



THE ARMY LAWYER

Headquarters, Department of the Army

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Lore of the Corps

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Lore of the Corps

From Advanced Course to Career Course to Advanced Course (Again) to Graduate Course: A Short History of Advanced Military Legal Education in the Corps

Fred L. Borch
Regimental Historian & Archivist

On 11 October 1952, nineteen Army lawyers began attending classes at The Judge Advocate General's School (TJAGSA) as part of the first Advanced Course.¹ This was a radical development in military legal education, as it was the first time in history that any service had established a program of instruction that would go beyond the basics of military law. More than sixty years later, as the members of the 62d Graduate Class complete their studies, it is time to take a brief look at the history of the Advanced Course and its evolution from a 32-week long program for 19 career Army judge advocates to today's 41-week long Graduate Course for 118 uniformed lawyers from the Army, Navy, Air Force, Marine Corps, and Coast Guard as well as 4 international military students.

The impetus for the Advanced Course was the recognition that the Corps did not have any education and training for those judge advocates that elected to remain in the Army for a career.² The Judge Advocate General's School, which had re-opened in 1950 with the start of the Korean War, had an eight-week Regular Course (now called the Judge Advocate Officer Basic Course) for new Army lawyers. But that course was devoted almost exclusively to courts-martial practice—which made sense given that the bread-and-butter of the Army lawyer in the 1950s was military justice. As for other legal disciplines—contract and procurement law, administrative and civil law, legal assistance, international law and the like—judge advocates generally learned “on-the-job” (OJT).³

This *ad hoc* nature of OJT education for career judge advocates, however, could not ensure that when members of the Corps advanced in rank and began to assume duties as staff judge advocates, they were prepared for the various legal issues that might arise at a post, camp, or station. Recognizing this shortcoming in the education of Army lawyers, Colonel (COL) Charles L. “Ted” Decker, TJAGSA's commandant, proposed that an Advanced Course be added to the curriculum. A small number of career-oriented judge advocates would be selected to come to Charlottesville for an academic year of graduate-level legal education, where they would have “the opportunity and incentive to engage in scholarly research” and further their “intellectual development.”⁴ The proposed course would provide “for a thorough and detailed study . . . [of] all aspects of the specialized field of military law.” The end result? A graduate of the Advanced Course would be able to provide significant contributions to the future development of military law while being better prepared to assume more senior leadership positions in the Corps.

The first Advanced Course consisted of nineteen student officers: one colonel, three lieutenant colonels (LTCs), ten majors (MAJs), and five captains (CPTs). When the class graduated on 25 May 1953, its Honor Graduate was MAJ Bruce C. Babbitt.⁵ Given its focus on developing staff judge advocates, the second and third Advanced Courses likewise consisted of relatively senior officers. There were eight LTCs out of twenty-three students in the second Course (which graduated on 21 May 1954), and seven LTCs out of twenty-two students in the third Course (which graduated on 27 May 1955).⁶

¹ THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, ANNUAL REPORT, 1951–61, at 65 [hereinafter ANNUAL REPORT].

² In the 1950s, other Army branches also developed an Advanced Course for their officer personnel. In the combat arms, for example, all commissioned officers were required to attend “a branch specific advanced course between their selection for promotion to captain and taking company-level command, normally prior to completing nine years of commissioned service.” JEROLD E. BROWN, HISTORICAL DICTIONARY OF THE U.S. ARMY 4 (2001). Successful completion of an Advanced Course was a prerequisite for selection to attend Command and General Staff College at Fort Leavenworth, Kansas. *Id.* Today, the Advanced Course is known as the Captains Career Course. Infantry and Armor officers, for example, attend a twenty-two-week Maneuver Captains Career Course at Fort Benning, Georgia. *Student Information*, U.S. ARMY MANEUVER CENTER OF EXCELLENCE, <https://www.benning.army.mil/mcoe/dot/mc3/StudentInformation.html#t1> (last visited June 4, 2014).

³ When The Judge Advocate General's School, U.S. Army (TJAGSA) began to offer instruction in non-military justice subjects, it did so with special stand-alone courses, with the first course (on contract termination) offered in August 1953. ANNUAL REPORT, *supra* note 1, at 71.

⁴ *Id.* at 7.

⁵ Bruce C. Babbitt was a unique judge advocate and Soldier. He was decorated with the Silver Star for gallantry in action while serving as an infantry officer in the Philippines in 1944 and commanded a rifle battalion while a judge advocate during the Korean War. Then Colonel Babbitt served as the Staff Judge Advocate, Military Assistance Command, Vietnam, from 1969 to 1970. Selected for brigadier general in 1970, Babbitt served as the Assistant Judge Advocate General for Civil Law until he retired from active duty in 1973. Brigadier General Babbitt died in 1999. *Who's Who in U.S. Army JAG Corps History*, THE JUDGE ADVOCATE GENERAL'S CORPS REGIMENTAL HISTORY, <https://www.jagcnet.army.mil/8525736A005BE1BE/0/5C2BEB1224678F5D852577AE00521D86?op=endocument&noly=1> (last visited June 4, 2014).

⁶ ANNUAL REPORT, *supra* note 1.

In 1955, the Advanced Course underwent a transformation when, for the first time, Navy officers were assigned as students. Since the Navy did not yet have a Judge Advocate General's Corps, the four Navy commanders (LTC equivalents) who attended the Fourth Advanced Course were known as legal specialists, not judge advocates.⁷

That same year, TJAGSA also reached a milestone when the American Bar Association (ABA) reported that the curriculum of the Regular and Advanced Courses made TJAGSA "the outstanding specialist graduate law school in the nation." The ABA concluded that TJAGSA, having "attained an excellence unsurpassed by the programs of any other school," had earned "provisional accreditation." Full approval as a law school was granted on 25 February 1958, with the Advanced Course "fully approved . . . as a graduate program in law."⁸ As a result, TJAGSA became the first—and is still the only—ABA-accredited military law school in the United States.

In August 1956, beginning with the Fifth Advanced Course, instruction was increased from 32 to 35 weeks, and the number of hours of instruction was increased from 1405 to 1556. According to the Commandant's *Annual Report*, this "enabled the School to provide more academic time for the student thesis program."⁹ By the end of the 1950s, every student was required to write a thesis, and about 300 hours of scheduled time was allotted for preparation and oral presentation of each student's thesis. These three additional weeks also provided more time for "LOGEX" instruction and participation—LOGEX being "a command post exercise" that focused on logistical issues arising under simulated field conditions.¹⁰

In the late 1950s, the curriculum of the Advanced Course underwent periodic revision—but any changes were "grounded upon the premise that the objective of the [Course] was and continues to be to provide leaders for the military legal profession."¹¹ In 1959, for example, the Advanced Course added twelve hours of instruction on jurisprudence, eight hours of instruction on military psychiatry, and nine hours of instruction on navigable waters. These additions required a corresponding reduction in the amount of time devoted to civil emergencies and military justice instruction.¹²

⁷ *Id.*

⁸ *Id.* at 8.

⁹ *Id.*

¹⁰ *Id.* at 10.

¹¹ *Id.* at 8.

¹² *Id.* at 9.

A final note about the Advanced Course in the 1950s: foreign military officers joined the Advanced Course for the first time, with LTC Eladio G. Samson, Philippine Army, attending the Sixth Advanced Course and Major Win Phe, Burmese Army, attending the Seventh Advanced Course. By the end of the 1950s, a total of three Burmese and three Filipino officers had attended the Advanced Course.

With the start of a new decade, the Advanced Course "was redesignated, by the Continental Army Command, as the Judge Advocate Officer Career Course."¹³ This name change seems to have been more form than substance, as the curriculum remained very similar in content. According to the 1962 *Annual Report of the Commandant*, the thirty-four-week course "thoroughly immersed" the student in legal history, jurisprudence, admiralty, military justice, military administrative law, procurement law, international law, comparative law, claims, civil affairs, legal assistance, military reservations, military training and counterinsurgency. Additionally, each career class student was required to write a thesis on a "significant problem area in military law."¹⁴ Topics included: "Legality of Orders," "Water Rights on Military Reservations," "Powers and Duties of Sentencing and Sentence Reviewing Authorities," and "Dishonorable Failure to Pay Debts."¹⁵



Students in seminar, 11th Career Course (1962–63)

The Corps made history once again with the Twelfth Career Course, which began on 3 September 1963. This is because, for the first time, there were two female Army judge advocates in attendance: MAJ Ann Wansley and MAJ Mary L. Attaya. Class size was still relatively small (by today's standards), with twenty-six Army lawyers (including Wansley and Attaya), and two Navy legal specialists. The number of foreign lawyers, however, had greatly increased:

¹³ *Id.*

¹⁴ THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, ANNUAL REPORT, FISCAL YEAR 1962, at 2.

¹⁵ *Id.* at 63–65.

two judge advocates from Turkey, one from the Philippines, and one from Thailand.¹⁶

By this time, the Advanced Course was configured in the two semester framework familiar to judge advocates today. In the first semester, the four teaching departments—Military Justice, Military Affairs (today’s Administrative and Civil Law), Procurement Law, and International and Comparative Law—were assigned a period of time in which that division taught its material and then administered a four-hour final examination at the end of its instruction. During the second semester, the students spent the first month concentrating on researching and writing their theses. They also attended four seminars twice a week. The following elective-type seminars were offered to the students in the class:

Commander’s Problems in Installation Administration
Constitutional Law and the Armed Forces
Research in Foreign and Comparative Law
Problem Areas in International Relations
Legal Control of International Conflict
The Right to Counsel
Model Penal Code and the UCMJ
Wiretapping and Electronic Eavesdropping
The Effect of Sovereignty on Government Contracts
Factors Affecting Competition in Government
Procurement
Government Contract Administration¹⁷

Finally, the students in the class took several field trips during their year at TJAGSA. There was a trip to the Army’s Engineer School, then located at Fort Belvoir, Virginia, for the purpose of getting instruction in mine warfare and nuclear weapons.¹⁸ The class also travelled to Washington, D.C., where fifteen of the students were admitted to the U.S. Supreme Court on motion of then COL George S. Prugh, who was serving as the Executive, Office of The Judge Advocate General.¹⁹



Army, Navy, and Marine Corps students, 13th Career Course (1964–65)

In 1966, the Career Course changed its name—back to the Advanced Course—and the Fifteenth Advanced Course began on 6 September 1966.²⁰ The goal of the course—still thirty-four weeks long—was the same: to “deepen and broaden a philosophical appreciation of the role of law in its application to all phases of military life and to prepare the officer student to render legal services to higher commanders.”²¹ The course consisted of twenty-eight students: twenty-five Army judge advocates, one Navy law specialist, and two Marine Corps legal specialists. Two students who would later reach flag rank were in this class: CPT William K. Suter, who would later wear two stars and serve as Acting The Judge Advocate General from 1989 to 1991 before becoming the Clerk of the U.S. Supreme Court, and CPT Dulaney L. O’Roark, Jr., who briefly served as TJAGSA’s commandant before being promoted to brigadier general in 1985.²²

In keeping with the times, as the Army began deploying personnel to Southeast Asia, there was a new course offering called “legal aspects of counterinsurgency.” The students took a field trip to Fort Bragg, North Carolina, where they attended “Exercise Blue Chip” and saw a demonstration of weapons, tactics, and equipment.²³

In the late 1960s and early 1970s, as American involvement in the Vietnam war increased and opposition to the war grew in U.S. society, the desire of many Americans to enter the Army—much less the JAG Corps—decreased

¹⁶ THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, ANNUAL REPORT, FISCAL YEAR 1963, at 12.

¹⁷ THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, ANNUAL REPORT, FISCAL YEAR 1964, at 14.

¹⁸ *Id.* at 15.

¹⁹ Executive is today’s Executive Officer, Office of The Judge Advocate General. Major General Prugh was The Judge Advocate General from 1971 to 1975. For more on Prugh, see JUDGE ADVOCATE GENERAL’S CORPS, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775–1975, at 256–57 (1975).

²⁰ THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, ANNUAL REPORT, FISCAL YEAR 1967, at 10 [hereinafter 1967 ANNUAL REPORT].

²¹ *Id.* at 9.

²² For more on Major General (retired) William K. Suter, see *New Clerk for Supreme Court*, N.Y. TIMES, 28 Jan. 1991, at A3. See also *Retiree Spotlight*, MILITARY OFFICER, Aug. 2010, at 28; FRED L. BORCH, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959–75, at 85, 95–96, 111.

²³ 1967 ANNUAL REPORT, *supra* note 20, at 10–11.

markedly. This explains, at least in part, why the Advanced Course was relatively small: the Corps was not retaining officers who were interested in staying on active duty and receiving advanced legal education. But a bigger issue, as explained by COL (retired) John Jay Douglass,²⁴ was that there was little incentive for judge advocates to attend the Advanced Course. First, attendance was not a requirement for promotion, much less being selected for a particular assignment and, in any event, those who did not wish to attend in residence could complete the Advanced Course by correspondence.

Second, Charlottesville was not considered to be a good duty assignment—at least for an academic year. There was no commissary or post exchange in the area and, in this era of relatively small pay checks for officers, this was a significant issue. Finally, there was the feeling that going to the Advanced Course to study law and engage in academic discourse was a waste of time for a career Army lawyer—time that could be better spent in the field doing legal work. There was a reasonable basis for this view, since many senior leaders in the Corps had never attended the Advanced Course—Major Generals Kenneth Hodson (TJAG from 1967 to 1971), George Prugh (TJAG from 1971 to 1975), and Wilton B. Persons (TJAG from 1971 to 1975), had not attended the Advanced Course. Prugh and Persons had not even attended a basic course.

Colonel Douglass, who served as TJAGSA Commandant from 1970 to 1974, was determined to enhance the prestige of the Advanced Course—and increase the number of students attending it. To this end, Douglass began soliciting younger judge advocates to come to Charlottesville to attend the course, which worked to some degree, but increased numbers only incrementally. Douglass also added some new features to the course. The students in the Nineteenth Advanced Course, for example, which was now thirty-six weeks in length, holding its first class on 31 August 1970, conducted a three-day field trip to the United Nations in New York City. The thirty-eight students in the class, which included military lawyers from Ethiopia, Iran, and South Vietnam, “received detailed briefings from both United States, United Nations, and foreign diplomats and legal advisors, including talks by Arab and Israeli representatives on the Middle East situation.”²⁵ Since the

upheaval resulting from the overwhelming Israeli victory in the Six Day War (June 1967) was still very much in the news, this focus on the Middle East should come as no surprise.

The Nineteenth Class also traveled by military aircraft to Fort Riley and Fort Leavenworth, Kansas. They toured the Correctional Training Facility at Riley and the U.S. Disciplinary Barracks at Fort Leavenworth, and were also given a tour and briefing at the Command and General Staff College in Kansas.²⁶ Similar field trips occurred for the next several years, as well. Understandably, Advanced Course attendance became more attractive in nature.

By the late 1970s, the Advanced Course consisted of between fifty and sixty students from the Army, Navy, and Marine Corps. According to the *Annual Bulletin 1977-1978*, “all students are attorneys with four to eight years of experience as practitioners” and selection to attend the course was “competitive”—at least for the Army judge advocates, who were selected by a board of officers convened by The Judge Advocate General of the Army.”²⁷

The 26th Advanced Course, for example, which began in August 1977 and ran forty-one weeks in length, consisted of core courses in the first semester and electives in the second semester. Each student was required to take “at least fourteen electives ranging from Law of the Sea to Legal Assistance.”²⁸ The thesis was no longer required, but a student could write a “research paper” in lieu of six electives, provided that the paper was suitable for publication and on “a legal topic acceptable to the School’s writing committee.”²⁹ Another option was to substitute electives offered by TJAGSA with “graduate courses at the University of Virginia Law School.”³⁰ These changes in the Advanced Course curriculum, however, had not altered the goal of the course—preparing “lawyers for duties as staff judge advocates and legal advisors at all levels.”³¹

The fifty-seven students who completed the 26th Advanced Class, including officers from Ghana, the Republic of China (Taiwan), and Zaire, were the last to complete an advanced course, as the program was renamed the Graduate Course in 1978. The decision to re-designate

²⁴ Colonel (Retired) John Jay Douglass, who served in the Corps from 1953 to 1974, finished his military legal career as TJAGSA’s commandant. It was Colonel Douglass who oversaw the design and construction of a new TJAGSA building on the University of Virginia’s North Grounds. Douglass also originated the General Officer Legal Orientation and Senior Officer Legal Orientation Courses. See generally JOHN JAY DOUGLASS, MEMOIRS OF AN ARMY LAWYER (2012); see also Fred L. Borch, *Legal Education for Commanders: The History of the General Officer Legal Orientation and Senior Officer Legal Orientation Courses*, ARMY LAW., Dec. 2013, at 1.

²⁵ THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, ANNUAL REPORT, 1970–71, at 23.

²⁶ *Id.*

²⁷ THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, ANNUAL BULL., 1977–78, at 9. The “Annual Report” was renamed the “Annual Bulletin” in 1977.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 10.

³¹ *Id.*

the program was made by then Commandant COL Barney L. Brannon, who served in that position from 1976 to 1979. Regardless of the name of the course, however, the fundamentals remained the same.

By the mid-1980s, the option not to attend the Graduate Course by completing it by correspondence was no longer available, and every judge advocate who desired to make the Corps a career was required to attend the Graduate Course. The *Annual Bulletin 1984–1985* describes the course as consisting “of between 75 and 85 students selected from the Army, Navy and Marine Corps.”³² The course, now forty-two weeks long, “was conducted over a two-semester academic year.”³³ The first semester was a core curriculum of “criminal law, administrative and civil law, international law, contract law, military subjects, and communications.”³⁴ Students were required to take electives in the second semester.³⁵

A major development in the history of the Advanced/Career/Graduate Course occurred in 1988, when Congress enacted legislation authorizing TJAGSA to award a “Masters of Law” in military law. This degree first went to the 36th Graduate Course, when its members graduated in May 1988. Captain Elyce Santerre, who had the highest overall academic standing in the class, was the first to walk across the stage and consequently was the first judge advocate to be awarded the LL.M.³⁶

In the 1990s and the 2000s, the curriculum of the Graduate Course changed—with some courses deleted and others added—depending on changes in the law and the needs of the Army. The course also now operates on the quarter system and, while the bulk of the core curriculum is taught during the first two quarters, electives are now offered in the second quarter. Another major development over the past twenty years has been the presence of Air Force judge advocates in the Graduate Course, with the first Air Force attorney, Captain Bruce T. Smith, attending the 39th Graduate Course in 1990. Since that time, there have been Air Force officers in every Graduate Class.

The latest Graduate Course—the 62d—which began on 12 August 2013, had 114 uniformed judge advocates: seventy-seven active Army, five Army Reserve, two Army National Guard, ten Air Force, fifteen Marine Corps, four

Navy, and one Coast Guard. Four international law students, from Egypt, Israel, Korea, and Turkey, rounded out the class of 118. As with the 61st Graduate Course, the size of the class required that it be divided into two parts (Sections A & B). One section receives its core instruction in the morning, with the other section being taught the same material in the afternoon.

While the content of the instruction remains similar to that delivered to earlier Advanced, Career, and Graduate Courses, the method of delivering this instruction is remarkably different, given the prevalence of information technology in the class room. For example, while the Graduate Classes in the 1990s were taught from paper outlines, today’s students have their instructional materials delivered to them electronically via Blackboard.

The 62d Graduate Course also continued the now traditional trip to the U.S. Supreme Court, where those who so desired were admitted to the Court. While a trip to New York City or Kansas is no longer part of the curriculum, the students of the 62d Graduate Course did travel to Gettysburg, Pennsylvania, for a two-day staff ride that focused on leadership issues during the Battle of Gettysburg—an event inaugurated in the 54th Graduate Class in April 2006.

When the 62d Graduate Course graduated on 22 May 2014, its members returned to the field and other judge advocate assignments better educated in military law and better prepared to be future leaders. Consequently, while much has changed in the manner in which advanced legal education is taught at The Judge Advocate General’s Legal Center and School over the years, the fundamental purpose of that education remains the same.

*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.*

³² THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, ANNUAL BULL. 1984–85, at 13.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 13.

³⁶ For more on the LL.M., see Fred L. Borch, *Master of Laws in Military Law: The Story Behind the LL.M. Awarded by The Judge Advocate General’s School*, ARMY LAW., Aug. 2010, at 1.

A Primer: Army Conference Approval and Funding

Major Shaun B. Lister*

I. Introduction

It is 1630 on Friday afternoon in the Administrative & Civil Law Division of the Office of the Staff Judge Advocate (OSJA). You have worked late every night this week and are looking forward to spending some time with your family. Tonight will be the first night all week you sit down for dinner together. You call home to tell your spouse you will be leaving at 1700 and to see if you need to stop at the store for anything. As you hang up, the Chief of International and Operational Law walks into your office and tells you some guy from G3 is going to call you in a minute with a couple of questions about the conference policy. You reply, "No problem, Ma'am." As she walks out of your office, the phone rings and the person on the other end tells you he needs you to review a conference request tonight so the Commanding General (CG) can sign it to forward to the Chief of Staff of the Army (CSA) for approval. "It has to be done tonight! This is a capstone event and it's very important to the CG. If we don't get it done, we're at mission failure!"

Although he has used the less hysterical form of "people will die" if you do not help get this conference request done by completing a legal review, you understand the event is important to the CG and failure will likely result in a phone call to your boss. Even though the apparent crisis appears to be a result of G3's failure to plan, "JAG" will be seen as the point of failure. You respond, "Go ahead and e-mail me the request." You realize you are probably not leaving at 1700. However, because you have a thorough understanding of Army conference guidance, you can efficiently review the request and be home in time for dinner.

The Secretary of the Army recently issued a comprehensive Army conference policy, Army Directive 2014-01.¹ Prior to the new policy, practitioners gleaned Army conference guidance from a series of Department of Defense (DoD) and Department of Army (DA) directives and policy memoranda, beginning with Army Directive 2011-20.² The purpose of this article is to review and summarize the legal

authority relating to conference planning and approval, and to provide practitioners with a framework for reviewing conference requests and assisting commanders and staffs in navigating the conference guidance.

Part II of this article summarizes the historical background of the conference policy and analyzes current and past conference guidance to furnish practitioners with an understanding of the scrutiny Army conferences will continue to receive by executive branch and congressional leadership. Next, the article presents an analytical framework for determining whether a planned event exhibits sufficient indicia of a conference to qualify as a conference. Part IV furnishes practitioners with a means of analyzing exemptions and preparing exemption requests for the proper approval authority. Part V enables practitioners to assist commands in preparing conference requests that comply with conference guidance and withstand scrutiny at higher levels; it also provides practitioners with a framework by which to conduct required legal reviews of conference requests and requests for exemptions. Part V further explains key conference issues relating to non-DoD organizations and non-federal entities, including attending conferences sponsored by non-federal entities, co-locating Army conferences with conferences sponsored by non-federal entities, and co-sponsoring conferences with non-federal entities. The article concludes by reviewing the various conference reporting requirements.

II. Background

Spanish philosopher George Santayana said, "Those who do not remember the past are condemned to repeat it."³ As the federal budget tightened over the past several years, reigning in conference-related expenses became a focus of the DoD. Preceding current conference guidance, the Secretary of Defense issued a policy memorandum to the service secretaries (among other recipients) directing the use of an online tool to calculate personnel costs associated with attending, sponsoring, or hosting conferences.⁴

Although many practitioners are aware of the infamous General Services Administration (GSA) conference scandal, the event leading directly to an Army conference policy was the Installation Management Command (IMCOM) annual commanders' conference held in San Antonio, Texas, from

* Judge Advocate, U.S. Army. Presently assigned as Associate Professor, Criminal Law Department, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. This article was submitted in partial completion of the Master of Laws requirements for the 62nd Judge Advocate Graduate Course.

¹ U.S. ARMY DEP'T, DIR. 2014-01, ARMY CONFERENCE POLICY (18 Dec. 2013) [hereinafter ARMY DIR. 2014-01] (effective date of 1 Jan. 2014), available at http://armypubs.army.mil/epubs/pdf/ad2014_01.pdf. An Army Conference Policy worksheet, created by the Army North Office of the Staff Judge Advocate, is attached as Appendix A.

² U.S. ARMY DEP'T, DIR. 2011-20, DEPARTMENT OF THE ARMY CONFERENCES (14 Oct. 2011) [hereinafter ARMY DIR. 2011-20].

³ George Santayana, BRAINY QUOTE, <http://www.brainyquote.com/quotes/quotes/g/georgesant101521.html> (last visited June 5, 2014).

⁴ Memorandum from Sec'y of Defense to Principal Officials of Dep't of Defense, subject: Consideration of Costs in DoD Decision-Making (27 Dec. 2010).

18 to 21 April 2011.⁵ After the conference, the Inspector General received an anonymous complaint alleging misuse of funds and improper support to a non-federal entity.⁶ The resulting investigation revealed the conference failed to comply with travel regulations and rules governing ethics and contracting.⁷ On 20 April 2011, the Secretary of the Army issued Army Directive 2011-05, in which he withheld authority to approve conferences.⁸ Thereafter, the Secretary implemented Army Directive 2011-20,⁹ which included the Army Conference Policy.¹⁰

The GSA conference scandal created even further controversy. Although the GSA Public Buildings Service conference pre-dated the IMCOM commanders' conference, the Office of the Inspector General did not release its report of investigation until 2 April 2012.¹¹ The report detailed excessive spending on conference planning and food, improper contracting, and numerous other questionable or improper expenses, including luxury accommodations.¹²

In the wake of the GSA conference publicity, spending on conferences became highly scrutinized and various departments within the executive branch released policy memoranda aimed at curbing spending on conferences. On 11 May 2012, the Office of Management and Budget (OMB) issued memorandum M-12-12 designed to reduce costs related to travel, conferences, real property, and fleet management.¹³ On 3 June 2012, the Deputy Secretary of Defense published guidance to implement the 11 May 2012

OMB memorandum.¹⁴ This memorandum instructed the heads of all DoD components to review any proposed conferences where the total cost to the DoD would exceed \$100,000 and established new approval authorities for conferences depending on the total cost of the conference.¹⁵ On 22 August 2012, signaling increased congressional scrutiny on conferences, the House of Representatives Committee on Oversight and Government Reform sent a letter to Secretary of Defense Leon Panetta identifying sixty-four DoD conferences held between December 2006 and September 2011 that exceeded the GSA conference in total per-person cost and requested additional documents relating to those conferences.¹⁶

During this time of increased scrutiny, the Secretary of the Army issued a memorandum restricting Army conferences.¹⁷ In this memorandum, the Secretary generally prohibited conferences with a cost exceeding \$500,000 and reiterated that only the Deputy Secretary of Defense could approve such conferences.¹⁸ The Secretary withheld authority to approve conferences that cost between \$100,000 and \$500,000.¹⁹ He cautioned approval authorities to "[a]ssess, in deliberate fashion, whether the conference significantly furthers the mission of your command, organization, or activity. Discretionary and 'nice to have' events that engender networking, information sharing, or professional development in a general sense normally will not meet this standard."²⁰

Perhaps by coincidence—yet only thirty-seven days following the 22 August 2012, House committee letter—the Deputy Secretary of Defense issued a second memorandum requiring approving authorities to implement conference oversight requirements and established a tiered system of

⁵ PowerPoint Presentation, Levator Norsworthy, Jr., Acting Deputy General Counsel, Office of General Counsel, Issues From My Inbox . . . , slide 4 (n.d.), available at <http://fedbar.org/Norsworthy> (last visited June 11, 2014).

⁶ *Id.*

⁷ *Id.*

⁸ U.S. DEP'T OF ARMY, DIR. 2011-5, DEPARTMENT OF THE ARMY CONFERENCES, SYMPOSIA, SEMINARS AND MEETINGS (20 Apr. 2011).

⁹ ARMY DIR. 2011-20, *supra* note 2 (prior to the effective date of Army Directive 2014-01, Army Directive 2011-20 provided the basic framework for all conference requests).

¹⁰ *Id.* enclosure 1.

¹¹ U.S. GEN. SERV. ADMIN., OFFICE OF INSPECTOR GEN., OFFICE OF INVESTIGATIONS, MANAGEMENT DEFICIENCY REPORT ON GENERAL SERVICES ADMINISTRATION PUBLIC BUILDINGS SERVICE 2010 WESTERN REGIONS CONFERENCE (Apr. 2, 2012).

¹² *Id.* For example, GSA spent over \$130,000 for travel and catering at off-site planning meetings before the conference, \$146,527.05 on catering at the conference, and \$30,207.60 for the closing reception (attendees included contractors), and \$75,000 for a team building contractor. *Id.*

¹³ Memorandum from Exec. Office of the President, Office of Mgmt. and Budget to Heads of Exec. Dep'ts and Agencies, subject: Promoting Efficient Spending to Support Agency Operations (11 May 2012).

¹⁴ Memorandum from Deputy Sec'y of Defense to Principal Officials of Dep't of Defense, subject: Implementation of May 11, 2012, Office of Management and Budget Memorandum, "Promoting Efficient Spending to Support Agency Operations" (3 June 2012).

¹⁵ *Id.* (establishing the Department of Defense (DoD) Deputy Chief Management Officer as the approval authority for any conference with a total cost to the DoD of between \$100,000 and \$500,000, and the Secretary of Defense as the approval authority for any conference with a total cost to the DoD above \$500,000).

¹⁶ Letter from One Hundred Twelfth Congress, House of Representatives, Committee on Oversight and Government Reform to Sec'y of Defense Leon Panetta (Aug. 22, 2012), available at <http://oversight.house.gov/wp-content/uploads/2012/08/2012-08-22-DEI-to-Panetta-DoD-follow-up-conferences-due-9-5.pdf> (last visited June 11, 2014).

¹⁷ Memorandum from Sec'y of Army to Principal Officials of Dep't of Army, subject: Continued Scrutiny of Conferences (3 Aug. 2012).

¹⁸ *Id.* at 2.

¹⁹ *Id.*

²⁰ *Id.* at 1.

conference approval authorities.²¹ The 29 September 2012 memorandum required the Secretary of the Army or Under Secretary of the Army to approve all Army-hosted conferences with total costs exceeding \$500,000, conferences involving spouse travel, or Army attendance at any conference hosted by a non-DoD entity when the total cost exceeded \$20,000.²² For Army-hosted conferences with a total cost between \$100,000 and \$500,000, the memorandum authorized the Secretary of the Army to delegate approval authority to several specified delegates, including the Administrative Assistant to the Secretary of the Army.²³ For Army-hosted conferences with a total cost below \$100,000 and non-DoD-hosted conferences with a total cost below \$20,000, the 12 September 2012, memorandum permitted the Secretary of the Army to delegate approval authority to “appropriate General Officers/Flag Officers/Senior Executive Service members”²⁴ Additionally, the memorandum provided definitions to use in determining if an event was a conference and exempted a number of events from the definition of a conference.²⁵

On 17 October 2012, the Secretary of the Army issued a memorandum to implement the DoD conference policy.²⁶ This interim guidance delegated approval authority for Army-hosted conferences with a total cost between \$100,000 and \$500,000 to commanders of Army Commands (for conferences hosted by their commands) and to the Administrative Assistant to the Secretary of the Army (AASA) for other Army-hosted conferences.²⁷ The Secretary delegated approval for Army-hosted conferences with a total cost below \$100,000 to “commanders of Army Commands, Army Service Component Commands, and Direct Reporting Units (headed by a general officer or member of the Senior Executive Service) and to HQDA Principal Officials for conferences sponsored or funded by their respective commands, organizations, or activities.”²⁸

²¹ Memorandum from Deputy Sec’y of Defense to Principal Officials of Dep’t of Defense, subject: Implementation of Conference Oversight Requirements and Delegation of Conference Approval Authority (29 Sept. 2012). On 6 November 2013, the DoD Deputy Chief Management Officer issued a memorandum, subject: Implementation of Updated Conference Oversight Requirements, which superseded and canceled the 29 September 2012 memorandum.

²² *Id.* at 6.

²³ *Id.* at 7–8.

²⁴ *Id.* at 11.

²⁵ *Id.* at 12–13.

²⁶ Memorandum from Sec’y of Army to Principal Officials of Dep’t of Army, subject: Interim Guidance for Implementation of New OSD Conference Policy (17 Oct. 2012) (superseded by Army Directive 2014-01).

²⁷ *Id.* at 2.

²⁸ *Id.*

The Secretary delegated authority to the AASA to approve all requests for exemptions, as well as approval authority for all conferences hosted by a non-DoD entity with a total cost to the Army of less than \$20,000.²⁹ Subsequently, the Administrative Assistant to the Secretary of the Army issued a memorandum reiterating the approval authorities delegated in the Secretary’s 17 October 2012 memorandum.³⁰ Additionally, the AASA established procedures for requesting exemptions and requesting attendance at conferences hosted by non-DoD entities.³¹

With fiscal constraints tightening in the early part of fiscal year (FY) 2013, the Secretary of the Army issued a memorandum with additional restrictions aimed at reducing expenditures.³² The memorandum contained two provisions directly impacting the ability to sponsor or attend conferences. The Secretary ordered commands to “[c]urtail temporary duties and professional training that are not mission-critical, such as attendance at or hosting conferences, staff assistance visits, and training seminars.”³³ The memorandum also required conference approval authorities to “significantly curtail participation in conferences with exceptions only for mission-critical activities executable within the fiscal guidance published by the ASA(FM&C).”³⁴

On 23 May 2013, after sequestration went into effect, the Under Secretary of Defense issued a memorandum to “ensure consistency in the treatment of issues across the [DoD] as the Department implements sequestration”³⁵ The memorandum, which rescinded a 5 March 2013 memorandum of the same subject, seemed designed to cut costs within the DoD relating primarily to travel, public affairs events, and conferences. Specifically, with regard to conferences, the Under Secretary of Defense emphasized the requirement that conferences be “mission critical.”³⁶

²⁹ *Id.* at 3. The Secretary retained authority to approve Army-hosted conferences costing over \$500,000 and authority to approve Army attendance at conferences hosted by non-DoD entities where the cost to the Army exceeded \$20,000. *Id.*

³⁰ Memorandum from Admin. Assistant to Sec’y of Army to Principal Officials of the Dep’t of the Army, subject: Supplemental Conference Guidance and Data Call for Proposed FY 13 Conferences (29 Oct. 2012) (superseded by Army Directive 2014-01).

³¹ *Id.*

³² Memorandum from Sec’y of the Army to Principal Officials of Dep’t of Army, subject: Risk Mitigation in the Face of Fiscal Uncertainty (16 Jan. 2013).

³³ *Id.* at 2(d).

³⁴ *Id.* at 2(e) (Assistant Secretary of the Army for Financial Management and Comptroller).

³⁵ Memorandum from Under Sec’y of Defense to Principal Officials of the Dep’t of Defense, subject: Additional Guidance for Handling Budgetary Uncertainty in Fiscal Year 2013 (23 May 2013).

³⁶ *Id.* at 5.

On 6 November 2013, the DoD Deputy Chief Management Officer issued DoD Conference Guidance 2.0.³⁷ The new conference guidance specifically canceled and replaced the DoD conference guidance from 29 September 2012.³⁸ On 18 December 2013, the Secretary of the Army issued a new comprehensive Army conference policy, Army Directive 2014-01.³⁹ With the issuance of Army Directive 2014-01, commands seeking to sponsor or attend conferences, and judge advocates reviewing conference requests, no longer needed to interpret multiple policy memoranda. The new Army conference policy includes the process for determining whether an event is a conference; contains the process for completing and reviewing conference requests; and introduces new approval authorities and reporting requirements.⁴⁰ To further assist Army conference planners, legal reviewers, and potential attendees, the AASA, who continues to be the Army conference manager,⁴¹ furnished templates on its conference homepage for both conference requests and legal reviews.⁴²

III. Does the Event Qualify as a Conference?

Current DoD and DA policies generally establish three types of events: (1) events not considered conferences; (2) exempt conferences; and (3) conferences.⁴³ Therefore, the first step in conference analysis is to resolve whether a proposed event qualifies as a conference.⁴⁴ To qualify as a conference, the event must meet the definition of a conference⁴⁵ and must exhibit sufficient “indicia” of a

conference.⁴⁶ Regardless of the name,⁴⁷ when an event exhibits sufficient indicia of a conference, it must go through the conference approval process.⁴⁸ Indicia of a conference include: attendee travel; registration process; registration fees; a published substantive agenda; scheduled speakers; sponsor fees; affiliated social events; the use of official representational funds (ORF); and multi-day schedules.⁴⁹ No single indicator is sufficient to make an event a conference.⁵⁰ If the event does not exhibit sufficient indicia of a conference, the conference policy does not apply to the event and the event does not require conference approval; thus, normal TDY procedures should be followed.⁵¹

IV. Exemptions

Although an event exhibits enough indicators of a conference, it may qualify for an exemption. In DoD Conference Guidance 2.0, the Department of Defense acknowledged several exempt activities not considered conferences, even if they have sufficient indicia of a conference.⁵² The new Army conference policy also recognizes exemptions; but, unlike DoD Conference Guidance 2.0, it distinguishes between events that are explicitly exempt and events that are exempt only if the proper approval authority grants a request for exemption.⁵³ Therefore, if the event qualifies as a conference, the next step in the review process is to determine if an exemption applies and, if one does, whether it requires approval.

³⁷ Memorandum from Deputy Chief Mgmt Officer to Principal Officials of the Dep’t of Def., subject: Implementation of Updated Conference Oversight Requirements (6 Nov. 2013). The DoD Conference Guidance 2.0 is attached to the memorandum, although not identified as an attachment.

³⁸ *Id.* at 5.

³⁹ ARMY DIR. 2014-01, *supra* note 1.

⁴⁰ *Id.* enclosure 1.

⁴¹ *Id.*

⁴² *Army Conferences Policy and Templates*, OAA.ARMY.MIL, <https://securecac.hqda.pentagon.mil/oaacustomer/conferences.aspx> (last visited June 11, 2014). Access to the Army Conferences portal on the Office of the Administrative Assistant (OAA) website requires a common access card. The templates found at the OAA homepage are extremely helpful and should be used by commands in preparing conference requests and by the judge advocate who reviews the request.

⁴³ E-mail from Jack Cahill, Army Conferences Mgmt., Resources and Programs Agency, Office of the Admin. Assistant to the Sec’y of the Army to the author (Jan. 25, 2013, 3:13pm) [hereinafter Cahill E-mail].

⁴⁴ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 2.

⁴⁵ U.S. DEP’T OF DEF. JOINT FEDERAL TRAVEL REGULATION/JOINT TRAVEL REGULATION (JFTR/JTR) app. A, at A1-6 (May 1, 2014) [hereinafter JFTR/JTR]. Conference is defined as “[a] meeting, retreat, seminar, symposium, or event that involves attendee travel.” *Id.* This definition “[a]lso applies to training activities that are conferences under 5 U.S.C § 410.404 [and] [d]oes not include regularly scheduled courses of

instruction conducted at GOV’T/commercial facility.” *Id.* Army Directive 2014-01, however, does not exempt formal classroom training in commercial facilities. *Id.*

⁴⁶ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 3.

⁴⁷ *Id.* (“Conferences are often referred to as expositions, conventions, symposiums, seminars, workshops, exhibitions, or meetings.”).

⁴⁸ *Id.*

⁴⁹ *Id.*; see, e.g., Cahill E-mail, *supra* note 43.

⁵⁰ *Id.* (“Generally, the presence or absence of any one indicator is not enough to determine whether the event is a conference; you must weigh the presence of multiple indicia.”).

⁵¹ *Id.* (“Events that are not characterized as a conference under this policy do not require further action as a conference.”).

⁵² U.S. DEP’T OF DEFENSE CONFERENCE GUIDANCE 2.0, pt. IV, para. 4 (Nov. 6, 2013). The DoD Conference Guidance 2.0 is attached to Memorandum from Deputy Chief Management Officer to Principal Officials of the Dep’t of Defense, subject: Implementation of Updated Conference Oversight Requirements.

⁵³ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 5.

A. Explicit Exemptions

Army conference guidance identifies four explicit exemptions.⁵⁴ If an explicit exemption applies, the event is not considered a conference,⁵⁵ and there is no requirement to track or report it.⁵⁶ The four explicit exemptions are: (1) “[m]eetings necessary to carry out statutory command and staff oversight functions,” such as investigations or inspections; (2) formal classroom training that is regularly scheduled and conducted at government or military facilities or educational institutions; (3) “[c]hange of command, funerals, official military award, or other such ceremonies” so long as they are not held in conjunction with a conference; and (4) meetings of certain advisory committees where membership consists of one or more members who are not full-time federal employees.⁵⁷ If an event does not clearly meet the explicit exemption criteria, the command must classify it as a conference and continue with the conference approval process.⁵⁸

B. Exemptions Requiring Approval

The Army conference guidance recognizes four types of events that may be exempt with approval.⁵⁹ Army Directive 2014-01 provides a table containing the exemption criteria, decision factors, and approval authority for each.⁶⁰ Meetings to consider internal agency business matters are the first type of event that may necessitate an exemption approval.⁶¹ These events may not be conferences, and the conference policy instructs commands to seek advice from a legal

advisor.⁶² If no clear indication exists that the event is not a conference, the command should request an exemption.⁶³ The second type of a potentially exempt event is a bilateral or multilateral international cooperation engagement.⁶⁴ Events with a primary purpose of military or civilian recruiting and/or recruitment advertising make up the third category.⁶⁵ The last type of event is “[m]eetings necessary to carry out planning or execution of operational or operational exercise activities, or predeployment, deployment, or post-deployment activities.”⁶⁶

Events requiring exemption approval have a tiered approval authority system depending on the cost and/or location of the event. Heads/commanders of direct reporting units (DRUs) and Army Service Component Commands (ASCCs) headed by general officers or senior executive service employees, commanding generals and deputy commanding generals of Army Commands, HQDA principal officials, the Principal Deputy Assistant Secretary of the Army (Acquisition, Logistics, and Technology), or the Deputy Administrative Assistant to the Secretary of the Army may approve exemptions for this category of events costing less than \$100,000 and held in a government or military facility.⁶⁷ Where the event costs between \$100,000 and \$500,000 or is held in a commercial facility, the Chief of Staff of the Army (CSA), Vice Chief of Staff of the Army (VCSA), Director of the Army Staff (DAS),⁶⁸ commanding generals of FORSCOM, TRADOC, or Army Material Command (AMC),⁶⁹ or the AASA are the approval authorities.⁷⁰ For any event in this category with a cost to

⁵⁴ *Id.* (presenting a departure from prior Army conference guidance contained in Memorandum from Secretary of the Army to Principal Officials of Dep’t of Army, subject: Interim Guidance for Implementation of New OSD Conference Policy (Oct. 17, 2012), which required all exemption requests to be forwarded to the Administrative Assistant to the Secretary of the Army for approval).

⁵⁵ *Id.* Although conference rules do not apply to events that are explicitly exempt, attendees at such events must follow local policy regarding travel, must comply with the Joint Federal Travel Regulation, and must adhere to other applicable travel guidance promulgated by the Secretary of the Army. *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 6. The table containing exempt conferences requiring approval, found at page 6 of ARMY DIR. 2014-01, includes a fifth category of event, formal classroom training held at *commercial* facilities. Although the DoD lists this category as one that is exempted, DA further limited this category by ruling that such training events are *not* exempt and must be processed as conferences. The OAA conference homepage furnishes an exemption determination tool to assist exemption approval authorities decide and document their decisions. *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* More than likely, these events should be considered conferences only when they exhibit sufficient indicia of a conference, or involve non-DoD or non-federal entities. *Id.*

⁶³ *Id.* at 5 (“If you cannot make a clear-cut determination, categorize the event as a conference and process it under this policy.”).

⁶⁴ *Id.* Army Service Component Commands having significant security cooperation missions will be particularly interested in obtaining exemptions for security cooperation events.

⁶⁵ *Id.*

⁶⁶ *Id.* This category includes meetings to plan and prepare war games, military exercises, and operational deployments, as well as the execution of these events. *Id.*

⁶⁷ *Id.* at 6. The Deputy Administrative Assistant to the Secretary of the Army is the approval authority for Army Organizations that do not fall under one of the other approval authorities. *Id.*

⁶⁸ *Id.* The Chief of Staff of the Army (CSA), Vice Chief of Staff of the Army (VCSA), and Director of the Army Staff (DAS) are approval authorities for HQDA Offices of the CSA, VCSA, DAS, and Sergeant Major of the Army (SMA), and Army Service Component Commands (ASCCs) and Direct Reporting Units (DRUs) reporting directly to the CSA. *Id.*

⁶⁹ *Id.* (for units falling under each of those Major Commands (MACOMs), respectively).

⁷⁰ *Id.* (for Army units that do not fall directly under any of the other approval authorities).

the Army exceeding \$500,000, the AASA is the approval authority.⁷¹

Conference approvals must be in writing and the signed document, along with all supporting documentation, must be retained for five years.⁷² Additionally, the Secretary of the Army, through the Office of the Administrative Assistant, maintains oversight of exemption approvals since they must be reported to the Office of the Administrative Assistant to the Secretary of the Army upon request.⁷³ Therefore, exemption approval authorities should carefully consider exemption requests and strictly adhere to the requirement that “[e]xemptions . . . be granted only when a *clear determination* can be made.”⁷⁴ Also, although legal reviews for exemption requests are not required by the Army conference policy, judge advocates would be well-advised to include legal reviews with exemption requests.⁷⁵

V. Analysis of Conference Requests

When an event exhibits sufficient indicia of a conference and does not qualify for an exemption, commands must follow conference approval procedures.⁷⁶ There are four conference categories:⁷⁷ Army-hosted conferences;⁷⁸ Army co-sponsored conferences;⁷⁹ conferences hosted by non-Army DoD organizations;⁸⁰ and

⁷¹ *Id.* The AASA is the approval authority for any exemption request for an event that exceeds \$500,000 in costs.

⁷² *Id.* at 7.

⁷³ *Id.* at 10. Army Directive 2014-01 states that requests for reporting are expected to be quarterly, and it will likely be similar to the quarterly data call in effect pursuant to previous Army conference guidance. *Id.*

⁷⁴ *Id.* at 5 (emphasis added).

⁷⁵ Legal reviews were required for exemption requests pursuant to Memorandum from Admin. Assistant to the Sec’y of Army to Principal Officials of the Dep’t of Army, subject: Supplemental Conference Guidance and Data Call for Proposed FY 13 Conferences (Oct. 29, 2012) (requiring legal reviews for exemption requests).

⁷⁶ Cahill E-mail, *supra* note 43.

⁷⁷ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 3.

⁷⁸ *Id.*

⁷⁹ *Id.* Co-sponsored conferences may be conducted with other U.S., foreign, or multi-government organizations, such as NATO, or with other non-federal entities. *Id.* A co-sponsorship occurs when the Army “develops the substantive aspects of the event or provides substantial logistical support, as defined by the JER, or the Army provides more than 50 percent or more of the speakers at a single conference.” U.S. DEP’T OF DEF., 5500.7-R, JOINT ETHICS REGULATION (JER) para. 3-207 (30 Aug. 1993) (C7, 17 Nov. 2011).

⁸⁰ ARMY DIR. 2014-01, *supra* note 1, at 4. The DoD organization sponsoring the conference is responsible for obtaining conference approval; Army attendees are responsible for complying with local, Department of the Army (DA), or DoD travel policies. *Id.*

non-DoD hosted conferences.⁸¹ Approval procedures depend on the type of conference being considered.⁸² The cost of the conference determines the approval authority.⁸³

A. Approval Authorities

Conference approval authority for both Army-sponsored conferences and conferences hosted by non-DoD organizations depends on the cost of the conference.⁸⁴ For Army-sponsored conferences with a cost exceeding \$500,000, and for non-DoD-hosted conferences with a cost exceeding \$50,000, the conference approval authorities are the Secretary of the Army or Under Secretary of the Army.⁸⁵

The approval authorities for Army-sponsored conferences costing \$100,000 to \$500,000, and non-DoD-hosted conferences costing \$10,000 to \$50,000 are:

(1) the CSA or VCSA for HQDA offices of the CSA, VCSA, DAS, and SMA, and ASCCs or DRUs reporting directly to the CSA;

(2) CG FORSCOM for all units reporting to FORSCOM;

(3) CG TRADOC for all units reporting to TRADOC;

(4) CG AMC for all units reporting to AMC; and

(5) AASA for any organizations that do not report to any of the other approval authorities.⁸⁶

⁸¹ *Id.* Any conference hosted by an agency or organization that is not part of the DA or DoD falls within this category. Attendance at these conferences must be processed in accordance with Army Directive 2014-01. *Id.*

⁸² *Id.* at 3.

⁸³ *Id.* at 8.

⁸⁴ *Id.* The tiered conference approval authorities are carried forward from previous Army conference guidance; however, under prior Army conference direction only Secretary of the Army, Under Secretary of the Army, or Administrative Assistant to the Secretary of the Army could approve attendance at conferences hosted by non-DoD organization, depending on the cost of attending the conference. See Memorandum from Sec’y of Army to Principal Officials of Dep’t of Army, subject: Interim Guidance for Implementation of New OSD Conference Policy (Oct. 17, 2012) (superseded by Army Directive 2014-01).

⁸⁵ *Id.* The Secretary of the Army or Under Secretary of the Army are also the approval authorities for any conferences, regardless of cost, that involve spouse travel at government expense. U.S. DEP’T OF ARMY, DIR. 2007-01, POLICY FOR TRAVEL BY DEPARTMENT OF ARMY OFFICIALS 20–25 (25 Jan. 2007) (governing Army spouse travel).

⁸⁶ ARMY DIR. 2014-01, *supra* note 1, enclosure 1. The Army conference policy contains a table to assist commands in determining the proper approval authority for events.

Army-sponsored conferences costing less than \$100,000 and conferences hosted by non-DoD organizations costing less than \$10,000 may be approved by heads or commanders of DRUs or ASCCs,⁸⁷ commanding generals or deputy commanding generals of Army Commands, HQDA Principal Officials,⁸⁸ and the Principal Deputy Assistant Secretary of the Army (Acquisition, Logistics, and Technology).⁸⁹

B. Approval Procedures for Army-Sponsored and Co-Sponsored Conferences

Approval procedures for Army-sponsored conferences are contained in Section II of Enclosure 1 to Army Directive 2014-01.⁹⁰ Co-sponsored conferences are treated as Army-sponsored conferences for approval purposes.⁹¹ The Army conference policy mandates requests use a template found at the Office of the Administrative Assistant (OAA) conference home page.⁹² Additionally, the endorsement level of all requests is one level lower than the approval authority, and requests are due at the approval authority at least sixty days prior to the event.⁹³ All conference requests must provide an attached legal review and address the elements identified below.

1. Dates of Conference

The request must identify the dates of the conference, including travel days.⁹⁴ The Army conference policy

⁸⁷ *Id.* Only commanders and heads of DRUs or ASCCs who are general officers or senior executive service employees have conference approval authority. *Id.*

⁸⁸ *Id.* (list of HQDA Principal Officials available at <https://www.army.mil/info/organization/headquarters/hqda/> (last visited May 30, 2014)).

⁸⁹ *Id.*

⁹⁰ *Id.* at 10–21.

⁹¹ *Id.* at 22. Co-sponsorships with commercial non-federal entities implicate the Joint Ethics Regulation (JER) and require prior approval of a co-sponsorship agreement, in accordance with JER para. 3-206, approved separately from the conference approval request. The JER does not apply to co-sponsorships with foreign governments or multi-governmental organizations, such as NATO, but Army Directive 2014-01 recommends entering into a co-sponsorship agreement to clarify each party's responsibilities. *Id.*

⁹² *Id.* at 11; see Army Conferences, *supra* note 42 (providing OAA conference home page). Office of the Administrative Assistant and Office of the Administrative Assistant to the Secretary of the Army are synonymous.

⁹³ *Id.* For example, an Army-hosted conference costing \$150,000 requested by U.S. Army Europe (USAREUR) must be endorsed by the USAREUR Commanding General (CG) and received by the Chief of Staff for the Army (CSA) not later than sixty days prior to the planned event.

⁹⁴ *Id.* at 12.

requires the length of the conference be limited to the time necessary to meet mission requirements.⁹⁵ Social activities may not be held during normal duty hours and may not be used to extend conference attendees in travel status.⁹⁶ While military awards ceremonies may be held during duty hours as official business, they cannot extend the time attendees are in TDY status.⁹⁷

2. Purpose and Justification

Conference requests must state the purpose and justification of the conference.⁹⁸ Army policy regarding conferences presumes that co-location is unnecessary.⁹⁹ To overcome this presumption, the request must provide sufficient information to convince the approval authority that the “conference will further the Army’s mission.”¹⁰⁰ The policy also directs that the request “must certify that hosting the event is mission-critical for all proposed attendees. In addition to this statement, the request *must provide sufficient information to fully substantiate and justify how the event is mission-critical for all proposed attendees.*”¹⁰¹

Army conference guidance contains two new requirements for approval requests. Conference requests must state whether the conference has been held before and include the dates and locations of the previous conference.¹⁰²

⁹⁵ *Id.*

⁹⁶ *Id.* As a practical matter, when conducting a legal review of a conference request, it is important to ensure that any social activities, such as ice breakers, military balls, or golf tournaments, are conducted after duty hours and not on the last day of any conference.

⁹⁷ *Id.* Conference planners should ensure that award ceremonies are not the only event planned for the last day of a conference before attendees are released to return to their duty locations.

⁹⁸ *Id.* The purpose and justification portion of a conference request is, perhaps, the most important part of the request since it is the part of the request where the party requesting the conference convinces the approval authority that the event is mission-critical.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (“Every attendee and every member of the support staff must be justified as mission-critical.”). This requirement is more stringent than prior guidance contained in Memorandum from Sec’y Army to Commander, U.S. Army Forces Command, et al., subject: Delegation of Authority to Approve Conferences (Oct. 18, 2012), which mandated only that the event be mission-essential, and Memorandum from Sec’y of Army to Principal Officials of Dept’ of Army, et al., subject: Risk Mitigation in the Face of Fiscal Uncertainty (Jan. 16, 2013), which required conferences be mission-critical. There is no indication in the guidance of any difference in the terms mission-essential and mission-critical, but mission-critical persists in the most recent DoD and DA conference guidance.

¹⁰² *Army Conferences Policy and Templates*, *supra* note 42. A copy of the Army-hosted conference request template is available on the OAA.ARMY.MIL homepage under “Templates” and is attached as Appendix B.

Additionally, the request should provide a justification for holding the conference again and include a copy of the after action report (AAR) of the previous conference.¹⁰³ These requirements highlight the need for accurate recordkeeping by commands.

3. Cost Benefit Analysis

A conference request must contain a cost-benefit analysis.¹⁰⁴ This paragraph of the conference request must state the conference objectives and declare that meeting those objectives requires attendee travel.¹⁰⁵ If a conference requires travel, the request must include a certification that the conference objectives cannot be met by cheaper alternative means, such as teleconferencing, video teleconferencing, web-based training, train-the-trainer, or other means.¹⁰⁶

4. Site Selection and Venue

The conference request must include information pertaining to the site selection and data to support the selection of the city and venue.¹⁰⁷ Conference policy mandates that military or government facilities are the first choice for conference venues to support the goal of conducting conferences at the least expensive location that meets the requirements of the conference.¹⁰⁸ On-post Morale, Welfare, and Recreation (MWR) facilities and the Armed Forces Resort Centers, such as Edelweiss in Garmisch, Germany, or Shades of Green in Orlando, Florida, are considered government facilities for purposes of conference approval procedures.¹⁰⁹ If the venue is a commercial facility, the request must specify attempts made to secure a government or military location and explain why neither is being used.¹¹⁰ Selection of commercial facilities requires: (1) a demonstrated cost savings compared to a government/military facility, and (2) a rationale why government or military facilities are not adequate to meet

¹⁰³ *Id.*

¹⁰⁴ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 12.

¹⁰⁵ *Army Conferences Policy and Templates*, *supra* notes 42 and 102.

¹⁰⁶ *Id.*

¹⁰⁷ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 12. Although Army Directive 2014-01 suggests that information relating to site selection and venue are part of the cost-benefit analysis, the conference request template requires site selection analysis to be a separate paragraph.

¹⁰⁸ *Id.*

¹⁰⁹ E-mail from Lori Kimmons, Resources and Programs Agency, Special Programs Office, Office of the Admin. Assistant to the Sec'y of the Army to author (Dec. 19, 2012, 3:54 PM).

¹¹⁰ *Army Conferences Policy and Templates*, *supra* notes 42 and 102.

conference requirements, such as operational necessities.¹¹¹ Conference planners must change conference dates if adequate government facilities are available in the selected location on dates different from the planned dates.¹¹²

When selecting a venue, conference planners must consider at least three cities.¹¹³ Once planners select a particular city, they must consider at least three venues within the city.¹¹⁴ If planners choose a commercial facility, it must be on the list of approved accommodations maintained by the Federal Emergency Management Agency.¹¹⁵ Conference planners must use factors listed in Army Directive 2014-01 in deciding on a conference venue.¹¹⁶ The conference policy requires commands to document and maintain a record of the conference selection process.¹¹⁷ Commands should be aware that their conference requests and approvals are subject to audit.

5. Attendees

Conference requests must include a breakdown of all conference attendees.¹¹⁸ Conference planners must use the attendee table contained in the conference request template to account for all attendees.¹¹⁹ To capture all costs to the

¹¹¹ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 16.

¹¹² *Id.* (“Government and military locations may not be ruled out as a conference venue solely because the facility is not available on the exact dates the sponsor wants to hold the conference.”). There is no guidance or standard in the directive concerning what would be reasonable in terms of date changes for a conference based on facility availability, leading to uncertainty for conference planners as to how far left or right from their preferred conference dates the planner should consider.

¹¹³ *Id.* at 15. When selecting among cities, conference planners must consider per diem expenses, travel costs, distance from most attendees, and seasonal rates (among other considerations) to obtain the most cost-effective venue for the Army.

¹¹⁴ *Id.* Planners must always keep in mind the preference for government facilities.

¹¹⁵ *Id.* A list of approved accommodations is available at <http://usfa.fema.gov/applications/hotel> (last visited June 11, 2014) (providing an easy-to-use search engine for a convenient method of searching approved accommodations). Note that Outside the Continental United States locations are not included in the list of approved accommodations.

¹¹⁶ *Id.* The non-exclusive list of factors includes: availability of on-post lodging; participation in the Lodging Success Program; distance to the nearest airport; availability of free airport-shuttle service; cost of the venue; availability of rooms below the per diem rate; and public perception. *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 13 (explaining that the breakdown of attendees will identify the numbers of attendees in each category: (1) DA military, (2) DA civilian; (3) non-Army U.S. military, (4) contractors; (5) Army funded spouses; (6) contractors; and (7) other attendees such as guest speakers, statutory volunteers, or other federal government employees).

¹¹⁹ *Id.*

Army, planners must include as attendees conference participants, support staff, aides, presenters, guest speakers, and non-Army personnel.¹²⁰ Commands must limit the list of attendees to the minimum number of attendees necessary to achieve conference objectives.¹²¹ The request needs to include the criteria used to select attendees, along with an explanation of why the command selected each attendee.¹²² Lastly, the conference request must specifically state why each attendee is mission critical.¹²³

6. Security Assessment

A security assessment must be conducted and attached to the conference request for all conferences held in a commercial facility.¹²⁴ The security assessment must include a force protection assessment, a statement indicating if foreign government personnel will attend, and a statement indicating the conference's classification level.¹²⁵ If there are foreign government personnel attendees, the security assessment needs to contain a statement that the conference sponsor has coordinated with the Deputy Chief of Staff, G2 and will comply with the requirements of Army Regulation 380-10 (Foreign Disclosure and Contacts with Foreign Representatives).¹²⁶

7. Conference Funding

The new conference request template requires an explanation of how the conference will be funded.¹²⁷ If planners expect to use ORF, they must explain the use of ORF in the conference request.¹²⁸ In addition, the conference request must include information concerning contracting procedures and any contract documents should be attached to the conference request.¹²⁹

¹²⁰ *Id.*

¹²¹ *Army Conferences Policy and Templates, supra* notes 42 and 102.

¹²² *Id.* In practice, commands should use a spreadsheet or some other method of documenting each attendee along with the selection criteria used for selecting attendees.

¹²³ *Id.*

¹²⁴ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 13.

¹²⁵ *Id.* at 14 (stating local installation Departments of Emergency Services can assist with force protection assessments).

¹²⁶ *Id.* (providing coordination with the Deputy Chief of Staff, G2 requires 120 days before the conference date).

¹²⁷ *Army Conferences Policy and Templates, supra* notes 42 and 102.

¹²⁸ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 16. Official representation funds (ORF) are requested and approved separately from conferences.

¹²⁹ *Army Conferences Policy and Templates, supra* notes 42 and 102.

8. Meals, Per Diem, Refreshments, and Fees

Conference requests must address meals, per diem, refreshments, and fees.¹³⁰ Conference requests need to indicate any meals provided at government expense. If furnished as part of a government contract or conference registration fee, they are government provided meals.¹³¹ If the government supplies all meals at government expense, the cost of the meals may not exceed the meals per diem for the location of the conference.¹³² If the government provides fewer than all the meals at government expense, planners must use the proportional meal rate (PMR).¹³³ If planners use the PMR, the total of the PMR plus the cost of government provided meals cannot exceed the total meals per diem for the location.¹³⁴ If served during normal meal times, planners must consider government-provided refreshments as meals.¹³⁵ Generally, Army policy prohibits light refreshments, not considered a meal, unless they cannot be eliminated from the contract and the venue will not reduce the rate if refreshments are not provided.¹³⁶ Lastly, conference requests must account for any fees charged to offset conference costs as well as any fees charged by guest speakers.¹³⁷ Planners must capture all estimated conference costs and enter them into a table in the conference request template.¹³⁸ Conference planners must ensure that they do not include any expressly prohibited expenses.¹³⁹

¹³⁰ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 19. Meals, per diem, and refreshments are addressed in paragraphs 9 and 10 of the conference request template.

¹³¹ *Id.* Travelers must ensure that they properly annotate government furnished meals on their travel vouchers. *Id.*

¹³² *Id.* If all meals are provided at government expense, the traveler may only claim incidental expenses. *Id.*

¹³³ JFTR/JTR, *supra* note 45, app. R1, at 4.

¹³⁴ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 19. For example, if one meal costing \$10 is provided at government expense and the proportional meal rate is \$55, the meals per diem for the location cannot be less than \$65. *Id.*

¹³⁵ JFTR/JTR, *supra* note 133. Oftentimes, icebreakers are held on the opening evening of a conference during dinner hours, and if light refreshments are served, it is considered a government furnished meal. *Id.*

¹³⁶ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 20 (otherwise referred to as "nonsegregable" and "nonseverable"). Conference sponsors should be prepared to provide evidence that refreshments are, in fact, nonsegregable and nonseverable.

¹³⁷ *Id.* at 17 (stating honorariums and speakers' fees are limited to \$2,000 per speaker).

¹³⁸ *Army Conferences Policy and Templates, supra* notes 42 and 102.

¹³⁹ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 17 (generally prohibiting entertainment-related expenses).

9. Legal Reviews

All conference requests require an attached legal review.¹⁴⁰ “The legal review must address all fiscal, ethic[al], contracting, and travel issues, including a comprehensive assessment of whether the conference complies with applicable regulations and Army policy.”¹⁴¹ The Office of the Administrative Assistant’s conference homepage provides a template for conducting legal reviews of Army-sponsored conferences.¹⁴² In the legal review, the judge advocate must address all required portions of the conference request and note any legal objections.¹⁴³ Planners must address any legal objections before forwarding the conference request to the approval authority.¹⁴⁴

C. Conference Sponsored by Non-federal Entities and Non-DoD Organizations

This subsection discusses requests to attend conferences sponsored by non-DoD organizations and non-federal entities.¹⁴⁵ Non-federal entities may sponsor, co-sponsor, or be co-located with conferences. Such conferences are treated as Army-sponsored conferences for purposes of conference approval procedures.¹⁴⁶ However, these conferences may be subject to provisions of the Joint Ethics Regulation (JER).¹⁴⁷

Requests to attend any conference sponsored by a non-DoD organization must use the non-DoD conference request template.¹⁴⁸ As with Army-sponsored conferences, requests to attend non-DoD conferences must justify attendance and certify that attending the conference is mission-critical for all proposed attendees. Specifically, the request “*must provide sufficient information to fully substantiate and justify how the event is mission-critical for all proposed attendees.*”¹⁴⁹ Requests to attend a conference sponsored by

a non-DoD entity must include the conference agenda as an attachment.¹⁵⁰

Requests to attend non-DoD conferences require a cost-benefit analysis explaining the expected benefit of attendance, along with a description of exactly what the Army is paying for and a certification that less expensive methods are not available.¹⁵¹ The request also needs to include a breakdown of conference attendees and a justification for each attendee.¹⁵² Lastly, the request must contain a breakdown of the total cost to the Army for attending the conference.¹⁵³ In calculating the cost for attending the conference, it is important to keep in mind that any meals provided as part of a government-paid conference fee are considered government-furnished meals.¹⁵⁴

Army Directive 2014-01 mandates legal reviews for requests to attend non-DoD conferences, and must be included with the request as an attachment.¹⁵⁵ The OAA conference homepage contains a template for legal reviews of non-DoD conferences, the use of which ensures that they are thorough and complete.¹⁵⁶

D. Local and No-Cost Conferences

In addition to the four main categories of conferences, two additional conference categories may require approval: local conferences and no-cost conferences.¹⁵⁷ The Army conference policy specifies events held at the local duty location and not involving travel may nevertheless be conferences if there is any cost to the Army.¹⁵⁸ If a local event incurs any cost to the Army, the conference sponsor must submit a conference request in accordance with Army

¹⁴⁰ *Id.* at 14.

¹⁴¹ *Id.*

¹⁴² *Army Conferences Policy and Templates*, *supra* notes 42 and 102. A copy of the legal review template is available on the OAA.ARMY.MIL homepage under “Templates” and is attached as Appendix C.

¹⁴³ *Id.*

¹⁴⁴ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 14.

¹⁴⁵ For purposes of conference approval procedures, any entity or organization that is not part of the Department of Defense is treated identically.

¹⁴⁶ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 21.

¹⁴⁷ *See, e.g.* JER, *supra* note 79, ch. 3.

¹⁴⁸ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 24.

¹⁴⁹ *Id.* (“Attendees must be kept to the minimum mission-critical number”).

¹⁵⁰ *Id.* at 25.

¹⁵¹ *Army Conferences Policy and Templates*, *supra* notes 42 and 102. A copy of the template for non-DoD conference requests under \$50,000 is available on the OAA.ARMY.MIL homepage under “Templates” and is attached as Appendix D.

¹⁵² *Id.* The non-DoD conference request template includes a number of factors that may be considered in making the mission-critical determination.

¹⁵³ *Id.* In calculating the cost to the Army, one must consider any gifts of travel under 31 U.S.C. § 1353.

¹⁵⁴ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 27.

¹⁵⁵ *Id.* at 26.

¹⁵⁶ *Army Conferences Policy and Templates*, *supra* notes 42 and 102. A copy of the template for legal reviews of non-DoD-hosted conferences is available on the OAA.ARMY.MIL homepage under “Templates” and is attached as Appendix E.

¹⁵⁷ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 4.

¹⁵⁸ *Id.*

Directive 2014-01.¹⁵⁹ Likewise, on occasion, Army personnel may be invited to attend conferences sponsored by non-federal entities at no cost to the Army through waived registration fees or gifted travel pursuant to 31 U.S.C. § 1353.¹⁶⁰ If attendance at a conference is truly at no cost to the Army, a conference request is not required.¹⁶¹ However, the Army conference policy cautions care when accepting gifts of travel because certain travel-related expenses, such as parking and per diem on travel days, may not be covered by the offered gift.¹⁶² Army Directive 2014-01 requires conference requests if there is any reimbursable cost to the Army.¹⁶³ As a practical matter, however, offered gifts of travel should be handled before completing the conference request since such gifts will likely reduce the cost to the Army and may improve the chances of conference approval.

VI. Reporting Requirements

To maintain oversight of conferences sponsored and attended by DoD personnel, DoD Conference Guidance 2.0 established a series of reporting requirements for DoD components.¹⁶⁴ To implement them, the Secretary of the Army included conference reporting requirements in Army Directive 2014-01.¹⁶⁵ Any conferences “considered to have particularly high visibility or [that] exhibit unusual circumstances” must be reported to the Office of the Administrative Assistant during the planning process.¹⁶⁶ Within five days after approval of any conference action,

¹⁵⁹ *Id.* Costs to the government could include, for example, mileage reimbursement, parking fees, or meal reimbursement where local travel exceeds twelve hours. *Id.*

¹⁶⁰ Title 31 U.S. Code Section 1353 is the authority for the acceptance of gifts of travel and travel related expenses. The travel must be in the interests of the Government. Cash may not be accepted by DoD employees. Additionally, the Secretary of the Army Travel policy provides specific requirements for the acceptance of travel related gifts under 31 U.S.C. § 1353. Offered gifts of travel related expenses may be accepted so long as the offer was: (1) unsolicited and completely voluntary; (2) is only used for official travel; (3) is used for a conference or other similar function; (4) does not create a conflict of interest; and (5) acceptance would not cause a reasonable person in possession of the relevant facts to question the integrity of Army programs or operations. (Army Directive 2007-01 regulates acceptance of gifts of travel pursuant to 31 U.S.C. § 1353.).

¹⁶¹ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 4 (“For conferences involving absolutely no reimbursable travel or attendance costs, or other Army expenditures, conference approval is not necessary.”).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ DEP’T OF DEF. CONFERENCE GUIDANCE 2.0 (Nov. 6, 2013), *supra* note 53, at 19.

¹⁶⁵ ARMY DIR. 2014-01, *supra* note 1, enclosure 1, at 9–10.

¹⁶⁶ *Id.* Unusual circumstances means conferences with a particularly high cost, conferences with media or congressional interest, conferences that involve controversial topics, or that may have an appearance of impropriety due to location or planned events. *Id.*

commands must forward the written approval and conference request packet to OAA.¹⁶⁷ Within twenty-five days after the end of any conference, organizations must furnish OAA with an AAR.¹⁶⁸ For Army-hosted conferences, the organization hosting the conference will submit the AAR.¹⁶⁹ For conferences hosted by non-DoD organizations, each command requesting approval to attend the non-DoD conference supplies the AAR for its personnel to OAA.¹⁷⁰

VII. Conclusion

Conference oversight is clearly a priority at the highest levels of the DoD. Although the new conference guidance and the availability of online tools at the OAA conference homepage have simplified the conference request and approval process somewhat, preparation of conference requests sufficient to obtain approval will remain a challenge to commands. Through a thorough understanding of DoD and DA conference policies, travel and ethics regulations, and their commanders’ missions, judge advocates will enable their commands to more effectively and efficiently navigate the new conference guidance.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* Conferences costing more than \$50,000 require a full AAR, whereas conferences costing less than \$50,000 require a “simplified closeout report . . .” *Id.* Templates for the AAR and closeout reports are located on the OAA conference homepage. See *Army Conferences Policy and Templates*, *supra* note 42.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

Appendix A

ARNORTH Army Conference Policy¹⁷¹

Army Conference Policy –

Determining the Appropriate Level Approval for Conference Hosting and Attendance

This worksheet is designed to assist command conference planners in determining the appropriate level approval for conferences sponsored by ARNORTH, or conferences that ARNORTH personnel desire to attend in furtherance of their official duties. This worksheet is prepared in accordance with the Army Conference Policy, dated 18 December 2013. The Command Conference Manager should be contacted as soon as you start planning a conference or desire to attend a conference. If you have questions about the criteria listed below, please contact the Administrative and Civil Law Division, Office of the Staff Judge Advocate, at (210)221-2373.

I. Determination of a Conference		
<p>Does the event qualify as a “conference?”</p> <p>1. <u>JFTR/JTR definition of a “conference”</u> – “[a] meeting, retreat, seminar, symposium or <i>event that involves attendee travel</i>. Also applies to training activities that are considered to be conferences under 5 C.F.R. § 410.404.”</p> <p>2. Indicia of a Conference: They typically involve (a) topical matters of interest, and the participation of, multiple agencies and/or non-Federal participants; (b) Registration process; (c) Registration fees; (d) a published substantive agenda (multiple-day agendas); (e) speakers or discussion panels; and (f) affiliated social events. (Note: Generally, the presence or absence of any one indicator is not enough to determine whether the event is a conference; you must weigh the presence of multiple indicia.)</p> <ul style="list-style-type: none"> • <i>Events meeting the JFTR/JTR definition and held in commercial facilities normally will be categorized as conferences regardless of other indicia.</i> • <i>If you cannot make a clear-cut determination, categorize the event as a conference and process it accordingly.</i> 	<input type="checkbox"/> YES Go to Block II below.	<input type="checkbox"/> NO  Events not categorized as a conference under this policy do not require further action as a conference. However, ARNORTH personnel must follow DoD, Army and agency’s TDY policies for approval and abide by all pertinent travel policies and guidelines.
II. Exemptible Conferences		
<p>1. <u>Explicit Exemptions:</u> Can the event be properly categorized as one of the following?</p> <p>a. Meetings necessary to carry out statutory command and staff oversight functions (e.g., investigations, inspections, audits or site visits).</p> <p>b. Formal classroom training held in a Government or military facility or educational institution (e.g., regular courses of instruction or training seminars, or other recurring training).</p> <p>c. Change of command, official military award, funeral or other official ceremonies.</p> <p>d. Meetings of advisory committees subject to DoDI 5105.04 (DoD</p>	<input type="checkbox"/> YES This event is explicitly exempted from the Army Conference Policy. Proceed IAW your command guidance.	<input type="checkbox"/> NO Go to question II.2.

¹⁷¹ Reproduced with permission of the Army North Office of the Staff Judge Advocate.

<p>Federal Advisory Committee Management Program) where membership consists of one or more individuals who are not full-time or permanent Federal officers or employees.</p> <ul style="list-style-type: none"> • <i>When in doubt, contact your legal advisor or treat the event as a conference and process it accordingly.</i> 		
<p>2. <u>Exemptions Requiring Approval</u>: If the event can be categorized as one of the following, it requires approval. Note: Prepare the OAA-approved Exemption Determination Tool (Encl. 1) to be submitted to the appropriate approval authority.</p>		
<p>a. Meetings to consider internal agency business matters. This exemption would include activities such as meetings that take place as part of an organization’s regular course of business.</p>	<p><input type="checkbox"/> YES Need approval as specified below:</p> <p>i. Costs <\$100K, and held in a Government/military facility: CG, ARNORTH must approve.</p> <p>ii. Costs \$100K - \$500K, or held in a commercial facility: CSA/VCSA/DAS must approve.</p> <p>iii. Costs >\$500K: AASA must approve.</p>	<p><input type="checkbox"/> NO Go to question II.2.b.</p>
<p>b. Bilateral and multilateral International cooperation engagements.</p>	<p><input type="checkbox"/> YES Need approval as provided under II.2.a. above.</p>	<p><input type="checkbox"/> NO Go to question II.2.c.</p>
<p>c. Events where the primary purpose of DoD’s participation is military or civilian recruiting and/or recruitment advertising.</p>	<p><input type="checkbox"/> YES Need approval as specified below:</p> <p>i. Costs <\$50K: CG, ARNORTH must approve.</p> <p>ii. Costs \$50K or above: CSA/VCSA/DAS must approve.</p>	<p><input type="checkbox"/> NO Go to question II.2.d.</p>
<p>d. ARNORTH-hosted formal classroom training held <i>in a commercial facility</i>. This exemption would include activities such as regular courses of instruction or training seminars.</p>	<p><input type="checkbox"/> YES Need approval as specified below:</p> <p>i. Costs <\$100K: CG, ARNORTH must approve.</p> <p>ii. Costs up to \$500K: CSA/VCSA must approve.</p> <p>iii. Costs exceeding</p>	<p><input type="checkbox"/> NO Go to question II.2.e.</p>

	\$500K: SA must approve.	
e. Meetings necessary to carry out planning or execution of operational or operational exercise activities, or predeployment, deployment or post-deployment activities.	<input type="checkbox"/> YES Need approval as provided under II.2.a. above.	<input type="checkbox"/> NO Go to block III below.
III. Types of Conferences		
1. Is the conference hosted/sponsored by ARNORTH?	<input type="checkbox"/> YES Go to Block IV below.	<input type="checkbox"/> NO Go to question III.2.
2. Is the conference hosted/sponsored by another DoD/Army organization?	<input type="checkbox"/> YES Go to block V below.	<input type="checkbox"/> NO Go to question III. 3.
3. Is the conference hosted/sponsored by a non-DoD organization (e.g., another federal agency or non-Federal entity)?	<input type="checkbox"/> YES Go to block VI below.	
IV. ARNORTH-Hosted/Sponsored Conferences		
1. All requests must be received by the approval authority at least <i>60 days in advance</i> of the conference or commitment of nonrefundable funds.		Approvals must be in writing and maintained for 5 years.
2. Approval Authority:		
i. Costs exceeding \$500K (generally prohibited), or if it involves spouse travel at Government expense regardless of cost		SA
ii. Costs between \$100K and \$500K.		CSA/VCSA
iii. Costs under \$100K		CG, ARNORTH
3. Process: Prepare the OAA-approved request memo (Encl . 2), providing the following information: <ul style="list-style-type: none"> (a) Dates (including travel days) – ice breakers, receptions, socials, golf tournaments, or other ancillary activities will not be held during regularly scheduled duty hours. (b) Purpose and Justification: The justification for hosting the conference <i>must overcome the presumption that face-to-face collocation of personnel is not necessary.</i> The justification must also specifically substantiate and justify how the event is mission-critical for all proposed attendees. (c) Cost-Benefit Analysis: Provide a detailed and credible cost-benefit analysis that includes an explanation of other options considered (e.g., VTC, or train-the-trainer), as well as information on site selection and enough data to support the selected city and venue. Once the most cost-effective geographic locale is identified, <i>Government or military facilities should be the first choice for all Army hosted-conferences.</i> If a Government or military facility is not chosen, provide justification for the use of a commercial facility and a cost comparison between the venues considered. (d) Estimated Total Costs. Use the Cost Assessment and Program Evaluation cost estimating calculator (https://www.cape.osd.mil/CostGuidance/), and also the cost estimation table in the request template. 		

<p>Estimated costs must include expenses for all DoD-funded attendees, not just Army-funded attendees. Requesting organizations are responsible for gathering cost estimate data on non-Army attendees from other DoD components.</p> <p>Exempted costs:</p> <ul style="list-style-type: none"> - Employee time for conference planning and preparation; - Employee time for conference attendance; - Security cost; and - Costs associated with use of GOVs. <p>(e) <u>Substantive Agenda</u>.</p> <p>(f) <u>Security Assessment</u>.</p> <p>(g) <u>Legal Review</u>.</p> <p>(h) <u>Precontract Decision Documents</u>. The requester must include any contract-related documents that would assist the approval authority, such as the letter of intent from the hotel or a request for proposal.</p>	
<p>V. DoD-Hosted/Sponsored Conferences</p> <p>For conferences hosted by a DoD organization external to the Army, the host DoD component is responsible for estimating and reporting total DoD attendance and costs. The hosting organization is responsible for obtaining conference approval from its appropriate approval authority. As a general rule, Army conference approval is not required, but attendance will be limited to those Army personnel who are mission-critical and whose attendance was included and approved in the hosting DoD organization's request. Army attendees must follow DoD, Army and their organization's TDY policies for approval and abide by all pertinent travel policies and guidelines.</p>	
<p>VI. Non-DoD Hosted/Sponsored Conferences</p>	
<p>1. All requests must be received by the approval authority at least 30 days before the start date of the conference or before the obligation of nonrefundable funds (such as registration fees) regardless of approval authority.</p>	<p>Approvals must be in writing and maintained for 5 years.</p>
<p>2. Approval Authority:</p>	
<p>i. Costs \$50K or above.</p>	<p>SA</p>
<p>ii. Costs \$10K or above, but under \$50K.</p>	<p>CSA/VCSA</p>
<p>iii. Costs under \$10K</p>	<p>CG, ARNORTH</p>
<p>3. Process: Prepare the OAA-approved request template (Encl. 3 or 4 as appropriate), providing the following information must be provided:</p> <p>(a) <u>Dates</u>. The dates of the conference will include travel days.</p> <p>(b) <u>Purpose and Justification</u>. The justification must overcome the presumption that face-to-face collocation of personnel is not necessary. The justification must certify that attending the event is mission-critical and fully substantiate how it is mission-critical for all proposed attendees. The request also needs to clearly address how attending the conference will further the Army's mission.</p> <p>(c) <u>Estimated Total Costs</u>: Must use the cost estimation table in the OAA-approved request template.</p> <p>Exempted costs:</p> <ul style="list-style-type: none"> - Employee time for conference attendance or travel time; and - Costs associated with use of GOVs. 	

(d) Attendees. A breakdown of attendees, including the rationale and criteria applied to scope the attendee population, and the mission-critical justification for the requested number of attendees. Attendees must include all participants, including support staff, aides, guest speakers and presenters.

(e) Substantive Agenda.

(f) Legal Review.

VII. Co-sponsored Conferences

A conference is considered a co-sponsored conference if ARNORTH develops the substantive aspects of the event or provides substantial logistical support, or ARNORTH provides 50 percent or more of the speakers at a single conference. ***Requests for co-sponsored conferences must be processed and approved IAW Block IV.3 above.***

❖ ***Spousal Travel: Every instance of accompanied spouse travel represents an exception to policy. Regardless of cost, any conference requests that include Government-funded spouse travel must be approved by the SA.***

4 Encls.

1. Exemption Determination Tool.
2. Army Hosted Conference Request Template.
3. Non-DoD Over \$50K Conference Request Template.
4. Non-DoD Under \$50K Conference Request Template.

Appendix B

Army-Hosted Conference Request Template

YOUR OFFICIAL LETTERHEAD

(OFFICE SYMBOL)

(date signed)

MEMORANDUM THRU (if applicable)

FOR (Approval Authority in accordance with Army Directive 2014-01)

SUBJECT: Request Approval to (Sponsor or Cosponsor) the (Insert Name of Event),
(Dates)

1. Event. (Insert name of sponsoring proponent) requests approval to conduct the (insert name of conference), (insert dates of conference including travel days) at (insert venue, city, State, or country, if OCONUS).

2. Purpose and Justification. Explain why the conference is being held; include any applicable statutes or regulations. Explain how this conference will further the mission of the Department and any tangible benefits from hosting the event. Justify how hosting the conference is mission-critical. If the conference is being cosponsored, include a full explanation of the terms of the cosponsorship (that is, who is providing what). If the conference is cosponsored with a non-Federal entity, additional requirements apply (refer to section 2, paragraph 6 of Army Directive 2014-01).

3. Previous Conferences. If this conference was held previously, list the dates and locations, if known. If this is a recurring conference, justify why the conference should be held again and any expected differences from the previous iteration. Provide a copy of the last after action review.

4. Cost-Benefit Analysis. Explain the benefits of holding the conference. You must provide the specific objectives and/or tangible benefits you seek to achieve. Explain why lower cost alternatives (such as teleconferencing, video conferencing, or Web conferencing) were not feasible, and include any cost-saving features from previous conferences. For any conference requiring travel, include a certifying statement that the objectives of the conference cannot be satisfactorily accomplished less expensively by correspondence, teleconferencing, Web-based communications, or other appropriate means.

5. Analysis for Location Selection. Clearly indicate whether a Government/military facility or commercial facility is being used. Government-owned or leased space or military installation must be the first choice for venue. Demonstrate efforts to first secure Government or military space. If a Government/military facility is not being used for the event, explain why. Identify three geographic locations surveyed and provide a convincing business argument for the selected geographic location. (For example, you

SUBJECT: Request Approval to (Sponsor or Cosponsor) the (Insert Name of Event), (Dates)

should demonstrate where the majority of your attendees are traveling from and why the geographic location is the most cost-effective.) If a Government/military facility is not used, clearly identify the three venues considered in the geographic location where the conference will take place, including costs and any other factors used in the selection.

6. Attendees. Explain what measures were taken to discipline attendance to ensure the minimum number of attendees. Provide information on your expected attendees (for example, all general officers in the medical profession on the East Coast). Clearly articulate why these attendees have been selected to attend the conference. Certify that each attendee is mission-critical. Then complete this chart for your expected attendance:

	Local	Travel Required	Total
DA Military			
DA Civilian			
Other DoD Component (Non-Army)			
Contractors (NOTE: Include any contractors who are traveling to attend or support the conference. Explain in the narrative their role and how they are funded--through a contract line item number, etc.). Legal review should specifically address contractor attendance.			
"Other" Specify (other Federal Government personnel, statutory volunteers, guest speakers, etc.) Legal review should specifically address other attendees.			
Foreign (Military or Government)			
Government-funded spouses			
GRAND TOTAL			
Of those above*:			
Number of Army-funded attendees			
Number of DoD (non-Army) funded attendees			
Number non-DoD funded attendees (specify)			
GRAND TOTAL (should match the Grand Total above)			

* OSD conference policy requires us to report attendee numbers broken out by Army-funded, DoD-funded, and total attendance.

SUBJECT: Request Approval to (Sponsor or Cosponsor) the (Insert Name of Event), (Dates)

7. Security. You must enclose with your conference request a conference security assessment, including threat and vulnerability assessments for the conference facility site and any specific security requirements for the conference facility. If the facility has not been selected at the time of the request, include as much information as you know. Provide contact information for the security office handling the conference. State the classification of the conference and certify that the procedures outlined in AR 380-5 (Department of the Army Information Security Program) have been followed, if applicable. If any personnel from a foreign government are attending, or if any classified information will be discussed, certify that the event has been coordinated with the Office of the Deputy Chief of Staff, G-2 (DAMI). The requirements of this section vary greatly depending on the specific facts of the conference (for example, a commercial facility or military installation). Contact your local security office for specific requirements.

8. Funding and Contracts. **Clearly explain how the conference is funded.** Explain who is paying for all costs associated with the event and what funding source they are using (regular Operation and Maintenance, Army; official representation funds (ORF)); registration or exhibit fees; grants; or any other Government agency funds). Include funding from both the conference proponent and attendees' organizations. For example, state whether attendees' organizations are funding travel and reimbursable registration fees. (A full explanation of how registration fees will be collected and expended should be included in paragraph 10.) If applicable, state the amount of ORF being requested and the date the ORF packet was submitted or will be submitted in accordance with AR 37-47 (Representation Funds of the Secretary of the Army). A separate ORF request must be submitted. **If you are using an NFE conference planner, provide the name of the contractor and clearly describe the services being provided.** Enclose any contract-related documents that will be relevant to decision making. **Include a description of the contracting procedures used, including whether contracts were awarded on a competitive basis and any cost comparison conducted in evaluating potential contractors.**

9. Meals and Incidental Expenses (M&IE). State whether any meals will be provided at Government expense in lieu of per diem. State the cost of each meal (including gratuity and applicable taxes) for each person. For example, each day attendees will be provided breakfast, lunch, and dinner at the following costs: B = \$#/person, L = \$#/person, D = \$#/person OR conference attendees will be provided lunch each day at \$#/person). If one or two Government-furnished meals are provided, the proportional meal rate (PMR) applies. See the Directive or Joint Federal Travel Regulations/Joint Travel Regulations for more information on M&IE and PMR. You must demonstrate that the actual cost of the Government-furnished meals plus PMR does not exceed the per diem for the locale. If all meals are provided at Government expense, PMR is not authorized, but attendees are still entitled to incidentals (\$5 in most CONUS locations). If meal breaks are worked into the agenda and attendees will purchase all meals with

SUBJECT: Request Approval to (Sponsor or Cosponsor) the (Insert Name of Event), (Dates)

their provided per diem or optional nonreimbursable registration fee, please indicate "No Government-furnished meals." In the "Estimated Costs" table in paragraph 13, you will need to show the calculations of M&IE and Government-furnished meals to make sure attendees are given the proper M&IE rate. Travelers are authorized 75 percent of M&IE on travel days regardless of meals provided.

10. Refreshments. Explain whether any refreshments will be provided and how they will be funded. Army policy is that refreshments are a personal expense and will not be provided at Government expense. Conference planners may offer attendees the opportunity to purchase refreshments as a personal expense ***not reimbursable*** by the Government. On rare occasions refreshments are both nonsegregable (not identifiable as a separate charge in the facility costs) and nonnegotiable (that is, the facility will not reduce the cost of the venue if refreshments are refused). ***Any refreshments provided must be specifically addressed in the written legal review submitted with the conference request.***

11. Fees. State whether a conference registration fee or exhibitor (vendor) fee will be collected, state the amount of the fee collected for each person or vendor, and list all expenses and costs the fee covers. Collection of fees must be conducted as permitted by applicable law, regulation, and policy. ***Any conference or exhibit fee must be explicitly addressed in the written legal review submitted with the conference request.***

12. Honoraria or Speaker Fees. State whether (or not) honorariums or speaker fees will be paid and the cost paid for each speaker. In general, fees are limited to \$2,000 a person, but refer to your command policy and/or DoD 7000.14-R (DoD Financial Management Regulation), Volume 10, chapter 12, paragraph 1208 (Payments of Fees for Guest Speakers, Lecturers, and Panelists) for more information. Include an explanation of any other costs to the Army for speakers (travel costs, etc.)

13. Estimated Army Costs. State the estimated costs for all expenses listed in the table and show all calculations (*examples of appropriate remarks and calculations are provided in italics*). Costs should include not only those for attendees, but also for speakers, support staff—anyone traveling at Army expense. This table is the only acceptable cost estimate template. Equations to show estimated costs are required.

SUBJECT: Request Approval to (Sponsor or Cosponsor) the (Insert Name of Event),
(Dates)

Expense	Estimated Cost	Remarks/Calculations
Travel costs for attendees		(Average price of plane ticket) x (# of attendees) and/or POV reimbursement or other travel methods. Include rental cars, airport parking fees, room taxes, taxi or POV mileage to and from airports, etc.
<i>Example:</i>	\$47,722	\$500 x 95 attendees flying = \$47,500 \$ 555/mile x 80 mi x 5 attendees driving = \$222
Total Travel Costs	\$	Total of the previous costs, including per diem and travel expenses
<i>Hosting Costs</i>		
Meeting space rental costs	\$	Include all costs associated with facility rental space.
Fees for guest speakers, lecturers, or panelists	\$	Include cost for each speaker, travel costs or any other costs associated with speakers; include all DoD-funded costs (ex. Navy speakers) if not included in numbers above.
Printing or reproduction costs	\$	For example, reproduction costs for handouts.
Standard supplies	\$	For example, name tags, pens, paper, folders
Other costs	\$	For example, van needed to transport supplies to venue or Official Representation Funds
Contract costs	\$	Include any costs for contract support and/or contract conference planners. Include the contract or requisition # if known and a description of what it covers (what is the s. If not included above, include support contractor labor costs in this section.
Total Hosting Costs	\$	Total of the costs, including, but not limited to: supplies, printing/reproduction, meeting space, and contracted facilitators.
<i>Audiovisual Costs</i>		
Audiovisual Cost	\$	Include any audiovisual cost estimates (screens, microphones, etc.) Audiovisual costs must be broken out separately and cannot be included in meeting space rental costs or contracted facilitator costs.

SUBJECT: Request Approval to (Sponsor or Cosponsor) the (Insert Name of Event),
(Dates)

Expense	Estimated Cost	Remarks/Calculations
Food and Beverage Costs		
Food and Beverages	\$	Include any costs for food, beverages, and refreshments provided by the host.
TOTAL EXPENSES	\$	Calculate the total expenses
Revenue (such as non-Army registration, exhibitor, or sponsor fees, and any grant monies)	(\$\$\$\$)	Describe each source of revenue and the amount.
TOTAL COSTS	\$	Total Expenses – Total Revenue

14. Estimated Other DoD Costs. OSD requires us to capture the total costs DoD paid. Use this next table to provide estimated costs for non-Army DoD attendees. Best estimates are acceptable.

Expense	Estimated Cost	Remarks/Calculations
<i>Travel Costs</i>		
Lodging costs for attendees	\$	
M&IE costs for attendees	\$	
Government-furnished meals	\$	
Travel costs for attendees	\$	
Total Travel Costs	\$	
Other Costs		
Conference/registration fee	\$	
Other costs	\$	
Total Other Costs	\$	
Total Non-Army DoD Costs	\$	Total of the above travel and other cost sections.

SUBJECT: Request Approval to (Sponsor or Cosponsor) the (Insert Name of Event),
(Dates)

15. Reporting Requirement. Within 5 business days of approval, a copy of the approval memorandum and this request must be forwarded to OAA's Army Conference Management Directorate at hqda.conferences.inbox@mail.mil. Within 25 days of the conclusion of the conference, provide an after action report to the approval authority and OAA. Required formats for the after action and closeout reports are available on the Army Conference home site.

16. Point of Contact. (Provide organization contact information: name, phone number, email address. This should be the individual most knowledgeable about the conference who should be contacted with questions.)

(Signature Block of Reviewing Official)

NOTE: The following items must accompany this request:

1. Conference agenda
2. Security review
3. Legal review
4. Precontract decision documents (if applicable)
5. Approval of venue selection within NCR by WHS (if applicable)

Appendix C

Army-Hosted Conference Legal Review Template

YOUR OFFICIAL LETTERHEAD

(OFFICE SYMBOL)

(date signed)

MEMORANDUM THRU (if applicable)

FOR (Requestor)

SUBJECT: Legal Review of (Sponsoring Proponent) (Name of Event), (Dates)

1. References: (list all relevant references)
2. Event. (Name of sponsoring proponent) requests approval to conduct the (name of conference), (dates of conference excluding travel days) at (venue, city, State, or country if OCONUS).
3. BLUF. State whether or not you have a legal objection to the request and briefly explain why.
4. Purpose and Justification. Is the purpose and justification for the event clearly explained? Does the agenda appear robust? Has the request overcome the presumption that a face-to-face event is not required?
5. Mission-Critical Analysis. Does the request contain a mission-critical certification? Consider quoting DoD's and the Secretary's mission-critical travel and attendance requirement. Does the request contain sufficient information to allow the approval authority to make a credible mission-critical determination for ALL the proposed attendees—not just some of them?
6. Cost-Benefit Analysis. Are less costly alternatives addressed? Is clear justification provided for why less costly alternatives are not used? Is the required certification statement included in the request or the endorsement? Is the request signed by a general officer or member of the Senior Executive Service?
7. Analysis of Location Selection. Were three geographic areas compared? Were three local facilities compared? Were Government/military facilities considered first? How does the proposed site help minimize costs? Does the request establish that commercial facilities are more economical than Government/military facilities if a commercial facility is used? Did the requesting organization try to contain the size of the conference to the capacity of the Government/military facilities nearest the majority of local attendees?

SUBJECT: Legal Review of (Sponsoring Proponent) (Name of Event), (Dates)

8. Attendees. Is Army-funded attendance limited to the minimum mission-critical attendees? Does the request contain sufficient information about the attendees and the requirement for all proposed attendees to attend to allow the approval authority to make a credible mission-critical determination for all or some portion of the attendees? Does the request explain the measures taken to discipline attendance? Are any spouses traveling at Government expense? How is contractor attendance funded?

9. Security. Is a security assessment in the required format provided? Does it raise any new issues?

10. Funding and Contracts. Is the proposed expenditure consistent with Army policy? Is the correct funding source being used? Is the correct approval authority cited? Are copies of any conference-related contracts provided?

11. Per Diem. Is the Government providing meals? Are the meals provided (if any) compliant with applicable rules, policy, and law? Has the requester demonstrated that the cost of any provided meals plus the authorized proportional meal rate do not exceed the local meal rate? Are meal and incidental rates consistent with local area allowances? Is lodging provided at the per diem rate? Are room taxes addressed? Does the request indicate whether room tax relief was or is being requested from the commercial lodging facility?

12. Refreshments. Are refreshments provided? How are they funded: Nonreimbursable conference fee? On a pay-as-you-go basis? As part of the facility rental? If provided as part of the facility rental, are refreshments nonsegregable and nonnegotiable?

13. Fees. Does the event have a registration/conference fee? If so, who pays and what is its purpose? What does the fee cover (specifically address any meals included in the registration fee and cross reference with paragraph 11)? Is the fee reimbursable? If so, is the expense a permissible expenditure?

14. Honoraria or Speaker Fees. Is the Government paying these fees? Why, how much, and what type of funds are proposed? Is the fee for each speaker within the \$2,000 limit? How necessary is this speaker?

15. Estimated Costs. Review the estimated costs. Identify and discuss any questionable expenses (for example, audiovisual charges, security, bartender fees, gifts, rental car, contractor facilitator fee, or anything else that does not look right). Are rental cars authorized? If yes, how does that affect the cost of the conference? Were alternatives to rental cars considered? Are transportation costs to and from the airport and airport parking addressed? Are there facility fees? What facilities are we paying for? Are conference room, audiovisual fees, etc. reasonable?

SUBJECT: Legal Review of (Sponsoring Proponent) (Name of Event), (Dates)

16. Conclusion. The conclusion must state "No legal objections" or summarize the deficiencies in or concerns with the request. Even if not legally objectionable, summarize any concerns the approval authority should know about and consider in deciding whether to approve the request.

17. Point of Contact. (Provide organization contact information: name, phone number, email address.)

(Signature Block of Reviewing Official)

Appendix D

Non-DoD-Sponsored Conference (Under \$50,000) Request Template

YOUR OFFICIAL LETTERHEAD

(OFFICE SYMBOL)

(date signed)

MEMORANDUM FOR (Approval Authority in accordance with Army Directive 2014-01)

SUBJECT: Request Approval to Spend Less Than \$50,000 on Army Attendance at (Insert Name of Non-DoD Event), (Dates)

1. Event. Request approval for Army expenditures of less than \$50,000 for Army attendance at the (name of non-DoD conference), (dates of conference), at (venue, city, State and country, if OCONUS).
2. Purpose. Explain why Army personnel are attending the conference and how participation will advance the mission of the department. Provide a detailed justification for attendance at this event, including any applicable regulations or directives. Explain why this event was chosen and include supporting justification from the conference mission or agenda that explains why attendance is required. ***Attest that this event is mission-critical to the Army.***
3. Justification and Cost-Benefit Analysis
 - a. Anticipated Benefits. Provide a detailed description of the anticipated benefits of conference attendance. As part of this description, quantify the benefit(s) in terms of a tangible result to assist with the cost-benefit analysis and describe the tangible return on investment. What do you expect to get out of the conference and why is it the best option? If this is a recurring event, provide cost-benefit details from the last iteration as part of this justification. Justify how attending the event is mission-critical.
 - b. Conference Fees and Contracts. Clearly explain what the Army is funding, including contractual support, in association with the conference (such as an exhibit booth, display, advertising or Web site) and what funding source is used for the expenses. State whether the Army is paying conference registration or exhibitor (vendor) fees. Provide the amount of the fee, by type and costs it covers, such as but not restricted to, training certifications, light refreshments, meals, recognition on the conference Web site and/or space in a conference exhibition hall. Explain what actions you took to minimize these costs. Highlight any sunk costs, such as nonrefundable travel or registration fees. If meals are included in the registration fee, the proportional meal rate (PMR) applies.
 - c. Alternatives. Explain why lower cost alternatives, such as virtual conferencing or a DoD-hosted event, were not feasible.

SUBJECT: Request Approval to Spend Less Than \$50,000 on Army Attendance at (Insert Name of Non-DoD Event), (Dates)

4. Attendees. Provide the following information on expected attendees:-

Number of DA civilian attendees	
Number of Army military attendees	
GRAND TOTAL	
Of the attendees:	
Number of local attendees (those not on TDY orders—usually traveling from within the local commuting area)	
Number funded from other sources (Section 1353 travel)	
Number of Army-funded attendees (either centrally or command-funded). (Note: This is NOT the # on TDY; this is the number of attendees funded at Government expense).	
Number of spouses traveling at Government expense (additional approval required).	

5. Attendee Justification. Justify why attendance is mission-critical for the requested attendees. Based on your functional expertise, identify categories of attendees and associated restrictions. The following list provides examples of criteria you may use to justify conference attendance. This list is not all-inclusive. Certify that each attendee is mission-critical.

a. *Registered speakers*: Attendance may be restricted to personnel the conference organizer invited to speak at one or more conference sessions. Normally, but not always, this individual would be included in the conference agenda by name.

b. *Subject matter experts*: Individuals who are critical to the success of the conference based on their unique knowledge of a specific issue or process.

c. *Required agency representation*: Attendance may be authorized for a specific group or type of organization if the conference is expected to distribute and/or clarify information that is critical to the efficient and effective operations of those organizations in the future. This criterion would generally restrict representation to the minimum required to address the organization's concerns and gather the required information (for example, two from an Army Service Component Command, one from a resource management office, three for each installation, etc.).

d. *Required training not provided elsewhere*: Attendance may be restricted to those for whom the conference is expected to distribute and/or clarify information that is

SUBJECT: Request Approval to Spend Less Than \$50,000 on Army Attendance at (Insert Name of Non-DoD Event), (Dates)

required for professional certification and/or career progression, and no alternative is available. In these instances, the conference proponent is expected to work with the conference organizer to develop nonconference alternatives for required training in the future.

e. *Career or position specific:* Conference attendance may be constrained to individuals in a certain career field and/or duty position to receive critical information not available via an alternative forum. As in paragraph 5d, the proponent would be expected to work with the conference organizer to develop alternative information outlets to reduce or eliminate required conference attendance in the future.

f. *Coordination and networking:* Generally the least compelling reason for conference travel and attendance, this criterion may be restricted to individuals who are new to their profession or duty position to give them an opportunity to meet key people.

g. *Previous attendance:* Attendees may be restricted based on frequency of attendance, such as every other year or every other session. This criterion is particularly applicable to personnel attending just for networking or noncritical training.

h. *Allocation rule:* Attendance can be directly constrained to a specific number of attendees or a specific dollar amount for each command.

6. Total Costs. Complete the following table to detail the estimated costs for all expenses and show all calculations. Examples of appropriate remarks and calculations are provided. Costs should include any Army funds to be expended, whether by the conference attendees, commands or organizations. Highlight any sunk costs, such as nonrefundable travel or registration fees. If meals are included in the registration fee, PMR applies.

SUBJECT: Request Approval to Spend Less Than \$50,000 on Army Attendance at
(Insert Name of Non-DoD Event), (Dates)

Expense	Estimated Cost	Remarks/Calculations
<i>Attendee Costs</i>		
Lodging costs for attendees		(Hotel rate) x (# nights) x (# of attendees on TDY) = \$____. Clearly state if lodging exceeds the per diem lodging rate (justification must be included). If the # of nights for attendees varies (for example, support staff arrives early), show the calculations. Organizations should request tax exemption where possible. If tax exemption is not feasible, calculate hotel tax fees and add to the total in this box. In addition, include any "resort fees" or other costs associated with conference lodging.
<i>Example: Washington, DC</i>	<i>\$112,000</i>	<i>\$224 x 5 nights x 100 attendees = \$112,000</i>
M&IE costs for attendees		FIRST & LAST DAY OF TRAVEL: (M&IE rate) x 75% x (2 travel days) x (# of attendees on TDY) = \$____. CONFERENCE DAYS (w/ no Government-furnished meals): (M&IE rate) x (# full conference days) x (# of attendees on TDY) = \$____. CONFERENCE DAYS (with Government-furnished meals): (PMR) x (# days with Government-furnished meals) x (# of attendees on TDY) = \$____. NOTE: PMR is used for any days the Government provides one or two meals; if it provides three meals, only incidentals are allowable. Local attendees (those not in TDY status) are not authorized meals at Government expense.
<i>Example: Washington, DC</i>	<i>\$36,050</i>	
Travel costs for attendees		(Average price of plane ticket) x (# of attendees) and/or POV reimbursement or other travel methods. Include rental cars, airport parking fees, room taxes, taxi or POV mileage to and from airports, etc.
<i>Example:</i>	<i>\$47,722</i>	<i>\$500 x 95 attendees flying = \$47,500</i> <i>\$.555/mile x 80 mi x 5 attendees driving = \$222</i>
Registration fee		Number of attendees x registration fee; include a short description of what is included in the registration fee (such as meals, materials)

SUBJECT: Request Approval to Spend Less Than \$50,000 on Army Attendance at
(Insert Name of Non-DoD Event), (Dates)

Expense	Estimated Cost	Remarks/Calculations
Total attendee costs	\$	Total of the above costs to include: per diem, travel expenses and registration fees
Other Costs		
Exhibit fee (if applicable)	\$	Specify what size exhibit was purchased and any applicable associated costs.
Other costs	\$	For example, van needed to transport supplies to venue. Include all specific costs associated with attending the conference not included above
Total other costs	\$	Total of the costs above, including exhibit or other costs
TOTAL COSTS	\$	Total Expenses

7. Reporting Requirement. Within 5 business days of approval, a copy of the approval memorandum and this request must be forwarded to OAA's Army Conference Management Directorate at hqda.conferences.inbox@mail.mil. Within 25 days of the conclusion of the conference, provide an after action report to the approval authority and OAA. Required formats for after action and closeout reports are available on the Army Conference home page.

8. Point of Contact. (Provide organization contact information: name, phone number, email address.)

Encl

(Signature Block of Requester)

NOTE: The following items must accompany this request:

1. Conference agenda
2. Legal review

Appendix E

Non-DoD-Sponsored Conference Legal Review Template

YOUR OFFICIAL LETTERHEAD

(OFFICE SYMBOL)

(date signed)

MEMORANDUM THRU (if applicable)

FOR (Approval Authority or Endorser, as applicable)

SUBJECT: Legal Review of (Name of Requesting Organization)'s Request to Attend (Name of Sponsoring Organization)'s (Name of Event), (Dates)

1. References: (List relevant references, including DoD conference policy, Army conference policy, and any applicable DoD or Army policy memorandums.)
2. Event. I have reviewed (name or requestor/requesting organization)'s request for approval to spend (total estimated cost) to send (total number of requested attendees) to (name of sponsoring organization)'s (name of conference), (dates of conference excluding travel days) at (venue, city, State, or country if OCONUS).
3. BLUE. Briefly indicate whether the request does or does not comply with the intent and requirements of the applicable references.
4. Purpose and Justification. Is the purpose of the conference explained and is clear justification for Army attendance at the conference provided? Does the agenda appear robust? Has the request overcome the presumption that a face-to-face event is not required?
5. Certification Statement. Does the request contain the mandatory mission-critical certification statement?
6. Mission-Critical Analysis. Does the request contain sufficient information to allow the approval authority to make a credible mission-critical determination for all proposed attendees—not just some of them? Paraphrase or quote key portions of the request to summarize its key points to support a mission-critical determination. Explain how these key points do or do not provide enough information to allow the approval authority to make a credible mission-critical determination for ALL requested attendees, not just some attendees.
7. Attendees. Is attendance limited to the minimum mission-critical attendees? Does the request contain sufficient information about the attendees and the requirement for all proposed attendees to attend to allow the approval authority to make a credible mission-critical determination for all or some portion of the attendees? Does the

SUBJECT: Legal Review of (Name of Requesting Organization)'s Request to Attend (Name of Sponsoring Organization)'s (Name of Event), (Dates)

request explain the measures taken to discipline attendance? Are any spouses traveling at Government expense? How is contractor attendance funded?

8. Funding and Contracts. Is the proposed expenditure consistent with Army policy? Is the correct funding source being used? Is the correct approval authority cited? Are copies of any conference-related contracts provided?

9. Registration Fee. Does the event have a registration/conference fee? If so, list the registration fees applicable to the Army attendees. Who pays? What does the fee cover? Specifically identify any meals or entertainment events included in the registration fee and cross-reference with paragraph 10. Is the fee reimbursable? If so, is the expense a permissible expenditure?

10. Per Diem. Is the Government providing meals? Are the meals provided (if any) compliant with applicable rules, policy, and law? Has the requester demonstrated that any provided meals plus the authorized proportional meal rate do not exceed the local meal rate? Are meal and incidental rates consistent with local area allowances? Is lodging provided at the per diem rate? Are room taxes addressed? Does the request indicate whether room tax relief was or is being requested from the commercial lodging facility?

11. Estimated Costs. Review the estimated costs. Identify and discuss any questionable expenses (for entertainment, gifts, or anything else that does not look right). Are rental cars authorized? If yes, how does that affect the cost of the conference? Were alternatives to rental cars considered? Are transportation costs to and from the airport and airport parking addressed?

12. Conclusion. Indicate whether the request is "not legally objectionable" or "is legally objectionable." Summarize any deficiencies in or concerns with the request, including those that might not rise to the level of rendering the request legally objectionable. While the approval authority determines if the requested attendance is mission-critical to the Army, the legal review should point out deficiencies or lack of information in the request that make the request suspect or insufficient to support a credible mission-critical determination.

13. Point of Contact. (Provide organization contact information: name, phone number, email address.)

(Signature Block of Reviewing Official)

Authenticating Digital Evidence from the Cloud

Major Scott A. McDonald*

“I’m saying give it to somebody don’t know any better. It’s a fugazy.”¹

I. Introduction

Digital media and communications are a significant part of American life. A 2008 study found that “[s]ome 69% of online Americans use webmail services, store data online, or use software programs such as word processing applications whose functionality is located on the web.”² With the surge in popularity of social networking and online storage sites such as Facebook, LinkedIn, Twitter, and Dropbox, that number is substantially larger for 2013.³

Perhaps unknowingly, these users all participate in what is now more commonly referred to as “cloud computing” or “the cloud.” Logging in to Gmail, uploading videos to YouTube, or posting a status update to Twitter or Facebook means plugging in to the cloud—“an emerging architecture by which data and applications reside in cyberspace, allowing users to access them through any web-connected device.”⁴ In fact, most experts believe that by 2020 virtually

all digital work will be conducted in the cloud.⁵

Cloud architecture, however, has been growing far beyond conventional personal use. For example, Amazon recently launched a free public storage option that gives users the ability to store five gigabytes of media (music, photos, videos, documents) and to access that media from any internet-capable device.⁶ With this application, Amazon gives users free storage for up to 2,000 photos.⁷

Equally popular services such as Google Drive and Dropbox provide a folder synchronization option. With these services, though the user’s data may be stored on the cloud, the interface makes it appear as though the digital information is locally stored.⁸ These services also offer passive backup of digital data to the cloud, which means users need not take any affirmative action to effect the cloud-based storage of their information.⁹

With this significant increase in the use of cloud architecture, and the attendant increase of available digital evidence, law enforcement has taken notice. Google reports that in 2012 alone, it received 42,327 requests for data from government agencies¹⁰ in relation to criminal matters.¹¹ Though courts have grown more comfortable and familiar with the introduction of digital evidence in the form of e-mail and web pages,¹² very few reported decisions address the use of digital evidence obtained from the cloud.¹³

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¹ DONNIE BRASCO (1997). Although there is no solid reference for the word “fugazi,” in this scene, Donnie Brasco uses the term “fugazy” to describe a jewel, which appears to be a diamond, as a “fake.”

² PEW RESEARCH CTR., USE OF CLOUD COMPUTING APPLICATIONS AND SERVICES 1 (2008) [hereinafter PEW SURVEY], available at http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Cloud.Memo.pdf.

³ See Cindy Pham, *E-Discovery in the Cloud Era: What’s a Litigant to Do?*, 5 HASTINGS SCI. & TECH. L.J. 139, 139 (2013).

In 2008, the total cloud service revenue was \$46.4 billion, rising to \$58.6 billion by 2009. This amount further increased to \$68.3 billion in 2010. By 2014, the market is expected to be worth \$148.8 billion and it is predicted that people will process more than 50 percent of all computing workloads through cloud computing. Furthermore, it is estimated that, by 2015, cloud usage will grow twelve-fold to represent one-third of Internet traffic.

Id. (citations omitted).

⁴ PEW SURVEY, *supra* note 2, at 1.

⁵ See PEW RESEARCH CTR., THE FUTURE OF CLOUD COMPUTING 2 (2010), available at http://pewinternet.org/~media/Files/Reports/2010/PIP_Future_of_the_Internet_cloud_computing.pdf.

⁶ AMAZON, https://www.amazon.com/cloudrive/learnmore/ref=sa_menu_acd_lrn2 (last visited May 28, 2014).

⁷ *Id.*

⁸ For example, Dropbox users can install an application that creates a folder on the user’s desktop, or mobile device, that appears to be located locally, but in actuality is remotely stored. “Dropbox will watch your Dropbox folder and automatically make sure your files are the same no matter where you access them.” DROPBOX, <https://www.dropbox.com/help/4/en> (last visited May 2, 2014).

⁹ *Id.*

¹⁰ *User Data Requests*, GOOGLE, <http://www.google.com/transparencyreport/userdatarequests/> (last visited May 28, 2014).

¹¹ *FAQ*, GOOGLE, <http://www.google.com/transparencyreport/userdatarequests/faq/> (last visited May 28, 2014).

¹² See generally *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007).

¹³ As of 2 May 2014, a search of Lexis’s “all federal and state” database for “cloud computing” reveals fifty-seven decisions discussing the matter, fifty-three of which were issued within the last five years.

This article describes the nature of cloud architecture, criminal aspects of cloud storage, and then addresses issues of authenticating evidence obtained from the cloud.¹⁴ Drawing parallels from the approved methods of authentication for e-mail and webpages, this article argues that despite some unique issues associated with data obtained from the cloud, authentication of cloud data should not present an insurmountable obstacle for counsel.

II. Background

Though the cloud has been available for some time now, an understanding of what the cloud actually is will assist counsel in gathering the information needed to authenticate digital evidence obtained from the cloud.¹⁵ This is particularly true when developments in cloud technology continue to change the definition of cloud architecture.¹⁶ With that foundation in place, a brief examination of the traditional means of authenticating digital evidence will assist counsel in applying the Military Rules of Evidence (MRE) 901¹⁷ to authenticate evidence obtained from the cloud.¹⁸ Much of this article actually references Federal Rules of Evidence (FRE) 901 because the rule is substantially similar to MRE 901, and the body of caselaw regarding authentication of evidence is far better developed for FRE 901.¹⁹

A. What Is the Cloud?

The cloud is not a conventional home computer, laptop, or external storage device. Rather, the cloud is comprised of public or private remote servers. Data is stored on these servers and accessed by users through some form of internet facilitated interface.²⁰ For example, a Missouri resident may access their Gmail via their internet device (computer, laptop, iPad, tablet device, or smart phone), and read their messages, which may be stored on a server in either

California or Virginia. Similarly, an Amazon cloud user may upload their video files from their home in New York, but their data would transfer to a server farm in Northern Virginia.²¹ To the end user, the transfer of and access to this data is seamless.

Cloud computing, however, entails additional characteristics that can complicate authentication of the data for evidentiary purposes.²² First, data may not remain on the original server. The cloud service provider may instead farm the data out to another server run by another service provider. For example, Amazon requires more server capacity during peak shopping season and may farm out personal cloud data storage to another provider like Google.²³ When Amazon does this, a user's data may be farmed out in its entirety, or only a portion of the data may be transferred.²⁴

As noted before, for the end user, the process is seamless. However, while the former is akin to transferring an entire file folder from one office to another, the latter is more like transferring pages six, eight, and twenty of a critical report to another office, while leaving the remaining pages in the original office. This was not always the issue before—generally, digital files existed in their entirety on one medium. An entire digital photo file existed on a disc, thumb drive, or hard drive. Now, a portion of that file may exist on one server, and the remainder may exist on another server located thousands of miles away.

The second complicating characteristic of cloud computing is redundancy. Because servers always carry the risk of catastrophic failure, “[a] cloud computing system must make a copy of all its clients’ information and store it on other devices.”²⁵ Thus, a user of Dropbox may upload one copy of a photo they took on vacation and never realize that the photo has been duplicated and potentially stored on any one of many servers located throughout the world. As a result, cloud content gathered pursuant to a law enforcement investigation may not be the original content stored by the user.²⁶

¹⁴ This article limits its focus to an examination of the means and methods of authenticating digital evidence under Military Rules of Evidence (MRE) 901 (Requirement of authentication or identification). Recognizing that some digital evidence may be self-authenticating under MRE 902 (Self-Authentication), such a discussion is beyond the scope of this paper.

¹⁵ See *infra* Part II.A.

¹⁶ See *infra* Part II.B.

¹⁷ Requirement of authentication or identification.

¹⁸ See *infra* Part II.C.

¹⁹ See also *United States v. Blanchard*, 48 M.J. 306, 309 (C.A.A.F. 1998) (noting MRE 901 is the same as FRE 901, and going on to cite federal cases in support of the decision). “It suffices to say that these same principles are applicable at courts-martial and, accordingly, federal court of appeals decisions applying these principles would be most helpful.” *Id.* at 309–10.

²⁰ “[T]he data or software applications are not stored on the user’s computer, but rather are accessed through the web from any device at any location a person can get web access.” PEW SURVEY, *supra* note 2, at 4.

²¹ Amazon maintains nine regional server farms worldwide for its cloud service. AMAZON, <http://aws.amazon.com/ec2/> (last visited May 28, 2014).

²² See *infra* Part III.C.

²³ See David Navetta, *Legal Implications of Cloud Computing—Part One (the Basics and Framing the Issues)*, INFORMATION LAW GROUP (Aug. 18, 2009), <http://www.infolawgroup.com/2009/08/tags/security/legal-implications-of-cloud-computing-part-one-the-basics-and-framing-the-issues/>.

²⁴ *Id.*

²⁵ Jonathan Strickland, *How Cloud Computing Works*, HOW STUFF WORKS, <http://computer.howstuffworks.com/cloud-computing1.htm> (last visited May 28, 2014).

²⁶ Though this necessarily implicates MRE 1001–08, the “best evidence rule,” which is beyond the scope of this article, it remains an important consideration for counsel attempting to clear the hurdle of authentication. The fact that digital content is constantly replicated may not, in the end, be very problematic. See, e.g., *State v. Bellar*, 217 P.3d 1094, 1110 (Or. Ct.

These characteristics distinguish digital evidence obtained from the cloud from traditional forms of digital evidence, such as e-mail and webpages. However, at one time, courts were forced to analogize webpages and e-mail to similar non-digital evidence to facilitate authentication and admission.²⁷ Thus, while it is important to recognize the differences between cloud-based evidence and traditional digital evidence, cloud-based evidence shares similar characteristics.

B. New Developments in Cloud Computing

Technology is ever evolving. Likewise, the nature of cloud computing continues to evolve. Notably, a new technique for cloud computing was recently developed wherein users do not store data on remote server farms, but instead store data on the devices of other users.²⁸ The new system, dubbed Seattle, “connects devices directly to one another in a decentralized network, relaying information more quickly than it could through a single, often distant exchange point.”²⁹ Currently, the developers of Seattle are working to expand the system in order to enable similar sharing and storage across portable devices, such as smartphones.³⁰

Thus, as cloud computing architecture evolves and continues to grow more amorphous, the attendant challenge of authenticating that data will also evolve.³¹ This is because, unlike the previous analogies of file folders being transferred between offices,³² the Seattle system is akin to one hundred different people having a single page of a critical report, all of whom have to come together to view the report in its entirety.

App. 2009) (Sercombe, J., dissenting) (quoting Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 564 (2005)) (“From a technical perspective, it usually makes no sense to speak of having an ‘original’ set of data. Given this, it would be troublesome and artificial to treat copies as different from originals.”).

²⁷ See, e.g., *Manuel v. State*, 357 S.W.3d 66, 75 (Tex. App. 2011) (noting that the “reply-letter doctrine” applies to authentication of e-mail). “Another traditional method of authentication permitted by Rule 901 is the ‘reply-letter doctrine.’ Under this doctrine, a letter received in the due course of mail purportedly in answer to another letter is *prima facie* genuine and admissible without further proof of authenticity.” *Id.* (citations omitted).

²⁸ See *How Justin Cappos Created a New Way to Cloud Compute*, POPULAR SCI., <http://www.popsci.com/science/article/2013-09/justin-cappos> (last visited May 28, 2014).

²⁹ *Id.*

³⁰ *Id.*

³¹ See PROSPECTIVE ANALYSIS ON TRENDS IN CYBERCRIME FROM 2011 TO 2020, at 21 (2011), available at <http://www.mcafee.com/us/resources/white-papers/wp-trends-in-cybercrime-2011-2020.pdf>. “There is also an opinion that cloud computing architectures blur the boundaries between what is physical and what is digital, to the point where no one knows where the data is stored, nor who manages and uses it, etc.” *Id.*

³² See *supra* Part II.A.

C. Traditional Means of Authentication

The requirements for authentication are set out in Military Rules of Evidence (MRE) 901. The rule provides that prior to a particular piece of evidence being admissible, the court must be satisfied that “the matter in question is what its proponent claims.”³³ This is not to say that the proponent must “prove beyond all doubt that the evidence is authentic and has not been altered.”³⁴ Rather, the proponent must meet only the low threshold established in the rule, with issues of reliability going instead to weight.³⁵

The authentication requirement may be satisfied by testimony from a witness with knowledge of the matter, comparison with previously authenticated items, establishment of distinctive characteristics, or a description of the process or system that created the matter in question.³⁶ The proponent of an exhibit may also authenticate documents with an attestation certificate or testimony from the custodian of records, though this may only be mandatory if required by law.³⁷ Some evidence, however, is self-authenticating and does not require the foregoing.³⁸

If the trial court determines that the proponent of the evidence has satisfied the authenticity requirement, the court should admit the evidence if it comports with any additional relevant rules of evidence.³⁹ At that point, as noted above, the opponent’s objection to authentication and any reliability issues go to the weight of the evidence rather than admissibility.⁴⁰

1. Testimony of a Witness with Knowledge

One of the most basic methods of authentication is proffering testimony from a witness with knowledge of the evidence who can make out a *prima facie* case that the evidence is what it purports to be.⁴¹ For example, when

³³ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 901(a) (2012) [hereinafter MCM].

³⁴ U.S. ATT’Y MANUAL, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS 197 (2009) [hereinafter U.S. ATTY MANUAL] (citation omitted).

³⁵ See *id.* at 197–98.

³⁶ MCM, *supra* note 33, MIL. R. EVID. 901(b). “Rule 901(b) is a non-exhaustive list of illustrative examples of authentication techniques.” *Id.* MIL. R. EVID. 901(b) analysis, at A22-60.

³⁷ *Id.* MIL. R. EVID. 903.

³⁸ *Id.* MIL. R. EVID. 902.

³⁹ WEINSTEIN’S EVIDENCE MANUAL § 8.01[1] (citing *United States v. Patterson*, 277 F.3d 713 (4th Cir. 2002)).

⁴⁰ *Id.* (citing *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 n.6 (9th Cir. 2002)).

⁴¹ MCM, *supra* note 33, MIL. R. EVID. 901(b)(1); FED. R. EVID. 901(b)(1); see also *United States v. Lanzon*, 639 F.3d 1293, 1301 (11th Cir. 2011) (citing *United States v. Caldwell*, 776 F.2d 989, 1002 (11th Cir. 1985)).

Keith Lanzon attempted to solicit an undercover officer for a sexual encounter with what he believed to be an underage girl, the government charged Lanzon with “attempting to persuade, entice, or coerce a minor to engage in sexual activity.”⁴² At trial, the government offered into evidence a transcript of the American Online (AOL) chat sessions between Lanzon and the undercover officer.⁴³ The government also introduced the testimony of the officer who testified about his role in the online conversation and about his method of preparing the transcript, including copying, pasting, and comparing the online chat with the Word document he created to ensure accuracy.⁴⁴ According to the court, the officer’s testimony, as a witness with knowledge, was sufficient to demonstrate that the transcript of the online conversation was what it purported to be and was therefore sufficiently authenticated.⁴⁵

2. Comparison by an Expert Witness or the Trier of Fact

A proponent may also authenticate evidence by comparing it with a previously authenticated piece of evidence.⁴⁶ For example, in *United States v. Safavian*, the government introduced e-mail evidence that had been authenticated under FRE 901(b)(4), the “distinctive characteristics” provision discussed *infra*.⁴⁷ The government also sought to introduce a number of additional e-mails that lacked similarly distinctive characteristics.⁴⁸ Those e-mails only contained the e-mail address “MerrittDC@aol.com.”⁴⁹ However, the previously authenticated e-mails included e-mails from “MerrittDC@aol.com,” which included a signature block that provided “the defendant’s name and the name of his business . . . (as well as other information, such as the business’ address, telephone, and fax numbers)”⁵⁰ According to the court, this information sufficiently connected the defendant to the e-mail address in question—MerrittDC@aol.com.⁵¹ Therefore, under FRE 901(b)(3), by comparison, the e-mails with only the e-mail address and no

(detective testifying that transcripts were accurate copies of online conversations sufficient evidence to authenticate).

⁴² *Lanzon*, 639 F.3d at 1296.

⁴³ *Id.* at 1300.

⁴⁴ *Id.* at 1300–01.

⁴⁵ *Id.* at 1301.

⁴⁶ MCM, *supra* note 33, MIL. R. EVID. 901(b)(3); FED. R. EVID. 901(b)(3); *see also* *United States v. Crandall*, 1986 CMR LEXIS 2255, at *4–5 (N.M.C.M.R. 1986) (finding signature comparison with known and unknown signatures satisfied MRE 901(b)(3)).

⁴⁷ 435 F. Supp. 2d. 36, 40 (D.D.C. 2006); *see also infra* Part II.C.3.

⁴⁸ *Safavian*, 435 F. Supp. 2d. at 40.

⁴⁹ *Id.*

⁵⁰ *Id.* at 40–41.

⁵¹ *Id.*

signature blocks were also properly authenticated as e-mails of Safavian.⁵²

3. Distinctive Characteristics and the Like

Evidence may also be properly authenticated if its distinctive characteristics, “taken in conjunction with circumstances,” demonstrate that it is what it purports to be.⁵³ For example, when law enforcement officers apprehended Raul Trujillo for his connection with a cocaine smuggling ring, Trujillo was put through the standard “booking” procedures.⁵⁴ Trujillo at some point in the process asked to use the restroom, and used that opportunity for respite to attempt to eat a note with evidentiary value.⁵⁵ Special agents, noticing Trujillo’s attempt, pulled Trujillo from the bathroom “and saw a piece of paper ‘flutter’ into the toilet.”⁵⁶ The agents also retrieved the remainder of the paper from Trujillo’s mouth.⁵⁷ At trial, Trujillo challenged the authenticity of the scraps of paper.⁵⁸ However, based on the testimony of the agents about the circumstances surrounding the paper’s discovery, the court found that “given the proximity of time and the circumstances surrounding the obtaining of this evidence,” it was properly authenticated under FRE 901(b)(4).⁵⁹

Similarly with digital evidence, forensic examiners compare hash values—the unique “fingerprints” of digital files—and metadata⁶⁰—essentially data about data. Hash values and metadata are created and stored with digital evidence in the “background” of a user’s activity, often without the knowledge of the user.⁶¹ Each of these processes provides the proponent of digital evidence the ability to authenticate evidence through its own distinctive characteristics.⁶²

⁵² *Id.* at 41.

⁵³ MCM, *supra* note 33, MIL. R. EVID. 901(b)(4); FED. R. EVID. 901(b)(4); *see also* *United States v. Worthington*, 2006 CCA LEXIS 410, at *7–9 (A. Ct. Crim. App. 2006) (finding e-mail exchange properly authenticated with witness testimony regarding distinctive characteristics).

⁵⁴ *United States v. Trujillo*, 146 F.3d 838, 842–43 (11th Cir. 1998).

⁵⁵ *Id.* at 843–44.

⁵⁶ *Id.* at 843.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 843–44.

⁶⁰ For a more detailed explanation of metadata and a discussion about the ethics of mining and scrubbing metadata, *see* Major Brian J. Chapuran, *Should You Scrub? Can You Mine? The Ethics of Metadata in the Army*, ARMY LAW., Sept. 2009, at 1.

⁶¹ *See* *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 546–48 (D. Md. 2007).

⁶² *See id.* at 546–48.

4. Evidence About a Process or System

A proponent of evidence may also authenticate evidence by describing a process or system that created the evidence and demonstrating that it “produces an accurate result.”⁶³ For example, in *United States v. Espinal-Almeida*,⁶⁴ the government introduced data obtained from a GPS unit seized from aboard a vessel used to smuggle cocaine from the Dominican Republic to Puerto Rico.⁶⁵ Jose Durand, “a forensic scientist with Customs,” testified that he examined the GPS, secured the data, and used the GPS software to analyze the data.⁶⁶ Durand also testified extensively about how the GPS and the software worked, including the intentional margin of error that manufacturers build into each commercial GPS unit to distinguish them from government units.⁶⁷ The court found that even though Durand did not testify about whether or not the device and software were in good working order, such evidence could be reasonably inferred, and the GPS data and analysis were properly authenticated under FRE 901(b)(9).⁶⁸

5. Weight Versus Admissibility

Even when a proponent’s efforts to authenticate evidence are not perfect, minor defects in evidence regarding authentication generally go to weight rather than admissibility.⁶⁹ For example, in *Laurentz v. State*, prosecutors offered evidence of James Laurentz’s Facebook messages to the child victim with whom he had sexual contact the night before.⁷⁰ In the messages, Laurentz was apologetic and begged for forgiveness.⁷¹ Laurentz challenged the authenticity of the messages, arguing, among other things, that the victim’s “name [was] misspelled on the exhibit.”⁷² However, the court ruled that the state had sufficiently authenticated the messages “through witness testimony and circumstantial evidence,” and noted that the misspelling of the victim’s name was merely a factor for the “jury to consider when evaluating the weight and credibility of the witness testimony linking the correspondence to [the victim].”⁷³

⁶³ MCM, *supra* note 33, MIL. R. EVID. 901(b)(9); FED. R. EVID. 901(b)(9).

⁶⁴ 699 F.3d 588, 611 (1st Cir. 2012).

⁶⁵ *Id.* at 595–96, 608.

⁶⁶ *Id.* at 611.

⁶⁷ *Id.* at 611–12.

⁶⁸ *Id.* at 612.

⁶⁹ WEINSTEIN’S EVIDENCE MANUAL § 8.01[1] (citing *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 n.6 (9th Cir. 2002)).

⁷⁰ 2013 Tex. App. LEXIS 12603, at *1–5 (Tex. App. 2013).

⁷¹ *Id.* at *3–4.

⁷² *Id.* at *15.

⁷³ *Id.* at *11, *15–16.

III. Analysis

The traditional methods of authentication readily lend themselves to the authentication of digital evidence. Courts have already turned to those traditional methods to authenticate websites and e-mail.⁷⁴ Though cloud based evidence is different, evidence obtained from the cloud is closely analogous to evidence obtained from websites and e-mail.⁷⁵ Thus, though no case law on this subject matter exists just yet, thoughtful consideration of the similarities and differences between cloud based evidence, e-mail, and webpages, coupled with application of the traditional means of authentication, will enable counsel to satisfy the relatively low threshold requirements of MRE 901.

A. Criminal Evidence in the Cloud

The importance of cloud based digital evidence in criminal prosecutions is slowly starting to reveal itself in the record of published criminal decisions. Cloud storage is remote and accessible from virtually anywhere the user can access the internet. Users can therefore distance themselves from the data stored on the cloud. Users can also reduce the ability of the government to discover the data by either hiding their cloud storage activities or by using secure anonymous cloud service providers.⁷⁶ Thus, once the government does secure cloud-based digital evidence, it can prove invaluable in a variety of aspects.

The District Court for the Eastern District of New York recognized the intrinsic value and, in particular, the dangerous nature of cloud-based evidence when it assessed the continued pre-trial detention of Adam Savader.⁷⁷ In *Savader*, the government’s criminal complaint described the conduct of a defendant who, using a variety of methods,

⁷⁴ See *infra* Part III.B.

⁷⁵ See *infra* Part III.C.

⁷⁶ An assortment of cloud storage providers now offer “anonymous” storage. See, e.g., *FAQs, SPIDER OAK*, https://spideroak.com/faq/category/privacy_passwords/ (last visited May 1, 2014) (“SpiderOak is, in fact, truly zero knowledge. The only thing we know for sure about your data is how many encrypted data blocks it uses”); *Anonymous Cloud Servers, HOST CONFIDENTIAL*, <http://hostconfidential.com/page.php?id=20> (last visited May 1, 2014) (“Dedicated anonymous cloud servers look, behave, and work exactly like anonymous dedicated servers. These instances run in a [sic] anonymous virtualized cloud environment,”). Data Shell offers cloud storage and accepts BitCoin for payment, which takes cloud storage anonymity to a new level. *DATA SHELL*, <http://www.datashell.co.uk/> (last visited May 1, 2014); see also *PROSPECTIVE ANALYSIS ON TRENDS IN CYBERCRIME FROM 2011 TO 2020, supra* note 31, at 11. “In general, the anonymity of the Internet and the global breadth and depth of networks support the impunity of the criminals, and cloud computing will make it even more difficult to look for and record evidence.” *Id.* For a thorough discussion on BitCoin and its use in criminal endeavors, see Derek A. Dion, Note, *I’ll Gladly Trade You Two Bits on Tuesday for a Byte Today: Bitcoin, Regulating Fraud in the E-economy of Hackercash*, 2013 U. ILL. J.L. TECH. & POL’Y 165 (2013).

⁷⁷ *United States v. Savader*, 2013 WL 1943014 (E.D.N.Y. 2013).

victimized fifteen young women “through unauthorized access to computer systems, extortion and cyber stalking.”⁷⁸ With some skill and social engineering, Savader managed to secure the passwords of his victims, gain access to their personal data, and gather “compromising photos of the victims—usually in various states of undress”⁷⁹ Savader would then use the information he obtained to extort and threaten his victims.⁸⁰

For the court, Savader’s continued detention would turn not on the nature of his offenses, but rather on the continued threat Savader posed if released.⁸¹ Because Savader’s charges did “not appear to constitute crimes of violence,” under the Bail Reform Act, the government could only secure Savader’s continued detention if he posed a potential future threat to the witnesses or victims.⁸²

In assessing Savader’s risk, the court looked primarily to the government’s evidence of Savader’s cloud storage account.⁸³ Although the government had secured “approximately 25 computer devices” from Savader’s home,⁸⁴ it was the discovery of his cloud storage account that was most relevant to the detention application.⁸⁵ In his cloud account, Savader stored files that bore the names of the victims, which “presumably contain[ed] the photograph files used as part of the extortion.”⁸⁶ Because Savader had the ability to access these cloud-based files from almost anywhere, the court reasoned, Savader had “effectively ‘weaponized’ these items, presenting a significant risk [to his victims].”⁸⁷ In the end, though, the court characterized it as a close call, and approved Savader’s continued detention to effectively prevent Savader from accessing his “secret cache of weapons.”⁸⁸

As this decision pertained to a pre-trial detention hearing, there was no discussion regarding the admissibility of the evidence the government had obtained. However, one

⁷⁸ *Id.* at *1.

⁷⁹ *Id.* at *2.

⁸⁰ *Id.* at *2–3.

⁸¹ *Id.* at *12–13.

⁸² *Id.* The Bail Reform Act outlines the requirements for the “release or detention of a defendant pending trial.” 18 U.S.C. § 3142 (2014). Under the act, the government can request a hearing to secure continued detention for defendants who committed a “crime of violence,” an offense with a potential sentence of life imprisonment or death, or certain controlled substances offenses. *Id.* § 3142(f)(1). The government may also request continued detention if the government suspects that the defendant will flee or attempt to obstruct justice. *Id.* § 3142(f)(2).

⁸³ *Savader*, 2013 WL 1943014, at *13.

⁸⁴ *Id.* at *4.

⁸⁵ *Id.* at *13–14.

⁸⁶ *Id.* at *13.

⁸⁷ *Id.* at *14.

⁸⁸ *Id.* at *14–17.

of the first hurdles at trial would be the authentication of the evidence the government obtains, including any cloud-based evidence.

B. Authenticating E-mail and Web Pages—An Intermediate Step

Before considering an acceptable approach to authenticating cloud-based evidence, a discussion regarding authentication of closely related digital evidence is helpful. E-mail and webpages, though distinct, share similar characteristics to cloud-based evidence. By drawing from the procedures now well established for authentication of e-mail and webpages, counsel can develop a methodology for authenticating cloud-based evidence.

1. Authenticating E-mail

Authentication of some forms of digital evidence, at one time a challenge, has now become well-established practice.⁸⁹ In fact, in 2007, when parties to a civil suit proffered nothing but unauthenticated e-mail traffic as evidence, one district court magistrate judge took to authoring a 100-page decision to express his intolerance for the misstep, and dismissed the suit.⁹⁰ In drafting what is essentially a handbook on authenticating digital evidence, the court noted that e-mail evidence is extremely common and “there are many ways in which e-mail evidence may be authenticated.”⁹¹

According to the court, the most frequent methods used to authenticate e-mail under FRE 901 include testimony from a person with personal knowledge of the e-mail, comparison with authenticated samples, evidence of distinctive characteristics, and certified copies of business records.⁹² For example, a proponent of an e-mail message may show, with either direct or circumstantial evidence, that the message included the sender’s and recipient’s e-mail address, that the recipient replied to the message, or that the message was discussed in subsequent conversations.⁹³

When Eugene Devbrow, a prisoner in the custody of the Indiana Department of Corrections, filed suit alleging retaliation by a prison guard, he sought to introduce an e-

⁸⁹ “Indeed, it is not unusual to see a case consisting almost entirely of e-mail evidence.” *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 554 (D. Md. 2007); see also WEINSTEIN’S EVIDENCE MANUAL § 8.01[3][f] (outlining the process of authenticating e-mail and chat room conversations).

⁹⁰ See *Lorraine*, 241 F.R.D. at 534–35.

⁹¹ *Id.* at 554.

⁹² *Id.* at 555; see also *supra* Part II.C.

⁹³ WEINSTEIN’S EVIDENCE MANUAL § 8.01[3][f].

mail to evidence his claim.⁹⁴ Devbrow received the e-mail directly from the prison, which he argued was sufficient to satisfy the authentication requirements of FRE 901.⁹⁵ The Seventh Circuit recognized that certain circumstantial evidence, “such as an e-mail’s context, e-mail address, or previous correspondence between the parties,” might serve the purposes of FRE 901.⁹⁶ However, “the most direct method of authentication is a statement from the author or an individual who saw the author compose and send the e-mail.”⁹⁷

The guard who engaged in the retaliatory conduct allegedly authored the e-mail Devbrow sought to introduce.⁹⁸ Try as he might, it is unlikely that, as an inmate, Devbrow would have the ability to secure direct evidence of authenticity.⁹⁹ Without direct evidence, and because Devbrow also failed to provide sufficient circumstantial evidence of authenticity, the Seventh Circuit held that exclusion of the e-mail by the trial court was proper.¹⁰⁰

2. Authenticating Webpages

Authentication of a commercial web page is only slightly more difficult than the authentication of e-mail. Because of the increased potential for third-party manipulation, courts “require proof by the proponent that the organization hosting the website actually posted the statements or authorized their posting.”¹⁰¹ However, webpages from social networking sites, deemed particularly susceptible to manipulation, garner more scrutiny from courts and require more substantial authentication.¹⁰² Still,

⁹⁴ Devbrow v. Gallegos, 2013 U.S. App. LEXIS 22278, at *4-5 (7th Cir. 2013).

⁹⁵ *Id.* at *5.

⁹⁶ *Id.* at *6.

⁹⁷ *Id.*

⁹⁸ *Id.* at *5.

⁹⁹ “But Devbrow did not show that either he or anyone else saw Gallegos actually compose or transmit the e-mail” *Id.* at *6.

¹⁰⁰ *Id.* *5-6.

¹⁰¹ Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 555 (D. Md. 2007) (citation omitted). See also the strange case of *United States v. Jackson*, involving a wayward law student who attempted to defraud United Parcel Service and then cover up the fraud by attributing the matter to a white supremacist group. 208 F.3d 633 (7th Cir. 2000). Jackson sought to introduce postings from the group’s website that purported to take responsibility for the damage for which she sought compensation. *Id.* at 638. The trial court, however, properly excluded the evidence “because it lacked authentication.” *Id.* “Jackson needed to show that the web postings . . . actually were posted by the groups, as opposed to being slipped onto the groups’ web sites by Jackson herself, who was a skilled computer user.” *Id.*

¹⁰² See, e.g., *Griffin v. Maryland*, 2011 Md. LEXIS 226 (Md. 2011). In *Griffin*, the government authenticated a MySpace page with evidence of date of birth, residence, and photographs of the purported user offered by an investigating detective. Reversing the accused’s murder conviction, the appellate court suggested soliciting evidence from the purported author, searching the author’s computer for corroborating evidence, or obtaining

as with e-mail, for the proponent to demonstrate that the website is what it purports to be, the proponent might offer direct or circumstantial evidence from a witness with personal knowledge,¹⁰³ demonstrate distinctive characteristics of the site, or establish indications of official endorsement by the owner.¹⁰⁴

In *State v. Rossi*, Nicholas Rossi sought a new trial following his conviction for sexual imposition and public indecency following a sexual encounter that occurred in the stairwell of a community college campus.¹⁰⁵ The basis for Rossi’s request was “newly discovered evidence” of the victim’s recantation and motive to lie.¹⁰⁶ As proof, Rossi offered a “blog post copied from the Myspace web address which Rossi alleges was written and posted by the victim . . . after his trial was concluded.”¹⁰⁷

At the hearing on Rossi’s motion for a new trial, the court ruled that Rossi failed to properly authenticate the post from the webpage.¹⁰⁸ The state, in response to Rossi’s

corroborating evidence from the social networking service provider. *Id.* at *3-4, *34-36. See also *United States v. Standing*, where the court found that the defendant’s website was properly authenticated when an agent testified that the domain registrant was an associate of the defendant (who was using a pseudonym). 2005 U.S. Dist. LEXIS 41330, at *5-6, *17 (D. Ohio 2005).

¹⁰³ See *United States v. Bansal*, 663 F.3d 634, 667-68 (3d Cir. 2011). *Bansal* involved the prosecution of an illegal online pharmacy operation. *Id.* at 640-42. Bansal challenged the authentication of the screenshots of his website. *Id.* at 667. The government had offered screenshots of the website obtained from the Internet Archive’s “Wayback Machine.” *Id.* Because “the government called a witness to testify about how the Wayback Machine website works and how reliable its contents are,” and “compared the screenshots with previously authenticated and admitted images,” the evidence was sufficient to support authentication under FRE 901(b)(1). *Id.* at 667-68.

¹⁰⁴ See *Lorraine*, 241 F.R.D. at 556; see also FED. R. EVID. 901(b). Additional considerations include

[t]he length of time the data was posted on the site; whether others report having seen it; whether it remains on the website for the court to verify; whether the data is of a type ordinarily posted on that website or websites of similar entities (e.g., financial information from corporations); whether the owner of the site has elsewhere published the same data, in whole or in part; whether others have published the same data, in whole or in part; [and] whether the data has been republished by others who identify the source of the data as the website in question.

Lorraine, 241 F.R.D. at 555-56 (quoting Gregory P. Joseph, *Internet and E-mail Evidence*, 13 PRAC. LITIGATOR (Mar. 2002)), reprinted in STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL pt. 4, at 20 (9th ed. 2006).

¹⁰⁵ 2012 Ohio App. LEXIS 2236, at *P2-P3, *P16 (Ohio Ct. App. 2012).

¹⁰⁶ *Id.* at *P3. The post read, *inter alia*, “But I have done went so far by lying n [sic] getting some stranger to go to jail and in legal so you wouldn’t think I would cheat on you even when I did slip because he was cute, but I didn’t give in to my desire I’m drunk right now, but maybe when I [sic] sober we can talk about it.” *Id.* (emphasis in original).

¹⁰⁷ *Id.* at *P9.

¹⁰⁸ See *id.*

proffer, presented testimony from a forensic expert.¹⁰⁹ The expert stated that the blog post had an incorrect day-date match (i.e., the day of the week did not match with the calendar date of the year), which indicated the post had been fabricated or altered.¹¹⁰ The expert also testified about the ease and simplicity of such an alteration.¹¹¹ Additionally, the expert testified that the victim was unequivocal in her denial of authorship of the post.¹¹² Therefore, in light of the testimony, and the internal inconsistency, it was proper for the trial court to find that the webpage post was not properly authenticated.¹¹³

3. Hybrid Cases

At times, the challenge of authentication is complicated when the evidence is a social networking webpage with traits of e-mail messaging. For example, in *Campbell v. State*,¹¹⁴ the Court of Appeals in Texas was confronted with an authentication challenge involving Facebook messages. The state charged Travis Campbell with aggravated sexual assault and aggravated assault with a deadly weapon, stemming from an incident that followed his girlfriend's receipt of a Facebook message from another man.¹¹⁵

At trial, the state introduced evidence of inculpatory messages that Campbell sent to his girlfriend.¹¹⁶ Each of the messages contained a header that included Campbell's name and a date stamp.¹¹⁷ The appellate court analyzed the authentication issue under Texas Rules of Evidence 901, which is modeled closely after its federal counterpart.¹¹⁸ Recognizing that social media sites such as Facebook are susceptible to fraud, the court stated that it is insufficient to merely argue that on its face, a message purports to be from a person's social networking account.¹¹⁹

However, to satisfy the rule in this case, the state

¹⁰⁹ *Id.* at *P18.

¹¹⁰ *Id.* The post stated it was published on Monday, May 16, 2008. However, May 16, 2008, was actually a Friday. *Id.*

¹¹¹ *Id.* at *P19.

¹¹² *Id.*

¹¹³ *See id.* at *P21–22.

¹¹⁴ 382 S.W.3d 545, 547 (Tex. Ct. App. 2012).

¹¹⁵ *Id.* at 546–47.

¹¹⁶ *Id.* at 550.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 547–48. The Texas rules provide that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” TEX. R. EVID. 901(a).

¹¹⁹ *Campbell*, 382 S.W.3d at 549. For example, “anyone can establish a fictitious profile under any name” and “a person may gain access to another person’s account by obtaining the user’s name and password.” *Id.*

presented additional circumstantial evidence to authenticate the messages.¹²⁰ First, Campbell’s girlfriend and victim testified that she received the messages, that she did not send the messages to herself, and that at the time the messages were sent, the victim did not have access to Campbell’s Facebook account.¹²¹

Additionally, the messages revealed an internal consistency upon which the court also relied to support the threshold showing of authenticity.¹²² Campbell, who was of Jamaican decent, testified at trial and his unique speech pattern was reflected in the messages that he sent to his victim following the attack.¹²³ The messages also included references to the attack and the potential for criminal charges.¹²⁴ Thus, when considered together with the relevant undisputed testimony, the proffered evidence was at least “within the zone of reasonable disagreement,” and the jury was entitled to make the determination of authenticity.¹²⁵

C. Authenticating Evidence from the Cloud

Digital evidence from the cloud can be similar in many ways to e-mail and webpage evidence. E-mail or webpages may be remotely stored, they are accessible online, across multiple platforms, and are susceptible to manipulation or fraud. A user’s cloud account, much like a webpage or e-mail account, can be “hacked,” faked, or shared with other users.¹²⁶

¹²⁰ *Id.* at 549–50.

¹²¹ *Id.* at 550.

¹²² *Id.* at 550–51.

¹²³ *Id.* For example, one message read, “[I] did you bad something that you would never though [sic],” and another read, “[I] should never put my hand on you, who is me to do that to you.” *Id.* at 550. By way of comparison, at trial, Campbell testified that “I take up the knife out of her way, her reach, and tell her that, this, you cannot play with knife because knife will give you a cut.” *Id.* at 551 n.3.

¹²⁴ *Id.* at 550–51. For example, Campbell wrote, “[D]on’t lock me up please i am begging you,” and “i am so f---ing stuppid [sic] for hurthig [sic] u i am guilty.” *Id.* at 550.

¹²⁵ *Id.* at 551–52 (quoting *Tienda v. State*, 358 S.W.3d 633, 638, 645–46 (Tex. Crim. App. 2012)); *see also* *United States v. Grant*, 2011 CCA LEXIS 217, at *3–5 (A.F. Ct. Crim. App. 2011) (finding Facebook messages properly authenticated with testimony regarding timing, photograph, and message content).

¹²⁶ *See, e.g., Campbell*, 382 S.W.3d at 548–49 (“[I]n evaluating whether an electronic communication has been sufficiently linked to the purported author, we recognize that electronic communications are susceptible to fabrication and manipulation.”). In *Campbell*, the court went on to discuss the authentication issues associated with false account creation and unauthorized access. *Id.* at 549. For a more thorough discussion of internal consistency as it relates to authentication, see *supra* notes 122 through 125 and accompanying text.

However, cloud-based data, unlike e-mail, lacks the readily identifiable characteristics, such as a sender and recipient, that tend to make authentication of e-mail easier.¹²⁷ Therefore, in the absence of an acknowledgement of authorship and authenticity from a party with relevant knowledge, cautious counsel should consider gathering additional circumstantial evidence of authenticity to satisfy the requirements of MRE 901.¹²⁸

Combining the established methods for authenticating webpages and e-mail with the following additional considerations, counsel will be better prepared to deal with the challenge of authenticating cloud-based digital evidence. These additional considerations include: ownership or authorship of the evidence, data integrity, redundancy, and the nature of the cloud service itself.

1. Establishing Ownership/Authorship

Establishing ownership or authorship of digital evidence obtained from the cloud can assist with authentication under MRE 901. As is the case with e-mail and webpages,¹²⁹ showing that a relevant party owned or authored the evidence may be an important part of the circumstantial evidence portrait that a proponent paints during the authentication process. To determine ownership or authorship, the cloud service provider's terms of service are a good starting point.¹³⁰

First, knowing what procedures the service provider uses to record transactions and assign those transactions to particular users can be helpful. Some cloud service providers collect an extensive amount of user information when the user accesses the service. Dropbox, for example, collects information regarding the device and software used to access the service, including the internet protocol address, the last webpage visited before visiting Dropbox, user searches within Dropbox, the user's mobile carrier, and "date and time stamps associated with transactions, system

configuration information, [and] metadata . . ."¹³¹ Dropbox also warns that while it does not currently geolocate a user via their application software, it may do so in the future, and does collect geolocation data that may be included in any photos that a user uploads to its cloud service.¹³² This information can serve to circumstantially link the subject to the evidence in question, or, in the case of shared folders, may demonstrate the proponent of the evidence needs to dig deeper to establish ownership or authorship.

Second, the cloud service provider's terms of service may provide guidance regarding ownership of content. Ownership information can vary greatly among cloud service providers. For example, Dropbox informs users that "Your Stuff is yours. These terms don't give us any rights to Your Stuff . . ."¹³³ Google, however, notes that while user submitted content belongs to the owner, Google has a license to use or modify that content as Google sees fit.¹³⁴

Finally, the evidence itself may share internal consistencies that demonstrate ownership or authorship.¹³⁵ For example, an accused may take a "selfie"¹³⁶ with his iPhone at the scene of the crime, and the photo may then be uploaded to iCloud. In a process similar to authentication of a Facebook message, the proponent may seek to show that the photo reveals the defendant's face and arm, as he holds the phone to take the picture, while standing at the scene of

¹²⁷ Nonetheless, sender and recipient information alone is generally insufficient to authenticate e-mail evidence. *Campbell*, 382 S.W.3d at 550 ("[T]he messages themselves purport to be messages sent from a Facebook account bearing Campbell's name to an account bearing Ana's name. While this fact alone is insufficient to authenticate Campbell as the author, when combined with other circumstantial evidence, the record may support a finding by a rational jury that the messages were authored and sent by Campbell.").

¹²⁸ *Campbell v. State* is instructive in this matter. See *supra* Part III.B.3.

¹²⁹ See *supra* Parts III.B.1 and III.B.2.

¹³⁰ Counsel may introduce evidence of a cloud service provider's terms of service through a witness with knowledge of the terms, and need not necessarily be a witness with "personal" knowledge. See generally *United States v. Swecker*, 2001 CCA LEXIS 107, at *12 (A.F. Ct. Crim. App. 2001) ("The case law interpreting this rule indicates that the foundation witness need not be the person who prepared the record, nor need they have personal knowledge of the entries. The witness need only have sufficient knowledge of the record-keeping system to establish its reliability.").

¹³¹ *Privacy Policy*, DROPBOX, available at <http://www.dropbox.com/privacy> (last visited Dec. 1, 2013).

¹³² *Id.* Similarly, when a user accesses Google Drive's cloud service, Google collects search queries, telephone numbers, time and date information, internet protocol address, device information, and, at times, geolocation information. *Privacy Policy*, GOOGLE DRIVE, <http://www.google.com/policies/privacy/> (last visited May 1, 2014). Apple's iCloud service makes consent to geolocation a part of their service as well. *iCloud Terms and Conditions*, APPLE ICLOUD, <https://www.apple.com/legal/internet-services/icloud/en/terms.html> (last visited May 1, 2014). Geolocation refers to the ability to pinpoint the location of the user through a device's GPS, wireless, cell-tower, or Bluetooth access. In re *Smartphone Geolocation Data Application*, 2013 WL 5583711, at *7 (E.D.N.Y. 2013) ("One important aspect of smartphone technology is the ability of these devices to identify, in real time, their geographic location, which data can be shared with certain programs and providers to enable advanced functions.").

¹³³ See *Terms of Service*, DROPBOX, <http://www.dropbox.com/terms> (last visited May 2, 2014).

¹³⁴ See *Google Documents Terms of Service*, GOOGLE, <http://www.google.com/intl/en/policies/terms/> (last visited May 1, 2014) ("When you upload or otherwise submit content to our Services, you give Google (and those we work with) a worldwide license to use, host, store, reproduce, modify, create derivative works (such as those resulting from translations, adaptations or other changes we make so that your content works better with our Services), communicate, publish, publicly perform, publicly display and distribute such content.").

¹³⁵ See, e.g., *Campbell v. State*, 382 S.W.3d 545, 551-52 (Tex. Ct. App. 2012).

¹³⁶ "The term 'selfie' is the name given to a self-portrait photograph, 'often snapped at odd angles with smartphones[.]' and 'typically made to post on a social networking website (or sen[t] in a text message)[.]'" *United States v. Doe*, 2013 WL 4212400, at *8 n.6 (W.D.N.C. 2013) (citation omitted).

the crime. Taken together with some additional corroborating evidence for example, testimony that indicates the background is indeed the scene of the crime, or geolocation data, and evidence that the iCloud service belonged to the defendant, the purposes of MRE 901 would be served.

2. Data Integrity, Alterations, and Tampering

In addition to establishing authorship or ownership of digital evidence obtained from the cloud, counsel should also consider the procedures the service provider uses to ensure data integrity. This is significant because some cloud services make no guarantees of data integrity.¹³⁷ Evidence that shows signs of corruption, alteration, or tampering may or may not be admissible.¹³⁸ If altered evidence is sufficiently authenticated and admitted, the fact finder may accord that evidence less weight.¹³⁹

In *United States v. Hock Chee Koo*, the government charged Shengbao Wu with conspiracy to commit wire fraud, computer fraud, and theft of trade secrets.¹⁴⁰ In the course of the investigation, Wu's laptop was secured by the government from Lawrence Hoffman, Wu's employer.¹⁴¹ Hoffman "had filed a civil lawsuit against Wu the day before he obtained Wu's laptop."¹⁴² Then, over the course of two days, Hoffman used the laptop and perused its contents.¹⁴³ A subsequent FBI forensic examination revealed that Hoffman's actions, combined with those of a civilian

¹³⁷ See, e.g., *Terms of Service*, DROPBOX, *supra* note 133 ("You, and not Dropbox, are responsible for maintaining and protecting all of your stuff. Dropbox will not be liable for any loss or corruption of your stuff, or for any costs or expenses associated with backing up or restoring any of your stuff."); *iCloud Terms and Conditions*, APPLE ICLOUD, *supra* note 132 ("Apple does not guarantee or warrant that any content you may store or access through the service will not be subject to inadvertent damage, corruption, loss, or removal . . .").

¹³⁸ See, e.g., *State v. Ararat*, 2006 Ohio App. LEXIS 1592, at *P56 (Ohio Ct. App. 2006) (finding that security video altered to put the video in chronological order and padded, "wherein duplicate images are inserted between the photos taken by the security cameras at set intervals, in order to create a final product that approximates real time viewing" was properly admitted by the trial court); *United States v. Dawson*, 425 F.3d 389, 392–93 (7th Cir. 2005) (recordings of conversations with defendants were properly authenticated even though they contained gaps and erasures and possibly exculpatory information). *But see* *United States v. Hock Chee Koo*, 770 F. Supp. 2d 1115 (D. Or. 2011) (finding alterations were too significant to permit authentication of evidence).

¹³⁹ See, e.g., *United States v. Safavian*, 435 F. Supp. 2d 36, 41 (D.D.C. 2006) (rejecting defendant's argument that because e-mail can be altered, especially when replied to or forwarded, it could not be properly authenticated, finding instead that "defendant's argument is more appropriately directed to the weight the jury should give the evidence, not to its authenticity.").

¹⁴⁰ 770 F. Supp. 2d 1115, 1118–19 (D. Or. 2011).

¹⁴¹ *Id.* at 1119, 1124.

¹⁴² *Id.* at 1125.

¹⁴³ *Id.*

forensic examiner hired by Hoffman, resulted in the access, alteration, or deletion of over 1,000 files.¹⁴⁴

Because Hoffman and his examiners tampered with and altered the evidence, the trial court excluded the FBI's forensic image of Wu's laptop.¹⁴⁵ Despite the government's assertion that the evidence of alteration should go to weight, not admissibility, the government failed to demonstrate that the laptop was "in 'substantially the same condition as when the crime was committed.'"¹⁴⁶ Thus, the laptop image was not properly authenticated under FRE 901(a) and was excluded.¹⁴⁷

3. Redundancy

Even if digital evidence is altered, tampered with, or corrupt, the cloud service provider may have sufficient redundancy to provide a copy of the original unaltered or intact content. For example, Dropbox advises its users that Dropbox keeps redundant backups of all data over multiple locations to prevent the remote possibility of data loss. "In fact, if you're using the Dropbox desktop application, your files are backed up several times."¹⁴⁸ Thus, if authentication due to corruption, alteration, or tampering becomes an issue, counsel should inquire into the service provider's policy regarding backup timing and frequency.¹⁴⁹ This may afford the proponent of such evidence the ability to secure an unaltered or undamaged version of the evidence.

4. Nature of the Cloud Service

Finally, in considering potential issues regarding digital evidence obtained from the cloud, counsel should inquire into the nature of the cloud service itself. Cloud services can be free public services, paid private services, or a hybrid of both.¹⁵⁰ Additionally, the cloud service may provide the

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1126.

¹⁴⁶ *Id.* (citation omitted).

¹⁴⁷ *Id.*

¹⁴⁸ *Security Overview*, DROPBOX, <https://www.dropbox.com/help/122/en> (last visited May 2, 2014) ("By default, Dropbox saves a history of all deleted and earlier versions of files for 30 days for all Dropbox accounts.").

¹⁴⁹ This note does not address the implication of Federal Rules of Evidence 1001–08, the "best evidence rule." For a thorough discussion of the application of the best evidence rule to digital evidence, see *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 576–83 (D. Md. 2007). See also *State v. Bellar*, 217 P.3d 1094, 1110 (Or. Ct. App. 2009) (Sercombe, J., dissenting) (quoting Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 564 (2005)) (asserting that an "original" is likely a distinction without a difference when it comes to digital evidence).

¹⁵⁰ Apple's iCloud is a service provided to Apple product users, though it does offer some PC support through Apple software. *iCloud*, ICLOUD, <http://www.apple.com/icloud/> (last visited May 2, 2014). Dropbox and Google Drive offer free public services with an option to buy more storage space. DROPBOX, <https://www.dropbox.com/upgrade> (last visited May 2,

user the option to publicly or privately share access to the stored files.¹⁵¹ Shared access to files creates a potential authentication issue when considering ownership or authorship.¹⁵²

However, providing some evidence of each of these cloud-specific characteristics will help counsel when authenticating, or challenging the authentication of, cloud data. Coupling this evidence with the established methods for authenticating e-mail and webpages will help ensure that the proffered cloud based evidence can be authenticated under MRE 901. Regardless, as noted above, the threshold is low and counsel need only show that the evidence proffered is what it purports to be.¹⁵³

IV. Conclusion

Storing data in the cloud is becoming more and more commonplace. Its frequency of use will likely only continue to increase. As a result, a growing number of litigants will turn to the cloud for relevant evidence. To ensure admissibility of that evidence at trial, counsel need to establish a sufficient foundation for authentication.

Currently, there is a dearth of case law and guidance regarding proper methods of authentication of cloud data, but counsel are not without guideposts. Though cloud-based digital evidence is different from e-mail and webpages, coupling evidence of ownership, authorship, data integrity, and the nature of the cloud service with traditionally accepted methods of authentication for e-mail and webpages, will enable counsel to meet the threshold requirements of MRE 901 and clear one of the first hurdles of admissibility.

2014); *Storage Plan Pricing*, GOOGLE DRIVE, <https://support.google.com/drive/answer/2375123?hl=en> (last visited May 2, 2014). Amazon offers both free public and private business solutions. *Amazon Web Services*, AMAZON SIMPLE STORAGE SERVICE, <http://aws.amazon.com/s3/> (last visited May 2, 2014).

¹⁵¹ See, e.g., *Dropbox Terms of Service*, DROPBOX, <https://www.dropbox.com/privacy#terms> (last visited May 29, 2014) (“The Services provide features that allow you to share your stuff with others or to make it public. There are many things that users may do with that stuff (for example, copy it, modify it, re-share it). Please consider carefully what you choose to share or make public. Dropbox has no responsibility for that activity.”).

¹⁵² See *supra* Part III.C.1.

¹⁵³ See *supra* notes 33–35 and accompanying text.

The Terror Courts: Rough Justice at Guantanamo Bay¹

Reviewed by Major Thomas S. Hong*

*A country without law is a jungle. If we are law governed, if we live up to our values, if we don't see national security and law as a contradiction in terms—we can persuade individuals that these trials are fair.*²

I. An American Legal and Human Rights Controversy

Controversy surrounding the detention camps of Joint Task Force Guantanamo and its deployment in the War on Terrorism has surpassed its twelfth year.² Wedded to the detention operations at Guantanamo Bay (Gitmo) are the military commissions set up “to try alien unprivileged enemy belligerents for violations of the law of war and other offenses”³ Even with the improvements to the commissions, persistent challenges remain as to its implementation and exit strategy.⁴

Among the prominent figures involved in the commissions, Brigadier General Mark S. Martins of the U.S. Army Judge Advocate General's Corps was selected to supervise the prosecution of Khalid Sheikh Mohammed and

four other co-conspirators to the 9/11 attacks.⁵ Since his October 2011 appointment as Chief Prosecutor of the commissions, Brigadier General Martins has advocated for the continued use of the commissions in speeches and interviews.⁶ In light of this recent effort to portray the military commissions in its most positive light, a good primer on the history and issues surrounding the commissions helps the practitioner understand the context and import of Brigadier General Martins' arguments, and most importantly, the stakes involved.⁷

To fill the knowledge gap, Jess Bravin's *Terror Courts* is highly recommended for an overarching backstory to what may be one of the greatest American legal and human rights controversies of the twenty-first century. A Boalt Hall-educated legal correspondent for the *Wall Street Journal*, Bravin got on the military commission trail shortly after reporting from Ground Zero on 11 September 2001.⁸ Following this report, he continued to cover the legal aftermath of the attacks; namely, the legislation that would eventually become known as the Patriot Act.⁹ When he

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¹ JESS BRAVIN, *THE TERROR COURTS: ROUGH JUSTICE AT GUANTANAMO BAY* (2013).

² Brigadier General Mark Martins, Chief Prosecutor, Military Comm'ns, U.S. Army, Judge Advocate Gen.'s Corps, LENS Conference: A Conversation with the Chief Prosecutor (Mar. 1, 2013), available at Youtube, http://www.youtube.com/watch?v=pdAI9nMr_2U (video clip posted by Dukelaw (Mar. 1, 2013) (discussing military commissions and the Military Commissions Act of 2009)).

³ John T. Woolley & Gerhard Peters, The American Presidency Project, President George W. Bush: Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), available at <http://www.presidency.ucsb.edu/ws?pid=63124>. “The first detainees arrived from Kandahar on Friday, January 11, 2002.” BRAVIN, *supra*, note 1, at 77.

⁴ 10 U.S.C. § 948b (2012). The Military Commissions Act of 2009, Public Law 111-84 (MCA), signed by President Barack Obama on 28 October 2009, authorizes the President to create military commissions. It lays out who can be charged, tried, and punished, and outlines the accused's basic rights and procedures for conducting the commissions. The 2009 MCA superseded the 2006 Military Commissions Act. See *Military Commissions History*, OFFICE OF MILITARY COMM'NS, <http://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx> (last visited June 9, 2014).

⁵ See, e.g., Human Rights First, *Guantanamo: A Comprehensive Exit Strategy*, July 21, 2013, available at <http://www.humanrightsfirst.org/resource/guantanamo-comprehensive-exit-strategy> (“[Even] the military commission cases of the alleged 9/11 plotters and the alleged USS Cole bomber have been beset with scandal (e.g., the CIA was discovered to have the ability to censor the proceedings) and legal uncertainty (e.g., the presiding judge was unsure whether the Constitution applied).”). For a list of some earlier articles critical of the 2001 creation of the military commissions, see Major Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW, Mar. 2002, at 41, 41 n.3.

⁶ Brigadier General Martins's speeches are available on Youtube. Transcriptions to Brigadier General Martins's Keynote Address at the American Bar Association's 21st Annual Review of the Field of National Security Law: Legitimacy and Constraint in Reformed Military Commissions (1 Dec. 2011) are available at http://www.americanbar.org/content/dam/aba/events/law_national_security/mark_martins_key-note_address.authcheckdam.pdf.

⁷ An example of a counterpoint to Brigadier General Martins's advocacy of military commissions prosecution comes from William K. Lietzau, a retired U.S. Marine Corps colonel and judge advocate. Lietzau, while serving as a National Security Council staff member, recommended to President Obama's White House counsel, Gregory Craig, “to pull the plug” on the military commissions altogether. Lietzau reasoned that the “exigent circumstances” that “may have once justified establishing a parallel system of rough justice for enemy aliens long had passed.” BRAVIN, *supra*, note 1, at 355. Lietzau also believed that conviction in federal court was the gold standard and beyond scrutiny, while “a military commission conviction would be clouded for years by appeals through the federal court system, which would still have to resolve such basic questions as which, if any, constitutional provisions applied” *Id.*

⁸ See *Journalist Jess Bravin '97 Wins Jacobs Fellowship*, BERKELEY LAW.EDU (Sept. 5, 2006), <http://www.law.berkeley.edu/4015.htm>. Bravin graduated from the University of California at Berkeley, School of Law, commonly known as Boalt Hall. *Id.*; see also Jess Bravin: Law, Politics, & the Media Lecture Series (Sept. 5, 2006) [hereinafter Bravin Presentation at Syracuse Law School], available at YOUTUBE, <http://www.youtube.com/watch?v=pGWcbWNkRJu> (video clip posted by SyracuseLaw on Apr. 15, 2013).

⁹ *Id.*

¹⁰ See Interview by Mark Robertson with Jess Bravin, The “Who, What, and Why” Behind Guantanamo: An Interview with Jess Bravin, in Los

discovered that the idea of reviving the military commissions was afoot, he became “quite interested” and began covering it before President Bush signed the military order on 13 November 2001 establishing the military commissions.¹⁰

Driven by natural curiosity and a legally trained mind, Bravin doggedly pursues the inside story of the military commissions from its rebirth, development, and iterations.¹¹ Bravin employs great storytelling and behind-the-scenes expositions of the commissions’ movers and shakers. Like a seasoned trial lawyer before a seated jury, Bravin knows his audience and keeps them engaged with dramatic stories of the people involved in making legal and political history. In addition to containing a compelling story of the struggles and relative triumphs of political elites, government lawyers, and defendants, *Terror Courts* provides valuable lessons for government and military lawyers who may one day find themselves caught up in history-making cases.

II. “More a Narrative Than a Law Book”¹²

By his own assessment, Bravin asserts his book is more of a narrative of what happened in the military commission cases than a “law book.”¹³ To that end, Bravin skillfully tells the story of the commissions and the people who played a key role in this portion of government and military history. The storyline is quite simple. After the hijacking and the terrorist attacks on U.S. soil transpired on 11 September 2001, President Bush created the military commissions on the advice of a small group of individuals.¹⁴ The President ordered the military commissions into existence with the expectation that the trials would be full and fair, but that punishments—including the death penalty—would be imposed quickly. This was due in part to its stripped-down military nature and the lack of any appeal rights.¹⁵

Angeles, Ca. (May 22, 2013), L.A. REV. OF BOOKS, available at <http://lareviewofbooks.org/interview/the-who-what-and-why-behind-guantanamo-an-interview-with-jess-bravin#>.

¹¹ *Id.*

¹² See Bravin Presentation at Syracuse Law School, *supra* note 8. It is unclear what Bravin means by a “law book,” but it is accurate to say that his book is more of a historical novel than a treatise or hornbook on the modern-day military commissions.

¹³ *Id.*

¹⁴ See *infra* note 27 and accompanying text.

¹⁵ BRAVIN, *supra*, note 1, at 38.

¹⁶ The prosecutors’ discovery of some form of torture of detainees while under U.S. custody is introduced in the book through the eyes of Vernon Stuart Couch, a U.S. Marine Corps lieutenant colonel judge advocate who was one of the first military prosecutors to volunteer to join the prosecution staff at the Office of Military Commissions. *Id.* at 8–9; see *infra* note 32 and accompanying text. During one of the first visits to Guantanamo, Couch saw a detainee kneeling on the floor with flashing strobe lights and deafening, heavy-metal music playing. *Id.* at 84. Later, one of the defendants (Ahmed al-Darbi) that Couch was to prosecute was found to have been physically and sexually assaulted more than a dozen times by

Once the order was signed, the military commissions’ lawyers were selected and the wheels of justice began to turn. The problem was that principled and independent military prosecutors—and later military defense lawyers—saw significant issues with bringing the cases to trial because the detainee-defendants were abused and tortured while in U.S. custody.¹⁶ The prosecuting lawyers complained to their superiors that the cases were tainted and fraught with legal landmines.¹⁷ With pressure mounting to bring wrongdoers to swift justice, mixed with the general unsavoriness of trying such cases, internal office strife and personnel changes ensued.¹⁸ It is interesting to note that even before the military prosecutors were named and assigned, The Judge Advocate Generals of the U.S. Army, Navy, Air Force, and Marine Corps expressed issues and doubts with the military commissions draft proposal.¹⁹

The latter part of the book deals with how certain members of the State Department and the Office of the Military Commissions, along with members of the legislative and judicial branches, worked to undo—or at least fix—the problematic parts of the 13 November 2001, Presidential Military Order.²⁰ By 2006, the U.S. Supreme Court in *Hamdan v. Rumsfeld*²¹ ruled that the commissions

U.S. government agents, e.g., being dragged and thrown against walls; punched in the chest and stomach; made to urinate and defecate in the street; and sexually touched and humiliated. *Id.* at 268–69.

¹⁷ Legal landmines, such as the suppression of a defendant’s statements obtained through coercive interrogation methods, risked the prosecution’s case since most of the evidence against the defendants came from “detainee statements—or, rather, summaries of detainee statements, paraphrased by an interrogator and edited by higher-ups.” *Id.* at 83.

¹⁸ *Id.* at 136–39.

¹⁹ *Id.* at 39. Bravin states that the top military lawyers only had thirty minutes to review and comment on the draft document. This vignette sets up the theme that runs throughout the story: conflicts between military lawyers and “political appointees such as [John] Yoo and [David] Addington.” *Id.*; see also *infra* note 27 and accompanying text; see generally Major General (Retired) Thomas J. Romig, *The Thirty-First Charles L. Decker Lecture in Administrative and Civil Law*, 220 MIL. L. REV. (forthcoming Fall 2014) [hereinafter Romig Lecture]. “[T]o our surprise, the President signed and issued the military order that established Military Commissions. They had ignored all of our comments, all of our advice; all they wanted, apparently, was a rubber stamp.” *Id.*

²⁰ Bravin peppers the second half with vignettes of individuals and offices that tried to improve the commissions. Examples include Couch’s memorandum itemizing what he saw as problems with the military commissions, Condoleezza Rice’s attempt, as the Secretary of State, to bring commissions closer to international legal standards, and Commissions Appointing Authority John Altenburg’s 232-page proposed rulebook. *Id.* at 240–44, 272–84. Chapter 14 of the book begins with stories of Senator Lindsey Graham’s actions to understand and fix the commissions’ problems through the passage of legislation. *Id.* at 309–12. Bravin also describes several Supreme Court cases in his book, such as *Rasul v. Bush*, the case that held that U.S. courts can consider challenges to the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. *Id.* at 167–68; see also *Rasul v. Bush*, 542 U.S. 466, 480–82 (2004).

²¹ 548 U.S. 557 (2006).

²² 10 U.S.C. § 948a-d (2012). “In response to the Hamdan ruling, Congress enacts the Military Commissions Act (MCA) of 2006. The 2006 MCA

convened under President Bush's order did not have the power to try the detainee. In response, Congress passed the Military Commissions Act of 2006.²² Further reforms were later passed in the Military Commissions Act of 2009, the replacement to the 2006 law.²³ After struggling to bring any case to trial, the military commissions finally did so in 2007, but the outcome failed to match the track record of severe punishments netted by the Department of Justice (DoJ) in its prosecutions of terrorists in U.S. District Courts.²⁴

authorizes the trial by military commission of alien unlawful enemy combatants engaged in hostilities against the U.S. for violations of the law of war and other offenses triable by military commission." *Military Commissions History*, OFFICE OF MILITARY COMMISSIONS, <http://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx> (last visited June 5, 2014). Bravin notes that then-Senator Barack Obama voted against the bill. BRAVIN, *supra*, note 1, at 312.

²³ Congress enacted the Military Commissions Act of 2009 as part of the Department of Defense Authorization Act (NDAA) for FY2010, Pub. L. No. 111-84, 123 Stat. 2190 (2009).

The 2009 MCA expands the rights of an accused to align more closely with the rights afforded to an accused in courts-martial and federal criminal cases. It enhances an accused's rights to counsel, including the right to request a specific counsel from the defense pool and, in capital cases, to have counsel with expertise in capital cases. The 2009 MCA also prohibits the use in evidence of statements that were obtained by torture or cruel, inhuman, and degrading treatment.

Military Commissions History, OFFICE OF MILITARY COMMISSIONS, <http://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx> (last visited June 5, 2014).

²⁴ See BRAVIN, *supra* note 1, at 374–75. David Hicks, a young Australian citizen, was the first detainee to be tried after the Military Commissions Act of 2006. He pled guilty to and was convicted of providing material support for terrorism. His formal sentence was seven years, but he would only serve nine months in an Australian prison. *Id.* Bravin also gives significant details of the commissions trial of Salim Ahmed Salim Hamdan, the driver for Osama bin Laden. He was found guilty of providing material support for terrorism, but not guilty of conspiracy. *Id.* at 334. Hamdan's sentence was confinement for sixty-six months with sixty-one months credited for time already served in confinement. *Id.* at 341–42. Compared to the military commissions, the Department of Justice prosecutions of terrorists resulted in higher confinement terms. For example, Mohamad Ibrahim Shnewer, brothers Dritan Duka, Shain Duka, and Eljvir Duka, and Serdar Tatar, were convicted of plotting to kill U.S. Soldiers in an armed attack on the military base in Fort Dix, New Jersey. Their sentences ranged from thirty-three years in prison to life in prison plus thirty years. See Press Release, U.S. Department of Justice, Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System (June 9, 2009), available at <http://www.justice.gov/opa/pr/2009/June/09-ag-564.html>.

²⁵ The other co-conspirators are Walid bin Attash (aka Khallad), who is accused of running an al Qaeda training camp and observing airport security in Malaysia to formulate a hijacking plan; Ramzi Binalshibh, who is accused of assisting the 9/11 hijackers with financial transactions and helping them find flight schools; Ali Abdul Aziz (Khalid Sheikh Mohammed's nephew and aka Amar al-Baluchi), who is accused of sending \$127,000 to the hijackers for their expenses and flight training and helping to facilitate their travel to the United States; and Mustafa Ahmed Adam al-Hawsawi, who is accused of assisting the hijackers with money, Western clothing, traveler's checks, and credit cards. BRAVIN, *supra* note 1, at 321–22.

The book ends with a description of the pending joint trial of Khalid Sheikh Mohammed (KSM)—the self-professed mastermind behind the 11 September 2001 attacks—and four alleged co-conspirators.²⁵ The proceedings were so mired in pretrial and constitutional issues that an actual trial date was set one year from the arraignment.²⁶ Although Bravin does not say it outright, he lets the story conclude with the implication that the military commissions are a failed project of the Bush Administration that President Obama inherited and—for political and other reasons—could not put out to pasture.

III. Movers and Shakers

Bravin's book is compelling because he weaves into the story the personal motivations and world views of the people behind the establishment of the commissions. Bravin uses biographical information to show what motivated key influencers to use military commissions rather than the DoJ in federal court for prosecution. Bravin's story makes clear that the modern-day military commissions were not the brainchild of President George W. Bush. Rather, the movers and shakers behind military commissions included David Addington, the legal advisor to Vice President Dick Cheney; John Yoo,²⁷ Deputy Assistant U.S. Attorney General in the Office of Legal Counsel; Donald Rumsfeld, Secretary of Defense; and Dick Cheney, Vice President of the United States. This small inner circle believed the President, as Commander in Chief, had unbridled power to prosecute the terrorists involved in the multi-plane hijacking and suicide missions as war criminals.²⁸

On the political side, Mr. Cheney obtained the President's approval for the military commissions at a private lunch meeting, and Mr. Rumsfeld was the action officer who executed it once it was issued.²⁹ For the most part, U.S. Attorney General John Ashcroft, the various military service Judge Advocate Generals, and other potential subject matter experts, were decisively cut out from the decision matrix.³⁰ Incredibly, the twenty-first century

²⁶ *Id.* at 368–70. Bravin notes that the defense refused to "acknowledge the venue's legitimacy, insisting that even threshold questions—such as whether the defendant wished to be represented by his lawyer—could not be addressed without first assessing the impact of confinement, abuse, and military interference with attorney-client communications prior to the hearing." *Id.*

²⁷ It appears that Mr. Addington was the top lawyer who had the political will and muscle to check any dissent from other agency lawyers about the commissions, while Mr. Yoo supplied the constitutional legal theories and justifications. Unfortunately, any legal review of Mr. Yoo's work by the Department of Justice or judge advocates was cut short intentionally. *Id.* at 37–43.

²⁸ *Id.* at 47–53.

²⁹ *Id.* at 43–44.

³⁰ *Id.*; see generally Romig Lecture, *supra* note 19.

American military commissions came about by the legal and political initiative of only about four individuals.

Moving from a focus on the top legal and political figures in the early days of the commissions, Bravin shifts the spotlight to the prosecutors and their supervisors assigned to the newly minted commissions by providing individual biographical information.³¹ Judge advocates will be most familiar with these individuals and their professional backgrounds because they are all contemporary or former colleagues (several have retired from the military). As the main subject of chapter one suggests, Stuart Couch (known as “Tater” by his military friends) is the main character in Bravin’s book.³²

Couch, who was a judge advocate in the U.S. Marine Corps, shares his struggles as a prosecutor dealing with the issue of detainee torture. The history of the military commissions becomes interwoven with Couch’s professional history. This is fortuitous for those seeking a good example of how a person should handle ethical and legal problems during one’s career. For Couch, the dilemma dealt with what to do with his growing sense that the defendants he was charged to prosecute were abused and tortured in one form or another, and that the only evidence the government could present against them at trial came from the defendants’ own admissions of guilt.³³ Couch did what most judge advocates should do when facing significant issues: he consulted his mentors for advice, talked with his spouse for support, examined his conscience, and kept his mind open to the possibility of speaking truth to power—even as a military officer and lawyer whose loyalty and duty were aligned to the Office of the Military Commissions.³⁴ Military and government lawyers will have much food for thought when considering the issues and dilemmas that Couch faced.

To keep the story complete and balanced, Bravin also gives relevant biographical sketches of some of the detainees whose names are associated with the military commissions as actual defendants or prospective defendants. Detainees

³¹ Some of the notable military commissions prosecutors named in Bravin’s book are: Army Colonel Fred Borch (Retired); Navy Commander Scott Lang (Retired); Army Colonel Bob Swann (Retired, but stayed in the Office of the Military Commission as a Department of the Army civilian); Air Force Colonel Morris Davis (Retired); and Army Brigadier General Mark Martins.

³² See Bravin Presentation at Syracuse Law School, *supra* note 8. Stuart Couch retired from the Marines in 2009 and is currently an Immigration Judge at the U.S. Department of Justice. Following his position as Senior Prosecutor for the Office of Military Commissions, he served for three years as a Senior Appellate Judge at the Navy-Marine Corps Court of Criminal Appeals. See BRAVIN, *supra* note 1, at 382; see also Stuart Couch, *Profile Overview*, LINKEDIN, <http://www.linkedin.com/pub/stuart-couch/4/5b7/955> (last visited June 9, 2014).

³³ See BRAVIN, *supra* note 1, at 145–50.

³⁴ *Id.*

³⁵ *Id.* at 68–69. Slahi is also suspected of recruiting Ziad Jarrah, the hijacker that crashed United Airlines Flight 93 in Pennsylvania. *Id.*

like Salim Ahmed Salim Hamdan (Osama bin Laden’s driver) and Mohamedou Ould Slahi (an al Qaeda leader who allegedly recruited Mohammed Atta (the ringleader) and Marwan al-Shehhi, the men who crashed the commercial jets on 11 September 2001) are profiled and covered extensively by Bravin.³⁵ In fact, Bravin first introduces Hamdan as early as the book’s prologue. Hamdan’s life story develops throughout the book and ends in a dramatic courtroom scene. After a relatively lenient sentence is announced, Hamdan interrupts the commission members from being excused to again apologize to them, the military judge, and everyone else in the room.³⁶ These stories humanize the detainees held at Gitmo and evoke a degree of sympathy for those caught and held there without any sign or hope of future release.³⁷ Even KSM seems to garner more sympathy after *Terror Court* describes the torture he faced.³⁸ How the trial of KSM and the alleged co-conspirators will turn out remains to be seen, but the success or failure of the military commissions is clearly tied to these cases.³⁹

IV. Lessons Learned for Judge Advocates and Government Lawyers

In addition to providing an insider’s account of the military commissions’ creation and development, Bravin’s *Terror Courts* presents several lessons for judge advocates and government lawyers to consider. Many judge advocates are named in the book, and their words, actions, and characteristics are integrated into the commissions’ story. In telling the story of the military commissions, Bravin airs the proverbial dirty laundry sometimes found in legal offices.

³⁶ *Id.* at 334–42. Hamdan was sentenced to sixty-six months’ confinement and was given sixty-one months credit for time served. In his sentencing argument, prosecutor John Murphy had asked for thirty years at a minimum. The sixty-six months, Bravin points out, is only 1.6 percent of what was asked. *Id.*

³⁷ See *id.* at 376–77 (discussing the unlikely chance that Mohammed al-Qahtani, the alleged Twentieth Hijacker, will be released even when his prosecution case was rejected by the Convening Authority Susan Crawford in 2008 due to torture inflicted on him by U.S. interrogators).

³⁸ *Id.* at 88–89. Bravin provides a vignette where Couch reads the *Atlantic Monthly* magazine article by Mark Bowden describing KSM being “locked naked in a cell with no trace of daylight,” “filled day and night with harsh light and noise,” and “kept awake cold and probably wet.” *Id.*

³⁹ Near the end of the book, Bravin writes that the Army military judge, Colonel James Pohl, assigned to hear the KSM and co-defendants’ case, had set a tentative trial date of 5 May 2013. *Id.* at 370–71. Presently, the trial has not taken place, and the Military Judge Scheduling Order filed on 19 June 2014 is not available due to a pending “security review per the 2011 Regulation for Trial by Military Commission Chapter 19 Section 4.” The most recent Docketing Order that is available at the www.mc.mil website is dated 4 May 2014 and orders several motion hearings for 16–17 June 2014. See Amended Docket Order, *United States v. Khalid Shaikh Mohammad, et al.*, AE 302 (28 May 2014), available at <http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20%28AE302%29.pdf>.

⁴⁰ See generally BRAVIN, *supra* note 1, at 131–53. Chapter 6 provides the best examples of leadership struggles and office strife.

Some of the judge advocates come out as outstanding lawyers, officers, and leaders, but most do not.⁴⁰

The biggest lesson deals with leadership. Although the theme of failed leadership is present throughout the book, Bravin dedicates an entire chapter entitled “The Ides of March” to it. The chapter contains the events of the office turmoil that racked the Office of the Chief Prosecutor around March 2003.⁴¹ Without rehashing the many issues and specifics involved, the lessons learned are the following: First, listen to your subordinates. They may be junior in rank or position and lack experience, but they are lawyers with independent thought and motivations. If their persistent, work-related complaints are not addressed to their satisfaction, larger problems will arise. Second, handle fundamental problems with candor and integrity. Do not hide issues from your own superiors, no matter how much higher wants something done without a hitch. Third, keep in mind that a journalist may find what you are doing important enough to write about, and if you have failed to address the problems in the office with your subordinates and superiors satisfactorily, your acts and omissions may show up in a book years after you have moved on to another assignment.⁴²

V. Conclusion

Bravin’s *The Terror Courts*, with its fluid stories and key characters, provides an easy-to-grasp history and development of the military commissions. *The Terror Court’s* theme and story show how the Bush administration lawyers saw the modern-day military commission as a powerful wartime justice apparatus that would be unleashed on all captured terrorists. The purpose was to obtain swift justice and to deliver the convicted to the punishment phase without undue delay. What the legal planners and their

political bosses did not realize at the time were the significant and persistent objections that the legal community—both inside and outside the executive branch—would raise. As any trial lawyer knows, with continued objections come court rulings, remedies, and lengthy delays. This is precisely what happened with the military commissions.

America has been dealing with the difficulties raised by the military commissions for over a decade, and there is still significant doubt and skepticism about how the pending trial of the so-called 9/11 mastermind and his co-conspirators will pan out.⁴³ However, amidst the doubts and negative opinions, it is certain that Brigadier General Martins and the commissions’ lawyers—be they prosecution or defense—will do their utmost to uphold justice and not let America down.

⁴¹ *Id.* at 136 (describing scathing e-mails between judge advocates within the Office of the Chief Prosecutor for the public to read—and judge—regarding perceived leadership, ethical, and moral failures in the office).

⁴² *See id.* at 141.

⁴³ The epilogue reveals Bravin’s ideological position. He highlights the persistent and thorny challenges for the reformed (and better staffed) commissions. He points out the following issues: that the differential legal treatment and standards for aliens may violate the Geneva Conventions and customary international law; how differential treatment may cause reciprocal action by hostile governments; how military commissions may actually net more lenient punishments than those in federal court; how detainees who underwent abuse at the hands of interrogators may never be prosecuted; and, finally, how the D.C. Circuit Court’s vacation of Salim Hamdan’s conviction for “material support for terrorism” have caused major legal issues for future cases. *Id.* at 377–78. After highlighting these difficult issues, Bravin concludes the book with a rhetorical statement. Describing the pending trials of the military commission, he writes, “[t]he question remains whether they can be done right at all.” *Id.* at 381. Bravin’s choice to finally close the book with Lieutenant Colonel Stuart Couch’s glory-filled medal citation may indicate that Bravin is hopeful and positive about the military commissions, but the fact that his last two words are “Donald Rumsfeld” seem to indicate the opposite. After all, the Defense Secretary was the main approval authority for detainee torture. *Id.* at 383.

Trying Cases to Win in One Volume¹

Reviewed by Dwight H. Sullivan*

I. Introduction

Every now and then, a book changes the way we think about its subject. A baseball fan who was not already a sabermetrician² will see the game differently after reading *Moneyball*.³ *Thinking About Crime*,⁴ as its title suggests, influenced the way its readers thought about crime. What *Moneyball* did for baseball and *Thinking About Crime* did for criminology, *Trying Cases to Win in One Volume* does for trial advocacy.

Trying Cases to Win is a collaborative effort between practicing attorney and former U.S. District Judge Herbert J. Stern, and George Washington University Professor and National Trial Advocacy College Director Stephen A. Saltzburg. Judge Stern had previously authored a five-volume series of *Trying Cases to Win* books.⁵ *Trying Cases to Win in One Volume* is a new, consolidated, and abridged version of that series, published by the American Bar Association in September 2013.

II. Challenging Trial Advocacy Conventional Wisdom

The book advances three central “rules” for effective advocacy: (1) personal advocacy, (2) one central theme, and (3) make the case bigger than the facts. These are supported by four advocacy “laws”: (1) primacy, (2) recency, (3) frequency, and (4) vividness. But more fundamentally, the authors offer an approach to advocacy built on persuasion

theory and confirmation bias,⁶ leading to an emphasis on primacy.⁷ This is reflected by the book’s heavy emphasis on opening statements—or, as the authors prefer, “opening arguments”⁸—which they view as far more important than closing arguments.⁹

Trying Cases to Win is far more than an introductory textbook for trial advocacy—though it serves that function well.¹⁰ The book may be best appreciated by experienced trial advocates. More than a reminder of important trial advocacy lessons, the book challenges some of trial lawyers’ most ingrained beliefs and practices.

The book is iconoclastic, challenging not only longtime trial advocacy conventional wisdom, but also such trial advocacy paragons as Irving Younger¹¹ and Thomas Mauet.¹² The authors also aggressively refute advice from

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¹ HERBERT J. STERN & STEPHEN A. SALTZBURG, TRYING CASES TO WIN IN ONE VOLUME (2013).

² Bill James “coined the word *sabermetrics*, a general term that refers to the use of statistics in the quest for truly objective knowledge about baseball.” SETH MNOOKIN, FEEDING THE MONSTER 161 (2006). The word “derives from SABR, the acronym for the Society for American Baseball Research.” MICHAEL LEWIS, MONEYBALL 82 n.* (2004).

³ LEWIS, *supra* note 2.

⁴ JAMES Q. WILSON, THINKING ABOUT CRIME (1975).

⁵ HERBERT J. STERN, TRYING CASES TO WIN: OPENING ARGUMENTS AND VOIR DIRE (1991); HERBERT J. STERN, TRYING CASES TO WIN: DIRECT EXAMINATION (1992); HERBERT J. STERN, TRYING CASES TO WIN: CROSS EXAMINATION (1993); HERBERT J. STERN, TRYING CASES TO WIN: SUMMATION (1995); HERBERT J. STERN & STEPHEN A. SALTZBURG, TRYING CASES TO WIN: ANATOMY OF A TRIAL (1999).

⁶ “Confirmation bias’ refers to our tendency to seek out evidence that confirms an existing belief, notion, theory, or hypothesis, and to neglect contradictory evidence.” Michael Palmer, *Which Is Better? The Deal or the Ordeal? An Examination of Some Challenges of Case Valuation*, VT. B. J., Fall 2010, at 1, 2.

⁷ “Primacy is the notion that what we hear first is important because it colors our thinking, commits us to positions, and will heavily determine the way we will view what comes later.” STERN & SALTZBURG, *supra* note 1, at 59.

⁸ “Of course an opening is an argument. It argues what you expect the evidence will be and what the evidence will prove, just as a closing argument argues what the evidence has been and what the evidence has proven.” *Id.* at 75.

⁹ See *id.* at 69–70, 372.

¹⁰ The author of this review used the book when team teaching an introductory trial advocacy class during the Fall 2013 semester at George Washington University Law School.

¹¹ STERN & SALTZBURG, *supra* note 1, at 5–6 (repudiating Younger’s analysis of asking one question too many on cross-examination); *id.* at 281 (same); *id.* at 252 (“reject the commandments”). Younger “served as prosecutor, judge, and law professor during his distinguished career.” Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by a More Majestic Standard*, 15 BERKELEY J. CRIM. L. 259, 268 (2010). He has been called “the preeminent authority on cross-examination.” Sara Whitaker & Steven Lubet, *Clarence Darrow, Neuroscientist: What Trial Lawyers Can Learn from Decision Science*, 36 AM. J. TRIAL ADVOC. 61, 70 (2012). Younger’s Ten Commandments of Cross-Examination, “[f]irst presented at a 1975 National Institute of Trial Advocacy conference in Colorado, . . . have become the baseline of modern cross-examination theory.” *Id.*; see generally IRVING YOUNGER, THE ART OF CROSS-EXAMINATION (1976).

¹² See, e.g., STERN & SALTZBURG, *supra* note 1 (disagreeing with Mauet concerning reservation of opening statement); 75–76, 80–81 (disagreeing with Mauet concerning how to distinguish permissible opening statement from impressive argument during the opening); 112–13 (disagreeing with Mauet regarding opening statements); 205 (describing Mauet’s advice concerning preparation of witnesses for direct examination as “the worst way to prepare the witness to testify”). Professor Mauet is the Director of the Trial Advocacy Program at the University of Arizona James E. Rogers College of Law. He is the author of, among many other publications, *Trial Techniques and Trials* (9th ed. 2013).

less hallowed trial advocacy authors, firing broadsides at, among others, jury consultant Sonia Hamlin¹³ and *Trial Advocacy in a Nutshell* author Paul Bergman.¹⁴ The book even rejects some approaches that judge advocates may have learned during military trial advocacy training, such as framing an opening statement in the present tense.¹⁵

Should a defense counsel “assume the burden” during opening statement in a criminal case and tell the jury (or members) that she will “prove” her case? Is it sometimes appropriate for a counsel to ask a question on cross-examination when she does not know what the witness’s answer will be? Is opening statement a better opportunity to persuade the factfinder than closing argument? If you answered no to any of those questions, you disagree with *Trying Cases to Win*’s authors.¹⁶

But while vigorously advocating the authors’ preferred approaches, the book acknowledges and presents alternative trial advocacy views.¹⁷ Few will agree with all of the

authors’ recommendations. But even a reader who disagrees with some—or most—will be a better litigator for having thought about their recommended approach before concluding that an alternate course is better.

Not everything in the book is controversial. The book’s compelling guidance for how to deal with a nonresponsive answer on cross-examination,¹⁸ testimony about conversations,¹⁹ and the dangers of building arguments on “even if” themes,²⁰ for example, will garner near universal agreement.

Co-authored by a former federal judge, the book’s analysis of trial advocacy in bench trials is particularly important.²¹ Beginning a lecture on appellate advocacy, renowned Supreme Court advocate John W. Davis famously asked, “[S]upposing fishes had the gift of speech, who would listen to a fisherman’s weary discourse on fly-casting . . . and all the other tiresome stuff that fishermen talk about, if the fish himself could be induced to give his views on the most effective methods of approach[?]”²² Here we have a former fish—and a big fish at that—telling us how to hook his former colleagues.

The volume is not only informative, but also a pleasure to read. The writing is clear, engaging, and sometimes unexpectedly funny. For example, during a discussion of the prohibition against expressing personal opinions during argument to the jury, the authors write: “This rule has been in existence since the first ethical canon went off in 1855.”²³ And a discussion of introducing exhibits includes the observation, “Lengthy, detailed ‘foundations’ are boring, turgid, and dull (the name of America’s largest law firm) and form arteriosclerosis in the aorta of advocacy.”²⁴

III. Using *Trying Cases to Win* for Professional Military Education

Military lawyers will find the book particularly worthwhile. Many of the book’s lessons are reinforced by analyses of leading trial litigators’ performances during mock trials of the *United States v. Calley* case²⁵ arising from

¹³ STERN & SALTZBURG, *supra* note 1 (disagreeing with Hamlin’s analysis of “humanizing” the counsel during opening statement); 111–12 (disagreeing with Hamlin’s recommendation to begin opening statements with a description of the trial process). Sonya Hamlin’s book *What Makes Juries Listen: A Communications Expert Looks at the Trial* (1985), has been called “one of the seminal texts for lawyers that comes from the jury consultant community.” Robert A. Mead, “Suggestions of Substantial Value”: A Selected, Annotated Bibliography of American Trial Practice Guides, 51 U. KAN. L. REV. 543, 550 (2003). “Sonya Hamlin is a communications expert who works both as a jury consultant and a communications trainer for attorneys.” *Id.*

¹⁴ STERN & SALTZBURG, *supra* note 1, at 81–82, 100–01 (disagreeing with Bergman’s analysis of what distinguishes permissible opening statement from impermissible argument). Paul Bergman is a professor at the UCLA School of Law.

¹⁵ Compare *id.* at 117 (“The present tense confines the speaker to the chronological mode. It does not permit you to *argue*.”), with Major Martin Sittler, *The Art of Storytelling*, ARMY LAW., Oct. 1999, at 30, 30.

A subtle, yet extremely effective, way to tell a story is to use the present tense. This is a difficult technique that requires practice. When we think of a prior event, it is only natural to talk about the event in the past tense. The goal, however, is to place the panel members at the scene and have the event unfold before their eyes. To do this, the story must be told in the present tense By using the present tense, the listener lives the story as it unfolds. Try it; you will see the results. The members will lean forward and really listen to what you are saying.

Id.

¹⁶ STERN & SALTZBURG, *supra* note 1, at 86–88 (“Whether the law gives you the burden or it doesn’t, always assume the burden before the jury.” (italics omitted)) (“What, then, should you say if you represent the criminal or civil defendant? Exactly the same thing that the civil plaintiff should say: ‘I will provide to you’”); 262 (rejecting cross-examination “commandment” to not ask a question unless the cross-examiner knows the answer); 371 (rejecting view “that closing argument is the advocate’s best opportunity to persuade and to bring jurors over to his side”).

¹⁷ See, e.g., *id.* at 355–36 (presenting competing visions of closing argument).

¹⁸ *Id.* at 266–69.

¹⁹ *Id.* at 225–27.

²⁰ *Id.* at 38–40.

²¹ See *id.* at 133–35.

²² John W. Davis, *The Argument of an Appeal*, 3 J. APP. PRAC. & PROCESS 745, 745 (2001), reprinting 26 A.B.A. J. 895 (1940).

²³ STERN & SALTZBURG, *supra* note 1, at 380.

²⁴ *Id.* at 233.

²⁵ See generally *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R.), *aff’d*, 48 C.M.R. 19 (1973).

war crimes during the Vietnam conflict.²⁶ Judge advocates will find those examples particularly relevant and engrossing.

Military justice practitioners will find the book valuable for another reason as well: most will have sufficient trial experience to compare the book's advice to their own experience litigating cases. While reading the book, I constantly thought about how its guidance might have changed the way I litigated some particular case. Judge advocates in trial litigation billets will have an immediate opportunity to employ the lessons that the book teaches.

The book is a useful tool for supervisory judge advocates. One of the most important roles of supervisory judge advocates in the military justice field is improving their subordinates' trial advocacy skills.²⁷ *Trying Cases to Win* can both help guide supervisors' critiques of their subordinates' trial performance and serve as the focal point for an office trial advocacy training program.

IV. Conclusion

Perhaps the best reason for a trial advocate to read *Trying Cases* is the danger that opposing counsel will. Just as more-traditional baseball general managers were once at a competitive disadvantage when negotiating trades with sabermetrics' early adopters, trial advocates who do not understand *Trying Cases to Win*'s lessons will be vulnerable when litigating against those who do.

²⁶ STERN & SALTZBURG, *supra* note 1, at 137–59, 191–200, 216–18, 315–31, 385–86.

²⁷ See generally Major Jay Thoman, *Advancing Advocacy*, ARMY LAW., Sept. 2011, at 35, 35 (“Teaching trial advocacy is one of the most critical duties of a supervising attorney in the trial arena.”).

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 TJAGLCS 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 servicemembers and civilian employees must obtain reservations through their directorates' training office. U.S. Army Reserve (USAR) and Army National Guard (ARNG) Soldiers must obtain reservations through their unit training offices.

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 3172.

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 ATRRS Self-Development Center and click on "Update" your ATRRS Profile (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. Continuing Legal Education (CLE)

The armed services' legal schools provide courses that grant continuing legal education credit in most states. Please check the following web addresses for the most recent course offerings and dates:

a. The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS).

Go to: <https://www.jagcnet.army.mil>. Click on the "Legal Center and School" button in the menu across the top. In the ribbon menu that expands, click "course listing" under the "JAG School" column.

b. The Naval Justice School (NJS).

Go to: http://www.jag.navy.mil/njs_curriculum.htm. Click on the link under the "COURSE SCHEDULE" located in the main column.

c. The Air Force Judge Advocate General's School (AFJAGS).

Go to: <http://www.afjag.af.mil/library/index.asp>. Click on the AFJAGS Annual Bulletin link in the middle of the column. That booklet contains the course schedule.

3. Civilian-Sponsored CLE Institutions

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

NDAА: 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

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

a. The JAOAC is mandatory for all Reserve Component 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 December.

b. Phase I (nonresident online): Phase I is limited to USAR and ARNG 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, students 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 enrollment in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each December at TJAGLCS. Students must have submitted by 1 November all Phase I subcourses, to include all writing exercises, and have received a passing score to be eligible to attend the two-week resident Phase II in December of the following year.

d. Students who fail to submit all Phase I non-resident subcourses by 2400 hours, 1 November 2014, will not be allowed to attend the December 2014 Phase II resident JAOAC. Phase II includes a mandatory APFT and height and weight screening. Failure to pass the APFT or height and weight may result in the student's disenrollment.

e. If you have additional questions regarding JAOAC, contact MAJ T. Scott Randall, commercial telephone (434) 971-3368, or e-mail thomas.s.randall2.mil@mail.mil.

5. Mandatory Continuing Legal Education

a. Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state 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).

b. 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.

c. 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.

d. Regardless of how course attendance is documented, it is the personal responsibility of Judge Advocates 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.

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

Current Materials of Interest

1. The USALSA Information Technology Division and JAGCNet

a. The USALSA Information Technology Division operates a knowledge management, and information service, called JAGCNet. Its primary mission is dedicated to servicing the Army legal community, but alternately provides 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 available through JAGCNet.

b. You may access the “Public” side of JAGCNet by using the following link: <http://www.jagcnet.army.mil>. Do not attempt to log in. The TJAGSA publications can be found using the following process once you have reached the site:

(1) Click on the “Legal Center and School” link across the top of the page. The page will drop down.

(2) If you want to view the “Army Lawyer” or “Military Law Review,” click on those links as desired.

(3) If you want to view other publications, click on the “Publications” link below the “School” title and click on it. This will bring you to a long list of publications.

(4) There is also a link to the “Law Library” that will provide access to additional resources.

c. If you have access to the “Private” side of JAGCNet, you can get to the TJAGLCS publications by using the following link: <http://www.jagcnet2.army.mil>. Be advised that to access the “Private” side of JAGCNet, you MUST have a JAGCNet Account.

(1) Once logged into JAGCNet, find the “TJAGLCS” link across the top of the page and click on it. The page will drop down.

(2) Find the “Publications” link under the “School” title and click on it.

(3) There are several other resource links there as well. You can find links the “Army Lawyer,” the “Military Law Review,” and the “Law Library.”

d. Access to the “Private” side of JAGCNet is restricted to registered users who have been approved by the Information Technology Division, and fall into one or more of the categories listed below.

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

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

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

(4) FLEP students;

(5) 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.

e. Requests for exceptions to the access policy should be e-mailed to: itdservicedesk@jagc-smtp.army.mil.

f. If you do not have a JAGCNet account, and meet the criteria in subparagraph d. (1) through (5) above, you can request one.

(1) Use the following link: <https://www.jagcnet.army.mil/Register>

(2) Fill out the form as completely as possible. Omitting information or submitting an incomplete document will delay approval of your request.

(3) Once you have finished, click "Submit." The JAGCNet Service Desk Team will process your request within 2 business days.

2. The Judge Advocate General's Legal Center and School (TJAGLCS)

a. The Judge Advocate General's Legal Center and School (TJAGLCS), Charlottesville, Virginia, continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows 7 Enterprise and Microsoft Office 2007 Professional.

b. The faculty and staff of TJAGLCS are available through the Internet. Addresses for TJAGLCS 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 the Information Technology Division at (703) 693-0000. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

c. 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. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jt.cnet.army.mil/tjagsa>. Click on "directory" for the listings.

d. Personnel desiring to call TJAGLCS 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 TJAGLCS Information Technology Division at (434) 971 -3264 or DSN 521-3264.

3. Additional Materials of Interest

a. Additional material related to the Judge Advocate General's Corps can be found on the JAG Corps Network (JAGCNet) at www.jagcnet.army.mil.

b. In addition to links for JAG University (JAGU) and other JAG Corps portals, there is a "Public Doc Libraries" section link on the home page for information available to the general public.

c. Additional information is available once you have been granted access to the non-public section of JAGCNet, via the "Access" link on the homepage.

d. Contact information for JAGCNet is 703-693-0000 (DSN: 223) or at itdservicedesk@jagc-smtp.army.mil.

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