



THE ARMY LAWYER

Headquarters, Department of the Army

May 2012

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Department of the Army Pamphlet 27-50-468

Editor, Captain Joseph D. Wilkinson II
Technical Editor, Charles J. Strong

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

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

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

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

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Lore of the Corps

The Greatest Judge Advocate in History? The Extraordinary Life of Major General Enoch H. Crowder (1859–1932)

Fred L. Borch
Regimental Historian & Archivist

Who is the greatest judge advocate in history? If “greatest” is defined as “most accomplished while in uniform,” then Major General (MG) Enoch Herbert Crowder, the Judge Advocate General (TJAG) from 1911 to 1923, is arguably the most deserving of the accolade. Crowder served an unprecedented forty-six years on active duty, was the first Army lawyer to wear two stars on his shoulders, and was TJAG for twelve years. Crowder also was the Provost Marshal General during World War I, and while serving as the Army’s top law enforcement officer, prepared the Selective Service Act of 1917 and supervised America’s first draft since the Civil War—successfully inducting over 2.8 million men into the armed services. But these achievements, noteworthy as they may be, are only a small part of what Crowder accomplished during his truly superlative career as a Soldier.

While Crowder has been called “Judge Advocate *Extraordinaire*,”¹ no one would have predicted from his humble beginnings that he was destined for greatness. Born on 11 April 1859, in a “boarded-over” log cabin in Grundy County, Missouri, Crowder grew up in a farming family. But young “Bert” Crowder “preferred reading to plowing”² and he attended a local academy, from which he graduated when he was sixteen.

Crowder then began working on a nearby farm for twenty-five cents a day (plus board) but soon decided that there must be easier ways to earn a living than manual labor. His success as a student in high school helped Crowder to obtain a position as a teacher in a nearby rural school. While he liked teaching, Crowder wanted an advanced education. His preference was to attend the state university in Columbia but it was impossible to save enough money for tuition, room, and board on a monthly salary of fifteen dollars. This explains why young Bert Crowder did what so many Americans have done when they lacked the funds for college but wanted higher education: he took the competitive West Point examination held in his congressional district, won an appointment, and, on 1 September 1877, took his oath of office as a cadet.³

¹ U.S. ARMY, JUDGE ADVOCATE GENERAL’S CORPS, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS 1775–1975, at 104 (1975).

² DAVID A. LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN 21 (1955).

³ *Id.* at 24. For example, Dwight D. Eisenhower, arguably the most successful West Point graduate to come out of World War II, pursued an appointment to the U.S. Military Academy not because he desired to soldier

After graduation in 1881 (ranking thirty-first in a class of fifty-four), then-Second Lieutenant (2LT) Crowder joined the 8th U.S. Cavalry at Fort Brown, near Brownsville, Texas. He must have been pleased, as “cavalry appointments were especially sought after by West Pointers . . . because they offered service on the frontier.” Since the death of Custer and his men at the Battle of the Little Big Horn had only occurred five years earlier, Crowder and officers like him knew that combat with Native American warriors was very possible.

But Crowder never saw any fighting while in Texas, and instead spent his time scouting the Rio Grande frontier for cattle thieves and supervising troopers engaged in target practice and routine marches. Crowder also decided that he had sufficient time to study law, which had interested him greatly while he was a cadet. He borrowed law books from a local attorney and, after learning enough of the statutes and procedures of Texas, was “examined by a committee of the bar” and admitted to practice in Texas in April 1884.⁴

Shortly after becoming an attorney in Texas, Crowder was assigned to Jefferson Barracks, near St. Louis, Missouri. This installation was one of the oldest military establishments in the United States, having been founded in 1826. In Crowder’s day, it was a recruit depot where newly enlisted men “were received and trained for thirty-six days before being assigned to regiments.”⁵ While supervising the basic training of new Soldiers took considerable effort, 2LT Crowder still found time to study for and pass the Missouri Bar. He was now licensed as a lawyer in two states and in the Federal courts.

Crowder now seems to have decided that he needed a law degree in order to have any luck in obtaining a transfer from the cavalry to the Judge Advocate General’s Department (JAGD). Consequently, he asked to be transferred from Jefferson Barracks to the state university in Columbia, where he would serve as professor of military science and tactics—and enroll as a law school student. The War Department granted Crowder’s request and he joined the university faculty in July 1885. Less than a year later, in June 1886, 2LT Crowder was awarded an LL.B.

but because he wanted a free education. STEPHEN E. AMBROSE, EISENHOWER: SOLDIER, GENERAL OF THE ARMY, PRESIDENT-ELECT 1890–1952, at 38–39 (1983).

⁴ LOCKMILLER, *supra* note 2, at 38.

⁵ *Id.* at 40.

His timing could not have been better as the next month, five days after being promoted to first lieutenant (1LT), Crowder was ordered to return to his regiment as a troop commander in the Geronimo campaign. After the Apache warrior and his men surrendered, 1LT Crowder returned to the University of Missouri, where he resumed his teaching assignment as professor of military science. Three years later, Crowder rejoined the 8th Cavalry at Fort Yates, Dakota Territory, and participated in the final campaign against the Sioux.

In 1891, Crowder asked to be “detached” from the Cavalry for service with the JAGD. This request was granted, undoubtedly because 1LT Crowder had been a licensed attorney since 1884 and had a law degree. He joined the Department, and was appointed as captain (CPT) and acting judge advocate in the Department of the Platte, Omaha, Nebraska.

Crowder excelled in his new job as legal advisor to Brigadier General (BG) John R. Brooke, Commander of the Department of the Platte. Captain Crowder “made investigations, prosecuted and reviewed court-martial cases, and prepared contracts and other legal papers.” He also authored speeches and reports for his boss, “earning a splendid reputation from his ability to turn out vast quantities of paperwork in a relatively short time.”⁶

Crowder’s hard work paid off: on 11 January 1895, he was chosen over fifty other applicants to receive a permanent appointment in the JAGD. This meant a permanent transfer from the Cavalry and a promotion from CPT to major (MAJ). Crowder was thirty-six-years old and, as he was now the youngest officer in the JAGD, had a bright future.⁷

When the Spanish-American War began in 1898, now-lieutenant colonel (LTC) Crowder was in the Philippines. Although he did not see combat (much to his regret), Crowder distinguished himself in a variety of assignments during the days and months that followed. Crowder was a member of the commission that arranged final terms for the surrender of Manila and the Spanish Army; he later worked closely with MG Arthur MacArthur, the Provost Marshal General, to establish a new government for Manila.⁸

In April 1899, Crowder was named the president of the Board of Claims and in that position oversaw claims for money damages filed by Filipino citizens against the United States. Most of the claims were for damages to or loss of livestock, horses, supplies, and buildings. Some were fraudulent and some were excessive, but all had to be heard. Crowder and the three other Army officers on the board rejected claims that were incident to American combat operations with Spanish troops, but recommended the payment of hundreds of meritorious claims.

At the same time, LTC Crowder was also serving on the Philippine Supreme Court; he had been appointed an associate justice of the civil division in May 1899. Crowder and his fellow justices not only heard civil and criminal appeals, but also reorganized the Philippine court system. Crowder personally authored the new *Philippine Code of Criminal Procedure*. The existing Spanish colonial framework was imperfect and was no longer functioning well. Crowder’s code, which was “remarkable for its brevity and clearness,” replaced that regime. According to Crowder’s biographer, his code (with some amendments) continued to be the foundation of criminal justice in the Philippines until at least the 1950s.⁹

In May 1900, MG MacArthur became the military governor of the Philippines. Remembering Crowder from their earlier time together when MacArthur was Provost Marshal General, MacArthur immediately transferred Crowder from his Supreme Court duties and made Crowder his military secretary and legal advisor. This meant that LTC Crowder was now the “civil administrator of the Philippines and actually, if not in rank, the second in command.” Departments and bureaus under Crowder’s direct control included: the Treasury and Customs Departments; Forestry, Mining and Civil Service Bureaus; Patent and Copyright Office; Department of Public Works; and Judicial Department. Crowder also had direct responsibility for all municipal and provincial governments in the islands.¹⁰

The military government of the Philippines was replaced by a civilian administration in July 1901, and MG MacArthur, LTC Crowder, and other military administrators left the islands for the United States. Crowder’s performance, however, had been so impressive that President Theodore Roosevelt rewarded him with an appointment as a brigadier general in the Volunteer Army. This promotion occurred on 20 June 1901 but only lasted ten days: when the military government ceased at the end of the month, Crowder reverted to his permanent rank of LTC and had to remove the silver stars from his shoulders.¹¹ It was, however, a unique event in judge advocate history: the first

⁶ *Id.* at 59.

⁷ *Id.* at 61.

⁸ *Id.* at 71.

⁹ *Id.* at 78.

¹⁰ *Id.* at 80.

¹¹ *Id.* at 84.

time that an Army lawyer other than the Judge Advocate General (tJAG)¹² had worn general officer rank. The promotion had been very much deserved. Major General MacArthur said that he could not remember any time in American history “any instance in which a purely military officer had discharged such a variety of civil duties in a manner so entirely beneficial to the public interests.” The future president, William Howard Taft, was just as effusive in his praise: Crowder “did, to my personal knowledge, an enormous amount of very hard work, and he did it well.”¹³

Crowder then returned to Washington, D.C., where tJAG, BG George Davis, appointed him as a deputy in the Judge Advocate General’s Office. In this position, LTC Crowder assisted Davis in receiving and reviewing the proceedings of all courts-martial, courts of inquiry, and military commissions. He also served as legal advisor to the Secretary of War and other officials of the War Department. Finally, Crowder and other judge advocates “made inspections, prepared all sorts of legal papers, and rendered opinions on questions of military law.”¹⁴

In April 1903, Crowder was promoted to colonel (COL) and, subsequently chosen to be “chief of the First Division of the Chief of Staff.” This position, the forerunner to today’s Deputy Chief of Staff for Personnel (G-1), had been created as a result of Congress’s decision to create an Army General Staff. Crowder’s new job required him to study and report on pending military legislation, reorganization plans, and general administrative matters affecting the Army. Colonel Crowder again excelled in this non-lawyer assignment. When the Japanese attacked Russian units in 1904, Crowder’s boss, Army Chief of Staff Lieutenant General A. R. Chaffee decided that Crowder was the best man to send to the Far East. As a result, COL Crowder was the senior American observer with the Imperial Japanese Army during the Russo-Japanese War of 1904–1905. He witnessed first-hand the battles fought between Japanese and Russian armies in Manchuria, including the fighting around strategic city Mukden, where a Japanese force of 460,000 defeated 360,000 Russians.¹⁵

Colonel Crowder returned to the United States in June 1905 and reported for duty in Washington, D.C. Slightly more than a year later, William Howard Taft, now the Secretary of War, personally selected Crowder to be the legal advisor to the U.S.-sponsored Provisional Government of Cuba. From October 1906 to January 1909, COL Crowder

was in Havana, where he made his biggest contribution as chairman of the Advisory Law Commission. This body, which consisted of nine Cubans and three U.S. citizens, drafted a municipal law that organized municipalities and gave them independence in local matters. Crowder and his fellow commissioners also drafted an electoral code that recognized universal manhood suffrage, “but restricted eligibility for public office to Cubans who could read and write.” Finally, the Advisory Law Commission also created a judicial law that overhauled the legal system in Cuba; its major achievement was to free the judiciary from the executive, to which it had been subordinate under Spanish colonial law.¹⁶

When COL Crowder left Havana in January 1909, his “brilliant intellect and indefatigable industry” were lauded by both Cubans and Americans.¹⁷ He returned to the Office of the Judge Advocate General but, within months, was detailed by now-President Taft (who knew him well from their years in the Philippines and knew of his talents as a diplomat) to be a member of the U.S. delegation to the Fourth Pan American Conference. Crowder represented the United States in Buenos Aires, Argentina, before making official visits to Chile, Colombia, Ecuador, Panama, and Peru.

From South America, COL Crowder took a steamer to Europe, where he studied the military penal systems of England and France with the view that examining British and French courts-martial might suggest improvements or reforms in the Articles of War that governed military justice in the Army.

Crowder returned to Washington, D.C., in late 1910. Major General George Davis was scheduled to retire as tJAG in February and had recommended COL Crowder to succeed him. Given this endorsement and Crowder’s relationship with President Taft, no one was surprised when, on 11 February 1911, the president nominated COL Crowder to be tJAG with the rank of brigadier general. When he was confirmed by the Senate a short time later, BG Crowder made history again as the first in the West Point Class of 1881 to become a general officer.¹⁸

¹² Prior to 31 January 1924, the top uniformed lawyer in the Army was “the Judge Advocate General.” On that day, however, War Department General Orders No. 2, announced that the position would now be known as “The Judge Advocate General.”

¹³ LOCKMILLER, *supra* note 3, at 85.

¹⁴ *Id.* at 87.

¹⁵ *Id.* at 92–93, 100–08.

¹⁶ *Id.* at 115–16.

¹⁷ *Id.* at 118.

¹⁸ *Id.* at 132.

As tJAG, Crowder implemented a number of far-reaching changes. He directed that JAG opinions be published regularly and disseminated to the field. Crowder also decided that all opinions issued since 1862 would be collected and published as a new digest; this occurred in 1912. Crowder also convinced the War Department to create a program for line officers to be sent to law school at government expense—the forerunner of today’s Funded Legal Education Program. Finally, BG Crowder oversaw the revision of the Articles of War (they had not been revised since 1874) and directed the revision and publication of a new *Manual for Courts-Martial*.

Crowder also was the driving force behind major reforms in the operation of prisons in the Army. It was BG Crowder who, after lengthy consultation with sociologists and penologists, convinced the Army—and the Congress—to create the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas. For the first time, the Army embraced the idea that “the primary purpose” of the Army prison system should be to identify incarcerated Soldiers who could be rehabilitated and restored to duty.¹⁹

The American entry into World War I shifted Crowder’s focus away from military law and lawyers. He was appointed Provost Marshal General by the Army’s leadership and quickly took charge of the Army’s transformation from a small professional all-volunteer service to a wartime force consisting largely of civilian draftees. Starting in May 1917, after the Congress passed America’s first Selective Service Act (prepared by General Crowder and his assistants), he supervised the registration, classification and induction of over 2.8 million men into the armed forces. Crowder’s “especially meritorious and conspicuous service as Provost Marshal General in the preparation and operation of the draft laws of the Nation during the War” was later recognized with the award of the Army Distinguished Service Medal.²⁰

Now-MG Crowder (legislation enacted by Congress in 1916 made tJAG a two-star position) was so successful in implementing the wartime draft that, in the summer of 1918, a provision “was inserted in the Army Appropriation Bill” to promote him to three-star rank.²¹ Crowder already was the first judge advocate to wear two stars; if this 1918 provision had become law, he would have been the first judge advocate to reach the rank of lieutenant general. But, uncomfortable with the idea of being a “swivel chair” lieutenant general, Crowder refused the promotion and instead—unsuccessfully—asked for a field command in France.²²

¹⁹ *Id.* at 136–37.

²⁰ War Department, Gen. Orders No. 144 (18 Nov. 1919).

²¹ LOCKMILLER, *supra* note 3, at 191.

²² THE ARMY LAWYER, *supra* note 1, at 105.

After World War I ended, MG Crowder found himself, along with the entire military justice system, under attack for being “un-American.” Brigadier General Samuel T. Ansell, a friend and fellow Army lawyer who had served as Acting Judge Advocate General and performed much of the Army’s legal work while Crowder focused on the draft, charged that courts-martial were “patently defective” and needed immediate revision by Congress. While Crowder vigorously defended the system against attacks by Ansell and others, he nonetheless recommended certain reforms to Congress. These included greater protections for the accused and a new authority in the President to reverse or alter any court-martial sentence found by him to have been adjudged erroneously.²³

On 14 February 1923, after forty-six years of service, General Crowder retired from active duty. That same day, he topped off his remarkable career as a Soldier by immediately accepting an appointment as the first U.S. Ambassador to Cuba. This was a highly unusual event, because active and retired Army and Navy officers are prohibited by law from holding any appointment in the Diplomatic and Consular Service.²⁴ The result was that, on 22 January 1923, Congress enacted special legislation so that Crowder could accept this diplomatic post,²⁵ which he held until leaving Havana in 1927. Crowder settled in Chicago, where he practiced civilian law until he died in 1932, aged seventy-three years. He never married and left the bulk of his estate to his sisters.

²³ ENOCH J. CROWDER, *MILITARY JUSTICE DURING THE WAR* 64 (1919), available at http://www.loc.gov/rr/frd/Military_Law/MJ_during_war.html. In this sixty-page letter to the Secretary of War, MG Crowder made his defense of the American military justice system and his recommendations for Congressional and executive reform of that system. As noted in that letter, MG Crowder had previously asked the Secretary to implement three-man Boards of Review, “for the purpose of equalizing punishment through recommendations for clemency.” *Id.* at 42. His recommendations for reform included the institution of a “law member,” that is, a lawyer from the Judge Advocate General’s Department to serve as a panel member and give legal advice to the panel in “serious, difficult, and complicated cases.” *Id.* (Previously the panel had received its legal advice from the prosecuting judge advocate.) This reform was implemented and the “law member” was the forerunner of today’s Military Judge. See Fred L. Borch, III, *The Trial by Court-Martial of Colonel William “Billy” Mitchell*, *ARMY LAW.*, Jan. 2012, at 1, 2 n.9. For more on the controversy over reforming the Articles of War, see Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 *MIL. L. REV.* 1 (1967); JOHN M. LINDLEY, *A SOLDIER IS ALSO A CITIZEN: THE CONTROVERSY OVER MILITARY JUSTICE, 1917–1920* (1990).

²⁴ Revised Statutes, sec. 1223 (1923).

²⁵ 42 Stat. 1160 (1923). While Congress acceded to President Harding’s request that Crowder be made an ambassador, the legislation denied Crowder his military retired pay during the period of this diplomatic appointment. He earned \$17,500 a year as ambassador.

Crowder has not been forgotten. On the contrary, he was the first Judge Advocate General to have a full-length biography.²⁶ But was MG Crowder the “greatest” judge

advocate in history? He certainly had a remarkable life and an equally remarkable career, and no one in our Regiment’s history has ever accomplished more as an Army lawyer.

More historical information can be found at

The Judge Advocate General’s Corps
Regimental History Website

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

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

²⁶ In addition to Crowder, Brigadier General Joseph Holt, who served as JAG from 1862 until 1875, has been the subject of biographers. Two biographies have been published, both in 2011: JOSHUA E. KASTENBERG, *LAW IN WAR, WAR AS LAW: BRIGADIER GENERAL JOSEPH HOLT AND THE JUDGE ADVOCATE GENERAL’S DEPARTMENT IN THE CIVIL WAR AND EARLY RECONSTRUCTION, 1861–1865* (2011); ELIZABETH D. LEONARD, *LINCOLN’S FORGOTTEN ALLY: JUDGE ADVOCATE GENERAL JOSEPH HOLT OF KENTUCKY* (2011).

A Balancing Act: In Pursuit of Proportionality in Self-Defense for On-Scene Commanders

Major Eric C. Husby*

*It is, of course, impossible to measure human lives against a military advantage to be gained. However, as long as wars are fought, and if there is to be compliance with the law of war, some such approximations must be made. Unfortunately, such an approximation must always be a subjective one and, unless it is completely unjustifiable, it would be not only impossible, but unjust, to judge an individual on any basis other than that of the total information available to him at the time*¹

I. Introduction

Over the past decade of counterinsurgency operations, U.S. commanders have come to recognize the negative strategic impact of decisions by their on-scene commanders to employ indirect fire (IDF) and close air support (CAS)² that result in incidental civilian injuries or property destruction. This recognition has led to the withdrawal of approval authorities for such missions to higher levels of command in deliberate offensive operations, and counterinsurgency policy-based tactical directives that restrict targeting authority even during some troops-in-contact (TIC)³ and self-defense scenarios.⁴ Despite this

recognition and emphasis, there exists a continued gap in training of, and application by, on-scene commanders of related obligations under international humanitarian law (IHL). Eliminating this training gap would support decentralized counterinsurgency operations.⁵ Part of the training gap may result from confusion among judge advocates about the applicability of the proportionality balancing test to defensive operations, whether deliberate or hasty.⁶

The principles of proportionality and minimization of collateral damage under Additional Protocol I to the Geneva Conventions (AP I),⁷ as applicable to U.S. forces under customary international law (CIL) and Department of Defense (DoD) policy,⁸ must be applied by on-scene commanders when coordinating uses of force in self-defense. “Proportionality” in duration and scope of force under the standing rules of engagement (SROE)⁹ must not be

* Judge Advocate, U.S. Army. Presently assigned as Senior Defense Counsel, U.S. Army Trial Defense Service, U.S. Army Alaska Branch Office, Joint Base Elmendorf-Richardson, Alaska. Previously assigned as Chief, Operational Law, Multi-National Division-North, Contingency Operating Base Speicher, Iraq, 2007–2008; and, Chief, Operational Law, 1st Armored Division, Wiesbaden, Germany, 2006–2007.

¹ 1 HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 85 (1985).

² Indirect fire are “fire[s] delivered on a target that is not itself used as a point of aim for the weapons or the director, such as mortars, artillery” JOINT PUB. 3-09.3, CLOSE AIR SUPPORT, at III-25 (8 July 2009). Close air support (CAS) is “air action by fixed-wing (FW) and rotary-wing (RW) aircraft against hostile targets that are in close proximity to friendly forces” *Id.* at I-1.

³ A troops-in-contact (TIC) situation is a battlefield scenario in which “friendly ground forces [are] receiving effective fire.” *Id.* at V-19.

⁴ See, e.g., INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DESKBOOK 155 (2011), available at http://www.loc.gov/rr/frd/Military_Law/pdf/LOW-Deskbook-2011.pdf (noting that “[r]ules of engagement may require elevating the decision to attack if collateral damage is anticipated to exceed thresholds established by higher-level commanders”); Press Release, Headquarters, Int’l Security Assistance Force, Tactical Directive (July 6, 2009) [hereinafter 2009 Tactical Directive], available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf (unclassified version of General Stanley McChrystal’s tactical directive referencing counterinsurgency principles in requiring responses like close air support potentially affecting civilian structures be a last resort in self-defense situations). See also Press Release, Headquarters, Int’l Security Assistance Force (SAF), General Petraeus Issues Updated Tactical Directive (Aug. 4, 2010), available at <http://smallwarsjournal.com/documents/isafnewsrelease2.pdf> (allowing indirect fire and CAS, apart from under two classified conditions, only where the approving commander can determine no civilians are present, or as a matter of self-defense where no other effective options are available); Memorandum from Commander, Int’l Security Assistance Force/U.S. Forces-Afghanistan, COMISAF’s Tactical Directive (30 Nov. 2011), available at <http://www.isaf.nato.int/images/docs/20111105%20nuc%20tactical%20directive%20revision%204%20%28releaseable%20version>

%29%20r.pdf (detailing releasable portions of the current tactical directive and expressing the commander’s intent to eliminate all ISAF-caused civilian casualties).

⁵ “Commanders ensure that their Soldiers and Marines are properly trained . . . in methods of shaping situations so that small-unit leaders have to make fewer split-second, life-or-death decisions.” U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-142 (15 Dec. 2006). Among the manual’s “contemporary imperatives for counterinsurgency” is the need to “empower the lowest levels” of military leaders: “Higher commanders empower subordinates to make decisions within the commander’s intent. They leave details of execution to their subordinates and expect them to use initiative and judgment to accomplish the mission.” *Id.* para. 1-145.

⁶ Law of war (LOW) training, including requirements which overlap rules of engagement, is a judge advocate responsibility, overseen by the General Counsel of the Department of Defense (DoD), and in coordination with supported commanders. See U.S. DEP’T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 5.1.5 (22 Feb. 2011) [hereinafter DODD 2311.01E].

⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

⁸ Although Additional Protocol I (AP I) is specifically applicable to international armed conflicts, DoD policy requires that servicemembers “comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.” DODD 2311.01E, *supra* note 6, para. 4.1. The United States has not ratified AP I; however, the portions of AP I applicable to this article are viewed as expressions of customary international law (CIL). See *infra* Part II.A.1–2 and notes 11 and 14.

⁹ CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (13 June 2005) [hereinafter SROE] (unclassified portions).

confused with the IHL obligation to apply a military advantage versus incidental loss to civilians balancing test in any “attack,” whether offensive or defensive in nature.

This article first examines the general requirements under IHL for commanders to balance military advantage against expected incidental loss to civilians and to take precautions to minimize that expected loss. It then distinguishes the *jus ad bellum* concept of “proportionality” identified as a self-defense principle under the SROE and demonstrate why its wording may lead to confusion over the applicability of the *jus in bello* proportionality balancing test in defensive operations.¹⁰ Next, the article identifies when and why the proportionality balancing test is applicable under IHL to on-scene commanders during defensive and unplanned TIC situations. Finally, having identified its scope of applicability within these situations, the article discusses the practical application by on-scene commanders of the proportionality balancing test and duty to minimize collateral damage.

II. Proportionality Requirements Under International Humanitarian Law

Proportionality is one of the four principles governing the use of force in IHL. Its requirements are stated within Articles 51 and 57 of AP I, most of which the United States follows as the embodiment of CIL.¹¹ The principle of proportionality is a precautionary measure against indiscriminate attacks that affect the civilian population. Proportionality balancing is a subset of the broad IHL requirement that, “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians, and civilian objects.”¹²

The unclassified portions of the SROE are provided in Appendix A to chapter 5 of the *Operational Law Handbook*. INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK (2012), available at http://www.loc.gov/rr/frd/Military_Law/operational-law-handbooks.html [hereinafter OPERATIONAL LAW HANDBOOK].

¹⁰ *Jus ad bellum* is the body of international law that governs the conditions under which a state resorts to an armed conflict. *Jus in bello*, or International Humanitarian Law (IHL), is the body of international law governing the actions of a state during an armed conflict, once it has started. See, e.g., *IHL and Other Legal Regimes—Jus ad Bellum and Jus in Bello*, INT’L. COMM. OF THE RED CROSS (Oct. 29, 2010), <http://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm>.

¹¹ See Michael Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT’L L. & POL’Y 419 (1987) (presented while Matheson served as Deputy Legal Advisor, U.S. Department of State).

¹² AP I, *supra* note 7, art. 57(1).

A. Proportionality Balancing Test

Under AP I, the principle of proportionality prohibits attacks “expected to cause incidental . . . injury to civilians [or] damage to civilian objects, . . . which would be excessive in relation to the concrete and direct military advantage anticipated.”¹³ The United States follows this prohibition as CIL, and requires commanders to adhere to it by weighing “the anticipated loss of civilian life and damage to civilian property reasonably expected to result from military operations [against] the advantages expected to be gained.”¹⁴ At a minimum, the United States views CIL as prohibiting attacks “that would *clearly result* in collateral civilian casualties disproportionate to the expected military advantage.”¹⁵ In discussing this formulation of the proportionality balancing test, it is helpful to review some key definitions.

1. Definitions

Some of the terms of art in this proportionality test requirement are not explicitly defined in U.S. military doctrinal publications. However, “military advantage” can be defined simply as “a more favorable position pertaining to war.”¹⁶ The key is that “an identifiable military benefit . . . should derive from the degradation, neutralization, destruction, capture, or disruption of the object.”¹⁷ The term “concrete and direct” is a qualitative concept measured by “enemy forces killed or captured and the amount of enemy equipment destroyed or damaged.”¹⁸ Defined in the negative, “[a] remote advantage to be gained at some unknown time in the future” would weigh too lightly against

¹³ *Id.* art. 51(5)(b). This prohibition is restated as a requirement to refrain from planning and deciding to launching such an attack under Article 57, Precautions in Attack. *Id.* art. 57(2)(a)(iii).

¹⁴ JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING app. E, para. E.2.d. (13 Apr. 2007) [hereinafter JOINT PUB. 3-60]. See U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE paras. 39–41 (18 July 1956) [hereinafter FM 27-10]; U.S. DEP’T OF NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, HEADQUARTERS, U.S. MARINE CORPS, DEP’T OF HOMELAND SECURITY AND U.S. COAST GUARD, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS [NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A], at 5-2 (2007); AIR FORCE OPERATIONS & THE LAW—A GUIDE FOR AIR, SPACE & CYBER FORCES 19 (2009) [hereinafter AIR FORCE OPERATIONS].

¹⁵ Matheson, *supra* note 11, at 426 (emphasis added). *But see* JOINT PUB. 3-60, *supra* note 14, at E-1 (using the broader “may be expected to cause” language of AP I, article 51); FM 27-10, *supra* note 14, para. 41 (using a middle ground of “probable losses”).

¹⁶ Commander Matthew L. Beran, *The Proportionality Balancing Test Revisited: How Counterinsurgency Changes “Military Advantage,”* ARMY LAW., Aug. 2010, at 8. The scope of the military advantage that U.S. military doctrine attaches to the military advantage side of the balancing test is discussed *infra* in Part IIA.1–2 and note 26.

¹⁷ U.S. DEP’T OF AIR FORCE, PAM. 14-210, USAF INTELLIGENCE TARGETING GUIDE 12 (1 Feb. 1998).

¹⁸ Beran, *supra* note 16, at 8.

civilian losses.¹⁹ The term “incidental” should not be read to mean “incurred casually,” but rather to mean “likely to happen in . . . subordinate conjunction” with the attack, and “unavoidable and unintentional.”²⁰ Finally, “excessive” is a term not specifically defined in U.S. military doctrine in this context.²¹ As a general legal term, it means “greater than what is usual or proper.”²² In this context, “excessive” is commonly used interchangeably with “disproportionate.”²³ “Excessive” is a forgiving standard and difficult to pinpoint outside the context of the full facts of a specific situation, but one that must be consciously applied by a commander.²⁴ As with most major military decisions, what is “excessive” rests on the subjective judgment of a commander, based on the “weighing of factors which cannot be quantified. The best that can be expected of the decision-maker is that he act honestly and competently.”²⁵

¹⁹ MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, at 365 (1982). The authors were members of the Germany and United States delegations to the diplomatic conference in Geneva from 1974 to 1977. Their commentary is a guide to the Protocols, referencing “the drafting history as the authors experienced it.” *Id.* at v.

²⁰ WEBSTER’S UNABRIDGED DICTIONARY 966 (1998); INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 12 (2011) [hereinafter OPERATIONAL LAW HANDBOOK]. The International Committee of the Red Cross (ICRC) Commentary to AP I does purport to place a broad quantification on the meaning of “incidental,” stating that “[t]he Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.” COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 626 (1987) [hereinafter ICRC COMMENTARY]. However, this statement does not define “extensive,” a concept difficult to define without examining the magnitude of the counterbalancing military advantage. In a case of potential “extensive” civilian casualties, the broader IHL prohibition against indiscriminate attacks would usually be a more appropriate lens, with the attack potentially violating the “directed at a specific military objective” requirement or the means not being capable of being “directed at a specific military objective.” AP I, *supra* note 6, art. 51(4)(a) and (b).

²¹ See, e.g., OPERATIONAL LAW HANDBOOK, *supra* note 20, at 12 (defining incidental damage and military advantage, but not discussing the meaning of “excessive”).

²² BLACK’S LAW DICTIONARY 561 (6th ed. 1990).

²³ See, e.g., Matheson, *supra* note 11, at 426.

²⁴ See W. Hays Parks, *Air War and the Law of War*, 32 A.F.L. REV. 1, 201 (1990). An extreme example of injury and damage to civilians which today would be considered excessive in violation AP I, article 51(5)(b) is the Allied bombing of Dresden in 1945. Dresden’s sole military facilities were a rail yard and communication lines, while the city housed thousands of civilian refugees. During the repeated bombing, it is estimated that 35,000 people died—most of whom were civilians. ALEXANDER MCKEE, *DRESDEN 1945: THE DEVIL’S TINDERBOX* 109, 274 (1984). “What is ‘usual and proper’ cannot be fixed by definitions within the balancing test. The balancing test must set forth the process and means of proportionality assessments, but not mathematical formulas or precise metrics, because such numerical standards will change with each military operation.” Beran, *supra* note 16, at 9.

²⁵ BOTHE, PARTSCH & SOLF, *supra* note 19, at 310.

2. Scope of the Military Advantage to Be Considered

The general definition of military advantage is straightforward, as shown above; but the scope of that advantage as used in proportionality balancing is up for debate in the international legal community. To illustrate, the U.S. position and that of some other states and commentators is that the military advantage to be weighed is generally “not restricted to tactical gains, but is linked to the full context of a strategy.”²⁶ The U.S. position differs from that of the International Committee of the Red Cross (ICRC), which advocates a narrow tactical view of military advantage.²⁷ Although under the U.S. view the military advantage to be weighed does not have to be limited to tactical gains, U.S. military doctrine recognizes that either approach is a legitimate choice for a commander to employ in the balancing calculus.²⁸

B. Requirement to Avoid or Minimize Incidental Civilian Loss

Interrelated with the proportionality balancing test are several precautions required by IHL, specifically by Article 57 of AP I. These precautions are inextricably linked to the test, since the calculus will change as precautions are adopted or rejected. First among these precautions are the duties of commanders to verify that the objects of their attacks are not civilians or civilian objects and then to take precautions to avoid or at least minimize incidental injury of civilians or damage to civilian property.²⁹ AP I ratifiers, including frequent U.S. coalition partners, are required to “do everything feasible” to verify the objective is not civilian, and “take all feasible precautions” in their choice of means and method—a high standard.³⁰ The United States

²⁶ JOINT PUB. 3-60, *supra* note 14, at E-1. “The military advantage anticipated is intended to refer to the advantage anticipated from [the commander’s] actions [in an operation] considered as a whole, and not only from isolated or particular parts thereof.” *Id.* This formulation of the scope of military advantage for purpose of proportionality is similar to the declaration of the United Kingdom regarding Article 51 when it ratified AP I, referring to “an attack considered as a whole and not from isolated or particular parts of the attack.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), United Kingdom Ratification with Declarations and Reservations, Jan. 28, 1998, 2020 U.N.T.S. 77 [hereinafter United Kingdom Declarations].

²⁷ ICRC COMMENTARY, *supra* note 20, at 683–84 (stating that the military advantage must be “relatively close,” and related to a “specific tactical operation”).

²⁸ OPERATIONAL LAW HANDBOOK, *supra* note 20, at 12 (military advantage may be examined “on a target-by-target basis, but also may be done in an overall sense [related to] campaign objectives”). As discussed below in Part VI.A, the target-specific military advantage will usually be a more workable standard in the context of balancing by an on-scene commander, but he is not precluded from taking the broader mission into the calculus.

²⁹ AP I, *supra* note 7, art. 57(2)(a)(i) and (ii). The third precaution is a restatement of the Article 51 proportionality balancing test. *Id.* art. 57(2)(a)(iii).

³⁰ *Id.*

views the substance of these obligations as CIL, applicable in the “conduct of military operations,” but substitutes a practicability test in place of feasibility.³¹ Joint U.S. doctrine specifically places a requirement on planners to ensure that civilian objects are not targeted.³²

This requirement to verify that objectives are not civilian objects could be read as resting within the doctrinal plans cell at higher levels of command; but the requirement is, in fact, applicable at any level where a plan or decision is made to attack a target. Such broad applicability is clear from AP I’s inclusion of “those who plan *or decide*” and the U.S. position that Article 57-related CIL applies “in the conduct of military operations” in general.³³ United States doctrine requires commanders to minimize or avoid incidental civilian loss by examining the type of military target, terrain, weapon choice, weather, and civilian proximity in order to minimize or avoid incidental civilian loss.³⁴ These factors are also useful in a balancing test analysis of any residual expected incidental civilian loss, since the data also facilitates a reasoned estimation of the magnitude of the incidental civilian loss that must be balanced.³⁵

C. Requirement to Cancel or Suspend Attacks Where No Longer Proportionate

The next precaution in attack required by Article 57 is canceling or suspending an attack “if it becomes apparent that . . . the attack may be expected to cause incidental [civilian loss] . . . which would be excessive”³⁶ Unlike the first three precautionary requirements, which apply specifically to “those who plan or decide upon an attack,” this obligation is of general application and intuitively applicable at least down to the on-scene commander level.³⁷

³¹ Matheson, *supra* note 11, at 426–27.

³² JOINT PUB. 3-60, *supra* note 14, at E-4.

³³ AP I, *supra* note 7, art. 57(2)(a) (emphasis added); Matheson, *supra* note 11, at 426–27.

³⁴ JOINT PUB. 3-60, *supra* note 14, at E-3.

³⁵ “Minimization of Civilian Casualties. Attacks are not prohibited against military targets even if they cause incidental injury or damage to civilians or civilian objects. In spite of precautions, such incidental casualties are inevitable during armed conflict.” *Id.* at E-4.

³⁶ AP I, *supra* note 7, art. 57(b).

³⁷ BOTHE, PARTSCH & SOLF, *supra* note 19, at 366 (emphasis added). Bothe asserts that

[a]s originally proposed . . . this provision was addressed to “those who launch an attack” . . . “if possible.” The Committee [did not adopt this language] so that it would apply to *all commanders* who have the authority to cancel or suspend attacks . . . [including] the commander of military organizations actually engaged in combat.

Id. (emphasis added).

As joint U.S. military doctrine explains, “[t]arget intelligence may be found to be faulty before an attack is . . . completed. If it becomes apparent that a target is no longer a lawful military objective, the attack must be cancelled or suspended.”³⁸

D. Requirement to Give Advance Warning When Circumstances Permit

The final required precaution in attack from Article 57, which is applicable to the United States as an expression of CIL, is an obligation to give “effective advance warning . . . of attacks which may affect the civilian population, unless circumstances do not permit.”³⁹ Joint U.S. military doctrine reverses the default starting point for this decision, requiring warnings “when circumstances permit.”⁴⁰ Circumstances permit when “any degradation in attack effectiveness is outweighed by the reduction in collateral damage” due to civilians being able to leave the objective.⁴¹ As with the rule for canceling or suspending an attack, the responsibility for this required warning is not limited to “those who plan or decide upon an attack.”⁴² With the general requirements regarding the proportionality balancing test and related precautions in attack laid out, the issue is the applicability of these rules to on-scene commanders in TIC scenarios and in the exercise of self-defense authorities.

III. SROE Self-Defense Principle of “Proportionality” Distinguished

Rules of engagement (ROE) constrain commanders’ actions, as does IHL. Although ROE will usually impose policy-based obligations more restrictive than those required by law, they can never serve to relieve commanders of basic underlying IHL obligations.⁴³ Thus, the SROE must be interpreted consistently with commanders’ IHL obligations

³⁸ JOINT PUB. 3-60, *supra* note 14, at E-4.

³⁹ AP I, *supra* note 7, art. 57(2)(c); Matheson, *supra* note 11, at 426–27. *See also* Convention (IV) Respecting the Laws and Customs of War on Land, art. 26, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV]. Article 57(2)(c) can be viewed as an authoritative interpretation of requirements to warn under Hague IV, rather than maintaining the “bombardment” versus “assault” distinction. BOTHE *supra*, note 19, at 368. An additional provision applicable to ratifiers of AP I requires that when a choice between multiple military objectives with similar military advantage is possible, the one expected to cause the least civilian loss must be selected. AP I, *supra* note 7, art. 57(3). Neither U.S. treatment of AP I requirements, nor U.S. military doctrine express this as applicable to U.S. commanders.

⁴⁰ JOINT PUB. 3-60, *supra* note 14, at E-4.

⁴¹ *Id.*

⁴² AP I, *supra* note 7, art. 57(2)(a) and (c).

⁴³ *See* OPERATIONAL LAW HANDBOOK, *supra* note 20, at 74.

to conduct proportionality balancing and take precautions in attack to spare the civilian population.⁴⁴

A. The *Jus ad Bellum* Nature of SROE “Proportionality”

In its discussion of self-defense procedures, the SROE enumerates de-escalation, necessity, and proportionality as the “principles of self-defense.”⁴⁵ As the SROE define proportionality for purposes of self-defense, they essentially require the responsible leader to make a *jus ad bellum* determination regarding what level of force is sufficient to respond decisively to a threat.⁴⁶ This determination must incorporate the principle of giving the force opportunity to cease threatening actions or withdraw. Further, the principle of necessity is satisfied only for so long as the force continues to commit hostile acts or demonstrate hostile intent. The SROE self-defense proportionality principle is clearly designed to aid a commander in a lawful resort to armed conflict (*jus ad bellum*) on a localized, specific incident scale.

This *jus ad bellum* focus in the SROE regarding IHL principles related to self-defense does not obviate the need to apply *jus in bello* IHL principles, including military necessity, distinction, and humanity, once a self-defense engagement is initiated. Although these *jus in bello* principles are not enumerated in the SROE, they are taught by judge advocates and commanders during law of war (LoW) and ROE briefings, and are routinely included on mission- or theater-specific ROE cards.⁴⁷ The SROE also alludes generally to these rules in its declaration that “all appropriate actions may be used in self defense.”⁴⁸

⁴⁴ The SROE “establish fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all military operations . . . occurring outside U.S. territory,” with an emphasis in the unclassified portions on rules regarding self-defense. SROE, *supra* note 9, § 1a. Although a mission will almost always be conducted under theater- or operation-specific ROE, those ROE are implemented as supplemental measures to the SROE, situating the SROE and its definitions as fundamental to all extra-territorial U.S. military operations. *Id.* at 2.

⁴⁵ *Id.* at A-3.

⁴⁶ “Proportionality. The use of force in self-defense should be sufficient to respond decisively to hostile acts or demonstrations of hostile intent. Such use of force may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration, and scope of force used should not exceed what is required.” *Id.*

⁴⁷ See, e.g., PowerPoint Presentation, Training Devs. Dir., The Judge Advocate Gen.’s Legal Ctr. & Sch., U.S. Army, The Law of War: The Rules that Govern the Conduct of Soldiers in Military Operations (1 Oct. 2011) [hereinafter LoW Standard Training Package], available at <https://jag.ellc.learn.army.mil/bbcdwebdav/institution/JAG%20Institution/Library/Main%20Page/STPs/OpLaw/Law%20of%20War.ppt> (JAG University account required); U.S. FORCES—IRAQ ROE CARD, in HEADQUARTERS HEADQUARTERS, U.S. FORCES—IRAQ OPERATION ORDER 11-01, annex C, app. 8, tab B (6 Jan. 2011) (requiring servicemembers to “[m]inimize incidental injury, loss of life, and collateral damage”).

⁴⁸ SROE, *supra* note 9, § 4.a. (emphasis added).

B. Confusing SROE Language Regarding *Jus ad Bellum* Proportionality

Since proportionality balancing is one of the core *jus in bello* principles that determines whether a self-defense action is “appropriate,” commanders and inexperienced operational law practitioners may be confused by SROE language appearing to except the requirement. In the 2005 revision to the SROE, the following language was added to the self-defense principle of proportionality: “The concept of proportionality in self-defense [decisive response, using no more force than required] should not be confused with attempts to minimize collateral damage during *offensive* operations.”⁴⁹ The basis under IHL for drawing this distinction is unclear. Why this language was added to the SROE is unknown.⁵⁰ However, a plain reading suggests that while other *jus in bello* principles apply during defensive operations, the Article 51 and 57 requirements to minimize collateral damage and conduct proportionality balancing apply during offensive operations only.

The SROE language is vague about whether *jus in bello* proportionality is required during self-defense. This can lead to confusion because other military publications do not address this question. For instance, the *Operational Law Handbook*, designed as a “how to” guide for judge advocates,⁵¹ does not address the applicability of *jus in bello* proportionality in self-defense situations.⁵² In the Army Judge Advocate General University (JAGU) SROE Standard Training Package (STP),⁵³ the concept of proportionality

⁴⁹ *Id.* § 4.a.(3) (emphasis added). The previous version of the SROE, updated in 2000, used the section heading “Means of Self-Defense” rather than “Principles of Self-Defense,” and the former “Proportionality” paragraph was entitled “Proportional Force.” The language of this paragraph made no reference to collateral damage or offensive versus defensive operations, and stated: “When the use of force in self-defense is necessary, the nature, duration, and scope of the engagement should not exceed that which is required to decisively counter the hostile act or demonstrated hostile intent and to ensure the continued protection of US forces or other protected personnel or property.” CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, at A-6 (15 Jan. 2000) (unclassified portions).

⁵⁰ Drafter’s commentary regarding this 2005 revised language regarding proportionality is unavailable.

⁵¹ OPERATIONAL LAW HANDBOOK, *supra* note 20, at ii.

⁵² *Id.* at 75–76. In its exposition of the topic of self-defense under the SROE, the handbook simply repeats the *jus ad bellum* definition of proportionality. *Id.* at 76. In a separate section related to the *jus in bello* principle of proportionality, the handbook does define a triggering attack as either offensive or defensive in nature, but does not elucidate what types of self-defense actions would qualify as a defensive attack. Neither section references or explains the 2005 SROE update regarding the duty to minimize collateral damage as distinctly applicable to offensive operations.

⁵³ PowerPoint Presentation, Training Devs. Dir., The Judge Advocate Gen.’s Legal Ctr. & Sch., U.S. Army, The Standing Rules of Engagement (SROE) Standard Training Package (STP) (1 Oct. 2011), available at <https://jag.ellc.learn.army.mil/bbcdwebdav/institution/JAG%20Institution/Library/Main%20Page/STPs/OpLaw/ROE.ppt> (JAG University account required) (referencing the *jus ad bellum* self-defense proportionate force rules, but only referencing collateral damage to link it as a concept relevant to offensive operations).

balancing is not addressed. Neither is it addressed in the JAGU LoW STP for Soldiers who may end up as on-scene commanders with IDF and CAS request authority.⁵⁴ Thus, while the Army systematically trains its forces on the requirements of AP I, Articles 51 and 57 CIL as applied to deliberate “offensive” targeting, and incorporates these requirements into such targeting,⁵⁵ they may get short shrift as applied to TIC, self-defense, and defensive operations (apart from non-uniform local training based on the expertise of individual judge advocates and commanders).

IV. Applicability of *Jus in Bello* Proportionality During Defensive Operations

Despite the confusing SROE language and the paucity of standardized U.S. military training and doctrine on the subject, customary IHL requirements set out by Articles 51 and 57 of AP I do apply to defensive attacks.

A. What Are Proportionality Balancing Requirement-Triggering “Attacks”?

Any attacks, offensive or defensive, trigger the proportionality balancing requirements and duties to minimize collateral damage under Articles 51 and 57 of AP I. Article 49 defines “attacks” as “acts of violence against the adversary, whether in offence or in defence.”⁵⁶ Thus, the SROE language indicating a distinction between offensive and defensive operations for the applicability of minimizing collateral damage is inapt. The ICRC commentary on the AP I definition suggests that attacks are “co-ordinated acts of violence against the adversary by a specific military formation engaged in a specific military operation, rather than . . . each act of violence of the individual combatants who are members of that formation.”⁵⁷ The definition’s plural use of “acts” supports this interpretation. However,

⁵⁴ LoW Standard Training Package, *supra* note 47. The Law of War Standard Training Package (LoW STP) briefly addresses the proportionality requirement, but unlike its treatment of other *jus in bello* principles which are explained at a Soldier-on-the-ground level, it simply terms it a “commander’s tool” and does not discuss what constitutes an attack, or when positive conduct of a balancing test may be required. *Id.* at 11.

⁵⁵ See, e.g., JOINT CHIEFS OF STAFF, JOINT MAN. 3160.01, NO STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY (13 Feb. 2009) [hereinafter JOINT MAN. 3160.01] (assisting commanders in their obligation to assess proportionality in the context of deliberate offensive targeting, and requiring training and certification of personnel preparing formal collateral damage estimates).

⁵⁶ AP I, *supra* note 7, art. 49(1).

⁵⁷ BOTHE, PARTSCH & SOLF, *supra* note 19, at 288. See ICRC DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949 COMMENTARY 54 (1973) [hereinafter ICRC DRAFT]. This formulation of the definition of attacks comports with the declaration made by the United Kingdom upon ratifying AP I, regarding Article 51 and 57 military advantage calculations being applicable to an attack as a whole, rather than individual or isolated pieces thereof. See United Kingdom Declarations, *supra* note 26.

when the entirety of an attack consists of a special operative acting alone, or an individual aircraft dropping bombs, that attack still meets the Article 49 definition and requires whoever plans or directs the attack to consider proportionality.⁵⁸

“Acts of violence” refer to uses of physical force, and do not include such things as military information support to operations. Thus, as used in AP I, the term “attacks” has a broad but concrete definition.⁵⁹ Individual, uncoordinated acts of violence are not considered part of an “attack.” Other than that, nothing in the language, origins, or scholarly interpretation of AP I excepts a TIC situation, a self-defense scenario involving coordinated acts of violence, or any other defensive operation from necessitating proportionality balancing and efforts to minimize collateral damage.

B. Certain Troops-in-Contact and Self-Defense Use of Force as Ostensibly Offensive

In recent conflicts, self-defense and TIC scenarios involving U.S. Forces have often been quasi-offensive in nature.⁶⁰ For example, some patrol missions in Afghanistan have been designed to draw out adversaries, thereby triggering TIC and self-defense authorities under the ROE.⁶¹ Further, the U.S. definition of self-defense includes pursuit doctrine, which could otherwise be characterized as a hasty conduct-based offensive operation.⁶² Consequently, even if the U.S. position was that proportionality balancing and attempts to minimize collateral damage are required for offensive operations only, commanders preparing for TIC and self-defense operations would need training on these subjects, because these situations blur the line between offense and defense. But such operations are often directed

⁵⁸ BOTHE, PARTSCH & SOLF, *supra* note 19, at 288.

⁵⁹ By contrast, common military maneuver doctrine associates the term with offensive operations only. *Id.* at 289.

⁶⁰ Notably, the doctrinal definition of TIC is unrelated to the offensive or defensive posture of the situation. See *supra* note 3. Prior to the issuance of the 2009–2011 tactical directives in Afghanistan, TICs commonly turned into hasty offensive operations. Telephone Interview with Captain Gilbert J. Comley, Judge Advocate, U.S. Army (Dec. 14, 2011) [hereinafter Comley Telephone Interview]. Captain Comley was deployed to Afghanistan as the Chief, Operational Law, 10th Mountain Division and Regional Command-South, from 2010 to 2011. Captain Comley’s responsibilities included developing, training, and providing guidance regarding the tactical directives and IHL as applied to CAS and IDF in TIC and self-defense situations within his unit’s area of responsibility. *Id.*

⁶¹ Interview with Major Christopher Harry, Judge Advocate, U.S. Army, in Charlottesville, Va. (Jan. 29, 2012). Major Harry was deployed to Kandahar, Afghanistan, as a Special Operations Task Force (SOTF) Judge Advocate in 2009 and 2010. During this deployment, his responsibilities included operational law advice to SOTF kinetic operations throughout southern Afghanistan and parts of western and central Afghanistan. *Id.*

⁶² The pursuit doctrine extends the right of self-defense to include “the authority to pursue and engage forces that have committed a hostile act or demonstrated hostile intent, if those forces continue to commit hostile acts or demonstrate hostile intent.” SROE, *supra* note 9, § 4.b.

by on-scene commanders at the lowest levels of leadership. That is why basic practical training on proportionality principles is important at all levels of military organizations.

V. When Is an On-Scene Commander Required to Conduct a Proportionality Balancing Test?

The responsibility under IHL to take precautions in attacks rests with those who “plan or decide” to attack.⁶³ In conventional warfare, these precautions must be decided on by commanders and staff officers at relatively high organizational levels. However, in current contingency operations, smaller units may have to plan or decide attacks—especially hasty offensive or defensive attacks— independently. The language of AP I does not limit the requirements to take precautions to minimize collateral damage, and to avoid or suspend attacks that fail the proportionality balancing test, to any specific level of command. Rather, the Article 57 obligations “apply at whatever level the regulated functions are being performed.”⁶⁴ Thus, even a squad leader planning a hasty attack must comply with CIL as expressed in Article 57(a) to spare civilians and civilian objects. Further, the obligation to cancel or suspend an attack does not rest solely with whoever planned or authorized the attack. A commander actually engaged in combat, who has authority to cancel or suspend an attack, must do so if it becomes apparent that the attack would violate the principle of proportionality. This obligation is clear from the organizational structure of Article 57, which divorces the obligation to “cancel or suspend” from the “those who plan or decide” jurisdictional language.⁶⁵

Many TIC scenarios do not require the on-scene commander to conduct a proportionality analysis. If the target is purely military in nature, with no known civilian persons or objects in jeopardy, the attack is not “expected to cause” any incidental loss to civilians and no proportionality balancing is required.⁶⁶ Likewise, when members of a formation are exercising individual self-defense as a subset of the inherent right of unit self-defense,⁶⁷ the triggering

⁶³ AP I, *supra* note 7, art. 57(2)(a).

⁶⁴ BOTHE, PARTSCH & SOLF, *supra* note 19, at 363.

⁶⁵ Additionally, the original proposed language regarding AP I, Article 57(b) expressly addressed the requirement to cancel or suspend violative attacks with “those who launch an attack.” The adopted language was instead made passive to be applicable to any commander with authority to cancel or suspend an attack. ICRC DRAFT, *supra* note 57, at 64; BOTHE, PARTSCH & SOLF, *supra* note 19, at 366.

⁶⁶ However, the commander has a continuing duty to perform proportionality balancing and cancel or suspend the attack if it subsequently becomes apparent that civilian persons or property are in jeopardy, and the expected incidental civilian loss would be excessive as defined by IHL proportionality principles. AP I, *supra* note 7, art. 57(2)(b).

⁶⁷ “Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander . . . , military

condition of “coordinated acts of violence” by a “specific military formation” is not met, and no balancing test is required.⁶⁸ However, when coordinated acts of violence are planned or decided at the on-scene commander level and civilian persons or objects are potentially in jeopardy, that military leader—of whatever rank—is obligated to assess (1) whether the attack is proportional, (2) what practicable measures can minimize collateral damage, (3) whether the attack has become disproportionate and should be suspended, and (4) whether circumstances permit advance warning to civilians.⁶⁹ Whether an attack is coordinated and whether it places civilians or civilian property at risk is fuzzy at the margins, as is often the case at the point of impact between IHL and a real battlefield scenario. However, directing CAS, IDF, or organic unit firepower with equivalent destructive capabilities against structures or terrain likely to contain civilians or civilian property would trigger the requirements of Article 57.⁷⁰

VI. Practical Requirements Article 57 Places on On-Scene Commanders

On-scene commanders obligated to take actions in accordance with AP I Article 57 must take “*all reasonable steps* to ensure . . . that [the] objectives may be attacked without probable losses in lives and damage to [civilian] property disproportionate to the military advantage anticipated.”⁷¹ To be reasonable, the responsible leader must be aware of the obligation and affirmatively balance the proportionality of the attack. The extent of that deliberative

members may exercise individual self-defense” SROE, *supra* note 9, § 2.a.

⁶⁸ As discussed above in Part III.B and note 50, attacks triggering the requirements of AP I, Article 57 are limited to “co-ordinated acts of violence against the adversary by a specific military formation engaged in a specific military operation, rather than . . . each act of violence of the individual combatants who are members of that formation.” BOTHE, PARTSCH & SOLF, *supra* note 19, at 288.

⁶⁹ This is so because the obligations of Article 57 apply at every level where regulated functions are performed, including the on-scene commander level. *Id.* at 636.

⁷⁰ See, e.g., 2009 Tactical Directive, *supra* note 4. Although based most directly on strategic goals in the Afghanistan counterinsurgency environment, rather than IHL obligations, the tactical directive requires

leaders *at all levels* to scrutinize and limit the use of force like close air support (CAS) against residential compounds and other locations likely to produce civilian casualties Commanders must weigh the gain of using CAS against the cost of civilian casualties, which in the long run make mission success more difficult and turn the Afghan people against us.

Id. at 1–2 (emphasis added).

⁷¹ FM 27-10, *supra* note 14, para. 41 (emphasis added). “All reasonable steps” and “all practicable precautions” are used interchangeably in the U.S. interpretation of Article 57 as an expression of CIL, as a substitute for the treaty language of “all *feasible* precautions.” See Matheson, *supra* note 11, at 426–27; AP I, *supra* note 7, art. 57(2)(a)(ii).

balancing and the factors considered on each side of the balancing equation will vary based on the combat circumstances in which the test is applied. This is because, under IHL, a commander's actions are judged based on the situation as the commander sees it—including reasonably available information—at the time of decision.⁷² At a minimum, the on-scene commander must consciously consider the potential for collateral damage in light of the military objective. In a TIC scenario, the military objective will often be preservation of the lives of friendly forces, a legitimate factor to weigh on the military advantage side of the calculus.⁷³ Time constraints and combat conditions considered, the commander should gather a reasonable amount of information to inform the decision.

If the attack is anticipated to affect the civilian population, even in a self-defense scenario the on-scene commander must positively determine whether circumstances permit advance warning of the attack. If heavily armed adversaries are being pursued into a likely civilian structure, with the number of civilian occupants unknown, circumstances may allow the engaged unit to maintain a temporary safe standoff distance, warn the civilians, and give them time to exit the building before continuing the engagement.⁷⁴ The potential gradations of such a scenario are endless, but the key requirement is that the option to warn be considered, resulting in a reasonable decision based on the information available at that time.

A. Military Advantage Side of the Proportionality Calculus

In a “true” self-defense scenario, as where a squad is pinned down by fire from an adversary taking cover in a civilian structure, the “concrete and direct military advantage” side of the calculus is no more complex than protecting the lives of servicemembers.⁷⁵ When the troops

⁷² This proposition is known as the “Rendulic Rule.” General Lothar Rendulic was found not guilty of a charge before the Nuremberg Tribunal, since the conditions, as they appeared to him at the time, were both subjectively and objectively sufficient to support the decision made, despite what was later determined to be unnecessary destruction of civilian property. 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1296 (1951), available at http://www.loc.gov/tr/frd/Military_Law/NTs_war-criminals.html; see also Geoffrey Corn & Gary Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 TEX. INT’L L.J. 337, 375 (2012). “Commanders must determine if use of force is proportional based on all information reasonably available at the time.” AIR FORCE OPERATIONS, *supra* note 14, at 20.

⁷³ See BOTHE, PARTSCH & SOLF, *supra* note 19, at 311.

⁷⁴ Comley Telephone Interview, *supra* note 60.

⁷⁵ See 2009 Tactical Directive, *supra* note 4, at 2. In this scenario, IHL does not forbid the commander to attack and cause collateral civilian casualties unless there are no other means available to counter the threat. However, political or strategic considerations may lead to such a requirement in counterinsurgency operations. “This directive does not prevent commanders from protecting the lives of their men and women as a matter of self-defense where it is determined no other options . . . are available to effectively counter the threat. *Id.* (emphasis added).

are not pinned down—when, for example, they are pursuing an adversary per the U.S. self-defense pursuit doctrine—the military advantage considerations for the on-scene commander will expand. These include preventing the adversaries from later reengaging friendly forces and nesting the effect of the attack within overall strategic objectives.⁷⁶ The on-scene commander's consideration of strategic objectives in a counterinsurgency environment may be as simple as recognizing that even collateral loss that is not unlawfully excessive can undermine the objective of protecting and de-radicalizing the civilian population, so that the military advantage of using force is reduced.⁷⁷

B. Expected Incidental Civilian Loss Side of the Proportionality Calculus

The information reasonably available to responsible on-scene commanders about expected civilian losses in an attack will vary greatly. However, on-scene commanders should usually be able to reference training and intelligence regarding the demographics, typical civilian patterns of life, and types of structures commonly occupied by civilians.⁷⁸ Additionally, they should be trained on the general effects of the weapons system they intend to use. In introducing its draft proposal for precautions in attack, which formed the basis for AP I Article 57, the ICRC opined that factors regarding the potential for civilian loss which should be considered include “configuration of the terrain (danger of landslide, or of ricocheting); the relative accuracy of the weapons used . . .; the specific nature of the military objectives,” time of day, and weather conditions.⁷⁹

In situations where the on-scene commander is responsible for the proportionality balancing test, time

⁷⁶ See BOTHE, PARTSCH & SOLF, *supra* note 19, at 311. Such consideration of military advantage at the strategic level by an on-scene commander during an engagement with the enemy may appear overly burdensome; however, through training and pre-mission consideration of the requirement in the context of the specific operation, extended contemplation on the objective should be unnecessary. Further, this type of strategic contemplation is already being required at all levels of leadership in Afghanistan for mission success, if not for IHL compliance purposes. See 2009 Tactical Directive, *supra* note 4, at 1–2.

⁷⁷ The tactical directive requires that while considering the advantage of use of CAS, the commander must consider that even non-excessive civilian casualties may “make mission success more difficult and turn the Afghan people against us.” *Id.* See also 2011 Tactical Directive, *supra* note 4, at 1 (noting that “every civilian casualty is a detriment to our interests”). Recent scholarship concerning proportionality balancing in the context of counterinsurgency operations proposes that when the mission is one of “providing for the safety and security of the local population,” collateral loss should be weighed as a negative on the military advantage side of the balancing test, potentially counterbalancing the weight of safety of friendly forces or destruction of the enemy. Beran, *supra* note 16, at 10.

⁷⁸ Harry, *supra* note 61.

⁷⁹ Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974–1977, Summary Records 21, para. 3, accord to BOTHE, PARTSCH & SOLF, *supra* note 19, at 364.

constraints or tactical circumstances are unlikely to permit extended surveillance or technical intelligence collection to determine expected civilian losses. However, the on-scene commander should be trained on and visually assess evidence of civilian patterns of life, including the type and number of vehicles, equipment, and animals in the vicinity of a structure, and the presence of toys or women's and children's air-drying laundry.⁸⁰ Article 57 does not require the commander to know precisely the extent of civilian loss that will occur, only that reasonably available information be used to estimate expected loss.⁸¹ This information should be used by the on-scene commander both to decide what precautions may be practically taken to minimize incidental civilian loss and to weigh against the military advantage sought to determine if the attack should proceed.

Since these practical requirements flex with the specific situation under the Rendulic rule, they should never be too onerous for a properly trained on-scene commander to apply within the tactical tempo.⁸²

VII. Conclusion

The proportionality balancing test is inherently subjective, as the AP I drafters, subsequent IHL scholars, and military doctrine alike recognize. Collateral civilian loss defies mathematical comparison to a counterbalancing military advantage outside the rare "X expected collateral civilian deaths versus Y certain friendly forces deaths" scenario. Judge advocates must avoid relying on a complex and time-consuming formal, weighted formula—such as is used in collateral damage estimates for deliberate air

strikes⁸³—in teaching balancing requirements to potential on-scene commanders. Those military leaders, of whatever rank, are already expected to make complex and subjective judgment calls on the battlefield in other areas. International humanitarian law proportionality analysis simply requires similar honest, informed, subjective judgment calls. Training for small group leaders should focus on helping them apply this art to the proportionality analysis they may unexpectedly have to employ.

Informed judge advocates and commanders should bridge the training gap by focusing on what triggers an on-scene commander's IHL obligation to take precautions in attack to minimize collateral civilian loss, what constitutes a compliant proportionality balancing analysis, and what inputs that leader can expect to be able to hastily compare during an ongoing engagement to inform that analysis. Judge advocates can ensure that during LoW and ROE training they emphasize that *jus in bello* proportionality obligations apply not just to senior commanders and staff planning deliberate offensive operations through a formal collateral damage estimate process, but also apply to the on-scene commander responsible for planning or deciding to execute any coordinated acts of violence, whether offensive or defensive in nature. Senior leaders and judge advocates owe meaningful instruction to on-scene commanders, because while exact balancing is impossible and cannot be required, failure to perform a reasonable proportionality analysis during qualifying attacks violates IHL and DoD policy.

⁸⁰ Interview with Major Christopher Harry, *supra* note 61.

⁸¹ Beran indicates a belief that "lack of knowledge regarding the presence, or absence, of civilians already in [a] building [entered by Taliban insurgents] at the time of the engagement [makes] it impossible . . . to complete the required proportionality assessment . . ." Beran, *supra* note 16, at 6. However, what is required is not actual knowledge of the presence of civilians, but affirmative weighing of collateral damage based on reasonably available information. If direct observational or intelligence-based information regarding civilian presence is not available, the required proportionality assessment may still be validly completed based on whatever indirect indications of civilian persons or property are reasonably available.

⁸² Interview with Major Christopher Harry, *supra* note 61; Comley Telephone Interview, *supra* note 60.

⁸³ See generally JOINT MANUAL 3160.01, *supra* note 55.

What We Know: A Brief Tax Update

Lieutenant Colonel Samuel W. Kan, CFP®*

Although many of the provisions of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 will soon sunset,¹ there is still some degree of tax certainty for the current tax year and beyond. For example, the Middle Class Relief and Job Creation Act of 2012 extends the payroll tax reduction through 2012, while cost of living adjustments allow taxpayers to increase their 2012 Thrift Savings Plan or 401(k) contributions from \$16,500 to \$17,000.² This brief tax update provides five appendices to summarize some of the most common federal and state tax issues faced by servicemembers and military retirees.

First, Appendix A shows the marginal income tax brackets for 2011 and 2012 based on the taxpayer's federal income tax filing status. Second, Appendix B shows the income tax standard deductions and personal exemptions for 2011 and 2012. Third, Appendix C shows the alternative minimum tax (AMT) exemption for 2011 and 2012. Fourth, Appendix D shows the annual gift tax, the lifetime gift tax, and the estate and generation-skipping transfer (GST) tax exclusions and tax rates through 2013, assuming no congressional action. Fifth, Appendix E shows how each state currently treats the state income taxability of military income and military retirement pay.

As both federal and state governments continue to modify the applicable tax laws, practitioners are cautioned to use these appendices only as quick reference tools to expedite appropriate and necessary tax research for their particular cases. Hopefully, these tools will provide a useful starting point for legal assistance tax practitioners to meet the needs of their clients in a timely manner.

* Judge Advocate, U.S. Army. Presently assigned as the Deputy Staff Judge Advocate, 2d Infantry Division, Camp Red Cloud, Korea. This update was written while assigned as Professor and Vice Chair, Administrative and Civil Law Department, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia. Special thanks to Ms. Emily Moy, my summer intern research assistant, who co-wrote appendix E, Mr. Chuck Strong, the Technical Editor of *The Army Lawyer*, and Captain Joseph Wilkinson, the former Editor of *The Army Lawyer* and current Editor of the *Military Law Review*.

¹ See Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (extending the "Bush Tax Cuts" through 2012).

² See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 [HR 3630]. Through 2012, the payroll tax reduction reduces the employee-side of the Social Security tax on the first \$110,100 of wages from 6.2 to 4.2 percent. See *id.* §1001. The Social Security tax is part of the Federal Insurance Contributions Act (FICA) tax which provides for social security benefits through the Old-Age, Survivors and Disability Insurance (OASDI) tax, as well as, for Medicaid benefits through the hospital insurance tax. The Middle Class Tax Relief and Job Creation Act of 2012 also extends the Emergency Unemployment Compensation Program which will provide Unemployment Insurance benefits through January 2, 2013. See *id.* § 2122. See I.R.C. § 402(g)(4) (establishing that the elective deferral amount is subject to change based on cost-of-living adjustments). By increasing elective deferrals, taxpayers may be able to reduce both their adjusted gross income and their taxable income, resulting in significant benefits when they file their income taxes. In the alternative, rather than getting immediate tax benefits now by contributing to the traditional Thrift Savings Plan (TSP) and taking advantage of elective deferrals, servicemembers may want to take advantage of the new TSP Roth feature. The Roth TSP will work very similarly to a Roth Individual Retirement Account (IRA) subjecting contributions to tax now, but exempting timely withdrawals of the contributions and their earnings from tax in the future. Servicemembers should be able to make Roth TSP contributions starting in October 2012.

Appendix A

The Marginal Tax Brackets for the 2011 Tax Year³

1. Single Individuals (other than Surviving Spouses and Heads of Households):

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	8,500	0	+ 10% of amount over \$0
8,500	34,500	\$850	+ 15% of amount over \$8,500
34,500	83,600	\$4,750	+ 25% of amount over \$34,500
83,600	174,400	\$17,025	+ 28% of amount over \$83,600
174,400	379,150	\$42,449	+ 33% of amount over \$174,400
379,150		\$110,016.50	+ 35% of amount over \$379,150

2. Married Individuals Filing Joint Returns and Surviving Spouses:

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	17,000	0	+ 10% of amount over \$0
17,000	69,000	\$1,700	+ 15% of amount over \$17,000
69,000	139,350	\$9,500	+ 25% of amount over \$69,000
139,350	212,300	\$27,087.50	+ 28% of amount over \$139,350
212,300	379,150	\$47,513.50	+ 33% of amount over \$212,300
379,150		\$102,574	+ 35% of amount over \$379,150

3. Heads of Households:

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	12,150	0	+ 10% of amount over \$0
12,150	46,250	\$1,215	+ 15% of amount over \$12,150
46,250	119,400	\$6,330	+ 25% of amount over \$46,250
119,400	193,350	\$24,617.50	+ 28% of amount over \$119,400
193,350	379,150	\$45,323.50	+ 33% of amount over \$193,350
379,150		\$106,637.50	+ 35% of amount over \$379,150

4. Married Individuals Filing Separate Returns:

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	8,500	0	+ 10% of amount over \$0
8,500	34,500	\$850	+ 15% of amount over \$8,500
34,500	69,675	\$4,750	+ 25% of amount over \$34,500
69,675	106,150	\$13,543.75	+ 28% of amount over \$69,675
106,150	189,575	\$23,756.75	+ 33% of amount over \$106,150
189,575		\$51,287	+ 35% of amount over \$189,575

³ See Rev. Proc. 2011-12, 2011-2 I.R.B. 297. Due to the progressive federal income tax system, taxpayers earning more income will have to pay a higher percentage of their income in taxes. For example, if a married taxpayer filed a joint tax return, the first \$17,000 of taxable income would be subject to a 10% tax rate, while income over \$17,000 but less than \$69,000 would be subject to a 15% tax rate. To calculate a taxpayer's federal income tax, a taxpayer would apply the applicable tax rate to each segment of income. For example, if a taxpayer's taxable income was \$95,025 and that taxpayer filed a joint return in 2011, the taxpayer would be liable for \$16,006 (i.e., \$9,500 + .25 (\$95,025 - \$69,000)) in federal income taxes.

The Marginal Tax Brackets for the 2012 Tax Year⁴

1. Single Individuals (other than Surviving Spouses and Heads of Households):

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	8,700	0	+ 10% of amount over \$0
8,700	35,350	\$870	+ 15% of amount over \$8,700
35,350	85,650	\$4,867.50	+ 25% of amount over \$35,350
85,650	178,650	\$17,442.50	+ 28% of amount over \$85,650
178,650	388,350	\$43,482.50	+ 33% of amount over \$178,650
388,350		\$112,683.50	+ 35% of amount over \$388,350

2. Married Individuals Filing Joint Returns and Surviving Spouses:

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	17,400	0	+ 10% of amount over \$0
17,400	70,700	\$1,740	+ 15% of amount over \$17,400
70,700	142,700	\$9,735	+ 25% of amount over \$70,700
142,700	217,450	\$27,735	+ 28% of amount over \$142,700
217,450	388,350	\$48,665	+ 33% of amount over \$217,450
388,350		\$105,062	+ 35% of amount over \$388,350

3. Heads of Households:

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	12,400	0	+ 10% of amount over \$0
12,400	47,350	\$1,240	+ 15% of amount over \$12,400
47,350	122,300	\$6,482.50	+ 25% of amount over \$47,350
122,300	198,050	\$25,220	+ 28% of amount over \$122,300
198,050	388,350	\$46,430	+ 33% of amount over \$198,050
388,350		\$109,229	+ 35% of amount over \$388,350

4. Married Individuals Filing Separate Returns:

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	8,700	0	+ 10% of amount over \$0
8,700	35,350	\$870	+ 15% of amount over \$8,700
35,350	71,350	\$4,867.50	+ 25% of amount over \$35,350
71,350	108,725	\$13,867.50	+ 28% of amount over \$71,350
108,725	194,175	\$24,332.50	+ 33% of amount over \$108,725
194,175		\$52,531	+ 35% of amount over \$194,175

⁴ See Rev. Proc. 2011-52, 2011-45 I.R.B. 703. Due to the progressive federal income tax system, taxpayers earning more income will have to pay a higher percentage of their income in taxes. For example, if a married taxpayer filed a joint tax return, the first \$17,400 of taxable income would be subject to a 10% tax rate, while income over \$17,400 but less than \$70,700 would be subject to a 15% tax rate. To calculate a taxpayer's federal income tax, a taxpayer would apply the applicable tax rate to each segment of income. For example, if a taxpayer's taxable income was \$95,025 and that taxpayer filed a joint tax return in 2012, the taxpayer would be liable for \$15,816 (i.e., \$9,735 + .25 (\$95,025 - \$70,700)) in federal income taxes.

Appendix B

2011 Standard Deductions and Personal Exemption⁵

Filing Status	Standard Deduction	If Over Age 65 (Add Per Taxpayer)	If Blind (Add Per Taxpayer)
Married Filing Jointly or Qualifying Widow(er)	\$11,600	+ \$1,150	+ \$1,150
Head of Household	\$8,500	+ \$1,450	+ \$1,450
Single	\$5,800	+ \$1,450	+ \$1,450
Married Filing Separately	\$5,800	+ \$1,150	+ \$1,150

Personal Exemption	\$3,700
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2012 Standard Deductions and Personal Exemption⁶

Filing Status	Standard Deduction	If Over Age 65 (Add Per Taxpayer)	If Blind (Add Per Taxpayer)
Married Filing Jointly or Qualifying Widow(er)	\$11,900	+ \$1,150	+ \$1,150
Head of Household	\$8,700	+ \$1,450	+ \$1,450
Single	\$5,950	+ \$1,450	+ \$1,450
Married Filing Separately	\$5,950	+ \$1,150	+ \$1,150

Personal Exemption	\$3,800
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⁵ See Rev Proc 2011-12, 2011-2 I.R.B. 299. See also I.R.C. § 63(c) and (f). See generally U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., PUB. 17, YOUR FEDERAL INCOME TAX: FOR INDIVIDUALS 142-43 (2011) (providing a worksheet and instructions to calculate the 2011 standard deduction; explaining that individuals for whom an exemption can be claimed on another person's tax return is generally limited to the greater of \$950, or the individual's earned income + \$300 for a total value of up to \$5800, the 2011 regular standard deduction amount). Taxpayers who take the standard deduction may be able to take additional deductions if they are over age 65 or blind. For example, if a single taxpayer was over age 65 and blind, his standard deduction in 2011 would be \$8,700 (i.e., \$5,800 + \$1,450 + \$1,450).

⁶ See Rev Proc 2011-52, 2011-45 I.R.B. 701. The standard deduction for an individual for whom an exemption can be claimed on another person's tax return is generally limited to the greater of \$950, or the individual's earned income + \$300 for a total value of up to \$5950, the 2012 regular standard deduction amount. See *id.* See also I.R.C. § 63(c) and (f). Taxpayers who take the standard deduction may be able to take additional deductions if they are over age 65 or blind. For example, if a single taxpayer was over age 65 and blind, his standard deduction in 2012 would be \$8,850 (i.e., \$5,950 + \$1,450 + \$1,450).

Appendix C

2011 and 2012 Alternative Minimum Tax Rates⁷

Filing Status	2011 AMT Exemption	2012 AMT Exemption
Married Filing Jointly and Surviving Spouses	\$74,450	\$45,000
Single and Head of Household	\$48,450	\$33,750
Married Filing Separately	\$37,225	\$22,500

⁷ I.R.C. § 55(d)(1) (2012) (establishing an elevated AMT exemption amount in 2011 that will expire in 2012 absent congressional action). At the time of this article, Congress had not yet passed an expected AMT patch for 2012.

Appendix D

Exclusions, Exemptions, and Gift / Estate /GST Tax Rates⁸

Year	Annual Gift Exclusion ⁹	Estate / GST Exclusion ¹⁰	Gift Tax Exclusion ¹¹	Highest Gift, Estate, and GST Tax Rate ¹²
2002	\$11,000	\$1 Million	\$1 Million	50%
2003	\$11,000	\$1 Million	\$1 Million	49%
2004	\$11,000	\$1.5 Million	\$1 Million	48%
2005	\$11,000	\$1.5 Million	\$1 Million	47%
2006	\$12,000	\$2 Million	\$1 Million	46%
2007	\$12,000	\$2 Million	\$1 Million	45%
2008	\$12,000	\$2 Million	\$1 Million	45%
2009	\$13,000	\$3.5 Million	\$1 Million	45%
2010	\$13,000	\$5 Million ¹³	\$5 Million	35% ¹⁴ (but the GST Tax Rate is 0%) ¹⁵
2011	\$13,000	\$5 Million	\$5 Million	35%
2012	\$13,000	\$5.12 Million ¹⁶	\$5.12 Million ¹⁷	35%
2013	To be Determined	\$1 Million	\$1 Million	55%

⁸ See JOINT COMM. ON TAXATION, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM, JCX-108-07, at 11, 14 (2007) available at www.jct.gov/x-108-07.pdf (last visited Mar. 17, 2012) (showing similar tables). See also CCH, 2010 TAX LEGISLATION, TAX RELIEF, UNEMPLOYMENT INSURANCE REAUTHORIZATION, AND JOB CREATION ACT OF 2010, RIC MODERNIZATION ACT OF 2010, AND OTHER RECENT TAX ACTS para. 705 [hereinafter CCH, 2010 TAX LEGISLATION] (providing an in-depth explanation of the gift, estate, and generation-skipping transfer (GST) taxes, as well as how the Tax Relief Act of 2010 impacts these taxes).

⁹ See I.R.C. § 2503 (Jan. 1, 1998) (establishing that \$10,000 annual exclusion with an inflation adjustment). See also Rev. Proc. 2010-40, § 3.21, 2010-46 I.R.B. 663 (establishing that the annual exclusion for gifts in 2011 is \$13,000; establishing that the annual exclusion for gifts to spouses who are not United States citizens in 2011 is \$136,000). See also Rev. Proc. 2011-52, 2011-45 I.R.B. 707 (establishing that the annual exclusion for gifts in 2012 is \$13,000; establishing that the annual exclusion for gifts to spouses who are not United States citizens in 2012 is \$139,000).

¹⁰ See I.R.C. §§ 2010 and 2631 (2010).

¹¹ See *id.* § 2505 (2011). See also I.R.C. § 2010 (2010).

¹² See I.R.C. §§ 2001 and 2502 (2011). See I.R.C. §§ 2601 and 2602 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296) (discussing the taxes imposed by the GST tax).

¹³ See CCH, 2010 Tax Legislation, *supra* note 8, para. 705 (explaining that the \$5 million GST tax exemption is available in 2010 even if the executor of a decedent in 2010 elects for the estate tax not to apply).

¹⁴ *But see* § 301(c), 124 Stat. 3296 (establishing that in 2010, the personal representative may elect a carryover basis regime to apply; if the administrator so elects, the estate tax would not be applicable, but the beneficiaries would only be allowed to take a limited step-up in basis depending on how the administrator chooses to allocate the \$1.3 million or up to \$4.3 million if the property is allocated to a surviving spouse).

¹⁵ *Id.* § 302(c), 124 Stat. 3296 (establishing the 2010 GST tax rate as zero). See also I.R.C. § 2641 (defining the applicable rate (i.e., the tax rate) with respect to the GST tax as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer).

¹⁶ See Rev. Proc. 2011-52 § 3.29, 2011-45 I.R.B. 707 (establishing the unified credit against the estate tax for 2012 as \$5.12 million). See I.R.C. § 2010(c)(3)(B) (2010) (establishing that in 2012 the exemption amount will be subject to an inflation adjustment rounded to the nearest \$10,000).

¹⁷ See I.R.C. § 2505(a) (2011) (establishing that the federal gift tax exclusion amount will be equal to the federal estate tax exclusion amount).

Appendix E

State Income Tax¹⁸

State	Military Pay Excluded?	Military Retirement Pay Excluded?	Citation and State Department of Revenue Websites
Alabama	No	Yes	ALA. CODE §§ 40-18-3; 40-18-20 (2012); http://www.revenue.alabama.gov/
Alaska	No State Income Tax	No State Income Tax	ALASKA STAT. ANN. tit. 43, ch. 20, art. 1. (2012); http://www.tax.state.ak.us/
Arizona	Yes ¹⁹	Partial ²⁰	ARIZ. REV. STAT. ANN. § 43-1022 (2012); http://www.azdor.gov/
Arkansas	Partial ²¹	Partial ²²	ARK. CODE ANN. §§ 26-51-306; 26-51-307 (2012); http://www.dfa.arkansas.gov/offices/incomeTax/Pages/default.aspx
California	Yes (under certain circumstances) ²³	No	CAL. REV. & TAX. CODE § 17140.5 (2012); https://www.ftb.ca.gov/index.shtml?disabled=true
Colorado	No ²⁴	Partial ²⁵	COLO. REV. STAT. ANN. §§ 39-22-103, 39-22-104 (2012); http://www.colorado.gov/cs/Satellite/Revenue-Main/XRM/1177024783507
Connecticut	Yes (under certain circumstances) ²⁶	Partial ²⁷	CONN. GEN. STAT. ANN. § 12-701 (2012); http://www.ct.gov/drs/site/default.asp

¹⁸ This state income tax guide is meant only as a quick reference tool. Military taxpayers should understand that in general, their military income is only subject to state income tax for the state of their legal domicile. See generally NR ADMIN. LAW & U.S. NAVY OFFICE OF THE JUDGE ADVOCATE GEN., LEGAL ASSISTANCE POL'Y DIV. (CODE 16), STATE TAX GUIDE (2012), available at <http://www.jag.navy.mil/organization/documents/tax/StateTaxGuide.pdf> (providing a wealth of detail concerning the state income tax implications for each state).

¹⁹ ARIZ. REV. STAT. ANN. § 43-1022(19) (2012) (excluding compensation received for active service as a member of the reserves, the national guard, or the armed forces of the United States from Arizona state income tax).

²⁰ *Id.* § 43-1022(2)(a) (excluding the first \$2500 in military retirement benefits from Arizona state income tax).

²¹ ARK. CODE ANN. § 26-51-306(a)(1)(C) (2012) (excluding the first \$9000 of active duty pay from Arkansas state income tax).

²² *Id.* § 26-51-307 (excluding the first \$6000 of pension income from Arkansas state income tax).

²³ CAL. REV. & TAX. CODE § 17140.5(c)(2) (2012) (exempting military income of servicemembers not domiciled in California from California state income tax). However, servicemembers domiciled in California are subject to income taxation while stationed in California on permanent military orders, but not subject to income tax if they leave California under PCS orders. See STATE OF CAL. FRANCHISE TAX BOARD, FTB PUB. 1032, TAX INFORMATION FOR MILITARY PERSONNEL (2011), available at https://www.ftb.ca.gov/forms/2011/11_1032.pdf. See STATE OF CAL. FRANCHISE TAX BOARD, FTB PUB. 1005, PENSION AND ANNUITY GUIDELINES (2011), available at https://www.ftb.ca.gov/forms/2011/11_1005.pdf (establishing that the military pensions of California residents are taxable by California, while the military pensions of nonresidents are not taxable by California).

²⁴ COLO. REV. STAT. ANN. § 39-22-103(8)(b)(I)(A) (2012) (establishing the exception that an individual domiciled in Colorado who is absent from the state for a period of at least three hundred and five days of the tax year and is stationed outside of the United States for active military duty may file as a non-resident). See COLO. DEP'T. OF REVENUE, FYI INCOME 21: MILITARY SERVICEPERSONS (2011), available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251757205766&ssbinary=true> (providing guidance to service members as to what income is taxable, and whether they qualify as residents or nonresidents; establishing that nonresident servicemembers do not have to report their military income to Colorado).

²⁵ COLO. REV. STAT. ANN. § 39-22-104(4)(f)(III) (2012) (establishing that servicemembers who are aged fifty-five to sixty-four at the close of the tax year may exclude up to \$20,000 of their military retirement benefits, while servicemembers who are aged sixty-five and over at the close of the tax year may exclude up to \$24,000).

²⁶ CONN. GEN. STAT. ANN. § 12-701(a)(1) (2012) (establishing that a servicemember domiciled in Connecticut may qualify as a nonresident for tax purposes under certain limited circumstances, such as if the taxpayer maintains no permanent place of abode in Connecticut, maintains a permanent place of abode elsewhere, and spends no more than thirty days of the taxable year in Connecticut). See also STATE OF CONN. DEP'T OF REVENUE SERVS. IP 2009(21), CONNECTICUT INCOME TAX INFORMATION FOR ARMED FORCES PERSONNEL AND VETERANS, <http://www.ct.gov/drs/cwp/view.asp?A=1510&Q=456614> (last visited June 28, 2012) (providing detailed tax information concerning what income is taxable, who qualifies as a nonresident, and guidance regarding the Military Spouses Residency Relief Act).

²⁷ CONN. GEN. STAT. § 12-701(a)(20)(B)(xvii) (2012) (excluding 50% of military retirement pay from Connecticut state income tax).

D.C.	No ²⁸	Partial ²⁹	D.C. CODE § 47-1803.02(a)(2)(N) (2012); http://otr.cfo.dc.gov/otr/site/default.asp
Delaware	No	Partial ³⁰	DEL. CODE ANN. tit. 30, §§ 1105, 1106, 1121 (2012); http://revenue.delaware.gov/
Florida	No State Income Tax	No State Income Tax	Fla. Const. art. 7, § 5(a) ³¹ (2012); http://dor.myflorida.com/dor/info_individuals.html
Georgia	No	Partial ³²	GA. CODE ANN. § 48-7-27 (2012); https://etax.dor.ga.gov/
Hawaii	No ³³	Yes ³⁴	HAW. REV. STAT. §§ 235-2.3, 235-7 (2012); http://www.state.hi.us/tax/
Idaho	Yes (under certain conditions) ³⁵	Partial ³⁶	IDAHO CODE ANN. §§ 63-3013, 63-3022A (2012); http://tax.idaho.gov/
Illinois	Yes ³⁷	Yes ³⁸	35 ILL. COMP. STAT. ANN. 5/203 (2012); http://www.revenue.state.il.us/#t=tab1
Indiana	Partial ³⁹	Partial ⁴⁰	IND. CODE ANN. §6-3-2-4 (2012); http://www.in.gov/dor/

²⁸ See DISTRICT OF COLUMBIA OFFICE OF TAX AND REVENUE, 2011 DISTRICT OF COLUMBIA (DC) INDIVIDUAL INCOME TAX FORMS AND INSTRUCTIONS: D-40 SCHEDULE I, ADDITIONS TO AND SUBTRACTIONS FROM FEDERAL ADJUSTED GROSS INCOME P2 (2011), available at http://otr.cfo.dc.gov/otr/frames.asp?doc=/otr/lib/otr/january_2012/2011_d-40_d-40ez_web_booklet.pdf (providing guidance to servicemembers and their spouses concerning who has to file District of Columbia income taxes in light of the Military Spouses Residency Relief Act).

²⁹ D.C. CODE § 47-1803.02(a)(2)(N) (2012) (excluding up to \$3000 of military retired pay from gross income for those aged sixty-two or over at the close of the tax year).

³⁰ DEL. CODE ANN. tit. 30, § 1106(b)(3)(b) (2012) (excluding up to \$2000 of pension income for taxpayers under age sixty at the close of the tax year, and up to \$12,500 of pension income for taxpayers who are aged sixty or over at the close of the tax year).

³¹ See FLA. CONST. art. 7, § 5(a) (providing that no tax upon estates or inheritances or upon the income of natural persons . . . shall be levied by Florida . . .). See also FLA. STAT ANN. § 220.02 (2012). See also FLORIDA DEP'T OF REVENUE, GT-800025: TAX INFORMATION FOR NEW RESIDENTS 2 (2010), available at http://dor.myflorida.com/dor/info_individuals.html (explaining that Florida does not impose personal income, inheritance, gift, or intangible personal property taxes).

³² GA. CODE ANN. § 48-7-27(a)(5)(A) (2012) (excluding retirement income up to \$35,000 for taxpayers older than sixty-two but less than sixty-five during any part of the tax year; excluding retirement income in increasing amounts from \$35,000 in 2011 and \$65,000 in 2012 up to a full exclusion of all retirement income in 2016 and beyond for taxpayers aged sixty-five and older during any part of the tax year).

³³ HAW. REV. STAT. § 235-7(a)(7) (2012) (creating the exception that income received by a reserve servicemember or Hawaii national guardsman may exclude pay equal to the equivalent pay received for forty-eight drills and fifteen days of annual duty at an E-5 pay grade after eight years of service). In 2011, this amount was equal to \$5,881. See STATE OF HAWAII—DEP'T OF TAXATION, FORM N-11: INDIVIDUAL INCOME TAX RETURN RESIDENT CALENDAR YEAR 2011, available at http://www.state.hi.us/tax/2011/n11_f.pdf.

³⁴ HAW. REV. STAT. § 235-7(a)(2) (2012) (excluding public retirement pensions from Hawaii income tax).

³⁵ IDAHO CODE ANN. § 63-3013 (2012) (specifying that individuals will not be considered residents if they are absent from the state for at least 445 days in a fifteen-month period; specifying that such individuals do not have to file an Idaho income tax return; clarifying that servicemembers will continue to be treated as residents if they (1) have a permanent home in Idaho where their spouses or minor children live for more than sixty days in any calendar year or (2) claim Idaho as their tax home for Federal Income Tax purposes; establishing that servicemembers will regain their resident status when they spend more than sixty days in Idaho in any calendar year). Although servicemembers may be required to file an Idaho income tax return if they are considered residents, they may be able to deduct military income earned outside of Idaho if they "were on active duty for 120 or more consecutive days" and they "were stationed outside of Idaho for all or part of the year." IDAHO STATE TAX COMM'N, IDAHO INDIVIDUAL INCOME TAX FORMS AND INSTRUCTIONS 6 (2011), available at http://tax.idaho.gov/forms/EIN00046_09-07-2011.pdf.

³⁶ IDAHO CODE ANN. §63-3022A(a)(4) (2012) (excluding military retirement pay for servicemembers once they reach the age of sixty-five, or sixty-two if they are disabled).

³⁷ 35 ILL. COMP. STAT. ANN. 5/203(a)(2)(E) (2012) (excluding from Illinois state income tax any compensation to a resident for active duty service in the armed forces or as a member of the national guard of any state). See ILL. DEPT. OF REVENUE, PUB. 102, ILLINOIS FILING REQUIREMENTS FOR MILITARY PERSONNEL 2-3 (2011), available at <http://www.revenue.state.il.us/Publications/Pubs/Pub-102.pdf> (clarifying that although military pay is included in a taxpayer's federal adjusted gross income, it is usually subtracted when calculating Illinois state income tax).

³⁸ 35 ILL. COMP. STAT. ANN. 5/203(a)(2)(F) (2012) (excluding from Illinois state income tax all amounts distributed by a retirement plan for employees of any governmental agency or unit).

³⁹ IND. CODE ANN. § 6-3-2-4 (2012) (excluding the first \$5000 of income, including any retirement benefits, earned by an individual for the individual's service in an active or reserve component of the armed forces).

⁴⁰ See *id.*

Iowa	Yes ⁴¹	Partial ⁴²	IOWA CODE ANN. § 422.9 (2012); http://www.iowa.gov/tax/
Kansas	Partial ⁴³	Yes ⁴⁴	KAN. STAT. ANN. § 79-32,117 (2012); http://www.ksrevenue.org/
Kentucky	Yes ⁴⁵	Partial ⁴⁶	KY. REV. STAT. ANN. § 141.021 (2012); http://www.revenue.ky.gov/
Louisiana	Partial ⁴⁷	Yes ⁴⁸	LA. REV. STAT. ANN. §§ 47:293; 47:44.2 (2012); http://www.revenue.louisiana.gov/
Maine	No ⁴⁹	Partial ⁵⁰	ME. REV. STAT. ANN. tit. 36, § 5122 (2012) ; http://www.maine.gov/revenue/
Maryland	Partial ⁵¹	Partial ⁵²	MD. CODE, TAX-GEN. § 10-207 (2012); http://individuals.marylandtaxes.com/taxforms/default.asp
Massachusetts	No ⁵³	Yes ⁵⁴	MASS. GEN. LAWS ANN. ch. 62, § 2 (2012); http://www.mass.gov/dor/

⁴¹ IOWA CODE ANN. § 422.7(42A) (2012) (excluding all pay received by the taxpayer from the federal government for military service performed while on active duty status in the armed forces, the reserve, or the national guard).

⁴² *Id.* § 422.7(31), (38) (excluding up to \$6000 of pension income for individuals meeting certain conditions, and up to \$12,000 of pension income for married taxpayers filing joint returns who meet certain conditions; excluding the amount of withdrawals from qualified retirement plan accounts made during the tax year from Iowa state income tax if the taxpayer or taxpayer's spouse is a member of the Iowa national guard or reserve forces of the United States and is ordered to state military service or federal service). *See also* IOWA DEP'T OF REVENUE, 2011 IOWA INCOME TAX INFORMATION 3 (2011), available at <http://www.iowa.gov/tax/forms/1141002.pdf> (clarifying that taxpayers who meet certain conditions may be able to exclude up to \$6000 (\$12,000 for married taxpayers filing joint returns) of pension income).

⁴³ KAN. STAT. ANN. § 79-32,117(c)(xvii) (2012) (excludes amounts received for repayment of educational or student loans as a result of the taxpayer's service in the armed forces of the United States, as well as, incentive to join, enlist or remain in the armed forces or Kansas national guard from Kansas state income tax).

⁴⁴ *Id.* § 79-32,117(c)(vii) (excludes amounts received as military retirement benefits from Kansas state income tax).

⁴⁵ KY. REV. STAT. ANN. § 141.010(10)(u) (2012) (excluding any military pay received by active duty members, reserve component members and members of the national guard from Kentucky state income tax for tax years on or after 1 January 2010).

⁴⁶ *Id.* § 141.010(10)(i)(2) (excluding up to \$41,110 of total distributions from pension plans for those retiring after 31 December 1997 from Kentucky state income tax; excluding federal retirement annuities received by individuals retiring on or before Dec. 31, 1997 from Kentucky state income tax). *See also* KENTUCKY DEP'T OF REVENUE, SCHEDULE P: KENTUCKY PENSION INCOME EXCLUSION (2011), available at http://www.revenue.ky.gov/NR/rdonlyres/FE5D1BEC-CC6E-4528-9350-D9C051E6CB2B/0/11_42A740P20110002_FINAL.pdf (providing guidance that the exclusion amount could be greater than \$41,110 if the individual retired before Jan. 1, 1998).

⁴⁷ LA. REV. STAT. ANN. § 293(9)(e) (2012) (excluding up to \$30,000 of military pay earned outside Louisiana from Louisiana state income tax for individuals who are on active duty as a member of the armed forces of the United States, which full-time duty is or will be continuous and uninterrupted for one hundred twenty consecutive days or more).

⁴⁸ *Id.* § 47:44.2 (excluding military retirement benefits from Louisiana state income tax).

⁴⁹ *See* MAINE DEP'T OF REVENUE, 2011 MAINE RESIDENT INDIVIDUAL INCOME TAX BOOKLET 2 (2011), available at http://www.maine.gov/revenue/forms/1040/2011/11_Short11040Book_downloadable.pdf.

⁵⁰ ME. REV. STAT. ANN. tit. 36, § 5122(2)(M)(1) (2012) (excluding up to \$6000 of military retirement pay from Maine state income tax).

⁵¹ MD. CODE ANN., TAX-GEN. § 10-207(p)(1)-(2) (2012) (excluding up to the first \$15,000 of military pay that is received by a member of the armed forces from Maryland state income tax, while reducing the exclusion amount dollar-for-dollar for any amount exceeding \$15,000. As a result, the exclusion is reduced to 0 if military pay exceeds \$30,000).

⁵² *Id.* § 10-207(q)(2) (excluding the first \$5000 of military retired pay from Maryland state income tax).

⁵³ *See Residency Status*, MASS. DEP'T OF REVENUE, <http://www.mass.gov/dor/individuals/filing-and-payment-information/guide-to-personal-income-tax/residency-status.html#Military> (last visited Mar. 22, 2012) (providing additional guidance to military personnel and their military spouses, such as whether they qualify as residents and need to file Massachusetts state income taxes).

⁵⁴ MASS. GEN. ANN. LAWS Ch. 62 § 2(a)(2)(E) (2012) (excluding military retirement pay from Massachusetts state income tax).

Michigan	Yes ⁵⁵	Yes ⁵⁶	MICH. COMP. LAWS ANN. § 206.30(1)(e)(i) (2012); http://www.michigan.gov/treasury
Minnesota	Yes ⁵⁷	Partial ⁵⁸	MINN. STAT. ANN. § 290.01 (2012); http://taxes.state.mn.us/Pages/index.aspx
Mississippi	No ⁵⁹	Yes ⁶⁰	MISS. CODE ANN. § 27-7-15 (2012); http://www.dor.ms.gov/
Missouri	Possibly	Partial ⁶¹	MO. ANN. STAT. §§ 143.041, 143.101, 143.124 (2012); http://dor.mo.gov/
Montana	Yes	Partial ⁶²	MONT. ADMIN. R. 42.15.214, 42.15.219 (2012); http://revenue.mt.gov/default.mcp
Nebraska	No ⁶³	No	NEB. REV. STAT. § 77-2716 (2012); http://www.revenue.ne.gov/
Nevada	No State Income Tax ⁶⁴	No State Income Tax	http://tax.state.nv.us/ (2012)
New Hampshire	No State Income Tax	No State Income Tax	http://www.revenue.nh.gov/ (2012)
New Jersey	No ⁶⁵	Yes ⁶⁶	N.J. STAT. ANN. §§ 54A:6-7; 54A:6-26 (2012); http://www.state.nj.us/treasury/taxation/

⁵⁵ MICH. COMP. LAW. ANN. § 206.30(1)(e)(i) (2012) (excluding compensation, including retirement benefits, received by services in the armed forces of the United States). See also *Frequently Asked Questions: Individual Income Tax*, MICH. DEP'T OF TREASURY, available at <http://www.michigan.gov/taxes/0,4676,7-238-43715-153976--F,00.html> (last visited Mar. 22, 2012) (clarifying that active duty pay was excluded from Michigan state income tax).

⁵⁶ MICH. COMP. LAW. ANN. § 206.30(1)(e)(i) (2012) (excluding compensation, including retirement benefits, received through service in the armed forces of the United States).

⁵⁷ MINN. STAT. ANN. § 290.01(19b)(10)-(11) (2012) (excluding military pay of active duty servicemembers, and active service performed by Minnesota National Guard and reserve component members from Minnesota state income tax). See also MINN. DEP'T. OF REVENUE, MILITARY PERSONNEL INDIVIDUAL INCOME TAX FACT SHEET #5 (2012), available at http://www.revenue.state.mn.us/individuals/individ_income/factsheets/fact_sheets_fs5.pdf.

⁵⁸ MINN. STAT. ANN. § 290.0677 (2012) (providing a \$750 military service credit to retired servicemembers who served at least twenty years or who have a 100% service-connected disability rating for a permanent disability, but reducing this benefit by 10% of adjusted gross income in excess of \$30,000).

⁵⁹ See *Individual Income Tax FAQs*, DEPT. OF REVENUE, STATE OF MISS., <http://www.dor.ms.gov/info/faqs/IndividualIncomeFAQs.html#exemptmilitary> (last visited Mar. 22, 2012) (providing guidance on who has to file Mississippi state income taxes).

⁶⁰ MISS. CODE ANN. § 27-7-15(4)(k) (2012) (excluding United States government retirement system benefits from Mississippi state income tax).

⁶¹ MO. REV. STAT. § 143.124(14) (establishing that as of 1 January 2010, retirement benefits received by any taxpayer as a result of service in the armed forces are exempt from state income tax in increasing percentages from 15% in 2010 to 100% in 2016 and beyond. For example, in 2012, 45% of such retirement benefits would be subtracted from Missouri adjusted gross income).

⁶² MONT. ADMIN. R. 42.15.219 (2012) (excluding up to \$3600 (adjusted for inflation each year) of pension income, but reducing that exclusion by \$2 for every \$1 over \$30,000 of federal adjusted gross income). For the 2011 tax year, up to \$3760 of pension income could be excluded. See MONT. DEPT. OF REV, INDIVIDUAL INCOME TAX DOWNLOADABLE FORMS: WORKSHEET IV—PARTIAL PENSION AND ANNUITY INCOME EXEMPTION (2012), available at http://revenue.mt.gov/content/formsandresources/downloadable-forms/2011/Form_2_Worksheet_III_and_IV_2011.pdf.

⁶³ See NEB. DEPT. OF REVENUE, INFORMATION GUIDE: NEBRASKA INCOME TAX FOR MILITARY SERVICEMEMBERS (THEIR SPOUSES) AND CIVILIANS WORKING WITH U.S. FORCES IN COMBAT ZONES (2009), available at <http://www.revenue.ne.gov/info/8-364.pdf>. See also *Frequently Asked Questions for Military Spouses and their Employers*, NEB. DEP'T OF REVENUE, http://www.revenue.ne.gov/question/military_fa.html (last visited Mar. 22, 2012).

⁶⁴ See *Frequently Asked Questions—Does NH Have an Income Tax or Sales Tax?*, N.H. DEP'T OF REVENUE ADMIN., <http://www.revenue.nh.gov/faq/gti-rev.htm> (last visited Mar. 22, 2012) (explaining that although there is no income tax, there is a tax on interest and dividend income).

⁶⁵ N.J. STAT. STAT. § 54A:6-7 (2012). See also State of New Jersey Dept. of Taxation, *Income Tax Filing Requirements—Military Personnel*, available at <http://www.state.nj.us/treasury/taxation/military/requirements.shtml> (last visited Mar. 22, 2012) (clarifying that New Jersey residents are subject to tax on all their income, including their military pay). See also N.J. DIV. OF TAXATION, BULL. GIT-7: TAX TOPIC—MILITARY PERSONNEL (2011), available at <http://www.state.nj.us/treasury/taxation/pdf/pubs/tgi-ee/git7.pdf> (defining “domiciliary” and “resident” for New Jersey state income tax purposes; clarifying that a servicemember whose domicile is outside of New Jersey does not become a resident of New Jersey for state income tax purposes when assigned to a duty station in New Jersey).

⁶⁶ N.J. STAT. § 54A:6-26 (2012) (excluding military pension payments from New Jersey state income tax).

New Mexico	Yes ⁶⁷	No	N.M. STAT. ANN. § 7-2-5.11 (2012); http://www.tax.newmexico.gov/
New York	Yes (under certain circumstances) ⁶⁸	Yes ⁶⁹	N.Y. TAX LAW §§ 605; 612 (2012); http://www.tax.ny.gov/
North Carolina	No	Partial ⁷⁰	N.C. GEN. STAT. ANN. §105-134.6 (2012); http://www.dor.state.nc.us/individual/
North Dakota	No ⁷¹	No	N.D. CENT. CODE ANN. § 57-38-01 (2012); http://www.nd.gov/tax/indincome/
Ohio	Yes ⁷²	Yes ⁷³	OHIO REV. CODE ANN. §§ 5747.01(24); 5747.01(26) (2012); http://tax.ohio.gov/channels/other/individual.stm
Oklahoma	Yes ⁷⁴	Partial ⁷⁵	OKLA. STAT. ANN. tit. 68, § 2358(E) (2012); http://www.tax.ok.gov/incometax.html
Oregon	No ⁷⁶	No	OR. REV. STAT. ANN. §§ 316.027; 316.127 (2012); http://www.oregon.gov/dor/
Pennsylvania	Yes ⁷⁷	Yes	72 PA. CONS. STAT. ANN. §§ 3402-303(B)(6); 3402-303(B)(10); 7303(a)(1) (2012); http://www.revenue.state.pa.us
Rhode Island	No	No	R.I. GEN. LAWS ANN. § 44-30-2.6 (2012); http://www.tax.ri.gov/

⁶⁷ N.M. STAT. ANN. § 7-2-5.11 (2012) (excluding military pay from New Mexico state income tax). *See also* N.M. TAXATION AND REVENUE DEP'T, FYI-101 INFORMATION FOR NEW RESIDENTS (2012), *available at* http://www.tax.newmexico.gov/SiteCollectionDocuments/Publications/FYI-Publications/FYI-101_INFORMATION%20FOR%20NEW%20RESIDENTS%207-09.pdf (providing a wealth of detail for new residents about the types of taxes in New Mexico and who has to file what type of tax returns).

⁶⁸ N.Y. TAX LAW § 605 (2012) (establishing that servicemembers are considered non-residents for tax purposes if they fall into either of two groups. Group A: (1) they do not maintain a permanent home in New York, (2) they maintain a permanent home outside New York, and (3) they did not spend more than 30 days in New York during the tax year. Group B: (1) they were in a foreign country for at least 450 out of 548 consecutive days, and (2) spent fewer than 90 days in a permanent home in New York during that time). *See also* N.Y. STATE DEP'T OF TAXATION AND FINANCE, NEW YORK STATE INCOME TAX INFORMATION FOR MILITARY PERSONNEL AND VETERANS (2011), *available at* <http://www.tax.ny.gov/pdf/publications/income/pub361.pdf>.

⁶⁹ N.Y. TAX LAW § 612(c)(3)(ii) (2012) ("Pensions to officers and employees of the United States of America, any territory or possession or political subdivision of such territory or possession, the District of Columbia, or any agency or instrumentality of any one of the foregoing, to the extent includible in gross income for federal income tax purposes.") (This language appears to exclude military pension benefits from New York state income tax).

⁷⁰ N.C. GEN. STAT. §105-134.6(6) (2010). Retirees may deduct up to \$4000, depending on their circumstances.

⁷¹ N.D. CENT. CODE ANN. § 57-38-01 (2012). Nonresidents who may need to file North Dakota state income taxes can deduct federal active duty compensation from their taxable income, and residents who mobilize can deduct their federal active duty compensation in calculating their North Dakota taxable income. N.D. OFFICE OF STATE TAX COMM'R, INCOME TAX TREATMENT OF MILITARY PERSONNEL 6 (2010), *available at* <http://www.nd.gov/tax/ind income/pubs/guide/gl-28243.pdf>.

⁷² OHIO REV. CODE ANN. § 5747.01(24) (2012) (exempting military pay for an active duty member domiciled in Ohio but stationed outside of the state).

⁷³ *Id.* § 5747.01(26) (2012) (exempting military retirement pay from Ohio state income tax).

⁷⁴ OKLA. STAT. ANN. tit. 68, § 2358(E)(5)(b) (2012) (allowing all income received as compensation for service in the armed forces to be deducted from taxable income).

⁷⁵ *Id.* § 2358(E)(19) (2012) (allowing 75% or \$10,000 (whichever is greater) of retirement benefits received for services in the armed forces to be deducted from gross income).

⁷⁶ OR. REV. STAT. ANN. § 316.127(7) (2012). Oregon domiciliaries stationed outside of Oregon may be considered nonresidents for tax purposes (and thus they would not subject their military pay to Oregon state income taxes) if the Servicemembers: (1) do not have a permanent residence in Oregon; (2) have a permanent residence outside of Oregon for the entire tax year; and (3) spent less than thirty-one days in Oregon during the tax year. *See id.* § 316.127(7). *See also id.* § 316.027(1)(a)(A). *See also Military Personnel Filing Information*, OR. DEP'T OF REVENUE, <http://www.oregon.gov/DOR/PERTAX/pages/personal-income-tax-overview/general.aspx#nineteen> (last visited May 24, 2012).

⁷⁷ 72 P.S. § 7303(a)(1) (2012) (excluding compensation for active duty pay earned outside of Pennsylvania from Pennsylvania state income tax).

South Carolina	No ⁷⁸	Partial ⁷⁹	S.C. CODE ANN. § 12-6-1170 (2012); http://www.sctax.org/default.htm
South Dakota	No State Income Tax	No State Income Tax	South Dakota Codified Laws § 10-4-1 (2012); http://www.state.sd.us/drr2/
Tennessee	Yes ⁸⁰	Yes	TENN. CODE ANN. § 67-2-101 (2012); http://www.tn.gov/revenue/
Texas	No State Income Tax	No State Income Tax	V.T.C.A. Tax Code § 101.001 (2012); http://www.window.state.tx.us/taxes/
Utah	No	No ⁸¹	UTAH CODE ANN. § 59-10-1019 (2012); http://tax.utah.gov/forms/pubs/pub-57.pdf
Vermont	Yes (under certain conditions) ⁸²	No	VT. STAT. ANN. tit. 32, § 5823 (2012); http://www.state.vt.us/tax/individual.shtml
Virginia	No ⁸³	No ⁸⁴	VA. CODE ANN. § 58.1-321, 58.1-322 (2011); http://www.tax.virginia.gov/
Washington	No State Income Tax ⁸⁵	No State Income Tax	WEST'S REV. CODE WA ANN. § 82.04.010 (2012); http://dor.wa.gov/Content/Home/Default.aspx
West Virginia	Yes (under certain circumstances) ⁸⁶	Partial ⁸⁷	W. VA. CODE ANN. §§ 11-21-7; 11-21-12 (2012); http://www.wva.state.wv.us/wvtax/default.aspx
Wisconsin	No ⁸⁸	Yes	WIS. STAT. ANN. § 71.05(1) (2012); http://www.revenue.wi.gov/individuals/index.html
Wyoming	No State Income Tax	No State Income Tax	WYOMING STAT. ANN. § 39-12-101 (2012); http://revenue.state.wy.us/

⁷⁸ *But see* S.C. CODE ANN. § 12-6-1120(7) (2012) (excluding up to fifteen days' worth of compensation received for service in the National Guard or the reserve component of the armed forces from South Carolina state income tax).

⁷⁹ S.C. CODE ANN. § 12-6-1170 (2012) (allowing taxpayer to deduct up to \$10,000 of retirement income and up to \$15,000 of total income from South Carolina state taxable income, beginning in the year that the taxpayer reaches age sixty-five).

⁸⁰ TENN. CODE ANN. § 67-2-101 (2012). *See also Individual Income Tax: Taxes at a Glance*, TENN. DEP'T OF REVENUE, <http://www.tn.gov/revenue/ntaxes/indinc.shtml> (last visited June 29, 2011) (establishing that Tennessee's individual income tax is only imposed on taxpayers receiving interest from bonds and notes, and dividends from stock).

⁸¹ UTAH CODE ANN. § 59-10-1019 (2012). *See also* UTAH DEP'T OF REVENUE, INDIVIDUAL INCOME TAX TC-40 FORMS & INSTRUCTIONS 14 (2012), available at <http://tax.utah.gov/forms/current/tc-40inst.pdf> (establishing that taxpayers under age sixty-five may claim a tax credit of up to \$288, while retirees aged sixty-five and over may claim tax credit of up to \$450).

⁸² VT. STAT. ANN. tit. 32, § 5823(a)(2) (2012) (exempting full-time active duty military income earned outside of the state from Vermont state income tax).

⁸³ *See* VA. CODE ANN. § 58.1-321(B) (2012); *id.* § 58.1-322(C)(23) (exempting up to \$15,000 of military basic pay for military personnel on extended active duty for periods in excess of ninety days; however, the subtraction amount is reduced dollar-for-dollar by the amount which the taxpayer's military basic pay exceeds \$15,000 and is reduced to zero if such military basic pay amount is equal to or exceeds \$30,000).

⁸⁴ *See Individual FAQs*, VA. DEP'T OF TAXATION, <http://www.tax.virginia.gov/site.cfm?alias=IndividualFAQ3> (last visited May 28, 2012). *But see* VA. CODE ANN. § 58.1-322(C)(26) (exempting Congressional Medal of Honor Recipient's military retirement pay from Virginia state income tax).

⁸⁵ *Income Tax*, WASH. DEP'T OF REVENUE, <http://dor.wa.gov/content/FindTaxesAndRates/IncomeTax/> (last visited May 28, 2012) (explaining that although there is no personal income tax, persons who engage in business are subject to business, occupation, and/or public utility taxes).

⁸⁶ W. VA. CODE ANN. § 11-21-7 (2012) (defining the term nonresident for tax purposes to include a servicemember who "maintains no permanent place of abode in West Virginia, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the tax year in West Virginia).

⁸⁷ *Id.* § 11-21-12(c)(7)(B) (excluding the first \$20,000 of military retirement pay from West Virginia state income tax).

⁸⁸ *See Military and Veterans*, WIS. DEP'T OF REVENUE, <http://www.revenue.wi.gov/individuals/military.html> (last visited May 28, 2012) (providing numerous tax references for military members and veterans, such as explaining what income is subject to Wisconsin state income tax).

A View from the Bench: Prohibition on Disjunctive Charging Using “Or”

*Colonel R. Peter Masterton**

Charge I: Violation of the UCMJ Article 121.

Specification: In that Sergeant (E-5) John Q. Public did, at or near Camp Snuffy, Oklahoma, on or about 1 January 2012, steal cash or property of a value of about \$200, the property of the U.S Government.

Charge II: Violation of the UCMJ Article 134.

Specification: In that Sergeant (E-5) John Q. Public, a married man, did, at or near Camp Snuffy, Oklahoma, on or about 1 January 2012, wrongfully have sexual intercourse with Mary Roe, a woman not his wife, such conduct being to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces.

Military practitioners are familiar with charges containing the word “or.” The term “on or about” may be used to describe the date an offense occurred¹ and the term “at or near” may be used to describe the place of the offense.² However, it is generally improper to use the disjunctive “or” in other parts of the specification, because it leads to ambiguity.³ The charges listed above both violate this prohibition against disjunctive charging. The first improperly alleges theft of cash “or” property, causing confusion as to what the accused allegedly stole. The second improperly alleges prejudice to good order and discipline “or” service discrediting conduct, leading to a similar ambiguity.

The Manual for Courts-Martial specifically cautions against disjunctive charging.⁴ The rule stems from the requirement to ensure specifications are sufficiently specific to inform the accused of the misconduct allegedly committed, to enable the accused to prepare a defense, and to protect the accused against double jeopardy.⁵

Several cases have dealt with this issue. In *United States v. Autrey*, the Court of Military Appeals held that it is improper to find an accused guilty of wrongful appropriation of “money and/or property” because the charge makes it impossible to determine what the accused appropriated.⁶ In *United States v. WoodeI*, the Navy-Marine Court of Military Review held that is improper to allege that an accused introduced drugs onto a military installation “for the purpose of use and/or distribution” because the charge provided “no clue to the offense with which [the accused] was charged.”⁷ In *United States v. Gonzalez*, the same court held that it is improper to charge an accused with desertion with the intent to “avoid hazardous duty or shirk important service.”⁸ The

* Currently assigned as the Chief Circuit Judge of the Fifth Judicial Circuit, U.S. Army Trial Judiciary, Kaiserslautern, Germany. The topic for this note was suggested by Colonel Frank Whitney, a former deployed military judge, who is also a federal district court judge in the Western District of North Carolina.

¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307(c)(3), discussion, para. (D)(ii) (2012) [hereinafter MCM].

² *Id.* R.C.M. 307(c)(3), para. (E), discussion.

³ The Confiscation Cases, *Slidell’s Land*, 87 U.S. 92, 104 (1874) (“an indictment or criminal information which charges the person accused, in the disjunctive, with being guilty of one or of another of several offences [sic], would be destitute of the necessary certainty, and would be wholly insufficient”; the Court went on to hold that this prohibition did not apply to non-criminal real property condemnation proceedings).

⁴ MCM, *supra* note 1, R.C.M. 307(c)(3), para. (G)(iv), discussion. The rule is contained in the discussion of duplicitous charges: “[o]ne specification should not allege more than one offense, either conjunctively (the accused ‘lost and destroyed’) or alternatively (the accused ‘lost or destroyed’). However, if two acts or a series of acts constitute one offense, they may be alleged conjunctively.”

⁵ *Id.* R.C.M. 307(c)(3), para. (G)(iii) discussion.

⁶ *United States v. Autrey*, 30 C.M.R. 252, 254–55 (C.M.A. 1961) (accused was charged with larceny and found guilty, pursuant to his plea, of the lesser included offense of wrongful appropriation of “money and/or property”; the appellate court held the specification void for uncertainty and found that the accused’s guilty plea at a special court-martial, where he was not represented by an attorney, did not constitute waiver).

⁷ *United States v. Woode*, 18 M.J. 640, 641 (N.M.C.M.R. 1984) (accused was found guilty, contrary to his plea, of introduction of cocaine onto a military base “for the purpose of use and/or distribution”; as a result of ambiguity, the finding of guilty as to the aggravating factor—the intent to distribute—was disapproved). *But see United States v. Cook*, 44 C.M.R. 788, 789 (N.C.M.R. 1971) (charge alleged conspiracy to sell “dangerous depressant, stimulant or hallucinogenic drugs” and also alleged actual sale of “dangerous depressant, stimulant, or hallucinogenic drug”—court held that the conspiracy charge was sufficient as written, and the additional language did not violate the rule against disjunctive charging where accused did not question the charge at trial).

⁸ *United States v. Gonzalez*, 39 M.J. 742, 749 (N.M.C.M.R. 1994) (accused was convicted, contrary to his plea, of desertion with “intent to avoid hazardous duty and/or to shirk important service;” the court found the disjunctive charging to be error but held that the error was waived by failure to object at trial, at least in the absence of demonstrable prejudice). Desertion with intent to remain away permanently is a separate crime and should not be charged either conjunctively or disjunctively in the same specification as either kind of desertion with intent to shirk. *See United*

most recent military case dealing with this issue is *United States v. Crane*, an unreported opinion from the Army Court of Criminal Appeals.⁹ In *Crane* the accused was charged with and pled guilty to conspiracy to “introduce and/or distribute cocaine and/or ecstasy.” The Army court held that the disjunctive charging was error, but that the error was waived by failure to raise the issue at trial.¹⁰ The court went on to “strongly discourage disjunctive pleadings.”¹¹

Federal district courts prohibit disjunctive charging. When a federal criminal statute uses the word “or” to specify several means by which an offense may be committed, federal district courts require prosecutors to charge the offenses in the conjunctive using the word “and.”¹² Improper use of the word “or” in federal criminal indictments can be a fatal error,¹³ but failure to object to disjunctive charges at trial can waive the issue.¹⁴ Federal district courts also permit prosecutors to prove offenses in the disjunctive even though they are charged in the conjunctive.¹⁵ For example, if an accused is charged with money laundering (1) with the intent to promote unlawful

activity “and” (2) knowing it will conceal unlawful activity, proof of either theory will sustain a conviction.¹⁶

The rule against disjunctive charging should be observed when alleging the “terminal element” of offenses under Article 134 of the Uniform Code of Military Justice. This article is a catch-all provision that prohibits offenses, such as adultery and false swearing, that are not specifically defined by Congress in other punitive articles.¹⁷ Article 134 criminalizes (1) “all disorders and neglects to the prejudice of good order and discipline,” (2) “all conduct of a nature to bring discredit upon the armed forces,” and (3) “crimes and offenses not capital”—offenses under other sections of the federal criminal code.¹⁸ For offenses charged under the first two clauses, the “terminal element” is listed in the Manual as follows: “That, under the circumstances, the accused’s conduct was to the prejudice of good order and discipline in the armed forces OR was of a nature to bring discredit upon the armed forces.”¹⁹ Although the terminal element is not listed in most of the sample specifications under Article 134,²⁰ the Court of Appeals for the Armed Forces recently required that it be expressly included in the specification.²¹

States v. Kim, 35 M.J. 553, 554 (A.C.M.R. 1992); see also Captain Joseph D. Wilkinson II, *Custom Instructions for Desertion with Intent to Shirk*, ARMY LAW., Jan. 2012, at 57 n.9.

⁹ No. 20080469, 2009 WL 6832590, at *1 (A. Ct. Crim. App. Aug. 18, 2009).

¹⁰ *Id.* at *1.

¹¹ “Such pleadings serve no discernable purpose and unnecessarily create avoidable appellate issues.” *Id.* at *2.

¹² *United States v. Poffenbarger*, 20 F.2d 42, 44 (8th Cir. 1927) (accused was convicted with theft of mail; court held that prosecutor’s substitution of the word “and” in the indictment for the word “or” in the criminal statute was not only proper but required; “[t]o recite that the defendant did the one thing or another makes the indictment bad for uncertainty”); *United States v. Heflin*, 223 F.2d 371, 373 (5th Cir. 1955) (accused was convicted of bank robbery from “person and presence” of victim; court upheld this language, stating that “where a statute specifies several means or ways by which an offense may be committed in alternative, it is bad pleading to allege the means in the alternative; the proper way is to connect the allegations . . . with the conjunctive ‘and,’ and not with the word ‘or’” (quoting 42 C.J.S., *Indictments and Informations* § 101 (1955))).

¹³ *United States v. MacKenzie*, 170 F. Supp. 797, 798–99 (D. Me. 1959) (accused was charged with violation of alcohol tax laws by having in his “possession or custody or under his control” an unregistered still and distilling apparatus; court dismissed this count, holding that the use of the disjunctive in indictment lacked the necessary certainty and was wholly insufficient); *United States v. Vann*, 660 F.3d 771, 774 n.4 (4th Cir. 2011) (court stated in dicta that “a disjunctive charge in an indictment contravenes an accused’s constitutional rights;” court held that accused’s plea of guilty to a state offense charged in the conjunctive did not necessarily mean that he was found guilty of both offenses for purposes of federal sentence enhancement provisions for violent felonies).

¹⁴ *United States v. Laverick*, 348 F.2d 708, 714 (3d Cir. 1965) (where accused was convicted of bribery and did not raise a specific objection to the use of the disjunctive in the indictment, this issue was waived on appeal).

¹⁵ *United States v. Coughlin*, 610 F.3d 89, 106-07 & n.10 (D.C. Cir. 2010) (“as the Supreme Court has repeatedly held, the government is entitled to prove criminal acts in the disjunctive, notwithstanding that the indictment charges them in the conjunctive”) (citing *Griffin v. United States*, 502 U.S. 46, 56–60 (1991)).

¹⁶ *United States v. Van Nguyen*, 602 F.3d 886, 900 (8th Cir. 2010) (accused was charged with, among other things, money laundering (1) with the intent to promote illegal activity, (2) knowing it would disguise illegal activity and (3) to avoid reporting requirements; the court upheld the accused’s conviction ruling that proof of any of these alternate theories would sustain a conviction).

¹⁷ MCM, *supra* note 1, pt. IV, para. 60. The President has defined a number of offenses which constitute disorders or neglects to the prejudice of good order and discipline or conduct of a nature to bring discredit upon the armed forces. *Id.* paras. 61–113. The offense of adultery is described in paragraph 62 and the offense of false swearing is defined in paragraph 79.

¹⁸ 10 U.S.C. § 934 (2006). Non-capital crimes and offenses include federal crimes of unlimited application, such as counterfeiting under 18 U.S.C. § 471, and crimes of local application committed on federal installations, such as state offenses assimilated into federal law under the Federal Assimilative Crimes Act, 18 U.S.C. § 13 (2012). MCM, *supra* note 1, pt. IV, para. 60c(4).

¹⁹ See MCM, *supra* note 1, pt. IV, para. 60b (emphasis added).

²⁰ The definition of adultery includes the following sample specification: “In that ___ (personal jurisdiction data), (a married man/a married woman), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ___ 20___, wrongfully have sexual intercourse with ____, a (married) (woman/man) not (his wife) (her husband).” *Id.* para. 62f. Most other sample specifications for offenses under Article 134 also do not contain the terminal element of prejudice to good order and discipline or discredit to the service. However, the discussion to Article 134 states that practitioners should expressly alleged at least one of the terminal elements. *Id.* para. 60.c(6)(a) discussion.

²¹ *United States v. Fosler*, 70 M.J. 225 (2011) (where the accused was convicted, contrary to the plea, of an adultery specification that did not include the terminal element under Article 134 and the defense specifically objected to this omission at trial, the Court of Appeals for the Armed Forces dismissed the finding on this specification, ruling that an express allegation of the terminal element is constitutionally required). U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK (1 Jan. 2010) [hereinafter MJB] (C11–16, 3 Feb. 2012) (addressing this failure in the MCM’s sample specifications under Article 134 and including a conjunctive allegation of the terminal elements of clause 1 and clause 2 for those Article 134 offenses).

Prosecutors drafting Article 134 charges should ensure they do not use the disjunctive “or” when including the terminal element, because this violates the rule against disjunctive charging. In drafting charges under the first two clauses of Article 134, prosecutors can use three approaches: (1) charge prejudice to good order and discipline, (2) charge service discrediting conduct, or (3) charge both prejudice to good order and discipline “and” service discrediting conduct.²² Prosecutors should not charge in the alternative: they should not allege that the accused’s conduct was either prejudicial to good order and discipline “or” brought discredit to the service.

The new model specification for child pornography under Article 134 includes the phrase “a minor, or what appears to be a minor, engaging in sexually explicit conduct.”²³ Prosecutors and defense counsel should be alert

to this use of the disjunctive, since the propriety of this language has not yet been tested by the appellate courts. This issue may be avoided in some cases by simply using the phrase “what appears to be a minor” or the words “a minor” in place of the above phrase.

Prosecutors must be alert to avoid the pitfalls of disjunctive charging. Defense counsel should object to disjunctive charges before entering pleas,²⁴ since failure to object may lead to waiver of the issue.²⁵

²² These three methods of charging are recommended in the MJB, *supra* note 21, para. 3-60-2A n.2.1. Charges under clause 3 state a separate offense with different elements, and should not be charged in the same specification with the others, as this would be duplicitous pleading. *See* United States v. Moultrie, No. 36372, 2007 WL 1725787, at *2 (A.F. Ct. Crim. App. May 31, 2007) (noting that child pornography charges under clauses 1 and 2 had different elements from child pornography charges under clause 3); MCM, *supra* note 1, R.C.M. 906(b)(5) discussion (noting that each specification may state only one offense, and that severance is the remedy when separate offenses are charged in the same specification).

²³ MCM, *supra* note 1, pt. IV, ¶ 68b.f. This is because the depiction of an actual minor is not an element of the offense, although the “depiction” must be able to convince the ordinary viewer that it is of an actual minor. United States v. Beaty, 70 M.J. 39, 40 n.2 (C.A.A.F. 2011).

²⁴ MCM, *supra* note 1, R.C.M. 905(b)(2) (“objections based on defects in the charges and specifications” must be raised before a plea is entered).

²⁵ United States v. Gonzalez, 39 M.J. 742, 749 (N.M.C.M.R. 1994) (error was not reversible in the absence of prejudice when the accused failed to object).

Book Reviews

The Druggist of Auschwitz¹

Reviewed by Major Derek A. Rowe*

*Monsters exist, but they are too few in numbers to be truly dangerous. More dangerous are . . . the functionaries ready to believe and act without asking questions.*²

In fewer than two years, over 1.1 million people, mostly Jews, were killed at Auschwitz, a German concentration camp in present-day Poland.³ Between 1942 and 1944, up to 24,000 people a day were gassed and incinerated at Auschwitz.⁴ Most victims were gassed upon arrival and fully cooperated because they did not know they were walking into gas chambers.⁵ As such, Auschwitz represents the most efficient machinery of the Holocaust, a signal event in human history, and perhaps the darkest example of humanity's capacity for inhumanity.⁶ Given the singularity of the Holocaust, there has been no shortage of writings on the subject.⁷ Against this backdrop, Dieter Schlesak sets forth *The Druggist of Auschwitz*, a documentary novel.

Schlesak takes a new tack by focusing on a little-known military pharmacist, Dr. Victor Capesius.⁸ Dr. Capesius worked in the pharmacy at Auschwitz and was later convicted for his participation in selecting prisoners for the gas chambers.⁹ Through the eyes of a fictional character named Adam Salmen, Dr. Capesius is observed prior to the

war, during the war while at Auschwitz, and throughout his post-war life.¹⁰ This review first examines how effectively Schlesak contrasts the horrors of day-to-day camp operations, which cry for justice, with the absence of remorse expressed by Dr. Capesius for his role at Auschwitz. The second part analyzes Schlesak's discussion of two ethical situations arising in the context of Auschwitz's operations. The third section appraises Schlesak's use of a fictional character and Schlesak's credibility on factual representations. Ultimately, Schlesak is successful at communicating his intended message, but his disorganized style limits the application and reach of his work.

I. Schlesak's thesis: The horror of Auschwitz was possible because men like Dr. Capesius felt no guilt for their crimes.

From the opening paragraph and throughout every chapter, Schlesak describes the cruelty at Auschwitz using vivid imagery, as shown in the following examples:

[T]he bodies were not scattered throughout the room, but towered up in a pile to the ceiling, for the Zyklon B with its poisonous gases first started at the floor level and then rose. . . . So the unlucky victims trampled over one another: the higher up they could get, the later the deadly gas would reach them. A horrific struggle for two more minutes of life.¹¹

The child was standing by the truck playing with his apple. Then Boger went up to the child, grabbed him, swung him by the feet and smashed his head against the barracks. Then he calmly picked up the child's apple. And Draser told me to wipe up 'that mess' on the wall (This type of murder was known as the 'Boger swing.')

* Judge Advocate, U.S. Air Force. Presently assigned as Regional General Counsel, Exchange-Europe/Southwest Asia, Wiesbaden, Germany.

¹ DIETER SCHLESAK, *THE DRUGGIST OF AUSCHWITZ* (John Hargraves trans., 1st ed. 2011).

² PRIMO LEVI, *THE REAWAKENING* 228 (Stuart Woolf trans., 1993).

³ *Holocaust Encyclopedia: Auschwitz*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005189> (last visited Sept. 2, 2012) [hereinafter *Holocaust Encyclopedia*] (stating at least 1.1 million were murdered at Auschwitz). See also ROBERT JAN VAN PELT, *THE CASE FOR AUSCHWITZ 257* (2002) (When initially interrogated by British Military Intelligence officers, Rudolf Hoss (Auschwitz camp Commandant) stated that approximately 2.5 million were killed at Auschwitz.).

⁴ SCHLESAK, *supra* note 1, at 10, 56.

⁵ *Id.* at 67, 119.

⁶ *Holocaust Encyclopedia*, *supra* note 3 ("The Auschwitz concentration camp complex was the largest of its kind established by the Nazi regime.").

⁷ Amazon and Barnes and Noble currently stock over 240 different Holocaust titles. Additionally, some of the best-known Holocaust authors have written specifically on the Auschwitz experience: VIKTOR FRANKL, *MAN'S SEARCH FOR MEANING* (1946); ANNE FRANK, *DIARY OF A YOUNG GIRL* (1947); PRIMO LEVI, *IF THIS IS A MAN* (1947); ELIE WIESEL, *NIGHT* (1960); CORRIE TEN BOOM, *THE HIDING PLACE* (1971), to name a few.

⁸ SCHLESAK, *supra* note 1, at 13.

⁹ *Id.* at 18. Before this book appeared, Dr. Victor Capesius was not a widely known figure in Holocaust genre writings. Capesius was one of twenty-two defendants tried in the 1963–1965 Frankfurt Auschwitz trials.

¹⁰ *Id.* at vii.

¹¹ *Id.* at 70.

¹² *Id.* at 256.

A sick and starving prisoner is beaten and stomped to death by a German soldier for not wearing his hat.¹³

Vivid imagery is certainly not new to Auschwitz-specific Holocaust writings.¹⁴ Because similar works exist on Auschwitz, some critics dismiss Schlesak's heavy-handed approach as repetitive and unnecessary.¹⁵ Others, perhaps those who are less familiar with Auschwitz writings, are simply overwhelmed by the horrors described.¹⁶ Yet as with other landmark events in history, the lessons of the Holocaust bear repeating.¹⁷ Moreover, the images are necessary for the first part of Schlesak's purpose: to drive home the reality of these horrific events.¹⁸ Visualizing progressively worse cruelties in every chapter leaves an impression of reality that is not made by cursory statistics of death by fire, gassing, or execution. With a firm grasp of the nature and magnitude of the crimes, the reader is in a position to receive the second part of Schlesak's consistent, if indirect, message: the atrocities of Auschwitz were possible because men like Dr. Capesius felt no guilt or remorse for what happened there.¹⁹

¹³ *Id.* at 295.

¹⁴ PRIMO LEVI, *IF THIS IS A MAN* 9 (1958). Levi wrote in the preface, "As an account of atrocities . . . this book of mine adds nothing to what is already known to readers throughout the world on the disturbing question of the death camps." Each of the works cited in note 7, *supra*, and particularly Elie Wiesel's *Night*, gives a first-hand account of day-to-day horrors at Auschwitz.

¹⁵ See Michael Hofmann, *The Death Camp Pharmacist*, N.Y. TIMES (Jun. 24, 2011), <http://www.nytimes.com/2011/06/26/books/review/book-review-the-druggist-of-auschwitz-by-dieter-schlesak.html?pagewanted=all> (comparing Schlesak's book unfavorably with "the formal brilliance and heroic forbearance of much direct or first-generation or pre-'documentary' Holocaust writing: Primo Levi or Tadeusz Borowski or Elie Wiesel or Imre Kertesz or Fred Wander").

¹⁶ Mary Whipple, *Dieter Schlesak—The Druggist of Auschwitz*, SEEING THE WORLD THROUGH BOOKS: REVIEWS BY MARY WHIPPLE (May 6, 2011), <http://marywhiplereviews.com/dieter-schlesak-the-druggist-holocaust/> ("This is a difficult book to read—the horrors are so great and so overwhelming . . ."). See also Alan Cheuse, *Depravity, Despair In 'Druggist of Auschwitz'*, NPR BOOKS (May 12, 2011), <http://www.npr.org/2011/05/12/136250384/review-the-druggist-of-auschwitz/> ("[I]t was about 40 pages in that I set the book down, unable to take much more of its horrors."); R.M. Peterson, *The Druggist of Auschwitz* review, AMAZON.COM (May 25, 2011), <http://www.amazon.com/The-Druggist-Auschwitz-Documentary-Novel/dp/0374144060> ("The litany of horrors overwhelms everything else in the book.").

¹⁷ Herbert Mitgang, *Writing Holocaust Memories*, N.Y. TIMES, Nov. 15, 1986, at 11 (quoting Aharon Appelfeld, *To the Land of the Cattails*, "The Holocaust is a central event in many people's lives, but it also has become a metaphor for our century. There cannot be an end to speaking and writing about it").

¹⁸ This brief review critically analyzes Schlesak's main thesis. It is worth noting however, that Schlesak has painstakingly collected and injected trial testimony, letters, and personal interviews into his work. The sheer volume of documentary support assembled by Schlesak generally lends credibility to the imagery described.

¹⁹ SCHLESAK, *supra* note 1, 133 ("For Capesius feels absolutely no guilt; his conscience never bothers him. . . . It was precisely this inability [to feel guilt] that made Auschwitz possible in the first place.").

Granted, this message has been published before.²⁰ In *Eichmann in Jerusalem*, Hannah Arendt makes the same point using evidence gathered for, and presented at, Adolf Eichmann's trial.²¹ Both Schlesak and Arendt highlight the absence of any remorse or sense of guilt from the defendants for their roles in the Holocaust.²² Yet this is not surprising to prosecutors or criminal defense attorneys. At trial in the United States, any statement that may be perceived as consciousness of guilt can be used as evidence against the defendant, assuming a proper foundation can be laid. Dr. Capesius and other Holocaust perpetrators are keenly aware that such statements can make the difference between conviction and acquittal. Therefore, it is understandable that remorseful statements that would satisfy the public generally are not made or are not publicized.²³ Whether or not the lack of remorse is a significant observation, Schlesak effectively communicates this and the reality of Auschwitz operations using the little-known figure of Dr. Capesius. Readers with the stomach to finish the book are brutally reminded of what occurred during the Holocaust at Auschwitz. With that vivid reminder, readers are shocked that Dr. Capesius never expressed any guilt for his role.²⁴ Thus, on his central two-part thesis, Schlesak is successful, though his secondary message has limited value because criminal defendants so often refrain from expressing guilt or remorse.

II. Schlesak on Military Ethics

Schlesak guides the reader to reflect on military ethics as he discusses how otherwise normal German soldiers could succumb to the genocide of the Holocaust. However, he fails to develop this line of thought. A secondary figure in the book, SS Second Lieutenant Roland Albert, states, "[I]t was just love of order and sense of duty" that kept him working at Auschwitz.²⁵ In context, the chapter merely gives

²⁰ See Martha Toll, *The Druggist of Auschwitz*, WASH. INDEPENDENT REV. OF BOOKS, <http://www.washingtonindependentreviewofbooks.com/book-review/the-druggist-of-auschwitz-a-documentary-novel/> (last visited July 2, 2012) ("Nor is Schlesak the first to chronicle the complete disconnection between the perpetrators' actions and their later disavowal of personal responsibility.").

²¹ HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 21 (1965) (discussing the lack of remorse Adolf Eichmann, a Nazi regime figurehead, exhibited at his trial).

²² *Id.* See also *supra* note 19.

²³ BERND NAUMANN, *AUSCHWITZ*, at xiv (Johan Praeger ed., 1966) (noting that silence from the defendants prevailed, as presiding Auschwitz Trial Judge Hans Hofmeyer remarked, "I have yet to meet anyone who did anything in Auschwitz. . . . The commandant was not there, the officer in charge only happened to be present, the representative of the Political Section only carried lists, and still another one only came with the keys.").

²⁴ In a survey of twenty-two independent reviews of *The Druggist* posted on Amazon.com, every reviewer commented on the impression made by horrific imagery. Most reviewers also commented on Dr. Capesius's lack of remorse.

²⁵ SCHLESAK, *supra* note 1, at 224, and ch. 5 (heading). Schlesak also quotes Albert as saying that "orders are orders," at 179, and there was "no back talk," at 242.

the reader the impression that Albert was mentally ill.²⁶ However, the following testimony from the 1963-65 Frankfurt Auschwitz trial, quoted in the book, provides an insight into how a soldier may have felt forced to work at Auschwitz against his will:

A human reaction in Auschwitz was only possible in the first few hours. After you had been there just a short while, it was impossible to react normally. Because of the duty roster, everyone had some kind of skeleton in his closet. You were trapped, you had to go along.²⁷

This shows that some German soldiers were not aware of what was happening at Auschwitz until they arrived. Once they witnessed executions or gassings in the first few hours, they were complicit and therefore in a dangerous situation. This is particularly true as the war drew to a close; new soldiers would likely be seen as potential witnesses against experienced Auschwitz soldiers. This passage provides one rationale for how the Auschwitz operation perpetuated itself through fear. This dialogue is also valuable because it allows military readers to ponder how they would react upon being transferred to Auschwitz and realizing the nature of the camp mission. However, Schlesak does not develop this line of thought; he only presents it in passing.

A second opportunity for ethical reflection is provided when Dr. Capesius testifies that he assumed what was happening at Auschwitz was legal.²⁸ Clearly, Auschwitz was a criminal enterprise, but Schlesak's testimony is insightful for today's military readers because law has increasingly permeated the conduct of war.²⁹ Today's military readers may have to take action that will later be scrutinized in court. To avoid being wrong about the law, military readers may ponder their legal awareness while working in a combat zone. Again, Schlesak provides this opportunity for ethical reflection through testimony, but he does not develop it with

²⁶ *Id.* at 185, 223, 224. During interviews Albert frequently stutters and spontaneously quotes poems of dubious connection to the conversation. He also taught religion while working at Auschwitz.

²⁷ *Id.* at 247.

²⁸ *Id.* at 104.

Question from the court: "while you were in Auschwitz, did the events taking place there ever seem to you to be illegal?" Answer of the defendant Capesius: "I grew up in Transylvania with a great respect for all things German. . . . My father especially was constantly saying that Germany was the model of order and the rule of law. Given this attitude, I assumed as well that what was going on in Auschwitz was legal. . . ."

²⁹ See Colonel Charles Dunlap, Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts (Carr Ctr. for Human Rights Policy, Harvard Kennedy School of Gov't, Workshop Paper, 2001), available at <http://www.hks.harvard.edu/cchp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

commentary; he only quotes Dr. Capesius's responses and moves on to a different subject.³⁰

III. Schlesak's Confusing Organization and Questionable Credibility

Schlesak's organization and style make the book difficult to follow for two key reasons: first, the fictional character fails to connect the events into a coherent, logical narrative; and second, Schlesak loses credibility by frequently mixing fiction into the text he asserts is fact.³¹

A. Fictional Character

Per the jacket cover, and not stated in the actual text, Adam Salmen is the fictional character through whom Schlesak tells the Auschwitz story.³² Adam is from the same hometown as Schlesak and Dr. Capesius: Schassburg, Transylvania.³³ Schlesak begins on the first page speaking of Adam in third person so the reader assumes either that Schlesak himself is speaking, or that Schlesak will later clarify who is speaking.³⁴ He never clarifies. Sometimes Adam does speak in first person, and sometimes someone else, presumably Schlesak, speaks in first person.³⁵ Nor does Schlesak consistently use Adam as the narrator; all too often throughout the book, Schlesak changes speakers, leaving the reader confused.³⁶ Normally, the author of a documentary novel uses a fictional character to connect documented parts of a story in a logical or chronological order.³⁷ An effective

³⁰ SCHLESAK, *supra* note 1, at 105.

³¹ "Schlesak's primary point is the horrific reality of the Holocaust. This fact may render stylistic considerations petty and 'beside the point.'" Toll, *supra* note 20. It is also worth noting that given the large number of German words, German cities, and German authors referenced in this translation of Schlesak's book, it is clearly intended for a German audience. Although this is not Schlesak's shortcoming (the book is a translation), this makes it difficult for an English-speaking reader to follow. This reviewer found an encyclopedia helpful to bridge contextual gaps that naturally resulted from unfamiliarity with German words, cities, and authors.

³² SCHLESAK, *supra* note 1, left inside flap. This is highlighted because it is easy to miss; one particular book reviewer, writing for National Public Radio, missed what is hidden in the flap and states, "As his main narrator [Schlesak] uses the testimony of an actual survivor named Adam, one of the Jewish prisoners. . . ." Cheuse, *supra* note 16, at 1.

³³ *Id.* at 4 (stating that Adam is the last Jew of Schassburg and discussing Schlesak's visit with Adam at his home).

³⁴ *Id.* at 3.

³⁵ *Id.*

³⁶ Peterson, *supra* note 16 ("Too many times it is not sufficiently clear who is speaking."). See also Whipple, *supra* note 16 ("The novel moves around, changing speakers, introducing and discussing an event from the point of view of one person at one point, then later in the book, giving a somewhat different point of view on the same event by a different person.").

³⁷ See OXFORD DICTIONARY OF LITERARY TERMS 95 (3d ed. 2008) (describing "documentary" as including such documentary-style novels as Upton Sinclair's, *The Jungle* (1906)).

example of this technique in the Holocaust genre is found in Elie Wiesel's *Night*.³⁸

In *Night*, Wiesel uses a fictional character, Eliezer, who represents Wiesel, himself a survivor of Auschwitz.³⁹ Eliezer relates his entire Auschwitz experience through his first-person account. The result is a seamless narrative that the reader can easily relate to and follow. In contrast, Schlesak only occasionally uses Adam to connect events; he frequently abandons Adam as narrator and carries on with several pages of witness testimony dialogue or summary, interspersed with brief first-person narrative.⁴⁰ In these passages, when Schlesak returns to Adam, the subject is a new event or topic. The effect is disorienting for the reader and creates gaps the reader must bridge with assumptions. Schlesak's failure to clarify who is speaking, coupled with his failure to consistently use Adam to connect the narrative, make it unnecessarily difficult for the reader to follow the key Auschwitz events he recounts.

B. Credibility

Roughly one third of the book is written in italics, with the remainder in Roman type. An Editor's Note explains that italic type, taken from the original German edition, is used for fictional narrative and Roman type for "quoting either from transcripts . . . or from his own [Schlesak's] interviews."⁴¹ Given the sheer volume of Roman type throughout the book, the Editor's Note gives the reader a strong sense that the book is fully supported with source documents. This impression is strengthened with the inclusion of actual trial testimony, judicial notes, pictures of witnesses, witness statements, and a lengthy "Works Consulted and Cited" bibliography at the end.⁴² However, for the critical reader, this editorial note loses credibility beginning on page one.⁴³ None of the Roman type on page one comes from transcripts or interviews because it is Adam's fictional background.⁴⁴ Five of the first eight pages have lengthy sections of Roman type that are also fictional.⁴⁵

Again, Adam is a fictional character. His conversation with Schlesak and his journal are likewise fictional. Yet Adam's conversations, poems, journal entries, and thoughts are in both Roman and italic type throughout the book.⁴⁶ This invites the critical reader to ponder two questions: What else in Roman type that is not specifically attributed to witness testimony is also fictional commentary? Furthermore, by using this italics/Roman type model, is Schlesak attempting to promote his book as more factual than it really is? The bottom line is that Schlesak undermines his hard work at assembling facts from transcripts, documents, and interviews by inserting fiction in a typeset he asserts is for factual matters.⁴⁷

IV. Conclusion

On one hand, *The Druggist* is an excellent summary of Dr. Capesius's involvement at Auschwitz.⁴⁸ *The Druggist* contains a wealth of imagery, in painful detail, of the horrors of the Holocaust. This imagery successfully impresses upon the reader the reality of what took place at Auschwitz.⁴⁹ Schlesak also demonstrates that Dr. Capesius never showed guilt or remorse for his part in the genocide, which is unsatisfying to many, but unremarkable to attorney-readers. On the other hand, Schlesak misuses his fictional character, making his narrative difficult to follow. Additionally, while it is clear that Schlesak has amassed a wealth of documentary support, he calls his factual credibility into question by misusing a typeface distinction. Ultimately, Schlesak's stylistic problems eclipse his successes, so that this reviewer does not recommend *The Druggist* for a Judge Advocate who is looking for an introduction to Holocaust genre writings. This is particularly true when *The Druggist* is compared to other, easier-to-read Auschwitz accounts readily available.⁵⁰

³⁸ ELIE WIESEL, *NIGHT* ch. 1 (Stella Rodway trans., 2d ed. 1960).

³⁹ *Id.* at vi.

⁴⁰ SCHLESAK, *supra* note 1, at 28, 30–31, 38–44, 176.

⁴¹ *Id.* at vii.

⁴² *Id.* at 119.

⁴³ *Id.* at 3.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 6, 8, 11, 23, 60, 93, 107, 133, 176.

⁴⁷ This is particularly unfortunate because Schlesak actually knew Dr. Capesius. *Id.* at 232. Schlesak's mother also dated Dr. Capesius. *Id.* Therefore, Schlesak is in a position to gather more evidence and shed more light on Dr. Capesius's life than other authors.

⁴⁸ Compare NAUMANN, *supra* note 23 (summarizing evidence and trial testimony of all twenty-two defendants tried during the Auschwitz trials), with SCHLESAK, *supra* note 1, ch. 2 (generally showing that Schlesak's work at collecting documents and witness-related information is far more comprehensive than Naumann's)).

⁴⁹ As noted by Martha Toll, reminding readers of Auschwitz has intrinsic value and may render literary criticism "beside the point." Toll, *supra* note 20.

⁵⁰ See *supra* note 7 (listing notable Auschwitz authors, such as Viktor Frankl, whose book *Man's Search for Meaning* sold over twelve million copies in twenty-four languages, or Elie Wiesel's *Night*, that sold over six million copies).

CLE News

1. Resident Course Quotas

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

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

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

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

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).

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

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

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

2. TJAGLCS CLE Course Schedule (June 2011–September 2012) (<http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
GENERAL		
	61st Judge Advocate Officer Graduate Course	13 Aug – 23 May 13

NCO ACADEMY COURSES		
512-27D30	1st Advanced Leaders Course (Ph 2)	15 Oct – 20 Nov 12
512-27D30	2d Advanced Leaders Course (Ph 2)	7 Jan – 12 Feb 13
512-27D30	3d Advanced Leaders Course (Ph 2)	7 Jan – 12 Feb 13
512-27D30	4th Advanced Leaders Course (Ph 2)	11 Mar – 16 Apr 13
512-27D30	6th Advanced Leaders Course (Ph 2)	8 Jul – 13 Aug 13
512-27D40	1st Senior Leaders Course (Ph 2)	15 Oct – 20 Nov 12
512-27D40	2d Senior Leaders Course (Ph 2)	11 Mar – 16 Apr 13
512-27D40	3d Senior Leaders Course (Ph 2)	6 May – 11 Jun 13
512-27D40	4th Senior Leaders Course (Ph 2)	8 Jul – 13 Aug 13

CRIMINAL LAW		
5F-F34	43d Criminal Law Advocacy Course	17 – 21 Sep 12

3. Naval Justice School and FY 2011–2012 Course Schedule

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

Naval Justice School Newport, RI		
CDP	Course Title	Dates
900B	Reserve Legal Assistance (020)	24 – 28 Sep 12
03TP	Basic Trial Advocacy (020)	17 – 21 Sep 12
748A	Law of Naval Operations (020)	17 – 21 Sep (Norfolk)
0258	Senior Officer (070)	24 – 28 Sep 12 (Newport)
07HN	Legalman Paralegal Core (030)	31 Aug – 20 Dec 12
627S	Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100)	17 – 19 Sep 12 (Pendleton) 19 – 21 Sep 12 (Norfolk)
NA	Legal Service Court Reporter (020)	10 Jul – 5 Oct 12

Naval Justice School Detachment San Diego, CA		
3759	Senior Officer Course (060)	17 – 21 Sep (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2012 Course Schedule

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

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Will Preparation Paralegal Course, Class 12-F	11 – 13 Sep 2012

Will Preparation Paralegal Course, Class 12-G	17 – 19 Sep 2012
Trial & Defense Advocacy Course, Class 12-B	17 – 29 Sep 2012
Accident Investigation Course, Class 12-A	18 – 21 Sep 2012

5. Civilian-Sponsored CLE Courses

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

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600
- ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990
- CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973
- CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University Law School
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

MC Law: Mississippi College School of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(803) 705-5000

NDAA: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please go to the Judge Advocate General's University (JAGU) homepage accessible at <https://jag.ellc.learn.army.mil>. Look for the registration area. Submit questions through the JAGU helpdesk located at the homepage.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2013 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2012 will not be allowed to attend the resident course. The resident course is 6 – 18 January 2013. In-person registration is from 1300 – 1700 on 6 January 2013; graduation will be complete by 1200 on 18 January 2013.

e. If you have additional questions regarding JAOAC, contact LTC Baucum Fulk, commercial telephone (434) 971-3357, or e-mail baucum.fulk@us.army.mil.

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website

at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

2. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact

Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

3. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General’s Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

Department of the Army
The Judge Advocate General's Legal Center & School
U.S. Army
ATTN: JAGS-ADA-P, Technical Editor
Charlottesville, VA 22903-1781

PERIODICALS

By Order of the Secretary of the Army:

RAYMOND T. ODIERNO
General, United States Army
Chief of Staff

Official:



JOYCE E. MORROW
Administrative Assistant to the
Secretary of the Army
1225505
