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Lore of the Corps

Articles

TJAGLCS Features

Book Review

Lore of the Corps

Samuel W. Koster v. The United States: A Forgotten Legal Episode from the Massacre at My Lai

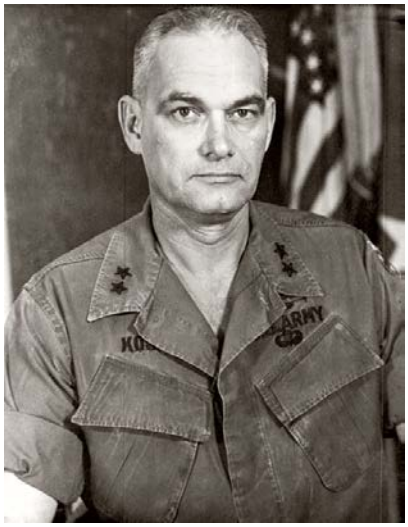
Fred L. Borch
Regimental Historian & Archivist

In March 1970, Lieutenant General William R. Peers completed his official investigation into the murders committed by Lieutenant William F. "Rusty" Calley and his platoon at the South Vietnamese sub-hamlet of My Lai 4 in March 1968.[1] On the basis of Peers' scathing report about what has become known as the "My Lai Massacre," Major General Samuel W. Koster, who was in command of the 23d Infantry "Americal" Division at the time, and to which Calley and his men had been assigned, was charged with failure to obey lawful regulations and dereliction of duty in covering up the massacre.[2] While Koster was never prosecuted at a court-martial,[3] Secretary of the Army Stanley R. Resor took administrative action against him: Stanley vacated Koster's temporary promotion as a major general, reducing him to his permanent rank of brigadier general, and he revoked the Distinguished Service Medal (DSM) that Koster had been awarded as Americal Division commander.[4] He also directed the filing of a Letter of Censure in Koster's official military personnel records.[5]

But Koster fought back in the courts, and what follows is the story of that struggle—*Samuel W. Koster v. The United States*—an episode in military legal history that today is mostly forgotten.[6]

Born in December 1919, Samuel William Koster graduated from the United States Military Academy in 1942 and was commissioned in the Infantry.[7] He subsequently had a stellar career, which included substantial wartime experience. Koster served as a company and battalion commander in World War II (earning a Silver Star, two Bronze Stars, and the Purple Heart) and was the commanding officer of the Eighth Army's guerilla warfare unit during the Korean War.[8] He also had significant peacetime experience as an instructor at West Point, and in various assignments at Fort Benning, Georgia, in the Pacific, and at the Pentagon.[9]

By late 1968, Koster held the permanent rank of brigadier general and the temporary rank of major general.[10] While wearing two stars, Koster commanded the 23d Infantry Division in Vietnam. This was "a difficult assignment because of the conglomerate make-up of the Division and its very large area of operations."[11] After returning from Vietnam, while still holding the temporary two-star rank, Koster served as the Superintendent of the United States Military Academy, a high honor and an assignment that indicated that Koster had not yet reached the end of this career as an Army general officer.[12]


Major General Samuel W. Koster circa 1968

[1] WILLIAM R. PEERS, THE MY LAI INQUIRY 213 (1979).

[2] Koster v. United States, 685 F.2d 407, 409 (Cl. Ct. 1982).

[3] *Id.* Charges against Koster were dismissed on January 28, 1971. *Id*.

[4] *Id*. at 409-10.

[5] RICHARD HAMMER, THE COURT-MARTIAL OF LT. CALLEY 35, 43 (1971).

[6] *Koster*, 685 F.2d at 408.

[7] David Stout, *Gen. S.W. Koster, 86, Who Was Demoted After My Lai, Dies*, NEW YORK TIMES, Feb. 11, 2006.

[8] *Koster*, 685 F.2d at 408-09.

[9] Stout, *supra* note 7.

[10] Prior to the enactment of the Defense Personnel Management Act in 1980, commissioned officers in the Regular Army (RA) had both permanent and temporary ranks. Title 10, United States Code, Section 3442, provided that a regular commissioned officer might hold, in addition to his "regular" or permanent grade, a temporary grade in the Army of the United States (AUS). 10 U.S.C. § 3442 (1956) (repealed 1980). Consequently, an officer might hold an RA appointment as a captain and an AUS appointment as a lieutenant colonel. The appointments in the RA and AUS were independent of each other and selections for promotion to higher grades in each status were also independent of each other. *Id.* As a practical matter, almost every RA officer in the Army during Koster's era had a more senior temporary rank.

[11] *Koster*, 685 F.2d at 408. The 23d Division was created in Vietnam in September 1967 by combining three separate brigades that were already "in country." Consequently, it was a unique unit in that it was the only combat division formed outside the United States. The division was deactivated after its withdrawal from Vietnam in November 1971.

[12] Stout, *supra* note 7.

On March 16, 1968, Lieutenant William F. "Rusty" Calley and his platoon, members of Major General Koster's command, murdered at least 300 Vietnamese civilians near the village of My Lai.[13] Shortly after this massacre of non-combatant civilians, Koster "came to know of at least four irregularities that should have spurred him to call for a fuller investigation and for a report of the results to be made to higher authority"[14] as required by regulations promulgated by the Military Assistance Command, Vietnam (MACV).[15] First, Koster learned that there were "unusual" body count figures for the day, in that 128 enemy soldiers were reported killed yet only two friendly soldiers killed and eleven wounded. Second, he learned that "an unusually large number" of Vietnamese civilians had been killed by artillery fire. Third, Koster "received personally a watered-down version of the report by a U.S. helicopter pilot who tried to stop the killing at My Lai."[16] Finally, a month later, Major General Koster learned about a Viet Cong leaflet claiming that U.S. troops had massacred "some 500 civilians" near the hamlet of My Lai.[17]

Lieutenant Calley at trial, Fort Benning, Georgia

While the subsequent investigation into the My Lai Massacre done by Lieutenant General William R. Peers revealed that Koster did make some inquiries, Peers ultimately concluded that Major General Koster had not done enough. As Peers put it, Koster was one of thirty persons who had knowledge of the war crimes committed at My Lai "but had not made official reports, had suppressed relevant information, had failed to order investigations, or had not followed up on the investigations that were made."[18]

As a result of these failures, while serving as division commander, charges were preferred against Koster in March 1970.[19] The charges, which had been drafted by Colonel Hubert Miller,[20] then a judge advocate assigned to the Office of the Judge Advocate General, alleged that Koster had failed to obey orders and regulations and had been derelict in the performance of his duty, a violation of Article 92, Uniform Code of Military Justice (UCMJ).[21]

An investigation conducted pursuant to Article 32, UCMJ, "acknowledged" that Koster "may have been remiss" in not ordering a proper investigation into the alleged war crimes, but recommended dismissal of the court-martial charges against him.[22] The result was that charges were dismissed by Lieutenant General Jonathan O. Seaman in January 1971.[23]

In May 1971, on the recommendation of General William C. Westmoreland, then serving as Army Chief of Staff, Secretary of the Army Resor took the following administrative actions against Major General Koster. First, he vacated Koster's appointment as a temporary major general, so that Koster reverted to his permanent rank of brigadier general.[24] Second, he directed that a Letter of Censure, which criticized Koster's failure to report known civilian casualties to higher headquarters and his failure to insure that a proper investigation was conducted into killings

[13] HARRY G. SUMMERS, JR., HISTORICAL ATLAS OF THE VIETNAM WAR 140 (1995). In addition to the killings at My Lai, Calley and his men "raped and sodomized" women and children, set houses on fire, and bayonetted the inhabitants of the village as they attempted to escape. *Id*.

[14] *Koster*, 685 F.2d at 409.

[15] MILITARY ASSISTANCE COMMAND, VIETNAM (MACV) DIR. 20-4, INSPECTIONS AND INVESTIGATIONS, WAR CRIMES (18 May 1968) *reprinted in* GEORGE F. PRUGH, LAW AT WAR (1975), Appendix F (requiring the reporting of all war crimes committed by or against U.S. forces). For more on the evolution of the policy requiring the reporting of war crimes, see FRED L. BORCH, JUDGE ADVOCATES IN VIETNAM (2004), 34-36.

[16] *Koster*, 685 F.2d at 409. The helicopter pilot was Warrant Office Hugh C. Thompson who, while piloting a Hiller OH-23 Raven observation helicopter, witnessed the killings at My Lai. Thompson landed his OH-23 and then directed Bell UH-1 Iroquois utility helicopter gunships under his command to land and evacuate some of the civilians facing death at My Lai. WILLIAM R. PEERS, THE MY LAI INQUIRY 66-76 (1979).

[17] *Koster*, 685 F.2d at 409.

[18] PEERS, *supra* note 1, at 212.

[19] *Koster*, 685 F.2d at 409.

[20] PEERS, *supra* note 1, at 214. For more on Hubert Miller, see Fred L. Borch, *A Remarkable Judge Advocate by Any Measure: Colonel Hubert Miller (1918-2000)*, ARMY LAW., Mar. 2011, at 2.

[21] PEERS, *supra* note 1, at 212.

[22] *Id*. at 223.

[23] *Koster*, 685 F.2d at 409. Lieutenant General Jonathan O. Seaman was the Commander, First Army. He was the General Court-Martial Convening Authority for twelve of the fourteen individuals against whom charges were preferred as a result of their involvement in the My Lai Massacre. *Id*. at 221. Born in 1911, Seaman was a graduate of the U.S. Military Academy (Class of 1934). *Lt. Gen. Jonathan Seaman, 74, Dies; Commanded Army Troops in Vietnam*, WASH. POST, Feb. 26, 1986, at B6. He had a distinguished career as a combat Soldier, including command of the 1st Infantry Division in Vietnam. *Id*. After 37 years of active duty, Seaman retired as a lieutenant general. *Id*. He died in South Carolina in 1986. *Id*.

[24] *Koster*, 685 F.2d at 409-10.

at My Lai, be placed in Koster's military personnel file.[25] Finally, Secretary Resor directed the withdrawal of the Distinguished Service Medal awarded to Koster for his service as Americal Division commander.[26]

Instead of leaving the Army after his loss of a star, Koster became deputy commander of the Army's Test and Evaluation Command at Aberdeen Proving Ground, Maryland.[27] He hoped to be promoted to the permanent grade of major general, but adverse information in his Officer Efficiency Reports apparently prevented any such promotion. Additionally, when Koster retired from active duty in 1973, Secretary of the Army Callaway, who had succeeded Secretary Resor, refused to find that Koster had performed satisfactorily in the grade of major general.[28] Under the law as it then existed, Koster could have received retired pay as a major general if Callaway had determined that he had served satisfactorily as a two star for six months.[29] When Calloway declined to make this determination, Koster's retired pay was computed based on his permanent rank as a one-star.[30]

For the next ten years, Brigadier General Koster fought to clear his name. He insisted that the Army's censure of him was "unfair and unjust" and based on "faulty conclusions."[31] He admitted that he had been "under the impression that only about 20 civilians had been 'inadvertently killed' by artillery, helicopter guns and 'some small-arms fire'" at My Lai but insisted that this was an insufficient basis to impose administrative "punishments" upon him.[32]

In January 1974, Koster filed a petition with the Army Board for Correction of Military Records (ABCMR).[33] He alleged that he was improperly retired as a brigadier general and that his records should be corrected to reflect retirement as a two-star.[34] Koster also requested removal of the Letter of Censure from his military personnel records and the restoration of his Distinguished Service Medal.[35] Three years later, in January 1977, Brigadier General Koster also filed a petition in the U.S. Court of Claims.[36] Since his petition with ABCMR was still pending, Koster apparently filed his petition with the Court of Claims so as to avoid the running of the statute of limitations in his case. This also explains why Koster concurrently petitioned the Court to suspend proceedings until the ABCMR had acted in his case.[37]

For reasons that are not clear from the legal records in the proceedings, it took Brigadier General Koster more than five years to submit a 415-page brief with seventy-five exhibits to the ABCMR.[38] This explains why it was not until March 1980 that the ABCMR was able to act upon Koster's January 1974 petition. In an "extensive memorandum," the Board ruled against Brigadier General Koster, concluding that the administrative sanctions imposed by the Secretary of the Army—the Letter of Censure, termination of his temporary appointment as a major general, and withdrawal of his DSM—were "justified on the record of evidence and were not arbitrary or capricious."[39]

With the ABCMR decision now final, it was time for the Court of Claims to examine Koster's petition. The Civil Division of the Department of Justice (DOJ), representing the government, filed a motion for summary judgment on July 7, 1981.[40] While DOJ attorneys filed the 100-page brief with the court, it was authored by then MAJ Michael J. Nardotti, Jr., a relatively young judge advocate assigned to the Litigation Division, Office of the Judge Advocate General.[41]

Nardotti presented a number of reasons in support of the motion for summary judgment. First, he argued that plaintiff Koster's failure to submit a brief to the ABCMR for more than five years after filing his original petition meant that Koster's claim had "excessive and inexcusable delay." The government was prejudiced by this delay and the court, argued Nardotti, should dismiss Koster's petition as barred by the doctrine of laches.[42]

Alternatively, argued MAJ Nardotti, as the Court of Claims had jurisdiction over only money claims against the government, it had no jurisdiction to review the Secretary of

[25] *Id.*

[26] *Id.* at 411. *See also* Defendant's Motion for Summary Judgment at 32, Koster v. United States 685 F.2d 407 (Cl. Ct. 1982) (No. 65-77) (historian files, TJAGLCS).

[27] Stout, *supra* note 7; *see also Koster*, 685 F.2d at 412.

[28] *Koster*, 685 F.2d at 410.

[29] *Id.*

[30] Stout, *supra* note 7.

[31] *Id.*

[32] *Id.*

[33] *Koster*, 685 F.2d at 410.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 408.

[37] *Id.* at 411.

[38] *Id.*

[39] *Id.* at 413.

[40] Defendant's Motion for Summary Judgment at 32, Koster v. United States, 685 F.2d 407 (Cl. Ct. 1982) (No. 65-77) (historians files, TJAGLCS).

[41] Nardotti is identified as "of counsel" on the brief. *Id.*

[42] Defendant's Motion for Summary Judgment at 57, Koster v. United States, 685 F.2d 407 (Cl. Ct. 1982) (No. 65-77) (historians files, TJAGLCS).

the Army's decision to vacate Koster's temporary appointment to major general or to review Koster's claim for retirement at two-star rank. It also had no jurisdiction over the Letter of Censure or the revocation of Koster's DSM.[43]

Major General Michael J. Nardotti, Jr., The Judge Advocate General, U.S. Army, 1993-1997

The Court of Claims agreed that it lacked the power to resolve the issue of the letter and the decoration, but it found that the vacation of his temporary appointment to two-star rank and his reduced retirement pay as a brigadier general did "colorably involve money" and consequently gave the court jurisdiction over these issues.[44]

But the court agreed with MAJ Nardotti's argument that the only issue was whether the ABCMR's decision in Koster's case was "arbitrary, capricious, unsupported by substantial evidence, in bad faith or contrary to law or regulation."[45] After carefully examining the administrative record created by the ABCMR and considering the written and oral arguments presented by both sides, the Court of Claims ruled against Koster.[46] On July 28, 1982, it held that it "was not able to conclude that the decision of the ABCMR should be overturned."[47] The court granted the government's motion for summary judgment and it denied Koster's cross-motion for summary judgment.[48]

It is worth noting that the Court of Claims was "sensitive" to Brigadier General Koster's claim he was made "to suffer for the political and public pressures that were brought to bear on the Army as a result of the My Lai incident."[49] The court, however, quoted from a memorandum written by Army Secretary Resor to the Secretary of Defense in March 1973. In the court's view, that memorandum best explained why the adverse administrative actions taken against Koster had been both lawful and fair:

> There is no single area of administration of the Army in which strict concepts of command responsibility need more to be enforced than with respect of vigorous investigation of alleged misconduct. . . . General Koster may not have deliberately allowed an inadequate investigation to occur, but he did let it happen, and he had ample resources to prevent it from happening . . . .
>
> . . . .
>
> Doubtless there will be some, including military officers, who feel that General Koster is being treated harshly, or that he is being made a scapegoat. . . . [But] the job of maintaining necessary standards of responsibility of senior officials is too important to the Army and to the nation to be significantly influenced by the criticism of those who are inadequately informed . . . .[50]

What became of two of the participants in this event in legal history? Brigadier General Koster died in January 2006 at his home in Annapolis, Maryland. He was 86 years old. Major Nardotti continued his career as an Army lawyer and, after serving as The Judge Advocate General from 1993 to 1997, retired as a major general. He continues to practice law at Squire Patton Boggs in Washington, D.C.[51]

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website
https://www.jagcnet.army.mil/8525736A005BE1BE

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

[43] *Id.* at 60-62.

[44] *Koster*, 685 F.2d at 413.

[45] *Id.* at 411.

[46] *Id.* at 409.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 414.

[50] *Id.* at 419.

[51] For an excellent treatment of Major General Nardotti's place in military legal history, see George R. Smawley, *The Soldier-Lawyer: A Summary and Analysis of An Oral History of Major General Michael J. Nardotti, Jr., United States Army (Retired) (1969-1997)*, 168 MIL. L. REV. 1-39 (2001).

World War II JAG School Scrapbooks on the Library of Congress Website

In 1942, the Judge Advocate General's School opened on the campus of the University of Michigan in Ann Arbor, Michigan. Initially, the School was under the leadership of Colonel Edward H. "Ham" Young, who determined the curriculum and put together the initial staff and faculty. When Young departed for a new assignment in late 1944, he was succeeded by Colonel Reginald C. Miller, who served as Commandant until the School closed in 1946. During its operation at the University of Michigan, the School transformed hundreds of civilian lawyers into Army judge advocates. These military lawyers ultimately served as uniformed attorneys in a variety of world-wide locations, including Australia, China, England, France, Germany, India, Japan, and Morocco. These scrapbooks contain photographs, newspaper articles, graduation programs, and other documents related to the operation of the School from 1943 to 1946.

See the scrapbooks here:
http://www.loc.gov/rr/frd/Military_Law/Scrapbooks.html

Applying the New Military Rule of Evidence 513: How Adopting Wisconsin's Interpretation of the Psychotherapist Privilege Protects Victims and Improves Military Justice

Major Cormac M. Smith[*]

Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.[1]

I. Introduction

You are a special victim counsel (SVC) representing sexual assault survivors.[2] You zealously represent their interests, explain to them the nuances of the military justice process, and counsel them on a wide range of issues. Despite being competent in navigating court-martial procedures, when a client shows emotional suffering resulting from sexual assault trauma, you recommend they seek professional psychiatric help. After all, a clinical psychiatrist is far better prepared than an attorney to provide such treatment.

It seemed obvious that referring the client to counseling was in her best interest. However, a military judge orders production of the counseling records for an in camera review, leaving the client feeling exposed and betrayed. You advised the client to seek treatment to combat emotional suffering from the sexual assault; all counseling you provide is privileged and the court would not order production of statements covered by the lawyer-client privilege.[3] Now the client wants an explanation why—against her wishes—the judge, and potentially government and defense counsel, will review the client's treatment discussions with a psychiatrist. Why should the client's privacy suffer further because she sought treatment through the best available means? Would a better interpretation of the psychotherapist privilege encourage victims to seek treatment while still protecting the accused's right to a fair trial?

From inception, the military psychotherapist privilege, Military Rule of Evidence (MRE) 513, insufficiently safeguarded privileged communications. As discussed in Part II, when the Supreme Court established a federal psychotherapist privilege through common law, it ruled that psychiatric treatment improves public mental health and requires an environment of "confidence and trust" to be effective.[4] Accordingly, the Court declined to make the privilege "contingent upon a trial judge's . . . evaluation."[5] In contrast, the subsequent military psychotherapist privilege permitted in camera review if a judge deemed it necessary to rule on production motions.[6] The military judiciary routinely reviewed privileged communication,[7] degrading the privilege's effectiveness.

Congress and the President recently strengthened MRE 513's protections through the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act (NDAA) for Fiscal Year 2015.[8] The changes, analyzed in Part III, include removal of a frequently used "constitutionally required" exception to the privilege and establish more stringent limitations on in camera reviews.[9] Yet a statute or executive order cannot supersede the Constitution,[10] and Part III(A) discusses how courts differ on when the Constitution requires privilege exceptions.[11] Amidst this uncertainty, the military judiciary should select

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[1] Jaffee v. Redmond, 518 U.S. 1, 10 (1996).

[2] The term "survivor" is commonly used within the Department of Defense to describe victims of a sexual offense. *See*, e.g., U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FOR FISCAL YEAR 2014 at 5 (2014).

[3] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 502 (2012) [hereinafter MCM] (lawyer-client privilege containing no provision for judicial in camera review of protected communication).

[4] *Jaffee*, 518 U.S. at 10.

[5] *Id.* at 17.

[6] MCM, *supra* note 3, MIL. R. EVID. 513(e)(3).

[7] *See infra* notes 40–43.

[8] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 3369 (2014) [hereinafter 2015 NDAA].

[9] *Id*.

[10] *See Ex parte* Siebold, 100 U.S. 371, 376 (1879) ("An unconstitutional law is void, and is as no law.").

[11] *Compare* United States v. Shrader, 716 F. Supp. 2d 464, 472–73 (S.D. W. Va. 2010) (finding a defendant's constitutional rights did not require an in camera review of psychotherapist records) *with* Bassine v. Hill, 450 F. Supp. 2d 1182, 1185–86 (D. Or. 2006) (determining that the due process and confrontation clauses mandated in camera review of privileged mental health records).

the best of several interpretations of the new MRE 513, discussed in Part III(B), to meaningfully strengthen the psychotherapist privilege.

The military judiciary should adopt Wisconsin's judicial interpretation of the psychotherapist privilege and, when necessary, bar a patient's testimony unless the patient waives the privilege for an in camera review. Part III(C) explains that judges should only use this process under exceptional circumstances, such as when there is evidence of a patient's "[r]ecantation or [o]ther [c]ontradictory [c]onduct . . . [b]ehavioral, [m]ental, or [e]motional [d]ifficulties . . . [or] [a]bility to [p]erceive, [r]emember, and [r]elate [e]vents."[12] This interpretation recognizes that an accused's rights might require a court to review privileged records in camera yet still preserves the trust necessary for a successful psychotherapist-patient relationship. The justification for a more protective psychotherapist privilege comes not only from the 2015 NDAA and persuasive case law, but also from the source of the federal privilege—the Supreme Court's decision in *Jaffee v. Redmond*.[13]

II. The Origins of MRE 513

Analysis of MRE 513 must begin with the federal psychotherapist privilege creation. Military privileges are generally established in MREs set forth by executive order.[14] In contrast, federal rule of evidence privileges are not statutorily enumerated but created through common law.[15] A framework of federal courts recognizing privileges case-by-case inevitably leads to circuit splits regarding privilege recognition, requiring resolution from the Supreme Court.[16]

A. The Federal Psychotherapist Privilege

In 1996, the Supreme Court recognized a federal psychotherapist privilege in *Jaffee v. Redmond*.[17] The bulk of the Court's reasoning relied not on precedent of the privilege's recognition in federal and state jurisdictions but on the underlying policy justification for establishing a psychotherapist privilege.[18] The Court rarely recognizes new privileges which "are in derogation of the search for truth."[19] While acknowledging that the psychotherapist privilege impeded truth-seeking, the Court determined that the privilege "promotes sufficiently important interests to outweigh the need for probative evidence . . . ."[20] The psychotherapist privilege serves the public good by rectifying citizens' mental suffering.[21] Additionally, the therapy's effectiveness depends upon a trusting environment.[22]

Psychotherapy treatment "depends upon an atmosphere of confidence and trust in which the patient is willing to make frank and complete disclosures of facts, emotions, memories and fears."[23] The Court compared the psychotherapist privilege to attorney and spousal privileges[24] and determined that the "mere possibility of disclosure" impeded the communication necessary for successful treatment.[25] Accordingly, the Court refused to make the privilege subject to trial judges' weighing the patient's interest with the evidentiary interest, stating such a balancing test "would eviscerate the effectiveness of the privilege."[26]

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[12] Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 OR. L. REV 1, 41–45 (2007). Fishman categorizes these as the areas where courts give "serious consideration" to discovery requests for rape and child sexual assault victim mental health records. *Id.* at 41.

[13] Jaffee v. Redmond, 518 U.S. 1 (1996).

[14] UCMJ art. 36(a) (2012). In addition to privileges established in Military Rule of Evidence (MREs) or the Manual for Courts-Martial (MCM), military courts recognize privileges established in the U.S. Constitution as applied to servicemembers, federal statute as applied to courts-martial, and privileges established through federal criminal case law if not inconsistent with the Uniform Code of Military Justice (UCMJ), MREs, or the MCM. MCM, *supra* note 3, MIL. R. EVID. 501(a).

[15] FED. R. EVID. 501. By relying on common law privileges, Congress rejected a proposal from the Supreme Court and the Judicial Conference of the United States recommending adoption of nine testimonial privileges. Jaffee v. Redmond, 518 U.S. 1, 8 n.7 (1996). The recommended privileges included a psychotherapist-patient privilege. *Id.*

[16] *Jaffee*, 518 U.S. at 7.

[17] *Id.* at 9–10. In doing so, the Court resolved a conflict among the federal circuits, some of which recognized the privilege and some of which did not. *Id.* at 7. The Court noted that every state and the District of Columbia recognized some form of a psychotherapist privilege, yet it extended the privilege beyond psychotherapists to include licensed social workers conducting psychotherapy as well. *Id.* at 12, 15.

[18] *Id.* at 10–11.

[19] United States v. Nixon, 418 U.S. 683, 710 (1974).

[20] *Jaffee*, 518 U.S. at 9–10 (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)). The Court determined that recognizing the privilege would result in small evidentiary loss, reasoning that patients would divulge less in an unprivileged setting. *Id.* at 11–12.

[21] *Id.* at 11.

[22] *Id.* at 10. *See also* JAMES F. ALEXANDER ET AL., HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE 181 (Allen E. Bergin & Sol L. Garfield eds., 4th ed. 1994) ("It should come as no surprise that helping people deal with depression, inadequacy, anxiety, and inner conflicts, as well as helping them form viable relationships and meaningful directions for their lives, can be greatly facilitated in a therapeutic relationship that is characterized by trust, warmth, acceptance, and human wisdom.").

[23] *Jaffee*, 518 U.S. at 10. The Court contrasted psychotherapists with physicians, who could successfully treat a patient based solely on a physical examination and objective information from the patient. *Id. See also* LEWIS R. WOLBERG, THE TECHNIQUE OF PSYCHOTHERAPY 630 (4th ed. 1988) (encouraging therapists to assuage patient fears by explaining that what the patient divulges, and their therapy records, are "completely confidential and will, under no circumstances, be divulged").

[24] *Jaffee*, 518 U.S. at 10.

[25] *Id.*

[26] *Id.* at 17.

Unfortunately, MRE 513, crafted in the wake of *Jaffee*, incorporated such a balancing test.[27]

B. The Pre-2015 Military Psychotherapist Privilege

President Clinton signed into law the military psychotherapist privilege as MRE 513 in 1999.[28] The rule was created to "clarif[y] military law in light of [*Jaffee*]" and to follow federal evidentiary rules "when practicable."[29]

Military Rule of Evidence 513 was purportedly "based on the social benefit of confidential counseling recognized by *Jaffee*,"[30] yet it included the judicial balancing test *Jaffee* found destructive to the privilege.[31] The rule contained eight enumerated exceptions to the privilege,[32] including "when admission or disclosure of a communication is constitutionally required."[33] Disputes over production or admission of mental health records require military judges to conduct a hearing on the proponent's motion.[34] If necessary to rule on the motion, the military judge "may" review the records in camera.[35] Although the rule's analysis describes the psychotherapist privilege as "similar to the clergy-penitent privilege,"[36] the clergy privilege is truly absolute, containing no exception, no process for production, and no process for in camera review.[37] Military Rule of Evidence 513's weaknesses did not lie dormant; the military judiciary frequently used the rule's in camera balancing test.[38]

Military case law demonstrates that an in camera review of a victim's mental health records is almost certain once defense requests the records.[39] In some cases, after an in camera review, the court provides parties with portions of the mental health record for use during the merits portion of the trial.[40] Sometimes the court conducts an in camera

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[27] MCM, *supra* note 3, MIL. R. EVID. 513(e)(3).

[28] Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999).

[29] MCM, *supra* note 3, MIL. R. EVID. 513 analysis, at A22–45. Courts-martial may recognize privileges created through federal criminal case law if not inconsistent with the UCMJ, MREs, or MCM. *Id.*, MIL. R. EVID. 501(a)(5). However, the United States Court of Appeals for the Armed Forces (CAAF) determined that the President occupied the field with MRE 501(d), which limits privilege claims for communication to physicians, thus preventing recognition of a common law military psychotherapist privilege. United States v. Rodriguez, 54 M.J. 156, 160 (C.A.A.F. 2000). The Court of Appeals for the Armed Forces ruled on *Rodriguez* after President Clinton signed MRE 513 into law; however, the case considered whether a military psychotherapist privilege existed in any form during the post-*Jaffee*, pre-MRE 513 time period, and concluded that it did not. *Id.* at 161.

[30] MCM, *supra* note 3, MIL. R. EVID. 513 analysis, at A22–45.

[31] *Compare Jaffee*, 518 U.S. at 17 (determining a balancing component would "eviscerate the effectiveness of the privilege") *with* MCM, *supra* note 3, MIL. R. EVID. 513(e)(3) (establishing that military judges "shall" conduct in camera reviews of purportedly privileged communication when necessary to rule on production motions). *See also Rodriguez*, 54 M.J. at 161 (contrasting the "full civilian" and "limited military" psychotherapist privileges).

[32] MCM, *supra* note 3, MIL. R. EVID. 513(d). Some exceptions, such as those to ensure the security of classified information, are justified by "separate concerns . . . to ensure military readiness and national security." *Id.*, MIL. R. EVID. 513 analysis, at A22–45. The exceptions are,

> (1) [W]hen the patient is dead; (2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse; (3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication; (4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient; (5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud; (6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission; (7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by [Rule for Court-Martial] 706 or Mil. R. Evid. 302 . . . ; or (8) when admission or disclosure of a communication is constitutionally required.

MCM, supra note 3, at MIL. R. EVID. 513(d).

[33] MCM, *supra* note 3, at MIL. R. EVID. 513(d)(8).

[34] *Id.* at MIL. R. EVID. 513(e)(2).

[35] 2013 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,643, 78 Fed Reg. 29, 559 (May 15, 2013), MIL. R. EVID. 513(e)(3) [hereinafter 2013 Amendments to the MCM]. The rule's initial language encouraged in camera reviews even more by stating that the military judge "shall" review the communications in camera "if such examination is necessary" for the ruling. MCM, *supra* note 3, MIL. R. EVID. 513(e)(3). Military Rule of Evidence 513 analysis from the 2013 Amendments to the MCM states that the change was designed for stylistic reasons and to "expand the military judge's authority and discretion to conduct in camera reviews." 2013 Amendments to the MCM, MIL. R. EVID. 513 analysis, at A22–51 (2013).

[36] MCM, *supra* note 3, MIL. R. EVID. 513 analysis, at A22–45.

[37] MCM, *supra* note 3, MIL. R. EVID. 503.

[38] *See infra* notes 40–43.

[39] *See id*. A notable exception to the trend of universal in camera review is the Navy-Marine Corps Court of Criminal Appeals' decision in *United States v. Klemick*. United States v. Klemick, 65 M.J. 576 (N-M. Ct. Crim. App. 2006). The court looked to state appellate courts for persuasive authority in establishing an evidentiary threshold for in camera reviews and applied Wisconsin's standard. *Id.* at 579–80 (citing State v. Green, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298). However, *Klemick* is distinguishable as involving the accused's spouse's psychotherapist records under the child abuse exception. *Id.* at 578. Even purporting to use the Wisconsin standard, the court found an in camera review and release of records appropriate. *Id.* at 581.

[40] *See* United States v. Mora, No. 201200335, 2012 WL 7807212 (N-M. Ct. Crim. App. Mar. 28, 2013) (finding in favor of defense's motion to compel discovery of victim's mental health records); United States v. Piette, No. 38101, 2014 CCA LEXIS 568 (A.F. Ct. Crim. App. Aug. 6, 2014) (ordering production of victim's counseling records for defense and government after an in camera review); United States v. Cano, No. 20010086, 2004 CCA LEXIS 331 (A. Ct. Crim. App. Feb. 4, 2004) (approving a military judge's rejection of a privilege claim for an eleven-year-old child's post-sexual assault counseling records); United States v. Burgh, No. 38207, 2014 CCA LEXIS 824 (A.F. Ct. Crim. App. Apr. 16, 2014) (ordering release of

review but only releases portions of the records for use during sentencing.[41] At other times, the court orders an in camera review but does not release the mental health records.[42] In camera reviews of mental health records are so ubiquitous that the government even sometimes requests them or fails to object to them on behalf of victims,[43] and judges order production for in camera review prior to the mandatory hearing.[44]

United States v. Cano shows the expansiveness of military courts' use of in camera reviews and the low hurdle for production.[45] In *Cano*, the U.S. Army Court of Criminal Appeals described a military judge's order to produce "everything . . . even remotely potentially helpful to the defense" from counseling records as a "fair trial standard."[46] Despite such a generous standard, the court ruled that the judge erred by producing too *few* of the counseling records.[47] It urged military judges to review such privileged materials "with an eye and mind-set of a defense counsel at the beginning of case preparation" in order to determine which portions to produce.[48] Whatever adjective suits communication protected by such a low production standard, it is not 'privileged.'

United States v. Harding[49] highlights the lengths to which some military judges will go to thwart a patient's intent and a therapist's effort to maintain the privilege. In that case, the prosecution issued a subpoena for the mental health records of a reported sexual assault victim.[50] The prosecution issued the subpoena in response to a discovery request even without an MRE 513(e) hearing, apparently choosing to not object to defense's request for the records or claim the privilege on the victim's behalf.[51] A civilian social worker declined to produce the sexual assault victim's counseling records because of the privileged nature of the records.[52] Despite a subsequent hearing on the matter, a reissue of the subpoena by the military judge, and a warrant of attachment authorizing U.S. Marshals to seize the records, the social worker persisted in refusing to produce the mental health records.[53] The military judge decided an in camera review was necessary to rule on the production request.[54] Determining there was no adequate substitute for the review, and lacking the records or means to obtain them, the judge abated proceedings on the underlying rape charge.[55] Although the alleged victim in this case maintained her privilege and proceedings were abated, most victims are unlikely to benefit from psychotherapists willing to violate subpoenas or U.S. Marshals unwilling to execute a warrant of attachment. Their privilege, then, is less secure.

The military psychotherapist privilege's poor track record of protecting patient privacy was a direct result of the rule's poor structure. Military Rule of Evidence 513 contained a "constitutionally required" exception to the privilege, with no guidance for the limits of that exception.[56]

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seventy-nine pages of a victim's mental health records to defense, though none contained communication forming the basis of their request).

[41] *See* United States v. Williams, No. 35066, 2004 CCA LEXIS 169 (A.F. Ct. Crim. App. July 28, 2004) (ordering production of communications involving impact of the offense after the military judge's review of the mental health records); United States v. Palmer, No. 38184, 2013 CCA LEXIS 1116 (A.F. Ct. Crim. App. Nov. 25, 2013) (allowing defense to use portions of the records to impeach the victim concerning impact of the rape); United States v. Hudgins, No. 38305, 2014 CCA LEXIS 227 (A.F. Ct. Crim. App. Apr. 3, 2014) (declining to produce mental health records for the merits portion of the trial, but provided portions to defense during sentencing after an expert testified about the victim's post-traumatic symptoms).

[42] *See* United States v. Nast, No. S31687, 2010 CCA LEXIS 190 (A.F. Ct. Crim. App. June 28, 2010) (denying defense's motion to order production of mental health records after an in camera review); United States v. Verdejo-Ruiz, No. 37957, 2014 CCA LEXIS 607 (A.F. Ct. Crim. App. Aug. 14, 2014) (denying production of victims mental health records for defense); United States v. Walker, No. 38237, 2014 CCA LEXIS 306 (A.F. Ct. Crim. App. May 15, 2014) (granting defense's motion to review every victims' mental health records, although the government failed to locate them prior to trial); United States v. Phillips, No. 36412, 2008 CCA LEXIS 113 (A.F. Ct. Crim. App. Mar. 19, 2008) (denying release of material information from victim's mental health records due to defense's failure to meet their burden).

[43] *See* United States v. Nixon, No. 37622, 2012 CCA LEXIS 438 (A.F. Ct. Crim. App. Nov. 14, 2012) (releasing portions of four victims mental health records to trial and defense counsel after conducting an in camera review of the records at prosecution's request); United States v. Wallace, No. 201100300, 2012 CCA LEXIS 109 (N-M. Ct. Crim. App. Mar. 30, 2012) (requesting in camera review of a sexual assault victim's mental health records went unopposed by the government).

[44] *See* CC v. Lippert, No. 20140779, slip op. at 2 (A. Ct. Crim. App. Oct. 16, 2014) (instructing a military judge to "comply with Military Rule of Evidence 513(e)(2)" after the judge ordered production of a reported victim's mental health records for an in camera review without conducting the required hearing).

[45] *Cano*, 2004 CCA LEXIS 331.

[46] *Id.* at *9.

[47] *Id.*

[48] *Id.*

[49] United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006).

[50] *Id.* at 65.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 66. Even though the U.S. Court of Appeals for the Tenth Circuit authorized the Marshalls to execute the warrant of attachment, they did not execute it. *Id.*

[54] *Id.*

[55] *Id.*

[56] MCM, *supra* note 3, MIL. R. EVID. 513(d)(8). Some observers consider this similar to MRE 412's constitutional exception. *See* Major Stacy Flippin, *Military Rule of Evidence (MRE) 513: A Shield to Protect Communications of Victims and Witnesses to Psychotherapists*, ARMY LAW., Sept. 2003, at 1, 11 (encouraging practitioners to use MRE 412's constitutionally required exception as a guideline for MRE 513's exception). However, the analysis is fundamentally different. Section IV MREs involve "Relevancy and its Limits" rather than the "Privileges" of Section V MREs. *Compare* MCM, *supra* note 3, pt. III Section IV ("Relevancy and its Limits") *with Id.* pt. III Section V ("Privileges"). As such, the MRE 412 cases determine when the Constitution guarantees an

The military judge "may" examine the privileged communications "if such examination is necessary."[57] This essentially compelled a prudent military judge wishing to protect the record to at least review the privileged communication in camera once a party requested production.[58] A patient and her therapist had no recourse to prevent judicial review of their communication unless they were willing to violate a subpoena.[59] Military Rule of Evidence 513 established the type of balancing test[60] *Jaffee* rejected as destructive to the privilege's purpose.[61] By the Supreme Court's standard, the pre-2015 MRE 513 was an "uncertain privilege . . . little better than no privilege at all."[62]

III. 2015 NDAA Changes to MRE 513

As a result of MRE 513's inadequate protections, Congress strengthened and broadened the privilege's protections by mandating changes to the rule through the 2015 NDAA.[63] First, the changes extend the privilege to include communication with "other licensed mental health professionals."[64] Second, the changes remove the "constitutionally required" privilege exception.[65] Third, production or disclosure of privileged communication ordered by military judges must be "narrowly tailored to only the specific records or communications . . . that meet the requirements for one of the enumerated exceptions to the privilege and are included in the stated purpose for which . . . such records or communications are sought."[66] Finally, the changes mandate an evidentiary burden for a party seeking an in camera review or admission of mental health records; the party must also prove the evidence falls under an enumerated exception.[67]

The Joint Service Committee drafted the new MRE 513 to incorporate these required changes; the rule now requires a military judge, prior to conducting an in camera review, to

> [F]ind by a preponderance of the evidence that the moving party: (A) showed a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege; (B) that the requested information meets one of the enumerated exceptions under [MRE 513(d)]; (C) that the information sought is not merely cumulative of other information available; and (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.[68]

Solely based on its text, the new MRE 513 creates an essentially absolute privilege for victims' mental health records. The rule no longer contains a "constitutionally required" exception,[69] and it strictly limits review, production, and disclosure to only the enumerated exceptions.[70] None of the seven remaining exceptions plausibly apply to victims' mental health records, absent uncommon circumstances.[71] Therefore, facially, the new privilege creates an impenetrable wall to defense counsel seeking review of mental health records for impeachment evidence or inconsistent statements.

This does not settle whether there are additional, non-textual exceptions to the privilege. The "constitutionally required" exception was arguably superfluous to begin with,[72] rendering its removal meaningless. Even if the 2015 NDAA or MRE 513 purport to prevent disclosure or introduction of constitutionally required communication, they cannot do so.[73] Regardless of Congressional intent, the judiciary is independently charged with determining what evidence is constitutionally required for a fair trial.[74]

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accused the ability to present *known* evidence at trial. *See* United States v. Ellenbrock, 70 M.J. 314, 318–19 (C.A.A.F. 2011) (finding that MRE 412's constitutionally required exception affords an accused the opportunity for cross-examination of a witness's motive to lie using evidence which is "relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice" (citing United States v. Gaddis, 70 M.J. 248, 255 (C.A.A.F. 2011))). The psychotherapist privilege's "constitutionally required" exception requires a different determination: when does the Constitution require a trial judge to pierce an evidentiary privilege to search for *unknown* evidence? If defense can pierce the privilege by merely speculating that the communication might contain admissible evidence, the privilege offers hollow protection.

[57] 2013 Amendments to the MCM, *supra* note 35.

[58] *See supra* notes 46–48 and accompanying text.

[59] *See supra* notes 50–55 and accompanying text.

[60] MCM, *supra* note 3, MIL. R. EVID. 513(e).

[61] Jaffee v. Redmond, 518 U.S. 1, 17 (1996).

[62] *Id.* at 18 (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).

[63] 2015 NDAA, *supra* note 8, at 3369.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] Manual for Courts-Martial; Proposed Amendments, 80 Fed. Reg. 6057, 6059 (Feb. 4, 2015).

[69] *Id.*

[70] *Id.*

[71] *See* MCM, *supra* note 3, MIL. R. EVID. 513(d)(1)–(7).

[72] *See* United States v. Gaddis, 70 M.J. 248, 253 (C.A.A.F. 2011) (finding that an MRE may not "limit the introduction of evidence that is required to be admitted by the Constitution").

[73] *See supra* note 10 and accompanying text.

[74] *See* Marbury v. Madison, 5 U.S. 137, 177–79 (1803) (asserting that the judiciary is responsible for determining the applicable law and that the Constitution is superior to legislatively passed laws).

Before assessing the military judiciary's options when interpreting the new, more protective MRE 513, one must determine the constitutional limitations of evidentiary privileges. The analysis begins by addressing when, or if, the Constitution requires piercing the privilege.

A. When Does the Constitution Require Exceptions to a Psychotherapist Privilege?

A review of case law from the U.S. Supreme Court and federal courts provides more confusion than clarity regarding when the Constitution requires privilege piercing. Commentators note that determining privilege limitations requires an assessment of the requirements of the Due Process Clause of the Fifth Amendment and the Confrontation Clause of the Sixth Amendment.[75] The Due Process Clause guarantees procedures characterized by "that fundamental fairness essential to the very concept of justice."[76] A defendant's right under the Confrontation Clause of the Sixth Amendment serves the "main and essential purpose . . . to secure for the opponent the opportunity of cross-examination" of adverse witnesses.[77] Additionally, the Supreme Court recognized that, whether based on the Fifth or Sixth Amendment, a defendant has a constitutional right to present a complete defense.[78] Although the Fifth Amendment, Sixth Amendment, and "complete defense" rights potentially restrict evidentiary privileges, the contours of such restrictions are poorly defined.

1. Supreme Court Guidance

The Supreme Court serves as the ultimate arbiter of constitutional interpretation,[79] yet its guidance on the mandatory limits of evidentiary privileges is incomplete and opaque.[80] The two leading Supreme Court cases regarding the constitutional limits of privileges leave significant room for interpretation of their scope.[81] In *Davis v. Alaska*, the Court ruled that, despite the state's interest in juvenile offender confidentiality, the Confrontation Clause guaranteed the defense the opportunity to present such evidence suggesting witness bias.[82] However, *Davis* addressed whether the Confrontation Clause guaranteed the opportunity to cross-examine a witness using matters the defense already possessed,[83] not whether the Clause mandated access to material of unknown content such as privileged mental health records.

In *Pennsylvania v. Ritchie*, the Court ruled that the Due Process Clause entitled the defendant to an in camera review of privileged Children and Youth Services (CYS) records to uncover potentially exculpatory information.[84] However, in explaining its ruling, the Court noted that the CYS records were not protected by an absolute privilege;[85] the privilege at issue contained exceptions for court orders and criminal investigations, along with nine other exceptions.[86] The Court observed that the Pennsylvania statute—creating the privilege—explicitly envisioned the privilege's use in judicial proceedings whereas the state's unqualified sexual assault counselor's privilege was not explicitly envisioned for judicial use.[87] The Court "express[ed] no opinion" whether the case results would differ for an absolute privilege.[88]

Therefore, neither *Davis* nor *Richie* clarifies whether the Constitution requires in camera review of materials protected by an absolute privilege or a privilege limiting judicial reviews to strictly defined circumstances.

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[75] *See* Fishman, *supra* note 12, at 9. Fishman also observes that the Compulsory Process Clause of the Sixth Amendment may place limits on privileges. *Id.*

[76] Lisenba v. California, 314 U.S. 219, 236 (1941).

[77] Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986) (emphasis omitted) (quoting Davis v. Alaska, 415 U.S. 308, 315–16 (1974)).

[78] *See* Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (citing Crane v. Kentucky, 476 U.S. 683, 690 (1986)). Although evidentiary rules must yield to a criminal defendant's constitutional rights, this precept only restricts those evidentiary rules that "infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Id.* at 324–25 (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998)) (internal quotation marks omitted). The Supreme Court weighed the costs and benefits of a psychotherapist privilege in *Jaffee* and recognized the privilege. Jaffee v. Redmond, 518 U.S. 1, 10 (1996). Therefore, one can hardly find the privilege generally "arbitrary" or "disproportionate" to the societal good the privilege creates.

[79] *See Marbury*, 5 U.S. at 173.

[80] *See* Commonwealth v. Barroso, 122 S.W.3d 554, 561 (Ky. 2003) ("[T]o date, the United States Supreme Court has held that the denial of the right to impeach a prosecution witness violates the Confrontation Clause but has yet to muster a majority on whether the denial of pretrial access to impeachment evidence is also a denial of confrontation rights. It has declared that evidentiary rules and at least one recognized evidentiary privilege must yield to a criminal defendant's due process right to present a defense. It has also stated that a defendant's due process right to discover exculpatory evidence in the possession of the government cannot be defeated by a qualified privilege, and that the 'fair administration of justice' requires that privileged inculpatory evidence in the hands of a third party be turned over to the prosecution. It has further held that the right to compulsory process includes the right to elicit favorable testimony from defense witnesses, but has yet to specifically decide whether that same right prevails over an absolute privilege . . . .") (citations omitted).

[81] *See* Flippin, *supra* note 56, at 11 (observing that the Supreme Court has yet to provide guidance for the plethora of scenarios not covered by *Ritchie* and *Davis*).

[82] Davis v. Alaska, 415 U.S. 308, 319 (1974).

[83] *Id.* at 313–14.

[84] Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987).

[85] *Id.* at 57–58.

[86] *Id.* at 43 n.2.

[87] *Id.* at 57–58.

[88] *Id.* at 57 n.14.

Significantly, the Court decided *Jaffee* after both *Davis* and *Ritchie*;[89] presumably, the Court determined that the absolute psychotherapist privilege established in *Jaffee* complied with its prior rulings.

2. Federal Court Confusion

Almost two decades after the *Jaffee* decision, the Supreme Court's incomplete guidance predictably causes inconsistent psychotherapist privilege application in federal criminal trials.[90] The privilege *Jaffee* created was absolute, refusing to allow judicial review to determine the privilege's applicability.[91] However, *Jaffee* was a civil case and the majority did not discuss the implication of the psychotherapist privilege in criminal trials;[92] federal courts determining the constitutional limits of the privilege arrive at different conclusions.

Despite the clarity in *Jaffee*, Federal courts split on how the psychotherapist privilege applies in criminal trials.[93] The District Court of Oregon found it comparable to the lawyer-client privilege, ruling that only a waiver would allow for in camera review of counseling records.[94] However, a later opinion within the district determined that, based on the facts of the case, the Due Process Clause required an in camera review of a witness's mental health records.[95] The District Court of Massachusetts flatly determined that the federal psychotherapist privilege did not apply in a criminal trial.[96] The Southern District of West Virginia determined that the Sixth Amendment does not require piercing the psychotherapist privilege in criminal trials, even for in camera reviews, noting "the emphatic language used by the *Jaffee* court regarding the fallacy of a balancing test . . . ."[97] Recently, the same district pierced the privilege for an in camera review, yet cautioned, "[T]his holding must necessarily be limited to this perfect storm of facts."[98] Categorizing application of the psychotherapist privilege in federal criminal trials as "neither comprehensive nor uniform,"[99] the court complained, "The dearth of substantive treatment of this crucial issue is somewhat inexplicable."[100] Until the Supreme Court expands upon the precedent of *Davis*, *Ritchie*, and *Jaffee*, the constitutional limits of psychotherapy privileges remains open to wide judicial interpretation.

B. Possible Judicial Interpretations of the New MRE 513

Faced with clear instructions from Congress and the President but unclear guidance on privileges' constitutional limitations, the military judiciary has several options for interpreting the new MRE 513.

1. Removal of the "Constitutionally Required" Exception is Inconsequential

The military judiciary might determine that, because Congress and the President cannot prevent the Constitution's application to a rule of evidence,[101] removing a "constitutionally required" exception has no effect. Under this interpretation, the courts would continue to recognize a "constitutionally required" exception despite its removal from MRE 513 and continue following the military case law detailed above.[102]

This interpretation is unsupported by applicable case law precedent[103] and would likely result in further legislation.[104] As discussed above, the Supreme Court

[89] *See supra* notes 1, 82, 84.

[90] *See* United States v. White, No. 2:12-cr-00221, 2013 U.S. Dist. LEXIS 49426, at *29 (S.D. W. Va. Apr. 5, 2013) (noting that federal court application of *Jaffee's* psychotherapist privilege lacks uniformity).

[91] Jaffee v. Redmond, 518 U.S. 1, 15 (1996).

[92] However, the dissent noted that the privilege may prevent establishing a defense, implying the ruling's applicability in criminal trials. *Id.* at 19 (Scalia, J., dissenting).

[93] *See White*, 2013 U.S. Dist. LEXIS 49426, at *29 (noting that federal court application of *Jaffee's* psychotherapist privilege lacks uniformity).

[94] United States v. Doyle, 1 F. Supp. 2d 1187, 1191 (D. Or. 1998).

[95] Dispennett v. Cook, No. 98-1252-ST, 2001 U.S. Dist. LEXIS 22196, at *30–31 (D. Or. Oct. 23, 2001). *See also* Bassine v. Hill, 450 F. Supp. 2d 1182, 1185–86 (D. Or. 2006) (determining that the due process and confrontation clauses mandate in camera review of mental health records, distinguishing *Jaffee* as a civil case).

[96] United States v. Mazzola, 217 F.R.D. 84, 88 (D. Mass. 2003). *See also* United States v. Tarantino, No. 08-CR-655 (JS), 2011 U.S. Dist. LEXIS 13630, at *2 (E.D.N.Y. Feb. 11, 2011) (ruling that the privilege "must yield to the Defendant's effort to obtain information helpful to his defense"); United States v. Alperin, 128 F. Supp. 2d 1251, 1253–55 (N.D. Cal. 2001) (ordering an in camera review of mental health records to determine their evidentiary value to the defendant using California state law as guidance for the federal privilege).

[97] United States v. Shrader, 716 F. Supp. 2d 464, 472 (S.D. W. Va. 2010).

[98] *White*, 2013 U.S. Dist. LEXIS 49426, at *49.

[99] *Id.* at *29.

[100] *Id.* at *35 (referring to the psychotherapist privilege as a clash between privacy rights in psychological treatment and constitutional rights of a fair trial and confrontation).

[101] *See* United States v. Gaddis, 70 M.J. 248, 253 (C.A.A.F. 2011) (finding that an MRE may not "limit the introduction of evidence that is required to be admitted by the Constitution").

[102] *See supra* notes 40–55 and accompanying text.

[103] *See supra* notes 80–89 and accompanying text.

[104] For instance, in *LRM v. Kastenberg*, CAAF declined to grant a reported victim's writ of mandamus, determining that the military judge had discretion under Rule for Court Martial (R.C.M.) 801 to limit the ability of a victim to be heard regarding MREs 513 and 412. LRM v. Kastenberg, 72 M.J. 364, 372 (C.A.A.F. 2013). Seemingly in response to this opinion, the following year Congress amended the UCMJ to grant victims the right to

provides no clear mandate that the Constitution requires courts to pierce strictly defined privileges to search for exculpatory evidence. Nor is there support within the military courts' treatment of other privileges. Most other MREs, which must also satisfy constitutional requirements, are not routinely breached for in camera reviews.[105]

If the judiciary replaces the textual "constitutionally required" exception, removed by Congress and the President, with an identical judicially created one, it invites further rule revisions. Proponents of this interpretation might argue that because Congress did not remove MRE 513's in camera review mechanism, the privilege is qualified; therefore, *Ritchie* subjects it to judicial piercing and review. While such an interpretation of *Ritchie* is debatable,[106] Congress could revise MRE 513 to resemble the absolute clergy privilege found in MRE 503 which contains no exceptions and offers no framework for in camera reviews.[107]

This interpretation merely maintains the status quo, serves neither the interests of justice nor patient privilege, and willfully thwarts congressional and presidential intent. Instead of ignoring the "constitutionally required" exception removal, the judiciary could interpret the changes by the letter of the new rule.

2. Military Rule of Evidence 513 is Absolute Outside of the Enumerated Exceptions

The judiciary could strictly interpret MRE 513 by its current text, essentially making it an absolute privilege for victim records. Other jurisdictions employ similar interpretations, finding there is no constitutionally required breach of the psychotherapist privilege.[108] The Supreme Court of Pennsylvania recognized the "clear mandate" of the state's statutory psychotherapist privilege and found it was not outweighed by the Confrontation or Due Process Clause rights.[109] The Colorado Supreme Court similarly upheld the state's privilege against a constitutionality challenge, concluding that only a patient's waiver permitted breaching the state's psychologist privilege for an in camera review.[110] Two Florida appellate courts[111] also determined that the Constitution did not require piercing the state's absolute privilege.[112]

This interpretation is unduly limited, leaving no room for judicial discretion in extreme cases, such as if the accused demonstrates that a victim is unable to distinguish fantasy from reality. While the new MRE 513 offers no framework for conducting in camera review in such cases, the third and best possible judicial interpretation of the new rule offers the judiciary a way to preserve the accused's right to a fair trial while complying with the new rule's requirements.

3. Judges May Bar a Witness's Testimony, Under Exceptional Circumstances, Unless the Witness Waives the Privilege for an in Camera Review

Eschewing the more restrictive interpretations above, the judiciary might instead follow the states that recognize that the psychotherapist privilege restricts access to mental health records, yet still conclude that, at times, the defendant's constitutional rights require at least an in camera review of mental health records.[113] These jurisdictions resolve the conflict by conducting a review only if the patient waives the privilege; if the witness refuses to grant the waiver, the courts suppress the witness's testimony.[114] If a judge determines that a review of privileged communications is required, this approach grants the witness

petition appellate courts for writs of mandamus if the victim believed their rights were violated. 2015 NDAA, *supra* note 7 at 3368.

[105] *See* Major Paul. M. Schimpf, *Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications between a Victim and Victim-Advocate in the Military*, 185 MIL. L. REV 149, 173 (2005) (classifying MRE 513, with its in camera review mechanism, as a "second-tier privilege" compared with lawyer-client, spousal, and clergy privileges).

[106] For example, the new MRE 513 offers far more protection than the privilege in *Ritchie*. *Compare* Manual for Courts-Martial; Proposed Amendments, 80 Fed. Reg. 6057, 6059 (Feb. 4, 2015) (permitting judicial review, production, and disclosure under an enumerated exception) *with* Pennsylvania v. Ritchie, 480 U.S. 39, 43 n.2 (1987) (making privileged materials available to "[a] court of competent jurisdiction pursuant to a court order"). Outside of the strictly limited privilege exceptions, the current MRE 513 is more analogous to an absolute privilege, to which *Ritchie's* rule explicitly did not extend. *Ritchie*, 480 U.S. at 57 n.14.

[107] MCM, *supra* note 3, MIL. R. EVID. 503.

[108] *See* Jennifer L. Hebert, *Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants*, 83 TEX. L. REV. 1453, 1466 (2005) (observing that five states have some form of a counselor-patient privilege which permits no release for court proceedings).

[109] Commonwealth v. Counterman, 719 A.2d 284, 295 (Pa. 1998).

[110] People v. Dist. Ct. of Denver, 719 P.2d 722, 727 (Colo. 1986).

[111] State v. Famiglietti, 817 So. 2d 901, 906 (Fla. Dist. Ct. App. 2002); State v. Roberson, 884 So. 2d 976, 980 (Fla. Dist. Ct. App. 2004).

[112] *But see* Fishman, *supra* note 12, at 23 (describing Florida appellate courts as divided).

[113] *See id.* at 18 (finding that Connecticut, Michigan, Nebraska, New Mexico, Wisconsin, and South Dakota use this approach).

[114] *See* State v. Shiffra, 499 N.W.2d 719, 724 (Wis. Ct. App. 1993) (finding that when the Constitution requires an in camera review of a witness's mental health records and the witness refuses to release her records, suppressing the witness's testimony is the only appropriate remedy), *abrogated on other grounds by* State v. Green, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298; State v. Peeler, 857 A.2d 808, 841 (Conn. 2004) (finding that once a defendant makes a preliminary showing that privileged records are necessary to impeach a witness, the state must either secure the patient's privilege waiver or the court will strike her testimony); People v. Stanaway, 521 N.W.2d 557, 562, 577 (Mich. 1994) (ruling that if a defendant establishes a "reasonable probability" that the records likely contain information necessary to defense and the patient does not waive her privilege, courts must suppress the patient's testimony).

the ability to prevent access to their records, yet preserves the defendant's constitutional rights.[115] Under such an interpretation, the judiciary empowers patients to retain confidentiality of their psychotherapist records even to the detriment of the criminal prosecution.[116]

It is logical for military courts to follow this interpretation, because Wisconsin, a state applying the psychotherapist privilege in this manner, served as the basis for the new changes to MRE 513.[117] The Wisconsin Supreme Court articulated that, to warrant an in camera review, a defendant must "set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant."[118] Like other jurisdictions of this type, Wisconsin courts only permit judicial review of privileged mental health records once the patient waives his or her privilege.[119] When a defendant's rights require in camera review and the patient declines to waive his or her privilege, the only "appropriate" remedy is suppression of the patient's testimony.[120]

When such situations arise, this interpretation essentially grants victims veto power over the criminal trial. Although some may find this an anathema to the military justice system, it merely continues the trend toward granting victims a greater voice in the process. Just as a victim may choose to file a restricted or unrestricted report of sexual assault[121] and choose to testify or not at an Article 32 preliminary hearing,[122] this privilege interpretation gives the victim authority in the trial process with regard to his or her privileged records.

Military judges should adopt this third interpretation of the new MRE 513 because it satisfies the competing interests of the accused and the patient, it does not undermine the 2015 NDAA by crafting a judicial "constitutionally required" exception, and it follows the Wisconsin interpretation which served as the inspiration for the MRE 513 changes. As articulated by the Nebraska Supreme Court, "this appears to be the only method by which both the right of the witness and the right of the defendant may be accommodated."[123]

C. Applying the Best Interpretation of MRE 513

If the military judiciary follows the Wisconsin interpretation of the MRE 513 changes, one question remains. What types of potential evidence necessitate a military judge barring a witness's testimony, absent privilege waiver for an in camera review? Clifford S. Fishman, professor of law at the Catholic University of America, found a limited number of possible reasons why judges presiding over rape and child abuse cases should pierce the psychotherapist privilege.[124] He determined that they fell into three specific categories: "Recantation or [o]ther [c]ontradictory [c]onduct[;] . . . [e]vidence of [b]ehavioral, [m]ental, or [e]motional [d]ifficulties[;] . . . [and] [c]omplainant's ability to [p]erceive, [r]emember, and [r]elate [e]vents . . . ."[125]

If the judiciary adopts the Wisconsin interpretation of the new MRE 513, it should only ask witnesses to waive their privilege for in camera reviews if there is a "reasonable likelihood" the privileged records contain evidence within one of these categories. Potential evidence of inconsistent statements should never satisfy this standard. As Fishman describes,

> On one point there appears to be a unanimous consensus. In sexual-assault and child abuse cases, there is general agreement that a defendant must do more than speculate that, because the complainant has participated in counseling or therapy after the alleged assault, the records in question might contain statements about the incident or incidents that are inconsistent with the complainant's testimony at trial.

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[115] *See Shiffra*, 499 N.W.2d at 724 (finding that when the Constitution requires an in camera review of a witness's mental health records and the witness refuses to release their records, suppressing the witness's testimony is the only appropriate remedy).

[116] *But see* Fishman, *supra* note 12, at 24 (arguing that this approach creates problems with limiting prosecutorial discretion, poor social policy, unworkable judicial administration, and under age witnesses).

[117] *See* JUDICIAL PROCEEDINGS PANEL, INITIAL REPORT 117 (Feb. 2015) (asserting that the 2015 NDAA incorporates the *Klemick* standard into MRE 513). As noted above, *Klemick* adopted the Wisconsin standard. United States v. Klemick, 65 M.J. 576, 579–80 (N-M. Ct. Crim. App. 2006) (citing *Green*, 2002 WI 68).

[118] *Green*, 2002 WI 68, ¶ 34.

[119] *See* State v. Solberg, 564 N.W.2d 775, 780 (Wis. 1997) (finding that even appellate courts must ensure a patient waived her privilege prior to conducting a review of the patient's psychological record).

[120] *See Shiffra*, 499 N.W.2d at 724 (finding that when the Constitution requires a court to review privileged mental health records but the patient refuses release, the only way to ensure the defendant's fair trial is to suppress the witness's testimony).

[121] U.S. DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES, enclosure 4, para. 1. (28 Mar. 2013). While the proposed interpretation at times allows suspects to avoid prosecution regardless of the government's intent, a restricted report results in the same outcome based solely on the victim's reporting preference. *Id.* Both restricted reports and the interpretation proposed here favor victim preference over the government's in certain circumstances.

[122] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, 954 (2013).

[123] State v. Trammell, 435 N.W.2d 197, 201 (Neb. 1989).

[124] Fishman, *supra* note 12, at 41.

[125] *Id.* at 41–45. Fishman also includes a fourth generic category of "Other Situations Involving Rape and Child Abuse Complaints." *Id.* at 46.

> Because this assertion can be plausibly made in every sexual-assault or child molestation case, if this was enough to trigger an in camera review, a court would be required to conduct the review in virtually every such case.[126]

When establishing the new MRE 513's scope, military courts should adopt Wisconsin's jurisprudence, coupled with Fishman's three categories. Doing so protects the victim by granting her access and control over her privileged mental health records. This interpretation protects the accused by offering the ability to prove an in camera review is necessary based on a reasonable likelihood the records contain evidence falling into one of Fishman's three categories. Once the accused meets the threshold, the victim will only testify if she allows an in camera review of her mental health records. The interpretation complies with the new MRE 513 requirements, improves the military justice system's protection of patient privilege, and ensures that the accused receives a fair trial.

VI. Conclusion

The military psychotherapist privilege is only meaningful if it offers significant protections, both from their production and capricious in camera reviews. The modifications to MRE 513 convey this intent by removing a commonly used privilege exception and creating a greater burden for parties seeking in camera review of mental health records.[127] Military judges now have the opportunity to protect privileged mental health records, while respecting the accused's constitutional rights, by adopting Wisconsin's approach to the psychotherapist privilege in conjunction with Fishman's three categories necessitating review of privileged communication.

Evaluating the SVC scenario from Part I illustrates the benefits of the proposed interpretation of the MRE 513 changes. Under the Wisconsin model for the privilege, the SVC can comfort the victim by explaining that there is a significant barrier preventing anyone from reviewing the client's records. Ordinarily, either the SVC or government counsel will represent the victim's position in any trial proceeding to contest production of the mental health records.[128] The attorney contesting mental health record production should focus on the policy justifications for the psychotherapist privilege articulated in *Jaffee*.[129] Further, the attorney should articulate that ordering an in camera review or production would result in victims being less forthcoming in counseling sessions, or even from seeking counseling at all. The overall result of an in camera review would result in less effective psychotherapist treatment, directly undermining the goal of the privilege.

Notwithstanding these arguments, if a judge determines a review of the records is required, an SVC must execute her responsibility to advise her client even when the victim's interest conflicts with the government's.[130] The victim, most likely unfamiliar with legal processes, must rely on insightful advice from her SVC to make an informed decision. Under the Wisconsin interpretation of the privilege, the victim may bar the in camera review, likely resulting in dismissal of the charges dependent upon the victim's testimony. Alternatively, the victim may determine that seeking justice outweighs her privacy interest in the privileged communication and allow the review. The victim holds the key to her privilege.

Although privileges "are not lightly created" and impede courts' truth seeking function,[131] they manifest the value legislatures and the judiciary, representing public interest, place on protecting some relationships from court intrusion. The psychotherapist-patient relationship requires "confidence and trust."[132] Adopting Wisconsin's privilege interpretation protects this trust by guarding against routine in camera reviews. Simultaneously, this interpretation protects an accused's right to a fair trial by allowing courts, under exceptional circumstances, to make a witness's testimony contingent upon privilege waiver for an in camera review. Adopting Wisconsin's privilege model, coupled with Fishman's categories of evidence requiring review, would increase protection of victims and enhance military justice.

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[126] *Id.* at 37–38 (footnote omitted). *See also* State v. Green, 646 N.W.2d 298, 311 (Wis. 2002) ("The mere assertion . . . that the sexual assault was discussed during counseling and that the counseling records may contain statements that are inconsistent with other reports is insufficient to compel an in camera review."); People v. Stanaway, 521 N.W.2d 557, 576 (Mich. 1994) ("The defendant overstates his case when he asserts that his right to discovery, confrontation, and effective cross-examination compels that he be granted an opportunity to discover any potentially exculpatory evidence.").

[127] 2015 NDAA, *supra* note 8, at 3369.

[128] *See* LRM v. Kastenberg, 72 M.J. 364, 372 (C.A.A.F. 2013) (finding that MRE 513 affords the victim the "right to a reasonable opportunity to be heard on factual and legal grounds"). *See also* 2015 NDAA, *supra* note 8, at 3368 (granting victims the right to petition criminal appeals courts for writs of mandamus to enforce MRE 513).

[129] In particular, the attorney should note the importance of psychotherapy in alleviating mental problems, that the therapy's effectiveness depends upon a trusting environment, and that any threat of disclosure or review harms the trust of the psychotherapist-patient relationship. Jaffee v. Redmond, 518 U.S. 1, 10–11 (1996).

[130] *See* Memorandum from The Judge Advocate General to Judge Advocate Legal Service Personnel, subject: Office of the Judge Advocate General Policy Memorandum #14-01, Special Victim Counsel (1 Nov. 2013) (establishing special victim counsels' "primary duty" to represent their client's interest, even if opposed to the government).

[131] United States v. Nixon, 418 U.S. 683, 710 (1974).

[132] *Jaffee*, 518 U.S. at 10.

A Primer on Key International Law Issues for the *Regionally Aligned* Legal Advisor

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I. Introduction

You are currently a Special Victim Prosecutor or the Senior Defense Counsel in one of the busiest jurisdictions in the Army—or maybe you are the Chief of Administrative Law at an Office of the Staff Judge Advocate with installation responsibility—or you are a Branch Chief at Litigation Division at Fort Belvoir. So, what is next? You know you are up for reassignment and you cannot help but think that your next stop will be in a military justice position, or maybe a shot at being a Deputy Staff Judge Advocate. Your cell phone rings. It is the field grade assignments officer from the Judge Advocate General's (JAG's) Corps Personnel, Plans, and Training Office calling about your next assignment. She says, "Congratulations, you are going to be a brigade judge advocate for a Regionally Aligned Brigade." Or perhaps you are a Reserve or National Guard judge advocate who is mobilizing to support this brigade. "Do not worry," you are told, "you will be perfect for the job, and get there early; they are deploying to the Horn of Africa in two months."

Are you ready? What do you know about Regionally Aligned Forces (RAF)? How should you start preparing for your next assignment? First, relax; you *are* a perfect fit for the job. Much of the expertise you have already developed as a judge advocate will serve you well while working in a regionally aligned unit.

The RAF concept represents a transition in the Army's strategic vision for how it employs its operational and tactical forces, and the implementation of RAF will give rise to unique, region-specific legal issues. Many of these issues are unique to international and operational law. Judge advocates at all levels, and in all types of assignments will need to be aware of the legal questions that the RAF focus presents. This article is a road map to assist you in preparing for those key international law issues that you will face as a judge advocate in a regionally aligned unit.

Certainly a judge advocate assigned to an RAF unit must be broadly skilled and competent within all JAG Corps's (JAGC's) core legal disciplines. However, this article focuses on the international legal issues that judge advocates involved in RAF missions will likely encounter. First, it begins with a brief introduction to RAF and the Army's strategic objectives for implementation of RAF. Second, this article discusses the various areas of practice commonly associated with international law, but applied through the aperture of na RAF environment. This includes a discussion about command relationships, international agreements, human rights, rules of engagement (ROE), security cooperation, and information sharing. Third, this article discusses the references and resources that you should become acquainted with prior to arriving at your next assignment. In the end, you should have a better understanding of the international legal proficiency expected of you at the tactical and operational levels in an RAF unit, and how RAF fits into the strategic vision for the Army.

II. The Background of RAF

> *By aligning unit headquarters and rotational units to combatant commands, and tailoring our combatant training centers and exercises to plan for their greatest contingencies, units will gain invaluable expertise and cultural awareness, and be prepared to meet the regional requirements more rapidly and effectively than ever before.*[1]

A. The RAF Concept

Regionally Aligned Forces are Army units that are either assigned to combatant commands (CCMDs) or are service retained but aligned to a specific CCMD.[2] Regionally Aligned Forces incorporate Army Total Force capabilities,

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[1] C. Todd Lopez, Army News Serv., *Future Army Forces Must Be Regionally Aligned, Odierno Says*, U.S. DEP'T OF DEF (Oct. 24, 2012), http://www.defense.gov/News/NewsArticle.aspx?ID=118316 (quoting General Ray Odierno) [hereinafter Lopez].

[2] HEADQUARTERS, DEP'T OF ARMY, FRAGMENTARY ORDER 2 TO EXECUTION ORDER 052-13 IN SUPPORT OF REGIONALLY ALIGNED FORCES (RAF) para. 1.C.2.A (29 July 2015) [hereinafter FRAGO 2].

giving combatant commanders (CCDRs) "scalable, tailorable capabilities"[3] that are trained and developed to meet regional and global mission requirements. This is a fundamental change to how the Army has organized, trained, and equipped itself for the needs of the operational CCMDs. This fundamental change will require Soldiers to develop a comprehensive understanding of the cultures and parts of the world to which they are aligned.[4]

The RAF concept also represents "a critical first step in operationalizing 'Strategic Landpower,' which is the combination of land, human, and cyber activities that make decisive outcomes more likely and increases options for preventing and containing conflict."[5] This strategic shift in how the Army conceptualizes the employment of ground forces in support of global events in the land, human, and cyber domains is consistent with current national security objectives and strategic guidance issued by the President and the Secretary of Defense.[6] For example, the RAF concept is ideally suited to *build global security*, one of three current defense strategic pillars, which is accomplished through forward or deployed forces that provide presence and conduct training, exercises, and other forms of military-to-military activities in support of U.S. national security interests.[7]

The successful implementation of the RAF concept achieves U.S. national security objectives by: bolstering partner nation capacity, securing U.S. global access and power projection capability, fostering interagency integration, and ensuring our forces better understand the human domain where they operate.[8] In keeping with those objectives, RAF are both integral to the Army vision of being "Globally Responsive and Regionally Engaged," and to the Army's ability to "Prevent, Shape, and Win" our nations wars.[9] How exactly will the RAF concept be implemented? The remainder of this section focuses on RAF implementation by taking a closer look at the RAF authorities, missions, and forces.

B. RAF Authorities

To fully grasp the RAF concept, it is imperative that you take time to review the source documents ordering RAF into execution, specifically Headquarters, Department of the Army (HQDA), Execution Order (EXORD) 052-13 in support of (ISO) Regionally Aligned Forces (RAF) (RAF EXORD) and its attendant annexes, appendices, and Fragmentary Orders (FRAGOs).[10] In the RAF EXORD and all that flows from it, HQDA explains that "the RAF concept provides a way to resource CCMD requirements in a more flexible and agile way."[11]

The EXORD, however, does not create or confer the authority to deploy or employ Army forces in support of combatant command missions or operations.[12] Instead, that authority must be found elsewhere. Annex AA to FRAGO 01 of the RAF EXORD is a good place to start.[13] The specific procedures of that annex will not be covered in detail here, but it is important to note at the outset that RAF and missions must be authorized under preexisting legal authorities and Department of Defense (DoD) directives.[14] To assist in comprehending those authorities and directives, the next two sections provide a brief overview of how forces are to be provided to CCMDs and what missions RAF are expected to support short of combat operations.

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[3] *Id*.

[4] Todd Lopez, Army News Serv., *Odierno: Those who doubt relevance of ground forces naïve*, U.S. ARMY (Oct. 23, 2013) http://www.army.mil/article/113730/Odierno__Those_who_doubt_relevance_of_ground_forces_na__ve/.

[5] Kimberly Field, James Learmont, and James Charland, *US Landpower in Regional Focus, Regionally Aligned Forces: Business Not as Usual*, U.S. ARMY WAR C. Q. PARAMETERS, 55 (Autumn 2013).

[6] *See id*; *see also* Lopez, *supra* note 1 ("Also bolstering the Army's expertise within the human dimension is the interaction that Soldiers have with allied militaries as part of the Army's regionally aligned forces concept."); Rosa Brooks, *Portrait of the Army as a Work in Progress*, FOREIGN POL. (May 8, 2014), http://foreignpolicy.com/2014/05/08/portrait-of-the-army-as-a-work-in-progress/ (citing General Odierno's interview and his explanation regarding the Army's future and RAF); Colonel Kristian M. Marks, *Enabling Theater Security Cooperation Through Regionally Aligned Forces*, U.S. ARMY WAR C. STRATEGY RES. PROJECT (2013) (providing an in-depth explanation regarding the Army's shift to the Regionally Aligned Force concept in order to meet future global requirements); BARACK OBAMA, NATIONAL SECURITY STRATEGY 7 (2015) ("Our military is postured globally to protect our citizens and interests, preserve regional stability, render humanitarian assistance and disaster relief, and build the capacity of our partners to join with us in meeting security challenges."); U.S. DEP'T OF DEF., QUADRENNIAL DEF. REV. 12 (2014) ("Continuing a strong U.S. commitment to shaping world events is essential to deter and prevent conflict and to assure our allies and partners of our commitment to our shared security. This global engagement is fundamental to U.S. leadership and influence.").

[7] DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW 16 (2014).

[8] Kimberly Field et al., *supra* note 5, at 56-57; *see also* Marks, *supra* note 6; *see also* Brooks, *supra* note 6 (referencing General Odierno's comments at the 2013 annual meeting of the Association of the United States Army stressing the importance of understanding the human domain).

[9] Marks, *supra* note 6.

[10] *See* HEADQUARTERS, DEP'T OF ARMY, EXECUTION ORDER 052-13 IN SUPPORT OF REGIONALLY ALIGNED FORCES (27 Dec. 2012) [hereinafter RAF EXORD]; HEADQUARTERS, DEP'T OF ARMY FRAGMENTARY ORDER 1 TO EXECUTION ORDER 052-13 IN SUPPORT OF REGIONALLY ALIGNED FORCES annex AA (17 Oct. 2013) [hereinafter FRAGO 1]; FRAGO 2, *supra* note 2.

[11] RAF EXORD, *supra* note 10, at 1.B.2.A.

[12] *Id*. at 1.C.1.A.

[13] This annex and its appendices (there are two) specifically address the RAF authorities for *deployment* and *employment* of RAF and the specific "business rules" for providing forces to Combatant Commands (CCMDs) in order to accomplish RAF missions under existing law and directives. FRAGO 1, *supra* note 10, at Annex AA.

[14] For an overview of general U.S. *statutory* authorities that relate to implementing RAF, *see* COLONEL ROBERT J. DESOUSA & COLONEL SCOTT J. BERTINETTI, RAF AND AUTHORITIES (Carlisle Compendia 2015).

C. RAF Units

The RAF concept provides CCDRs with "tailored, trained, responsive, and consistently available Army forces."[15] Traditionally, those forces have been provided in one of two ways—they were either *assigned* or *allocated* to the CCMDs. Now, RAF units may be assigned, allocated, or *unassigned service retained CCMD aligned*.[16] The difference between a command relationship that is "assigned" versus "allocated" versus "service retained, combatant command aligned" is based on the administrative and operational structure of the armed forces created by the *Goldwater-Nichols Act* itself.[17]

Assigned forces are directly under combatant command authority by direction of the Secretary of Defense (SECDEF) as provided in the "Forces for Unified Commands" memorandum and Section II of the Global Force Management Implementation Guidance (GFMIG). These forces are available while assigned for the range of military operations (ROMO) to include peacetime operations.[18] Allocated forces are provided to a CCMD for an assigned mission. Therefore, the CCDR is limited to employing allocated forces for purposes directed by the SECDEF or the President for that mission.[19] Service Retained, CCMD Aligned (SRCA) units are those forces unassigned to a CCMD, but aligned as directed by the Secretary of the Army (SECARMY) for purposes of planning and training with a CCMD.[20] This relationship is for a designated period of time as directed by the Army Force Provider's alignment order and allows for direct liaison with the CCMD. The key distinction with this designation is that it does not bestow command authority upon the CCDR.[21]

Finally, the RAF concept emphasizes that successful implementation can be done only with the Army's "Total Force," meaning its active *and* reserve components.[22] This is key to the success of RAF as it is implemented simultaneously with troop end strength reductions.[23] Reserve component forces can work into the RAF concept in two ways: first, by augmenting and integrating with regionally aligned active component forces; and second, by conducting their own regionally aligned training, exchanges, and operations, such as the National Guard State Partnership Program. Reserve component Soldiers, furthermore, often possess key advantages and specialties in areas of civilian expertise that can be important to RAF engagement.

In addition to total force integration, units must be committed to understanding the cultures, geography, languages, and militaries of the countries where they are most likely to be employed while maintaining readiness to respond globally.[24] Therefore, in order to meet mission requirements under RAF, Army forces will "conduct necessary [Language, Regional Expertise, and Culture (LREC)] training to meet combatant command requirements."[25] In other words, units may need to engage in more robust training to develop awareness and knowledge of the region to which they may be aligned.

D. RAF Missions

Notably, RAF units must be prepared to conduct a number of military operations, doctrinally referred to as a ROMO.[26] Conducted over the conflict continuum, the ROMO is categorized into three areas in which the United States utilizes the joint force as an instrument of national power. They are "Military Engagement, Security Cooperation, and Deterrence," "Crisis Response and Limited Contingency Operations," and "Major Operations and Campaigns."[27]

Our Nation's militaries conduct the ROMO through "unified action." Unified action is the synchronized, coordinated, and, when appropriate, integrated U.S. military operations with intergovernmental agencies, multinational partners, and non-government organizations in order to establish unity of effort for achieving U.S. strategic goals. Unified Action is conducted in accordance with domestic and international law, governed by U.S. government policy, and shaped by national interests.[28]

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[15] U.S. DEP'T OF ARMY, ASSESSMENT ON REGIONALLY ALIGNED FORCES, REPORT TO CONGRESS 2015, 2.

[16] FRAGO 2, *supra* note 2, at 1.C.2.A, 1.C.4.E.; *see also* FRAGO 1, *supra* note 10, at AA-3.

[17] 10 U.S.C. § 161 (1986).

[18] FRAGO 1, *supra* note 10, at AA-3.

[19] *Id.*

[20] FRAGO 2, *supra* note 2, at 1.C.2.E.2.

[21] FRAGO 1, *supra* note 10, at AA-3.

[22] FRAGO 1, *supra* note 10, at 0-6; *see also* Brooks, *supra* note 6 (referencing an interview with Colonel James Learmont, a British Army exchange officer assigned as lead to the Stability Support Division of the Strategy, Plans, and Policy Directorate of the Office of the Deputy CoS, G-3/5/7); *see also* FRAGO 2, *supra* note 2, at 3.A.1.B.

[23] Statement by The Honorable John M. McHugh, Secretary of the Army, and General Raymond T. Odierno, Chief of Staff United States Army, Before the Committee on Armed Services, U.S. Senate, Second Session, 113th Congress, On the Posture of the United States Army, April 3, 2014 (Record Version); *see also* David Vergun, *Regionally Aligned Forces Continue to Organize Despite Budget Uncertainties*, ARMY.MIL (Oct. 23, 2013), http://www.army.mil/article/113660/Regionally_aligned_foces_ continue_to_ orgainize_ despite_budget_uncertainties/.

[24] RAF EXORD, *supra* note 10, at 5.

[25] FRAGO 1, *supra* note 10, at 0-7.

[26] FRAGO 2, *supra* note 2, at 1.B.3.A., 1.C.3.E; FRAGO 1, *supra* note 10, at 0-4; JOINT CHIEFS OF STAFF, JOINT PUBLICATION, 3-0, JOINT OPERATIONS, at 11 (August 2011)

[27] JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS *x*, I-5 (11 Aug. 2011) [hereinafter JOINT PUB. 3-0].

[28] *Id.* at *x*, I-8; *see also* FRAGO 2, *supra* note 2, at 3.C.1.

The RAF concept synchronizes the Army's efforts to conduct contingency operations along with the national defense strategic objective to build partner-nation capacity through security cooperation.[29] Security cooperation encompasses all DoD activities conducted with foreign nations—particularly with defense establishments—with the purpose of promoting U.S. national security and partner-nation military capacity, securing access for peacetime operations, and, if necessary, guaranteeing capabilities for projecting national power in contingency operations.[30] Security cooperation includes a wide range of activities such as military-to-military contacts, global "train and equip" priorities, combined exercises, international military education and training, humanitarian assistance, security assistance, and international armaments cooperation.[31] The Army has also issued recent strategic guidance emphasizing engagement with partner-nation military forces, institutions, and populations, as central to the Army's security cooperation mission to "prevent, shape, and win."[32] A regionally aligned judge advocate could be involved in security cooperation from a wide range of perspectives, such as: issues involving legal and fiscal authorities for military operations, questions involving all core competencies in a deployed environment, and direct participation through legal engagements.[33] As with all of the various missions described in this part, a judge advocate will need to be prepared for a widest possible array of legal activities and issues when working in an RAF environment.

III. International Agreements and RAF

Regardless of the type of RAF mission, international agreements[34] (IAs) will likely govern critical deployment functions such as: entry of forces, jurisdiction waivers, freedom of movement, customs, claims, and transfer of logistics. An agreement may also grant your brigade the authority to carry weapons, use radio frequencies, drive on roads, or occupy facilities.

As a regionally aligned brigade judge advocate you must (1) understand the basic framework of international and domestic treaty law; (2) research and identify the existing agreements between the United States and each country in your area of responsibility; (3) understand common international agreement provisions to ensure compliance during the entire ROMO; (4) know who holds the authority to negotiate, conclude, amend, or terminate an agreement; and (5) be prepared to assist in drafting a request for authority to negotiate, conclude, amend, or terminate an agreement ISO the mission.

A. International and Domestic Treaty Law

Treaties are a main source of international law. Unlike customary international law, treaties only bind the parties to that agreement. Under domestic law, the United States divides international agreements into two general categories: "treaties," and "international agreements other than treaties." International agreements other than treaties may enter into force upon signature and do not require the advice and consent of the Senate.[35]

B. Researching International Agreements

Locating IAs for each country in the region is a challenge. It is recommended that you use the following unclassified sources to populate your database.

Federal law requires the Department of State to annually publish a document entitled Treaties in Force (TIF).[36] Once you identify the agreement in TIF, use the Treaties and Other International Agreements Series (TIAS) to access the

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[29] FRAGO 1, *supra* note 10, at Annex Y, Appendix 2; FRAGO 2, *supra* note 2, at 3.C.1.

[30] FRAGO 1, *supra* note 10, at AA-4; *see also* U.S. DEP'T OF DEF., DIR. 5132.03, DEPARTMENT OF DEFENSE POLICY AND RESPONSIBILITY RELATING TO SECURITY COOPERATION (24 Oct. 2008) [hereinafter DODD 5132.03]; U.S. DEP'T OF ARMY, REG. 11-31, ARMY SECURITY COOPERATION POLICY para. 1-1 (21 Mar. 2013) [hereinafter AR 11-31].

[31] FRAGO 1, *supra* note 10, at AA-4. One subset of security cooperation, security assistance, represents the programs through which the U.S. government provides military material, training, and other services to other countries in furtherance of U.S. national security goals.

[32] ARMY STRATEGIC GUIDANCE FOR SECURITY COOPERATION: AN ENDURING MISSION FOR "PREVENT, SHAPE, WIN" (2014).

[33] *See infra* Part VI.

[34] International agreements may take the form of a memorandum of understanding or memorandum of agreement, an exchange of letters, an exchange of diplomatic notes ("Dip Notes"), a technical arrangement, a protocol, a *note verbale*, an *aide memoire*, etc. The title or form of the agreement is of little consequence. Forms that usually are not regarded as international agreements include contracts made under the Federal Acquisition Regulation (FAR), credit arrangements, standardization agreements (STANAGs), leases, agreements solely to establish administrative procedures, and Foreign Military Sales (FMS) letters of offer and acceptance.

[35] U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, vol. 11, ch. 720, (Sept. 25, 2006) [hereinafter FOREIGN AFFAIRS MANUAL]. The executive branch has the constitutional authority to enter into executive agreements because an existing treaty authorizes the agreement, legislation authorizes the agreement, or the agreement falls under the President's constitutional authority.

[36] *Treaties in Force*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/treaty/tif/index.htm (last visited Apr. 16, 2015); 1 U.S.C. § 112a (2004). The Treaties in Force (TIF) lists agreements by country in alphabetical order. Usually the TIF will include citations to the United States Treaties and Other International Agreements (UST), the Treaties and Other International Agreements (TIAS) Series, or the United Nations Treaty Series (UNTS). A lack of a citation in the TIF indicates that the agreement is not yet published in one of the treaty series. An "NP" citation indicates that the Department of State made a decision to not publish that particular agreement.

agreement.[37] The TIF and TIAS are unclassified series. Consequently, while TIF and the TIAS are a good place to start, they often fail to offer a complete solution for your developing database.

The Army Judge Advocate General's International and Operational Law Division (IOLD) manages an online document library that contains many unclassified IAs.[38] You may also find multinational agreements elsewhere on the Internet, such as on the United Nations or North Atlantic Treaty Organization (NATO) websites. Judge advocates assigned in NATO positions are also a potential resource, as they can access NATO's legal research database (account required). Finally, you should round out your research by working through your technical chain of judge advocates. The service and CCMD Office of the Staff Judge Advocate maintain the most comprehensive database of agreements (typically on the secure Secret Internet Protocol Router Network (SIPRNet)) for countries within their areas of responsibility.

C. Compliance with Existing International Agreements

1. Criminal Jurisdiction

Under international law, a State has jurisdiction over all persons found within its borders unless that State consents to a derogation of that sovereign right.[39] Beyond a complete waiver of jurisdiction, there are four common arrangements. First, receiving states may grant status protections equivalent to those afforded to the administrative and technical staff (A&T Status) of the U.S. Embassy.[40] Second, an agreement may create a shared jurisdiction arrangement.[41] Third, some nations extend status protections to visiting forces through domestic statutes commonly called Visiting Forces Acts.[42] Finally, if your unit is deploying to a country without status protections, it is completely subject to the host nation's jurisdiction. Your research should include country law studies to identify unique offenses in the receiving state's domestic code. Remember, a lack of status protections is a planning factor for your commander but not necessarily a legal objection.[43]

2. Claim Waivers

As with any deployment, you naturally can anticipate that your unit will break or destroy items. Absent an agreement to the contrary (or a combat claims exclusion), the United States will usually pay for damages caused by its forces. Prior to deployments, judge advocates should check to see if the State waived the privilege to file a claim or agreed to pay third party claims caused by U.S. forces in the performance of official duties.

3. Force Protection

A sovereign is responsible for the security of persons within its territory. This does not, however, relieve the U.S. commander of his or her responsibility for the safety of the unit. As part of predeployment preparation, you should review the applicable rules of engagement and the international agreement for force protection terms.

4. Entry and Exit Waivers

States typically require foreigners to present passports and visas to enter into its territory. Processing passport and visa applications for your entire unit will have a significant impact on your commander's operational flexibility. As part of your initial research, you should identify whether the receiving state authorizes U.S. personnel to enter and exit its territory with military identification cards and orders (or other expedited procedures).

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[37] *Texts of International Agreements to which the US is a Party*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/treaty/tias/index.htm (last visited Apr. 16, 2015).

[38] *International & Operational Law Library*, JAGCNET, https://www.jagcnet2.army.mil/Sites/io.nsf/homeLibrary.xsp (last visited Apr. 16, 2015).

[39] U.S. forces are generally subject to exclusive U.S. jurisdiction during a combat deployment. At the termination of combat activities, however, the primary right to exercise criminal jurisdiction will revert to the receiving state or fall under another jurisdictional structure pursuant to a negotiated agreement.

[40] Vienna Convention on Diplomatic Relations, art. 37, Apr. 18, 1961, 23 UST 3227, 500 U.N.T.S. 95. Under administrative and technical staff status, the United States exercises exclusive criminal and civil jurisdiction for acts committed within the scope of duty.

[41] Under a shared jurisdiction scheme, conduct that constitutes an offense under the law of the receiving state, but not the sending state, is exclusively within the jurisdiction of the receiving state. For example, dereliction of duty is an offense under the Uniform Code of Military Justice (UCMJ), but not under German law, so exclusive jurisdiction rests with the United States for that offense. For conduct that constitutes an offense under the laws of both the receiving and sending states, there is concurrent jurisdiction and primary jurisdiction is assigned to one party. The sending state usually has primary jurisdiction when the sending state or individual is the victim or the conduct is committed in the performance of official duty. For example, if a U.S. Soldier assaults another U.S. Soldier, it violates both U.S. and German law, but primary jurisdiction rests with the United States because the victim is from the sending state. In all other cases, primary jurisdiction rests with the receiving state unless waived. *See* NORTH ATLANTIC TREATY ORGANIZATION, Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, http://www.nato.int/cps/en/natohq/official_texts_17265.htm.

[42] Although not an international agreement, judge advocates should acquire a translated copy of the Visiting Forces Act to understand host nation law.

[43] Travel into a country without status protections may require combatant command (COCOM)-level approval. If U.S. military personnel are subjected to foreign criminal jurisdiction, the United States must take steps to ensure that the service member receives a fair trial. *See* U.S. DEP'T OF DEF., DIR. 5525.1, STATUS OF FORCES POLICY AND INFORMATION (21 Nov. 2003) and implementing service regulations.

5. Customs and Taxes

While U.S. forces must pay for goods and services requested and received, sovereigns generally do not tax other sovereigns. Receiving states normally exempt U.S. forces from paying customs, duties, and taxes on goods and services imported to or acquired in the territory of the receiving state for official use. A friction point occurs when the receiving State charges U.S. forces a "processing fee," for example, instead of taxes or duties.

6. Contracting

States often consent through agreements for U.S. forces to locally contract for supplies and services that are not available from the host nation government. This provision does not alter or obviate other U.S. fiscal and contracting requirements.

7. Insurance, Vehicle Registration, and Drivers' Licenses

Status of Forces Agreements (SOFAs) typically exempt the United States from acquiring third party liability insurance. The U.S. government is "self-insured"; the Federal Torts Claims Act provides specific authority to pay claims for damages.[44] Many countries also waive the requirement for the U.S. to register its vehicles. Finally, States may utilize agreements to authorize U.S. personnel to drive official U.S. vehicles with U.S. drivers' licenses, or to issue licenses based solely on the possession of a valid U.S. license.

8. Communications Support

Absent an agreement to the contrary, host-nation law will govern your commander's use of frequencies within the electromagnetic spectrum. This includes not only tactical communications but also commercial radio and television airwaves.

While deploying judge advocates will most frequently reference SOFAs, or other agreements establishing jurisdictional protections, you should also become familiar with agreements governing logistics support, pre-positioning equipment, acquisition and cross servicing,[45] personnel exchange programs, and defense assistance programs.

D. Authority to Negotiate, Conclude, Amend, or Terminate an Agreement

The DoD's authority to negotiate or conclude international agreements is delegated from the President's executive power or provided by Congress through legislation.[46] The SECDEF delegated the authority to negotiate agreements that are predominately the concern of a single service to each service secretary, and agreements concerning the operational command of joint forces to the Chairman, Joint Chiefs of Staff (CJCS).[47] The DoD strictly prohibits personnel from negotiating or concluding an IA without written approval. It is essential for judge advocates to know what constitutes the "negotiation" or "conclusion" of an IA to help commanders and staff avoid inadvertent action without first obtaining the proper authority.[48]

E. Seeking Authority: The Circular 175 Procedure

There is a specific procedure for requesting authority to negotiate, amend, conclude, or terminate an IA. This is known as the "Circular 175" procedure.[49] The request, sent

[44] 28 U.S.C. § 1346(b) (2013); 28 U.S.C. § 2671 (2000).

[45] 10 U.S.C. §§ 2341-2350 (2006). United States forces and those of an eligible country may provide logistics support, supplies, and services on a reciprocal basis. Such support, supplies, and services are reimbursed through: replacement in kind; trade of support, supplies, or services of equal value; or cash. Units cannot use Acquisition Cross-Service Agreement (ACSAs) as a substitute for normal sources of supply, or as a substitute for foreign military sales procedures. For additional guidance, *see* U.S. DEP'T OF DEF., DIR. 2010.9, ACQUISITION AND CROSS-SERVICING AGREEMENTS (24 Nov. 2003); INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK ch. 14 (2014) [hereinafter OPERATIONAL LAW HANDBOOK].

[46] For example, Exchange of Training and Related Support authorizes the President to "provide training and related support to military and civilian defense personnel of a friendly foreign country or an international organization" and goes on to require an international agreement to implement the support. In Executive Order 13637, the President delegated his agreement authority under 22 U.S.C. § 2770a (1985) to the Secretary of Defense (SECDEF). Exec. Order No. 13637, 78 Fed. Reg. 16, 127 (Mar. 8, 2013); 10 U.S.C. § 2342 (2006). Thus, SECDEF is authorized to enter into certain agreements with specified countries for logistics support, supplies, and services.

[47] U.S. DEP'T OF DEF., DIR. 5530.3, INTERNATIONAL AGREEMENTS para. 8.2, 8.4 (11 June 1987) [hereinafter DODD 5530.3]; CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 2300.01D, INTERNATIONAL AGREEMENTS (5 Oct. 2007). The Chairman of the Joint Chiefs of Staff (CJCS) delegated authority to the Combatant Commanders (CCDRs). Judge advocates should review combatant command (CCMD) and service regulations pertaining to international agreements.

[48] DODD 5530.3, *supra* note 47, at para. 8.2, 8.4. The term "negotiation" does not include preliminary or exploratory discussions, or routine meetings where no draft documents are discussed, so long as such discussions or meetings are conducted with the understanding that the views communicated do not and shall not bind or commit any side, legally or otherwise. *Id.*

[49] U.S. DEP'T OF STATE, CIRCULAR NO. 175 (13 Dec. 1955). This document governed the process for concluding international agreements that bind the United States. "Circular 175" or "C175" refers to the State Department's procedures for prior coordination and approval of treaties and other international agreements. Although codified at 22 C.F.R. § 181.4 (2006) and directed in the Foreign Affairs Manual, Volume 11, Chapter 720, the "C175" reference remains as the descriptor for those procedures. *See* Circular 175 Procedure, U.S. DEP'T OF STATE, http://www.state.gov/s/l/treaty/faqs/70132.htm (last visited Apr. 16, 2015).

through the chain of command to the Undersecretary of Defense for Policy, must include a draft of the proposed agreement, a legal memorandum, and a fiscal memorandum.[50] The legal memorandum must trace the constitutional or statutory authority to execute each of the proposed obligations and address any other legal considerations.[51] It is highly unlikely that this authority will be granted at the brigade level. Regionally aligned brigade judge advocates are advised to raise any request for international agreements with the ASCC.

IV. Human Rights Law and RAF Operations

International human rights law (IHRL) plays an increasingly significant role in legal support to RAF operations. Therefore, RAF judge advocates can help maximize their value to the command by understanding several key IHRL-related issues. First, IHRL-related U.S. Leahy vetting legislation affects whether or not the DoD will fund RAF assistance to foreign forces. Second, many foreign forces are bound by multiple human rights treaties, and U.S. judge advocates are often required to teach these treaty obligations to partnered forces. Finally, human rights treaty obligations may restrict partnered forces' military operations. In sum, RAF judge advocates should understand those restrictions and their potential effects on U.S. interoperability missions.

A. Fiscal Impacts of IHRL ("Leahy Vetting")

Before a regionally aligned force may provide training, equipment, or assistance to foreign forces in their respective regions, federal law requires that the recipient forces be vetted in order to ensure they have not committed "gross violations of human rights."[52] This vetting requirement is commonly referred to as Leahy vetting. The DoD published implementation guidance for this statutory requirement in August 2014.[53] The Department of State—not the RAF—accomplishes the foreign force vetting. Normally, the Office of Security Cooperation (OSC) is responsible for training and working with the appropriate U.S. embassy for vetting. However, if your unit is initiating the training or support, plan on additional liaison work in order to ensure that any required vetting is accomplished on time.[54] Although Leahy vetting issues are largely fiscal in nature, in practice, the operational law attorney—not the contract/fiscal attorney—often carries the majority of the associated workload.

B. Professor of RAF—Teaching International Human Rights Law

Foreign forces training with RAF are often signatories to regional human rights treaty obligations, some of which the United States has not signed or ratified.[55] Consequently, RAF judge advocates must not only be aware of these regional treaty obligations, but also be prepared to teach them to partnered forces. In addition to the specific provisions within these treaties, RAF judge advocates should also be prepared to teach the distinctions between IHRL and the law of armed conflict (LOAC) and how the two bodies of law interact with each other.[56]

When your unit is scheduled to conduct training in a designated region, confirm what legal training will be required of the RAF. Then reach out to the appropriate combatant command (CCMD) legal office through proper channels (e.g., for Africa-based unit training, contact the United States Africa Command (USAFRICOM) Legal Engagements section, via United States Army Africa, and the Defense Institute for International Legal Studies (DIILS)). Next, ask if those organizations have trained recently in that country and, if so, what they briefed. Finally, if possible, arrange a meeting with the local foreign forces legal advisor (if any) prior to the start of the training or operation in order to discuss IHRL-related trends and issues within the partner unit.

C. The Indirect Effects of Regional IHRL Obligations

Regional international human rights treaty provisions can restrict partner forces' military operations, which can in turn

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[50] When Under Secretary of Defense for Policy (USD(P)) does not have the blanket authority to negotiate and conclude an agreement, the Department of Defense (DoD) will submit a Circular 175 packet to the Department of State, Treaties Affairs Office, in accordance with the procedures set forth in the Foreign Affairs Manual, Volume 11, Chapter 720.

[51] DODD 5530.3, *supra* note 48, para. 9.3.

[52] *See* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, §1204, 128 Stat. 3292, 3530 (2014). Section 1206 of the same bill contains a limited authority to provide human rights training to foreign forces that would otherwise be prohibited from receiving U.S. training; 10 U.S.C. §2282 (2015). *See also* OPERATIONAL LAW HANDBOOK, *supra* note 45, at 55, 228.

[53] *See* Memorandum from The Secretary of Defense, subject: Implementation of Section 8057 DoD Appropriations Act, 2014, (18 Aug. 2014). This is a helpful document that addresses statutory definitions, exceptions, etc.

[54] As an RAF comes up with ideas for operations in their region, "little t" training often turns out to be the most timely, and overall best, fiscal route to take. Scoping operational plans such that they fit within the confines of "safety, interoperability, and familiarization" that is low cost and does not significantly increase capacity of foreign forces helps qualify for "little t" status. The more complex "Big T" training may require months in order to secure funding. *See* OPERATIONAL LAW HANDBOOK, *supra* note 47, at 236.

[55] The three primary regional international human rights law (IHRL) treaties are: The European Convention on Human Rights (http://www.echr.coe.int/Documents/Convention_ENG.pdf), the African Charter on Human and Peoples' Rights (http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf), and the Inter-American Charter on Human Rights (https://www.oas.org/dil/access_to_information_American_Convention_on_Human_Rights.pdf).

[56] OPERATIONAL LAW HANDBOOK, *supra* note 45, at 52-54.

indirectly affect U.S. military operations—particularly during contingency operations. The RAF judge advocates who understand their partner nation's regional human rights obligations can help ensure that their own command understands how the partnered nation's IHRL obligations can indirectly affect U.S. operations and then plan accordingly. For example, if a partner force's regional IHRL treaty obligations prevent them from conducting detainee operations under the LOAC principles and policies under which U.S. forces operate, the RAF command needs to know that in order to properly plan interoperability missions. Finally, it is important that pre-deployment legal training include clear guidance on how members of the unit are required to report potential IHRL violations.

Without a doubt, IHRL impacts RAF operations. An awareness of the considerations and suggestions discussed above can help the RAF judge advocate provide solid legal support and contribute to the RAF being a "regionally engaged and globally responsive" force.[57]

V. Rules of Engagement

If your RAF unit receives notice to conduct a security cooperation "shaping" mission, one area you may overlook is the ROE. Although not as complex as ROE for decisive action, you still need to consider both the use of force in self-defense while deployed OCONUS, and, depending on the mission, the ROE training and development you will conduct with partner nations. For example, what force are Soldiers authorized to use to defend weapon systems, vehicles and aircraft, or ammunition, whether static or in a convoy, in the host nation? Can your unit detain civilians in self-defense? How will your unit conduct training with a nation that cannot or will not participate in certain types of operations or use certain weapon systems? The purpose of this section is to discuss ROE development, training, and implementation for RAF shaping missions.

A. What ROE Apply to Your Mission?

The ROE facilitate planning and execution of operations by providing direction on circumstances and limitations under which the U.S. military uses force during operations.[58] In the RAF operating environment during shaping missions, it is especially critical that Soldiers understand when they are legally permitted to use force, and their commander's intent for when they should use force in a given situation.[59] The first step is to determine which ROE apply to the assigned mission. At a minimum, the Standing ROE (SROE) apply outside of U.S. territory to all military operations and contingencies.[60] It is likely that the geographic CCMD with whom you are regionally aligned has established theater-specific ROE,[61] and it is possible that the SECDEF has authorized ROE for your mission through an Executive Order (EXORD).[62] At a minimum, your unit must address the concept and parameters for unit and individual self-defense in a shaping operational environment. Therefore, it is essential to any noncombat operation to evaluate how to implement, where appropriate, escalation of force (EOF) procedures in order to emphasize de-escalation of force during these operations.[63] Another area to investigate is agreements with the host nation. It is likely that such an agreement will control your unit's ability to carry and use weapons in performance of your unit's mission.[64] After determining the applicable ROE—even if that is only the SROE—you must next determine how the ROE will apply to your specific mission.

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[57] RAF EXORD, *supra* note 10, at 2, 3, 9. *See also* Kimberly Field et al., *supra* note 5, at 56.

[58] JOINT CHIEFS OF STAFF, JOINT PUB.1-02, DEP'T OF DEF. DICTIONARY OF MILITARY & ASSOCIATED TERMS 213 (15 Mar. 15) (defining rules of engagement).

[59] Colonel Peter Newell & Major Joe Ratermann, *Rules of Engagement Training: Internalizing the Commander's Intent*, COMBAT TRAINING CTR. BULL. 11 (July, 22 2008), https://call2.army.mil/toc.aspx?document=4170&tag=108 [hereinafter *ROE Training: Internalizing the Commander's Intent*]. This article provides a valuable overview of the importance of the integration of the commander's intent into Rules of Engagement (ROE) training.

[60] CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES (13 June 2005) [hereinafter CJCSI 3121.01B]. CJCSI 3121.01B is classified SECRET, but many of the most important policy provisions and definitions are UNCLASSIFIED and are found in the OPERATIONAL LAW HANDBOOK at Chapter 5.

[61] *Id.* at 4; Operational Law Handbook, *supra* note 47, at 82. Most, if not all, of the geographic combatant commands maintain their own theater-specific ROE. Accessing this ROE will require access to a Secret Internet Protocol Router Network (SIPRNet).

[62] *See* CJCSI 3121.01B, *supra* note 60. Notably, Executive Orders are often classified SECRET as well.

[63] CJCSI 3121.01B, *supra* note 60 at 2, I-1 ("When time and circumstances permit, the forces committing hostile acts or demonstrating hostile intent should be warned and given the opportunity to withdraw or cease threatening actions."). While U.S. forces do not have to de-escalate the situation when force is used against them, RAF missions are conducted in peaceful, permissive environments where the nature of the threat likely dictates less aggressive responses in self-defense. Traditionally, Escalation of Force (EOF) procedures served to "help with the proportional application of force in self-defense situations . . . . [T]he basic idea is simple—to increase the magnitude of force applied to an identified threat until the threat is deterred or, if necessary, eliminated . . . . [Escalation of Force] was envisioned to be used in times where there was no actual enemy." Lieutenant Colonel Randall Bagwell, *The Threat Assessment Process (TAP): The Evolution of Escalation of Force*, ARMY LAW., Apr. 2008, at 5. This article provides an excellent overview of how the traditional concept of using EOF procedures to de-escalate hostile situations has become confused with more recent procedures used in Iraq and Afghanistan to identify threats. In the RAF environment, where one anticipates "no actual enemy," EOF procedures are an important tool for Soldiers to understand when, how, and why to implement.

[64] *See supra* note 63 and accompanying text concerning International Agreements. A consideration for force protection measures is to rely on host nation security forces to provide primary defense for convoys and encampments.

B. Conduct Mission Analysis

Once you know the ROE for your mission, the staff must conduct mission analysis in order to determine how to apply the ROE to the mission. While the particulars of the Military Decision Making Process (MDMP)[65] are beyond the scope of this article, judge advocates must analyze the mission in order to best advise the command on the application of the ROE. Perhaps the most important input into this step in terms of the ROE is the commander's intent and initial guidance from both your commander as well as higher headquarters.[66] The commander's intent and guidance gives the legal advisor along with the command staff a shared understanding of how the commander wants to apply the ROE.[67] As the staff understands the mission and the commander's intent, they should determine what supplemental measures, if any, the command should request or implement.[68] Finally, once mission analysis is complete, the judge advocate and the staff should begin to develop proposed ROE training during the MDMP steps of course of action development, analysis, comparison, and approval.[69]

C. ROE Training

1. Training U.S. Forces to Defend Themselves in an RAF Environment

During mission analysis, commanders should make clear their intent for how they want to train the application of the ROE.[70] More than likely, the noncombat RAF shaping mission will be decentralized in nature.[71] Therefore, ROE training should focus on empowering small unit leaders (company commanders and senior noncommissioned officers) to serve as the primary trainers for their Soldiers and to situational training[72] applying the commander's intent to the anticipated threat (or lack thereof).[73]

One tool to consider is The Judge Advocate General's Legal Center and School's International and Operational Law Department's four-step training model for conducting an ROE training program: (1) formal classroom training led by unit judge advocates; (2) commander-led discussions with Soldiers that emphasize the commander's intent; (3) practical application of the ROE through situational training; and (4) emphasizing application of the ROE through the AAR process.[74] Using this model, judge advocates can efficiently assist commanders in delivering effective ROE training, both academic and practical, to Soldiers preparing to deploy to noncombat environments. Beyond ensuring Soldiers understand the commander's intent with regard to the use of force in self-defense, judge advocates must also be prepared to assist their units with conducting training with international partners under common ROE.

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[65] U.S. DEP'T OF ARMY, DOCTRINE REF. PUB. 5-0, THE OPERATIONS PROCESS para. 2-52 – 2-64 (17 May 2012) [hereinafter ADRP 5-0]; U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS para. 9-1 (5 May 2014) (C1, 11 May 2015) [hereinafter FM 6-0]. *See* Major Michael J. O'Connor, *A Judge Advocate's Guide to Operational Planning*, ARMY LAW., Sept. 2014, at 5, 17. Major O'Connor's article is an excellent overview of Army planning processes for judge advocates.

[66] *See* FM 6-0, *supra* note 65, para. 9-73–9-79; U.S. DEP'T OF ARMY, DOCTRINE REF. PUB. 6-0, MISSION COMMAND para. 2-12 – 2-15 (17 May 2012) (C2, 28 Mar. 2014) [hereinafter ADRP 6-0]. The commander's intent "is a clear and concise expression of the purpose of the operation and the desired military end state that supports mission command, provides focus to the staff, and helps . . . achieve the commander's desired results without further orders . . . ." FM 6-0, *supra* note 65, para. 9-73. The commander's intent "explains the broader purpose of the operation[,] . . . [allowing] subordinate commanders and Soldiers to gain insight into what is expected of them, what constraints apply, and most importantly, why the mission is being conducted." *Id.* para. 9-74.

[67] ADRP 6-0, *supra* note 665, para. 2-9–2-11 ("Effective commanders and staff use collaboration and dialogue to create a shared understanding of the operational issues, concerns, and approaches to solving them. Commanders gain valuable insight while also sharing their own vision and commander's intent."). For example, while a mission-specific ROE may allow Soldiers to use deadly force in certain situations, a commander may emphasize that based on the political environment and anticipated nature of threats, the commander wants to emphasize de-escalation as a primary tool to counter use of force against Soldiers.

[68] CJCSI 3121.01B, *supra* note 60, at 2, I-1. Supplemental measures "enable commanders to tailor ROE for specific missions," and consist of both permissive supplemental measures (those that require "prior approval of the SECDEF or combatant commander" for use of certain weapons/tactics) and restrictive measures ("used to place limits on the use of force for mission accomplishment"). *Id*. Examples to consider are: restrictions on detention of civilians, warning shots, and various weapon systems.

[69] *See generally* ADRP 5-0, *supra* note 65, at Fig. 2-6; FM 6-0, *supra* note 65, para. 9-82–9-187; O'Connor, *supra* note 65, at 20.

[70] Newell, *supra* note 59, at 11, 13 ("Commanders are personally responsible for the actions of their subordinates. . . [and] must be able to communicate clearly to those in their command how their leaders expect them to act and react in tactical situations within permissible ROE and EOF parameters.").

[71] *See* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, 2D BRIGADE, 1ST INFANTRY DIVISION, BRIGADE JUDGE ADVOCATE AFTER ACTION REVIEW, at 2 (June 2013 – June 2014) [hereinafter 2-1 ID RAF AAR] ("RAF missions were non-combat missions and did not implement ROE beyond the standing provisions on self-defense in the SROE . . . . Soldiers needed to . . . [get] their mindset closer to their right to self-defense at home station than the use of force in combat environments in Iraq and Afghanistan."). This particular Brigade Judge Advocate also emphasized that "RAF missions can involve small groups of Soldiers operating with minimal supervision." *Id.* at 4.

[72] Major Winston S. Williams, *Training the Rules of Engagement for the Counterinsurgency Fight*, ARMY LAW., Jan. 2012, at 45–47. Major Williams' article provides great insight on proven methods for implementing ROE training in a large unit, emphasizing situational training (requiring Soldiers to practice tasks within a particular mission scenario until they perform the task to standard). *Id*. at 45–46. It also stresses the importance of empowering small unit leaders to conduct ROE training, both because of stretched legal resources and the inherent responsibility for training that rests with company commanders and noncommissioned officers. *Id*. *See also* Captain Howard H. Hoege, *ROE . . . also a Matter of Doctrine*, ARMY LAW., June 2002, at 1, 3–5. Because units will often deploy in small groups throughout a large area during an RAF mission, legal advisors should focus on executing decentralized training to an established standard.

[73] 2-1 ID RAF AAR, *supra* note 71, at 4.

[74] *See* Newell, *supra* note 59, at 12–16.

2. Training U.S. Forces to Operate with International Partners in the RAF Environment

As multinational operations become more frequent for the U.S. military, developing common ROE is a critical component for ensuring interoperability between forces.[75] While nations are willing to contribute to such international operations, their participation often hinges on each nation's caveats on operations.[76] These restrictions usually create friction for commanders, but judge advocates can ease conflicts by concentrating on three key areas:[77] (1) the "shifting nature of caveats, both declared and undeclared";[78] (2) varying national interpretations of self-defense policies;[79] and (3) ROE training that navigates national caveats and restrictions while emphasizing commonality.[80]

The NATO ROE[81] offers a resource for understanding and developing common ROE, but given that many RAF missions may fall outside of the NATO structure, the *Rules of Engagement Handbook* (*ROE Handbook*) is perhaps a better tool for developing common ROE training.[82] The *ROE Handbook* provides international partners with a framework for addressing a wide variety of operational issues, from the use of force in self-defense, to detention,[83] to the use of various weapon systems. Through MDMP, the staff will understand potential operations, which should drive identification of the applicable ROE groups, series, and rules applicable to the operation or training exercise. Once the staff generates the specific ROE, legal and political advisors can work through each ROE rule to produce an ROE matrix that allows the staff to quickly identify areas of commonality and friction.[84] Finally, with the ROE matrix in hand, the staff can ascertain constraints on operations and work through various scenarios to create ROE training that forces units to train to operate under a common operating picture.

VI. RAF and Security Cooperation

The RAF concept is a key factor in how the Army seeks to execute security cooperation—a key component to the Army's strategy of "Prevent, Shape, and Win."[85] Security cooperation comprises all activities undertaken by the DoD to encourage and enable international partners—including foreign defense establishments—to work with the United States to achieve strategic objectives.[86] A broad variety of activities are part of security cooperation, ranging from foreign arms sales regulated by Congress and the State Department, to multinational training exercises with partner militaries all the way down to smaller unit, group, or individual training opportunities or exchanges. As a regionally aligned judge advocate, you could be engaged in security cooperation from a wide range of perspectives, and you should expect to perform the full range of your core functional competencies on any RAF security cooperation mission. You will likely even find yourself directly engaged in security cooperation through, for example, participating in LOAC training with partner nations. This part of the article

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[75] Major Winston S. Williams, *Multinational Rules of Engagement: Caveats and Friction*, ARMY LAW, Jan. 2013, at 24.

[76] *Id*.

[77] *Id*.

[78] *Id*. at 24-25 ("Declared caveats are established . . . by a national government and are known . . . early on . . . ." Some examples of declared caveats include "geographical limitations and combat operation prohibitions . . . ." Undeclared caveats "are those caveats that are not well documented in advance and often emerge during an operation . . . [and] may also result from differing interpretations of host nation policies and the international law of self-defense.").

[79] *Id*. at 25-26 ("All nations recognize the right of self-defense . . . [and] generally agree on a common definition of self-defense, which is 'the use of force to defend against attack or imminent attack,' [but] [w]ithin this common definition . . . are multiple interpretations of what the words mean.").

[80] *Id*. at 27-28 (The staff "should develop vignettes that are unique to staff operations, especially as these relate to self-defense/troops-in-contact situations," and should include "situations where caveats restrict a multinational partner to specific geographical areas and preclude offensive operations . . . [which] will help the staff develop battle drills and standard operating procedures (SOPs) for operations in theater."). Unit legal advisors must coordinate with the ASCC when it comes to developing common ROE. The ASCC, through its interagency and international relationships, is best suited to advise and assist when it comes to multinational ROE.

[81] NORTH ATLANTIC TREATY ORG., MILITARY COMM., MC 362/1, NATO RULES OF ENGAGEMENT (2003), https://clovis.hq.nato.int/RC/Basic%20documents/Forms/,DanaInfo=clovis.hq.nato.int+All%20Policies.aspx?Paged=TRUE&p_SortBehavior=0&p_FileLeafRef=MC%5f0215%5f39%2epdf&p_ID=1107&PageFirstRow=61&&CA3E-CBFA-44FF-8278-DAB9F59872FE [hereinafter NATO ROE] (login and password required).

[82] INT'L. INST. OF HUMANITARIAN LAW, Sanremo Handbook on Rules of Engagement (Nov. 2009) [hereinafter ROE Handbook], http://www.iihl.org/sanremo-handbook-on-roe. The ROE Handbook is a proven tool for nations to "identify and manage the respective legal and policy positions of nations participating in a multinational environment and promotes an understanding of national ROE policies." *Id*. at 1.

[83] Detention operations are beyond the scope of this article; however, like ROE, it is an area legal advisors should not ignore. In a shaping environment, detention will be severely restricted. Your unit might detain in self-defense, but international agreements might necessitate immediate transfer to host nation forces. Detention during military operations, especially in a non-international armed conflict, is a controversial topic for many nations; thus, as you plan for multinational ROE, you will find detention is one area where nations usually fail to agree.

[84] Roe Handbook, *supra* note 82, at annex B. Using the "compendium of ROE" found in annex B of the ROE Handbook as a guide, partner nations can develop a matrix that lists the ROE authorizations by Group/Series/Rule along with the participating nations and colors or codes to portray that nation's caveats with respect to a range of issues. *See* Appendix 3 for an example of an ROE matrix. The authors would like to thank Captain Tim Mathews, Operational Law Attorney, U.S. Army South, for providing an excellent example of an ROE matrix for a multinational training exercises, created using the ROE Handbook as a guide.

[85] ARMY STRATEGIC GUIDANCE FOR SECURITY COOPERATION: AN ENDURING MISSION FOR "PREVENT, SHAPE, WIN" (2014).

[86] DoDD 5132.03, *supra* note 32; AR 11-31, *supra* note 32, para. 1-1; JOINT CHIEFS OF STAFF, JOINT PUB. 3-22, FOREIGN INTERNAL DEFENSE (12 July 2010).

aims to give you a general introduction to the range of security cooperation activities you might be involved in as a regionally aligned judge advocate.

One of the Army's top priorities for its role in the larger DoD security cooperation endeavor is to enhance support to the respective geographic combatant commands, and this is where the "regional" focus becomes key. Army service component commands develop theater and functional campaign support plans that identify the security cooperation capabilities required to achieve CCMD objectives.[87] The importance of engagement with foreign security forces is grounded in the Army's approach to prevent future wars by deterring threats; to shape future conflict by creating security conditions favorable to the United States and allied interests; and, when necessary, to win conflicts based in part upon access to, interoperability with, and knowledge of regional partners and allies—i.e., "prevent, shape, and win."[88] The RAF concept is one of the major components of the Army's approach to security cooperation.[89] In the vision of the Army, RAF supports security cooperation by building expertise, experience, and relationships within the aligned region. There are several specific areas within security cooperation where the regionally aligned judge advocate should be prepared to engage.

As a regionally aligned judge advocate, you will need an understanding of your unit's role in a security cooperation mission. Security cooperation, in addition to RAF, involves a plethora of initiatives including defense trade and arms transfers, humanitarian assistance and disaster relief, international military education and training, and defense institution building.[90] It is important that you understand the ASCC's campaign plan and the programs at play within your partnered region. As your unit's judge advocate you will be required to provide legal support across the full spectrum of military law core competencies, so an understanding of the security cooperation mission will be critical. Reach out to your technical chain of judge advocates as well as the interagency resources that can provide more information on the legal challenges of any particular type of security cooperation mission.

In addition to the legal challenges facing an RAF unit in a deployed environment, RAF provides an additional opportunity for you to contribute directly as a judge advocate to the substantive goals of security cooperation. One of the key components of successful security cooperation is to work with partner militaries who maintain good order and discipline, respect the rule of law, and follow the LOAC. In other words, military law can be a big part of the RAF mission. As part of this focus, The U.S. Army Judge Advocate General (TJAG) recently issued guidance to the JAGC in a memorandum on Legal Engagements in Support of the Army Security Cooperation Strategy.[91] There are three lines of effort prescribed for the Army JAGC: (1) reinforcing the standards of the LOAC, (2) military-to-military engagements, and (3) building relationships and enhancing interoperability.[92] This guidance helps judge advocates think about ways to use both RAF and other concepts to support the mission of "prevent, shape, and win."

Judge advocates should be intimately involved with military-to-military engagements, particularly with foreign military attorneys. "Engagement with foreign security forces . . . is central to building security around the world by enabling the [CCMD] commanders to shape their theaters of operation."[93] By working with foreign military legal officers, judge advocates can help to build partner nations' ability to operate within the parameters of the LOAC and other applicable bodies of international law or customary international law that govern operations during peacetime and hostilities. Additionally, forming personal relationships with foreign partners can be vital when working through other issues that may arise down the line.

In addition to partnering with their attorney counterparts, judge advocates can expect to have small groups within their unit, military training teams, sent more frequently to assist partner nations with a variety of skills training necessary to ensure stability and interoperability. These skills vary from small-unit tactics, such as gunnery, or utilizing military working dogs, to training on the LOAC and IHRL. Judge advocates should also be prepared to participate in large-scale exercises and training with partner units—both here in CONUS, as well as abroad in the host nation's country. In a regionally aligned unit, you may well be the primary lawyer expected to interface with partner militaries in security cooperation.

The purpose of all of these operations is to accomplish several things: (1) build and develop our partners' capacity; (2) understand and solve interoperability issues with equipment, as well as differences in techniques, tactics, and

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[87] *CALL Newsletter*, UNITED STATES ARMY COMBINED ARMS CENTER (July 2014), http://usacac.army.mil/organizations/mccoe/call.

[88] ARMY STRATEGIC GUIDANCE FOR SECURITY COOPERATION (2014).

[89] *Id.*

[90] *See* AR 11-31, ARMY SECURITY COOPERATION POLICY. The United States accomplishes these initiatives through a variety of activities such as the Foreign Military Sales program, the Afghan Security Forces Fund, DoD Regional Centers, Combating Terrorism Fellowship Program, and many others. *See Programs*, DEFENSE SECURITY COOPERATION AGENCY, http://www.dsca.mil/programs (last visited Oct. 1, 2015).

[91] Memorandum from Lieutenant General Flora D. Darpino, The Judge Advocate General, U.S. Army, to Judge Advocate Legal Services Personnel, subject: Legal Engagements in Support of the Army Security Cooperation Strategy (30 Apr. 2014).

[92] *Id.*

[93] ARMY STRATEGIC GUIDANCE FOR SECURITY COOPERATION (2014); *see also* Jay Morse, *Regionally-Aligned Forces: Less About what it is; More About what it can Be*, SMALL WARS JOURNAL (Jan. 2015) ("Human engagement is the crux of RAF.").

procedures, and; (3) maintain our own unit readiness. By achieving these strategic goals, the hope is to shape the environments for potential future operations and shape our partners' abilities to ensure peace within their own regions, which will hopefully prevent the United States from having to deploy combat forces to these areas. However, should the need arise, our forces will still be prepared to win our nation's battles when called to do so.

As a regionally aligned judge advocate, it is critical that you understand the country, region, and culture of the partner nations in your region. As the legal advisor, your commanders will look to you to provide answers to the wide variety of legal issues and questions that come with a security cooperation mission. Furthermore, you may be part of the main effort to help train partners on military law, LOAC, and other areas that build the legal capacity to help "prevent, shape, and win."

VII. Foreign Disclosure of Classified Military Information

While conducting an RAF mission, you may be asked to share information with foreign partners. Disclosure of classified information is sometimes permissible; therefore, personnel should understand proper classification of information and disclosure limitations. This section introduces the policies and regulations that govern disclosure and release of this information. As discussed in other sections, early coordination with subject matter experts is paramount. Knowledge of disclosure procedures prior to the sharing of classified information will ensure mission requirements are met while continuing to protect national security interests.

A. Classified Military Information

Understanding the type of information available and who is authorized to obtain that information is paramount to protecting National Security and foreign relations.[94] There are three types of information normally handled by military units: classified military information (CMI), controlled unclassified information (CUI), and information within the public domain.[95] Importantly, CMI is information under the control of an agency within the DoD, which requires protection in the interest of national security.[96] This type of information falls within eight categories and should normally only be classified by an originator with authority over that category.[97] Therefore, care must be taken when sharing information with foreign nationals as units do not have authority to release information they did not originate.[98]

B. Foreign Disclosure Officer

Disclosure decisions are not made by legal advisors; moreover, you should coordinate with the official appointed by your unit to ensure you avoid improper disclosures. Commanders of Army units shall appoint a Foreign Disclosure Officer (FDO) in writing and publish foreign disclosure procedures that include coordination and referral to the FDO, who shall ensure the following factors are considered.[99] First, FDOs may only disclose information originating from the command or organization in which they have delegated authority.[100] Second, the FDO shall not exceed the classification level authorized for disclosure of classified material (NDP-1). Finally, the FDO must ensure all five disclosure criteria listed in NDP-1 are met.[101] Because of the complexities of foreign disclosure policies, establishing a relationship with the FDO early to ensure consistent communication and coordination can avoid improper disclosure of information.

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[94] U.S. DEP'T OF DEF, INTERNATIONAL PROGRAMS SECURITY HANDBOOK, 3-11 (June 2009) [hereinafter IPS HANDBOOK]. Information that is obtained from another foreign government, from another agency, or is combined military information must be approved for release, in writing, by each interested party.

[95] U.S. DEP'T OF ARMY, REG. 380-10, FOREIGN DISCLOSURE AND CONTACTS WITH FOREIGN REPRESENTATIVES para. 2-3 (14 Jul. 2015) [hereinafter AR 380-10]. While this RAF section is primarily focused on the dissemination of classified military information (CMI), the regulation does discuss the dissemination of controlled unclassified information (CUI) to foreign nationals. You may handle CUI with no marking or distribution statements. It is incumbent upon all originators to review material prior to making a disclosure determination to determine whether the information is CUI or information within the public domain. Information may be disclosed regardless of the form, to include but not limited to classified documents or other written material, visual media, or through oral communication. *Id.*

[96] NATIONAL SECURITY DECISION MEMORANDUM 119, DISCLOSURE OF CLASSIFIED UNITED STATES MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS, 2 (20 Jul. 1971) [hereinafter NSDM 119]. The National Policy and Procedures for the Disclosure of Classified Material (NDP-1) is the SECDEF implementing policy, which will be on file with a foreign disclosure officer. NDP-1 and national policy prohibits giving the express or implied impression to foreign governments that defense information, technology or equipment will be shared without first obtaining authorization.

[97] IPS HANDBOOK *supra* note 1, encl. 2. *See also* AR 380-10 *supra* note 2, para. 2-4; Executive Order No. 13526, Original Classification Authority, 2 FR 75 (5 Jan. 2010).

[98] IPS HANDBOOK, *supra* note 1, 3-2. *See also* AR 380-10, *supra* note 2, para. 1-5.

[99] AR 380-10, *supra* note 2, para. 1-18.

[100] U.S. DEP'T OF DEF., DIR. 5230.11, DISCLOSURE OF CLASSIFIED MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS para. 3 (16 June 1992).

[101] *Id.* These criteria require: (1) the proposed disclosure to a foreign government must be consistent with U.S. foreign policy and national security objectives; (2) the disclosure will not compromise an unreasonable risk to the U.S. position in military security objectives; (3) the foreign recipient will afford the information substantially the same degree of security given to it by the United States; (4) disclosure will result in a benefit at least equivalent to the value of the information disclosed; and (5) disclosure is limited to information necessary to the purpose for which disclosure is made.

VIII. Helpful RAF Resources

By now you realize that there is a lot to learn before you are a fully functioning, regionally aligned judge advocate. But, there are places you can go for assistance. Here are helpful resources that will become more robust as the RAF program develops.

A. *Milsuite* Resources

The first place to look for RAF references is *Milsuite*.[102] There are resources including the RAF concept, guidance, and orders as well as best practices. In the future, *Milsuite* may have country-specific information as the RAF concept develops. *Milsuite* is also a good place to go to ask RAF-related questions and receive input from experts.

B. National Guard State Partnership Program

For over twenty years the states' National Guards have developed an RAF-like security cooperation partnership with seventy-four countries throughout the world.[103] It is worth your time to check to see if the nation you are aligned with already has a National Guard State Partner.[104] If it does, contact the judge advocates assigned to that state's joint forces headquarters and see what resources and contacts they have. The total force can work together to foster relationships with this nation.

C. CLAMO and IOLD RAF Resources

1. RAF Repository

The Center for Law and Military Operations (CLAMO) has combined its vast database with the International and Operation Law Division (IOLD) to develop an RAF-specific webpage.[105] Furthermore, each of the Army Service Component Command OSJAs have populated this webpage with resources specific to their area of operation and region of the world. The page allows you to click on geographic combatant commands and then search by country.[106] Currently, searching this database will give you all of the CLAMO and the IOLD publicly-available information on your country. The Office of The Judge Advocate General's Information Technology Division is constructing a classified version of this website so that classified information may be posted as well

2. Other CLAMO Resources

The Center for Law and Military Operations has generated several other resources that are helpful for any judge advocate operating overseas. First, CLAMO has a document that focuses on where to find country-specific legal resources outside of the DoD websites.[107] Second, CLAMO publishes annually a practitioner's handbook on conducting rule of law operations.[108] Finally, judge advocates should access CLAMO's IO Document Library for postings on JAGCNet of current international and operational resources, and after action reports on military operations and exercises.[109]

D. Marine Corps' Center For Lessons Learned

The U.S. Marine Corps' Center for Lessons Learned's website has a good search function to help locate any country-specific information they have gathered.[110] It is worth your time to go to their website and search for the country you are aligned with and see what information is available.

E. Stay Tuned

All of the links above are works in progress and will be updated as the RAF program develops. Do not forget to review them periodically to see what new information has been posted.

IX. Conclusion

Regionally Aligned Forces are a critical part of the DoD's concept of "Strategic Landpower." The RAF concept will bring new challenges for the judge advocates assigned to these developing units. While the lessons learned from traditional brigade judge advocates will be essential to a

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[102] *Regionally Aligned Forces*, MILBOOK, https://www.milsuite.mil/book/groups/regionally-aligned-force-raf (last visited Oct. 1, 2015).

[103] *State Partnership Program*, NATIONAL GUARD, http://www.nationalguard.mil/Leadership/JointStaff/J5/InternationalAffairsDivision/StatePartnershipProgram.aspx (last visited Oct. 1, 2015).

[104] *Id.* (click on the partnership map).

[105] *RAF Repository*, JAGCNET, https://www.jagcnet2.army.mil/Sites/io.nsf/homeContent.xsp?documentId=5E93A3E490538BB985257E87005D718A# (last visited Oct. 1, 2015).

[106] *Id.*

[107] *Center for Army Lessons Learned*, JAGCNET, https://www.jagcnet2.army.mil/Sites%5C%5Cio.nsf/0/8D2D6BFBF650206085257DAC00699A54/%24File/ CLAMO%20Guide-%20Legal%20Country%20Studies%20Resources.docx (last visited Oct. 1, 2015).

[108] U.S. ARMY CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES (2015).

[109] CLAMO's document library may be accessed through JAGCNet at hhtps://www.jagcnet.army.mil. A common access card is required.

[110] MARINE CORPS CENTER FOR LESSONS LEARNED, https://www.mccll.usmc.mil/index.cfm (last visited Oct. 1, 2015).

successful assignment, the international law issues RAF judge advocates will face will be new. This article provides an RAF judge advocate a useful background of the key international law issues that will arise during your assignment. Judge advocates can use these resources to develop country-specific international law expertise that will be essential to a successful tour with regionally aligned forces.

Discovery for Three at a Table Set for Two:
An Alteration of Rule for Courts-Martial 701 to Accommodate the Practical and Philosophical Realities of the Victim as a Limited Third Party

Major John C. Olson, Jr.[*]

Special victim counsel (SVC): Your honor, Captain Ben Stafford, counsel for the victim named in the specification of the charge, Private First Class Elizabeth Kerr, I wish to be heard on her behalf on this issue before the court under Military Rule of Evidence 514.

Military judge (MJ): Very well, do you have a motion?

SVC: I do your honor; the victim, Private First Class Kerr, moves this court to deny production of her victim advocate's notes as they are protected communications. Not only are they privileged under the rule, but they are neither relevant to the events in question, nor material to the defense.

MJ: Thank you counsel, let's take up the question of relevance first. You may present evidence.

SVC: Sir, unfortunately, I have not been provided with any discovery from which to glean potential case theories of either the prosecution or defense. Therefore, I am unable to present evidence on the question of relevance.

MJ: Counsel, without evidence to convince the court why your client's conversations with her victim advocate are neither relevant nor material, I cannot consider your motion. Your motion is denied.

I. Hollow Is The Right to Be Heard Without A Foundation From Which to Speak.

Private First Class Elizabeth Kerr, having just received some very disturbing news, seeks out her counsel for advice. She walks in his office, closes the door, and sits down. The color drains from her face, and her body language screams nervousness and apprehension as she looks to her counsel. With her face in her hands, and her eyes full of tears she says, "The prosecutor told me the defense wants to see all the notes my victim advocate took when we spoke. I thought they were confidential. He told me generally they are, but the judge may determine otherwise. Is that true? I told her some things that cannot come out."

In reality, "I don't know," is the only reasonable answer her lawyer can give her because he cannot possibly know if that information will be relevant without knowing the evidence likely to be presented. Yet, under the current state of the law[1] he must walk into court blindly, hoping to somehow save his client from a re-victimization that has driven so many victims to distrust and abandonment of the system.[2] How frustrating to assert the rights of a victim without any ammunition with which to make the fight. While lady justice must certainly don the blindfold for the system to work, the litigants cannot.

In 2013, in the military justice system, Congress codified and mandated the process of providing victims with their own attorneys charged with counseling clients on their rights, guiding them through the often opaque criminal justice process, and, when needed, advocating on their behalf.[3] In so doing, the familiar two-party adversarial system transformed into an ungainly and awkward triangle. The problem is in its current form, Rule for Courts-Martial (herein after R.C.M.) 701 does not provide disclosure of any

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[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701 (2012) [hereinafter MCM]. Rule for Courts-Martial (R.C.M.) 701 currently contemplates two parties, the prosecution and defense, as defined in R.C.M. 103(16). *Id.* Therefore, as there are no express disclosure requirements flowing from either of these parties to the victim and her counsel, the only the way the victim can get any discovery is through the often calculated generosity of either the defense or prosecution.

[2] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT vi-viii, 1-15 (1982) (summarizing the introductory statement given by Lois Haight Herrington of the chairman preceding the task force); IRVIN WALLER, RIGHTS FOR THE VICTIMS OF CRIME; REBALANCING JUSTICE 1-11 (2011); *see also* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1321-22 (2002).

[3] *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 701, 1704, 1706, 1716, 1747, 127 Stat. 672 (2013). The Court of Criminal Appeals for the Armed Forces (CAAF) legitimized this change in *Kastenberg*, L.R.M. v. Kastenberg, 72 M.J. 364, 368-69 (C.A.A.F. 2013).

discovery for the victim. This notable absence essentially denies the right to be heard because, absent disclosure outside of this rule, the victim's counsel has virtually nothing upon which to anchor that right. When the United States Court of Appeals of the Armed Forces (CAAF) conferred limited party status on the victim in *Kastenberg*, it gave the victim standing and the right to be heard factually as well as legally.[4]

If the victim has the right to be heard, then the victim must have the right to present evidence. And, if the victim has the right to present evidence, then the victim must have a right to receive and compel discovery from which to derive the evidence to present.[5] Therefore, R.C.M. 701 must be revised in a way that provides meaningful and needed discovery for the victim. Nowhere are the effects of these monumental changes more glaring and onerous than in the practice of pretrial preparations and discovery. When parties use discovery in preparation for trial—more often than not—discovery shapes the field of litigation upon which the trial will unfold.

After a brief background of discovery and the victim's role in the criminal justice process, this article will propose changes to R.C.M. 701. These changes will ensure the victim's counsel has access to the evidence required to advocate on his client's behalf while simultaneously limiting the victim's power. This will insulate the constitutional concerns of the accused and account for the practical realities of interest alignment.

II. Understanding Competing Perspectives through Historical Context

Today, the due process model of criminal justice encompasses what most criminal attorneys perceive to be the bedrock principle of their just and noble profession.[6] However, the due process model is just one recent perspective of several through which society has viewed the criminal justice process.[7] For example, many modern practioners may be shocked to discover that the presumption of guilt and not that of innocence played a much larger role in American prosecutions.[8] These perspectives—due process, crime control, and victim participation[9]—form the basis for the rules at play in cases and compete to form a balance protecting the interests of the parties.[10] However, as this new limited party will inevitably upset that delicate balance, one must understand the various perspectives and their historical context in order to revise the rules in a way that accommodates the new party and maintains the balance.

A. Discovery in a Criminal Case

Discovery rules bear clues and allusions to perspectives they support—both current and bygone. According to Justice Brennen, under the due process model, providing pretrial discovery to the accused enhances the truth-finding process and minimizes the danger that an innocent defendant will be convicted.[11] If a fair trial for the accused is the ideal, then the myriad of narrow and exceedingly limited disclosure rules would seem to be out of place.[12] However, when considered against a fear-of-the-accused perspective—that criminal defendants would hijack the trial with perjured testimony and witness intimidation in order to subvert the evidence—those narrow and limited rules make perfect sense.[13] This perspective, along with the rules that support it, represents the antithesis of the principle of presumed innocence.[14] Despite such cases as *Brady*[15] and *Giglio*,[16] even the Supreme Court has affirmed that a criminal defendant has no constitutional right to discovery generally.[17]

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[4] *Kastenberg*, 72 M.J. at 369-70.

[5] *See* United States v. Aycock, 35 C.M.R. 130, 132 (C.M.A. 1964) (quoting Commonwealth v. O'Keefe, 148 A. 73, 74 (Pa. 1929), "It is vain to give the accused a day in court, with no opportunity to prepare for it . . . . [T]he principle is equally valid when applied to [discovery]."); *see also* United States v. Enloe, 35 C.M.R. 228, 233 (C.M.A. 1956) (providing the perfect parallel when it quotes Bobo v. Commonwealth, 48 S.E. 2d 213, 215 (Va. 1948), stating that "an accused has the unqualified right to 'call for evidence in his favor.' This includes the right to prepare for trial which, in turn, includes the right to interview material witnesses and to ascertain the truth.").

[6] Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (1999); Larry C. Wilson, *Independent Legal Representation for Victims of Sexual Assault: A Model for Delivery of Legal Services*, 23 WINDSOR Y.B. ACCESS JUST. PERSP. ON L. REFORM 249, 274-75 (2005).

[7] *Id.*

[8] Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 582-83 (2006) (quoting Judge Learned Hand in United States v. Garsson 291 F. 646, 649 (S.D.N.Y. 1923), who stated "Our [p]rocedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream."); *see also* William F. Fox Jr., *The "Presumption of Innocence" as Constitutional Doctrine*, 28 CATH. U. L. REV. 253 (1979).

[9] Beloof, *supra* note 6, at 292.

[10] *Id.*

[11] William J. Brennan Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U.L.Q. 1 (1990).

[12] *See* FED. R. CRIM. P. 12.4, 15-17; *Cf.* FED. R. CIV. P. 26-37.

[13] Brennan, *supra* note 11, at 5-8.

[14] *Cf.* Fox, *supra* note 8; *See also* Brady v. Maryland, 373 U.S. 83, 87 (1963).

[15] *See generally Brady*, 373 U.S. at 83.

[16] Giglio v. United States, 405 U.S. 150 (1972).

[17] Kaley v. United States, 134 S. Ct. 1090, 1101 (2014); Weatherford v. Bursey, 429 U.S. 545, 559-61 (1977) (ruling that Brady v. Maryland did not create a constitutional right to discovery stating, "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."); *see also* Prosser, *supra* note 8, at 560-61; Brennan, *supra* note 11, at 8-9.

The Military by contrast has a tradition of open and liberal discovery.

> Military discovery practice has been quite liberal . . . . Providing broad discovery at an early stage reduces pretrial motions practice and surprise and delay at trial. It leads to better informed judgment about the merits of the case and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. In short, experience has shown that broad discovery contributes substantially to the truth-finding process and to the efficiency with which it functions.[18]

This language explains the reasoning behind R.C.M. 701, under which the prosecutor must maintain an open file from which he must make active disclosures and permit inspection.[19]

Article 46 of the Uniform Code of Military Justice (UCMJ) embodies this philosophy, granting equal access to witnesses and other evidence as the President may provide. "[A]lthough [the prosecutor's] primary duty is to prosecute, any act inconsistent with a genuine desire to have the whole truth revealed is prohibited."[20] Synthesizing this collective guidance demonstrates that the military justice system embraces the due process model in which the revelation of the truth comes from the empowerment of the accused through full and open discovery.[21] If full and open discovery enables the accused's preparation, then similar discovery provisions would likewise aid the victim. With that empowerment, the victim will be able to resume her once prominent and primary role as prosecutrix.

B. The Return of the Prosecutrix—the Victim's Historical Role in and Subsequent Ouster from the Criminal Justice System.

Most criminal justice practioners are accustomed to viewing the victim as little more than a witness.[22] When a prosecutor empowers, supports, and even sincerely empathizes with the victim, he does so primarily in an effort to enhance the direct examination of that victim.[23] This is not meant to imply that the prosecutor does not care about the victim, but rather that his focus is primarily on justice and conviction. Be that as it may, historically speaking, this model is both revolutionary and, more surprisingly, recent. "Contrary to popular view, 'victim participation was the paradigm of the adversarial trial and has been for close to one thousand years.'"[24]

At the time when the founding fathers gathered in Philadelphia to hash out the foundation and fabric of American law, the victim was the primary player in criminal trials.[25] Private prosecutors passed the bar to argue the guilt of the accused.[26] At a time when crime control was not generally considered a responsibility of the state, the English settlers brought the legal tradition of private prosecution with them and continued its use into the nineteenth century.[27] In that model, victims would often make an arrest and hire a private attorney who would then conduct the prosecution against the perpetrator; furthermore, the state's role, if any, was to help facilitate the process for a fee.[28] Intuitively, the victim neither cared for nor adhered to the presumption of innocence much less the due process rights of the accused. Rather, the victim utilized the court system as a civilized means of retribution against an assailant whom she knew to be guilty.

Beginning in the late eighteenth century, this paradigm slowly shifted toward the public prosecutor model, which became the primary method of prosecution by the turn of the twentieth century.[29] Though there are many reasons for this shift, the system relegated the victim to the sidelines as

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[18] MCM *supra* note 1, at R.C.M. 701 analysis para. A21-33-34 (2012); *see also* United States v. Enloe, 35 C.M.R. 228, 230-31 (C.M.A. 1956).

[19] *But cf.* FED R. CRIM. P. 16. In stark contrast to the military prosecutor, a federal prosecutor must only disclose that which he plans to present at trial rather than anything material to the preparation of the defense. *Id.*

[20] *Id*. at 4; MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 115, 44g-h (1951); MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 115, 44g-h (1969).

[21] *See generally* Major Paul A. Wilbur, Generosity of Discovery in Military Law: Too Much of a Good Thing? Apr. 3, 1986 (unpublished thesis, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army) (on file with The Judge Advocate Gen.'s Legal Ctr. & Sch. Libr.); *cf.* Brennan, *supra* note 11.

[22] This assertion is based on the author's recent professional experiences as a special victim prosecutor, defense counsel, and trial counsel [hereinafter Professional Experience].

[23] *Id*.

[24] Wilson, *supra* note 6, at 261; *see also* DOUGLAS E. BELOOF, VICTIMS' RIGHTS: A DOCUMENTARY AND REFERENCE GUIDE 5-8 (2012).

[25] William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, VICTIMS' RIGHTS: A DOCUMENTARY AND REFERENCE GUIDE, 12-15 (Douglas E. Beloof, 2012).

[26] *Id.*; Karen L. Kennard, *The Victim's Vet: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL L. REV. 417, 417-19 (citing Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 387-88 (1986)).

[27] Ramsey, *supra* note 2, at 1322, 1328; Michael T. McCormack, *The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law*, 37 SUFFOLK U.L. REV. 497, 499-502 (2004).

[28] McDonald, *supra* note 25; *see also*, Karen L. Kennard, *supra* note 26, at 419-20.

[29] Karen L. Kennard, *supra* note 26, at 419-20.

nothing more than the complaining witness. "When public prosecution supplanted primary justice, it also destroyed the victim's status as a party to the case and silenced her voice in court without adding constitutional protections for victim's rights."[30] The victim's loss of party status triggered the inevitable loss of victim specific remedies such as restitution—replaced by incarceration and the ideology of rehabilitation—and the conversion of the collective perspective from crime as a private affront to a public injury.[31]

As a result, victims have come to feel disassociated from, if not scared of and even disgusted with, the system responsible for holding their attackers accountable.[32] What is worse, until fairly recently, victims had no real means of redress when the system simply ignored their wishes or blocked them from the process altogether.[33] Now, with *Kastenberg* re-establishing party status for victims, the challenge inevitably becomes the creation of a hybrid model combining the retribution-seeking victim with the public justice-seeking prosecutor, who is responsible for protecting all the rights granted to the accused by the Constitution.[34] Because discovery plays such a prominent role, the rules must appropriately balance these competing interests and philosophies to successfully create such a hybrid.[35]

III. Irreconcilable Differences—Exposing the Significant Conflicts Resulting from the Addition of a Third Litigant, and Determining a Solution

The question posed in this article—how to provide a victim with the discovery needed to adequately assert her rights—seems simple and straight-forward at first; however, upon closer scrutiny, the solution must negotiate and avoid the serious and ostensibly irreconcilable conflicts that arise out of such disclosure. These conflicts call into question and even threaten the most bedrock principles of the criminal justice process. In the end, a universally acceptable solution is not possible, leaving a very difficult choice that will touch upon the core values of the criminal justice system.

Most military justice practitioners first viewed the concept of a legal representative for victims as foolhardy as it was foreign—the primary source of that frustration being one of philosophy and perspective.[36] Most prosecutors play the role of public servants seeking justice within the due process model.[37] In this model, justice equals litigation, analysis, and scrutiny of facts with a careful balance of society's need for retribution, rehabilitation, deterrence, and protection, against the accused's all-important right to a fair trial.[38]

While trial counsel and defense counsel may take the principle of the presumption of innocence as gospel, intuitively, the victim most likely does not. More accurately, with the exception of the rare case in which the perpetrator is unknown to the victim, the victim not only presumes guilt, she is sure of it. She prefers the victims' participation model in which the prosecution is nothing more than the means through which society balances the scales and punishes her assailant.[39] She has no incentive to aid the accused at all—not by submitting to interviews, and certainly not by providing him with information that may help him discredit her or worse, be acquitted.

Conversely, our society now embraces the due process model of criminal justice in which the accused is innocent until proven guilty and has constitutional rights designed to ensure a fair trial.[40] As currently defined and practiced, due process is incompatible with the victim participation model because, while the latter assumes the veracity of the victim's allegation as a baseline, the former is skeptical of the

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[30] Ramsey, *supra* note 2, at 1321-22, 1328. Factors that influenced the shift towards the public prosecutor model include: the public's desire for its government to engage in crime control, the influence of the Enlightenment on the perspective of protecting the accused, financial benefit for the state, and the belief that the private prosecutorial model was elitist and potentially vindictive. *Id.*; Miranda v. Arizona, 384 U.S. 436, 491 (1966).

[31] *See* McDonald, *supra* note 25; Kennard, *supra* note 26, at 419-20. The obvious counterpoint here is the victim's ability to file suit against her assailant in civil court; however, this alternative is far more problematic than it would seem. First, the victim must have the financial means to file suit and hire an attorney. McDonald, *supra* note 25. Second, she is not likely to find an attorney to take her case as most attorneys will not find such a case profitable. *Id.* Lastly, a civil remedy cannot deter the wrongdoer and protect society in the way that criminal remedies can. *Id.*

[32] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 2; WALLER, *supra* note 2.

[33] 18 U.S.C. § 3771 (2004); 10 U.S.C.A. § 806 (2013).

[34] *Kastenberg*, 72 M.J. at 368-69; *see also* Beloof, *supra* note 6.

[35] The great irony here is that the constitutional protections of the accused were created and continue to be vehemently defended in order to protect against the government prosecutor who in pursuit of "justice" generally strives to protect those constitutional protections as much as the defense counsel. By contrast, there generally is no such fear applied to the private prosecutor who represented a far more biased client. While an accused may have more protection to guard against a tyrannical state in principle, common sense dictates that he has far more to fear from the biased victim.

[36] *On Oversight: Sexual Assaults in the Military, Hearing Before the U.S. Senate Committee on Armed Services, Subcommittee on Military Personnel*, 113th Cong. 14-15 (2013) (statement of Lieutenant General Dana K. Chipman, The Judge Advocate General, United States Army).

[37] Aggregate responses to general survey of current and former military justice practioners on their practical experience with the special victim counsel (SVC), on file with author; Professional Experience, *supra* note 22.

[38] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES BENCHBOOK para. 2-5-21 (1 Jan. 2010) [hereinafter DA PAM. 27-9]. Note that this paradigm is so ingrained in the collective conscious that defense counsel expect nothing less from the prosecutors with whom they tangle, often expressing shock, disappointment, and moral outrage at anything less. Professional Experience, *supra* note 22.

[39] *See* Beloof, *supra* note 6; *see also* Wilson, *supra* note 6, at 274-75.

[40] Wilson, *supra* note 6, at 274-75.

allegation and provides the accused with every opportunity to prove it false.[41] Now that *Kastenberg* has juxtaposed these two antithetical models, practitioners must consider the increased potential for serious conflict.

For example, now that the victim is an active participant in the litigation, should she have disclosure obligations towards the other two—i.e. *Brady* material? Those with a protect-the-accused, due process model perspective would likely favor victim disclosure requirements quite strongly. However, those more amenable to a victim-focused perspective would likely see such requirements as unfairly favoring the victim's assailant. If the answer is yes, and the victim must disclose, then the law effectively pierces attorney-client privilege and punishes the victim for asserting her right to be heard. On the other hand, if the answer is no, and the law protects the sanctity of the victim's privilege, then the accused's right to a fair trial will have been dealt a severe blow. Consider Military Rule of Evidence (MRE) 502(a)(3) in which the attorney-client privilege survives disclosures between separate parties on matters of common interest.[42] If the attorney-client privilege prevails over *Brady*, then under that rule, provided conviction qualifies as a common interest, the victim would be able to prevent the prosecutor from disclosing exculpatory information to the accused.[43] Under this construction, the victim could moot the most significant fair trial protection the accused has ever achieved and potentially hijack the entire trial.

Stated another way, if the due process model endures, policy makers must confront the issue of whether the victim counsel is a party with responsibilities to the court or purely the victim's attorney with ethical constraints of confidentiality precluding any act that may damage the victim's position.[44] With no clear answer, the accused-defense attorney relationship is illuminating. This example provides some guidance as even defense counsel have disclosure obligations contrary to their client's interests.[45] The only justification for such disclosures is the truth-finding goal of the trial.[46] Therefore, if the accused must disclose information contrary to interest in order to promote the truth-finding function of the trial, then the victim and her counsel should face similar disclosure requirements.

Given these conflicts, in order to once again make room for the victim as a party to the case in a hybrid system of discovery, the rules must choose one philosophy as dominant while accommodating the other wherever possible. Given the constitutional guarantees for criminal defendants and the vast and comprehensive jurisprudence in support of those guarantees, the rules proposed herein operate within the due process model.

IV. Rewriting R.C.M. 701 to Account for and Empower the New Reality[47]

As the victim's counsel programs are likely here to stay, the system must adapt in order to accommodate third parties.[48] And, it must do so in such a way that the traditional checks, balances, and constitutional protections of the due process model are maintained.[49] Nowhere is that more important than in the practice of discovery because it sets the stage for everything that follows.

While the victim's counsel may have little difficulty being heard by the trial judge and the convening authority, without access to adequate information and evidence through discovery, he will likely have little if anything to say. Imagine a situation in which the trial counsel concedes a motion under MRE 412 in order to strengthen a non-intuitive theory and gain a tactical advantage over the defense in an effort to convict the accused of sexually assaulting the victim—an outcome the victim ultimately supports. Now imagine that the victim's counsel has entered an appearance, and is sitting in court when he hears the trial counsel concede the motion. If the victim's counsel has neither seen nor analyzed the evidence and has therefore failed to anticipate trial counsel's theory, he will likely move the court to suppress the evidence out of consideration of his client's privacy. The victim's counsel may have just done his client a grave disservice. In winning the battle, he may have cost the trial counsel, and ultimately his client, the war. Absent ineffective assistance, providing discovery to the victim likely eliminates this issue.[50]

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[41] *See, e.g.*, Olden v. Kentucky, 488 U.S. 227 (1988).

[42] MCM, *supra* note 1, Military Rule of Evidence (MRE) 502(a)(3).

[43] *See id.*

[44] *See* U.S. DEP'T OF ARMY, Reg. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Appendix B, Rule 1.6 (1 Jun. 1992) [hereinafter AR 27-26]; *But see* AR 27-26, Rule 3.3 and 3.4. Within the context of discovery, in many ways these rules pull the SVC in completely opposite directions. Without proper guidance, these attorneys must decide whether they should reveal confidential privileged information or disobey the court requiring candor and fairness to opposing counsel. Either way, the attorney will likely run afoul of one ethical rule or another. Articulating clear disclosure requirements will remove ambiguity and guess work.

[45] MCM, *supra* note 1, at R.C.M. 701(b)(3).

[46] Brennan, *supra* note 9, at 2.

[47] The complete proposal for R.C.M. 701 can be found in *infra* Appendix A, Proposed Revision of R.C.M. 701, and *infra* Appendix B, Proposed Revisions to R.C.M. 701 (Graphic Representation). For comparison, R.C.M. 701 in its current form can be found in *infra* Appendix C.

[48] *See, e.g.*, Phil Cave, *Lest you be Confused*, CAAFLOG (May 5, 2014), http://www.caaflog.com/2014/05/05/lest-you-be-confused/; *see also* Phil Cave, *NDAA Chairman's markup*, CAAFLOG (May 7, 2014), http://www.caaflog.com/2014/05/07/ndaa-chairmans-markup/ (discussing the current political atmosphere of scrutiny on the Military's ability to and future in preventing/prosecution sexual assaults).

[49] Wilson, *supra* note 6, at 274-75.

[50] While the victim may insist on opposing the motion—regardless of the broader implications on the trial—she would do so after receiving legal advice.

A. Discovery for the Victim

The current definition of "party" found in R.C.M. 103(16) does not currently include the victim or any other potentially limited party.[51] However, in *Kastenberg*, the court held that the rule as written does not preclude the inclusion of a limited third party therein.[52] Given the absence of an express recognition of the third party, the simple solution is the addition of subparagraph (C) as follows: "Any limited party, to include victims, having the right to be heard on specific questions of law." This change will fundamentally alter the perception and feel of the process, and pave the way for the requisite changes to R.C.M. 701.

1. New Disclosure Requirements of the Government

Currently, R.C.M. 701(a) outlines what and how the trial counsel must make disclosures to the defense.[53] However, once policy makers alter R.C.M. 103(16) to reflect *Kastenberg*,[54] a rewritten 701 will expand the trial counsel's disclosure obligations to all parties.[55] This change would put the victim and her counsel on an equal, albeit proportional, footing. With the charge sheet, convening orders, Article 34 advice, and all statements in hand, the victim's counsel would grasp the factual realities of the case that had eluded him previously. With this information, the victim's counsel will be more effective and accurate in his advice and in advocating his client's interests in court. That said, if the object is to reincorporate the victim-prosecutorial perspective, the law must go beyond charge sheets and statements.

Rule for Courts-Martial (R.C.M.)701(a)(2) should also be altered to allow for inspection by any party desiring to do so. Like the revisions to subparagraph (a) and (a)(1), the rule should be rewritten to reflect the new triangular matrix, without granting access beyond the limits of the victim's newly-minted limited standing.[56] Currently, the rule only compels the government to open its file for an inspection of evidence material to the preparation of the defense or that the prosecution intends for use in its case in chief.[57] Presumably, the victim's counsel would similarly need access to information material to his own preparations. To accomplish this task, the rule must allow the victim's counsel the same inspection right as the defense; however, that right must be limited to only that which the victim needs. Anything more invites inequity which threatens the equilibrium of the process.

The biggest danger in adding a new player to the court martial and overhauling the system is upsetting the delicate balance between the parties. The tools a victim receives to assert her rights must be limited in scope. Given too much, the victim may have the ability to hijack the entire process and significantly infringe upon the accused's right to a fair trial.[58] As *Kastenberg* expressly limited the standing of the victim to questions arising under MRE 412, 513, and 514, the victim needs only that evidence relevant to the matters in which she has a right to participate.[59] Therefore, the rule should empower the victim as intended by Congress and *Kastenberg* without sacrificing the balance and superior status of the prosecution and defense.[60] Regardless of the more significant and active role of the victim, it must always be secondary to the determination of the accused's guilt or lack thereof. Equating the victim's position to the defense in this context raises the question of whether the prosecution should receive reciprocal discovery in the same manner currently mandated in R.C.M. 701(b)(3).[61]

Even in its current form, discovery is not a one-way street.[62] Should the defense want to examine the government's file beyond the basic disclosures required by R.C.M. 701(a)(1), it must permit the government the appropriate quid pro quo.[63] Should the defense counsel choose to hold his evidentiary cards close to the vest, he may do so, but only by allowing the prosecutor to do the same.[64]

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[51] MCM, *supra* note 1, at R.C.M. 103(16).

[52] *Kastenberg*, 72 M.J. at 268. Despite the court's clear inference to the contrary, for the opinion and the new expansion in the law to stand at all, the premise of a limited third party is a mandatory foundation. *Id*.

[53] MCM, *supra* note 1, at R.C.M. 701(a).

[54] *Kastenberg*, 72 M.J. at 268.

[55] *See infra* Appendix A, Proposed Revision of R.C.M. 701.

[56] *See generally Kastenberg*, 72 M.J. at 364; *see also* 10 U.S.C.A. § 806b (2013).

[57] MCM, *supra* note 1, at R.C.M. 701(a)(2).

[58] Imagine a scenario in which the accused's Sexual Assault Forensic Examination (SAFE) notes several lacerations on his arms sustained the day before the assault and of which the victim was unaware at the time of the assault. If the victim were to gain those documents in discovery, she may be tempted to alter her testimony in order to enhance her claim that she fought back. While this is the same fear Justice Brennen denounces as applied to defendants, the victim's situation is distinct as she has no countervailing need to know. Brennan, *supra* note 9. Therefore, while one would hope that the victim—and especially her counsel—would be candid and truthful before the court, safeguards can be put in place without harming the victim's limited status and various rights to be heard.

[59] *See generally Kastenberg*, 72 M.J. at 364.

[60] *See generally id*; *see also* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 701, 1704, 1706, 1716, 1747, 127 Stat. 672 (2013).

[61] MCM, *supra* note 1, at R.C.M. 701(b)(3).

[62] If the defense requests to inspect the government's file under R.C.M. 701(a)(2), upon request the defense must make available that which it intends to use in its case in chief as well. MCM, *supra* note 1, at R.C.M. 701(b)(3).

[63] MCM, *supra* note 1, at R.C.M. 701(b)(3).

[64] *Id*.

Similarly, circumstances may arise in which revealing very little if anything to the prosecutor best serves the victim's interests. For example, one can imagine that a victim opposing a domestic violence prosecution may not want her attorney to disclose evidence of her husband's additional misconduct to the prosecutor. Similarly, if possible, the victim may wish to conceal her own misconduct behind the wall of privilege. Much as they do for the defense, the rules must allow for this tactical decision—but not at the expense of creating an unfair disadvantage to the prosecution's interest in holding an offender accountable.[65] The alternative creates a reality in which the prosecution must open its files to the victim without gaining any insight as to how the victim may use that information. As a result, the victim could potentially derail the government's case.[66] Therefore, the same R.C.M. 701(b)(3) quid pro quo obligation on the defense must likewise apply to the victim.[67] While the prosecution may have the lion's share of useful information, it is not the only source.

2. Changes in the Disclosure Requirements of the Defense

In practice, much of the litigation adverse to the victim's interest will originate with the defense. If the goal is to effectively advise the victim and ensure her counsel can effectively litigate her interests in court, there should likewise be an exchange between the victim and the defense. But, as was the case above, the rules should compel only that which the victim needs. Therefore, the rule should be expanded as follows:

> Before presenting an interlocutory question directly or indirectly controlled by MRE 412, 513, and 514 to the court, the defense shall notify the victim of the names and addresses of all witnesses other than the accused, whom the defense intends to call during litigation on that interlocutory question, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the interlocutory question.

This revision would go a long way in accomplishing this aim by giving the victim and her counsel the tools needed to effectively assert her right to be heard. A requirement to notify the victim of such a defense would complete the goal.

Under the current law, R.C.M. 701(b)(2) requires the defense to notify the prosecution of its intent to assert certain defenses.[68] For the victim's right to be heard to be meaningful, this rule must be expanded. The best solution is as follows: "In a case in which the accused is charged with Art. 120, 120a, 120b, 120c, 125, or a sexual offense alleged under Art. 134, the defense shall notify the trial counsel and the victim's counsel before the beginning of trial on the merits of its intent to offer the defenses of consent, reasonable mistake of fact as to consent, or both." Despite its offense-based limitations, this revision will no doubt be controversial because under the current law the defense has been able to keep its theory hidden until the last minute.[69] The defense's ability to shroud its theory of the case puts both the prosecution and the victim litigant at a disadvantage.

Imagine the defense brings an MRE 412 motion in an effort to admit evidence of a sexual encounter with a third party several nights prior to the event in question. In this case, the defense could potentially go with a theory of never-happened, consent, or reasonable mistake of fact as to consent. Depending on which theory the defense chooses, the evidence could be completely irrelevant or constitutionally required. Without prior notification, not only does the victim's counsel lack the ability to counsel his client and prepare his response and representation, but the victim will have to answer for it regardless. With this revision, the victim and her counsel will be able to prepare and potentially preclude needlessly embarrassing litigation. Fundamentally, this requirement is no different than notifying the prosecutor of the intent to employ an alibi defense—it allows the opposition to investigate, prepare, and prevent the deception of the fact finder. Although this informational empowerment allows the victim to effectively assert her rights, granting the victim too much information beyond her needs creates the danger that the victim can use that information to sway the trial and upset the delicate balance. Therefore, because of that danger and the limited party status granted in *Kastenberg*, the revisions must limit the discovery to the victim to only that which she needs to assert her rights.[70]

Similar to the prosecutor, it is equally important that the defense disclose to the victim only that which she needs to assert her rights. Limiting defense disclosure obligations will maintain the appropriate balance between the accused and the limited party victim. While it is true that the defense must disclose its merits witnesses per R.C.M. 701(b)(1),[71]

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[65] *Id.*

[66] Imagine for example a situation in which the defense does not request discovery for fear of having to provide reciprocal discovery. In that situation, if the victim and accused's interests are aligned, the accused could use the victim as a proxy through which to gain an insight into the prosecution's case while avoiding the required reciprocation and thereby gaining an unfair advantage.

[67] *See infra* Appendix A, Proposed Rewrite of R.C.M. 701(c)(2).

[68] MCM, *supra* note 1, at R.C.M. 701(b)(2).

[69] *See* MCM, *supra* note 1, at R.C.M. 701(b)(3).

[70] *Kastenberg*, 72 M.J. at 368-69.

[71] MCM, *supra* note 1, at R.C.M. 701(b)(1).

over-disclosure to the victim has the potential to be particularly dangerous given the victim's potentially intimate knowledge of the facts and players involved. While a victim and prosecution alignment may render this point moot, circumstances may be such that an overly-informed victim presents too great a risk to the accused's ability to mount a defense.[72]

Some may believe that these revisions do not go far enough, that the victim is entitled to even more. For instance, an argument can be made that the defense should be forced to disclose any evidence that may be used to sully the victim's character. However, once again, that takes the victim and her counsel beyond the status carved out by *Kastenberg*.[73] While it seems intuitive for the victim to be informed of when and how her character may be attacked, she does not have a need to know because she lacks standing to actively rebut that evidence at trial. That aspect of the trial, as unsavory as it may be for her, goes beyond the boundaries of her participation in the case.

Thus far, these proposed revisions have provided the victim and her counsel with the information needed to assert the victim's rights. True balance cannot be achieved until the victim and her counsel face disclosure requirements of their own. In what will amount to one of the trickiest and most delicate necessities of these revisions, R.C.M. 701 must strike an appropriate equilibrium between the accused's right to be informed of exculpatory evidence under *Brady v. Maryland*[74] and the confidentiality between the victim and her counsel.[75]

B. Disclosure by the Victim

For every persuasive argument proponents of disclosure may make, proponents of strict confidentiality between the victim and her counsel likely have an equally valid response. In fact, these rule changes that provide a benefit to the victim would seem to put the victim in a worse position than prior to the changes because previously a victim could keep information private, but now she may be compelled to disclose. However, any revisions to the rules must continue to reflect that the accused's constitutional right to a fair trial is paramount.[76] This is one of the primary flash points in the conflict of competing perspectives. On one hand, the victim should not be punished for retaining counsel by losing the protection of her attorney-client privilege. On the other, once the victim becomes an active participant, she should be subject to the same rules as the other litigants in order to maintain the delicate equilibrium vital to the due process model. Therefore, if the victim chooses to insert herself into the process beyond the role of complaining witness, then she must abide by rules designed to maintain balance and ensure the accused receives his fair trial. Though not direct, this allows the victim to retain some control over whether or not she must disclose.

Brady holds that, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[77] Even more important is the rationale behind the rule.

> The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.[78]

The rationale here is important because it illuminates the perspective of the rule, and ultimately the goal of a criminal trial—a fair trial for the accused.

The biggest danger in adding a third player is the extent to which the third party may possess such *Brady*-like exculpatory evidence and shield it from the accused. Without a rule requiring disclosures, hiding exculpatory evidence from one's attacker may be the best reason for victims to retain counsel at all. Such a paradigm would ultimately shift the focus and power toward the protection of the dignity and sensibilities of the victim and thus away from the accused's right to a fair trial. While protecting a victim's dignity during the potentially traumatic trial is important, it cannot trump the accused's right to a fair trial.[79]

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[72] Imagine, for example, that the defense counsel is preparing a defense based primarily on character evidence—negative toward the victim and positive regarding the accused. If the victim and her counsel have unfettered access to the defense's witness list, the victim may take on a far more active role in the prosecution by actively identifying, vetting, and suggesting witnesses capable of derailing the defense's case thus forcing the accused to defend against two adversaries rather than just one. While that may be appropriate on questions that directly affect the rights of the victim, it is highly inappropriate for the case in chief.

[73] *See generally* L.R.M. v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013).

[74] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[75] *See* U.S. CONST. amend. VI; Maine v. Moulton, 474 U.S. 159 (1985); United States v. Turley, 24 C.M.R. 72 (C.M.A. 1957); United States v. Fair, 10 C.M.R. 19, 25-26 (C.M.A. 1953) (noting that the principle of confidentiality was designed to encourage full and unrestrained communication between client and attorney).

[76] Compare the chilling effect on the victim's candor with her counsel to the spirit of *Brady*. If the victim is afraid to admit certain things to her lawyer for fear of having that information turned over to the accused, then the relationship will be strained. Brady v. Maryland, 373 U.S. 83, 87 (1963).

[77] *Id*.

[78] *Id*. at 87-88.

[79] *See* U.S. v. Stellato, No. 15-0315 (C.A.A.F. Aug. 20, 2015); *see also infra* Appendix D, discussion of *U.S. v. Stillato*, for a more in-depth discussion of this case as it applies to the concept of victim disclosure.

One can foresee an obvious example upon inspection of MRE 412(b)(1)(c).[80] Imagine a victim in a sexual assault case comes to her attorney with the following confession:

> After he raped me, we started talking again. One thing led to another and we ended up exchanging dirty texts and I sent him a few racy photos. I have since gotten a new phone, but I still have the old one with all of that on there. I want him to pay for what he did to me, but I'm afraid if this stuff were to come out, no one would believe me.

Now imagine that the accused deleted that content. A savvy attorney would tell the victim not to speak of the phone, texts, or images unless asked specifically about them.[81] Furthermore, that counsel would sit in on every interview and instruct her client not to answer questions that may reveal that information.[82] Being none the wiser, the accused proceeds to trial without being able to raise what could potentially be reasonable doubt in the case. While that counsel has successfully shielded his client from embarrassment in court and helped bring about the desired conviction, he did so at the expense of the accused's right to a fair trial.[83] Policy makers must decide which is more important; *Brady* and its progeny would clearly favor the accused's right to a fair trial.[84]

Any revisions within the discovery rules need to compel the victim and her counsel to disclose exculpatory evidence once she inserts herself into the trial. In the example above, the bad facts associated with the phone are not dispositive of whether or not the accused actually committed the offense. But without that information that same accused would be deprived of a fair trial. Without a compulsion to disclose, the victim would effectively wield the power to shade, alter, or even mislead the trial. While requiring disclosures may have a chilling effect on the attorney-client relationship between the victim and her counsel, the alternative has the potential to undermine the entire process. Therefore, should the victim choose to take on a participatory role greater than that of mere witness, the victim, as a limited party, must adhere to the due process perspective.

The rules should compel these victim disclosures to the prosecution as well. Imagine once more the hypothetical case above. Under the current construct, if the defense learned of the existence of the phone, under a *Brady*[85] analysis, the prosecutor could be accused of failing to disclose exculpatory evidence—evidence from which the prosecutor was effectively sealed off by and through the victim's counsel.[86] The changes proposed herein, while extensive, address these holes and concerns in an intuitive and practical manner.

Including the prosecutor as a recipient of exculpatory evidence from the victim solves several discovery inequities created by the new paradigm.[87] First and foremost, such a rule would create a redundancy in disclosure to the defense as the prosecutor remains bound by the requirement to disclose all qualifying evidence within his care and control.[88] Second, this rule change would somewhat relieve the prosecutor from an ethical duty to disclose that which he may not know. Lastly, with the exception of evidence held exclusively by the accused, all parties to the trial would start on an equal informational footing. This is significant to the

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[80] MCM, *supra* note 1, at MRE 412(b)(1)(c).

[81] *Compare* AR 27-26, *supra* note 44, para. 1.2, *with* AR 27-26, *supra* note 44, para. 3.3, 3.4(1)(a), and (1)(f)(2). Rule 1.1 requires the Judge Advocate—in this case the SVC—to do that which is in his client's best interests; however, rule 3.4(a)(1) prohibits unlawful obstruction to relevant information. AR 27-26, *supra* note 44, para 1.2; AR 27-26, *supra* note 44, para. 3.4(1)(a). Depending on the meaning or interpretation of "unlawful" in rule 3.4(a)(1), these two rules may be irreconcilable. As of now there is no guidance as to which rule trumps or how the SVC may make that determination.

[82] Professional Experience, *supra* note 22. Much of the dynamic between the victim's counsel and either defense or government counsel is personality driven. Outside of the solicitation of incriminating evidence by the prosecutor, the victim in her role as a witness has no legal authority to refuse to answer the questions of the other parties; however, an overzealous victim's counsel may nevertheless instruct her client not to answer certain questions. Regardless of her authority to give that advice, if her client follows it, the victim's counsel has effectively walled off potentially relevant evidence. *Id.*

[83] *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1963). Once again this will depend on one's particular perspective. From that of the victim, the accused is guilty, and needs only to be convicted and sentenced to satisfy her desire for retribution. Professional Experience, *supra* note 22. Therefore, disclosing evidence that confuses or obscures that guilt will only frustrate the victim's reasonable goal. Conversely, from a presumption of innocence perspective, the accused's inability to learn of and present such evidence would irreparably harm his ability to prove his innocence.

[84] The obvious counter point is that even now a savvy victim is able to conceal *Brady* material from the prosecutor thereby ensuring the defense is never the wiser. Therefore, why punish the victim and make her turn over evidence—effectively piercing her own privilege against her interest—just because she has retained counsel and chosen to assert her rights? However, because the victim is now an active participant in the litigation, she has the ability to manipulate the proceedings more than ever before—not to mention her attorney's ethical duties to the court.

[85] *Brady*, 373 U.S. at 87.

[86] *See* U.S. v. Stellato, No. 15-0315, 34-35 (C.A.A.F. Aug. 20, 2015) (distinguishing its decision to hold the trial counsel responsible for failure to investigate and make disclosures from evidence held by a cooperating witness from significant opposing case law based on the trial counsel's "willful blindness" and ability to review that evidence); *Brady*, 373 U.S. at 87 (1963) (holding that the intent is not to punish the state, but rather to ensure the accused receives a fair trial).

[87] An unconstitutional taking is the obvious counterpoint. U.S. CONST. amend. V. It is not difficult to imagine a scenario in which the prosecution would try to force the victim to hand over personal property in order to comply with *Brady*—a clear taking. However, the fairly simple solution would be to expressly deny the government the power to deprive the victim of her personal property outside a proper subpoena and simultaneously grant the military judge the ability to abate or dismiss the proceedings in the event the victim decides she would rather maintain her privacy than allow the trial to go forward. With such a rule, the accused could not be forced into a trial without knowledge of constitutionally-required evidence and the victim could not be forced to surrender her property.

[88] MCM, *supra* note 1, at R.C.M. 701(a)(6); *but see* MCM, *supra* note 1, at MRE 502(a)(3).

prosecutor because beyond the concerns of how the evidence will play at trial, that evidence may also influence the decision to go to trial in the first place. Without the duty to disclose to the government, it is entirely possible that the victim and her counsel could effectively drive a case into court that had no business being tried in the first place.

Once it is determined that the victim must disclose, one must decide when she must disclose. The point of retention of counsel is too early, as that would effectively stifle the motivation to seek counsel and fatally weaken the attorney-client privilege, as that would force her to disclose information before knowing if she even wants to be heard. Arguably, this creates an inequity in favor of the victim because she would likely receive discovery prior to becoming a party and incurring her own disclosure obligations. This may seem concerning at first glance, but the alternative once again forces the victim to litigate blind.[89] In reality, this will not be as harmful to the accused as it may seem. If she does not file a motion, the accused is no worse off than he was prior to disclosure. If she does file, she has a reciprocal discovery obligation.[90] The victim's disclosure obligation should only arise when she seeks additional discovery from the prosecution—a choice triggering reciprocal discovery—or files a motion or response because these acts take her beyond her traditional witness role.

Given the practical reality of shifting and aligning interests between a now three-party system, these disclosures are the key to withholding the power of "swing vote" from the victim and maintaining the balances critical to the integrity of the system. However, privilege still poses a major obstacle to the smooth resolution of this discovery issue.

C. The Practical Alignment of Parties and the Problem of Privilege

In considering this third party, the intuitive equilateral triangle one might envision is misleading as the victim's interest will almost inevitably create a two-on-one scenario. Despite the checks on the danger of victim primacy—the victim can decide which party to support—she can potentially shift the balance of power according to her preference. In a worst case scenario, the victim could essentially predetermine the victor with her decision of which party to support. The solutions to this problem are the proposed disclosure obligations of the victim working in tandem with MRE 502(a)(3).

Practically speaking, the victim's counsel best serves his client's interests when he works with the party with whom those interests are aligned. However, one would think that MRE 510 would render that almost impossible.[91] MRE 502(a)(3) solves that problem. On matters in which parties share a common interest, their attorneys may collude behind the wall of attorney-client privilege.[92] While this legal provision initially envisioned co-defendants in criminal trials, it has been used frequently in civil practice by both co-defendants and co-plaintiffs.[93] As written, if the victim and the government share a common interest—conviction of the accused—then the victim's counsel and the prosecutor could share privileged information without triggering MRE 510. Without the disclosure requirements proposed herein, MRE 502(a)(3) would permit the victim to block prosecutorial disclosures to the defense, thus pulling the teeth out of *Brady* altogether.

Conversely, if the victim's interests align with the defense, the victim could effectively block the defense's reciprocal disclosures. Imagine the defense files its discovery request thereby granting them access to the prosecutor's files. If the defense intended to present evidence protected by the victim's attorney-client privilege in its case in chief, MRE 502(a)(3) could prevent that disclosure. Furthermore, the defense could similarly and significantly devalue the prosecutor's ability to develop testimony with the "hostile" victim by preparing the victim alongside her counsel as they discuss and incorporate the privileged information of the accused. Having done so, the defense counsel could then use attorney-client privilege under MRE 502(a)(3) to virtually silence the victim in front of the prosecutor.

In these situations, essentially the victim has merged with the party of her choice. And, by using attorney-client privilege as a sword instead of the shield, the victim can control the flow of information and thereby significantly influence the outcome of the trial. As this new paradigm matures, military justice practioners will discover this windfall and exploit it. When that inevitability comes, the truth finding function of the trial will take a back seat, and the due process model will suffer. The solution is the mandatory victim disclosures that match those of the other litigants. While unfortunately this requires the attorney-client relationship to be pierced to a degree, such is the cost of admission as the alternative is a far worse proposition and must be avoided.

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[89] If the victim does not receive discovery until she has filed a motion, then she has no discovery upon which to base that motion.

[90] The victim passing that evidence to the prosecution is the obvious counterpoint; however, the defense disclosure obligation only materializes if they intend to file. The prosecution will know about it anyway in due course.

[91] MCM, *supra* note 1, at MRE 510.

[92] MCM, *supra* note 1, at MRE 502(a)(3).

[93] *See generally* James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631 (1997); *see also* Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 50 (June 23, 2005).

V. Conclusion

With CAAF and Congress firmly entrenching the victim into the litigation as a limited party, the rules proposed in this article will accommodate this new party in her pursuit of her rights. However, these rules go further and account for the second and third order effects created by the addition of a third party. These proposed rules not only provide the victim with discovery, but do so in such a way that maintains the critical balance vital to the due process model of criminal justice. At the same time, they make significant concessions to the resurgent victim-first perspective. One way or another, the inclusion of the victim as a litigant necessarily created new conflict with the presumption of innocence precariously suspended in the middle. The result is a choice of whether to maintain allegiance to that axiom or abandon it. Though a compromise in many ways, the rules proposed in this article reflect the choice to maintain such allegiance because in a free society in which one's liberty is his greatest resource, the criminal justice system must guarantee that one cannot lose that liberty without complete due process of law.

Appendix A. Proposed Revision of R.C.M. 701

Rule 701. Discovery [Note that all proposed revisions to R.C.M. 701 are in red]

(a) *Disclosure by the trial counsel to all parties.* Except as otherwise provided in subsections (g) and (h)(2) of this rule, the trial counsel shall provide the following information or matters to the defense—

(1) *Papers accompanying charges; convening order; statements.* As soon as practicable after service of charges under R.C.M. 602, the trial counsel shall provide all parties with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit all parties to inspect:

(A) Any paper which accompanied the charges when they were referred to the court-martial, including papers sent with charges upon a rehearing or new trial;

(B) The convening order and any amending orders;

(C) Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel; and

(D) Any matters submitted by a victim to the convening authority to be considered on the question of referral by the convening authority shall be disclosed to the defense.

(E) For the purposes of paragraph (a)(1) of this rule, the victim is a party upon her counsel filing notice of representation.

(2) *Documents, tangible objects, reports.* After service of charges, upon request of either the defense or the victim, the Government shall permit the requesting party to inspect the following—for the accused, provided it is material to the preparations of the defense, for the victim, provided it is material to the preparation of litigation of interlocutory questions controlled, either directly or indirectly, by MRE 412, 513, or 514. In addition, the defense is further entitled to inspect any of the following provided it is intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, whereas the victim is limited to an inspection of the following provided it is intended for use by the trial counsel in an appropriate interlocutory question:

(A) Any books, papers, documents . . . which are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or

(i) were obtained from or belong to the accused upon a defense request to inspect;

(ii) were obtained from or belong to the victim upon a victim's request to inspect; and

(B) Any results or reports of physical or mental examinations, and of scientific tests or experiments . . . the existence of which is known or by the exercise of due diligence may become known to the trial counsel.

(3) *Witnesses*. Before the beginning of trial on the merits, the trial counsel shall notify the defense of the names and addresses of the witnesses the trial counsel intends to call:

(A) In the prosecution case-in-chief; and

(B) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when trial counsel has received timely notice under subsection (b)(1) or (2) of this rule

(4) *Prior convictions of accused offered on the merits.* Before arraignment . . . and shall permit the defense to inspect such records when they are in the trial counsel's possession

(5) *Information to be offered at sentencing*. Upon request of the defense the trial counsel shall:

(A) Permit the defense to inspect . . . .

(B) Notify the defense of the names and addresses of . . . .

(6) *Evidence favorable to the defense*.

(A) The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:

(i) Negate the guilt of the accused of an offense charged;

(ii) Reduce the degree of guilt of the accused of an offense charged; or

(iii) Reduce the punishment

(B) The trial counsel shall not be required to disclose the existence of the evidence favorable to the defense as defined in subsection (6)(A) of this rule if that evidence is in the exclusive possession of the victim and therefore unknown to the trial counsel unless the trial counsel and victim's counsel share a mutual privilege under MRE 502(a)(3).

(7) *Information regarding Pre-Trial Agreements.* Should the victim retain counsel, the trial counsel shall provide offers to plead guilty, the allied documents, and the Art. 34 advice to victim's counsel no later than two days prior to referral by the GCMCA. If the victim has not retained counsel, the trial counsel shall inform the victim of offer to plea and the details of such an offer, and disclose to the victim the contents of the SJA's advice under Art. 34 of the UCMJ.

(8) *Matters submitted by the victim*. The trial counsel shall disclose to the defense any matters submitted to the convening authority by the victim regarding referral or post-trial action under Art. 60 prior to the convening authority taking action.

(b) *Disclosure by the defense*. Except as otherwise provided in subsections (g) and (h)(2) of this rule, the defense shall provide the following information to all parties of the trial—

(1) *Names of witnesses and statements*

(A) To the trial counsel:

(i) Before the beginning of trial on the merits, the defense shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(ii) Upon request of the trial counsel, the defense shall also:

(i) Provide the trial counsel with the names and addresses of any witnesses whom the defense intends to call at the presentencing proceedings under R.C.M. 1001(c); and

(ii) Permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.

(B) *To the victim:* Before presenting an interlocutory question directly or indirectly controlled by MRE 412, 513, or 514 to the court, if in receipt of a notice of representation by an attorney for victim, the defense shall notify the victim of the names and addresses of all witnesses other than the accused, whom the defense intends to call during litigation on the interlocutory question, and provide all statements known by the defense to have been made by such witnesses in connection with the interlocutory question.

(2) *Notice of certain defenses.*

(A) The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition. Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense, and, in the case of an innocent ingestion defense, the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substance in question, and the names and addresses of the witnesses upon whom the accused intends to rely to establish any such defenses.

(B) In a case in which the accused is charged with Art. 120, 120a, 120b, 120c, 125, or a sexual offense alleged under Art. 134, if in receipt of a notice of representation by an attorney for victim, the defense shall notify the trial counsel and the victim before the beginning of trial on the merits of its intent to offer the defenses of consent, reasonable mistake of fact as to consent, or both.

(3) *Documents and tangible objects.* If the defense requests disclosure . . . or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.

(4) *Reports of examination and tests.* If the defense requests disclosure under subsection (a)(2)(B) of this rule . . . when the results or reports relate to that witness' testimony.

(5) *Inadmissibility of withdrawn defense* . . . .

(c) *Disclosure by the victim.* Except as otherwise provided in subsections (g) and (h)(2)**,** in cases in which the victim has requested discovery under paragraph (a)(2), or filed a motion or response with the court, the victim shall provide the following information or matters to all parties:

(1) *Evidence favorable to the defense.* The victim shall, as soon as practicable following the assumption of the role of a party, disclose to all parties the existence of evidence known to the victim which reasonably tends to:

(A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused of an offense charged; or

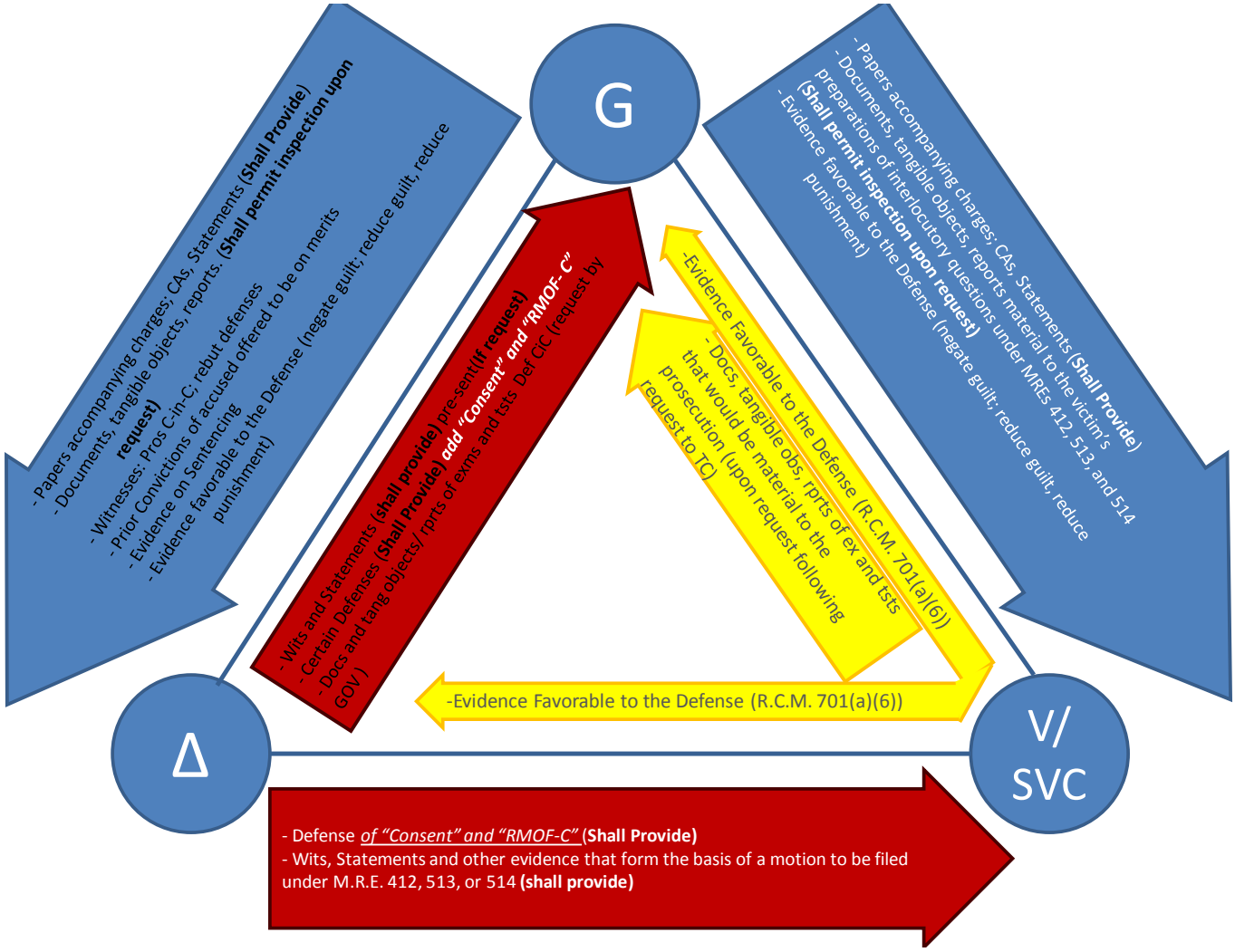
(C) Reduce the punishment.

(2) *Documents, tangible objects.* If the victim requests disclosure under subsection (a)(2)(A) of this rule, upon compliance with such request by the Government, the victim, on request of the trial counsel, shall permit the trial counsel to inspect books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the victim to include that of the victim's counsel and which are material to the preparation of the prosecution.

(A) If the victim refuses to disclose tangible evidence under paragraph (c)(1) of this rule, the military judge may, in his discretion, abate the proceedings until such time as the victim agrees to disclose, or dismiss the case with or without prejudice. The Government may not compel the victim to disclose such tangible evidence.

(3) *Reports of examination and tests.* If the victim requests disclosure under subsection (a)(2)(B) of this rule, upon compliance with such request by the Government, the victim, on request of the trial counsel, shall permit the trial counsel to inspect any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are within the possession, custody, or control of the victim to include that of the victim's counsel and which are material to the preparation of the prosecution.

Appendix B. Proposed Revisions to R.C.M. 701 (Graphic Representation)



Appendix C. R.C.M. 701 in its current form

Rule 701. Discovery

(a) *Disclosure by the trial counsel.* Except as otherwise provided in subsections (f) and (g)(2) of this rule, the trial counsel shall provide the following information or matters to the defense—

(1) *Papers accompanying charges; convening orders; statements.* As soon as practicable after service of charges under R.C.M. 602, the trial counsel shall provide the defense with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit the defense to inspect:

(A) Any paper which accompanied the charges when they were referred to the court-martial, including papers sent with charges upon a rehearing or new trial;

(B) The convening order and any amending orders; and

(C) Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel.

(2) *Documents, tangible objects, reports.* After service of charges, upon request of the defense, the Government shall permit the defense to inspect:

(A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused; and

(B) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

(3) *Witnesses.* Before the beginning of trial on the merits the trial counsel shall notify the defense of the names and addresses of the witnesses the trial counsel intends to call:

(A) In the prosecution case-in-chief; and

(B) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when trial counsel has received timely notice under subsection (b)(1) or (2) of this rule.

(4) *Prior convictions of accused offered on the merits.* Before arraignment the trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment, and shall permit the defense to inspect such records when they are in the trial counsel's possession.

(5) *Information to be offered at sentencing.* Upon request of the defense the trial counsel shall:

(A) Permit the defense to inspect such written material as will be presented by the prosecution at the presentencing proceedings; and

(B) Notify the defense of the names and addresses of the witnesses the trial counsel intends to call at the presentencing proceedings under R.C.M. 1001(b).

(6) *Evidence favorable to the defense.* The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:

(A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused of an offense charged; or

(C) Reduce the punishment.

(b) *Disclosure by the defense.* Except as otherwise provided in subsections (f) and (g)(2) of this rule, the defense shall provide the following information to the trial counsel—

(1) *Names of witnesses and statements.*

(A) Before the beginning of trial on the merits, the defenses shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(B) Upon request of the trial counsel, the defense shall also

(i) Provide the trial counsel with the names and addresses of any witnesses whom the defense intends to call at the presentencing proceedings under R.C.M. 1001(c); and

(ii) Permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.

(2) *Notice of certain defenses.* The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition. Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense, and, in the case of an innocent ingestion defense, the place or places where, and the circumstances under which the defense claims the accused

innocently ingested the substance in question, and the names and addresses of the witnesses upon whom the accused intends to rely to establish any such defenses.

(3) *Documents and tangible objects.* If the defense requests disclosure under subsection (a)(2)(A) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.

(4) *Reports of examination and tests.* If the defense requests disclosure under subsection (a)(2)(B) of this rule, upon compliance with such request by the Government, the defense, on request of trial counsel, shall (except as provided in R.C.M. 706, Mil. R. Evid. 302, and Mil. R. Evid. 513) permit the trial counsel to inspect any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are within the possession, custody, or control of the defense that the defense intends to introduce as evidence in the defense case-in-chief at trial or that were prepared by a witness whom the defense intends to call at trial when the results or reports relate to that witness' testimony.

(5) *Inadmissibility of withdrawn defense.* If an intention to rely upon a defense under subsection (b)(2) of this rule is withdrawn, evidence of such intention and disclosures by the accused or defense counsel made in connection with such intention is not, in any court-martial, admissible against the accused who gave notice of the intention.

(c) *Failure to call witness.* The fact that a witness' name is on a list of expected or intended witnesses provided to an opposing party, whether required by this rule or not, shall not be ground for comment upon a failure to call the witness.

(d) *Continuing duty to disclose.* If, before or during the court-martial, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party or the military judge of the existence of the additional evidence or material.

(e) *Access to witnesses and evidence.* Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.

(f) *Information not subject to disclosure.* Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives.

(g) *Regulation of discovery.*

(1) *Time, place, and manner.* The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just.

(2) *Protective and modifying orders.* Upon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge. If the military judge grants relief after such an ex parte showing, the entire text of the party's statement shall be sealed and attached to the record of trial as an appellate exhibit. Such material may be examined by reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

(3) *Failure to comply.* If at any time during the court-martial it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:

(A) Order the party to permit discovery;

(B) Grant a continuance;

(C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and

(D) Enter such other order as is just under the circumstances. This rule shall not limit the right of the accused to testify in the accused's behalf.

(h) *Inspect.* As used in this rule "inspect" includes the right to photograph and copy.

U.S. v. Stellato provides a real world warning of how a victim may manipulate evidence resulting in harm to the accused. In this child sexual abuse case, the victim's mother maintained a box of evidence that she updated and maintained presumably in anticipation of an eventual trial—information that included evidence of a potential recantation.[1] In considering the prosecution's failure and potential refusal to disclose the material to the defense, the court found that a prosecutor's due diligence discovery obligations under MRE 701 extends into the possessions of cooperating witnesses—reversing the decision[2] of the Army Court of Criminal Appeals.[3] The court differentiated *Stellato* from the standard rule that prosecutor has no duty to search for or obtain exculpatory evidence that is in the possession of cooperating witnesses[4] based on the fact that in *Stellato*, the trial counsel had "pretrial knowledge of the existence of the box of evidence[,] . . . [an] ability to review material contained in [the box,]"and was "willfully blind" to the box's contents.[5] While this distinction and resulting holding may seem reasonable under its facts, when applied in a context in which the victim is represented by counsel, this ruling becomes problematic and potentially untenable.

When one changes the facts of *Stellato* so that the victim is represented by counsel, the case creates the strong potential for disadvantage to the accused and clearly subverts the spirit and intent of *Brady*.[6] The *Stellato* court did not contemplate a victim represented by counsel when it expanded the definition of "care and control" of the government to include possession by third parties.[7] As such the court did not contemplate the ability of the victim, through counsel, to frustrate the good faith efforts of the trial counsel to discover and disclose that which the defense is entitled. For example, without a duty to disclose, had the victim in *Stellato* been represented, her counsel likely would have advised his client to share with the trial counsel only that which was in her interest to disclose, thereby concealing the exculpatory evidence. Even under the conditions imposed by the court, one can easily imagine a scenario in which a special victim counsel (SVC) could effectively block the government's disclosure obligations. By keeping that exculpatory evidence safe behind the wall of confidential representation and even privilege, a savvy victim's counsel would essentially be able to deprive the accused of potentially critical information and by extension his fair trial, thereby shifting the balance and focus away from the accused's right to a fair trial in favor of the victim's retributive goals. This proposition is all the more dangerous considering MRE 502(a)(3) as discussed in section V, subsection C, of this article. If the goal of the criminal trial is to find the truth while maintaining the presumption of innocence and protecting the due process rights of the accused, then this result is untenable.

Additionally, while it may still be reasonable to exempt the prosecutor from rummaging through the possessions of third parties or cooperating witnesses, the *Stellato* ruling makes the prosecutor's role far more precarious as one can imagine a scenario in which he is aware of potentially exculpatory evidence but is either unable to get at it or precluded from disclosing it. Following this decision, whether or not a court would give the trial counsel a pass when the SVC frustrates his discovery efforts remains to be seen.

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[1] U.S. v. Stellato, No. 15-0315, 5 (C.A.A.F. Aug. 20, 2015).

[2] U.S. v. Stellato, No. 20140453, 20-21 (A. Ct. Crim. App. Nov. 17, 2014).

[3] *Stellato*, No. 15-0315, 33-36.

[4] *Id*., at 33-34.

[5] *Id*. at 34.

[6] Brady v. Maryland, 373 U.S. 83 (1963).

[7] *Stellato*, No. 15-0315, 34. As noted above, the possession of cooperating witnesses is within the care and control of the government provided the conditions outlined by the court are met. *Id*. How liberally those conditions are interpreted going forward remains to be seen.

The Things They Cannot Say[1]

Reviewed by *Major James A. Burkart*[*]

Killing turns everything on its head. Watching people being killed, especially those you know, is a memory that can't be erased. But actually doing the killing or being fully complicit in it is a lifelong sentence to contemplate the nature of one's own character, endlessly asking, "Am I good, or am I evil?" and slowly growing mad at the equivocation of this trick question whose answer is definitively yes.[2]

I. Introduction

As a journalist, Kevin Sites spent most of the last decade covering wars around the world.[3] Within a single year he bounced around the globe to visit twenty different conflicts.[4] He reflected on his experience:

> I have both carried the wounded and walked away from the dying. But more than anything else, I've had to watch and bear witness. I've seen the killing of human beings at nearly every point on the spectrum of our existence, from small children to wrinkled octogenarians. I've watched killing from a great distance, bombs dropped from the sky. I've watched killing within the distance of an embrace, one man executing another. And these images, both as I captured them and as I contemplated them after, have changed me forever. They continue to define me and imbue me with a sense of importance and even swagger, while they also kill me slowly in the moments when I fully consider my complicity.[5]

Sites wrote *The Things They Cannot Say*, which includes his own personal anecdotes and eleven short stories about various veterans, in an attempt to understand and make sense of his wartime experiences.[6] In the process, he discovered "that sharing the burden of [his] wars and the mistakes [he] made in them helped [him], at least initially, to understand and to heal."[7] His underlying goal is to extend this cathartic opportunity, to tell and to know, to all combat veterans and society in general.[8]

II. *The Things They Carried*

The Things They Cannot Say asserts that when humans go to war they will carry home some part of the combat with them and when they are reluctant to speak about their experiences they will continue to carry, alone and without support, the "physical and psychological burdens of their war experiences."[9] The title of the book is inspired by Tim O'Brien's Vietnam classic *The Things They Carried* and instantly invokes the connection between carrying the burdens of war and not talking about it with others.[10] Indeed, *The Things They Cannot Say* is a modern-day attempt to replicate the powerful fictional storytelling of *The Things They Carried*, which served as a voice for many Vietnam veterans who were unable or unwilling to express their emotions to their often antagonistic fellow citizens.[11]

The remark in *The Things They Cannot Say* that "[w]hen you go to war and you come back it doesn't leave you"[12] rings as an echo from a verse in *The Things They Carried* that "[y]ou come over clean and you get dirty and then afterward it's never the same."[13] To this parallel

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[1] KEVIN SITES, THE THINGS THEY CANNOT SAY (2013). Of caution, the reader should not be distracted by the fact Sites was the journalist who recorded and released the video of a Marine shooting an unarmed, wounded insurgent in a Fallujah mosque. The military reader might be initially wary toward the author and the judge advocate may be tempted to get bogged down with the potential military justice implications. However, the actual facts and circumstances of the incidents within the mosque are not essential to the main themes of this particular book and can be left to explore and debate at another time and place. *Id.* at xxvi-xxvii.

[2] SITES, *supra* note 1, at xvii.

[3] *Id.* at xxiv.

[4] KEVIN SITES, IN THE HOT ZONE: ONE MAN, ONE YEAR, TWENTY WARS (2007).

[5] SITES, *supra* note 1, at xxiv-xxv.

[6] *Id.* at xxiv.

[7] *Id.* at xxv.

[8] *Id.* at xxxi-xxxii.

[9] *Id.* at xxxiv. "War is shaped by human nature and is subject to the complexities, inconsistencies, and peculiarities which characterize human behavior." U.S. MARINE CORPS, WARFIGHTING 13 (Currency Doubleday 1995) (1989).

[10] TIM O'BRIEN, THE THINGS THEY CARRIED (Mariner Books 2009) (1990); SITES, *supra* note 1, at 293.

[11] "Those who have had any such experience as the author will see its truthfulness at once, and to all other readers it is commended as a statement of actual things by one who experienced them to the fullest." O'BRIEN, *supra* note 10, at unnumbered page after table of contents. *See also* SITES, *supra* note 1, at 159.

[12] SITES, *supra* note 1, at 216.

[13] O'BRIEN, *supra* note 10, at 109; SITES, *supra* note 1, at 138, 168, 178. An earlier voice from World War II counseled, "The soldier who has yielded himself to the fortunes of war, has sought to kill and to escape being killed, or who has even lived long enough in the disordered landscape of battle, is no longer what he was . . . . In a real sense he becomes a fighting man, a *Homo furens*." J. GLENN GRAY, THE WARRIORS 27 (Bison Books 1998) (1959).

diagnosis of carrying combat home, whether as pressure on the mind, a burdensome weight to the shoulders, or a stain on the soul, both Sites and O'Brien prescribe a strong dosage of storytelling since stories have the redemptive power to save the veteran and inform society.[14] *The Things They Cannot Say* represents not only a collection of stories in itself, which helped at least twelve individuals share their experiences, but also a call for more storytelling, both for veterans to speak and for society to listen."[15]

There is a balance between moving a story along and stopping to insert analysis, and *The Things They Cannot Say* clearly chooses readability. The narratives are short and flow well, but by being brief Sites only scratches the surface of many of the combat psychology subjects without providing in-depth analysis. For example, although he acknowledges the complete combat narrative includes "giving voice to the natural excitement and fellowship of war as well as communalizing grief," the stories Sites uses predominately focus on the negative traumas of killing, survivor's guilt, and morally-ambiguous situations.[16]

In comparison, Sebastian Junger in *War* more comprehensively covers the full spectrum of emotions, not only mentioning fear and killing, but also emphasizing the love, excitement, and comradeship that forms an integral part of a combat deployment.[17] Although it sounds oxymoronic, love is found in war to such a degree that veterans "have come home to find themselves desperately missing what should have been the worst experience of their lives" because "the willingness to die for another person is a form of love that even religions fail to inspire, and the experience of it changes a person profoundly."[18] Fortunately, in addition to the sampling of stories, Sites includes great references for those desiring to explore additional accounts and deeper analysis.[19]

Within the brief snapshots Sites exposes, one must recognize there is no such thing as a "cookie cutter" war story. Everyone has a unique personality and each individual goes through an idiosyncratic war experience.[20] This is apparent in the contrast between the two veterans introduced in the first two chapters; although both Army Staff Sergeant Mikeal Auton and Marine Corporal William Wold killed multiple enemy combatants from close range in Iraq, the Soldier "seem[ed] unfazed by the deadly business" while the Marine "struggle[ed] with nightmares, flashbacks and emotional numbing."[21]

There are plenty of books addressing how it feels to actually do the killing.[22] What makes *The Things They Cannot Say* distinctive within the combat psychology conversation is the discourse on how it feels to be complicit in killing. Sites recounts his experience of encountering a wounded insurgent within a Fallujah mosque, stating,

> I'm a journalist, not a soldier, but I've killed in combat. This is how I did it: I looked into the eyes of my victim as he begged for his life, lying before me covered in nothing but a ripped shirt, white underwear and his own dried blood, then I shrugged my shoulders, turned and walked away.[23]

The insurgent was later found dead from what Sites believed to be a summary execution by Marines.[24] Though he did not pull the trigger, Sites felt he killed the man with his indifference when he could have otherwise intervened to prevent his death.[25]

Sites carried his complicity home and like many veterans tried to numb his emotions through alcohol, recreational drugs, empty sex, and rushes of adrenaline.[26] Thinking it a weakness, Sites resisted counseling and sank into a deep melancholy of "nearly total physical and emotional withdrawal."[27] Out of this darkness came the light of a new personal relationship with his future wife.[28] He suddenly found motivation to seek help, and through therapy sessions, he eventually understood that his "past actions during war didn't make [him] a bad person, nor did

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[14] O'BRIEN, *supra* note 10, at 37, 213. "The warrior who does share the descriptive and often disturbing narrative of his own war experiences reconnects himself to his community while simultaneously reminding them of the responsibilities that they also bear for his actions by sending him to fight and kill on their behalf." SITES, *supra* note 1, at xxxi-xxxii.

[15] SITES, *supra* note 1, at xxxiv.

[16] *Id.* at 278.

[17] SEBASTIAN JUNGER, WAR (2010).

[18] *Id.* at 233, 239. *See also* GRAY, *supra* note 13, at 39-46, 89-94. "Many veterans who are honest with themselves will admit, I believe, that the experience of communal effort in battle, even under the altered conditions of modern war, has been a high point in their lives." *Id.* at 44.

[19] SITES, *supra* note 1, at 292-93.

[20] NANCY SHERMAN, AFTERWAR 8, 10 (2015). "Any view of the nature of war would hardly be accurate or complete without consideration of the effects of danger, fear, exhaustion, and privation on the men who must do the fighting. However, these effects vary greatly from case to case. Individuals and peoples react differently to the stress of war." U.S. MARINE CORPS, *supra* note 9, at 13.

[21] SITES, *supra* note 1, at 48, 66. *See also* Colonel Morris Goins' use of a "psychological firewall [that] has allowed him to be at peace with himself, both morally and professionally." *Id.* at 230.

[22] *See, e.g.*, LIEUTENANT COLONEL DAVE GROSSMAN, ON KILLING (Back Bay Books 2009) (1995); KARL MARLANTES, WHAT IT IS LIKE TO GO TO WAR (2011).

[23] SITES, *supra* note 1, at xvii.

[24] *Id.* at 8.

[25] *Id.* at xvii.

[26] *Id.* at xvii-xviii, 14.

[27] *Id.* at 14-15.

[28] *Id.* at 279-83. Interestingly, "[i]t is primarily women who reintegrate the warrior back into society." MARLANTES, *supra* note 22, at 190.

they invalidate the good things inside [him]; they simply proved the existence of both."[29] Sites came to recognize the Jungian duality within him and resolved to share his experience to help others do the same. Sites says,

> The truth I've been able to discern from my interviews and personal experiences in war is the not-unfamiliar concept that it magnifies the duality of our nature—our capacity for good and propensity for evil—and has an unequal power to unite and divide us, to fill us simultaneously with pride and shame. But the piece that we are only beginning to more fully embrace (out of necessity, with thousands of American troops returned or returning home from the wars in Iraq and Afghanistan) is that that same sense of duality can destroy us if we do not honestly share its full and complete narrative.[30]

III. The Things They Can Say

Storytelling is a "way to release warriors from the bonds of their own silence and help them say the things they felt they could not say."[31] Yet many veterans, as silent stoics, bear their burdens in isolation and struggle to overcome their fear to honestly share their intimate combat experience.[32] Although talking about war may still appear taboo to quiet military professionals and society at large, many warriors "often want to share parts of their wars—so long as they can feel a sense of safety and trust."[33] The veteran needs the right audience, which is often found among other military veterans.[34] While not sharing with his wife and children, an Israeli soldier talks openly with his unit because "[t]here's a lot of knowledge and experience that we share that you can only talk about and go over with a person who was there."[35]

Accordingly, some recommend troops take slow ships home from a combat theater, as in World War II, to decompress with their buddies, "relive their feelings, express grief for lost comrades, tell each other about their fears, and, above all, receive the support of their fellow soldiers."[36] Conversely, curiosity is not caring. One Dutch soldier was hesitant to share his stories with civilians because they "might have curiosity, but deep down they don't really care or don't really want to know."[37] Just as there is no single combat experience, there is no single method of storytelling.

> Each and every one of us veterans must have a song to sing about our war experience before we can walk back into the community . . . . Perhaps it is drawing pictures or reciting poetry about the war. Perhaps it is getting together with a small group and telling stories. Perhaps it is dreaming about it and writing the dreams down and then telling people your dreams. But it isn't enough just to do the art in solitude and sing the song alone. You must sing it to other people.[38]

IV. The Things They Advise

The default for judge advocates is often to view the study of combat psychology as a means to help their warrior clients when their legal "work requires understanding the motivations and behaviors of servicemembers," such as advising commanders, defending a Soldier accused of a crime, or training Marines on hostile intent scenarios.[39] This book review proposes that with the increased participation of judge advocates in combat operations, they should study combat psychology because they themselves are warriors that experience war.[40] A judge advocate who assesses real-time tactical situations and recommends action is arguably complicit in the employment of lethal fires against enemy combatants and thus susceptible to the full range of emotions associated with killing, from the adrenaline-induced exhilaration to the "bitter harvest of guilt."[41]

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[29] SITES, *supra* note 1, at 287.

[30] *Id.* at 278. Marlantes had a similar epiphany, stating, "So am I a killer? No, but part of me is." MARLANTES, *supra* note 22, at 69.

[31] SITES, *supra* note 1, at xxv-xxvi.

[32] *Id.* at 224.

[33] SHERMAN, *supra* note 20, at 2. There is an aversion to share intimate moments. O'BRIEN, *supra* note 10, at 81 ("Just as a gentleman doesn't kiss and tell, a warrior doesn't kill and tell because a war story is really just a love story."). *Id.*

[34] SITES, *supra* note 1, at 108, 137, 161, 163, 178.

[35] *Id.* at 249.

[36] GROSSMAN, *supra* note 22, at 274-75; MARLANTES, *supra* note 22, at 182. Junger offers the interesting idea of making every town or city hall on Veterans Day available to veterans who want to speak publically about war; the community would support the troops by showing up to listen. Sebastian Junger, *How PTSD Became a Problem Far Beyond the Battlefield*, VANITY FAIR (June 2015), http://www.vanityfair.com/news/2015/05/ptsd- war-home-sebastian-junger.

[37] SITES, *supra* note 1, at 270. Even Sites initially comes across as a combat voyeur concerned with curiosity for the morbid rather than genuine care for the veteran, when interviewing Corporal Wold in the immediate aftermath of a firefight. *Id.* at 31.

[38] MARLANTES, *supra* note 22, at 207.

[39] Commander Valerie Small, *On Combat*, ARMY LAW., June 2012, at 34, 37; Major Jacob D. Bashore, *War*, ARMY LAW., Jan. 2011, at 61, 64, 65.

[40] The assertions in this article are based on the reviewer's professional experience as a Battalion Judge Advocate, 1st Battalion, 9th Marines in Helmand Province, Afghanistan, from June 2011 to December 2011 wherein he personally participated in the battalion fires process, as well as recent professional experience as a Marine Representative for the Center for Law and Military Operations (CLAMO), The Judge Advocate General's Legal Center and School in Charlottesville, Virginia, from November 2012 to August 2015 wherein he conducted numerous formal after-action reports and informal conversations with judge advocates upon their redeployment from combat operations [hereinafter Professional Experience].

[41] GROSSMAN, *supra* note 22, at 88; Professional Experience, *supra* note 41.

Historically, the ability to kill came with the reciprocal danger of getting killed.[42] However, as modern-day warriors develop technological means to kill an adversary from a relatively safe distance, the ability to cause harm and the ability to suffer harm have been separated to some degree.[43] Lieutenant Colonel Dave Grossman postulates that the greater the distance between the two, the less trauma a killer will experience because the combatant may "pretend they are not killing human beings."[44] Yet with modern surveillance systems, those associated with killing from a distance can now be undeniably certain that they are responsible for the deaths of other human beings.[45] Some Remotely Piloted Aircraft operators have described extensive trauma associated with repeatedly observing missile impacts followed by the pixelated, "thermal images of a growing puddle of hot blood."[46] Judge advocates witness a similar scene; they often review a detailed target package prior to a strike, provide real-time advice during target engagement, and then review post-strike battle damage assessments that includes graphic videos and photos.[47]

When those that associate with killing from the safety of the sidelines vicariously celebrate a touchdown, they face both an internal doubt of whether they deserve to feel such emotions and the external ridicule from the grunt players for not sharing the same exposure to physical dangers on the field.[48] The underlying question is whether those who are complicit with killing from a distance can be considered part of the band of brothers when they do not risk shedding blood with those on the ground.[49] More research and discussion is needed to comprehend what some judge advocates might carry home from their active participation within the targeting process.[50]

V. Conclusion

The Things They Cannot Say serves as an excellent primer to better understand the things veterans carry with them when they return home from combat and the things they should be encouraged to say to their fellow citizens. This book is recommended as an initial foray into the topic area, to be followed up with further study of the other books referenced therein. For judge advocates, the book counsels that it is not enough to learn their role in the targeting process—covering the technical and tactical skills of rules of engagement and collateral damage estimation—they must also learn how to deal with their complicity in killing because "even legally justifiable actions can greatly trouble warriors."[51]

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[42] *See generally* GROSSMAN, *supra* note 22.

[43] JUNGER, *supra* note 17, at 140; MARLANTES, *supra* note 22, at 24-25.

[44] GROSSMAN, *supra* note 22, at 97, 107. Grossman claims to have not found a "single instance of individuals who have refused to kill the enemy under these circumstances, nor . . . a single instance of psychiatric trauma associated with this type of killing." *Id.* at 108. However, the reviewer is familiar with a senior judge advocate that refused to participate in the targeting process based on personal beliefs. Professional Experience, *supra* note 41.

[45] Professional Experience, *supra* note 41. "A unique dimension of modern war with as yet unknown impact is that with modern technology people take lives on the other side of the world but are not in danger of being killed in return. . . . [M]any troops engaged in distant forms of military action often feel detached from the experience of killing, their victims, and their own status as combat veterans. They may not rehumanize the foe or reconcile with their own histories until long after their service, if at all." EDWARD TICK, WARRIOR'S RETURN: RESTORING THE SOUL AFTER WAR 83 (2014).

[46] Richard Engel, *Former Drone Operator Says He's Haunted by His Part in More than 1,600 Deaths*, NBC NEWS (June 6, 2013, 3:58 AM), http://investigations.nbcnews.com/_news/2013/06/06/18787450-former-drone- operator-says-hes-haunted-by-his-part-in-more-than-1600-deaths. Studies indicate that drone operators have post-traumatic stress at the same rates as pilots that fly combat missions in war zones. Junger, *supra* note 36.

[47] Professional Experience, *supra* note 41. While even a legal kill of an enemy combatant will trigger an emotional response, there is a distinct trauma associated with causing civilian casualties, regardless of intent or legality. *Id.* "Troops suffer moral trauma for having killed when they should not have. Or killing the wrong people. Or killing civilians to get to the foe. Or killing foes defined by the government as an enemy but posing no threat to the homeland. Or killing these foes, then studying history and politics and realizing these were 'ancient wrongs painted to be right.' Or just from realizing that the other was a human being." TICK, *supra* note 46, at 83.

[48] BRIAN CASTNER, THE LONG WALK 204 (2012); Professional Experience, *supra* note 41; MARLANTES, *supra* note 22, at 33, 40-41. The role of the judge advocate in targeting is often mocked. "In every battalion operations center, a lawyer monitored all calls for artillery or air support, constantly weighing who might face court-martial or be relieved of command for making a wrong call." BING WEST, ONE MILLION STEPS: A MARINE PLATOON AT WAR 29 (2014).

[49] WILLIAM SHAKESPEARE, THE LIFE OF KING HENRY THE FIFTH act 4, sc. 3.

[50] In addition to targeting, judge advocates experience other wartime phenomena. Some judge advocates have directly participated in combat and have been wounded in combat operations. REGIMENTAL COMBAT TEAM 1 STAFF JUDGE ADVOCATE, FALLUJAH AFTER ACTION REPORT (2005) (on file with CLAMO). A judge advocate may develop a personal relationship with a local national, working shoulder to shoulder, only to find out post-deployment about his death at the hands of the enemy. Frank Biggio, *An Afghan Death: Haji Abdul Manaf Was My Brother*, WAR ON THE ROCKS (May 26, 2015), http://warontherocks.com/2015/05/an-afghan-death-haji- abdul-manaf-was-my-brother/; Professional Experience, *supra* note 40. Upon redeployment, judge advocates, especially individual augmentees that immediately detach, may also experience an emptiness of missing friends and the comradeship within a unit. MARLANTES, *supra* note 22, at 203; Professional Experience, *supra* note 40. Finally comes the screeching halt of transition from the exciting to the trivial, going from advising Zeus upon Mount Olympus about hurling lightning bolts from the sky one week to reviewing the sale of candy bars as part of a unit soda mess the next. SITES, *supra* note 1, at 1; MARLANTES, *supra* note 22, at 66, 204; Professional Experience, *supra* note 41.

[51] Lieutenant Colonel Douglas A. Pryer, *Moral Injury and Military Suicide*, CICERO MAGAZINE (June 3, 2014, 3:30 PM), http://ciceromagazine.com/feature/moral-injury-and-military-suicide. "America's legalistic approach to war fails to adequately account for the powerful moral forces that determine the course of a conflict and the long-term psychological effects of this conflict on those caught up in it. If our nation and military continues to conflate the 'legal' with the 'moral,' things will only get worse." *Id.* "The Marine Corps taught me how to kill but it didn't teach me how to deal with killing." MARLANTES, *supra* note 22, at 3.

Prisoner B-3087[1]

Reviewed by *Major Paul M. Shea*[*]

I. Introduction

Prisoner B-3087 is a young–adult novel based on Polish–American Jack Gruener's real–life experiences; taking the reader from the German invasion of Poland in 1939 to the Allied conquest of Germany in 1945. Yanek, a young Jewish boy from Krakow, serves as the narrator. Only ten years old when the invasion begins, he transitions to adulthood, while enduring the full gamut of Nazi oppression: mass segregation, involuntary deportation, forced labor, and ultimately genocidal liquidation.

With only 260 pages of text to consume, fast readers should be able to finish the book in a single sitting. One looking for an exhaustive account of the Holocaust, the German occupation of Poland, or the development of modern international law should look elsewhere. This novel offers minimal historical context or social commentary. It offers no conjecture as to the underlying causes of these events. This is simply the story of one young man caught in the maelstrom of world events.

However, sometimes less is more. The book has particular value for new and prospective judge advocates or military paralegals who want to familiarize themselves with international law and the law of military operations. Yanek's ordeal foreshadows the development of the Geneva Conventions in 1949 as well as several prominent war crime trials. The story serves as an introduction to several relevant topics, such as the treatment of civilians in occupied territories, post–conflict justice, and the modern evolution of international law. It will prove a useful professional development tool showing how strategic, operational, and tactical decisions affect people at the ground level.

II. The Human Element

Joseph Stalin allegedly said, "A single death is a tragedy, a million deaths is a statistic."[2] As callous as it sounds, the statement contains a ring of truth; the greater the scale of the atrocity, the more difficult it is to comprehend. World War II and the Holocaust, with their millions of casualties, exemplify this difficulty. By keeping the focus on Yanek's personal odyssey, *Prisoner B-3087* gives readers a relatable young man to guide them through a world of incomprehensible cruelty.

The book has no extended prologue or ominous foreshadowing. At the beginning of the war, Yanek is an ordinary child in a nondescript family. The scenes in the first pages could take place in any household throughout the world. While the family fears the Nazi's blatant antisemitism, they have faith in the Polish Army and other Allied forces.[3] They are shocked when Krakow falls so quickly,[4] and must rapidly adjust to living with an occupied force that grows increasingly hostile towards them.

Yanek's firsthand account of suffering reminds readers of the human cost of Germany's political actions. His survival throughout this ordeal is a testament to his admirable fortitude, and to happenstance. He admits that "you could play the game perfectly and still lose."[5] For every example of survival through physical strength, cunning, or sheer will, there is a narrow escape attributable to seeming trivialities like arriving home late[6] or getting into a particular train car.[7] One wonders what stories other victims might have told if fate had shifted differently for them.

Military lawyers and paralegals should pay particular attention to Yanek's account. Modern legal training emphasizes an almost mathematical analysis and application of the law to foster consistency and equity. However, to truly appreciate the statutes and treaties which they analyze, legal professionals must understand the events that impelled their creation in the first place. *Prisoner B-3087* has great value when read in conjunction with such primary sources and related detailed treatises.

III. Occupation

For the Jews of Krakow, hope of maintaining even a semblance of a normal life after the invasion dissipates quickly.[8] Within weeks, the Germans bar Jews from public spaces like libraries, parks, and theatres.[9] Schools expel

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[1] ALAN GRATZ, PRISONER B-3087 (2013).

[2] Anne Freemantle, *Unwritten Pages at the End of the Diary*, N.Y. TIMES BOOK REVIEW, Sept. 28, 1958, at 3. *But see* RALPH KEYES, THE QUOTE VERIFIER 41 (2007) ("[V]arious versions of this cynical observation are typically attributed to Stalin . . . No [direct] source is usually given, however, presumably because none exists."). *Id.*

[3] GRATZ, *supra* note 1, at 3.

[4] *Id.* at 5.

[5] *Id.* at 129.

[6] *Id.* at 56.

[7] *Id.* at 233.

[8] *Id.* at 10.

[9] *Id.*

Jewish children.[10] Curfews are instituted and lethally enforced.[11] While this maltreatment is bad enough, it is only the beginning. A little over a year later, all Jews are moved into a single neighborhood and walled in.[12] Yanek's family endures the overcrowding, overbearing restrictions, and widespread food shortages as best it can.

The family's resolve and bond both break in 1942, as the Germans begin to send thousands of Jews to "resettlement camps."[13] At first, they seek "volunteers" through the Judenrat,[14] elder Jews serving as intermediaries between the Nazis and Jewish Communities, but they soon resort to pulling people off the street arbitrarily.[15] One day Yanek returns home to find his parents missing.[16] He never sees or hears from them again. Shortly thereafter, he is sent to Plaszow Concentration Camp to work as a tailor.[17]

A pattern quickly emerges when reading this work in conjunction with Geneva Convention IV.[18] The abuse that Yanek, his family, and the Jews of Krakow experienced parallels much of the conduct that Geneva Convention IV would expressly forbid less than a decade later. The general disenfranchisement of any group based on arbitrary qualities such as race or religion would henceforth be forbidden.[19] Denial of access to education would also be expressly prohibited.[20] Perhaps most importantly, forced deportations were banned,[21] and forced labor was severely restricted.[22] All of this was done in the hopes of sparing future inhabitants of occupied lands from the abuse that so many endured during World War II.

IV. Internment

Yanek spends the remainder of the war as a prisoner. While he initially reports to Plaszow, shifting German wartime requirements and steady allied advances prompt repeated transfers. Before his liberation from Dachau in 1945, he spends time at ten different concentration camps, including Auschwitz, Buchenwald, and Birkenau (where he receives the identification tattoo that also serves as the book's title).[23]

Yanek's point of view sheds light on the daily realities of life in a concentration camp; barracks overflowing with people, backbreaking work, little to no food, and sadistic overseers. Death looms over the camp like a fog—in some cases quite literally.[24] Each day he watches as fellow inmates are selected for liquidation,[25] killed in arbitrary punishments,[26] or perish from disease or exhaustion;[27] he is acutely aware that his own time could come at any moment, without warning.

Once again, the parallels between German conduct and later restrictions of Geneva Convention IV are obvious and not coincidental. Article 32,[28] for example, prohibits murder, corporal punishment, and medical experiments; all of which were routine at Auschwitz and elsewhere. The minimal internment standards put into place by the Convention[29] sought to avoid the hazardous squalor which Yanek and his fellow captives endured. Collective punishment, used by the Germans to destroy prisoner morale and discourage mass uprisings,[30] was also banned.[31]

V. Post-Conflict Justice

Throughout his trials, Yanek resolves to survive, knowing that he must stay (relatively) healthy and appear stout enough to continue working. Ironically, by surviving for so long, this teenager effectively becomes an *old-timer* among other inmates. His longevity also allows him to meet a variety of figures, both generic and distinctive, representing various facets of the Holocaust.

Conventional wisdom tends to paint the World War II era in primary colors, eschewing shades of grey. So it is noteworthy when a condensed young–adult novel addresses the complexities of the era head–on. *Prisoner B-3087* introduces various supporting characters reflecting the often

[10] *Id.* at 8.

[11] *Id.* at 12.

[12] *Id.* at 14.

[13] *Id.* at 38.

[14] *Id.* at 39.

[15] *Id.* at 56.

[16] *Id.* at 58.

[17] *Id.* at 62.

[18] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, T.I.A.S. No. 3365 [hereinafter GC IV].

[19] *Id.* at art. 27.

[20] *Id.* at art. 50.

[21] *Id.* at art. 49.

[22] *Id.* at art. 51.

[23] GRATZ, *supra* note 1, at 131.

[24] *Id.* at 148.

[25] *Id.* at 150.

[26] *Id.* at 110.

[27] *Id.* at 240.

[28] GC IV, *supra* note 28, at art. 32.

[29] *See id.*, Part III, Section IV, Chapter II.

[30] GRATZ, *supra* note 1, at 111.

[31] GC IV, *supra* note 28, at art. 33.

incongruous behavior among occupied communities throughout World War II. Members of the aforementioned Judenrat are viewed as traitorous collaborators. Sadistic Kapos, fellow camp inmates placed in supervisory roles,[32] dish out physical and psychological abuse. Some Kapos would later be tried in Israel for their wartime actions.[33] Perhaps worst of all, prisoners lament the futility of escape, fearing that Gentile Poles will turn them in or even kill them.[34]

Despite his best efforts, Yanek also crosses paths with four historic Nazi figures: Joseph Mengele,[35] the physician infamous for human experimentation at Auschwitz Concentration Camp; Amon Goethe,[36] the sadistic commander of Plazow Concentration Camp, best known today as the main antagonist in the film *Schindler's List*;[37] Karl Otto Koch,[38] the commander of Buchenwald Concentration Camp; and Koch's wife Ilse. Curious readers should research the unique ways in which each of these figures was taken to task (or not) for their respective crimes against humanity. This comparative analysis speaks to various methods of post-conflict justice.

Joseph Mengele spent several years in post-war Germany as a wanted fugitive. He eventually fled to Argentina.[39] After becoming aware of his reputed whereabouts, West Germany requested extradition in 1960.[40] Mengele then travelled to various Latin American nations, staying one step ahead of the hangman's noose. He died of a stroke in 1979 after evading justice for over three decades.[41]

Amon Goethe eventually had to answer to his former victims. He appeared before the Supreme National Tribunal of Poland in 1946.[42] He argued unpersuasively that he merely carried out the orders of his superiors and that his actions were within acceptable limits of command disciplinary discretion. The Tribunal convicted him of well over ten thousand counts of murder. He was executed on September 13, 1946.[43]

Jack Gruener's actual encounters with Mengele and Goethe inspired Yanek's experiences in the novel.[44] In contrast, Yanek's interactions with Karl Otto and Ilsa Koch result from artistic license.[45] When Jack Gruener arrived in Buchenwald in 1945, the Kochs had already moved on; the reason why is fascinating.

Karl Otto Koch served as the Buchenwald Commandant from 1937-1941. During that time he and his wife pilfered vast amounts of money and valuables from camp inmates.[46] In 1943, after a long investigation, the German military charged him with various crimes including embezzlement and incitement to murder. He was executed in 1945, shortly before the Allied conquest of Germany.[47] Strange as it may seem, Koch stands as an example of internal German discipline against an abusive officer during World War II.

His wife Ilse, who also worked at the camp, evaded a German conviction. However, in 1947, an Allied tribunal sentenced the "Queen of Buchenwald" to life imprisonment.[48] In 1949, General Lucius Clay, the United States Military Governor for Germany, commuted her sentence to time served.[49] His decision was very controversial, but he argued that her crimes were largely against the German people, so it would be more appropriate for them to take action.[50] They agreed. West Germany took her into custody and sentenced her to life imprisonment.[51]

The divergent paths taken by these war criminals hint at questions that continue to vex international law scholars today. How do we properly dispense post–conflict justice? Who can be trusted to be a fair arbiter; the conqueror (the United States), the vanquished (West Germany), the oppressed (Poland), or an international tribunal? How do we avoid the appearance of "victor's justice," rigged trials, or "kangaroo courts"? Does the political need to reconcile and move forward trump the victims' interest in retribution? Yanek's testimonial speaks to the need for justice. But in some cases the pursuit of justice may prolong a conflict,

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[32] GRATZ, *supra* note 1, at 65.

[33] *See, e.g.*, Orna Ben-Naftali & Yogev Tuval, *Punishing International Crimes Committed by the Persecuted, The Kapo Trials in Israel (1950s-1960s)*, J. INT'L CRIM. JUST. 4:1, 128 (2006).

[34] GRATZ, *supra* note 1, at 117.

[35] *Id.* at 150.

[36] *Id.* at 71.

[37] SCHINDLER'S LIST (Universal Pictures 1993).

[38] GRATZ, *supra* note 1, at 205.

[39] *Joseph Mengele*, U.S. HOLOCAUST MEMORIAL MUSEUM, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007060 (last visited Nov. 1, 2015).

[40] *Id.*

[41] *Id.*

[42] *Amon Goethe*, OSKAR SCHINDLER, http://www.oskarschindler.com/12.htm (last visited Nov.1, 2015).

[43] *Id.*

[44] GRATZ, *supra* note 1, at 258.

[45] The author notes in the Afterword that he took some liberties with time and location "to paint a fuller and more representative picture." *Id.*

[46] DAVID A. HACKETT, THE BUCHENWALD REPORT 339-41 (1995).

[47] *Id.*

[48] Hal Boyle, *Cruel 'Queen of Buchenwald' Given a Permanent Address*, MILWAUKEE J., Aug. 14, 1947, at 2.

[49] JEAN EDWARD SMITH, LUCIUS CLAY–AN AMERICAN LIFE 301 (2014).

[50] *Id.*

[51] *Id.*

creating even more victims. Perhaps such difficulties lend credence to the emerging notion of preventative, humanitarian intervention, but this solution leads to other debates over state sovereignty and selective enforcement.[52]

VI. Conclusion

General William Tecumseh Sherman once said "war is cruelty and you cannot refine it."[53] Even today, some Soldiers, policymakers, and others sympathize with Sherman's viewpoint, viewing the law of war as an absurdity that impedes mission accomplishment.[54] *Prisoner B-3087* shows what war at its least refined actually looks like at the ground level. Unrestricted warfare leads to absurdities too, and millions of non–combatants throughout the world have similarly harrowing stories to tell. The development of international law in the aftermath of World War II continues the effort to refute General Sherman. While this progression may be uneven, this work reminds us of its noble purpose to avoid the brutal mistakes of the past.

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[52] *See, e.g.*, REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001).

[53] Letter from Major General William T. Sherman, Commander, Military Division of the Mississippi, to James M. Calhoun, Mayor, Atlanta, Georgia (Sept. 12, 1864) (foreshadowing the infamous "Burning of Atlanta" in the U.S. Civil War).

[54] *See, e.g.*, MARCUS LUTTRELL & PATRICK ROBINSON, LONE SURVIVOR 169 (2007) ("The truth is, any government that thinks war is somehow fair and subject to rules like a baseball game should probably not get into one. Because nothing's fair in war, and occasionally the wrong people do get killed . . . . Faced with the murderous cutthroats of the Taliban, we are not fighting under the rules of Geneva IV Article 4. We are fighting under the rules of Article 223.556 mm–that's the caliber and bullet gauge of our M4 rifle."). *Id.*

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