep their child.[10] A month after Slusher was released from active duty, a family court judge permanently modified the original custody order because it was "in the best interests of the child."[11] Slusher stated, "[e]very time I went to court . . . I kept thinking there was no way they could rule against a mother because she was serving her country."[12]

Specialist Tonya Towne maintained physical custody of her son for eight years before being deployed to Iraq in 2004.[13] When she returned home in 2005, a New York family court modified her original custody order and gave permanent physical custody to her ex-husband.[14] Despite finding Towne to be an "excellent mother," the appellate court refused to overturn the family court's decision.[15] Towne's opinion: "I don't care how they word it; it's a punishment to the [S]oldier. The whole reason I'm in this situation is because I did a job for the military."[16]

Staff Sergeant Jessica Tolbe's husband received temporary custody of their two children when she deployed to Iraq for a fifteen month tour with her Hawaii unit. [17] However, when she redeployed and travelled to Tennessee to pick up her two sons in February 2009, Tolbe's ex-husband refused to honor their original custody order.[18] Instead, he filed for permanent modification of the original custody order and currently has custody of their children pending resolution of his petition.[19] Tolbe believes she "should never have been in this situation," and admits she has contemplated failing to fulfill military family care plan

---

[*] Judge Advocate, U.S. Army. Presently assigned as Military Personnel Law Attorney, Administrative Law Division, Office of The Judge Advocate General, Washington D.C. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course.

[1] Interview by Sergeant Major (U.S. Army, Retired) Erwin H. Koehler for the Ctr. of Military History with Sergeant Major of the Army George W. Dunaway, Second Sergeant Major of the Army (December 1993), as *reprinted in* DANIELLE GIOVANELLI & MARIANNA MERRICK YAMAMOTO, THE SERGEANTS MAJOR OF THE ARMY ON LEADERSHIP AND THE PROFESSION OF ARMS 39, 86–87 (Saundra J. Daugherty ed., The Ass'n of the U.S. Army, 2009).

[2] *After Iraq, National Guard Soldier Loses Custody of Son* (North Country public radio broadcast Feb. 14, 2008), http://www.northcountrypublicradio.org/news/newstopics.php?tid=64&nophotos=l&limit=10&start=10 [hereinafter North Country Radio Broadcast].

[3] David Kocieniewski, *A Soldier's Service Leads to a Custody Battle Back Home*, N.Y. TIMES, Sept. 1, 2009, at A1.

[4] Pauline Arrillaga, *Deployed Troops Battle for Child Custody*, WASH. POST, May 5, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007//05/05AR2007050500673.html.

[5] Leo Shane III, *Custody Battles Can Become a Rude 'Welcome Home' for Military Parents*, STARS & STRIPES (Mideast), Sept. 6, 2009.

[6] *See supra* notes 2–5.

[7] *See id*.

[8] *See* Arrillaga, *supra* note 4.

[9] *Id.*

[10] *Id*.

[11] *Id*.

[12] Shane, *supra* note 5.

[13] North Country Radio Broadcast, *supra* note 2.

[14] *Id*.

[15] Diffin v. Towne (*Diffin II*), 849 N.Y.S.2d 687 (N.Y. App. Div. 2008).

[16] North Country Radio Broadcast, *supra* note 2.

[17] Shane, *supra* note 5.

[18] *Id*.

[19] *Id*.

requirements,[20] "effectively end[ing] her military career," six years before she is eligible to retire.[21]

One former United States Army Judge Advocate said he believes that hundreds of servicemembers have been affected.[22] One only has to do a "Google" search to confirm the accuracy of this statement.[23] Another military attorney and National Guard Soldier recalled a case "where the judge wanted my client to swear that he wasn't going to be deployed again."[24] On the other hand, the president of the National Council of Juvenile and Family Court Judges asserts that state court judges are simply following their state codes that typically say "the primary interest is the best interest of the child."[25] Too often, state court judges assume that awarding custody to a military parent does not serve this interest.

However, the standard for modification of initial custody orders is by no means consistent throughout the fifty states.[26] Lieutenant Slusher eventually regained custody of her daughter.[27] During her two-year court battle, Kentucky changed its custody laws and mandated modifications based "in whole or in part" on deployments or mobilization were automatically void.[28] Kentucky law now requires reinstatement of the original custody order upon the servicemember's redeployment or release from active duty.[29] Specialist Towne was not so lucky. Even though Towne had "demonstrated . . . an unwavering commitment to [her son] Derrell's well-being,"[30] the Court of Appeals of New York denied her motion for leave to appeal the lower court's decision.[31] Finally, in the case of Staff Sergeant Jessica Tolbe—the outcome of her custody battle will largely depend on whether jurisdiction to hear the case lies with Tennessee where the children currently reside with their father, or in Hawaii where they lived before her deployment.[32] In Tennessee, there is some protection against permanent modification of initial custody orders based on deployments unless the parent "volunteers for permanent military duty as a career choice."[33] Hawaii provides servicemembers no protection.[34]

The Department of Defense (DoD) acknowledges that servicemember custody cases in response to deployments and mobilizations are escalating.[35] In the active duty military alone, there are more than 70,000 single parents.[36] As of March 2009, more than 30,000 single parents have deployed overseas as part of the Global War on Terror.[37] Further, the military divorce rate is equivalent to the civilian population[38] and the military operational tempo shows no signs of slowing down.[39] Thus, thousands of parents remain subject to unpredictable and inconsistent treatment of military deployments under fifty individual state custody modification laws.

The United States needs a uniform custody act for servicemembers which prohibits state courts from considering the military deployments of all servicemembers, Active and Reserve Components, during permanent child custody modification proceedings (the "deployment rule").[40]

---

[20] The military family care plan is a document required of single parents, dual military servicemembers, or divorced servicemembers with children. If a servicemember required to complete a family care plan fails to do so, this may result in involuntary separation from the military. The family care plan is discussed further in Part II.C of this article.

[21] *Id.*

[22] North Country Radio Broadcast, *supra* note 2.

[23] This author googled "Deployed Soldier Lose Custody" on 5 March 2010 and the search returned 25,500 hits.

[24] Shane, *supra* note 5.

[25] Arrillaga, *supra* note 4.

[26] *See infra* Part III.B (discussing the inconsistencies between the state statutes).

[27] Arrillaga, *supra* note 4.

[28] KY. REV. STAT. ANN. § 403.340(5) (West 2010).

[29] *Id.*

[30] *Diffin II*, 849 N.Y.S.2d 687, 690 (N.Y. App. Div. 2008).

[31] Diffin v. Towne (*Diffin III*), 889 N.E.2d 82 (N.Y. 2008).

[32] Ultimately jurisdiction will be determined by the provisions of the Uniform Child Custody Jurisdiction Enforcement Act, which both Tennessee and Hawaii have adopted. *See* HAW. REV. STAT. §§ 583A-101–317 (West 2010) and TENN. CODE ANN. §§ 36-6-201–43 (West 2009).

[33] TENN. CODE ANN. § 36-6-113(e) (West 2009). A strong argument can be made that this provision of the statute prevents a judge from applying the protections of Tennessee Code § 36-6-113 (b)(d) to a Soldier who enlists in the Active Component. This is in conflict with Tennessee Code § 36-6-113(a)(1) which states that the law's protections apply to the Active and Reserve Component. There is no case law interpreting these provisions of the statute yet.

[34] *See* HAW. REV. STAT. § 571-46(a)(6) (West 2010).

[35] North Country Radio Broadcast, *supra* note 2.

[36] Russ Bynum, *Charges Filed Against Non-Deployed Single Mom*, ARMY TIMES, Jan. 16, 2010, *available at* http://www.armytimes.com/news/2010/01ap_army_hutchinson_refused_deployment_011410/.

[37] *Women Warriors: Supporting She 'Who Has Borne the Battle,'* ISSUE REPORT (Iraq & Afg. Vet. of Am., N.Y., N.Y.), Oct. 2009, at 4 (citing data collected by the Defense Manpower Data Center on deployed demographics of single servicemembers).

[38] *Id.* at 5.

[39] *See infra* Part VI.A (discussing the current military operational tempo).

[40] In this article "deployment" means the temporary transfer of a servicemember serving in an active duty status to a location other than their normal place of duty or residence in support of a combat or military operation. This includes the mobilization of National Guard or Reserve servicemember to extended active duty status at Continental United Sates (CONUS) installations in support of military operations. "Deployment" does not include National Guard or Reserve annual training periods. This article only advocates for a deployment rule as defined above to be included in a uniform act on military child custody. This author acknowledges that there are additional areas regarding military child custody that are ripe for resolution, to include visitation rights during deployment "rest and recuperation" periods and assignment of temporary custody to third parties during deployment.

This rule is in the best interests of children and helps to provide more predictability to imprecise child custody standards by removing the ability of state judges to factor in military service based on their own personal and moral values.[41] Further, a deployment rule is required as a matter of policy. Such a rule is consistent with the multiple "nationalizing influences"[42] on family law over the last half-century.[43] This rule also recognizes that some consideration should be given to parental needs.[44] Finally, the rule is in keeping with this country's long tradition of providing special rights, protections, and benefits to those that sacrifice for the nation[45] and promotes Congress's constitutional directive to maintain[46] armed forces "for the common defence."[47]

This article will provide a summary of the current legal methodology for modification proceedings and background information on the Congressional and state response to the issues described above. The article will highlight the problems caused by the disparate or inexistent state laws through comparative analysis of the likely outcome of *Diffin v. Towne* (*Diffin II*)[48] under the laws of four states. Additionally, this article will explain that a deployment rule is in the best interest of children and is consistent with the fifty-year trend to establish national norms in family law, including the area of child custody. Next, the article will provide a recommendation for the best method to establish a deployment rule—state adoption of a uniform act on servicemember child custody. Finally, the article will conclude with the policy rationale in favor of a deployment rule.

Recently, the *Army Times* Managing Editor stated "the idea of volunteering to serve your country and then facing the prospect of losing your children is just, you know, it's a little mind-boggling."[49] Lieutenant Slusher still wonders why the law "protects your job while you're away," yet, "[i]t doesn't protect custody of your children."[50] This country needs a servicemember deployment rule to solve this problem.

II. Background

A. State Modification Standards in General

Generally, states resolve modification petitions by utilizing a two-pronged "change in circumstances" test that is mandated by statute[51] or judicial precedent.[52] Under this test, courts must find that there has been a substantial change in circumstances since the original custody award and that modification of the original order is necessary to the best interests of the child.[53] Normally, the parent seeking modification bears the burden of proving both prongs of the test.[54] As noted by scholars, the modification standard "virtually invites relitigation,"[55] because at any given

[41] *See infra* Part IV.C.

[42] Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue*, 42 FAM. L.Q. 713 (Winter 2009).

[43] *See infra* Part V.

[44] *See infra* Part VI.C.

[45] *See infra* Part VI.B.

[46] Congress is required to "raise and support Armies" and to "provide and maintain a Navy." U.S. CONST. art. I, § 8, cls. 12–13. This policy rationale is discussed in Part VI.A.

[47] *Id.* art. I, § 8, cl. 1. The Constitution spells "defense" as "defence." *Id.*

[48] 849 N.Y.S.2d 687 (N.Y. App. Div. 2008). This case is about a servicemember who lost primary physical custody of her child because she deployed to Iraq. *See also* Part III.A.1.

[49] North Country Radio Broadcast, *supra* note 2.

[50] Shane, *supra* note 5.

[51] *E.g.*, MO. ANN. STAT. § 452.410 (West 2009) (stating that in order to modify a previous custody order, courts must find "upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child"); ALASKA STAT. § 25-20-110(a) (2009) (stating that a child custody order "may be modified if the court determines that a change in circumstances requires the modification of the award and the modification is in the best interests of the child").

[52] *E.g.*, Keel v. Keel, 303 S.E.2d 917, 921 (Va. 1983) (stating that modification of previous child custody orders require courts to answer two questions: "first, has there been a change in circumstances since the most recent custody award; second, would a change in custody be in the best interests of the children") (citations omitted); Wade v. Hirschman, 903 So. 2d 928, 931 (Fla. 2005) (upholding the substantial change test utilized in Cooper v. Gress, 854 So. 2d 262 (Fla. Dist. Ct. App. 1st Dist. 2003), which states that the parent seeking modification "must show both that the circumstances have substantially, materially changed since the original custody determination *and* that the child's best interests justify changing custody."); Brown v. Yana, 127 P.3d 28, 33 (Cal. 2006) (stating that "custody modification is appropriate only if the parent seeking modification demonstrates 'a significant change of circumstances' indicating that a different custody arrangement would be in the child's best interest."); McLendon v. McLendon, 455 So. 2d 863, 865 (Ala. 1984) (stating that the parent "seeking modification [must] prove to the court's satisfaction that material changes affecting the child's welfare since the most recent decree demonstrate that custody should be disturbed to promote the child's best interests.").

[53] *Supra* notes 51–52.

[54] *E.g.*, McKinnie v. McKinnie, 472 N.W.2d 243, 244 (S.D. 1991) (finding that "as a general rule, a parent seeking a change of custody must show 1) a substantial change of circumstances, and 2) that the welfare and best interests of the child require modification."); Collins v. Collins, 51 P.3d 691, 693 (Or. Ct. App. 2002) (citing State *ex rel.* Johnson v. Bail, 938 P.2d 209, 212 (Or. 1997) (stating "we require the party moving for the change to demonstrate that (1) a change in circumstances has occurred since the most recent custodial order, and that (2) the modification will serve the best interests of the child."); Ellis v. Carucci, 161 P.3d 239, 242–43 (Nev. 2007) (holding that "modification of primary physical custody is warranted only when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification . . . the party seeking a modification of custody bears the burden of satisfying both prongs.").

[55] Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 763 (1985).

moment in time a parent may assert that there have been circumstances requiring modification of the initial custody order to promote the child's best interests.[56] Further, courts have nearly unlimited discretion in determining whether the prongs of the change in circumstances test have been satisfied.[57] For example, in Virginia, where judges are required to consider several statutory factors during the best interests portion of modification proceedings,[58] there is no requirement to "quantify or elaborate exactly what weight or consideration it has given to each of the statutory factors."[59] Additionally, the broad statutory language states that judges may consider "[s]uch other factors as the court deems necessary and proper to the determination."[60] For servicemembers who have previously been awarded physical custody of their children, this regime leaves them especially vulnerable to modification petitions by the noncustodial parent before or after deployments. The state modification standards and their effect on deployed servicemember child custody cases have evoked a response from Federal and state lawmakers and other interested parties.[61]

B. Federal, State, and the Uniform Law Commission Response to Servicemember Cases

1. United States Congress

The 2008 National Defense Authorization Act added the words "including any child custody proceeding" to the default judgment and ninety-day stay of proceedings provisions of the Servicemember's Civil Relief Act (SCRA).[62] Despite this explicit clarification of the applicability of the SCRA to child custody proceedings, the change offers little relief to servicemembers. This is because deployments are typically longer than the minimum ninety-days courts are required to stay proceedings pursuant to the SCRA, and courts are authorized to refuse additional requests.[63] Additionally, courts are not precluded from issuing temporary modification orders that may affect the best interests of the child analysis during permanent modification proceedings after the servicemember redeploys.[64] Finally, the American Bar Association (ABA) and the DoD have contested multiple Congressional efforts to broaden the child custody protections with federal legislation.[65] Consequently, the SCRA remains silent regarding what consideration courts may give to deployments in permanent modification proceedings.

2. State Legislatures

The state response has been varied. Some states have passed military child custody statutes,[66] while others have not.[67] Among the states that have acted, many fail to

[56] *See generally id.* at 763 (arguing for stricter standards before a court has discretion to make child custody modifications); JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979) (arguing against modification except in cases of imminent harm to the child).

[57] *E.g.*, Brown v. Brown, 518 S.E.2d 336, 338 (Va. Ct. App. 1999) ("In deciding whether to modify a custody order, the trial court's paramount concern must be the children's best interests. However, the trial court has broad discretion in determining what promotes the children's best interests.") (citations omitted); *Yana*, 127 P.3d at 36 (citing Navarro v. LaMusga, 88 P.3d 81 (Cal. 2004) (stating that a court has "'wide discretion'" in its change of circumstances and best interests determinations during child custody modification proceedings)).

[58] VA. CODE ANN. § 20-124.3 (West 2009).

[59] *Brown*, 518 S.E.2d at 338 (citations omitted).

[60] VA. CODE ANN. § 20-124.3(10) (West 2009).

[61] *See infra* Part II.B and Part II.C (explaining initiatives or reaction by Congress, state legislatures, the American Bar Association (ABA), and others).

[62] National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008, H.R. 5986, Pub. L. No. 110-181, 122 Stat. 3 (codified at 50 U.S.C.A. App. §§ 521(a), 522(a) (West 2009)). *See* Part IV.B.2 (discussing provisions of the Servicemember's Civil Relief Act (SCRA)).

[63] 50 U.S.C.A. App. §§ 521(b)(1), 521(d) (West 2009).

[64] *See, e.g.*, *infra* Part III.A (discussing that the *Diffin II* court found that the child had adjusted to his new environment under the temporary order and returning to the original custody order would cause disruption while he readjusted to his previous home). *See also* Whitaker v. Dixon, No. 32, 2009 WL 3837254 (Md.) (citing Lenser v. McGowan, 191 S.W.3d 506, 511 (Ark. 2004) (stating their agreement with the Lenser court's analysis that temporary custody orders are not precluded by the SCRA)).

[65] *See* Anita M. Ventrelli & Donald J. Guter, American Bar Association Resolution 106 (February 2009), *available at* http://www.abanet.org/leadership/2009/midyear/recommendations/106.pdf (stating the ABA opposition to any federal legislation related to military child custody cases child involving a deploying parent). Resolution 106 was adopted by the entire ABA at their 2009 Mid-Year Assembly. ABA, 2009 Midyear Assembly Meeting Minutes (Feb 14, 2009), *available at* http://www.abanet.org/yld/assembly/my09recap.shtml; *see also* e-mail from Colonel Shawn Shumake, Dir., Office of Legal Pol'y, Office of the Under Sec'y of Def. for Pers. and Readiness, to author (Jan. 14, 2010) (with attachment) (Priority Department of Defense Appeal FY 2010 Defense Authorization Bill) (on file with author). Congressional efforts to modify the SCRA include H.R. 4469, 11th Cong. (2d Sess. 2010); H.R. 2647, 111th Cong. (1st Sess. 2009) (located at title. V, subtitle H, § 208); H.R. 5658, 110th Cong. (2d Sess. 2008) (located at title XLV, § 4510); and S. 1658, 110th Cong. (1st Sess. 2007).

[66] The following states have some form of military child custody statute: Arizona, Arkansas, California, Colorado, Florida, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Mississippi, Montana, Nebraska, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin; *see also infra* Appendix A; Part III.B.4 (discussing that the rights and protections provided by the individual military child custody statutes are extremely diverse). Just because a state has passed a military child custody statute does not mean that they have protected military parents from losing custody of their children due to a deployment. Many of the states provide extremely limited protections. *See infra* note 156.

[67] The following states have no military child custody statute: Connecticut, Georgia, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Nevada, New Hampshire, New Mexico, Rhode Island, Vermont, Washington D.C., and Wyoming. The following states have bills that have been pending since as early as 2006: Alabama (H.B. 332, Reg. Sess. (2006)); Alaska (H.B. 264, 25th Leg., 1st Sess. (2007)); Delaware (H.B. 294, 144th G.A., Reg. Sess. (2008)); Minnesota (H.F. 2494, 85th Leg Sess. (2007)); New Jersey

provide guidance on the consideration courts should give to deployments in change of circumstances determinations and/or best interests analysis.[68] Thus, in a majority of states, these findings are entirely subjective and based on a particular judge's personal value system.

3. Uniform Law Commission

Formed in 1892, the Uniform Law Commission (ULC) is a not-for-profit, "unincorporated association" of commissions from every state.[69] The ULC strives to establish uniformity in state laws where it is "desirable and practicable,"[70] by promulgating "uniform" or "model" acts for adoption by state legislatures.[71] In the past, the ULC has drafted uniform acts for real estate law, family law, and consumer law. The ULC was also responsible for creating the Uniform Interstate Family Support Act (UIPSA), which was adopted by all fifty states.[72]

In 2009, the ULC responded to the inconsistent actions of the state legislatures in the area of military child custody by approving the formation of the Drafting Committee on Visitation and Custody Issues Affecting Military Personnel and Their Families (Military Custody Committee).[73] The committee will meet periodically for at least two years during an "open drafting process" in which they will solicit the expertise of representatives that reflect the positions of the various interests.[74] At a minimum, the draft act will be submitted to the entire ULC at the National Conference of Commissioners on Uniform State Laws (NCCUSL) for debate at two annual meetings prior to its approval and promulgation to the states for adoption.[75] The ULC website states that the Military Custody Committee will prepare an act that provides "standards and procedures" for military child custody issues for presentation at the 2011 annual meeting.[76] However, given the ABA's vigorous opposition to numerous proposals to amend the SCRA to reconcile state military custody laws,[77] the changes to the composition of the ULC Military Custody Committee is significant. Since the committee's original 2009 formation, three notable ABA members have been added to the drafting committee, while many original committee members are no longer participants.[78] The ABA now holds the majority of drafting committee members.[79]

C. The ABA and the DoD

In ABA Resolution 106, the organization asserts that "Americans owe many things to those who disproportionately bear the burden of national sacrifice," yet opposes any amendment to the SCRA which would prohibit state courts from using deployments as justification to modify child custody orders.[80] The ABA argues that federal legislation creates the risk of federal-question jurisdiction[81] in an area historically resolved by state courts.[82] Further, the ABA asserts that federal legislation is unnecessary since several individual states have passed legislation related to military child custody issues.[83] Finally, the ABA argues that such legislation would harm the best interests of the child standard and "tie the hands of judges" by forcing them to honor the custody order in effect prior to a parent's deployment.[84] However, the ABA resolution fails to address

(S.2910, 2006–2007 Leg. Sess.); Ohio (H.B. 503, 126th G.A., Reg. Sess. (Ohio 2006); *see also*, *infra* Appendix A.

[68] *See, e.g.*, MD. CODE ANN., FAM. LAW § 9-107 (West 2010); TEX. FAM. CODE ANN. § 156.105 (West 2009).

[69] Uniform Law Commission (ULC), Frequently Asked Questions About The National Conference of Commissioners on Uniform State Laws (NCCUSL), http://www.nccusl.org/Update/Desktop Default.aspx?tabindex =5&tabid=61 (last visited Mar. 1, 2010) [hereinafter FAQS About NCCUSL].

[70] NCCUSL CONST. art. 1, § 1.2 (2002), *available at* http://www.nccusl.org/ Update/DesktopDefault.aspx?tab index =3&tabid=18.

[71] FAQS About NCCUSL, *supra* note 69.

[72] *Id.*

[73] Press Release, ULC, New Drafting and Study Committees to be Appointed (Aug. 1, 2009), *available at* http://www.nccusl.org/Update/ DesktopModules/NewsDisplay.aspx?ItemID=219.

[74] FAQS About NCCUSL, *supra* note 69.

[75] *Id.* There is a two-step approval process which includes a vote of all commissioners followed by a vote of each state commission. If the ULC approves an act, it must be approved by the majority of state commissions. The second vote balances the advantage of states with large commissions on the initial vote of the entire ULC.

[76] ULC, Drafting Committees, http://www.nccusl.org/update/DesktopDe fault.aspx?tabindex=0&tabid=59 (last visited Feb. 28, 2010) [hereinafter Drafting Committees].

[77] Ventrelli & Guter, *supra* note 65.

[78] *Compare* ULC, Visitation and Custody Issues Affecting Military, http://www.nccusl.org/update/CommitteeSearchResults.aspx?committee= 340 (last visited Feb. 28, 2010) (providing for twelve drafting committee members, listed with the appropriate title as Committee Chair, Committee Member, or Committee Reporter), *with* Drafting Committees, *supra* note 77 (showing the deletion of all but two of the original drafting committee members and adding three new drafting committee members, listed with the following titles: ABA Advisor, Government and Public Sector Lawyers Division; ABA Section Advisor, Government and Public Sector Lawyers Division; and ABA Section Advisor, Family Law Section).

[79] *See* Drafting Committees, *supra* note 76.

[80] Ventrelli & Guter, *supra* note 65.

[81] *See* 28 U.S.C. § 1331 (2006) (providing for federal jurisdiction in cases involving federal laws); *id.* § 1446 (providing procedures for removal of certain state court actions to a federal district court).

[82] Ventrelli & Guter, *supra* note 65. *But cf. infra* Part V.C (explaining numerous instances where federal courts have become involved in family law issues to include child custody and visitation).

[83] Ventrelli & Guter, *supra* note 65. *But cf., supra* note 67 (listing the numerous states that have failed to act); *supra* note 66 (explaining the dramatic differences between the rights and benefits given to military parents under the state statutes); *infra* Part III.B (analyzing the diversity in the state laws).

[84] Ventrelli & Guter, *supra* note 65.

alternatives to federal legislation which would prevent federal-question jurisdiction;[85] how to resolve the wide variance in benefits and protections among the enacted state military custody statutes;[86] or the problems associated with the nearly unfettered discretion given to state court judges under the best interests of the child standard.[87] Instead, the ABA advocates for the status quo and against any law which would "upset the well-established legal-social framework for managing child custody cases."[88] This framework leaves thousands of deploying military parents vulnerable to extensive attorney fees, repeated court appearances, and protracted litigation to maintain custody of their children, as the price of their sacrifice for the nation each time they are ordered to deploy.

In an unsigned and undated DoD position paper, DoD advocates against federal legislation protecting deploying servicemembers from losing custody of their children.[89] The DoD notes that current state laws governing military child custody "vary to some degree" and that at least forty percent of states have failed to pass any legislation giving guidance to the courts.[90] Yet, the DoD position is that federal legislation providing consistent guidance to the states and protection to servicemembers who have served the nation would be "counterproductive."[91] Instead, the DoD asserts that judge advocates should work with the ABA to publicize opportunities for servicemembers to receive pro-bono representation from civilian family law attorneys and encourages those states that have not passed military child custody statutes to do so.[92] Finally, the DoD claims that pending adjustments to the military family care plan by each branch of service will resolve many of the problems that "result in litigation after deployment."[93]

On 27 October 2009, Chief of Naval Operations issued a new U.S. Navy family care policy.[94] On 30 November 2009, the Army issued a rapid action revision to the family care plan provision of its Regulation 600-20.[95] The revised Navy and Army guidance addresses whom is responsible for completing a family care plan and the importance of pre-deployment planning with the noncustodial parent.[96] However, the revamped plans inadequately resolve military child custody issues because a non-military parent cannot be forced to sign the plan. Additionally, even if the non-military parent does sign the family care plan, it is "not binding upon a court of law."[97]

Specialist (SPC) Leydi Mendoza's custody battle after her Army National Guard deployment to Iraq illustrates this point. Specialist Mendoza had a family care plan in place and agreed upon by her child's father prior to her deployment.[98] The agreement specified that upon her redeployment they would resume shared custody of their two-year-old daughter.[99] Unfortunately, when SPC Mendoza returned home, the child's father refused to abide by the agreement and claimed that visits of more than a few hours between SPC Mendoza and her daughter were "too disruptive."[100] The unenforceable family care plan did little to resolve SPC Mendoza's problem. As a result, she has spent thousands in legal fees thus far to gain access to a daughter she saw everyday prior to the deployment.[101] Additionally, servicemembers involved in custody proceedings similar to SPC Mendoza's should take little comfort in the progress of her case. Analysis of state child custody laws indicate that the same case heard in another state would likely result in a completely different outcome.[102]

---

[85] *See infra* Part VII.B (explaining the best method to protect military parents from losing their children is to create a Uniform Act for adoption by all fifty states).

[86] *See infra* Part III.B (arguing that the only way to prevent the variance in benefits and protections provided to servicemembers is for the states to adopt a uniform act that includes a deployment rule).

[87] *See infra* Part IV (discussing in part, the indeterminate and unpredictable nature of the bests interest of the child standard and the increased litigation that results from such a standard).

[88] Ventrelli & Guter, *supra* note 65.

[89] CBS Evening News with Katie Couric, Department of Defense Statement on Federal Child Custody Legislation (n.d.), http://www.cbsnews.com/stories/2009/12/12/eveningnews/main5972251.shtml (last visited Mar. 3, 2010) [hereinafter DoD Statement]. The paper's reference to a 22 September 2009 meeting between several Department of Defense (DoD) representatives on the issue of child custody indicates the paper was completed after this date. *Id*. This author has made numerous attempts to obtain a signed statement from the DoD. On 12 January 2010, the Office of the Under Secretary of Defense for Personnel and Readiness confirmed telephonically that the memorandum on the CBS news website is the DoD's statement.

[90] *Id*.

[91] *Id*.

[92] *Id*. Although DoD encourages states that do not have military custody statutes to pass legislation, they give no guidance regarding what the statute should include or which state to follow as a model statute. *Id*. This is significant because the variance in the states that have passed legislation is significant. *See infra* Part III.B.

[93] DoD Statement, *supra* note 89.

[94] U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 1740.4D, U.S. NAVY FAMILY CARE POLICY (Oct. 27, 2009) [hereinafter OPNAVINST 1740.4D].

[95] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 5-5 (Nov. 30, 2009) [hereinafter AR 600-20].

[96] OPNAVINST 1740.4D, *supra* note 94, at 3–4, 6; AR 600-20, *supra* note 95, paras. 5-5(a)(2), 5-5(b).

[97] AR 600-20, *supra* note 95, paras. 5-5(j)(1); *see also* OPNAVINST 1740.4D, *supra* note 94, at 2.

[98] Victor Epstein, *NJ Soldier Wins in Custody Dispute*, ARMY TIMES, Sept. 3, 2009, *available at* http://www.armytimes.com/news/2009/09/ap_090109.

[99] *Id*.

[100] Kocieniewski, *supra* note 3.

[101] *Id*. Thus far, a New Jersey court has granted Specialist Mendoza daily visitation and weekend overnight visits. Epstein, *supra* note 98.

[102] *See infra* Part III.

III. Comparative Analysis

One of the bedrock principles of the American legal system is that similarly situated individuals should be treated alike by the courts.[103] Some family law scholars assert that this equity precept should be applied to child custody in the form of "rule-like" standards, preventing judges from relying on their individual value systems to make custody determinations.[104] Other benefits of such a custody scheme are that it reduces fairness concerns and provides more predictable results, thereby reducing litigation of original custody orders.[105] However, under the current hodgepodge of state laws, the same case heard in different states may yield fifty different outcomes. Indeed, comparative analysis of *Diffin II*[106] under New York law and three sample states illustrates this point.[107] This operating system does little to instill a sense of fairness for servicemembers facing custody modification proceedings or provide predictability, which is ultimately in the best interests of the child.

A. *Diffin II*

1. Background and Facts

Richard Diffin and Tanya Towne were married in 1993.[108] They had a son in 1995.[109] In 1997, the couple separated.[110] Their April 2000 divorce decree incorporated the custody provision of their separation agreement,[111] awarding primary physical custody to Towne, a member of the Army National Guard.[112] Four years later, Towne received active duty orders to deploy to Iraq.[113] On April 30, 2004, Diffin petitioned for permanent modification of the initial custody order based on Towne's deployment.[114] A New York family court awarded temporary custody to Diffin for the duration of the deployment and stayed final judgment until Towne redeployed.[115] In October 2005, in anticipation of her November redeployment, Towne requested the court reinstate the original custody order that she and Diffin had operated under from 1997 until her deployment in 2004.[116] The Montgomery County, New York Court refused, despite their finding that both parents were "fit and financially able to care for the child."[117] On January 3, 2008, the New York Supreme Court, Appellate Division, affirmed the family court's judgment.[118] On May 6, 2008, the Court of Appeals of New York denied Towne's motion for review.[119]

2. Outcome of Diffin II *If Adjudicated in New York*

In New York, modification requires a preliminary finding that there has been a substantial change in circumstances since the initial custody order.[120] Only then will the courts determine if a custody change is in the child's best interests.[121] During the litigation of *Diffin II*, a New York statute specifying the consideration courts should give to military deployments when determining either a change of circumstance or the best interests of the child did not exist.[122] The New York Appellate Court states that they "do not hold that her [Towne's] deployment in and of itself constitutes a significant change in circumstances."[123] Nevertheless, the rest of the opinion does not support this statement. The only other stated basis for the court's finding a change in circumstance was Towne's legal separation from her second husband after redeploying from Iraq.[124] However, under New York precedent, this should not have triggered the required "significant" change in circumstances.[125]

---

[103] *See, e.g.*, HERBERT LIONEL ALDOLPHUS HART, THE CONCEPT OF LAW 124–54 (Penelope Bulloch & Joseph Raz eds., 2d ed. 1994); LISA M. SEGHETTI & ALISON M. SMITH, CONG. RESEARCH SERV., FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS AND POLICY OPTIONS, at CRS-11 to CRS-14 (2007) (discussing that the belief that indeterminate sentencing "promoted unwarranted disparity in sentences as well as uncertainty of punishment" was part of the rationale for the federal sentencing guidelines).

[104] CLAIRE BREEN, THE STANDARD OF THE BEST INTERESTS OF THE CHILD: A WESTERN TRADITION IN INTERNATIONAL AND COMPARATIVE LAW 57 (2002); JONATHAN W. GOULD & DALE A. MARTINDALE, THE ART AND SCIENCE OF CHILD CUSTODY EVALUATIONS 33 (2007).

[105] BREEN, *supra* note 104, at 57.

[106] 849 N.Y.S.2d 687 (N.Y. App. Div. 2008).

[107] *See infra* Part III.A.

[108] *Diffin II*, 849 N.Y.S.2d at 689.

[109] *Id*.

[110] *Id*.

[111] *Id*.; Diffin v. Towne (*Diffin I*), 3 Misc.3d 1107(A), 2004 WL 1218792, at *1 (N.Y. Fam. Ct.).

[112] *Diffin II*, 849 N.Y.S.2d at 689; *Diffin I*, 2004 WL 1218792, at *1.

[113] *Diffin II*, 849 N.Y.S.2d at 689; *Diffin I*, 2004 WL 1218792, at *1.

[114] *Diffin I*, 2004 WL 1218792, at *1.

[115] *Id*. at *8.

[116] *Diffin II*, 849 N.Y.S.2d at 689.

[117] *See id*. at 690.

[118] *Id.* at 687.

[119] *Diffin III*, 889 N.E.2d 82, 82 (N.Y. 2008).

[120] *See, e.g.*, Kerwin v. Kerwin, 833 N.Y.S.2d 694, 695 (N.Y. App. Div. 2007); Peck v. Bush, 826 N.Y.S.2d 496 (N.Y. App. Div. 2006).

[121] *See, e.g.*, *Kerwin*, 833 N.Y.S.2d at 69; Meyer v. Lerche, 807 N.Y.S.2d 151 (N.Y. App. Div. 2005).

[122] N.Y. DOM. REL. § 75-l (regarding military service by parents and the effect on child custody orders took effect on 24 March 2009). The amended § 75-l took effect on 15 November 2009.

[123] *Diffin II*, 849 N.Y.S.2d at 690.

[124] *Id*.

[125] New York courts have found that similar circumstances—remarriage or introduction of new members into a household—do not warrant modification. *See* Said v. Said, 878 N.Y.S.2d 384 (2009); Bradley v. Bradley 10 N.Y.S.2d 699(1939); *see also* Scanlon v. Ciaravalli, 152 N.Y.S.2d 494 (1956). The Scanlon court stated, "other than respondent's

Further, the significance the court placed on Towne's deployment is even more apparent in their best interest analysis. New York courts consider several non-exclusive factors when determining best interests, to include parental fitness, the prior performance of each parent, each parent's ability to ensure the child's well-being, and each parent's willingness to encourage a relationship with the other parent.[126] Applying these factors, the court found that Diffin and Towne were "both excellent parents" that have demonstrated "stable employment, adequate income, suitable homes, and an unwavering commitment to Derrell's [the child's] wellbeing."[127] The court goes on to state that under the original custody order, Diffin and Towne "enjoyed a long-standing shared custody arrangement that nurtured Derrell's relationships with both parents."[128] Furthermore, the court finds that the "record establishes that Derrell would be loved, supported and well cared for in the custody of either parent."[129] The court's dicta reflect that under best interest analysis, these parents were equal at minimum. Thus, there was no legal rationale to support the family court's permanent modification order. Towne should have been able to maintain physical custody of her child. Instead, she lost custody of her child solely because of her military deployment. Indeed, the court states, "but for the mother's deployment in 2004," the original custody order "might well remain in effect today."[130] Subsequently, New York has essentially codified the circumstances of *Diffin II*—deployments alone are a per se "change in circumstance" justifying modification proceedings; and judges have full discretion to determine what weight to give deployments in their best interests analysis.[131]

3. Outcome of Diffin II *If Adjudicated in Iowa*

This case would have resulted in the exact opposite outcome had it been heard in Iowa. Similar to New York case law, Iowa requires the parent seeking modification to show a "substantial change in circumstances" since the initial custody order.[132] However, the original order will only be changed if that parent also proves that they "can offer the child superior care," based on the best interests of the child.[133] Unlike the New York Domestic Relations Law § 75-l, the Iowa legislature has mandated that custody orders in effect preceding a deployment must be reinstated if a temporary order is issued due to the deployment.[134] Additionally, the Iowa law explicitly states that deployments do not establish a substantial change in circumstances and may not be considered in the best interest analysis during modification proceedings.[135] In Iowa, Towne's original custody order would have been reinstated as soon as she returned. If Diffin requested permanent modification upon her return, the court could only consider Towne's separation from her second husband, not her deployment, in the change of circumstances determination. Even if an Iowa court determined that Towne's separation by itself created a substantial change in circumstances, the original custody order would likely remain in effect. Assuming the validity of the *Diffin II* findings—that Towne and Diffin were equally effective caregivers[136]—Diffin would be unable to show that he could "minister more effectively to the child's well being," the second requirement for modification.[137]

Finally, the likelihood of such an outcome in Iowa is underscored by the Iowa Court of Appeal's retroactive application of the Iowa military custody statute in a 2009 case.[138] The court refused to consider a parent's Iraq deployment during their review of a case heard by the lower court prior to the statute's July 2008 effective date.[139] The court stated, "[W]e readily agree with the sound policy behind this legislation, believe such a policy should apply even before the effective date of the legislation, and

---

remarriage, we find no such change of circumstances here." 152 N.Y.S.2d at 495–96. The court went on to find that the remarriage was not "a sufficient ground or reason for modification" of the original custody order. *Id*. at 496. It follows that elimination of a member of the household should not establish a significant change in circumstance.

[126] *Diffin II*, 849 N.Y.S.2d at 689. The courts also consider the child's wishes, the child's stability, and each parent's residential environment. *Id*.

[127] *Id*. at 690.

[128] *Id*.

[129] *Id*.

[130] *Id.*

[131] Under the New York Statute effective 15 November 2009, modification orders may be issued based on temporary assignment, orders to active duty, or deployment if there is "clear and convincing evidence" that modification is in the child's best interest. N.Y. DOM. REL. § 75-l(1)–(2) (West 2009). The servicemember's return from the relevant period of active duty or deployment, is a per se substantial change in circumstance which entitles either parent to a modification hearing. *Id*. § 75-l(3). If a previous order was issued during the servicemember's deployment, it will only be changed if the court determines that it is in the best interests of the child. *Id*.

[132] Brueland v. Baldus, No. 08-0946, 2009 WL 250347, at *4 (Iowa App. Feb. 4, 2009); *see also In re* Maher, 596 N.W.2d 561, 565 (Iowa 1999); Mears v. Mears, 213 N.W.2d 511, 514 (Iowa 1973).

[133] *Brueland*, 2009 WL 250347 at *5. The opinion goes on to state that even if there is a change in circumstances, if parents are found to be equally fit, custody should not be changed. *Id*.

[134] IOWA CODE ANN. § 598.41C(1) (West 2010). This statute may have been a reaction to the case, *In re Grantham*, wherein a temporary custody order awarding primary physical custody to the noncustodial parent during the custodial parent's deployment was made permanent after the custodial parent redeployed. 698 N.W.2d 140 (Iowa 2005).

[135] *Id*.

[136] *Supra* notes 127–29.

[137] *Brueland*, 2009 WL 250347, at *5. The opinion goes on to state that even if there is a change in circumstances, if parents are found to be equally fit, custody should not be changed. *Id*. at *4.

[138] *See id*. at *4.

[139] *See id*.; *see also* IOWA CODE ANN. § 3.7(1) (West 2010) (stating all laws passed during sessions of the Iowa General Assembly take effect on first day of July after passage).

accordingly have applied that policy in our de novo review."[140]

4. Outcome of Diffin II *If Adjudicated in North Carolina*

In North Carolina, like New York and Iowa, the general standard for modification requires an initial determination of substantially changed circumstances, followed by a determination that the change is in the best interests of the child. [141] North Carolina also has a military child custody statute that provides a third version of the consideration courts should give deployments.[142] Courts may not consider temporary duty, deployments, and mobilizations in change of circumstance determinations during permanent modification proceedings.[143] The breadth of this prohibition includes the "temporary disruption to the child's schedule" caused by temporary duty, deployment, or mobilization.[144] This prevents the courts from circumventing the statute by considering the immediate consequences of the deployment in lieu of the deployment.[145] However, if a noncustodial parent successfully alleges an independent basis establishing a significant change in circumstances, North Carolina courts may consider deployments in their best interests of the child analysis.[146] A North Carolina hearing of *Diffin II* would only have assured Towne of maintaining physical custody of her son if the court determined that the separation from her second husband was an insufficient basis for a change in circumstances.

5. Outcome of Diffin II *If Adjudicated in Texas*

The Texas Legislature has passed a fourth version of a military child custody statute. The Texas rendition prohibits judges from basing their change of circumstance determinations "*solely*" on military deployments in the case of permanent modification proceedings.[147] Dissimilar to Iowa and North Carolina, states that have entirely barred courts from considering military deployments in change of circumstances determinations,[148] Texas judges have wide discretion to determine whether or not modification is justified in cases of deploying parents. Additionally, the case law gives little guidance. Texas courts have stated that "there is no definite guide line as to what constitutes a material change of circumstances."[149] The Texas statute fails to address how deployments should be factored into the best interest analysis once a court has found a substantial change in circumstances. Thus, *Diffin II* would likely result in a much different outcome if heard in Texas versus another state such as Iowa or North Carolina. Furthermore, the Texas statute would likely produce inconsistent results if *Diffin II* were heard by two different jurisdictions *within* the state. The results will depend on which judge hears the case and each judge's worldview and subjective opinion of how much weight to give deployments in change of circumstances and best interests determinations. As scholars have warned, "little guidance and a lot of discretion" in child custody proceedings may result in "arbitrary and heavy-handed" decisions.[150]

B. Analysis of Diversity in State Laws

The tremendous diversity among state laws demonstrated by the four examples above only highlight *some* of the differences. Twenty states do not have a military child custody statute.[151] In the states that have passed legislation, similarly situated servicemembers should expect vastly inconsistent outcomes between and within jurisdictions because of the following conflicts of law:

> (1) Uneven application. Six states have made their statutes applicable to members of the Reserve Component only;[152]

[140] *Brueland*, 2009 WL 250347, at *4. The servicemember eventually lost this case based on the teen daughter's preference to live with her mom and her hostile relationship with her stepmother. *Id*. at *5–7.

[141] *See* N.C. GEN. STAT. ANN. §§ 50-13.7(a), 50-13.2(a) (West 2009); *see also* Shipman v. Shipman, 586 S.E.2d 250 (N.C. 2003); Speaks v. Fankek, 470 S.E.2d 82 (1996 N.C. App.); Steele v. Steele, 244 S.E.2d 466 (N.C. 1978).

[142] *See* N.C. GEN. STAT. ANN. § 50-13.7A (West 2009).

[143] *Id.* § 50-13.7A(c)(2).

[144] *Id*.

[145] This is essentially what the Court did in *Diffin II* when they stated that the deployment did not "in and of itself constitute a significant change in circumstances," and then emphasized that the deployment caused a temporary "disruption" in the child's life and required him to establish himself in a different school, make new friends, and become comfortable in his dad's home. *Diffin II*, 849 N.Y.S.2d 687, 691 (N.Y. App. Div. 2008).

[146] *See* N.C. GEN. STAT. ANN. § 50-13.7A(g) (West 2009).

[147] *See* TEX. FAM. CODE ANN. § 156.105 (West 2009).

[148] *See supra* notes 134, 143.

[149] Wright v. Wright, 610 S.W.2d 553, 555 (Tex. Civ. App. 1980); *see also In re* A.L.E., 279 S.W.3d 424, 428 (Tex. Ct. App. 2009) (stating that courts are not "confined to rigid or definite guidelines" in change of circumstances determinations).

[150] BREEN, *supra* note 104, at 57.

[151] *Supra* note 67.

[152] *See* ARK. CODE ANN. § 9-13-110 (West 2010); COLO. REV. STAT. ANN. § 14-10-131.3 (West 2010); IDAHO CODE ANN. § 32-717 (West 2010); ME. REV. STAT. ANN. 37-B, § 343 (West 2009); OR. REV. STAT. ANN. § 107-169 (West 2009); TENN. CODE ANN. §36-6-113 (West 2009).

(2) Dissimilar definitions of key terminology, such as servicemember, deployment, and active duty;[153]

(3) Disparate limitations on qualifying deployment lengths. For example, in Arizona, only deployments of six months or less qualify for the statutory protections.[154] On the other hand, in Oregon, deployments of up to 30 continuous months qualify;[155]

(4) Extremely diverse rights and protections. For example, compare the vast protections offered to deploying servicemembers in Iowa with the expedited hearing and limited rights available to Maryland and Virginia servicemembers.[156] Additionally, while some states prohibit courts from considering deployments in change of circumstance determinations, at least one state mandates that courts consider redeployment a change in circumstances permitting modification proceedings upon request of a parent.[157] Other states allow their courts to consider deployments in change of circumstances determinations, so long as it is not the sole consideration.[158] There is also wide variance in the weight state courts may give deployments in best interests of the child determinations during permanent modification proceedings.[159]

Deployment must not be a factor in permanent child custody modification proceedings.[160] This will ensure a custody standard that "offers effective and useful guidelines, so that similar cases are decided similarly."[161] A uniform act that includes a deployment rule would prevent "extralegal factors," such as a local judge's personal opinion of military deployments, from "significantly affecting final dispositions."[162]

IV. Best Interests of the Child Standard

As discussed in Part II of this article, during permanent modification proceedings, states require courts to determine that changing the previous custody order is in the best interests of the child.[163] However, a rule excluding military deployments from consideration during these proceedings is in the best interests of the child because it decreases the likelihood of constant relitigation of custody orders, acknowledges the benefits of growing up as a military dependent, takes a step away from the current indeterminate child custody regime, and takes a step towards national norms in family law.

A. Deployment Rule Will Decrease Modification Litigation, Which Is Consistent with the Best Interests of Children

In the 1970s, renowned child psychiatrists Goldstein, Freud, and Solnit asserted that repeated litigation of child custody was harmful to children and that initial child

[153] *Compare, e.g.*, N.Y. DOM. REL. § 75-l (West 2009) (which has no definitions in its statute), *and* COLO. REV. STAT. ANN. § 14-10-131.3(II)(2)(a) (West 2010) (defining "active duty" as serving in "[a] reserve component of the armed forces; or [t]he National guard for a period that exceeds thirty consecutive days in a calendar year."), *with* IOWA CODE ANN. § 598.41C(1) (West 2010) (stating "'active duty' means active military duty pursuant to orders issued under Title X of the United States Code. However, this section shall not apply to active guard and reserve duty or similar full-time military duty performed by a parent when the child remains in the actual custody of the parent.").

[154] ARIZ. REV. STAT. ANN. § 25-411 (West 2010).

[155] OR. REV. STAT. ANN. § 107.169 (West 2009).

[156] *Compare, e.g., supra* Part III.A.3 (describing the broad protections of Iowa Code Ann. § 598.41C (West 2010)), *and* MD. CODE ANN., FAM. LAW § 9-107 (West 2010) (providing for "expedited" hearing rights), *with* VA. CODE ANN. § 20-124.8 (West 2009) (providing a right to a hearing within 30 days after redployment; if a temporary order has been issued, the non-deploying parent has to show that the order in place before the deployment is no longer in the child's best interests). Note that in the Maryland statute there is no time limit associated with the expedited hearing. It is unclear whether this right is violated if there is no hearing within seven days? fifteen days? After the first available court date on the judge's docket? Additionally, neither the Maryland nor the Virginia statute have any enforcement mechanism associated with the expedited or 30 day hearing rights, leaving them both open for abuse by over-docketed family courts.

[157] *Compare, e.g.*, MISS. CODE ANN. § 93-5-34 (West 2009), *with* N.Y. DOM. REL. § 75-l (West 2009).

[158] *See, e.g.*, S.C. CODE ANN. §§ 63-5-910, 63-5-920 (West 2009); CAL. FAM. CODE § 3047 (West 2010).

[159] *Compare, e.g.*, MICH. COMP. LAWS ANN. § 722-27 (West 2010); IOWA CODE ANN. § 598.41C (West 2010) (stating that courts must disregard deployments completely in best interests of the child determinations), *with* KAN. STAT. ANN. § 60-1630 (West 2010); S.D. CODIFIED LAWS § 33-8-10 (West 2009) (stating that deployments may not be the sole consideration in best interests of the child determinations).

[160] The focus of this article is on modifications after an initial custody order. However, it follows that servicemembers involved in initial custody proceedings immediately before or after a deployment should also receive the benefit of this protection. For example, in a North Dakota case, a National Guard Soldier completed divorce proceedings immediately upon his return from an Iraq deployment. The district court "penalized him for being absent due to military deployment," and awarded physical custody to his non-military spouse. Lindberg v. Lindberg, 770 N.W.2d 252, 258 (N.D. 2009). The North Dakota Supreme Court "commend[ed] Chris Lindberg's service to our country," and upheld the district court's decision. *Id*.

[161] Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, PSYCHOL. PUB. POL'Y & L., 843, 845 (2000).

[162] *Id*.

[163] *See supra* Part II.A (discussing that state modification proceedings generally require a substantial change in circumstances followed by a determination that modification is in the best interests of the child).

custody orders assigning primary physical custody to a "fit" parent should not be subject to modification.[164] Others have commented on the damage caused by repeated custody litigation, including the emotional trauma children experience by being repeatedly forced to choose sides, feeling like a bargaining chip or pawn, and having to serve in uncomfortable adult-like roles of referee or mediator between two hostile parents.[165] Yet, under the current child custody litigation format, the behavior that leads to this trauma is encouraged.

Continual litigation of initial custody determinations is more likely because an argument can always be made for modification under the subjective best interests analysis.[166] Further, this system not only encourages re-litigation of custody orders, but fosters calculated decisions which are also harmful to children, such as the use of experts and witnesses that denigrate the character of the other parent, and delay tactics which may favor a parent who has physical custody under a temporary order.[167] This regime, which "emphasizes finger-pointing over cooperation,"[168] does not serve the best interests of children. A rule that prohibits courts from considering military deployments in best interests determinations would discourage modification litigation by making futile any petition prompted by a custodial parent's military deployment. The noncustodial parent would know with certainty a petition brought on this basis would not succeed, thereby reducing the harm children experience during protracted custody litigation.

B. A Deployment Rule Acknowledges the Benefits of Being a "Military Brat"

1. Children Who Grow Up in the "Military Lifestyle" Turn Out Well

Significant empirical evidence runs counter to the frequent assertion that military life has a negative impact on military children.[169] As early as the 1960's, studies have shown that military children are less likely to have behavioral disorders and participate in juvenile crimes than civilian children.[170] Since then, numerous studies cast doubt on the commonly held belief that the "stresses of military life" can lead to childhood problems.[171] In 1981, a researcher published a six-year comparative study of 374 military and non-military children under the age of nineteen.[172] He found that that military children were fifty percent less likely to abuse drugs and alcohol, eleven percent less likely to smoke cigarettes, and that fewer military dependents exhibited personality disorders or hyperactivity.[173] Ten years later, a group of military psychiatrists studied 213 military dependents between the ages of six and twelve to determine whether military children are more likely to have behavioral health problems than their civilian counterparts.[174] They concluded that the "results do not support the notion that levels of psychopathology are greatly increased in children of military parents."[175] In fact, in their study of the children's symptom self-reports and teacher's ratings of these same children, the military children were "at or below national norms."[176]

In a similar study by Dr. Henry Watanabe, based on a survey of 135 children in the next age range—thirteen through eighteen—the Walter Reed physician concluded that the "the military adolescent is able to develop a healthy self-image, even with the experience of having to grow up in an environment where frequent adjustments must be made because of military necessities and demands."[177] His findings indicate that children raised by a military parent thrive. His study specifically revealed that military teenagers have a "strongly positive" body image, are sexually "conservative," and possess "exceptional" impulse control and social skills when compared to civilian teenagers.[178] Finally, Dr. Wantanabe notes that the "military community and sociocultural milieu seem to impact in a

---

[164] GOLDSTEIN, FREUD & SOLNIT, *supra* note 56, at 37.

[165] Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 24 (1987); Linda Elrod, *When Should Custody Orders Be Modified?*, 26 SPG FAM. ADVOC. 40, 41 (2004).

[166] Elster, *supra* note 165, at 24; *see infra* Part IV.C (discussing the best interests of the child standard).

[167] Katherine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 471 (1999); Elster, *supra* note 165, at 23–24.

[168] Bartlett, *supra* note 167, at 472.

[169] *See* MILITARY BRATS AND OTHER GLOBAL NOMADS 68–69 (Morton G. Ender ed. 2002) [hereinafter MILITARY BRATS AND OTHER GLOBAL NOMADS] (discussing the research suggesting that geographic mobility, parental absence, and other aspects of military life can damage the development of a child); *but see* Anita Chandra et al., *Children on the Homefront: The Experience of Children from Military Families*, 125 J. AM. ACAD. PEDIATRICS 16, 16–25 (2010) (reporting that military children have more emotional difficulties than their civilian counterparts).

[170] James A. Kenny, *The Child in the Military Community*, J. AM. ACAD. CHILD PSYCHIATRY 51, 57–60 (1967). *But cf.*, Don M. Lagrone, *The Military Family Syndrome*, 135 AM. J. PSYCHIATRY 1040, 1040–43 (1978) (discussing his two-year study finding that behavioral disorders were more frequent in 792 military children than their civilian counterparts).

[171] James Morrison, *Rethinking the Military Family Syndrome*, 138:3 AM J. PSYCHIATRY 354, 354 (1981).

[172] *Id.* Fifty-nine percent of the military children had experienced a separation from their military parent that was six months or more. *Id.*

[173] *Id*.

[174] Commander Peter S. Jensen et al., *The "Military Family Syndrome" Revisited: "By the Numbers,"* 179:2 J. NERV. MENT. DIS. 102, 102 (1991).

[175] *Id*.

[176] *Id*. at 106.

[177] Henry K. Watanabe, *A Survey of Adolescent Military Family Members Self-Image*, 14:2 J. YOUTH & ADOLESCENCE 102, 106 (1985).

[178] *Id*. at 103.

favorable manner on the military adolescent dependent," in his explanation of the "superior showing" of military teenagers.[179]

2. Academic Achievement Is High Among Children Raised by Military Parents

Research indicates that military children succeed academically as well. In a six-year survey of approximately 607 adults raised as military dependents, educational achievement was high. Greater than ninety-five percent completed a year of post-secondary education and twenty-nine percent possessed graduate school degrees.[180] Additionally, nearly eighty-one percent of these same adults spoke a language other than English and attributed it to their military childhood.[181]

The DoD school system achievement numbers support the success of the sample above. In 2003, DoD eighth graders achieved the first and fourth highest scores in reading compared to all other state scores and fourth graders achieved the third and fifth highest scores.[182] African-American and Hispanic children had the top scores in the nation in both mathematics and reading compared to minorities in all other states.[183] In national standardized tests of fourth and eighth graders from 1992 through 2009, DoD students have beaten the national average each time.[184] Further, children raised by military parents are able to obtain academic achievement advantages early because they have access to the military childcare system which has been lauded over the last two decades. In 1997, President Clinton called the Military Child Development Program a "model for the nation" and recognized the DoD's commitment to standards, financial support, and oversight of the military childcare system.[185] Finally, in 2007, the National Association of Child Care Resource & Referral Agencies ranked DoD as having the number one child care system in the country.[186]

3. Military Support Systems Are Equipped to Handle Children's Needs Due to Deployments

We know that children do experience stress *during* a parent's deployment[187]—that is inevitable whether the child's primary custodian is the servicemember or the non-military parent. However, the military community is better equipped to provide support to children to minimize stress after a parent's deployment. A deployment rule, ensuring that previous orders awarding physical custody to servicemembers remain in place, facilitates access to a litany of services for children. Studies prove that military dependents of deployed personnel benefit from family resource centers such as Army Community Service or the Navy's Fleet and Family Support Center and the use of military youth centers.[188] Additionally, military installations offer services through unit family readiness group programs[189] and have DoD schools that are more likely than their civilian counterparts to employ teachers and counselors who themselves are spouses of deploying men and women.[190] As one researcher who studied the behavior of military children noted, "the military service provides a relatively close-knit 'family' atmosphere, in which job, social, school, and medical components touch one another at more points than may be true in the civilian community."[191] A deployment rule is in children's best interests because it gives them increased access to this "close-knit" village-type atmosphere.

---

[179] *Id*. at 106.

[180] MILITARY BRATS AND OTHER GLOBAL NOMADS, *supra* note 169, at 88.

[181] *Id*.

[182] Press Release, Dep't of Def. Educ. Activity, DoD School Students Continue Top Tier National Performance (Nov. 13, 2003) [hereinafter, DoD School National Performance] (on file with author). Eighth graders at overseas DoD schools scored first in the nation, eighth graders at stateside DoD schools scored fourth in the nation, fourth graders at overseas DoD schools scored third in the nation, and fourth graders at stateside DoD schools scored fifth in the nation. *Id*. *See also* News Release, Dep't of Def. Educ. Activity, DoD School Students Continue to Improve in Mathematics (Nov. 13, 2003) [hereinafter DoD School Mathematics] (noting that eighth graders at overseas DoD schools scored third in the nation; eighth graders at stateside DoD schools scored seventh in the nation; and fourth graders at overseas and stateside DoD schools scored sixth in the nation) (on file with author).

[183] DoD School National Performance, *supra* note 182; DoD School Mathematics, *supra* note 182.

[184] U.S. DEP'T EDUC., NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS AT GRADES 4 AND 8: THE NATION'S REPORT CARD MATHEMATICS 16, 32 (2009).

[185] Press Release, U.S. Dep't of Def., Military Child Development Program Cited as National Model (Oct. 21, 1997), *available at* http://www.defense.gov/Releases/Release.aspx?ReleaseID=1450.

[186] Press Release, Nat'l Ass'n of Child Care Res. & Referral Agencies, New State Report Card on Child Care: States Fall Short in Protecting Children's Safety and in Promoting Learning in Child Care (Mar. 1, 2007), *available at* http://www.naccrra.org/news/press-releases/31/.

[187] Chandra et al., *supra* note 169, at 16–25; U.S. ARMY MORALE, WELFARE & RECREATION, WHAT WE KNOW ABOUT MILITARY FAMILIES: UPDATE 89 (2007) [hereinafter MILITARY FAMILIES].

[188] MILITARY FAMILIES, *supra* note 187, at 90; MILITARY BRATS AND OTHER GLOBAL NOMADS, *supra* note 169, at 71.

[189] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICE app. J (Army Family Readiness Group Operations) (19 Sept. 2007).

[190] *See* RAND NAT'L DEF. RES. INST., WORKING AROUND THE MILITARY: CHALLENGES TO MILITARY SPOUSE EMPLOYMENT AND EDUCATION 23, 105 (2004) (noting that in a study of 1100 military spouses, the fourth most common occupation was teaching; teaching was the number one occupation of military spouses with graduate degrees and military spouses of senior officers; and the number two profession of junior officer spouses).

[191] Morrison, *supra* note 171, at 356.

C. A Deployment Rule Takes an Important Step Away from a Flawed and Indeterminate Child Custody Regime

The best interests analysis has been assessed as "too discretionary and unpredictable to provide guidance to courts and litigants and too vague to guard against the risk of arbitrary decision-making."[192] Another critic noted that "decisions made in this framework are less a product of reasoned application of precedent than of the personality . . . and biases of the trial judge."[193] A deployment rule moves away from one of the significant critiques of the best interests analysis—its indeterminate nature[194]—by removing a judge's discretion to determine what weight to give military deployments in modification proceedings. Further, this step towards a more rule-like standard in child custody is beneficial since many common precepts of the best interests analysis are flawed and inconsistent with scientific data. For example, the common assumptions that (1) young children need their mothers; and (2) and that boys should be placed with their fathers is contradicted by findings of "no direct linear relationship" between age and gender and child adjustment in several studies.[195] A myth related to military children recently invalidated is that their rate of mobility is a significant factor in their psychological adjustment.[196] The lack of empirical support for general assumptions often applied under best interests analysis makes establishing national norms, such as a deployment rule, more attractive. As psychiatrists Goldstein, Freud, and Solnit noted over thirty years ago, "[s]implicity is the ultimate sophistication in deciding a child's placement."[197] A deployment rule is in keeping with this standard.

V. Standardization of Family Law

Although many in the legal community have concluded that family issues are "a matter of exclusive state concern and beyond federal regulation,"[198] this has not slowed the expansion of national norms in family law through the growth of national associations and organizations, significant federal laws and Supreme Court decisions, and the work of the NCCUSL.[199] As discussed in Part III of this article, a deployment rule would produce more consistent results in military child custody disputes, regardless of the state forum. This reflects the country's fifty-year trend of establishing uniformity among the states in family law matters, to include child custody.

A. National Associations and Organizations

Since the 1950s, national organizations have formed, which resulted in increased interaction between relevant family law practitioners—from psychiatrists to lawyers to social workers.[200] For example, the National Association of Social Workers was formed in 1955. Their mission is to contribute to the "professional growth and development of its members, create and maintain standards for the profession, and to advance sound social policies."[201] The organization currently has more than 25,000 members whose primary practice area is related to children and families.[202] It logically follows that increased discussion between family law-related professionals has helped to foster general practice norms throughout the United States.[203]

B. Uniform Acts

The ULC has been an important force to reconcile state family laws over the last fifty years.[204] The ULC has drafted and proposed to state legislatures more than 200 Acts providing "uniformity" where "diversity obstruct[ed] the interests of all citizens of the United States."[205] Further, the ULC has been quite active in family law, and child custody in particular. Since 1968, the Commission has promulgated more than a dozen Uniform Acts relevant to children and

[192] ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY 162 (2004).

[193] Wexler, *supra* note 55, at 762.

[194] *E.g.*, Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 172 (1992); Elster, *supra* note 166, at 11–16.

[195] Krauss & Sales, *supra* note 161, at 854.

[196] Lisa B. Finkel et al., *Geographic Mobility, Family, and Maternal Variables as Related to the Psychosocial Adjustment of Military Children*, 168:12 MIL. MED. 1019–24 (2003).

[197] GOLDSTEIN, FREUD & SOLNIT, *supra* note 56, at 116.

[198] Sylvia Law, *Families and Federalism*, 4 WASH. U.J.L. & POL'Y 175, 178 (2000).

[199] *See infra* Parts V.A–D.

[200] *See, e.g.*, *General Fact Sheets*, NAT'L ASS'N OF SOC. WORKERS, *available at* https://www.socialworkers.org/pressroom/features/general/ nasw.asp. The National Association of Social Workers formed in 1955. *Id*. *See also About the Academy*, AM. ACAD.OF MATRIMONIAL LAWYERS, *available at* http://www.aaml. org/go/about-the-academy/ (noting that this association was formed in 1962, "[t]o encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected," and that there are currently nearly 2000 attorney-members in all fifty states); *About AFCC*, ASS'N OF FAMILY AND CONCILIATION COURTS, *available at* http://www.afccnet.org/about/ index.asp (explaining that the AFCC was founded in the 1960s and includes family law professionals from various fields, including judges, attorneys, mediators, social workers, psychologists, and educators who come together to exchange information, share perspectives and work collaboratively on projects).

[201] *General Fact Sheets*, NAT'L ASS'N OF SOCIAL WORKERS, *available at* https://www.socialworkers.org/ pressroom/features/general/nasw.asp.

[202] *Id*.

[203] *See* Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: the Interests of Children in the Balance*, 42(3) FAM. L.Q. 381, 383 (2008).

[204] *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law*, 42 FAM. L.Q. 713, 714 (Winter 2009); *see also* Elrod & Dale, *supra* note 203, at 383.

[205] FAQS About NCCUSL, *supra* note 69.

family issues.[206] Aspects of the Uniform Child Custody Prevention Act (UCCPA) and the Model Marriage and Divorce Act (MMDA) are especially relevant for their application to a military deployment rule.

1. Uniform Child Custody Prevention Act

The UCCPA demonstrates the important role Uniform Acts can play in resolving inconsistent definitions and terminology among state laws. In 2006, the ULC proposed the UCCPA to the states for adoption and passage.[207] The UCCPA resolves the inconsistencies between the state parental custodial interference criminal statutes. Although every state has criminalized custodial interference, the UCCPA addresses the large disparities in the elements establishing the offense, prerequisites to prosecution, and the minimum and maximum sentences.[208] The UCCPA reconciles these inconsistencies by establishing uniform and exclusive factors that all state courts must apply to determine whether standard abduction prevention measures must be applied in a particular case.[209] Just as the disparate state custodial interference laws spurred the ULC to submit UCCPA to the states for passage in 2006, there is a similar need to prevent inconsistent outcomes and establish standard definitions for military custody modification proceedings.[210]

2. Model Marriage and Divorce Act

Approved by the NCCUSL in 1970, the MMDA includes provisions standardizing legal rules for child custody modification.[211] The MMDA is particularly relevant to a deployment rule because it was promulgated to establish a rigorous modification standard and a presumption in favor of the original custodial parent.[212] The MMDA prohibits motions for modification earlier than two years after initial custody determinations absent a reasonable belief of serious danger to a child's physical, mental, or emotional health.[213] Further, for all other modification proceedings, a judge's discretion to change the initial custody order is greatly restricted.[214] The MMDA drafters believed finality was the critical factor in child custody, rather than continually litigating which of two fit parents is "more fit" at any particular moment in time.[215]

Despite MMDA §409's lack of widespread state adoption, scholars have advocated that a "stricter, clearer, more certain standard governing custody modification is essential,"[216] and the NCUSSL continues to champion the MMDA to "serve as guideline legislation" that states should use to draft their child custody statutes.[217] It is unlikely that a military deployment would ever be adequate to substantiate modification under the MMDA standard.

C. Supreme Court Decisions

In the 1899 case, *Simms v. Simms*, the Supreme Court stated, "[t]he whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the State, and not the laws of the United States."[218] Yet, in *Meyer v. Nebraska*, the Court jumped feet first into setting national

[206] *See* ULC, Final Acts and Legislation, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=2 &tabid=60 (last visited Mar. 1, 2010) (providing a searchable webpage with links to the following Uniform or Model Acts: (1) Uniform Child Abduction Prevent Act; (2) Uniform Child Custody Jurisdiction Enforcement Act (replacing the previously promulgated Uniform Child Custody Jurisdiction Act); (3) Uniform Child Witness Testimony by Alternative Methods Act; (4) Uniform Disposition of Community Property Rights at Death Act; (5) Uniform Guardianship and Protective Proceedings Act; (6) Uniform Interstate Family Support Act; (7) Uniform Parentage Act; (8) Uniform Premarital Agreement Act; (9) Uniform Transfers to Minors Act; (10) Model Adoption Act; (11) Model Marital Property Act; and (12) Model Marriage and Divorce Act). Model Acts were initially Uniform Acts and later reclassified as Models. *Id.*

[207] ULC, A Few Facts About the Uniform Child Abduction Prevention Act (UCAPA), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucapa.asp (last visited Mar. 1, 2010).

[208] NCCUSL, *Uniform Child Abduction Prevention Act (Statutory Text, Comments and Unofficial Annotations by Linda D. Elrod, Reporter),* 41(3) FAM. L.Q. 23, 29 (2007).

[209] ULC, Summary: UCAPA, http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ucapa.asp (last visited Mar. 1, 2010) (noting some of the factors courts must consider include lack of cooperation with a previous custody order, selling assets, domestic violence, and requesting a child's academic records).

[210] *See supra* Part III.C (discussing the variance in state laws regarding who qualifies as a service member and whether deployments may be considered in change of circumstance and best interest determinations).

[211] Unif. Marriage and Divorce Act (MMDA) § 409, 9 U.L.A. 628 (1987) (amended 1971, 1973). The MMDA was downgraded to a Model Act in 1983 due to limited state enactment. *See* John J. Sampson, *Uniform Family Laws and Model Acts,* 42(3) FAM. L.Q. 673, 685 (2008). Arizona, Colorado, Illinois, Kentucky, and Washington have adopted the UMDA child custody modification provisions in part. *See* ARIZ. REV. STAT. ANN. § 25-411A (West 2009); COLO. REV. STAT. ANN. § 14-10-129 (West 2009); ILL. COMP. STAT. ANN. h. 750 § 5/610 (West 2009); KY. REV. STAT. ANN. § 403.340(2)-(4) (West 2009); WASH. REV. CODE ANN. § 26.09.260 (West 2009).

[212] *See* UMDA § 409, 9 U.L.A. 628 (1987) (amended 1971, 1973).

[213] *Id.* § 409(a).

[214] *Id.* § 409(b). A court must find: (1) a change in circumstances; and (2) modification is in the child's best interest; and one of the following: (a) the custodian agrees; or (b) the child has been integrated into another home with the custodian's consent; or (c) the child's physical, mental or emotional health is in serious danger and modification is more beneficial to the child than the current custody situation.

[215] Wexler, *supra* note 55, at 774. Wexler also points out that academic studies reinforce the benefit of strict modification standards. For example, one study found that "low levels of interparental conflict and hostility . . . following a divorce correlate with diminished adjustment problems in children's social, emotional and cognitive development." *Id.* at 789–90.

[216] *Id.* at 784.

[217] ULC, About NCCUSL: Introduction, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex= 0&tabid=11 (last visited Mar. 1, 2010).

[218] 175 U.S. 162, 167 (1899).

norms in this area by reaffirming that parents' right to educate their children is a constitutionally-protected liberty.[219] This case was followed by others that have had a significant impact in establishing uniformity in state family laws, including *Griswold v. Connecticut*, establishing the right to privacy in marital relations,[220] *Loving v. Virginia*, prohibiting states from criminalizing interracial marriage,[221] and *Troxel v. Granville*, finding that parents—not the state—have the right to determine when grandparent visitation is appropriate.[222] Constitutional experts recognize that despite the Court's sometimes mantra that family law is reserved to the states,[223] it has been "among the forces transforming American family law over the last fifty years."[224]

D. Federal Laws

Although it is a widely held view that the states are primarily responsible for legislation regarding families,[225] "the federal government has considerable authority to intervene and has often done so."[226] Federal laws have frequently been used to "promote particular family values."[227] Some federal statutes are particularly relevant to the goals of a deployment rule because they illustrate how federal legislation has been used to mandate uniform and consistent state treatment in family law, including laws affecting children.

1. Child Abuse Prevention and Treatment Act of 1974[228]

The Child Abuse Prevention and Treatment Act (CAPTA) was established to assist in the "prevention, identification, and treatment of child abuse and neglect."[229] The Act effectively creates national definitions for key terms such as "child abuse" and "neglect"[230] by requiring the states to use the federal definitions in order to receive grant money.[231] Additionally, federal funds are dependent on numerous eligibility factors,[232] including requirements that the states (1) institute laws that allow for termination of parental rights of parents convicted of certain heinous crimes committed against another parent or child;[233] and (2) assign an attorney or special advocate as guardian ad litem in every court proceeding involving child abuse or neglect.[234] A deployment rule would accomplish exactly what this Act did—common definitions for critical terms such as "active duty," "deployment," and "servicemember," and similar state requirements in permanent military child custody modification proceedings.

2. Indian Child Welfare Act of 1978[235]

This Act was passed as a remedy to the "alarmingly high percentage" and "often unwarranted" removal of Indian children from their homes through state proceedings.[236] Importantly, the Act recognized that American Indians are a unique population and that the states frequently discounted the special social and cultural aspects related to Native Americans.[237] The Act provides Indian tribes with exclusive jurisdiction over child custody proceedings involving all Indian children within a tribe's reservation,[238] requires the states to transfer any foster care or parental rights proceeding involving an Indian child that does not reside within reservation to the appropriate tribe,[239] and empowers Indian

[219] 262 U.S. 390, 399 (1923).

[220] 381 U.S. 479, 485–86 (1965).

[221] 388 U.S. 1, 2 (1967).

[222] 530 U.S. 57, 57–8 (2000).

[223] *See Simms*, 175 U.S. at 167; *see also* Law, *supra* note 198, at 178–80 (discussing Supreme Court holdings in United States v. Lopez, 514 U.S. 549 (1995), United States v. Morrison, 529 U.S. 598 (2000), and Ankenbrandt v. Richards, 504 U.S. 689 (1992)).

[224] David D. Meyer, *The Constitutionalization of Family Law*, 42(3) FAM. L.Q. 529, 529 (2008).

[225] *See* Law, *supra* note 198, at 178.

[226] *Id*. at 184.

[227] *Id*.

[228] Pub. L. No. 93-347, 8 Stat. 4 (1974) (codified at 42 U.S.C. §§ 5101–07 (2006)).

[229] *Id.*

[230] 42 U.S.C. § 5106(g). The terms mean, "at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm."

[231] *See id.* § 5106(a)(b)(2)(A). The available grants under this Act are currently pending reauthorization by Congress. Since 1974, reauthorizations have occurred in 1978, 1984, 1986, 1989, 1992, 1996, and 2003 (through FY 2008). Howard Davidson, *Federal Law and State Intervention When Parents Fail: Has National Guidance of Our Child Welfare System Been Successful?*, 42(3) FAM. L.Q. 481, 485–90 (2008).

[232] 42 U.S.C. § 5106(a)(b)(c).

[233] *Id.* § 5106(a)(b)(2)(A)(xvii). These crimes include felony assault resulting in serious bodily injury and murder or voluntary manslaughter, including conspiracy, solicitation or attempt to commit murder or voluntary manslaughter. *Id.*

[234] *Id.* § 5106(a)(b)(2)(A)(xiii).

[235] Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901–63).

[236] *Id.* § 2(4), 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1901(4)).

[237] *Id.* § 2(5), 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1901(5)).

[238] *Id.* § 101(a), 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1911). Child custody proceeding is defined as a foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement. *Id.* § 4. The term does not include divorce custody orders unless custody is awarded to a third party. *See* Thomas J. Meyers & Jonathan J. Siebers, *The Indian Child Welfare Act: Myths and Mistaken Application*, 83 MICH. BAR J. 19, 20 (2004).

[239] § 101(b), 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1911). The state court may retain jurisdiction if the tribal court declines to take the case or if either parent objects. *Id.*

tribes to intervene, at any time, in any state proceeding involving foster care or parental rights.[240] There are similarities between a deployment rule for servicemembers and the Indian Child Welfare Act (ICWA). First, the ICWA established a national rule for certain child custody cases for a unique population within the United States. Second, by removing the state from these custody proceedings, the ICWA prevented state court judges from considering the special circumstances associated with being raised by Native American parents.

During the last fifty-plus years, the growth of national organizations, the efforts of the NCCUSL, relevant Supreme Court decisions and even federal legislation have all worked to establish national norms in family law, to include child custody. A deployment rule is in keeping with this trend towards standardization and would produce more consistent results in military child custody modification disputes.

VI. Policy Considerations: The Constitution, a Tradition of Special Protections for Servicemembers, and Parental Needs and Rights

Experts have asserted there is a "practical need to make compromises" when there are conflicting "protected interests" in child custody proceedings.[241] One academic pointed out that in these situations, the cases have been determined in accordance with the "priorities established legislatively or traditionally."[242] This nation's traditions and legislative priorities establish the legitimacy of a uniform child custody law that forbids courts from considering military deployments in modification proceedings as a matter of policy.

One has to look no further than the Constitution, which grants to Congress the power to "provide for the common defence"[243] and "raise and support" armed forces,[244] to find strong policy rationale for such a rule. Additionally, Congress has frequently provided special benefits based on military status similar to minorities, the disabled, and other protected groups.[245] These benefits have routinely been upheld by the courts.[246] Finally, the rights and needs of parents is a policy interest long recognized by the Supreme Court[247] and often missing from the current child custody legal methodology.[248] One scholar noted that there are situations where "public policy would have to take precedence" in child custody cases. [249] It is difficult to imagine a situation more deserving of such precedence than the deployment of the nation's servicemembers.

A. The Constitution Directs Congress to Maintain a Sufficient Fighting Force

Certainly, a critical policy consideration is Congress's constitutional power "[t]o raise and support armies . . . [and] [t]o provide and maintain a navy."[250] This power is exceptionally important now, after more than eight years of military deployments in support of Operation Enduring Freedom[251] and Operation Iraqi Freedom.[252] Military recruitment has suffered—quantitatively and qualitatively. In 2006 and 2007, the Army National Guard and the Air National Guard failed to meet their recruiting goals.[253] During this same period in the active component, the Army accepted approximately ten percent fewer high school diploma graduates than their benchmarks in order to meet its overall recruiting targets.[254] Further, in 2007, after missing recruiting quotas for the summer months, the Army only reached its goal of 80,000 recruits by introducing a $20,000.00 bonus in August 2007 for any person willing to "quick ship" and report to basic training within thirty days.[255] The Army Under Secretary of Defense for Personnel and Readiness proclaimed 2008 to be "the strongest recruiting year we've had since 2002" after the Army met its 80,000 Soldier recruitment goal by 517 Soldiers.[256] However, in order to reach this goal, the Army opened its own General Education Diploma completion center at Fort Jackson, South Carolina and relied on extensive bonuses and moral waivers for serious

---

[240] § 101(c), 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1911).

[241] MENTAL HEALTH ASPECTS OF CUSTODY LAW 70 (Robert J. Levy ed., 2005).

[242] *Id*.

[243] U.S. CONST. art. I, §8, cl. 1.

[244] *Id.* art. I, § 8, cl. 12.

[245] *See infra* Part VI.B.

[246] *See id.*

[247] *See infra* Part V.C.

[248] *See id.*

[249] BREEN, *supra* note 104, at 59.

[250] U.S. CONST. art. I, §8, cls. 12–13.

[251] *See Operation Enduring Freedom—Operations*, GLOBALSECURITY.ORG, *available at* http://www.globalsecurity.org/military/ops/enduring-freedom-ops.htm ("Operation Enduring Freedom began on 7 October 2001, four weeks after the 11 September 2001 terrorist attacks on America.").

[252] *See id.* (Operation Iraqi Freedom began on 19 March 2003).

[253] CHARLES A. HENNING & LAWRENCE KAPP, CONG. RESEARCH SERV., RECRUITING AND RETENTION: AN OVERVIEW OF FY 2006 AND FY 2007 RESULTS FOR ACTIVE AND RESERVE COMPONENT ENLISTED PERSONNEL, at CRS-6 (Feb. 2008).

[254] *Id*. at CRS-4.

[255] Josh White, *Army Exceeds Recruitment Goal For August by 528*, WASH. POST, Sept. 5, 2007, *available at* http://www.washington post.com/wp-dyn/content/article/2007/09/04/AR2007090401976.hmtl.

[256] News Release, U.S. Army, Army Exceed Recruiting Goal for Fiscal Year 2008 (Oct. 10, 2008), *available at* http://www.army.mil/-newsreleases/2008/10/13228-army-exceed-recruiting-goal-for-fiscal-year-2008/.

misconduct.[257] Over the last few years, the Army has doubled the maximum allowable number of Category IV recruits,[258] provided more personnel and money to its Recruiting Command, raised the maximum age for enlistees from thirty-five to forty-two, eased appearance standards, and doubled enlistment bonuses in an effort to maintain its force.[259]

Further, the strain on the military shows no sign of decreasing. After taking office, President Obama deployed an additional 21,000 servicemembers to Afghanistan.[260] In July 2009, Defense Secretary Gates authorized 22,000 additional active duty troops for a three-year period.[261] In December 2009, President Obama announced a 30,000 troop surge to Afghanistan in 2010.[262] The current operational pace warrants incentives and not disincentives—like the prospect of losing custody of their children—for servicemembers to remain in the military.

Congress's mandate has been the driving force behind numerous policies, from legislation on military recruiting at educational institutions[263] to bonuses to retain active duty personnel.[264] In 2002, Congress flexed this power in a way that impacted children by enacting the No Child Left Behind Act (NCLB).[265] Secondary schools that refused to provide student information to military recruiters were excluded from receiving funding under the act.[266] Additionally, high schools were required to provide recruiters with equal access to students as given to university representatives and potential employers.[267] Federal courts have rejected local attempts to challenge these policies. Recently, a California district court struck down local ordinances that prohibited military recruiting of any kind within city limits.[268] The court found that even if the local school districts chose not to receive funds under the NCLB, the ordinances were unconstitutional in violation of the Supremacy Clause based on Congress's declaration of "national policy in favor of recruiting persons for voluntary enlistment in the [A]rmed [F]orces."[269] The court further found that "the ordinances aim[ed] to frustrate that congressionally declared objective."[270]

The Solomon Amendment also faced a court challenge in *Rumsfeld v. Forum for Academic Institutional Rights*.[271] Universities argued that allowing military recruiters on their grounds violated campus policies prohibiting discrimination based on sexual preference and amounted to endorsement of the "Don't Ask, Don't Tell" policy.[272] They asserted that this was an infringement of their First Amendment speech rights.[273] However, the Supreme Court found that the Congressional interest in "rais[ing] and support[ing]" military forces[274] took precedent over university free speech rights, regardless of whether other means of achieving this interest were sufficient.[275]

---

[257] *Id*.

[258] Category IV recruits are those that score in the 10th through the 30th percentile on the Armed Forces Qualification Test. *See* HENNING & KAPP, *supra* note 253, at CRS-4.

[259] *Id.* at CRS-2–3.

[260] Peter Baker & Mark Landler, *Obama Demands Afghan Reforms Produce Results*, N.Y. TIMES, Nov. 20, 2009, *available at* http://www.nytimes.com/2009/11/20/world/asia/20policy.html.

[261] Robert Gates, U.S. Sec'y of Def. & Admiral Michael Mullen, Chairman of the Joint Chiefs of Staff, News Briefing from the Pentagon (Jul. 20, 2009) (transcript available at http://www.defenselink.mil/transcripts.transcript.aspx?transcriptid=4447).

[262] Barack Obama, President of the United States, Remarks by the President in Address to the Nation on the Way Forward in Afghanistan and Pakistan (Dec. 1, 2009) (transcript available at http://www.whitehouse.gov /the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan).

[263] *See infra* Part VI.A.

[264] *See, e.g.*, PERSONNEL PLANS AND TRAINING OFFICE, JAG PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES, app. Personnel Policies sec. IV (1 Nov. 2009). This publication outlines a package of loan repayments, incentive pay and bonuses totaling $185,000 during a Judge Advocate's career. The publication states "The Judge Advocate Officer Incentive Program was created to facilitate the accessing and retaining of lawyers in the Regular Army." *Id*.

[265] An Act to Close the Achievement Gap with Accountability, Flexibility, and Choice, So That No Child is Left Behind (No Child Left Behind Act), Pub. L. No. 107-110, 115 Stat. 1425 (2002).

[266] *See* 20 U.S.C. § 7908(a)(1) (2006); *but cf. id.* § 7908(a)(2) (The No Child Left Behind Act does include a provision that enables parents to request the school withhold their child's information.).

[267] *See id.* § 7908(a)(3).

[268] United States v. City of Arcata, 2009 U.S. Dist. LEXIS 57555 (N.D. Cal. 2009) (The city ordinances stated, "No person who is employed by or an agent of the United States government shall, within the City of [Arcata or Eureka], in the execution of his or her job duties, recruit, initiate contact with for the purposes of recruiting, or promote the future enlistment of any person under the age of eighteen into any branch of the United States Armed Forces.").

[269] *Id*.

[270] *Id*. In the mid-nineties, Congress enacted aggressive legislation to ensure military recruiters and officer training programs were not excluded from college campuses. In 1994, the "Solomon Amendment" was passed as part of the NDAA for FY 1995. NDAA for FY 1995, Pub. L. No. 103–337, 108 Stat. 2776 (1994). The amendment denied certain funds to universities that refused military recruiters' access to students, student information, or campus facilities. *Id.* Then in the NDAA for FY 1996, Congress denied funding to universities with "anti-ROTC" policies. NDAA for FY 1996, Pub. L. No. 104–106, 110 Stat. 315 (1996) (as codified in 10 U.S.C. § 983 (2006)). The term "anti-ROTC" was substituted for "policy or practice (regardless of when implemented) that either prohibits, or in effect prevents" the establishment of ROTC programs or a student from attending a ROTC program at a neighboring university. *Id*.

[271] 547 U.S. 47 (2006).

[272] *Id*. at 50.

[273] *Id*.

[274] U.S. CONST. art. I, § 8, cl. 12.

[275] *Rumsfeld*, 547 U.S. at 67 ("Military recruiting promotes the substantial Government interest in raising and supporting the Armed Forces . . . The issue is not whether other means of raising an army and providing for a navy might be adequate . . . It suffices that the means chosen by Congress add to the effectiveness of military recruitment.").

Congressional and judicial activity in mandating military access to secondary schools and college campuses establishes a precedent for holding our national interest in a healthy fighting force over other competing interests, even when children are involved. Similarly here, Congress's interest in providing for the "common defence"[276] should carry significant weight against other interests in military custody cases, except when a child is in danger of imminent harm.

B. Special Protections for Servicemembers

In a Supreme Court decision upholding Congress's special grant of tax exempt status to veterans' organizations involved in "substantial lobbying," the Court stated "[v]eterans have been obliged to drop their own affairs to take up the burdens of the nation."[277] The Court goes on to explain that "[o]ur country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages. This policy has 'always been deemed to be legitimate.'"[278] The Supreme Court's assertion is supported by numerous nationally-mandated protections relevant to establishing a deployment rule for child custody cases, such as the Uniform Services Employment and Reemployment Rights Act (USERRA) and the SCRA.[279]

1. Uniform Services Employment and Reemployment Rights Act of 1994 [280]

The purposes served by preventing courts from considering deployments in modification hearings match up well to the goals of the USERRA. The first purpose of USERRA is to promote military service by decreasing the repercussions of service on the member's civilian employment.[281] Similarly, a deployment rule would remove the disincentive to serve for fear of losing custody of one's children.

The second purpose of USERRA is to "minimize disruption in the lives of the service member, employers, co-workers and communities by providing for the prompt reemployment of a member upon completion of service."[282] Again, the purpose of the deployment rule is quite similar—to minimize the disruption in the lives of children, caregivers, custodial and noncustodial parents after a servicemember returns from deployment by providing for the smooth transition of children back to their custodial parents without disruptive and protracted modification proceedings.

Finally, USERRA forbids employers from discriminating against members of the military based on their service.[283] Likewise, a deployment rule would prevent state court judges from using military deployments as a method of distinguishing between fit parents in child custody modification proceedings.

The USERRA treats military members as a "special" or "protected" class similar to the status given to minorities or the disabled in Title VII of the Civil Rights Act and the American with Disabilities Act.[284] Additionally, the judicial and legislative branches have actively enforced USERRA benefits. The courts have "broadly construed [USERRA] in favor of its military beneficiaries."[285] Further, in 2008, Congress abolished complaint filing deadlines in the Veterans Benefits Improvement Act.[286]

Enforcement of USERRA places a burden on employers, who confront "business related hardships due to the absence of their reserve service member employees."[287] Nevertheless, the interest in maintaining a strong military has trumped the potential burden to employers. The USERRA gives servicemembers "special" status despite competing interests. Servicemembers should receive this same preferential treatment by law and by the courts in the matters of child custody.

2. Servicemembers Civil Relief Act of 2003[288]

The SCRA serves to "strengthen, and expedite the national defense"[289] by endowing servicemembers with

[276] U.S. CONST. art. I, §8, cl. 1.

[277] Regan v. Taxation with Representation of Wash., 461 U.S. 540, 550 (1983) (citing Boone v. Lightner, 319 U.S. 561, 575 (1943)).

[278] *Id.* at 550 (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

[279] *See infra* Part VI.B.

[280] 38 U.S.C. §§ 4301–4334 (2006).

[281] *See* Major Michele A. Forte, *Reemployment Rights for the Guard and Reserve: Will Civilian Employers Pay the Price for National Defense?*, 59 A.F. L. REV. 287, 289–90 (2007).

[282] *Id.*

[283] *See id.*

[284] *See id*. at 294 (citing Lieutenant Colonel Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55, 56 (1999)). The Uniform Services Employment and Reemployment Rights Act (USERRA) provides for protection against discrimination based on protected status (military service), similar to Title VII's protection from discrimination based on race, sex, creed, color and national origin. The USERRA also contains the duty to make reasonable accommodations for an employee seeking reinstatement who has become disabled due to his or her military service, similar to the accommodations in the Americans with Disabilities Act. *Id.*

[285] Forte, *supra* note 281, at 295.

[286] *See* 38 U.S.C. § 4327(b) (2006).

[287] Forte, *supra* note 281, at 291.

[288] 50 U.S.C. app. § 501–596 (2006).

[289] *Id.* § 502(1).

special rights and privileges so that servicemembers may "devote their entire energy to the defense needs of the Nation."[290] Although the current version of the SCRA is only six years old, the goals are no different than the Soldiers' and Sailors' Civil Relief Acts (SSCRA) of 1918 and 1940.[291] Similar to USERRA, enforcement of the SCRA "may result in detriment to parties who are not in the military service."[292] The SCRA is evidence of the country's long-standing tradition of treating servicemembers special as a matter of policy. As the Supreme Court explained:

> The justification for providing a special benefit for veterans, as opposed to nonveterans, has been recognized throughout the history of our country. It merits restatement. First, the simple interest in expressing the majority's gratitude for services that often entail hardship, hazard, and separation from family and friends, and that may be vital to the continued security of our Nation, is itself an adequate justification for providing veterans with a tangible token of appreciation. Second, recognition of the fact that military service . . . justifies additional tangible benefits . . . to help overcome the adverse consequences of service.[293]

The SCRA includes provisions for certain eviction protections,[294] early termination of home and automobile leases,[295] and reduced interest rates on pre-service debts.[296] The SCRA protects all members of the Armed Forces, to include the Reserve Component, during periods of military service[297] and is applicable to every civil, judicial, or administrative matter held in any state or territory of the United States.[298] Significantly, the SCRA requires courts to stay any civil proceeding for at least ninety days upon receipt of an application that includes:

> (1) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear; [and]
>
> (2) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.[299]

Accordingly, as long as a servicemember meets the requirements of the provision above, courts have no flexibility in determining whether or not to grant a stay. This is exactly the type of mandatory provision which is necessary in the area of permanent child custody modification proceedings in order to protect servicemembers and maintain a robust volunteer military. The nation's warfighters should have peace of mind that when they are deployed to a combat zone or activated to fill a critical military need, that the price will not be the loss of their children.

3. Education & Immigration

Opponents of a deployment rule may argue that it is different than other servicemember protections because it also impacts military children.[300] However, our nation has previously adopted servicemember protections which also impact or benefit military children. For example, the immigration rights of military children are directly impacted by their parent's military service. Non-citizen servicemembers receive expedited citizenship processing based solely on their military status.[301] Children of non-citizens may apply time spent overseas pursuant to military orders towards their own residency requirements for naturalization.[302]

---

[290] *Id*.

[291] *See* Sara Estrin, *The SCRA: Why and How this Act Applies to Child Custody Proceedings*, 27 LAW & INEQ. J. 211, 213 (Winter 2009) (discussing the history of the SCRA and its purposes beginning with the Civil War).

[292] Hunt v. UAW Local 1762, 2006 U.S. Dist. LEXIS 12673 (E.D. Ark. Mar. 7, 2006) (citing Craven v. Vought, 1041 Pa. Dist. & Cnty. Dec. LEXIS 239 (PA C.P. 1941)).

[293] Hooper. v. Bernalillo Cnty. Assessor, 472 U.S. 612, 626 (1985).

[294] 50 U.S.C. app. § 531 (2006).

[295] *Id*. § 535.

[296] *Id*. § 527.

[297] *Id*. § 511.

[298] *Id*. § 512(a)(1)–(3).

[299] *Id*. § 522(b)(2)(A)–(B).

[300] *But see supra* Part IV (explaining that a deployment rule is in the best interest of children and has a positive impact on military children).

[301] Lieutenant Colonel Jeffrey P. Sexton, *Noncitizen Servicemembers: Do They Really Have to Die to Become U.S. Citizens?*, ARMY LAW., Sept. 2008, at 50, 51–52 (noting that since July 2002, servicemembers have had the right to immediately naturalize without meeting the normal residency time requirements; military applications are all detailed to the Nebraska Service Center for more efficient processing; and the 2004 NDAA required that servicemembers have complete access to the naturalization process, to include taking the oath of citizenship, at overseas duty stations); *see also* Exec. Order No. 13,269, 67 C.F.R. 485, 287 (2002), *reprinted as amended in* 8 U.S.C. § 1440 (2006).

[302] 8 U.S.C. § 1433(d) (2006).

Additionally, the Post-9/11 Veterans Educational Assistance Act of 2008 (VEAA) was passed,[303] largely as a result of the increased sacrifices attributable to the Global War on Terror.[304] During the last twenty-five years, the Montgomery GI Bill (MGIB) has served as the predominant source of assistance to servicemembers seeking post-secondary education.[305] The VEAA significantly increases the benefits available under the MGIB,[306] and includes a provision that allows servicemembers to transfer VEAA benefits to their children.[307] These examples illustrate that often our nation provides the military with special protections, even when they impact children. Further, often these benefits explicitly extend to military children.

C. Parental Rights

Another important policy consideration is parental rights. As one scholar noted, a child's "protection should not be achieved at the expense of large losses in parental welfare rights." [308] This is precisely what happens when redeploying parents have their original custody jurisdiction reversed as a result of their service. A deployment rule reflects the assertions of many experts that some weight should be given to parental needs in custody determinations.[309] Further, this viewpoint is bolstered by the Supreme Court's long tradition of recognizing parenting as a "fundamental right" requiring significant due process prior to state action regarding these rights.[310] In *Troxel*, a mother contested a state court's award of increased visitation to her children's paternal grandparents against her wishes.[311] The judge's ruling was based on a Washington statute that allowed for such visitation so long as it was in the best interests of the children.[312] Ultimately, the U.S. Supreme Court found the statute "unconstitutionally infringe[d] on parents' fundamental right to rear their children."[313] In reaching its holding, the Court gave no consideration and included no discussion of the best interests of the children.[314] Indeed, the Court *only* considered the rights and interests of the adults involved.[315] The Supreme Court's holding in this case supports the proposition that there are important factors—other than what one state court judge determines is in the best interests of the child—that should be considered in child custody determinations.

Consideration of parental needs of deploying servicemembers, this country's extensive history of granting special protections to the military, and Congress's mandate to build and maintain armed forces all provide heavy weight to the argument that military deployments should be excluded as a factor from permanent child custody modification proceedings.

[303] Post-9/11 Veterans Educational Assistance Act of 2008 (VEAA), Pub. L. No. 110-252, 122 Stat. 2357 (codified at 38 U.S.C. §§ 101, 3301, 3311–3319, 3321–3324 (2006)).

[304] *See* Joseph B. Keillor, *Veterans at the Gates: Exploring the New GI Bill and its Transformative Possibilities*, 87 WASH. U. L. REV. 175, 177 (2009) (noting comments by Senator James Webb that only a "'very small percentage of the country'" serve in the military and that those "'serving since 9/11 [ought] to receive a GI Bill that is worthy of their service,'" and comments by the Dartmouth College President in support of the bill, "'[f]ew Americans realize that the young people who are serving their country in Iraq and Afghanistan will not receive the kind of assistance that their grandfathers received when they returned from World War II.'"); *see also* Ravi Shankar, *Recent Development: Post-9/11 Veterans Educational Assistance Act of 2008*, 46 HARV. J. ON LEGIS., 303, 303 (2009) (noting the Montgomery GI Bill was "intended as a small recruitment incentive during peacetime").

[305] Veterans' Educational Assistance Act of 1984 (MGIB), Pub. L. No. 98-525, 98 Stat. 2553 (1984) (codified at 38 U.S.C. §§ 3001–3002, 3011–3020, 3021–3023, 3031–3036 (2006)).

[306] *See, e.g.*, Benefit Comparison Chart (U.S. Dep't of Veterans Affairs), *available at* http://www.gibill.va.gov/gi_bill_info/CH33/Benefit_Comparison_Chart.htm (showing that in addition to direct tuition payments to a qualifying institution of higher learning, the VEAA provides a monthly housing allowance equal to the E-5 Basic Allowance for Housing rate, a yearly book stipend of up to $1000, expands eligibility to include service academy and ROTC graduates, eliminates MGIB requirement for enrollees to pay $100 per month for the first twelve months of their enlistment; decreases minimum requirement to receive some benefit from two years to ninety days of active duty service; increases period to use benefit from ten years to fifteen years); *but c.f.* Keillor, *supra* note 304, at 185–86 (noting instances where the MGIB is more advantageous, including those who wish to participate in correspondence and apprenticeships and those who reside in low-cost areas and are already attending school tuition free (due to scholarships or a state benefit)).

[307] 38 U.S.C. § 3319(c), (g)(2)(A)(i) (2006). Servicemembers who have completed six years of active duty service may transfer their education benefits to their children, so long as they agree to serve for an additional four years. Children may not use the benefits until the servicemember has completed ten years of active duty service.

[308] BREEN, *supra* note 104, at 61–62.

[309] Becker, *supra* note 194, at 172; Elster, *supra* note 165, at 16–21; David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 499–503 (1984).

[310] *See* Troxel v. Granville, 530 U .S. 57, 65 (2000) (stating "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this court."); *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that the right to raise one's children has been deemed "essential to the orderly pursuit of happiness by free men."); May v. Anderson, 345 U.S. 528, 533 (1953) (stating that the "right to the care, custody, management and companionship of [a parent's] minor children . . . [are] far more precious . . . than property rights."); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

[311] *Troxel*, 530 U.S. at 57.

[312] *See* WASH. REV. CODE § 26.10.160(3) (West 2009) (stating, "[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.").

[313] *Troxel*, 530 U.S. at 57 (affirming the holding of *In re Troxel*, 940 P.2d 698 (Wash. App. Div. 1997)).

[314] Daniel W. Shuman, Troxel v. Granville *and the Boundaries of Therapeutic Jurisprudence*, 41 FAM. CT. REV. 67, 71 (2003); *see also Troxel*, 530 U.S. at 67–71.

[315] Shuman, *supra* note 314; *see also Troxel*, 530 U.S. at 67–71.

VII. Creating a Uniform Deployment Rule

A. What a Uniform Deployment Rule Must Include

A deployment rule that includes the following provisions is in the best interests of children, is consistent with establishment of national norms in family law, and is required as a matter of policy:

> (1) Neither deployments nor the immediate consequences of deployment, to include temporary disruption to children before, during, or after the period of deployment, may be considered in change of circumstance determinations and best interests analysis conducted during permanent child custody modification proceedings.
>
> (2) Temporary modification orders issued during a deployment terminate immediately upon a servicemember's return to their usual place of residence or permanent duty station and automatically revert back to the custody order in effect prior to the deployment.
>
> (3) Applicability. Paragraphs (1) and (2) are applicable to all servicemembers.
>
> (4) Definitions.
>
> a. "Servicemember" means any member serving in an active duty status in the Armed Forces of the United States, National Guard, or the Reserves.
>
> b. "Active duty" means service pursuant to United States Code Title 10 or full-time National Guard duty pursuant to United States Code Title 32 § 502(f)(2) for the purpose of homeland defense operations.
>
> c. "Deployment" means the temporary transfer of a servicemember serving in an active duty status to a location other than their normal place of duty or residence in support of a combat or military operation. This includes the mobilization of National Guard or Reserve servicemember to extended active duty status at CONUS installations in support of military operations. "Deployment" does not include National Guard or Reserve annual training periods.
>
> d. "Child custody order" means a court ordered or court approved agreement regarding the physical and residential placement of children, including orders regarding visitation.
>
> e. "Permanent child custody modification proceedings" means any judicial proceeding to change the custody order in effect prior to a military deployment. This includes proceedings that would change court orders regarding visitation rights of servicemembers that are not the primary physical custodians of their children. Temporary modification orders during the length of the deployment are authorized.

B. Best Method to Achieve a Uniform Deployment Rule

Servicemember protections and standardized family laws have been achieved through a variety of methods to include federal legislation as discussed in Part V of this article; however, a Uniform Military Child Custody Act promulgated by the ULC and adopted by the states is the best method for creating a deployment rule. This method ensures that the states are utilizing common definitions and will reconcile disparate rules regarding qualifying servicemembers and military deployments.[316] Consistent terminology and guidance to courts will make it more likely that similarly situated servicemembers achieve similar outcomes no matter their jurisdiction. Additionally, a uniform act is in compliance with the DoD opposition to federal legislation in this area[317] and prevents any possibility of federal-question jurisdiction, as raised by the ABA in its 2009 Resolution opposing a child custody amendment to the SCRA.[318] Finally, a uniform act has a high likelihood for full state adoption in a relatively short time period as evidenced by the widely-adopted Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and UIFSA.

1. Uniform Child Custody Jurisdiction Enforcement Act

Ultimately, it is the "state legislatures, not NCCUSL, that determine the need for uniformity."[319] However, the UCCJEA and its predecessor, the Uniform Child Custody Jurisdiction Act (UCCJA), show that when there is great diversity between the states, uniform acts are universally accepted and adopted by the states. The ULC submitted the UCCJA to the states for adoption in 1968 to synchronize state child custody jurisdiction statutes and prevent noncustodial parents from driving their children to a

---

[316] *See supra* Part III.B.

[317] *See* DoD Statement, *supra* note 89.

[318] *See* Ventrelli & Guter, *supra* note 65.

[319] Sampson, *supra* note 211, at 674.

neighboring state in search of a court that would modify another state's custody order to their benefit.[320] The 1968 UCCJA was adopted by every state to include Washington D.C., and the U.S. Virgin Islands.[321] In 1997, the ULC updated the UCCJA and replaced it with the UCCJEA. The UCCJEA improves upon the UCCJA by establishing (1) that the child's state of residence is the appropriate jurisdiction to determine which state will have jurisdiction over initial child custody disputes; and (2) clarifying that the original state of child custody jurisdiction is the only state that may modify a previous custody order until both parents and the child no longer reside in the state.[322] Subsequently, all states have adopted the UCCJEA with the exceptions of Massachusetts and Vermont where the UCCJA is still law.[323] The UCCJEA was widely adopted because it was a vehicle for bringing "clearer standards" in child custody jurisdiction law and "uniform procedure to the law of interstate enforcement that [was] . . . producing inconsistent results."[324] A servicemember custody act which includes a deployment rule should be similarly accepted as a vehicle for providing definite standards to be applied in military child custody modification proceedings to prevent inconsistent outcomes for deploying servicemembers depending on the state of jurisdiction.

2. Uniform Interstate Family Support Act

The UIFSA reduces the possibility for multiple state support orders and makes procedures for initiating and enforcing support orders more efficient.[325] If a uniform act on military child custody does not enjoy the quick and widespread adoption of the UCCJEA, the UISFA provides a model to ensure state implementation. The UIFSA was originally promulgated in 1992 and was subsequently adopted by thirty-five states.[326] In 1996, the UIFSA was amended in response to requests for clarification by federally funded child support agencies.[327] Congress endorsed the amended act by conditioning federal aid for child support enforcement to state adoption of the UIFSA as amended within eighteen months.[328] Every state adopted the UIFSA within this timeline.[329] Similarly, in the case of military child custody modifications, there are federal interests in maintaining armed forces and providing consistent standards for servicemembers, which make a uniform act ripe for this type of federal endorsement.

VIII. Conclusion

> *A Soldier is the most-trusted profession in America. Americans have trust in you because you trust each other. No matter how difficult times are, those of us who love the Army must stick with it.*[330]

A uniform custody act for servicemembers that prohibits state courts from considering deployments as a factor in permanent child custody modification is in the best interests of children. Such a rule reduces the likelihood of emotional damage to children caused by continual relitigation of custody orders, removes some of the discretion which leads to judgments based on personal biases in custody proceedings, and increases children's access to military support services following a custodial parent's deployment. Additionally, a deployment rule is consistent with the trend towards national norms in family law, is in accordance with Congress's responsibility to maintain this country's Armed Forces and the nation's long history of granting special rights and protections to its servicemembers. Finally, using a uniform act as the vehicle to establish a deployment rule does not conflict with DoD or the ABA's opposition to amending the SCRA to establish this protection.

An Army officer, who recently returned from Afghanistan only to discover her ex-husband refused to give back her son stated, "We're asked to drop everything to go to combat . . . . Is it too much to ask that we have protection

---

[320] ULC, Summary: Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), http://www/mccis;/org/Update/uniformact_summaries/uniformacts-s-uccjea.asp (last visited Mar. 1, 2010) [hereinafter UCCJEA Summary].

[321] NCCUSL, UCCJEA (with prefatory notes and comments) 1 (1997) [hereinafter UCCJEA Notes].

[322] UCCJEA art. 2, § 201; *id.* art. 2, § 202. The UCCJEA explicitly states that the state of original jurisdiction has "exclusive, continuing jurisdiction" until the child or both parents no longer reside in that state. *Id.* Whereas the UCCJA stated that a "legitimate exercise of jurisdiction must be honored by any other state until the basis for that exercise of jurisdiction no longer exists." UCCJEA Summary, *supra* note 320.

[323] ULC, A Few Facts About The UCCJEA, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uccjea.asp (last visited Mar. 1, 2010).

[324] UCCJEA Notes, *supra* note 321.

[325] *See* John J. Sampson, *Uniform Interstate Family Support Act (2001) with Prefatory Notes and Comments* (UIFSA), 36 FAM. L.Q. 329, 342–46 (2002) (discussing the UIFSA's long arm jurisdiction and continuing, exclusive jurisdiction which help to maintain support proceedings in one state; also discussing UIFSA's provision enabling support proceedings to be initiated by administrative agencies instead of courts in interstate proceedings and allowing for direct enforcement of support orders through the employer).

[326] *Id.* at 337.

[327] *Id*.

[328] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, subtit. C, § 321, 110 Stat. 2105 (codified at 42 U.S.C.A. § 666 (West 2010)).

[329] Sampson, *supra* note 325, at 338.

[330] Ninth Sergeant Major of the Army Richard A. Kidd (July 1991–June 1995), Medical Training Resources, Quotes on The Army Values, MEDTRNG.COM, http://www.medtrng.com/janldrshipquotes.htm (last visited Mar. 1, 2010).

for when we come back to get our children back?"[331] This country needs a uniform act that includes a deployment rule, enabling the servicemembers of this nation's all-volunteer force to serve without fear that they will lose custody of their children.

[331] Michelle Miller, *Single Parents Who Battle in America's Wars Can Find Themselves Fighting for Custody of Their Children When They Return*, CBSNEWS.COM, Dec. 12, 2009, http://www.cbsnews.com/stories/2009/12/12/eveningnews/main5972251.shtml.

Appendix A

State Military Modification Statutes

State	Statute	Pending Bills
Alabama	No Deployment Statute	H.B. 332, Reg. Sess. (2006)
Alaska	No Deployment Statute	H.B. 264, 25th Leg., 1st Sess. (2007)
Arizona	ARIZ. REV. STAT. ANN. § 25-411 (West 2010)	
Arkansas	ARK. CODE ANN. § 9-13-110 (West 2010)	
California	CAL. FAM. CODE § 3047 (West 2010)	
Colorado	COLO. REV. STAT. ANN. § 14-10-131.3 (West 2010)	
Connecticut	No Deployment Statute	
Delaware	No Deployment Statute	H.B. 294, 144th Gen. Assemb. (2008)
Florida	FLA. STAT. ANN. § 61.13002 (West 2010)	
Georgia	No Deployment Statute	
Hawaii	No Deployment Statute	
Idaho	IDAHO CODE ANN. § 32-17 (West 2010)	
Illinois	No Deployment Statute	
Indiana	No Deployment Statute	
Iowa	IOWA CODE ANN. § 598.41C (West 2010)	
Kansas	KAN. STAT. ANN. § 60-1630 (West 2010)	
Kentucky	KY. REV. STAT. ANN. § 403.340 (West 2010)	
Louisiana	No Deployment Statute	
Maine	ME. REV. STAT. ANN. 37-B § 343 (West 2010)	
Maryland	MD. CODE ANN., FAM. LAW § 9-107 (West 2010)	
Massachusetts	No Deployment Statute	
Michigan	MICH. COMP. LAWS ANN. § 722-27 (West 2010)	
Minnesota	No Deployment Statute	H.F. 2494, 85th Leg. Sess. (2007)
Mississippi	MISS. CODE ANN. § 93-5-34 (West 2009)	
Missouri	MO. ANN. STAT. 452-412 (West 2009)	
Montana	MONT. CODE ANN. § 40-4-212 (2009)	
Nebraska	NEB. REV. STAT. ANN. § 42-364 (2009)	
Nevada	No Deployment Statute	
New Hampshire	No Deployment Statute	
New Jersey	No Deployment Statute	S.2910, 2006-2007 Leg. Sess.
New Mexico	No Deployment Statute	
New York	N.Y. DOM. REL. § 75-l (West 2009)	
North Carolina	N.C. GEN. STAT. ANN. § 50-13.7A (West 2009)	

North Dakota	N.D. CENT. CODE § 14-09-06.6 (2009)	
Ohio	No Deployment Statute	H.B. 503, 126th Gen. Assemb. (2006)
Oklahoma	OKLA. STAT. ANN. TIT. 43, §112 (West 2009)	
Oregon	OR. REV. STAT. ANN. § 107.169 (West 2009)	
Pennsylvania	51 PA. STAT. ANN. § 4109 (West 2009)	
Rhode Island	No Deployment Statute	
South Carolina	S.C. ANN. §§ 63-5-910, 63-5-920 (West 2009)	
South Dakota	S.D. CODIFIED LAWS § 33-8-10 (West 2009)	
Tennessee	TENN. CODE ANN. § 36-6-113 (West 2009)	
Texas	TEX. FAM. CODE ANN. §§ 153.702, 156.102 (West 2009)	
Utah	UTAH CODE ANN. § 30-3-40 (West 2009)	
Vermont	No Deployment Statute	
Virginia	VA. CODE ANN. § 20-124.8 (West 2009)	
Washington	WASH. REV. CODE ANN. §§ 26.09.010, 26.09.260 (West 2009)	
Washington D.C.	No Deployment Statute	
West Virginia	W. VA. CODE ANN. § 48-9-404 (West 2009)	
Wisconsin	WIS. STAT. ANN. § 767.451 (West 2009)	
Wyoming	No Deployment Statute	

Appendix B

Department of Defense Statement on Child Custody Legislation[333]

DEPARTMENT OF DEFENSE POSITION

The DoD opposes efforts to create Federal child custody legislation affecting Service members. At least 30 States provide some level of statutory child custody protection for Service members and their families. These States' laws understandably vary to some degree because they are tied to substantive and procedural differences found in their body of family law. Also, many of these variances reflect different societal dimensions found in different communities across the country. By encouraging each State to address the issues within the context of their already-existing body of State law, these cases will proceed quicker and more smoothly with less likelihood of lengthy appellate review. We strongly believe that Federal legislation in this area of the law, which has historically and almost exclusively been handled by the States, would be counterproductive.

The Department applauds the efforts by those States that have passed legislation to the Department and encourages the other States to consider similar legislation.

Meanwhile, the Department is itself taking, or will take, a number of steps to further protect our Service members:

First, the Secretary of Defense has personally written the governors of the States that have yet to pass legislation addressing the special considerations of child custody cases in the military to urge them to pass such legislation.

Second, DoD has included concerns over child custody matters on the list of the Department's 10 Key Quality of Life Issues, and these are now being presented to governors, State legislators and other State officials. On September 22, 2009, a representative from the Department's Office of Legal Policy and an expert in military child custody met with each of the Department's ten Regional State Liaisons and discussed military child custody issues. These liaisons are now reaching out to State officials whose legislatures have not addressed military custody concerns to encourage them to act.

Third, DoD will ask the military service Judge Advocates General and the Staff Judge Advocate to the Commandant to ensure they are doing all they can to work with the American Bar Association (ABA), and State Bar leaders to publicize, emphasize, and support the ABA's national pro bono project, as well as pro-bono initiatives in the States. These pro-bono efforts can provide our Service members access to free legal representation from some of the country's most accomplished child custody practitioners. Fourth, DoD is engaged with the military services to update and standardize Family Care Plans across the services. These plans are developed to ensure that families are taken care of during absences due to drills, annual training, mobilization, and deployment. They include provision for long-term and short-term care of children. The Department recognizes that improvements to its Family Care Plan guidance can address many of the custody issues that

[333] DoD Statement, *supra* note 89. This statement was cut and pasted into this article directly from the document available at the CBS evening news website. The first paragraph is highlighted exactly as it was highlighted in the document on the website.

could otherwise result in litigation after deployment. By clarifying those who require a Family Care Plan and emphasizing the importance of custody negotiations with the noncustodial parent early in the process—before deployment—the issues that most often give rise to litigation can largely by avoided. The Department is convinced that these efforts can resolve far more issues in favor of our Service members than can new Federal legislation.

Something More Than a Three-Hour Tour:
Rules for Detention and Treatment of Persons at Sea on U.S. Naval Warships

Major Winston G. McMillan[*]

Maritime forces will work with others to ensure an adequate level of security and awareness in the maritime domain. In doing so, transnational threats—terrorists and extremists; proliferators of weapons of mass destruction; pirates; traffickers in persons, drugs, and conventional weapons; and other criminals—will be constrained.[1]

I. Introduction

United States naval warships travel the seas executing missions vital to U.S. national interests. During periods of armed conflict and in peacetime, U.S. naval warships may occasionally detain persons in order to accomplish the mission and to provide security on the seas. For example in May 2009, when Somali pirates attacked a container vessel, the *Maersk Alabama*, and held the ship's captain, Richard Phillips hostage on a small lifeboat.[2] In response, the United States sent an amphibious assault ship, the USS *Boxer* (LHD-4), a destroyer, the USS *Bainbridge* (DDG-96),[3] and a frigate, the USS *Halyburton* (FFG-40) to rescue the hostage.[4] A U.S. Navy SEAL team from the USS *Boxer* killed three of the pirates. The remaining pirate surrendered and was detained aboard the *Bainbridge*.[5]

Piracy on the high seas is not the only peacetime scenario which can lead to detaining persons at sea. Illegal narcotics trafficking, international terrorism, asylum-seekers, and refugees are on the rise and can present similar challenges for our naval forces.[6] These circumstances require a thorough understanding of the rules for detention of persons at sea for the judge advocate advising commanders within the sea services.

During contingency and routine operations, U.S. warships[7] may have to detain various classes of individuals. Detaining persons at sea carries broad political and legal implications which require a comprehensive understanding of the laws for detention at sea. Part II of this primer will discuss the historical background of detaining prisoners during armed conflict, and provide an overview of the current law as it pertains to detention of enemy prisoners of war (EPWs) and civilians on board a U.S. warship during armed conflict.[8] Although this primer primarily addresses the rules, regulations, sources of authority, and legal precedent concerning detaining persons in non-armed conflict situations, an understanding of the detention authority within the law of armed conflict (LOAC) will serve as a reference point for the reader. Part II will also briefly address the basic care and treatment requirements of persons detained at sea within LOAC.

---

[*]Judge Advocate, U.S. Marine Corps. Presently assigned as Military Justice Officer and Assistance Officer-in-Charge, Legal Services Support Section, Combat Logistics Regiment 37, 3d Marine Logistics Group, III Marine Expeditionary Force, Okinawa, Japan. This article was submitted in partial completion of the Master of Laws requirements of the 58th Judge Advocate Officer Graduate Course.

[1] U.S. NAVY, U.S. MARINE CORPS, & U.S. COAST GUARD, A COOPERATIVE STRATEGY FOR 21ST CENTURY SEAPOWER (2007), *available at* http://www.navy.mil/maritime/MaritimeStrategy.pdf. (last visited Mar. 5, 2010).

[2] Zane Verje et al., *Hostage Captain Rescued; Navy Snipers Kill 3 Pirates*, Apr. 12, 2009, http://www.cnn.com/2009/WORLD/africa/04/12/somalia.pirates/index.html.

[3] Interestingly, the USS *Bainbridge's* namesake, William Bainbridge, had a prominent role in U.S. relations with the Barbary pirates from 1800 until 1811. In 1800, William Bainbridge begrudgingly negotiated tribute payments with the dey [rulers] in Algiers, and later commanded the vessel USS *Philadelphia* which he surrendered to Tripolitan pirates upon running the ship aground. *See* MICHAEL B. OREN, POWER, FAITH AND FANTASY (W.W. Norton & Co., Inc., N.Y. 2007).

[4] Mike Mount & Barbara Starr, *More Pirates Searching for Lifeboats, Official Says*, Apr. 10, 2009, http://www.cnn.com/2009/WORLD/africa/04/10/somalia.u.s.ship/index.html.

[5] *See* Verje et al., *supra* note 2.

[6] *See, e.g.*, U.N. High Commission on Refugees, *Conflicts in Afghanistan and Somalia Fuel Asylum Seekers*, 24 Mar. 2009, http://www.unhcr.org/49c8a8d62.html (reporting on the large increase of asylum applications in industrialized nations and attributing the increase of applications to persons migrating from Afghanistan, Somalia, and other countries experiencing turmoil or conflict). *See also Hostile Shores, Abuse and Refoulement of Asylum Seekers and Refugees in Yemen, available at* http://www.hrw.org/en/reports/2009/12/21/hostile-shores-0 (detailing the harsh conditions of asylum-seekers and refugees from Somalia and Ethiopia transiting the African coast in overcrowded boats).

[7] U.N. Convention on Law of the Seas, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS III] (Article 29 of UNCLOS III defines a "warship" as a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.). *Id.* art. 29 *See also* U.S. DEP'T OF THE NAVY, NAVAL WARFARE, PUB. 1-14M/U.S. MARINE CORPS MCPW 5-2.1, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 2.2.1 (June 2007) [hereinafter NWP 1-14M]. *Id.*

[8] For ease of distinction, I will refer to those prisoners detained by U.S. or Coalition authorities as enemy prisoners of war (EPWs) and Americans captured as prisoners of war (POWs) will be referred to as POWs. *See* U.S. DEP'T OF DEF., DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM para. E.2.1.2 (5 Sept. 2006) [hereinafter DODD 2310.01E] ("Any EPW Individuals under the custody and/or control of the Department of Defense according Reference (g), Articles 4 and 5.").

Part III of this primer steps outside of LOAC and classifies certain types of persons who may be detained at sea during non-armed conflict situations into two major categories: criminal (conduct-based) and non-criminal (status-based). Within the criminal category, the primer analyzes the rules for detention of pirates, terrorists, and drug traffickers. Within the non-criminal category, the primer will analyze the rules for holding asylum-seekers/refugees and mariners in distress on board the naval warship, which under some circumstances may be construed as "detention." Part III will also detail the general treatment and care requirements for these non-armed conflict situations. The intent of this primer is to provide the judge advocate a synthesized reference to the multiple sources of authority for detaining persons at sea.

II. Detention of Persons at Sea within the Law of Armed Conflict

The authority to detain persons during armed conflict has been exercised in wars from the time of our nation's beginning to the most recent operations in Afghanistan and Iraq.[9] Yet, because of the history of abuse and the difficulty in monitoring conditions, human rights organizations and the United Nations take a close interest in detention of prisoners of war aboard naval warships.[10]

Given the politically sensitive nature of sea-based detentions, judge advocates must be able to quickly identify and distinguish the requirements for detention and treatment during peacetime and armed conflict. This section will briefly examine the historical examples of placing detainees and EPWs on warships during periods of armed conflict. Also examined are the applicable rules for detention of EPWs and enemy civilians within LOAC. This section will conclude by describing the basic care and treatment requirements for those detained persons within LOAC.

A. Historical Background of Internment and General Rules for Internment

For centuries, sea-faring nations placed prisoners on warships during periods of armed conflict.[11] During the American Revolution, England imprisoned over 11,000 American soldiers on board prison "hulks" including the HMS *Jersey* anchored in New York's East River.[12] Over 160 years later, during World War II (WWII), the Japanese transported and interned American prisoners of war on merchant ships and warships. The cramped, horrific living conditions on board vessels resulted in a high risk of disease and exposed prisoners to unnecessary risk of death.[13] In one of the great tragedies of WWII, U.S. naval warships destroyed at least five Japanese ships unknowingly killing thousands of American prisoners of war (POWs) on board those vessels.[14] The extremely negative experiences of WWII POWs/EPWs interned on Japanese naval vessels led the drafters of the Third Geneva Convention (GC III) to ensure that POWs/EPWs were not permanently interned on vessels at sea.[15] Thus, as a general rule, Articles 22 and 23 of the GC III prohibit the internment of EPWs at sea, internment of EPWs in an injurious climate, and the exposure of EPWs to hostile fire.[16] Further, while the Fourth

---

[9] *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57834 (Nov. 13 2001) (President Bush issued an order to the Secretary of Defense authorizing detention of persons captured by the U.S. military.); JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL 31367, TREATMENT OF "BATTLEFIELD DETAINEES" IN THE WAR ON TERRORISM 1-10 (2007), *available at* http://www.au.af.mil/au/awc/awcgate/crs/rl31367.pdf.

[10] Duncan Campbell & Richard Norton-Taylor, *U.S. Accused of Holding Terror Suspects on Prison Ships*, GUARDIAN, Jun. 2, 2008, http://www.guardian.co.uk/world/2008/jun/02/usa.humanrights (reporting on complaints from human rights' lawyers alleging that the United States used "floating prison" detaining an unknown number of prisoners in unknown locations). *See also U.S. Holding Prisoners of Warships: UN Official*, ARAB NEWS, June 29, 2005, http://www.arabnews.com/?page=4&section=0&article=66127&d=29&m=6&y=2005 (reporting that United Nations learned of "very, very serious" allegations that the United States is using "prison ships" to hold detained terror suspects).

[11] *See* DENIS SMITH, THE PRISONERS OF CABRERA: NAPOLEON'S FORGOTTEN SOLDIERS, 1809–1814 (2001) (describing the horrid conditions of French prisoners placed aboard Spanish warships from 1809 – 1814.). *See* JOHN LEHMAN, ON SEAS OF GLORY, HEROIC MEN, GREAT SHIPS, AND EPIC BATTLES OF THE AMERICAN NAVY 15–18 (2001). The British military housed American POWs on board "hulks" converted from older warships used as floating prisons during the American Revolutionary War. The HMS *Jersey*, one of the most notorious of the British prison ships, held American prisoners after the British captured New York. The wretched living conditions of the prisoners resulted in the deaths of thousands of prisoners.

[12] *See* LEHMAN, *supra* note 11, at 15.

[13] In World War II, the Japanese interned American prisoners of war on warships and freighters dubbed "Hell Ships." On these ships, American POWs were made to perform slave labor and were exposed to harsh sanitary conditions. Additionally the POWs were placed in substantial risk of harm from attack by the American Pacific Fleet. *See* GARY K. REYNOLDS, CONGR. RESEARCH SERV., RL30606, U.S. PRISONER OF WAR AND CIVILIAN AMERICAN CITIZENS CAPTURED AND INTERNED BY JAPAN IN WORLD WAR II: THE ISSUE OF COMPENSATION BY JAPAN 12 (2002), *available at* http://www.fas.org/man/crs/RL30606.pdf.

[14] *Id.* at 13, 13–14 (describing accounts of five POW ships that were sunk by U.S. ships and planes resulting in over 5000 deaths).

[15] *See* 1 REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON ITS ACTIVITIES DURING THE SECOND WORLD WAR 248 (1946); HOWARD LEVIE, TERRORISM AND WAR: THE LAW OF WAR CRIMES 9 (1992) (Oceana Publications ed., 1948); *see also* ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 11–14 n.67 (Oceans Law and Policy Department, Center for Naval Warfare Studies, Naval War College (15 Nov 1997)) [hereinafter ANNOTATED SUPPLEMENT]; Lieutenant Commander Edward J. Cook et al., *Prisoners of War in the 21st Century: Issues in Modern Warfare*, 50 NAVAL L. REV. 1 (2004) (analyzing the lawfulness of placing prisoners of war on naval vessels).

[16] Geneva Convention Relative to the Treatment of Prisoners of War art. 21 Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]. Article 22 states, "Prisoners of War may only be interned only in premises

Geneva Convention (GC IV) does not specifically mention detaining civilians on warships, there are some important limitations on the detention of civilians aboard naval warships which will be discussed later in this section.[17] In light of this general rule prohibiting the internment of EPWs aboard naval warships, one must explore other authorities for the detention of prisoners aboard U.S. naval warships. This exploration begins with identifying the authority for detaining combatants during armed conflict.

B. General Rules for Detaining Prisoners at Seas During LOAC

The authority of our nation and the Commander-in-Chief to detain enemy combatants during armed conflict is well-settled under the law of war and supported by judicial decision.[18] In *Ex parte Quirin,* the Supreme Court held that:

> Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[19]

Article 21 of the GC III provides that "the Detaining Power may subject prisoners of war to internment."[20] The LOAC establishes straightforward guidance for detaining persons at sea. As previously mentioned, GC III strictly prohibits the internment of POWs on naval war vessels.[21]

In certain armed conflict situations, the temporary detention of EPWs on naval vessels cannot be avoided. Although Articles 22 and 23 of GC III prohibit internment of EPWs on board naval vessels,[22] Article 16 of the Second Geneva Convention (GC II) provides the authority for detention and treatment of "wounded, sick, and shipwrecked members" of the armed forces sea.[23] Article 16 provides that combatants at sea who are *hors de combat*, and fall into enemy hands will be treated as prisoners of war.[24] Jean Pictet, in his commentary to GC II, writes that a person's GC II status takes precedence over GC III status where both Conventions may apply.[25] The Second Geneva Convention most often applies with regard to detaining sailors after a naval engagement; however, GC II applies regardless of how the wounded, sick, or shipwrecked belligerent falls into the hands of the opposing party.[26] Thus, a wounded EPW brought aboard a naval warship would fall within the guise of GC II. Article 16 of GC II also allows the warship commander detaining prisoners to determine whether it is "expedient to hold them, or to convey them to a port in the captor's own country, to a neutral power, or even to a port in enemy territory.[27] In addition to the "wounded, sick, and shipwrecked" under GC II, other classes of EPWs or detainees may be detained aboard warships in certain circumstances.

One such circumstance could occur during land-based kinetic operations involving high-tempo maneuvers inserting ground forces into forward areas with a rapid advance. During these fast-paced operations, a ground commander may not want to retard the advance or potentially endanger prisoners by halting to construct internment facilities. Instead, the ground commander may desire to safely and expediently hold the detainees or prisoners on board a nearby naval warship on a temporary basis. Such a detention must be distinguished from an "internment."

Army Regulation 190-8 (AR 190-8), a joint service regulation, provides authoritative guidance for U.S. forces regarding the temporary sea-based detention of EPWs, detainees, and civilians.[28] In accordance with GC III, AR

located on land affording guarantee of hygiene and healthfulness." Article 23 states, "No prisoner of war…may be exposed to hostile fire." *Id.* at 22.

[17] Geneva Convention Relative to the Protection of Civilian Persons in Time of War Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC IV] (Article 42 also provides that the civilian "internee" may also be assigned a residence.). *Id.* art. 42.

[18] Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 162 (D.D.C. 2004), *rev'd* 413 F.3d 33 (D.C. Cir. 2005), *rev'd* 548 U.S. 557, 558 (2006), *Ex parte* Quirin, 317 U.S. 1 (1942).

[19] *Quirin*, 317 U.S. at 29.

[20] *See* GC III, *supra* note 16, art. 21.

[21] *Id.* arts. 22–23 (Specifically, Article 22 provides, "[p]risoners of war may only be interned on land and affording every guarantee of hygiene and healthfulness." Article 22 further states, "[p]risoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favourable climate" and "[n]o prisoner may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone" and "[p]risoners of war shall have the shelter against air bombardment and other hazards of war address the internment land-based location requirement and conditions of internment.") *Id.* arts. 22, 23.

[22] *Id.* art. 23. Article 23 states, "Prisoners of War may only be interned only in premises located on land affording guarantee of hygiene and healthfulness." Article 23 states, "No prisoner of war . . . may be exposed to hostile fire." *Id.* at 23.

[23] Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II].

[24] *Id.* art. 16.

[25] *See* COMMENTARY, II GENEVA CONVENTION RELATIVE TO THE WOUNDED, SICK, AND SHIPWRECKED MEMBERS OF THE ARMED FORCES AT SEA (Jean Pictet., 1960) [hereinafter PICTET COMMENTARY GC II].

[26] *Id.*

[27] *Id.* art. 16; *see also id.* at 115–16. The Article 16 commentary provides the limits of the captor's decision to temporarily hold on board one its ships the enemy wounded, sick and shipwrecked pending transfer to land, (2) land them in neutral territory, and (3) returned the wounded to their home country.

[28] U.S. DEP'T OF ARMY, ARMY REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1 Nov. 1997) [hereinafter AR 190-8] (also published as a multi-service

190-8 requires detainees and EPWs to be interned on land, yet allows the *temporary* detention of EPWs and civilians on board naval vessels. The regulation places no specific time constraint on the detention; however, AR 190-8 provides that the sea-based detention is "limited to the minimum period necessary to evacuate them from the combat zone or to avoid significant harm that would be faced if detained on land."[29] Thus, the temporary detention of enemy combatants aboard naval warships is permitted; however, the advising judge advocate must recognize the limited nature of the detention, and distinguish it from the longer-term detention permitted in a land-based internment facility.

Having discussed the detention authority for sea-based detention of enemy combatants, the next section will address the authority for detaining civilians and unprivileged belligerents on naval warships during armed conflict.

C. Detention of Civilians At Sea—Protected Persons and Unprivileged Belligerents

Not all civilians are alike, and numerous authorities exist for the detention of civilians within the framework of LOAC. These authorities for detention and requirements for treatment of civilians during armed conflict vary based upon the status and classification of the civilian. This section will address the authority for detention and treatment of civilians who are considered "protected persons" under GC IV as well as those individuals considered "unprivileged belligerents."[30]

1. Detaining the Civilian in LOAC—Protected Persons

Article 78 of GC IV allows civilians from an enemy nation who fall under the control of a belligerent to be interned if necessary for security purposes.[31] Article 2 states that GC IV provisions on civilian internees apply only when two parties are engaged in international armed conflict and in cases of total or partial occupation of the territory of a party to the convention.[32] When considered "protected persons," the captor may not remove the civilians from the occupied territory in which they reside unless the "security of the population or imperative military reasons demand."[33] When considered "protected persons" under Article 4 of GC IV, detained enemy civilians will receive certain protections.[34] Such protections include prohibiting internment "in areas particularly exposed to the dangers of war."[35] Further, GC IV provisions may not apply to all civilians detained during armed conflict, such as Al-Qaeda terrorists or persons who engage in hostilities against the

---

regulation as MCO 3461.1, OPNAVINST 3461.6, AFJI 31-30). The regulation provides:

> Special policy pertaining to the temporary detention of EPW, CI [Civilian Internee], RP [Retained Person] and other detained persons aboard United States Naval Vessels:
>
> (1) Detention of EPW/RP on board naval vessels will be limited.
>
> (2) EPW recovered at sea may be temporarily held on board as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility, or to another vessel for transfer to a shore facility.
>
> (3) EPW/RP may be temporarily held aboard naval vessels while being transported between land facilities. They may also be treated and temporarily quartered aboard naval vessels incidental to their treatment, to receive necessary and appropriate medical attention if such detention would appreciably improve their health or safety prospects.
>
> (4) Holding of EPW/RP on vessels must be temporary, limited to the minimum period necessary to evacuate them from the combat zone or to avoid significant harm that would be faced if detained on land.
>
> (5) Use of immobilized vessels for temporary holding of EPW/RP is not authorized without Secretary of Defense approval.

Id. para. 2-1(f)(2)(b) .

[29] *Id.*

[30] *See* GC III, *supra* note 16, art. 4. GC IV, *supra* note 17, arts. 4, 5 (Article 4 defines "protected persons" and Article 5 contains derogations from requirements of GC IV for various civilians including spies and persons hostile to the security of the State) (establishing limitation providing categories of persons including of POW status). Analysis of detention of civilians within GC III is beyond the scope of this primer. For further information on this matter, see Colonel K.W. Watkins, *Combatants, Unprivileged Belligerents, and Conflicts in the 21st Century* 18 (June 2004) (Int'l Humanitarian Law Research Initiative, Harvard Program on Humanitarian Policy and Conflict Research, Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge), *available at* http://ihl.ihlresearch.org/index.cfm?pageId=2069.

[31] GC IV, *supra* note 17, art. 78.

[32] *Id.* art. 2. Article provides that GC IV applies (1) "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties" (2) in "cases of partial or total occupation of the territory of a High Contracting Party" or (3) when in the case where one of the parties to the conflict is not a High Contracting Party, but "accepts and applies the provisions thereof."

[33] *Id*. art. 49.

[34] *Id.* art. 4, arts. 79–135. An analysis of the extent of these protections is beyond the scope of this primer.

[35] *Id*. art. 4, at 83. Article 4 states:

> Persons protected by the Convention are those who, at any given moment and in any manner whatsoever, find themselves, in case of a conflict or occupations, in the hands of a Party to the conflict or occupations, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Id. art. 4; *see also* AR 190-8, *supra* note 28, at 32 ("A civilian who is interned during armed conflict or occupation for security reasons or for protection or because he has committed an offense against the detaining power.").

occupying power, as they may be considered unprivileged belligerents.[36]

2. Detaining the Unprivileged Belligerent during LOAC

Like the name implies, unprivileged belligerents are persons who engage in unlawful combatant acts and may be prosecuted under the domestic laws of the captor.[37] This individual is labeled "unprivileged" because he will not receive the privileges normally afforded to prisoners of war.[38] This "unprivileged belligerent" class is defined as "persons who are not entitled to treatment either as peaceful civilians or as prisoners of war because they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949."[39]

The 2009 MCA defines an unprivileged belligerent as an individual (other than a privileged belligerent) who—

> (A) has engaged in hostilities against the United States or its coalition partners;
>
> (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or
>
> (C) was a part of Al-Qaeda at the time of the alleged offenses under this chapter. [40]

The term "unprivileged belligerent" as defined in the 2009 Military Commissions Act (MCA) replaces the previous term "unlawful enemy combatant."[41]

Within LOAC, a "terrorist" is often considered to be an unprivileged belligerent because of his hostile acts committed outside of a combatant status.[42] The United States' authority to detain an unprivileged belligerent is found within the laws of war as well as the inherent right of self-defense contained in the U.N. Charter.[43] Domestically, the power is vested with the President in his authority as Commander-in-Chief.[44] Additionally, if an unprivileged belligerent is a person the President "determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons" such as a member of Al-Qaeda, then the 2001 Congressional Authorization to Use Force (AUMF) will permit the detention.[45]

Army Regulation 190-8 as previously discussed will also apply to civilians, including unprivileged belligerents.[46] Considering the unprivileged belligerent would fall within the category of a "detained person" under AR 190-8, the detention must still be temporary in nature.[47] Thus, a naval

---

[36] GC IV, *supra* note 17, art. 5. *See also* Memorandum from Jack L. Goldsmith, III, Assistant Attorney Gen. to the President, subject: Protected Person Status in Occupied Iraq Under the Fourth Geneva Convention (Mar. 18, 2004), *available at* http://www.justice.gov/olc/2004/gc4mar18.pdf (analyzing GC IV's applicability to civilians during Operation Iraqi Freedom to determine "protected person" status of certain civilians and issuing controversial opinion that captured Al-Qaeda do not receive protected person status under GC IV).

[37] GARY. D. SOLIS, THE LAW OF ARMED CONFLICT, INTERNATIONAL HUMANITARIAN LAW IN WAR (Cambridge, 2010).

[38] *Id.*

[39] *Id.*

[40] Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190.

[41] *See* U.S. DEP'T OF DEF., DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM (5 Sept. 2006) [hereinafter DODD 2310.01E].

> Unlawful enemy combatants are persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict. For purposes of the war on terrorism, the term Unlawful Enemy Combatant is defined to include, but is not limited to, an individual who is or was part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.

Id. See also Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (using the term "unlawful enemy combatant").

[42] Watkins, *supra* note 30, at 10.

> Exclusion of a group from combatant status is perhaps most easily applied in respect of terrorist organizations that by definition do not respect the fundamental distinction between combatants and civilians in their actions and sometimes overtly reject any requirement to do so.

Id. See SOLIS, *supra* note 37, at 206–11 (providing further analysis on unprivileged belligerents/unlawful combatants as it pertains to Taliban and Al-Qaeda).

[43] U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense"); *see also* Watkins, *supra* note 30, 4.

[44] U.S. CONST. art. II, § 2. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01b, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES encl. A, para. 1(D) (June 13, 2005) [hereinafter CJSI 3121.01b]; Watkins, *supra* note 30, at 18.

[45] Authorization to Use Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF]. The AUMF states:

> [t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id.

[46] AR 190-8, *supra* note 28, para. 2-1(f)(2)(b) ("Special policy pertaining to the temporary detention of EPW, CI, RP and other detained persons aboard United States Naval Vessels"). In the author's opinion, detained unprivileged belligerent may be considered "other detained" persons under AR 190-8.

[47] *Id.*

commander has the legal authority in international law, domestic law, and service regulations to temporarily detain civilians and unprivileged belligerents on board the warship during armed conflict. The advising judge advocate should also be aware of historical examples of sea-based *temporary detentions* of belligerents during armed conflict.

E. Examples of Temporary Detention at Sea within LOAC

History provides a few examples of permissible temporary detentions of EPWs at sea. During the Falklands War in the early 1980's, the United Kingdom housed Argentine prisoners aboard the British warships based on practical concerns of being able to provide safer and more habitable temporary detention facilities.[48] Likewise, during Operation Enduring Freedom (OEF), the United States placed Taliban and Al-Qaeda detainees on board amphibious assault ships for temporary detention and transit to more permanent land-based internment facilities.[49] Later, during Operation Iraqi Freedom (OIF), due to operational exigencies on the battlefield, the amphibious assault ship USS *Dubuque* served as a temporary detention facility for captured Iraqi EPWs.[50] These detentions exemplify situations in which modern forces needed to temporarily place EPWs and detainees during armed conflict on board naval warships. Acknowledging that LOAC and service regulations permit temporary detentions on warships, the advising judge advocate must take the next step of identifying the legal requirements for care and treatment of these detained persons during armed conflict.

F. Treatment of Detained Persons at Sea Within LOAC

The standards of treatment for persons detained within LOAC will vary based upon the person's status. The Third and Fourth Geneva Conventions articulate multiple standards of treatment for POWs/EPWs, civilians, and detainees.[51] In an international armed conflict between two State parties, a detained person falling within the requirements of Article 4 to GC III for POW status will receive the specified protections provided under GC III.[52] Persons detained within a "conflict not of an international character" are afforded the protections of Article 3 to GC III, which requires that detained persons will be "treated humanely."[53] "Protected persons" as defined by Article 4 of GC IV will receive protections identified in Articles 79–135 of GC IV.[54] These specified protections provide due process and treatment requirements for detained civilians

At a minimum, regardless of the status of the detainee, all persons detained on board a U.S. warship will be treated humanely and receive the protections afforded in Common Article 3 to the Geneva Conventions.[55] The Detainee Treatment Act of 2005 provides the minimal treatment standards for all detainees under the control of Department of Defense (DoD) personnel, stating that"[n]o individual in the custody or under the physical control of the U.S. Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."[56] The definition of "[c]ruel, inhuman, or degrading treatment or punishment" under the Detainee Treatment Act "means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the U.N. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984."[57] Department of Defense Directive 2310.01E (DoDD 2310.01E) and AR 190-8 also require humane treatment and medical care for detainees.[58] The advising judge advocate should also review other regulations pertaining to certain actions (such as interrogation) that are allowed while the detained person is in U.S. custody.

---

[48] During the war, the British captured over 10,000 Argentine POWs and thousands of POWs were placed on British vessels. MAX HASTINGS & SIMON JENKINS, THE BATTLE FOR THE FALKLANDS (1991). *See also* MARTIN MIDDLEBROOK, TASK FORCE: THE FALKLANDS WAR 247, 381, and 385 (1982) (recording that "13,000 Argentine soldiers surrendered, winter was fast approaching, and the tent shelters the British had sent were lost in the sinking of the ATLANTIC CONVEYOR.").

[49] *See* Eric Schmitt, *U.S. Captures Senior Al Qa'eda Trainer*, N.Y. TIMES, Jan. 6, 2002, at A1, *available at* http://www.nytimes.com/2002/01/06/international/asia/06DETA.html?ex=1156824000&en=e90aaf17230648ec&ei=5070 (discussing detainees including American Taliban John Walker Lindh and former Taliban ambassador to Pakistan, Mullah Abdul Salam Zaeef detained aboard the USS *Bataan*).

[50] Cook et al., *supra* note 15, at 16. The author conducted a series of interviews and also posits that the government of Kuwait's refusal to allow detention facilities contributed to the need to temporarily detain the EPWs on board the naval vessel. *Id.*

[51] *See* GC III, *supra* note 16; GC IV, *supra* note 17.

[52] GC III, *supra* note 16.

[53] *Id*.

[54] GC IV, *supra* note 17, arts. 79–135.

[55] *See, e.g*., Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 [hereinafter Detainee Treatment Act], Memorandum from Deputy Sec'y of Def. to Secretaries of the Military Dep'ts, subject: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense (7 July 2006) [hereinafter England Memo], *available at* http://www.defenselink.mil/news/Aug2006/d20060814comm3.pdf. After the Supreme Court's ruling in *Hamdan v. Rumsfeld*, Deputy Secretary of Defense issued new guidance to Department of Defense in regards to individuals detained in the Global War on Terrorism. *Id.* (citing 548 U.S. 557 (2006)); U.S. DEP'T OF DEF., DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM para. E2.1 (5 Sept. 2006) [hereinafter DODD 2310.01E]; AR 190-8, *supra* note 28.

[56] Detainee Treatment Act, *supra* note 55.

[57] *Id.*

[58] DODD 2310.01E, *supra* note 55, at E4; AR 190-8, *supra* note 28, at 2.

Given the previous hostile acts of EPWs or other detained persons, the commanding officer may desire to question that individual for intelligence or other military purposes. The judge advocate should be advised that interrogations, debriefing, or tactical questioning is only permitted under certain limited circumstances.[59] Army Field Manual 2-22.3 (FM 2-22.3) contains the only authorized interrogation techniques.[60] In addition to FM 2-22.3, the judge advocate should review DoDD 3115.09, *Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning*, for further guidance pertaining to questioning the detained person.[61] Having discussed detentions and basic treatment requirements within LOAC, this primer will now address the rules for detentions at sea during non-armed conflict situations.

III. Detention of Persons at Sea During Situations Not Involving Armed Conflict

The legal basis for peacetime detention of persons at sea will vary based upon the classification of the person being detained or the circumstances surrounding the detention itself. Rarely is the legal authority for such detention neatly spelled out. As previously discussed, LOAC applies to those unprivileged belligerents, EPWs, and enemy civilians detained during periods of armed conflict, but LOAC is not an applicable detention authority for peacetime detention of civilians. Through a series of vignettes pertaining to typical peacetime detentions at sea, Section A, *infra*, will identify the authority for conduct-based detentions arising from a suspicion of criminal activity. Section B, *infra*, will identify the authority for status-based detentions of a person who engages in no criminal conduct, yet may be detained based upon their status or circumstances. Finally, Section C will address the basic care and treatment requirements for those persons detained during these non-armed conflict situations.

A. Criminal (Conduct-Based) Detentions

Even though the world's oceans are vast open spaces with no single government, they are not lawless places where criminal activity can be carried out with impunity. When criminal conduct occurs, U.S. naval forces have the authority to take action on the high seas, to include detaining criminals to allow further action against them by the U.S. Government or its allies. This sub-section will focus on those criminal acts involving piracy, terrorism, and drug-trafficking.

1. Detaining the Pirate

Scenario: You are the Staff Judge Advocate aboard the USS *Wasp* (LHD-1) assigned to a Combined Task Force, which is conducting anti-piracy operations. The ship has responded to a pirate attack on an Indian-flagged cargo ship. The attack was thwarted by shipboard forces, ten pirates are under U.S. control, but are still on board the Indian cargo vessel.[62] The *Wasp's* commanding officer (CO) turns to you and asks, "Can we bring the pirates aboard the *Wasp* and lock 'em up?"

Both the Law of the Sea and international law encourages repression of piracy and permits the detention of pirates on board a U.S. naval warship. The primary treaty for detention of pirates is found in the U.N. Convention on the Law of the Sea (UNCLOS III).[63] Article 100 of UNCLOS III provides a basis for detaining suspected pirates by requiring states to "cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."[64] Article 105 of

---

[59] U.S. DEP'T OF THE ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTION OPERATIONS (Sept. 2006) [hereinafter FM 2-22.3]; DODD 2310.01E *supra* note 55, para. E2.1., U.S. DEP'T OF DEF., DIR. 3115.09, DOD INTELLIGENCE, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING (9 Oct. 2008) [hereinafter DODD 3115.09]; Exec. Order No. 13,491, 74 Fed. Reg. 4893 (2009) [hereinafter EO 13,491].

[60] *See* § 1002, 119 Stat. 2680 ("No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation"); *see also* EO 13,491, *supra* note 59 (a detainee "shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3"); FM 2-22.3, *supra* note 59.

[61] *See* DODD 3115.09, *supra* note 59; *see also* EO 13,491 *supra* note 59, § 74.16 (A detainee "shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3.").

[62] Press Release, Commander, U.S. Naval Forces Cent. Command/5th Fleet Pub. Affairs, More Suspected Pirates Apprehended in the Gulf of Aden (Feb. 12, 2009), *available at* http://www.cusnc.navy.mil/articles/2009/028.html (providing a similar historical account of this fictional vignette).

[63] Although the United States is not a party to UNCLOS III, it views the navigation and overflight provisions as customary international law and, except for the deep seabed mining provisions, adheres to the provisions of UNCLOS III. *See* UNCLOS III, *supra* note 7; U.S. Oceans Policy, Statement by the President, Mar. 10, 1983, 19 WEEKLY COMP. PRES. DOC. (1983); NWP 1-14M, *supra* note 7, at 1.3.

[64] UNCLOS III, *supra* note 7; *see also id.* art. 101. The U.N. Law of the Sea Convention defines piracy as consisting of any of the following acts

> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

UNCLOS III provides that "[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board."[65] Providing further authority for the detention, Article 107 of UNCLOS III states that only "warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service authorized to that effect" are authorized to seize vessels on account of piracy.[66]

United Nations Security Council Resolutions (UNSCRs) pertaining to piracy operations which are routinely issued and renewed will also serve as legal authority authorizing detention. Pursuant to Chapter VII, Article 39 of the UN Charter, the Security Council has authority to identify "the existence of any threat to peace, breach of the peace, or act of aggression" and to determine which measures should be employed to address the threats.[67] Article 25 of the U.N. Charter binds the decisions of the Security Council to members of the U.N. Charter.[68] The Security Council will often issue its determinations made in accordance with Article 39 through a council resolution.[69] If the above vignette occurred in the Gulf of Aden near Somalia, then there are a number of UNSCRs which call upon states to combat piracy in that region and which serve as international legal authority to detain the pirates on board the naval warship.[70] The advising judge advocate should also consider other sources of authority for detention of the pirates such as U.S. domestic law, service regulations, rules of engagement, and operational orders.

United States domestic law provides authority for detaining pirates beginning with the U. S. Constitution. Article 1, Section 8 states that "[t]he Congress shall have Power, . . . to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[71] Through 18 U.S.C. § 1651, Congress exercised its constitutional authority and criminalized acts of piracy on the high seas.[72] Congress has also authorized the President

> to instruct the commanders of the public armed vessels of the United States to *subdue*, *seize*, *take*, and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel; and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas.[73]

As a matter of policy, the unclassified Standing Rules of Engagement (SROE) also address repression of piracy, stating that "U.S. warships and aircraft have an obligation to repress piracy on or over international waters directed against any vessel or aircraft, whether U.S. or foreign flagged."[74] In addition, the practitioner will likely have

---

> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Id.

[65] *Id.* art. 105. *See also* Convention on the High Seas, art. 19, Apr. 29, 1958, 13 U.S.T 2312, 450 U.N.T.S. 82 [hereinafter 1958 High Seas Convention] (Article 19 states, "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board." The United States is a party to the 1958 High Seas Convention.).

[66] UNCLOS III, *supra* note 7, art. 107. *See also* International Maritime Organization Convention and Protocol from the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668 [hereinafter SUA Convention]; Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21 (Nov. 1, 2005) [hereinafter SUA Protocol], *available at* http://www.state.gov/t/isn/trty/81727.htm. Similar to UNCLOS III, the SUA Convention and its 2005 Protocol (SUA protocol) also prohibit certain acts which affect the safety of maritime navigation. Certain pirate-type acts may not fall within Article 101 of UNCLOS III (i.e., because of political motive), but may be prohibited under the SUA Convention and SUA protocols.

[67] U.N. Charter art. 39 (measures to be employed shall be "taken in accordance with Articles 41 and 42, to maintain and restore international peace and security).

[68] *Id.* art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."). *Id*.

[69] *See* NATIONAL SECURITY LAW 220–221 (John N. Moore & Robert F. Turner, eds., Carolina Press 2005) (analyzing the UN's authority to act under Article 39 and the methods and language of its resolutions).

[70] S.C. Res.1816, U.N. Doc. S/RES/1816 (June 2, 2008); S.C. Res.1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res.1846, U.N. Doc. S/RES/1851 (Dec. 16, 2008); S.C. Res.1814, U.N. Doc. S/RES/1897 (Nov. 30, 2009); S.C. Res.1910, U.N. Doc. S/RES/1910 (Jan. 28, 2010) (all resolutions calling on States to participate in defeating piracy and armed robbery off Somalia's coast by deploying naval vessels and military aircraft, and through seizure and disposition of boats and arms used in the commission of those crimes).

[71] U.S. CONST. art. I, § 8, cl.10.

[72] 18 U.S.C. § 1651 (2006) ("Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."). *Id.*

[73] 33 U.S.C. § 382 (2006)(emphasis added).

[74] CJCSI 3121.01b, *supra* note 44, at A-4. This unclassified version of the SROE also provides:

> For ship and aircraft commanders repressing an act of piracy, the right and obligation of unit self-defense extend to the persons, vessels or aircraft assisted. Every effort should be made to obtain the consent of the coastal state prior to continuation of the pursuit if a fleeing pirate vessel or aircraft proceeds into the territorial sea, archipelagic waters or airspace of that country.

access to classified material and should review the classified version of the SROE as well as any additional theater-specific rules of engagement provided by the chain-of-command. The practitioner should also reference any regional, fleet, or command operational orders pertaining to detainee practices and treatment.

Through UNCLOS III, UNSCRs, U.S. Constitution, U.S. Code § 1651, applicable SROE and operational orders, the judge advocate should advise the CO in the above scenario that he may detain the pirates.[75] The next subsection will present another scenario involving a different group of criminals who operate on the seas: *terrorists*.

2. Detaining the Terrorist

Scenario: After the pirates have been transported to authorities for subsequent prosecution, the USS *Wasp* continues its operations. Intelligence reports indicate that a Panamanian-flagged cargo vessel departed from the Philippines heading for Yemen. The Panamanian vessel's cargo contains bomb-making material, including suspected chemical weapons material. The *Wasp* was tasked with intercepting the cargo vessel and a boarding team discovers suspected chemical weapons material. The vessel's crew has been assembled and corralled aboard the Panamanian vessel. Some are suspected of being members of Abu Sayyaf, a terrorist organization based in the Philippines. The *Wasp* CO turns to you and asks, "I want to detain the suspected terrorists on board *Wasp*. Are there going to be any legal problems with that?"

UNCLOS III does not address terrorism or suspicion of terrorism as a basis for interception or detention.[76] However, international law provides a variety of legal bases for interception of vessels at sea, which may also lead to the requisite legal authority to detain a suspected terrorist at sea.[77] The practitioner should be cautioned that authority to intercept a vessel does not always equate to authority to detain the vessel, its contents, or its crew.[78] Depending upon the circumstances and authorization, the naval warship may conduct either a permissive or non-permissive interdiction. Article 110 of UNCLOS III allows a non-permissive boarding if the suspect ship is not entitled to complete immunity in accordance with Articles 95 and 96 of UNCLOS, is engaged in piracy, slave trading, unauthorized broadcasting, or is without nationality.[79] Thus, UNCLOS will not provide authority for a *non-permissive* boarding based (solely?) upon suspicion of terrorism or transporting terrorists.[80]

The naval warship, however, may conduct a boarding pursuant to "flag state consent" in which the suspect vessel's flag state has either provided *ad hoc* consent or prior consent to the requesting State.[81] Under the latter approach, nations may negotiate and reach agreements to obtain advanced consent to board under certain circumstances.[82] The naval warship may also board the suspect vessel with "Master's Consent," in which the suspect ship's master consents to the boarding, and could also include consensual search of the vessel.[83] In other scenarios, however, a master's consent to board or search will not automatically result in authority to arrest or detain suspects without consent of the flag state.[84]

As an example of the flag state consent regime, the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (SUA Convention) [85] and its 2005 Protocol (SUA Protocol) may serve as authority for the interception and subsequent detention of terrorists in a maritime environment.[86] Articles 3, 3*bis*, 3*ter*, and 3*quater* of the SUA Protocol prohibits certain acts of terrorism that involve executing, or providing assistance to, an attack on a ship, causing an explosion, hijacking a vessel, or transporting weapons of mass destruction (WMD) intended for terrorist purposes.[87] The 2005 SUA Protocol expands on the 1988 SUA Convention by providing a procedure for state vessels to board suspect

---

Id.

[75] The judge advocate should make appropriate arrangements with the State Department via the chain of command in order to ensure proper transfer of the pirates. In recent years, U.S. warships have temporarily detained pirates on board vessels pending disposition and transfer to various countries for subsequent prosecution. *See also* Eva Strickmann, *EU and NATO Efforts to Counter Piracy off Somalia: A Drop in the Ocean?*, INT'L SEC. INFO. SERV. (Europe) (Oct. 2009), http://www.isis-europe.org/pdf/2009_artrel_332_esr 46-eu-nato-counterpiracy.pdf; Jacquelyn S. Porth, *Kenya Accepts Seven Alleged Pirates from U.S. Navy for Trial*, AMERICA.GOV, Mar. 5, 2009, http://www.america.gov/st/peacesec- english/2009/March/20090305170025 sjhtrop0.3772089.html.

[76] UNCLOS III, *supra* note 7, art. 101. Article101 requires the piratical acts to be "committed for private ends."

[77] NWP 1-14M, *supra* note 7, at 4-7,

[78] *See* David Wilson, *Interdiction on the High Seas: The Role and Authority of a Master in the Boarding and Searching of His Ship by Foreign Warships*, 55 NAVAL L. REV. 157, 164–65 (2008) ("However, unlike piracy, once a foreign warship boards and finds evidence of slavery, it does not have the legal authority to seize the ship or arrest its crew."); UNCLOS III, *supra* note 7, art. 110.

[79] UNCLOS III, *supra* note 7, art. 110. Articles 95 and 96 pertain to warships and state-owned or operated ships in non-commercial service; NWP 1-14M, *supra* note 7, at 4-7.

[80] UNCLOS III, *supra* note 7, art. 110.

[81] NWP 1-14M, *supra* note 7, at 4-7.

[82] *Id*. at 3-12, 4-7.

[83] *Id*. at 3-12.

[84] *Id*. at 3-12.

[85] SUA Protocol, *supra* note 66. The 1988 adoption of the SUA Convention in Rome was intended to improve maritime safety in the aftermath of the 1985 hijacking of the Achille Lauro.

[86] SUA Convention, *supra* note 66.

[87] *Id.*

vessels from another state.[88] Upon receiving flag state consent either via *ad hoc* consent, implied consent, or advanced consent, Article 8*bis* of the SUA Protocol permits the boarding of a suspect vessel when the requesting party has "reasonable grounds" to suspect that the vessel has or is about to engage in acts prohibited by Articles 3, 3*bis*, 3*ter*, and 3*quater* of the SUA Protocol.[89] When evidence of such prohibited conduct is discovered, the flag state "may also authorize the detention of the ship, cargo and persons on board."[90] In the above scenario, since the terrorist suspects were transporting chemical weapons materials in violation of Article 3, 3*bis*, 3*ter*, and 3*quater* of the SUA Protocol, the detention will be permitted so long as the flag state of Panama consents to the detention.[91]

Another potential authority for the detention of a suspected terrorist transporting WMD on the seas is a bilateral agreement stemming from the Proliferation Security Initiative (PSI).[92] Although the PSI is not a treaty, the PSI is a cooperative initiative between the United States and over ninety nations designed to limit the illicit trade and transport of WMD.[93] The PSI in itself will not establish authority for detention of the terrorist, but provides the means to board the suspected vessel based on the PSI's individual authorizations from bilateral agreements between the United States and the suspect vessel's flag state.[94] In detaining persons as part of this cooperative agreement, the U.S. naval warship would initially notify the vessel's flag state via U.S. diplomatic channels prior to boarding.[95] Absent exigent circumstances, the U.S. warship would have the opportunity to coordinate efforts or obtain the authorization for detention of suspected terrorists if necessary.[96]

In the above scenario, the judge advocate should consider any applicable operational agreement from the flag state of the vessel (Panama) which permits boarding or inspection. A bilateral operational agreement may also give general or specific authority for detention of the suspected terrorist.[97] Thus, detention of terror suspects grounded in consent (via flag state, bilateral agreement, or master's consent) is key to establishing the authority to detain the terror suspect. However, these forms of consent are not the only mechanisms for the warship commander to legally detain terrorist suspects.

In the absence of direct detention authority from a bilateral agreement, treaty, or flag state consent, the naval warship may detain based upon self-defense. Depending on the imminence of the threat, the detention could be supported as a matter of self-defense under Article 51 of the U.N. Charter, or the SROE.[98] Terrorists are often considered unprivileged enemy belligerents, and would fall within the authorities for detention as previously discussed in Part II concerning detention within LOAC. However, terrorists are

---

[88] *Id.*

[89] *Id.* at 8*bis*(5). *See also* Natalie Klein, *The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 35 DENV. J. INT'L L. & POL'Y 287, 288 (2007) (analyzing the changes to the 2005 SUA Protocol and the shipboarding procedures under the SUA Protocol, 8*bis*).

[90] SUA Protocol, *supra* note 85, at 8*bis*(6).

[91] *See also id.* at 8*bis*(8). Should the flag state fail to provide consent, the flag state may choose to exercise jurisdiction over the suspect ship. "For all boardings pursuant to this article, the flag state has the right to exercise jurisdiction over a detained ship, cargo, or other items and person on board, including seizure, forfeitures, arrest, and prosecution."

[92] U.S. Dep't of State, Proliferation Security Initiative, http://www.state.gov/t/isn/c10390.htm (last visited Mar. 5, 2010) [hereinafter PSI]; *see also* Jofi Joseph, *The Proliferation Security Initiative: Can Interdiction Stop Proliferation?*, ARMS CONTROL TODAY (June 2004), http://www.armscontrol.org/act/2004_06/Joseph (providing a more in depth historical background on the PSI).

[93] PSI, *supra* note 92.

[94] *See* Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT'L L. 507 (2005) (analyzing the PSI for implications on boarding an detention of vessels, cargo, or persons). A detailed analysis of the shipboarding provisions of the PSI, as well as the intricacies of the multiple bilateral agreements for shipboarding and detention of persons transporting WMD, is beyond the scope of this primer.

[95] U.S. DEP'T OF NAVY, SEC'Y INSTR. 5820.7C, COOPERATION WITH CIVILIAN LAW ENFORCEMENT 5 (26 Jan. 2006) (Acknowledging that the DoD policy prohibits direct involvement in law enforcement even though the Possee Comitatus Act (PCA) does not encompass the Navy and Marine Corps). *See also* U.S. DEP'T OF DEF., DIR 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS para. E4.3 (16 Jan. 2009) [hereinafter DODD 5525.5].

[96] DODD 5525.5, *supra* note 95, at E4.

[97] PSI, *supra* note 92 (stating that the United States has operational agreements with Panama and the Philippines pertaining to the PSI). *See also* Amendment to the Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice of Article XV, para. 3 (May 12, 2004), *available at* http://www.state.gov/t/isn/trty/32858.htm (last visited Mar. 5, 2010).

> Boardings and searches pursuant to this Supplementary Arrangement shall be carried out by law enforcement officials from law enforcement ships or aircraft, or from technical support vessels of a Party or of third States, and, in emergencies and under exceptional circumstances, may be assisted by designated auxiliary personnel from technical support vessels or aircraft of a Party or of third States. However, when law enforcement officials are not readily available, boardings and searches undertaken pursuant to Article X of this Supplementary Arrangement to suppress proliferation by sea may, upon advance notice to the other Party, also be carried out by designated auxiliary personnel. These personnel shall in such cases be subject to the provisions in this Supplementary Arrangement governing the conduct and operations of law enforcement officials

Id.

[98] U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense"); CJSI 3121.01b, *supra* note 44, at A-4.

often detained and prosecuted under a criminal regime as well.[99] The "criminal" verses "combatant" classification of a "terrorist" can sometimes be confusing.[100] The advising judge advocate should determine if higher authority has clarified the parameters of "criminal" or "combatant" classification in advance of detaining the suspected terrorist.

The U.S. Code defines the federal crime of terrorism by criminalizing certain activities, but there is not a specific crime of "terrorism."[101] Through 18 U.S.C. § 2332a and 18 U.S.C. § 2332b, the U.S. Code criminalizes acts of terrorism and unlawful use or possession of WMD.[102] Prior interagency coordination through the chain of command is advised in order to proceed under either a criminal-based detention or LOAC-based detention.[103] If the incident occurs within U.S. territorial jurisdiction, then the constraints of DoD Regulation 5525.5 pertaining to the Posse Comitatus Act (PCA) may prohibit the detention of the suspect by the naval warship.[104] However, if a U.S. Coast Guard Law Enforcement Detachment (LEDET) is available to support the initial arrest of the terrorists, further detention on board the naval vessel for transport may be permitted.[105] Additionally, emergency circumstances may permit continued detention via request by the U.S. Attorney General to the Secretary of Defense.[106] Assuming that any of the international treaties, domestic statutes, or regulations apply, further detention of the terrorist will be warranted, and the warship would continue its operations until able to coordinate with appropriate authorities for the hand-over of the terrorist for prosecution.

Thus, deciphering the appropriate authority for detention of the terrorist is complex. The practitioner may have to maneuver though volumes of legal authority prior to arriving at the appropriate source for the detention. The next criminal conduct scenario involves counter-drug operations, which are frequently conducted by the U.S. Coast Guard and U.S. naval warships.

3. Detaining the Illegal Drug Trafficker

Scenario: Having successfully completed the counter-piracy mission and thwarted a terrorist operation, the USS *Wasp* was en route to homeport when it was routed to the Caribbean Sea for counter-drug operations. A U.S. Coast Guard LEDET has arrived on board and held meetings and briefings. New to drug interdiction operations, you begin contemplating the requisite authority for detaining drug smugglers and the requirements for their treatment on board the *Wasp*.

International law and the law of the sea require all nations to counter illegal drug-trafficking.[107] However, the law of the sea generally leaves the high seas jurisdiction and authority to interdict vessels suspected of drug trafficking with the suspect vessel's flag state.[108] This means that U.S. vessels conducting drug interdiction on the high seas will do so with flag state or master's consent. The DoD is the lead agency for U.S. monitoring of maritime illegal drug trafficking.[109] Maritime law enforcement is primarily conducted by the U.S. Coast Guard.[110] Unconstrained by the PCA, the Coast Guard has the authority to detain, inspect, search, seize and arrest suspected drug traffickers.[111]

---

[99] SOLIS, *supra* note 37, at 164–67 (detailing the complexities of the dual approach to combating terrorism through the criminal justice and military models).

[100] *Id*. at 164.

[101] 18 U.S.C. § 2332b(g)(5) (2006). *See also Terrorist Financing*, U.S. ATTORNEY'S BULL., vol. 51, no. 4 (July 2003), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5104.pdf (analyzing various U.S. criminal statutes pertaining to terrorist activity); ELIZABETH MARTIN, CONGRESSIONAL RESEARCH SERV., RS21021, TERRORISM AND RELATED TERMS IN STATUTE AND REGULATION: SELECTED LANGUAGE (2006), *available at* http://www.fas.org/sgp/crs/terror/RS21021.pdf (compiling various definitions of terrorism within the U.S. Code).

[102] 18 U.S.C. § 2332a (2006); *id.* § 2332b.

[103] *See* Nat'l Sec. Presidential Dir.-41/Homeland Security Presidential Directive-13 (NSPD-41/HSPD-13) (Mari. Sec. Policy) (Dec. 21, 2004).

[104] The PCA will likely have no extraterritorial application. *See* Chandler v. United States, 171 F.2d 921, 936 (1st. Cir. 1948), *cert denied*, 226 U.S. 918 (1949); D'Aquino v. United States, 192 F.2d 338, 351, *cert. denied*, 343 U.S. 935 (1952); Memorandum from Office of the Assistant Attorney Gen., to General Brent Scowcroft, subject: Extraterritorial Effect of the Posse Comitatus (3 Nov. 1989). *See* UNCLOS III, *supra* note 7, art. 2 ("Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention").

[105] 10 U.S.C. § 379 (2006) (requiring assignment of Coast Guard personnel to naval vessels for law enforcement matters); *id.* § 374; NWP 1-14M, *supra* note 7, at 3.11.3.2.3, ANNOTATED SUPPLEMENT, *supra* note 15, at 3.11.3.2.3. *See also* Douglas Daniels, *How to Allocate Responsibilities Between the Navy and Coast Guard in Maritime Counterterrorism Operations*, 61 U. MIAMI L. REV. 467 (Jan. 2007).

[106] 10 U.S.C. § 382 (Section 382 pertains to DoD assistance to law enforcement during emergency situations involving chemical or biological WMD.).

[107] UNCLOS III, *supra* note 7, art. 108; *see also* U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, art. 17, Dec. 20, 1988 (entered into force Nov. 11, 1990), 28 I.L.M. 497 (1989), implemented by the United States in 46 U.S.C. app. § 70504 (2006) ("The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea."). *See also* The Single Convention on Narcotic Drugs, 1961, N.Y. (Mar. 30, 1961), 18 U.S.T. 1407, T.I.A.S. 6298, 520 U.N.T.S. 204, including the protocol amending the Single Convention on Narcotics Drugs, 1961, Geneva (Mar. 25 1972), 26 U.S.T. 1439, T.I.A.S. 8118, 976 U.N.T.S. 3, is implemented by the United States in 22 U.S.C. § 2291 (2006).

[108] UNLCOS III, *supra* note 7, art. 108.

[109] 10 U.S.C. § 124(a)(1) (2006) ("The Department of Defense shall serve as the single lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States.").

[110] 14 U.S.C. § 2 (2006).

[111] *Id.* § 89 ("The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and water over which the United States has jurisdiction . . . [and] may at any time go on board of any vessel subject to the jurisdiction, or operation of any law, of the United States.").

United States law and DoD regulations require a U.S. Navy warship engaging in drug interdiction operations to have a U.S. Coast Guard personnel or attached LEDET to supervise drug interdiction operations regardless of whether the ship is operating in international waters or United States domestic waters.[112] This requirement for LEDETs is in place so that the naval warship can execute this law enforcement action without violating the PCA (if operating in domestic U.S. waters) and to support the prosecution of the suspects by ensuring the operation is conducted by personnel with sufficient expertise and who will be available for trial. When the naval warship's commander is contemplating the detention of drug traffickers in international waters without having a U.S. Coast Guard LEDET supervise the operation, then the naval warship should coordinate efforts with the vessel's flag state by obtaining consent and acting in accordance with any standing agreement with the flag state prior to detaining the traffickers.[113]

The U.S. Navy warship (with U.S. Coast Guard LEDET presence) may also detain the traffickers under the authority of the Maritime Drug Law Enforcement Act provided the vessel is subject to the jurisdiction of the United States within the meaning of 46 U.S.C. § 70502(c).[114] The detention of any drug traffickers will be authorized until the persons are transported to appropriate civilian authorities for disposition and prosecution.[115]

Conduct-based detentions present a number of challenged for the advising judge advocate in determining the appropriate legal basis for the detention. The judge advocate must not only consider the person's conduct which prompts the commander to seek detention, but also the location of the vessel, flag state of the vessel, agreements with the flag state, and even service regulations requiring certain personnel to participate in the operation. The legal issues are further complicated when the warship commander must "detain" innocent persons who are associated with criminal conduct (i.e. held hostage) or merely because of one status from perilous conditions. The next section will address the legal authority for detaining a person based upon his status or perilous condition.

B. Non-Criminal (Humanitarian or Status-Based) Detentions

During peacetime operations on the high seas, U.S. warships are frequently called upon by individuals for rescue or assistance. When interdicting unsafe vessels, or responding to acts of terrorism, drug trafficking, or piracy, commanders of naval warships may have reason to hold certain persons, restrict their movements, and transport them to a specific location, even if the individual did not engage in nefarious activities. The next vignette describes two classes of persons that a naval warship may detain as a result of humanitarian or status-based concerns.

Scenario: While conducting counter-piracy operations, the USS *Wasp* encountered a small, overcrowded vessel containing more than seventy-five people on board. The vessel's seaworthiness was questionable, so the *Wasp* CO sent a small boat to investigate. The boat reported that the small vessel's engines have failed, and it appears to be slowly taking on water. The *Wasp* CO decides that all persons on board the vessel will be brought to *Wasp* for their safety. Once on board the *Wasp*, forty passengers from the boat seek asylum status; the remaining passengers are considered refugees. Additionally, five members of the crew are suspected of illegally trafficking the passengers. The CO wants to know the legal authority for holding the asylum-seekers/refugees and the crew members, his obligations for their treatment, and whether he needs to immediately transport the asylum-seekers/refugees back to shore. Sub-sections 1 and 2 will address the legal authority while Section C will address treatment requirements.

1. The Mariner in Distress

The CO has the authority to bring on board passengers and crewmembers as a result of distress conditions. Customary international law recognizes the duty of a mariner to come to the assistance of a vessel in distress at sea.[116] Article 98 of UNCLOS III states:

> Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
>
> (a) to render assistance to any person found at sea in danger of being lost;
>
> (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so

[112] 10 U.S.C. § 379 (2006). *See also* DoDD 5525.5, *supra* note 95, at E.4.1.3., enclosure E.4.

[113] NWP 1-14M, *supra* note 7, at 3.8.

[114] Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70502(b) to (c), 70503(a)(1) (2006) (Section 70502(c) identifies various categories of vessels subject to U.S. jurisdiction.).

[115] *See* CTR. FOR LAW & MILITARY OPERATIONS, U.S. COAST GUARD–OPERATIONS LAW GROUP, GUIDE TO COUNTERDRUG OPERATIONS (2d ed. July 2010) (providing an excellent synopsis of U.S. Coast Guard counterdrug operations and legal bases for drug interdiction, detention, and prosecution) (on file with the author).

[116] NWP 1-14M, *supra* note 7, at 3.2 ("The obligation of mariners to provide material aid in cases of distress encountered at sea has long been recognized in custom and tradition.").

> far as such action may reasonably be expected of him;
>
> (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call. [117]

Articles 18(2) and 45 of UNCLOS III further authorize a ship to stop and anchor in the territorial sea of another State if necessary to render assistance to persons or aircraft in danger or distress.[118] Section 0925 of the Navy Regulations imposes the same duty to render assistance to mariners in distress.[119] Likewise, Coast Guard regulations impose a duty for assistance to distressed mariners and passengers.[120]

Acting within customary international law and service regulations, the U.S. Navy has historically assisted mariners of all nationalities in times of distress.[121] Thus the CO, in accordance with longstanding tradition and customary international law, has the authority to come to the aid of the mariners in distress and, if necessary, hold the distressed mariners aboard the naval warship. Restrictions on liberty and freedom of movement placed on such mariners will be discussed in Part C.

2. The Asylum-Seeker/Refugee Taken Aboard the Naval Warship

In international law, detaining asylum-seekers and refugees involves an analysis of non-refoulement and domestic immigration policies.[122] Non-refoulement is the principle that asylum-seekers or refugees should not be expelled or returned to a location in which they may suffer persecution on account of that person's "race, religion, nationality, membership of a particular social group or political opinion."[123] Immigration policies and laws are determined by each nation. As such, the authority to detain the asylum seeker will be governed by U.S. domestic law, policy and service regulations.[124] The naval warship commander is not authorized to grant asylum, but can grant the status of "temporary refuge."[125] The Customs and Immigration Service, Department of Justice may process and grant requests for asylum within the U.S., Puerto Rico and U.S. possessions.[126] Additionally, DoD personnel are not permitted to "directly or indirectly invite persons to seek asylum or temporary refuge."[127] Service regulations require different responses to asylum-seekers based on the location in which the asylum-seeker makes his request.[128]

When the request for temporary refuge or asylum occurs in international waters or territories of exclusive U.S. jurisdiction, the applicant, at his request, will be received on board the naval vessel.[129] Should the request for temporary refuge or asylum occur in foreign territory such as another State's territorial seas, then "temporary refuge shall be granted for humanitarian reasons" on board the vessel "wherein life or safety of a person is put in imminent danger."[130] An asylum-seeker that makes a request for asylum to a U.S. warship in port or in foreign waters but is not in imminent danger would be referred to the nearest American embassy or U.S. Consulate.[131] If "temporary refuge" is granted, the CO is not permitted to surrender the asylum-seeker to a foreign jurisdiction absent approval from the Secretary of the Navy (SECNAV) or higher authority.[132]

In the above scenario, if the refugees/asylum-seekers were brought on board in international waters, and sought asylum from the United States, the CO should grant them

---

[117] UNCLOS III, *supra* note 7, art. 98. *See also* 1958 High Seas Convention, *supra* note 65, art. 12.

[118] UNCLOS III, *supra* note 7, arts. 18, 45, 52.

[119] *See also* U.S. DEP'T OF NAVY, REG. 0939, GRANTING OF ASYLUM AND TEMPORARY REFUGE (1990) [hereinafter NAVY REGULATIONS 1990].

[120] U.S. COAST GUARD REGULATIONS (COMDTINST M5000.3 (Series B)), art. 4-2-5 (1992).

[121] *See, e.g.*, JFK *Rescues Iranian Mariners in Persian Gulf*, http://www.navy.mil/search/display.asp?story_id=14737 (last visited Jan. 20, 2010). On 14 August 2004, the USS *John F. Kennedy* rescued six Iranian mariners from a cargo dhow. The naval warship brought the Iranians aboard, provided medical treatment, and returned the Iranians to appropriate Iranian representatives.

[122] *See also* U.S. DEP'T OF DEF., INSTR. 2000.11, PROCEDURES FOR HANDLING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE para. 3a (May 13, 2010) (C1, 17 May 1973) [hereinafter DODI 2000.11]; 2 RESTATEMENT (THIRD), § 711 Reporters' Note 7, at 195–96, and 1 *id.*, § 433, Reporters' Note 4, at 338–39 (non-refoulement is by 8 U.S.C. § 1231(b)(3) (2006)).

[123] Convention Relating to the Status of Refugees art. 33 (1951) T.S. No 2545, 189 U.N.T.S. 150 [hereinafter 1951 Convention]). *See also* Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 89–171 (Erika Feller, Volker Türk & Frances Nicholson ed., 2003), *available at* http://www.unhcr.org/419c75ce4.html (analyzing the principle of non-refoulement).

[124] *See* NAVY REGULATIONS 1990, *supra* note 119; U.S. DEP'T OF NAVY, SEC'Y, INSTR. 5710.22A, POLITICAL ASYLUM AND TEMPORARY REFUGE para. 5a(2)(d) (29 Dec. 2005) [hereinafter SECNAVINST 5710.22A].

[125] SECNAVINST 5710.22A, *supra* note 124, para. 5a(2)(d).

[126] DODI 2000.11 *supra* note 122, para. 4a.

[127] *See* NAVY REGULATIONS 1990, *supra* note 119, para. 0939; SECNAVINST 5710.22A, *supra* note 122, para. 5; DoDI 2000.11 *supra* note 122, para. 4(b)(2)(c).

[128] SECNAVINST 5710.22A, *supra* note 124, para. 5.

[129] *Id.* para. 5.

[130] *Id.* para. 5(2)(a).

[131] *Id.* para. 5(2)(e).

[132] *Id.* para. 5(2)(a) – (b). For further information concerning processing requests for asylum, see NWP 1-14M, *supra* note 7.

"temporary refuge" until higher authority determines disposition.[133] The next section will discuss the care and treatment required for the refugees/asylum-seekers, as well as the permissible restrictions on their liberty while on board the warship.

C. Treatment Requirements for Peacetime Detention Situations Outside of LOAC

This section provides the practitioner with the requirements for treatment of the persons detained in the scenarios discussed in sections A and B above. For all classes of persons detained or held in the non-armed conflict scenarios, the basic treatment requirements remain the same. As in detentions during armed conflict, the Detainee Treatment Act of 2005 applies on warships during non-armed conflict situations.[134] The Detainee Treatment Act requires humane treatment for all persons under custody or control of DoD personnel.[135] However, the Detainee Treatment Act and service regulations do not specify the authorized liberty restrictions that warship's CO may place on the detained person.

Commanders are "responsible for the satisfactory accomplishment of the mission and duties assigned to their command."[136] In bringing aboard civilian passengers and detainees, the commanding officer may need to take appropriate safeguards to maintain the safety and security of the vessel and crew. Such security measures may involve limiting access to certain parts of the warship and segregating detainees as needed.[137] As previously mentioned, the minimum standard of treatment for detained persons under U.S. custody is humane treatment.[138] In addition to the general requirement of humane treatment for those persons detained or held, there are certain treatment guidelines pertaining to suspects detained pursuant to the SUA protocol, refugees, and Article 10 of the 2005 SUA protocol requires that "[a]ny person who is taken into custody, or regarding whom any other measures are taken or proceeding are being carried out pursuant to this Convention, shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law."[139]

In detaining the asylum-seekers, the CO is also required to afford "every reasonable care and protection under the circumstances.[140] The regulations provide no further guidance on what constitutes "reasonable care and protection."[141] The CO may also return the asylum-seekers to their home country, so long as it does not violate the principle of refoulement as discussed in the previous section. Coordination with higher authority will be required in accordance with service regulations.[142]

Certain provision under the Safety of Life at Sea Convention (SOLAS) may serve as guidance during operations which pertain to detention of pirates, asylum-seekers, or refugees.[143] During counter-piracy operations, often suspected pirates are released due to insufficient evidence for prosecution. Further, persons detained during such operations may be innocent persons such as asylum-seekers, refugees, or a vessel's crew held hostage. All of the classes of persons may be held aboard the U.S. warship prior to their release. Upon the release of the "innocent" person, SOLAS requires certain measures to be taken prior to their release, such as ensuring they are returned to seaworthy vessels and/or safe conditions.[144] Additionally, practitioners should seek out the latest practical techniques for care and in-processing of detained pirates, distressed mariners, or asylum-seekers such as photographing, categorization, seizing personal effects, and preliminary health examinations.[145]

---

[133] SECNAVINST 5710.22A, *supra* note 124, para. 5(2)(a)–(b). *See also* NWP 1-14M, *supra* note 7 (providing further information concerning processing requests for asylum).

[134] Detainee Treatment Act, *supra* note 55 ("[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.").

[135] *Id.*

[136] NAVY REGULATIONS 1990, *supra* note 119, at 0702.

[137] CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, AFTER ACTION REPORT, OPERATION ENDURING FREEDOM, MARITIME SECURITY OPERATIONS, COUNTER-PIRACY OPERATIONS, 28 MAY 2009–21 OCTOBER 2009, at 3 (18 Dec. 2009) [hereinafter USS *RONALD REAGAN* AAR] (Recommendation by Carrier Strike Group Judge Advocate for preparation and training for holding detainees.).

[138] Detainee Treatment Act, *supra* note 55 (prohibiting "[c]ruel, inhuman, or degrading treatment or punishment").

[139] SUA Protocol, *supra* note 66, art. 10.

[140] SECNAVINST 5710.22A, *supra* note 124, para. 5(a)(1)(b).

[141] DoDD 2000.11, *supra* note 122, at 4.1.1.2; SECNAVINST 5710.22A, *supra* note 124, para. 5.

[142] SECNAVINST 5710.22A, *supra* note 124, para. 5(a)(3); *see also* UN High Comm'n on Refugees, Int'l Mari. Org., *Rescue at Sea: A Guide to Principles and Practice as Applied to Migrants and Refugees* (Jun. 12, 2009), *available at* http://www.unhcr.org/450037d34.html (providing a useful pamphlet on refugee law and contact information for international organizations.

[143] International Convention for the Safety of Life at Sea, Nov. 1, 1974 (as amended), 32 U.S.T. 47, 1184 U.N.T.S. 276 [hereinafter SOLAS].

[144] *Id.* ch. V.

[145] E-mail from Lieutenant Tracy Reynolds, Judge Advocate Gen. Corps, U.S. Navy, Staff Judge Advocate, to CTF-151 (May 11, 2010 08:49 EST) [hereinafter Reynolds e-mail] (detailing the complexities of distinguishing hostile pirates from innocents such as fishermen and providing details of in-processing of suspected pirates and mariners in distress) (on file with author).

Thus, the basic care and treatment standards for person detain during non-armed conflict situations are similar to the requirements for detained persons during armed conflict. The level of security required will be based on the commanders needs to preserve safety and security of the vessel, crew, and persons detained, but the CO must also comply with international law and regulations requiring humane treatment.

V. Conclusion

International law, domestic law, and service regulations provide the legal requirements for detention, care, and treatment for the scenarios discussed in this primer. The authorities are both numerous and wrought with intricacy. The need to understand detention authority and treatment requirements for persons detained outside of armed conflict was illustrated in May 2009, when the U.S. captured and detained the sole surviving pirate from the May 2009 *Maersk Alabama* pirate attack, Abduwali Abdukhadir Muse.[146] During this high-profile operation, the naval commander of the USS *Bainbridge*, presumably after consulting with the task forces' legal counsel, detained the injured Muse and later transferred him to New York for prosecution.[147] This historical pirate attack highlighted the existence of a cancerous threat to the American shipping industry in the Gulf of Aden. The operation displayed America's resolve to counter that threat by use of naval force. As evidenced by the increasing number of pirate attacks in 2009, piracy on the seas will likely continue in the near future, and naval force will be employed to counter acts of piracy.[148] Other criminal acts on the high seas, such as terrorism and illegal drug trafficking, will continue to pose threats to our nation's peace and security as well. As long as people continue to traverse the oceans, U.S. naval ships must be prepared for maritime detentions both during armed conflict and peacetime.

Judge advocates, particularly in the sea services, should be familiar with the commander's detention authority and the general treatment requirements for persons detained at sea in both armed and non-armed conflict situations. Before deploying, judge advocates must know how to implement these principles in advance of the next at-sea detention in order to prevent U.S. naval forces from engaging in unauthorized detentions, which could erupt into international incidents or increased public scrutiny. In addition to the legal authorities mentioned in this primer, judge advocates also need to review brig regulations and assist in determining safe and secure locations to detain persons should the brig facilities prove inadequate or even unnecessary. Finally, judge advocates should assist in developing standard operating procedures, training, or exercises for detaining persons at sea.[149] The judge advocate who properly advises his commander on those persons detained at sea will surely be a valuable asset to the commander by assisting him in complying with the law.

---

[146] Justin Fishel, *Navy Seals Kill Pirates, Rescue American Hostage*, FOXNEWS.COM (Apr. 12, 2009), http://www.foxnews.com/politics/2009/04/12/navy-seals-kill-pirates-rescue-american-hostage/; Hussein Saddique, *Accused Somali Pirate Arraigned in Federal Court*, CNN.COM (May. 21, 2009), http://www.cnn.com/2009/CRIME/05/21/ny.somali.pirate.arraigned/index.html.

[147] Fishel, *supra* note 146; Saddique, *supra* note 146.

.

[148] INT'L CHAMBER OF COMMERCE (ICC), INT'L MARI. BUREAU, PIRACY AND ROBBERY AGAINST SHIPS, 2009 ANNUAL REPORT (Jan. 2010), *available at* http://www.icc-ccs.org/. *See also Unprecedented Increase in Somali Pirate Activity*, ICC COMMERCIAL CRIME SERVS., Oct. 21, 2009, http://www.iccccs.org/index.php?option=com_content&view=article&id=376:unprecedented-increase-in-somali-pirate-6activity&catid=60:news&Itemid=51 (last visited Jan. 13, 2010).

[149] USS *RONALD REAGAN* AAR, *supra* note 137, at 3.

Surviving the Multiplicity/LIO Family Vortex[1]

Captain Gary E. Felicetti[*]

I. Introduction

Drafting or reviewing court-martial charges is one of the most important, and maddening, jobs in military justice. Unresolved issues can be fatal to the case several years after trial, and at least four complicated legal doctrines must be applied: multiplicity; lesser included offenses; unreasonable multiplication of charges; and multiplicity for sentencing. Each is marked by hard turns and at least one total reversal. For example, in 2009, lesser included offense doctrine underwent a complete about-face in *United States v. Miller*.[2] Less than a year later, the Court of Appeals for the Armed Forces (CAAF) swept away an important aspect of *Miller* in yet another restructuring of military lesser included offense (LIO) doctrine.[3]

Moreover, each doctrine flows from the common "multiplicity" ancestor so there is a lot of overlap between the four modern doctrines. Well into the 1990s, the word "multiplicity" served as an omnibus term encompassing all four doctrines within the family.[4] A "multiplicity" objection could subsequently trigger a four part analysis.[5] Courts of this period were not always clear on which part of the existing multiplicity doctrine they relied on when deciding cases. This history is reflected in the *Manual for Courts-Martial* (*MCM*), which often illustrates both an incorrect and misleading multiplicity analysis.[6]

It is not surprising that the multiplicity family has been described as "chaos" and the "Sargasso Sea" of military and federal law;[7] or, similar to the Sargasso Sea, a vortex that sucks in all sorts of debris, traps sailors for months, and causes great suffering.[8] At the very least, the four intertwined descendants share an extremely complicated and evolving history that is woven together in a way that even appellate courts find confusing at times.[9]

It's easy to see why. After reviewing the cases and *MCM* provisions, one can fairly conclude that these legal doctrines involve only a difficult series of rules that change every few years. This article, however, takes a more optimistic view, and intends to provide practitioners with a

---

[*] Judge Advocate, U.S. Coast Guard. Currently assigned as Chief Trial Judge, U.S. Coast Guard, Arlington, Virginia.

[1] This compact analytical framework is not based on any particular fact pattern or case. It is neither an advance ruling in any specific case, or a directive that Coast Guard trial judges adopt a particular view of any of the issues discussed. It is also not a comprehensive guide on how to fully resolve all aspects of these four doctrines. Courts, after struggling with the multiplicity family vortex for decades, have yet to produce such guidance. This framework simply provides some clarity on how to approach, conceptualize, and analyze these intertwined issues.

[2] The *Miller* court overruled prior cases holding that clauses 1 and 2 of Uniform Code of Military Justice (UCMJ) art. 134 (2008) were *per se* included in every enumerated offense and therefore "necessarily included" under Article 79, UCMJ. 67 M.J. 385 (C.A.A.F. 2009). This completed an important transition to a pleading-elements approach in military lesser included offense doctrine. *Infra* note 33.

[3] United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010). *See supra* note 2. The *Jones* case, without any specific comment on rejection of the pleading-elements approach, changed the military to a statutory elements approach for LIOs. *Jones*, at 471.

[4] United States v. Johnson, 26 M.J. 415 (C.M.A. 1988) (multiplicity challenge resolved on the basis that the two charges were multiplicious for sentencing); United States v. Teters, 37 M.J. 370, 373 (C.A.A.F. 1993) (discussing a three-step analysis of multiplicity in terms of charging, findings, and sentencing that was first recognized in United States v. Baker, 14 M.J. 361 (C.M.A. 1983)).

[5] *See Baker*, 14 M.J. 361.

[6] For example, some of the multiplicity language in the discussion of Rule for Court-Martial (RCM) 1003(c)(1)(C) is from a discarded judicial test for unreasonable multiplication of charges. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(c)(1)(C) discussion (2008) [hereinafter MCM]. Michael Breslin & LeEllen Coacher, *Multiplicity and Unreasonable Multiplication of Charges: A Guide to the Perplexed*, 45 A.F. L. REV. 99, 126 (1998). Also, the discussion of RCM 907(b)(3)(B) is partially based on cases, including *United States v. Gibson*, 11 M.J. 435 (C.M.A. 1981), that predate major reversals in multiplicity and lesser included offense doctrine. MCM, *supra*, R.C.M. 907(b)(3)(B) drafters' analysis, at A21-58. Moreover, the lead opinion in the most recent case, *Gibson*, doesn't explicitly focus on any particular legal doctrine by name. *Gibson*, 11 M.J. at 437. As a result, the discussion reflects the pre-1995 equation that "multiplicity" = multiplicity + lesser included offenses (LIO) + unreasonable multiplication of charges + multiplicity for sentencing. MCM, *supra*, R.C.M. 907(b)(3)(B) discussion; *see infra* Parts II and III.A. *Jones*, 68 M.J. at 474 (Baker J. dissenting) (listing additional *MCM* inaccuracies while the main opinion limits the applicability of much of paragraph 3b(1)). MCM, *supra*, pt. IV, para. 3b(1); *Infra* note 51 and accompanying text.

[7] Albernaz v. United States, 450 U.S. 333, 343 (1981); *Baker*, 14 M.J. at 372 (Cook, J., dissenting); United States v. Roberson, 43 M.J. 732, 734 (A.F. Ct. Crim. App. 1995) (*rev'd* on other grounds).

[8] The Sargasso Sea is a region in the middle of the North Atlantic Ocean surrounded by ocean currents. It is the only "sea" without shores. Historically, sailing ships became trapped here for lengthy periods due to the often calm winds. The wait often caused suffering and death. Today, the surrounding surface currents cause the Sargasso to accumulate a high concentration of non-biodegradable plastic waste. Sargasso Sea, *available at* http://en.wikipedia.org/wiki/Sargasso_Sea.

[9] In *United States v. Weymouth*, 43 M.J. 329 (C.A.A.F. 1995), the court considered the question of whether various assault offenses were lesser included offenses of attempted murder. On this issue of law, the court found the trial judge "technically" wrong on the law; however, the majority upheld the trial ruling on the grounds that the military judge did not "abuse his discretion." Of course, matters of law are reviewed *de novo.* Use of the "abuse of discretion" standard indicates that the court may have lost situational awareness and applied the standard of review for unreasonable multiplication of charges. United States v. Pauling, 60 M.J. 91, 95 (C.A.A.F. 2004) (unreasonable multiplication of charges ruling is reviewed for abuse of discretion). For a complete discussion of this and other examples of the widespread confusion, see Breslin & Coacher, *supra* note 6, at 102–09.

succinct framework on how to successfully navigate the often confusing multiplicity/LIO "family vortex."

II. Lesser Included Offenses (LIOs): The Core Issue Is Due Process Notice

The court-martial process begins with an allegation contained in a specification. A specification is a plain, concise, and definitive statement of the essential facts constituting the charged offense.[10] A legally sufficient specification must: (1) allege all the elements of the offense; (2) provide notice to the accused of what he must defend against; and (3) give sufficient facts to protect against double jeopardy for the same offense.[11]

The LIO doctrine focuses on providing the required notice to the accused.[12] Adequate notice is critical because an accused may be found guilty of any offense "necessarily included" in the charged offense; an attempt to commit the charged offense; or an attempt to commit an offense that is "necessarily included" in the charged offense.[13] Moreover, reviewing authorities may set aside the trial findings and instead approve or affirm any LIO.[14] As a matter of due process, the accused is entitled to notice of those lesser included offenses applicable to the greater offenses listed on the charge sheet.[15]

The first published 1951 *MCM* appears to take a fairly narrow approach to the LIOs permitted by Article 79, Uniform Code of Military Justice (UCMJ). At the beginning, an offense could only be a LIO if all the elements of the lesser offense were necessary elements of the greater offense charged. [16] The *MCM* further defined an LIO as follows: "An offense found is not included within an offense charged if it requires proof of any element not required in proving the offense charged. . . ."[17] This apparent simplicity, however, was contradicted by an appendix listing various Article 134 general offenses as LIOs of many enumerated offenses such as riot, murder, and rape.[18] The 1951 *MCM* did not explain how the additional elements exclusive to Article 134 offenses—prejudice to good order and discipline or discredit to the armed forces—now became elements of the greater charged offenses.[19]

Given this historical inconsistency, it is not surprising that the LIO doctrine underwent several interpretations of when offenses were "necessarily included" under Article 79. The courts zigzagged through various tests.[20] Lesser included offense doctrine eventually became a confusing "Hydra" analysis involving issues of double jeopardy, double punishment, *sua sponte* instructions, duplicity, and multiplicity.[21] Chief Judge Crawford's Hydra metaphor is particularly apt since, in Greek mythology, cutting off one head of the Hydra in an attempt to kill the monster only caused it to grow two more.[22]

In 1994, the CAAF attempted to kill the monster by adopting the federal statutory elements test for all non-Article 134 LIOs.[23] Under Article 79, the test required that an offense was "necessarily included" if the statutory elements of the greater offense were proof of the lesser

[10] MCM, *supra* note 6, R.C.M. 307(c)(3) & discussion.

[11] United States v. Sell, 11 C.M.R. 202, 206 (C.M.A. 1953). The requirement that the specification protect against double jeopardy is addressed in the multiplicity section of this article. *Infra* Part III.A.

[12] United States v. Miller, 67 M.J. 385 (C.A.A.F. 2009). Due Process under the Constitution requires that an accused be on notice of the offense that must be defended against, and only lesser included offenses that meet these notice requirements may be affirmed by an appellate court. *Id*. at 388 (citing Jackson v. Virginia, 443 U.S. 307 (1979)).

[13] UCMJ art. 79 (2008).

[14] *Id.* art. 59(b).

[15] *Sell*, 11 C.M.R. at 206; *Miller*, 67 M.J. at 388.

[16] MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 158 (1951) [hereinafter 1951 MCM].

[17] *Id*.

[18] *Id*. app. 12 (listing various Article 134 offenses as LIOs of many enumerated offenses). Article 134 contains the additional elements of either prejudice to good order and discipline or discredit to the armed forces.

[19] While subsequent case law didn't squarely address the issue, it indicates that the required due process notice of these Article 134 LIOs is provided by the statutory elements, pleadings, and proof at trial. *Infra* note 33. This is known as a pleading-elements-proof approach to LIOs

[20] United States v. Weymouth, 43 M.J. 329, 332, 334, 335 (C.A.A.F. 1995) (inherent relationship test) (fairly embraced concept). This is only a partial list of the many formulations of the now-discarded tests. For a more complete history discussion of the old tests, see James A. Young III, *Multiplicity and Lesser Included Offenses*, 39 A.F. L. REV. 159 (1996).

[21] *Weymouth*, 43 M.J. at 342 (Crawford, J., concurring in the result).

[22] Lernaean Hydra, http://en.wikipedia.org/wiki/Lernaean_Hydra. One example of the Hydra-like aspect of the law involves the concept of merger within LIO doctrine. The LIO merger doctrine permits lesser-included offenses to be subsumed into the greater offense for purposes of findings. *E.g.*, United States v. Teters, 37 M.J. 370, 375 (C.M.A.1993). As implemented at trial, it is impossible for an accused to be convicted of both the greater and lesser included offense since the members only consider the lesser offense after acquitting on the greater. In other words, the accused cannot be convicted and punished for both offenses. As will be seen later, this sounds a lot like the double jeopardy analysis behind multiplicity. *Infra* Part III.A. A LIO analysis, therefore, sometimes became the first step in a multiplicity analysis. United States v. Johnson, 26 M.J. 415, 418–19 (C.M.A. 1988). Eventually, the merger aspect of LIO doctrine was fully assimilated into double jeopardy doctrine which made it, once again, part of multiplicity. *Teters*, 37 M.J. at 376. Thus, some pre-assimilation cases and *MCM* provisions, apparently about LIO doctrine, actually now apply to multiplicity. This partially explains why many leading multiplicity cases discuss LIO doctrine and vice versa. *See also infra* note 39 and accompanying text (providing a more recent Hydra-like example arising from the 2009 *Miller* decision).

[23] United States v. Foster, 40 M.J. 140, 142 (C.M.A. 1994). In many ways, the court moved military LIO practice back to that of the 1951 *MCM*. *Supra* notes 16–19 and accompanying text.

offense,[24] and therefore the greater offense cannot be committed without also committing the lesser.[25] Because the greater and lesser offenses share common statutory elements, the accused has full notice that he could also be convicted of the lesser offense.[26] This conclusion was based on the military courts' interpretation of Article 79, UCMJ, as informed by the nearly identical Federal Rule of Criminal Procedure 31(c).[27] At this point, both the Federal and Military justice systems employed an elements approach for determining LIOs.

Approximately a year later, in 1995, the CAAF reconsidered its position and adopted a pleading-elements approach to LIOs. Due to the differences between military and federal practice, the "elements" used to determine military LIOs consist not only of statutory elements but also other factors required to be alleged in the specification.[28] Specifically,

> the formal written accusation in court-martial practice consists of two parts, the technical charge and the specification. For offenses in violation of the code, the charge merely indicates the article the accused is alleged to have violated, while the specification sets forth the specific facts and circumstances relied upon as constituting the violation.[29]

As the court continued to largely reject the concept that trial evidence provided proper due process notice to an accused, this trend supports the theory that prior fair notice to the accused is the core issue in LIO doctrine.[30] A military accused receives fair notice through the charge sheet which provides both those elements denoted in the statutes and those necessarily alleged in the specifications.[31]

A military accused also receives fair notice from the President who, pursuant to his rulemaking authority under UCMJ Article 36(a), issues the *MCM*.[32] This notice emphasizes the qualitative aspects of the pleading-elements approach to LIOs. It tells the accused to also prepare to defend against other charges if: (1) all of the elements of the lesser offense are included in the greater, but one or more elements is legally less serious (e.g. housebreaking is a LIO of burglary); (2) all of the elements of the lesser offense are included and necessary parts of the greater, but the mental element is legally less serious (e.g. wrongful appropriation is a LIO of larceny); and (3) not all of the LIO elements are included, but the factual allegations in the specification provide the notice. (for example, assault with a dangerous weapon may be a LIO of robbery).[33]

---

[24] *Weymouth*, 43 M.J. at 332, 335. This aspect of LIO doctrine is reflected in paragraph 3b(1)(a). MCM, *supra* note 6, pt. IV, para. 3b(1)(a)..

[25] United States v. Oatney, 45 M.J. 185, 188 (C.A.A.F. 1996) (Even under a much broader and subjective test, now-rejected, the entire lesser offense still had to be contained within the greater offense.).

[26] United States v. Medina, 66 M.J. 21, 27 (C.A.A.F. 2008).

[27] *Weymouth*, 43 M.J. at 331, 333.

[28] *Id.* at 340. The cited differences include the following: the importance of the specification in military practice which provides a great deal of, sometimes critical, information not contained in the statutory charge ("military offenses are not exclusively the product of statutes"); the military policy of bundling all known charges into a single trial; non-multiplicious charges may be separately punished in the military but not in the federal system; unitary sentencing in the military; and there being no federal corollary for the military concept of a "legally less serious" element. *Id*. at 335–36.

Subsequent to the *Weymouth* decision, there was arguably some narrowing of the differences between the military and federal systems—at least with respect to federal courts relying on more than just the statutory elements in some situations. *See* Rutledge v. United States, 517 U.S. 292 (1996) (discussing conspiracy to distribute controlled substances as a lesser included offense of a continuing criminal enterprise).

[29] *Weymouth*, 43 M.J. at 333–34. The *Weymouth* court also noted two potential problems in a pleading-elements approach: (1) prosecutorial abuse by deliberately omitting critical facts from the allegation to keep a related charge separate; and (2) the Government creating an additional LIO by alleging extra, non-essential facts. *Id.* at 334, 337, nn.4, 5.

[30] However, a total break from the pleading-elements-proof approach to Article 134 LIOs was not fully implemented until the 2009 *Miller* case. *See supra* note 2 and *infra* note 33 (discussing United States v. Foster).

[31] *Weymouth*, 43 M.J. at 334.

[32] *Id.* at 333–34. The President has traditionally exercised the power to make rules for governing the military, including rules for courts-martial, as commander-in-chief. Explicit statutory authority has been provided since around 1813 and currently resides in Article 36, UCMJ. MCM, *supra* note 6, drafters' analysis of Rules for Courts-Martial, at A21-1. For more on how the President exercises the rulemaking authority, see Gregory E. Maggs, *Cautious Skepticism About the Benefit of Adding More Formalities to the* Manual for Courts-Martial *Rule-Making Process: A Response to Captain Kevin J. Barry*, 166 MIL. L. REV. 1 (2000). Captain Barry's reply immediately follows.

[33] MCM, *supra* note 6, pt. IV, para. 3b(1) (excluding subsection 3b(1)(a) which mostly reflects the common statutory elements test discussed at *supra* note 26 and accompanying text). Paragraph 3b(1) and (2) are based on paragraph 158 of the 1969 *MCM*. MANUAL FOR COURTS-MARTIAL, UNITED STATES (rev. 1969). MCM, *supra* note 6, para. 3, at A23-2 (drafters' analysis of the punitive articles). *See also Weymouth*, 43 M.J. at 333. The *Weymouth* court appeared to emphasize two separate sources for the required Due Process notice: the statutory elements and the separate *MCM* language. Prior to 1995, the Court of Appeals for the Armed Force (CAAF) had primarily pointed at Article 79's "necessarily included" language. For example, in *United States v. Foster*, 40 M.J. 140 (C.A.A.F. 1994), *rev'd* United States v. Miller, 67 M.J. 385 (C.A.A.F. 2009), the court stated that Article 79 permitted elements to be implied for realistic or rational derivative offenses under Article 134. *Foster*, 40 M.J. at 143. This approach depended "upon the facts of the case." *Id*. Thus, until at least the early 1990s, offenses were "necessarily included" under Article 79 based on the statutory elements, pleadings, and proof at trial of the greater offense. *Id*. at 148 (Sullivan, C.J., concurring); United States v. Teters, 37 M.J. 370, 376 (C.M.A.1993).

The CAAF partially changed course in *Weymouth* when it rejected its prior construction of Article 79 (elements plus pleadings plus proof all required by Article 79). The *Weymouth* court clearly substituted an elements approach for non-Article 134 LIOs consistent with *Schmuck v. United States*, 489 U.S. 705 (1989). Use of the *Schmuck* test, however, created a potential conflict with some existing *MCM* language that went well beyond the statutory elements and, in some ways, reflected the earlier CAAF tests for LIOs. The *Weymouth* court put renewed emphasis on Part IV of the *MCM* as reflecting some unique aspects of military law. This

The President also provided very specific, offense-by-offense LIO listings throughout Part IV of the *MCM*.[34] Not surprisingly, courts held that this listing adequately notified an accused of the additional charges against which he must be prepared to defend against—at least in a guilty plea.[35]

After a period of relative stability, in 2009 the CAAF fully implemented the pleading-elements approach for all LIOs by revoking the special exemption it created for LIOs under Article 134.[36] In *Miller*, the court explicitly overruled prior cases holding that clauses 1 and 2 of Article 134 UCMJ were *per se* included in every enumerated offense, and that this *per se* inclusion satisfied the definition of "necessarily included" under UCMJ Article 79.[37]

At the same time, the *MCM*'s LIO listings still reflected the prior rules—including the qualitative approach to statutory elements that permitted additional elements to be created by the pleadings.[38] This raised several new issues about the presidential power to list offenses as LIOs.[39] While these regulatory lists were certainly useful and logically provided notice to the accused, did Article 79 and due process permit the President to provide the required notice in this manner?[40]

In *United States v. Jones*, the CAAF emphatically answered "no" and, with sweeping language, adopted the statutory elements test for LIOs that it had declined to fully implement in 1994 and 1995.[41] Under this language, there is only one way for an accused to receive the required notice in a contested case—"with reference to the elements defined by Congress for the greater offense."[42]

This appears to make LIO doctrine very simple. "If *all* of the elements of offense X are also elements of offense Y, then X is a LIO of Y."[43] Or, in pictorial form:

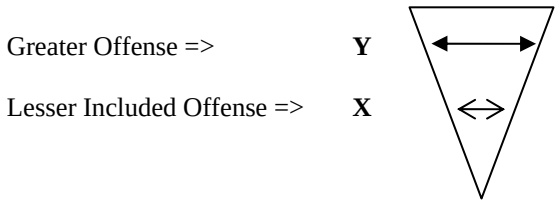

Diagram 1

Therefore, "Offense Y is called the greater offense because it contains *all* of the elements of offense X along with one or more additional elements."[44] In pictorial form, all of X must be within the inverted triangle in diagram 1. Surprisingly, the court did not even mention the discarded pleading-elements approach by name.[45] This, along with the fact that *Jones* involved a LIO arising under Article 134, coupled with a vague statement by the court on which prior cases were now overruled, still permits future flexibility.[46]

---

preserved the *MCM* without reviving the very "inherent relationship" test rejected in *Teters*. It also distanced LIO doctrine, a bit, from multiplicity doctrine and highlighted that notice to the accused is the core LIO issue.

In the end, the *Weymouth* court ratified the federal statutory elements test but then pointed to the *MCM* and some unique aspects of military law as expanding the traditional understanding of elements. ("in the military, those elements required to be alleged in the specification, along with the statutory elements, constitute the elements of the offense for the purpose of the elements test."). *Weymouth*, 43 M.J. at 340. Thus, the military had a pleading-elements approach for all non-Article 134 LIOs. The *Miller* court completed implementation of the pleading-elements approach in 2009 by prohibiting implied elements to permit an un-pled Article 134 LIO. *Miller*, 67 M.J. at 389. Less than a year later, the CAAF discarded the pleading-elements approach for LIOs. United States v. Jones, 68 M.J. 465, 470 (C.A.A.F. 2010).

[34] The 1951 *MCM* contained a table of commonly included offenses in an appendix. 1951 MCM, *supra* note 16, app. 12. The information in the table was eventually broken up and the LIOs listed by each individual offense.

[35] United States v. Holland, 68 M.J. 576 (C.G. Ct. Crim. App. 2009); *Weymouth*, 43 M.J. at 342 (Crawford, C.J., concurring). The CAAF appears to have ratified this approach in *Jones*. 68 M.J. at 473. In *United States v Conliffe*, the majority gave significant weight to the notice provided by the *MCM*'s explicit LIO listing. 67 M.J. 127, 133 (C.A.A.F. 2009).

[36] *Supra* notes 2, 28–29 and accompanying text.

[37] *Miller*, 67 M.J. at 389.

[38] MCM, *supra* note 6, pt. IV, para. 3b(1) (excluding the text not contained in parenthesis in subsection 3b(1)(a), which reflects the common statutory elements test discussed at *supra* note 24 and accompanying text).

[39] United States v. McCracken, 67 M.J. 467, 468, 469 n.2 (C.A.A.F. 2009) (Baker, J., concurring in the result). For example, can the President make an Article 134 offense with different elements a LIO of an enumerated offense by simply listing it as such in the *MCM*? *Id.* Also, (1) "Whether the elements test articulated in *Schmuck v. United States*, 489 U.S. 705, 716 (1989), precludes the President from delineating certain Article 134, UCMJ, offenses as lesser included offenses of enumerated offenses absent a statutory change to the enumerated offense; (2) Whether the due process principles advanced in *Schmuck* can, as a matter of law, be satisfied through mechanisms of fair notice other than the elements test; and (3) What appellate effect, if any, does an agreement by the parties at trial that an offense is a lesser included offense have on the greater offense being considered on appeal." *McCracken*, 67 M.J. at 469 (Baker, J., concurring in the result).

[40] *Id*.

[41] *Supra* notes 28, 30, and 33 (discussing *Foster* and *Weymouth*) and accompanying text.

[42] United States v. Jones, 68 M.J. 465, 471 (C.A.A.F. 2010). This is partially a rule of statutory interpretation to determine congressional intent for Article 79. It may, for some offenses, therefore, be supplanted by more direct evidence of congressional intent.

[43] *Id*. at 470 (emphasis added). Of course, *Jones* involved a LIO arising under Article 134 so the language is dicta for other LIOs.

[44] *Id*. The court's recent decisions, therefore, basically returned military law to the original 1951 *MCM* while also correcting the original illogic that permitted LIOs to arise under Article 134 even though these offenses had at least one additional element. *Supra* notes 16–18 and accompanying text.

[45] The CAAF established the pleading-elements approach to LIOs in *Weymouth*. *Supra* notes 28–31 and accompanying text. Yet, only Judge Crawford's comment in *Weymouth* equating LIO doctrine to a Hydra is explicitly mentioned in *Jones*. *Jones*, 68 M.J. at 468.

[46] "To the extent any of our post-*Teters* cases have deviated from the elements test, they are overruled." *Jones*, 68 M.J. at 472. This intentional

Of course, few things are straightforward in the LIO/multiplicity family vortex. In footnote 9 of *Jones*, the court states that "the elements defined by Congress for the greater offense" also include the elements established by the President in the *MCM* for the enumerated Article 134 offenses.[47] Moreover, the CAAF subsequently held that the elements test does not require the use of identical statutory language. Instead, the relationship between two offenses is determined by applying the "normal principles of statutory construction."[48] In other words, the predictable bright lines of *Jones* are not yet so predictable and the *MCM* still matters.

However, the *MCM*'s LIO listings that go beyond the statutory elements approach receive little or no deference. They provide guidance to the judge advocates under the President's command regarding potential violations of Article 134, and perhaps, persuasive authority to the courts.[49] They may also be useful in a guilty plea since the accused is always free to plead not guilty to the charged offense but guilty of a named lesser included offense or guilty by exceptions and substitutions.[50] Beyond this, some parts of the *MCM* are now very misleading since the greater charged offense must contain all of the statutory elements of each LIO.[51]

The *MCM*'s explicit LIO listings may also throw the government an occasional curveball. The prosecution must charge or lose any related offenses that are not LIOs.[52] Rule for Court-Martial 307(c)(4)'s discussion section states that "[i]n no case should both an offense and lesser included offense be separately charged."[53] The question then is, does this language apply to the *MCM*'s LIOs that are no longer "necessarily included" as a matter of law? Until the *MCM* is

---

vagueness may be designed to preserve future flexibility. Lesser included offenses doctrine has historically migrated between the poles of a predictable objective test and realistic flexibility. *See* United States v. Neblock, 45 M.J. 191, 201 (C.A.A.F. 1996) (Cox, C.J., concurring). It is possible, therefore, that the Jones case announced arrival at one pole before the court continues back toward the other.

In a recent update, the CAAF interpreted the relevant statutes to conclude that assault consummated by a battery, Article 128, UCMJ, is a LIO of wrongful sexual contact under Article 120, UCMJ. United States v. Bonner 70 M.J. 1 (C.A.A.F. 2011). The CAAF appears to be maintaining the strict discipline of *Jones* for LIOs arising under Article 134 while using statutory interpretation to preserve flexibility for other LIOs.

[47] *Jones* cites three specific cases as examples of the proper application of the elements test in the multiplicity context. One, *United States v. Wheeler*, treats the elements created by the President for specific Article 134 offenses as the equivalent of statutory elements. 40 M.J. 242, 246–47 (C.M.A. 1994). Neither *Wheeler* nor *Jones* explains why the elements established by the President for specific Article 134 offenses are the equivalent of statutory elements in a multiplicity analysis. However, it is probably under a theory of congressional delegation.

[48] United States v. Alston, 69 M.J. 214, 216 (C.A.A.F. 2010) (internal citation omitted). *Alston* presented the nearly ideal situation of two well-defined offenses within a statute recently enacted by the same Congress. The court easily concluded that "bodily harm" was a subset of "force." *Id.* (comparing Article 120(t)(8), UCMJ with Article 120(t)(5)(c), UCMJ). This makes aggravated sexual assault a LIO of rape by force.

[49] *Jones*, 68 M.J. at 471–72. While the court was specifically addressing Article 134 LIOs, it is obvious that offenses under Article 134 contain at least one additional statutory element than the enumerated offenses in Articles 81–132. In other words, it would normally be pointless for the President to say that any Article 134 offense is a LIO of an enumerated offense. Pleading extra words in a charged Articles 81–132 offense to reflect prejudice to good order and discipline, as suggested by *Medina*, should not be effective since only the statutory elements should matter when identifying LIOs. United States v. Medina, 66 M.J. 21, 27 (C.A.A.F. 2008). Therefore, until the next clarifications, the *Jones* language should apply to all LIOs listed in the *MCM*. This has potential implications for both the defense and prosecution since a failure to list an offense as a LIO in the *MCM* does not mean it is not a LIO under the new elements test. *Alston*, 69 M.J. at 216.

[50] *Jones*, 68 M.J. at 473. It is not entirely clear from *Jones* if a *MCM* LIO listing that exceeds the boundaries of the statutory elements approach is considered a "named" LIO. However, "an accused may choose, with convening authority approval, to plead guilty to any amended specification as long as the plea inquiry establishes that such a plea is knowing and voluntary and the plea is accepted by the military judge." United States v. Morton, 69 M.J. 12, 16 (C.A.A.F. 2010). A key practice point is that the accused must plead guilty to the other offense as opposed to being found guilty of it based on an improvident attempt to plead guilty to some other offense.

[51] *Jones*, 68 M.J at 471. Under *Jones*, all of the statutory elements of the lesser offense must be included in the greater. As discussed in *supra* note 44, the court has returned LIO doctrine to its roots in the 1951 *MCM* while also curing the original sin of permitting LIOs to arise under Article 134 even though these offenses have at least one additional element. In other words, some longstanding *MCM* language is invalid under *Jones.*

For example, housebreaking was listed as a LIO of burglary in the 1951 *MCM*. This legacy carried forward into Part IV of the 2008 *MCM*. Contrary to this language, however, housebreaking *should not* be a LIO of burglary. Housebreaking, the purported LIO, has two elements not fully contained within burglary (intent to commit *any* criminal offense therein for housebreaking as opposed to the intent to commit only certain specified offenses for burglary; and unlawful entry *at any time* for housebreaking as opposed to a *nighttime* entry for burglary). The purported LIO has elemental language that extends outside of the inverted triangle in *supra* diagram 1. It should not, therefore, be a LIO, at least under the *Jones* language. United States v. Arriaga, No. 10-0572/AF, _ M.J. _ (C.A.A.F. Feb. 7, 2011) will resolve this specific LIO question. The case's oral argument at CAAF suggested some willingness to move toward a more flexible approach to notice that might ultimately resemble the discarded pleadings-elements approach to LIOs.

Wrongful appropriation is another legacy LIO. It, on the other hand, *should* still be a LIO of larceny if courts conclude that the intent to permanently deprive or defraud fully contains the lesser intent to temporarily deprive or defraud. This would appear to be a "common sense" or "flexible" reading of the statutory elements since a permanent deprivation is forever. Forever fully includes any temporary period that is less than forever.

Yet, this is fairly close to the qualitative approach to the elements in the rejected pleading-elements doctrine. The *Jones* case, moreover, explicitly criticized "liberal standards," the "fairly embraced" test, and the "inherent relationship approach." *Jones*, 68 M.J. at 469. It also rejected LIOs "by fair implication," and the "extremely generous standard" for LIOs used by earlier courts. *Id*. It, therefore, remains to be seen if future courts will take a flexible approach based on necessity or stick with the predictable simplicity established in *Jones*. Until such guidance is provided, caution should be used when relying on the qualitative LIOs described in paragraph 3b(1)(b) & (c). MCM, *supra* note 6, pt. IV, para. 3b(1)(b) & (c).

[52] *See infra* Part III.A. Charging two offenses that are neither multiplicious nor in a greater-lesser offense relationship is permitted.

[53] MCM, *supra* note 6, R.C.M. 307(c)(4).

changed, a court might hold the government to the *MCM* listing and prohibit the charging of both offenses.[54]

The LIO portion of the Hydra may have been slain. But will it stay dead? [55] Prior courts identified legitimate reasons for the pleadings-elements approach and the multiple tests that preceded it.[56] Bright line tests sometimes produce harsh results, and preserving these tests in the face of severe outcomes requires discipline. If history is any guide, the latest round of clarifications will not be the last word in LIO doctrine.[57]

This new approach to LIOs should generate significantly longer charge sheets. The old rule, despite its faults, produced a larger number of LIOs that previously did not need to be listed on the charge sheet. While somewhat counter-intuitive, a larger number of LIOs benefits both the Government and accused.[58] The Government doesn't have to charge every conceivable theory of criminal liability.[59] The accused is protected from the prosecutor who wants to use "elemental literalism" to slice a single event into the maximum number of charges in an attempt to increase the potential sentence.[60] The old rule protected the accused from what is now called an unreasonable multiplication of charges.[61]

Under the new LIO analysis, this is no longer true since only the statutory elements should matter. How does a court resolve the tension between accurately describing the alleged misconduct and accounting for litigation contingencies, while trying to avoid overcharging? This brings us to the rest of the "family," or the related doctrines of multiplicity, unreasonable multiplication of charges, and multiplicity for sentencing.

III. Multiplicity, Unreasonable Multiplication of Charges, and Multiplicity for Sentencing

Each of these three descendents of "multiplicity" offers an avenue to dispute charging decisions while also recognizing the Government's need to account for exigencies of proof through trial, review, and appellate action.[62] Both the Government and accused have important equities at stake. Overcharging increases punitive exposure and may suggest to the members that the accused has bad character. On the other hand, omitting a closely-related offense that is not a LIO may result in an unjust acquittal. Understanding this tension is one of the keys to successfully navigating this intertwined side of the family.

A. Multiplicity (or Multiplicious for Findings): The Issues Are Normally Legislative Intent and Double Jeopardy

Multiplicity is an issue of law that enforces the Double Jeopardy Clause.[63] It protects an accused from multiple

---

[54] *Infra* Part III.B and note 739 (anomaly of a multiplicious offense that is not a LIO).

[55] The challenge of the strict statutory elements approach is illustrated in the 2009 case *United States v. Conliffe*, 67 M.J. 127 (C.A.A.F. 2009). The court had an excellent opportunity to implement a strict statutory elements approach to LIOs. Instead, it showed flexibility, emphasized the fair notice aspect of LIO doctrine, and held that the disorder or discredit element of Article 134 is close enough to the element of disgrace in Article 133 for LIO purposes. *Id.* at 134. As noted by the dissent, this essentially resurrected the inherent elements approach which had supposedly been rejected by the same court in 2008. *Id*. at 135–36 (Erdmann, J. and Ryan, J., dissenting in part). In theory, the *Conliffe* holding should not survive the objective simplicity mandated by *Jones*. It remains to be seen, however, how long the strict discipline of *Jones* will be enforced.

[56] *Supra* note 28.

[57] *See supra* note 51. *United States v. Wheeler* contains an interesting quote about the long-term prognosis for clear boundaries that require discipline to maintain in the face of sometimes harsh or undesirable results: "Our entire profession is trained to attack bright lines the way hounds attack foxes . . . [and] soon breaks down what might have been a bright line into a blurry impressionistic pattern." 40 M.J. 242, 246 (C.M.A. 1994) (internal quotes omitted). To compound matters, some of the important cases overruled by the switch to a statutory elements approach had explicitly claimed to be implementing it! *See* United States v. Foster, 40 M.J. 140, 142 (C.M.A. 1994).

[58] *See generally* United States v. Emmons, 31 M.J. 108, 111 (C.M.A. 1990) ("An instruction on a lesser-included offense, when warranted, serves both the defense and the prosecution. If the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. A defendant, however, is also entitled to a lesser-offense instruction . . . because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.") (internal quotations and citations omitted).

In light of this benefit, it might be prudent for military judges to conduct a brief inquiry whenever the defense objects to an LIO instruction to ensure that the accused understands what he or she is giving up.

[59] This Government action would be partially motivated by the desire to preclude a defense argument that, while the accused is guilty of some other uncharged offense, an acquittal is required due to its omission from the charge sheet.

[60] United States v. Weymouth, 43 M.J. 329, 336 (C.A.A.F. 1995). In a court-martial, a charge that is separate for findings is also normally separate for sentencing. *Id*. It may, in other words, also be punished separately. However, LIOs cannot be charged separately. MCM, *supra* note 6, R.C.M. 307(c)(4) discussion. Thus, having more related offenses considered to be lesser included of the charged offense reduces the maximum number of potential charges. This, in turn, reduces the maximum potential punishment.

[61] *Weymouth*, 43 M.J. at 336. *Infra* Part III.B.

[62] MCM, *supra* note 6, R.C.M. 307(c)(4) discussion; *Weymouth*, 43 M.J. at 338; United States v. Quiroz, 55 M.J. 334, 340 (C.A.A.F. 2001) (Crawford, C.J., dissenting). *See also* MCM, *supra* note 6, R.C.M. 907(b)(3)(B) (A multiplicious charge may be dismissed if unnecessary to enable the prosecution to meet exigencies of proof through trial, review, and appellate action.),

[63] Blockburger v. United States, 284 U.S. 299 (1932); United States v. Teters, 37 M.J. 370 (C.M.A.1993). The double jeopardy clause has a threefold purpose: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

convictions and punishments arising out of a single criminal transaction, or distinct act,[64] unless Congress intended it.[65]

Legislative intent is almost always a disputed issue since only Congress can authorize multiple convictions and punishments. Congress expresses its intent on multiple convictions within normal legislative action: the statutory language; the evolution of the bill's language as it moved through Congress; floor remarks by members; and reports issued after the bill's passage.[66]

In the absence of an express declaration or other guidepost, congressional intent is most frequently inferred through the elements of the offenses.[67] Congress intended to allow multiple convictions under different statutes for one act if each offense requires proof of a statutory element that the other does not.[68] In fact, it is "unquestionably established" that the multiplicity elements test "is to be applied to the elements of the statutes violated and not to the pleadings or proof of these offenses."[69] As such, multiple convictions and punishments are permitted for a distinct act if the two charges each have at least one separate statutory element from the other.

It is extremely difficult to discuss multiplicity without also mentioning LIOs. Both use an elements test and one can often reach the same end result using the other doctrine.[70] Additionally, courts sometimes treat them as interchangeable.[71] However, it is important to conceptualize them separately because a multiplicity analysis should focus on discerning legislative intent in order to enforce the Double Jeopardy Clause. Lesser included offense doctrine ensures that an accused has due process notice of the lesser offenses he must be prepared to defend against, and that the form of this notice complies with other statutory and constitutional requirements.[72] A significant amount of the family vortex can be avoided by keeping these two underlying purposes in mind when approaching the issues in a particular case.

Although closely related, multiplicity and LIOs are not the same. A LIO is always multiplicious with the greater offense; however, if two charges are multiplicious, it does not necessarily mean that one is the LIO of the other.[73]

Multiplicity's focus on the statutory elements reflects its narrow role as a protection against double jeopardy. In many cases, multiplicity does not significantly limit the Government's charging discretion. For example, taking one pill containing two illegal substances can result in two charges; one for each illegal substance contained in the pill.[74] This is true even if the accused believed the pill contained only one illegal substance. The two specifications each have a different element based on the actual drug consumed, and courts properly infer that Congress intended

---

[64] *See* United States v. Paxton, 64 M.J. 484, 490 (C.A.A.F. 2007) (providing an example of the distinction between single and multiple criminal transactions) ("The primary question raised by this issue is whether the indecent acts committed by Paxton and the rape amount to the 'same act or course of conduct' or whether they are distinct and discrete acts, allowing separate convictions.").

[65] *Teters*, 37 M.J. at 373 (citing Ball v. United States, 470 U.S. 856 (1985) and Albernaz v. United States, 450 U.S. 333 (1981)). "A constitutional violation under the Double Jeopardy Clause of the Constitution now occurs only if a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct." *Id.*

[66] Comparing a law's final language with the original and amended bill that produced the law is a generally recognized form of legislative history since it reflects actual votes by the members of Congress. Members' remarks during floor debate are helpful, but the comments may only reflect the speaker's views. Committee reports or other published "legislative histories" are written by congressional staff, often after the bill becomes law. They are not voted on, or even viewed in many instances, by the members. This form of "legislative history," therefore, normally receives less, or in some cases no, consideration. *See* NORMAN J. SINGER & J.D. SHAMBLE SINGER, THE USE OF LEGISLATIVE HISTORY IN A SYSTEM OF SEPARATED POWERS, SUTHERLAND STATUTORY CONSTRUCTION § 5A:5 (6th ed.).

[67] *Teters*, 37 M.J. at 373.

[68] *E.g.*, United States v. Dillon, 61 M.J. 221 (C.A.A.F. 2005).

[69] *Teters*, 37 M.J. at 377. The multiplicity elements test is about determining congressional intent regarding convictions under different statutes. When drafting legislation, Congress obviously did not consider the allegations or proof in any particular future case. Logically, only the statutory elements can provide insight into Congressional intent regarding punishment under multiple statutes.

[70] *See supra* note 22 (discussing the merger concept within LIO doctrine and describing this from a multiplicity perspective, one would say that a statutory LIO (identical overlapping statutory elements) is, by definition, multiplicious with the greater offense).

[71] The U.S. Supreme Court, for example, has typically resolved one aspect of the multiplicity issue by determining whether or not one offense is a lesser included offense of the other. Rutledge v. United States, 517 U.S. 292, 297 (1996) (discussing application of the *Blockberger* elements test). The military's leading multiplicity case, *Teters*, also has an extensive LIO discussion. *Teters*, 37 M.J. at 374–76. While treating the two doctrines as interchangeable may be highly confusing, it is reasonable. Article 79, UCMJ also reflects congressional intent regarding multiple punishments for one act since an accused cannot be punished for both the greater and lesser included offense. From this perspective, which emphasizes Congressional intent over notice to the accused, the *Teters* elements test for multiplicity should be identical to the elements test for LIOs. *See* United States v. Trew, 68 M.J. 364, 370 (C.A.A.F. 2010) (Stucky, J., concurring in the result).

[72] United States v. Miller, 67 M.J. 385, 388 (C.A.A.F. 2009); *Jones*, 68 M.J. at 471.

[73] *See supra* note 51 (discussing how housebreaking does not appear to be a LIO of burglary since the burglary offense does not contain 100% of the housebreaking elements). A prosecutor might now want to charge both offenses to account for contingencies of proof. However, each offense does not require proof of a fact (element) not contained within the other. They are, therefore, multiplicious for findings. The accused cannot be convicted and punished of both charges for the same event. Should a pretrial defense multiplicity motion be granted? If not, then should preliminary instructions be provided to ensure that the members do not draw a negative inference about the accused from the number of charges? *See infra* note 118. The anomaly of a multiplicious offense that is not a LIO may be one reason for CAAF to eventually relax the strict statutory elements approach in *Jones* and permit more qualitative LIOs.

[74] *Dillon*, 61 M.J. at 223–24.

to punish both acts. Since Congress intended separate punishment, there is no double jeopardy issue.

The courts also treat the elements developed by the President for the specified Article 134 offenses as statutory elements,[75] resulting in wide charging discretion. For example, engaging in sexual intercourse with someone other than a spouse can result in two charges: adultery and indecent acts. This is true even if the identity of the sexual partner is the sole reason the act was indecent.[76] The two specifications each have a different element, so a proper judicial inference is that the President, in his promulgation of Article 134, intended separate punishment for both acts.

Some military courts were dissatisfied with this somewhat harsh simplicity. The judicial response was arguably creation of a new legal right and yet another subjective test.[77] One might more charitably characterize it as the revival of a longstanding military legal doctrine that had been incorrectly discarded because it was entangled in the military's extremely confusing, and now-rejected, multiplicity test. In any event, current military law clearly distinguishes between multiplicity and unreasonable multiplication of charges.

B. Unreasonable Multiplication of Charges (UMC): The Issue Is Abuse of Prosecutorial Discretion

It is uncontroversial that "one transaction should not be made the basis for an unreasonable multiplication of charges against one person."[78] Unreasonable multiplication of charges doctrine (UMC) is a separate policy pronouncement to address abuse of prosecutorial discretion in instances where multiplicity does not exist.[79] It promotes fairness considerations separate from an analysis of the statutes, their elements, and the intent of Congress.[80] Unreasonable multiplication of charges, therefore, imposes limits on prosecutorial discretion that Congress did not. It also implements the accepted principle that a person may not be punished twice for what is, in effect, one offense.[81]

Any abuse of prosecutorial discretion, like multiplicity itself, may be remedied by dismissal or consolidation of the appropriate charges, or a limit on the maximum punishment.[82] Like multiplicity, UMC also overlaps with one part of lesser included offense doctrine.[83] This overlap is small, however, since LIO doctrine is about notice to the accused, while UMC is about alleged abuse of prosecutorial discretion. The trial ruling on allegations of prosecutorial discretion is itself reviewed for an abuse of discretion.[84] At the trial level, UMC litigation should emphasize fact-finding.[85]

By its very nature, the proper exercise of prosecutorial discretion cannot be reduced to a formula.[86] Absent direct evidence of abuse, however, a number of *non-exclusive* factors may circumstantially show that the Government abused its discretion and is "piling on."[87] Some questions to consider are as follows: Are the charges and specifications based on one transaction contrary to RCM 307(c)(4)? Do the charges misrepresent or exaggerate the accused's misconduct?[88] Do they unreasonably, or perhaps unfairly, increase the punitive exposure?[89] Do the charges involve a

[75] United States v. Wheeler, 40 M.J. 242, 246–47 (C.M.A. 1994). This older case is still important since the CAAF cited it as a model application of multiplicity doctrine in the 2010 *Jones* case. United States v. Jones, 68 M.J. 465, 470 n.9 (C.A.A.F. 2010).

[76] *Wheeler*, 40 M.J. at 243. Sergeant Wheeler had an adulterous affair with his seventeen-year old stepdaughter and cohabitated with her after she moved out of the family home.

[77] United States v. Quiroz, 55 M.J. 334, 339 & 345 (C.A.A.F. 2001) (Crawford, C.J. and Sullivan, J., dissenting).

[78] MCM, *supra* note 6, R.C.M. 307(c)(4). Prior to *Quiroz*, this language was in the non-binding discussion. *Quiroz*, 55 M.J. at 337. It was moved from the non-binding discussion section to the rule to reflect the *Quiroz* decision. MCM, *supra* note 6, R.C.M. 307(c)(4) drafters' analysis, at A21-23. *See also id.* para. 26b.

[79] *Quiroz*, 55 M.J. at 337–38 ("In short, even if offenses are not multiplicious as a matter of law with respect to double jeopardy concerns, the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system."); MCM, *supra* note 6, R.C.M. 905(c)(1) & (c)(2)(A).

[80] *Quiroz*, 55 M.J. at 337.

[81] *E.g.*, MCM, *supra* note 6, .R.C.M 1003(c)(1)(C) discussion.

[82] United States v. Roderick, 62 M.J. 425, 433 (C.A.A.F. 2006); *Quiroz* 55 M.J at 339; United States v. Balcarczyk, 52 M.J. 809, 813 (N-M. Ct. Crim. App. 2000).

[83] *See supra* notes 70 and 71.

[84] United States v. Pauling, 60 M.J. 91, 95 (C.A.A.F. 2004). Of course, a service court of appeals can always apply its separate *de novo* review authority under Article 66(c), UCMJ. A court doing so should, in theory at least, clearly state what standard of review it applied. A *de novo* review of the facts and trial ruling may simply indicate a different perspective based on the written record, consultations with the other appellate judges, and nearly unlimited time to reflect on the issue. It does not, therefore, have the obvious precedential value of a decision that the trial judge misunderstood the applicable law or abused his or her discretion.

[85] On the other hand, multiplicity and whether one offense is a LIO of another are both matters of law which are reviewed *de novo* since there are few, if any, relevant facts in dispute. United States v. Teters, 37 M.J. 370, 376 (C.M.A.1993) (applying the *de novo* review without using the label).

[86] ABA, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, CRIMINAL JUSTICE SECTION STANDARDS commentary to standard 3-3.9 (1992) [hereinafter STANDARDS FOR CRIMINAL JUSTICE], *available at* http://www.abanet.org/crimjust/standards/pfunc_toc.html (discretion in the charging decision).

[87] United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001).

[88] *Id.*

[89] *Id.*; United States v. Anderson, 68 M.J. 378, 386 (C.A.A.F. 2010) (Changing, without comment, the phrasing of this factor from the longstanding "unreasonably increase" to "unfairly increase" punitive exposure.).

unique feature of military law that increases the potential for abuse?[90] Did the Government face some reasonable contingencies of proof or law that justifies the multiple charges?[91] Did the Government's charging strategy, although aggressive, reflect a reasoned approach?[92] Has the Government added non-essential facts to the specification to obtain additional LIOs or omitted some language to keep a related charge separate?[93] Has the Government charged a LIO suggested only by the *MCM*?[94]

Of course, the purpose of all the factors, questions, and circumstantial evidence is to show that the convening authority abused his or her prosecutorial discretion.[95] But what does that really mean? The phrase "abuse of discretion" has a wide variety of definitions and has not been formally defined in this context.[96] Nonetheless, an abuse of discretion normally means much more than a difference of opinion.[97] The convening authority's charging decisions, therefore, receive at least some deference.[98] Unreasonable multiplication of charges is *not* an appropriate tool for the trial judge to simply reduce a prescribed maximum punishment to a level he or she deems reasonable.[99]

For example, in *United States v. LaBean*,[100] the Government increased punitive exposure by charging one eighteen-minute internet session that downloaded child pornography as twenty-five separate acts. This was not an abuse of prosecutorial discretion.[101] The defense, with the burden of persuasion, must therefore show more than a very aggressive charging decision.[102]

There is rarely any direct evidence of prosecutorial abuse. Defense and trial counsel, therefore, almost always seek to infer or refute it using only the non-exclusive factors discussed in *Quiroz* itself.[103] Unfortunately, the ultimate issue of prosecutorial abuse is frequently lost in the focus on the *Quiroz* factors. Both the government and defense counsel frequently fail to marshal evidence to support their positions.[104] Unreasonable multiplication of charges is about the defense proving an abuse of prosecutorial discretion. The facts do matter!

It should be even more difficult to prove "piling on" in light of several recent changes in the law. First, the new LIO doctrine means that far fewer offenses are now included. The government must either list a related charge or forfeit it. Moreover, the courts have made it hazardous to plead "on divers occasions,"[105] thus encouraging the Government to charge each known event separately. Finally, appellate courts may no longer affirm a closely related offense in a guilty plea.[106] This also encourages the Government to plead each reasonable theory of criminal liability to account for the exigencies of proof. In fact, the CAAF explicitly endorses the practice.[107]

---

[90] *Quiroz* 55 M.J. at 337; United States v. LaBean, 56 M.J. 587, 588 & 592 (C.G. Ct. Crim. App. 2001).

[91] United States v. Quiroz (*Quiroz IV*), 57 M.J. 583, 586 (N-M. Ct. Crim. App. 2002) (no contingencies of proof in a guilty plea).

[92] United States v. Campbell, 66 M.J. 578, 583 (N-M. Ct. Crim. App. 2008).

[93] United States v. Weymouth, 43 M.J. 329, 334, 337 nn.4, 5 (C.A.A.F. 1995).

[94] *See supra* note 51 and accompanying text.

[95] *Quiroz*, 55 M.J. at 338. The most direct statement of how commanders are supposed to exercise their prosecutorial discretion is contained in RCM 306(b) Discussion. MCM, *supra* note 6, R.C.M. 306(b) discussion. The Criminal Justice Section of the ABA addresses prosecutorial discretion in Standard 3-3.9 "Discretion in the Charging Decision." Standard 3-3.9(f) states "The prosecutor should not bring or seek charges greater in number of degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense." STANDARDS FOR CRIMINAL JUSTICE, *supra* note 86. The commentary adds that the prosecutor should not "pile on" charges to induce a guilty plea.

[96] Abuse of discretion, when applied to a military judge, has a "potpourri" of definitions depending upon the circumstances. United States v. Luster, 55 M.J. 67, 73 (C.A.A.F. 2001) (Crawford, C.J., dissenting).

[97] United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) ("To reverse for an abuse of discretion involves far more than a difference in . . . opinion. . . . The challenged action must . . . be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal.") (internal quotations omitted); MCM, *supra* note 6, R.C.M. 305(j)(1) & analysis (initial reviewing officer's decision regarding pretrial confinement entitled to substantial weight when being reviewed for an abuse of discretion.).

[98] At a bare minimum, this deference is reflected in the assignment of the burden of persuasion to the Defense. MCM, *supra* note 6, R.C.M. 905(c)(1) & (c)(2)(A).

[99] United States v. LaBean, 56 M.J. 587, 594 (C.G. Ct. Crim. App. 2001).

[100] *Id.* at 588.

[101] *Id.* at 588 & 592. It was also, obviously, not multiplicious.

[102] *See id.*; United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001); MCM, *supra* note 6, R.C.M. 905(c)(1) & (c)(2)(A).

[103] *Quiroz*, 55 M.J. at 338. The explicitly non-exclusive factors considered in *Quiroz* are less comprehensive that the listing earlier in this section.

[104] For example, the Article 32 officer may have recommended consolidating the charges or even opined that they were excessive. Evidence showing how a key witness's statements have changed over time might be introduced to show the need for two separate charges to account for the contingencies of proof. The convening authority could even offer some direct evidence, in other words testimony, about how he or she made their decision. Of course, testimony always has costs and risks that must be balanced against the benefits.

[105] *E.g.*, United States v. Ross, 68 M.J. 415 (C.A.A.F. 2010).

[106] United States v. Morton, 69 M.J. 12 (C.A.A.F. 2010) (reversing course on the closely related offense doctrine). Prior to *Morton*, an appellate court could "uphold a conviction when the providence inquiry clearly establishes guilt of an offense different from but closely related to the crime to which the accused has pleaded guilty." *Id.* at 14 (citing United States v. Wright, 22 M.J. 25, 27 (C.M.A. 1986)).

[107] *See Morton*, 69 M.J. at 16.

> It is the Government's responsibility to determine what offense to bring against an accused. . . . In some instances there may be a genuine question as to whether one offense as opposed to another is sustainable. In such a case, the prosecution may

These developments should limit the future impact of UMC doctrine. How can attempting to comply with the law and provide due process notice of related offenses be an abuse of prosecutorial discretion? Fortunately, the final member of the multiplicity/LIO family provides a vehicle to address the challenge of much longer charge sheets.

C. Multiplicity for Sentencing (MFS): The Issue May Be Discretionary Relief to Fill Gaps in the Other Doctrines

Multiplicity for sentencing (MFS) is an elusive doctrine firmly bound up in the complicated history of the multiplicity "family." It only applies after a conviction when it permits the merger of closely related offenses for sentencing purposes. It is poorly defined, however, and considered somewhat of a "mess."[108] This is due to several factors. (1) Its history is closely intertwined with the conflicting tests for multiplicity used over the years.[109] (2) This connection is so close that MFS is sometimes referred to as multiplicity and analyzed as a multiplicity issue.[110] (3) Multiplicity for sentencing also used to be the remedy for what is now called UMC.[111] (4) Although no longer formally part of a modern multiplicity analysis, treating offenses as MFS can still, under some circumstances, be part of the solution when the issue of multiplicity is raised.[112] Finally, (5) courts have not clearly defined MFS so vestiges of this history remain sprinkled throughout the *MCM* with no clarifying language.[113]

As a result, MFS arguably no longer *really* exists, and one service court of appeals held just that.[114] Normally, a charge that is separate for findings is also separate for sentencing, and the accused as a matter of law may be punished for violating both.[115] It remains unclear why the maximum sentence should be reduced for charges that are neither multiplicious nor an unreasonable multiplication of charges. Nonetheless, the CAAF, while not defining MFS, has clearly stated that it remains a separate doctrine.[116]

So what does the ability to merge closely related offenses for sentencing purposes add to the mix? It eliminates any extra punitive exposure, which is one of the factors in the *Quiroz* analysis. Its continued status as a separate source of relief was affirmed in the same case establishing modern UMC doctrine.[117] At the very least, MFS has a potential role when unreasonable multiplication of charges is raised since it reduces the punitive exposure of the additional charges.[118]

Beyond this use, the application of MFS is unclear; however, case law states that MFS is a separate discretionary tool for the military judge to use in a "prudent and salutary fashion."[119] If MFS is truly a separate doctrine, and not just an adjunct to UMC, then it must do more than provide a way to counter one of the many *Quiroz* factors for UMC.

Two service courts of appeals have characterized MFS as an equitable doctrine; one that permits a military judge to treat certain offenses as identical for sentencing, even if they are neither multiplicious nor an UMC.[120] Multiplicity for sentencing may act as a military trial judge's discretionary tool to reduce the maximum punishment to the amount he or she considers reasonable.[121]

---

properly charge both offenses for exigencies of proof, a long accepted practice in military law.

Id. (internal citations omitted).

[108] United States v. Baker, 14 M.J. 361 (C.M.A. 1983) (Everett, C.J., concurring & Cook, J., dissenting).

[109] For a history of the various multiplicity tests, see Breslin & Coacher, *supra* note 6, at 102–09. A detailed historical analysis is also contained in Chief Judge Crawford's *Quiroz* dissent. United States v. Quiroz, 55 M.J. 334, 339–44 (C.A.A.F. 2001).

[110] United States v. Paxton, 64 M.J. 484, 489–90 (C.A.A.F. 2007) (The granted issue was whether the charges were multiplicious for sentencing. The court, however, explicitly conducted a multiplicity analysis.). *See also* RCM 1003(c)(1)(C) and Discussion, which contains the *MCM*'s most complete MFS discussion as part of a "Multiplicity" section. MCM, *supra* note 6, R.C.M. 1003(c)(1)(C) & discussion. Read in isolation, this makes it appear that MFS is the sole remedy for multiplicity. *See supra* note 6.

[111] *Quiroz*, 55 M.J. at 347–48 (Sullivan, J., dissenting).

[112] United States v. Traxler, 39 M.J. 476 (C.M.A. 1994)("conservative approach" taken at trial); MCM, *supra* note 6, R.C.M. 1003(c)(1)(C) and discussion. Also recall that multiplicity enforces the double jeopardy clause which "protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[113] *Quiroz*, 55 M.J. at 347–48 (Sullivan, J., dissenting).

[114] *Id.* at 339 (discussing and rejecting the position taken by the Navy Marine Corps Court of Appeals (N-M. Ct. Crim. App.).

[115] United States v. Weymouth, 43 M.J. 329, 336 (C.A.A.F. 1995); United States v. Balcarczyk, 52 M.J. 809, 812 (N-M. Ct. Crim. App. 2000).

[116] *Quiroz*, 55 M.J. at 339 ("[m]ilitary judges have traditionally exercised the power to treat offenses as "multiplicious for sentencing" in a prudent and salutary fashion."). *See also Traxler*, 39 M.J at 480, MCM, *supra* note 6, R.C.M. 906(b)(12) (right of an accused to submit a motion for appropriate relief based on "multiplicity of offenses for sentencing purposes.").

[117] *Quiroz*, 55 M.J. at 339.

[118] Finding some offenses MFS might be combined with an initial instruction to the members explaining which charges are included only to account for various contingencies and to remind them to draw no negative inference from the number of charges and specifications.

[119] *Quiroz*, 55 M.J. at 339. It also appears that MFS is primarily, or perhaps exclusively, a tool for trial judges. *See* United States v. Paxton, 64 M.J. 484, 489–90 (C.A.A.F. 2007) (MFS appeal yet the court conducted a strict multiplicity analysis.); *cf.* United States v. Anderson, 68 M.J. 378, 386 (C.A.A.F. 2010) (comprehensive challenge to the charges yet no mention of MFS).

[120] *Balcarczyk*, 52 M.J. at 813–14; United States v. Molina, 68 M.J. 532, 536 (C.G. Ct. Crim. App. 2009).

[121] *See* United States v. Oatney, 45 M.J. 185, 189–90 (C.A.A.F. 1996). *See also* MCM, *supra* note 6, R.C.M. 1003(c) (1) (C) discussion (Even if charges are not multiplicious, no separate punishment if a single impulse or intent, or a unity of time, or existence of a connected chain of events.). However, some of this language is from a discarded test for multiplicity and, therefore, of only limited value as a general guideline. Breslin &

On balance, MFS is a highly discretionary doctrine to ensure that a person is not punished twice for what is, in effect, one offense. It empowers the military judge with equitable-like authority to address gaps between the multiplicity, UMC, LIO, and other doctrines. These gaps may be even larger under the new test for LIOs.

IV. Conclusion

When flying on a clear day, the view is often best at around 3000 feet above ground. One can still make out individual houses but also see how the neighborhoods fit together. The relationships between lesser included offenses, multiplicity, unreasonable multiplication of charges, and multiplicity for sentencing should initially be viewed at altitude. From there, the doctrines and the largely separate purposes behind each are distinct. One can also see the tension within each. The Government needs flexibility to accurately describe the alleged misconduct in a way that accounts for the many contingencies ahead; while at the same time, the accused must be protected from surprise, double jeopardy, and prosecutorial abuse. At altitude, one can also more easily spot the use of an outcome-based approach or the old omnibus "multiplicity" term: a case or argument so focused on the result that it may have failed to clearly articulate which doctrine within the multiplicity family it used to get there.[122]

With a firm grasp of the mid-level view, one may safely descend into the details of a particular case without getting trapped in the vortex of *MCM* provisions and appellate decisions. During the descent, use precise language to help keep separate issues separate. Keep the primary purpose of each doctrine front and center at all times.[123] If this fails and the Sargasso vortex is about to overwhelm, then return to altitude for fresh bearings.

Coacher, *supra* note 6, at 126. *See also supra* note 99 and accompanying text (UMC is not the tool for the trial judge to simply reduce a prescribed maximum punishment to a level he or she deems reasonable.).

[122] *Supra* note 9 (discussing one such CAAF opinion). *Supra* note 6 (discussing another such case that has become part of the Discussion section of RCM 907).

[123] For example, since LIO law is primarily about due process notice to the accused, an agreement between the parties on a LIO instruction suggests a short inquiry with the accused to establish that he or she had full notice of the agreed LIO and was ready to defend against it at trial. *See* also *supra* note 58.

Legal Research Note

Researching Biomedical Literature on PubMed®

Heather M. Enderle
Electronic Services Librarian

The National Center for Biotechnology Information (NCBI) developed PubMed®[1] as a free gateway to the National Library of Medicine's MEDLINE® system, a database of over eighteen million citations and abstracts from biomedical literature. PubMed® contains over twenty million citations from MEDLINE®, and additional life/general science and chemistry journals. In addition to citations and abstracts, a subset of PubMed® records links to free full-text articles from life science journal publishers.[2] Military lawyers might find PubMed® especially useful for evaluating medical cases involving depression, suicide, or for learning more about post-traumatic stress disorder.

The PubMed® home page provides quick links to user guides and tutorials. Enter search terms in the basic search box to run a search. A list of relevant citations appears, as well as links to documents broken down by free full text and reviews. For example, a search for **combat wound** brings up a list of citations with links to the article abstracts and full-text, if available. Click on a citation to find the abstract, full citation, authors, publisher, and full text availability. If the full-text of the article is not available for free, a link to the publisher website is provided. The Related Citations box is also a helpful feature for finding related citations to an article on point.

The Advanced Search offers users the ability to build a search using fields such as journal, author, title, and text word. Limits in search terms can further narrow a search by human or animal study, language, sex, age, or type of article (editorial, clinical trial, review, letter, etc.). One can also narrow searches by full text or free full text availability. Researchers can email the results, save to a file, clipboard or a collection for later reference.

The My NCBI feature on PubMed® is another free gateway that enables one to save searches for future use, set search preferences and filters, and to setup email alerts on a topic. This is a particularly useful tool to stay abreast of a particular topic, find new articles on a subject, and to save search results for later reference. Users can also save searches to prevent the need to reconstruct a search.

Other PubMed® tools include the Single Citation Matcher, which is a quick way to locate the abstract and link to the full text of an article if one has part of an article citation. The Clinical Queries feature limits searches to studies of particular disorders by diagnosis, therapy or prognosis. PubMed® Mobile is a new beta web interface for mobile users and offers a very basic search screen, easy for researchers to use on the go.

For extensive PubMed® use, *The NCBI Handbook*[3] is available online and provides in-depth information on PubMed® databases and content. Look for future PubMed® enhancements and news through the PubMed® Really Simple Syndication (RSS) feed, PubMed® New and Noteworthy.[4]

For more information contact the Electronic Services Librarian at TJAGLCS-Digital-Librarian@conus.army.mil

[1] PUBMED.GOV, http://www.ncbi.nlm.nih.gov/pubmed/ (last visited Mar. 24, 2011).

[2] PUBMED: CATALOG OF MEDICAL LITERATURE, NCBI FACT SHEETS, ftp://ftp.ncbi.nih.gov/pub/factsheets/Factsheet_PubMed.pdf (last visited Mar. 24, 2011).

[3] THE NCBI HANDBOOK (Jo McEntyre & Jim Ostell eds., 2002), NAT'L CTR. FOR BIOTECHNOLOGY INFO., http://www.ncbi.nlm.nih.gov/books/NBK21101/.

[4] PUBMED NEW AND NOTEWORTHY, NAT'L CTR. FOR BIOTECHNOLOGY INFO., http://www.ncbi.nlm.nih.gov/feed/rss.cgi?ChanKey=PubMedNews (last visited Mar. 24, 2011).

The Secrets of Abu Ghraib Revealed:
American Soldiers on Trial[1]

Reviewed by *Major Eric J. Lawless*[*]

"We're going to find out what kind of monster I am today."[2]

I. Introduction

Over six years ago, CBS News anchor Dan Rather introduced to the world the notorious Abu Ghraib photos—to include photos of naked Iraqi prisoners stacked in a pile, a naked Iraqi being led about with a dog leash around his neck, and a hooded prisoner with wires connected to his fingers.[3] Even more alarming to many viewers was the sight of American Soldiers in each photo proudly taunting their victims.[4] Despite widespread familiarity with the photos, the name "Abu Ghraib" still evokes strong feelings of anger among the military and the public. In *The Secrets of Abu Ghraib Revealed: American Soldiers on Trial*, Christopher Graveline and Michael Clemens write a personal, first-hand account of the crimes at Abu Ghraib to answer the question on everyone's mind: *Who is to blame for this detainee abuse*?

Two prevailing theories exist about the Abu Ghraib abuses. One theory blames senior leaders in the Government for ordering the abusive actions, while another theory concludes that seven "bad apples" abused detainees for their own entertainment.[5] After a thorough examination of the evidence, the authors conclude that the truth falls somewhere in the middle.[6] While the authors identify and explain failures at all levels of leadership, they ultimately conclude that "criminal culpability falls closer on the continuum to the enlisted [S]oldiers working the night shift."[7]

While all may not agree with the authors' ultimate conclusion, the book does thoroughly investigate all possible sources of fault, scrutinizing actions from the White House all the way down to the individual prison guards. The book also provides a factual framework on which readers can make their own personal assessments. *The Secrets of Abu Ghraib Revealed* is an engrossing story with the readability of a John Grisham novel and should be on the reading list of judge advocates, military leaders, and those interested in an accurate recitation of the events at Abu Ghraib in the fall of 2003.

II. Background

On 7 November 2003, seven prison guards from the 372d Military Police (MP) Company[8] viciously abused seven Iraqi prisoners, outraging the international community,[9] destroying their own military careers,[10] threatening the mission in Iraq,[11] and "gave the [U.S.] Army a black eye."[12] Based on their personal experience with the scandal, the authors describe the inner workings of the adjudication of the cases in detail. One book reviewer noted that "[o]nly six people have complete knowledge of the Abu Ghraib investigation and prosecutions; Graveline and Clemens are two of them."[13] Christopher Graveline, a prosecutor in the Abu Ghraib cases and the lead prosecutor in *United States v. PFC Lynndie England*, conducted extensive research and investigation in preparing seven courts-martial against the military prison guards.[14] Michael

---

[*] Judge Advocate, U.S. Army. Student, 59th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[1] GRAVELINE & MICHAEL CLEMENS, THE SECRETS OF ABU GHRAIB REVEALED: AMERICAN SOLDIERS ON TRIAL (2010).

[2] *Id.* at 213 (quoting Corporal (CPL) Charles Graner's statement to the media as he entered the courthouse the day of his general court-martial).

[3] *Id.* at ix.

[4] *Id.*

[5] *Id.* at 299.

[6] *Id.*

[7] *Id.*

[8] The 372d Military Police Company is an Army Reserve unit headquartered in Cumberland, Maryland.

[9] GRAVELINE & CLEMENS, *supra* note 1, at 9–11, 28.

[10] *Id.* at 305–07. Staff Sergeant (SSG) Ivan Frederick was found guilty of assault and maltreatment of detainees at a general court-martial on 20 October 2004 and was sentenced to eight years confinement and a dishonorable discharge. Specialist (SPC) Megan Ambuhl was found guilty of dereliction of duty at a summary court-martial on 30 October 2004 and was sentenced to a reduction in rank. She was subsequently administratively discharged from the Army. Corporal Charles Graner was found guilty of assault and maltreatment of detainees at a general court-martial on 14 January 2005 and was sentenced to ten years confinement and a dishonorable discharge. Sergeant (SGT) Javal Davis was found guilty of assault and dereliction of duty at a general court-martial on 1 February 2005 and was sentenced to six months confinement and a bad-conduct discharge. Specialist Sabrina Harmon was found guilty of maltreatment of detainees at a special-court martial on 17 May 2005 and was sentenced to six months confinement and a bad-conduct discharge. Specialist Jeremy Sivits was found guilty of maltreatment of detainees at a special court-martial on 19 May 2005 and was sentenced to one year confinement and a bad-conduct discharge. Private First Class (PFC) Lynndie England was found guilty of maltreatment of detainees at a general court-martial on 26 September 2005 and was sentenced to three years confinement and a dishonorable discharge.

[11] *Id.* at 9–11.

[12] *Id.* at 199.

[13] *Id.* inside front dust cover.

[14] *Id.* at 321. Christopher Graveline (then Captain (CPT) Graveline) was an Army prosecutor in the Abu Ghraib abuses courts-martial. He previously

Clemens, a military policeman assigned to the Abu Ghraib prosecution team as a special investigator, performed the majority of the work behind the scenes, including his travels back to the States to interview Soldiers, Family members, and civilian co-workers of the accused, allowing government prosecutors to focus on case preparation.[15] With Master Sergeant (MSG) Clemens assigned as the investigator, the prosecution team could then analyze the case in detail at points where the Criminal Investigation Division (CID) was either unable or unwilling to do the same.[16]

III. Analysis

In their preface, Graveline and Clemens explain that the book provides an unbiased factual account of the Abu Ghraib detainee abuse to allow the reader to make an informed decision about what actually happened at the detention facility.[17] In presenting the facts, the co-authors analyze three categories of evidence: the official policy on detainee treatment; leadership failures; and military intelligence operations.[18] The authors do a commendable job of presenting evidence to support two main contentions: whether it was the chain of command or the individual Soldiers who are to blame for this scandal. In their epilogue, however, Graveline and Clemens subsequently break from their stated intent to present an unbiased story and expressly conclude while the chain of command made several mistakes, the ultimate blame falls squarely on the enlisted Soldiers who carried out the abuses.[19] Although a reasonable conclusion, the authors' opinion comes across as a self-serving effort to justify their prosecutorial decisions.

A. Official Policy Did Not Authorize Detainee Abuse

Initially, the authors cite to standing U.S. policies in effect in Iraq regarding detainee handling and interrogation.[20] In a memorandum from the White House, President Bush states that Al Qaeda is not a "High Contracting Party" and therefore, not eligible for the protections granted under the Geneva Convention.[21] Nevertheless, the memo goes further, stating that "the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."[22] Although many critics claim that this memorandum opened the door for the abuses at Abu Ghraib, their argument is unpersuasive for several reasons. First, the memorandum is grounded in international law because the Geneva Convention is a contract between "High Contracting Parties" and those that are not members do not enjoy its protections.[23] Second, despite Al Qaeda's status as a non-party, the President gave a military order to treat all detainees humanely.[24] Third, there was never evidence of an order to the contrary despite thorough investigations conducted by the military and the media.

Next, the authors introduce a policy memorandum dated 16 April 2003 from Secretary of Defense Donald Rumsfeld directed to the Commander at the military prison in Guantanamo, Cuba. The authors point out that the Secretary of Defense organized a working group to develop recommendations and provide a legal review in support of their assertion that the Secretary of Defense had not authorized the Abu Ghraib abuse. According to Graveline, within this framework, many of the legal opinions actually went too far and found certain harsher interrogation techniques, such as threatening a detainee with death, were legal.[25] Despite this legal analysis, the memorandum went through several revisions before final publication, and ultimately ended up being even more restrictive than was originally endorsed by the legal advisers. In response, Secretary Rumsfeld limited his authorization to twenty-four interrogation techniques.[26] Most of the techniques were directly from Army Field Manual 34-52,[27] but he also approved five additional techniques.[28] When authorizing these techniques, Secretary Rumsfeld reinforced the President's directive that all detainees be treated humanely and consistent with the Geneva Conventions.[29] Additionally, to clarify that there was no miscommunication, the authors note that the Department of Defense working

had served as a prosecutor in the 101st Airborne Division at Fort Campbell, Kentucky; the Government Appellate Division in Washington D.C.; and V Corps in Heidelberg, Germany. He has since left the Army and currently works for the U.S. Department of Justice as an Assistant U.S. Attorney. *Id.*

[15] *See id.* at 145-47, 321. Master Sergeant (MSG) Michael Clemens (Ret.) was a military policeman and investigator in the Army Reserve for twenty-two years. He deployed and conducted investigations in Bosnia, Croatia, Hungary, Kuwait, and Iraq. In his civilian capacity, he works as deputy federal agent. *Id.* at 321.

[16] *See id.* at 114–15.

[17] *Id.* at x.

[18] *See id.* at 299–300.

[19] *See id.* at 299–302.

[20] *Id.* at 95, 106–08, 111–12.

[21] *Id.* at 95.

[22] *Id.* (quoting a presidential memorandum dated 7 February 2002).

[23] *Id.*

[24] *See id.* at 106–07.

[25] *Id.* at 98–101, 104-05.

[26] *Id.* at 106–07.

[27] U.S. DEP'T OF ARMY, FIELD MANUAL 34–52, INTELLIGENCE INTERROGATION para. 3 (28 Sept. 1992).

[28] GRAVELINE & CLEMENS, *supra* note 1, at 106 (in addition to techniques authorized by FM 34–52, the memorandum authorized the following techniques: dietary manipulation, environmental manipulation, sleep adjustment, false flag, and isolation).

[29] *Id.*

group memorandum and the Department of Justice memorandum relied upon by the President were never introduced to the lower levels of the command.[30]

Finally, the authors discuss the *Iraq Rules of Engagement* (ROE) published by Lieutenant General (LTG) Ricardo Sanchez, Commanding General of Combined Joint Task Force-7 (CJTF-7). Lieutenant General Sanchez's policy, signed on 12 October 2003, was even more restrictive than that of the Secretary of Defense.[31] In the ROE, LTG Sanchez only authorized the interrogation techniques contained in Army Field Manual 34-52.[32] The ROE did leave open the possibility of an exception to policy, but only with his direct authorization.[33] An exception to policy was never requested.[34]

The authors present each of the documents as credible evidence that government and military senior level leadership provided specific guidance on interrogation techniques in Iraq in order to prevent abuses like those committed at Abu Ghraib. Specifically, the memorandum from the President requiring all detainees be treated humanely in accordance with the Geneva Convention, the Secretary of Defense directive that authorized only specified interrogation techniques were to be used, and the Iraq ROE limiting interrogation techniques to those listed in the Army field manual each support the conclusion that official policy did not authorize detainee abuse. This evidence becomes more persuasive when compared to the lack of substantive evidence to the contrary, which would likely have surfaced during the subsequent prosecutions stemming from the scandal.

B. The Environment at Abu Ghraib Contributed to the Abuses

In addition to the policy memoranda, the authors critically examine how the Abu Ghraib environment led to the detainee abuse. According to the Staff Judge Advocate for CJTF-7, the Soldiers of the 372d MP Company found themselves in the middle of a "detention mess" when they arrived in the fall of 2003.[35] They were under-trained, under-staffed, and under-resourced.[36] The Army and the Military Police Corps were not prepared to conduct large scale detainee operations in Iraq.[37] Moreover, the increasing level of violence in Iraq created an instant need for actionable intelligence.[38]

In addition to the physical challenges of living and working in a prison located in a combat zone with few creature comforts, the unit had internal problems that contributed to the scandal. Immediately upon learning of photographs depicting detainee abuse, LTG Sanchez ordered Major General (MG) Antonio Taguba, the Deputy Commanding General for Support of Coalition Forces Land Component Command, to conduct an investigation into the detainee abuses at Abu Ghraib.[39] Major General Taguba's report made several findings, but most significant was that poor command climate, inept unit leadership, lack of training, and low Soldier morale were the primary factors that led to the detainee abuses.[40]

When Staff Sergeant (SSG) Frederick testified at his court-martial, his testimony supported MG Taguba's findings that the unit did not receive any training necessary to run a prison.[41] SSG Frederick also testified that he never received the requested guidance from his chain of command.[42] After the court-martial, SSG Frederick confirmed that LTC Jordan, the Military Intelligence Battalion Commander for Abu Ghraib, had been to the prison a few times, and that he had specifically asked LTC Jordan for rules and regulations during these visits.[43] However, LTC Jordan never gave SSG Frederick any guidance.[44] Staff Sergeant Frederick also confirmed that he "rarely" saw his company commander or platoon leader in the prison.[45] While SSG Frederick may blame the lack of leadership and the primitive working conditions at Abu Ghraib as two reasons for the detainee abuse, he does concede that the abuses captured in the infamous photographs were nothing more than "pure entertainment for the military police."[46]

[30] *Id.* at 111.

[31] *Id.* at 112.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 109.

[36] *Id.* at 109–110.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 54.

[40] *Id.* at 55–56. Major General Taguba found the 800th MP Brigade Commander, Brigadier General (BG) Janis Karpinski, to have failed in her responsibilities. *Id.* at 56. He went further and described the 320th MP Battalion Commander, LTC Jerry Phillabaum as an "extremely ineffective commander and leader." *Id.*

[41] *Id.* at 171.

[42] *Id.*

[43] *Id.* at 191.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 186.

C. Military Intelligence Did Not Order the Abuses Identified in the Photographs

Finally, the most persuasive argument presented by Graveline and Clemens, despite theories to the contrary that the military intelligence community at Abu Ghraib ordered the abuse as an interrogation technique to "soften up" the detainees,[47] is that the abused detainees were never interrogated and had zero military intelligence value.[48] The detainees targeted for abuse were common criminals being held for crimes such as burglary, larceny, rape, and assault.[49] Additional evidence also refuted the "military intelligence ordered us to do it" defense at courts-martial, including contradictory testimony that the military police dog handlers were using the dogs to scare the detainees in a contest to see if the prisoners would "shit themselves."[50] The fact that day shift guards never engaged in detainee abuse further supports the authors' conclusion that the "bad apple" military prison guards working the night shift came up with these abusive ideas solely for their own amusement.[51]

IV. Additional Considerations

While Graveline and Clemens successfully provide facts surrounding the prisoner abuse at Abu Ghraib, an underlying theme throughout the book is the media's interest in the case, the widespread international attention, and the general magnitude of the criminal cases.[52] The authors portray the Abu Ghraib scandal as a major event in the Global War on Terror that was closely watched by the global community for America's reaction and response.[53] Repeated references to this global scrutiny were unnecessary and unduly distracting from the main point of the book. The reader is left feeling that the authors are attempting to build their credibility by augmenting the heightened media scrutiny. Certainly, Abu Ghraib was a big case, but not necessarily one of "the biggest cases in military history" as alleged by the authors.[54]

While the book offers a new perspective on the scandal at Abu Ghraib, the title of the book, *The Secrets of Abu Ghraib Revealed*, is misleading because the subject matter is dated. Of particular note is a book previously written in 2006 by Brigadier General (BG) Janis Karpinski, the Commanding General of the 800th Military Police Brigade responsible for prison operations during the Abu Ghraib detainee abuse.[55] Many other books previously published on the subject leave few secrets to reveal.[56] In contrast, this book, written in 2010, comes six years after the abuses hit the news and five years after the last court-martial. Comparatively, while *The Secrets of Abu Ghraib Revealed* presents a predominantly unbiased factual account of the detainee abuses, it may have come a little too late.

However, *The Secrets of Abu Ghraib Revealed* does offer particularly useful insights for military leaders and judge advocates. In exploring the abuses, the authors' rendition clearly highlights the pervasive lack of leadership presence at the prison.[57] For example, the reader is left asking a couple of key questions: first, how is it possible that a staff sergeant was the most senior Soldier present; and second, where were the officers? After reading this book, military leaders will much better appreciate the eighth troop leading procedure: supervise.[58] For judge advocates in particular, the book also demonstrates how a military police investigator specifically detailed to the trial team is a combat multiplier because they can dig deep into the investigation allowing the attorneys to focus on trial preparation and procedure.

V. Conclusion

Despite its shortcomings, *The Secrets of Abu Ghraib Revealed* accomplishes its mission and sets the facts straight on what happened, how it happened, and who is to blame. Graveline and Clemens present both an informative and enlightening story of the Abu Ghraib detainee abuses and their preparation for the criminal trials of the seven accused

[47] SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 29–30 (2004).

[48] *Id.* at 121–22, 155–56, 230–31.

[49] GRAVELINE & CLEMENS, *supra* note 1, at 122.

[50] *Id.* at 289.

[51] *Id.* at 300. Sergeant Hydrue Joyner was in charge of the prison tier during the day shift. He performed his duties well despite the same conditions as the night shift. He was reputed to be friendly with and respected by the detainees. *Id*. at 79–80.

[52] *Id.* at ix, 8–9, 13, 15, 28, 30, 37, 40, 93, 113, 124, 128, 144, 146, 165, 171, 212–13, 242, 244, 259, 265, 283, 295.

[53] *Id.* at 9.

[54] *Id.* at 125.

[55] JANIS KARPINSKI, ONE WOMAN'S ARMY: THE COMMANDING GENERAL OF ABU GHRAIB TELLS HER STORY 208, 236 (2006) (Brigadier General Karpinski denies responsibility for the Abu Ghraib abuses. Additionally, she refuses to believe that her subordinate Military Police Soldiers performed the abuses for their own entertainment, but rather believes that they were ordered to "soften up" the detainees by the military intelligence officers).

[56] *See, e.g.*, HERSH, *supra* note 47; STEVEN STRASSER, THE ABU GHRAIB INVESTIGATIONS: THE OFFICIAL INDEPENDENT PANEL AND PENTAGON REPORTS ON THE SHOCKING PRISONER ABUSE IN IRAQ (2005); KAREN J. GREENBERG, THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (2005); S.G. MESTROVIC, THE TRIALS OF ABU GHRAIB: AN EXPERT WITNESS ACCOUNT OF SHAME AND HONOR (2005); GARY S. WINKLER, TORTURED: LYNNDIE ENGLAND, ABU GHRAIB AND THE PHOTOGRAPHS THAT SHOCKED THE WORLD (2009).

[57] GRAVELINE & CLEMENS, *supra* note 1, at 191.

[58] U.S. DEP'T OF ARMY, FIELD MANUAL 3-21.8, INFANTRY RIFLE PLATOON AND SQUAD para. 5-46 (28 Mar. 2007).

Soldiers. I recommend this book to those who are interested in learning more about the circumstances of the Abu Ghraib detainee abuse, the mechanics of criminal justice, and in becoming better military leaders.

CLE News

1. Resident Course Quotas

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

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

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

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

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).

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

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

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

2. TJAGLCS CLE Course Schedule (August 2009–September 2010) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C20	184th JAOBC/BOLC III (Ph 2)	18 Feb. – 4 May 11
5-27-C20	185th JAOBC/BOLC III (Ph 2)	15 Jul – 28 Sep 11
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C22	60th Judge Advocate Officer Graduate Course	15 Aug – 25 May 12
5F-F1	217th Senior Officer Legal Orientation Course	20 – 24 Jun 11
5F-F1	218th Senior Officer Legal Orientation Course	29 Aug – 2 Sep 11
5F-F3	17th RC General Officer Legal Orientation Course	1 – 3 Jun 11
5F-F52	41st Staff Judge Advocate Course	6 – 10 Jun 11
5F-F52-S	14th SJA Team Leadership Course	6 – 8 Jun 11
JARC 181	Judge Advocate Recruiting Conference	20 – 22 Jul 11

NCO ACADEMY COURSES		
512-27D30	5th Advanced Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D30	6th Advanced Leaders Course (Ph 2)	1 Aug – 6 Sep 11
512-27D40	3d Senior Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D40	4th Senior Leaders Course (Ph 2)	1 Aug – 6 Sep 11

WARRANT OFFICER COURSES		
7A-270A0	JA Warrant Officer Basic Course	23 May – 17 Jun 11
7A-270A1	22d Legal Administrators Course	13 – 17 Jun 11
7A-270A2	12th JA Warrant Officer Advanced Course	28 Mar – 22 Apr 11

ENLISTED COURSES		
512-27D-BCT	13th BCT NCOIC Course	9 – 13 May 11
512-27D/DCSP	20th Senior Paralegal Course	20 – 24 Jun 11
512-27DC5	35th Court Reporter Course	18 Apr – 17 Jun 11
512-27DC5	36th Court Reporter Course	25 Jul – 23 Sep 11
512-27DC6	11th Senior Court Reporter Course	11 – 15 Jul 11

ADMINISTRATIVE AND CIVIL LAW		
5F-F22	64th Law of Federal Employment Course	22 – 26 Aug 11
5F-F24E	2011USAREUR Administrative Law CLE	12 – 16 Sep 11
5F-F202	9th Ethics Counselors Course	11 – 15 Apr 11

CONTRACT AND FISCAL LAW		
5F-F10	164th Contract Attorneys Course	18 – 29 Jul 11
5F-F103	11th Advanced Contract Course	31 Aug – 2 Sep 11

CRIMINAL LAW		
5F-F31	17th Military Justice Managers Course	22 – 26 Aug 11
5F-F33	54th Military Judge Course	18 Apr – 6 May 11
5F-F34	38th Criminal Law Advocacy Course	12 – 16 Sep 11
5F-F34	39th Criminal Law Advocacy Course	19 – 23 Sep 11

INTERNATIONAL AND OPERATIONAL LAW		
5F-F40	2011 Brigade Judge Advocate Symposium	9 – 13 May 11
5F-F47E	2011 USAREUR Operational Law CLE	16 – 19 Aug 11
5F-F41	7th Intelligence Law Course	15 – 19 Aug 11
5F-F47	56th Operational Law of War Course	1 – 12 Aug 11
5F-F48	4th Rule of Law Course	11 -15 Jul 11

3. Naval Justice School and FY 2010–2011 Course Schedule

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

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (030)	1 Aug – 7 Oct 11
0258 (Newport)	Senior Officer (050) Senior Officer (060) Senior Officer (070) Senior Officer (080)	25 – 29 Apr 11 (Newport) 23 – 27 May 11 (Newport) 13 – 17 Jun 11 (Newport) 6 – 9 Sep 11 (Newport)
2622 (Fleet)	Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110) Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	9 – 13 May 11 (Pensacola) 16 – 20 May 11 (Naples, Italy) 27 Jun – 1 Jun 11 (Pensacola) 1 – 5 Aug 11 (Pensacola) 1 – 5 Aug 11 (Camp Lejeune) 8 – 12 Aug 11 (Quantico)
03RF	Continuing Legal Education (020) Continuing Legal Education (030)	7 Mar – 20 May 11 13 Jun – 28 Aug 11
07HN	Legalman Paralegal Core (010) Legalman Paralegal Core (020) Legalman Paralegal Core (030)	26 Jan – 18 May 11 24 May – 9 Aug 11 31 Aug – 20 Dec 11

NA	Intermediate Trial Advocacy (010)	16 – 20 May 11
525N	Prosecuting Complex Cases (010)	11 – 15 Jul 11
627S	Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	16 – 20 May 11(Naples) 1 – 3 Jun 11 (San Diego) 1 – 3 Jun 11 (Norfolk) 6 – 8 Jul 11 (San Diego) 8 – 10 Aug 11 (Millington) 20 – 22 Sep ((Pendleton) 21 – 23 Sep 11 (Norfolk)
748A	Law of Naval Operations (020)	19 – 23 Sep 11 (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (010)	25 Jul – 5 Aug 11
786R	Advanced SJA/Ethics (010)	25 – 29 Jul 11
7485	Classified Information Litigation Course (010)	2 – 6 May 11 (Andrews AFB)
846L	Senior Legalman Leadership Course (010)	25 – 29 Jul 11
850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	25 Apr – 6 May 11 (Norfolk) 11 – 22 Jul 11 (San Diego)
850V	Law of Military Operations (010)	6 – 17 Jun 11
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	20 – 24 Jun 11 26 – 30 Sep 11
932V	Coast Guard Legal Technician Course (010)	8 – 19 Aug 11
961A (PACOM)	Continuing Legal Education (030)	16 – 20 May 11 (Naples)
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted) (020)	TBD TBD
961J	Defending Complex Cases (010)	18 – 22 Jul 11
3938	Computer Crimes (010)	6 – 10 Jun 11 (Newport)
3759	Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	25 – 29 Apr 11 (Bremerton) 2 – 6 May 11 (San Diego) 6 – 10 Jun 11 (San Diego) 19 – 23 Sep 11 (Pendleton)
4040	Paralegal Research & Writing (030)	18 – 29 Jul 11
4044	Joint Operational Law Training (010)	TBD
NA	Iraq Pre-Deployment Training (020)	12 – 14 Jul 11
NA	Legal Specialist Course (030)	29 Apr – 1 Jul 11
NA	Paralegal Ethics Course (030)	13 – 17 Jun 11

NA	Legal Service Court Reporter (030)	22 July – 7 Oct 11

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	9 – 27 May 11 13 Jun – 1 Jul 11 11 – 29 Jul 11 15 Aug – 2 Sep 11
0379	Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	16 – 27 May 11 18 – 29 Jul 1 22 Aug – 2 Sep 11
3760	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	6 – 10 Jun 11 8 – 12 Aug 11 (Millington) 12 – 16 Sep 11

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	9 – 27 May 11 13 Jun – 1 Jul 11 25 Jul – 12 Aug 11 22 Aug – 9 Sep 11

947J	Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080) Legal Clerk Course (090)	9 – 20 May 11 13 – 24 Jun 11 1 – 12 Aug 11 22 Aug – 2 Sep 11

4. Air Force Judge Advocate General School Fiscal Year 2010–2011 Course Schedule

For information about attending the following cou Legal Clerk Course (070)rses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB,AL	
Course Title	**Dates**
Paralegal Apprentice Course, Class 11-04	25 Apr – 8 Jun 11
Cyber Law Course, Class 11-A	26 – 28 Apr 11
Total Air Force Operations Law Course, Class 11-A	29 Apr – 1 May 11
Advanced Trial Advocacy Course, Class 11-A	9 – 13 May 11
Operations Law Course, Class 11-A	16 – 27 May 11

Negotiation and Appropriate Dispute Resolution Course, 11-A	23 – 27 May 11
Reserve Forces Paralegal Course, Class 11-A	6 – 10 Jun 11
Staff Judge Advocate Course, Class 11-A	13 – 24 Jun 11
Law Office Management Course, Class 11-A	13 – 24 Jun 11
Paralegal Apprentice Course, Class 11-05	20 Jun – 3 Aug 11
Judge Advocate Staff Officer Course, Class 11-C	11 Jul – 9 Sep 11
Paralegal Craftsman Course, Class 11-03	11 Jul – 23 Aug 11
Paralegal Apprentice Course, Class 11-06	15 Aug – 21 Sep 11
Environmental Law Course, Class 11-A	22 – 26 Aug 11
Trial & Defense Advocacy Course, Class 11-B	12 – 23 Sep 11
Accident Investigation Course, Class 11-A	12 – 16 Sep 11

5. Civilian-Sponsored CLE Courses

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

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1220 North Fillmore Street, Suite 444 Arlington, VA 22201 (571) 481-9100
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University Law School 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227

LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
MC Law:	Mississippi College School of Law 151 East Griffith Street Jackson, MS 39201 (601) 925-7107, fax (601) 925-7115
NAC	National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (803) 705-5000
NDAA:	National District Attorneys Association 44 Canal Center Plaza, Suite 110 Alexandria, VA 22314 (703) 549-9222
NDAED:	National District Attorneys Education Division 1600 Hampton Street Columbia, SC 29208 (803) 705-5095
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 (in MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700

TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at https://jag.learn.army.mil.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2012 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2011 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact Ms. Donna Pugh, commercial telephone (434) 971-3350, or e-mail donna.pugh@us.army.mil.

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. Training Year (TY) 2011 RC On-Sites, Functional Exercises and Senior Leader Courses

Date	Region	Location	Units	ATRRS Number	POCs
30 Apr – 6 May 2011	Trial Defense Service Functional Excercise	San Antonio, TX	22d LSO 154th LSO	NA	CPT DuShane Eubanks d.eubanks@us.army.mil 972.343.3143 Mr. Anthony McCullough Anthony.mccullough@us.army.mil 972.343.4263
14 – 21 May 2011	Nationwide	Fort McCoy, WI	8 Soldiers from each LSO	NA	SSG Keisha Parks keisha.williams@usar.army.mil 301.944.3708
2 – 5 Jun 2011	Yearly Training Brief and Senior Leadership Course	Gaithersburg, MD	Each LSO Cdr, Sr Paralegal NCO, plus one designated by LSO Cdr	NA	LTC Dave Barrett David.barrett1@us.army.mil SSG Keisha Parks keisha.williams@usar.army.mil 301.944.3708
15 – 17 Jul 2011	Northeast On-Site FOCUS: Rule of Law	New York City, NY	4th LSO 3d LSO 7th LSO 153d LSO	004	CPT Scott Horton Scott.g.horton@us.army.mil CW2 Deborah Rivera Deborah.rivera1@us.army.mil 718.325.7077
12 – 14 Aug 2011	Midwest On-Site FOCUS: Rule of Law	Chicago, IL	91st LSO 9th LSO 8th LSO 214th LSO	005	MAJ Brad Olson Bradley.olson@us.army.mil SFC Treva Mazique treva.mazique@usar.army.mil 708.209.2600, ext. 229

2. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

4. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.