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MILITARY LAW REVIEW

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MILITARY LAW REVIEW

Volume 211 **Spring 2012**

MARGIN OF ERROR: POTENTIAL PITFALLS OF THE RULING IN *THE PROSECUTOR v. ANTE GOTOVINA*

MAJOR GENERAL (RET.) WALTER B. HUFFMAN*

I. Introduction[1]

On April 15, 2011, the International Criminal Tribunal for the Former Yugoslavia (ICTY)[2] sentenced Croatian General Ante Gotovina to twenty-four years in prison[3] on charges stemming from his actions

---

* Dean Emeritus and Professor of Law, Texas Tech University School of Law. General Huffman was the senior legal advisor to the U.S. Army VII Corps commander during Operation Desert Storm and subsequently served as The Judge Advocate General of the Army. Before attending law school, General Huffman commanded field artillery firing batteries both in the United States and in combat in Vietnam.

[1] The author gratefully acknowledges the assistance of many colleagues in the development of this article. I particularly thank Professor Laurie Blank, Director of the International Humanitarian Law Clinic at Emory University School of Law for hosting a meeting of experts on this subject where the seeds of this article were planted and many of its concepts discussed. *See generally* Int'l Humanitarian Law Clinic at Emory Sch. of Law, Operational Law Experts Roundtable on the Gotovina Judgment, Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law, No. 12-186 (Jan. 28, 2012) (on file with the International Humanitarian Law Clinic at Emory School of Law).

[2] The International Criminal Tribunal (Former Yugoslavia) (ICTY) was established by S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), after the Security Council determined that "ethnic cleansing" and other widespread violations of humanitarian law occurred within the former Yugoslavia. By the time Operation Storm began in August 1995, Croatian leaders knew that the ICTY, UN observers and the entire world were watching daily developments in the Balkan wars. Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, ¶ 1986 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011) (appeal pending). All ICTY documents cited in this article are available at the ICTY website, http://icr.icty.org/default.aspx (link requires registration).

[3] General Gotovina has been confined in The Hague since December 2005. *See* COMMUNICATIONS SERV. OF THE INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, CASE INFORMATION SHEET, "OPERATION STORM" (IT-06-90), GOTOVINA & MARKAC (2012), *available at* http://www.icty.org/x/cases/gotovina/cis/en/cis_gotovina_al_en.pdf. As this article goes to publication, the case is pending in the ICTY

during Operation Storm, the 1995 Croatian military campaign to reclaim territory from the self-proclaimed Republic of Serbian Krajina (RSK).[4] While General Gotovina was formally charged with participating in a joint criminal enterprise to drive ethnic Serbs out of the Krajina region, the case against him was based largely on allegations that he ordered unlawful artillery and rocket attacks on four towns during conventional combat operations against RSK Serbian forces.[5] Because very few judicial opinions apply the law of war to tactical artillery operations, the Trial Chamber's judgment raises issues of significant legal and operational importance and will command the attention of scholars, courts, and military professionals worldwide. This article critically examines the court's reasoning and concludes that in the interests of justice, the coherent development of international humanitarian law, and the protection of innocent civilians in future wars, the Gotovina judgment should be set aside.[6]

Combat for the control of cities is as old as warfare itself, and the bombardment of cities is a grim reality of war. Cities offer a belligerent

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Appeals Chamber. Official court records and filings of parties relating to this case are accessible at http://icr.icty.org/default.aspx.

[4] *Gotovina*, Case No. IT-06-90-T, Judgment (appeal pending).

[5] This article focuses on the operational and legal validity of the court's findings relating to unlawful use of tactical artillery. While the judgment now under appeal raises other issues, the allegations relating to Gotovina's role in the artillery attacks are central to all aspects of the case against him. *See* Part II.D. *infra*.

[6] Trial chamber decisions are not binding precedent and have no formal authority to change the law, but as one learned treatise aptly observed regarding the weight of decisions of international tribunals: "A coherent body of jurisprudence will naturally have important consequences for the law." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (5th ed. 1998). *See also* William J. Fenrick, *The Development of the Law of Armed Conflict through the Jurisprudence of the ICTY*, in THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENIUM 77, 77-78 (Michael N. Schmitt & Leslie C. Green, eds., 1998).

> Judicial decisions are a subsidiary means for the determination of rules of international law, not a source of law equivalent to treaties, custom or general principles of law. Further, there is no rule of precedent in international law as such. The decisions and practice of the ICTY, if they are to have a positive impact on the development of the law of armed conflict, must persuade external decision makers such as foreign ministry officials, officials in international organizations, other judges, military officers and academic critics of their relevance and utility.

Id.

cover from enemy fire, logistical support, and a host of facilities with military significance, such as communications nodes, transportation hubs, national defense headquarters, and political capitols.[7] At the same time, urban battles bring war's violence into deadly proximity with civilian populations and produce some of the most horrific cases of human suffering and loss of innocent life in the annals of warfare. It is no surprise, then, that cities are often focal points in military campaigns, and the names of cities echo throughout history as reminders of the tragic legacy of urban warfare—Troy, Jericho, Solferino, Gettysburg, Stalingrad, Hue, and Fallujah.[8] Cities not only lie at the crossroads of military history; they also mark a moral and legal frontier between savagery and restraint, between total war and the amelioration of suffering. The quest for rational legal constraints on the attack and defense of urban areas has therefore tested international commitment to humanitarian law and driven the evolution of core legal principles in the law of armed conflict. No other operational scenario places greater demands on the moral and legal commitments of an army or the vitality of humanitarian law. The development of modern weapons, the changing face of war, and the evolution of international humanitarian law have intensified efforts in the modern era to formulate legal standards that balance humanitarian concerns and the military necessity of fighting in and for control of cities.

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[7] *See* United States v. Ohlendorf (Einsatzgruppen Trial), 4 Trials of War Crimes Before the Nuremburg Military Tribunals Under Control Council Law No. 10, Nuremberg, Oct. 1946-Nov. 1949, at 466–67 (1948).

> A city is bombed for tactical purposes; communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that nonmilitary persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action.

Id.

[8] After the 1859 Battle of Solferino, Swiss doctor Henri Dunant published a book describing the horrible suffering of civilian residents and wounded soldiers left on the battlefield that led to the establishment of the International Committee of the Red Cross. HENRI DUNANT, A MEMORY OF SOLFERINO (Eng. ed. 1939) (1862). *See* Adam Roberts, *Land Warfare: From Hague to Nuremburg*, *in* THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 132 (Michael Howard et al. eds., 1994) ("One of the most destructive aspects of hostilities, whether ancient or modern, is siege warfare . . . The most terrible siege of the Second World War was that of Leningrad, whose heroism in the face of disaster engraves its name permanently in the history of war. . . .").

This article reviews the ICTY judgment against General Gotovina, which found that Croatian artillery and rocket attacks on four Serb-held towns during Operation Storm violated the law of war, and focuses especially on the court's inordinate reliance on a novel, accuracy-based standard. The Trial Chamber found that legitimate military targets existed in each of the four Serb-held towns at issue, and that some of the shelling was lawfully directed at those military targets.[9] The court presumed, however, that any projectile that landed over 200 meters from a known military target was the product either of indiscriminate fire or deliberate targeting of "civilian areas"[10] (hereinafter, this presumption will be called "the 200 meter rule"). The court found that "too many projectiles impacted in areas too far away from identified artillery targets . . . for the artillery projectiles to have impacted in these areas incidentally as a result of errors or inaccuracies in the HV [Croatian] artillery fire."[11] This finding serves as the linchpin for the court's conclusion that Gotovina ordered unlawful attacks on Serb-held towns.

Viewed in light of international legal standards and operational realities, the "200 meter rule" is subject to serious legal and technical challenge. Neither the evidence in the record of trial nor field artillery doctrine and practice supports the court's 200 meter standard. None of the military experts who testified at trial were asked to comment on a 200 meter standard or asked what an appropriate standard might be. Neither the prosecution nor the defense appears to have anticipated the court's invention of, or reliance upon, this rigid accuracy standard. In fact, the court itself does not clearly explain the origin or basis of its 200 meter rule. Artillery experts, both prosecution and defense, reviewed the standard during appellate motions and unanimously agreed that this standard of accuracy is operationally and technically impossible to achieve, even under ideal conditions.

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[9] This article works within the evidentiary and factual parameters set by the court in its published judgment. The court noted,

> The Trial Chamber used specific terminology in its factual findings. For example, it used the term 'the Trial Chamber finds' for incidents where the factual basis was sufficient to further consider the incident against applicable law. If an incident was not further considered, the Trial Chamber used terms like "the evidence indicates" or "the evidence suggests."

Gotovina, Case No. IT-06-90-T, Judgment, ¶ 63.

[10] *Id.* ¶ 1898.

[11] *Id.* ¶ 1906.

The 200 meter rule is not only operationally unrealistic, but also inconsistent with the existing legal framework. Targeting law focuses on intent at the time the decision to attack was made, not on a post hoc analysis of the accuracy of fires. A technically valid accuracy guideline could serve legitimately as one factor supporting an inference of intent, but elevating an accuracy guideline to a dispositive rule would, in effect, impose a new strict liability offense for artillery and rocket fire in populated areas. Gotovina could not have known that his indirect fires would be judged after the fact by this impossibly stringent standard of accuracy. The 200 meter rule's variance from existing law and lack of legal or operational precedent raises serious and fundamental legal concerns. Finally, and most importantly, the 200 meter rule upsets the law's careful balance between military necessity and humanitarian restraint by creating incentives for both attackers and defenders to choose means and methods of warfare that inevitably will increase the dangers of war for noncombatants in towns and cities. These operational and legal concerns independently, and certainly in combination, raise sufficient grounds for overturning the *Gotovina* judgment. By reversing the trial judgment, the Appeals Chamber would promote consistency in, adherence to, and faith in the international humanitarian laws that govern warfare in populated areas.

II. Background and Charging of General Gotovina

A. Operation Storm

After the dissolution of the Former Yugoslavia in 1990, Serbs in the Krajina region of Croatia, encouraged and assisted by Slobodan Milosevic, declared their independence and proclaimed the Republic of Serbian Krajina (RSK).[12] Supported by the Serbian Army, the Krajina Serbs pursued a campaign of "ethnic cleansing" that resulted in the expulsion of most ethnic Croats from the region by 1993.[13] Upon winning its own independence in 1992, Croatia vowed to restore the Krajina to Croatian control and began planning for such an operation as early as 1993. After the failure of UN-brokered peace talks in the spring

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[12] *Id.* ¶ 1693 (reviewing the central role and dominant political, economic and military influence of Milosevic in RSK affairs and finding that "Serbia/FRY had overall control of the SVK [Krajina Serb forces]").

[13] *Id.* ¶ 1686. *See also* R. CRAIG NATION, WAR IN THE BALKANS 1991–2002, at 109–10 (2003).

of 1995, both sides prepared for imminent armed conflict in the Krajina. The Croatian military campaign for control of the Krajina region was called "Operation Storm."

Operation Storm was the largest conventional military ground operation in Europe since WWII.[14] Croatian forces anticipated stiff resistance from about 39,000 Krajina Serb forces backed by up to 100,000 well-equipped Serbian Army (JNA) troops deployed in Bosnia. Serbian intervention could have led to a protracted conflict and a devastating Croatian defeat.[15] General Gotovina, a senior military leader throughout the war, commanded approximately 35,000 troops in the southern sector of operations (i.e., the Split Military District).[16] Combat operations began in the early morning hours of August 4, 1995, with Croatian artillery and rocket attacks on targets throughout the region, followed by the swift advance of Croatian forces on multiple axes toward Knin, the capital and generally accepted strategic center of gravity of the Krajina Serb government.[17] The strategic military objective of the operation was to eliminate Serbian forces and regain control of the

---

[14] *Id*. at 189–90. There was no allegation that Croatia's resort to war was itself unlawful. "[T]he case was not about . . . Croatia's choice to resort to Operation Storm. This case was about whether Serb civilians in the Krajina were the targets of crimes, and whether the Accused should be held criminally liable for these crimes." *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 13.

[15] According to U.S. envoy Richard Holbrooke, both U.S. and British intelligence services predicted that Milosevic would intervene and the Serb Army (JNA) would defeat any Croatian attack on Krajina. U.S. Defense Secretary Perry and Chairman of the Joint Chiefs, General Shalikashvili, pointedly warned Croatian defense Minister Susak in February 1995 that combined Serbian and Krajina Serb forces would defeat Croatian forces if they invaded Krajina. *See* RICHARD HOLBROOKE, TO END A WAR 90, 102 (1998) (calling Operation Storm a "dramatic gamble").

[16] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 75.

[17] *See id.* ¶ 1169:

> Under NATO doctrine, neutralization and or destruction of the enemy's centre of gravity can lead to the destruction of the enemy. . . According to Konings [Prosecution expert], the centre of gravity for the RSK was Knin, so taking control of Knin was important for the HV [Croatian Army] to succeed.

The term "center of gravity" is defined as "[t]he source of power that provides moral or physical strength, freedom of action, or will to act." U.S. DEP'T OF DEF., JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2012), *available at* http://www.dtic.mil/doctrine/dod_dictionary/ [hereinafter DOD DICTIONARY]. At least nine hundred of at least 1205 rounds at issue in this case were fired at targets in Knin.

region. Serbian military intervention never materialized, and General Gotovina's forces broke through Krajina Serb defenses and seized control of Knin by the end of August 5, the second day of operations. Operation Storm was a military success and also a strategic turning point which contributed ultimately to the signing of the Dayton Peace Accords in December 1995.[18]

B. Croatian Artillery in Operation Storm

The prosecution attempted to portray Operation Storm as an ethnic cleansing campaign, which relied on unlawful artillery attacks to drive Serb civilians out of the Krajina region.[19] The defense attempted to show the strategic and tactical planning involved in a relatively standard military campaign to regain territory and decrease the Serbian threat to Croatia. Marko Rajcic, General Gotovina's Chief of Artillery, was responsible for planning, coordination, and control of all indirect fire assets employed by Gotovina in Operation Storm.[20] Rajcic testified that planning for operations in Krajina began several years prior to the conflict, and that he began drafting lists of military targets in the Krajina region in 1993. Based on intelligence and surveillance operations, including aerial photography from unmanned drones, Rajcic identified military targets, determined their coordinates, and began fire support planning in earnest. Throughout 1994 and the spring of 1995, Rajcic continued to update and refine target lists and conducted a large live-fire artillery exercise to prepare his forces for the anticipated conflict.[21]

On June 26, 1995, the Croatian Army Chief of Staff issued a planning directive for Operation Storm, which ordered artillery and rocket forces in Gotovina's sector to focus on neutralizing enemy Main

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[18] The Croat Army reported lingering skirmishes for up to fourteen days after Croatia announced successful end to hostilities. *Gotovina*, Case No. IT-06-90-T, Judgment ¶ 1697. At the strategic level, Operation Storm altered the balance of power in the region and is considered a major contributing factor to resumed peace talks which led to the Dayton Peace Accords in Dec. 1995. *See* HOLBROOKE, *supra* note 15, at 100–03.

[19] *See* Prosecutor v. Gotovina, Case No. IT-06-90-T, Prosecution's Public Redacted Final Trial Brief , ¶¶ 55, 61, 64 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2010) [hereinafter Prosecution Trial Brief].

[20] The court relied extensively on Rajcic's testimony for background on Operation Storm artillery planning; without otherwise questioning his credibility, it rejected his interpretation of Gotovina's orders to "place the towns of Knin, Benkovac, Gracac and Obravac under fire." *See* Part IV.B.7, *infra*.

[21] *See Gotovina*, Case No. IT-06-90-T, Judgment ¶¶ 1177–78.

Staff and Corps command posts in Knin and brigade command posts, troop concentrations, armor, and artillery in the areas of Knin and Benkovac, including fuel and ammunition supply centers.[22] On July 31, a few days before the offensive, Gotovina and Rajcic attended a meeting with Croatian President Tudjman and other top leaders on the Island of Brioni.[23] The transcript of this meeting was offered by both the prosecution and the defense to buttress their respective characterizations of Operation Storm. The prosecution alleged that the "plan to permanently and forcibly remove the Krajina Serbs crystallized" at Brioni,[24] and the court apparently agreed with that reading of the meeting transcript.[25] The court also found, however, that "the primary focus of the meeting was on whether, how, and when a military operation against the SVK [Serbian Army of Krajina] should be launched."[26] The meeting transcript shows that Croatian leaders were equally focused on the military risks and the international perceptions of the operation. President Tudjman reportedly told his military commanders that the main task was "to inflict such powerful blows in several directions that the Serbian forces will no longer be able to recover, but will have to capitulate."[27] He also stated that conducting the operation "professionally" would protect Croatian forces from politically motivated criticism of the operation.[28]

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[22] Prior to Operation Storm, Croatian military leaders believed that Knin was the critical command and control center of the Serbs and that it would be strongly defended. *See id.* ¶ 1220 ("Statements of the RSK and SVK leadership led the HV [Croatian Army] to believe that the SVK [Krajina Serb militia] intended to resist and defend Knin to the last man.").

[23] According to the indictment, Croatian President Franjo Tudjman was a central figure in the joint criminal enterprise. Having died in 1999 of natural causes, he was not charged in the case. Prosecutor v. Gotovina, Case No. IT-06-90-T, Amended Joinder Indictment, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 12, 2008) [hereinafter Indictment].

[24] Prosecution Trial Brief, *supra* note 19, ¶ 4; *cf.* Prosecutor v. Gotovina, Case No. IT-06-90-A, Prosecution Response to Ante Gotovina's Appeal Brief, ¶ 169 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 12, 2011).

[25] The court relied heavily on the transcript of the Brioni meeting and found that it accurately reflected the discussions there. *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1989. The court deemed Brioni the birthplace of a joint criminal enterprise under President Tudjman's leadership, yet it is undisputed that military plans for the operation had been under development for years. Much was also said at the meeting about the conduct of military operations, as such, and the use of artillery support. *See, e.g.*, *id.* ¶ 1977.

[26] *Id.* ¶ 1990.

[27] *Id.* ¶ 1972 (finding that "striking blows" and making Serbs "disappear" referred to Serb forces, not civilians).

[28] *Id.* At Brioni, Tudjman asked Gotovina if Knin could be attacked without collateral damage to the UN observer camp located there, to which Gotovina responded that "Croatian forces could fire with great precision without hitting them." *Id.* ¶ 1977.

Additionally, according to the meeting transcript, Tudjman pointedly urged commanders to conserve ammunition and suggested air assault tactics as a means to avoid unintended collateral damage to United Nations Confidence Restoration Operation [UNCRO] barracks in Knin.[29]

After the Brioni meeting, final fire support planning consisted mainly of updating existing plans based on the most current intelligence.[30] On August 1, Gotovina assembled his subordinate commanders for a final operational planning meeting. Consistent with Gotovina's previous conduct and Croatian Army regulations,[31] Rajcic testified that Gotovina ordered all commanders to focus solely on defeating enemy forces, to follow the Geneva Conventions, and to restrict artillery fire to high-payoff military targets in order to conserve limited ammunition resources.[32] He quoted Gotovina as emphasizing that "the artillery needed to be as precise as possible and could only target military objectives that provided the highest military advantages."[33] Gotovina tasked all artillery-rocket groups[34] to support the main effort through powerful strikes against enemy front line units, command nodes, and indirect fire assets in depth. While tactical direct support artillery focused on enemy forces at the front lines, operational artillery assets under Rajcic's direct control[35] were to concentrate fires on strategic and operational targets in Knin, Benkovac, Obravac, and Gracac. Rajcic also testified that the Operation Storm plan relied heavily on synchronized

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[29] *Id.* ¶¶ 1980–82. Mate Granic, Croatian Deputy Prime Minister and Minister of Foreign Affairs, told investigators that Croatian authorities wanted to avoid "unnecessary civilian casualties at all costs," that he believed compliance with the law of war was critical, and that Croatia had been warned by various governments to conduct a lawful military operation. *Id.* ¶ 1986.

[30] *Id.* ¶ 1180.

[31] *Id.* ¶ 71 ("Commanders were responsible for military discipline and compliance with the international law of war." Further, "military personnel were not obliged to carry out criminal orders.").

[32] *Id.* ¶ 1182 (Gotovina "emphasized that the operation was aimed only at enemy soldiers and . . . also warned those present to instruct their subordinates that enemy prisoners of war and civilians should receive proper treatment and protection.").

[33] *Id.* ¶ 1181.

[34] *Id.* ¶ 79. Croatian artillery was organized into five groups. When firing at strategic targets and targets in operational depth, such as those in Knin, they were under Gotovina's command and control through Rajcic. This included artillery groups TS-1 through TS 4. TS-5 was OPCON to (i.e., operationally controlled by) Special Police (SP) commander Markac. Direct support missions for tactical front line units fell to unit commanders to select targets. About 75% of the artillery support was tactical DS missions and 25% dedicated to operational depth. *Id.*

[35] *Id.* ¶ 6 (noting that Markac controlled rocket and artillery forces OPCON to his SP units).

artillery support to shock, surprise, disorient, and disrupt enemy command, control, and communications.[36]

Rajcic also testified that Gotovina specifically told him that "with regard to using artillery in the civilian-populated areas of Knin, Benkovac, Obrovac and Gracac, maximum precision and proportionality should be respected."[37] Rajcic testified about the detailed military necessity and proportionality review he performed in response to these orders. Rajcic stated that, based on this analysis, he deleted any military targets firing at which risked inflicting excessive collateral damage compared to the target's military value.[38] He also matched weapons to targets based on considerations of proportionality and ordered protective measures, such as time-of-day restrictions, in order to minimize the risk to civilians near urban targets.[39] Finally, Rajcic deployed forward observers and aerial drones in the final days before the operation in order to update artillery maps and target lists.[40]

Meeting minutes introduced at trial described a meeting between Gotovina and other high-ranking Croat leaders and Minister of Defense Susak on August 2, 1995. Susak ordered all commanders to prevent offenses against the civilian population and to protect the United Nations Protection Force (UNPROFOR) in order to protect Croatia's political image and eliminate any basis for criminal allegations stemming from Operation Storm.[41] In summary, the record shows that Croatian leaders were acutely aware of their legal obligation to protect civilians throughout the area of operations and also of international scrutiny by NATO governments, the ICTY, and UN observers present throughout the prospective battlefield.[42]

It was in this context that General Gotovina on August 2 ordered Rajcic to "place the towns of Knin, Obravac, Gracic and Benkovac under fire."[43] The meaning and effect of this order was one of the principal

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[36] *Id.* ¶ 1185.
[37] *Id.* ¶ 1183.
[38] *Id.* ¶¶ 1182–84; *see also id.* ¶ 1435 (witness corroborating this guidance to subordinate artillery units).
[39] *See id.* ¶¶ 1245, 1184.
[40] *Id.* ¶ 1182.
[41] *Id.* ¶ 1987.
[42] *Id.* ¶ 2003 (U.S. Ambassador Peter Galbraith warned Tudjman on August 1, 1995, that "there would be bad consequences if Croatia targeted UN personnel and did not protect civilians").
[43] *Id.* ¶¶ 1172 and 1178.

issues in the case. Artillery commander Rajcic testified that he and his subordinate artillery and rocket units understood this as an order to strike previously identified military targets, consistent with the target lists and Gotovina's explicit guidance regarding military objectives, distinction, and proportionality.[44] The prosecution contended, however, that this was an unlawful order to attack civilian areas to cause a forcible evacuation of the civilian Serbian population.[45]

During offensive operations on August 4 and 5, 1995, General Gotovina's forces shelled pre-planned operational targets in Knin, Benkovac, Obrovac, and Gracac and also executed tactical fire missions in response to calls for fire from various maneuver units.[46] Rajcic's testimony indicates that he monitored intelligence updates throughout the battle to confirm the military value of pre-planned targets in Knin.[47] Trial evidence confirmed the presence of Serb forces, command and control, and logistical assets in each town.[48] Also, Serb indirect fires occurred in these areas, which seem to make it impossible to attribute all shelling effects to Croatian artillery alone.[49]

C. Effects of Croatian Artillery Fire

Evidence presented at trial, seventeen years after Operation Storm, regarding the actual effects of Croatian artillery and rocket fire on 4 and 5 August, 1995, was extensive but glaringly incomplete in key respects. Not all Croat artillery logs, reports, and maps were entered into evidence, leaving many key factual questions unanswered.[50] Lacking any

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[44] *Id*. ¶ 1188. *See* Part IV.B.*7*., *infra* (discussing the court's findings as to the meaning of the order).
[45] *See* Prosecution Trial Brief, *supra* note 19, ¶ 124.
[46] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1255. Both sides at trial agreed that there were tactical calls for fire. *See* Prosecution Trial Brief, *supra* note 19, ¶ 143.
[47] *See, e.g.*, *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1260 (citing Rajcic's testimony that radio intercepts confirmed active Serb command and control centers in Knin before any shelling of those targets on the morning of 5 August).
[48] *See* Part IV.B.1, *infra*.
[49] *See, e.g.*, *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1396 (discussing the origin of a mortar attack in Knin on August 5, the court found it was "unable to conclusively determine which forces fired the mortar").
[50] *See id.* ¶ 1783. Even where the record supported findings regarding the shelling, the defendant has pointed out significant shortcomings in the court's sifting of the evidence. In the Appellant Reply Brief, Gotovina offers a compelling demonstration of the court's failure to take into account all of the impact evidence in the record.

comprehensive survey of battle damage, the court was forced to rely on the faded memories of combatants and observers, and an incomplete documentary record.[51] The court found that at least 1205 rounds were fired in the vicinity of Knin, Benkovac, Obrovac and Gracac, and used the testimony of various witnesses to estimate the impact points of 154 of those shells. It found that only 74 of these landed outside a 200 meter radius, and only 9 of those 74 outside a 400 meter radius, from legitimate targets known to the court. Thus, the court's findings of wrongful intent were based on a sample of less than 13% of the rounds fired—how much less, the court could not say.

Suffice it to say, to found a criminal conviction–proof beyond a reasonable doubt–based primarily on what appears to be an extrapolation from the scanty evidence before the court is concerning. There was no evidence that the sample of 154 shells considered (selected simply by whatever the witnesses could remember) was representative of the whole. One issue with this determination by the court that will strike a sour chord with criminal lawyers is the legally impermissible burden-shifting aspect of the court's extrapolation into the unknown. And even if one believes that shifting the burden of going forward to the defense regarding impact analysis is legally defensible, how exactly would a combat commander, enmeshed in battle and all that goes with that, go about producing that evidence? This is one reason why the Law of Armed Conflict focuses the culpability determination on the commander's intent, not what happened in the exigencies of combat. And on this point, the conflicting evidence cannot be said to reach the criminal law standard of proof beyond a reasonable doubt–or even a less probative standard.

[51] The court also properly noted that "the chaotic picture of events on the ground" based upon eyewitness impressions rendered the court "necessarily cautious in drawing conclusions with regard to specific incidents based on any general impressions." The court considered all evidence but reviewed and discussed "best available evidence." *Id.* ¶ 1176.

D. The Indictment

The indictment alleged that General Gotovina participated in a joint criminal enterprise with other Croatian political and military leaders, the alleged objective of which was the persecution and forced deportation (i.e., "ethnic cleansing") of ethnic Serbs from the Krajina region.[52] Gotovina and two other defendants were charged with crimes against humanity under Article 5 of the ICTY statute and violations of the laws and customs of war under Article 3[53] for their individual contributions to the alleged criminal enterprise.[54] Although the defendants were accused of various other crimes against the Serb population of Krajina, the heart of the case against Gotovina was unlawful shelling, and that shelling was specifically found to be "an important element in the execution" of the alleged criminal enterprise.[55] Stated differently, Gotovina's conviction turns on the lawfulness vel non of the artillery fires against targets in the Krajina towns and cities.[56] Although unlawful shelling is not charged as a separate offense, allegations of unlawful shelling appear throughout the

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[52] Indictment, *supra* note 23, ¶ 12.

[53] Statute of the International Criminal Tribunal (Former Yugoslavia), May 25, 1993, 32 I.L.M. 1159 [hereinafter ICTY Statute]. Substantive crimes under the ICTY Statute include grave breaches of the Geneva Conventions of 1949 (art. 2), violations of the laws or customs of war (art. 3), genocide (art. 4), and crimes against humanity (art. 5).

[54] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 2374. Counts 4 (plunder), 5 (wanton destruction), 6 & 7 (murder) were attributed to Gotovina solely as foreseeable consequences of the "joint criminal enterprise." There was no allegation that he ordered or aided and abetted such crimes. The court found that following regular military operations, Croatian forces "committed a large number of murders, inhumane acts, cruel treatment, and acts of destruction and plunder against Krajina Serb civilians throughout August and September 1995." *Id.* ¶ 2307. The findings on unlawful shelling and their implications for targeting law are the focus of this article. However, it should be noted that unlawful shelling is central to the case against Gotovina. *See id.* ¶¶ 2324, 2363, 2370. In particular, the court used the alleged "unlawful attacks" as evidence that Gotovina "knew that there was a widespread and systematic attack against a civilian population," *id.* ¶ 2370, without which knowledge he could not be found guilty of any crime against humanity under Article 5 of the ICTY statute. *Id.* ¶ 1701 (establishing such knowledge as an element of Article 5). Without a finding of unlawful shelling, the case against Gotovina is greatly and perhaps fatally weakened.

[55] *Id.* ¶¶ 2324 and 2370; *see also* Prosecution Trial Brief, *supra* note 19, ¶¶ 121–22, 134.

[56] This follows from the logic of Joint Criminal Enterprise (JCE) liability. *See* Indictment, *supra* note 23, ¶ 38. If Gotovina contributed to the JCE by unlawful shelling and his liability for the other crimes committed was based on the premise that they were foreseeable consequences of the JCE, then a finding that he did not contribute to the JCE breaks the connection to the other crimes and would require a complete reassessment of his liability, if any, for any other crime committed by Croatian soldiers.

indictment[57] and were central to the prosecution's theory of ethnic cleansing.[58]

III. Relevant Law of War Standards

On the spectrum of conflict, Operation Storm was high intensity conventional combat governed by the international laws and customs of war.[59] Accordingly, it must be sharply distinguished from the various Balkans peacekeeping and peace enforcement operations, which were governed by peacetime rules of engagement (ROE),[60] and from notorious

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[57] The general allegations assert that "Croatian forces shelled civilian areas." *Id.* ¶ 28. In the formal statement of charges, shelling is mentioned explicitly in count 1 (persecutions) as "other inhumane acts, including the shelling of civilians" and as "unlawful attacks on civilians and civilian areas." Counts 2 and 3 (deportation and forcible transfer) refer more obliquely to "the threat and/or commission of violent and intimidating acts." Counts 8 (inhumane acts) and 9 (cruel treatment) refer to "firing upon (including aerial attack)" Serb civilians in Operation Storm. "[E]xtensive shelling of civilian areas" is also listed as one form of inhumane acts and cruel treatment in the indictment. *Id.* ¶ 34. Thus, unlawful shelling is alleged in the Indictment as one of the alleged crimes against humanity in Counts 1, 2, 3, and 8 as a Law of Armed Conflict (LOAC) violation in Count 9.

[58] The Prosecutor alleged that the JCE relied on "a strategy to use artillery to force out the Krajina Serbs." *See* Prosecution Trial Brief, *supra* note 19, ¶¶ 55, 61, 64. Although the indictment is vague about shelling in Counts 2 and 3, the court treated shelling as one of the principal means of forcing Serb civilians out of Krajina. *See Gotovina*, Case No. IT-06-90-T, Judgment, ¶¶ 1742–46. "The Trial Chamber finds that the artillery attack instilled great fear in those present" and "this fear was the primary and direct cause of their departure." *Id.* ¶¶ 1743–44. The court also found that Croatian forces specifically intended to cause deportation by shelling. *Id.* ¶ 1746. The court explicitly and primarily treated unlawful shelling as part of the crime of persecution. *See id.* ¶¶ 1810, 1840, 1856, 1892–1945.

[59] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶¶ 1686–98 (finding this was an international armed conflict subject to the laws and customs of war). *See also* Prosecution Trial Brief, *supra* note 19, ¶ 469 ("[I]ntensity of the conflict was sufficiently high to distinguish [it] from 'banditry, unorganized and short-lived insurrections, or terrorist activities.").

[60] "ROE are directives issued by competent military authority to delineate the circumstances and limitations under which . . . forces will initiate and/or continue combat engagement with other forces encountered." DoD DICTIONARY, *supra* note 17. In other words, ROE provide the framework for controlling use of force consistent with the mission, policy and law. Peacekeeping ROE ordinarily are based on self-defense and hence are far more restrictive than the law of war. "ROE provide restraints on a commander's action consistent with both domestic and international law and may, under certain circumstances, impose greater restrictions on action than those required by law." INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 74 (2004) [hereinafter OPLAW HANDBOOK].

atrocities perpetrated by military forces against defenseless civilian populations in Bosnia-Herzegovina.[61] To understand and evaluate the court's judgment, it is therefore essential to review the law of armed conflict (LOAC) pertaining to attacking targets in and near populated areas in conventional combat operations.

In general, the LOAC is intended to formalize customary and mutually agreed constraints on the use of force in war, for the purpose of protecting noncombatants and minimizing unnecessary suffering.[62] This aspiration for limited and regulated warfare grew out of the customary practices of civilized nations and is conceptually rooted in operational reality.[63] Having evolved from the customary practices of armies in the field, the law of war reflects the logic of military science and is consistent with the means and methods of warfare practiced by civilized nations.[64] Thus, LOAC standards are generally consistent with operational art and current technological capabilities and limitations.[65] This consistency between the law and the practice of civilized nations is inherent in the definition of customary international law and the contractual nature of conventional law.[66] This close correspondence

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[61] *See* JOHN HAGAN, JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL 67–69 (2003) (reviewing the history of Bosnian Serb shelling of civilians in Sarajevo and Srebrenica).

[62] PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 342-43 (7th ed. 2004).

[63] This is a key factor in ensuring compliance with the law of war. *See* Louise Doswald-Beck, *Humanitarian Law in Future Wars*, *in* THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENIUM 39, 40–41 (Michael N. Schmitt & Leslie C. Green, eds., 1998).

[64] The organic relationship between operational art and the law of war is thoroughly discussed and well documented in Geoffrey S. Corn & Lieutenant Colonel Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC through an Operational Lens*, 47 TEX. INT'L L. J. 337, 358–59 (2012).

[65] COMMENTARY TO THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 2195 (Yves Sandoz et al. eds. 1987), *available at* http://www.loc.gov/rr/frd/Military_Law/RC_commentary-1977.html [hereinafter COMMENTARY TO THE ADDITIONAL PROTOCOLS]. ("In fact it is clear that no responsible military commander would wish to attack objectives which were of no military interest. In this respect, humanitarian interests and military interests coincide.").

[66] "A rule of customary international law is one which is created and sustained by the constant and uniform practice of states and other subjects of international law in or impinging upon their international legal relations in the belief that they are under a legal obligation to do so." Comm. on Formation of Customary (Gen.) Int'l Law, Int'l Law Ass'n, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law*, 69 INT'L L. ASS'N REP. CONF. 712, 719 (2000), *available at* http://www.ila-hq.org/pdf/CustomaryLaw.pdf. *See also* BROWNLIE, *supra* note 6, at 4-6.

between law and practice promotes respect for and compliance with the law in combat operations. It also explains why LOAC principles are embedded in the military doctrine, training, and practices of modern armies.[67] The law of war, like military doctrine itself, seeks to direct and limit combat operations to military purposes and objectives.[68] The law of war accepts the necessity of war in defined circumstances and seeks to minimize the inevitable suffering of war, including collateral casualties and property damage to noncombatants.[69] It is generally accepted that adherence to these standards will promote humane treatment of prisoners and civilians, restoration of peace, and future compliance with the law of armed conflict.[70]

Codification of the customary laws governing tactical shelling began with Hague Convention IV of 1907 and its regulations of the means and methods of warfare.[71] Those regulations remain in effect today, but the most explicit statement of customary international law on the use of artillery and other conventional indirect fire weapons against targets in populated areas is found in Protocol I to the Geneva Conventions (1977) (Protocol I).[72] Not all major powers have ratified this 1978 convention, but all the specific provisions discussed here are generally accepted as authoritative statements of customary international law, binding on all nations.[73] It is these specific standards that the Trial Chamber invoked in

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[67] *See generally* Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT'L L., No. 3, at 728–29 (May 2009) (citing specific examples of how law of war principles are embedded in U.S. military doctrine).

[68] COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 65, ¶ 2206. "The entire law of armed conflict is, of course, the result of an equitable balance between the necessities of war and humanitarian requirements"; *see also id.* ¶ 2219. "[The rule of proportionality] is aimed at establishing an equitable balance between humanitarian requirements and the sad necessities of war." *Id.*

[69] *Id.* ¶ 1935. "There is no doubt that armed conflicts entail dangers to the civilian population, but these should be reduced to a minimum." *Id.*

[70] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 2 (18 July 1956) [hereinafter FM 27-10] (Purposes of the Law of War).

[71] *See* Convention (IV) Respecting the Laws and Customs of War on Land, Annex (Regs.), art. 25, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague IV].

[72] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

[73] *See* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL. 419, 420–21 (1987).

its judgment condemning Gotovina's use of artillery and rockets in Operation Storm.[74]

The relevant standards of battlefield conduct in Protocol I allow commanders reasonable latitude in the exercise of good faith judgment under the myriad circumstances and difficult conditions of combat.[75] This results in legal standards that are often intentionally and patently imprecise.[76] The International Committee of the Red Cross (ICRC) commentaries on Protocol I cite the "heavy burden of responsibility on military commanders, particularly as the various provisions are relatively imprecise and are open to a fairly broad margin of judgment."[77] This perspective is crucial when these legal standards are applied in a judicial setting to decisions made in the heat of battle and the "fog of war"[78] many years after combat action occurs. While prosecution of war crimes is unquestionably essential to effective enforcement and deterrence, international humanitarian law adopts a posture of deference to the operational perspective of the combatants, who must apply its standards in the difficult circumstances of battle. Judicial decisions in this area of practice, to be credible, must be solidly based on current legal standards and give appropriate respect to the good faith judgment of combat commanders.

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[74] *See, e.g.*, Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, ¶ 1827 (Int'l Crim. Trib. For the Former Yugoslavia Apr. 15, 2011) (citing military necessity as a consideration in determining whether persecution in violation of Article 5 took place); *id.* ¶ 1910 & n.935 (citing concepts of distinction and proportionality to determine whether shells were lawfully fired).

[75] COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 65, ¶ 2187 (in discussing article 57, noting that "the various provisions are relatively imprecise and are open to a fairly broad margin of judgment").

[76] *Id.* (noting that some parties characterized the targeting laws of Protocol I as "dangerously imprecise").

[77] *Id.*

[78] The term "fog of war" alludes to the endemic uncertainties of the battlefield and is commonly attributed to CARL VON CLAUSEWITZ, ON WAR, bk. 2, ch. 2, § 24 (Col. J.J. Graham trans. 1873), *available at* http://www.clausewitz.com/readings/OnWar1873/BK2ch02.html ("[T]he great uncertainty of all data in war is a peculiar difficulty, because all action must, to a certain extent, be planned in a mere twilight . . . like the effect of a fog or moonshine. . . .").

A. Targeting Law

The law of targeting[79] is governed by three foundational principles, which are the starting point for legal analysis of combat actions.[80] The *principle of military necessity* justifies those measures, not forbidden by international law, which are indispensable for securing the complete submission of the enemy as soon as possible.[81] Military necessity requires that, before striking any target, a commander must make a reasonable determination that the target is a valid military objective.[82] The *principle of distinction* follows logically and yields the foundational rule of targeting in Protocol I, Article 48: "Parties to the conflict shall at all times *distinguish* between the civilian population and combatants and between civilian objects and military objectives and accordingly *shall direct their operations only against military objectives*."[83]

Protection of civilians and civilian property from the dangers of military action is one of the principal goals of the law of war.[84] Intentional attacks on civilians are absolutely prohibited under Protocol I, Article 51(2).[85] Likewise, indiscriminate attacks are prohibited by

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[79] Targeting is how a military commander brings combat power to bear against enemy military objectives to set the conditions for achieving tactical, operational, and strategic success. Targeting is a complex process, beginning with analysis of the mission and task for subordinate units. The targeting process starts with an assessment of enemy targets, including a determination that each target is a lawful object of attack under the law of armed conflict (LOAC). The process then defines desired effects on each target, matches combat capabilities to each target, executes the attack, and assesses effects. Targeting is a cyclical process of analysis, execution, and assessment until the military objective is achieved. Corn & Corn, *supra* note 64, at 349–50.

[80] A fourth principle, prevention of unnecessary suffering, prohibits use of weapons and tactics that are calculated to inflict unnecessary suffering. *See* OPLAW HANDBOOK, *supra* note 60, at 13–14.

[81] *See* FM 27-10, *supra* note 70, ¶ 2 (Purposes of the Law of War).

[82] Defined as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage." Protocol I, *supra* note 72, art. 52(2).

[83] *Id.* art. 48 (emphasis added).

[84] *Id.* art. 51(1). "The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations." *Id.* This applies equally to civilian property that is not being used for military purpose. *Id.* art. 52(1) & (2) ("Civilian objects shall not be the object of attack or reprisals. . . . Attacks shall be limited strictly to military objectives. . . .").

[85] *See id.* art. 51(2) ("The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.").

Articles 51(4) and 51(5)(a).[86] The law also recognizes the fundamental reality that military targets often lie close to civilian populations, so that attacks on military targets will sometimes cause incidental casualties and property damage.[87] The enemy's emplacement of military objectives close to civilians or civilian objects does not render them immune from attack. Rather, the *Principle of Proportionality* requires commanders to make a conscious, good-faith determination that anticipated collateral effects are reasonably proportional to the military goals of the attack.[88] This principle is codified in Protocol I, Article 51(5)(b), which states that an attack is disproportionate, and therefore unlawful, only if it "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[89] Thus, the law does not prohibit or condemn collateral damage and casualties *per se*, but only where such effects are "*excessive*"

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[86] *See id.* art. 51(4) ("Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective . . . and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian property without distinction."). Article 51(5) specifies two distinct types of indiscriminate attacks:

> Among others, the following types of attacks are to be considered indiscriminate: (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Id. art. 51(5).

[87] *See* United States v. Ohlendorf (Einsatzgruppen Trial), 4 Trials of War Crimes Before the Nuremburg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946-Nov. 1949, at 466–67 (1948).

> A city is bombed for tactical purposes; communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that nonmilitary persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action.

Id.

[88] *See* FM 27-10, *supra* note 70, ¶ 41.

[89] *See* Protocol I, *supra* note 72, art. 51(5)(b). The proportionality formula is also reiterated in Article 57(2)(iii).

when weighed against the military purpose of the combat action. The phrases "may be expected" and "anticipated" indicate that proportionality judgments are to be based on information available at the time the targeting decision is made and not on the actual effects of the attack viewed in hindsight.

Where collateral harm to civilians and civilian objects is anticipated, commanders are required to make deliberate, good faith proportionality judgments based on information reasonably available before the attack.[90] In the author's experience, there is no more difficult position than that of combat commanders making targeting decisions. Their judgments call for complex evaluations of risk and consequences that are not susceptible to precise mathematical analysis. The term "excessive" in the definition of proportionality is a prime example of the relative and fact-dependent nature of these judgments. The standard of proportionality is intentionally and necessarily vague. It must be understood in light of the additional obligations and precautions of an attacking force in Article 57 of Protocol I, including the obligations to minimize incidental loss of civilian life, to choose means and methods which pose the least danger to civilians, and to give advance warning of an attack "unless circumstances do not permit."[91]

Although the focus of this article is on the conviction of General Gotovina during his command of attacking forces, it is worth noting that the obligation to protect civilians from the effects of combat applies equally to attacking and defending forces. Both bear legal responsibility for the safety and protection of civilians. All parties to a conflict are

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[90] Precautions in the attack include the obligation to "do everything feasible to verify that the objectives attacked are neither civilian nor civilian objects. . . " *Id.* art. 57(2)(a)(i). *See also* COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 65, ¶ 1952.

> The military character of an objective can sometimes be recognized visually, but most frequently those who give the order or take the decision to attack will do so on information provided by the competent services of the army. In the majority of cases they will not themselves have the opportunity to check the accuracy of such information; they should at least make sure that the information is precise and recent . . . .

See also id. ¶ 2195 ("Thus the identification of the objective, particularly when it is located at a great distance, should be carried out with great care . . . .") and ¶ 2199 (recognizing the differing ISR capabilities of belligerents).

[91] Protocol I, *supra* note 72, art. 57(2).

prohibited from using civilians and civilian objects "to shield military objectives from attacks or to shield, favor or impede military operations."[92] All parties to the conflict are therefore obligated to "avoid locating military objectives within or near densely populated areas."[93] Additionally, a party that has control over a civilian area shall "endeavor to remove the civilian population, individual civilians and civilian objects from the vicinity of military objectives" and shall also take other precautions to protect them from harm.[94] Thus, a heavy legal obligation and responsibility to protect civilians rests on a defending force that chooses to occupy a town. Even when a defending force deliberately places military objectives in populated areas, the attacking force remains bound by legal targeting standards. The presence of civilians, however, does not render a military objective immune from attack, and to this author's knowledge no court or authoritative treatise has ever held that artillery cannot be used against lawful military targets situated in populated areas.

The ICRC commentaries note that "[i]n the early stages of the discussions on the codification of the law of bombardments, the possibility had been entertained of expressly providing the standard of precision required for bombardments on towns and cities. . . ."[95] However, the high contracting parties chose not to impose a rigid rule, such as the 200 meter rule or any other fixed measurement, relying instead on the general duties to distinguish military targets from civilians and to minimize civilian casualties by all feasible and tactically prudent means. That standard accommodates a wide range of technical and operational capabilities and places the commander's subjective knowledge, intent, and good faith at the center of the legal analysis. These rules are equally applicable to all means and methods of war, from laser-guided munitions to slingshots and grenades. The law does not require any particular standard of accuracy, but it does require combatants to do their best within their technical, tactical, and intelligence limitations. Advanced technology has not eliminated (and cannot, for the foreseeable future, eliminate) civilian casualties from warfare; that is why the principles of military necessity, distinction, and

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[92] *Id.* art. 51(7).
[93] *Id.* art. 58(b).
[94] *Id.* art. 58(a) & (c). In light of the legal obligation of the defending party to remove civilians from the target area, when possible, and the Serbs failure to do so in this case, it is ironic that Gotovina was charged and convicted for causing the flight of civilian refugees by shelling the very areas the Serbs chose to defend.
[95] COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 65, ¶ 2185.

proportionality remain relevant and essential even in the age of precision guided munitions.[96]

B. Criminal Prosecution of Shelling Offenses

From the Hague Conventions of 1907 to Geneva Protocols of 1977, LOAC treaties were written and conceived primarily as state obligations during international armed conflict. The translation of these battlefield regulations into formal criminal charges in cases before the ICTY requires the rigorous definition of the elements of each offense. Rules drafted with the regulation of battlefield action in mind must be filtered through the special requirements of criminal law in the context of an individual war crimes prosecution.[97] Defining the elements of war crimes based on custom and law of war treaties presents special challenges to courts, which must grapple with texts that were not drafted as criminal statutes and do not meet the more rigorous modern legislative standards of criminal law. Vagueness in language, deference to the field commander's good faith judgment, and a lack of clearly delineated elements pose significant challenges to courts responsible for defining the elements of proof for offenses arising under the law of war.[98] The

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[96] *See generally* Scott Peterson, *Smarter Bombs Still Hit Civilians*, CHRISTIAN SCI. MONITOR, http://www.csmonitor.com/2002/1022/p01s01-wosc.html (Oct. 22, 2002) (citing examples and statistics showing that "smart bomb" attacks have inflicted civilian casualties at ever-increasing rates).

[97] Prosecutor v. Delalic, Case No. IT-96-1-T, Judgment, ¶ 405 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (noting that the principles of legality must be applied differently in war crimes cases due to "the nature of international law; the absence of international legislative policies and standards; the ad hoc processes of technical drafting," etc.), *available at* 1998 WL 34310017.

[98] COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 65, ¶ 2187, highlights this problem when referring to disagreements among parties to the Protocols about precautions in the attack under Article 57:

> The differences of opinion were mainly related to the very heavy burden of responsibility imposed by this article on military commanders, particularly as the various provisions are relatively imprecise and are open to fairly broad margin of judgment. ..Those who favored a greater degree of precision argued that in the field of penal law it is necessary to be precise, so that anyone violating the provisions would know that he was committing a grave breach. As we will see below, several delegations considered that this condition was not met and that the article was dangerously imprecise.

Id.

ICTY has played a key role in developing definitions for war crimes.[99] It is the Trial Chamber's duty to determine the elements of each offense by referring to treaties, customs, prior decisions of the ICTY Appeals Chamber, and general principles of law.[100]

Gotovina was not charged separately for unlawful shelling. Of the eight counts in the indictment against him, only count 1 (persecution, charged as a crime against humanity under the ICTY statute) specifically mentions shelling.[101] Yet allegations of unlawful shelling are implicit in the other charges of crimes against humanity (i.e., counts 2, 3, and 8).[102] Unlawful shelling is both central to the *Gotovina* indictment and the primary basis of Gotovina's conviction.

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[99] Other sources of offense definition are found, for example, in domestic legislation, judicial precedent, learned treatises, and the ICC Statute, App. 4 (Elements of Crimes). *See, e.g.*, War Crimes Act of 1996, 18 U.S.C. § 2441 (2006); *see also* INT'L CRIMINAL COURT (ICC), REPORT OF THE PREPARATORY COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT. ADDENDUM. PART II, FINALIZED DRAFT TEXT OF THE ELEMENTS OF CRIMES (Nov. 2, 2000), *available at* http://untreaty.un.org./cod/icc/prepcomm/jun2000/5thdocs.htm.

[100] *See* Prosecutor v. Galic, Case No. IT-98-29-A, Judgment, ¶ 71 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (ruling that the determination of the legal elements of crimes is "the responsibility of the Trial Chamber"), *available at* 2006 WL 4549662.

[101] "Ante Gotovina, Invan Cermak and Mladen Markac are responsible for acts of persecution against the Krajina Serbs including: deportation and forcible transfer; destruction and burning of Serb homes and businesses; plunder and looting of public or private Serb property; murder; other inhumane acts, *including the shelling of civilians* and cruel treatment; unlawful attacks on civilians and civilian objects; imposition of restrictive and discriminatory measures, including the imposition of discriminatory laws; discriminatory expropriation of property; unlawful detentions; disappearances." Indictment, *supra* note 23, at ¶ 48 (emphasis added).

[102] The indictment for counts 2 and 3 (deportation and forcible transfer under Articles 5 and 3 of the statute) does not mention shelling *per se*, but states that the three accused "acting individually and/or through their participation in the joint criminal enterprise planned, instigated, ordered, committed, and/or aided and abetted the planning, preparation and/or execution of the forcible transfer and/or deportation of members of the Krajina Serb population from the southern portion of the Krajina region to the SFRY, Bosnia and Herzegovina and/or other parts of Croatia, by the threat and/or commission of violent and intimidating acts (including the plunder and destruction of property). . . ."

1. Actus Reus

Count 1 of the indictment charges Gotovina with persecution as a crime against humanity in violation of Article 5 of the ICTY statute. The court found the following elements were needed to sustain a conviction under Article 5:

> (i) there was an attack;
> (ii) the attack was widespread or systematic;
> (iii) the attack was directed against a civilian population;
> (iv) the acts of the perpetrator were part of the attack;
> (v) the perpetrator knew that there was, at the time of his or her acts, a widespread or systematic attack directed against a civilian population and that his or her acts were part of that attack.[103]

The court used its 200 meter rule to determine that the prosecution had met the third element, and shown that Gotovina was targeting entire towns and the civilian population rather than military targets located in those towns.[104]

2. Mens Rea

As shown above, the court explicitly acknowledged the need for guilty knowledge to support a conviction under Article 5. Furthermore, the crime of persecution, the subject of count 1 (which explicitly relies on the shelling) requires "an act or omission which . . . is carried out with the intention to discriminate on political, racial, or religious grounds."[105] On this point, the court noted that persecution requires a *specific intent* to discriminate.[106] Yet with respect to the shelling, the *Gotovina* court

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[103] Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, ¶ 1701 (Int'l Crim. Trib. For the Former Yugoslavia Apr. 15, 2011).
[104] *Id.* ¶¶ 1911 (Knin), 1923 (Benkovac), 1935 (Gracac), 1943 (Obrovac).
[105] *Id.* ¶ 1801.
[106] *Id.* ¶ 2590. It has been persuasively argued that not only persecution, but all crimes against humanity under article 5, are and ought to be treated as specific intent crimes – specifically, that the element of attacks directed at a civilian population ought to be read as requiring specific intent to target civilians. Sienho Yee, *The* Erdemovic *Sentencing Judgment: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia*, 26 GA. J. INT'L & COMP. L. 263, 299-300 (1997) (arguing that the defense of duress should apply in crimes against humanity because it negates specific intent). However, for crimes against humanity, the ICTY requires only the specific intent

relied heavily on its inference that Gotovina targeted towns as a whole—an inference that, as shown below, wrongly relies on the 200 meter rule—plus the fact that the towns were predominantly Serbian in ethnicity.[107]

While it is certainly possible to prove specific intent with circumstantial evidence, in this case the circumstantial evidence was far too weak to show specific intent. Without the 200 meter rule this finding collapses. When an indiscriminate attack is alleged, the results of the attack alone are not enough to show intent or even knowledge; guilt or innocence depend on the commander's prospective assessment of the target area and anticipated collateral effects. This rule, sometimes called the "Rendulic rule,"[108] has profound implications for the *Gotovina* case. The explicit language of Protocol I supports this crucial rule: an attack is unlawful if it "*may be expected to cause* incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which *would be* excessive in relation to the concrete and direct military advantage *anticipated*."[109] Several of the states that adopted or acceded to Protocol I explicitly did so on the understanding that this rule applies.[110] Even if the commander's judgment is conclusively shown to

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for the underlying act, plus objective knowledge that the act was performed in the context of a widespread or systematic attack on a population. Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment, ¶ 212 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), *available at* 2001 WL 34712270.

[107] *See Gotovina*, Case No. IT-06-90-T, Judgment, ¶¶ 1912 (Knin), 1924 (Benkovac), 1936 (Gracac), 1944 (Obrovac). In each case, the court found "discrimination in fact" by noting the ethnic composition of the towns, and found intent to discriminate by observing "the language of the HV's artillery orders and the deliberate shelling of areas devoid of military targets." But the "deliberate shelling" in question was established primarily by the 200 meter rule.

[108] United States v. List (Hostage Case), 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Nuremberg, Oct. 1946–Nov. 1949, at 759, 1296 (1951), *available at* http://www.loc.gov/rr/frd/Military_Law/NTs_war-criminals.html. General Rendulic was charged with unlawful destruction of civilian facilities during the Nazi retreat from Finland at the end of WWII. He was acquitted of that crime on grounds that his decision to attack the civilian facilities was based on his honest, but mistaken belief that the Soviet army was in hot pursuit. "But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal." *Id. See* Corn & Corn, *supra* note 64, at 375.

[109] Protocol I, *supra* note 72, art. 51(5)(b).

[110] DOCUMENTS ON THE LAW OF WAR, 462–68 (Adam Roberts & Richard Guelff, eds., 2d ed. 1989). The countries that expressly invoked some version of the Rendulic rule were

have been erroneous in hindsight, based on battle damage assessment, such error alone is never sufficient for a finding of guilt.[111] The law does not require the commander always to be right; instead it requires a good faith judgment based on information available in the heat of battle. Civilian casualties, property destruction, and impact locations viewed in hindsight are not enough to prove a commander guilty of indiscriminate attacks. The results of an attack are but one factor from which intent *at the time of attack* may be inferred.[112]

Austria, Belgium, Italy, New Zealand, Switzerland, and the United Kingdom. *Id.* These statements have been described as "the codification of the Rendulic rule." Commander Charles A. Allen, Reporter, *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, 86 AM. SOC'Y INT'L LAW PROC. 39, 47 n.5 (remarks of Francoise J. Hampson, Department of Law and Human Rights Center, University of Essex). Several other states made similar statements upon ratification of Protocol I. *See Practice Relating to Rule 15. The Principle of Precaution in Attack, Section D. Information Required for Deciding upon Precautions in Attack*, http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule15_sectiond (last visited Aug. 10, 2012) (under "other national practice," the website cites such statements from Australia, Canada, Germany, Ireland, and Spain, in addition to those noted above). The United States and the Netherlands also made similar statements at the 1974-1977 Diplomatic Conference on Humanitarian Law. *Id.*

[111] One noteworthy and tragic example of this principle was the U.S. precision air strike on the Al Firdus bunker in Baghdad during the First Gulf War on February 13, 1991, which resulted in the deaths of several hundred civilians. Intelligence sources indicated that Iraqi high command was using the bunker and surveillance confirmed that the site was protected by camouflage, military access guards and barbed wire. Based on these facts, Coalition authorities targeted the bunker, unaware that it was being used as a civilian bomb shelter at night. An inquiry into the tragedy determined that the bunker was a legitimate target and that Coalition commanders had acted properly based on the information available at the time the bunker was slated for attack. CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 702 (U.S. Dep't of Defense, 1992); *see also* Major Ariane L. DeSaussure, *The Role of the Law of Armed Conflict during the Persian Gulf War: An Overview*, 37 AIR FORCE L. REV. 41, 64–65 (1994).

[112] The ICTY has considered a range of factors relevant to determining the legality of shelling in other cases, including: (1) scale of casualties; (2) damage to civilian objects; (3) means and methods of attack; (4) widespread or systematic nature of the attacks; (5) existence of fierce fighting; (6) number of incidents compared to the size of the area; (7) distance between victims and source of fire; (8) presence of military targets in the vicinity; (9) status and appearance of victims. *See* Prosecutor v. Galic, Case No. IT-98-29-A, Judgment, ¶¶ 132–33 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (listing factors based on Appeals Chamber shelling cases). *See also* Prosecutor v. Gotovina, Case No. IT-06-90-T, Prosecution's Response to Ante Gotovina's Appeal Brief ¶ 19 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 12, 2011) (citing Appeals Chamber rulings *Milosevic*, *Strugar*, and *Galic*).

IV. The Trial Chamber Judgment

A. Findings of Guilt

The court found General Gotovina guilty on counts 1 (persecution), 2 (forced deportation), 8 (inhumane acts), and 9 (cruel treatment), based partly on his tactical artillery and rocket attacks against the Serb-held towns of Knin, Benkovac, Gracac, and Obravac during combat operations on 4 and 5 August 1995.[113] Despite the voluminous length of the opinion (1400 pages) and its detailed review of the evidence relating to Croatian artillery attacks, the court's rationale on unlawful shelling is relatively simple.[114] Announcing its judgment in open court at The Hague on April 15, 2011, the court summarized its rationale for finding unlawful artillery attacks as follows:

> The Chamber carefully compared the evidence on the locations of impacts in these towns with the locations of possible military targets. Based on this comparison, and the relevant artillery orders and reports . . . the Chamber found that the Croatian forces treated the towns themselves as targets for artillery fire. . . [which]

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[113] *See* Part II.D., *supra*. Gotovina was acquitted on count 3 (forcible transfer) for technical reasons unrelated to shelling. The crimes charged in counts 4 (plunder), 5 (wanton destruction), 6 & 7 (murder) were attributed to Gotovina as foreseeable consequences of the JCE. *Gotovina*, Case No. IT-06-90-T, Judgment, ¶¶ 2372–75. In reaching this judgment, the trial court stated that "unlawful [artillery] attacks against civilians and civilian objects [ordered by Gotovina] . . . signaled his attitude towards crimes and towards Serbs to his subordinates." *Id.* ¶ 2373. The finding of unlawful shelling was the linchpin of the judgment against Gotovina and important to the conclusion that Gotovina participated in the JCE. *See id.* ¶ 2370 (finding that the "unlawful attacks formed an important element in the execution of the JCE" and assessing his actions "in light of [his] order to unlawfully attack civilians and civilian objects"). Whether a conviction could be sustained on other grounds appears doubtful, but is beyond the scope of this article.

[114] The parties' appellate briefs vigorously disputed the court's actual rationale for unlawful shelling. They disagreed about the meaning of the 200 meter rule, its importance to the verdict and the actual grounds of decision. *See Gotovina*, Case No. IT-06-90-T, Appellant's Brief of Ante Gotovina, ¶ 19 (arguing that the 200 meter rule was the sole basis for the court's finding of unlawful shelling); *cf. Gotovina*, Case No. IT-06-90-T, Prosecution Response to Ante Gotovina's Appeal Brief, ¶ 63 (arguing that Gotovina "distorts the role and relevance" of the 200 meter rule and that the court's ruling is based on "far more" than the 200 meter rule).

> constituted an indiscriminate attack on these towns and an unlawful attack on civilians and civilian objects.[115]

As explained below, the 200 meter rule was central to the court's comparison of impact locations and military target locations, and to construing as illegal Gotovina's order to "put the towns of Knin, Obrovac, Gracac and Benkovac under fire." Thus the central and decisive role of the 200 meter rule in the court's reasoning is patent.[116] Without the 200 meter rule, the court's finding of unlawful artillery attacks on the four towns in issue would have a greatly weakened evidentiary basis and that, in turn, would seem to undermine the finding that Gotovina violated international law by ordering unlawful shelling.

In the judgment itself, the court stated, "Croatian forces did not limit themselves to shelling areas containing military targets, but also deliberately targeted civilian areas"[117] and "treated the towns themselves as targets for artillery fire."[118] Therefore, the court concluded, the shelling "constituted an indiscriminate attack . . . and thus an unlawful attack on civilians and civilian objects."[119] Thus, the court apparently embraced a hybrid theory of both deliberate and indiscriminate targeting in violation of Protocol I, Articles 51(2) and (5)(a).[120] The court's

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[115] INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, JUDGMENT SUMMARY FOR GOTOVINA, *ET AL*. (2011), *available at* www.icty.org/x/cases/gotovina/tjug/en/110415_summary.pdf.

[116] On appeal, the prosecution conceded that the 200 meter standard was overly narrow, but characterized it as a "rule of thumb" and "only one factor" in the court's analysis. Prosecutor v. Gotovina, Case No. IT-06-90-T, Prosecution Response to Gotovina's Second Motion to Admit New Evidence Under Rule 115, ¶ 47 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 27, 2012). However, in the author's view, no detached reading of the judgment can mistake the indispensible importance of the 200 meter rule in the court's reasoning. Absent the 200 meter rule, the court has no strong basis to infer any indiscriminate or deliberate attacks on civilians and civilian objects.

[117] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶¶ 1911 and 1936. The court's use of the term "civilian area" in several passages is not defined, but seems to describe areas in the towns devoid of military targets. Under the law of war "civilians" and "civilian objects" are legally defined and significant elements, which the prosecutor is obligated to prove. Protocol I, *supra* note 72, arts. 50 and 52.

[118] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1743 ("[T]he Trial Chamber found that [Croatian forces] deliberately targeted civilian areas in these towns and treated the towns themselves as targets for artillery fire and that the shelling of these towns constituted an unlawful attack on civilians and civilian objects.").

[119] *Id.* ¶ 1911.

[120] The prosecution also interprets the judgment this way: "The Prosecution argued and proved at trial that the shelling attack on the four towns was unlawful, in the sense of a direct *and* indiscriminate attack on civilians and civilian objects." Prosecutor v. Gotovina,

assertion that Gotovina "deliberately targeted civilian areas" denotes intentional attacks on civilians and civilian objects, a violation of Article 51(2). Elsewhere, the court seemed to articulate a theory of indiscriminate shelling on the towns as a whole, which would constitute indiscriminate shelling in violation of Article 51(5)(a).[121]

B. Specific Findings Relating to Croatian Shelling

The 200 meter rule and its central place in the court's ruling have been alluded to already, and thus it is necessary to examine this unprecedented rule in some detail. The meaning and function of the 200 meter rule is best understood in light of the court's interconnected chain of findings.[122] Stated in its simplest terms, the court found that applying the 200 meter rule to the known military targets and a small sample of artillery impact points led to the inference that Gotovina ordered indiscriminate or intentional shelling of civilians and civilian objects in the four towns. The court rejected alternative interpretations of the pattern of impact points, such as mobile targets of opportunity, as not established by the evidence.

Case No. IT-06-90-T, Prosecution's Response to Gotovina's Supplemental Brief, ¶¶ 2, 12 (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2012) (emphasis added).

[121] In addition to findings of intentional and indiscriminate attacks on civilians and civilian objects in the towns, the court found that on at least two occasions Croatian shelling of Serbian leader Milan Martic's residence in Knin (plus another Croatian shelling of a place where he was believed to be) created an excessive risk of civilian casualties and hence violated Protocol I, Article 51(5)(b). The court found that Martic's residence was a lawful target and that Croatian artillery engaged the target believing Martic was present at that location. The court found that Martic's residence was the object of intentional attack on those three occasions based on Croatian artillery logs and reports–and not based on the 200 meter rule. (The court found this attack to be disproportionate, and to demonstrate disregard for civilian casualties, but not an intentional attack on civilians or civilian objects per se.)

[122] The court used specific terms to highlight its key findings: it used the term "the Trial Chamber finds" for incidents where the factual basis was sufficient to further consider the incident against applicable law. If an incident was not further considered, the Trial Chamber used terms like "the evidence indicates" or "the evidence suggests." *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 63.

1. Finding #1: There were lawful military objectives in the towns shelled by Gotovina's forces.

The court carefully considered the pre-planned target list for Knin developed by Gotovina's chief of artillery prior to Operation Storm.[123] The court found the targets there identified by Rajcic and approved by Gotovina to be lawful military targets.[124] The court did not have the target lists for Bencovak, Graca, and Obravac, but nonetheless found legitimate military targets in all three towns.[125] Had there been no military objectives in the towns, then the shelling would have been patently illegal.[126] The finding of legitimate military objectives in the towns meant that the shelling was not *per se* unlawful and required a more careful analysis of Gotovina's intent in shelling the towns. The court applied the 200 meter rule to these military targets and found that "artillery projectiles which impacted within a distance of 200 meters of an identified artillery target were deliberately fired at that target."[127] The greater distance at which the other projectiles fell was central to the court's finding that they were deliberately or indiscriminately fired at civilian targets.[128]

2. Finding #2: At least some of the Croatian shelling was lawful.

The court found that some of the rounds fired in all four towns were fired at legitimate targets, but others were unlawful attacks on civilian areas or indiscriminate attacks on the towns as a whole. The court made this dual finding explicit: "[T]he Trial Chamber finds that on 4 and 5 August 1995, at the orders of Gotovina and Rajcic, the HV fired artillery projectiles *deliberately targeting previously identified military targets*

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[123] *Id.* ¶ 1177.

[124] The court found at least ten lawful targets on the artillery target lists for Knin that were shelled on August 4 and 5: Krajina Serb Headquarters, the Northern Barracks, the Senjak barracks, Martic's residence, the police station, a railway station, a post office, an intersection, an open field north of a school, and a factory. *Id.* ¶¶ 1899–1902.

[125] For the fact that the court did not have the target lists, see *id.* ¶ 1915 (Brakovac), ¶ 1926 (Gracac), and ¶ 1938 (Obrovac). For the court's finding of lawful targets, partly based on the testimony of Rajcic, see *id.* ¶¶ 1917–19 (Benkovac), ¶ 1929 (Gracac), ¶ 1939 (Obrovac).

[126] *See* Hague IV, *supra* note 71, Annex, art. 25. "The attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited."

[127] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1898.

[128] *Id.* ¶¶ 1906–07, 1920, 1932, 1940.

and also targeting areas devoid of such military targets."[129] The finding of both lawful and unlawful attacks results in part from the 200 meter rule, which infers the intent of an attack from where the rounds landed in relation to known military targets.

3. Finding #3: The means (weapons) and methods (tactics) of Croatian shelling were not per se indiscriminate.

Croatian forces employed unobserved general support fires[130] from 130 mm tube artillery and multiple rocket launchers to strike pre-planned operational targets in the towns at issues. The court found these fires to be a lawful means and method of war and that harassing fire employed in Knin, Benkovac, Gracac, and Obrovac was a legitimate means of disrupting enemy military activity.[131] The court rejected the prosecutor's contention that rocket attacks in populated areas were *per se* indiscriminate.[132] Even though BM-21 rocket batteries are generally less accurate than artillery and mortar systems, they may be lawfully used against targets in populated areas in some circumstances.[133] As discussed above, under the law of war, the location of military objectives in towns does not render those targets immune from attack, but only requires the attacking force to choose means and methods of attack that will minimize collateral harm to civilians and to make a good faith judgment that anticipates collateral effects will not be excessive in relation to the military advantage gained by the attack.[134] The court found that the means and methods chosen by Gotovina to attack military targets in the towns were not unlawful.

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[129] *Id.* ¶ 1911 (finding for Knin) (emphasis added). The court repeats this finding for each of the other three towns in issue. *Id.* ¶¶ 1923 (Benkovac), 1935 (Gracac), and 1943 (Obrovac).

[130] General Support (or "GS") artillery fire is generally long range, unobserved fire in support of tactical or operational objectives. *See* Prosecutor v. Gotovina, Case No. IT-06-90-T, Motion to Admit Additional Evidence under Rule 115, exh. 20 (Scales Report), at 4 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 4, 2011).

[131] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1897.

[132] *See* Prosecution Trial Brief, *supra* note 19, ¶ 492.

[133] *Gotovina*, Case No. IT-06-90-T, Judgment ¶ 1897.

[134] *See* Part III.A, *supra*.

4. Finding #4: Shells that landed more than 200 meters from a known military objective were deemed unlawful (deliberate or indiscriminate) attacks on "civilian areas."

This "200 meter rule," which is central to the ruling, makes its first appearance in paragraph 1898 of the judgment.[135] In introducing the rule, the court considered the testimony of prosecution artillery expert, Lieutenant Colonel Harry Konings, Royal Netherlands Army, as to variations in range and deflection[136] typical of 155 mm NATO cannon fire, which he described as "similar" to the 130 mm Soviet guns actually used by the Croats.[137] The court also considered the testimony of Rajcic on the same variations for 130 mm fire.[138] These witnesses gave likely errors of 55 to 75 meters (range) and 5-15 meters (deflection) for the weapons in question.

The court also cited the testimony of Lieutenant General Andrew Leslie, Canadian Armed Forces, Chief of Staff for the UN mission in Croatia, who had been in Knin during the shelling and whom the court described as "a military officer with extensive experience in artillery."[139] General Leslie testified that rounds landing within a 400 meter radius of a target with the first shot would be "acceptable," but the court discounted this suggested standard because the witness was "not called as an artillery expert" and did not testify in detail about the basis for this estimate.[140]

After noting various factors that might degrade accuracy of artillery fire, the court commented that "the variations in the locations of impacts

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[135] *Gotovina*, Case No. IT-06-90-T, Judgment ¶ 1898. "Evaluating all of this evidence, the Trial Chamber considers it a reasonable interpretation of the evidence that those artillery projectiles which impacted within a distance of 200 meters of an identified artillery target were deliberately fired at that artillery target." (This text is found in the section covering legal findings on count 1 (persecution).)

[136] "Range and deflection" refer to the location of where an artillery round falls in relation to a target and the imaginary line between the gun and its target. "For the distribution of artillery or rockets about their aimpoint, the pattern is typically elliptical and the probable errors will be described in both range, parallel to the gun-target line, and deflection, perpendicular to the gun-target line." Prosecutor v. Gotovina, Case No. IT-06-90-T, Motion to Admit Additional Evidence, exh. 21 (report of William A. Shoffner), at 3 (Nov. 4, 2011) [hereinafter Shoffner Report].

[137] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶¶ 1164, 1898.

[138] *Id.* ¶ 1898.

[139] *Id.* ¶ 1167.

[140] *Id.* ¶ 1898.

of the artillery weaponry employed by the HV [Croatian army] is difficult to delimit precisely, as it depends on a number of factors *on which the Chamber has not received detailed evidence*."[141] Despite this seemingly crucial concession, the court decreed a 200 meter standard of accuracy, with no further reference to evidence or authority and no explanation of the methodology used to derive that standard. The court simply stated that, "[e]valuating all of this evidence, the Trial Chamber considers it a reasonable interpretation of the evidence that those artillery projectiles which impacted within a distance of 200 meters of an identified artillery target were deliberately fired at that artillery target."[142]

With regard to impact locations outside of the 200 meter radius from legitimate artillery targets, the court found that they did not land so far from the targets "incidentally as a result of errors or inaccuracies in the HV's artillery fire," but instead were deliberately aimed there.[143] The court further found that most of these rounds landed in "civilian areas," because there was no evidence of Serb military or police presence and no evidence "indicating that firing at these areas would offer a definite military advantage."[144]

5. Finding #5: "Too many" rounds landed more than 200 meters from legitimate military targets to be the product of inaccurate fire.

The court estimated that at least 1205 rounds were fired at the towns in question on 4 and 5 August 1995.[145] The court found that only some of

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[141] *Id*. (emphasis added).
[142] *Id.*
[143] *Id.* ¶¶ 1906 (hospital and cemetery, 400–700 meters from the nearest identified target in Knin), 1920 (factories and various parts of Benkovac, 250–700 meters from the nearest identified targets), 1932–33 (parts of Gracac 300–800 meters from the nearest identified targets), and 1940 (health clinic and factory located 200–400 meters from the nearest targets in Obrovac); *but see id.* ¶¶ 1919 (considering a firemen's hall 500 meters from the nearest identified target and a gas station 150 meters from the hall; the court found that the HV deliberately targeted the hall, but concluded that they could have considered the hall a legitimate target, and therefore treated it as such), 1931 (concluding that an intersection not identified by Rajcic as a target might still be a legitimate target).
[144] *Id.* ¶¶ (Knin), 1921 (Benkovac), 1933 (Gracac), 1941 (Obrovac).
[145] *See id.* ¶¶ 1909, 1916 and 1928, and 1939 (stating that "not less than" 900 shells fell on Knin, 150 on Benkovac, and 150 on Gracac, and listing five locations in Obrovac at which "one or more" shells were fired).

the shell impact locations could be determined based on eyewitness testimony.[146] Nonetheless, the court concluded

> that too many projectiles impacted in areas which were too far away from identified artillery targets...for the artillery projectiles to have impacted in these areas incidentally as a result of errors or inaccuracies in the HV's artillery fire. Thus, the Trial Chamber finds that the HV deliberately fired artillery projectiles targeting these areas in Knin.[147]

It bears noting that "too many" is an imprecise and elastic standard, compared to the definitive edge of the court's precise 200 meter rule of accuracy.[148]

6. Finding #6: Impacts beyond 200 meters were not attributable to targets of opportunity.

The ICTY Statute incorporates the bedrock principle that a defendant is innocent until proven guilty.[149] The judgment acknowledged that the burden of proof as to the elements of the offense "remains with the

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[146] *Id.* ¶¶ 1909, 1922, 1934, 1942. In each of these sections, the court noted that it could determine impact locations for only "some" of the projectiles fired, but found that, of these, "a considerable proportion" were fired at civilian objects or areas. According to the defense appellate brief, the court was able to determine the location 154 of approximately 1205 projectiles fired, and determined that 74 of these 154 fell outside the 200 meter limit, with only 9 of those 74 falling more than 400 meters from acceptable targets. Prosecutor v. Gotovina, Case No. IT-06-90-T, Appellant's Brief of Ante Gotovina, ¶ 3 and Annex A (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2011) [hereinafter Gotovina Appellant's Brief].

[147] *Gotovina*, Case No. IT-06-980-T, Judgment ¶ 1906.

[148] The court also acknowledged the limited sample of impact points it was able to determine. "The Trial Chamber considers that the number of civilian objects or areas in Knin deliberately fired at by the HV [Croatian Army] may appear limited….Of the locations of impact which the Trial Chamber was able to establish, a *considerable portion* are civilian objects or areas." *Id.* ¶ 1909 (emphasis added).

[149] *See* ICTY Statute, *supra* note 53, art. 21(3) (Rights of the Accused) ("The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute."). *See also* RULES OF PROCEDURE AND EVIDENCE OF THE ICTY R. 87(A), Rev. 46, Oct. 20, 2011, http://www.icty.org/sid/ [hereinafter ICTY Rules] ("A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond a reasonable doubt.").

Prosecution throughout the trial,"[150] and that the accused "must be acquitted if there is any reasonable explanation of the evidence other than the guilt of the accused."[151] One possible exculpatory explanation for the pattern of artillery impact points would be inaccuracy, but the court rejected that explanation based on its 200 meter rule. The court also considered "targets of opportunity" as one additional alternative explanation which it had a legal duty to address.

Rajcic testified that "commanders of artillery groups . . . directed and corrected artillery fire during operation Storm," and had twenty-two artillery observation points near Knin to make this possible. Nonetheless, the court dismissed this exculpatory possibility on two grounds. First, the court noted that, despite Rajcic's testimony about calls for fire, Croatian artillery reports and operational log books make no mention of forward observers in Knin.[152] Therefore, the court concluded that "the evidence does not establish whether the HV had artillery observers"[153] who could have called for fire, and stated that "[i]f they did not, at least on August 4, the HV would have been unable to spot, report on, and then direct fire at SVK or police units or vehicles, which would have presented so called opportunistic targets (i.e. not previously identified), also referred to as tactical (as opposed to operational) targets."[154] But in using such reasoning, the court impermissibly placed the burden of proof on the defense, and resolved a major factual ambiguity in favor of the prosecution. This further strains the usefulness of the 200 meter rule, because to apply the rule the court must assume it has an exhaustive list of locations of legitimate targets. Otherwise, to apply the rule leaves open the question: 200 meters from what?

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[150] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 14 (citing Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgment, ¶ 22 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004)). The ICTY Rules place the burden of production on the defense only as to "special defenses," ICTY RULES, *supra* note 149, art. 67(B)(i)(a) and (b) ("[t]he defense shall notify the Prosecutor of its intent to offer (a) the defense of alibi . . . (b) any special defense . . . and any other evidence upon which the accused intends to rely to establish the special defense.").

[151] Prosecutor v. Delalic, Case no. IT-96-21-A, Judgment, ¶ 458 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (discussing cases based on circumstantial evidence). "It is not sufficient that it is a reasonable conclusion from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion that is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted."

[152] *Id.* ¶ 1907.

[153] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1907.

[154] *Id.*

Second, even if forward observers had been deployed, the court stated that "the limited SVK and police presence in Knin indicates that there would, in any event, have been few opportunistic targets in Knin on 4 and 5 August."[155] The court further examined the evidence of this presence and noted that the limited evidence of SKV and police presence did not place them in the areas where the suspect artillery fire hit. However, the evidence *was* limited—as it had to be by its nature (most of the witnesses took cover during periods of intense shelling)—and even a few targets of opportunity could draw a great many rounds to places not considered legitimate targets by the court. On the basis of only these two observations—the lack of proof about forward observers on August 4 and the low probability of mobile targets in the areas hit—the court rejected the possibility that the impacts further than 200 meters from identified military targets resulted from firing at targets of opportunity.

In considering the shelling evidence at Gracac, the court took this kind of reasoning even further. The court acknowledged that "[t]he evidence does not clearly establish the location of the Gracac command post [a legitimate military target] within Gracac town," and that neither the prosecution nor the defense had produced evidence on the location of this target.[156] Nonetheless, the court noted shelling near two houses that were 450 meters from *each other*—and concluded on that basis alone that the shells must not have been aimed at the command post, wherever it was (the 200 meter rule, at its strictest, is evident in this finding).[157] The court also noted evidence that the Croatian army did use both Special Police (SP) and unit commanders as forward spotters for artillery in Gracac, but decided the rounds could not have been fired at targets of opportunity—because there was no evidence the forward spotters had a view of Gracac at 5 a.m. (when the rounds were fired), because there was no evidence that SVK or police were moving through the area at 5 a.m., and because the court would not "expect" such movement given the minimal SVK presence in Gracac.[158] Again, the court had to make broad assumptions, treat the absence of evidence as evidence of absence, and resolve ambiguities in favor of the prosecution to be able to apply its 200 meter standard.

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[155] *Id.* ¶ 1908.
[156] *Id.* ¶ 1933.
[157] *See id.*
[158] *Id.*

7. Finding #7: Gotovina's order to "place the towns under fire" was deemed an unlawful order to attack civilians.

It is undisputed that Gotovina issued orders two days before the battle began to "put the towns of Knin, Obravac, Gracac and Benkovac under fire."[159] Rajcic testified that Gotovina's order, in context, implied attacks only against the lawful targets on the pre-planned target list.[160] The prosecution's artillery expert, however, testified that when giving orders to shell targets in urban areas, "detailed specification of military targets is an absolute pre-condition, otherwise the vague nature of the order may be interpreted as ordering, or at least permitting commanders to fire randomly into the named cities."[161] Unable to resolve the order's ambiguity and interpret its intended meaning based solely on the wording of the order, the court turned to the pattern of artillery impact locations and the 200 meter rule as a means of inferring the meaning and intent of the order and assessing Rajcic's credibility on that issue.

The court found that Rajcic's testimony about the interpretation of the order was not credible, primarily because it concluded that the pattern of artillery impacts was not consistent with Rajcic's explanation.[162] The analysis of impact based on the 200 meter rule was the principal ground cited by the court for choosing between the possible interpretations of the order.[163]

V. Critique of the 200 Meter Rule

The ICTY mandate requires judges to interpret and apply the law of war in complex individual criminal cases, often many years (here, fifteen) after the events at issue. In effect, judges must combine two complex systems of law, each with very different processes and legal

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[159] *Id.* ¶ 1185.
[160] *Id.* ¶ 1188.
[161] *Id.* ¶ 1172. The defense artillery expert, Professor Geoffrey Corn, agreed that the order was ambiguous, and might be interpreted either as requiring indiscriminate shelling of the towns or as requiring fire on predetermined military objectives. *Id.* ¶ 1173.
[162] *Id.* ¶ 1906. The court also noted that Croat artillery reported firing at least 24 shells "at Knin or at the general area of Knin . . . without further specifying a target." *Id.* ¶ 1895 However, the court also noted that the artillery reports in its possession "provide[d] only a partial and at times coded account of the targets fired at in Knin," and concluded that these reports alone could not establish indiscriminate firing. *Id.* Thus, the 200 meter rule was critical to the court's ultimate findings of guilt.
[163] *See id.* ¶¶ 1911, 1923, 1935, 1943.

traditions: international regulation of the battlefield and judicial punishment of criminals. The latter tradition carries with it core legal values and principles that exert a conservative bias on how LOAC rules should be interpreted in order to protect the interests of justice and basic rights of defendants.[164]

The ICTY stands at the intersection of these two traditions and, with admirable skill and erudition, has played a historically pivotal and positive role in the development of adjudicative standards for the international enforcement of LOAC. Indeed, some of the most important developments in the law of war in recent decades are found in the judgments of the ICTY and the International Criminal Tribunal for Rwanda. Occasionally, this process produces well-intended judgments that require correction through the process of appellate review. Such correction is needed here, where the Trial Chamber relied on an operationally invalid standard of accuracy that also transgresses fundamental and universally recognized principles of criminal law.

A. Expert Assessment of the 200 Meter Rule

The court's invention of and reliance on the 200 meter standard was anticipated neither by the prosecution nor the defense when the Trial Chamber Judgment was published in April 2011.[165] This finding was neither litigated by the parties nor raised by the prosecution at trial. On appeal both the defense and prosecution obtained opinions from artillery experts and submitted their written opinions to the Appeals Chamber as additional evidence under Rule 115 of the ICTY Rules of Procedure and Evidence.[166] Instead of the "battle of the experts" that is the norm in such

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[164] *See* Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶¶ 402–13 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (holding that basic principles of criminal law, such as the prohibition of ex post facto laws and the Rule of Lenity, apply when the ICTY interprets its statute).

[165] *See* Gotovina Appellant's Brief, *supra* note 146, ¶¶ 11–13 (asserting that Gotovina had no notice of the 200 meter rule and neither prosecution nor defense experts were asked to opine on the standard at trial); Prosecutor v. Gotovina, Case No. IT-06-90-T, Notice of Filing Redacted Public Version of Prosecution Response to Ante Gotovina's Appeal Brief, ¶¶ 83–87 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 12, 2011) (arguing that Gotovina had notice of "margin of error" issues at trial but not denying that the 200 meter standard *per se* was not discussed at any time during trial).

[166] *See* Prosecutor v. Gotovina, Case No. IT-06-90-T, Notice of Filing Public Redacted Version of Appellant Ante Gotovina's Second Motion to Admit Additional Evidence Pursuant to Rule 115 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2012); and

situations, prosecution and defense artillery masters found themselves in agreement on one key point: the court's 200 meter standard is both technically unsound and operationally unrealistic, even under ideal conditions. The experts also generally concurred in the technical and operational variables likely to affect the accuracy of artillery and rocket fires. The unanimous opinions of the experts even led the prosecution to concede that the 200 meter rule was untenable.[167]

1. Defense Artillery Experts

On appeal, the defense has offered expert opinions on the 200 meter rule as evidence under Rule 115.[168] These opinions are authored by arguably some of the foremost artillery experts in NATO.[169] Together these experts represent well over 235 years of combined fire support and military operational experience in combat, academic, and training environments. Their military and scholarly contributions to artillery theory are respected around the world. They include General Granville-

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Prosecutor v. Gotovina, Case No. IT-06-90-T, Prosecution Response to Gotovina's Second Motion to Admit Additional Evidence Pursuant to Rule 115; Prosecutor v. Gotovina, Case No. IT-06-90-T, Supplemental Response to Gotovina's First Rule 115 Motion (Int'l Crim. Trib. for the Former Yugoslavia Apr. 27, 2012) [hereinafter Pros. Rule 115 Response]. Motions to admit additional evidence were denied by the Appeals Chamber on grounds that they could have been presented at trial and were, therefore, not admissible under Rule 115. Prosecutor v. Gotovina, Case No. IT-06-90-T, Decision on Ante Gotovina's and Mladen Markac's Motions for the Admission of Additional Evidence on Appeal ¶¶ 16–17 (Int'l Crim. Trib. for the Former Yugoslavia June 21, 2012). These reports, however, remain part of the appellate record and are accessible to public review at http://icr.icty.org/default.aspx.

[167] "The Prosecution agrees that the 200-metre margin of error is overly narrow." *Gotovina*, Case No. IT-06-909-T, Response to Gotovina's First Rule 115 Motion, ¶ 47 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 27, 2012).

[168] *See* ICTY RULES, *supra* note 149, R. 115 (providing that "[a] party may apply by motion to present additional evidence [beyond the record of trial] before the Appeals Chamber").

[169] In addition to the four opinions offered in Gotovina's First and Second Rule 115 motions, two additional artillery experts were consulted by the defense and produced written opinions. One is from a former Chief of Staff of the German Training and Doctrine Command. Comments and Conclusions by GenMaj (ret.) Rolf Th. Ocken, German Army, on the Subject "Croatian Army use of Artillery in KNIN, CROATIA on 4-5 August 1995," (Nov. 19, 2011) (*infra* app. A) [hereinafter Ocken Report]. The other is from Lieutenant General (ret.) Percurt Green, former Deputy Supreme Commander of the Swedish Armed Forces. Report, Subject: Croatian Army use of Artillery and Rockets, Knin Croatia, 4-5 August 1995 (Apr. 2012) (*infra* app. B) [hereinafter Green Report].

Chapman, a Master Gunner of the British Army and Commander in Chief of British forces deployed to Iraq and Afghanistan; General Griffith, former U.S. Army Vice Chief of Staff; Lieutenant General Wilson A. Shoffner (Ret.), a former Commandant of the U.S. Army Artillery Center and School; and Major General Robert Scales (Ret.), a respected veteran, scholar, and author of several works on artillery art and science.[170]

These respected experts were asked to focus exclusively on whether the 200 meter standard was either technically or tactically rational or attainable under the circumstances set forth in the court's judgment. They were asked to review the court's findings as to the basis and application of the 200 meter rule in the context of the shelling of Knin, which was the most detailed and important part of the court's shelling analysis.[171] They were given access only to the court's judgment (not the complete record of trial) and for purposes of their analysis accepted the court's findings as to the lawfulness of the military targets engaged by Croatian artillery. They were not asked to express opinions about whether Croatian shelling in Operation Storm complied with the law of war.

The defense experts unanimously found that the court did not adequately consider the full range of factors that influence accuracy in the planning and execution of artillery fire.[172] General Scales provided a detailed discussion of the many factors that influence dispersion of canon and rocket fire in an operational setting. He concluded that "the Trial Chamber did not adequately consider the full impact of these execution variables in assessing the effects of HV [Croatian] artillery."[173] Among several critical factors overlooked by the Trial Chamber, one example was the lack of an accurate meteorological message prior to firing. General Scales characterized this as "[t]he most telling technical

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[170] The relevant qualifications of each expert are summarized in their respective reports, cited below.

[171] Prosecutor v. Gotovina, Case No. IT-06-90-T, Motion to Admit Additional Evidence, exh. 20 (Scales Report), at 1 (Int'l Crim. Trib. for the Former Yugoslavia Nov 4, 2011) [hereinafter Scales Report].

[172] *See* Shoffner Report, *supra* note 136, at 2, 4; Ocken Report, *infra* app. A; Green Report, *infra* app. B.

[173] Scales Report, *supra* note 171, at 6. Those factors analyzed by General Scales which would have a significant effect on accuracy, included range, meteorological conditions, target location, battery location azimuth of fire, ammunition lot and quality, platform stability, condition of material, opportunity to "register" targets, training and experience of the cannon crews. *Id*. at 7–10.

shortcoming of HV artillery operations at Knin,"[174] which is "the single greatest source of deviation from firing tables and thus the largest source of error at the target." He also noted that the "map spotting" technique used by Croatian gunners could have reduced target accuracy by 100 meters or more, and that the likely inexperience of the Croatian gunners could have added more to this inaccuracy.[175]

Even if a firing battery could achieve perfect execution of fire missions, which General Scales points out is "a factual impossibility" (a point this author's experience certainly supports), the routine occurrence of "outliers" might fully explain the few rounds found by the court beyond 400 meters from military targets. According to Scales, "[a]bout one round in every hundred for advanced systems and one in 50 for older systems . . . occasionally impact outside the normal radius."[176] As General Scales further explains, these aberrant results are usually caused by "flaws in the manufacture of ammunition." If the 154 shots examined by the court were a representative sample of all the shots fired—and whether they were is unknown and unknowable—this problem alone would explain 3 of the 9 shots found to lie over 400 meters from their targets. If the sample was not representative, it might explain them all.

In summary, taking all of the normal execution variables into account and applying the mathematical formulas on which artillery fire is based, all experts emphatically agreed that the 200 meter rule was a technically, mathematically, and operationally impossible standard of accuracy under the conditions of Operation Storm. Master Gunner of the British Army, retired four-star General Sir Granville-Chapman, stated: "There is, in my opinion, absolutely no justification for concluding that rounds falling outside the 200 metre box were indicative of a deliberate attempt to fire on separate (and possibly inappropriate) targets."[177]

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[174] *Id.* at 10.

[175] *Id.* at 6. *See also* Ocken Report, *infra* app. A, at 2 n.5 (noting that inaccurate meteorological data generally accounts for "50-70% of the total errors"). This discussion is not cited to definitively assert that the lack of accurate meteorological data caused errant rounds, but rather simply to highlight some of the technical processes and expertise required to deliver accurate artillery fire and thereby underscore the danger of dictating an artillery combat standard of accuracy by judicial fiat. As the U.S. Supreme Court has noted on several occasions, even the best and most well-intentioned judges are generally ill equipped in terms of training and experience to render definitive opinions on military combat operations. *See* Parker v. Levy, 417 U.S. 733, 748 (1974) and cases cited therein.

[176] Scales Report, *supra* note 171, at 8.

[177] Prosecutor v. Gotovina, Case No. IT-06-90-T, Notice of Filing Public Redacted Version of Appellant Ante Gotovina's Second Motion to Admit Additional Evidence

General Shoffner, the former Chief of Artillery for the U.S. Army, called the 200 meter rule "totally unrealistic"[178] and "simply wrong," and concluded, "There is no scientific, mathematical or practical justification for such a conclusion."[179]

It is worth noting that even with their extensive experience, these combat veterans and artillery experts declined to assert a single, bright-line standard of accuracy that would be appropriate in all circumstances. However, General Scales stated that 400 meters would be far a more realistic standard for HV artillery in Operation Storm, and all identified a variety of factors that would bear on analysis of the issue.[180] General Scales and General Shoffner provided the detailed mathematical and technical formulas for determining the expected dispersion patterns of the artillery systems used under the conditions faced by HV forces in the Krajina. General Scales found that "firing errors far greater than 200 meters" would be expected and that "the compounding of errors traditional in such missions, in fact, would offer a radial error of at least 400 meters."[181] General Granville-Chapman thought the evidence showed especial care taken by the Croat gunners. Noting that "a high proportion of the rounds fell within 200 meters," General Granville-Chapman concluded that "in many ways such accuracy is remarkable,

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Pursuant to Rule 115, annex E (Granville-Chapman Report), at 1–2 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2012) [hereinafter Granville-Chapman Report] (observing that even British artillery in Afghanistan "typically delivers only 90% of its rounds within a 250 meter box at its operational range").

[178] Applying standard mathematical formulas to normal dispersion patterns of artillery fire under conditions faced by Croation forces, General Shoffner showed that "as much as half the rounds fired could be expected to be greater than 200 meters from the aim point." Shoffner Report, *supra* note 136, at 2.

[179] *Id.* at 2. Swedish General Green said, "the 200 meter standard adopted by the court is completely inconsistent with both technical and practical aspects of artillery employment," and called the rule "the most astonishing statement from the portions of the Trial Chamber judgment I reviewed." Green Report, *infra* app. B. *See also* Shoffner Report, *supra* note 136, at 3 ("Nor does the 200 meter standard reflect the science of indirect fire weapons or the established practice by artillerists around the world for predicting the probable impact of indirect fired weapons."); Ocken Report, *infra* app. A, at 2 ("I can state unequivocally that a circle of 200m around a target could never serve as a realistic or proper standard for a sound assessment of cannon and rocket fire over a distance from 8 to 27 kilometers.").

[180] *See* Scales Report, *supra* note 171, at 5-9. In this he agreed with Lt. Gen. Leslie, who testified at trial that for rounds to land within 400 meters of their targets would be "acceptable" with the weapons in question under the circumstances. Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, ¶ 1167 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

[181] Scales Report, *supra* note 171, at 1.

given the age of equipment, the state of training of the crews, and the unsophisticated means…of attending to variables such as weather conditions. . . ."[182]

2. Prosecution Artillery Experts

In response to the defense motion to admit expert opinions of allied artillery experts, the prosecution offered the opinions of three senior career British officers with solid artillery credentials.[183] Among their distinctions, General Applegate was a Master-General of the Ordnance and commander of the European Rapid Reaction Force artillery group, which in 1995 fired more than 1,499 rounds in 56 fire missions in support of the intervention to lift the siege of Sarajevo.[184] General Brown was a former Director of Royal Artillery; and General Ashmore is a currently serving British general with extensive field artillery experience in Iraq.

The opinions of the British generals are described as "rebuttal reports,"[185] and they are critical of some Croatian artillery practices; however, all three prosecution experts joined the defense experts in unanimously rejecting the 200 meter rule as a completely invalid standard for judging the accuracy of Croatian artillery fire in Operation

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[182] Granville-Chapman Report, *supra* note 177, at 2. General Green found the high degree of accuracy "quite surprising." Green Report, *infra* app. B. *See also* Prosecutor v. Gotovina, Case No. IT-06-90-T, Motion to Admit Additional Evidence, exhibit 22 (Griffith Report), at 2 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 4, 2011) [hereinafter Griffith Report] (finding that, given the lack of any proven civilian casualties and the dispersion of rounds, "General Gotovina's use of indirect fires was done in a responsible manner . . . by any reasonable standard"); Shoffner found "nothing that would lead me to conclude that these firings were not within accepted norms for dispersion and accuracy given the methods and weapons used." Shoffner Report, *supra* note 136, at 4. The experts also commented on the relatively low volume of fire given the operational circumstances faced by Croatian forces. Based on many years of combat experience in various wars, General Griffith said "the volume of artillery fire" over the two-day period in issue and given the number of lawful targets engaged "was not excessive." Griffith Report, *supra*, at 4; Shoffner Report, *supra* note 136, at 2 ("not considered excessive"); Granville-Chapman Report, *supra* note 180, at 1 ("[T]he number of rounds fired looks modest and entirely consistent with seeking to neutralize the opposition in an urban setting, rather than wholesale destruction.").

[183] Pros. Rule 115 Response, *supra* note 166.

[184] Prosecutor v. Gotovina, Case No. IT-06-90-T, Supplemental Response to Gotovina's First Rule 115 Motion, annex I (Applegate Report), at 21 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 27, 2012) [hereinafter Applegate Report].

[185] *See* Pros. Rule 115 Response, *supra* note 166, ¶ 38.

Storm. Having reviewed the defense expert reports, General Applegate states: "I concur with their arguments concerning the specific ruling that the 200m zone of error . . . is inappropriate and fails to take into account the characteristics of the weapons system, and that 400m is a more appropriate rule of thumb."[186] Similarly, after listing various control measures he would have recommended to Rajcic and Gotovina, General Ashmore conceded, "However, I would highlight that I agree . . . that the Trial Chamber's conclusion as to a reasonable radius of error (200m) was far too restrictive and a 400m radius is a more accurate and realistic standard to use."[187]

Compelled by operational reality to abandon the court's 200 meter standard, the prosecution used its expert reports to criticize Croatian artillery operations on various other grounds, upon which the court itself did not rely.[188] General Ashmore argued that the Croatian fire control measures were not sufficiently strict to limit collateral casualties and damage to civilian property. He stressed the importance of observed fire, current intelligence, prompt battle damage assessments, clear ROE, withholding of authority to target fire in towns to the brigade level or higher, and use of fire support coordination measures such as "no fire" or "restricted fire" areas.[189] Ashmore noted routine use of such measures in his experience, leading him to conclude that "given the apparent failure of the HV [Croatian forces] to consider and address these factors . . . I would consider those Fires to have been, in the main, inappropriate indiscriminate and reckless."[190] General Applegate similarly concluded: "based upon my own experience of engaging targets in Sarajevo with artillery fire . . . I find that the HV, at the very least, failed to exercise due care in the application of artillery fire. . . ."[191]

As noted in Part I above, Rajcic testified that some of the planning factors advocated by the prosecution experts were actually incorporated into the deliberate fire support planning for Operation Storm.[192] Others,

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[186] Applegate Report, *supra* note 184, at 20.
[187] Pros. Rule 115 Response, *supra* note 166, Annex III (Ashmore Report), at 4 [hereinafter Ashmore Report]. *See also id.*, Annex II (Brown Report), at 2 (referring to the 200 meter rule as an "erroneous conclusion").
[188] *See id.* ¶ 55.
[189] Ashmore Report, *supra* note 187, at 2.
[190] *Id.* at 5.
[191] Applegate Report, *supra* note 184, at 20 (noting his experience in peacekeeping operations).
[192] *See* Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, ¶¶ 1245, 1182, 1184 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

such as ongoing battle damage assessment (BDA), were not feasible in the circumstances of a two-day blitz into enemy territory, given Croatia's limited aerial surveillance capabilities. Regardless, such measures in themselves are not required by the law of war. While the court in *Gotovina* did take some testimony on the usefulness of forward observers in avoiding civilian casualties, it did not base its findings of unlawful shelling on such considerations, but instead rested its ruling on the 200 meter rule, which all of the prosecution and defense experts found to be invalid.

In the author's opinion, while Croatian forces might have considered additional restrictive measures—and perhaps British forces would have—neither the law of war nor the mission parameters required or necessitated their use. Artillery control measures in peacekeeping operations, such as General Applegate's experience in Sarajevo, are typically far more restrictive than those required by the law of war in conventional combat operations, such as Operation Storm. Although British-style fire control measures are excellent in this author's experience,[193] the LOAC does not require every combatant to meet their standards.

3. An Operationally Invalid Standard

A hallmark of international humanitarian law is its consistency with the actual practice of warfare by civilized nations.[194] This consistency promotes respect for and compliance with the law of war. Legal standards that make compliance impossible will inevitably be ignored and ultimately undermine respect for the law among military personnel.[195] The specific LOAC rules governing the means and methods of warfare, including the law of targeting, place reasonable constraints on the manner in which forces use their combat power in the chaotic maul of warfare. Legal standards that are inconsistent with the operational realities of modern war, the limitations of technology, and the customary

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[193] The British First Armored Division was attached to the U.S. Army VII Corps during Desert Storm and performed magnificently. *See* FRED FRANKS & TOM CLANCY, INTO THE STORM 592 (1997).

[194] *See generally* Corn & Corn, *supra* note 64 (insightful analysis of how operational art corresponds to the law of war).

[195] Doswald-Beck, *supra* note 63, at 45 (noting that "belief in the appropriateness of humanitarian rules is the single most important factor for effective implementation of the law").

practice of civilized nations will not be considered practical or workable by armies in the field. Unless nations expressly undertake, in advance, to supersede customary military practices through treaties and conventions, the law should therefore be interpreted consistent with contemporary operational art and technology.[196]

A determination that a legal standard is operationally and technically invalid is a sufficient reason to invalidate the rule. The law of war does not ask the impossible of battlefield commanders; nor does it unfairly disadvantage armies that lack the technological capabilities of the most advanced nations. It requires only that commanders act in good faith to do all within their capabilities and limitations to minimize civilian casualties while accomplishing their missions. General Gotovina was bound to operate within the technical constraints of his combat capabilities. Croatian forces did not have the most modern indirect fire weapons, and certainly did not have precision-guided munitions. Even beyond the modest capabilities of Gotovina's indirect fire capabilities, no army on earth could meet a 200 meter standard, or any other hard and fast standard that failed to account for the myriad vagaries associated with artillery in combat that result statistically in errant rounds. The court's desire to create a more precise standard of judgment is understandable. However, the danger exists that this rule—which is temptingly simple—will be read in the future as a universal standard of accuracy. If the complex judgments of battlefield commanders could be measured against a simple mathematical standard, the task of criminal adjudication would be greatly simplified. But the law of war historically, consistently, and necessarily has declined to provide a bright-line standard.[197]

B. The 200 Meter Rule in Light of Fundamental Legal Principles

While the operational and technical invalidity of the 200 meter rule is sufficient to invalidate the findings of unlawful shelling, the court's heavy reliance on a post-hoc accuracy standard raises additional, independent legal concerns.

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[196] This occurred, for example, with the 1925 Geneva Protocol and with the 1980 Conventional Weapons Treaty. An analogous situation occurs when new emissions standards are promulgated by regulation or statute, forcing automobile manufacturers to upgrade existing automobile technology.

[197] *See infra* note 208.

1. Legal Insufficiency of an Accuracy-Based Standard

The first strictly legal concern raised by the use of the 200 meter rule is its tendency to distort application of the law of war to allegations of unlawful shelling. The Rendulic rule requires proof of criminal intent at the time the attack was ordered.[198] The 200 meter rule diverts the court's attention from this key element through inordinate reliance on the location of artillery impacts and other post-hoc target effects evidence. While target effects evidence may be one relevant factor from which the intent of an attack may be inferred,[199] it cannot be dispositive standing alone. Thus, the law, properly applied, may exonerate a commander who mistakenly inflicts the most dreadful civilian casualties based on a reasonable, but mistaken, belief that he was attacking a purely military target.[200] On the other hand, the law may condemn a commander who launches an attack knowing it will likely cause civilian casualties that are excessive in relation to the anticipated military advantage gained, even if no casualties result.[201]

2. Strict Liability and the Principle of Legality

Nullum crimen sine lege and *nulla poena sine lege* are fundamental principles of criminal law that have been fully embraced by ICTY jurisprudence. Known together as the principle of legality, these fundamental rules prohibits "the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission."[202] "Associated with these principles are the

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[198] *See* Part III.B.*2*, *supra.*

[199] As noted above, the ICTY has considered a range of factors relevant to determining the legality of shelling in other cases, including: (1) scale of casualties; (2) damage to civilian objects; (3) means and methods of attack; (4) widespread or systematic nature of the attacks; (5) existence of fierce fighting; (6) number of incidents compared to the size of the area; (7) distance between victims and source of fire; (8) presence of military targets in the vicinity; and (9) status and appearance of victims. *See* Prosecutor v. Galic, Case No. IT-98-29-A, Judgment, ¶¶ 132–133 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (listing factors based on Appeals Chamber shelling cases), *available at* 2006 WL 4549662.

[200] *See supra* note 111 (discussing the al Firdus bunker incident in Desert Storm).

[201] Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment, ¶ 105 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

[202] Prosecutor v. Delalic, Case No. IT-96-1-T, ¶¶ 313, 402 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), *available at* 1998 WL 34310017. These principles translate as "no crime without a law, no punishment without a law." For an analysis of the principle of legality in ICTY jurisprudence, see generally M.C. BASSIOUNI & P.

requirement of specificity and the prohibition of ambiguity in criminal legislation," and the prohibition of retroactive or *ex post facto* laws.[203] As expressed in the International Covenant on Civil and Political Rights, "No one shall be held guilty of any criminal offense for any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. . . ."[204] This principle is not explicit in the ICTY Statute (as it is in the statute of the International Criminal Court[205]), but the court has unequivocally embraced it as a fundamental and indispensible attribute of justice. The principle of legality is implicated whenever a court explicitly or implicitly creates a new offense, expands criminal liability under an existing offense, or increases the penalty prescribed by law. Arguably, the 200 meter rule creates a new strict liability standard for shelling in urban settings or, at a minimum, expands existing criminal liability for shelling well beyond any previous standard.[206]

Although ICTY opinions contribute to the development and clarification of humanitarian law standards, the tribunal is not empowered to make law or to expand the substantive standards of criminal liability under the law of war.[207] Creating a more stringent standard of substantive law exceeds the permissible role of any international tribunal, yet that is what occurred here. The court's unattainable 200 meter standard of accuracy not only departed from

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MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 265–91 (1996).

[203] *Delalic*, Case No. IT-96-1-T, Judgment ¶ 402.

[204] International Convenant on Civil and Political Rights, art. 15, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

[205] *See* Rome Statute of the International Criminal Court, art. 22, July 17, 1998, 2187 U.N.T.S. 90 (1998) [hereinafter ICC Statute]. "*Nullum crimen sine lege.* A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."

[206] In addition to concerns related to the principle of legality, the court's invention and application of the 200 meter rule after the trial had ended, without any discussion of the rule during trial, raises substantial fair notice concerns under Article 21(4)(a) of the ICTY Statute. Gotovina has asserted fair notice as grounds for appeal. Prosecutor v. Gotovina, Case No. IT-06-90-T, Appellant's Brief of Ante Gotovina, ¶ 11–13 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2011).

[207] *See Delaic*, Case No. IT-96-1-T, Judgment ¶ 417 (pointing out that the UN Security Council, which created the ICTY, "not being a legislative body, cannot create offenses. It therefore vests in the Tribunal the exercise of jurisdiction of offences *already recognized* in international humanitarian law" (emphasis added)). *See also* CIARA DAMGAARD, INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES 35–42 (2008) (reviewing sources of international law and discussing the role of the ICTY in the process of developing and clarifying law of war).

current battlefield reality, but also implicitly created a new strict liability offense for indirect fire against legitimate military targets embedded in urban settings. Prior to the court's ruling, no court, military manual, learned treatise, or commentary on Protocol I had ever asserted or held that 200 meters was a legal standard of accuracy that would be enforced by criminal sanctions. Indeed, the ICRC commentaries recognized that the high contracting parties had explicitly considered, but not adopted, such a rigid mathematical standard.[208] The court's desire to fashion a simple, precise, and black-and-white standard, while understandable, impermissibly amended the law of war and applied it to Croatian shelling fifteen years after Operation Storm. As a practical matter, such an *ex post facto* determination undermines respect for the law and may promote noncompliance.

For good reason, the law of war has never reduced the rules of indiscriminate fire and proportionality to mathematical formulas. The circumstances of combat and the factors affecting accuracy and data available to the commander at the time a targeting decision is made are infinitely variable. The law requires a commander to make a good faith judgment, oftentimes under extreme pressures of time and danger. When viewed in hindsight, such decisions warrant a healthy degree of deference. In adjudicating allegations of criminal conduct, courts must operate within the framework of the law as it exists. Here, the error of creating a post hoc standard is compounded by the arbitrary and unrealistic content of the standard itself. By creating the 200 meter standard and using it, in effect, as a substantive standard of criminal liability, the court traveled far beyond the framework of existing law.

C. Legal Incentives Which Can Endanger Noncombatants

Military legal advisors closely follow developments in the Law of Armed Conflict, including decisions of courts such as the ICTY. This decision, however it is resolved on appeal, is likely to significantly influence military practice in the field. No matter how the *Gotovina* appeal is decided, the trial judgment will serve as a cautionary tale for

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[208] COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 65, ¶¶ 2185 ("In the early stages of the discussions on the codification of the law of bombardments, the possibility had been entertained of expressly providing the standard of precision required for bombardments on towns and cities. . . ."), 2187 (noting that the rule as adopted is "imprecise").

commanders who employ indirect fires in populated areas. Great care in wording orders, documenting legal review and precautionary measures, taking fire control measures, and documenting battle damage must be paramount in the planning and execution of indirect fires.

However, if the judgment is allowed to stand, it could have unintended consequences and create perverse incentives that would increase the danger of urban combat for civilians and combatants alike.

From the perspective of the attacking force, any impossible standard of precision, including the standard imposed by the *Gotovina* court, would expose conscientious commanders to serious legal jeopardy. This led British General Granville-Chapman to call the *Gotovina* judgment "extraordinarily unsafe in terms of the precedent it sets for the use of indirect fire."[209]

From the defending force's perspective, as General Percurt Green of the Swedish Armed Forces, and a renowned artillery expert, warned: "Should this standard gain traction in international law, it will make it virtually impossible for commanders to employ artillery against vital enemy targets in populated areas, thereby creating an incentive for the enemy to co-mingle their most valuable assets in the midst of civilians."[210] By subjecting the attacking force commander to a strict liability standard, such as the 200 meter rule, the judgment dramatically enhances the "human shield" effect of locating critical military assets in populated areas.[211] Defenders seeking an asymmetrical advantage to offset an attacker's superior strength will exploit the attacker's reluctance to incur the risk criminal prosecution by shelling lawful targets in a town—and in so doing will increase the risk of harm to civilians.[212] This

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[209] Granville-Chapman Report, *supra* note 177, at 2.
[210] Green Report, *infra* app. B.
[211] *See generally* Richard Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, VAND. J. TRANSNAT'L L. 42, 690 (2009) (discussing how Protocol I's targeting rules favor the defender and "provides a powerful incentive for insurgents and terrorist organizations to rely on their enemies' observance of the law of war").
[212] *Id.* at 690.

> It creates a "win-win-win" situation for such groups: either their adversaries avoid striking them altogether out of fear of causing civilian casualties (win); or they attack them, cause civilian casualties, and suffer international condemnation (win); or they forego air power and artillery and attack using ground troops, there

in turn upends the purpose and norms of international humanitarian law. According to German General Rolf Ocken, "[A] standard of this nature would induce enemies to keep, or actually move civilians closer to military targets based near urban areas, thereby actually endangering them, in hopes of exploiting an unrealistic standard that simply does not comport with standards applicable everywhere to sound and proper use of artillery and indirect fire."[213]

VI. Conclusion

The court, in undertaking its important task in this case, clearly attempted to err, if at all, in favor of protecting innocent civilians. For this effort they should be applauded. However, as many of us have learned the hard way, sometimes the most important law of all is the law of unintended consequences. In this case, by basing their well-intentioned verdict on an operational requirement that is neither based on current legal norms nor operationally achievable, the court's decision will likely have exactly the opposite effect of that intended. If the legal rules protecting civilians become unrealistic, they will be either disregarded or abused, and civilians will be placed in greater danger than they already are when cities are attacked.

General Gotovina's conviction is based on a rule that is wholly unsupported by any custom or convention, any precedent in international jurisprudence, or any basis in operational art or military capabilities. This rule should be scrapped.

The law of armed conflict seeks to strike a careful balance between military necessity and humanitarian concern for the protection of civilians. Neither the 200 meter standard nor any other simple numerical standard, when adopted as a basis for striking that balance, gives proper deference to or appreciation of the exceptionally difficult and complex task facing the combat commander. While violations of LOAC standards should be prosecuted with uncompromising vigor, the limits of

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> by incurring much greater casualties and the loss of their public's support for the conflict (win).

See also Corn & Corn, *supra* note 64, at 370.

[213] Ocken Report, *infra* app. A, at 3.

the law must be respected and the protection of the rights of defendants deserves the same uncompromising vigor.

Appendix A

Report of Maj. Gen. Rolf Ocken (ret.) (Germany)

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19. November 2011

Comments and Conclusions by GenMaj (ret.) Rolf Th. Ocken, German Army on the Subject "Croatian Army use of Artillery in KNIN, CROATIA on 4-5 August 1995"

1. By way of introduction, I am a retired German Army General Major, having served 38 years on active duty in the Bundeswehr, German Armed Forces. My final position was Chief of Staff of the German Training and Doctrine Command (Heeresamt) in KÖLN, GERMANY. My basic branch was Artillery, and I served 13 years in artillery units and formations, learning and executing specific artillery tasks in various functions:

- as a gunner on the (US) 105 mm field howitzer and as a specialist private in a battery fire direction centre, I learned the basics of being an artillerist: Accuracy and speed are two "musts." The smallest error can lead to huge consequences,
- as a battery officer, later a fire direction officer and finally a forward observer in units with (US) 105 mm howitzers and later (GE) 105 mm howitzers,
- as a commander of a 155 mm M 109 G battery,
- as an S 3 in a 155 mm M 109 G battalion, being responsible for the education and training of the battalion survey team and fire direction centre together with all subordinate battery survey teams and fire direction centres to ensure that the effectiveness of the artillery battalion as a whole is reached and maintained,
- as a specialist in developing artillery safety procedures at the German Artillery School in IDAR OBERSTEIN, GERMANY, and further, on to educate safety teams for artillery regiments in order to minimize recurring accidents during live artillery firing on training areas,,[1]
- as a commander of an M 109 G battalion, and
- as commander of a mechanized armoured infantry brigade, an M 109 battalion was one of my subordinate formations.

As the Chief of Staff of the German Training and Doctrine Command artillery development in the context of combined forces was one of my primary tasks. Efficiency, and, even more important, accuracy, were and are always, a top priority.

Beyond having served in German artillery units, I should add that I served from 1981 to 1984 as a Military Attaché in the Embassy of the Federal Republic of Germany in Belgrade, SFRY, and in this capacity, had the opportunity to visit KNIN and also to observe life firing of a JNA artillery unit.[2] There I learned, and observed, first hand, the doctrine of the "all peoples army"

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[1] German artillery units must exercise their live firing in densely populated areas. Very often it is necessary to use firing positions which are located outside the training areas. As a result we fire across populated areas, even villages, streets, football-fields etc. In cases of errors which lead to a "short round", we sometimes suffer (and we still do!) damages in areas between the firing system and the impact area; if we erroneously produce a "too-far-round", the projectiles hit civilian installations which are located in prolongation of the trajectory, on the other side of the impact area. Most of my experience goes to the Training Area MUNSTER where the population was and is still used to artillery firing accidents – in spite of the most intensive training , very rigid safety regulations and, nowadays, extremely sophisticated equipment. We are now much better, but human and mechanical error still unfortunately, occur.

[2] In the course of Exercise „Jedinstvo" the JNA demonstrated live artillery fire on a training area. While this was a major event for the JNA – all Military Attachés accredited in the SFRY were present – the fire was obviously inaccurate: both in time and in placement.

in which, in the event of mobilization, every man would find his place in a particular unit.[3] I gained an appreciation there for the considerable effort entailed in storing weapons and ammunition, and the reality that adequate assets to do this properly were almost never available.[4] I concluded from this first hand experience that the fighting units in the last Yugoslav civil war were far less well-trained, adequately equipped, and properly maintained, with accurately sorted ammunition than I as an artilleryman would hope for as an ideal.

2. I have been asked to review and report my findings relative to the Trial Chamber's opinion on the subject shelling KNIN or shelling military targets in KNIN on 4. and 5. August 1995.

a. At this outset, my views expressed here are limited to that part of the Trial Chamber's findings, in which the Chamber states that

> "the HV's shelling of KNIN on 4 and 5 August 1995 constitutes an indiscriminate attack on the town and thus an unlawful attack on civilians and civilian objects in KNIN"

with the justification that

only those shells which impacted within a 200 m circle around a military target within the city of KNIN were militarily justified, but those shells which impacted outside that 200 m circle around the military target deemed to be an indiscriminate attack against the civilian population.

b. Fire on the targets in KNIN reportedly came from four separate firing units: Two 130 mm cannon units, firing from a distance of 25 and 27 kilometres and two 122 mm multiple rocket units, firing from a distance of 18-20 kilometres.
Theses systems almost never were employed in "Direct Support" missions, but almost always in "General Support" missions, what means: Without observation in order to correct the fire. It is evident that accuracy as to target acquisition, system laying, very exact positioning of the system, availability of weather data, accuracy related to systems and ammunition maintenance and personnel training is of paramount significance and vital to the effectiveness of the systems.
"General Support" missions are executed to engage "area targets". I have never experienced a case – and I can hardly imagine a situation – where a "General Support" mission would be to engage a "point target."
Without computing meters and mils, without knowing details about the availability of meteorological data[5] and the level or degree of crew training and fire direction specialists, I can state unequivocally that a circle of 200 m around a target could never serve as a realistic or proper standard for a sound assessment of cannon and rocket fire over a distance from 18 to 27 kilometres.

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[3] Visiting factories or larger companies the Military Attachés were regularly briefed that every man (and often woman) had his place in the "all peoples army", that his rifle was prepared, and that he knew his military mission. We concluded that the SFRY government wanted to project force and capabilities that exceeded reality.

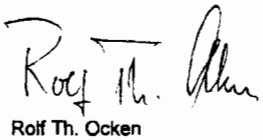
[4] We witnessed and toured firsthand parts of a „hollow mountain" in Bosnia containing in one part a hospital and in another a storage site.

[5] These data generally encompass 50-70% of the total error.

c. In his excellent and extremely thorough analysis, General Scales makes it very clear that a myriad of important sources for potential ballistic errors must be taken into consideration when assessing both the accuracy as well as the inaccuracy of artillery fire.
The 130 mm Soviet origin cannon and the 122 mm Soviet origin rocket launcher are very old systems. Even if "every technical aspect of every mission were perfect, normal dispersion alone would result in some small percentage of rockets and shells landing outside a 200-meter radius."[6] Based upon many years of sobering firsthand experience, I can attest, however, that this starting assumption, real world, i.e., assuming complete perfection, is totally unrealistic. That being the case, we must assume more realistically for some rounds that various causes of imperfection will inevitably lead to a number of shells impacting outside of a 200-meter circle.

d. I would also like to refer to General Shoffner's mathematical analysis. Having the relevant figures of dispersion for 130 mm shells and 122 mm rockets in mind, I am actually surprised that only some 50 projectiles impacted outside the Chamber's circle of 200 meters, and that very few impacted measurably further far away: four projectiles appr. 450 meters from the nearest target, and appr. one projectile 700 meters from the nearest target.

3. In full consonance with General Scales, General Shoffer and General Green of Sweden, I come to the conclusion that the 200-meter-assessment of the Trial Chamber is absolutely inconsistent with both mathematics and all practical experiences with artillery and rocket firing. This assessment leads me to state respectfully that the Trial Chamber could never justly come to the conclusion that "the HV's shelling of KNIN on 4 and 5 August 1995 constitutes an indiscriminate attack on the town and thus an unlawful attack on civilians and civilian objects in KNIN."
I also join General Scales, General Shoffer and General Green in their concern as to the consequences of a 200-meter-circle standard: among many other problems, a standard of this nature would induce enemies to keep, or actually move civilians closer to military targets based near urban areas, thereby actually endangering them, in hopes of exploiting an unrealistic standard that simply does not comport with standards applicable everywhere to sound and proper use of artillery and indirect fire.



Rolf Th. Ocken
General Major, GE Army, (ret.)

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[6] See report General Scales, page 10, number 11

Appendix B

Report of Lt. Gen. Percurt Green (ret.) (Sweden)

SUBJECT: Croatian Army use of Artillery and Rockets, Knin Croatia, 4-5 August 1995

I am a retired Swedish Army Lieutenant General who spent 42 years in active service. My final post was Commanding General, Central Joint Command, prior to which I served as the Commanding General Army Material Command and between 1994-1998 as the Deputy Supreme Commander of the Swedish Armed Forces. My basic branch was artillery where I served a tour as an Artillery Battalion Commander.

I have reviewed carefully the report rendered by Major General (Ret.) Bob Scales, as well as the reports and conclusions submitted by Lieutenant General (Ret.) Wilson A. Shoffner and General (Ret.)Ronald H. Griffith. Furthermore, I have reviewed the document from the International Criminal Tribunal for the Former Yugoslavia, "Gotovina Defence Final Trial Brief" (IT-06-90-T D36469 - D36155, 27 July 2010) in the parts related to the Knin operation (referred to below as (G and the specific para-number)). which I deemed critical to acquire an overall picture of the Operation Storm, and thereby get a better background for understanding the artillery aspects in the operation against the town of Knin. That evidence was provided from the perspective of the defence, but it was useful insofar as overall factual information as to the overall operation. Finally, I also read paragraphs 1890-1916 of the Trial Chamber Opinion, which focuses on Knin, and the August 4-5, 1995 time period.

I limit my observations to the artillery operation in Knin on 4 and 5 August as I am in no position to make any informed judgment as to the possibility of other alleged war crimes that may have been committed by either side. Furthermore, based on the findings of the Trial Chamber, my assessment is based on the assumption that the targets placed under attack in Knin during those dates, (referred to in (G 258)) qualified as lawful objects of attack due to their military significance. Based on this assumption, I agree with General Griffith's statement (Paragraph 2) that the volume of artillery fire was not excessive.
The planning, described in (G 192-196, 205-209) gives a picture of "ordinary planning of an artillery mission."
In (G 201) a reduction of artillery due to inability to sustain a resupply rate necessary is mentioned, which in my view points at a need for concentration on the most important targets at the decisive time in the attack, which explains the surge of fires in the early morning hours of both days. In (G 258) the military objectives, selected for engagement are outlined by RAJCIC (*the Artillery Commander)* in his testimony. In my view the targets fully meet the criteria of a military target. (See also G 264-266)
I fully agree with General Shoffner's findings concerning the dispersion of rounds fired (his Paragraph 2 c). The results are mathematically correct, and, as he attests, the estimates are conservative. Taking in consideration the meteorological conditions, the geographical data for launcher displacement and the target coordinates (by only using "map-spot" techniques), the dispersion of the differing projectile weights, the condition of the separate weapons and the other factors (outlined in General Scales report, (his Paragraph 8), all of which contribute to the dispersion from the aim point, the 200 meters standard used by the court cannot be supportable.
The Trial Chamber concluded that 50 projectiles out of 900 landed outside the 200 meter perimeter of targets it determined qualified as legitimate. As General Griffith also mentions (his Paragraph 3), this small quantity of rounds not attributed to a lawful target is quite surprising, since added to the above mentioned limitations, the firings were conducted at the extreme limits of range with both the 130 mm pieces and 122 mm MLRS, a factor that substantially increases the probability of "short" or "long" rounds. In other words, this firing range has a considerable impact on the dispersion.

After having reviewed the documents mentioned above, I agree fully with the findings and conclusions drawn by the Generals Scales, Shoffner and Griffith in their respective reports. It is important to state that my comments address only the employment of artillery in Knin on the 4 and 5 August 1995 and I can make no judgment concerning the Operation Storm as a whole.
I also feel compelled to note what I consider to be the most astonishing statement from the portions of the Trial Chamber judgment I reviewed: "—the reasonable interpretation of the evidence that those artillery projectiles which impacted within a distance of 200 meter of an identified artillery target were deliberately fired at that target." Based on this conclusion, the Trial Chamber then found that all projectiles impacting outside that radius were the result of deliberate attack against civilian areas in Knin. The reason this is astonishing is because, as Major General Scales' report indicates, the 200 meter standard adopted by the Court is completely inconsistent with both technical and practical aspects of artillery employment, which therefore undermines the ultimate finding that the 50 rounds impacting beyond 200 meters of an accepted lawful target conclusively prove a deliberate attack against civilians. Should this standard gain traction in international law, it will make it virtually impossible for commanders to employ artillery against vital enemy targets in populated areas, thereby creating an incentive for the enemy to co-mingle their most valuable assets in the midst of civilians.

Respectfully submitted,

Percurt Green
Lieutenant General, Swedish Armed Forces, Retired

REAUTHORIZING THE "WAR ON TERROR": THE LEGAL AND POLICY IMPLICATIONS OF THE AUMF'S COMING OBSOLESCENCE

BEAU D. BARNES*

I. Introduction—Ten Years After 9/11, Whither the War on Terror?

Ten years after the terrorist attacks of September 11, 2001, the United States is reassessing its struggle against terrorism. The armed conflict against terrorist groups,[1] which most consider to have begun in the fall of 2001 with the September 11 attacks and the subsequent invasion of Afghanistan to depose the Taliban regime, has spread to multiple locations throughout the world.[2] Mirroring the geographic

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[1] The debate on what label should be used for the armed conflict authorized by the Authorization for Use of Military Force (AUMF)—War on Terror, Global War on Terrorism, GWOT, or The Long War—is an important one, but not one that I will engage in this article. *See generally* Herbert W. Simons, *From Post-9/11 Melodrama to Quagmire in Iraq: A Rhetorical History*, 10 RHETORIC & PUB. AFF. 183, 184 (2007) (arguing that rhetorical analysis "helps explain why" after 9/11 "the administration chose to evade the hard questions of motivation for the attacks and to respond instead with a sanitized, melodramatic framing of the crisis, coupled with the launch of a vaguely defined, seemingly unlimited 'war on terror'"). It suffices for this article's purpose that the U.S. Supreme Court has recognized that there exists a "conflict with al Qaeda" that is separate from the conflict with the Taliban, and that the former implicates the AUMF. Hamdan v. Rumsfeld, 548 U.S. 557, 628–29 (2006) ("Hamdan was captured and detained incident to the *conflict with al Qaeda* and not the conflict with the Taliban. . . .") (emphasis added); *see also* Jack Goldsmith, *Long-Term Terrorist Detention and a U.S. National Security Court*, *in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 75, 77 (Benjamin Wittes ed., 2009) ("[E]very branch of the U.S. government today agrees that the nation is in an 'armed conflict' (the modern legal term for 'war') with al Qaeda, its affiliates, and other Islamist militants in Afghanistan, Iraq, and elsewhere.").

[2] Recent media coverage has focused on the armed conflict against Al Qaeda's expansion to Yemen and the Horn of Africa. Craig Whitlock & Greg Miller, *U.S. Assembling Secret Drone Bases in Africa, Arabian Peninsula, Officials Say*, WASH. POST, Sept. 20, 2011, http://www.washingtonpost.com/world/national-security/us-building-secret-drone-bases-

diffusion, the conflict has also spread to other organizations beyond those that perpetrated 9/11. Although initially a conflict with Al Qaeda,[3] the conflict now encompasses organizations, groups, and networks as diverse as Al Qaeda in the Arabian Peninsula, the Pakistani Taliban, the Haqqani Network in Pakistan, Jemaah Islamiyah in Indonesia, Boko Haram in Nigeria, and Al Shabaab in Somalia.[4] This diffusion, combined with the increasingly publicity surrounding drone attacks[5] and the inevitable reflection brought about by decennial anniversaries,[6] has led to renewed debate about the United States's "war on terrorism" and the law that has authorized it to date.

This article, prompted by Congress's recent failed efforts to revisit and refine the September 18, 2001, Authorization for Use of Military Force (AUMF), argues for a "middle ground" approach to the statute's reauthorization. It makes the case that a new authorization is needed because, contrary to the Obama Administration's suggestions, the current statute is rapidly approaching obsolescence. Despite the intense media focus on the most recent legislative cycle, Congress has left the 2001 authorization legally unaltered and still anchored to the September 11, 2001, attacks. Confronting this reality presents three options: foregoing military operations against non-Al Qaeda terrorist organizations,

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in-africa-arabian-peninsula-officials-say/2011/09/20/gIQAJ8rOjK_story.html (describing the Obama administration's "constellation of secret drone bases [in Ethiopia, Djibouti, Yemen, and the Seychelles] for counterterrorism operations in the Horn of Africa and the Arabian Peninsula"). However, the U.S. military's counterterrorism operations extend throughout the globe. In fact, the Department of Defense's Global War on Terrorism Expeditionary Medal recognizes individuals for service in dozens of countries, including in the Middle East, North Africa, West Africa, East Africa, South America, Europe, and Guantanamo Bay, Cuba. *Global War on Terrorism Expeditionary Medal*, AIR FORCE PERSONNEL CTR., http://www.afpc.af.mil/library/factsheets/factsheet_print.asp?fsID=7812&page=1 (last visited June 24, 2012).

[3] This article uses the spelling "Al Qaeda" throughout, but respects the choices of other authors, leaving quoted sections as originally written.

[4] *See, e.g.*, Paul R. Pillar, *The Diffusion of Terrorism*, 21 MEDITERRANEAN Q. 1, 3 (2010) ("Al Qaeda is, despite its salience and name recognition, only a piece of the larger organizational picture of Islamist terrorism."); Thom Shanker & Eric Schmitt, *Three Terrorist Groups in Africa Pose Threat to U.S., American Commander Says*, N.Y. TIMES, Sept. 14, 2011, http://www.nytimes.com/2011/09/15/world/africa/three-terrorist-groups-in-africa-pose-threat-to-us-general-ham-says.html.

[5] *See* PETER BERGEN & KATHERINE TIEDEMANN, NEW AMERICA FOUND., THE YEAR OF THE DRONE: AN ANALYSIS OF U.S. DRONE STRIKES IN PAKISTAN, 2004–2010 (2010), *available at* http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/bergentiedemann2.pdf.

[6] *See, e.g.*, Symposium, *Unsettled Foundations, Uncertain Results: 9/11 and the Law, Ten Years After*, 63 RUTGERS L. REV. 1085 (2011).

accepting the AUMF's obsolescence and relying on alternative legal authority, or refashioning a new domestic statutory authority for the U.S. military's global anti-terrorist operations.

A new AUMF is the best option available to U.S. policymakers if it is to continue its military efforts against terrorist groups and networks.[7] A new authorization would clarify the authority the current AUMF grants to the president, which, especially as it relates to the use of military force against U.S. citizens and within the domestic territory of the United States, is extraordinarily vague. A new authorization would also avert tempting, but ultimately dangerous, legal alternatives—namely, harmful interpretations of domestic and international law. On the domestic front, reverting to a reliance on the president's Commander in Chief powers would place the U.S. military's global anti-terrorism efforts on a fragile legal foundation already weakened by the Supreme Court's skepticism and further remove this important military campaign from effective democratic control. In the international arena, relying instead on an overly expansive interpretation of the right to self-defense under international law would undermine the Obama Administration's efforts to lead by legal example and encourage the proliferation of a potentially destabilizing understanding of the *jus ad bellum*. Reaffirming the AUMF is therefore not just an issue of legal and academic curiosity, but a matter of vital domestic and international concern. Despite the urgent need for a proper legal basis for U.S. military counterterrorism operations, however, Congress's recent efforts have fallen short. This article thus argues generally for a new AUMF, but also specifically that the new authorization should strike a measured balance, granting the President the power to effectively combat global terrorism while stopping short of authorizing unlimited, permanent war with whomever the President deems an enemy.[8]

Part II of this article will explain why congressional action actually matters today as an affirmative grant of authority and a substantive restriction on the President's power to use military force. Part III will examine the scope of the current AUMF in light of its text, legislative

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[7] Of course, a new AUMF is by no means the *only* legal authority upon which the United States could base its global counterterrorism efforts; this article argues merely that such an approach is the best solution in light of the costs associated with the alternatives.

[8] Although much of the previous analysis of the AUMF has focused on its application to detention and detainee issues, this article will address the AUMF's relevance to the increasingly prevalent target killing of suspected terrorists through military and covert operations.

history, and subsequent reception. Drawing on executive branch interpretations and the Supreme Court's recent decisions, as well as the jurisprudence of the D.C. Circuit Court of Appeals, this section will demonstrate that no consensus exists about the statute's precise scope. Nevertheless, the Executive Branch has interpreted it broadly and the judiciary has in large part acquiesced to that construction. Specifically, President Obama has used expansive interpretations of terms such as "associated forces" to greatly expand his administration's international targeted killing operations, including organizations with only a tenuous link to the September 11, 2001, terrorist attacks.

Because of the proliferation of new terrorist groups with no ties to September 11, as well as the successful targeting of Al Qaeda's "core group," Part IV will argue that the AUMF's legal demise is close at hand or, with regard to certain groups, already here. As this authority wanes, Congress must reauthorize the AUMF to avoid significant consequences in both domestic and international law and policy. Simply put, should current events further vitiate the AUMF, the demands of the international system will likely force the United States to rely on legal interpretations that sap American democracy and diminish U.S. national security.

Part V outlines specific policy proposals for a reauthorization of military force against terrorist groups that reflects the current contours of the armed conflict against terrorist groups. It begins by analyzing Congress's recent efforts to reaffirm the AUMF in the 2012 National Defense Authorization Act, which ultimately failed to address the AUMF's fragile legal foundation. This section ends by arguing for a new AUMF that includes time limits, a regular review procedure, a more clearly defined geographic scope, and unambiguous target definitions, thereby avoiding excessive deference to executive branch determinations in the critical arena of targeted killing. Prolonged and systematic military action, perhaps the most consequential activity a state can undertake, should be supported by the Congress. The AUMF, passed in the uncertain days immediately following the attacks of September 11, was sufficient for its immediate purpose: preventing further attacks by those who perpetrated 9/11. The now antiquated statute, however, must be updated for the dramatically different world we face today, or else it will surely fall short of properly guaranteeing the security of the United States.

II. Does the AUMF Matter?

Some understandings of the nature and scope of executive power under the Constitution would render this article's argument—and indeed any suggestion that the AUMF limits presidential power—largely irrelevant. These approaches generally adopt an expansive view of the President's powers under the Commander in Chief Clause,[9] the Vesting Clause,[10] or both.[11] Typically, they declare that Congress "can[not] place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing,

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[9] *See, e.g.*, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 174 (1996) ("The Framers established a system which was designed to encourage presidential initiative in war, but which granted Congress an ultimate check on executive actions."). For the argument opposing Yoo's theory, see MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 81 (1990) ("[There] is no evidence that the Framers intended to confer upon the President any independent authority to commit the armed forces to combat, except in order to repel 'sudden attacks.'"); *see also* Tung Yin, *Structural Objections to the Inherent Commander-in-Chief Power Thesis*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 965, 967–76 (2007) (comparing the "conventional" view that the Commander in Chief power "operates subsequent and subordinate to Congress's decision to unleash military force" with the "inherent powers" view of the Commander in Chief Clause that while Congress may defund the military, the President "enjoys the freedom to deploy and use the military as he sees fit"); Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 440–41 (2011) (concluding, in a review of three of Yoo's works, that "it is all but impossible to discern what legal limits Yoo does accept on presidential action"). Indeed, some interpretations of administrative law deference principles would arrive at roughly the same result. *See* Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2671, 2671 n.67 (2005) (arguing that if "super-strong deference that derives from the combination of *Chevron* with what are plausibly taken to be his constitutional responsibilities" means "the President has clear constitutional power to do as he proposes," then "the AUMF would be irrelevant").

[10] *See, e.g.*, Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234 (2001) ("[M]ost importantly, the President enjoys a 'residual' foreign affairs power under Article II, Section 1's grant of 'the executive power.'"). For an in-depth response to the Vesting Clause Thesis, see Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 688 (2004) ("[N]either the Vesting Clause Thesis nor executive power essentialism find any significant support—and indeed, barely any plausible mention—in the materials on which originalists typically rely—that is, materials from the Founding and from the experiences of the national and state governments in the years leading to the Founding.").

[11] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 581, 587 (2004) (Thomas, J., dissenting) (finding that because "the Constitution vests in the President '[t]he executive Power,' provides that he 'shall be Commander in Chief of the' Armed Forces, and places in him the power to recognize foreign governments . . . the President very well may have inherent authority to detain those arrayed against our troops") (internal citations omitted).

and nature of the response . . . [because] [t]hese decisions, under our Constitution, are for the President alone to make."[12]

Unsurprisingly, this article embraces an interpretation of the Constitution that is at odds with the Vesting Clause thesis, and instead hews closer to the view expressed in Justice Robert Jackson's concurrence in the 1952 *Steel Seizure* case.[13] The Constitution explicitly empowers Congress in the area of foreign affairs to, among other actions, approve treaties,[14] declare war,[15] and regulate the armed forces.[16] These textual grants of authority would be vitiated if Congress were unable, in the exercise of these powers, to "wage a limited war; limited in place, in objects, and in time."[17] A full exposition of this oft-addressed topic is beyond the scope of this article, however, and it suffices for present purposes to merely align it with the overwhelming majority of scholars who conceive of a Constitution where Congress may authorize limited military force in a manner which is binding on the Executive Branch.[18]

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[12] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to the Deputy Counsel to the President, *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001), *available at* http://www.justice.gov/olc/warpowers925.htm ("[T]he President may deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11."); *see also* Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 487 (2002) ("[T]he President's constitutional authority to deploy military force against terrorists and the states that harbor or support them includes both the power to respond to past attacks and the power to act preemptively against future ones.").

[13] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

[14] U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

[15] *Id.* art. I, § 8, cl. 11 ("Congress shall have power . . . [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.").

[16] *Id.* art. I, § 8, cl. 14 ("Congress shall have power . . . [t]o make Rules for the Government and Regulation of the land and naval Forces.").

[17] Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800) ("[I]f a partial war is waged, its extent and operation depend on our municipal laws.").

[18] *See, e.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1112 (2008) (recognizing "two hundred years of historical practice" rejecting "the new and troubling claim that the President is entitled to unfettered discretion in the conduct of war"); Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 393 (2008) ("Congress maintains the ultimate

Furthermore, the Vesting Clause thesis and all-powerful views of the Commander in Chief Clause have been rejected in large part by the judiciary[19] and the current administration.[20] Indeed, one significant reason for considering the AUMF to be an actual limit on Presidential power, and a relevant subject for legal analysis, is because that is how the Obama Administration understands the statute. State Department Legal Adviser Harold Koh, in his March 25, 2010, speech to the

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authority to decide the methods by which the United States will wage war. The President can direct and manage warfare, however, the only Commander in Chief power that Congress cannot override is the President's power to command: to be, in Alexander Hamilton's words, the nation's 'first General and Admiral.'") (internal citation omitted); Letter from David J. Barron, Professor, Harvard Law Sch. et al., to Harry Reid, Majority Leader, U.S. Senate et al. 5 (Jan. 17, 2007), *available at* www.law.duke.edu/features/pdf/congress_power_letter.pdf ("Wherever one comes down on the outer limits of legislative war powers, *Little v. Barreme* and *Bas v. Tingy* make clear that Congress retains substantial power to define the scope and nature of a military conflict that it has authorized, even where these definitions may limit the operations of troops on the ground.").

[19] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (noting the "weakness of the Government's mixed claim of inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war").

[20] *See, e.g.*, John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599, 601 (2011) ("The courts have rejected, and a new Administration has abandoned . . . claims that the President has complete discretion to fight the nation's armed conflicts in any manner the President deems expedient."). Of course, the Obama Administration's rejection of strong presidential powers has been far from universal. Indeed, the current administration has embraced broad executive authority in a wide array of situations. *See, e.g.*, Charlie Savage, *In G.O.P. Field, Broad View of Presidential Power Prevails*, N.Y. TIMES, Dec. 29, 2011, http://www.nytimes.com/2011/12/30/us/politics/gop-field-has-broad-views-on-executive-power.html (noting President Obama's policy that he had the "inherent constitutional power" to "deploy[] the American military to join NATO allies in airborne attacks on Libyan government forces" "because he could 'reasonably determine that such use of force was in the national interest"); Jeremy B. White, *So Far, Obama More Like Bush, Than Carter, on War Powers Authority*, INT'L BUS. TIMES, June 23, 2011, http://www.ibtimes.com/articles/168306/20110623/obama-libya-libya-resolution-yemen-strikes-obama-yemen.htm ("[President Obama] has come under fire for invoking the state secrets privilege to block government actions from being revealed in court, for authorizing the assassination of terrorism suspects even if they are U.S. citizens, and for continuing the practice of indefinitely detaining terror suspects without trial."); Edwin Meese III & Todd Gaziano, *Obama's Recess Appointments Are Unconstitutional*, WASH. POST, Jan. 5, 2012, http://www.washingtonpost.com/opinions/obamas-recess-appointments-are-unconstitutional/2012/01/05/gIQAnWRfdP_story.html ("President Obama's attempt to unilaterally appoint three people to seats on the National Labor Relations Board and Richard Cordray to head the new Consumer Financial Protection Bureau . . . is a breathtaking violation of the separation of powers and the duty of comity that the executive owes to Congress.").

American Society of International Law, clarified that "as a matter of domestic law" the Obama Administration relies on the AUMF for its authority to detain and use force against terrorist organizations.[21] Furthermore, Koh specifically disclaimed the previous administration's reliance on an expansive reading of the Constitution's Commander in Chief Clause.[22] Roughly stated, the AUMF matters, at least in part, because the Obama Administration says it matters.

The scope of the AUMF is also important for any future judicial opinion that might rely in part on Justice Jackson's *Steel Seizure* concurrence.[23] Support from Congress places the President's actions in Jackson's first zone, where executive power is at its zenith, because it "includes all that he possesses in his own right plus all that Congress can delegate."[24] Express or implied congressional disapproval, discernible by identifying the outer limits of the AUMF's authorization, would place the President's "power . . . at its lowest ebb."[25] In this third zone, executive claims "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[26] Indeed, Jackson specifically rejected an overly powerful executive, observing that the Framers did not intend to fashion the President into an American monarch.[27]

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[21] Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, Address Before the Annual Meeting of the American Society of International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/1/releases/remarks/139119.htm (last visited June 24, 2012).

[22] *Id.* ("First, as a matter of domestic law, the Obama Administration has not based its claim of authority to detain those at GITMO and Bagram on the President's Article II authority as Commander-in-Chief. Instead, we have relied on legislative authority expressly granted to the President by Congress in the 2001 AUMF."); *see also* Respondent's Memorandum Regarding The Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, *In re* Guantánamo Bay Detainee Litigation, Misc. No. 08-442, at 1, 3 (D.D.C. Mar. 13, 2009), *available at* http://www.justice.gov/opa/documents/memo-re-det-auth.pdf (announcing that the Obama Administration's "refin[ed] position with respect to its authority to detain those persons who are now being held at Guantanamo Bay" is "derived from the AUMF").

[23] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

[24] *Id.* at 636.

[25] *Id.* at 637.

[26] *Id.* at 638.

[27] *Id.* at 641 ("The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.").

Jackson's concurrence has become the most significant guidepost in debates over the constitutionality of executive action in the realm of national security and foreign relations.[28] Indeed, some have argued that it was given "the status of law"[29] by then-Associate Justice William Rehnquist in *Dames & Moore v. Regan*.[30] Speaking for the Court, Rehnquist applied Jackson's tripartite framework to an executive order settling pending U.S. claims against Iran, noting that "[t]he parties and the lower courts . . . have all agreed that much relevant analysis is contained in [*Youngstown*]."[31] More recently, Chief Justice John Roberts declared that "Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in [the area of foreign relations law]."[32] Should a future court adjudicate the nature or extent of the President's authority to engage in military actions against terrorists, an applicable statute would confer upon such executive action

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[28] *See, e.g.*, Adam J. White, *Justice Jackson's Draft Opinions in the Steel Seizure Cases*, 69 ALB. L. REV. 1107, 1107 (2006) ("As the nation debates the Constitution's limits on executive action in the global war on terror, Justice Jackson's opinion has grown ubiquitous in legal discourse."); Sarah H. Cleveland, Hamdi *Meets* Youngstown*: Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants*," 68 ALB. L. REV. 1127, 1128 (2005) (noting that "[i]t is impossible to exaggerate the significance of Justice Jackson's concurrence in Youngstown for U.S. foreign relations jurisprudence" and that "Jackson's concurrence . . . established the starting framework for analyzing all future foreign relations and individual liberties problems").

[29] Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power:* Little v. Barreme *or* Curtiss-Wright*?*, 13 YALE J. INT'L L. 5, 19 (1988). *See also* Stephen I. Vladeck, *Foreign Affairs Originalism in* Youngstown*'s Shadow*, 53 ST. LOUIS U. L.J. 29, 35 (2008) ("[Jackson's] opinion was later effectively adopted by the Supreme Court in Dames & Moore v. Regan, where then-Justice Rehnquist described Jackson's framework as 'analytically useful.'"). This characterization of *Dames & Moore*, however, is disputed by others, who argue that "Justice Rehnquist's statutory interpretation in *Dames & Moore* radically undercuts *Youngstown*'s vision of a balanced national security process." Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1311 (1987) ("[*Dames & Moore* has the] effect of dramatically narrowing Jackson Category Three to those very few foreign affairs cases in which the President both lacks inherent constitutional powers and is foolish enough to act contrary to congressional intent clearly expressed on the face of a statute."); *see also* Cleveland, *supra* note 28, at 1138 ("Jackson's analysis was badly abused in *Dames & Moore v. Regan*, where the Court found that Congress, through acquiescence, had impliedly authorized the President's power to terminate the claims of U.S. nationals against Iran."); Roy E. Brownell II, *The Coexistence of* United States v. Curtiss-Wright *and* Youngstown Sheet & Tube v. Sawyer *in National Security Jurisprudence*, 16 J.L. & POL. 1, 68 (2000) (arguing that *Dames & Moore* "talks like *Youngstown*, but walks like *Curtiss-Wright*").

[30] 453 U.S. 654 (1981).

[31] *Id.* at 668.

[32] Medellin v. Texas, 552 U.S. 491, 494 (2008).

"the strongest of presumptions and the widest latitude of judicial interpretation."[33] The AUMF therefore exercises a profound legal influence on the future of the United States' struggle against terrorism, and its precise scope, authorization, and continuing vitality matter a great deal.

III. What Does the AUMF Authorize?

On September 14, 2001, in response to the terrorist attacks of September 11, Congress passed the AUMF.[34] President Bush signed it into law on September 18, declaring that Congress's actions showed that "[o]ur whole Nation is unalterably committed to a direct, forceful, and comprehensive response to these terrorist attacks and the scourge of terrorism directed against the United States and its interests."[35] Rather than seeking to address an act of mass criminality, the Bush Administration adopted an explicit "war paradigm" in the United States' conflict with the perpetrators of 9/11.[36]

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[33] *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Indeed, Justice Jackson's tripartite approach to presidential authority in foreign affairs and national security, now nearly 60 years old, is alive and well in the Supreme Court's jurisprudence, accepted by nearly all of the current justices. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (2006) (holding that the President "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers" (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring))); *Youngstown*, 343 U.S. at 638 (Kennedy, J., concurring) ("The proper framework for assessing whether executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.") (citation omitted); *id.* at 680 (Thomas, J., dissenting) ("When the President acts pursuant to an express or implied authorization from Congress, his actions are supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion . . . rest[s] heavily upon any who might attack it." (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)) (internal quotation marks omitted)). *See also* Neal Kumar Katyal, Hamdan v. Rumsfeld: *The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 99 (2006) ("Both then-Judge Roberts and then-Judge Alito professed extreme reverence for [Justice Jackson's] framework at their confirmation hearings.").

[34] S.J. Res. 23, 107th Cong. (2001).

[35] President George W. Bush, Statement by The President after Signing Authorization for Use of Military Force Bill, September 18, 2001, *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010918-10.html.

[36] For a defense of President Bush's invocation of the armed conflict paradigm, see BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 45 (2008) ("[T]reating the conflict as a legal war offered maximal operation flexibility. The model provided a recognized framework for American forces to bomb Taliban positions, a framework under which they could also legitimately kill Al Qaeda and Taliban operatives in battle. It also allowed the military to detain such people and

In the weeks after September 11, 2001, no one seriously questioned[37] the President's authority to prosecute what he called the "War on Terror."[38] President Bush found that the Taliban had harbored and supported Al Qaeda,[39] and therefore had "aided the terrorist attacks that occurred on September 11, 2001."[40] Although the scope of the military force authorized by the AUMF was sufficiently clear in October 2001, that is no longer the case today. Most prominently, it is unclear if the AUMF permits targeted killings in Pakistan and Yemen of groups with only loose affiliations with Al Qaeda. Indeed, because of the statute's specific reference to the 9/11 attacks, it is nearing obsolescence. This section will examine the text and legislative history of the AUMF in order to inform an analysis of its scope. It will then describe the AUMF's subsequent interpretation in the Executive Branch and treatment by the judiciary branch. Through a combination of broad executive branch interpretations and judicial acquiescence, the statute has provided justification for an expansive use of military force abroad pursuant to the armed conflict against international terrorists. Finally, despite the absence of a consensus on the AUMF's precise scope, the evidence compels the conclusion that the AUMF will soon prove insufficient to legally authorize the United States' global counterterrorism efforts.

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interrogate them long term. . . . In the short term, war was the only way to invoke the full range of presidential powers that George W. Bush wished to bring to bear on Al Qaeda—and that any other president would likewise have wanted to invoke.").

[37] *See, e.g.*, *id.* at 44 ("At the outset of the conflict, the [war-based] model presented relatively little controversy."); *see also Afghanistan Wakes After Night of Intense Bombings*, CNN.COM, Oct. 7, 2001, *available at* http://archives.cnn.com/2001/US/10/07/gen.america.under.attack/ (describing the U.S.-British attacks throughout Afghanistan and not addressing the legal basis for the attack).

[38] This phrase is normally attributed to President Bush's September 20, 2001, speech. President George W. Bush, Address to Joint Session of Congress, Sept. 20, 2001, *available at* http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html ("Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."). It is unclear, however, whether President Bush was asserting that the United States was at that moment in an armed conflict with Al Qaeda or merely employing a rhetorical technique similar to the "War on Drugs" and the "War on Poverty."

[39] *Id.* ("[The Taliban] is threatening people everywhere by sponsoring and sheltering and supplying terrorists. By aiding and abetting murder, the Taliban regime is committing murder.").

[40] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

A. September 18, 2001, AUMF—Text and Legislative History

The AUMF is divided into three parts: five preambulatory clauses, one section delineating the granted authority, and one section placing the authorization within the rubric of the War Powers Resolution.[41]

In pertinent part, the AUMF authorizes the President

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[42]

The AUMF—proposed, debated, and passed within three days[43]—is most cogently analyzed based on five reference points: object, method, time, place, and purpose.[44]

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[41] *Id.*

[42] *Id.* § 2(a).

[43] Congress bypassed the normal committee procedure to move more quickly and placed the House Speaker and Senate Majority Leader in charge of negotiations. Because of this expedited process, "no formal reports on this legislation were made by any committee of either the House or the Senate." RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS 22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 2 (2007); *see also* David Abramowitz, *The President, The Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 78 (2002) ("Rapid consideration of the use of force authorization embodied in S.J. Res. 23, conceived on the afternoon of September 12 and passed by the Senate on the morning of September 14, did not allow much time for reflection . . . .").

[44] These five elements draw upon those used in other articles analyzing the AUMF. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2072 (2005) ("For purposes of [historical] comparison, these authorizations [of military force] can be broken down into five analytical components: (1) the authorized military resources; (2) the authorized methods of force; (3) the authorized targets; (4) the purpose of the use of force; and (5) the timing and procedural restrictions on the use of force.").

1. Object: Who Is the Target?

The AUMF authorizes force against "those nations, organizations, or persons [who] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Perhaps the most important interpretive issue is whether the AUMF's authority extends to terrorists that did not play a part in the 9/11 terrorist attacks.[45] The text itself is clear that Congress did not authorize the President to use "military action against terrorists generally."[46] Participants noted that a "consensus quickly developed that the authority should be limited to those responsible for the September 11 attacks."[47] Indeed, the adopted text contrasts with the White House's proposed language, which would have authorized not only "all necessary and appropriate force" against those responsible for 9/11, but also military force generally "to deter and pre-empt any future acts of terrorism or aggression against the United States."[48] Because of the broad scope of this language, it "was strongly opposed by key legislators in Congress and was not included in the final version of the legislation that was passed."[49]

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[45] I do not question Congress's power to authorize military force abroad against non-state actors. *See also* 147 CONG. REC. H5640 (daily ed. Sept. 14, 2001) (statement by Rep. Ron Paul) (stating that Congress "declare[d] war against a group that is not a country"). Since the earliest days of U.S. history, it has been understood that Congress can authorize the use of "particular armed forces in a specified way for limited ends" against non-state actors. Bradley & Goldsmith, *supra* note 44, at 2073–74 (describing limited U.S. military force authorizations against, among other groups, "Indians" and "slave traders and pirates"). Of course, authorizing military force against non-state actors within the United States is a far more complex matter, on which the AUMF itself is far from clear. *See infra* Part III.A.4.

[46] GRIMMETT, *supra* note 43, at 3 ("Congress limited the scope of the President's authorization to use U.S. military force through P.L. 107-40 to military actions against only those international terrorists and other parties directly involved in aiding or materially supporting the September 11, 2001 attacks on the United States. The authorization was not framed in terms of use of military action against terrorists generally.").

[47] Abramowitz, *supra* note 43, at 74. *See also* Bradley & Goldsmith, *supra* note 44, at 2108 ("If an individual had no connection to the September 11 attacks, then he is not covered as a 'person' under the AUMF even if he subsequently decides to commit terrorist acts against the United States.").

[48] GRIMMETT, *supra* note 43, at 5–6.

[49] *Id.* at 2–3 ("This language would have seemingly authorized the President, without durational limit, and at his sole discretion, to take military action against any nation, terrorist group or individuals in the world without having to seek further authority from the Congress. It would have granted the President open-ended authority to act against all terrorism and terrorists or potential aggressors against the United States anywhere, not just the authority to act against the terrorists involved n the September 11, 2001 attacks, and those nations, organizations and persons who had aided or harbored the terrorists.").

Contemporaneous congressional statements corroborate this textual understanding. A typical description of the AUMF in Congress was of a "joint resolution authorizing the use of military force against those responsible for the September 11, 2001 terrorist acts against our country."[50] Although members of Congress variously praised and criticized the resolution's language for its singular focus on those responsible for 9/11, they uniformly understood the AUMF not to authorize a general "war on terrorism" but only a war against *certain terrorists*.[51] In sum, the AUMF is "broad, but . . . not unlimited."[52]

2. Method: What Actions May the President Take?

The AUMF authorizes the President to "use all necessary and appropriate force";[53] neither its text nor its structure explicitly constrains the means that it authorizes. The statute's reference to "force" clearly means military force and thus encompasses the use of lethal force.[54]

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[50] *See, e.g.*, 147 CONG. REC. H5647 (daily ed. Sept. 14, 2001) (statement of Rep. Joseph Knollenberg).

[51] *Compare* 147 CONG. REC. H5649 (daily ed. Sept. 14, 2001) (statement of Rep. John Spratt) ("These words have large scope. We do not know for sure who the enemy is, where he may be found, or who may be harboring him. Congress is giving the President the authority to act before we have answers to these basic questions because we cannot be paralyzed. We need to answer this treacherous attack upon our people on our soil, and that is why we grant the President this broad grant of authority."), *and* CONG. REC. H5642 (daily ed. Sept. 14, 2001) (statement of Rep. Eleanor Holmes Norton) ("[T]he language before us is limited only by the slim anchor of its September 11 reference, but allows war against any and all prospective persons and entities."), *with* 147 CONG. REC. H5654 (daily ed. Sept. 14, 2001) (statement of Rep. Lamar Smith) ("[T]his joint resolution is well intended, but it does not go far enough [because it] should have authorized the President to attack, apprehend, and punish terrorists whenever it is in the best interests of America to do so. . . . [Instead, this resolution] ties the President's hands and allows only the pursuit of one individual and his followers and supporters."), *and* 147 CONG. REC. H5643 (daily ed. Sept. 14, 2001) (statement of Rep. Howard Berman) ("[T]his is not just about bin Laden. There are other radical groups that engage in terrorism [and to] win the war against terrorism, we must eliminate the entire infrastructure that sustains these organizations.").

[52] 147 CONG. REC. H5671 (daily ed. Sept. 14, 2001) (statement of Rep. Mark Udall) ("It covers the culpable but it is not aimed at anyone else.").

[53] Those present during negotiations apparently felt that the word "all" immediately preceding "necessary and appropriate force" did not alter the authority granted. Abramowitz, *supra* note 43, at 75 ("[I]t was quickly agreed that whether ['all'] was included or not was of very little substantive effect.").

[54] The Supreme Court subsequently interpreted "necessary and appropriate force" as including authority for military detention. Hamdi v. Rumsfeld, 542 U.S 507, 517 (2004) (plurality opinion) ("We conclude that detention of individuals falling into the limited

Even if there existed any ambiguity about the word "force" in Section (a), the statute's name clearly contemplates the use of *military* force.[55]

The modifiers "necessary and appropriate," however, do appear to have some limiting effect, especially when read together with the AUMF's preamble. The force the President employs could accordingly only be that which is "necessary and appropriate" to "prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Force that went beyond that required to prevent future attacks would be unauthorized. According to this construction, if the United States had, for example, responded to the 9/11 attacks by reverting to the World War II-era practice of indiscriminate carpet bombing, that action would have been *ultra vires* as beyond that which was "necessary and appropriate" to prevent future terrorist attacks.[56]

3. Time: How Long Does Authorization Last?

Although the AUMF's text includes no express temporal element, such an element is implicit in the statute's reference to "the terrorist attacks that occurred on September 11, 2001." Constructively, therefore, it is nearly impossible for the AUMF to last forever. Indeed, the only member of Congress to address this issue, then Chairman of the Senate Foreign Relations Committee Joe Biden, explicitly rejected a time limit while referring to September 11, 2001.[57] Furthermore, the only member of either house of Congress to oppose the AUMF, Congresswoman Barbara Lee of California, opposed the AUMF precisely because it authorized military force "anywhere, in any country, . . . and *without*

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category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use.").

[55] Even if this were not sufficient, the AUMF's explicit reference to the War Powers Resolution in Section 2(b) supports the inference that lethal force is authorized. *See* AUMF, *supra* note 40, § 2(b).

[56] Of course, such a bombing campaign would also almost certainly violate the *jus in bello* requirements of necessity, distinction, and proportionality. *See* Laurie R. Blank, *After "Top Gun": How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT'L L. 675, 681-83 (2012). This point, however, is beyond the scope of this article.

[57] 147 CONG. REC. S9422-23 (daily ed. Sept. 14, 2001) ("[The AUMF] does not limit the amount of time that the President may prosecute this action against the parties guilty for the September 11 attacks.").

time limit."[58] Congress's authorization contemplated an indefinite effort to destroy the threat posed by those responsible for the September 11, 2001, attacks. Although the context of subsequent events could certainly sap the continuing vitality of the AUMF—including, for example, the elimination of those responsible for 9/11—the mere passage of time, without any other factors, does not vitiate Congress's authorization.

4. Place: Where May "Organizations or Persons" Be Targeted?

The fourth issue that arises in examining the AUMF's scope is that of geographic scope. This issue can be further sub-divided into two parts: first, whether any region or state lies beyond the reach of the AUMF; and second, whether the AUMF authorizes force within the territory of the United States itself. The text itself includes no geographic reference point, and a straightforward application of the *ejusdem generis* canon of statutory construction to "nations, organizations, or persons" yields no common geographic characteristic. In fact, the three potential targets are dissimilar—"nations" have fixed geographic locations, "organizations" can exist geographically (but need not),[59] and "persons" exist in physical form but are anything but fixed in geography.

The AUMF's language does not limit the use of force to any particular region or country. Nor does it explicitly exclude any specific country. Moreover, given the lack of specific knowledge on September 14, 2001, about who was behind the September 11 attacks, it would have

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[58] Congresswoman Barbara Lee, *Why I Opposed the Resolution to Authorize Force*, S.F. CHRON., Sept. 23, 2011 (emphasis added), *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2001/09/23/INLEE.DTL. *But see* GRIMMETT, *supra* note 43, at 2–3 (noting that "the proposed White House draft resolution was strongly opposed by key legislators in Congress and was not included in the final version" because its language was, *inter alia*, "without durational limit").

[59] It is important to note that targeting an "organization" can mean targeting the organization's members, its command structure, its headquarters, or its assets. In this case, because Al Qaeda has no headquarters or major assets, targeting it amounts to targeting its members and structure. In addition, an organization could itself be destroyed without the elimination of all of its members. In such a case, the remaining individuals of the defunct organization could only be targeted if it would be "necessary and appropriate" to prevent future attacks against the United States. If the remaining individuals posed no threat, the AUMF would not authorize force against them. If they continued to pose a threat, however, their lack of a continued organizational affiliation would not place them beyond the AUMF's reach. Because of the overlapping authorization in the AUMF, even Al Qaeda's complete demise as an organization would not, *ipso facto*, mean that the United States could not target its (now former) members.

been puzzling for Congress to have authorized military action against the perpetrators, but only if they were in certain countries. Indeed, the congressional debate was replete with references to the AUMF's "worldwide" scope[60] and Congress's targeting of "terrorism wherever it exists on earth."[61]

The AUMF's domestic applicability is less clear. Although the AUMF does not explicitly preclude any particular country, it would seem to implicitly exclude the United States itself, because it would be nonsensical for the United States to attack itself as a nation. The AUMF's applicability to "organizations" and "persons" within the United States, however, is a closer call.[62] The AUMF's text does not limit the use of force geographically, a conclusion that is strengthened in light of previous use of force authorizations' explicit geographic limitations.[63] Indeed, the attacks of September 11, 2001, although originating from abroad, were launched from Boston, Newark, and Washington, DC.[64] Congress itself, in the AUMF's second "whereas" clause, declared that "such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both *at home* and abroad."[65] Moreover, it is

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[60] *E.g.*, 147 CONG. REC. H5658 (daily ed. Sept. 14, 2001) (statement of Rep. John Shadegg).

[61] 147 CONG. REC. H5653 (daily ed. Sept. 14, 2001) (statement of Rep. John Tanner).

[62] *Compare* Bradley & Goldsmith, *supra* note 44, at 2117 (finding that "the AUMF authorizes the President to use force anywhere he encounters the enemy covered by the AUMF, including the United States"), *and* Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Authority for Use of Military Force to Combat Terrorist Activities Within the United States 15 (Oct. 23, 2001), *available at* http://www.justice.gov/olc/docs/memomilitaryforcecombatus10232001.pdf ("[The AUMF] supplies the congressional authorization for the domestic use of military force."), *with* Abramowitz, *supra* note 43, at 75 ("[I]n the debate on this statute, several key members of Congress clearly indicated that this resolution was intended to authorize use of force abroad.").

[63] Bradley & Goldsmith, *supra* note 44, at 2117 n.313 (comparing the AUMF to prior use of force authorizations).

[64] Linda J. Demaine & Brian Rosen, *Process Dangers of Military Involvement in Civil Law Enforcement: Rectifying the Posse Comitatus Act*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 167, 199 n.134 (2006) ("Because it has been determined that Al Qaeda planned and committed the September 11th attacks, the joint resolution may authorize the President to use military force against all persons who are members of Al Qaeda, whether within or without the territory of the United States.").

[65] AUMF, *supra* note 40 (emphasis added). *See also* Bradley & Goldsmith, *supra* note 44, at 2117–18.

unlikely that preexisting constitutional understandings or statutory law would preclude reading the AUMF to provide such an authorization.[66]

On the other hand, however, the accounts of participants generally foreclosed any domestic application for the AUMF. The congressional debate generally assumed that the AUMF was not an authorization of force within U.S. borders.[67] In 2005, former Senate Majority Leader Tom Daschle, responding to the breaking news of President Bush's use of warrantless wiretapping against U.S. citizens, maintained that the AUMF's negotiators had explicitly rejected its application to the United States.[68] In addition, no geographic modifier, such as "abroad," was

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[66] Although the Posse Comitatus Act of 1878 is often thought to categorically bar military operations within the United States, the prohibition is more nuanced. The Posse Comitatus Act bars only the military's deployment "as a posse comitatus or otherwise to execute the laws." 18 U.S.C. § 1385 (Suppl. 2006). The statute is generally considered to "prohibit[] the military from executing the civil law" or acting as a law enforcement agency, but "[i]t does not prohibit the military from responding to situations that call for homeland defense." Demaine & Rosen, *supra* note 64, at 180. Difficult lines exist, however, between law enforcement and military action or homeland defense. *See* Christopher J. Schmidt & David A. Klinger, *Altering the Posse Comitatus Act: Letting the Military Address Terrorist Attacks on U.S. Soil*, 39 CREIGHTON L. REV. 667, 673 (2006) ("The fact that there is no bright line between criminal acts and acts of war presents a pair of problems when it comes to mobilizing the military to defeat terrorist attacks."). Finally, however, any problems the Posse Comitatus Act might pose for domestic application of the AUMF are disposed of through the Act's exceptions clause, which expressly excludes "cases and under circumstances expressly authorized by the Constitution or Act of Congress." 18 U.S.C. § 1385. Therefore, even if the actions undertaken were deemed law enforcement, rather than military, the AUMF would likely function as an express statutory authorization. *See* Demaine & Rosen, *supra* note 64, at 199 (noting that while "no court has decided whether the [AUMF] constitutes a PCA exception," in "a situation . . . involving individuals connected with the September 11th attacks or otherwise connected with Al Qaeda that . . . calls for only a civil response," "the joint resolution appears to authorize the President to use the military to execute the law against those individuals").

[67] *See, e.g.*, 147 CONG. REC. S9423 (daily ed. Sept. 14, 2001) (statement of Sen. Joseph Biden) ("[I]t should go without saying . . . that the resolution is directed *only* at using force abroad to combat acts of international terrorism.") (emphasis added); 147 CONG. REC. H5639 (daily ed. Sept. 14, 2001) (statement of Rep. Tom Lantos) ("The resolution before us empowers the President to bring to bear the full force of American power *abroad* in our struggle against the scourge of international terrorism.") (emphasis added). A single Member of Congress, Representative Jesse Jackson, Jr., pointed out that the AUMF "could be interpreted, if read literally, to give the President the authority to deploy or use our armed forces domestically." 147 CONG. REC. H5675 (daily ed. Sept. 14, 2001).

[68] Tom Daschle, *Power We Didn't Grant*, WASH. POST, Dec. 23, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/22/AR2005122201101.html ("Literally minutes before the Senate cast its vote, the administration sought to add the

added after the phrase "necessary and appropriate force" because this addition "was arguably unnecessary in light of the references in section 2(b) of the joint resolution to the War Powers Resolution (WPR), which generally deals with introducing U.S. forces abroad."[69] Although it seems unlikely that the U.S. military would execute lethal drone strikes against suspected terrorists within the territory of the United States, it is unclear that this is foreclosed by the AUMF.[70]

5. Purpose: Why May They Be Targeted?

The AUMF authorizes the President to use force against those "nations, organizations, or persons he determines planned, authorized, committed, or aided" the September 11 attacks "in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[71] This element, however, is ambiguous—the AUMF's "in order to" clause could function as a limiting clause or merely as a hortatory statement of policy. The former interpretation would appear to exhibit a preventive aim, limiting the actions taken under the AUMF to those necessary to prevent future terrorist attacks. In other words, this reading of the AUMF would seem to authorize *only* preventive military action, which is further limited to those terrorist organizations that played some role—through direct

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words 'in the United States and' after 'appropriate force' in the agreed-upon text. This last-minute change would have given the president broad authority to exercise expansive powers not just overseas—where we all understood he wanted authority to act—but right here in the United States, potentially against American citizens. I could see no justification for Congress to accede to this extraordinary request for additional authority. I refused."). Indeed, Daschle argues that the Bush Administration itself didn't believe that the AUMF authorized military actions in the United States because "at the time, the administration clearly felt they weren't [included] or it wouldn't have tried to insert the additional language." *Id.*

[69] Abramowitz, *supra* note 43, at 75. For the counterargument to Abramowitz's position, see Bradley & Goldsmith, *supra* note 44, at 2118 n.316 (noting that Abramowitz's interpretation of the War Powers Resolution is "incorrect [because] [t]he War Powers Resolution addresses every situation in which the President introduces U.S. armed forces 'into hostilities' and it expressly contemplates a situation [that] Congress is unable to meet because of 'an armed attack upon the United States'") (internal citations omitted).

[70] The use of lethal military force within the territory of the United States would raise myriad legal issues, including the application of the Fourth Amendment and due process under the Fifth and Fourteenth Amendments, as well as possibly the Posse Comitatus Act, which are beyond the scope of this article. For a brief discussion of these issues, see Bradley & Goldsmith, *supra* note 44, at 2120 n.325; *see also supra* note 66 (discussing the Posse Comitatus Act).

[71] AUMF, *supra* note 40, § 2(a).

involvement or by indirectly aiding those directly responsible—in the September 11 attacks.[72] The legislative history supports this inference—members of Congress argued that the AUMF empowered the President only to prevent further acts of terrorism against the United States.[73]

An alternative interpretation is that the "in order to" clause is hortatory only—it merely states a rhetorical and policy goal. Some participant accounts corroborate this understanding, rejecting this provision's limiting power and maintaining that its inclusion has no domestic legal effect.[74] According to this account, the AUMF's "in order to" clause was included to satisfy the pro forma requirements of international law—chiefly, the international law prohibition against reprisals—but was not actually a substantive limit on the President's power to use force against those who perpetrated or who indirectly supported the September 11, 2001, attacks. Thus it is unclear what limit, if any, the AUMF's ostensible preventive purpose imposes on the President.

B. The AUMF in Practice: Executive and Judicial Interpretations

Understanding the reach of the AUMF requires analyzing not just the statute itself, but also its subsequent reception by the other branches of government. In interpreting the statute's parsimonious language, the executive and judicial branches have engaged in an iterative process which has resulted in the currently accepted broad understanding of those who may be targeted pursuant to the AUMF.

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[72] Of course, military action under such circumstances could arguably rely not on the AUMF, but on the international legal right of self-defense, U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . ."), or the President's "power to repel sudden attacks." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., 1911) (1787).

[73] *See, e.g.*, 147 CONG. REC. S9422 (daily ed. Sept. 14, 2001) (statement of Sen. Joseph Biden) ("In short, the President is authorized to go after those responsible for the barbaric acts of September 11, 2001 to ensure that those same actors do not engage in additional acts of international terrorism against the United States.").

[74] Abramowitz, *supra* note 43, at 75 ("While one might argue that it is a limitation on the use of force, the preventive aim actually corresponds to international legal standards that forbid retaliation but accept prevention as a legal basis for the use of force."). According to Abramowitz, the drafters recognized that reprisals were unlawful under international law and sought to avoid this legal issue by including the prevention wording. *Id.* at 75 n.15 (citing IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 431 (1963)).

The Bush Administration initially construed broadly membership in the "organizations" that planned the September 11, 2001, attacks. An "enemy combatant,"[75] according to the Executive Branch in 2004,

> shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.[76]

Courts noted that "[u]se of the word 'includes' indicates that the government interprets the AUMF to permit the indefinite detention of individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies."[77] The Supreme

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[75] Because of the Bush Administration's early reliance on the President's Article II powers, it is unclear that the phrase "enemy combatant" is coextensive with the Bush Administration's understanding of those individuals covered by the AUMF. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004) (plurality opinion) ("[T]he Government has never provided any court with the full criteria that it uses in classifying individuals as ['enemy combatants'].."). The Bush Administration's brief in *Hamdi* relied principally on the President's powers as Commander in Chief, only secondarily invoking the AUMF. Brief for Respondent at 13, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696) (arguing that the President's "authority to vanquish the enemy and repel foreign attack in time of war . . . is fully engaged with respect to the armed conflict that the United States is now fighting against the al Qaeda terrorist network and its supporters in the mountains of Afghanistan and elsewhere [and] is supported by the statutory backing of Congress"). The government's brief, however, indicated that it understood Congress's authorization as encompassing "the President's use of 'all necessary and appropriate force' in connection with the current conflict," including "capturing and detaining enemy combatants." *Id.* at 20 (internal citation omitted). Additionally, the Bush Administration's use of "enemy combatant" conflated two groups—those fighting *lawfully* (lawful enemy combatants) and those fighting *illegally* (unlawful enemy combatants). Unlawful combatants, or unprivileged belligerents, can be tried for their crimes; lawful combatants, or privileged belligerents, are participating in an "internationally legal" war and must be held as prisoners of war. *See generally* Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 851–52 (2009) (comparing the legal meaning of different terms used to describe those who take part in armed conflicts).

[76] Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to Gordon R. England, Sec'y of the Navy 1 (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul 2004/d20040707review.pdf.

[77] *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005). The Bush Administration even argued, in response to a hypothetical posed by the court, that the AUMF provided authority to detain "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities. . . ." *Id.* (internal citation omitted).

Court's initial tepid response to the Bush Administration's broad construction came in *Hamdi v. Rumsfeld*, where the Court held that the AUMF applied to "individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for [the September 11, 2001] attacks."[78] The Court specifically acknowledged the AUMF's nexus requirement, recognizing that it covers only "'nations, organizations, or persons' associated with the September 11, 2001, terrorist attacks."[79] Finally, the Court recognized that the detention of AUMF-eligible individuals "for the duration of the particular conflict in which they were captured . . . is so fundamental and accepted an incident of war as to be an exercise of the 'necessary and appropriate force'" authorized in the AUMF.[80] The Court's decision, however, did not determine the full extent of the AUMF's scope.[81]

The Court addressed the AUMF twice more—in *Hamdan v. Rumsfeld*[82] and *Boumediene v. Bush*[83]—but neither case fully resolved the issue of the AUMF's scope. *Hamdan* held only that the AUMF did not provide a sufficiently clear statement to override Congress's previous authorization of military commissions through Article 21 of the Uniform Code of Military Justice.[84] The AUMF, therefore, did not extend to executive actions that were not specifically included, either in the statute's text or legislative history. Although some characterized the Court's ruling as rejecting the Bush Administration's supposed "blank check" construction of the AUMF,[85] the Court actually held the AUMF

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[78] *Hamdi*, 542 U.S. at 518.
[79] *Id.*
[80] *Id.*
[81] BENJAMIN WITTES et al., BROOKINGS INST., THE EMERGING LAW OF DETENTION 2.0: THE GUANTANAMO HABEAS CASES AS LAWMAKING 23 (2011), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2011/05_guantanamo_wittes/05_guantanamo_wittes.pdf ("This holding left open the question of whether the AUMF . . . similarly provided for such non-criminal detention of persons captured in other circumstances. Less obviously, it also left open a set of difficult issues concerning what it meant to be a 'member' or 'part' of any of these organizations, at least some of which are better characterized as loose associational networks than as hierarchical organizations.").
[82] 548 U.S. 557 (2006).
[83] 553 U.S. 723 (2008).
[84] *Hamdan*, 548 U.S. at 559 ('[T]here is nothing in the AUMF's text or legislative history even hinting that Congress intended to expand or alter the authorization set forth in UCMJ Art. 21.").
[85] PBS Newshour, *High Court Blocks Guantanamo Tribunals*, June 29, 2006 (statement of Joseph Margulies) *available at* http://www.pbs.org/newshour/bb/law/jan-june06/guantanamo2_06-29.html ("[W]hile the court just addresses commission questions here,

inapplicable to the case, and therefore the AUMF's scope was not affected.[86] *Boumediene* similarly elided directly grappling with the AUMF, deciding on jurisdictional grounds only that "§ 7 of the Military Commissions Act of 2006 . . . operate[d] as an unconstitutional suspension of the writ" of habeas corpus.[87] Thus, the Supreme Court effectively delegated the task of judicially interpreting the AUMF to the lower courts.

Although the Obama Administration has attempted to rhetorically distance itself from the Bush Administration's approach—forcibly rejecting, for example, the Bush Administration's notion of a "global war on terror"[88]—it has "continued to defend a broad authority to detain suspected al Qaeda and affiliated terrorists based on the law of war."[89] The Obama Administration's conception of AUMF-covered individuals is

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the fact is this is now the second time that they have rejected the administration's position on the authorization for the use of military force, the proposition that the AUMF amounted to a blank and signed check now has been rejected twice."). Indeed, although the scope of the Court's decision in *Hamdan* was narrow, it has been hailed as "demonstrat[ing] the continued judicial resistance to the President's excessive claims of executive power and disregard for the rule of law." Jonathan Hafetz, *Vindicating the Rule of Law: The Legacy of* Hamdan v. Rumsfeld, 31 FLETCHER F. WORLD AFF. 25, 33 (2007).

[86] *Cf. Hamdan*, 548 U.S. at 681–82 (Thomas, J., dissenting) (arguing that the majority's suggestion "that the AUMF has no bearing on the scope of the President's power to utilize military commissions in the present conflict" was in "error").

[87] *Boumediene*, 553 U.S. at 732 ("We do not address whether the President has authority to detain these petitioners. . . .").

[88] *See, e.g.*, Toby Harnden, *Barack Obama Adviser Rejects 'Global War on Terror,'* THE TELEGRAPH, Aug. 7, 2009, http://www.telegraph.co.uk/news/worldnews/barackobama/5990566/Barack-Obama-adviser-rejects-global-war-on-terror.html ("John Brennan, a former career CIA officer who worked closely with the Bush administration, lambasted the policies of President George W Bush and made the case for a broader approach to fighting Islamic extremism.").

[89] Matthew C. Waxman, *Administrative Detention: Integrating Strategy and Institutional Design*, *in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 43, 45 (Benjamin Wittes ed., 2009). *See also* Eli Lake, *The 9/14 Presidency*, REASON, Apr. 6, 2010, http://reason.com/archives/2010/04/06/the-914-presidency ("It's true that the president's speeches and some of his administration's policy rollouts have emphasized a break from the Bush era, [but] [w]hen it comes to the legal framework for confronting terrorism, President Obama is acting in no meaningful sense any different than President Bush after 2006. . . ."); Peter Bergen, *Warrior in Chief*, N.Y. TIMES, Apr. 28, 2012, http://www.nytimes.com/2012/04/29/opinion/sunday/president-obama-warrior-in-chief.html?r=1&ref=opinion (noting "the strange, persistent cognitive dissonance about this president and his relation to military force" that causes "many [to] continue to see him as the negotiator in chief rather than the warrior in chief that he actually is").

> persons who were part of, or substantially supported, Taliban or Al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy forces.[90]

Thus, "the Obama administration adjusted the Bush Administration's standard only trivially,"[91] while leaving undefined the phrases "associated forces," "substantially supported," and "directly supported."[92] Indeed, the new administration avoided fully addressing the previous administration's contentions, arguing in court filings that the determination of the AUMF's extension to an individual should focus on whether that individual "was *functionally* 'part of' al Qaeda."[93]

The concept of "associated forces" warrants a brief analytical detour, as the phrase forms the outer limit of the AUMF's scope. Arguing that the AUMF covers Al Qaeda members is uncontroversial, but just how far beyond that undisputed claim the AUMF reaches is disputed. In other words, how the law conceives of Al Qaeda's "associated forces" ultimately determines who can be targeted and detained pursuant to the AUMF. The Obama Administration has placed increasing emphasis on the phrase, noting that "[t]he concept has become more relevant over time, as al Qaeda has, over the last 10 years, become more de-

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[90] Respondent's Memorandum Regarding The Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, *In Re* Guantánamo Bay Detainee Litigation, Misc. No. 08-442, at 2 (D.D.C. Mar. 13, 2009), *available at* http://www.justice.gov/opa/documents/memo-re-det-auth.pdf.

[91] Jack Goldsmith, *Long-Term Terrorist Detention and a U.S. National Security Court*, *in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 75, 84 (Benjamin Wittes ed., 2009).

[92] Indeed, commentators have noted that much of the current confusion in the applicable standard centers on the ambiguity of these phrases. *See* Benjamin Wittes & Robert Chesney, *NDAA FAQ: A Guide for the Perplexed*, LAWFARE, http://www.lawfareblog.com/2011/12/ndaa-faq-a-guide-for-the-perplexed/ ("The D.C. Circuit, in fact, has tentatively adopted a definition of the class detainable under the AUMF that is, if anything, broader than what the administration seeks. While the administration—and now Congress—would detain only on the basis of 'substantial support,' the D.C. Circuit has articulated a standard which would permit detention of those who 'purposefully and materially support' the enemy, even if not substantially.").

[93] Letter from Sharon Swingle, Justice Dep't Civil Div., to the Clerk of the United States Court of Appeals for the District of Columbia Circuit at 1, Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. Sept. 22, 2009) (No. 08-5537) (emphasis added) (cited in WITTES et al., *supra* note 81, at 29).

centralized, and relies more on associates to carry out its terrorist aims."[94] According to the administration, an "associated force" "has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners."[95] This construction of the phrase, aside from its extreme pliability, also notably excludes any reference to an "associated force's" involvement in the September 11 attacks, further distancing the Obama Administration's interpretation from the text and purpose of the AUMF itself. Although the concept's outer limit is unclear, courts have noted that "'[a]ssociated forces' do not include terrorist organizations who merely share an abstract philosophy or even a common purpose with al Qaeda" and that "there must be an actual association in the current conflict with al Qaeda or the Taliban."[96]

In light of the lack of overarching framework legislation in the area of detention operations, the D.C. federal district and appellate courts have been the main actors addressing the AUMF's scope.[97] The D.C. Circuit Court of Appeals, as the designated appellate body for habeas cases in the conflict against Al Qaeda, "has developed a broad consensus that membership in an AUMF-covered group is a sufficient condition for detention."[98] However, this left open the crucial question of "[w]hat precisely counts as 'membership' in a clandestine, diffused network such as Al Qaeda?"[99] Courts have considered various factors, including participation in the Al Qaeda chain of command and participation in Al Qaeda training camps.[100] However, the judicial finding of membership in

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[94] Jeh Johnsen, General Counsel, U.S. Dep't of Defense, National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012) [hereinafter Johnson, Lawyering in the Obama Administration], *available at* http://www.lawfareblog.com /2012/02/jeh-johnson-speech-at-yale-law-school/ (last visited Feb. 25, 2012).

[95] *Id.* ("In other words, the group must not only be aligned with al Qaeda. It must have also entered the fight against the United States or its coalition partners. Thus, an 'associated force' is not any terrorist group in the world that merely embraces the al Qaeda ideology. More is required before we draw the legal conclusion that the group fits within the statutory authorization for the use of military force passed by the Congress in 2001.").

[96] Hamlily v. Obama, 616 F. Supp. 2d 63, 75 n.17 (D.D.C. 2009).

[97] For a criticism of this development, see BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 103–30 (2008).

[98] WITTES et al., *supra* note 81, at 32.

[99] *Id*.

[100] *Id.* at 32–33. "'[M]ere sympathy for or association with an enemy organization does not render an individual a member' of that enemy organization." *Hamlily*, 616 F. Supp. 2d at 75 n.17 (quoting Gherebi v. Obama, 609 F. Supp. 2d 43, 68 (D.D.C. 2009)).

an organization within the scope of the AUMF remains a "gestalt impression conveyed by the totality of the circumstances, measured against unspecified—and potentially inconsistent—metrics of affiliation held by particular judges."[101]

In sum, the AUMF's current meaning is far from clear. Significant disagreements exist about, among other areas, the AUMF's geographic scope; its temporal vitality; its applicability to U.S. citizens and new, Al Qaeda-affiliated groups; and the extent of the government's detention authority. No political consensus exists, precluding the development of any implicit understandings about the AUMF's scope. The Supreme Court appears unlikely to act affirmatively to more proactively define the conflict, as it has seemed to act only to correct executive overreaching. The prosecution of U.S. military efforts against terrorism, however, is too important to leave in this state of uncertainty.

IV. Why the United States Needs a New AUMF

The AUMF must inevitably expire because it is expressly linked to the September 11, 2001, attacks against the United States. Moreover, because of the impending downfall of Al Qaeda as we know it, the statute's demise will come more quickly than most assume. Although the United States still faces myriad terrorist threats, the threat from Al Qaeda itself—the "core" group actually responsible for 9/11—is dissipating. So long as a substantial terrorist threat continues, however, the United States will require a framework within which to combat terrorist organizations and activities. Consequently, Congress should enact a new statute that supersedes the AUMF and addresses the major legal and constitutional issues relating to the use of force by the President that have arisen since the September 11 attacks and will persist in the foreseeable future.

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[101] WITTES et al., *supra* note 81, at 33. *See also* Khan v. Obama, 741 F. Supp. 2d 1, 5 (D.D.C. 2010) ("[T]here are no settled criteria for determining who is 'part of' the Taliban, al-Qaida, or an associated force. That determination must be made on a case-by-case basis by using a functional rather than formal approach and by focusing on the actions of the individual in relation to the organization. The Court must consider the totality of the evidence to assess the individual's relationship with the organization. But being 'part of' the Taliban, al-Qaida, or an associated force requires some level of knowledge or intent.") (internal citations and quotation marks omitted).

A. The AUMF's Inevitable Expiration

Although it is difficult to determine exactly when the AUMF will become obsolete, the mere fact that a precise date is unclear should not lead to the conclusion that the AUMF will be perpetually valid. Al Qaeda, the organization responsible for the September 11, 2001, attacks is considered by some to have been already rendered "operationally ineffective"[102] and "crumpled at its core."[103] Moreover, even if Al Qaeda continues to possess the ability to threaten the United States,[104] not all terrorist organizations currently possess a meaningful link to Al Qaeda, rendering the AUMF already insufficient in certain circumstances. Indeed, individuals from across the political spectrum have recognized that the AUMF's focus on those involved in "the terrorist attacks that occurred on September 11, 2001" is outdated and no longer addresses the breadth of threats facing the United States.[105] At a certain point, the

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[102] Greg Miller, *Al-Qaeda Targets Dwindle as Group Shrinks*, WASH. POST, Nov. 22, 2011, http://www.washingtonpost.com/world/national-security/al-qaeda-targets-dwindle-as-group-shrinks/2011/11/22/gIQAbXJNmN_story.html; *see also* JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 148 (2006) ("[T]here is no reason to believe [the armed conflict against Al Qaeda] will go on for a generation. . . . Our current conflict is with al Qaeda, and we can declare hostilities over when it can no longer attack the United States in a meaningful way."); Paul D. Miller, *When Will the U.S. Drone War End?*, WASH. POST, Nov. 17, 2011, http://www.washingtonpost.com /opinions/when-will-the-us-drone-war-end/2011/11/15/gIQAZ677VN_story.html?hpid=z 5 (arguing that the "war against al-Qaeda" will be over "when U.S. intelligence no longer judges al-Qaeda to be a clear and present danger to national security").

[103] Greg Miller, *Al-Qaeda Is Weaker Without bin Laden, but Its Franchise Persists*, WASH. POST, Apr. 27, 2012,http://www.washingtonpost.com/world/national-security/manhunt-details-us-mission-to-find-osama-bin-laden/2012/04/27/gIQAz5pLoT_story.html ("The emerging picture is of a network that is crumpled at its core, apparently incapable of an attack on the scale of Sept. 11, 2001, yet poised to survive its founder's demise . . . . 'The organization that brought us 9/11 is essentially gone,' said the official, among several who spoke on the condition of anonymity to discuss U.S. intelligence assessments of al-Qaeda with reporters a year after bin Laden was killed. 'But the movement . . . the ideology of the global jihad, bin Laden's philosophy – that survives in a variety of places outside Pakistan.'").

[104] For a recent argument on this point, see Seth G. Jones, *Think Again: Al Qaeda*, FOREIGN POL'Y, May/June 2012, *available at* http://www.foreignpolicy.com/articles/ 2012/04/23/think_again_al_qaeda?page=0,0 ("Predictions of al Qaeda's imminent demise are rooted more in wishful thinking and politicians' desire for applause lines than in rigorous analysis. Al Qaeda's broader network isn't even down—don't think it's about to be knocked out.").

[105] *See, e.g.*, Conor Friedersdorf, *The War on Terror Will Soon Be Illegal*, THE ATLANTIC, Nov. 28, 2011, http://www.theatlantic.com/politics/archive/2011/11/the-war-on-terror-will-soon-be-illegal/249153/ ("Obviously, there will be terrorists left in the world when

terrorist groups that threaten the United States targets will no longer have a plausible or sufficiently direct link to the September 11, 2001, attacks.[106]

This shift has likely already occurred. Former Attorney General Michael Mukasey, writing recently in support of efforts to reaffirm the original AUMF, noted that currently "there are organizations, including the Pakistani Taliban, that are arguably not within its reach."[107] It is similarly unclear if the AUMF extends to organizations like Al Qaeda in the Arabian Penninsula, whose formation as a group—and connection to Al Qaeda's "core"—postdates 9/11 and is indirect at best.[108] Former State Department Legal Adviser John Bellinger has argued that the Obama Administration's reliance on the AUMF for its targeted killing and detention operations is "legally risky" because "[s]hould our military or intelligence agencies wish to target or detain a terrorist who is not part of al-Qaeda, they would lack the legal authority to do so, unless the

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the folks who perpetrated 9/11 are dead or arrested, and it may even make sense to wage war on them. But doing so requires a new congressional authorization.").

[106] *See* Laurie R. Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS L. REV. 1169, 1182 (2011) ("Thus, the United States might defeat al-Qaeda in some meaningful way, ending their ability to launch any effective attacks against the United States or its allies. But, some other terrorist group will take up—or have already taken up—the same fight, and the United States will still be engaged in a conflict with terrorist groups.") (internal citation omitted).

[107] Letter from Michael B. Mukasey, to Congressman Howard P. "Buck" McKeon (May 20, 2011), *available at* http://www.lawfareblog.com/wp-content/uploades/2011/05/Mukasey-Letter.pdf).

[108] *See* Bruce Ackerman, *President Obama: Don't go there*, WASH. POST., Apr. 20, 2012, http://www.washingtonpost.com/opinions/expanding-bombings-in-yemen-takes-war-too-far/2012/04/20/gIQAq7hUWT_story.html (arguing that while "[t]he risk of attacks from Yemen may be real," "the 2001 resolution doesn't provide the president with authority to respond to these threats without seeking further congressional consent" and that the president should not "pretend[] that Congress has given him authority that Bush clearly failed to obtain at the height of the panic after Sept. 11"). *But see* Wittes & Chesney, *supra* note 92 ("[T]he AUMF on its face is certainly not a blanket authorization to use force against just any terrorist threat. But it does not follow that an attack directed at AQAP lies beyond the AUMF's scope."). An additional issue that surfaces with regard to AUMF-based targeting of AQAP operatives in Yemen is the extent to which their violent goals target opposing factions within Yemen or the United States itself. *See* Greg Miller, *U.S. Drone Targets in Yemen Raise Questions*, WASH. POST, June 4, 2010, http://www.washingtonpost.com/world/national-security/us-drone-targets-in-yemen-raise-questions/2012/06/02/gJQAP0jz9U_story.html ("In more than 20 U.S. airstrikes over a span of five months, three 'high-value' terrorism targets have been killed, U.S. officials said. A growing number of attacks have been aimed at lower-level figures who are suspected of having links to terrorism operatives but are seen mainly as leaders of factions focused on gaining territory in Yemen's internal struggle.").

administration expands (and the federal courts uphold) its legal justification."[109] Indeed, "[c]ircumstances alone . . . will put enormous pressure on—and ultimately render obsolete—the legal framework we currently employ to justify these operations."[110]

While the court of public opinion seems to have accepted the AUMF's inevitable expiration, courts of law appear poised to accept this argument as well. Justice O'Connor's plurality opinion in *Hamdi* admitted that the AUMF granted "the authority to detain for the duration of the relevant conflict."[111] She also suggested, however, that that authority would terminate at some point, based on "the practical circumstances of [this] conflict," which may be "entirely unlike those of the conflicts that informed the development of the law of war."[112] Justice Kennedy's opinion in *Boumediene* also hinted that the future contours of the war on terror might force the Court to revisit the extent of the conflict.[113] Lower federal courts have already started to ask some of the questions about the duration of the AUMF's authority, which the Supreme Court has left unaddressed to date.[114]

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[109] John B. Bellinger III, *A Counterterrorism Law in Need of Updating*, WASH. POST, Nov. 26, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112503116.html; *see also* Karen DeYoung & Greg Jaffe, *U.S. 'Secret War' Expands Globally As Special Operations Forces Take Larger Role*, WASH. POST, June 4, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/06/03/AR2010060304965.html (quoting Bellinger as arguing that "[m]any of those currently being targeted . . . 'particularly in places outside Afghanistan,' had nothing to do with the 2001 attacks").

[110] Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, *in* LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346, 389 (Benjamin Wittes ed., 2009) [hereinafter Anderson, *Targeted Killing*] ("[T]errorism will not always be about something plausibly tied to September 11 or al Qaeda at all."); *see also* Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a 'Legal Geography of War,'* *in* FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW 8 (Peter Berkowitz ed., 2011) [hereinafter Anderson, *Legal Geography of War*], *available at* http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf (noting "that the gradual passage of time and drift of terrorist groups meant that invocation of the [Non-International Armed Conflict], Al Qaeda, and the AUMF was moving toward a ritual, purely formalistic invocation").

[111] Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion).

[112] *Id.*

[113] Boumediene v. Bush, 553 U.S. 723, 797–98 (2008) ("Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.");

[114] *See, e.g.*, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 9 (D.D.C. 2010) ("[H]ow does the evolving AQAP [Al Qaeda in the Arabian Peninsula] relate to the core al Qaeda for purposes of assessing the legality of targeting AQAP (or its principals) under the

The Obama Administration has notably disagreed with these assessments, arguing that the AUMF "is still a viable authorization today."[115] The administration's position, however, appears contradictory, as it has simultaneously described the limited reach of the AUMF as "encompass[ing] only those groups or people with a link to the terrorist attacks on 9/11, or associated forces"[116] and celebrated the functional neutralization of Al Qaeda as a continuing threat to U.S. national security.[117] The administration's position, however, remains in the minority. Notwithstanding the administration's continuing fealty to the 2001 statute, as pressures build to address these issues, the "temporal vitality"[118] of the AUMF will continue to be challenged. The successful targeting of those responsible for the attacks of September 11, 2001, will ensure that the AUMF's vitality will not be indefinite.

Moreover, even if one rejects as overly optimistic the position that Al Qaeda is currently or will soon be incapable of threatening the United States, the AUMF is already insufficient to reach many terrorist organizations. Assuming a robust Al Qaeda for the indefinite future does not change the disconnected status of certain terrorist groups; as much as it might wish to the contrary, Al Qaeda does not control all Islamist terrorism.[119]

B. The Consequences of Failing to Reauthorize

The AUMF's inevitable expiration, brought about by the increasingly tenuous link between current U.S. military and covert

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September 18, 2001 Authorization for the Use of Military Force?"); *see also* Awad v. Obama, 608 F.3d 1, 11 (D.C. Cir. 2010) (recognizing that "the United States's authority to detain an enemy combatant is . . . dependent . . . upon the continuation of hostilities"); Padilla v. Bush, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002) ("At some point in the future, when operations against al Qaeda fighters end, or the operational capacity of al Qaeda is effectively destroyed, there may be occasion to debate the legality of continuing to hold prisoners based on their connection to al Qaeda, assuming such prisoners continue to be held at that time.").

[115] Johnson, Lawyering in the Obama Administration, *supra* note 94.

[116] *Id.*

[117] Miller, *supra* note 102 (quoting an unnamed Obama administration official as stating that "[w]e have rendered the organization that brought us 9/11 operationally ineffective.").

[118] WITTES et al., *supra* note 81, at 42.

[119] *See* Paul R. Pillar, *The Diffusion of Terrorism*, 21 MEDITERRANEAN Q. 1, 3 (2010) ("Al Qaeda is, despite its salience and name recognition, only a piece of the larger organizational picture of Islamist terrorism.").

operations and those who perpetrated the September 11 attacks, leaves few good options for the Obama Administration. Unless Congress soon reauthorizes military force in the struggle against international terrorists, the administration will face difficult policy decisions. Congress, however, shows no signs of recognizing the AUMF's limited lifespan or a willingness to meaningfully re-write the statute. In light of this reticence, one choice would be for the Obama Administration to acknowledge the AUMF's limited scope and, on that basis, forego detention operations and targeted killings against non-Al Qaeda-related terrorists. For both strategic and political reasons, this is extremely unlikely, especially with a president in office who has already shown a willingness to defy legal criticism and aggressively target terrorists around the globe.[120] Another option would be for the Executive Branch to acknowledge the absence of legal authority, but continue targeted killings nonetheless. For obvious reasons, this option is problematic and unlikely to occur.

Therefore, the more likely result is that the Executive Branch, grappling with the absence of explicit legal authority for a critical policy, would need to make increasingly strained legal arguments to support its actions.[121] Thus, the Obama Administration will soon be forced to rationalize ongoing operations under existing legal authorities, which, I argue below, will have significant harmful consequences for the United States. Indeed, the administration faces a Catch-22—its efforts to destroy Al Qaeda as a functioning organization will lead directly to the vitiation of the AUMF. The administration is "starting with a result and finding the legal and policy justifications for it," which often leads to poor policy formulation.[122] Potential legal rationales would perforce rest on exceedingly strained legal arguments based on the AUMF itself, the President's Commander in Chief powers, or the international law of self-

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[120] John B. Bellinger III, *Will Drone Strikes Become Obama's Guantanamo?*, WASH. POST, Oct. 2, 2011, http://www.washingtonpost.com/opinions/will-drone-strikes-become-obamas-guantanamo/2011/09/30/gIQA0ReIGL_story.html ("[T]he U.S. legal position may not satisfy the rest of the world. No other government has said publicly that it agrees with the U.S. policy or legal rationale for drones.").

[121] Of course, this assumes that continuing the United States' worldwide armed conflict against terrorism is a sound policy option. However, in the short- and medium-term, it appears highly unlikely that either the Obama Administration, or a Republican president taking office in January 2013, will deviate from the current strategy.

[122] Blank, *supra* note 106, at 1191 (describing the Obama Administration's policy towards "indefinite detention of terrorist suspects" as "tak[ing] a problematic decision and 'prettify[ing]' it").

defense.[123] Besides the inherent damage to U.S. credibility attendant to unconvincing legal rationales, each alternative option would prove legally fragile, destabilizing to the international political order, or both.

1. Effect on Domestic Law and Policy

Congress's failure to reauthorize military force would lead to bad domestic law and even worse national security policy. First, a legal rationale based on the AUMF itself will increasingly be difficult to sustain. Fewer and fewer terrorists will have any plausible connection to the September 11 attacks or Al Qaeda, and arguments for finding those connections are already logically attenuated. The definition of those individuals who may lawfully be targeted and detained could be expanded incrementally from the current definition, defining more and more groups as Al Qaeda's "co-belligerents" and "associated forces."[124] But this approach, apart from its obvious logical weakness, would likely be rejected by the courts at some point.[125] The policy of the United States should not be to continue to rely on the September 18, 2001, AUMF.

Second, basing U.S. counterterrorism efforts on the President's constitutional authority as Commander in Chief is legally unstable, and therefore unsound national security policy, because a combination of legal difficulties and political considerations make it unlikely that such a rationale could be sustained. This type of strategy would likely run afoul

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[123] Furthermore, if Congress does not reauthorize the AUMF, "it is possible that the courts could have the last word in determining the scope of the armed conflict, even though they are the branch of government with the least degree of competence to make those decisions." *Ten Years After the 2001 AUMF: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror Before the H. Comm. on Armed Servs.*, 112th Cong. 8 (2011) (statement of Steven Engel, former Deputy Ass't Att'y Gen. in the Office of Legal Counsel of the U.S. Dep't of Justice). Besides the issue of institutional competence, acquiescing to the courts also implicates concerns about democratic control over the current armed conflict.

[124] *See, e.g.*, Anderson, *Targeted Killing*, *supra* note 110, at 389 ("As new terrorist enemies emerge, so long as they are 'jihadist' in character, we might continue referring to them as 'affiliated' with al Qaeda and therefore co-belligerent. But the label will eventually become a mere legalism in order to bring them under the umbrella of an AUMF passed after September 11.").

[125] *See, e.g.*, Bellinger, *supra* note 109; *Ten Years After the 2001 AUMF: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror Before the H. Comm. on Armed Servs.*, 112th Cong. (2011) (statement of Steven Engel, former Deputy Ass't Att'y Gen. in the Office of Legal Counsel of the U.S. Dep't of Justice).

of the courts and risk destabilizing judicial intervention,[126] because the Supreme Court has shown a willingness to step in and assert a more proactive role to strike down excessive claims of presidential authority.[127] Politically, using an overly robust theory of the Commander in Chief's powers to justify counterterrorism efforts would, ultimately, be difficult to sustain. President Obama, who ran for office in large part on the promise of repudiating the excesses of the Bush Administration, and indeed any president, would likely face political pressure to reject the claims of executive authority made "politically toxic" by the writings of John Yoo.[128] Because of the likely judicial resistance and political difficulties, claiming increased executive authority to prosecute the armed conflict against Al Qaeda would prove a specious and ultimately futile legal strategy. Simply put, forcing the Supreme Court to intervene and overrule the Executive's national security policy is anathema to good public policy. In such a world, U.S. national security policy would lack stability—confounding cooperation with allies and hindering negotiations with adversaries.

There are, of course, many situations where the president's position as Commander in Chief provides entirely uncontroversial authority for military actions against terrorists. In 1998, President Clinton ordered cruise missile strikes against Al Qaeda-related targets in Afghanistan and

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[126] *See* WITTES, *supra* note 36, at 62 ("One can still make a theoretical argument for an executive-only approach to problems like global terrorism. In practice, however, the argument is an unreal dream. When the president bypasses Congress—and Congress so willingly lets him do so—the result will not, in fact, be unrestrained executive latitude. It will be litigation, and another institution will step in to fill the void: the courts. When the executive branch untethers itself from statutory law, the courts will examine its actions with a more powerful microscope. If they lack clear law to apply, they will tend to create it with whatever surrogates might be available. The day has long passed when the executive branch can count on the courts to declare that the absence of a Congress saying 'no' is the equivalent of the legislature's saying 'yes.'").

[127] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) ("The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.'"); Hamdi v. Rumsfeld, 542 U.S. 507, 535–36 (2004) (plurality opinion) ("[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case . . . cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government.").

[128] Aaron Nielson, *An Indirect Argument for Limiting Presidential Power*, 30 HARV. J.L. & PUB. POL'Y 727, (2007) (reviewing of JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005)) ("*The Powers of War and Peace* [is] so politically toxic that [Judge] Alito's failure to reject its premises out of hand was, for many, 'radical.'").

Sudan in response to the embassy bombings in Kenya and Tanzania. In 1986, President Reagan ordered air strikes against Libyan targets after U.S. intelligence linked the bombing of a Berlin discotheque to Libyan operatives.[129] Executive authority to launch these operations without congressional approval was not seriously questioned, and no congressional approval was sought.[130] To be sure, many of the targeted killing operations carried out today fall squarely within the precedent of past practice supplied by these and other valid exercises of presidential authority. Notwithstanding disagreement about the scope of Congress's and the president's "war powers," few would disagree with the proposition that the president needs no authorization to act in self-defense on behalf of the country. However, it is equally clear that not all terrorists pose such a threat to the United States, and thus the

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[129] Of course, the historical record provides many more examples of unilateral presidentially authorized military action, many of which have occurred since the passage of the War Powers Resolution in 1973, whose purpose was "to ensure that Congress and the President share in making decisions that may get the United States involved in hostilities." RICHARD GRIMMETT, CONG. RESEARCH SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE (summary) (2012), *available at* http://www.fas.org/sgp/crs/natsec/RL33532.pdf. Since 1973, "[p]residents have submitted 134 reports to Congress as a result of the War Powers Resolution," *id.*, each time representing the use of U.S. armed forces "without obtaining congressional authorization for such action." *Id.* Most recently, the Obama Administration deployed significant air forces in Libya, but argued that the War Powers Resolution did *not* apply because the military deployment fell short of "hostilities." *See Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 14 (2011) (statement of Harold Koh, Legal Adviser, U.S. Dep't of State) ("[T]he term [hostilities] should not necessarily be read to include situations where the nature of the mission is limited[,] . . . the exposure of U.S. forces is limited[, and] the risk of escalation is therefore limited."). *But see* Michael J. Glennon, *Forum: The Cost of "Empty Words": A Comment on the Justice Department's Libya Opinion*, HARV. NAT'L SECURITY J. 6 (Apr. 14, 2011), http://harvardnsj.org/wp-content/uploads/2011/04/Forum_Glennon.pdf (questioning the Obama Administration's reliance on Executive precedent and arguing that that "[t]he President cannot call a war something other than a war and thereby dispense with the Constitution's requirement of congressional approval"). Additionally, the Obama Administration based its *domestic law* justification in part on the *international* authorization of the United Nations Security Council. This argument, although employed by the Executive Branch on several occasions, has also been widely criticized. *See, e.g.*, *id.* at 8 ("[Because the UN Charter is non-self-executing,] *Medellin* thus undercuts arguments that the [UN] Charter combined with a Security Council resolution provided a domestic source of war power permitting the President to use force in Libya.").

[130] *See* Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SECURITY L. & POL'Y 539, 558 (2012) (noting that by 1998, "the Clinton administration's lawyers apparently had concluded that 'under the law of armed conflict killing a person who posed an imminent threat to the United States would be an act of self-defense, not assassination.'" (quoting FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 132 (2004))).

Commander in Chief cannot justify all counterterrorism operations as "self-defense."

A third option would be to conduct all counterterrorism operations as covert operations under the aegis of Title 50.[131] Although the CIA typically carries out such "Title 50 operations," the separate roles of the military and intelligence community have become blurred in recent years.[132] The president must make a "finding" to authorize such operations,[133] which are conducted in secret to provide deniability for the U.S. Government.[134]

Relying entirely on covert counterterrorism operations, however, would suffer from several critical deficiencies. First, even invoking the cloak of "Title 50," it is "far from obvious" that covert operations are legal without supporting authority.[135] In other words, Title 50 operations, mostly carried out by the CIA, likely also require "sufficient domestic law foundation in terms of either an AUMF or a legitimate claim of inherent constitutional authority for the use of force under Article II."[136] Second, covert operations are by definition kept out of public view, making it difficult to subject them to typical democratic review. In light of "the democratic deficit that already plagues the nation in the legal war

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[131] "Title 50 authority has . . . become a shorthand . . . that refers to the domestic law authorization for engaging in quintessential intelligence activities such as intelligence collection and covert action." *Id.* at 616. The shorthand, however, masks a complicated area of law and policy, most of which defies easy summary because of both its complexity and its secrecy. *See generally* Andru E. Wall, *Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 3 J. NAT'L SECURITY L. & POL'Y 86 (2011).

[132] *See* Wall, *supra* note 131, at 91 ("[T]he use of 'Title 50' to refer solely to activities conducted by the CIA is, at best, inaccurate as the Secretary of Defense also possesses significant authorities under Title 50.").

[133] Chesney, *supra* note 130, at 601 ("[T]he current domestic legal architecture for national security activities imposes a presidential authorization obligation on activity constituting covert action . . . .").

[134] Anderson, *Legal Geography of War*, *supra* note 110, at 15 (describing how "targeted killing using drones [has gone] from more-or-less covert to merely 'plausibly deniable' to 'implausibly deniable'").

[135] Chesney, *supra* note 130, at 616 ("It is far from obvious that the only relevant domestic law question is whether Congress has given the CIA standing authority to engage in covert action.").

[136] *Id.* ("It is easy to answer in the affirmative with respect to this particular example; the AUMF provides a relatively strong foundation for resolving such Title 10 concerns. The important point, however, is that the drone program probably requires justification under both headings, and thus that it can be a bit misleading to ask *solely* about authorization under Title 10 or Title 50.").

on terror,"[137] further distancing counterterrorism operations from democratic oversight would exacerbate this problem.[138] Indeed, congressional oversight of covert operations—which, presumably, operates with full information—is already considered insufficient by many.[139] By operating entirely on a covert basis, "the Executive can initiate more conflict than the public might otherwise [be] willing to support."[140]

In a world without a valid AUMF, the United States could base its continued worldwide counterterrorism operations on various alternative domestic legal authorities. All of these alternative bases, however, carry with them significant costs—detrimental to U.S. security and democracy. The foreign and national security policy of the United States should rest on "a comprehensive legal regime to support its actions, one that [has] the blessings of Congress and to which a court would defer as the collective judgment of the American political system about a novel set of

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[137] Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1276–77 (2007) (noting that the "presidential netherworld" where "the President has been acting without the explicit support of the legislature" "is bad for the reputation of the United States, as well as for our deliberative democracy"). *See also* Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 OXFORD J. LEGAL. STUD. 189, 198 (2009) ("The 'war on terror' therefore presents a particularly worrisome situation: it can be fought clandestinely, it does not require broad-scale troop mobilizations, and it can be financed essentially off the books by deficit spending. These features also enable asymmetric wars to be fought without political accountability and broad-based consent, moving far beyond the enhanced executive power necessary to and expected during the conduct of traditional wars.").

[138] Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1078 (2004) ("[T]he legitimacy of military policymaking depends not just on broad congressional involvement, but also on democratic input and popular consent.").

[139] *See* Jennifer D. Kibbe, *Conducting Shadow Wars*, 5 J. NAT'L SECURITY L. & POL'Y 373, 383 (2012) (emphasizing that "the critical question is whether intelligence, and specifically covert action, issues are receiving appropriate congressional oversight").

[140] Michaels, *supra* note 138, at 1077. The democratic deficit vis-à-vis covert operations is not a new theory; it has surfaced as a significant problem in U.S. foreign policy, most prominently during the Iran-Contra affair. *See* HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN AND SENATE SELECT. COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, REPORT OF THE CONGRESSIONAL COMMS. INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO. 216, H.R. REP. NO. 433, 100th Cong., 1st Sess. 11 (1987), *available at* http://ia600301.us.archive.org/19/items/reportofcongress87unit/reportofcongress87unit.pdf ("The Administration's departure from democratic processes created the conditions for policy failure, and led to contradictions which undermined the credibility of the United States.").

problems."[141] Only then can the President's efforts be sustained and legitimate.

2. Effect on the International Law of Self-Defense

A failure to reauthorize military force would lead to significant negative consequences on the international level as well. Denying the Executive Branch the authority to carry out military operations in the armed conflict against Al Qaeda would force the President to find authorization elsewhere, most likely in the international law of self-defense—the *jus ad bellum*.[142] Finding sufficient legal authority for the United States's ongoing counterterrorism operations in the international law of self-defense, however, is problematic for several reasons. As a preliminary matter, relying on this rationale usurps Congress's role in regulating the contours of U.S. foreign and national security policy. If the Executive Branch can assert "self-defense against a continuing threat" to target and detain terrorists worldwide, it will almost always be able to find such a threat.[143] Indeed, the Obama Administration's broad understanding of the concept of "imminence" illustrates the danger of allowing the executive to rely on a self-defense authorization alone.[144]

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[141] WITTES, *supra* note 36, at 65.

[142] This position is most prominently promoted by Professor Kenneth Anderson, who argues that the United States should base its policy of targeted killing on the international law of self-defense, rather than the conduct of ongoing hostilities, because accepting an international humanitarian law approach "will subject the United States to requirements that it has not traditionally accepted as a matter of international law but that it will find difficult to dismiss when the IHL standard of armed conflict has not been met." Anderson, *Targeted Killing*, *supra* note 110, at 370. *See also* Anderson, *Legal Geography of War*, *supra* note 110, at 14 (arguing that future presidents should rely on "the category of naked self-defense" to respond to "terrorist threats unrelated to the AUMF that have not yet ripened into [Non-International Armed Conflict] but that a future president believes must be met with force").

[143] Anderson, *Targeted Killing*, *supra* note 110, at 370. Anderson also refers to the "accumulation of events" and "active defense view of anticipatory self-defense" theories as providing similar justification. *Id.*

[144] Eric H. Holder, Jr., Att'y Gen. of the United States, Address at Northwestern University School of Law (Mar. 5, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html (recognizing that the "Constitution empowers the President to protect the nation from any imminent threat of violent attack" but noting that "whether an individual presents an 'imminent threat' incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States"). *See also* Chesney, *supra* note 130, at 554

This approach also would inevitably lead to dangerous "slippery slopes." Once the President authorizes a targeted killing of an individual who does not pose an imminent threat in the strict law enforcement sense of "imminence,"[145] there are few potential targets that would be off-limits to the Executive Branch. Overly malleable concepts are not the proper bases for the consistent use of military force in a democracy. Although the Obama Administration has disclaimed this manner of broad authority because the AUMF "does not authorize military force against anyone the Executive labels a 'terrorist,'"[146] relying solely on the international law of self defense would likely lead to precisely such a result.

The slippery slope problem, however, is not just limited to the United States's military actions and the issue of domestic control. The creation of international norms is an iterative process, one to which the United States makes significant contributions. Because of this outsized influence, the United States should not claim international legal rights that it is not prepared to see proliferate around the globe. Scholars have observed that the Obama Administration's "expansive and open-ended interpretation of the right to self-defence threatens to destroy the prohibition on the use of armed force . . . ."[147] Indeed, "[i]f other states were to claim the broad-based authority that the United States does, to kill people anywhere, anytime, the result would be chaos."[148]

("The debate over how imminent a threat must be in order to warrant lethal force remains a central question—perhaps *the* central question—today.").

[145] *See* Tennesee v. Garner, 471 U.S. 1, 3 (1985) ("We conclude that [lethal] force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.").

[146] Johnson, Lawyering in the Obama Administration, *supra* note 94.

[147] Philip Alston, Statement of U.N. Special Rapporteur on U.S. Targeted Killings Without Due Process (Aug. 3, 2010), *available at* http://www.aclu.org/national-security/statement-un-special-rapporteur-us-targeted-killings-without-due-process.

[148] *Id.* Indeed, the Obama Administration's new formulation of the concept of "imminence" stands in stark contrast to the widely accepted customary international law standard of self-defense—the "Caroline doctrine"—which allows self-defense if "the necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation." Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 242 (2010) (citing Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton (Aug. 6, 1842), *in* 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 454, 455 (Hunter Miller ed., 1934)). *See also* Samuel Estreicher, *Privileging Asymmetric Warfare (Part II)?: The "Proportionality" Principle Under International Humanitarian Law*, 12 CHI. J. INT'L L. 143, 147 (2011) (describing "Secretary of State Daniel Webster's 1841–42 correspondence with his British counterparts concerning and 1837 Canadian attack in US waters on the Caroline" as

Encouraging the proliferation of an expansive law of international self-defense would not only be harmful to U.S. national security and global stability, but it would also directly contravene the Obama Administration's national security policy, sapping U.S. credibility. The Administration's National Security Strategy emphasizes U.S. "moral leadership," basing its approach to U.S. security in large part on "pursu[ing] a rules-based international system that can advance our own interests by serving mutual interests."[149] Defense Department General Counsel Jeh Johnson has argued that "[a]gainst an unconventional enemy that observes no borders and does not play by the rules, we must guard against aggressive interpretations of our authorities that will discredit our efforts, provoke controversy and invite challenge."[150] Cognizant of the risk of establishing unwise international legal norms, Johnson argued that the United States "must not make [legal authority] up to suit the moment."[151] The Obama Administration's global counterterrorism strategy is to "adher[e] to a stricter interpretation of the rule of law as an essential part of the wider strategy" of "turning the page on the past [and rooting] counterterrorism efforts within a more durable, legal foundation."[152]

"[t]he classic formulation of the customary rule" of self-defense); Peter Margulies, *When to Push the Envelope: Legal Ethics, The Rule of Law, and National Security Strategy*, 30 FORDHAM INT'L L.J. 642, 669 (2007) (noting that "Article 51 of the U.N. Charter . . . arguably codifies the customary international law principle articulated in Webster's letter").

[149] THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 12 (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_ strategy.pdf. *See also id.* at 22 ("The United States must reserve the right to act unilaterally if necessary to defend our nation and our interests, yet we will also seek to adhere to standards that govern the use of force. Doing so strengthens those who act in line with international standards, while isolating and weakening those who do not.").

[150] Johnson, Lawyering in the Obama Administration, *supra* note 94. *See also* Colonel Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, ARMY LAW., Sept. 2006, at 11 ("The United States must act consistently from a values basis and cannot appear to act hypocritically or parochially. Anything that adversely affects perceptions about the U.S. goals in the war on terrorism will weaken U.S. global legitimacy, and, therefore, adversely affect U.S. ability to successfully prosecute the war on terrorism.").

[151] *Id.* ("[I]n the conflict against an *unconventional* enemy such as al Qaeda, we must consistently apply *conventional* legal principles. We must apply, and we have applied, the law of armed conflict, including applicable provisions of the Geneva Conventions and customary international law, core principles of distinction and proportionality, historic precedent, and traditional principles of statutory construction.").

[152] MARC LYNCH, RHETORIC AND REALITY: COUNTERING TERRORISM IN THE AGE OF OBAMA 23 (2010), *available at* http://www.cnas.org/files/documents/publications/CNAS_Rhetoric%20and%20Reality_Lynch.pdf. Reliance on the stability-producing

Widely accepted legal arguments also facilitate cooperation from U.S. allies, especially from the United States' European allies, who have been wary of expansive U.S. legal interpretations.[153] Moreover, U.S. strategy vis-à-vis China focuses on binding that nation to international norms as it gains power in East Asia.[154] The United States is an international "standard-bearer" that "sets norms that are mimicked by others,"[155] and the Obama Administration acknowledges that its drone strikes act in a quasi-precedential fashion.[156] Risking the obsolescence of the AUMF would force the United States into an "aggressive interpretation" of international legal authority,[157] not just discrediting its

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effects of international norms are not a novel feature of U.S. national security policy. *See* U.S. DEP'T OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 7 (2005) (noting that one of the four strategic objectives of the National Defense Strategy is to create an environment "conducive to a favorable international system").

[153] *See* Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 U. PENN. L. REV. (manuscript at 27) (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstratc_id=2049532 (arguing that the United States should "seek international consensus" in "drawing a distinction between zones of active hostilities and elsewhere" to accommodate the "[k]ey European partners [who] have long viewed the conflict with al Qaeda as limited to the hot battlefield of Afghanistan and northwest Pakistan (and formerly Iraq)").

[154] David Nakamura, *Obama Heads to Bali After Touting Partnership to Australian Lawmakers, Troops*, WASH. POST, Nov. 17, 2011, http://www.washingtonpost.com/world/obama-rallies-australian-troops-around-new-us-military-partnership/2011/11/17/gIQASp2rTN_story.html?hpid=z1 ("At the summit, the United States and other countries will press China to agree to abide by 'international norms' in regards to the South China Sea . . ., administration officials said.").

[155] Daskal, *supra* note 153, at 28 ("Even if the United States thinks that it will exercise its asserted authorities responsibly, there are good reasons to be concerned about countries such as China, Russia, or Iran relying on United States' precedent to argue that it can detain without charge, or even worse, kill any suspected non-state enemy wherever they might be found."). *See also* Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=1&_r=1&sq=Obama%20and%20drones&st=nyt&scp=1 ("With China and Russia watching, the United States has set an international precedent for sending drones over borders to kill enemies.").

[156] *See* John O. Brennan, Ass't to the President for Homeland Security and Counterterrorism, The Ethics and Efficacy of the President's Counterterrorism Strategy, Remarks at the Woodrow Wilson International Center for Scholars (Apr. 30, 2012), *available at* http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy (last visited June 4, 2012) (arguing that because "[t]he United States is the first nation to regularly conduct strikes using remotely piloted aircraft in an armed conflict . . . we are establishing precedents that other nations may follow").

[157] LYNCH, *supra* note 152, at 24 ("The dramatic escalation of drone strikes against alleged leaders in Afghanistan, Pakistan, Yemen and elsewhere has been seen as a serious

own rationale, but facilitating that rationale's destabilizing adoption by nations around the world.[158]

United States efforts to entrench stabilizing global norms and oppose destabilizing international legal interpretations—a core tenet of U.S. foreign and national security policy[159]—would undoubtedly be hampered by continued reliance on self defense under the *jus ad bellum* to authorize military operations against international terrorists. Given the presumption that the United States's armed conflict with these terrorists will continue in its current form for at least the near term, ongoing authorization at the congressional level is a far better choice than continued reliance on the *jus ad bellum*. Congress should reauthorize the use of force in a manner tailored to the global conflict the United States is fighting today. Otherwise, the United States will be forced to continue to rely on a statute anchored only to the continued presence of those responsible for 9/11, a group that was small in 2001 and, due to the continued successful targeting of Al Qaeda members, is rapidly approaching zero.

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potential gap in the administration's commitment to the rule of law. The administration has strongly defended the legality of these drone strikes, but the legal foundations as to how drone strikes are carried out remain hotly contested."). Indeed, Lynch has noted that drone strikes place the administration's emphasis on the international rule of law in jeopardy, arguing that "[i]f the administration believes its original arguments about the importance of the rule of law for creating a durable and legitimate strategy, then it needs to act accordingly." *Id.*

[158] Norms of international behavior exercise a profound, yet complex and little understood, influence on state behavior. *See, e.g.*, Harold Honju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2651 (1997) ("As governmental and nongovernmental transnational actors repeatedly interact within the transnational legal process, they generate and interpret international norms and then seek to internalize those norms domestically. To the extent that those norms are successfully internalized, they become future determinants of why nations obey."). The point is not that U.S. rationales for targeted killing operations will directly cause other nations to replicate such actions, but that other nations will find it easier to justify violating an international norm if the United States is itself violating it. *See, e.g.*, Shirley V. Scott, *Identifying the Source and Nature of a State's Political Obligation towards International Law*, 1 J. INT'L L. & INT'L REL. 49, 49 (2005) (discussing "the impact . . . of the United States-led military action [against Iraq] on the specific content of the law of the use of force"); Geoffrey Corn & Dennis Gyllensporre, *International Legality, the Use of Military Force, and Burdens of Persuasion: Self-Defense, the Initiation of Hostilities, and the Impact of the Choice Between Two Evils on the Perception of International Legitimacy*, 30 PACE L. REV. 484, 526 (2010) (noting "the consequence[s] of being perceived as operating outside the accepted norms of international law in relation to the use of force").

[159] *See supra* notes 149–152 and accompanying text.

V. Reauthorizing the War on Terrorism: Towards a Balanced AUMF

In reaffirming the AUMF and reauthorizing military force against terrorist groups, Congress should look to the current contours of the threat of terrorism for guidance on how best to rewrite the statute. September 11 should not continue to be the *raison d'être* of global military counterterrorism operations. This section will first describe Congress's most recent effort to reaffirm the AUMF in the 2012 National Defense Authorization Act (NDAA), which ultimately left the problem of the AUMF's obsolescence unaddressed. It will then propose a standard for each of the five elements of the AUMF's scope previously analyzed in Part III, as well as several additional elements that are necessary to address issues that have arisen since the original AUMF's passage.

One counterargument to this proposal—and, indeed any proposal requiring greater congressional involvement—is that Congress is simply not up to the task. In this era of unparalleled congressional dysfunction, it seems unrealistic to presume Congress could agree on any given piece of legislation, let alone legislate a novel framework in a controversial policy area.[160] Such feasibility arguments, however, while an important reality check, should not stymie proposals for policy improvement. Indeed, political feasibility arguments often break down when the wisdom of a policy is demonstrated; to wit, cogent analysis of a previously infeasible position can illustrate its benefits, thereby rendering it more feasible. In the end, feasibility is both an independent and a dependent variable; it affects other arguments, but can also be affected itself.

A. The 2012 National Defense Authorization Act: Authorizing Permanent War?

In the 2012 legislative cycle, Congress chose to address the AUMF as part of the annual reauthorization of the Department of Defense's activities. Neither chamber, however, resolved the problem of the AUMF's rapidly approaching obsolescence.

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[160] Jinks & Katyal, *supra* note 137, at 1278 ("In the real world, it is far easier for Congress to do nothing than to do something.").

1. The House of Representatives—H.R. 1540

The House considered the AUMF through Section 1034 of its version of the NDAA. First, § 1034(1) reaffirmed that "the United States is engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces."[161] Second, § 1034(2) reaffirmed the President's "authority to use all necessary and appropriate force during the current armed conflict with al-Qaeda, the Taliban, and associated forces."[162] Third, § 1034(3) defined the target as including

> nations, organizations, and persons who are part of, or are substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners; or have engaged in hostilities or have directly supported hostilities or have directly supported hostilities in aid of a nation, organization, or person described [above].[163]

Finally, § 1034(4) specifically notes that "the President's authority . . . includes the authority to detain belligerents . . . until the termination of hostilities."[164] At first, it seems as though the House version mirrors current law as embodied by the Obama Administration's proposed definition of those who can be detained pursuant to the AUMF. Indeed, "Section 1034's definition of the enemy thus reflects the legal status quo."[165] Nevertheless, although it codifies the Obama Administration's current position, it includes no reference to the September 11 attacks, making it, in principle at least, a broader authorization of force without a logical or temporal conclusion.[166]

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[161] H.R. 1540, 112th Cong. § 1034(1) (2011).
[162] *Id.* § 1034(2).
[163] *Id.* § 1034(3).
[164] *Id.* § 1034(4).
[165] *Ten Years After the 2001 AUMF: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror Before the H. Comm. on Armed Servs.*, 112th Cong. 7 (2011) (statement of Steven Engel, former Deputy Ass't Att'y Gen. in the Office of Legal Counsel of the U.S. Dep't of Justice) ("Section 1034 does nothing more, but also no less, than confirm that Congress agrees with how the President has understood the existing armed conflict and his detention authority under the AUMF.").
[166] Letter from American Civil Liberties Union, to House Armed Services Committee (May 9, 2011) (arguing that § 1034 "could commit the United States to a worldwide war without clear enemies, without any geographical boundaries, . . . and without any boundary relating to time or specific objective to be achieved").

2. The Senate—S. 1867

The Senate version of the NDAA focused on the narrow issue of detention, but departed from the House bill in its definition of the target. Section 1031 of the Senate NDAA defines the enemy as *both* those already subject to the AUMF[167] and as

> [a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.[168]

This would have introduced a definitional complexity into the AUMF, because the difference between those two groups seems to imply that the latter group would be an additional valid target under the AUMF. This interpretation, however, is at odds with the rest of § 1031, which foreclosed any general change to the legal status quo by stating that "[n]othing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force."[169] Indeed, the expanded definition cannot be squared with the Senate voting "99 to 1 to say the bill does not affect 'existing law' about people arrested inside the United States."[170] The Senate bill also based the origin of its detention authority on the AUMF, subjecting it to the AUMF's quickly diminishing temporal vitality.[171]

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[167] S. 1867, 112th Cong. § 1031(b)(1) (2011) ("A person who planned authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.").
[168] *Id.* § 1031(b)(2).
[169] *Id.* § 1031(d).
[170] Charlie Savage, *Senate Declines to Clarify Rights of American Qaeda Suspects Arrested in U.S.*, N.Y. TIMES, Dec. 1, 2011, http://www.nytimes.com/2011/12/02/us/senate-declines-to-resolve-issue-of-american-qaeda-suspects-arrested-in-us.html?_r=1.
[171] S. 1867, 112th Cong. § 1031(a) ("Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107-40) includes the authority for the Armed Forces of the United States to detain covered person . . . pending disposition under the law of war.").

3. A Missed Opportunity—The 2012 National Defense Authorization Act

Although both the House and Senate failed separately to address the major outstanding issues presented by the AUMF and its uncertain temporal vitality, the conference process of merging the House and Senate versions presented an additional opportunity to remedy these issues. The final bill, however, also failed to place U.S. global counterterrorism efforts on sound legal footing. Indeed, much of the political capital spent during the process focused on the narrow issue of mandating military detention for terrorist suspects.[172]

Section 1021 addressed the AUMF, "affirm[ing] that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force . . . includes the authority for the Armed Forces of the United States to detain covered persons . . . pending disposition under the law of war."[173] In allowing detention under the law of war of "covered persons," Congress affirmed the authority of the president to detain those who perpetrated the September 11 attacks,[174] while also expanding the group of those legally detainable to include anyone "who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners."[175] This latter group includes "any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."[176]

These ostensible changes to the president's legal authority were counteracted, however, by the provision's subsequent sections, which repudiated any change to the status quo. Section (d) noted that "[n]othing in this section is intended to limit or expand the authority of the President

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[172] Wittes & Chesney, *supra* note 92 ("The NDAA is a spending authorization bill for the military fiscal year 2012. At more than 1,000 pages, it does a great many things. Almost all of the controversy about it, however, deals with a single portion of the bill: 'Subtitle D-Counterterrorism.' This subtitle contains a number of provisions related to military detention of terrorism suspects and the interaction between military detention and the operation of the criminal justice system.").

[173] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(a), 125 Stat. 1298 (2011).

[174] *Id.* § 1021(b)(1) ("A covered person under this section is any person . . . who planned authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.").

[175] *Id.* § 1021(b)(2).

[176] *Id.*

or the scope of the Authorization for Use of Military Force,"[177] while section (e) stated a similar disclaimer "relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States."[178] The absence of any change to the status quo was underscored by various legislators' statements.[179]

Though seeming to lead the United States into a new era of the military conflict against terrorism, the statute in actual effect changed very little, if anything. President Obama had initially opposed the NDAA's statutory language relevant to the AUMF because, "in purporting to affirm the conflict, [section 1034 of the House bill] would effectively recharacterize its scope and would risk creating confusion regarding applicable standards."[180] The president, however, ultimately signed the bill, recognizing that its final version "breaks no new ground and is unnecessary" with regard to the AUMF.[181] Indeed, commentators have observed that "a law that writes the administration's successful

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[177] *Id.* § 1021(d).

[178] *Id.* § 1021(e).

[179] *See, e.g.*, 157 CONG. REC. S8656 (daily ed. Dec. 15, 2011) (statement by Sen. Richard Durbin) ("[W]e have agreed, on a bipartisan basis, to include language in the bill offered by Senator Feinstein that makes it clear this bill does not change existing detention authority in any way. What it means is, the Supreme Court will make the decision who can and cannot be detained indefinitely without trial, not the Senate."); 157 CONG. REC. S8636 (daily ed. Dec. 15, 2011) (statement by Sen. John McCain) ("[T]his provision does not and is not intended to change the existing state of the law with regard to detention of U.S. citizens. This section simply restates the authority to detain what has already been upheld by the Federal courts. We are not expanding or limiting the authority to detain as established by the 2001 authorization for the use of military force."); Savage, *supra* note 170 (quoting Senator Carl Levin of Michigan as saying "We make clear that whatever the law is, it is unaffected by this language in our bill"). *But see* 157 CONG. REC. S8654 (daily ed. Dec. 15, 2011) (statement by Sen. Patrick Leahy) ("Section 1021 expands the 2001 Authorization of the Use of Military Force to include the authority to detain and hold indefinitely any person, even a U.S. citizen, if the military suspects that such a person has supported any force associated with al-Qaeda.").

[180] Office of Mgmt. & Budget, Exec. Office of the President, Statement of Administration Policy: H.R. 1540—National Defense Authorization Act for FY 2012, at 2, *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1540r_20110524.pdf (noting that "[a]t a minimum, this is an issue that merits more extensive consideration before possible inclusion").

[181] Office of Mgmt. & Budget, Exec. Office of the President, Statement by the President on H.R. 1540, Dec. 31, 2011, http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540 (last visited Feb. 6, 2012) ("My Administration strongly supported the inclusion of these limitations in order to make clear beyond doubt that the legislation does nothing more than confirm authorities that the Federal courts have recognized as lawful under the 2001 AUMF.").

litigating position into statute cannot reasonably be said to expand the government's detention authority."[182] Others, however, have disagreed, interpreting the 2012 NDAA as an unambiguous expansion of authority.[183]

The 2012 NDAA explicitly disclaims any change to the law prior to its passage, but its precise effect remains to be determined. Ultimately, however, the statute remains anchored to the 2001 AUMF, keeping a link

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[182] Wittes & Chesney, *supra* note 92 ("In fact, to the extent that the new statutory language will preempt the arguably broader D.C. Circuit definition [of the class detainable under the AUMF], it may actually narrow it—if only very slightly."). For the opposing view, see Professor Stephen Voss's response to Wittes and Chesney that "[t]he NDAA says more than the AUMF says" and "[t]here is certainly no unequivocal endorsement within the court system of that additional authority." Benjamin Wittes, *Stephen Voss Responds to Our FAQ*, LAWFARE, Dec. 22, 2011, http://www.lawfareblog.com/2011/12/stephen-voss-responds-to-our-faq/#more-4474 ("In a perfectly clear way, [the] NDAA expands the government's detention authority."); *see also* Benjamin Wittes, *Raha Wala Writes His Own FAQ*, LAWFARE, Dec. 20, 2011, http://www.lawfareblog.com/2011/12/raha-wala-writes-his-own-faq/ ("[I]f the question is whether the NDAA goes further than any statute-based detention authority upheld by our nation's highest court, I think the answer is undoubtedly yes. Similarly, if the question is whether the NDAA strengthens any future administration's hand in detaining members of 'associated forces' or supporters of al Qaeda and affiliated groups, I think one has to answer in the affirmative.").

[183] In *Hedges v. Obama*—the only case to date that has considered the 2012 NDAA's language—Judge Katherine Forrest of the Southern District of New York ruled in a preliminary injunction order that "Section 1021 [of the NDAA] is certainly far from a verbatim reprise of the AUMF [and] assume[d] . . . that Congress acted intentionally when crafting the differences as between the two statutes." No. 12 Civ. 331(KBF), 2012 WL 1721124, at *26 (S.D.N.Y. May 16, 2012). "[T]he AUMF is tied directly and only to those involved in the events of 9/11 [while] Section 1021 . . . has a non-specific definition of 'covered persons' that reaches beyond those involved in the 9/11 attacks by its very terms." *Id.* Judge Forrest's ruling, however, has been widely criticized, and its viability is unclear. *See* Robert Chesney, *Issues with* Hedges v. Obama, *and a Call for Suggestions for Statutory Language Defining Associated Forces*, LAWFARE, May 17, 2012, http://www.lawfareblog.com/2012/05/issues-with-hedges-v-obama-and-a-call-for-suggestions-for-statutory-language-defining-associated-forces/ ("I am puzzled, very much, by the judge's refusal to construe the NDAA as no more and no less broad than the AUMF. At page 3, she asserts that she is forced to construed (sic) them to be different out of deference to the principle that a separate statute must be presumed to have 'independent meaning.' Yet Section 1021(d) makes painfully clear that Congress indeed intended the two to be coextensive."); Benjamin Wittes, *A Few Thoughts on* Hedges, LAWFARE, May 17, 2012, http://www.lawfareblog.com/2012/05/a-few-thoughts-on-hedges/ ("The key point missed by Judge Forrest is that while the language of the NDAA differs substantially from the language of the AUMF, there is *virtually no difference at all* between the detention authority authorized by the NDAA and the detention authority authorized by the AUMF *as interpreted by the D.C. Circuit*.").

to the perpetrators of 9/11 as the basis for the U.S. military's worldwide counterterrorism operations.

B. Reauthorizing Military Force Against Terrorist Organizations—A Framework

Even after this most recent legislative fight over the AUMF, the statute's ambiguous scope and temporal vitality remain unaddressed. To the extent that any aspect of the president's AUMF-related authority was altered, how specifically the language changed the law is far from clear. Therefore, a new authorization for using military force against terrorist organizations is needed now more than ever.

This section lays out a framework for reauthorizing the AUMF, identifying the key areas to address and recommending solutions for each. Rather than proposing specific legislative language, this section identifies the most important elements that a new AUMF should address and offers potential solutions. Regardless of the specific language adopted, a stand-alone measure would be preferable to inclusion in broader, omnibus legislation. Such a process would allow true debate around a durable foundation for counterterrorism operations, rather than becoming just one element of a broader compromise. While Congress does not often debate a single measure unattached to other legislation, the impending withdrawal of American troops from Afghanistan—symbolizing, if not marking, the end of a relatively geographically concentrated era of counterterrorism and the beginning of an era of diffuse, global counterterrorism—could likely provide the event-based impetus for reconsideration of the AUMF.

1. Object

The object – *who* is the enemy—is perhaps the most difficult issue to address.[184] Finding an adequate solution must still address the threat from

[184] *Ten Years After the 2001 AUMF: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror Before the H. Comm. on Armed Servs.*, 112th Cong. 9 (2011) (statement of Professor Robert Chesney) ("Fleshing out the associated forces concept is no simple task, unfortunately. At a minimum Congress should consider establishing a statutory reporting mechanism to ensure Congressional awareness of the executive branch's ongoing applications of the concept."). Congresswoman Barbara Lee, the only Member of Congress to oppose the original AUMF, recently introduced a bill to

Al Qaeda, while at the same time acknowledging both that Al Qaeda has evolved into a diffuse, networked organization and that other terrorist organizations now pose equal or greater threats than Al Qaeda.[185] Merely stating that a person or group constitutes part of an "associated force" of Al Qaeda should not be sufficient to authorize military force.[186] Congress should adopt a hybrid approach in this circumstance, establishing a specific list of organizations that would fall under a new AUMF. Subsequently, if the President felt another organization should be added to the list, he could propose this to Congress through an expedited procedure. This would allow Congress to maintain a workable definition of the enemy and provide the president with flexibility, while also preventing *ipso facto* targeting determinations by the Executive Branch. Because not all terrorist organizations are the same, and some pose little or no threat to the United States, the fact of classification as a terrorist group alone should not suffice to trigger the use of military force.[187] Put differently, classification as a "Foreign Terrorist Organization" would be necessary but not sufficient for a renewed AUMF to apply.[188] The Executive Branch does not currently argue that the AUMF covers all of the organizations on the Foreign Terrorist Organization list. Through hearings and testimony, Congress should establish which terrorist organizations merit the authorization of continuing military force.[189]

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repeal the AUMF because it "has been used to justify . . . an ever-growing and indefinite pursuit of an ill-defined enemy abroad." David Swanson, *Congresswoman Lee Introduces Bill to Repeal AUMF*, FIREDOGLAKE (Sept. 6, 2011, 7:23 PM), http://my.firedoglake.com /davidswanson/2011/09/06/congresswoman-lee-introduces-bill-to-repeal-aumf/.

[185] *See, e.g.*, Leah Farrall, *How al Qaeda Works: What the Organization's Subsidiaries Say About Its Strength*, FOREIGN AFF., Mar./Apr. 2011, at 128, 134 ("[S]ince fleeing Afghanistan to Pakistan's tribal areas in late 2001, al Qaeda has founded a regional branch in the Arabian Peninsula and acquired franchises in Iraq and the Maghreb.").

[186] *See supra* notes 86–91 and accompanying text.

[187] *See* Michael J. Ellis, Comment, *Disaggregating Legal Strategies in the War on Terror*, 121 YALE L.J. 237, 245 (2011) ("If, as counterinsurgency theory suggests, defeating Al Qaeda requires separating local grievances from global ideology, our legal strategies should treat Al Qaeda and other organizations with global goals differently from local insurgents with limited goals.").

[188] The extreme outer limit of defining the enemy would thus be the State Department's "Foreign Terrorist Organizations" list. Dep't of State, http://www.state.gov/s/ct/rls/other/ des/123085.htm. Authorizing military force against groups such as the Irish Republican Army would seem to not be necessary, and would in fact send potentially counterproductive diplomatic signals.

[189] Disentangling the use of military force and "official" terrorist groups would support efforts to distinguish the varied threats against the United States. Even if it were possible, not all terrorist groups are best combated through military force. Indeed, the purpose of classifying "official" terrorist groups is principally correlated to targeting sanctions and terrorism-related criminal laws, such as the "Material Support" statute. *See* 18 U.S.C. §

Recent legislation addressing the Lord's Resistance Army—which operates across South Sudan, the Central African Republic, the Democratic Republic of the Congo, and northern Uganda[190]—could serve as a model. Although not an explicit authorization for the use of military force, Congress specifically legislated to "eliminate the threat posed by the Lord's Resistance Army."[191] Congress could undoubtedly direct similar attention to other terrorist organizations.[192]

"Persons" should be addressed in a similar fashion—on a selective and continuing basis by Congress. It will be a rare case in which an individual who has no affiliation with a larger terrorist group poses a significant threat to U.S. national security, but current policy

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2339B(a)(1) (Suppl. V 2006) ("Whoever knowingly provides material support or resources to a foreign terrorist organization . . . shall be fined under this title or imprisoned not more than 15 years, or both . . . ."). *But see* Ellis, *supra* note 187, at 247 (arguing that "the material support statute [should] criminalize support only for organizations that could be targeted with military force").

[190] For a thorough recent analysis of the LRA, see INTERNATIONAL CRISIS GROUP, THE LORD'S RESISTANCE ARMY: END GAME?, AFRICA REP. NO. 182–17, Nov. 2011, *available at* http://www.crisisgroup.org/en/regions/africa/horn-of-africa/uganda/182-the-lords-resistance-army-end-game.aspx.

[191] Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, Pub. L. No. 111-172, 124 Stat. 1209 (2010). In the act, Congress declared that U.S. policy is "to work with regional governments toward a comprehensive and lasting resolution to the conflict in northern Uganda [by] providing political, economic, military, and intelligence support for viable multilateral efforts to protect civilians from the Lord's Resistance Army, to apprehend or remove Joseph Kony and his top commanders from the battlefield in the continued absence of a negotiated solution, and to disarm and demobilize the remaining Lord's Resistance Army fighters." *Id.* § 3. *See also* ALEXIS ARIEFF & LAUREN PLOCH, CONG. RESEARCH SERV., R42094, THE LORD'S RESISTANCE ARMY: THE U.S. RESPONSE (2012), *available at* http://www.fas.org/sgp/crs/row/R42094.pdf.

[192] Although an example of Congressional attention to a single armed group, President Obama's subsequent deployment of approximately 100 military advisors to the region in 2011 to "provide assistance to regional forces that are working toward the removal of Joseph Kony from the battlefield also demonstrates the staying power of unilateral Executive initiative vis-à-vis Congress in military operations." White House Press Release, Letter from the President, to the Speaker of the House of Representatives and the President Pro Tempore of the Senate Regarding the Lord's Resistance Army (Oct. 14, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/10/14/letter-president-speaker-house-representatives-and-president-pro-tempore, also demonstrates the staying power of unilateral Executive initiative vis-à-vis Congress in military operations. Indeed, although the President authorized the deployment "[i]n furtherance of the Congress's stated policy," he also did so "pursuant to [his] constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive." *Id.* I thank Major Andrew Gillman for suggesting this point.

nevertheless shows that individual designations are feasible.[193] A policy of selective individual designation would also allow policy flexibility in the event that the President wishes to separate a dangerous individual from a more benign organization.[194]

"Nations" should not be included in the new AUMF. If another attack against the United States or its allies calls for an operation of a scale similar to that in Afghanistan in October of 2001, Congress should authorize that military action specifically. An armed conflict with a country poses far too many risks for the Executive Branch to do so alone.

Within the specific context of the target of the AUMF, Congress should address the process due to U.S. citizens under the Constitution. It is not clear that U.S. citizens fighting in an armed conflict against the United States need to be provided heightened process—judicial or executive or other—before targeting decisions are made, but Congress should nonetheless publicly describe the process that will be followed when a U.S. citizen is involved.[195] In a democracy such decisions are

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[193] Press Release, U.S. Dep't of State, Office of the Coordinator for Counterterrorism, Individuals and Entities Designated by the State Department Under E.O. 13224 (Jan. 26, 2012), *available at* http://www.state.gov/j/ct/rls/other/des/143210.htm (last visited June 24, 2012).

[194] *US Mulling to Designate Haqqani Network as FTO*, THE NATION, Sept. 28, 2011, http://nation.com.pk/pakistan-news-newspaper-daily-english-online/Politics/28-Sep-2011/US-reviewing-to-designate-Haqqani-network-as-FTO?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+pakistan-news-newspaper-daily-english-online%2FPolitics+%28The+Nation+%3A+Politics+News%29 ("The State Department has carried out a number of Executive Order 13224 designations that target, essentially the kingpins of the Haqqani Network financiers, leadership, as well as some of its most dangerous operatives.").

[195] Some have argued for the use of special procedures when the U.S. federal government targets U.S. citizens. *See, e.g.*, Lindsay Kwoka, Comment, *Trial by Sniper: The Legality of Targeted Killing in the War on Terror*, 14 U. PA. J. CONST. L. 301, 317 (2011) ("While such procedural protections as affording actual notice and providing the opportunity to rebut the assertions against him are not feasible in the context of targeted killing, a neutral decisionmaker should review the executive's decision to use targeted killing before a citizen can be killed,"). Other scholars have argued for similar procedures regardless of the targets' citizenship. *See* Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 447–48 (2009) ("A *Matthews*-style balancing suggests that to protect this right to life, the United States, too, has a duty to conduct intra-executive review of the use of deadly force through targeted killing."). A review procedure, however, need not be onerous or prohibitively intrusive or extensive. *See* Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 6, 2010, http://www.nytimes.com/2010/04/07/world/middleast/07/world/middleeast/07yemen.html (describing that Anwar al-Awlaki's inclusion on the CIA and military "lists of terrorists linked to Al Qaeda and its affiliates who are approved for

best made in the public eye.[196] The recent successful targeting of Anwar al-Awlaki, a U.S. citizen affiliated with Al Qaeda in the Arabian Peninsula and operating in Yemen, demonstrated the American public's considerable skepticism toward military operations against U.S. citizens.[197] Even if an increased level of process is ultimately decided upon, such a step would not overly burden the Executive Branch, as very few U.S. citizens are part of terrorist groups in armed conflict with the United States.[198]

Some would challenge the basis of public determinations about organizational targets, but there is no reason that such a step would impart any tactical advantage to a terrorist organization. Indeed, although legal definitions and targeting determinations are not as clear today, it seems logical that any terrorist organization targeted by the United States knows it is being targeted. Furthermore, providing a regular review process whereby the President proposes new groups for Congress to include, as well as a defined sunset clause on each authorization, would encourage those terrorist groups that have goals not actually at odds with U.S. national interests to make their intentions known.[199]

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capture or killing" "had to be approved by the National Security Council" because Awlaki is a U.S. citizen).

[196] *See* Benjamin McKelvey, Note, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 VAND. J. TRANSNAT'L L. 1353, 1358–59 (2011) ("[A]s the case of Anwar al-Aulaqi demonstrates, the legal standards for targeted killing are unknown, a chilling thought given the extraordinary power involved."); *see also supra* notes 137–140 and accompanying text.

[197] *See*, *e.g.*, Scott Shane, *U.S. Approval of Killing of Cleric Causes Unease*, N.Y. TIMES, May 13, 2010, http://www.nytimes.com/2010/05/14/world/14awlaki.html ("The Obama administration's decision to authorize the killing by the Central Intelligence Agency of a terrorism suspect who is an American citizen has set off a debate over the legal and political limits of drone missile strikes, a mainstay of the campaign against terrorism. The notion that the government can, in effect, execute one of its own citizens far from a combat zone, with no judicial process and based on secret intelligence, makes some legal authorities deeply uneasy.")

[198] One possible solution would be to require specific presidential certification of the citizen's status and the exhaustion of all non-lethal means before a U.S. citizen could be targeted. The 2002 Authorization for Use of Military Force against Iraq included such a certification requirement, albeit in a different context. Authorization for Use of Military Force Against Iraq Resolution of 2002, § 3(b), Pub. L. No. 107-243, 116 Stat. 1498.

[199] *See* Press Release, U.S. Dep't of State, Office of the Coordinator for Counterterrorism, Foreign Terrorist Organizations (Jan. 27, 2012) [hereinafter U.S. Dep't of State], *available at* http://www.state.gov/j/ct/rls/other/des/123085.htm (last visited June 24, 2012) ("FTO designations play a critical role in our fight against terrorism and are an effective means of . . . pressuring groups to get out of the terrorism business."). Indeed,

2. Method

Any approach to reauthorizing the AUMF should identify which specific "incidents of warfare" it contemplates.[200] Uncertainty regarding the extent of authority diminishes the potential for military success; those charged with fighting the global armed conflict against terrorist groups should know precisely what is authorized. Moreover, policy clarity is a virtue in a democracy, allowing the citizenry to more effectively monitor the actions of its military. The reauthorized AUMF should specifically include authorization for both detention and the lethal use of force, as well as clear standards for both. These standards, discussing, for example, how targeting decisions are made, should be public and describe the differences in their application to U.S. citizens and non-citizens.[201] The government need not disclose the specific weaponry employed or tactics used, but it should indicate when lethal force will be used against a threat that is not strictly imminent. To monitor potential abuses, internal executive branch oversight should be intensified, empowering either an independent board or inspector general to investigate abuses of targeting authority. In the detention context, meaningful review should be available for those detained; the word of the Executive Branch alone should not be sufficient to render an individual detainable.

Arguments will likely be made that disclosing targeting methods will empower terrorists. It is unlikely, however, that those targeted today are unaware of that fact. Clarity would also be a virtue, allowing those "on the fence" to distance themselves from targetable terrorist groups. Moreover, such a tactical disadvantage, assuming it is borne out in reality, is a cost that should be accepted when the State targets its own citizens.

"[u]ntil recently the [Immigration and Nationality Act] provided that FTOs must be redesignated every 2 years or the designation would lapse." *Id.*

[200] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion).

[201] *See Ten Years After the 2001 AUMF: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror Before the H. Comm. on Armed Servs.*, 112th Cong. 3 (2011) (statement of Michael Mukasey, former Attorney General) ("It should be amended to make clear to all involved, from troops to lawyers to judges—and to our enemies—that detention of suspected terrorists is authorized, and to set forth standards for detaining and/or killing terrorists, even those who are affiliated with groups other than those directly responsible for the 9/11 attacks.").

3. Time

Because of the expansion in the definition of the enemy, it is prudent for Congress to exercise more demanding oversight over a reauthorized global armed conflict against terrorists.[202] One way in which Congress could exercise such oversight is by superseding the original AUMF with a time-limited statute. With defined sunset clauses for the entire statute, or, alternatively, for the authorization of force against each specific group, the reauthorized AUMF would demand regular, but not continuous, attention from Congress.[203] Furthermore, if any aspect of the reauthorization proves unworkable or unwise, or if new developments challenge the existing authorization, Congress would be more likely to amend the statute, rather than encourage the Executive Branch to extrapolate vague legal standards from the statute's text. Moreover, time limits increase in importance when the United States is engaged in a conflict that some have considered has no logical end,[204] and employing lethal force is arguably the most important act the State undertakes. Therefore, "requir[ing] Congress and the President to re-ante every so often" is a minimally intrusive oversight mechanism given the important interests involved.[205]

4. Place

A reauthorized AUMF should clarify that the geographic reach of authorized military force against terrorists is global, but not domestic—it would reach every country but the United States itself.[206] A restriction to certain countries, however, is unnecessary and fraught with diplomatic landmines. Of course, the United States would not likely conduct kinetic

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[202] *See* Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L. 1, 22 (2010) ("[T]he diffuse geographic nature of most conflicts with terrorist groups generally makes traditional temporal concepts unlikely to apply effectively to such conflicts.").

[203] Similar previous "sunsets" were generally a length of two years. *See supra* note 199.

[204] *See* Stephen I. Vladeck, *Ludecke's Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT'L SECURITY L. & POL'Y 53, 53 (2006) ("The 'war' on terrorism may never end. At a minimum, it shows no sign of ending any time soon.").

[205] *See id.* at 95.

[206] *See* Blank, *supra* note 106, at 1174 ("If the United States is engaged in an armed conflict with terrorist groups—namely al-Qaeda—the question of where that conflict is taking place becomes critically important in assessing whether a particular person is being detained in connection with that armed conflict.").

counterterrorism operations "in friendly states permitting effective cooperation with authorities."[207] Explicitly excluding U.S. allies, such as Canada and the United Kingdom, from the authorization of military force, would beg the question of why other countries were not similarly included. This, in turn, would force the United States to publicly draw lines, needlessly alienating certain allies. Such a policy could also have the perverse effect of creating "safe harbors" in certain areas for terrorists.[208] Moreover, because authorizing any attack against a foreign government should be considered independently by Congress, the reauthorized statute would focus only on individuals and groups, who are highly mobile and not tied to any one country. Indeed, the basic geographic reach of a terrorist organization should be a factor considered by Congress in authorizing military force against it.

Additionally, a reauthorized AUMF should explicitly state that it provides authority for the use of force *abroad* only. This will provide a clear statement to preclude any future disagreements over domestic wiretapping, indefinite detention of those detained on U.S. soil, and the legality of using military force within the territory of the United States.[209] Moreover, such a restriction—or, more accurately, the absence of a provision affirmatively authorizing domestic military force—would merely accept the status quo created by the Posse Comitatus Act.[210] Under this framework, the military is not prevented from deploying domestically to repel an invasion or confront a major military attack, it is only prohibited from exercising law enforcement powers. Maintaining the exclusion of the military from acting in U.S. territory does not endanger U.S. national security, it merely acknowledges the dangers

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[207] Anderson, *Legal Geography of War*, *supra* note 110, at 11 (arguing that "no covert counterterrorism uses of force [are necessary] in London or Paris or Mumbai," but that "Yemen, Pakistan, Somalia, and so on" are "a different story").

[208] *See* Blank, *supra* note 202, at 26 ("Geographic limits designed to curtail the use of governmental military force thus effectively grant terrorists a safe haven and extend the conflict by enabling them to regroup and continue their attacks.").

[209] *See supra* Part III.A.4. For an analysis of the importance of "clear statements" with regard to the AUMF's geographic scope, see Steve Vladeck, *The Problematic NDAA: On Clear Statements and Non-Battlefield Detention*, LAWFARE, Dec. 13, 2011, http://www.lawfareblog.com/2011/12/the-problematic-ndaa-on-clear-statements-and-non-battlefield-detention/ ("The Second Circuit in *Padilla* specifically held that the [Non-Detention Act] requires 'clear' congressional authorization (which the AUMF didn't provide) for citizens picked up within the territorial United States.").

[210] *See supra* note 66.

inherent in such an authorization and the more than adequate strength of federal and state law enforcement.[211]

5. Purpose

The goal of all military action should be to prevent attacks against the United States and its allies. A reauthorized AUMF should not include a specific reference to the September 11 attacks, but rather should be oriented toward preventing future attacks on the United States by all terrorist organizations, especially by those organizations that are likely to attempt attacks on the United States. An explicit prospective approach would avoid conflation with the retributivist approach of criminal law and invocation of the internationally illegal concept of "reprisals."[212] Therefore, Congress should only authorize force against an organization if it has the intent and capability to target the United States or its allies.[213]

VI. Conclusion

The United States has been engaged in an armed conflict with Al Qaeda for over ten years, and arguably longer. Although this conflict began specifically focused on one relatively hierarchical organization concentrated in Afghanistan, it has since metastasized to include a plethora of groups and locations around the globe. These new "battlefields" in the "war on terrorism," however, do not correspond to the authorization currently employed to justify the United States' global efforts against terrorists. This discrepancy, already apparent to close

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[211] For a discussion of the near-military powers of state and federal non-military agencies, see New York Mayor Michael Bloomberg's recent comments on the New York Police Department. Tom Dworetzky, *Bloomberg's Army? The NYPD*, INT'L BUS. TIMES, Nov. 30, 2011, http://newyork.ibtimes.com/articles/258988/20111130/bloomberg-army-nypd.htm ("I have my own army in the NYPD, which is the seventh biggest army in the world.").

[212] *See supra* note 74 and accompanying text.

[213] *See* U.S. Dep't of State, *supra* note 199 ("When reviewing potential targets, [the Bureau of Counterterrorism in the State Department] looks not only at the actual terrorist attacks that a group has carried out, but also at whether the group has engaged in planning and preparations for possible future acts of terrorism or retains the capability and intent to carry out such acts."); *see also* Ellis, *supra* note 187, at 247–48 ("[I]nsisting that the targeted groups pose a threat to U.S. security—perhaps by requiring the executive branch to make formal findings to Congress—would reduce the chance that America unwittingly aggregates local guerillas with Al Qaeda's global insurgency.").

observers, will only increase as U.S. forces depart Afghanistan, leaving no geographic focal point for military counterterrorism operations. There are certainly other ways in which to justify continued operations against terrorist groups around the globe, but these alternative routes stretch our law to its limits and function as a poor exemplar for a nation that purports to serve as a model of global stability. Therefore, a new statutory basis for the armed conflict against global terrorism is required in order to avoid both intolerable policy choices and potentially harmful legal rationales. But in revisiting the statute passed in the uncertain days after September 11, 2001, Congress should not institutionalize an overly broad conception of this conflict. Careful attention to language and timing provisions, as well as ensuring a regular and continuous role for congressional review, can result in an appropriate statute that authorizes effective national security policy while maintaining the separation of powers and protecting individual liberties.

Of course, suggesting a reauthorization of the use of military force against terrorists around the globe to some degree necessarily entrenches the idea that all acts of terrorism against the United States should be viewed as elements of an "armed conflict," rather than as a law enforcement problem. This approach, however, is a realistic reflection of the current prevailing winds of U.S. national security policy, at least in the near term. Today, the threat posed by Al Qaeda is principally military in nature. The threat posed by other terrorists and terrorist groups, however, is evolving in myriad ways – in form, degree, and source – and the United States should be prepared to adapt its policies to respond.[214]

In the long term, terrorism may continue as a military threat, or revert back to a criminal issue. Therefore, maintaining flexibility in U.S. policy towards terrorists—principally by creating time limits on military force authorizations—appropriately acknowledges that the threat of terrorism is a fickle enemy that is constantly evolving. Jihadist terrorism only emerged as a major threat to the United States after 9/11, and a glance at history suggests that a new threat will—sooner or later—take its place.[215] When the threat of terrorism evolves again, as it is likely to do,

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[214] *See* WITTES, *supra* note 36, at 47 (noting that the conflict with Al Qaeda is "a new kind of war" because "[t]he conflict has involved military force at times," but "[i]t has also involved civilian law enforcement," "covert actions," "immigration authorities and banking regulations," "training and liaison with foreign police and intelligence organizations," "and countless other expressions of federal power").

[215] Indeed, many thought that the principal terrorist threat to the United States throughout much of the Twentieth Century was that posed by Puerto Rican nationalists, a fact often

the U.S. Government should respond accordingly, rather than relying on the previous war's rationale. Although terrorism should be combated in whatever form it takes, entrenching one approach to countering terrorism should be avoided at all costs.

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forgotten in today's national security debates. *See* JAMES M. POLAND, UNDERSTANDING TERRORISM: GROUPS, STRATEGIES, AND RESPONSES 72 (1988) ("The most serious terrorist attacks in the United States have historically been groups seeking Puerto Rican independence."). In 2006, the Department of Justice did not include jihadist terrorism among the major "[c]urrent domestic terrorism threats," instead listing "animal rights extremists, eco-terrorists, anarchists, anti-government extremists such as 'sovereign citizens' and unauthorized militias, Black separatists, White supremacists, and anti-abortion extremists." U.S. DEP'T OF JUSTICE, COUNTERTERRORISM WHITE PAPER 59 (2006), *available at* http://trac.syr.edu/tracereports/terrorism/169/include/terrorism.white paper.pdf. These examples, of course, are of domestic terrorism, which differs significantly from that which the AUMF targets. Nonetheless, the point remains: threats from terrorism will always change.

NOT ALL CIVILIANS ARE CREATED EQUAL:

THE PRINCIPLE OF DISTINCTION, THE QUESTION OF DIRECT PARTICIPATION IN HOSTILITIES AND EVOLVING RESTRAINTS ON THE USE OF FORCE IN WARFARE

TREVOR A. KECK*

I. Introduction

Warfare is fundamentally different today than in 1949 when states convened to draft and sign the four Geneva Conventions, which provided the foundation for the laws of war or international humanitarian law (IHL). After two horrific World Wars, inter-state conflict was the fundamental challenge to global peace and security at the time. Accordingly, the post-war global governance structure and the laws of war were primarily developed to regulate state-to-state war.

Today, states primarily fight wars against non-state armed groups (NSAG). These are often referred to as "asymmetric conflicts," due to the fact that the state often enjoys superior technology, training and manpower. To stand a chance against states with superior militaries, NSAGs often violate IHL, and more specifically the principle of distinction, by refusing to distinguish themselves from the civilian population. Due to the asymmetry of power, blending in with noncombatants is often a critical part of the NSAG's strategy in places such as Afghanistan, Iraq, the Palestinian territories, and Somalia.

The challenge of distinguishing combatants from noncombatants in contemporary wars necessitates fresh thinking about how to protect civilians while providing armed forces clear targeting guidelines. More specifically, the nature of contemporary warfare requires developing an international consensus on the scope of activities which constitute "direct participation in hostilities," or for which acts civilians lose their protected status. Indeed, uniform guidelines establishing when and how

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individuals lose immunity in war are necessary to provide militaries clear targeting guidelines while safeguarding protections for noncombatants.

This article seeks to addresses this challenge. Specifically, it will attempt to answer the following questions: How should armed forces discriminate between combatants and non-combatants in conflicts during which insurgents refuse to distinguish themselves from the civilian population? What criteria are to be used to determine that an individual is directly participating in hostilities (DPH), and thus not protected from direct attack? Finally, given the challenge of adhering to the principle of distinction in asymmetric conflicts, should restraints on the use of force be more restrictive in these conflicts than in conventional warfare?

This article will be divided into three parts. First, it will review the legal obligation to distinguish between combatants and noncombatants in war, the historical evolution of this principle, and the challenge state militaries face in observing this norm in asymmetric conflicts. The second section will analyze criteria developed by the International Committee of the Red Cross (ICRC) for distinguishing between combatants, civilians participating in hostilities and civilians protected against direct attack. Such criteria were developed for and published in the ICRC's 2009 report entitled, "Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law."

The final section analyzes restraints on the use of force during asymmetric conflicts between sophisticated state militaries and poorly trained and equipped non-state actors. In doing so, this article will demonstrate the logic of more restrictive restraints on lethal force during irregular warfare. In particular, this article contends that international human rights law should control lethal force during occupations or non-international armed conflicts where a party controls significant territory. Such a change would require that security forces exhaust non-lethal measures before resorting to deadly force, which could result in fewer noncombatant casualties at little additional risk to security forces.

II. The Problem of Distinction in 21st Century Warfare

A. The Historical Evolution of the Distinction Principle

The distinction principle is arguably the simplest, albeit most fundamental rule of IHL. According to the rule, parties to an armed

conflict must always "distinguish between the civilian population and combatants and between civilian objects and military objectives."[1] As the International Criminal Tribunal for Former Yugoslavia recently affirmed, intentionally violating this principle is never justified.[2] Indeed, knowingly directing an attack against noncombatants is a manifest violation of IHL.

The obligation to distinguish combatants from noncombatants has historically been recognized across cultures and nations.[3] As early as the 5th century B.C., Sun Tzu, the prominent Chinese military general, wrote "treat the captives well and care for them…generally in war the best policy is to take a state intact; to ruin it is inferior to this."[4] By the 2nd century B.C., Egypt and Sumeria had devised a complex set of rules governing the resort to and conduct of war, which included the obligation to distinguish combatants from noncombatants. [5] Around the same time, the Hindu civilization produced the *Book of Manu,* prescribing a set of rules similar to the Hague regulations of 1907, which included a prohibition on attacking civilians.[6] Thus, the distinction principle was recognized long before it was codified in 20th century treaties.

While a long recognized principle, compliance has been imperfect at best. As law of war scholar Gary Solis highlights, war has often been "waged not only against states and their armies, but against the

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[1] The distinction principle is codified in the Geneva Conventions and a norm of customary international law. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, June 8, 1977, U.N. Doc. A/32/144, annex I [hereinafter Protocol I]; International Committee of the Red Cross, Customary International Humanitarian Law database r. 1, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule1 [hereinafter ICRC Customary IHL] (last visited June 1, 2012) (explaining that, in the view of the ICRC, the obligation to distinguish between combatants and noncombatants in military operations is a rule of binding customary international law).

[2] Prosecutor v. Galic, Case No. IT-98-29-T, Trial Chamber Judgment and Opinion, ¶ 44 (Dec. 5, 2003).

[3] For a review of the origins of the laws of war, see 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 4 (Leon Friedman ed., 1972) [hereinafter THE LAW OF WAR: A DOCUMENTARY HISTORY].

[4] SUN TZU, THE ART OF WAR 76 (1963).

[5] JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 7 – 8 (1985).

[6] Chris af Jochnick & Roger Normand, *The Legitimization of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L. J. 49, 60 (1994).

inhabitants of the enemy states, as well."[7] Indeed, the history of warfare is full of tales of unspeakable barbarism, atrocities and massacres against combatants and civilians alike. Empires expanded through military conquest, involving pillage, rape, murder and often the wholesale destruction of nations and civilizations. The development of international law to govern armed conflicts was eventually seen as necessary to restrain mankind's worst impulses.

Absent any means of holding militaries accountable for intentionally killing civilians, pragmatism best explains if and why civilians were protected from direct attack. As Leon Friedman highlights, civilian populations were spared because they could "work for, pay tribute to, or be conscripted into, the victorious army."[8] Further, "unrestrained warfare would jeopardize reconciliation and make later trade and peaceful intercourse impossible."[9] Thus, "protections granted to noncombatants and civilians grew generally out of a utilitarian view of warfare and not from an ideological desire to preserve them from the horrors of war."[10]

Indeed, as Eric Talbot Jensen highlights, Sun Tzu's concerns for protecting "captives and enemy property and persons was not born from a humanitarian desire to preserve his adversary but as part of the overall goal to conquer the enemy."[11] Therefore, when marauding armies adhered to the principle of distinction, they most likely did so for pragmatic, rather than moral reasons. Empires needed human capital to grow their power and influence, and thus there was no reason to kill civilians, unless it was deemed necessary. Rather, there was a compelling reason to leave noncombatants unharmed.

The first discussion of the principle of distinction from a humanitarian perspective may be found in the writing of Francisco de Vitoria, one of the first western Law of War theorists. Vitoria noted that the "deliberate slaughter of the innocent is never lawful in itself…the basis of a just war is wrong done. But wrong is not done by an innocent

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[7] GARY SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 251 (2010).
[8] THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 3, at 4.
[9] *Id.*
[10] Eric Talbot Jensen, *The ICJ's Uganda Wall: A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 DEN. J. INT'L L. & POL'Y 2, 245 (2008).
[11] *Id.*

person."[12] Nevertheless, Vitoria supported an exception to the rule—military necessity. According to Vitoria, states could lawfully target innocent civilians if necessary to secure military victory.[13] Indeed, the notion that military necessity could override the obligation to distinguish between combatant and civilian largely remained an acceptable viewpoint until the drafting of the Geneva Conventions of 1949.[14]

Hugo Grotius, who is considered the father of international law, qualified Vitoria's arguments. According to Grotius, nations "must take care, so far as is possible, to prevent the death of innocent civilians, even by accident."[15] Further, Grotius noted, "it is the bidding of mercy, if not of justice, that, except for reasons that are weighty and will affect the safety of many, no action should be attempted whereby innocent persons may be threatened with destruction."[16] Thus, the modern day conception of proportionality and the requirement that states take precautions to prevent civilian deaths are found in the writing of Grotius.

Until the 19th century, the laws of war were only codified in bilateral treaties and reflected in state practice. Developments in new military technology, such as explosive bullets, spurred new interest in codifying a uniform set of protections for combatants in multilateral treaties. After Henry Dunant's gruesome account of the Battle of Solferino sent shockwaves through Europe, Western nations convened in Geneva to codify protections for combatants. While limited in scope to specific weapons, such as exploding bullets, agreements signed by the European powers gave rise to the notion of the prohibition against unnecessary suffering.[17]

Just a year prior, Francis Lieber, a general in charge of Union forces during the U.S. Civil War, had been commissioned to propose a code of regulations governing armed conflict for U.S soldiers.[18] The Lieber code, which was complete, humane, and comprehensible, quickly became an authoritative text, impacting military codes far beyond U.S. borders.

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[12] Francisco de Vitoria, *On the Indies and the Law of War* (1532), *in* THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 3, at 13.
[13] *Id*.
[14] Jochnick & Normand, *supra* note 6, at 64.
[15] Hugo Grotius, *The Law of War and Peace* bk. III, ch. XI, r. viii (1625), *in* THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 3, at 87.
[16] *Id.*
[17] THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 3, at 151.
[18] SOLIS, *supra* note 7, at 41.

Many European nations adopted instructions based on the Code, and it served as the basis for manuals for the American Army and The Hague Conventions of 1899 and 1907.[19]

Indeed, the Lieber Code was the first comprehensive set of laws governing war. The principle of distinction is codified in Article 22, which provides: "[Civilization requires] the distinction between the private individual belonging to a hostile country…and its men in arms . . . [T]he unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit."[20] While the distinction principle had long been recognized, the Lieber Code served as the basis for institutionalizing the protection of noncombatants.

But, progressive national military regulations and the Hague Conventions of 1899 and 1907 proved to be no match for total war. While the major military powers had been keen to sign onto agreements codifying restraints and limitations in war, the conventional view, as reflected by state practice in both World Wars, was that military necessity could trump the law.[21] Prussia had explicitly enumerated this idea in its 1870 military doctrine known as *Kriegraison.* One of the most influential and alarming passages of the Prussian doctrine provides:

> A war conducted with energy cannot be directed merely against the combatant forces of the Enemy State and positions they occupy, but it will and must in like manner seek to destroy the total intellectual and material resources of the latter. Humanitarian claims, such as the protection of men and their goals, can only be taken into consideration in so far as the nature and object of war permit.[22]

In short, *Kriegraison* granted German belligerents the right to do whatever they believed was necessary to secure military victory. While the allied military powers officially rejected the notion that necessity could trump the law, the U.S. firebombing of civilian populated areas, as well as the use of nuclear weapons against Japan clearly reflected an

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[19] THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 3, at 152–54.
[20] SOLIS, *supra* note 7, at 43–44.
[21] Jochnick & Normand, *supra* note 6, at 64.
[22] THE WAR BOOK OF THE GERMAN GENERAL STAFF 68 (J.H. Morgan trans., 1915), *in* Jochnick & Normand, *supra* note 6, at 64.

acceptance of *Kriegraison*. Indeed, while the Axis powers most frequently and systemically violated the law during WWII, both sides were responsible for significant indiscriminate attacks against civilian populations.

The horrors of two world wars generated significant support for strengthening the laws of war and improving enforcement by imposing individual criminal liability for violations. For the first time in history, an absolute prohibition against directly attacking civilians was codified in a binding multilateral treaty. Article 27 of the Fourth Geneva Convention stipulates that "protected persons are entitled, in all circumstances, to respect for their persons," which "shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof."[23] Further, Article 3 common to all four Geneva Conventions—which governs non-international conflicts—establishes that "persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely."[24] This article additionally precludes "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture."[25]

In 1977, state parties explicitly included the requirement of distinction in Additional Protocol I to the Geneva Conventions. Article 48 of Additional Protocol I to the Geneva Conventions, which covers international conflicts, provides:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[26]

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[23] Geneva Convention Relative to the Protection of Civilians in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[24] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; GC IV, *supra* note 23, art. 3.

[25] *Id.*

[26] Protocol I, *supra* note 1, art. 48.

A similar provision was included in Additional Protocol II to the Geneva Conventions, which covers non-international armed conflicts. Article 13(2) of AP II provides:

> The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.[27]

Today, the principle of distinction is regarded as the "most significant battlefield concept a combatant must observe."[28]

B. The Changing Nature of Warfare

While extremely simple on paper, adhering to the principle of distinction has become increasingly difficult in contemporary warfare for several reasons. First, since the end of the Cold War, intra-state conflicts have become the predominant form of warfare.[29] While the overall frequency of armed conflict has declined markedly since the end of the Cold War, the nature of conflict has largely changed from state-to-state military engagements to intra-state warfare.[30]

Increasingly, states fight against armed groups empowered by the political, economic and technological changes of the past twenty years.[31] Improvements in transport technology, the information revolution, and the deregulation of the international economy have enabled NSAGs to

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[27] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(2), June 8, 1977, U.N. Doc. A/32/144, Annex I [hereinafter Protocol II].

[28] SOLIS, *supra* note 7, at 251.

[29] For an analysis of global trends in armed conflict since 1946, see Monty G. Marshall & Benjamin R. Cole, *Global Report 2009: Conflict, Governance and State Fragility*, CTR. FOR SYSTEMIC PEACE & CTR. FOR GLOBAL POL'Y, December 7, 2009, http://www.systemicpeace.org/Global%20Report%202009.pdf (last visited December 5, 2011).

[30] *See* Lotta Harbom & Peter Wallensteen, *Armed Conflict and Its International Dimensions, 1946–2004*, 42 J. PEACE RES. 5 (2005); *see also generally* HUM. SECURITY CENTRE, HUMAN SECURITY REPORT 2005: WAR AND PEACE IN THE 21ST CENTURY (2005), http://www.hsrgroup.org/human-security-reports/2005/text.aspx (last visited Dec. 5, 2011) [hereinafter HUM. SECURITY REPORT 2005].

[31] Richard H. Schultz, Douglas Farah & Itamara V. Lochard, *Armed Groups: A Tier-One Security Priority*, INSS OCCASIONAL PAPER 57, USAF INST. FOR NAT'L SECURITY STUD. 31–34 (2004).

move, communicate and transfer capital faster and more easily.[32] As the forces of globalization have empowered non-state actors, power inside states has become more diffuse. In places like Afghanistan, the Democratic Republic of the Congo, Mexico, and Somalia, NSAGs control parts of the country, and challenge the government's monopoly on violence. As a result of the changes wrought by globalization, the threat of states going to war over territorial claims has receded. Today, security threats emanating from within poorly functioning states constitute the primary threat to international peace and security.[33]

While NSAGs are more powerful than in the past, superior military technology still provides conventional militaries a significant edge. To survive in an asymmetric war against the United States, the European Powers, or Israel, NSAGs often blend in with the civilian population, and force powerful states to fight a war of attrition. Former Deputy Supreme Allied Commander of Europe, Rupert Smith, calls this new form of combat, "War Amongst the People."[34]

"War Amongst the People" may be characterized by six broad trends. First, states fight for fundamentally different ends than in conventional military engagements. While states traditionally went to war to defeat an adversary, states now fight to secure a political outcome or guarantee security in the aftermath of a civil war.[35] Second, states fight amongst the population, rather than on an isolated battlefield away from non-combatants.[36] Third, western militaries are engaging in wars which "tend to be timeless, even unending."[37] Indeed, wars are no longer characterized by decisive battlefield victories resulting in a clear victor.

Fourth, Smith suggests that western militaries "fight to preserve the force rather than risking all to gain the objective."[38] During the 1990's, force protection became the mantra due to debacles in the Balkans and Eastern Africa, involving American and European soldiers dying while

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[32] For analysis of how globalization has empowered non-state armed groups, see John Mackinlay, *Globalization and Insurgency*, ADELPHI PAPERS No. 352, Nov. 2002, at 17–18.
[33] For a broad analysis of changes in the nature of warfare over the last century, see KALEVI J. HOLSTI, THE STATE, WAR AND THE STATE OF WAR 15 (1996).
[34] RUPERT SMITH, THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD (2006).
[35] *Id.* at 271.
[36] *Id.* at 280.
[37] *Id.*
[38] *Id.*

carrying out humanitarian missions. As a result, Western states sought to limit their military engagement in missions not deemed imperative to security interests. NATO's air intervention in Kosovo, which was conducted from 10,000 feet to avoid any casualties, is a classic example of this phenomenon. However, it is becoming increasingly difficult, if not impossible, to reconcile such a high standard of force protection with the political objectives in 21st century conflicts. The new counterinsurgency (COIN) doctrine developed by the United States accepts this conclusion.[39] COIN requires that U.S. soldiers use less force as a means to prevent civilian casualties, a fundamental change, which is both counter-intuitive for the soldier and essential to ensuring U.S. objectives in Afghanistan. While force protection is still important, the U.S. military has seemingly accepted the need for greater risk to its soldiers to secure political objectives in counter-insurgency warfare.

Fifth, Smith contends, western militaries are still largely organized to fight conventional wars, and thus unequipped for this new type of warfare.[40] Finally, Smith concludes, these new wars are predominately between states and NSAGs.[41] However, this does not preclude the involvement of states in supporting NSAGs. Even while the battles in places such as Afghanistan, southern Lebanon and the eastern Congo are principally between states and NSAGs, the direct or tacit support of foreign states is often critical to sustaining these NSAGs. Indeed, states often fight covertly through NSAGs in many contemporary wars.

The ascendancy of asymmetrical wars as the predominant form of conflict in the 21st century has negatively impacted noncombatants. Civilians are increasingly targeted and purposively killed in military operations. Most attacks on civilians are perpetrated by insurgents as part of a strategy not only to coerce and terrorize the civilian population, but also to undermine the state. As Sewall notes, insurgents "kill civilians to show that the government can't protect its own citizens. Insurgents' favorite tactic is to provoke overreaction from counterinsurgent forces, discrediting them before a vocal and increasingly international audience."[42]

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[39] For a discussion of the differences between conventional U.S. military doctrine and the U.S. COIN doctrine, see Sarah Sewall, *Introduction to the University of Chicago Press edition: A Radical Field Manual*, *in* U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MAN. at xxvii (2007).
[40] SMITH, *supra* note 34, at 280.
[41] *Id*.
[42] Sewall, *supra* note 39, at xxv.

Civilians increasingly bear the highest cost in post-cold war conflicts. In 1996, the United Nation's report on the "Impact of Armed Conflict on Children" noted that civilian fatalities in war climbed from 5 percent at the turn of the 20th century to more than 90 per cent during the wars of the 1990's.[43] More recent studies affirm this trend has continued during the wars of the 21st century. Emily Crawford highlights:

> [I]n WWI only 5 per cent of all victims were civilians, by the Korean War, the statistic rose to 60 per cent, with 70 per cent of all victims in the Vietnam War quantified as civilians or noncombatants. Most recently, the number of civilian deaths in the 2003 Iraq War has outnumbered combatant and insurgent deaths by a ratio of 20:1.[44]

Other researchers have claimed this alleged spike in civilian fatalities is an "urban myth."[45] Indeed, the 2005 Human Security Report claims that civilian battlefield deaths have sharply declined.[46] More recently, Adam Roberts has suggested "[t]he entire exercise of seeking universal civilian—military casualty ratios is flawed," due to the unreliability of field statistics.[47]

The position taken by Roberts is the most intellectually honest. But, even if cumulative civilian battlefield deaths have declined, it may still be possible that civilian fatalities relative to combatant deaths have increased, as the majority of scholars posit. Indeed, the contention is that noncombatants bear a higher burden of risk in asymmetric than in conventional warfare as a result of two phenomena. The first is not unique to asymmetric conflicts. As noted, civilians are purposively

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[43] U.N. Secretary General, *Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children, Note by the Secretary-General*, U.N. Doc. A/51/306, ¶ 24 (Aug. 26, 1996).

[44] EMILY CRAWFORD, THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT 15 (2010). Also affirming this trend is MARY KALDOR, NEW WARS AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA 100 (2001).

[45] Kristine Eck, *The 'Urban Myth' About Civilian War Deaths*, *in* HUM. SECURITY REPORT 2005, *supra* note 30, pt. II, at 75.

[46] HUM. SECURITY REPORT 2005, *supra* note 30, at 2–4, and 125–26; For another dissenting voice, see Erik Melander, Magnus Oberg & Jonathan Hall, *Are 'New Wars' More Atrocious? Battle Severity, Civilians Killed and Forced Migration Before and After the End of the Cold War*, 15 EUR. J. INT'L RELATIONS 3 (2009).

[47] Adam Roberts, *Lives and Statistics: Are 90% of War Victims Civilians?*, 52 SURVIVAL 3, 128 (2010).

attacked, often as part of a political strategy, in asymmetric or unconventional wars. Second, as insurgents blend in with the civilian population, counterinsurgents are faced with the complex task of distinguishing combatant from noncombatant.[48]

As Donald Snow highlights, insurgents "fight in different manners, are organized differently, and often do not wear military uniforms to help identify friend and foe."[49] To stand a chance against highly trained militaries with superior firepower, militant groups in Afghanistan, Iraq, Somalia and elsewhere often melt into the civilian noncombatant population, relying on stealth, secrecy and staying power. As a result, distinguishing combatant from noncombatant is considerably more difficult in many contemporary conflicts, presenting new challenges for protecting civilians from violence. As Eric Talbot Jensen notes, "increased civilian casualties will inevitably result because of the inability to discern who is 'targetable' and who is not."[50]

The problem is two-fold. First, irregular combatants do not distinguish themselves from civilians. Second, civilians increasingly *participate* in 21st century conflicts. In Afghanistan, for instance, "civilians" are often recruited to plant improvised electronic devices (IEDs) or provide intelligence support for armed groups. From the point of view of a U.S. or German soldier in Afghanistan, these are two sides of the same coin. During combat, soldiers may only target persons participating in hostile acts. Outside of hostilities, U.S. soldiers in Afghanistan may only target persons confirmed to be a member of al-Qaeda or the Taliban.

Membership in loosely organized, network oriented terrorist groups, however, is very different from membership in hierarchical militaries. In Afghanistan and Pakistan, the United States relies on "pattern of life" analysis to identify legitimate targets.[51] Combatants are identified through their prior participation in hostilities and interactions with

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[48] For an excellent analysis of these trends, see Andreas Wenger & Simon J. A. Mason, *The Civilianization of Armed Conflict: Trends and Implications*, 90 INT'L. REV. OF THE RED CROSS 872, 845–50 (2008).
[49] DONALD SNOW, UNCIVIL WARS 110 (1996).
[50] Jensen, *supra* note 10, at 243.
[51] For an explanation of how "pattern of life" analysis is used to support U.S. military operations, see Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Study on Targeted Killings*, UN Doc. A/HRC/14/24/Add. 6, ¶ 20 (2010).

known insurgents.[52] Indeed, in Afghanistan and other contemporary conflicts, it is rarely feasible for state militaries to distinguish combatant from civilian by relying on formal membership mechanisms. Adapting to changes in how armed groups organize themselves, state militaries resort to a function-based approach for targeting militants, whereby combatants are identified through their DPH.

The Geneva Conventions provide that civilians may not be directly targeted "unless and for such time as they take a direct part in hostilities."[53] What acts fall within the scope of DPH? There is no consensus on the answer to this question. Yet, protecting civilians and ensuring compliance with IHL in contemporary wars requires that the international community develop a consensus. As Wenger and Mason contend, clarifying the notion of "'direct participation in hostilities' is a necessary part of the process of adapting to the changing nature of armed conflict."[54]

III. Direct Participation in Hostilities: Toward Uniform Guidance

A. Treaty Law

The notion of direct or active participation in hostilities was first referenced in Common Article 3 to the Fourth Geneva Convention of 1949, which provides that:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.[55]

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[52] For a discussion on how "pattern of life" analysis supports target identification for U.S. drone strikes, see Jane Meyer, *The Predator War*, NEW YORKER, October 29, 2009, http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer?printable=true (last visited Dec. 5, 2011).

[53] Protocol I, *supra* note 1, art. 51(3); Protocol II, *supra* note 27, art. 13(3); ICRC CUSTOMARY IHL, *supra* note 1, r. 6.

[54] Wenger & Mason, *supra* note 48, at 851.

[55] GC I–IV, *supra* note 24, art. 3.

Common Article 3 precludes direct attack against combatants *hors de combat* or civilians not taking part in hostilities. In other words, this provision affords immunity to those individuals not participating in the conduct of war. While codifying an important precept of warfare, Common Article 3 provides parties to the Geneva Conventions little guidance in determining what acts constitute active participation in hostilities.

Soon after the Geneva Conventions entered into force, non-international conflicts became more frequent, and "civilians" increasingly became participants in insurgencies and rebellions against their colonial occupiers. The increasing prevalence of civilian fighters prompted states to draft new law on the loss of civilian immunity. Provisions were included in the 1977 Additional Protocols to the Geneva Conventions, which provided that civilians are protected "unless and for such time as they take a direct part in hostilities."[56]

While adding a temporal dimension to the notion of DPH, the text in the Additional Protocols remains as unclear as it does in Common Article 3. However, the ICRC's *Commentary* related to this clause provides some helpful guidance. For instance, the ICRC stipulates that, "'[D]irect' participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target."[57] Therefore, an individual's actions must actually cause harm or be likely to do so in order for those actions to cross the threshold of "direct participation."

The ICRC also explains the temporal dimension, noting that "[o]nce he ceases to participate, the civilian regains his right to protection…and he may no longer be attacked."[58] In short, civilians regain immunity after they cease participating in the conduct of hostilities. Finally, the ICRC's *Commentary* stipulates that, "[t]here should be a clear distinction between direct participation in hostilities and participation in the war

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[56] Protocol I, *supra* note 1, art. 51(3); Protocol II, *supra* note 27, art. 13(3); ICRC CUSTOMARY IHL, *supra* note 1, r. 6.

[57] COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), ¶ 1942, at 619 (Pilloud, Claude; Sandoz, Yves; Swinarski, Christophe; Zimmerman, Bruno, eds., 1987) [hereinafter COMMENTARY TO PROTOCOL I].

[58] *Id.*

effort . . . Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless."[59] Thus, mere participation in the war effort does not rise to the level of "direct participation"; the individual's actions must be directly linked to the conduct of hostilities.

While the ICRC's *Commentary* to the 1977 Additional Protocols provides some guidance, the notion of DPH remains mired in ambiguity. Indeed, as the ICRC contends, "a clear and uniform definition of direct participation in hostilities has not been developed in state practice."[60] Before considering the ICRC's 2009 Guidance on DPH, the next section will briefly describe a number of factors, which will be used to evaluate the efficacy of the ICRC's "Interpretive Guidance on the Notion of Direct Participation in Hostilities."

B. Interpreting Direct Participation in Hostilities: Critical Factors

As noted, the international community is split over how to interpret DPH. As one scholar notes, the lack of a consensus definition of this concept has led to a "degree of latitude in interpretation" leaving international actors with very different agendas to decide what constitutes DPH.[61] In general, views on how to interpret this concept may be divided into two schools of thought: (1) a narrow approach that restricts the activities qualifying as DPH, thus ensuring immunity to more individuals; and (2) a liberal or expansive approach that characterizes a broader range of activities as DPH, thus granting legal protection to fewer individuals.

Professor Antonio Cassese favors a narrow approach, preserving civilian immunity for all except those directly engaged in hostile activities at the time.[62] Importantly, Cassese rejects the existence of unlawful combatants; any individual not wearing a uniform is a civilian

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[59] *Id.*
[60] JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: BOOK 1, 23 (2006).
[61] Dan Stigall, *The Thickest Grey: Assessing the Status of the Civilian Response Corps Under the Law of International Armed Conflict and the U.S. Approach to Targeting Civilians*, 25 AM. U. INT'L L. REV 885, 893–94 (2010).
[62] ANTONIO CASSESE, INTERNATIONAL LAW 420–23 (2005).

protected from attack unless and for such time as they are DPH.[63] Others advocating a narrow approach, such as the ICRC, believe that an individual can permanently lose immunity *vis-à-vis* continuous and DPH. However, the ICRC urges other sorts of restrictions, arguing that civilians only lose immunity when preparing for or engaging in "specific hostile acts" satisfying certain criteria.[64] Supporters of the restrictive approach contend that linking the loss of immunity to participation in specific hostile activities best reflects treaty IHL, and will result in greater protections for noncombatants. Advocates for restrictive approaches further contend that strictly limiting the scope of activities by which a civilian loses immunity is critical to preserving the distinction between a combatant, whom is never protected, and a civilian, whom is protected when not DPH. In other words, an expansive interpretation of DPH could lead to a blurring of the lines between these two distinct categories of individuals.

Professor Michael Schmitt makes the case for a more liberal interpretation. According to Schmitt, "[g]rey areas should be interpreted liberally, i.e in favor of finding direct participation."[65] A liberal or expansive interpretation of DPH would enable state armed forces to target a broader range of civilians and counter efforts by insurgents to abuse the law. According to Schmitt, civilians whose activities may not satisfy the restrictive DPH test but which remain "intricately involved in a conflict" should be treated like combatants.[66] Although lacking a coherent and official position on this concept, it is generally believed that the U.S. military adheres to a more liberal interpretation of directly participating in hostilities.[67] Indeed, U.S. drone attacks against drug lords and other criminal networks in Afghanistan, which are believed to be

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[63] *See* Antonio Cassese, *Expert Opinion Written at the Request of the Petitioners*, *in* The Public Committee Against Torture et al. v. The Government of Israel et al., *On Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law* 5–10 (2006), http://www.stoptorture.org.il/files/cassese.pdf (last visited Dec. 5, 2011).

[64] The ICRC's position will be discussed in more detail below.

[65] Michael N. Schmitt, '*Direct Participation in Hostilities' and the 21st Century Armed Conflict*, *in* CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSCHRIFT FÜR DIETER FLECK 509 (Horst Fischer et al. eds., 2004).

[66] *Id.*

[67] For a brief discussion on U.S. approaches to this concept, see Stigall, *supra* note 61, at 895–98.

financing the insurgency but not engaging directly in combat, is evidence of a more expansive interpretation of DPH.[68]

Professor Schmitt contends that a liberal approach would change the incentive structure. Under the conservative interpretation, the law affords immunity to civilians who do not directly participate in the conduct of hostilities, but whom aid insurgents or support the general war effort in less direct ways. As will be discussed below, the line between direct participation in the conduct of war and mere participation in the war effort is not always clear. According to Schmitt, the liberal approach would clarify the law, while creating "an incentive for civilians to remain as distant from the conflict as possible—in doing so they can better avoid being charged with participation in the conflict and are less liable to being directly targeted."[69] Schmitt and other proponents of a liberal or expansive approach also contend that one hostile act should result in a permanent loss of legal protection for the duration of the conflict,[70] a very expansive interpretation of the temporal element of DPH.

Both of these schools of thought emphasize tenets underpinning IHL. The more liberal or expansive approach emphasizes the principle of military *necessity*, whereas the narrow or restrictive interpretation of DPH places greater emphasis on the principle of *humanity*. IHL is essentially a compromise between these two principles,[71] and thus, any definition of DPH must strike an appropriate balance between them. A consensus definition should not emphasize military needs while shifting the burden of risk to civilians, or establish such a high threshold for the loss of immunity so as to jeopardize the ability of armed forces to secure their military goals. Any definition should also comport with the

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[68] The U.S. military has been known to place drug traffickers financing the insurgency in Afghanistan on the capture or kill list. The legality of this practice is circumspect as most legal experts do not consider such individuals combatants or to be directly participating in hostilities. For an analysis from a U.S. Judge Advocate contending this practice violates international humanitarian law, see Major Edward C. Linneweber, *To Target, or Not to Target: Why 'Tis Nobler to Thwart the Afghan Narcotics Trade with Nonlethal Means,* MIL. L. REV. 207, 155–202 (2011).

[69] *Id.*

[70] *See* Michael Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements,* 42 N.Y.U. J. INT'L L. & POL 697, 737–38 (2010); Kenneth Watkins, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 3, 692–93 (2010).

[71] *See* Christopher Greenwood, *Historical Developments and Legal Basis*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 32 (Dieter Fleck ed., 1999).

positivist sources of IHL, namely the Geneva Conventions and the Additional Protocols. The customary practice of states, especially those fighting counter-insurgency wars, should be considered as well. Lastly, any interpretation must take into consideration the principle of reciprocity, a central tenet underpinning IHL.[72] In sum, any guidance must appropriately balance military necessity against the obligation to protect noncombatants, be consistent with treaty and customary IHL, and be fairly applied to all parties.

C. The ICRC's Interpretive Guidance

In 2009, the ICRC published its "Interpretive Guidance," to clarify the meaning of DPH.[73] According to the ICRC, the report's findings are based on discussions with fifty top legal experts from militaries, governments, international organizations, NGOs and academia. However, the ICRC concedes that the report does not reflect a unanimous or majority opinion of the participating experts, but rather the ICRC's recommended guidance. While the ICRC's guidance has generated some criticism, it is still considered an authoritative analysis of some of the most pressing legal questions facing state militaries conducting counterinsurgency and counterterrorism operations.

This section will begin by reviewing how treaty IHL defines non - state armed groups and combatants before moving to an analysis and critique of the ICRC's recommendations for distinguishing combatants from noncombatants. While concluding that the ICRC's guidance on combatants is under-inclusive, and would impose tighter restrictions than is necessary under treaty IHL, an argument is made that the ICRC's *functional combatant approach* makes sense for states fighting counterinsurgency wars for policy reasons. Next, it will analyze the criteria put forth by the ICRC to determine whether a civilian's acts constitute DPH. After referring and responding to critiques of the ICRC's guidance from preeminent scholars,[74] and comparing the ICRC's

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[72] For an analysis of the relevance of the principle of reciprocity in contemporary warfare, see Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 2 (2009).

[73] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, INT'L COMM. OF THE RED CROSS, Jan. 7, 2009, http://www.icrc.org/eng/resources/documents/publication/p0990.htm (last visited Dec. 5, 2011).

[74] I will refer primarily to critiques made by Kenneth Watkins, Michael N. Schmitt, Bill Boothby, W. Hays Parks published in a forum on this topic. *Forum: The ICRC*

guidance with various U.S. approaches to DPH, the conclusion drawn is that the ICRC's guidance on this issue is the most logical and consistent with treaty IHL.

1. Combatants in the 21st Century

As discussed, today's insurgent groups are often loosely organized networks, rather than hierarchical groups with members that are easily distinguishable from the civilian population. Marc Sageman contends that Salafi jihadi groups are better understood as social movements due to their flat, linear organization.[75] Some argue that because al-Qaeda or other transnational terrorist groups are organized differently than a traditional hierarchical armed group, members of these groups are civilians.[76] Proponents of this argument highlight that certain conditions must be met for Additional Protocol II, which covers non-international armed conflicts, to apply. For instance, Article 1(1) stipulates that Additional Protocol II applies to armed conflicts:

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[77]

This provision seems to require that, to be considered an "organized armed group" under Additional Protocol II, a group must have a "responsible command," exercise control over territory, carry out "sustained and concerted military operations," and abide by its obligations under the protocol. Al-Qaeda and many other transnational terror groups simply don't meet these requirements. At best, transnational terrorist groups have a military command, but as Sassóli

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Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, 42 N.Y.U. J. INT'L L. & POL. 637–10 (2010).

[75] MARC SAGEMAN, UNDERSTANDING TERROR NETWORKS 137–74 (2004).

[76] Marco Sassóli, *Transnational Armed Groups and International Humanitarian Law*, PROGRAM ON HUM. POL'Y & CONFLICT RES. AT HARV. UNIV. 12 (2006), http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf (last visited June 1, 2012).

[77] Protocol II, *supra* note 27, art. 1(1).

highlights, the loose hierarchy and secrecy of many of these groups "mean that many operational decisions (e.g., means and methods to achieve a goal) may be left to those fighting in the field rather than to 'commanders'."[78]

But there is a fundamental problem with regarding members of transnational terror groups as civilians. As the ICRC contends, "this approach would seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction, most notably because it would create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population."[79] It would enable terrorists to enjoy civilian immunity status outside of hostilities, as civilians can only be targeted "for such time" as they participate in hostile acts. Further, it would be inconsistent with how state parties to the Additional Protocols conceived civilian immunity. As the ICRC's *Commentary* highlights, state parties rejected the "soldier by night and peaceful citizen by day" phenomenon.[80] Finally, granting groups or individuals regularly participating in the conduct of war immunity status outside of hostilities would only incentivize violating the law as a means to secure greater protection than afforded to combatants. Such an approach would turn IHL on its head, penalizing those who follow the law while rewarding those violating it.

a. The Continuous Combatant Function

To balance the integrity of the law against civilian protection concerns, the ICRC recommends that states distinguish combatants from noncombatants by examining the individual's functions or activities. According to the ICRC, individuals fulfilling a continuous combatant function, that is individuals continuously participating in hostile acts, should be regarded as combatants. Importantly, the ICRC contends, persons fulfilling a continuous combat function (CCF) must be distinguished "from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions."[81] The difference is slight albeit important. Individuals fulfilling a CCF are

[78] Sassóli, *supra* note 76, at 30.
[79] Melzer, *supra* note 73, at 28.
[80] Commentary to Protocol I, *supra* note 57, ¶ 1677, at 515.
[81] Melzer, *supra* note 73, at 33–34.

"recruited, trained, and equipped . . . to continuously and directly participate in hostilities" on behalf of an armed group, whereas civilians directly participating in hostilities on a spontaneous or sporadic basis are more akin to reservists, who retain civilian immunity status "until and for such time as they are called back to active duty."[82] In other words, individuals fulfilling a CCF are fully integrated into the armed group they serve, whereas civilians with a history of mere sporadic participation in hostilities are called upon for specific and time limited missions.

It is important to note that the ICRC's function based criteria is a departure from treaty IHL, which prescribes a formal *membership-based approach.* The Third Geneva Convention of 1949, which deals with prisoners of war, outlines criteria under which a person is considered a member of an armed group. Article 4(2) of the convention stipulates that members of an irregular armed group include persons under a responsible command; displaying a "fixed distinctive sign"; "carrying arms openly"; and conducting "operations in accordance with the laws and customs of war."[83] Additional Protocol I to the 1949 Geneva Conventions includes a less imposing test. Article 43(1) of the Protocol simply stipulates that irregular forces be responsive to a military command.[84]

As the ICRC highlights, membership in irregular armed groups is "rarely formalized through an act of integration other than taking up a certain function for the group; and it is not consistently expressed through uniforms, fixed distinctive signs, or identification cards."[85] Moreover, "the informal and clandestine structures of most organized armed groups and the elastic nature of membership render it particularly difficult to distinguish between a non-State party to the conflict and its armed forces."[86] As a result, the ICRC stipulates that an individual's participation in combat, and record of sustained and DPH, should remain the decisive criterion for membership in an organized armed group.[87]

Kenneth Watkins, Professor of International Law at the U.S. Naval War College and former participant in discussions led by the ICRC on

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[82] *Id.*
[83] GC III, *supra* note 24, art. 4(2).
[84] Protocol I, *supra* note 1, art. 43(1).
[85] Melzer, *supra* note 73, at 32–33.
[86] *Id.*
[87] *Id.*

this topic, is highly critical of the ICRC's function-based approach. Watkins believes the ICRC erred by adopting membership criteria that are different for irregular armed combatants.[88] Watkins contends that all armed forces—irrespective of whether they belong to a state party or a non-state actor—should be treated the same; all parties should adhere to the traditional membership based approach. According to Watkins, any person carrying out a function involving "combat, combat support and combat service support functions, carrying arms openly, exercising command over the armed group, carrying out planning related to the conduct of hostilities, or other activities indicative of membership" qualifies as a member subject to direct attack.[89] Importantly, Watkins believes that "the combat function is not a definitive determinant of whether a person is a member of an armed group, but rather one of a number of factors that can be taken into consideration. The key factor remains that they are a member of an organization under a command structure."[90]

While the literature on irregular armed groups often identifies differences between these groups and state militaries, Watkins points out that NSAGs still possess many of the attributes of a regular armed force, notably a military command.[91] Indeed, others highlight that while irregular combatants may not adhere to the same organizational model as state militaries, they still maintain an ability to conduct military operations requiring a certain degree of hierarchy, organization and coordination.[92] This conclusion has important implications for the task of identifying irregular combatants by the traditional membership based approach. While the task of identifying irregular combatants may be more difficult, Watkins argues that U.S. and allied soldiers adopted new methods in Iraq and Afghanistan, which were effective and consistent with the traditional membership based approach codified in the Geneva Conventions.[93]

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[88] Watkins, *supra* note 70, at 675 & 690.
[89] *Id,* at 691.
[90] *Id.*
[91] *Id,* at 675.
[92] *See* RICHARD H. SCHULTZ, JR. & ANDREA DEW, INSURGENTS, TERRORISTS AND MILITIAS: THE WARRIORS OF CONTEMPORARY CONFLICT 263 (2006).
[93] Watkins, *supra* note 70, at 679.

b. Analysis

The differences between the two positions are small and not manifest. Watkins believes those providing political support (e.g., combat service support) to insurgent groups can be targeted, whereas the ICRC adopts a more restrictive approach. For instance, according to Watkins, anyone under a command including "cooks and administrative personnel, can be targeted in the same manner as if that person was a member of regular State armed forces."[94] In contrast, the ICRC, considers those fulfilling "political, administrative or other non-combat functions" to be noncombatants entitled to protection.[95] Watkins' approach is most consistent with Additional Protocol I, which treats all persons under a military command of a party, except for medical and religious personnel, as combatants.[96] Indeed, the *Commentary* to Additional Protocol I also support the notion that individuals fulfilling political or noncombat support functions for a party to a conflict are members of its armed forces.[97] Yet, while the conventional approach is

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[94] *Id.* at 692.

[95] Melzer, *supra* note 73, at 33–34.

[96] According to the Geneva Conventions, anyone operating under the "command" of a party to the armed conflict is a member of that party, and may be directly attacked. *See* Protocol I, *supra* note 1, art. 43(1), which provides:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.

[97] *See* COMMENTARY TO PROTOCOL I, *supra* note 57, ¶ 1677, at 515. The Geneva Conventions affirm that an individual need not fulfill a combat function for a party to a conflict to be considered a member of its armed forces, and thus a combatant. The critical issue is, as Watkins suggests, that the individual be under the chain of command of a party to a conflict. The Commentary to Additional Protocol I further supports this notion:

> [I]n any army there are numerous important categories of soldiers whose foremost or normal task has little to do with firing weapons. These include auxiliary services, administrative services, the military legal service and others. Whether they actually engage in firing weapons is not important. They are entitled to do so, which does not apply to either medical or religious personnel, despite their status as members of the armed forces, or to civilians, as they are not members of the armed forces. All members of the armed forces are combatants, and only members of the armed forces are combatants.

Id.

most consistent with treaty IHL, problems arise when one considers the feasibility of implementing this approach in contemporary warfare.

Nils Melzer, legal advisor to the ICRC and chief author of the "Interpretive Guidance," contends that the conventional membership based approach is simply not workable in modern day conflicts.[98] Indeed, the practical challenge of distinguishing combatant from noncombatant in modern day conflicts arguably necessitated the ICRC's alternative CCF theory. While Watkins has suggested U.S. and allied forces can still distinguish combatant from noncombatant relying on the membership-based approach, that contention stands in sharp contrast to hundreds of journalistic accounts of attacks on innocent civilians in Iraq and Afghanistan, purportedly based on faulty intelligence. In a field- based study on targeted killings, for instance, U.N. Special Rapporteur Philip Alston confirms that air strikes and raids in Afghanistan resulting in the death of innocent civilians based on faulty intelligence occur far too often.[99] Thus, while Watkins is correct that the ICRC's approach is more restrictive than is required by treaty IHL, implementing the conventional membership based approach may simply be too challenging in contemporary "wars amongst the people." This conclusion has important implications. Even if not legally required, states engaged in counterinsurgencies should adopt the ICRC's guidance in these conflicts for policy reasons. As will be discussed, protecting civilians from violence is an important cornerstone of a successful counterinsurgency campaign.

In his critique, Watkins contends that the ICRC ignores the "lessons of history" regarding the importance of civilian aid to insurgent groups.[100] Indeed, aid and comfort from the civilian population can be critical to sustaining an insurgency, but the host country population can also turn against insurgents. As discussed above, "wars amongst the people" are very different from conventional conflicts, in that armed forces are fighting not to secure a military solution, but rather to consolidate their legitimacy. Securing political support from the civilian population becomes critical, if not necessary to achieving this goal. It logically follows that protecting civilians from violence is essential to

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[98] Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 3, 849 (2010).
[99] Alston, *supra* note 51, ¶¶ 82–83.
[100] Watkins, *supra* note 70, at 684.

defeating an insurgency.[101] This conclusion has important implications for strategy and battlefield tactics.

Indeed, the U.S. military rewrote its doctrine to respond to the changed military and political realities inherent in counterinsurgency warfare. While conventional U.S. military doctrine emphasizes the application of "overwhelming force," the new U.S. COIN doctrine requires that U.S. forces use force more discreetly to avoid civilian casualties, and places greater emphasis on the provision of governance, social services and capacity building. Sarah Sewall, former Assistant Secretary of Defense and director of Harvard's Carr Center on Human Rights Policy, explains the doctrinal difference and the importance of the civilian in the COIN doctrine:

> The field manual [COIN doctrine] directs U.S. forces to make securing the civilian, rather than destroying the enemy, their top priority. The civilian population is the center of gravity—the deciding factor in the struggle . . . . The real battle is for civilian support for, or acquiescence to, the counterinsurgents and host nation government. The population waits to be convinced. Who will help them more, hurt them less, stay the longest, earn their trust? U.S. forces and local authorities therefore must take the civilian perspective into account. Civilian protection becomes *part of* the counterinsurgent's mission, in fact, the most important part. In this context, killing the civilian is no longer just collateral damage . . . The fact or perception of civilian deaths at the hands of their nominal protectors can change popular attitudes from neutrality to anger and active opposition.[102]

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[101] Influential scholars and analysts on counterinsurgency theory all agree on this point. *See* James Dobbins, *Counterinsurgency in Afghanistan*, Testimony before the U.S. Senate Committee on Armed Services (Feb. 26, 2009), *available at* http://armed-services.senate.gov/statemnt/2009/February/Dobbins%2002-26-09.pdf; John Mackinlay & Alison Al–Baddawy, *Rethinking Counterinsurgency*, RAND COUNTERINSURGENCY STUDY: vol. 5, at 52–53 (2008), http://www.rand.org/pubs/monographs/2008/RAND_MG595.5.pdf; David Kilcullen, *Counterinsurgency Redux*, 48 SURVIVAL 4 (2006); Christopher J. Lamb & Martin Cinnamond, *Unity of Effort: Key to Success in Afghanistan*, STRATEGIC FORUM 248 (Oct. 2009), http://www.ndu.edu/inss/docUploaded/SF248_Lamb.pdf.

[102] Sewall, *supra* note 39, at xxv.

Indeed, civilian deaths and the perception of civilian deaths has led to considerable public criticism of the U.S. and allied forces in Iraq and Afghanistan. The difference between conventional war and wars amongst the people is that the perception of the parties to a conflict matters during irregular warfare. Moreover, winning the war turns on the armed forces' ability to provide security, governance and social services to the civilian population.

It follows that counter-insurgents should employ deadly force more discreetly. Attacks likely to result in significant civilian casualties should be avoided to engender and sustain the support of the civilian populace. The lack of clarity over who is a combatant and who is a civilian provides a compelling reason to adopt the ICRC's restrictive criteria, directing attacks outside of hostilities only against those individuals fulfilling a CCF, or those persons that are clearly and unambiguously combatants. Attacking individuals fulfilling a political or non-combatant function in an armed group, who may be perceived to be noncombatants, will likely lead to criticism, undermining public support for counterinsurgents and the host nation.

Importantly, adopting the ICRC's CCF test as a matter of policy in counter insurgencies would not preclude application of the membership model in conventional wars, or conflicts where the enemy distinguishes themselves from the civilian population. Moreover, such an approach would not protect or exclude senior members of armed groups fulfilling political or strategic functions, as planning and organizing rank and file insurgents would certainly qualify as DPH. Indeed, individuals engaged in planning and strategy for an armed group would most likely qualify as combatants under the CCF test.

Rather, the CCF test would only exclude so-called "members" of an armed group that perform political functions not qualifying as DPH. As will be discussed, activities constituting DPH are broader than simply firing a weapon and may include providing intelligence or tactical support to an armed group. As a result, it is very difficult to conceptualize an individual that would: (a) lose legal protection under the membership model; (b) while remaining protected by the CCF test; (c) performing a function that is strategically and tactically important to an armed group. Watkins notes that an armed group's cooks and administrative personnel are targetable under the membership model.[103]

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[103] Watkins, *supra* note 70, at 692.

Based on the criteria above, it is difficult to surmise how targeting the Taliban's "head chef" would have any significant tactical value.

D. What Do Acts Constitute Direct Participation in Hostilities?

As discussed, individuals regularly participating in hostilities are combatants, and thus are never protected against direct attack. However, individuals that participate in hostilities sporadically or on an irregular basis are civilians, protected from direct attack when not DPH. For what acts does an individual lose protection under the laws of war, and how should armed forces interpret the temporal element of DPH? This section will answer these questions.

The ICRC's Interpretive Guidance stipulates that the notion of DPH is linked to specific acts and not "a person's status, function, or affiliation."[104] As discussed, civilians that DPH lose their protection temporarily, while participating in the conduct of war. Thus, treaty IHL distinguishes between combatants, whom are never protected, and civilians, whom may lose and regain legal protection. While an important distinction, the international communities' acceptance of the ICRC's CCF theory would mean that guidelines for determining whether an individual is DPH apply to both categories of individuals. Determining whether a person is a combatant or civilian would turn on the frequency of the individual's participation in the conduct of war.

With that in mind, this section will analyze the threshold for which individuals lose legal protection against direct attack, and the duration for which a *civilian* participating in hostilities loses such protection. According to the ICRC, an act must meet three criteria to qualify as direct participation in hostilities: (i) threshold of harm; (ii) direct causation; and (iii) belligerent nexus.[105] This next section will first explain each criterion and then analyze the criteria as a whole.

1. Threshold of Harm

According to the ICRC, the threshold of harm requirement is reached by an act "likely to adversely affect the military operations or military

[104] Melzer, *supra* note 73, at 44.
[105] *Id.* at 46.

capacity of a party to an armed conflict, or alternatively to inflict death, injury, or destruction on persons or objects protected against direct attack."[106] Importantly, "the qualification of an act as direct participation does not require the materialization of harm . . . but merely the objective likelihood that the act will result in such harm."[107] Killing or wounding military personnel as well as acts resulting in damage to military objects would obviously qualify. But, the threshold of harm requirement could also be reached by acts, which may not immediately result in concrete losses, but adversely affect "the military operations or military capacity of a party to the conflict," including "sabotage and other armed or unarmed activities restricting or disturbing deployments, logistics and communications."[108]

2. Direct Causation

According to the ICRC, there must also be "a direct casual link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part."[109] The ICRC stipulates, "[f]or a specific act to qualify as 'direct' rather than 'indirect' participation in hostilities there must be a sufficiently close casual relation between the act and the resulting harm."[110] Acts directly resulting in or expected to harm an adversary or protected person would meet the requirement, as would acts such as intelligence collection, transmitting targeting information on enemy positions, electronic interference with enemy computer networks and wiretapping an enemy command.[111] Meanwhile, acts merely contributing to the war effort, such as weapons production, propaganda and food production, would not meet the direct causation requirement, as these activities are not necessarily integral to the execution of specific military operations.

The direct causation requirement is best illustrated through examples. According to the ICRC, the planting and detonation of an improvised explosive device (IED) would meet the requirement while

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[106] *Id.* at 47.
[107] *Id.*
[108] *Id.* at 48.
[109] *Id.* at 51.
[110] *Id.* at 52.
[111] *Id.* at 48–49.

the assembly, storing or purchase of an IED would not.[112] In the context of drone attacks, identifying and marking a target as well as firing the weapon would meet the requirement.[113] Other situations are less clear. According to the ICRC, driving an ammunition truck to the frontlines in a conflict zone would meet the requirement, while the transportation of "ammunition from a factory to a port for further shipping to a storehouse in a conflict zone" is considered "too remote" to qualify.[114] While the "ammunition truck remains a legitimate military objective" in both situations, the ICRC stipulates that a direct attack against the truck in the second scenario would need to take into consideration the death of the driver in the proportionality assessment.[115] Presumably, the IED factory also remains a legitimate target, but the legality of attacking the factory would turn on proportionality considerations as well.

3. Belligerent Nexus

Finally, an individual's act must also "be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another."[116] Importantly, the ICRC clarifies, the belligerent nexus "should be distinguished from concepts such as subjective intent and hostile intent."[117] The reasons for participation in an act do not matter unless the individual is unaware of his or her participation. For instance, a driver unaware that he is transporting a bomb would remain protected. Any direct attack would need to take his death into proportionality considerations. Thus, while the reasons for the individual's participation in hostilities do not matter, the person's *knowledge* of participation does.

The belligerent nexus is important to distinguish an individual's participation in the conduct of war from criminal activities or acts of vigilantism. Force used in self-defense against "marauding soldiers" should also be distinguished from DPH. Civilians defending themselves against unlawful conduct by the parties to a conflict do not participate in hostilities by virtue of using force to defend themselves. As the ICRC

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[112] *Id.* at 54.
[113] *Id.* at 55.
[114] *Id.* at 56.
[115] *Id.*
[116] *Id.* at 58.
[117] *Id.*

highlights, "this would have the absurd consequence of legitimizing a previously unlawful attack."[118]

Direct attacks on civilians may meet the *belligerent nexus* requirement, provided the "violence is motivated by the same political disputes or ethnic hatred that underlie the surrounding armed conflict and where it causes harm of a specific military nature."[119] Thus, vigilantism, or taking "advantage of a breakdown of law and order to commit violent crimes" or settle scores would not meet the belligerent nexus requirement. The use of deadly force against civilians specifically to harm or undercut another party, however, would meet the requirement.

The ICRC acknowledges the inherent difficulty of "determining the belligerent nexus" in the fog of war, in which criminal groups often intermingle and cross paths with organized armed groups. The decisive question, according to the ICRC's Interpretive Guidance, "should be whether the conduct of a civilian, in conjunction with the circumstances prevailing at the relevant time and place, can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party."[120]

Analysis

Numerous critics, some of which participated in the ICRC's expert discussions, contend the ICRC's guidance is too narrow, and does not comport with contemporary state practice. As noted previously, the United States has a more expansive or liberal interpretation of DPH than that put forward by the ICRC. For instance, the Law of War Working Group at the Department of Defense (DoD) has claimed that civilians may be directly attacked "if there is: (1) geographic proximity of service provided to units in contact with the enemy, (2) proximity of relationship between services provided and harm resulting to [the] enemy, (3) temporal relation of support to enemy contact or harm resulting to [the] enemy."[121] According to this group, the act of "[e]ntering the theatre of

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[118] *Id.* at 61.
[119] *Id.* at 63.
[120] *Id.* at 64.
[121] Albert S. Janin, *Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage*, ARMY LAW., July 2007, at 89 (quoting 2 INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY & OPERATIONAL LAW 1–10 (2006)).

operations in support or operation of sensitive, high value equipment, such as a weapon system" constitutes DPH.[122] While only slightly broader than the ICRC's views, this approach de-emphasizes the direct causation element, and in some cases, could blur the line between DPH and mere participation in the war effort.

Others in the U.S. military have advocated for an even more expansive "functionality test," which does not turn on the threshold of harm element, nor does it "measure the geographic or temporal distance from the conflict."[123] Rather, the "functionality test" assesses the strategic importance of the individual based on their function carried out on the battlefield.[124] Theoretically, journalists and propagandists could be stripped of their legal protection under such an expansive test. Perhaps even more alarming is the degree of arbitrariness and unpredictability inherent in the test. For instance, while development and humanitarian workers may not be strategically important to conventional wars between state militaries, these civilians are deemed critical to counterinsurgency warfare. Embracing such an expansive test could place journalists and aid workers in places like Afghanistan and Somalia at even greater risk.

As noted above, while multiple U.S. viewpoints exist, the United States has no official position on the concept of DPH. Nor has the United States responded in any meaningful way to the ICRC's Guidance.[125] Given that the ICRC's view is considered more restrictive than various

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[122] *See* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., LAW OF WAR HANDBOOK 143 (Keith E. Puls ed., 2004), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2004.pdf [hereinafter LAW OF WAR HANDBOOK].

[123] Stigall, *supra* note 61, at 896 (discussing but disagreeing with this viewpoint).

[124] *Id.*

[125] The closest to an official United States response to the ICRC's Interpretive Guidance came from State Department Legal Advisor Harold Koh in May 2010, when he noted that:

> While we [the U.S. government] disagree with the International Committee of the Red Cross on some of the particulars, our general approach of looking at "functional" membership in an armed group has been endorsed not only by the federal courts, but also is consistent with the approach taken in the targeting context by the ICRC in its recent study on Direct Participation in Hostilities (DPH).

See Harold Hongju Koh, The Obama Administration and International Law, Annual Meeting of the American Society of International Law (May 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

United States approaches and practice, and that state practice and *opinio juris* rather than the ICRC's recommendations, form rules of customary international law, some critics argue that the ICRC's Guidance is merely academic and too restrictive to be of any use to states fighting insurgencies.

Michael Schmitt, Professor of International Law and former participant in the ICRC's expert discussions, contends the ICRC's approach, particularly the "threshold of harm" requirement, is too restrictive.[126] Schmitt believes that "restricting the threshold element to negative consequences for the enemy…risks an overly narrow interpretation."[127] According to Schmitt, actions which both harm the enemy as well as those that benefit a party should constitute DPH.[128] Schmitt discusses the use of IEDs by insurgents in Iraq and Afghanistan to illustrate his point. Schmitt writes, "the development, production, training for use, and fielding of IEDs necessitated costly investment in counter-technologies, hurt the moral of Coalition forces, and negatively affected perceptions as to the benefits of the conflict at home."[129] The implication is that individuals participating at each stage in the process described, that is in the "development, production, training for use, and fielding" of these weapons, are DPH and thus lose their legal protection while engaged in these acts.

There are two problems with Schmitt's criticism. First, as noted previously, the *Commentary* to Additional Protocol I provides that "hostile acts should be understood to be acts which by their nature and purpose are intended to cause *actual harm* to the personnel and equipment of the armed forces" (emphasis added).[130] Thus, the ICRC's guidance is consistent with the *Commentary*, which serves as a guide to interpreting Additional Protocol I.[131] Second, Schmitt's criticism isn't really focused on the threshold of harm criteria, but rather the direct causation element. For instance, the ICRC agrees with Schmitt that the

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[126] Schmitt, *supra* note 70, at 718.
[127] *Id.* at 720.
[128] *Id.*
[129] *Id.* at 719.
[130] COMMENTARY TO PROTOCOL I, *supra* note 57, ¶ 1942, at 618.
[131] *See* The Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. The VCLT stipulates that treaties are to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." If the original meaning is ambiguous or obscure, "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty."

fielding of IEDs amounts to DPH. However, stripping an individual of legal protection for mere development of a weapon would set a dangerous precedent. Indeed, it would eliminate the requirement of direct causation, lowering the threshold for loss of legal protection to mere indirect participation in hostilities. The more difficult question is whether the production and training for use of an IED would constitute DPH. The answer to this question turns on whether such acts sufficiently meet the direct causation requirement.

As noted, the direct causation element requires that an act be integral to a military operation, thus precluding direct attacks on those performing mere war sustaining acts.[132] This requirement is consistent with the *Commentary* to Additional Protocol I, which affirms "a clear distinction between direct participation in hostilities and participation in the war effort."[133] Thus, according to the *Commentary* and the *Interpretive Guidance,* munitions workers as well as those providing general training and weapons to insurgents remain protected, as the ICRC stipulated an individual must execute or play an integral role in a hostile act to lose legal protection.

While the ICRC is correct in noting that the *Commentary* to Additional Protocol I supports distinguishing participation in military operations from mere war sustaining acts, it's not clear this is consistently supported by state practice. Professor Michael Schmitt notes that, among those participating in the ICRC's expert discussions, all the experts with "military experience or who serve governments involved in combat supported the characterization of IED assembly as direct participation."[134] In public documents, the ISAF Command in Afghanistan acknowledges targeting "bomb-making personnel and materials" as part of their strategy to prevent the use of IEDs against NATO soldiers.[135] In an interview, one U.S. Judge Advocate General (JAG) with nearly twenty-five years experience in the military confirmed that he believed directly targeting IED and suicide bomb makers is consistent with IHL.[136] Indeed, if a state received actionable intelligence,

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[132] Melzer, *supra* note 73, at 51.
[133] COMMENTARY TO PROTOCOL I, *supra* note 57, ¶ 1945, at 618.
[134] Schmitt, *supra* note 70, at 731.
[135] Matthew Millham, *Attacking IED Networks*, INT'L SECURITY ASSISTANCE FORCE (ISAF), Dec. 31, 2010, http://www.isaf.nato.int/article/focus/attacking-ied-networks.html.
[136] Interview with a U.S. Judge Advocate General (requested anonymity) at the Fletcher School of Law and Diplomacy, Tufts University, in Medford, Mass. (Dec. 7, 2010).

Schmitt suggests, "few states would hesitate, on the basis that the action is not 'direct enough,' to attack those in the process of assembling IEDs."[137]

Two arguments can be made for including the production of IED's and suicide bombs in the scope of DPH. First, as Schmitt suggests, "given the clandestine nature by which such devices are emplaced, an immediate attack may be the only option for foiling a later operation employing the device."[138] It would be absurd to require NATO forces in Afghanistan to delay attack until an individual is actually setting the device on the side of the road. Indeed, it would provide insurgents and suicide bombers immunity until the last possible moment, creating an incentive for NSAG's to use these tactics more often while placing an unreasonable burden on state militaries. Second, unlike the munitions workers, IED and suicide bomb makers are often connected to insurgent groups, playing important roles in the planning and execution of specific military operations.[139] While some may just be criminal syndicates, a recent ISAF report highlights that IED bomb-makers are often intimately linked to the insurgency in Afghanistan.[140] Blank and Guiora argue that those making IED's and suicide bomb belts are neither "soldiers nor members of armed groups," but nonetheless should be considered a "permanent target" due to their regular and continuous participation in hostilities.[141] Therefore, while the ICRC believes IED makers are only merely sustaining the war effort, the better view is that these bomb makers actually fulfill a specific combat function, and thus are never protected against direct attack.

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[137] Schmitt, *supra* note 70, at 731.
[138] *Id.* at 731.
[139] Scott Swanson, *Viral Targeting of the IED Social Network System*, 8 SMALL WARS J. 4–7 (2007), http://smallwarsjournal.com/documents/swjmag/v8/swanson-swjvol8-excerpt.pdf.
[140] Michael Flynn, *State of the Insurgency: Trends, Intentions and Objectives*, INT'L SECURITY ASSISTANCE FORCE, December 22, 2009, *available at* http://www.hum.securitygateway.com/documents/ISAF_StateOfTheInsurgency_22December09.pdf.
[141] Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT'L SECURITY J. 74 (2010).

E. "For Such Time": The Temporal Dimension

Treaty and customary IHL provides that a civilian loses protection only "for such time"[142] as he or she is directly participating in hostilities. According to the ICRC, "for such time" should be interpreted as covering "measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution."[143] Further, the ICRC clarifies, "preparatory measures *aiming to carry out a specific hostile act* qualify as direct participation in hostilities, whereas preparatory measures *aiming to establish the general capacity to carry out unspecified hostile acts do not*".[144]

Again, the temporal dimension is best illustrated by examples. Loading bombs onto an airplane in preparation for an attack on military objectives "constitutes a measure preparatory to a specific hostile act and, therefore, qualifies as direct participation in hostilities."[145] Mere transportation of weapons for later use would qualify as a general measure in preparation for war, but not DPH. In short, civilians lose immunity for acts carried out in preparation of the execution of a specific act meeting the *threshold*, *causation* and *belligerent nexus* requirements. Equipping, instructing and transporting combatants would qualify, as would intelligence gathering and the positioning of equipment for a specific military operation.[146]

Importantly, the ICRC maintains that the phrase "unless and for such time" means that civilians may lose and regain immunity from direct attack on numerous occasions. In other words, "for such time" should be interpreted to mean that civilian immunity operates similar to a "revolving door," whereby "civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities."[147] As will be discussed, the "revolving door" concept is hotly contested, and some say a malfunction of IHL, as it enables insurgents to exploit the law to the detriment of law-abiding parties. Still, the ICRC maintains that the revolving door serves to

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[142] *See* Protocol I, *supra* note 1, art. 51(3); Protocol II, *supra* note 27, art. 13(3); ICRC Customary IHL, *supra* note 1, r. 6.
[143] Melzer, *supra* note 73, at 65.
[144] *Id.* at 66 (emphasis in original).
[145] *Id.*
[146] *Id.*
[147] *Id.* at 70.

protect civilians "from erroneous or arbitrary attack" and armed forces must accept it for individuals participating in hostilities infrequently.[148]

Analysis

The ICRC's explanation of the temporal dimension seems consistent with the *Commentary* to Additional Protocol I, which affirms that "'hostilities' covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon."[149] The "revolving door" theory is also consistent with the *Commentary* to Additional Protocol I, which stipulates that "[i]t is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection . . . and he may no longer be attacked."[150]

Indeed, the Israeli Supreme Court arrived at the same conclusion. In its *Targeted Killings* decision, the Court affirmed:

> Article 51(3) of *The First Protocol* states that civilians enjoy protection from the dangers stemming from military acts, and that they are not targets for attack, unless "and for such time" as they are taking a direct part in hostilities. The provisions of Article 51(3) of *The First Protocol* present a time requirement. A civilian taking a part in hostilities loses the protection from attack "for such time" as he is taking part in those hostilities. If "such time" has passed—the protection granted to the civilian returns.[151]

Thus, the ICRC's interpretation is consistent with treaty IHL, the *Commentaries* and the contemporary interpretation of respectable jurists.

However, the "revolving door" theory is so imprecise that it is fundamentally problematic. How many times may an individual

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[148] *Id.* at 71.
[149] *See* COMMENTARY TO PROTOCOL I, *supra* note 57, ¶ 1943, at 618–19.
[150] *Id.* ¶ 1944, at 619.
[151] The Public Committee against Torture in Israel et al. v. The Government of Israel et al., Case No. HCJ 769/02, Judgment, ¶ 38 (Dec. 11, 2005).

participate in hostile acts and remain protected outside of hostilities? When does infrequent participation in the conduct of war become regular and continuous? In other words, when does the "revolving door" stop revolving? There are no clear answers to these questions. The ICRC simply provides, "where individuals go beyond, spontaneous, sporadic, or unorganized direct participation in hostilities and become members of an organized armed group belonging to a party to the conflict, IHL deprives them of protection against direct attack for as long as they remain members of that group."[152]

By endorsing the "revolving door" theory, the ICRC has essentially placed the burden on states to demonstrate that the target of an attack outside of hostilities is a combatant, rather than a civilian with a sporadic history of participating in violence. Professor Watkins contends the burden should be shifted from counter-insurgents to the civilian. After the first act of participating in hostilities, Watkins contends an "affirmative disengagement would be required in order to establish that such persons are no longer direct participants in hostilities. A determination of disengagement would be based on concrete, objectively verifiable facts and on standards of good faith and reasonableness in the prevailing circumstances."[153] Theoretically, this could reinforce the distinction principle, as civilians wishing to remain protected would have a greater incentive to distance themselves from the belligerents.

The problem with this approach is that it shifts the entire burden of risk onto the civilian, and thus fails to strike an appropriate balance between military necessity and humanity. As the Israeli Court determined, the lack of precision requires that states deal with this problem on a case-by-case basis.[154] Unfortunately, while manifestly imprecise, the revolving door theory does serve an important purpose; it requires counterinsurgents overcome the burden of doubt, as the target of deadly force outside of hostilities must have participated in hostilities sufficiently enough to be considered a combatant *vis-à-vis* the CCF test.

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[152] Melzer, *supra* note 73, at 72.
[153] Watkins, *supra* note 70, at 692–93.
[154] *Public Committee,* Case No. HCJ 769/02, ¶ 39.

F. The Requirement of Precautions

As discussed above, distinguishing between these various categories of persons is incredibly challenging in contemporary wars amongst the people. As the ICRC highlights, counterinsurgents are faced with the complex task of distinguishing between "members of organized armed groups . . civilians directly participating in hostilities on a spontaneous, sporadic, or unorganized basis, and civilians who may or may not be providing support to the adversary, but who do not, at the time, directly participate in hostilities."[155]

The principle of precautions, which is codified in Additional Protocol I and considered a rule of customary international law, requires that those planning attacks must take all feasible measures "to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives."[156] Abiding by this principle in "wars among the people" requires that armed forces possess solid intelligence confirming that the individual to be attacked outside of hostilities is a bona fide combatant.[157] As the ICRC submits, in situations of doubt, combatants must assume a person is a civilian, protected against direct attack unless DPH.[158] This section of the ICRC's guidance is sound from both a legal and policy perspective, as it requires that counter-insurgents assume the burden of proof so as to protect noncombatants from arbitrary attacks. Armed forces must have solid and verifiable intelligence that, outside of active hostilities, the target of a direct attack has directly participated in hostilities so frequently that the individual qualifies as a combatant under the CCF test.

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[155] Melzer, *supra* note 73, at 74.
[156] Protocol I, *supra* note 1, art. 57(2)(a)(i); ICRC Customary IHL, *supra* note 1, r. 15; Melzer, *supra* note 73, at 74.
[157] For an excellent analysis of the application of the principle of precautions to targeted killings and counterterrorism operations, see David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?*, 16 E.J.I.L. 2, 201 (2005).
[158] Melzer, *supra* note 73, at 74–76.

IV. Restraints on the Use of Force in Contemporary Warfare

A. The ICRC's Targeting Guidance

The final section of the ICRC's Interpretive Guidance, entitled "Restraints on the use of force in direct attack," has elicited significant criticism. According to the ICRC, "the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is *actually necessary* to accomplish a legitimate military purpose in the prevailing circumstances."[159] The requirement of necessity, the ICRC contends, imposes an obligation to capture rather than kill a combatant or civilian DPH if and when reasonably possible.

The ICRC begins its complex argument by noting that, "the right of belligerents to adopt means of injuring the enemy is not unlimited."[160] Indeed, consistent with the principle of unnecessary suffering, the international community has developed numerous conventions proscribing indiscriminate weapons and inhumane conduct. While the international community has developed all sorts of proscriptions, however, the ICRC highlights that treaty IHL does not expressly regulate "the kind and degree of force permissible against legitimate targets."[161] Rather, the ICRC suggests, force is regulated by the principles of military necessity and humanity, which "underlie and inform the normative framework of IHL, and therefore shape the context in which its rules must be interpreted."[162]

To support this argument, the ICRC points to the "Marten's Clause," a provision in both *Additional Protocols* to the Geneva Conventions, which stipulates:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[163]

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[159] *Id.* at 77 (emphasis added).
[160] This is codified in two provisions: GC IV, *supra* note 23, art. 22; Protocol I, *supra* note 1, art. 35(1).
[161] Melzer, *supra* note 73, at 78.
[162] *Id.*
[163] Protocol I, *supra* note 1, art. 2; Protocol II, *supra* note 27, pmbls.

As a result of this provision, the ICRC contends, the use of lethal force in combat is to be regulated by balancing military necessity against the principle of humanity. According to the ICRC, "considerations of military necessity and humanity" do not "override the specific provisions of IHL."[164] Rather, these principles should shape the decisions of military lawyers, commanders and soldiers where the law is vague or unclear. In other words, where IHL lacks precision, any interpretation of what is permissible must strike a balance between the principles of military necessity and humanity.

Next, the ICRC turns to definitions. How should one interpret military necessity? Humanity? According to the United States, military necessity permits "measures not forbidden by international law, which are indispensable for securing the complete submission of the enemy."[165] The United Kingdom's doctrine suggests the principle of military necessity permits "only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources."[166] In the *Nuclear Weapons* case, the International Court of Justice (ICJ) suggested that military necessity should be interpreted to mean that states are precluded from inflicting "harm greater than that unavoidable to achieve legitimate military objectives."[167]

Meanwhile, the principle of humanity, according to the United Kingdom, "forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes."[168] According to the ICRC, a proper interpretation of the balance between military necessity and humanity neither grants combatants an unfettered right to kill nor imposes "a legal obligation to capture rather than kill regardless of the circumstances."[169] In other

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[164] Melzer, *supra* note 73, at 79.
[165] U.S. DEP'T OF ARMY, FIELD MANUAL 27 -10, THE LAW OF LAND WARFARE ¶ 3a (1956) [hereinafter FM 27-10].
[166] UNITED KINGDOM MINISTRY OF DEFENSE, THE MANUAL OF THE LAW OF ARMED CONFLICT sec. 2.2, ¶ 3a (2004) [hereinafter UK MANUAL OF THE LAW OF ARMED CONFLICT] (military necessity).
[167] Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 1996 I.C.J. ¶78 (July 8) [hereinafter Nuclear Weapons].
[168] UK MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 166, sec. 2.4 (Humanity).
[169] Melzer, *supra* note 73, at 78.

words, decisions to kill or capture a target should be driven by context, or what is reasonable in the prevailing circumstances. The question is, in what circumstances *may* a combatant use deadly force, and when *must* combatants attempt to capture and detain a target?

According to the ICRC, the combatant's obligations turn on the intensity of the war. In armed conflicts between two relatively well-armed and trained parties, the ICRC contends, "the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL."[170] But, restraints on the use of lethal force may increase with the parties' ability to stabilize and control territory. For instance, the ICRC contends, the restraining function "may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing," which will most often occur where a party occupies territory either in a formal state of occupation or an asymmetrical non-international armed conflict.[171] In other words, restraints on the use of force are not hard and fast, but rather change based on the circumstances – namely the intensity of the conflict, the parties' ability to project power and ultimately, what is reasonable in a given situation.

An example best illustrates the ICRC's guidance. Suppose ISAF forces in Afghanistan had verifiable intelligence confirming an unarmed individual in a restaurant was using a cell phone to transmit tactical intelligence to the Taliban. The act in question would fall within the scope of DPH, and thus the individual would lose protection. However, if the restaurant was situated within an area firmly controlled by ISAF forces, the ICRC suggests that, "it may be possible to neutralize the military threat posed by that civilian through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilian population."[172] If this were true, the ICRC contends, "it would defy basic notions of humanity to kill an adversary or to refrain from giving him an opportunity to surrender where there manifestly is no necessity for the use of lethal force."[173]

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[170] *Id.* at 80–81.
[171] *Id.*
[172] *Id.*
[173] *Id.* at 82.

Understandably, this section of the report has elicited some of the harshest criticism. W Hays Parks, former senior associate deputy general counsel at the U.S. Department of Defense and former participant in the ICRC's expert discussions, claims this section of the report imposes rules of law enforcement, ignoring the fact that IHL is considered to be *lex specialis* in armed conflict.[174] Indeed, the ICJ has confirmed on numerous occasions that while IHRL does apply during war, the principle of *lex specialis* means that IHL trumps human rights norms when the two legal regimes conflict.[175] According to Parks, the ICRC's argument that states use no more force than is "reasonably necessary" injects "human rights arguments as a substitute for law that courts consistently have ruled is *lex specialis*."[176] As a result, Parks contends that the ICRC's targeting guidance simply doesn't reflect *opinio juris*, and thus is not a reflection of customary international law.

Ultimately, however, the ICRC's conclusion regarding the hypothetical scenario makes perfect sense. It would defy logic to conclude that, notwithstanding the transmission of tactical intelligence to an adversary, an unarmed individual in an area firmly controlled by NATO forces in Afghanistan or Israeli forces in the West Bank could be lawfully targeted if capture was a reasonable option. But, the question is—does IHL impose an obligation to capture rather than kill? Is the ICRC's interpretation of military necessity consistent with the practice of leading militaries? Hays Parks claims "[t]here is no 'military necessity' determination requirement for an individual soldier to engage an enemy combatant or a civilian determined to be taking a direct part in hostilities, any more than there is for a soldier to attack an enemy tank."[177] A.P.V Rogers, a retired major general in the British Army and current Senior Fellow at the University of Cambridge, similarly contends "there is no such restraint in the law of armed conflict as that advocated in recommendation IX."[178] Indeed, Harvard Law Professor Gabriella Blum, a supporter of the ICRC's argument for policy reasons nevertheless

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[174] *See* W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 770, 796–97 (2010).

[175] *See* FM 27-10, *supra* note 165, ¶ 25; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), 2004 I.C.J. 136, ¶ 106 (July 9) [hereinafter Wall Opinion].

[176] Parks, *supra* note 174, at 799.

[177] *Id.* at 804.

[178] A.P.V. Rogers, *Direct Participation in Hostilities: Some Personal Reflections*, 48 MIL. L. & L. WAR REV. 144, 158 (2009); *see also* Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 147 (2010).

concludes it would require "a re-reading of the principle of military necessity."[179]

B. A Preferred Approach: Distinguishing Between IHL and IHRL

The problem with the ICRC's approach is not the conclusion reached, but rather the methodology. The ICRC's contention that IHL imposes a legal obligation to capture rather than kill is simply not a belief shared by most governments. Moreover, it confuses norms and principles of IHL with those of IHRL. Rather than clarifying and reinforcing IHL, acceptance of the ICRC's approach would risk creating a confusing and unpredictable legal regime, increasing the potential for unlawful activity, and ultimately undermining the law.

The better approach is the following: IHL is *lex specialis* in international and high intensity armed conflicts. Meanwhile, norms of IHRL should govern the use of force in military occupations, low—intensity asymmetric conflicts and more generally in situations where armed forces exercise "effective control" over territory. This approach finds support among scholars, judicial opinions and some state practice. Further, it firmly delineates a combatant's obligations under IHL from requirements imposed by IHRL. To support this argument, it is necessary to first briefly discuss the notion of extraterritorial human rights obligations. Second, this section will examine the relationship between IHL and IHRL during armed conflict. Third, this section discuss the "right to life," codified in the International Covenant on Civil and Political Rights (ICCPR), and explain what restraints are required on the use of force under IHRL. Finally, this section suggests that there is a lack of clarity over what law governs the use of force in situations where armed forces exercise considerable control over territory, such as a formal occupation or a non-international armed conflict where a party is largely policing and stabilizing territory. Conventional wisdom suggests that IHL governs the use of force in these situations. Yet, there is growing support, among scholars and international judicial bodies, for the notion that IHRL should, and in fact does govern lethal force in these situations. While a minority view, this section will demonstrate why IHRL should govern force in these situations and discuss how it would change combat operations.

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[179] Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 69, 74 (2010).

1. The Extraterritorial Application of Human Rights Obligations

A significant amount of literature has been devoted to discussing whether the ICCPR applies to a state party's actions beyond the confines of its borders.[180] The prevailing view is that the ICCPR may apply extraterritorially in certain circumstances. The provision at issue is Article 2(1), according to which, states parties have an obligation "to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[181] Whether or not the ICCPR applies beyond the confines of a state party's borders turns on how one interprets this clause, and more specifically whether (1) "territory" and "jurisdiction" are disjunctive or; (2) an individual must be *both* within the territory of a state and subject to that state's jurisdiction to enjoy the protections of the ICCPR.

Engaging in a lengthy analysis of this issue, however, is unnecessary for the purposes of this article. Some human rights obligations, such as norms concerning the security and protection of individuals, have attained the status of customary international law. As the ICJ has posited, basic human rights norms are considered rights *erga omnes*, requiring that all states respect and help secure their protection.[182] In other words, customary human rights obligations, such as the prohibition on arbitrary killings, apply always and everywhere; application of these norms does not turn on whether the ICCPR applies to the territory or individual in question.[183]

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[180] For a lengthy analysis of this issue, see NOAM LUBELL, EXTRA-TERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 193–232 (2010); *see also* Orna Ben–Naftali, *The Extraterritorial Application of Human Rights to Occupied Territories*, 100 A.S.I.L PROC. 90 (2006); Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 100 A.S.I.L PROC. 86 (2006); John Cerone, *The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US activities in Iraq*, ASIL INSIGHTS, October 25, 2005, *available at* http://www.asil.org/insights051025.cfm; Kevin Jon Heller, *Does the ICCPR Apply Extraterritorially?*, OPINIO JURIS, July 18, 2006, http://opiniojuris.org/2006/07/18/does-the-iccpr-apply-extraterritorially/.

[181] International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (emphasis added).

[182] Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, 1970 I.C.J. ¶ 33 (Feb. 5).

[183] This view is widely supported by state practice. Even the United States, which has

As discussed briefly above, the argument is that IHRL should govern the use of lethal force in some circumstances during armed conflict. Restrictions on lethal force imposed by IHRL flow from the "right to life" provision in the ICCPR, which is also considered to have attained the status of customary international law. Therefore, due to the limited scope of my argument, resolving whether or not the ICCPR applies extraterritorially and in what circumstances is unnecessary. The "right to life" and subsequent prohibition on arbitrary killings applies everywhere and in all circumstances.

2. The Application of IHRL during Armed Conflict

The United States and Israel have at times claimed that IHRL is irrelevant during war.[184] However, the prevailing view is that "human rights law continues to apply during armed conflict."[185] Support for this approach is widespread. First, IHL instruments affirm support for the application of "other applicable rules of international law relating to the protection of fundamental human rights" during armed conflict.[186] The *Commentary* to Additional Protocol I stipulates that these "other applicable rules of international law" refer to IHRL conventions.[187] A similar paragraph in the ICRC's *Commentary* to Additional Protocol II explains reference to "international instruments relating to human rights."[188] Second, the application of human rights norms during armed conflict is also consistent with human rights conventions, which preclude derogation of certain fundamental norms, such as the "right to life," even

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officially rejected extraterritorial application of the ICCPR, agrees that customary international human rights law applies everywhere and always. *See* THE U.S. OPERATIONAL LAW HANDBOOK 43, pt. I.B (2011), which notes:

> IHRL based on CIL binds all States, in all circumstances, and is thus obligatory. For official U.S. personnel (i.e., "State actors" in the language of IHRL) dealing with civilians outside the territory of the United States, it is CIL that establishes the human rights considered fundamental, and therefore obligatory.

[184] *See* NILS MELZER, TARGETED KILLINGS IN INTERNATIONAL LAW 79–80 (2008).
[185] *See* LUBELL *supra* note 180, at 237.
[186] Protocol I, *supra* note 1, art. 72; Protocol II, *supra* note 27, pmbls.
[187] COMMENTARY TO PROTOCOL I, *supra* note 57, at 842–43.
[188] COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II) ¶¶ 4428–29, at 1339–40 (Pilloud, Claude; Sandoz, Yves; Swinarski, Christophe; Zimmerman, Bruno, eds., 1987).

during a public emergency or armed conflict.[189] The ICJ has also repeatedly affirmed that both IHL and IHRL apply during armed conflict.[190] Indeed, it is also the opinion of numerous commentators.[191]

The application of IHRL during armed conflict is also consistent with the rules of treaty interpretation. For instance, Article 31(3)(a) of the Vienna Convention on the Law of Treaties provides that state parties shall take into consideration "any relevant rules of international law applicable in the relations between the parties."[192] Human rights norms, which provided the legal foundation for the Geneva Conventions and customary norms of IHL,[193] would seem relevant to interpreting what is permissible in war.

The true question is not whether IHRL applies during armed conflict, but how does IHRL apply? While IHL and IHRL coincide and may mutually reinforce each other on some issues, under different circumstances, the two legal constructs conflict with one another. For example, during war, the use of deadly force is authorized. Outside of war, deadly force is permissible only in rare instances. This section examines the relationship between IHRL and IHL and illustrates how IHRL can be applied successfully during armed conflict.

3. The Principle of Lex Specialis

The ICJ clarified the relationship between IHL and IHRL in its *Nuclear Weapons* advisory opinion. In the context of the use of deadly

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[189] *See* ICCPR, *supra* note 181, art. 4; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter ECHR]; American Convention on Human Rights art. 27, Nov. 22, 1969, 1144 U.N.T.S. 123.

[190] *See* FM 27-10, *supra* note 165, ¶ 25; Wall Opinion, *supra* note 175, ¶ 106; Armed Activities in the Territory of the Congo (Dem. Rep. of the Congo v. Uganda), 2005 I.C.J. ¶ 216 (Dec. 19) [hereinafter Armed Activities].

[191] For just a few prominent legal scholars that support this position, see LUBELL, *supra* note 180, at 236–47; R. PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW (2002); Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 2 (2007); CRAWFORD, *supra* note 44, at 118–52.

[192] VCLT, *supra* note 131, art. 31(3)(a).

[193] Vera Gowlland–Debbas, *The Right to Life and the Relationship Between Human Rights and Humanitarian Law*, *in* THE RIGHT TO LIFE 126 (Christian Tomuschat, Evelyne Lagrange and Stefan Oeter eds., 2010).

force, the ICJ affirmed:

> The test of what is an arbitrary deprivation of life . . . is] determined by the applicable *lex specialis,* namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant [International Covenant on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[194]

Similarly, Ian Bronwlie, a former U.N. Special Rapporteur, has concluded, "the application of . . . treaties concerning human rights . . . continues in times of armed conflict, but their application is determined by reference to the applicable *lex specialis*, namely, the law applicable in armed conflict."[195] Therefore, while human rights protections always exist, the principle of *lex specialis* stipulates that such rights are to be interpreted through the more permissive IHL regime during armed conflict. The two legal regimes may co-exist during war, but according to the *lex specialis* principle, IHL trumps IHRL in the event of a conflict of laws.

4. Complementarity

The *lex specialis* principle is often referenced to advance the argument that IHRL may apply, but is in effect irrelevant during armed conflict. The correct interpretation is that IHL may prevail in some instances, namely the use of deadly force, but IHRL may be the controlling body of law in other instances.[196] Humanitarian law instruments have nothing to say about the freedom of religion, for instance, and thus human rights conventions are referred to on that issue.

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[194] FM 27-10, *supra* note 165, ¶ 25.
[195] United Nations, *International Law Commission, Third Report on the Effects of Armed Conflict on Treaties, Ian Brownlie, Special Rapporteur*, ¶ 29, U.N. Doc. A/CN.4/578 (2007).
[196] Gowlland–Debbas, *supra* note 193, at 139.

As a result, the theory of complementarity provides a more nuanced method of interpreting the relationship between these two legal regimes. Complementarity suggests that IHL does not supersede IHRL, but rather the two legal regimes operate in parallel. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and the *Armed Activities* case,[197] the ICJ endorsed this theory of interpretation. For instance, in the *Wall* opinion, the ICJ explains its view:

> As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[198]

The U.N. Human Rights Committee has also referred to complementarity in explaining its view of the relationship between IHL and IHRL.[199] Importantly, complementarity presumes that IHL and IHRL are not exclusionary regimes, but rather buttress or complement each other. As Droege highlights, the principle of complementarity "sees international law as a regime in which different sets of rules cohabit in harmony."[200] In this sense, "human rights can be interpreted in light of international humanitarian law and *vice versa*."[201]

The theory of complementarity supports a fluid relationship between IHL and IHRL, whereby each regime fills gaps in the other. The principle of *lex specialis* exists alongside the theory of complementarity to determine the "test" in the event of a conflict of norms. Pursuant to this theory, IHL still governs the use of lethal force, but IHRL serves to fill gaps where IHL is silent. As a result, complementarity provides a more nuanced understanding of the relationship between the two legal regimes when there is not a conflict of laws. It may also help fill gaps in the law that develop as a result of the changing nature of international conflict.

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[197] Armed Activities, *supra* note 190, ¶¶ 215–16.
[198] Wall Opinion, *supra* note 175, ¶ 106.
[199] United Nations Human Rights Committee, *General Comment 31, Nature of the legal obligation imposed on State Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) [hereinafter UNHRC *General Comment 31*].
[200] Droege, *supra* note 191, at 337.
[201] *Id.*

C. The "Right to Life": Human Rights Restrictions on the Use of Force

As previously discussed, the conventional view is that IHL prevails in governing the use of force in armed conflict, whilst IHRL norms control force outside of war. As prominent IHL expert Jean Pictet once noted, "humanitarian law is valid only in the case of armed conflict while human rights are essentially applicable in peacetime."[202] Recent scholarship and judicial opinions have challenged that viewpoint. As noted previously, IHRL restraints on the use of force should control in asymmetrical low-intensity conflicts, or where the state has "effective control" even during an armed conflict. Preceding that discussion will be an explanation of the customary norm of the "right to life" as enshrined in the ICCPR, and the specific restraints imposed by this norm, to help the reader understand how subjecting force to IHRL in the described circumstances would change combat operations.

1. The Prohibition on Arbitrary Killings in Treaty and Customary Law

The international community first made reference to an individual "right to life" in the Universal Declaration on Human Rights (UDHR), a non-binding instrument adopted by the United Nations General Assembly in 1948. Although non-binding, the UDHR constituted an expression of basic rights to which U.N. member states believed all humans were entitled. Since its adoption, the UDHR has been referenced in numerous international human rights treaties, served as inspiration for constitutional development and national legislation pertaining to human rights, been cited in judicial decisions by the ICJ and been invoked in countless U.N. resolutions.[203] As a result, most of its provisions, including the right to life clause, are considered to reflect customary international law.[204]

The "right to life" norm is also codified in the ICCPR, which is regarded as the principal international human rights treaty. As of November 2011, 167 states were party to the ICCPR. Even while the treaty cannot be regarded as truly universal, most of its provisions are

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[202] JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 15 (1975).
[203] MELZER, *supra* note 184, at 190–95.
[204] SIMON CHESTERMAN, THOMAS FRANCK & DAVID MALONE, LAW AND PRACTICE OF THE UNITED NATIONS: DOCUMENTS AND COMMENTARY 451 (2008).

considered to have attained the status of customary international law. Article 6.1, the "right to life" clause, stipulates: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[205]

Reference to the "right to life" and the subsequent obligation to refrain from arbitrary killings has been widely affirmed in human rights treaties, national laws, international and national judicial decisions, and in non-binding statements by international organizations and governments around the world.[206] As a result, the prohibition against the arbitrary deprivation of life is widely considered to have attained the status of a *jus cogen*, or a fundamental principle of international law to which no derogation is permitted.[207] While the international community has at times been split over how to react to arbitrary killings, most states do not consider the use of deadly force acceptable, outside of an armed conflict, except in a narrow set of circumstances. This next section will discuss use of force restraints imposed by IHRL that flow from the customary "right to life" norm codified in the ICCPR.

2. Human Rights Law Restraints on the Use of Lethal Force

Similar to IHL instruments, the ICCPR does not expressly dictate how and when force can be employed consistent with the "right to life" provision. Rather, the precise restraints that customary IHRL imposes on lethal force have largely developed through interpreting the spirit of the UDHR and the ICCPR.[208] Today, the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990),[209] which was developed by law enforcement practitioners, academics and civil society groups from around the world, is widely considered to be the universal

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[205] ICCPR, *supra* note 181, art. 6.

[206] For a review of state practice and international judicial opinions referencing the prohibition of arbitrary killings, see MELZER, *supra* note 184, at 184–89.

[207] Discussion of the non-derogable nature of the "right to life" is widespread. *See* UNHRC, *General Comment 31*, *supra* note 199, ¶ 2; FM 27-10, *supra* note 165, ¶ 78; RESTATEMENT OF THE LAW (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(f), (n) (1987).

[208] *See* MELZER, *supra* note 184, at 184–96.

[209] Office of the United Nations High Commissioner for Human Rights, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders* (Sept. 7, 1990), *available at* http://www2.ohchr.org/english/law/firearms.htm [hereinafter *U.N. Basic Principles on the Use of Force*].

standard for the use of force consistent with the "right to life" and IHRL more generally.[210] In 1996, the U.N. Secretary General (UNSG) conducted a survey to assess compliance with these principles, and concluded that countries that responded[211] largely followed these standards or reported enacting reforms necessary to comply with these principles.[212] The UNSG further noted that these principles have served as a basis for national legislation and for developing international policies to combat national and transnational crime, and thus embody an international consensus on the restraints IHRL imposes on lethal force.[213]

Under IHRL, the use of lethal force must comply with four requirements. First, the requirement of sufficient legal basis, which is reflected in Articles 1 and 11 of the U.N. Basic Principles, stipulates that states should develop national regulations, outlining the circumstances under which lethal force may be employed. Second, according to the requirement of proportionality, which is codified in Article 9 of the of the U.N. Basic Principles, lethal force may only be employed in three circumstances: (1) "self-defence or defence of others against the imminent threat of death or serious injury"; (2) "to prevent the perpetration of a particularly serious crime involving grave threat to life"; or (3) "to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape."[214] Therefore, the principle of proportionality requires that force be used *only* to protect life or impose order; the killing of an individual may not "be the *sole*

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[210] *See* MELZER, *supra* note 184, at 199–200.

[211] The Secretary General, *United Nations Standards and Norms in the Field of Crime Prevention and Criminal Justice: Report of the Secretary–General*, E/CN.15/1996/16 (Apr. 11, 1996) [hereinafter *U.N. Standards and Norms in the Field of Crime Prevention and Criminal Justice*]. Responses from the following sixty-five states were reflected in this report: Argentina, Australia, Austria, Barbados, Belarus, Belgium, Chile, China, Colombia, Costa Rica, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Haiti, Holy See, Hungary, Iran, Ireland, Israel, Jamaica, Japan, Jordan, Lebanon, Liechtenstein, Luxemburg, Malawi, Maldives, Marshall Islands, Mauritius, Mexico, Mongolia, Morocco, Nepal, New Zealand, Niger, Oman, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, San Marino, Saudi Arabia, Singapore, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Tonga, Trinidad and Tobago, Turkey, United Kingdom of Great Britain and Northern Ireland, Tanzania, United States of America, and Vanuatu.

[212] *Id.* ¶ 12. The report examines compliance with a broader set of human rights norms and principles, but paragraph 12 reports on compliance with use of force principles.

[213] *Id.* ¶ 4.

[214] *U.N. Basic Principles on the Use of Force*, *supra* note 209, art. 9.

objective of an operation."[215]

Third, the requirement of necessity, which is codified in Article 4 of the U.N. Basic Principles, requires that "law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result."[216] Thus, as Nils Melzer contends, necessity requires that "the lawful use of force may not exceed what is 'absolutely' or 'strictly' necessary" to meet the objectives enumerated in the proportionality requirement.[217] Non-lethal measures, including capture, must be exhausted or considered insufficient before lethal force may be employed. Finally, the requirement of precaution, which is codified in Articles 2, 3, 5, 10 of the U.N. Basic Principles, stipulates that law enforcement officials should take every precaution so as to avoid the use of deadly force. Should force be employed, law enforcement officials should make every attempt to avoid fatalities.[218]

In contrast, the rules of IHL are far more permissive. While IHRL precludes killing an individual unless a last resort to protect life or impose order, IHL nearly always permits the use of deadly force against a combatant or civilian DPH, unless prohibited by a specific rule, or force would result in a disproportionate amount of civilian casualties.[219] Some will argue that requiring combatants to subject force to the more restrictive rules of IHRL, even if only in select circumstances where armed forces control territory, would essentially make war un-wageable. Such an approach could unfairly restrict armed forces, as IHRL may not provide combatants the necessary latitude to accomplish their military objectives and defend themselves.

That argument is not persuasive for two reasons. First, IHRL should govern the use of force only in a narrow set of circumstances, namely when armed forces establish firm control over territory and thus can effectively manage security pursuant to IHRL norms. Second, contrary to

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[215] *See* Alston, *supra* note 51, ¶¶ 29, 33.
[216] *U.N. Basic Principles on the Use of Force*, *supra* note 209, art. 4.
[217] Melzer, *supra* note 98, at 227–28.
[218] *Id.* at 203.
[219] Article 57 of Additional Protocol I to the Geneva Conventions enumerates the proportionality rule, which requires that states, "refrain from deciding to launch any attack which may be expected to cause [civilian damage] excessive in relation to the concrete and direct military advantage anticipated." *See* Protocol I, *supra* note 1, art. 57.

popular belief, IHRL does provide those bound by its requirements a significant amount of latitude. A brief discussion of *McCann and Others v. United Kingdom (1995)*,[220] a case heard by the European Court of Human Rights (ECtHR), will demonstrate that IHRL would provide military forces the necessary latitude to protect themselves and the public where such forces have established their authority. Importantly, while the ECtHR is interpreting the European Convention in this case, the "right to life" provision in the European Convention is extraordinarily similar to the prohibition on arbitrary killings in the ICCPR and customary international law. Thus, it provides a useful illustration of the restraints on the use of force under customary IHRL.

In 1988, three British operatives were given the task of arresting three individuals suspected to be members of the Irish Republican Army (IRA) on the strait of Gibraltar. The British operatives were told that the suspects had in their possession a bomb, which any of them could detonate via a concealed device, and that the suspects would likely detonate this weapon if challenged, thus resulting in a significant loss of life and injuries to nearby civilians. Further, the British operatives believed the IRA suspects were armed and would likely resist arrest.[221]

When confronted by the British operatives, the suspects made movements, which were "interpreted as a possible attempt to operate a radio-control device to detonate the bombs."[222] The British operatives opened fire, killing all three suspects. While it was later discovered that the suspects did not possess any weapons, explosives or detonation devices, the operatives convinced the ECtHR that it was reasonable to believe the suspects were about to detonate an explosive, threatening both the operatives and public safety.[223] In short, the British operatives, who had orders to take the men into custody, resorted to lethal force when they believed their actions were "absolutely necessary in order to safeguard innocent lives."[224] As a result, the ECtHR concluded that force was lawful in those circumstances.

In this instance, customary IHRL required that the British agents attempt to arrest the suspects and only resort to force when absolutely

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[220] McCann et al. v. United Kingdom, App. no. 18984/91, 21 Eur. Ct. H.R. 97 (1995).
[221] *Id.* at ¶ 195.
[222] Melzer, *supra* note 98, at 436.
[223] McCann v. United Kingdom, App. No. 18984/91, ¶ 200.
[224] *Id.*

necessary to defend themselves, the public or prevent the suspects from escaping. Applying these restraints to the conflict in Afghanistan, international forces would be required to attempt to capture combatants or civilians DPH when and if such individuals are found in areas firmly under their control. Resort to lethal force would be lawful if absolutely necessary to protect the lives of international forces, the public or if the suspect attempted escape. The legality of the use of force in these situations would still be judged by whether it was reasonable from the point of view of the commander or the soldier.

Importantly, this approach would still refer to IHL to determine whether an individual is a combatant, civilian DPH or a noncombatant. The approach put forth in this article would simply require that combatants abide by IHRL restrictions when using force in select circumstances, namely when such forces control territory. Given that such situations will likely only occur after periods of combat, and hostilities may reignite during periods of relative stability, the rules of IHL should continue to remain the primary legal regime and the one to refer to when determining an individual's status during an armed conflict. This approach would merely replace the restraints on lethal force imposed by IHL with those of IHRL for armed forces effectively engaged in policing and stabilization operations.

As will be demonstrated in the next section, this approach would be workable and result in fewer civilian casualties in contemporary conflicts. This suggested approach is feasible because IHRL would control lethal force only in areas where armed forces firmly control territory, where conditions make it more realistic to abide by such restraints without imposing significantly greater risk to the soldier. The approach I suggest would also result in fewer civilian casualties. As discussed previously, distinguishing between combatants and noncombatants is enormously difficult in contemporary wars. Noncombatants have often been killed or injured in these conflicts because of erroneous targeting and faulty intelligence. Requiring that armed forces abide by more restrictive rules on the use of lethal force where possible would go a long way towards reducing civilian casualties. The next section explains the notion of "effective control," and when IHRL should govern the use of lethal force during armed conflict.

D. "Effective Control": When Human Rights Law Should Govern the Use of Force

According to the 1907 *Convention Respecting the Laws and Customs of War on Land*, the law of belligerent occupation applies when territory is "actually placed under the authority of the hostile army" and "extends only to the territory where such authority has been established and can be exercised."[225] Even if not operating pursuant to a formal military occupation, the same rules of belligerent occupation apply when armed forces are considered to have "effective control."[226] As the European Court has opined, "effective control" occurs at the moment the state "exercises control of the territory and its inhabitants."[227] Importantly, the occupying power need not control every part of the territory to be considered to exercise effective control.[228]

Treaty IHL imposes law enforcement obligations on armed forces exercising control over territory. According to the *Convention Respecting the Laws and Customs of War on Land,* for instance, occupying powers "shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[229] In other words, as the *de facto* power, occupying forces have both a right and legal obligation to enforce public safety, law and order.[230] The imposition of public security obligations has important implications for the occupying power's rules of engagement. When a party to a conflict assumes "effective control" of territory, the occupier's aim is arguably no longer defeating an enemy, but rather ensuring public order and safety. Indeed, the rules of engagement in these situations may look more akin to robust peacekeeping than warfare.

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[225] Hague Convention IV Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2227, 75 U.N.T.S. 287 [hereinafter Hague Convention IV].
[226] Melzer, *supra* note 98, at 156.
[227] *See* Bankovic and Others v. Belgium and Others, App. No. 52207/99, Eur. Ct. H.R., Judgment, ¶ 71 (Dec. 19, 2001).
[228] The European Court of Human Rights has developed a great deal of case law on the application of European Union (EU) law to military operations conducted by EU members outside of the Union. *See* Loizidou v. Turkey, App. No. 15318/89, Eur. Ct. H.R., Judgment, ¶ 52 (Nov. 28, 1996); Cyprus v. Turkey, App. No. 25781/94, Eur. Ct. H.R., Judgment, ¶ 77 (May 10, 2001); Ilaşcu and Others v. Moldova and Russia, App. No. 48787/99, Eur. Ct. H.R., Judgment, ¶ 434, 442, 453, 464 & 481 (July 8, 2004).
[229] Hague Convention IV, *supra* note 225, art. 43.
[230] For more analysis of the legal obligations incumbent upon occupying powers, see Melzer, *supra* note 98, at 158.

What does this mean for restraints on the use of force? Neither of the IHL instruments governing belligerent occupation explicitly enumerates restraints on the use of force during an occupation or when armed forces exercise control over territory.[231] However, the imposition of a positive obligation to safeguard public security must correspond with tighter restraints on the use of force. Armed forces cannot be obliged to safeguard the peace and protect the public while also possessing the legal right to use lethal force as freely as in war. Indeed, numerous legal scholars agree: absent significant hostilities, the use of force by occupying powers or armed forces exercising control over territory is or should be subject to law enforcement or IHRL norms.[232]

This conclusion is supported by a number of scholars and influential case law. In an analysis of Israeli targeted killings in the Palestinian territories, for instance, Professor Kretzmer contends that occupation law, complemented by human rights law, is the applicable legal model.[233] Further, Kretzmer writes, "[u]nder this model force may only be used in the case of an imminent attack that cannot be halted by arresting the suspected terrorist."[234] The United Nations Human Rights Committee took the same view. In its report on Israel's targeted killings policy, the Committee argued that "[b]efore resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted."[235] Thus, according to Professor Kretzmer and the UNHRC, non-lethal options must be exhausted in the Palestinian territories because IHRL governs the use of force during an occupation.

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[231] The two relevant conventions include GC IV, *supra* note 23, and the Hague Convention IV, *supra* note 225.

[232] *See* Univ. Centre for Int'l Hum. Law, Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation 22 (Sept. 1–2, 2005), http://www.adh-geneva.ch/docs/expert-meetings/2005/3rapport_droit_vie.pdf (last visited Dec. 5, 2011) [hereinafter Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation]; Louise Doswald–Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, 88 INT'L REV. OF THE RED CROSS 864, 892 (2006); Charles Garraway, *"To Kill or Not to Kill"—Dilemmas on the Use of Force*, 14 J. CONFLICT & SECURITY L. 3, 509 (2010).

[233] Kretzmer, *supra* note 157, at 206.

[234] *Id*.

[235] United Nations Human Rights Committee, *Concluding observations of the Human Rights Committee: Israel*, U.N. Doc. CCPR/CO/78/ISR ¶ 15 (Aug. 21, 2003), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?OpenDocument.

In 2005, the Israeli Supreme Court came to a similar conclusion, when a public interest organization, *The Public Committee Against Torture in Israel*, brought a suit protesting Israel's targeted killings policy.[236] In its opinion, the court first established that Israel and Palestinian armed groups had been in "a continuous situation of armed conflict . . . since the first *intifada*."[237] According to the court, the existence of an armed conflict triggered the application of the "law regarding international armed conflict," the "laws of belligerent occupation" and human rights law.[238] To provide further clarification as to how it would apply the law, the court affirmed, "humanitarian law is the *lex specialis* which applies in the case of an armed conflict. When there is a gap (*lacuna*) in that law, it can be supplemented by human rights law."[239] Thus, while affirming that IHRL is applicable during an armed conflict, the court indicated it would first and foremost apply IHL, consistent with the *lex specialis* approach discussed previously.

Notably, the court refused to decide the legality of Israel's policy of targeted killings. Rather, the court provided the state with a legal framework to guide lethal force, but concluded that it could not "determine that a preventive strike is always legal" or "always illegal."[240] Interestingly, notwithstanding the fact that the court had proclaimed IHL to be *lex specialis,* the court imposed a law enforcement framework. For instance, the court affirmed that:

> [A] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed.[241]

Again, the obligation to capture rather than kill is not a restraint imposed

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[236] Public Committee against Torture in Israel et al. v. The Government of Israel et al., Case No. HCJ 769/02, Judgment, ¶ 38 (Dec. 11, 2005).
[237] *Id*. ¶ 16.
[238] *Id.* ¶ 18.
[239] *Id*.
[240] *Id.* ¶ 60.
[241] *Id.* ¶ 40.

by IHL, but rather IHRL. The court has either misinterpreted IHL norms, or applied IHRL principles. Indeed, it seems the latter occurred, given the panel's reference to "domestic law."

While Israel is considered to be engaged in an "armed conflict," the court seemed uncomfortable with applying IHL principles given Israel's status as an occupying power, the relatively low level of violence, and Israel's ability to accomplish its security objectives through peacetime tactics, notably arrest and detainment. However, what happens if violence intensifies as it did in 2007, after Palestinian militants fired over 200 Qassam rockets into Israeli territory?[242] It makes little sense to hold a state facing a serious public security threat to a law enforcement framework if its adversary resorts to wartime tactics.

Indeed, legal scholars and experts agree that, "when there is a situation of armed hostilities in an occupied territory, the IHL rules relating to the conduct of hostilities apply."[243] Importantly, such hostile action must result from groups challenging the occupying power.[244] In other words, an occupying power cannot simply resort to the more permissive rules of IHL on its own volition. Armed groups must undermine the peace in such a way that the occupying power cannot manage the threat without resorting to the more permissive rules of IHL. Once security is restored, the occupying power must again use force consistent with IHRL norms. Thus, occupation law is a dynamic set of rules, which provides greater latitude than IHRL when necessary, while redefining the goals from military victory to public security.

In recent years, international courts have applied the same principles of occupation law to asymmetric non-international armed conflicts, where armed forces exercise a considerable degree of control. In *Ozkan v Turkey*, for instance, the ECtHR applied an "absolute necessity" test for the use of deadly force by Turkish security forces, even after affirming the existence of an "armed conflict between the security forces and members of the PKK," an armed insurgent group operating in Turkey, Syria, and Northern Iraq.[245] In 1993, while

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[242] *See* Isabel Kershner, *Israel Fires on Militants Planting Bomb, Killing One*, N.Y. TIMES, April 8, 2007, *available at* http://www.nytimes.com/2007/04/08/world/middleeast.html.
[243] Doswald–Beck, *supra* note 232, at 893.
[244] Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation, *supra* note 232, at 26.
[245] Ozkan v Turkey, App. No. 47165/99, Eur. Ct. H.R., Judgment, ¶ 178 (Apr. 4, 2004).

searching a village for PKK members, Turkish security forces saw two men running toward the village. The Turkish soldiers fired two warning shots, which were met by gunshots fired from the village. The security forces responded by firing in the direction from which the shots emanated. As a result of the exchange, a girl named Abide Ekin was fatally wounded. The court determined that the decision by Turkish security forces to return fire "in response to shots fired at them from the village was 'absolutely necessary' for the purpose of protecting life. It follows that there has been no violation of Article 2 [of the ECHR] in this respect."[246] Again, there is no obligation to meet an "absolute necessity" test under IHL, which according to the conventional view, is *lex specialis* during an armed conflict. Rather than interpreting the "right to life" clause in the European Convention *vis-à-vis* IHL, the ECtHR directly applied IHRL to the use of deadly force.

In the case of *Isayeva et al. v Russia* (2005), the ECtHR took the same approach. The court examined whether the use of force by Russian fighter pilots, resulting in the death of more than a dozen civilians, violated Article 2 of the European Convention. While *en route* to another mission, the fighter pilots reported coming under attack from Chechen rebels in a ground convoy. The fighter pilots returned fire, destroying the convoy, killing sixteen civilians, and wounding eleven more. No affirmative witness could be found to corroborate the pilot's claims. Nevertheless, the court held that force by Russian pilots was justified under Article 2 of the European Convention. The court noted that it was "necessary to examine whether the operation was planned and controlled by the authorities so as to minimize, to the greatest extent possible, *recourse to lethal force*."[247] Of course, lethal force against combatants is nearly always permitted under IHL. If the ECtHR were applying the rules of IHL, there should have been no need to discuss whether or not the authorities effectively planned the operation so as to minimize "recourse to lethal force." However, under IHRL, the principle of precaution requires that authorities plan operations so as to prevent or minimize the effects of deadly force. It seems clear that the ECtHR was discussing the precaution principle in the case of *Isayeva et al v Russia* even though it was widely acknowledged that Russia was engaged in an armed conflict with rebels in Chechnya.

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[246] *Id.* ¶ 179.

[247] Isayeva et al. v. Russia, App. No. 57947/00, Eur. Ct. H.R. Judgment, ¶ 171 (Feb. 24, 2005) (emphasis added).

These judicial decisions provide support for the notion that IHRL principles should control the use of force by a state fighting an asymmetrical conflict against a NSAG until insurgents escalate violence to a point that it seriously threatens the lives of soldiers or the state's ability to maintain control over the territory in question. Admittedly, this tipping point will remain subjective and based more on the armed forces' capabilities than the actual level of violence. After insurgents have escalated the conflict beyond the tipping point, the state's response should be guided by the more permissive regime of IHL.

Importantly, these court cases reflect support for the "use-of-force" continuum first proposed by Jean Pictet.[248] In short, Pictet posited that IHL required that states only resort to deadly force against combatants if non-lethal measures had been exhausted.[249] As Parks highlights, governments flatly rejected this assertion, which was put forward by Pictet in the late 1970s.[250] Indeed, unless an enemy combatant voluntary offers to surrender, nothing in treaty or customary IHL requires that armed forces attempt capture even if feasible at the time. But, the Israeli Supreme Court and the ECtHR both seem to accept the view that, outside of active hostilities, IHRL norms, which do impose such a restraint, should govern targeting decisions in conflicts where the state exercises a considerable degree of control.

A number of scholars have come to the same conclusion. A report from an expert meeting on "The Right to Life in Armed Conflicts and Situations of Occupation," which was organized by the Center for International Humanitarian Law at Geneva University, confirms that some representatives from governments fighting counterinsurgency wars, prominent human rights organizations and scholars believe IHRL governs a state's offensive operations outside of hostilities in non-international armed conflicts.[251] While not a unanimous view, most of the individuals in attendance, according to the report, believed that a state's forces were required to "effect an arrest where possible, as well as to plan their operations in such a way as to maximize the opportunity of

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[248] PICTET, *supra* note 202, at 32.
[249] *Id.*
[250] Parks, *supra* note 174, at 787.
[251] *See* Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation, *supra* note 232, at 37–38. Individuals participating in this meeting included representatives from: the U.S. Mission in Geneva, the U.K. Army Legal Services, the Russian Mission in Geneva, the ICRC, Human Rights Watch, International Commission of Jurists, and several respected and influential academics.

being able to effect an arrest. One expert remarked that this rule of HRL provides greater clarity than does the IHL of NIAC" [non-international armed conflict].[252]

But, court decisions and scholarly views are one thing. What about the practice of states fighting these conflicts? The rules of engagement for U.S. soldiers in Afghanistan are classified. However, as noted above, the COIN doctrine, which was recently developed to guide U.S. counter-insurgency operations, imposes far greater restrictions on the use of force than in conventional warfare. According to U.S. Counterinsurgency Manual, "[i]n situations where civil security exists, even tenuously, Soldiers and Marines should pursue nonlethal means first, using lethal force only when necessary."[253] While the manual stops short of imposing a "least harmful means" or "last resort" test, the over-riding purpose of the doctrine is to limit the use of lethal force. Importantly, even if the manual required that U.S. Soldiers pursue nonlethal means first, the U.S. COIN manual is not a legal document. Rather, it provides guidelines and principles for counterinsurgency operations. As a result, the COIN manual is only a reflection of U.S. practice, and not *opinio juris*, or the belief that such action is required by law, which combined with state practice may constitute binding customary international law.

What has been COIN's effect on U.S. operations in Afghanistan? One U.S. special operations officer who had served four tours in Afghanistan and six tours in Iraq confirmed that the implementation of the COIN doctrine had resulted in significantly narrowing the U.S. rules of engagement (ROE), imposing far tighter restrictions on the use of force.[254] Indeed, the officer confirmed both the existence of an escalation of force matrix and that the current ROE requires U.S. forces to capture rather than kill when the circumstances permit. Even if U.S. soldiers had solid information on the location of a member of the Taliban, which under IHL could be targeted at any time, the officer confirmed that U.S. forces would be required to attempt to capture the insurgent so long as it did not pose excessive risk to U.S. forces.

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[252] *Id.* at 38.

[253] U.S. DEP'T OF ARMY /MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL 3-24 sec. 7-36 (15 Dec.Dec. 2006), *available at* http://www.fas.org/irp/doddir/army/fm3-24.pdf.

[254] Telephone Interview with a Global Operations Officer with the U.S. Special Forces (requested anonymity) (Jan. 26, 2011); *see also* Anna Mulrine, *How Afghanistan Civilian Deaths Have Changed the Way the US Military Fights*, CHRISTIAN SCI. MONITOR, July 27, 2011, http://www.csmonitor.com/USA/Military/2011/0727/How-Afghanistan-civilian-deaths-have-changed-the-way-the-US-military-fights.

Does this example represent a perceived legal obligation to capture rather than kill? Does it suggest the U.S. Government believes the use of force is subject to IHRL norms where U.S. or NATO forces have established "effective control" over territory? Not necessarily. Increased restrictions on the use of force stemming from the COIN doctrine are likely driven by policy. As discussed, compelling policy reasons dictate the adoption of restrictive ROE in Afghanistan. According to contemporary counterinsurgency theory, armed forces combating an insurgency must reduce civilian fatalities, arguably through both policing and more discriminate offensive operations. Limiting violence to targeted operations against individuals, which are unambiguously combatants, will likely reduce the number of noncombatant deaths.

Interestingly, the Israeli government claims that its targeted killings adhere to more restrictive restraints than those imposed by IHL. In the *Targeted Killings* case in 2005, the Israeli government noted that "[t]argeted killings are performed only as an exceptional step, when there is no alternative to them . . . [i]n cases in which security officials are of the opinion that alternatives to targeted killing exist, such alternatives are implemented to the extent possible."[255] Gabriella Blum, former senior legal advisor to the Israeli Military Advocate General's Corps, confirms that Israeli "targeted killing operations will not be carried out where there is a reasonable possibility of capturing the terrorist alive."[256] Of course, whether or not the Israeli military follows this stated policy in practice merits debate. But, it is noteworthy that the Israeli government claims to abide by the customary IHRL obligation requiring that authorities exhaust non-lethal options. Importantly, while the stated policy of the Israeli government may be regarded as state practice, an official policy does not necessarily constitute *opinio juris*.

By and large, states engaging in counterinsurgency and counterterrorist operations have adopted more conservative rules of engagement in these conflicts, severely restricting when soldiers may employ lethal force in some instances. Yet, policy objectives and public scrutiny, rather than a perceived legal obligation, are more likely the driving factors behind greater restraints on the use of force. In recent years, however, numerous courts and scholars have contended that IHRL may already govern the use of force in occupations and non-international

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[255] Public Committee against Torture in Israel et al. v. The Government of Israel et al., Case No. HCJ 769/02, Judgment, ¶ 13 (Dec. 11, 2005).
[256] Blum & Heymann, *supra* note 178, at 152.

armed conflicts more akin to robust peacekeeping than conventional wars. Indeed, the ECtHR has consistently looked to IHRL to determine the legality of lethal operations by member states engaged in internal conflicts. As a result, one scholar contends the Court "considers the principles of human rights law as *lex specialis* in right to life cases arising out of internal armed conflicts."[257] Further, the U.N. Human Rights Committee and the Israeli Supreme Court have also claimed Israeli targeted killings are subject to an "absolute necessity" test. While still a minority view, these actors are challenging the *status quo ante*, and the normative impact of these actors cannot be underestimated. Indeed, judiciaries and influential scholars shape the opinions of those in governments and the military. Given the trend toward more conservative or restrictive rules of engagement, complying with the restraints imposed by IHRL in the use of force could soon be regarded as a binding rule of customary international law.

V. Conclusion

In places such as Afghanistan, the Palestinian territories and Somalia, states fight against adversaries not easily distinguishable from the civilian population. The fact that NSAG have everything to lose and little to gain in distinguishing themselves from the civilian population suggests that state militaries will only continue to face difficulties in distinguishing between combatants and noncombatants when at war. Military lawyers seeking criteria for distinguishing between combatants and noncombatants in these conflicts should look to the ICRC's guidance on direct participation in hostilities, a sensible approach that adequately balances the needs of militaries with civilian protection concerns. Indeed, the ICRC's approach is the most feasible for distinguishing combatants from noncombatants in the types of wars fought today.

Given the challenge of adhering to the principle of distinction, this article considered whether the conventional targeting rules established by the permissive IHL regime make sense in asymmetric conflicts. This article suggested an alternative approach – specifically, that IHRL should govern the use of lethal force where parties to a conflict have either established effective control or are an occupying power at the time of

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[257] Juliet Chevalier–Watts, *Has Human Rights Law Become Lex Specialis for the European Court of Human Rights in Right to Life Cases Arising from Internal Armed Conflicts?*, 14 INT'L J. HUM. RTS. 4 (2010).

armed conflict. This approach makes sense for important policy reasons. The underlying purpose of IHL is to provide belligerents with a set of rules to effectively accomplish their military objectives while limiting harm and suffering to combatants and noncombatants alike. With territory firmly within their grasp, armed forces should be able to maintain security through the resort to non-lethal measures first. Indeed, it would be contrary to the spirit of the rule of law to conclude that armed forces may resort to lethal force first in a situation where arrest and detainment is a reasonable option. An obligation to attempt capture in these situations would also help prevent arbitrary attacks based on faulty intelligence.

As David Kennedy notes, the "boundary between law enforcement, limited by human rights law, and military action, limited by the laws of armed conflict, seems ever less tenable."[258] Increasingly, IHRL is becoming more important to the regulation of force during armed conflicts. Rather than determining whether a state of violence constitutes an armed conflict or merely internal disturbances, the armed forces' degree of control and the intensity of violence should determine which legal regime governs the use of force. Scholars and courts have supported a move in this direction. Indeed, these actors may play a key role in shaping a new norm requiring that state armed forces use force consistent with IHRL principles in areas under their control—even when the situation may be legally characterized as an armed conflict.

[258] DAVID KENNEDY, OF LAW AND WAR 113 (2006).

ECONOMICS AND AUSTERITY RELATIVE TO VETERANS' CLAIMS AND THE VETERANS APPEAL PROCESS

DAVID KIMBALL STEPHENSON*

I. Introduction

Providing for veterans who have selflessly served and dearly sacrificed is firmly rooted in our nation's history. Remembering the importance of this concept, lest we forget or overlook the noblest of all sacrifices, we must persevere to further the goals of a grateful nation in a responsible way.

Veterans who served this country in any capacity are a special class of individuals who earned the right to have an appellate system that is efficient and responsive to their appeals for relief. In this regard, the government has continuously modified the veterans' claims and appellate system to promote responsiveness and efficiency in the veterans' claims system. One such modification occurred in 1988 when judicial review was inserted in the veterans' claims process.[1] Despite the noble attempts to improve upon the veterans' claims system, significant delays in claim adjudication persist to this day.[2] The purpose of this article is to illustrate with current empirical data and historical research that increased efficiency in the existing veterans' claims process can be achieved by implementing a reasonable claim time limit to address the delays in claim adjudication. In addition to increased efficiency, this time limit would generate fiscal savings that would be preferable to savings generated from blanket cuts to federal spending and veterans' benefits.

To address the possibility of implementing a time limit in veterans claims, Part II-A discusses the legislative evolution of veterans'

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[1] *See* Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) [hereinafter VJRA].

[2] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-213, VETERANS' DISABILITY BENEFITS: FURTHER EVALUATION OF ONGOING INITIATIVES COULD HELP IDENTIFY EFFECTIVE APPROACHES FOR IMPROVING CLAIMS PROCESSING [hereinafter GAO 10-23] (2010); *The Impact of Operation Iraqi Freedom and Operation Enduring Freedom on the United States Department of Veterans Affairs: Hearing before the Subcomm. of the H. Comm. of Veterans Affairs*, 110th Cong. 48 (2007) [hereinafter *Impact of War on VA*] (statement of Professor Linda Bilmes, Harvard Univ.).

disability compensation law in relation to our evolving national economy. Part II-B discusses different legal theories that have evolved to govern the adjudication of veterans' disability compensation appeals. Part II-C connects the legal and legislative evolution by providing a brief structural overview of the current veterans' benefit-appellate system. Part III discusses a few of the appellate and structural changes the Veteran's Administration (VA) has made to address problem areas within its disability and compensation claims system. Part IV briefly describes the demographic characteristics of veterans who appealed their claims to the Court of Appeals for Veterans Claims (CAVC) in fiscal year (FY) 2010. Part V argues for the implementation of a statute of repose in our veterans' disability claim process to address the shortcomings of the current structure. Clearly, any change in the veterans' appellate process could have vast fiscal implications.[3] However, it is our collective obligation as Americans to explore the premises underlying the structure of the veterans' benefits and appellate system in order to promote efficiency, responsibility, and predictability in this unique system.

II: The Legislative Evolution of Veterans' Disability Pensions

In 1781, George Washington wrote, "We ought not to look back, unless it is to derive useful lessons from past errors and for the purpose of profiting by dear bought experience."[4] A system that originally began as a simple, straight-forward approach to administer veterans' disability compensation has since morphed into a complex administrative organism.[5] Consequently, the evolving legislative scheme that governs the current veterans' disability appellate system has had many intricate developments.[6] To address this historical complexity, it is necessary to

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[3] *See, e.g.*, VA PERFORMANCE AND ACCOUNTABILITY REPORT FY 2010, at I-92 [hereinafter VA PAR 2010], *available at* http://www.va.gov/budget/report/archive/FY-2010-VAPerformanceAccountabilityReport.zip (noting the increased net cost of a billion dollars as a result of implementing Agent Orange benefits).

[4] Letter from George Washington, to John Armstrong (Mar. 26, 1781) (The George Washington Papers at the Library of Congress), *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw210400.

[5] Linda Bilmes, *Soldiers Returning from Iraq and Afghanistan: The Long-term Costs of providing Veterans Medical Care and Disability Benefits* 6 (John F. Kennedy Sch. of Gov., Harvard Univ., Working Paper RWP07-001), *available at* http://web.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=4329 (describing the disability compensation process as lengthy and complicated).

[6] *See* WILLIAM H. GLASSON, THE HISTORY OF MILITARY PENSION LEGISLATION IN THE UNITED STATES 10 (New York: Columbia Univ. Press, 1900). From the founding of the

discuss three areas: the legislative evolution that has led to the modern day VA disability compensation and appellate system; the evolution of various legal theories that govern the adjudication of veterans' claims; and a brief overview of the current disability claims system.

A. The Legislative Evolution of Veterans' Disability Pensions

The roots of the modern day veterans' disability system can be traced back to antiquity, when Greece provided pensions to soldiers who could prove permanent injury.[7] Similar legislation enacted in Elizabethan England provided pensions to veterans who served after March 1588, the year the English defeated the Spanish Armada.[8] In the United States, this tradition dates back to 1636, when Plymouth Colony declared that any soldier maimed in defense of the Colony would be "maintained competently" for life at the expense of the public treasury.[9] In 1776, the Continental Congress continued this commitment to veterans by announcing it would provide disability compensation to soldiers injured in the struggle for American independence.[10] Although benevolent, these pieces of legislation provided little substantive guidance on how to evaluate or adjudicate a veteran's disability claim.[11]

In 1792, Congress began providing substance to this issue by passing the Invalid Pension Act of 1792 (the 1792 Act), which promised lifetime disability compensation payments to veterans injured in the defense of

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nation until the mid-20th century, veterans' disability pensions were divided into service pensions and disability pensions, with the latter being known as "invalid pensions." *See id*. Because the term "invalid pension" is no longer used, this article will refer to such pensions as a "disability compensation" when possible to limit confusion.

[7] Douglass C. McMurtrie, *The Historical Development of Public Provisions for the Disabled Soldier*, 26 INTERSTATE MED. J., Feb. 1919, at 109.

[8] An Acte for the Relief of Souldiours, 35 Eliz., c.4 (1588).

[9] Records of the Colony of New Plymouth in New England, vol. 11 [Laws 1623–1682], 13, 106, 182. *See* Daniel Vickers, *Competency and Competition: Economic Culture in Early America*, 47 WM. & MARY Q., Jan. 1990, at 3, 3–10 (equating the colonial notion of competent maintenance to subsistence).

[10] Worthington C. Ford et al., *Journals of the Continental Congress*, 1774–1789 (1914) (edited from the Original Records in the Library of Congress, vol. 5, at 702–05) (Washington: GPO, 1904–37).

[11] *See* ROBERT MAYO & FERDINAND MOULTON, ARMY AND NAVY PENSION LAWS OF THE UNITED STATES 1–2 (Lucas Brothers, 2d ed. 1854) (detailing the early procedures used to adjudicate colonial claims for disability compensation).

the colonies during the Revolutionary War.[12] However, the benevolence of the 1792 Act was confined by the inclusion of a two-year time frame in which veterans could apply for and receive benefits.[13] The 1792 Act also required veterans who sought disability compensation to appear before a Circuit Court Judge and submit evidence proving their claimed injury occurred during military service.[14] Once a veteran fulfilled this legal requirement, the court, acting pursuant to the 1792 Act, was then required to define the degree of the injury and connect it to a veteran's military service.[15] If a favorable determination resulted, the court informed the Secretary of War who then notified Congress to place the veteran's name on the federal pension list.[16] However, the 1792 Act provided that the Secretary of War could reverse the court's findings if the Secretary concluded that an "imposition or mistake" occurred.[17]

Supreme Court Justices John Jay and William Cushing protested against the 1792 Act on the grounds that it violated the separation of powers doctrine because it permitted an executive official to overturn judicial determinations.[18] In their protest, the Justices, along with New York Circuit Judge James Duane, offered a solution to the problem by proposing that appointed "commissioners" hear these claims instead of federal judges.[19] Future legislation structured in this way, they opined, would be constitutionally permissible because the separation of powers doctrine would not be implicated if an executive branch official

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[12] *See* An Act to Provide for the Settlement of Claims of Widows and Orphans Barred by the Limitations heretofore Established, and to Regulate the Claims of Invalid Pensions, 1 Stat. 243 (1792) [hereinafter 1792 Act], *available at* http://www.constitution.org/uslaw/sal/sal.htm.

[13] *Id.* It should be noted that after America won its independence from Great Britain, the uncertainty of the undeveloped national economy was a central concern as there was no longer a demand for war-time goods and our ability to establish and regulate foreign commerce was shrouded in uncertainty. *See* CHESTER A. WRIGHT, ECONOMIC HISTORY OF THE UNITED STATES 230 (William H. Spencer ed., Univ. of Chicago Press 1941).

[14] *See* 1792 Act, *supra* note 12; Susan L. Bloch & Maeva Marcus, *John Marshall's Selective Use of History in* Marbury v. Madison, WIS. L. REV. 301, 304 (1986) (discussing the procedure for obtaining an invalid pension under the 1792 and 1793 Acts).

[15] *See* 1792 Act, *supra* note 12.

[16] *See id.*; *see* GLASSON, *supra* note 6, at 26.

[17] *See* 1792 Act, *supra* note 12.

[18] GLASSON, *supra* note 6 at 26–27.

[19] *Id.* The protest may have also involved the perceived impact of adding veterans' claims to the burden of the early traveling circuit. *See* CLARE CUSHMAN, COURTWATCHERS: EYEWITNESS ACCOUNTS IN SUPREME COURT HISTORY 31–34 (2011) (detailing the burdens of early "circuit riding").

overturned the legal determination of a commissioner.[20] Although this distinction may seem arbitrary, it contributed to the fundamental questions posed in the landmark legal battle of *Marbury v. Madison*.[21] Despite the arguments raised by Justice Jay and his colleagues, the dispute over the provisions in the 1792 Act ended in a draw,[22] as Congress modified it the following year in the 1793 Act.[23]

The 1793 Act retained the two-year claim limitation period, but required veterans to produce and submit evidence of a service-connected disability, under oath, to a district court judge or a three-person commission.[24] In this way, the district courts acted as gatekeepers for the admission of evidence and forwarded admitted documents to the Secretary of War for authentication.[25] In turn, the Secretary would make a pension recommendation by submitting a statement of the case[26] to Congress for a decision in the first instance.[27] Determinations made by a district court under the 1793 Act were appealable, but only by the Secretary of War.[28] As a result, the Federal Government retained exclusive review of veterans' disability claims as a mechanism to correct an erroneous award.[29] Consequently, the early legislative and appellate paradigm of our veterans' disability compensation system was premised on giving Congress the ultimate authority to correct an erroneous benefit denial.[30] Put another way, a veteran who received an adverse disability compensation decision had to successfully persuade their Congressional representative, and perhaps other members of Congress, that they were

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[20] *See* GLASSON, *supra* note 6, at 27.
[21] 1 Cranch (5 U.S.) 137, 171 (1803).
[22] *Compare* 1792 Act, *supra* note 12, *with* An Act to Regulate the Claims of Invalid Pensions, 1 Stat. 324 (1793), *available at* http://www.constitution.org/uslaw/sal/sal.htm [hereinafter 1793 Act]. Because the 1792 Act was modified by the 1793 Act the following year, it was never officially challenged or sanctioned by the courts . *See In Hayburn's Case*, 2 Dall. 409, 2 U.S. 109 (1792); *In re* Yale Todd, 13 How. 40 (1851); Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L. REV. 1257, 1270–73, (2009) (explaining the relationship between *Hayburn's Case* and *Yale Todd* in the historical context of judicial review and the early Invalid Pension Acts).
[23] *See* 1793 Act, *supra* note 22; GLASSON, *supra* note 6, at 59.
[24] *See* 1793 Act, *supra* note 22.
[25] *See id.*
[26] *See id.* As a historical note this seems to be the first use of the term "statement of the case" used today. *See* 38 U.S.C. § 7105(a) (Westlaw 2012).
[27] *See* 1793 Act, *supra* note 22.
[28] *See id.*
[29] *Id.*
[30] *See* James D. Ridgway, *Splendid Isolation Revisited*, 3 VETERANS L. REV. 133, 146–49 (2011).

entitled to relief and secure a spot on the federal pension list through separate legislation.[31]

The substance of the 1792 and 1793 Acts helped establish the modern-day structure of administrative rule making procedures by placing the Secretary of War in a particularly influential position to administer the early veterans' disability pension system.[32] Because Congress typically focused veterans' legislation on a specific class of veteran,[33] and left the qualifying criteria broadly defined, the Secretary of War, Commissioner of Pensions, or any other duly appointed agency had to fill in the legislative gaps with administrative guidance.[34] Although

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[31] *See, e.g.*, An Act Concerning Invalid Pensioners, 2 Stat. 491 (1808) [hereinafter 1808 Act], *available at* http://www.constitution.org/uslaw/sal/sal.htm (illustrating the means in which discrete names were placed on the invalid or disabled pension list via independent legislation).

[32] *See* GLASSON, *supra* note 6, at 95.

[33] *See* GUSTAVUS A. WEBER, THE BUREAU OF PENSIONS: ITS HISTORY, ACTIVITIES, AND ORGANIZATION 9–25 (John Hopkins Press 1923) (illustrating Congress's historical approach to passing disability legislation targeted at veterans of specific wars or battles and the resulting administrative burden). Additionally, Congress continually updated legislation if it wanted to increase pensions or modify the names to the pension list. *See id.*; *see also* 1808 Act, *supra* note 31.

[34] As time passed, Congress frequently shifted the administration of pensions to different agencies, with the responsibility ultimately delegated to VA. For example, after the Revolutionary War, the Founders thought it best to vest the administration of veterans' pensions with the Department of War. *See* An Act to Provide for the Settlement of Claims of Widows and Orphans barred by the limitations heretofore established, and to regulate the Claims to Invalid Pensions, 1 Stat. 233, 244 (1792). At that time, veterans' claims were processed by pension agents who were operating under the authority and at the direction of the Secretary of War. *See, e.g.*, An Act to Authorize the Secretary at War to appoint an additional agent for paying pensioners of the United States, in the state of Tennessee, 3 Stat. 521 (1819). Around 1810, one of the first administrative agencies, the Military Lands and Pension Bureau, was created to help address veterans' disability claims. *See* Ridgeway, *supra* note 30. Although a separate agency, this bureau operated under the discretion of the Department of War. *Id.* As time passed, the Military Bounty Lands and Pension Bureau was divided into two parts, leaving the Pension Bureau as a separate entity. *Id.* In this way, Congress better positioned itself to oversee appropriations regarding veterans' disability claims. *Id.* In 1833, the Pension Bureau was renamed the Bureau of Pensions and the office was given a new head, the Commissioner of Pensions. *See* An Act for making appropriations for the civil and diplomatic expenses of government for the year one thousand eight hundred thirty-three, 4 Stat. 619, 622 (1833). The new Commissioner of Pensions was appointed by the President and operated under the previous rules promulgated by the Department of War. *See id.* Thus, the Bureau and the new Commissioner were still subordinate to the Secretary of War, but could promulgate new rules and regulations to regulate pensions. *See id.* This change was only temporary, however, as Congress reassigned the Bureau of Pensions to the Department of the Navy in 1840, and then to the newly created Department of the Interior in 1849. *See*

these early pieces of legislation provided the early framework used in adjudicating veterans' appeals, the scope of the benefits and the ability to appeal were limited by not providing a formal appeal process, barring claims after a specified time, and leaving qualifying criterion vaguely defined.[35]

One of the first legislative changes that expanded the qualifying criteria for veterans' benefits occurred in 1818, when the Department of the Treasury informed Congress that a tax surplus was expected.[36] Consequently, President Munroe suggested, and Congress approved, expanding the benefits paid to veterans of the Revolutionary War.[37] The resulting law, known as the Service Pension Act of 1818 (the 1818 Act), provided a lifetime pension to all veterans of the Revolutionary War, regardless of disability.[38] In order to qualify for a pension under the 1818

An Act to continue the office of the commissioner of Pensions, and to transfer the pension business, heretofore transacted in the Navy Department, to that office, 5 Stat. 369 (1840); An Act to establish the Home Department, and to provide for the Treasury Department an assistant Secretary of the Treasury and a commissioner of Customs, 9 Stat. 395 (1849).

In 1914, Congress created the Bureau of War Risk Insurance and, in 1917, assigned it as a parallel agency to administer veterans' pensions. *See* 40 Stat. 398 (1917). Because there were multiple agencies administering veterans pensions at this time, Congress abolished the Bureau of War Risk insurance and created the Veterans Bureau in 1921. *See* 42 Stat. 147 (1921); 42 Stat. 202 (1921). Nine years later, in 1930, Congress further streamlined the agencies responsible for administering veterans' disability pensions by abolishing the Bureau of Pensions, incorporating it into the Veterans Bureau. *See* 46 Stat. 1016 (1930). Later that same year, by executive order, President Taft authorized the Creation of the Veterans Administration. *See* Executive Order No. 5398 (1930). It was not until 1989, that the Veterans Administration was elevated to a cabinet-level agency to create the current Department of Veterans Affairs. *See* 102 Stat. 2635 (1989).

[35] *Compare* 1793 Act, 1 Stat. 324 (1793) (giving the Secretary of War the duty to provide Congress with a Statement of the Case to place the veterans on the pension list), *with* An Act to Make Provision for Persons that Have Been Disabled by Known Wounds Received in the Actual Service of the United States, During the Revolutionary War, 2 Stat. 242 (1803) (providing the Secretary of War with the ability to determine if the claim is correct within the meaning of the Act before transmitting the claim to Congress).

[36] GLASSON, *supra* note 6, at 32–36.

[37] An Act to Provide for Certain Persons Engaged in the Land and Naval Service of the United States, in the Revolutionary War, 3 Stat. 410 (1818) [hereinafter 1818 Act].

[38] *Id.* Between 1790 and 1819 the American economy began a period of growth as the French and English relaxed their restrictive trade policies after a series of wars were executed between the two nations. *See* GARY M. WALTON & HUGH ROCKOFF, THE HISTORY OF THE AMERICAN ECONOMY 149 (Thomas O. Gray ed., 9th ed. 2002). Additionally, the occurrence of the French Revolution helped stimulate a strong demand for American products overseas, resulting in a five-fold increase in exports over this time period. *See* WRIGHT, *supra* note 13, at 246–47.

Act, a veteran was only required to provide a sworn statement that they were a Revolutionary War veteran who was suffering from "reduced circumstances."[39] As a result of these low evidentiary standards, one legislator lamented that this piece of pension legislation would "be one that our posterity regrets."[40]

Indeed, the low evidentiary burdens of the 1818 Act proved ripe for fraud and abuse.[41] Specifically, after the 1818 Act was passed, the number of veterans on the federal pension list ballooned from 2,500 to over 18,000 over the next two-years.[42] This increase was so large that annual expenditures on pensions went up nearly ten-fold in one-year.[43] Accordingly, what started out as an altruistic and benevolent endeavor turned into a political nightmare as fellow citizens funneled into town hall meetings to allege that many men of able means were unjustly collecting ensions and abusing taxpayer goodwill.[44]

In response, Congress amended the 1818 Act and required veterans receiving pensions under the Act to submit a notarized statement of income and assets to verify their financial need.[45] If veterans did not comply, then the Secretary of War was empowered to remove such individuals from the pension list.[46] As a result of this amendment, over 6,000 names were removed from the pension list.[47] Despite this move towards increased fiscal responsibility, in 1823 Congress created a

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[39] GLASSON *supra*, note 6, at 33–35. The concept of reduced circumstances was meant to apply broadly as veterans only had to demonstrate a financial need to avert poverty. *Id.*
[40] *Id.* at 35.
[41] *Id.* at 37.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 36.
[45] *See* An Act in Addition to an Act, entitled 'An act to Provide for Certain Persons Engaged in the Land and Naval Service of the United States, in the Revolutionary War, 3 Stat. 569 (1820) [hereinafter 1820 Act], *available at* http://www.constitution.org/uslaw/sal/sal.htm. In economic terms, the Panic of 1819 coincides with this decline in veterans' disability benefits. *See* WRIGHT, *supra* note 13, at 494–95.
[46] *See* 1820 Act, *supra* note 45.
[47] GLASSON, *supra* note 6, at 39. *See also* An Act Regulating Payments to Invalid Pensioners, 3 Stat. 514 (1819) (requiring two affidavits by recognized surgeons describing disability and causation to establish eligibility for a disability pension), *available at* http://www.constitution.org/uslaw/sal/sal.htm.

mechanism for the 6,000 non-compliant veterans to be reinstated on the pension list if they were able to prove financial need.[48]

Despite the disturbing rate of fraud following the passage of the 1818 Act, when the economy began to improve[49] Congress resumed passing legislation that expanded and liberalized veterans' benefits.[50] For example, in 1828, Congress again passed an Act granting all veterans of the Revolutionary War a pension, regardless of need or disability.[51] Similarly, in 1862, the General Pension Act was passed which mandated that diseases, such as tuberculosis contracted during military service, were now compensable service-connected disabilities.[52] In 1873, Congress passed the Consolidation Act, which began to focus on the degree of disability, rather than military rank, as the primary factor for determining the amount paid for a service-connected disability.[53] In 1879, Congress passed the Arrears Act which permitted veterans to receive disability compensation from the date of discharge instead of the date of application.[54] In 1890, Congress passed the Disability Pension

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[48] *See* An Act Supplementary to the Acts to Provide for Certain Persons Engaged in the Land or Naval Service of the United States in the Revolutionary War, 3 Stat. 782 (1823), *available at* http://www.constitution.org/uslaw/sal/sal.htm.

[49] *See* HAROLD M. SOMERS, GROWTH OF THE AMERICAN ECONOMY: PERFORMANCE OF THE AMERICAN ECONOMY 319 (Harold F. Williamson ed., 2d ed., Prentice Hall Pub. 1951).

[50] *See* Theda Skocpol, *America's First Social Security System: The Expansion of Benefits for Civil War Veterans*, 114 POL. SCI. Q. 85, 108 (1993) (describing America's historical approach to veterans' disability as the most liberal in the world).

[51] An Act Supplementary to the Act for the Relief of Certain Surviving Officers and Soldiers of the Revolution, 4 Stat. 529 (1832), *available at* http://www.constitution.org /uslaw/sal/sal.htm. Indeed, pursuant to this Act, widows or orphans could even collect the pension due to the veteran. *Id.*

[52] An Act to Grant Pensions, 12 Stat. 566 (1862), *available at* http://www.constitution. org/uslaw/sal/sal.htm. Although this legislation was passed during the Civil War, the manufacturing, farming, mining, and commerce sectors experienced growth as the Federal Government began to stimulate the economy with spending. *See* SOMERS, *supra* note 49, at 324.

[53] *See* An Act to Revise, Consolidate, and Amend the Laws Relating to Pensions, 17 Stat. 566, 567 (1873), *available at* http://www.constitution.org/uslaw/sal/sal.htm. Throughout 1865-1890 the economy was relatively unstable, but benefited from investment in railroads, domestic land speculation, and a crop failure in Europe. *See* SOMERS, *supra* note 49, at 646–52.

[54] *See* An Act to Provide that All Pensions on Account of Death, or Wounds Received, or Disease Contracted, Shall Commence From the Date of Discharge From the Service of the United States, 20 Stat. 265 (1879), *available at* http://www.constituion.org/uslaw/sal/ sal.htm.

Act which permitted veterans to receive a disability compensation for mental conditions connected with active service.[55]

Although the legislation passed between 1828 and 1890 was well intended, Congress lost sight of the cumulative fiscal impact of continually expanding veterans' disability compensation benefits.[56] Indeed, it was not until 1933, in the wake of the Great Depression, that the government again realized it had to readdress the scope of the veterans' disability pension system.[57] To this end, Congress passed the Economy Act of 1933, which reflected an effort to remove judicial review of pension decisions,[58] repeal previous pension laws, review the current pension list to identify reductions, and reduce previously granted pensions by ten-percent.[59]

Despite the pre-World War II move toward reformation, when the economy began to improve, the stage was set for a renewed round of expansions in the veterans' benefits system.[60] During this period, Congress passed the Servicemen's Readjustment Act of 1944, which provided education benefits, home loan guaranties, and a year of unemployment compensation for veterans returning from war.[61] The success of this legislation led to the creation of the Veterans' Readjustment Benefits Act of 1966, which provided these same benefits to veterans without being premised upon war-time service.[62] In 1991, Congress passed the Agent Orange Act, which illustrated a recognition that certain diseases suffered by veterans were caused by exposure to

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[55] *See* An Act Granting Pensions to Soldiers and Sailors Who Are Incapacitated for the performance of Manual Labor, and Providing Pensions to Widows, Minor Children, and Dependent Parents, 26 Stat. 182 (1890).
[56] *See* Skocpol, *supra* note 50.
[57] *See* HISTORY OF THE U.S. SENATE COMMITTEE ON FINANCE (1932–1938) [hereinafter COMMITTEE ON FINANCE], *available at* http://finance.senate.gov/about/history/ (last visited Aug. 5, 2011).
[58] *See* Rory E. Riley, *Simplify, Simplify, Simplify-An Analysis of Two Decades of Judicial Review in the Veterans' Benefits Adjudication System*, 113 W.VA. L. REV. 67, 71–72 (2010).
[59] *See* An Act to Maintain the Credit of the United States, 48 Stat. 8, 12 (1933) [hereinafter Economy Act], *available at* http://www.constitution.org/uslaw/sal/sal.htm. This Act was also part of President Roosevelt's campaign promise to reduce $500 million in federal spending. *See* COMMITTEE ON FINANCE, *supra* note 57.
[60] *See* VA HISTORY IN BRIEF, *available at* http://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf. (last visited Mar. 5, 2012).
[61] *See* Servicemen's Readjustment Act, Pub. L. No. 78-346, 58 Stat. 284 (1944).
[62] *See* Pub. L. No. 89-358, 80 Stat. 12 (1966).

toxic herbicides while in Vietnam.[63] Similarly, in 1994 Congress passed legislation to recognize and compensate veterans for what is known as Gulf War Syndrome.[64] Although this is not an exhaustive list of the legislation passed in the post WWII era, if this historical expansion of benefits is coupled with the current state of the United States' economy,[65] it seems likely that the issue of reducing veterans' benefits through cuts in federal spending will again be addressed by Congress.[66]

B. Legal Evolution of Veterans' Disability Pensions

As veterans' disability claims legislation evolved to recognize a larger range of service-connected disabilities, the legal principles underlying the adjudication of veterans' claims and appeals followed a different trajectory. For greater insight into the modern day veterans' appellate system, it is necessary to discuss the evolution of the legal principles underlying the veterans' claims process.

After ratification of the Constitution, the idea of judicial review, as well as its role in the veterans' claims process, was in its infancy. As a result, early legal battles over veterans' disability claims were more conceptual in scope, focusing on constitutional propriety instead of the merits of a veteran's claim.[67] However, as the agencies that administered veterans' disability pensions developed new regulations to govern the

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[63] Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (1991). This statute allowed the Secretary of the VA to perform studies of diseases related to the exposure to herbicides, like Agent Orange, to enable compensation to be paid to those who were exposed. Twenty years later, the Secretary finalized a rule to compensate Vietnam veterans who were exposed by expanding the presumptive conditions listed in 38 U.S.C. § 1116 (2006). *See* VA PAR 2010, *supra* note 3.

[64] *See* 38 U.S.C. § 1117 (Westlaw 2012).

[65] Currently the U.S. economy is in a fragile state with unemployment at 8.3 percent, 2011 fourth quarter real gross domestic product growth at 2.8, and a federal budget deficit of $578 billion for the first five months of FY 2012. *See* News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, USDL-12-0163, at 2 (2012), *available at* http://www.bls.gov/news.release/pdf/empsit.pdf; BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, GDP GROWTH ACCELERATES IN THE FOURTH QUARTER (2012), *available at* http://www.bea.gov/newsreleases/national/gdp/gdphighlights.pdf; CONG. BUDGET OFFICE, MONTHLY BUDGET REVIEW FISCAL YEAR 2012 (2012), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/2012_02%20MBR.pdf.

[66] *See* Economy Act and accompanying text, *supra* note 59.

[67] *Compare In Hayburn's Case*, 2 U.S. 408 n.1 (1792), *with* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 315–20 (1985) (indicating the distinction between the modern approach to adjudicating a Veteran's appeal versus the early approach).

adjudication of claims, the competing legal theories underlying these claims began to emerge through various opinions issued by the courts.[68]

One of the first cases to question the legislative structure of the veterans' disability system was *Marbury v. Madison*.[69] Although this landmark case is more appropriately remembered for establishing judicial review, it nevertheless framed the discourse on the veterans' disability system by questioning the constitutional and legislative propriety of delegating executive authority over judicial determinations in veterans' claims.[70] Specifically, Chief Justice Marshall, in *Marbury*, openly questioned whether Congress could constitutionally delegate executive authority over judicial determinations via the 1792 Act when he stated:

> If [the Secretary of War] should refuse to [place a veteran's name on the pension list], would the veteran be without remedy? Is it to be contended, that where the law, in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? . . . Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law.[71]

Although the 1792 Act was not the primary issue in *Marbury*, the court intimated that veterans were entitled to some form of review over their disability compensation decisions, but the Court left the degree and scope of review undefined.[72]

After John Jay and his colleagues objected to the structure of the 1792 Act, Congress utilized the 1793 Act to establish itself as the final arbiter of veterans' disability compensation claims.[73] In *United States v. Ferreira*, Chief Justice Taney found it within the ambit of Congress's constitutional authority to delegate evidentiary rulings over veterans'

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[68] *See supra* note 34 (defining the administrative evolution over veterans' pensions).
[69] 5 U.S. (1 Cranch) 137, 164–65 (1803).
[70] *Id.*
[71] *Id.* at 163–66.
[72] *See id.* at 165.
[73] *See* 1793 Act, *supra* note 22.

claims to an independent tribunal.[74] In so doing, Justice Taney resurrected the previously undecided Hayburn's Case[75] and called Congress' decision to modify the 1792 Act "correct,"[76] concluding that Congress had the authority to create and define the powers of a veterans' pension tribunal.[77] Although *Marbury* and *Ferreira* differ factually, their legal findings affirmed the conclusions that (1) some review structure over veterans' appeals was appropriate, but (2) the precise structure of this tribunal was best left to Congressional discretion.

Next, the courts questioned whether an executive official's adjudication of a veteran's appeal constituted either a ministerial or discretionary act.[78] In *Decatur v. Paulding*, the Supreme Court reviewed a pension claim of a veteran's widow, Susan Decatur.[79] Mrs. Decatur was previously awarded a five-year survivor's pension pursuant to an independent legislative act of Congress.[80] After Mrs. Decatur was awarded this five-year pension, Congress passed an act to provide other similarly situated veteran-widows with pensions for life, or until they remarried, for which Mrs. Decatur also applied.[81] Recognizing the redundant nature of Mrs. Decatur's claims, the Secretary of the Navy[82] offered Mrs. Decatur a choice between the two pension awards, but she refused to make a choice and instead petitioned the courts to compel the Secretary of the Navy to place her name on both pension lists.[83]

In dismissing the petition, the Supreme Court found that Congress had expressly delegated discretion to the Secretary of the Navy to administer the pension fund.[84] In so doing, the Court delineated a ministerial act from a discretionary act in veterans' claims.[85] Simply put,

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[74] 54 U.S. 40, 46–48 (1851).
[75] 2 U.S. 109 (1792).
[76] *Ferreira*, 54 U.S. at 50.
[77] *Id*. at 51.
[78] *See* BLACK'S LAW DICTIONARY 534, 1086 (9th ed. 2009) (defining discretionary act as "[a] deed involving an exercise of personal judgment" and a ministerial act as involving "obedience to law instead of discretion").
[79] 39 U.S. 497, 497–98 (1840).
[80] *Id.*
[81] *Id*.
[82] Note the administrative oversight change. *See supra* note 34.
[83] *Decatur*, 39 U.S. at 498–99.
[84] *Id.*
[85] *Id*. at 497. A ministerial act can best be categorized as a command form the legislature, whereas a discretionary act requires the use of reasoning and expertise to carry out the legislative intent. *See* 4 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 64:6 (4th ed. 2011).

the Court held that the previous congressional act, which gave Mrs. Decatur her initial five-year pension, was ministerial in nature because it required compliance from executive officials.[86] However, under the latter act, the Secretary's congressionally delegated use of "judgment" was discretionary in nature, and the use of such delegated discretion could not form the basis of a cognizable legal claim.[87] Consequently, after the Supreme Court dismissed *Decatur* for a want of jurisdiction,[88] the Court began giving deference to an administrator's use of judgment in a claim's denial.[89]

After deciding *Decatur*, the Supreme Court next addressed whether a veteran's claim for disability compensation was either a vested legal right or merely a charitable gratuity.[90] If a veteran's claim was founded upon a vested legal right, then a veteran could invoke the Due Process Clause to have a previously denied claim brought before a court for review. In contrast, if a veteran's claim was classified as a charitable gratuity, then review of the claim could be dismissed on jurisdiction grounds, as in *Decatur*.[91] To resolve the issue of whether all claims for disability compensation were vested legal rights or charitable gratuities, the Supreme Court considered the competing claims of veterans who sought disability pensions under the policies of the Bureau of War Risk Insurance.[92]

Under the act that established the Bureau of War Risk Insurance, all veterans automatically received standard disability-pension insurance; however, this act also permitted veterans to receive greater coverage if they elected to purchase a separate Bureau insurance policy.[93] In this regard, two classes of veterans emerged: those with claims vested in

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[86] *Decatur*, 39 U.S. at 498–99.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *See* Lynch v. United States, 292 U.S. 571, 577(1934); *see also* United States v. Cook, 257 U.S. 523, 527 (1922); Frisbie v. United States, 157 U.S. 160, 166 (1895); United States v. Teller, 107 U.S. 64, 68 (1883) (discussing the distinction between vested rights and charitable gratuities)
[91] *See Lynch*, 292 U.S. at 577. The idea at this time was that pensions were viewed as gifts given without obligation. *See id.*; *Teller*, 107 U.S. at 68.
[92] *See Lynch*, 292 U.S. at 576–77.
[93] *Id.*; *compare* Article III, *with* Article IV of An Act to Amend and Act Entitled An Act to Authorize the Establishment of a Bureau War Risk Insurance in the Treasury Department, 40 Stat. 398, 405, 409 (1917) (indicating the differing disability policies available to veterans).

contract law and those based on the "gratuity" of the standard policy.[94] The Supreme Court took this opportunity to clarify that veterans who had purchased Bureau insurance policies had cognizable contract claims against the Federal government if their disability claims were denied.[95] Thus, a veteran who purchased a separate insurance policy could have their denied claim reviewed on due process grounds. In contrast, those who did not purchase a separate insurance policy could have their disability claims denied and rendered unreviewable because the standard disability policy was viewed as a gratuitous gift to all veterans.[96] As a result of this holding, if a veteran's claim was not founded upon a ministerial act or a vested legal right, then review of the claim's denial by a court was almost certainly precluded.[97]

Although the U.S. Court of Federal Claims (Court of Claims) was given jurisdiction over veterans' pension litigation in 1855,[98] the legal concept of deference and the distinction between a charitable gratuity and a vested legal right governed many of their early decisions.[99] Eventually, however, veterans' pension litigation was removed from the jurisdiction of the Court of Claims in 1887 when Congress passed the Tucker Act.[100] Consequently, a veteran who wished to pursue a legal claim against the Federal Government at this time could petition the courts for relief only when a contractual or ministerial right permitted such legal action.[101] Framed this way, the ability of veterans to petition the courts for review of adverse pension decisions was extremely

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[94] *Lynch*, 292 U.S. at 576–78.
[95] *Id.*
[96] *Id.*
[97] If a veteran's claim was classified as a gratuity and originated from a statute that provided the agency with discretion to administer the claimed benefit, then review of the claim's denial could be precluded, regardless of the reasoning used. However, the Supreme Court eventually eliminated this possibility when it formalized the arbitrary and capricious standard of review in veterans' claims decisions. *See* Silberschien v. United States, 266 U.S. 211, 225 (1924).
[98] *See* An act to Establish a Court of Claims for the Investigation of Claims against the United States, 10 Stat. 612 (1855).
[99] *See* Daily v. United States, 17 Ct. Cl. 144, 147–48 (1881) (upholding the gratuity concept in the administration of veterans' pensions by dismissing pension claim for lack of jurisdiction).
[100] *See* An Act to Provide for the Bringing of Suits Against the Government, 24 Stat. 505 (1887) (abolishing pensions from the U.S. Court of Claims Jurisdiction); Riley, *supra* note 58, at 71–72 (explaining that the Tucker Act's exclusion of judicial review was carried on by subsequent legislation).
[101] *See* Ridgeway, *supra* note 30.

limited.[102] Indeed, it was not until 1970 that these legal notions were challenged on due process grounds.[103]

The final concept that helped drive the intervention of modern judicial review in veterans' appeals was the modern notion of due process.[104] In *Goldberg v. Kelly*, the Supreme Court questioned if the Constitution permitted the State of New York to terminate welfare payments to state recipients without prior notice or procedure.[105] Although this case did not directly address the veterans' disability claims system, Justice Brennan, writing for the Court, broke down the theoretical distinction between charitable gratuities and vested legal rights by injecting the constitutional notion of due process into the discussion.[106] In *Goldberg*, Justice Brennan wrote:

> From its founding the nation's basic commitment has been to foster the dignity and well being of all persons within its borders. . . . [p]ublic assistance, then, is not a mere charity, but a means to promote the general Welfare, and secure the blessings of liberty to ourselves and our posterity.[107]

As a result of the Court's holding in *Goldberg*, the notion of "gratuitous" veterans' disability benefits that were not afforded constitutional protections was eroded.[108] Consequently, the debate about the paradigm of the veterans' appeals system began to shift from administrator deference to procedural fairness.[109] Recognizing this development, veterans' service organizations began to coalesce and present a unified

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[102] Indeed, it appears that after the passage of the Tucker Act the scheme of adjudicating veterans' disability compensation claims was returned to the colonial scheme.
[103] *See* Goldberg v. Kelly, 397 U.S. 254, 266–69 (1970).
[104] *Id.*
[105] *Id.*
[106] *Id.* at 264–65.
[107] *Id.*
[108] *Compare id.* at 262 (finding that the assertion that welfare benefits were a privilege and not a right was not constitutionally sound), *with* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 332–34 (1985) (finding that VA benefits "are more akin to social Security benefits."), *and* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (finding that the mailing procedures used to terminate Social Security benefits complied with the constitutional requirement of due process).
[109] In the wake of *Goldberg*, two veteran pension cases were decided by the Supreme Court on constitutional grounds that furthered the movement toward establishing judicial review over veterans' claims. *See* Traynor v. Turnage, 485 U.S. 535 (1988); Johnson v. Robinson, 415 U.S. 361 (1974).

front to Congress to advocate for the presence of judicial review in veterans' disability claims.[110] As a result, in 1988, Congress passed the Veterans Judicial Review Act,[111] which created the modern day U.S. Court of Court of Appeals for Veterans Claims,[112] an independent Article I Court.

C. An Overview of the Current Disability Compensation and Appellate System

In order to clarify terms and provide additional insight into the current VA benefits and appellate process, a brief overview will be given. This section begins with some initial distinctions within VA's system. Next, it will discuss the elements of a veteran's legal claim for disability compensation and define what generally constitutes a compensable disability. This section concludes by providing a brief overview of the procedural and appellate processes for a veteran's disability compensation claim.

Today, disability compensation is distinct from a disability pension.[113] A disability pension is paid to war-time veterans age 65 or older, who have limited income, and are rated permanently and totally disabled.[114] In contrast, disability compensation is paid to any veteran who was either injured or contracted a disease while on active service.[115] While disability pensions are a fundamental part of veterans' benefits, the focus of this article is on veterans' claims for disability compensation and the appellate process that governs the disputes over such claims.

A modern claim for disability compensation includes five legal elements.[116] These elements are as follows: "(1) veteran status; (2) existence of a disability; (3) service connection of the disability; (4) degree of disability, and (5) effective date of the disability."[117] A veteran

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[110] *See* Ridgeway, *supra* note 30 at 194–216; Riley, *supra* note 58, at 75.
[111] *See* VJRA, *supra* note 1.
[112] *See* Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, 112 Stat. 3315 (1998).
[113] *See Compensation and Pension Service*, U.S. DEP'T. OF VETERANS AFFAIRS, *available at* http://www.vba.va.gov/bln/21/ (last visited Mar. 5, 2012).
[114] *Id.*
[115] *Id.*
[116] D'Amico v. West, 209 F.3d 1322, 1326 (Fed. Cir. 2000).
[117] *Id.*

is defined broadly as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."[118] To establish the existence of a disability, the veteran needs either a medical opinion or medical evidence with a medical diagnosis.[119] To be compensable, the claimed disability must be service-connected, and "incurred or aggravated . . . in the line of duty in the active military, naval, or air service."[120] In this regard, a veteran can demonstrate service-connection by establishing that the existing disability was (1) directly connected to military service, (2) aggravated by military service, or (3) presumptively service-connected.[121] Once the disability is established as service-connected, an effective date for compensation is given and the disability is assigned a rating percentage aimed at compensating the veteran for the "average impairment in earning capacity."[122]

A veteran may initiate a VA claim for disability compensation by either a formal or informal written request at any time after separation from service.[123] Once the veteran initiates the claim process, a Veterans' Service Representative (VSR) contacts the veteran to schedule a medical examination and to obtain any relevant documents the veteran may have that are pertinent to the claim.[124] After the veteran receives a medical examination, the information is compiled and a Rating Veterans Service Representative (RVSR), working within a regional office (RO),[125] makes an initial rating decision, ranging from zero to one hundred percent.[126] If the veteran's medical records and medical examination do not support the claim that an existing disability is service-connected, then a zero rating is given for the claimed condition.[127]

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[118] 38 U.S.C. § 101 (Westlaw 2012).
[119] *See* 38 C.F.R. § 3.102 (Westlaw 2012).
[120] 38 U.S.C. § 101.
[121] *See* 38 C.F.R. § 3.304 (defining direct connection); *id.* § 3.305 (defining direct connection in peace-time service before 1947); *id.* § 3.306 (defining aggravation of a pre-service injury); *id.* § 3.307 (defining presumptive service connection).
[122] *Id.* § 4.1.
[123] 38 U.S.C. § 5101 (Westlaw 2012); *id.* § 5102; 38 C.F.R. § 3.1(p) (Westlaw 2012); 38 C.F.R. § 20.201 (Westlaw 2012).
[124] *See* Riley, *supra* note 58, at 455.
[125] This is also referred to as the agency of original jurisdiction (AOJ).
[126] *See* 38 C.F.R. § 4.25 (Westlaw 2012); U.S. DEP'T. OF VETERANS AFFAIRS, VETERANS BENEFITS MANUAL. 843–47 (2010), *available at* http://www.va.gov/opa/publications/benefits_book/federal_benefits.pdf.
[127] 38 C.F.R. § 4.31 (Westlaw 2012).

If the veteran disagrees with the initial disability rating, or if the veteran is denied a rating, he or she may begin the appeal process by filing a Notice of Disagreement (NOD) and request a *de novo* review by a separate Decision Review Officer (DRO).[128] If the finding is affirmed, then a Statement of the Case (SOC) is issued to the veteran detailing the reasoning for the denial.[129] The veteran has one-year from this notification to file an additional NOD to appeal the decision to the Board of Veterans Appeals (BVA), an administrative board within the VA.[130] If the veteran waits beyond this time limit, then the determination is deemed final and will not be reopened unless the veteran brings forth new and material evidence or establishes clear and unmistakable error in the decision process.[131] If the BVA affirms the RO decision, then a copy of the decision and its reasoning is supplied to the veteran, leaving the veteran with 120 days to file a Notice of Appeal (NOA) with the CAVC.[132] From this point, if the veteran receives an adverse determination from the CAVC, then he or she may appeal to the U.S. Court of Appeals for the Federal Circuit, and then up to the Supreme Court if the matter remains unresolved.[133]

If the CAVC remands a claim to the BVA, then the BVA is required by statute to give the claim "expedited" treatment.[134] When reviewing the CAVC decision, the BVA must allow the veteran to submit additional evidence pertinent to the remanded claim and may remand the same claim to the RO for further factual development.[135] Once all relevant facts are before the BVA, it will again issue a decision that is appealable in the manner described above.

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[128] *Id.*
[129] *Id.*; 38 U.S.C. § 7105 (Westlaw 2012); *id.* § 7112.
[130] 38 U.S.C. § 5102(a); *id.* § 5103(b).
[131] *See* 38 C.F.R. § 3.105; *id.* § 3.156.
[132] 38 U.S.C. § 7266.
[133] *Id.* §7252 (2012); *id.* § 7292.
[134] *Id.* § 5109B, *id.* § 7112.
[135] 38 C.F.R. § 19.9(3) (Westlaw 2012). In the context of newly submitted evidence, this distinction is critical because, procedurally, the Board of Veterans Appeals may not make a factual determination in the first instance, which requires a remand to the RO level for a determination in the first instance. *See* Disabled Am. Veterans v. Sec'y of Veterans Affairs, 327 F.3d 1339, 1341–42 (Fed. Cir. 2003).

III: Current Problems and Recent Attempts to Address VA's Appellate Claims System

The VA disability claims and appellate process has been subject to continued scrutiny over the years.[136] This criticism has largely focused on the claim volume, delays in adjudicating claims, and the accuracy of VA's decisions.[137] This section analyzes recent data to illustrate the magnitude of the task faced by VA, and discusses some of VA's most recent efforts to improve its efficiency and responsiveness within its disability compensation claims and appellate system.

As of FY 2010, over 4 million veterans received disability compensation benefits and over 1.1 million veterans filed new claims for benefits during this time period.[138] Of the 1.1 million claims, 150,475 NODs were filed with ROs.[139] Of these NODs, the BVA docketed 52,526 appeals for review in FY 2010.[140] Of the 52,526 appeals processed by the BVA, 96.4% were related to veterans contesting disability compensation rating decisions.[141] Furthermore, the VA projects that within the next year, the number of veterans seeking disability and compensation benefits will only increase.[142] Given the magnitude of this claims system, its efficiency, accuracy, and responsiveness have been chief areas of concern for VA.[143]

To address the efficiency, accuracy, and BVA claim volume in the disability claims process, in 2001 the Veteran's Administration inserted the DRO in the claim review process.[144] The program was designed to

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[136] *See* GAO 10-213, *supra* note 2; *Impact of War on VA*, *supra* note 2.
[137] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 11-812, CLEARER INFORMATION FOR VETERANS AND ADDITIONAL PERFORMANCE MEASURES COULD IMPROVE APPEAL PROCESS 2 (2011) [hereinafter GAO 11-812]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 11-69, MILITARY AND VETERANS DISABILITY SYSTEM: PILOT HAS ACHIEVED SOME GOALS, BUT FURTHER PLANNING AND MONITORING NEEDED 2 (2010) [hereinafter GAO 11-69]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-749T, VETERANS' DISABILITY BENEFITS CLAIMS PROCESSING: PROBLEMS PERSIST AND MAJOR PERFORMANCE IMPROVEMENTS MAY BE DIFFICULT (2005).
[138] VA PAR 2010, *supra* note 3, at I-3.
[139] *See* BOARD OF VETERANS APPEALS PERFORMANCE AND ACCOUNTABILITY REPORT 21 (2010), *available at* http://www.bva.va.gov/docs/Chairman_Annual_Rpts/BVA2010PAR.pdf.
[140] *Id*. at 18.
[141] *Id*. at 22.
[142] *Id*. at 21; *see also* Bilmes, *supra* note 5.
[143] *See* GAO 11-812, *supra* note 137.
[144] *See id.* at 2.

reduce the number of appeals before the BVA and reduce the time it takes a veteran to receive appeal relief by inserting an intermediate level of non-deferential review into the appellate process.[145] To date, the impact of inserting the DRO in the review process has not had the full effect that VA sought.[146] In fact, since the DRO was inserted in the disability claims process, the number of claims appealed to the BVA and the average time it takes to resolve such claims has not significantly reduced.[147]

To address the responsiveness of the disability claims system, especially in the context of veterans returning from the wars in Iraq and Afghanistan, VA has recently instituted a pilot program called the Integrated Disability Evaluation System (IDES).[148] The IDES is designed to address the disability claims of wounded veterans who suffer in-service injuries.[149] The goal of IDES is to eliminate the redundant nature of military medical evaluation boards (MEB) and the VA disability claims evaluations.[150] Simply put, the MEB is designed to determine, after a medical examination, whether a service member's in-service injury would interfere with further active service.[151] Prior to the implementation of IDES, if the MEB discharged the service member because of an in-service injury, then the service member was required to undergo a separate medical evaluation for VA disability compensation purposes.[152] IDES streamlines this process by combining the MEB evaluation with the VA disability compensation rating evaluation.[153] This process is designed to ensure that veterans receive VA's prompt attention after separating due to an in-service injury.[154] Recent data indicates that IDES is meeting VA's responsiveness goal of providing benefits within 305 days after a veteran separates from service.[155] However, because

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[145] *Id.*
[146] *Id.* at 23.
[147] *Id.*
[148] *See* GAO 11-69, *supra* note 137, at 2-4.
[149] *Id.* at 1.
[150] *Id.*
[151] *Id.* at 3.
[152] *Id.* at 2–5.
[153] *Id.* at 6.
[154] *Id.*
[155] *Id.*

IDES has not yet been fully implemented, its overall effectiveness at reducing appellate claim volume remains to be seen.[156]

Despite the VA's recent efforts to improve efficiency and accuracy in veterans' claims for disability compensation, the problem of reducing claim volume at the appellate level still persists.[157] When considering changes to a program of this size, one fundamental question must be asked: how can we, as a grateful nation, best respond to those who so selflessly sacrificed for our benefit? In looking toward the future, appropriate solutions may be found in supplementing this debate with data in order to analyze and target specific problem areas in our generous system.

IV: Demographics of Veterans Who Appeal to the CAVC

In order to gain insight into key indicators and demographics of veterans who appeal their disability compensation decisions, an independent study was performed by taking a sample of claims from the population of veterans' appeals adjudicated by the CAVC in FY 2010. The average age of a veteran-appellant in the sample study[158] was 62.26 years old[159] with a standard deviation of 11.89 years. This means that roughly two out of three CAVC appellants are between 51 and 73 years old. The median time a CAVC appellant spent on active duty was 776 days, or just over two years.

The total time between the date of appeal, measured by the filing date of the NOA, and the date of a CAVC decision, averaged 655 days, or almost 1.8 years, with a standard deviation of just over 5 months. This means that 95% of the appeals adjudicated in this time period took between eleven and thrity months to adjudicate. However, of the 655

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[156] *Id.* at 11–17 (finding uncertainty in the effectiveness due to gaps in data and for VA and DOD failing to include a control sample, that is a selection of veterans not participating in IDES, when measuring results).

[157] *See* VA PERFORMANCE AND ACCOUNTABILITY REPORT FY 2011, at II-125, 130 (2012), *available at* http://www.va.gov/budget/report.

[158] This study was an independent sample taken from claims appealed to the CAVC in FY 2010. For clarity and brevity, the methodology is omitted but on file with the author.

[159] Of the forty sample cases, six appeals concerned a deceased veteran's survivor benefits. As a result, these applications were removed from the average age calculation. If all appellants were included and age was calculated using the date of appeal, then the average age would rise slightly to 65.73 with a standard deviation of 12.51.

days mentioned, an appellant's claim spent an average of 523 days with the court clerk, with 236 days being mandated by rule.[160] Additionally, of the 655 days, an average of 160 days were utilized at the request or fault of the parties.[161] A more accurate indicator of the CAVC's efficiency is the number of days the claim spent in chambers, or the time interval from the date the claim was assigned to chambers until the date the decision was issued. This time interval amounted to an average of 132 days, or nearly four months. However, this average was negatively impacted by requests for oral argument, motions for reconsideration, and motions for panel decisions.[162]

V: Implementing a Statute of Repose in Veterans' Claims

This section argues for the implementation of a statute of repose in our veterans' claims system to address the continuing high claim volume. In addition to reducing claim volume, such a statute would also generate fiscal savings, further judicial economy, and promote fairness in a system that is "overburdened" and complex.[163] This section first defines the scope of the suggested statute of repose and recognizes that some exceptions should exist. Second, this section analyzes the justifications for the statute of repose by comparing it to suggested alternatives, likely objections, and by looking at VA's recent efforts to reduce claim volume and improve efficiency.

A. Defining the Statute of Repose and Its Scope

Both a statute of repose and a statute of limitation bar legal claims after the expiration of a predetermined amount of time.[164] A statute of limitation begins when a cause of action accrues, when either the facts of

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[160] *See* U.S. VET. APP. R. OF PRAC. AND PROC. R. 10, 28.1, 31, *available at* http://www.uscourts.cavc.gov/court_procedures/RulesonorafterApril12008.cfm (last visited Mar. 5, 2012).

[161] The number of days that resulted from the parties own motions was not allocated between chamber and the court clerk. This was calculated by summing all motions for extensions with all motions for stays. *See id.*

[162] *See id.*

[163] *Hearing on Review of Veterans Disability Compensation: Hearing Before the Comm. on Veterans' Affairs in the U.S. Senate*, 110th Cong., 2d Sess. 53 (2008) (statement of Steve Smithson, Deputy Dir., Veterans Affairs).

[164] *See id.*

a particular claim theoretically permit recovery, or when the individual knew or should have known that a legal remedy existed.[165] In contrast, a statute of repose "is designed to bar actions after a specified period of time has run from the occurrence of some [objective] event other than the injury which gave rise to the claim."[166]

The proposed statute of repose would bar only new claims for disability compensation after a liberal time period has elapsed subsequent to a veteran's last day of service.[167] This new claim distinction is important because, pursuant to current VA regulations, a veteran may advance a new claim for disability compensation at any time after their military service ends.[168] Similarly, once a veteran is given an initial disability rating, he or she may have this *preexisting* disability rating reevaluated for an increased rating at any time.[169] Moreover, if a veteran's disability claim is denied, he or she may seek to reopen this denial at any time by bringing forth new and material evidence[170] or alleging clear and unmistakable error in the decision process.[171]

To be clear, this article does not suggest that veterans should be barred from attempting to have a preexisting disability rating increased; nor does it suggest that a time bar should apply to veterans seeking

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[165] *See, e.g.*, 28 U.S.C. § 1658 (Westlaw 2012) (utilizing accrual language of a statute of limitations); *Developments in the Law Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185–89 (1950) [hereinafter *Statutes of Limitations*].

[166] *See* Gray v. Daimler Chrysler Corp., 821 N.E.2d 431 (Ind. Ct. App. 2005); Kissel v. Rosenbaum, 579 N.E.2d 1322, 1326 (Ind. Ct. App. 1991).

[167] *Cf.* 38 U.S.C. § 5110(3)(B)(g)-(h) (Westlaw 2012) (establishing no time bar for a veteran to have an existing disability rating reevaluated); Cook v. Principi, 318 F.3d 1334, 1337–42 (Fed. Cir. 2002) (discussing the statutory foundation of allegations regarding clearly erroneous decisions as well as new and material evidence).

The actual definition of a reasonable time period is suggested and left open by this article. However, there appears to be ample objective evidence on hand to make a general assessment of an appropriate time. *See* Nat'l Ctr. for Health Statistics, U.S. Dep't. of Health & Hum. Servs., *Health United States 2010, with a Special Feature on Death and Dying* 12–19 (2010) [hereinafter U.S. Health Report] (delineating the incidence of disease in Americans generally), *available at* http://www.cdc.gov/nchs/data/hus/hus10. Still, because VA is bound by the Administrative Procedure Act, this definition is best left for notice and comment procedures to articulate a more precise definition. *See* 38 U.S.C. § 501(d) (Westlaw 2012).

[168] *See* 38 U.S.C § 1101(1)-(2) (omitting time bar in general definition); *id.* § 1110 (omitting time bar for war time injuries); *id.* § 1131 (omitting time bar for peace time injuries).

[169] *See* 38 C.F.R. § 3.114 (Westlaw 2012).

[170] *See id.* § 5108.

[171] *See id.* § 5109A(a).

reevaluation on the basis of new and material evidence or clear and unmistakable error. Rather, this article's sole focus is to recommend that a liberal statute of repose be calculated and applied to bar claims for disability compensation that have not yet been filed to promote judicial economy and generate fiscal savings in the veterans' claims process.[172]

Of course, exceptions should be included for diseases and conditions that cannot be expected to become self-evident or manifest in this time period and, indeed, some exceptions would seem to be presently defined.[173] Still, the imposition of a statute of repose rests on the premise that most injuries, by nature, are inherently self-evident and the burden should be on the veteran to bring forth a claim for disability compensation in a predefined time period to reduce claim volume and promote judicial economy in the massive system that the VA administers.[174] Because the sample study indicates that the efficiency of the VA's current system is being compromised by the lack of a time limitation to file a claim, it is necessary to analyze the justification for implementing the suggested statute of repose in veterans' claims.

B. The Justification for Implementing a Statute of Repose in Veterans' Claims

Statutes of repose and limitations compel litigants to pursue their legal claims within an objective time frame to ensure that evidence is

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[172] *See* U.S. Health Report, *supra* note 167 (illustrating the available objective medical evidence that can be used to calculate a reasonable time). *See* H.R. REP. NO. 100-963, at 13, *reprinted in* U.S.C.C.A.N. 5782, 5794-95 (1988) [hereinafter H.R. REP. NO. 100-963] (defining the fundamental purpose of the veterans' claims system and its non-adversial nature).

[173] *See* 38 U.S.C. § 1112 (Westlaw 2012); *id.* § 1116; *id.* § 1117; *id.* § 1118 (indicating the presumption of certain diseases deemed to be service-connected); *id.* § 1702 (presumption of psychosis manifesting two years after active duty for WWII and Vietnam veterans).

[174] In terms of size, the VA's budget is almost five times larger than the Social Security Administration. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FY 2010, at 96, 110 (2009), *available at* http://www.gpoaccess.gov/usbudget/fy10/browse.html (comparing the FY 2010 proposed VA discretionary budget of 55.9 billion with the 11.6 billion proposed for the Social Security Administration). Because the scope and magnitude of the VA disability and compensation system is so massive, the proper duration of a "reasonable time" is left undecided by this article.

available and factual memory loss is mitigated.[175] Because filing delays have the potential to prejudice a party through the loss of memory or evidence, these statutes also promote fairness and insulate against these types of prejudice through the uses of time limits.[176] As an added benefit, a time limit also promotes judicial economy by focusing judicial resources on claims that are most likely to be factually supported.[177] For these reasons, it is unsurprising that such statutes pervade our legal paradigm as a mechanism to promote judicial economy and prevent prejudice by imposing a duty to assert a legal claim with a predefined time period.[178] Despite this purposeful salience, a similar provision in veterans' disability pension law has been curiously absent for some time. Although the current legislative structure that allows veterans to file new disability claims without a time limitation is admittedly inclusive, the problem may be that it is too inclusive. Given this, the immediate question is as follows: what would be the effect if this inclusiveness was circumscribed by a statute of repose?

After analyzing the data taken from the sample study noted above, a few key demographic indicators are revealed. First, the average age of a veteran-appellant before the CAVC during FY 2010 was 62.26 years old.[179] Second, the median time a CAVC appellant spent on active duty was just over two years. Assuming that veterans serve in their early twenties and separate after a median time of two years, these two data points suggest that the average CAVC appellant is waiting thirty or more years before alleging that an existing disability is service-connected. The absence of a time limit to file such a claim forces the VA claims and appellate system to potentially ignore realistic intervening factors, such as the effects of physical aging on the human body when analyzing the service-connection issue.[180] This is not to say that older veterans should

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[175] *See* McDonald v. Sun Oil Co., 548 F.3d 774, 779–81 (9th Cir. 2008). Indeed, inherent in such statutes is the acknowledgement that evidence and memory acuity dissipate with time. *See, e.g.*, Burnett v. New York R.R. Co., 380 U.S. 424, 428 (1968); Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342 348–49 (1944) (explaining the purpose of statutes of limitations.); *Statute of Limitations*, *supra* note 165.

[176] *See McDonald*, 548 F.3d at 779–81; Ry. Express Agency, 321 U.S. at 348–49.

[177] *See Statute of Limitations*, *supra* note 165, at 1185.

[178] *Id*. at 1200.

[179] Of the forty sample cases, six appeals concerned a deceased veteran's survivor benefits. As a result, these applications were removed from the average age calculation. If all appellants were included and age was calculated using the date of appeal, then the average would rise slightly to 65.73 with a standard deviation of 12.51.

[180] In fact, VA officials are expressly not permitted to use age as a factor in the decision-making process. 38 C.F.R. § 4.19 (Westlaw 2012).

be categorically barred from seeking a disability rating.[181] However, forcing medical and legal officials to evaluate a new claim for disability compensation without utilizing the common understanding that age negatively impacts health contributes unnecessarily to the complexity of VA's disability evaluation system.[182] To this end, imposing a statute of repose would be a simple mechanism that would account for this difficulty, without having the appearance of discriminating based on an appellant's specific age. [183]

To clarify this point, take a hypothetical example. Assume an individual enlists on active duty for four years at the age of twenty-two, injures a knee a short time thereafter, and receives the necessary medical care while in service. Four years later, this individual is honorably discharged and goes about life. Forty years after discharge, at the age of sixty-six, this veteran is now experiencing further knee problems and receives the diagnosis of arthritis. Under the current regulations, the veteran can file a claim for disability compensation, citing the existing disability, and claiming this disability is service-connected due to the knee injury suffered over forty years earlier. In response, VA must schedule a medical examination, assist in producing and procuring the veteran's service and private medical records, and somehow attempt to explain how the veteran's existing disability is unrelated to his or her service, without pointing to the obvious forty year gap or age of the veteran.

In fairness, it should be acknowledged that the sample taken from the CAVC population may suffer from a selection error: that is, a veteran who waits longer to file a claim for disability compensation may have a tougher time establishing the service-connection requirement, thereby increasing the likelihood the claim will be denied by the BVA and appealed to the CAVC. Nevertheless, this argument ignores the fact that judicial and fiscal resources are being expended on claims that are inextricably intertwined with the passage of extensive amounts of time, something that time bars are precisely designed to address.

As to the effects on judicial economy, if the proposed statute of repose is applied to claims taken from the sample study, with a hypothetical termination limit of twenty years after the last day of active

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[181] *Id.*
[182] *Id.*
[183] *Id.*

service, then the number of claims on appeal to CAVC would be reduced by 27%.[184] Admittedly, this reduction percentage may not have a congruent impact at the RO or BVA level, but it nevertheless indicates that substantial results can be achieved by applying a liberal time bar that allows in-service injuries to become manifest, yet directly promotes a reduction in the volume of disability compensation claims. Of course, a consequence of implementing this statute may actually cause veterans to file more claims, out of fear of losing benefits, but such a limit would place the ROs, the BVA, and the CAVC in a better position to efficiently adjudicate non-barred claims by focusing the saved resources on timely submitted claims.[185]

The Veteran's Administration has already inserted an additional level of review in the appeal process and has also started implementing the IDES program to address the high claim volume and responsiveness of VA's disability compensation system.[186] As discussed above, these programs have either had marginal impacts on appellate claim volume or have not yet been fully implemented to enable analysis.[187] As an alternative to creating additional bureaucratic complexities to an already complex system, a statute of repose with a liberal time limit would be a simpler alternative and would directly address the high claim volume and responsiveness areas that VA has sought to improve upon. As a result, if this statute were implemented, the number of appeals would likely decrease over time, thereby relieving pressure on the veterans' appellate system while furthering judicial economy and efficiency in the long term.[188]

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[184] This figure was calculated by using a hypothetical twenty-year limitation period. Appeals were coded as barred only if all elements of a claim on appeal were not raised within twenty years.

[185] Adopting a statute of repose may actually dovetail nicely with programs VA is currently testing to educate separating military members on benefits to address claim volume, thereby enhancing reduction results. *See* VA PAR 2010, *supra* note 3, at I-3 (explaining IDES program, the Benefits Delivery at Discharge program, and Quick Start Programs). Additionally, because VA is engaging veterans at a younger age through these programs and assessing their disabilities at discharge, a sudden flood of claims may not actually occur.

[186] *See* GAO11-812, *supra* note 137.

[187] *Id.*

[188] The implementation of the statute would dovetail with the VA's recent increased efforts to educate separating veterans on their potential disability benefits. *See supra* text accompanying note 185. Nevertheless, the precise implementation should be left within the Secretary's discretion to protect older veterans who have not received such briefings.

Some reactions to implementing a statute of repose in veterans' law are bound to be adverse, but inquiry into its potential effect should not be muted. The first possible objection to this proposal is that imposing the statute would deny benefits to veterans who might otherwise be eligible.[189] This argument is well founded in the current veterans' claims structure, but ignores the fact that the absolute inclusiveness of the present system is contributing to the high claim volume and delays in adjudication. As indicated by the sample study, this inclusiveness is permitting a significant number of veterans to wait an extensive amount of time before pursuing a new claim for disability compensation. The impact of this inclusiveness not only strains fiscal and judicial resources, but it also impacts the claim processing time of newer veterans who are returning home from the wars in Iraq and Afghanistan. Similar to the Great Depression and the 1818 Act that produced reductions to veterans' benefits, we too could benefit from hindsight when thinking about future changes to this system for the benefit of our future posterity.

A second objection might declare that the veterans' disability pension system is designed as uniquely claimant friendly, paternal, and non-adversarial, and the addition of a statute of repose would fundamentally undermine this structure.[190] This position, although benevolent, is no longer tenable because (1) it is inconsistent with the history of veterans benefits legislation; (2) it does not acknowledge that similar time limits are already active within other areas of veterans' benefits; (3) it does not consider that veterans, although a special class, should have a duty, in fairness to VA, to timely report an injury or disability thought to be service-connected; and (4) it does not consider that the impact could generate fiscal savings without resorting to blanket cuts in spending and benefits.

First, time limits that have already functioned much like a statute of repose were frequently included in early veterans' benefits legislation. For example, the 1793 Act provided disability compensation to veterans injured during the Revolutionary War if they applied within two-years after the legislation was passed.[191] Although such restrictions were removed in subsequent legislation, other provisions, such as a time limit

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[189] It should be noted here that there should not be constitutional due process concerns about denying non-need based benefits that have yet to be awarded. *See* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 333 (1985).
[190] *See* H.R. REP. NO. 100-963, *supra* note 172.
[191] *See* 1793 Act, *supra* note 22.

to claim a survivor's pension,[192] pervade the history of veterans' benefits legislation.[193] Similarly, when the Court of Claims briefly had jurisdiction over veterans' disability compensation claims, there was a six-year claim window.[194] Additionally, when the Bureau of War Risk Insurance was administering disability pensions, Congress instituted a two-year window for disability compensation claims.[195] Although this is not an exhaustive list of statutes that have imposed time bars in veterans' disability compensation claims, such examples do indicate their previous and accepted use.

Second, under the current statutory and regulatory scheme, there are a number of statutory provisions that bar veterans' benefits if they are not asserted in a predefined time period. For example, there is a December 31, 2011 time limit for "symptoms to become manifest" in order to receive a Gulf War syndrome disability compensation;[196] there is a marriage time bar to qualify as a widow for Dependency and Indemnity Compensation (DIC) benefits;[197] and there is a fifteen year time limit to claim or utilize education benefits under the new Post 9/11 GI Bill.[198] As these contemporary examples illustrate, if time limits are present in, and compatible with, other aspects of veterans' benefits legislation, then implementing a statute of repose to govern the adjudication of new claims for disability compensation should not be a viewed as a fundamental change. Rather, this change, if adopted, should be viewed as one that empowers a more fiscally responsible and efficient appellate system that leaves the underlying qualifying criterion for any compensable veterans' benefit untouched.

Third, in terms of fairness, the fundamental purpose for a statute of repose is to place litigants in relative equipoise by defining a time frame which ensures legal rights are asserted in a timely manner.[199] The concept of failing to timely pursue a legal claim is tied to the equitable doctrine of laches, which recognizes that defendants may be prejudiced

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[192] *Id.*
[193] *See* 40 Stat. 610, 610–12 (1918), 1 Stat. 540 (1798) (applying two year claim window), *available at* http://www.constitution.org/uslaw/sal/sal.htm.
[194] *See* 10 Stat. 612 (1855), *available at* http://www.constitution.org/uslaw/sal/sal.htm, *see also* Rev. Stat. § 1069 (1863).
[195] *See* 40 Stat. 102, 104 (1917), *available at* http://www.constitution.org/uslaw/sal/sal.htm.
[196] 38 C.F.R. § 3.317 (Westlaw 2012).
[197] *Id.* § 3.54.
[198] Pub. L. No. 110-252, 122 Stat. 2357 (2008).
[199] *See Statute of Limitations*, *supra* note 165.

by the passage of an extensive amount of time.[200] In the veterans' law context, the VA is mandated by statute to maintain records relevant to veterans' benefits and to provide these documents if a veteran pursues a claim for disability compensation.[201] Because a veteran may pursue a disability compensation claim at any time,[202] the VA bears the burden of production without the benefit of the equitable doctrine of laches.[203] Such a legislative scheme fails to recognize that this burden is unfair as it forces the VA, and the appellate system in general, to consider all claims no matter how old, tenuous, or unsupported.[204] Moreover, this legislative scheme also fails to recognize that veterans are better positioned, as the injured parties, to identify an in-service injury or event relating to disability compensation. Given this, requiring veterans to assert their claims in a timely manner under a statute of repose would place the VA and the appellate system upon a more equitable ground.

Fourth, the fiscal savings generated from implementing a statute of repose could counter the calls to reduce federal spending on veterans' benefits without touching a single dollar veterans currently receive from their existing disability ratings. As the historical analysis above indicates, when federal deficits are high, and the national economy is struggling, the call for reducing federal spending on veterans' benefits tends to be voiced. As a contemporary example, Representative Michelle Bachmann recently submitted a bill to congress that would have cut over four billion dollars from VA funding.[205] Although Representative Bachmann's proposal has been withdrawn, future calls for blanket federal spending reform will likely involve an impact on veterans' benefits. Finally, although the population claims before the CAVC make up less than one

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[200] *Id.*

[201] *See* 38 U.S.C. § 5103A (Westlaw 2012).

[202] *See Statute of Limitations*, *supra* note 165.

[203] Although the defense of laches is typically viewed as only applying to equitable remedies, federal courts (which are courts of law and equity) have recognized it as a defense to legal claims as well, making this defense and discussion relevant. *See* FED. R. CIV. P. 2, 8(c); Chirco v. Crosswinds Comtys., Inc., 474 F.3d 227 (6th Cir. 2007), *cert. denied*, 127 S. Ct. 2975 (2007).

[204] Because the current regulatory scheme permits a claim to be brought at any time, the administrative record keeping burden on the VA is incomprehensibly large. *See* 38 C.F. R. § 1.577 (Westlaw 2012).

[205] Representative Bachmann's proposal, as part of her presidential platform, proposed $400 billion in federal spending cuts with $4.5 billion in cuts to the VA's budget. *See* Richard Sisk, *Vets Rip Bachmann on Cuts to VA*, N.Y. DAILY NEWS, Jan. 28, 2011, a*vailable at* http://www. nydailynews.com/blogs/dc/2011/01/vets-rip-bachman-on-cuts-to-va (last visited June 18, 2012).

percent of the 1.1 million claims VA received for disability compensation in FY 2010, if the statute was adopted and generated a one-percent decrease, then claim volume could be potentially reduced by 11,000 claims. Such fiscal savings are tangible and would be a preferable means to achieve savings, especially when the only alternative is to impose blanket cuts in federal spending and benefits.

VI. Conclusion

When assessing proposed changes to a hallowed and unique American system, our reactions should be measured and deliberate. Although a statute of repose has not been present in the veterans' disability compensation system for nearly a century, the current demands on our federal resources suggest that all potential solutions to reducing this strain should be considered. The simple fact is that the veterans' appellate system is being dominated by veterans who separated from service decades before bringing claims. This is not to suggest that these veterans have no right to petition the Secretary or the courts for relief, but it does suggest that we must recognize and address this component of the veterans' appellate system if efficiency is to be improved. Although the sample study was focused on the appellate population of the CAVC, the implementation of a statute of repose may have more beneficial effects at the BVA or RO level, instead of the CAVC exclusively. For this reason, the Secretary of Veterans' Affairs is in the best position to study and implement this statute in fairness to veterans.

Although implementing a statute of repose is neither comprehensive nor perfect, if we remain open-minded, progress can be made in the veterans' appellate system for the benefit of all veterans. Such a suggestion for change may not be well received, especially among veterans' groups, but it would directly address the claim volume issue within the current veterans' appellate system and promote fiscal savings without undermining the benefits currently provided to veterans. Today's economy is depressed and history shows that the Federal government may respond by introducing cuts to some veterans' benefits. If cuts to veterans' benefits are considered, then they should be evaluated responsibly, so the full measure of our gratitude for those who are now in need.

DEBUNKING FIVE GREAT MYTHS ABOUT THE FOURTH AMENDMENT EXCLUSIONARY RULE

EUGENE R. MILHIZER*

I. Introduction

I would like to begin by expressing what a great honor it is to be invited to speak before such a distinguished group of jurists. I especially want to thank Colonel Diner, Lieutenant Colonel Brookhart, and Major Flor for their kind invitation and their support.

While serving as a professor in the Criminal Law Division here more than 20 years ago, I always looked forward to the Judge's Course. This is a special privilege for me to speak with you all today, as I cut my teeth and learned my craft as a trial and appellate counsel appearing before military judges. I must also confess, as a former Government Appellate Division advocate who twice had the privilege of arguing before the then-Army Court of Military Review sitting en banc, I am a bit apprehensive appearing before so many military judges gathered together in one place at one time. But confident in your kindness and judicial temperament, I will press on.

The subject of my talk today will be the Fourth Amendment[1] exclusionary rule. My position, if nothing else, is straightforward and

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* President, Dean, and Professor of Law, Ave Maria School of Law. This article draws from two previous articles by the author, *"The Exclusionary Rule Lottery" Revisited*, 59 CATHOLIC UNIV. L. REV. 747 (2010) [hereinafter "*Lottery Revisited*"], and *The Exclusionary Rule Lottery*, 39 U. TOL. L. REV. 755 (2008) [hereinafter "*Lottery*"]. This speech was presented at the 54th Judges Course at The Judge Advocate Generals School on May 5, 2011. The author is grateful to Professor Ryan Alford, Professor Mark Bonner, and Chief Justice Clifford Taylor for their wise comments and suggestions for an earlier draft of the article. The author is also grateful to Christy Alvey for her outstanding work as a research assistant.

[1] U.S. CONST. amend. IV. The text of the Fourth Amendment is as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The text does not specify exclusion as a remedy for Fourth Amendment violations and is, in fact, silent as to remedies in general.

clear: the rule must be rescinded and replaced with an approach under which most if not all evidence obtained as a result of unconstitutional searches and seizures is deemed to be *admissible* at trial, and that police officers who violate the Fourth Amendment should be punished or disciplined, as appropriate. This conclusion is based on my belief that the rule rests on an unprincipled premise; its costs outweigh its presumed and largely illusory benefits; it is ill-suited to accomplish its stated purposes; and it cannot be saved through marginal adjustments, major reforms or sweeping re-conceptualization.

While much can be debated about the Fourth Amendment exclusionary rule, its basic functioning is clear and undisputed: evidence obtained as the result of an unconstitutional search or seizure is suppressed at trial for the purpose of obtaining some broad or attenuated objective regardless of the relevance, necessity and probity of that evidence. The precise benefit or benefits to be achieved by operation of the rule is a matter of dispute, and I will address the subject of the rule's purported benefits a bit later in my talk today.

As contrasted to the rule's ostensible benefits, however, the rule's costs are far more certain and in some respects undeniable, although the precise magnitude of the costs has not been satisfactorily specified.[2] That being said, it seems only fair that the rule's proponents, who necessarily believe that the rule's diffuse and remote benefits outweigh its more immediate and tangible harms, should have the burden of persuasion in defending and justifying the rule. Opponents of the rule, for their part, should be prepared to address and rebut the contentions of the rule's proponents in order to make the case that the rule should not stand. This will be the task of my talk today.

Before one can respond to the rule's proponents, however, one must first state their position and, in particular, the specific justifications they offer for the rule. This is a surprisingly complicated proposition, as

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[2] The Supreme Court has said that the exclusionary rule "often frees the guilty." Stone v. Powell, 428 U.S. 465, 490 (1976). Efforts have been made to quantify the magnitude of this social cost. *See, e.g.*, Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: the NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 680, 688 (noting that the percentage of nonconvictions due to illegal searches were significant during the period studied, ranging from 2.8 to 7.1 percent, and the offenses at issue generally were drug offenses rather than violent crimes). Of course, there are a multiplicity of other, less concrete social costs connected with the exclusionary rule.

supporters of the rule do not speak with a uniform voice and may offer several inconsistent and sometimes conflicting justifications for it. Accordingly, and to facilitate my presentation today, I have organized the most common arguments in favor of the exclusionary rule into five major justifications, which I have characterized in an admittedly unflattering fashion as "myths." And so, here are the five great myths in support of the exclusionary rule:

Myth #1: The contemporary exclusionary rule is constitutionally required in order to achieve several objectives, which include but are not limited to deterring future police misconduct.

Myth #2: Even if the rule is not constitutionally required and is intended only to deter future police misconduct, it is justified because it efficiently accomplishes this objective.

Myth #3: Even if the present rule is too inefficient in deterring future police misconduct to justify its application, it can be sufficiently improved in achieving deterrence by a modification that accounts for the seriousness of the crime or the dangerousness of the criminal.

Myth #4: Even if deterrence of future police misconduct in any form is insufficient to justify the rule, the rule's objectives can be expanded to encompass and promote noble aspirations beyond police deterrence, which thereby justify the rule.

Myth #5: In any event, the rule is needed to preserve the integrity of the criminal justice system.

One caveat with respect to the five myths: if I am incorrect as to Myth #1, and the Supreme Court has instead concluded that the exclusionary rule *is* constitutionally required, then the other pragmatic justifications for the rule, which are the subject of Myths #2–#5, are not jurisprudentially needed in its defense. I hope that you will be convinced, at the conclusion of my discussion of Myth #1, that the Supreme Court has disavowed any constitutional basis for the exclusionary rule and thus a discussion of the other myths is warranted. Whether the Court was correct as a matter of law in its rejection of a constitutional basis for the exclusionary rule is beyond the scope of my discussion today.[3]

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[3] *See infra* notes 217 & 223 and accompanying text.

I will spend the balance of my time with you responding to the rule's proponents and debunking the five myths I just recited. Before proceeding with this task, however, a little background about the rule is in order.

II. Background

The term "exclusionary rule" is a bit like the lunchmeat spam—virtually everybody is familiar with it, only a few people are sure about its precise contents, and most people can stomach it only occasionally and in small portions. In the broadest sense, the term "exclusionary rule" is imprecise and encompasses several different rules and theories for exclusion based on a variety of factors, such as the type and nature of the government misconduct at issue and the rights thereby transgressed. For example, confessions obtained in violation of the *Miranda* protections[4] and those that are coerced in a traditional sense (such as those obtained by torture and threats[5]) each has its own distinct exclusionary rule. Evidence obtained via illegal searches and seizures that are so egregious as to "shock the conscience" is excluded under a third standard.[6] Other exclusionary rules govern certain Sixth Amendment[7] and Fourteenth Amendment[8] violations. Still others address certain statutory transgressions,[9] including those that violate Article 31 of the Uniform Code of Military Justice.[10] And, I am sure you are all quite familiar with the various constitutional and statutory rules relating to the exclusion of evidence found in the 300 series of the Military Rules of Evidence (MRE),[11] and in particular MRE 311 (pertaining to unlawful searches and seizures)[12] and MRE 321 (pertaining to eyewitness identification).[13]

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[4] Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).
[5] Colorado v. Connelly, 479 U.S. 157, 167 (1986); Spano v. New York, 360 U.S. 315, 321–24 (1959).
[6] *See* Rochin v. California, 342 U.S. 165, 172–73 (1952).
[7] U.S. CONST. amend. VI; United States v. Henry, 447 U.S. 264 272–74 (1980); Brewer v. Williams, 430 U.S. 387, 400–01 (1977).
[8] U.S. CONST. amend. XIV; *see* Stovall v. Denno, 388 U.S. 293, 294–98 (1967) (some pretrial identifications can be excluded under the Due Process Clause of the Fourteenth Amendment).
[9] *See generally* George E. Dix, *Nonconstitutional Exclusionary Rules in Criminal Procedure*, 27 AM. CRIM. L. REV. 53, 63–82 (1989) (discussing various nonconstitutional rules that have exclusionary rules).
[10] 10 U.S.C. § 831 (2006).
[11] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008) [hereinafter MCM].
[12] *Id.* MIL. R. EVID. 311 ("Evidence obtained from unlawful searches and seizures").

As most often used, however, the term "exclusionary rule" pertains to the exclusion of evidence obtained directly or derivatively from illegal searches and seizures in violation of the Fourth Amendment of the U.S. Constitution.[14] This is the version of the exclusionary rule that is the most often invoked,[15] and it is the one that generally first comes to mind for both legal practitioners and the broader public. Accordingly, this is the version of the exclusionary rule that will be the subject of my remarks today. With this brief background as prologue, let the debunking begin.

III. Myth #1: The Contemporary Exclusionary Rule is Constitutionally Required in Order to Achieve Several Objectives, Which Include but Are Not Limited to Deterring Future Police Misconduct

The exclusionary rule was first established by the United States Supreme Court for an ostensibly grand and lofty purpose, i.e., to vindicate the rights of individuals and protect the integrity of the criminal justice system. When the Supreme Court minted the rule in 1914, it instructed that exclusion was integral to the Fourth Amendment's protection against unreasonable searches and seizures.[16] The Court later explained that the rule was of constitutional dimension,[17] observing that without such a rule the Fourth Amendment would be reduced to a mere "form of words,"[18] which would amount to little more than a right

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[13] *Id*. MIL. R. EVID. 321 ("Eyewitness identification").
[14] U.S. CONST. amend. IV.
[15] *See, e.g.*, Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191, 192 (2010) (predicting that the Fourth Amendment, while remaining the most commonly implicated aspect of the Constitution, may *lose* its status as the most frequently litigated part).
[16] Weeks v. United States, 232 U.S. 383 (1914). A unanimous Court in *Weeks* emphasized the obligation of federal courts and officers to give effect to Fourth Amendment guarantees, suggesting that the essential violation was the invasion of an individual's right of personal security, personal liberty, and private property. Accordingly, the original warrantless search and the trial court's later refusal to return the materials violated Weeks's constitutional rights. *Weeks* was the first criminal case in which the rule was applied. The origin of the rule can be traced to *Boyd v. United States*, 116 U.S. 616, 630 (1886), in which the Court discussed the origins and principles of exclusion in the context of a civil forfeiture case. *See supra* note 1 (stating that the text of the Fourth Amendment is silent as to remedies).
[17] Mapp v. Ohio, 367 U.S. 643, 648, 657 (1961).
[18] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

without a remedy.[19] The Court's elevated justification for the rule was perhaps most eloquently expressed by Justice Louis Brandeis, who wrote that "[i]f the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[20] In Brandeis' words, "[t]o declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution."[21] I will return to Justice Brandeis's admonitions in greater detail later in this presentation.

In the years that followed, the Supreme Court reversed direction and stood this soaring rhetoric on its head. More recent Court decisions justifying the exclusionary rule placed increasing emphasis on deterring police misconduct[22] until this instrumental benefit had become the rule's only viable justification.[23] During this same period, the Court, in what can be charitably described as a blinding flash of self-awareness, announced that the rule had been created under its own rule-making auspices rather than being compelled by the Constitution.[24] Accordingly, by the mid-1970s, the exclusionary rule, which had been born as a constitutional imperative resting on a noble and expansive rationale, had been reduced to "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[25] Exclusion was no longer a right of the victim of an illegal search or seizure. It was instead a blunt and unsophisticated mechanism for curbing police misconduct, which accomplishes its objective by threatening the release

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[19] In *Weeks*, the Court wrote that without the exclusionary rule "the 4th Amendment . . . is of no value, and . . . might as well be stricken from the Constitution." *Weeks*, 232 U.S. at 393.

[20] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[21] *Id.*

[22] *Mapp*, 367 U.S. at 656 (citing Elkins v. United States, 364 U.S. 206, 217 (1960)).

[23] *See* Stone v. Powell, 428 U.S. 465, 485 (1976) (instructing that the judicial integrity justification for exclusion has only a "limited role [to play] . . . in the determination [of] whether to apply the [exclusionary] rule in a particular context"); United States v. Janis, 428 U.S. 433, 446 (1976) (instructing that deterrence is the "'prime purpose' of the rule, if not the sole one").

[24] Arizona v. Evans, 514 U.S. 1, 10 (1995) (instructing that the Fourth Amendment "contains no provision expressly precluding the use of evidence obtained in violation of its commands").

[25] United States v. Calandra, 414 U.S. 338, 348 (1974). *Accord* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) ("[T]he [exclusionary] rule is prudential rather than constitutionally mandated.").

of guilty and sometimes dangerous criminals into society if, as Judge Benjamin Cardozo famously put it, "the constable has blundered."[26]

According to the Court's reasoning, because police are "engaged in the often competitive enterprise of ferreting out crime,"[27] the threat that illegally gathered evidence would be excluded will restrain egregious ferreting and cause police to stay within constitutional bounds.[28] The argument is twofold and has aspects of specific and general deterrence. First, with respect to specific deterrence, the particular officer responsible for the misconduct "would be likely to feel aggrieved if her efforts were thwarted by exclusion and that exclusion would accordingly induce her to take greater care in the future."[29] Second, with respect to general deterrence, the repeated and systematic suppression of evidence would promote greater professionalism among law enforcement authorities and improve police practices.[30] The general deterrence claim is undergirded by a belief that is widely understood but generally unspoken: if the public is repeatedly made to suffer the consequences of police misconduct through the freeing of evildoers who avoid an otherwise just conviction and punishment, then its expression of collective fear, outrage and aversion to the harm will deter unlawful police behavior in the future.[31]

This reinvented version of the exclusionary rule is unapologetically instrumental, utilitarian, and blunt. It is instrumental in that the exclusion of evidence is not mandated because this is beneficial for its own sake, compelled by the Constitution, or motivated by some lofty purpose such as preserving the integrity of the judicial process. Rather, exclusion is simply a means to an end: the deterrence of future police misconduct. Any reverential notions relating to judicial integrity as a rationale for the

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[26] People v. Defore, 150 N.E. 585, 587 (1926).
[27] Johnson v. United States, 333 U.S. 10, 14 (1948).
[28] *See* Elkins v. United States, 364 U.S. 206, 217 (1960) (holding that the exclusionary rule's purpose "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it").
[29] ANDREW CHOO, ABUSE OF PROCESS AND JUDICIAL STAYS OF CRIMINAL PROCEEDINGS 96 (1993).
[30] *Id*. at 96–97.
[31] *See* 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 20.04[D][2][a], at 380 (4th ed. 2006) (observing that when a "murderer goes free [because evidence is suppressed] people are *less* secure in their persons, houses, papers, and effects").

exclusionary rule are subsumed by a deterrence-based justification.[32] In other words, the costs of exclusion are not borne so as to "enable the judiciary to avoid the taint of partnership in official lawlessness"[33]; rather, they are endured because exclusion is deemed to be the only effective remedy[34] at the disposal of the judiciary[35] to address police misconduct.[36]

The rule is utilitarian in that it is justified on the basis of balancing and choosing the lesser of two harmful outcomes: (1) allowing police misconduct to continue unchecked by the courts, versus (2) undermining the truth-seeking purpose of a criminal trial and permitting some guilty and even dangerous persons to go free.[37] And make no mistake about

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[32] *See* United States v. Calandra, 414 U.S. 338, 347–48 (1974) (holding that evidence is to be suppressed via the exclusionary rule only when the deterrent value of suppression is efficacious).

[33] *Id*. at 357 (Brennan, J., dissenting).

[34] It has repeatedly been argued that the exclusionary rule is the only effective means for deterring police misconduct. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 652 (1961) (noting "the obvious futility of relegating the Fourth Amendment to the protection of other remedies"); Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 360 (1974) (describing the exclusionary rule as "the primary instrument for enforcing the [F]ourth [A]mendment"); Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1389 (1983) (contending that civil liability will not lie for "the vast majority of [F]ourth [A]mendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice"); *id.* at 1386–88 (contending that criminal prosecutions or administrative sanctions against the offending officers and injunctive relief against widespread violations are especially unavailing); Henry Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 CALIF. L. REV. 929, 951 (1965) (arguing that "[t]he sole reason for exclusion is that experience has demonstrated this to be the only effective method for deterring the police from violating the Constitution").

[35] There is a related belief that is sometimes expressed by courts that it rests with the judiciary, as a matter of constitutional design, to curb police excesses via judge-ordered exclusion. *See, e.g.*, Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting) (instructing that the Fourth Amendment protections are "a constraint on the power of the sovereign, not merely on some of its agents"). For an especially evocative expression of the constitutional basis for exclusion premised on a separation-of-powers justification, see State v. Novembrino, 519 A.2d 820, 856 (N.J. 1987) (explaining that in the court's "view, the citizen's right to be free from unreasonable searches and seizures conducted without probable cause is just such a fundamental principle, to be preserved and protected with vigilance. *In our tripartite system of separate governmental powers, the primary responsibility for its preservation is that of the judiciary"*) (emphasis added).

[36] *Mapp*, 367 U.S. at 652.

[37] Pa. Bd. Of Prob. & Parole v. Scott, 524 U.S. 357, 364–65 (1998) (observing "the rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application") (internal quotation marks omitted); *see also* United States

it—the truth-seeking purpose of a criminal trial is undermined, both in reality and as a matter of perception, by operation of the exclusionary rule. Indeed, the exclusionary rule obtains its presumed deterrent force from the fact that the exclusion of evidence and its predictable consequences are real evils, which are suffered by the offending officer and the larger community. Let me explain. When wrongdoers are released because of police excesses, this outcome both frustrates the police—who seek to prevent crime and apprehend criminals—and is harmful to the common good. Individuals and society are likewise harmed when the police perform unreasonable searches and seizures, as privacy can be diminished, liberty can be restrained, and property rights can be compromised without sufficient cause. Viewed in this light, the exclusionary rule expresses nothing more than a policy determination based on a cost-benefit analysis: it disincentivizes police misconduct (which is judged to a greater harm) by suppressing its fruits at a criminal trial regardless of their reliability and probity (which is judged to be the lesser harm). Suppression is deemed to be the less damaging alternative even though it may undermine the truth-seeking purpose of the judicial process[38] and allow the guilty to remain unaccountable and go free. This is a starkly utilitarian calculus.

The rule is blunt in application insofar as it is automatic and largely categorical,[39] and is not nuanced in principle or tailored in application.[40] In assessing the harm resulting from suppression, the Court does not

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v. Payner, 447 U.S. 727, 734 (1980) (acknowledging "that the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case"); United States v. Havens, 446 U.S. 620, 626–27 (1980) (holding that the incremental furthering of deterrence achieved by forbidding impeachment of the defendant who testifies falsely during proper cross-examination is outweighed by the resulting impairment of the integrity of the fact-finding goals of the criminal trial caused by false testimony).

[38] *See supra* note 37 and *infra* notes 206–07 and accompanying text.

[39] I use the term *largely* categorical because several non-discretionary exceptions to the exclusionary rule have be recognized. *See, e.g.*, United States v. Leon, 468 U.S. 897, 924 (1984) (recognizing a good faith exception to the exclusionary rule); New York v. Quarles, 467 U.S. 649, 651 (1984) (recognizing a public safety exception to the exclusionary rule); Nix v. Williams, 467 U.S. 431, 448 (1984) (recognizing an inevitable discovery exception to the exclusionary rule).

[40] *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 419–20 (1971) (Burger, C.J., dissenting) (criticizing the exclusionary rule because it does not draw rational distinctions between dissimilar cases, and "characterizing the suppression doctrine as an anomalous and ineffective mechanism with which to regulate law enforcement").

evaluate the seriousness of the crime[41] or the future dangerousness of the criminal. The value of the evidence at issue to prove guilt is irrelevant.[42] The effectiveness of other methods of deterrence is irrelevant.[43] The fact that the rule promotes cynicism[44] and perjury[45] is irrelevant. And, as already noted, the integrity of the justice system, real and perceived, is also irrelevant. Similarly, the type and magnitude of harm to be avoided via suppression generally does not matter. Whether the officer was a first-time transgressor or recidivist does not matter. Whether he is motivated by a desire to achieve justice or his own self-interest, with some narrow exceptions to be discussed later,[46] does not matter.[47] The egregiousness of the police misconduct, again with only a few exceptions to be discussed later,[48] does not matter.[49] Nothing matters except the

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[41] *Compare* James D. Cameron & Richard Lustiger, *The Exclusionary Rule: A Cost-Benefit Analysis*, 101 F.D.R. 109, 142–52 (1984) (arguing in favor of a balancing approach to the exclusionary rule), and John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046 (1974) (proposing the abandonment of exclusionary rules in certain specified "serious" cases such as murder and kidnapping), *with* Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 11–29 (1987) (acknowledging, but rejecting, the proposition that the seriousness of the crime should be considered when determining whether to apply the exclusionary rule).

[42] Stone v. Powell, 428 U.S. 465, 490 (1976) ("[T]he physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.").

[43] *See*, *e.g.*, Carol S. Steiker, Response, *Second Thoughts about First Principles*, 107 HARV. L. REV. 820, 848 (1994) (contending that even though remedies other than exclusion are theoretically preferred, the "exclusionary rule is . . . the best we can realistically do").

[44] *See* 1 DRESSLER & MICHAELS, *supra* note 31, § 20.04[D][2][b], at 381–83 (noting that to "the public . . . the sight of guilty people going free because reliable evidence that could convict them is suppressed by judges on the basis of a technicality" is repulsive) (internal quotations omitted) (citation omitted).

[45] *See* WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH 38–39 (1999) (explaining the exclusionary rule promotes untruthful police testimony (so-called "testilying") and helps create "[a]n attitude of cynicism [that] starts to pervade courthouses as the criminal justice system comes to expect and tolerate dishonesty under oath").

[46] *See infra* notes 55–74 and accompanying text (discussing Herring v. United States, 129 S. Ct. 695 (2009)).

[47] *See* William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem with Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 365 (1991) (explaining that the subjective intent of the officer does not matter when evaluating the application of the good faith exception to the exclusionary rule).

[48] *See infra* notes 55–74 and accompanying text (discussing Herring v. United States, 129 S. Ct. 695 (2009).

objective of deterring largely undifferentiated police misconduct at the expense of largely undifferentiated social costs.[50] Considered in this light, using the exclusionary rule to benefit the justice system is a bit like using a pickaxe to repair a wristwatch.

As the just-described narrative convincingly demonstrates, the present-day Fourth Amendment exclusionary rule has been reduced to "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[51] I do not say this as an original thought; rather, I merely repeat what the Court has explicitly written about the rule on multiple occasions.[52] In fact, the language I just quoted is taken from the Supreme Court's 1974 decision of *United States v. Calandra*.[53] Despite these repeated and, I would argue, often unambiguous judicial pronouncements, many still cling to the fiction that the exclusionary rule is constitutionally required, and that its purposes are more expansive than simply deterring future police misconduct.

Any doubt about the Supreme Court's contemporary understanding of the origin and purpose of the Fourth Amendment exclusionary rule was indisputably settled by its recent decision in *Herring v. United States*,[54] decided on January 14, 2009. Bennie Herring traveled to the Coffee County, Alabama, Sheriff's Department to retrieve items from an impounded pickup truck.[55] Mark Anderson, an investigator with the Coffee County Sheriff's Department, asked the department's warrant clerk to check for any outstanding warrants on Herring.[56] The clerk contacted her counterpart at the neighboring Dale County Sheriff's

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[49] *See* Charles Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 TEX. L. REV. 736, 744 (1972) (arguing the exclusionary rule should only apply in cases of "outrageous" police misconduct).

[50] *See* United States v. Scott, 524 U.S. 357, 363 (1998) ("[W]e have held [the 'Exclusionary Rule'] to be applicable only where its deterrence [of police misconduct] outweigh[s] its "'substantial social costs.'"). To be fair, some proponents of the rule may concede that many or all of the above factors are technically relevant but nevertheless substantially outweighed by the imperative of deterring future police misconduct. *See, e.g.*, Steiker, *supra* note 43, at 848–52.

[51] United States v. Calandra, 414 U.S. 338, 348 (1974). *Accord Scott*, 524 U.S. at 363 ("[T]he [exclusionary] rule is prudential rather than constitutionally mandated.").

[52] *See, e.g.*, *Herring*, 129 S. Ct. at 699; Hudson v. Michigan, 547 U.S. 586, 591 (2006); Illinois v. Krull, 480 U.S. 340, 347 (1987); Stone v, Powell, 428 U.S. 465, 487 (1976).

[53] 414 U.S. at 348.

[54] 129 S. Ct. 695.

[55] *Id.* at 698.

[56] *Id*.

Department, who informed her that Herring had an outstanding warrant.[57] Within fifteen minutes, the Dale County clerk called back to advise the Coffee County sheriff's department that there had been a clerical mistake and Herring's warrant had been recalled five months earlier.[58] But by then it was too late, as Anderson had already arrested Herring and searched his vehicle, finding and seizing firearms and methamphetamines that were discovered inside.[59]

Herring was indicted in the U.S. District Court, Middle District of Alabama, for the crimes of felon in possession of firearms[60] and possession of a controlled substance.[61] He invoked the Fourth Amendment exclusionary rule to suppress the evidence seized from his vehicle, claiming that his arrest and derivative search of his truck were unlawful because they were based on an invalid and recalled warrant transmitted by police authorities in a neighboring county.[62] The motion was denied by the trial court and Herring was convicted.[63] The Court of Appeals affirmed, ruling that the evidence was admissible because the mistake relating to the warrant was made by police officials in a different county, the error was promptly corrected, and there was no evidence of a reoccurring problem or pattern of error.[64] Thereafter, the Supreme Court granted certiorari.[65]

The Supreme Court's decision in *Herring* is instructive for several reasons.[66] First, it explicitly and categorically re-affirms that the sole justification for the exclusionary rule is its presumed capacity to deter future police misconduct. In *Herring*, the Supreme Court observes that

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[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] 18 U.S.C. § 922(g)(1) (2006).
[61] 21 U.S.C. § 844(a) (2006).
[62] *Herring*, 129 S. Ct. at 699.
[63] *Id*. (citing United States v. Herring, 451 F. Supp. 2d 1290 (2005)).
[64] *Id.* (citing United States v. Herring, 492 F.3d 1212 (11th Cir. 2007)). The circuit court relied heavily on United States v. Leon, 468 U.S. 897 (1984), which established the good faith exception to the exclusionary rule.
[65] *Herring*, 492 F.3d 1212 (11th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3438 (U.S. Feb. 19, 2008) (No. 07-513).
[66] One caveat seems in order. *Herring* is a 5 to 4 decision. Chief Justice Roberts wrote the majority opinion, joined by Justices Scalia, Kennedy, Thomas, and Alito. Justice Ginsburg wrote the dissenting opinion, joined by Justices Stevens, Souter, and Breyer. Irrespective of the principle of *stare decisis*, it is possible that the Court's approach to the exclusionary rule could change, perhaps even dramatically, with a change in the composition of the Court.

"[w]e have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. Instead, we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future."[67] The Court further elaborates:

> Justice Ginsburg's dissent [in *Herring*] champions what she describes as a more majestic conception of . . . the exclusionary rule, which would exclude evidence even where deterrence does not justify doing so. Majestic or not, our cases reject this conception, and perhaps for this reason, her dissent relies almost exclusively on previous dissents to support its analysis.[68]

Second, *Herring* reflects some sensitivity to the criticism that the exclusionary rule is too blunt and crude by incorporating an evaluation of the type of police misconduct at issue, i.e., the harm to be deterred. The Court's assessment has two aspects: (1) what the Court calls the "nature" of the police misconduct, and (2) what it refers to as the "gravity" of the harm. With regard to the nature of the misconduct, *Herring* suggests that exclusion should be reserved for law-enforcement illegality that is flagrant, intentional or sufficiently deliberate.[69] The Court instructs that this limitation does not detract from the rule's purpose because "the exclusionary rule serves to deter deliberate, reckless or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[70] According to the Court, police misconduct not rising to this level of egregiousness, such as an isolated occurrence or negligent misconduct, may not justify the costs of exclusion.[71]

With regard to the gravity of the harm, the Court explains that "[t]he extent to which the exclusionary rule is justified by . . . deterrence principles varies with the culpability of the law enforcement conduct."[72] In the Court's words, the police misconduct must be "sufficiently culpable that such deterrence is worth the price paid by the justice

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[67] *Herring*, 129 S. Ct. at 700 (citations omitted).
[68] *Id*. at 700 n.2 (citations and internal quotation marks omitted).
[69] *Id.* at 701–03.
[70] *Id.* at 702.
[71] *See* Heffernan & Lovely, *supra* note 47, at 332–45 (arguing that most violations of the Fourth Amendment involve a good faith misunderstanding of the law or misinterpretation of the facts by the police).
[72] *Herring*, 129 S. Ct. at 701.

system."[73] Put another way, in order for the exclusion of evidence and its consequences to be a lesser evil in the Court's deterrence calculus, the police misconduct to be deterred must be sufficiently blameworthy. Otherwise, the benefit of deterring minimally offensive misconduct is not worth the social cost of excluding an undifferentiated range of probative and reliable evidence of guilt.

Although the evaluation of competing harms in *Herring* is perhaps more refined and exacting than previously undertaken by the Court, it is not the first occasion in which the Court has declined to exclude evidence when the illegal search or seizure that produced it fell short of deliberate police misconduct.[74] In *United States v. Leon*,[75] the Court first recognized the "good faith" exception to the exclusionary rule, deciding that evidence need not be excluded when the police act in good faith in reliance upon a facially valid warrant that was later determined to be invalid.[76] In *Massachusetts v. Sheppard*,[77] the Court applied the good faith exception when the police relied upon a warrant that was invalid because a judge forgot to make "clerical corrections."[78] In *Illinois v.*

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[73] *Id.* at 702. The exclusionary rule can be more easily countenanced by referring to the "price paid by the *justice system*," thereby suggesting that the only victim of the exclusionary rule is an impersonal, faceless, and monolithic bureaucracy or process. Of course, the justice system, and therefore the common good, suffers when guilty criminals are released without punishment. Real people also suffer—widows, orphans, rape survivors, molestation victims, drug addicts, and others. The "justice system" language obscures the many discrete victims of the exclusionary rule and unfairly minimizes its costs.

[74] *E.g.*, United States v. Ceccolini, 435 U.S. 268, 274–75 (1978) (holding that witness testimony is more likely than physical evidence to be free from the taint of an illegal search, but declining to adopt a "*per se* rule that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection between it and a violation of the Fourth Amendment," based on a determination that enough deterrence can be provided with this limitation and thereby avoiding additional social costs); Stone v. Powell, 428 U.S. 465, 494–95 (1976) (holding the exclusionary rule does not apply in federal habeas corpus proceedings because the static social costs of suppression outweigh the marginal deterrent benefits achieved in such a collateral context); Alderman v. United States, 394 U.S. 165, 174 (1969) (holding Fourth Amendment rights cannot be vicariously asserted based on a determination that enough deterrence can be provided with this limitation and thereby avoiding additional social costs). In each of these cases, the assumed benefit of deterring future police misconduct is balanced against the social cost of excluding probative evidence of guilt. In each case, the advantages of significant deterrence is deemed to outweigh the burdens of suppression, while the benefits of more attenuated deterrence is determined to be insufficient to outweigh these costs.

[75] 468 U.S. 897 (1984).

[76] *Id.* at 922.

[77] 468 U.S. 981 (1984).

[78] *Id.* at 991.

Krull,[79] the Court applied the good faith exception when the police relied on a statute that was later declared to be unconstitutional.[80] And finally, in *Arizona v. Evans*,[81] the Court applied the good faith exception when the police relied on mistaken information in a database prepared by a court employee.[82] In each of these cases, the police acted in conformity with and under the authority of a facially valid court document (such as a warrant or database) or a statute, which is precisely the type of conduct that the exclusionary rule seeks to encourage rather than deter. The Court has reasoned that in such circumstances, suppression would gratuitously punish the police[83] and be clearly outweighed by countervailing social costs. According to the Court, any need for deterrence for judges, court employees, and legislators, in order to promote compliance with the Fourth Amendment, can be accomplished by means other than the exclusionary rule.

Unlike these earlier cases, however, the Fourth Amendment violation in *Herring* originated with police officials, albeit from a neighboring county. Thus, and for the first time, the Court was willing to balance away police misconduct premised on an error attributable to the *police* in applying the good faith exception to avoid the remedy of exclusion. While the significance and future impact of the *Herring* decision remains a matter of debate,[84] it is clear that the case unequivocally reiterates that the exclusionary rule is not constitutionally required, and deterrence of future police misconduct is the *raison d'être* for the modern exclusionary

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[79] 480 U.S. 340 (1987).
[80] *Id*. at 349–50.
[81] 514 U.S. 1 (1995).
[82] *Id*. at 15.
[83] *See* Hudson v. Michigan, 547 U.S. 586, 594 (2006) (holding that the exclusionary rule "was inapplicable" for evidence obtained after a knock-and-announce violation because the interests violated by the abrupt entry of the police "have nothing to do with the seizure of the evidence"); United States v. Ramirez, 523 U.S. 65 (1998) (instructing that the "destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression," *id.* at 71, and, had the breaking of the window been unreasonable, it would have been necessary to determine whether there had been a "sufficient causal relationship between the breaking of the window and the discovery of the guns to warrant suppression of the evidence." *Id.* at 72 n.3).
[84] *Compare* Tom Goldstein, The Surpassing Significance of Herring, SCOTUSBLOG, (January 14, 2009), *available at* http://www.scotusblog.com/wp/the-surpassing-significance-of-herring/ (describing Herring as a "significant shift in the Court's jurisprudence"), *with* Orin Kerr, Responding to Tom Goldstein on *Herring*, *available at* http://www.volokh.com/posts/1231961926.shtml (describing *Herring* as a "minor case").

rule.[85] And, even if one approves of *Herring*'s attempt to make the exclusionary rule a little less categorical, the fact remains that the Supreme Court in that case nevertheless failed to address in any meaningful or comprehensive fashion the philosophical and prudential problems associated with an instrumental, utilitarian, and blunt policy initiative created and administered by courts in the guise of constitutional interpretation.

IV. Myth #2: Even If the Rule Is Not Constitutionally Required and Is Intended Only to Deter Future Police Misconduct, It Is Justified Because It Efficiently Accomplishes This Objective

I will begin the debunking of this myth by posing a hypothetical. Everyone would undoubtedly agree that reducing the time needed for firefighters to respond to calls at residences has important societal benefits. Among these are saving lives, preventing injury, and avoiding property damage. When vehicles are illegally parked near fire hydrants or in fire lanes, they can impede firefighters and thereby increase response time. To address the problem of these types of obstructions, legislation is proposed whereby the local fire department would deliberately delay for ten minutes responding to fires at the residences of those people who have previously been ticketed and convicted for this type of parking violation. In support of this approach, it is argued that the proposed legislation would reduce the aggregate response time for all residential fires because it would deter people from obstructing hydrants and fire lanes. In other words, the harm suffered by occasional ten-minute delays in responding to fires at the residences of violators would be more than offset by the increased overall efficiency achieved in responding to all residential fires, because the deterrence of certain types of parking violations would lead to less obstructions that might delay firefighters.[86]

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[85] It is possible, of course, that even if deterrence is the only justification offered for the court-made exclusionary rule, the rule could nevertheless help achieve other, unintended benefits. This is a corollary to the point about unintended consequences discussed *infra*, note 161, which is addressed here in the context of Myth # IV.

[86] Taking it a step further, I suppose a proponent of the proposed legislation might even consider arguing that if in a particular case the fire department unreasonably destroys or damages vehicles parked near hydrants or in fire lanes while engaged in the often competitive exercise of extinguishing fires, they ought to be deterred in the future from profiting from this type of misconduct through the deliberate burning down of the residences they would not have saved but for their unreasonable destruction or damaging of vehicles.

Assume further that you are a lawmaker who will be asked to vote on this legislation. No doubt, you are first confronted with the proposition of whether the law should deliberately impose harm on some people in order to achieve a collective good for all, which incidentally is akin to a normative question implicated by a deterrence-based Fourth Amendment exclusionary rule. In regard to this question, I would briefly note that the approach in the fire department hypothetical might be seen as less morally problematic than a deterrence-based exclusionary rule. This is because in the hypothetical, the people harmed by the deliberate delay in fire-department services are singled out because of their misconduct (their parking violations). In contrast, it is the public at large who are harmed by the release of dangerous criminals under the exclusionary rule, and this harm is inflicted upon the general public in response to misconduct for which they have no responsibility.

Leaving this moral issue aside, however, as a legislator you wish to evaluate the proposed statute on the basis of whether it will achieve the utilitarian benefit of enhancing overall response time. In support of the proposed rule, you would of course expect that its proponents would present persuasive empirical evidence to show that it would efficiently achieve its objective. Certainly no responsible decision-maker would accept the utility proposition that ostensibly justifies this proposed rule as a matter of faith or abstraction. Quite to the contrary, when the objective of a rule is to enhance utility through the comparison of competing costs and benefits, it is especially apropos and should be expected that the rule would be supported by convincing empirical evidence. In the absence of such evidence, I submit that it would be irresponsible to endorse or implement such a rule.

One would expect the same type of empirical support to have been marshaled for the present-day Fourth Amendment exclusionary rule insofar as it, like the hypothetical rule just described, is justified by balancing competing harms and benefits to achieve aggregate utility. It is astounding, therefore, that even after decades since its inception, the deterrence arguments in support of the exclusionary rule have never been empirically verified. Indeed, Professor Dallin Oaks, who performed what is widely recognized as the "[t]he most comprehensive study on the exclusionary rule,"[87] concluded that his research "obviously fall[s] short

[87] California v. Minjares, 443 U.S. 916, 926 (1979) (Rehnquist, J., dissenting from a denial of a stay) (referring to Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 CHI. L. REV. 665 (1970)).

of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule."[88] Other studies likewise fail to demonstrate that the exclusionary rule deters police misconduct and, in fact, they generally suggest the contrary.[89] Judge Richard Posner concurs that "[n]o one actually knows how effective the exclusionary rule is as a deterrent,"[90] and Professor Roger Dworkin has written that deterrence-based arguments in support of the rule are made "largely [as] a matter of faith."[91]

More than this, many proponents of the exclusionary rule candidly concede that its deterrence-based claims are, for all practical purposes, unverifiable. Professor Yale Kamisar, one of the most respected supporters of the exclusionary rule, acknowledges that such justifications for the rule involve "measuring imponderables and comparing incommensurables."[92] Others have lamented that "there is virtually no likelihood that the Court is going to receive any 'relevant statistics' which objectively measure the 'practical efficacy' of the exclusionary rule."[93]

One can speculate about the reasons for the dearth of empirical support for the rule and the willingness of courts and others to prop up and perpetuate the rule in the absence of any convincing data. It might be the case that the Supreme Court is not especially concerned about the

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[88] Oaks, *supra* note 87, at 709. In a postscript to the study, Oaks observes that his self-described "polemic on the rule . . . brushes past the uncertainties identified [in] the discussion of the data." *Id.* at 755.

[89] *E.g.*, Ronald L. Akers & Lonn Lanza-Kaduce, *The Exclusionary Rule: Legal Doctrine and Social Research on Constitutional Norms*, 2 SAM HOUS. ST. U. CRIM. JUST. CENTER RES. BULL. 1 (1986); James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUD. 243 (1973) (both suggesting that the exclusionary rule does not and cannot function as a meaningful deterrent for future police misconduct).

[90] Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49.

[91] Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 INDIANA L.J. 329, 333 (1973).

[92] Yale Kamisar, Gates, *"Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 613 (1984).

[93] Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* United States v. Calandra, 69 NW. U.L. REV. 740, 763–64 (1974). *See also* Stone v. Powell, 428 U.S. 465, 492 & n.32 (acknowledging the past "absence of supportive empirical evidence" for the exclusionary rule and describing recent empirical studies of the exclusionary rule as "inconclusive").

factual basis for its policy pronouncements.[94] It might instead be the case that courts are particularly incapable of engaging in the type of empirical fact finding used for making public policy, which should be reserved to the elected branches of government because of their competence, resources, and political authority.[95] But it remains likewise true that legislators and academics have been equally incapable of providing a solid empirical basis for the assumptions about police deterrence that have been repeatedly advanced to justify the exclusionary rule.

> It should also be considered that there are powerful countervailing considerations that weaken the unverifiable assumption that the exclusionary rule meaningfully deters future police misconduct. First, a police officer's violation of the Fourth Amendment, more likely than not, is unintended and lacks malice, and thus is unlikely to be deterred by the threat of suppression.[96] Second, even in the case of deliberate violations, the sanction of exclusion is often too remote and attenuated to achieve meaningful deterrence.[97] Third, many of the most problematic searches and seizures are never judicially reviewed precisely because they are problematic; often such cases are buried by the police and possible suppression motions are bargained

[94] *See Stone*, 428 U.S. at 492 (wherein the Court noted a lack of empirical evidence to support its premise that the exclusionary rule deters police misconduct).

[95] *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 230 (1981) (indicating that Congress is "the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems."); Oregon v. Mitchell, 400 U.S. 112, 247–48 (1970) (Brennan, J., concurring in part and dissenting in part) (acknowledging that "[t]he nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions" in comparison with the role of the legislature); Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 575 (1994) (recognizing that "[c]ourts are supposed to use moderation in reviewing decisions of the lawmaking body in order to avoid engaging in policymaking, because determining policy is not a function allocated to the judicial branch," particularly when the judge is appointed and not elected); Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CINCINNATI L. REV. 199, 209 (1971) (stating that the legislature is a better fact-finding institution than the court system for making laws because it has greater familiarity with "current social and economic conditions"); Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 323 (1987) (noting that "politically responsive officials are in a better position" to evaluate facts and policies for lawmaking purposes, and therefore courts should "abstain and defer to the legislature" to fulfill that role).

[96] *See* Heffernan & Lovely, *supra* note 47, at 365.

[97] 1 DRESSLER & MICHAELS, *supra* note 31, § 20.04[C], at 376.

> away as part of guilty plea arrangements.[98] Fourth, police officers—especially the malicious officers who are the best candidates for deterrence—may lie to avoid suppression.[99] Fifth, even where suppression is ordered, it often occurs long after the wrongful conduct has taken place and this sanction may never be communicated to the offending officer.[100] Sixth, some officers may intentionally violate the Fourth Amendment because they conclude that the incentives for conducting illegal searches and seizures—such as the suspect's arrest and indictment, loss of employment, deportation, confiscation of property, deprivation of privacy and liberty, and so forth—outweigh the disincentive of the possible future suppression of evidence.[101] Finally, the police can game the rule to shield their misconduct from suppression, such as by exploiting the standing requirements imposed on defendants.[102]

In particular, it seems likely that any presumed deterrent benefit gained by excluding illegally obtained evidence would be undermined by the way in which suppression decisions are typically made and announced. Usually before a motion to suppress is litigated, law enforcement officials and prosecutors have reviewed the matter and concluded that no constitutional violation has occurred. If a judge thereafter suppresses the evidence, the police and the public might simply conclude that the prosecutor was correct and the judge got it wrong. Moreover, when the suppression of evidence is ordered or affirmed on appeal, especially by a divided court, the community in general and police officers in particular may believe that the dissenting judges or justices were correct and the conduct by the police was legal. Indeed, the public and the specific officers involved may never actually learn of the court's decision or its rationale for suppressing evidence,

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[98] *Id.*
[99] *See* PIZZI, *supra* note 45, at 38–39.
[100] 1 DRESSLER & MICHAELS, *supra* note 31, § 20.04[C], at 376.
[101] *Id.*
[102] *See* Alderman v. United States, 394 U.S. 165, 174 (1969) (holding Fourth Amendment rights cannot be vicariously asserted). The Court no longer treats the issue of standing separately from the merits of a suspect's Fourth Amendment claims. Rakas v. Illinois, 439 U.S. 128, 138–39 (1978). Thus, in the case of a contested search, the Court would simply ask whether the suspect had an expectation of privacy in the area searched by the police. *See* Katz v. United States, 389 U.S. 347, 350–51 (1967) (holding that the Fourth Amendment protects against certain intrusions upon expectations of privacy).

and, if they do, this notification can occur years later and in a summarized and perhaps distorted fashion. For all of these additional reasons, the unverifiable claims of deterrence should be viewed with even greater caution.

Using the same type of speculative philosophizing as the rule's proponents employ—and admittedly pushing the envelope a bit to make a point—I suppose one could even argue that in the short term we ought to encourage *more* illegal searches and seizures by the police, as this would deter people from committing crimes. The rationale would go like this: More aggressive searching and seizing by the police will lead to less crime. Once the crime rate has declined to a specified tipping point, police would have less crime to investigate and, therefore, there would be less illegal searching and seizing going on. While all of us would no doubt reject such reasoning as wrong-headed and speculative, we should pause to consider whether such an approach is really so different in kind than the current thinking that passes as a pragmatic justification for the exclusionary rule for the deterrence advocates.

In summary, one must candidly accept that the deterrence claims upon which the exclusionary rule rests have not and probably cannot be empirically verified. In his regard, I am reminded of a scene from the great John Ford Western movie, *The Man Who Shot Liberty Valance*.[103] Without giving away too much of the plot, near the end of the film the Jimmy Stewart character, a lawyer and later United States Senator named Ransom Stoddard, tells a newspaper editor the true story about the death years earlier of an infamous outlaw named Liberty Valance, played by Lee Marvin. A legend had grown up about how Valance had died, which departs substantially from the actual events being related to the editor by Senator Stoddard. It was upon the false legend of Valance's death that Senator Stoddard had built his career and, indeed, the history of the West was irrevocably shaped. When Senator Stoddard finishes describing what had really happened, the editor abruptly destroyed his notes, explaining, "This is the West, sir. When the legend becomes fact, print the legend."

The legend of deterrence—the myth of deterrence, if you will—has been accepted as fact without verification. It has been printed and reprinted by the courts and others as an article of faith. It is astounding that the pseudo-empirical claim that justifies the present-day exclusionary rule can rest on what amounts to little more than surmises

[103] THE MAN WHO SHOT LIBERTY VALENCE (Paramount Pictures 1980).

and speculation. Indeed, the rule's proponents have conceded that they have failed to support their position with facts and have asked to be relieved of the burden of persuasion. Given all that is at stake, including the harmful and tangible consequences of the exclusionary rule, we should expect and insist upon much more.

V. Myth #3: Even if the Present Rule Is Too Inefficient in Deterring Future Police Misconduct to Justify its Application, It Can Be Sufficiently Improved in Achieving Deterrence by a Modification that Accounts for the Seriousness of the Crime or the Dangerousness of the Criminal

Some proponents contend that the present instrumental and utilitarian exclusionary rule can better realize its assumed deterrent benefits, while reducing countervailing costs, if the seriousness of the crime or the future dangerousness of the criminal were factored into the calculation of whether to suppress evidence. These proponents would, presumably, welcome the Court's efforts in *Herring* to refine the rule to account in some albeit limited fashion for the nature and gravity of the police misconduct.[104] They would additionally urge, however, that the Court should create a more robust and nuanced exclusionary calculus, which would better achieve desired deterrence while reducing exclusion and thereby achieving greater utility.

The argument to reduce unnecessary or too-costly exclusion based on pragmatic variables is not new. Professor Kamisar, although opposing such modifications to the exclusionary rule, has coined the phrase "'comparative reprehensibility' approach"[105] to describe what is an ostensibly more refined equation for evaluating proportional harms in deciding whether to suppress evidence obtained in violation of the Fourth Amendment. Many variations of the comparative reprehensibility approach have been proposed. Professor John Kaplan, for one, would carve out an exception to the exclusionary rule for certain serious offenses.[106] Professor William Plumb would recognize an exception for other heinous crimes, explaining that:

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[104] *See supra* notes 69–73 and accompanying text.
[105] Kamisar, *supra* note 92, at 2.
[106] Kaplan, *supra* note 41, at 1046 (contending that the exclusionary rule should not be applied in the case of "treason, espionage, murder, armed robbery and kidnapping by organized groups").

> [I]f the application of the [exclusionary] rule could be divorced from popular prejudices concerning the liquor, gambling, and revenue laws, in the enforcement of which the federal rule saw its greatest growth, and if a murderer, bank robber, or kidnapper should go free in the face of evidence of his guilt, the public would surely arise and condemn the helplessness of the courts against the depredations of the outlaws.[107]

Other commentators prefer a two-tiered approach, exempting certain serious cases from the exclusionary rule's reach while balancing the gravity of the unconstitutional police behavior against the magnitude of the crime to determine whether to exclude evidence in less egregious circumstances.[108] Some, who would exempt only a limited number of offenses from the exclusionary rule's reach, would also create an exception to the exemption to account for police misconduct that is so flagrant as to "shock the conscience."[109] Similarly proposed refinements of the exclusionary rule include the so-called "inadvertence" exception,[110] the "substantiality" test,[111] and the "proportionality" basis.[112] Consistent with this line of thinking, Australia has adopted a discretionary exclusionary rule, which requires the trial judge to weigh two competing considerations against each other in deciding whether to suppress evidence: "[1] the desirable goal of bringing to conviction the wrongdoer and [2] the undesirable effect of curial approval, or even

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[107] William T. Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 379 (1939) (footnotes omitted).

[108] Cameron & Lustiger, *supra* note 41, at 142–52.

[109] Kaplan, for one, argues that "some police violations would still invoke the exclusionary rule" even in the case of serious felonies that would otherwise be exempted. Kaplan, *supra* note 41, at 1046 (citing Rochin v. California, 342 U.S. 165, 172–73 (1952) (holding suppression is required when the police misconduct is so egregious as to "shock the conscience")).

[110] *Id.* at 1044 (observing that "[o]ne superficially tempting modification would be to hold the [exclusionary] rule inapplicable where the constitutional violation by the police officer was inadvertent"). Arguably, this could be the import of the recent *Herring* decision. *See supra* note 85 and accompanying text.

[111] Philip S. Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1, 27 (1975) (discussing the Model Code's approach wherein a suppression motion is granted only if the court finds that the violation upon which it is based was "substantial").

[112] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 490 (1976) (contending "[t]he disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the [exclusionary] rule is contrary to the idea of proportionality that is essential to the concept of justice").

encouragement, being given to the unlawful conduct of those whose task it is to enforce the law."[113]

The comparative reprehensibility approach and its analogues are sensibly motivated. If one accepts that the exclusionary rule is designed to obtain benefits while minimizing harm, then it seems only fair within this context to evaluate the relative harm caused by suppressing evidence as compared to the damage caused by admitting it. This type of assessment, however, necessarily begs the predicate question of which is generally more damaging to society: the misconduct by the police officer or the criminal activity of the suspect? Leaving aside on the one hand cases that involve especially abusive police activities that "shock the conscience"[114] and thus might deny due process,[115] and on the other certain petty crimes and minor *malum prohibitum* offenses, the self-evident answer is that the crime is almost always more harmful than the unreasonable search or seizure used to gather evidence to prosecute it, and the unpunished criminal is almost always more dangerous to society than the undeterred policeman who improperly gathered evidence of his guilt.[116] As Dean John Wigmore put it over eighty years ago, the exclusionary rule places courts "in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It

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[113] Craig Bradley, *Criminal Procedure in the "Land of Oz": Lessons for America*, 81 J. CRIM. L. & CRIMINOLOGY 99, 110 (1990) (quotations and citations omitted); *see* Frank Bates, *Improperly Obtained Evidence and Public Policy: An Australian Perspective*, 43 INT'L & COMP. L.Q. 379 (1994); *see generally* Rosemary Pattenden, *The Exclusion of Unfairly Obtained Evidence in England, Canada and Australia*, 29 INT'L & COMP. L.Q. 664 (1980) (comparing and contrasting the discretionary aspects of the exclusionary rule in England, Canada and Australia).

[114] *Rochin*, 342 U.S. at 209.

[115] U.S. Const. amend XIV:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No claim is made that every shocking episode of police misconduct necessarily denies due process. Such a determination would presumably turn, in part, on one's tolerance for or expectation of police excess, at least in the absence of a judicial standard for classifying constitutionally-based degrees of conscious-shocking behavior.

[116] To be clear, this observation should not be taken as an endorsement of consequentialism. It is simply a critique of the Court's exclusionary rule on its own terms.

regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer."[117]

It is difficult to imagine, however, how any of these proposed refinements to the exclusionary rule—to include comparative reprehensibility, inadvertence, substantiality, or proportionality—could ever be incorporated into a deterrent-based exclusionary rule. As I explained in the earlier article:

> [T]he decision whether to suppress could not be made before the merits of the suppression issue are litigated. To do so beforehand would be premature, as the exclusion of probative evidence could not be ordered unless and until it can be premised on a judicial finding that the police conduct was unconstitutional. Likewise, it appears obvious that the suppression decision would have to be made randomly or based on criteria unknown to the police at the time when they are participating in a search or seizure. If the ultimate suppression decision was made in relation to factors known by the police before they act—such as the seriousness or the crime or the dangerousness of the suspect—the same assumptions that underlie the exclusionary rule could prompt the police to adjust their conduct and risk the possible exclusion of evidence because of the urgent need to apprehend a particularly dangerous offender. This would undermine the goal of police deterrence that the rule seeks to achieve.[118]

Professor Craig Bradley agrees that although a mandatory and categorical rule is not necessary for deterrence in an abstract sense, it is required to achieve meaningful deterrence as a practical matter. Bradley explains:

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[117] John Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479, 482 (1922); *see* Edward Barrett, Jr., *Exclusion of Evidence Obtained by Illegal Searches—A Comment on* People vs. Cahan, 43 CAL. L. REV. 565, 582 (1955) (arguing that "put to the choice between permitting the consummation of the defendant's illegal scheme and the policemen's illegal scheme, the court must of necessity favor the defendant").

[118] Milhizer, *Lottery*, *supra* note [*], at 762.

> [i]f the police *knew* that the evidence would be excluded, for example, two-thirds of the time, they would likely be just as deterred from illegal searches as they are now. The trouble with this approach is that it has to be random. Otherwise, whatever the standards, the police will learn them and adjust their conduct accordingly.[119]

There is another fundamental problem with the "'comparative reprehensibility' approach," at least in its unadulterated form. As Dean Wigmore noted, the reprehensibility of criminals and their crimes almost always exceeds that of the police officers and their misconduct. Accordingly, when these competing evils are balanced against each other in individual cases, the expected outcome will be that the illegally obtained evidence will be admitted. Ironically, in cases involving especially serious crimes in which the deterrence of police misconduct is presumably most needed, a "comparative reprehensibility approach" would increase police confidence that the evidence they gathered would not later be suppressed. A presumptive default to allow the introduction of illegally obtained evidence, either generally in specific types of cases, would inevitably nullify any deterrent benefit that the exclusionary rule might otherwise achieve. This would result in a symbolic but impotent exclusionary rule that would defeat the rule's justifying purpose of deterring future police misconduct. It would also undermine possible legislative and executive initiatives that might address police misconduct in more effective ways.

The conclusion is inescapable: marginal tinkering with the exclusionary rule so that it more efficiently deters police misconduct will not produce a satisfying result and is ultimately doomed to failure. The rule's very design of influencing future police misconduct through the deliberate avoidance of the risk of exclusion is necessarily undermined if the police can calibrate their behavior to circumvent this risk while engaging in misconduct. The only possibility for systematically reducing the amount of evidence suppressed while retaining a comparable deterrent benefit from suppression would involve random decision making by the courts, such as a lottery for determining when illegally obtained evidence is excluded.[120] Of course, any indiscriminate process

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[119] Bradley, *supra* note 113, at 123 (emphasis in original).

[120] Milhizer, *Lottery*, *supra* note *, at 762 (describing a "straw-man" exclusion lottery to illustrate the utilitarian nature of the rule).

for deciding suppression motions would be summarily rejected because it is too blatantly unprincipled, among other reasons. Further, an approach that bases the suppression decision on a systematic comparison of the proportional reprehensibility of criminal and police misconduct would result, for all practical purposes, in an exclusionary rule in name only, as illegally obtained evidence would be rarely excluded and the police would have prior knowledge of this likely outcome. A toothless exclusionary rule can do great harm, as it would hold out the false promise of deterrence while masking the need engage in reform that effectively addresses police misconduct. Accordingly, the present deterrent-based exclusionary rule, as bad as it is, cannot be effectively reformed to incorporate a meaningful proportionality of harm analysis.

VI. Myth #4: Even if Deterrence of Future Police Misconduct in Any Form Is Insufficient to Justify the Rule, the Rule's Objectives Can Be Expanded to Encompass and Promote Noble Aspirations Beyond Police Deterrence, Which Thereby Justify the Rule

Given the insurmountable problems with reforming a deterrent-based exclusionary rule to obtain greater utility, the next logical question is whether a more encompassing rule might be crafted to account for the ostensibly "noble" benefits of excluding illegally obtained evidence. Some contend that exclusionary rule critics fail to consider the rule's full "majesty."[121] As we have already discussed, such lofty rationales for the rule have been rendered purely academic by the Court in its decisions such as *Herring*. But it is worthwhile to take up the academic question and thus confront the fourth great myth: that the incorporation of the exclusionary rule's more noble aspirations would justify its continued use.

As mentioned earlier, those who argue in favor of the noble and majestic exclusionary rule contend in some general sense that the systematic suppression of unconstitutionally obtained evidence would enhance the integrity and efficacy of the justice system[122] and achieve other related benefits. Many of these proponents recite the considerations expressed in Justice Brandeis' admonition in the *Olmstead* case, which

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[121] *See* Herring v. United States, 129 S. Ct. 695, 707 (2009) (Ginsberg, J., dissenting) (describing "a more majestic conception of the Fourth Amendment and its adjunct, the exclusionary rule") (internal quotations omitted).
[122] *Supra* notes 16–21 and accompanying text.

describes a more expansive rationale for excluding evidence obtained as a result of police misconduct. As quoted earlier, Brandeis famously asserts that the admission of illegally obtained evidence, as would occur in the absence of the exclusionary rule, would "breed[] contempt for the law," "invite[] anarchy," and "bring terrible retribution."[123] It is for these reasons among others, Brandeis argues, that the suppression of even reliable and probative evidence is justified.[124] To tolerate the admission of illegally obtained evidence at a criminal trial, Brandeis evocatively concludes, would be to endorse the proposition that "the end justifies the means."[125]

Before addressing the specific evils Brandeis recites, it is useful first to confront his over-arching critique about "end[s] justif[ying] the means."[126] Stripped of its rhetorical flourishes, the truth is that Brandeis's justification for the exclusionary rule rests on the same type of ends/means relationship that he so enthusiastically criticizes in defense of the rule's more noble purposes. The only difference between Brandeis's position and the present deterrence-based rule is that Brandeis seeks a more expansive utilitarian end, albeit using the same utilitarian means. Let me explain.

The present Supreme Court jurisprudence, as previously discussed, endorses the suppression of unconstitutionally obtained evidence (the means) in order to deter future police misconduct (the end). Brandeis instead supports the suppression of unconstitutionally obtained evidence (the same means) in order to enhance respect for the law (an additional end), promote good order in society (an additional end), and avoid retribution (an additional end). In theory, nothing would prevent combining the Court's objective of deterring police misconduct with

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[123] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[124] To be fair, Justice Brandeis' dissent in *Olmstead* is not limited to a narrow concern for police abuses; it also includes a more extensive argument that the exclusionary rule is constitutionally required for the rebalancing of the powers between the federal government and the citizen. Nevertheless, it is Brandeis' colorful rhetoric about police misconduct—and the resulting contempt for the law, anarchy, and retribution that this would cause—for which he is best remembered by exclusionary rule proponents. To put in context the broad influence of Brandeis' soaring rhetoric in *Olmstead*, a Google search of his opinion produces 220,000 results, while a similar search of Justice Stewart's more recent, iconic concurrence in *Jacobellis v. Ohio*, which refers to "know[ing] pornography when I see it," produced only 74,900 results. 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[125] *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

[126] *Id.*

Brandeis's ostensibly nobler goals to formulate a more comprehensive utilitarian approach for determining whether to suppress evidence, which calibrates how much exclusion (the means) is necessary to achieve the full range of desired ends, noble or otherwise. Arguably, this is exactly what the Court did years ago in its well-known decision in *Mapp v. Ohio*.[127] Any championing of Brandeis's reasoning because it advocates a nobler means (as opposed to nobler ends) is thus fundamentally misguided. In final analysis, Brandeis' admonition about the evils that would be visited by eliminating the exclusionary rule is simply a call for a more robust set of variables to be evaluated when fashioning a more encompassing but nevertheless utilitarian-based exclusionary rule.

But it is even worse than this. Brandeis's justification for the exclusionary rule rests on the same type of "bad means"/"good ends" instrumentalism that he is so willing to roundly condemn and attribute to his opponents. According to Brandeis, to allow the admission of tainted evidence (bad means) to secure the conviction of a guilty person (good ends) would endorse a corrupt form of instrumentalism. Brandeis's alternative—that we should suffer having dangerous criminals go free (bad means) in order to coerce police into behaving lawfully for a variety of noble reasons (good ends)—embraces the identical moral infirmity to which he objects. The exclusionary rule, as conceived by Brandeis, is every bit as accepting of the proposition that good ends can justify bad means.[128]

With these limitations in mind, we can now turn to Brandeis' first contention that the admission of illegally obtained evidence would "breed[] contempt for the law."[129] The argument seems premised on the following syllogism: (1) permitting the reception of evidence at trial indicates not only that the evidence is reliable, probative and relevant, but also it signals that courts encourage or condone the methods used to obtain the evidence; (2) courts should not encourage or condone illegal police conduct; and, therefore, (3) the reception of illegally obtained evidence signals that courts encourage or condone police misconduct. Further, because the courts are rightfully viewed by society as a guardian of justice and the law's legitimacy, their willingness to receive illegally

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[127] 367 U.S. 643, 655–56 (1961).

[128] In the quoted passage, Brandeis also refers to a "private criminal." *Id.* The import is unclear. There is little private about a criminal who has, by his crime, harmed and offended the public and, often times, particular members of the public, such as the victim and his family.

[129] *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

obtained evidence would undermine society's confidence in the law and breed contempt for it.

The argument is superficially attractive. The Supreme Court has instructed that "[a] rule admitting evidence in a criminal trial … has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur."[130] It is argued, therefore, that the exclusionary rule serves the important purpose of "enabling the judiciary to avoid the taint of partnership in official lawlessness," and that it "assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior. . . .[131] Professor Kamisar concurs that a principal reason for the exclusionary rule is so "the Court's aid should be denied in order to maintain respect for law [and] to preserve the judicial process from contamination."[132]

Ideally, courts would dispense perfect justice in pristine circumstances. The real world is not so tidy, and in reaching an optimal cost-benefit calculus one must realistically consider how much contempt is engendered for the law and the courts when dangerous criminals are released without punishment because the police engaged in misconduct while gathering reliable, probative and relevant evidence of their guilt.

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[130] Terry v. Ohio, 392 U.S. 1, 13 (1968). This premise, of course, is not universally true. For example, evidence of child abuse admitted in divorce cases is often obtained through disreputable means, such as aggressive self-help and private investigators, *In re* A.R., 236 S.W.3d 460, 465–68 (Tex. App. 2007) (describing a mother's overzealous and failed attempts to win custody by proving child abuse through doctors, investigators, home videos, and other various means), Lourdes K. v. Gregory Q., No. S-96-016, 1997 WL 256681, at 3 (Ohio App. 1997) (referencing a mother bribing her son to say things against his father in interviews to determine whether abuse occurred or not), and hypnosis. S.V. v. R.V., 933 S.W.2d 1, 8–22 (Tex. 1996) (discussing repressed memory and other evidence in divorce cases); Borawick v. Shay, 68 F.3d 597, 597 (2d Cir. 1995) (discussing "hypnotically refreshed recollections" of child abuse); *but see* Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 758–59 (1988)) (discussing how evidence of child abuse submitted by a mother often is not believed by the court). These decisions do not suggest that courts, by admitting such evidence, approve of the methods used to gather it, and it certainly does not prevent the appropriate authorities from addressing the underlying misconduct as needed. Other examples that can be offered to disprove Brandeis' premise are legion. *See, e.g.*, *infra* notes 176–77 and accompanying text (discussing private searches).

[131] United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

[132] Kamisar, *supra* note 92, at 604 (internal quotations omitted).

Imagine how much more contemptible society finds the law to be when a criminal freed under the auspices of the exclusionary rule reoffends, and the public thereafter learns that he was released for reasons that many would consider a legal technicality. It is fair to ask which categorical approach would breed more contempt for the law: (1) the status quo approach of freeing guilty and perhaps dangerous criminals without punishment for the sole purpose of deterring future police misconduct, or (2) an alternative approach which instead punishes the guilty based on evidence that the police obtained using unreasonable means even if doing so results in diminished deterrence of future police misconduct.

It also seems true that society would find it contemptible that offending officers (especially in egregious misconduct) often go unpunished, a fact that is attributable at least indirectly and in part to the existence of the exclusionary rule. It would seem even more contemptible that as a substitute for punishing misbehaving officers, the law has instead decided to prospectively deter them and others from engaging in future misconduct by suppressing the evidence they have gathered at a suspect's trial. Whatever contempt society may feel toward the law because a court admitted illegally obtained evidence at a trial would be largely mitigated if, along with punishing the guilty, the miscreant officers were made to pay for their misconduct and those who were victims of the police misconduct were properly compensated. Reasonable people would view this result—the guilty defendant being convicted and sentenced, the misbehaving officer being punished or sanctioned, and the victims being compensated—as a better resolution than could ever be realized through operation of the exclusionary rule. This alternative approach would achieve justice for the criminal, the police, the victim and society, and as a consequence would thereby promote respect for the law and for the courts that administer it.

Second, Brandeis suggests that the admission of illegally obtained evidence would "invite[] anarchy."[133] Leaving aside the rhetorical hyperbole, one might be tempted to respond simply that the Republic has managed to remain relatively anarchy-free for its first 130 years without the calming influence of a court-mandated, universal exclusionary rule.[134] When unrest of any sort did arise, such as during Shays'

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[133] *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

[134] Early in the nation's history, when police conducted an illegal search or seizure "[t]he criminal would have been convicted, and the offending constable would have been liable as a tort-feasor for trespassing upon a person's privacy without proper authority or

Rebellion[135] and the Civil War, a causal connection has never been suggested between such events and the unavailability of a federal exclusionary rule. And, more recently, one might note that the outbreak of urban riots[136] and campus unrest in the 1960s,[137] and the occupation of the Wisconsin state capital earlier this year, [138] all occurred despite the rule's purported ameliorative effects.

I suppose Brandeis's point is that in the absence of the exclusionary rule, the police could accumulate unchecked power that might lead to anarchy. Assuming there is some truth to this contention, history teaches that a concentration state authority and power is far more likely to lead to totalitarianism and oppression than it is to anarchy.[139] Further, if Brandeis is concerned that without the constraints of the exclusionary rule the police would run amok and indiscriminately trample the rights of citizens, then he places too little faith in the corrective effects of the

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cause." Gerald V. Bradley, *Searches and Seizures*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 325 (Edwin Meese III, ed. 2005). Later in time and prior to the universal imposition of the exclusionary rule by the Supreme Court, the states varied with regard to the adoption of an exclusionary rule in their courts. *See* People v. Defore, 150 N.E. 585, 587 (1926).

[135] LEONARD L. RICHARDS, SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE (2002). Ironically, Richards writes that Shays's Rebellion caused George Washington to emerge from retirement and advocate for a stronger national government. *Id*. at 1–4 & 129–30.

[136] *See, e.g.*, HUBERT G. LOCKE, THE DETROIT RIOT OF 1967 (Wayne State Univ. Press 1969); TOM HAYDEN, REBELLION IN NEWARK: OFFICIAL VIOLENCE AND GHETTO RESPONSE (Vintage Press 1967); *see also* Les Payne, *The L.A. Riots: A 'Quick' Study*, NEWSDAY, July 26, 1992, at 32 (discussing more recent urban riots in Los Angeles).

[137] *See* David L. Kirp, *Convenience-Store Demonstrating*, CHI. TRIB. Apr. 22, 1986, at C13.

[138] *See* Abby Sewell, *Wisconsin Governor Unveils $1B-Plus in Cuts*, CHI. TRIB., Mar. 2, 2011, at C13.

[139] *See, e.g.*, Mugambi Jouet, *The Failed Invigoration of Argentina's Constitution: Presidential Omnipotence, Repression, Instability and Lawlessness in Argentine History*, 39 U. MIAMI INTER-AM. L. REV. 409 (2008). Assume Brandeis is instead suggesting that admission of illegally obtained evidence would breed so much contempt and disrespect for the law that members of society would become motivated not to follow it. Again, this result could hardly be called "anarchy" as most people would nonetheless obey the law, perhaps even more scrupulously, because they feared unchecked police powers. This type of popular response to actual and potential police aggressiveness can be seen as another form of deterrence-motivated behavior. And, although a black-market economy might thrive and crime could flourish underground, it seems doubtful these are the kinds of circumstances Brandeis was contemplating when he referred to "anarchy." The simple truth is that as long as the police aggressively search and seize to enforce the law, fear of the police will promote obedience, rather than disobedience, of the law. While this state of affairs may tilt even excessively toward totalitarianism, it hardly risks anarchy.

democratic principles and structures that are integral to American law and society.[140] Law enforcement authorities operate under the direct control of the executive branch of the government and the indirect control of the people. If the police behave so egregiously as to incur public rancor, voters and taxpayers can surely make the political branches of government respond through the elective process and thereby constrain police excesses.[141] In any event, the courts would remain available to address the most extreme forms of police misconduct that "shocks the conscience."[142]

It should also be remembered that Brandeis's extravagant reference to anarchy was made in a 1928 Supreme Court decision, long before the many fundamental reforms in law enforcement policies and practices were instituted during the latter half of the twentieth century.[143] Police departments are now more professional and respectful of constitutional rights than they were in Brandeis's day.[144] Intra-departmental discipline of officers who engage in misconduct[145] and recourse to civil suits against offending police officials[146] appear more effective than in the

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[140] *See* Aziz Rana, *Statesman or Scribe? Legal Independence and the Problem of Democratic Citizenship*, 77 FORDHAM L. REV. 1665, 1670 (2009) (discussing the corrective nature of the American democratic tradition across all legal and social institutions).

[141] *See* Samuel Walker & Morgan MacDonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. C.R. L.J. 479, 498–99 (2009). This article also discusses how citizens have used tort law to help curb police misconduct.

[142] *See* Rochin v. California, 342 U.S. 165, 172–73 (1952).

[143] *See generally* WILBUR MILLER, COPS AND BOBBIES 150–51 (2d ed. 1999); ROBERT FOGELSON, BIG CITY POLICE 3 (1977); SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM (1977) (all discussing police reform during the twentieth century); Walker & MacDonald, *supra* note 141, at 498–99 (discussing the history of police misconduct and past reforms as well as recent legislative reforms that have helped make police agencies self-monitoring and self-adaptive).

[144] *Developments in the Law*: *Confessions*, 79 HARV. L. REV. 935, 940 (1966) (contending that police misconduct occurs only in "extraordinary cases, having no relation to the ordinary day-to-day operations of a police department"). As one dissenting justice in *Miranda* asserted in the context of obtaining confessions, "the examples of police brutality mentioned by the Court [in the majority opinion] are rare exceptions to the thousands of cases that appear every year in the law reports." Miranda v. Arizona, 384 U.S. 436, 499–500 (1966) (Clark, J., dissenting).

[145] *See* Roger Goldman & Steven Puro, *Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct*, 15 HASTINGS CONST. L.Q. 45, 47 (1987) (proposing the decertification of police officers who violate the Fourth Amendment).

[146] *See generally* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL L. REV. 363, 384 (discussing civil suits and finding them inadequate to address police misconduct).

past.[147] Granting that the exclusionary rule played some role in the reform movement,[148] it is highly doubtful that the police would revert to nineteenth century hooliganism if the rule were repealed today. And, even assuming that a causal relationship between suppression and deterrence persists, it is likely that the importance of deterring police misconduct via suppression would vary between police departments and jurisdictions depending on a variety of factors, including the degree to which reforms have been successfully internalized and implemented. It is doubtful that one size fits all, yet the Supreme Court paints with a universal brush when it imposes its Court-made exclusionary rule as a binding national requirement.

Moreover, even allowing that some small chance of anarchy might be risked if the exclusionary rule were repealed, it seems apparent that a greater countervailing risk of anarchy is presently assumed by the rule's largely indiscriminate application. Keep in mind that the exclusionary rule can cut many ways. For example, one can only imagine the impact on public tranquility if brutal police officers were set free because evidence of their guilt was suppressed at their trials via the exclusionary rule. Even leaving aside these types of cases, it appears far more disruptive to the fabric of society and thus anarchy inducing to release some guilty and perhaps recidivist offenders because of the categorical application of the exclusionary rule, as compared to failing to deter some future police misconduct because of the absence of the exclusionary rule.

Third, Brandeis contends that the admission of illegally obtained evidence would "bring terrible retribution."[149] This concern is misplaced. Properly understood, retribution is the central and indispensible basis for criminal punishment.[150] According to retributive principles, one ought to

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[147] A more detailed discussion of such alternatives to the exclusionary rule are beyond the scope of this article.

[148] Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 80, 94 (1992) (explaining that in a study of Cook County, Illinois criminal courts, the exclusionary rule had an "institutional deterrent effect," in that "police and prosecutorial institutions respond[ed] to the exclusionary rule by designing programs and procedures to ensure compliance with the Fourth Amendment").

[149] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[150] *See* C.S. Lewis, *The Humanitarian Theory of Punishment*, ANGLEFIRE.COM, *available at* http://www.angelfire.com/pro/lewiscs/humanitarian.html (explaining that punishment cannot be removed from the concept of desert); IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE

receive the punishment he deserves.[151] Retributive punishment benefits both the individual who is punished and the common good.[152] Other legitimate bases for punishment, such as deterrence[153] and rehabilitation,[154] are subsidiary to retribution.[155] We punish guilty people because they deserve it, and we do not punish innocent people even if doing so may rehabilitate them or deter others. Viewed in this light, retribution cannot be "terrible," as Brandeis describes it. Indeed, if we accept that a legitimate goal of the criminal law is to promote retribution that is morally justified, then we ought to be directly punishing the police officers who are personally guilty of conducting illegal searches or seizures because they deserve it, rather than trying to influence their future behavior indirectly by means of punishing the public at large who are not blameworthy for the misconduct perpetrated by the offending officers.

Perhaps Brandeis was warning about the possibility of "vengeance" rather than "retribution,"[156] expressing the belief that without the

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SCIENCE OF RIGHT 194–98 (W. Hastie trans., 1887) (explaining punishment can be imposed only because the individual on whom it is inflicted has committed a crime).

[151] Lewis, *supra* note 150; Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179–82 (Ferdinand Schoeman ed., 1987) (explaining that punishment is justified only because offenders deserve it).

[152] Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1891–92 (1991).

[153] *See* Eugene R. Milhizer, *Reflections on the Catholic Bishops' Statement about Deterrence*, 99 SOC. JUST. REP. 69 (2008) (discussing various aspects of deterrence and the legitimacy of deterrence as a basis for criminal punishment).

[154] *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 53 (1968) (describing rehabilitation as "[t]he most immediately appealing justification for punishment").

[155] *See* Lewis, *supra* note 150; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.03(B), at 16–19 (4th ed. 2006) (discussing retributive justifications for punishment); Marc O. DeGirolami, *Culpability in Creating the Choice of Evils*, 60 ALA. L. REV. 597, 630–31 (2009) (explaining that all adequate theories of punishment must derive from the principles of retribution); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955) (explaining the basis for punishment under a retributive theory); Massaro, *supra* note 152, at 1891–92 (noting how retribution is the favored justification for punishment because it allows for punishment in more situations than do rationales based on deterrence and rehabilitation).

[156] Vengeance is usually associated with anger by one who is wronged, and with a desire to make the wrongdoer suffer for no reason other than to attempt to heal the pain of the wronged, while retribution is usually associated with seeking a just punishment for conduct that is morally culpable. *See* Robin Wellford Slocum, *The Dilemma of the Vengeful Client: A Prescriptive Framework for Cooling the Flames of Anger*, 92 MARQ. L. REV. 481, 490–91 (2009) (discussing vengeance and how it stems from emotional pain

constraints on police conduct emanating from the exclusionary rule private citizens would be more likely to take the law into their own hands. Any such concern that the exclusionary rule will provoke "terrible vengeance" likewise cannot withstand scrutiny. As a matter of simple logic, vengeance is sought by those who have been wronged (and sometimes by others in their stead) against those who have perpetrated the wrong. If it is true that if police misconduct would run rampant in the absence of the exclusionary rule, then any resulting vengeance would probably be directed towards the police by those whose rights were violated by the police. It is likewise true that if some guilty people go unpunished as a consequence of the present exclusionary rule, any resulting vengeance because of this would probably be directed towards these guilty people by those whom they had victimized.[157] It seems obvious that a systematic application of the exclusionary rule would provoke more vengeance by victims against criminals who avoid punishment than a repeal of the rule would provoke by the public against misbehaving police officers.[158] In other words, in the aggregate the exclusionary rule seems much more likely to encourage rather than discourage vigilantism.[159] And, if some form of exclusionary rule is

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and anger); Tom Dannenbaum, *Crime Beyond Punishment*, 15 U.C. DAVIS J. INT'L L. & POL'Y 189, 194–95 (2009) (discussing how retribution is aimed at giving the wrongdoer "the punishment they deserve"). There are some observers, however, who contend, incorrectly in my judgment, that there is no distinction between retribution and vengeance. Justice Marshall, for example, believed that retribution, retaliation, and vengeance are one and the same. Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 HOW. L.J. 525, 526 (2009).

[157] It is also possible that some "terrible vengeance" could be directed toward the government officials who apply the exclusionary rule and thereby release dangerous criminals.

[158] *See* 1 DRESSLER & MICHAELS, *supra* note 31, § 20.04[D][2][b], at 381–83 (noting that the public finds the consequences of the exclusionary rule to be repulsive).

[159] Imagine the popular response if a killer who had terrorized a community for days or weeks was released because evidence of his guilt was excluded via the exclusionary rule. No doubt residents would turn to self-help measures to protect themselves, their families, and their property as the 'rule of law' failed to protect them. As it currently operates, the exclusionary rule thus could help provoke vigilantism as people might begin to feel that the law is impotent and their only effective option is self-obtained justice. This concern is understood with special force by some abused women who have unsuccessfully sought legal protection from their abusers. If the abuser returns to the streets or the victim's home unpunished, the victim may resort to killing the abuser because she has lost faith in the police to protect her. *See* Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237 (2008) (providing an analysis of women reacting to different situations where they feel helpless and without ability to seek protection from the law. Analogous situations may arise when citizens are once again faced with deadly

ultimately deemed to be necessary to curb vengeance by an angry public toward misbehaving police, then lawmakers can craft a more targeted approach to accomplish this objective.

Two final points are worth making, however briefly. First, if the basic and straightforward deterrence claims in support of the exclusionary rule are unverified and unverifiable, as has been established, then Brandeis's more abstract and expansive claims suffer the same infirmity but to a far greater degree.

Second, requiring exclusion as the principle remedy for Fourth Amendment violations can lead to the perverse result of unduly limiting Fourth Amendment protections. We are all familiar with the expression that bad facts lead to bad law. Consistent with this maxim, if the predominate means available for addressing marginal police behavior in egregious cases is through the suppression of critical evidence of guilt, then some judges may be tempted to declare questionable police conduct in extreme circumstances to be constitutional to avoid the remedy of suppression and its consequences.[160] This is a striking example of the impact of unintended consequences.[161]

For all of these reasons, the exclusionary rule cannot be justified by a more expansive and ostensibly noble set of utilitarian considerations espoused by Brandeis and others like him. Either instrumental approach—the Court's deterrence-based rule or Brandeis's more expansive and ostensibly nobler rule—results in the exclusion of reliable, probative, and relevant evidence of guilt, which is simply too costly when measured against the speculative, unverifiable and misguided benefits it seeks to achieve.

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criminals who are released because evidence is suppressed through the exclusionary rule).

[160] Slobogin, *supra* note 146, at 403 (contending that the exclusionary rule stultifies liberal interpretation of the Fourth Amendment, in large part because of judicial heuristics that grow out of constant exposure to litigants with dirty hands); *see also* 1 DRESSLER & MICHAELS, *supra* note 31, § 20.04[A], at 374 (observing "[t]here is also reason to believe that many trial judges have chosen to accept questionable testimony by police officers regarding searches and seizures, in order to prevent the exclusion of otherwise reliable evidence of a defendant's guilt.").

[161] *See generally* Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894–904 (1936) (applying a systematic analysis to the problem of unanticipated consequences of purposive social action).

VI. Myth #5: In any event, the Rule Is Needed to Preserve the Integrity of the Criminal Justice System

Some courts and commentators argue that apart from any utilitarian efficacy produced by the exclusionary rule, the rule is essential to preserve and protect the integrity of the criminal justice system.[162] I will refer to this as the value-based justification for exclusion. Its proponents assert that the integrity of the judicial process would be seriously compromised if the courts habitually received evidence obtained by the police in violation of the Fourth Amendment, and that this consequence alone is sufficient to justify the rule. Before squarely addressing the validity of this contention, it is instructive to examine the premises upon which it rests: an exaggerated and even romanticized view of the criminal justice system.

Criminal trials are human endeavors. They are characteristically marked by a rough-and-tumble confrontation between a prosecutor and a defense attorney, each motivated by different and usually competing objectives.[163] Trials are conducted in a charged environment where the stakes are high and implicate the possibility of a criminal conviction, financial punishment, confinement and, on rare occasions, even death. They ordinarily involve real victims who have suffered harm and seek justice and closure. In some cases, the community feels directly victimized or takes a special interest in a trial. Public safety from recidivism may also be at stake.

As with all human endeavors, the criminal justice system is imperfect. The law recognizes the legitimacy of criminal trials even when they are stained with serious substantive and procedural deficiencies. For example, verdicts are set aside only when errors of a

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[162] *See, e.g.*, Fred Gilbert Bennett, Note, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 UCLA L. REV. 119 (1973) (arguing in favor of retaining the exclusionary rule to promote judicial integrity); United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., joined by Douglas and Marshall, JJ., dissenting) (arguing courts can preserve judicial integrity by avoiding a partnership with police lawlessness).

[163] The Rules 3.1 and 3.8 of the *Model Rules of Professional Conduct* help highlight the different roles of the defense counsel and the prosecutor. MODEL RULES OF PROF'L CONDUCT R. 3.1 & 3.8 (2009). While defense counsel should never fabricate a story, he should advocate with force that the prosecutor prove every element of the crime. For an illustration of the competitiveness of trials, see generally *In re* Scott v. Hughes, 106 A.D.2d 355, 356 (1st Dept. 1984) (defense counsel's actions were "merely reflective of the intensity of the competitiveness of the trial and the zealousness of counsel").

certain magnitude have occurred. Depending on the circumstances, a guilty verdict will stand even if the judge is unwise or errs but does not abuse his discretion[164] or commit an error that is not plain.[165] In fact, Federal Rule of Evidence 403—like its military counterpart, MRE 403[166]—provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[167] In other words, under Rule 403, a criminal trial must tolerate unfair prejudice, confusion of the issues, and misleading of the jury, provided these infirmities are not too weighty. On other occasions, even an egregious error by a judge will not warrant reversal if it is deemed to be non-prejudicial.[168] Keep in mind that each of these situations involves courtroom errors by the trial judge, as contrasted to more remote and attenuated police misconduct that is the subject of the exclusionary rule. None of the evidentiary or appellate standards involving trial error cited above, even to the most ardent proponents of the exclusionary rule, are sufficiently weighty to undermine the integrity or legitimacy of the criminal justice system. These proponents know that to insist upon a perfect trial is to require the unobtainable.[169]

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[164] *See* Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 243–44 (2009) (explaining how appellate courts use the abuse of discretion standard to review a trial judge's mistakes and how the standard allows for errors of a certain magnitude).

[165] *See* United States v. Young, 470 U.S. 1, 14–15 (1985) (holding that the judge erred by allowing the prosecutor to continue with his statements, but that the error did not constitute plain error so the conviction was upheld).

[166] MCM, *supra* note 11, MIL. R. EVID. 403.

[167] FED. R. EVID. 403.

[168] *See* United States v. Olano, 507 U.S. 725, 734 (1993) (explaining that the defendant bears the burden of showing that he or she was prejudiced by the error).

[169] Then-Justice Rehnquist addressed the judicial integrity argument and the reality of imperfect criminal trials as follows:

> while it is quite true that courts are not to be participants in "dirty business," neither are they to be ethereal vestal virgins of another world, so determined to be like Caesar's wife, Calpurnia, that they cease to be effective forums in which both those charged with committing criminal acts and the society which makes the charge may have a fair trial in which relevant competent evidence is received in order to determine whether or not the charge is true.

California v. Minjares, 443 U.S. 916, 924 (1979) (Rehnquist, J., dissenting).

The criminal justice system likewise tolerates many varieties of police misconduct without invoking exclusion. With respect to confessions, for example, the Supreme Court in *Frazier v. Cupp*,[170] a 1969 case, considered whether lying to a suspect by the police while obtaining a confession renders the confession inadmissible. In *Frazier*, the police falsely told a suspect during interrogation that a co-suspect named Rawls had confessed to the crime.[171] The Court held "[t]he fact that the police misrepresented the statements that [another] had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible."[172] In other words, an intrinsically evil act of lying[173] by the police, which results in obtaining a confession (which has been called the most damning kind of evidence of guilt),[174] is not so serious a blow to judicial integrity so as to require the judge to suppress the confession. Other forms of deceptive police conduct to obtain confessions, such as posing as an undercover agent or fellow prisoner, are likewise insufficient to require suppression.[175]

Improper searches and seizures of many kinds are also tolerated and do not trigger suppression. For example, a search or seizure carried out by a private individual, even if it is unreasonable, does not implicate the Fourth Amendment.[176] Accordingly, evidence seized during private searches is admissible. Moreover, a government search that merely

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[170] 374 U.S. 731 (1969).
[171] *Id*. at 737.
[172] *Id*. at 739.
[173] Whether all police deception is morally illicit is beyond the scope of this article. And, no claim is made here that all permissions of falsity in another's mind are unjust. For instance, few people would claim that the patrons of Anne Frank would have acted unjustly by refusing to allow Nazis erroneously to believe she was in the home. ANNE FRANK & ELEANOR ROOSEVELT, ANNE FRANK: THE DIARY OF A YOUNG GIRL (1993). The question of affirmative lying is more complicated and has spurred great debate. Even Albertus Magnus and his pupil, Aquinas, are reported to have disagreed on such matters. "Aquinas, like Kant and apparently unlike his teacher Albert the Great, was a rigorist in allowing no exceptions to the prohibition of lying." A.S. McGrade, *What Aquinas Should Have Said? Finnis's Reconstruction of Social and Political Thomism*, 44 AM. J. JURIS. 125, 132 (1999).
[174] *See* Eugene R. Milhizer, *Confessions After* Connelly*: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMPLE L. REV. 1, 4–8 (2008) (describing the singularly important impact of confession evidence); Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (White, J., opinion of the Court) (concluding "[a] confession is like no other evidence." Indeed "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him").
[175] *See* Illinois v. Perkins, 496 U.S. 292 (1990) (holding a confession given to a law enforcement authority posing as a fellow prisoner was admissible).
[176] *See, e.g.*, United States v. Jacobsen, 466 U.S. 109, 113 (1984).

replicates a previous private intrusion is not a "search" under the Fourth Amendment; instead, it will be judged according to the degree that it exceeded the scope of the private search.[177]

Even when the police themselves engage in illegal searches and seizures, exclusion is not always required. Suppose the police illegally eavesdrop on a phone conversation between *A* and *B*, in which they implicate each other, as well as *C*, in a criminal enterprise. Thereafter, *A*, *B*, and *C* are each tried in separate criminal trials. The Court's decisional authority would hold that suppression is required at the trial of *A* and *B*, but not at *C*'s trial. This line drawing can be explained as a matter of "standing."[178] As a second example, assume an illegal search of *D*'s home by the police uncovers a murder weapon and leads to the identification of a witness who can provide incriminating testimony against *D*. Case law holds that the murder weapon must be excluded but the witness may be permitted to testify.[179] Inanimate objects are suppressed but tainted witness testimony is often allowed. As a third example, the Court has declined to apply the exclusionary rule in federal habeas corpus proceedings.[180] Many other exceptions to the exclusionary rule have been recognized by the Court, such as the good faith exception,[181] the public safety exception,[182] and the inevitable discovery exception.[183] And, in seeming contradiction to the position of the value-based proponents, evidence is more likely to be admitted consistent with the good faith exception when courts[184] or legislators,[185] rather than the police, engage in misconduct or err. Even when officers trespass on a

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[177] *Id*. at 115.
[178] *See supra* note 102 (discussing standing).
[179] *See* United States v. Ceccolini, 435 U.S. 268, 274–75 (1978) (holding that witness testimony is more likely than physical evidence to be free from the taint of an illegal search, but declining to adopt a "*per se* rule that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection between it and a violation of the Fourth Amendment").
[180] *See* Stone v. Powell, 428 U.S. 465, 494–95 (1976) (concluding the static social costs of suppression outweigh the marginal deterrent benefits achieved in such a collateral context).
[181] *See, e.g.*, United States v. Leon, 468 U.S. 897, 924 (1989) (recognizing a good faith exception to the exclusionary rule).
[182] *See, e.g.*, New York v. Quarles, 467 U.S. 649, 651 (1984) (recognizing a public safety exception to the exclusionary rule).
[183] *See, e.g.*, Nix v. Williams, 467 U.S. 431, 448 (1984) (recognizing an inevitable discovery exception to the exclusionary rule).
[184] Arizona v. Evans, 514 U.S. 1, 10 (1995).
[185] Illinois v. Krull, 480 U.S. 340, 349–50 (1987).

privately owned open field, the property they seize there will not be suppressed via the exclusionary rule.[186]

These examples demonstrate that in multiple contexts, including Fourth Amendment jurisprudence, the legal system tolerates substantial misconduct and error. Moreover, it absorbs error occurring in the courtroom at least as readily as error occurring at the stationhouse. Imperfection is accepted because the rules of procedure and admissibility are primarily a means to an end: justice. And, in the context of the criminal trial, justice resides more firmly and centrally in a truthful verdict than it does in the procedures that lead to a verdict, especially when the verdict turns out to be contrary to the truth because of truth-inhibiting procedures. Put another way, trial procedures derive much of their legitimacy because they generally accomplish their objective of achieving a just result. To more fully appreciate this ends/means distinction requires a brief discussion of the concept of "justice" and its relationship to "truth."

We can begin with the common definition of justice as external action[187]; "a habit whereby a man renders to each one his due . . . ."[188] Justice, according to this view,[189] is concerned both with the internal quality of an act and with its external consequences, i.e., the good of another.[190] As justice is a habit, however, it remains fundamentally a disposition of the individual.[191] This basic, Western definition of justice

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[186] Oliver v. United States, 466 U.S. 170, 180 (1984) (holding that it was not necessary to exclude drugs found on private property marked with no trespassing signs and bounded by fences and woods because the property was an 'open field' and thus did not receive Fourth Amendment protection).

[187] It is "external" in the sense that it is directed toward the good of another. *See infra* notes 188 & 190.

[188] AQUINAS, SUMMA THEOLOGIAE pt. II–II Q. 58, art. 1 (trans. Blackfriars of English Dominican Province trans., 1964).

[189] This should not be taken as the only theory of justice; there are several others of note. One such approach is the social-contract theory, reflected preeminently in writings of John Rawls, in particular in his *A Theory of Justice*. In this work, Rawls proposes a notion of "justice as fairness" and a theoretical "original position" from which to determine the principles that order a just society.

[190] "[Justice] is complete virtue in its fullest sense, because it is the actual exercise of a complete virtue. It is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbor also . . . . justice, alone of the virtues, is thought to be 'another's good', because it is related to our neighbor . . . ." ARISTOTLE, NICOMACHEAN ETHICS bk. V1129B 30–1130a 5, *in* THE BASIC WORKS OF ARISTOTLE 1003–04 (Richard McKeon trans., 1941) (citing Plato's Republic).

[191] *Id.*

originated with Plato[192] and Aristotle.[193] Christian thinkers, building upon these premises,[194] reached various conclusions about justice by adding in elements drawn from theology.[195] Notwithstanding these variations, several common and basic understandings about justice can be confidently asserted.

Foremost among these is that justice cannot be sustained in the absence of truth. This is so because justice, by its very nature, is an equitable judgment, which is externally directed in the guise of other persons.[196] As St. Thomas Aquinas instructs, the purpose of justice is "to direct man in his relations with others . . . because it denotes a kind of equality, as its very name implies."[197] This does not mean, of course, that *justice* and *equality* are synonymous, as justice is an "unlimited good"[198] while equality is not.

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[192] PLATO, REPUBLIC, bk. I & II 331b–369e, *in* PLATO COMPLETE WORKS 975–1009 (John M. Cooper ed., G.M.A. Grube trans., 1997) (discussing various theories of justice before reaching a conclusion as to its nature). Of course, there are other venerable sources that addressed the concept of "justice." *E.g.*, *Proverbs* 28:5 ("Evil men understand nothing of justice, but those who seek the Lord understand it all.").

[193] "We see that all men mean by justice that kind of state of character which makes people disposed to do what is just and makes them act justly and wish for what is just . . . ." ARISTOTLE, *supra* note 190, bk. V1129a 6–10, at 1002.

[194] "To everyone the idea of justice inevitably suggests the notion of a certain equality. From Plato and Aristotle, through St. Thomas Aquinas, down to the jurists, moralists and philosopher of our own day runs a thread of universal agreement on this point." Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543 n.20 (1982) (quoting HENRY SIDGWICK, THE METHODS OF ETHICS 380 (7th ed. 1907)).

[195] As Gilson writes of Aquinas:

> St. Thomas hastens to profit by this admission to make a distinction between Greek justice, which is entirely directed to the good of the city, and a particular justice, enriching the soul which acquires and exercises it as one of the most precious perfections. This time it is no longer in Aristotle that St. Thomas finds the text which authorizes him to proclaim that this justice exists, it is in St. Matthew's Gospel: "Blessed are they who hunger and thirst after justice."

ETIENNE GILSON, THE CHRISTIAN PHILOSOPHY OF ST. THOMAS AQUINAS 308 (1956).

[196] *See* AQUINAS, *supra* note 188, Q. 17, art. 4 ("True and false are opposed as contraries, and not, as some have said, as affirmation and negation . . . . For as truth implies an adequate apprehension of a thing, so falsity implies the contrary.").

[197] *Id.* at Q. 57, art. 1.

[198] Adler writes:

> [A]ll real goods are not of equal standing . . . . Some real goods are truly good only when limited. Pleasure is a real good, but we can want more pleasure than we need or more than is good for us to seek

Just as truth is the conformity of one's intellect with reality, so to justice is the equitable conformity of one's intentional acts[199] with reality in relation to other persons.[200] Justice, as a matter of historical reality, is the mortar that joins society to itself.[201] Mortimer Adler puts it this way: "Where love is absent, justice must step in to bind men together in states, so they can live peacefully and harmoniously with one another, acting and working together for a common purpose."[202]

> or obtain. The same is true of wealth. These are limited real goods. In contrast, knowledge is an unlimited real good. We can never seek or obtain more than is good for us . . . . [J]ustice is an unlimited good, as we shall presently see. One can want too much liberty and too much equality—more than it is good for us to have in relation to our fellowmen, and more than we have any right to. Not so with justice. No society can be too just; no individual can act more justly than is good for him or for his fellowmen.

MORTIMER ADLER, SIX GREAT IDEAS 137 (1981). As Aristotle writes of justice, "'neither evening nor morning star' is so wonderful . . . ." ARISTOTLE, *supra* note 190, bk. V, 1129b 26–29, at 1003.

[199] Aristotle, for one, claims that "a man acts unjustly or justly whenever he does such acts voluntarily; when involuntarily, he acts neither unjustly nor justly except in an incidental way; for he does things which happen to be just or unjust." ARISTOTLE, *supra* note 190, bk. V, 1135a 15–17, at 1015. In this sense, *T* commits an unjust act but is not unjust if he testifies, with all sincerity, that A^+ was the man he saw murder *B*—the reality being that A^+ has been long lost and as his yet unknown twin brother, A^-, was the real killer. Even though A^+ will be unjustly convicted, *T* is not guilty of being unjust. Were results all that mattered, then absurd possibilities would be allowed, as where one who intended to unjustly deprive an investor of money by selling a worthless piece of property could be considered to have acted justly if the land is later discovered to have large oil reserves on it and turns a nice profit for the investor.

[200] Adler makes the distinction between speaking falsity and lying:

> There is a clear difference between the judgment that what a man says is false and the judgment that he is telling a lie. His statement may be false without his necessarily being a liar. Try as he will to speak truthfully by saying precisely what he thinks, he may be mistaken in what he says through error or ignorance.
>
> The person we ask for directions may honestly but erroneously think that a certain road is the shortest route to the destination we wish to reach. When he tells us which road to take, what he says is false, but not a lie. However, if he does in fact know another road to be shorter and withholds that information from us, then his statement is not only a false one, but also a lie.

ADLER, *supra* note 198, at 38.

[201] MORTIMER ADLER, ARISTOTLE FOR EVERYBODY 267 (1985).

[202] *Id.* at 104.

To act justly (equitably in regard to others) necessarily demands conformity of the intellect with reality so that proper judgments can be made. If one accepts this relationship between the intellect and reality, then the inescapable conclusion is that lying, deceptive silence, or the obfuscation of the truth are doubly injurious to justice. First, they can frustrate the desires of another for true knowledge. Second, they can separate the intellect of another from reality, thereby causing skewed judgment and baseless actions,[203] which would predictably lead to unjust results. Justice is the equitable conformity of action with reality, and injustice is the inequitable discordance of action and reality.[204] As Benjamin Disraeli once put it, "Justice is truth in action."[205]

In the context of a criminal trial, both truth and justice are more fully realized when the guilty are convicted and the innocent are acquitted. The suppression of probative, reliable and relevant evidence of guilt, especially if this results in the acquittal of one who is guilty, constitutes an injustice. The Supreme Court has called the search for the truth the central purpose of a criminal trial[206] and the "fundamental goal" of the

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[203] Thus, if *A* lies to *B*, claiming that *C* took his TV when *A* really was the thief, then *A* doubly injures justice. First, *A* intentionally confounds *B*'s desire for knowledge of what happened to his TV. Second, *A* directs blame (and possibly punishment) toward the undeserving *C*. Hence, *B* will be rightly angry should he discover *A*'s fraud, not only that he was lied to, but also because of any retributive acts he was tricked into imposing against *C*.

[204]

> [W]e speak of injustice in reference to an inequality between one person and another, when one man wishes to have more goods, riches for example, or honors, and less evils, such as toil and losses, and thus injustice has a special matter and is a particular vice opposed to particular justice.

AQUINAS, *supra* note 188, at Q. 59, art. 1.

[205] THE OXFORD DICTIONARY OF QUOTATIONS 275 (Elizabeth Knowles, ed.) (6th ed. 2004).

[206] Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects' Dignity*, 41 VAL. U. L. REV. 1, 3 (2006) (explaining that "truthful confessions are singularly capable of promoting the search for truth, which the Supreme Court has described as a "fundamental goal" of the criminal justice system and the central purpose of a criminal trial" (citing *inter alia*, Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986), and United States v. Nobles, 422 U.S. 225, 230 (1985)). *Accord* Joseph D. Grano, *Ascertaining the Truth*, 77 CORNELL L. REV. 1061, 1064 (1992) (arguing the central importance of discovering the truth in the criminal justice system).

criminal justice system.[207] The basic purpose of the Federal Rules of Evidence, an important means to this end, is, in its own words, "that the truth may be ascertained . . . ."[208] When criminal trials produce truthful results their legitimacy and integrity are enhanced, and the public is reassured and more secure.[209] When court-created processes such as the Fourth Amendment exclusionary rule deceive the fact-finder and thereby cause the guilty to be acquitted, truth is encumbered, justice is threatened, and legitimacy and public confidence are undermined.

To better make the point, it is useful to move from an abstract discourse about truth and justice to concrete examples and applications of these concepts in circumstances that are analogous to those at stake in criminal trials.

• Suppose the hiring committee of a grade school learns, through evidence illegally obtained by a school employee, that an applicant for a teaching position has a history of child sexual abuse. Should this information be excluded from the hiring committee's consideration in order to preserve the integrity of the school system and its hiring practices?

• Suppose a regulating and approving authority learns, through evidence illegally obtained by one of its field investigators, that a prescription drug being considered for approval contains a mislabeled and untested substance. Should this information be excluded from the authority's consideration in order to preserve the integrity of the drug-approval process?

• Suppose a law professor at the JAG School learns, through evidence gathered by a student in a manner that violates the school's honor code, that another student who received an "A" grade cheated on a final examination. Should this information be excluded from the professor's determination of the cheating

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[207] United States v. Havens, 446 U.S. 620, 626 (1980). *See generally* PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 1.07, at 140 (2003) (calling the ascertainment of the truth the "main goal" of a criminal trial).
[208] FED. R. EVID. 102.
[209] *Nobles*, 422 U.S. at 230 ("[T]he dual aim of our criminal justice system . . . is 'that guilt shall not escape or innocence suffer'") (quoting Berger v. United States, 295 U.S. 78, 88 (1935)); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (stating that the purpose of a criminal trial is to "sort[] the guilty from the innocent").

student's grade and the school's determination of the cheating student's class standing in order to preserve the integrity of the academic culture and the grading process?

• Suppose a sport's governing body learns, through evidence obtained by an employee in a manner that violates the protections afforded to medical records, that a first-place swimmer used a banned performance enhancing drug during a swim meet. Should this information be excluded from the gold-medal determination process in order to preserve the integrity of athletic competition?

The answer to each of the above questions is self-evident: the improperly acquired evidence should be made available to the relevant decision-maker and should not, therefore, be excluded from consideration. A contrary approach, which endorses the suppression of such evidence, thereby sanctions predicating formal action on a deliberately misleading record. It would unwisely elevate process over substance. It would be unjust. It would harm and victimize individuals. It would deceive the public and cause it to lose confidence in legitimate authority. In the end, it would damage the very integrity of the decision-making system, of both its processes and its products, both real and perceived.

This is not to say that a principled and legitimate search for truth may never yield to countervailing considerations. Privacy, liberty, and property interests can be implicated by searches and seizures, illegal or otherwise. On rare occasions, human dignity and the common good may be so severely damaged by outrageous police misconduct that justice demands suppression. For example, no one can seriously contend that confessions obtained as a result of torture and truth serum have any place in a court of law.[210] In other circumstances, rules that promote important values through the exclusion of evidence in narrow situations, such as testimonial privileges,[211] are needed even when they are in tension with an unencumbered search for the truth.

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[210] *See* Rochin v. California, 342 U.S. 165, 172–73 (1952) (holding suppression is required when the police misconduct is so egregious as to "shock the conscience").

[211] *See* Note, *Privilege of Newspapermen to Withhold Sources of Information from the Court*, 45 YALE L.J. 357, 357 (1935) (discussing the most traditional and basic privileges as well as arguments for and against expanding the privileges); *see also* Patricia Shaughnessy, *Dealing with Privileges in International Commercial Arbitration*, 792 PLI/LIT 257, 274–75 (2009) (explaining differences between testimonial privileges (which protect the communication, but do not necessarily protect the information in the

The extent and manner in which the courts can address the problem of illegally obtained evidence while preserving the truth are serious topics that merit careful consideration. Perhaps the illegal conduct of the police officer could be made known at trial for the jury to consider in weighing the credibility of the police and the evidence they present. Perhaps criminal punishment can be mitigated to account for any violations of Fourth Amendment rights suffered by convicted criminals because of police misconduct. This approach would be particularly well-suited for jurisdictions that use some form of sentencing guidelines.[212] Indeed, some measure of recompense for the victims of police misconduct already occurs through the plea bargaining process, such as when charges are reduced or punishment is lessened in exchange for the defense foregoing illegal search or seizure claims. Finally, perhaps waivers of sovereign immunity can be expanded, making civil suits against miscreant police officers more available and attractive.[213] In the end, however, given the supreme importance of truth in achieving justice at a criminal trial, I would argue that courts should suppress truth-affirming evidence only when it is absolutely and demonstrably

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communication if it is available through other legal means) and informational privileges (which protect the information regardless of how it was communicated or found)). Testimonial privileges prevent the consideration of relevant and truthful information that cannot be obtained by any other means besides through the informant who is excluded from testifying. Suppressing such information inhibits one from understanding all of the relevant circumstances and thus encumbers the search for truth.

[212] For example, this type of mitigation might even be recognized under the Federal Sentencing Guidelines. *Cf.* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1. (2005) (authorizing downward departure of sentence based on defendant's acceptance of responsibility for his offense); *id*. § 4A1.3(1) (authorizing downward departure of sentence based on the defendant's favorable criminal history).

[213] One legislative initiative to replace the exclusionary rule would have provided:

> Evidence obtained as a result of a search or seizure that is otherwise admissible in a Federal criminal proceeding shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the Fourth Amendment of the Constitution.

See Note, *Taking Back Our Streets: Attempts in the 104th Congress to Reform the Exclusionary Rule*," 38 BOSTON COL. L. REV. 205, 224 n.184 (1996). This legislation would also have provided for a civil remedy, specified damages, allowed for attorney's fees, addressed *Bivens* and provided for disciplining rogue police officers. *Id*. at 225–26. *See also* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 421–22 (1971) (Burger, C.J., dissenting) (proposing a five-faceted Congressional statute, including the waiver of sovereign immunity, creating a new cause of action, creating a quasi-judicial tribunal to adjudicate these claims).

necessary to achieve some other important, tangible, and immediate purpose.[214] The Fourth Amendment exclusionary rule, in my judgment, falls far short of satisfying this standard.

Judge Robert Bork, a colleague of mine at Ave Maria School of Law, once remarked:

> [One of the reasons] sometimes given [in support of the exclusionary rule] is that courts shouldn't soil their hands by allowing in unconstitutionally acquired evidence. I have never been convinced by that argument because it seems the conscience of the court ought to be at least equally shaken by the idea of turning a criminal loose upon society.[215]

Both our conscience and common sense tell us to have grave doubts about the moral claims of exclusionary rule proponents. They instruct that when a court excludes evidence of guilt when this is not constitutionally compelled,[216] or not directly needed to advance some discrete but important value (such as in the case of privileges), it ceases to act like a court of law. It does not seek justice. It obfuscates the truth without good or sufficient reason. It acts illegitimately and undermines the integrity of the criminal justice system, real and perceived. And, it may transgress the separation of powers the Constitution seeks to preserve.[217] Evaluating the exclusionary rule through this prism, the so-

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[214] The damage caused by the exclusion of truthful evidence is even more insidious. Suppressing evidence conflicts with the oath taken by witnesses to tell the truth, the whole truth, and nothing but the truth. *See generally* Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1 (2009) (discussing the significance of oath and their importance in obtaining truth). Juries hear and see this oath administered and witnesses swear to it. The exclusion of evidence can result in misleading, abusing, and disrespecting the jury, as well as requiring witnesses to evade or finesse their oaths.

[215] Patrick B. McGuigan, *An Interview with Judge Robert H. Bork*, JUD. NOTICE, June 1986, at 1, 6.

[216] If the Constitution requires the suppression of evidence, then the rule of law and respect for legitimate authority requires that it be suppressed even if this encumbers the search for truth. Poindexter v. Greenhow, 114 U.S. 270, 291 (1885) (discussing how a lack of respect for legitimate constitutional authority would undermine the efficacy of the Constitution).

[217] This important issue is beyond the scope of this article. *See generally* Bennett L. Gershman, *Supervisory Power of the New York Courts*, 14 PACE L. REV. 41, 77 (1994) ("To the extent that supervisory power seeks to regulate matters ancillary to the criminal

called value-based justification for the exclusion rule—just as the various utilitarian justifications for it—cannot be sustained. Courts act with integrity when they apply just laws[218] to seek truth and thereby obtain real justice. They act otherwise when they create rules designed to hide the truth and thereby undermine just results for speculative and misguided purposes.

VI. Conclusion

In conclusion, I would like to invoke two iconic expressions for your reflection. First, consider the scripture verse, "the truth will set you free."[219] In American courtrooms, thanks to the exclusionary rule, it is instead the perverse case that the suppression of the truth will sometimes set free undeserving and guilty criminals while denying the freedom of closure and justice to victims. Second, consider the expression "truth, justice, and the American way."[220] The way in American courtrooms, thanks to the exclusionary rule, is that truth and justice are sometimes decoupled by suppressing the former so as to undermine the latter. Your mind and heart should be telling you that this is fundamentally wrong and should not stand. This is the truth, and the truth should be served.

In my judgment, it is time for the Supreme Court to act like a court and not a quasi-legislative body.[221] The Court may wish to reconsider

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trial, and without any written guidance contained in either the federal or state constitutions or statutes, it is vulnerable to claims of judicial activism, unprincipled subjectivism, and a violation of separation of powers."); Michael D. Hatcher, Note, *Printz Policy: Federalism Undermines* Miranda, 88 GEO. L.J. 177, 202–03 (1999) ("[T]he extent to which the Court acted in a legislative manner in *Miranda* highlights [its] violation of separation of powers principles.").

[218] 1 ST. AUGUSTINE OF HIPPO, ON FREE CHOICE OF THE WILL § 5 (explaining that "[a]n unjust law is no law at all").

[219] *John* 6:32 ("[Y]ou will know the truth, and the truth will set you free.").

[220] *See* Erik Lundegaard, *Truth, Justice and (Fill in the Blank)*, N.Y. TIMES, June 30, 2006, *available at* http://www.nytimes.com/2006/06/30/opinion/30lundegaard.html (last visited May 29, 2012).

[221] In his dissent in *Dickerson v. United States*, Justice Scalia argued that

> [the Court's] continued application of the *Miranda* code to the States despite [the Court's] consistent statements that running afoul of its dictates does not necessarily—or even usually—result in an actual constitutional violation, represents not the source of *Miranda*'s salvation but rather evidence of its ultimate illegitimacy.

whether the exclusion of unconstitutionally obtained evidence is constitutionally mandated.[222] This is a jurisprudential issue within the Court's competence and authority to decide.[223] If the Court adheres to the position that the exclusionary rule is not of constitutional origin, there exists no justification—narrow and pragmatic, noble and expansive, or value-based and integrity-centered—that would continence anything approaching the broad range of exclusion required under the present rule.[224]

If the Court instead holds to its view that exclusion is not constitutionally required, then it must repeal the exclusionary rule and leave it to the policy-making branches of government, and to the states, to develop rules and procedures for addressing police misconduct.[225] This would impose upon law makers at all levels increased responsibilities to establish a regime that at once punishes and deters police misconduct while protecting the truth-seeking purpose of a criminal trial. Legislative- and executive-created rules could better serve utility, in that they can more effectively account for a broad range of variables and be adjusted over time. They are also more capable of integrating noble and majestic aspirations. And, they can better enhance the integrity of the courts and the legitimacy of the law. They could "unburden society from the

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530 U.S. 428, 456 (2000) (Scalia, J., dissenting). The same can be said about a court-imposed Fourth Amendment exclusionary rule. *See generally* Joseph Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985) (discussing the limits on the Court's authority to create prophylactic rules).

[222] Justice Brennan, a proponent of the exclusionary rule, lamented that its deconstitutionalization "left [him] with the uneasy feeling that . . . a majority of [his] colleagues have positioned themselves to . . . abandon altogether the exclusionary rule in search-and-seizure cases." United States v. Calandra, 414 U.S. 338, 365 (1974) (Brennan, J., dissenting).

[223] Recognizing that the Court is competent to decide the constitutional issue does not necessarily mean that the Court would be correct in deciding that the exclusionary rule was required by the Constitution. While I believe that it is not, this is a question that is beyond the scope of this article. *See* Amar, *supra* note 209, at 785–86 (arguing there is no historical foundation for the exclusionary rule).

[224] Indeed, if the exclusionary rule is not of constitutional origin, then it is unclear by what authority the Supreme Court can exercise general supervisory authority over state courts. This question, and related issues involving separation of powers, is beyond the scope of this article.

[225] Even if the exclusionary rule were completely repealed and no new legislative or executive initiatives were undertaken, the criminal justice system would retain the ability to address the consequences of especially egregious police misconduct through mechanisms such as prosecutorial discretion, and executive clemency and pardons. A discussion of these processes is beyond the scope of this article.

consequences of an immoral and unwise rule, imposed by an illegitimate authority, designed to minimize one evil by threatening a different and often greater evil."[226]

I sincerely appreciate the privilege of being with you all today. Thank you for your attention and, far more importantly, for your service to our country.

[226] Milhizer, *Lottery Revisited*, *supra* note [*], at 768.

TWENTY-THIRD MAJOR FRANK B. CREEKMORE LECTURE: WHERE WE CAME FROM AND WHERE WE MAY BE GOING*

DR. MICHAEL J. DAVIDSON†

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* This is an edited transcript of a lecture delivered on November 17, 2011, by Dr. Michael J. Davidson, to attendees of the Government Contract and Fiscal Law Symposium, members of the staff and faculty of The Judge Advocate General's Legal Center and School, their distinguished guests, and officers of the 60th Judge Advocate Officer Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia.

The Major Frank B. Creekmore Lecture was established on January 11, 1989. The lecture is designed to assist The Judge Advocate General's School in meeting the educational challenges presented in the field of government contract law.

Frank Creekmore graduated from Sue Bennett College, London, Kentucky, and from Berea College, Berea, Kentucky. He attended the University of Tennessee School of Law, graduating in 1933, where he was inducted into the Order of the Coif for scholarly achievement. After graduation, Mr. Creekmore entered the private practice of law in Knoxville, Tennessee. In 1942, he entered the Army Air Corps and was assigned to McChord Field in Tacoma, Washington. From there, he participated in the Aleutian Islands campaign and served as the Commanding Officer of the 369th Air Base Defense Group.

Captain Creekmore attended The Judge Advocate General's School at the University of Michigan in the winter of 1944. Upon graduation, he was assigned to Robins Army Air Depot in Wellston, Georgia, as contract termination officer for the southeastern United States. During this assignment, he was instrumental in the prosecution and conviction of the Lockheed Corporation and its president for a $10 million fraud related to World War II P-38 Fighter contracts. At the War's end, Captain Creekmore was promoted to the rank of major in recognition of his efforts.

After the war, Major Creekmore returned to Knoxville and the private practice of law. He entered the Air Force Reserve in 1947, returning to active duty in 1952 to successfully defend his original termination decisions. Major Creekmore remained active as a reservist and retired in the rank of lieutenant colonel in 1969. He died in April 1970.

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Prior to ICE, Mr. Davidson was employed as a litigation and supervisory attorney at the Department of the Treasury for six years. He is a retired Army judge advocate, retiring as a lieutenant colonel after twenty-one years of active duty. While an Army JAG, he was a Special Trial Attorney with the Department of Justices's Commercial Litigation Branch (Civil Fraud) specializing in civil False Claims Act litigation, a Special Assistant U.S. Attorney in Arizona specializing in defense procurement fraud and public

If history is a gauge there has always been procurement fraud and there will always be procurement fraud. From the birth of the nation, there have been contractors who have put personal profit before patriotic fervor and have defrauded the military. Unfortunately that misconduct continues today as our nation is engaged in two wars in Southwest Asia.

In the procurement community there are two competing forces, corruption control on one side and commercial/business-like acquisition reform advocates on the other. The corruption control forces want greater

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integrity prosecutions; and a Branch Chief in the Army Procurement Fraud Division responsible for the coordination of legal remedies for contract fraud and for the development and presentation of contractor fraud and performance failure cases to the Army Suspension and Debarment Official. In addition, he also served as the Chief of Contract & Administrative Law at Army Component Central Command, as a litigation attorney in the Army's Litigation Center, and as a military prosecutor at Fort Hood, Texas.

Mr. Davidson graduated from the U.S. Military Academy in 1982. He received his law degree from the Marshall-Wythe School of Law, College of William & Mary in 1988, where he was a member of the Order of the Coif and an Editor & staff member of the *William & Mary Law Review*. Mr. Davidson received a LL.M. in Military Law from the Judge Advocate General's School in 1994 and a second LL.M. in Government Procurement Law, *with highest honors*, in 1998 from the George Washington University School of Law, where his thesis discussed Individual Surety Bond Fraud. Finally, Mr. Davidson was awarded the Doctor of Juridical Science (SJD) degree in 2007 from George Washington University School of Law in Government Procurement Law. His doctoral dissertation focused on defense procurement fraud.

Mr. Davidson is the author of two books: *A Call To Action: Re-Arming The Government In The War Against Defense Procurement Fraud* (Vanderplas Publishing, 2009); *A Guide to Military Criminal Law* (Naval Institute Press, 1999) and over forty legal articles. His procurement fraud-related articles include: *The ICE Suspension and Debarment Program Heats Up*, PROC. LAW. 1 (Fall 2010) (co-author); *Show Me The Money! Maximizing Agency Recoveries In Fraud Cases*, J. OF PUB. INQUIRY 1 (Fall/Winter 2009-2010); *VFATA: Virginia's False Claims Act*, 3 LIBERTY U. L. REV. 1 (Spring 2009); *The Government Knowledge Defense to the Civil False Claims Act: A Misnomer By Any Other Name Does Not Sound As Sweet*, 45 IDAHO L. REV. 41 (2008); *Combating Small-Dollar Fraud Through a Reinvigorated Program Fraud Civil Remedies Act*, 37 PUB. CONT. L.J. 213 (2008); *Protest Challenges to Integrity-Based Responsibility Determinations*, 14 FED. CIR. BAR J. 473 (2005); *Governmental Responses to Elder Abuse And Neglect in Nursing Homes: The Criminal Justice System and the Civil False Claims Act*, 12 ELDER L.J. 327 (2004); *Applying the False Claims Act to Commercial IT Procurements*, 34 PUB. CONT. L.J. 25 (2004), *reprinted at* 38 TAXPAYERS AGAINST FRAUD Q. REV., July 2005, at 105; *Claims Involving Fraud: Contracting Officer Limitations During Procurement Fraud Investigations*, ARMY LAW., Sept. 2002, at 21; Procurement Fraud Division Note, *The Miscellaneous Receipts Statute and Permissible Agency Recoveries of Monies*, ARMY. LAW., Mar. 2001, at 35; *10 U.S.C. 2408: An Unused Weapon in the Procurement Fraud Wars*, 26 PUB. CONT. L.J. 181 (Winter 1997); *The Joint Defense Doctrine: Getting Your Story Straight in the Mother of All Legal Minefields*, ARMY LAW., June 1997, at 17.

government oversight and regulation, and a strong anti-fraud legal regime. In contrast, there are those who want to procure or sell goods and services as efficiency and inexpensively as possible, with little regulation and oversight. Beginning during the Civil War, the interplay between these two forces influenced the development of our current body of law, and the tug and pull between them has been particularly pronounced in modern times.

First, I will review the history of procurement fraud, primarily focusing on the military as victim and the development of the current fraud control regime. Second, I will discuss three current issues: (1) the disturbing involvement of uniformed members of the military in procurement fraud; (2) the need for a sustained source of anti-fraud funding; and (3) the President's recent draft Executive Order attempting to merge campaign finance reform with the procurement fraud regime.

I. Where We Came from: A History of Procurement Fraud and the Development of a Fraud Control Regime

A. In The Beginning . . . There Was Fraud

Procurement fraud has plagued the military since the birth of our nation. During the Revolutionary War, the Continental Army suffered from shoddy supplies, war material, and foodstuffs delivered by unscrupulous contractors. Axes arrived without heads, food was inedible, blankets and shoes were substandard, and gunpowder unusable.[1] General George Washington exclaimed: "These murderers of our cause ought to be hunted down as pests of society and the greatest enemies to the happiness of America. I wish to God that the most atrocious of each state was hung . . . upon a gallows five times as high as the one prepared for Haman."[2]

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[1] JAMES F. NAGLE, HISTORY OF GOVERNMENT CONTRACTING 19 (2d ed. 1999) (citation omitted).

[2] William P. Barr, *Foreword, Seventh Survey of White Collar Crime*, 29 AM. CRIM. L. REV. 169, 171 (1992) (citing MARSHALL CLINARD, CORPORATE CORRUPTION: THE ABUSE OF POWER 69 (1990)).

B. The Civil War Produces The False Claims Act

During the Civil War, the Union Army encountered widespread fraud from defense contractors. Union soldiers opened ammunition crates and discovered sawdust instead of gunpowder.[3] Union cavalry were charged multiple times for the same horse[4] and many of the horses purchased were diseased or disabled.[5] Shoes were of such poor quality that they fell apart when wet and blankets were characterized as "little better than trash."[6]

Faced with such widespread fraud, Congress initially reacted by subjecting contractors to military jurisdiction.[7] Subsequently, in 1863, Congress again reacted to the rampant fraud and passed the False Claims Act.[8] Significantly, the Act also contained a *qui tam* provision, which permitted an individual (aka relator) to sue on behalf of the United States.[9] Following the defense procurement scandals of the 1980s, Congress significantly strengthened the FCA, reducing the scienter requirement, providing for treble damages, increasing the relator's potential recovery, and providing whistleblower protections.[10]

The Civil False Claims Act (FCA), 31 U.S.C. §§ 3729–3733, is now one of the Government's most powerful weapons against fraud, generating more than $27 billion since 1986.[11] Further, at least three

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[3] ANDY PASZTOR, WHEN THE PENTAGON WAS FOR SALE 11 (1995).
[4] *Id.*
[5] NAGLE, *supra* note 1, at 202; *see also* Larry D. Lahman, *Bad Mules: A Primer on the Federal False Claims Act*, 76 OKLA. B. J. 901, Apr. 9, 2005, at 901 ("decrepit horses and mules in ill health").
[6] NAGLE, *supra* note 1, at 198.
[7] In 1862, Congress extended military jurisdiction over contractors who supplied supplies and war material to the Army or Navy. At least nineteen contractors were convicted at Army courts-martial. Michael J. Davidson, *Court-Martialing Civilians Who Accompany the Armed Forces*, 56 FED. LAW. 43, 44 (Sept. 2009).
[8] Joe R. Whatley, Jr. & Thomas J. Butler, *Update on Government Contract Litigation: The False Claims Act and Beyond*, 56 FED. LAW. 39 (Jan. 2009) ("The FCA was passed in 1863 to address rampant misconduct in sales of military 'equipment' (mules, rifles, rations, and so forth) to the Union Army.").
[9] Lahman, *supra* note 5, at 901.
[10] *Id.* at 902.
[11] Press Release, Dep't of Justice, Department of Justice Recovers $3 Billion in False Claims Cases in Fiscal Year 2010 (Nov. 22, 2010), *available at* http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html.

major cities (Washington, D.C., New York City, Chicago) and twenty-six states have enacted their own versions of the FCA.[12]

C. Fraud on the Frontier and An Unlikely Hero

Even though there was a relatively small Army on the post Civil War frontier, there were reports of procurement fraud. Contractors provided old, Civil War era hardtack to the cavalry[13]and cheated the Army on supply contracts.[14] Highly sought-after fort construction contracts "sometimes involved illegal payoffs, cozy arrangements with key officers, and substandard inspections of the finished product."[15] The cost of Army contracts in Texas were regularly inflated.[16] Some of the local citizenry deliberately stirred up trouble with the Indian tribes so that the Army would be called in, along with their lucrative contracts.[17]

One historic figure who became involved in anti-fraud efforts was George Armstrong Custer, who would become famous after his defeat at the Battle of the Little Big Horn.[18] Custer publicly "related instances

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[12] Whatley & Butler, *supra* note 8, at 40.

[13] LAWRENCE A. FROST, THE COURT-MARTIAL OF GENERAL GEORGE ARMSTRONG CUSTER 79 (1987) ("Dishonest contractors had provided hardtack obviously old, as the dates of the Civil War years still were visible on the containers.").

[14] FAIRFAX DOWNEY, INDIAN-FIGHTING ARMY 139 (1957) (In Arizona, "contractors cheated the Government right and left on orders for hay, lumber, and other Army supplies."); *see* MICHAEL L. TATE, THE FRONTIER ARMY IN THE SETTLEMENT OF THE WEST 124 (1999) (Report from Fort Concho, Texas of inferior hay supplied by a contractor and repeatedly paid for by the post quartermaster, "even through cavalry officers refused to feed the hay to their horses").

[15] TATE, *supra* note 14, at 118.

[16] *Id.* at 124. The Acting Assistant Surgeon of Fort Concho, Texas, asserted that the inflation occurred with the assistance of "the entire Texas congressional delegation." *Id.*

[17] DOWNEY, *supra* note 14, at 139; *see also* TATE, *supra* note 14, at 114 ("Fanning the fires of an 'Indian Scare' became a common practice in the West when civilian contractors wished to expand their army business or save existing economic ties that were threatened by new policies."); ROBERT WOOSTER, THE MILITARY & UNITED STATES INDIAN POLICY 1865–1903, at 103 (1988) ("Army and Interior Department officials complained that western merchants provoked violence with Indians in order to attract more soldiers, government supply contracts, and money.").

[18] On June 25, 1876, a combined force of Sioux and Cheyenne warriors killed Custer and wiped out five companies of the U.S. Seventh Cavalry, a force of approximately 225 soldiers. Michael J. Davidson, *Court-Martialing Cadets*, 36 CAP. UNIV. L. REV. 625, 642 & n.63 (2008). A controversial figure, Custer had suffered a court-martial conviction as both a cadet (neglect of duty and conduct unbecoming) and as a Regular Army officer (absence without leave, failing to adequately repulse an Indian attack, and ordering

where bread baked and dated in 1861 was issued to his regiment in 1867; where huge stones weighing as much as twenty-five pounds were found in unbroken packages of provisions, for which the government had paid a food contractor high prices per pound."[19] Further, he complained of corrupt Indian agents and traders, who often defrauded the tribes.[20]

In addition, Custer testified twice before the House Committee on Expenditures in the War Department, which was investigating Secretary of War William Belknap for accepting bribes and kickbacks in exchange for Army post traderships, positions which gave the traders exclusive trading rights on Army posts.[21] Custer testified that "it was a common belief in the Army that the secretary was in league with the corrupt traders at Army posts and Indian reservations"[22] and that the frauds of which Custer was aware "could not possibly have been carried on to anything like the extent they were without [Belknap's] connivance and approval . . ."[23] Further, Custer testified that the post trader at his post, Fort Abraham Lincoln, had revealed to him that post traders were required to pay a hefty "tax to outside people," a third of which went to "an intimate friend of the Secretary" and "a portion went to the Secretary of War."[24] Custer also complained that the post traders charged the Army officers, soldiers and their families "exorbitant" prices for goods, and when one of Custer's officers attempted to purchase goods elsewhere and resell them to his men "at cost," Secretary Belknap sent a written rebuke to Custer reminding him that "no other person will be allowed to trade, peddle, or sell goods, by sample or otherwise, within the limits of the

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deserters shot). *Id.* at 643–44. Also, he enjoyed an impressive battlefield record during the Civil War, advancing to the temporary rank of Brigadier General by age twenty-four. *Id.* at 643. In comparison, Custer's brother Thomas, who also perished during the Battle of the Little Big Horn, was a two time recipient of the Medal of Honor. EDITORS OF THE BOSTON PUBLISHING COMPANY, ABOVE AND BEYOND: A HISTORY OF THE MEDAL OF HONOR FROM THE CIVIL WAR TO VIETNAM 53 (1985).

[19] FROST, *supra* note 13, at 35–36; *see also* GENERAL GEORGE A. CUSTER, MY LIFE ON THE PLAINS 46 (reprinted 2010) (1874).

[20] CUSTER, *supra* note 19, at 114–15.

[21] JAMES S. ROBBINS, LAST IN THEIR CLASS: CUSTER, PICKETT AND THE GOATS OF WEST POINT 335 (2006).

[22] *Id.*

[23] *Testimony of Gen. George A. Custer Before the Committee of Expenditures of the War Department* 26 (Mar. 29, 1876) [hereinafter Custer Testimony] (copy on file with author).

[24] *Id.* at 6.

[military] reserve."[25] Eventually, Belknap resigned to avoid impeachment and further embarrassment to the administration.[26]

In addition, Custer offered "vivid portraits of corrupt Army traders and Indian agents," including accusing Orville Grant—the President's brother—of accepting a bribe in exchange for the award of an Indian reservation trading post,[27] and being complicit in various frauds against the Army and tribes.[28] Custer explained how contractors with the Indian Department would deliver corn for the tribes, but then reroute the same corn to an Army post for sale, to be paid twice for the same corn.[29] In one instance, Custer discovered that an Army Sergeant had been bribed to inflate the weight of the corn sacks before the Army purchased them.[30] He also relayed reports of steamer boats contracted to transport food up river to the tribes, selling a portion to citizens along the route.[31] The testimony proved embarrassing for the President,[32] who replaced Custer as commanding officer of the Seventh Cavalry on the eve of the expedition against the Sioux.[33] Only after the intervention of Generals Terry and Sheridan did Grant changed his mind and return Custer to command.[34]

D. WWII: Truman Takes a Road Trip

The massive build-up of the armed forces during WWII generated an increase in associated procurement fraud. Largely dormant since the Civil War, the False Claims Act found renewed vigor.[35] In addition, the

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[25] *Id.* at 4–5.
[26] ROBBINS, *supra* note 21, at 335; WOOSTER, *supra* note 17, at 22 ("Belknap resigned to avoid impeachment for illegally selling post sutlerships.").
[27] ROBBINS, *supra* note 21, at 360; *see also* Custer Testimony, *supra* note 23, at 8 (Grant bribed), 16 (tribes defrauded), 16–17 (dishonest contractors), 22 (fraudulent Indian agents).
[28] Custer Testimony, *supra* note 23, at 23.
[29] *Id.* at 16–17.
[30] *Id.* at 17.
[31] *Id.* at 18–19, 23.
[32] ROBBINS, *supra* note 21, at 360. Custer had also annoyed Grant by openly associating with Democratic politicians in Washington and by publicly criticizing Grant's Indian policy. *Id.* at 360–61.
[33] *Id.* at 364.
[34] *Id.* at 365.
[35] John P. Robertson, *The False Claims Act*, 26 ARIZ. ST. L. REV. 899, 901 (1995) (The "Act lay essentially dormant until World War II broke out and fraud on the government by defense contractors increased.").

fraud, waste, and abuse attendant with America's build-up and procurement of goods and services necessary to fight the war also produced a fraud fighter whose other successes have largely eclipsed his contributions to curbing procurement fraud throughout the WWII period—Harry S. Truman.

After receiving complaints of "gross extravagancy and profiteering in the construction of Fort Leonard Wood," Truman decided to investigate for himself.[36] Using the family car, an "old Dodge," Truman drove from Washington, D.C., to Florida, then to the Midwest, and finally into Michigan inspecting Army bases and defense plants.[37] He discovered that the primary contractor for the construction of Fort Leonard Wood had no prior construction experience, material had been abandoned to the elements, and "hundreds of men [were] just standing around collecting their pay, doing nothing."[38] Further, most contracts were on a cost-plus basis ("paid for all costs plus a fixed percentage profit")—"an open ticket . . . for excessive profits."[39]

Returning to Washington, Truman convinced President Roosevelt and his colleagues in the Senate to permit him to form "the Senate Special Committee to Investigate the National Defense Program, " which became known as the Truman Committee.[40] During the Civil War, Lincoln's political opponents had formed a similar committee, which they used as a weapon against Lincoln, and while Roosevelt harbored concerns that he would suffer the same fate, he eventually relented.[41]

The Truman Committee found that the cost of building Army bases was grossly excessive, caused in part by cost-plus contracts.[42] Truman expanded the scope of his committee's investigation, traveling throughout the country, holding hearings both locally and in Washington, inspecting defense plants and investigating all aspects of defense production.[43] After discovering that a contractor was manufacturing

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[36] DAVID MCCULLOUGH, TRUMAN 256 (1992).
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 257–59.
[41] *Id.* 258. Confederate General Robert E. Lee reportedly "remarked that the committee was worth two divisions to him . . . ." *Id.*
[42] *Id.* The Army's Chief of Services of Supply attributed over $250 Million in cost savings to Truman's investigative efforts. *Id.*
[43] *Id.* at 263, 265–66.

defective engines, the Committee rejected over 400 engines and the Army Air Corps eventually disciplined one of its generals involved with the contract.[44] Similarly, the Committee discovered that the defense contractor producing the B-26 bomber knew that the wingspan was not wide enough, causing the plane to crash, but continued to produce the plane because production plans were too far along and the Government had already awarded it a contract.[45] After Truman threatened to terminate the contract and ensure the contractor never received another, the wings were corrected.[46]

Investigating reports of "outrageous" payrolls, Truman and other members of his Committee traveled to an airport in the Dallas-Fort Worth area for an inspection. The Committee discovered over six hundred men hiding in a hanger basement, who were on the contractor's payroll but performed no work.[47] Truman required the contractor to return the overpayments and then ensured it received no further contracts.[48] By war's end, Truman believed that his committee had saved the Government over $15 billion and thousands of lives.[49]

E. Vietnam and the Loss of Court-Martial Jurisdiction

The most significant development to come out of the Vietnam War, from a fraud control perspective, was the loss of court-martial jurisdiction over contractors. By today's standards, civilian contractors in Vietnam represented only a tiny percentage of the American presence in that theater of war, peaking at 9000 by 1969.[50] The military's legal pursuit of civilian contractors in Vietnam was hardly the result of prosecutorial zeal since only sixteen civilians were considered for court-martial by 1968 and only four of the sixteen actually went to trial.[51]

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[44] *Id.* at 271–72; MERLE MILLER, PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN 177–78 (1974).
[45] MCCULLOUGH, *supra* note 36, at 272; MILLER, *supra* note 44, at 177.
[46] MCCULLOUGH, *supra* note 36, at 272; MILLER, *supra* note 44, at 177.
[47] MILLER, *supra* note 44, at 177.
[48] *Id.*
[49] *Id.* at 176–77.
[50] MAJOR GENERAL GEORGE S. PRUGH, VIETNAM STUDIES: LAW AT WAR, VIETNAM 1964–1973, at 88 (1975).
[51] LT. COL. GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 168 (1989); PRUGH, *supra* note 50, at 109.

Rather, it was a reaction to concerns of an increased contractor presence and an associated increase in contractor misconduct.[52]

In *United States v. Averette* an Army contractor in Vietnam challenged his court-martial conviction for conspiracy and attempted larceny of Government-owned batteries, and the resultant sentence of a $500 fine and confinement for a year.[53] Reversing the conviction, the U.S. Court of Military Appeals held that Article 2(10)'s jurisdiction reach over contractors was limited to periods of declared war.[54] Significantly, an earlier decision from the U.S. Court of Appeals for the District of Columbia Circuit had also overturned the court-martial conviction of a civilian contractor on jurisdictional grounds.[55] With the loss of jurisdiction, the military resorted to a form of administrative debarment (and subsequent removal from Vietnam) to deal with misbehaving contractors, eventually debarring 943 by April 1971.[56]

The military's jurisdiction shortcomings were largely remedied by the John Warner National Defense Authorization Act for Fiscal Year 2007, which expanded Uniform Code of Military Justice jurisdiction over civilians accompanying the armed forces to include contingency operations.[57] Shortly thereafter, the Army achieved its first court-martial conviction of a contractor since Vietnam, an Army contractor in Iraq who stabbed another contractor.[58]

F. The Modern Era

During our professional lifetimes we have seen wide swings between the fraud control forces and the acquisition reform advocates, who desire less oversight and regulation and more efficiency and streamlined

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[52] PRUGH, *supra* note 50, at 109. After negotiations between the military, which desired greater jurisdiction, and the State Department, which wanted to rely on administrative sanctions, American authorities agreed to consider "the most serious and exceptional cases be tried by court-martial." *Id.*; *see also* SOLIS, *supra* note 51, at 168.
[53] 41 C.M.R. 363 (1970).
[54] *Id.*
[55] SOLIS, *supra* note 51, at 167–68 (citing Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969)).
[56] *Id.* at 168; PRUGH, *supra* note 50, at 110.
[57] Pub. L. No. 109-364, 120 Stat. 2083, § 552 (2006). A contingency operation is defined at 10 U.S.C. § 101(13) (2006).
[58] *Civilian Contractor Pleads Guilty at Court-Martial: First Prosecution Under Amended UCMJ*, 77 U.S. LAW WEEK (BNA) No. 1, at 2003 (July 1, 2008).

procedures. During the 1980s the acquisition community saw widespread corruption within the Defense industry and Congress reacted accordingly. For example, Operation Ill Wind was a massive investigation of defense procurement fraud involving large numbers of investigators and prosecutors, which resulted in the issuance of over 800 grand jury subpoenas, and the review of over two million documents.[59] Misconduct included "bribery and illegal gratuities; misuse of procurement information; mail and wire fraud; . . . conversion of government documents, including classified documents . . . and . . . false claims and false statements."[60] Ultimately, the Government convicted ninety individuals and entities.[61] Among those convicted were "an Assistant Secretary of the Navy, a Deputy Assistant Secretary of the Navy, and a Deputy Assistant Secretary of the Air Force."[62] In the wake of these scandals, Congress enacted the Procurement Integrity Act,[63] the Major Fraud Act,[64] the Prohibited Employment Statute,[65] the Program Fraud Remedies Act,[66] the Anti-Kickback Act,[67] and strengthened the Civil False Claims Act.[68] Beginning in the early 1980s Congress also

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[59] Brigadier General (Retired) Richard J. Bednar, *The Fourteenth Major Frank B. Creekmore Lecture*, 175 MIL. L. REV. 286, 290 (2003).
[60] *Id.*
[61] *Id.* For a detailed discussion of Operation Ill Wind, see generally PASZTOR, *supra* note 3.
[62] Press Release, U.S. Attorney, E. Dist. of Va., Combating Procurement Fraud: An Initiative to Increase Prevention and Prosecution of Fraud in the Federal Procurement Process 2 (Feb. 18, 2005), *available at* http://www.usdoj.gov/usao/vae/ArchivePress/FebruaryPDFArchive/05/21805FraudWhitePaper.pdf.
[63] 41 U.S.C. § 423 (recodified at 41 U.S.C. §§ 2101–2107 (2006)); *see* George Cahlink, *Closing Doors*, GOV'T EXEC., July 15, 2004, at 48, 52 (as a result of Ill Wind "Congress passed the 1988 Procurement Integrity Act . . . ").
[64] 18 U.S.C. § 1031 (2006).
[65] 10 U.S.C. § 2408 (2006); *see generally* Michael J. Davidson, *10 U.S.C. 2408: An Unused Weapon in the Procurement Fraud Wars*, 26 PUB. CONT. L. J., Winter 1997, at 181.
[66] 31 U.S.C. §§ 3801–3812 (2006); *see generally* Michael J. Davidson, *Combating Small-Dollar Fraud Through a Reinvigorated Program Fraud Civil Remedies Act*, 37 PUB. CONT. L.J. 213 (2008).
[67] 41 U.S.C. §§ 51–58.
[68] Bednar, *supra* note 59, at 301 (major revisions); *see also* Whatley & Butler, *supra* note 8, at 39 ("[I]n 1986 . . . the FCA became a viable tool in modern-day federal courts. Among other changes, the 1986 amendments restored the preponderance of the evidence standard, imposed treble damages and civil fines per false claim, increased rewards for qui tam plaintiffs, and provided for the payment of a successful plaintiff's expenses and attorneys' fees.").

began to pressure agencies to make better use of administrative suspension and debarment.[69]

By the 1990s however, the pendulum swung back toward procurement reform and a more efficient, business-like acquisition model.[70] The Federal Acquisition Streamlining Act (FASA) of 1994[71] and the Clinger-Cohen Act of 1996[72] brought significant changes to the federal procurement system, including streamlining procurement actions.[73] As part of the procurement reform efforts of the 1990s a number of systemic protections were reduced or eliminated, particularly for commercial item acquisitions. For example, the Prohibited Employment Statute, which prohibits felons from serving in positions of responsibility on defense contracts, is inapplicable to commercial items.[74] Additionally, the Certification Regarding Responsibility Matters requirement, which mandates that a contractor identify if it or its principals are suspended, debarred, proposed for debarment, have had a recent fraud-related conviction or civil judgment, or are under indictment, is likewise inapplicable for commercial item contracts under the simplified acquisition threshold.[75]

Further, Congress mandated reductions to the acquisition workforce.[76] Congressional policies reduced the acquisition workforce from "460,516 in fiscal 1990 to 230,556 in fiscal 1999."[77] The

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[69] Bednar, *supra* note 59, at 293.

[70] *See* Michael J. Benjamin, *Multiple Award Task And Delivery Order Contracts: Expanding Protest Grounds And Other Heresies*, 31 PUB. CONT. L.J., Spring 2002, at 429, 430 ("Procurement reform in the 1990s was characterized by greatly increased purchaser discretion and greatly reduced internal and external oversight"); Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627 (2001) (procurement reforms of the mid-1990s "were intended to make the procurement system less bureaucratic and more businesslike").

[71] Pub. L. No. 103-355, 108 Stat. 3243 (1994).

[72] Pub. L. No. 104-106, 110 Stat. 679 (1996).

[73] Ezenia!, Inc. v. United States, 80 Fed. Cl. 60, 64 (2008) ("The purpose of [FASA] was to streamline, in some instances, federal procurement actions").

[74] 10 U.S.C. § 2408(a)(4)(B) (2006); DFARS 212.503(a)(vii) (Jan. 2012).

[75] FAR 12.301(b)(2) (Jan. 2012); *id.* 52.212-3(h).

[76] Matthew Weigelt, *Panel Finds Contracting Disarray*, FED. COMPUTER WEEK, Nov. 12, 2007, at 42 ("Congress legislated acquisition workforce cuts of 25 percent in the 1990s . . . ."); *see* Joseph J. Petrillo, *Wrong Lessons Learned*, FED. COMPUTER WEEK, Sept. 17, 2007, at 38 ("it was the acquisition reforms of the 1990s that hollowed out government acquisition offices").

[77] Steven l. Schooner, *Keeping Up with Procurement*, GOVEXEC.COM (July 5, 2006), *available at* http://www.govexec.com/dailyfed/0706/070506.htm

acquisition workforce has yet to recover from the earlier reductions. Since 2000 federal procurement spending rose 155 percent, while the acquisition workforce only increased by 10 percent.[78]

Several procurement fraud scandals arose during the last decade, which caused the pendulum to again shift course. Notable among these scandals were the fraud, waste, and abuse seen in the wake of Hurricanes Katrina and Rita,[79] the Darlene Druyun affair,[80] and reports of widespread contract fraud and waste in Iraq/Afghanistan.[81]

Congress has taken some positive steps to address the fraud, most notably by again strengthening the Civil False Claims Act. The Fraud Enforcement and Recovery Act of 2009 modified the FCA, eliminating the requirement that a false claim be presented directly to the Government, ensuring that liability attaches when a subcontractor submits a false claim to the prime contractor or a government grantee rather than directly to the Government.[82] Additionally, Congress revised the FCA's language to eliminate any specific intent requirement.[83]

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[78] Scott Wilson & Robert O'Harrow Jr., *President Orders Review of Federal Contracting System*, WASH. POST, Mar. 5, 2009, at A4.

[79] The Government Accountability Office determined that "as much as 16 percent of the billions of dollars in Federal Emergency Management Administration aid to individuals after the two hurricanes was unwarranted" and that the Government paid "out as much as $1.4 billion in bogus assistance to victims of Hurricanes Katrina and Rita . . . ." Larry Mabgasak, *Fraudulent Katrina and Rita Claims Top $1 Billion*, WASH. POST, June 14, 2006, at A3; *see also* Chris Gosier, *New Reports of Katrina Contracting Abuse Anger Lawmakers*, FED. TIMES, May 8, 2006, at 7 ("Debris removal contractors gamed the system to inflate their profits . . . ."); *see Katrina Task Force Awaits Spike in Fraud Cases*, FED. TIMES, May 15, 2006, at 8 (noting a federal task force had prosecuted 261 persons for fraud).

[80] A senior DoD procurement official, Druyun "obtained jobs with Boeing for her daughter, her daughter's fiancée, and herself while negotiating a contract with Boeing on behalf of the Air Force. Druyun gave Boeing a 'parting gift' by agreeing to a higher price than she believed appropriate for Boeing's tanker aircraft." *Combating Procurement Fraud*, *supra* note 62, at 2. Druyun pled guilty to conspiracy and was sentended to nine months in prison. Laura M. Colarusso, *Revolving Door Leads to Jail*, FED. TIMES, Oct. 11, 2004, at 1.

[81] In 2011, the Commission on Wartime Contracting estimated that "[a]s much as $60 billion in U.S. funds has been lost to waste and fraud in Iraq and Afghanistan over the past decade through lax oversight of contractors, poor planning, and payoffs to warlords and insurgents . . . ." *Billions of War Dollars Lost to Fraud and Waste*, WASH. POST, Aug. 31, 2011, at A5. By the end of Fiscal Year 2010, civil FCA "settlements and judgments in procurement fraud cases involving the wars in Southwest Asia total[ed] $137.2 million." Press Release, *supra* note 11, at 3.

[82] Pub. L. No. 111-21, 123 Stat. 1617 (2009); *see* Steven L. Briggerman, *False Claims Act Amendments: A Major Expansion In The Scope of the Act*, 23 NASH & CIBINIC REP. ¶

Once again, there is a renewed emphasis on using suspension and debarment as an administrative remedy.[84] Recently, Congress has held hearings on the subject,[85] the Government Accountability Office has issued reports,[86] and on November 15, 2011, the Office of Management and Budget directed various actions by Executive Branch agencies to improve the use of suspension and debarment as an administrative remedy.[87]

II. Current Issues and Where We May Be Going

A. The Uniformed Military and Procurement Fraud

A particularly disturbing product of procurement fraud prosecutions arising out of Southwest Asia is the involvement in fraud by uniformed members of the armed forces. As an institution, the military should examine the causes and extent of this unsettling development and take corrective action. Historically, convictions of the uniformed military for

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58 (Nov. 2009). This change to the FCA was in response to *United States ex rel. Totten v. Bombardier Corp*., 380 F.3d 488 (D.C. Cir. 2004), which involved a false claim submitted to Amtrak, which was a government grantee. *Id.*

[83] Briggerman, *supra* note 82, ¶ 58. This revision was in response to *Allison Engine Co. v. United States ex rel Sanders*, 128 S. Ct. 2123 (2008), which interpreted 31 U.S.C. § 3729(a)(2)'s language, "to get a false or fraudulent claim paid," as requiring specific intent. This reasoning would also apply to the FCA's conspiracy provision. *Id.* Other revisions included an enlarged reverse false claim cause of action, increased whistleblower protections, and easier access to a Civil Investigative Demand. *Id.*

[84] Jason Miller, *Push for More Suspension, Debarments Receives Mixed Reactions*, Federal News Radio (11/18/2011), *available at* http://www.federalnewsradio.com/index.php?nid=851&sid=2638305 ("[P]ush by Congress and the administration for agencies to be more aggressive in suspending and debaring contractors . . . .").

[85] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-127T, SUSPENSION AND DEBARMENT, SOME AGENCY PROGRAMS NEED GREATER ATTENTION, AND GOVERNMENTWIDE OVERSIGHT COULD BE IMPROVED (2011) (Statement of William T. Woods, Dir. Acquisition and Sourcing Mgmt. (Oct. 6, 2011) (Testimony Before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, House of Representatives); *cf.* Geoffrey Emeigh, *SIGIR 'Aggessively' Pursuing Debarments, Suspensions, Bowen Tells Senate Panel*, 87 FED. CONTRACTS (BNA) 378 (Mar. 27, 2007) (testimony before committee investigating contract fraud in Iraq).

[86] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-739, SUSPENSION AND DEBARMENT, SOME AGENCY PROGRAMS NEED GREATER ATTENTION, AND GOVERNMENTWIDE OVERSIGHT COULD BE IMPROVED (2011).

[87] Memorandum from Jacob J. Lew, Dir., Office of Mgmt. and Budget to Heads of Executive Dep'ts and Agencies, *Suspension and Debarment of Federal Contractors and Grantees* (Nov. 15, 2011).

procurement fraud exist, but have been relatively episodic.[88] Despite the breadth of the Government's investigation in Operation Ill Wind, none of the ninety convictions included a uniformed service member.[89]

Unfortunately, news reports and press releases have reported a large number of convictions, indictments, and investigations of uniformed military personnel for procurement fraud related offenses. The ranks of those convicted for misconduct committed while on active duty in Southwest Asia include at least a colonel,[90] five lieutenant colonels,[91] eight majors or equivalent,[92] five captains,[93] a first lieutenant,[94] a chief

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[88] *See, e.g.*, United States v. Washington, 46 M.J. 477 (1997) (Air Force Staff Sergeant, contingency contracting officer during Operations Desert Shield and Storm, convictions included bribery and graft); United States v. Long, 12 C.M.R. 420 (A.B.R. 1953) (Army major, serving as a receiving officer certifying services rendered, accepted gifts from Korean contractor); United States v. Canella, 63 F. Supp. 377 (S.D. Calif. 1945), *aff'd* 157 F.2d 470 (9th Cir. 1946) (Army colonel convicted of conspiracy to defraud after receiving money for awarding contracts on an Army base); United States v. Hollis, 32 B.R. 331 (CBI-IBT 1943) (Army major in India, acting as contracting officer, wrongfully attempted to obtain a financial interest in companies he was purchasing from on behalf of the Army Air Corps).

[89] MICHAEL J. DAVIDSON, A CALL TO ACTION: RE-ARMING THE GOVERNMENT IN THE WAR AGAINST DEFENSE PROCUREMENT FRAUD 9 & n.95 (2008).

[90] Press Release, Dep't of Justice (DOJ), U.S. Army Colonel and Lt. Colonel Convicted of Conspiracy for Role in Fraud Scheme in Al-hillah, Iraq (Nov. 7, 2008).

[91] *Id.*; *see also* Press Release, DOJ, Former Army Official Sentenced to 18 Months in Prison for Accepting Illegal Gratuities from Contractors in Iraq (July 29, 2011) (Army LTC); Press Release, DOJ, Former Army Colonel Pleads Guilty in Bribery Scheme Involving Department of Defense Contracts in Iraq (June 10, 2008) (Army LTC); Press Release, DOJ, Army Lieutenant Colonel Pleads Guilty to Participating in Wire Fraud Scheme Arising out of Al-Hillah, Iraq (July 28, 2008) (two Army LTCs convicted).

[92] Press Release, DOJ, Former U.S. Army Major Pleads Guilty to Bribery Related to Contracting in Support of Iraq War (June 13, 2011); Press Release, DOJ, Army Contracting Officer Sentenced to 60 Months in Prison for Bribery (Jan. 19, 2011); Press Release, U.S. Attorney's Office, E. Dist. of Va., Business Owner and Former Naval Officer Plead Guilty to Bribery Scheme (Dec. 7, 2010) (Lieutenant Commander); Press Release, DOJ, Army Officer, Wife and Relatives Sentenced in Bribery and Money Laundering Scheme Related to DOD Contracts in Support of Iraq War (Dec. 2, 2009); Press Release, DOJ, Retired Army Major Pleads Guilty in Bribery Scheme Involving Department of Defense Contracts in Kuwait (Jan. 8, 2009); Press Release, DOJ, A U.S. Army Reserve Major Pleads Guilty for Role in Bribery Schemes Involving Department of Defense Contracts in Iraq (Dec. 22, 2008); Press Release, DOJ, U.S. Army Major Pleads Guilty to Bribery Scheme Related to Department of Defense Contracts in Kuwait (Aug. 13, 2008); Press Release, DOJ, Former Army Reserve Officer Sentenced to 10 Years in Prison on Bribery, Conspiracy and Money Laundering Charges (Oct. 19, 2007).

[93] Press Release, DOJ, Former Army Reserve Captain Sentenced to 120 Months in Prison for Soliciting 41.3 Million in Bribes and Conspiring to Traffic Heroin (Sept. 23, 2011); Press Release, DOJ, Former U.S. Army Reserve Officer Pleads Guilty to Accepting

warrant officer,[95] two sergeants first class,[96] two staff sergeants,[97] and a sergeant.[98] News reports identified other service members who had been indicted or were under investigation for misconduct in Southwest Asia[99] or elsewhere.[100]

One of the most egregious cases to come out of Southwest Asia involved Army Major John Cockerham, a contracting officer in Kuwait who pled guilty to bribery, conspiracy, and money laundering.[101] Cockerham received more than $9 million in bribes for awarding illegal contracts for supplies in Iraq and was expecting another $5.4 million.[102] The complex scheme involved Cockerhams's wife, sister, and niece. His

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Illegal Gratuities Related to Contracting When Serving at Camp Arifjan, Kuwait (Apr. 15, 2010); Press Release, DOJ, Former Military Officer Sentenced to 97 Months in Prison for Participating in Scheme to Steal Fuel from U.S. Army in Iraq (Nov. 6, 2009); Freeman Klopott, *Two U.S. Soldiers Plead Guilty to Selling Supplies to Iraqi Man*, WASH. EXAMINER, May 19, 2009, at 7; *Capt. Admits Taking Bribes in Iraq*, ARMY TIMES, Jan. 14, 2008, at 5.

[94] Press Release, DOJ, Retired Military Official Pleads Guilty to Bribery and Conspiracy Related to Defense Contracts in Afghanistan (July 1, 2009).

[95] *CWO5 Pleads Guilty to Bribery*, ARMY TIMES, Feb. 26, 2007, at 5.

[96] Press Release, DOJ, Army Sergeant Pleads Guilty to Accepting $1.4 Million in Illegal Gratuities Related to Military Dining Contracts in Kuwait (Apr. 21, 2010); Klopott, *supra* note 93, at 7.

[97] Press Release, DOJ, Former U.S. Army Staff Sergeant Pleads Guilty to Bribery in Afghanistan Fuel Theft Scheme (Sept. 24, 2010); Nedra Pickler, Former Marine Pleads Guilty to Accepting Bribes, Federal News Radio (Oct. 5, 2010), *available at* http://www.federalnewsradio.com/index.php?nid=110&sid=2070892.

[98] Press Release, DOJ, U.S. Army Sergeant Pleads Guilty to Bribery and Money Laundering Conspiracy Related to Department of Defense Contracts in Afghanistan (Oct. 20, 2009).

[99] Freeman Klopott, *Ex-Army Officer Charged in $40M Fuel Scam to Be Sentenced*, WASH. EXAMINER, Apr. 17, 2009, at 7; Press Release, DOJ, Five Individuals Arrested, Two Contracting Companies Charged in Bribery Conspiracy Related to Department of Defense Contracts in Afghanistan (Aug. 27, 2008) (Major and Technical Sergeant); *see* Richard Lardner, *Iraq Fraud Inquiry Focuses on Retired Army Colonel*, FED. NEWS RADIO.COM (Sept. 9, 2009), *available at* http://www.federalnewsradio.com/index.php?nid=110sid=1758285.

[100] Maria Glod, *Army Officer; 2 Area Men Indicted In Contract Scam*, WASH. POST, Aug. 25, 2009, at B2; *Former Army Officer Charged with Bribery*, WASH. TIMES, Dec. 13, 2007, at B3. In 2003, an Army colonel in Korea admitted to accepting bribes. Press Release, U.S. Attorney, Cent. Dist. of California, U.S. Army Colonel Pleads Guilty to Taking Bribes from South Korean Companies Seeking Military Contracts (Jan. 29, 2003).

[101] Dana Hedgpeth, *2 Plead Guilty to Army Bribery Scheme*, WASH. POST, June 25, 2008, at A9.

[102] *Id.*

wife and sister deposited the money in safe deposit banks in Kuwait and Dubai, and the niece helped create cover stories for the bribe money.[103]

B. The Need For A DoD Procurement Fraud Fund

To effectively, and consistently, combat procurement fraud, the Department of Defense—indeed most Executive Branch agencies—needs a sustained source of funding immune to competing policy and budgetary priorities. Our present circumstances provide compelling factual support to this proposition.

Following the terrorist attacks against the United States on September 11, 2001, law enforcement entities normally involved in procurement fraud shifted their mission focus to counterterrorism.[104] In 2005, Attorney General Alberto Gonzales testified before a Senate Subcommittee that DOJ's "No. 1 priority" was "preventing and combating terrorism."[105] Counterterrorism continues to be DOJ's first priority.[106] The Federal Bureau of Investigation's (FBI) shift was particularly pronounced. As one FBI official noted: "The foreign terrorist attacks upon the United States on September 11, 2001 demanded an instant 100% commitment from the FBI towards counter-terrorism. In the days and weeks that followed the attacks, almost every FBI Agent in the world worked diligently on one of the most massive investigations in

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[103] Press Release, Dep't of Justice, Army Officer, Wife and Relatives Sentenced in Bribery and Money Laundering Scheme Related to DOD Contracts in Support of Iraq War (Dec. 2, 2009).

[104] *See* Bednar, *supra* note 59, at 291 ("almost all of our investigative resources at the federal level are now being devoted not to procurement fraud, but to chasing the terrorists—to the anti-terrorist campaign").

[105] Prepared Statement of Alberto R. Gonzales, Attorney General of the United States Before the United States Senate Committee on Appropriations Subcommittee Commerce, Justice, Science and Related Agencies (May 24, 2005), *available at* http://www.usdoj.gov/ag/testimony/2005/052405committeeonappropriations.htm. During the Bush Administration, the Department of Justice "strongly emphasized immigration and terrorism-related investigations," with a ten percent reduction in the number of white collar prosecutions between 2000 and 2006. Dan Eggen & John Solomon, *Justice Dept.'s Focus Has Shifted*, WASH. POST, Oct. 17, 2007, at A1; *see also* Carrie Johnson, *Justice Department Putting New Focus on Combating Corporate Fraud*, WASH. POST, Feb. 12, 2009, at A6 (business fraud prosecutions "plunged after the Sept. 11, 2001 attacks . . . ").

[106] Jerry Seper, *Terrorism Top Concern at Justice*, WASH. TIMES, Nov. 15, 2011, at A6 ("counterterrorism remains the Justice Department's highest priority").

the FBI's history."[107] Since 9/11 the FBI has shifted 1,200 out of its criminal division, doubled the number of agents in its counterterrorism/counterintelligence division, increased the number of intelligence analysts by 205 percent and created a new category of intelligence agent.[108]

Similarly, DoD law enforcement entities reacted to the terrorist attacks by shifting resources to meet the new threat. For example, the Air Force Office of Special Investigations "nearly tripled" its antiterrorism services following 9/11.[109] Unfortunately, as investigative and prosecutorial resources devoted to procurement fraud were declining, the level of contracting—and attendant potential for fraud—was on the rise.[110]

In addition to competing priorities, fraud investigators and prosecutors must compete for funding. The current focus on fiscal responsibility and budget cuts provides a perfect example on point. The Department of Defense is anticipating significant budget cuts over the next decade,[111] with anticipated reductions in the civilian workforce.[112] The military saw similar reductions following the end of the Cold War; "when the Pentagon saw its budget slashed by nearly a quarter from 1989 to 1994."[113]

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[107] Letter from Joseph L. Ford, Chief Fin. Officer, Fed. Bureau of Investigation to Linda M. Calbom, U.S. Gov't Accountability Office 2 (Apr. 13, 2005), *reprinted at* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-05-388, FEDERAL BUREAU OF INVESTIGATION: ACCOUNTABILITY OVER THE HIPAA FUNDING OF HEALTH CARE FRAUD INVESTIGATIONS IS INADEQUATE 19 (2005); *see* Bednar, *supra* note 59, at 291 ("The FBI has almost no resources dedicated to Army procurement fraud or to Defense procurement fraud anymore. They are all after terrorists.").

[108] Barton Gellman, *The Terrorist Hunter: Has FBI Director Bob Mueller Fixed the Bureau That Blew 9/11?*, TIME, May 9, 2011, at 22, 26–27. The FBI criminal division investigates white collar crime. *Id.* at 26.

[109] Christine E. Williamson, *The Air Force Office of Special Investigations, Postured for the Future*, AIR & SPACE POWER J. at *3 (Summer 2005), *available at* http://www.airpower.maxwell.af.mil/airchronicles/apj/apj05/sum05/williamson.html.

[110] *See* Aimee Curl, *Contract Spending Climbs 83 Percent Since 2000*, FED. TIMES, Oct. 16, 2006, at 4; Griff Witte, *Prosecutor Addresses Contractors on Fraud*, WASH. POST, May 26, 2005, at E2 ("[M]oney has been flowing to contractors in record amounts since the terrorist attacks of Sept. 11, 2001.").

[111] Craig Whitlock, *Ex-Budget Chief Panetta Now on Other Side of Pentagon Cuts*, WASH. POST, Nov. 4, 2011, at A4 (National security/defense spending expected to be reduced $456-$600 billion over the next ten years.).

[112] Joe Davidson, *Pentagon Worries That Civilian Rolls Could Be Cut Further*, WASH. POST, Nov. 8, 2011, at B4.

[113] Whitlock, *supra* note 111, at A4.

The current fiscal landscape adds to the problem. There exist few mechanisms available for an agency to retain fraud-related recoveries. The Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b), requires that an agency return all recoveries to the general fund of the Treasury unless specific statutory authority exists to retain the money or unless the money constitutes a repayment to an appropriation.[114] For example, a victim agency may retain fraud-related restitution[115] and may retain single damages recovered pursuant to the Civil False Claims Act, 31 U.S.C. §§ 3729–3733.[116] Agency-recovered monies in the nature of a refund must generally be returned to the appropriation or fund charged with the original expenditure.[117] However, if that appropriation account is closed, the money is no longer available to the agency and must be returned to the Treasury.[118]

The notion of a dedicated source of funding for anti-fraud efforts is not a new one. For example, following passage of the Health Insurance Portability and Accountability Act (HIPAA) in 1996, Congress created the Health Care Fraud and Abuse Control Account to receive recoveries from health care fraud investigations and prosecutions, to supplement DOJ and the Department of Health and Human Services (HHS) appropriations, as well as to serve as a funding source for HHS Office of Inspector General's (OIG) anti-fraud efforts concerning Medicare and Medicaid.[119] Further, the Department of Justice's Three Percent Fund allows DOJ to retain money from its civil debt collection litigation activities, including Civil FCA litigation, as "no year" money to be used

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[114] *National Aeronautics and Space Administration-Retention of Demunization Compensation*, B-305402, 2006 WL 39322, at * 2 (Comp. Gen. Jan. 3, 2006).

[115] The Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663, as amended by the Mandatory Victim Restitution Act of 1996, 18 U.S.C. § 3663A, provides statutory authority for a victim agency to retain restitution.

[116] National Science Foundation-Disposition of False Claims Recoveries, B-310725 (Comp. Gen. May 20, 2008).

[117] Appropriation Accounting-Refunds And Collectibles, B-257905, 1995 WL 761474, at *2 (Comp. Gen. Dec. 26, 1995); Department of Interior-Disposition of Liquidated Damages Collected For Delayed Performance, B-242274, 1991 WL 202596, at *2 (Comp. Gen. Aug. 27, 1991). In *Federal Motor Carrier Safety Administration*, B-308478, 2006 WL 3956702, at *3 (Dec. 20, 2006), the GAO limited agency retention of restitution to that amount qualifying as a refund.

[118] Appropriation Accounting-Refunds and Collectibles, B-257905, 1995 WL 761474, at *2 (Dec. 26, 1995).

[119] DAVIDSON, *supra* note 89, at 109 (contains a detailed discussion of the fund); *see also* U.S. DEPARTMENT OF JUSTICE, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM AND GUIDELINES, CRIMINAL RESOURCE MANUAL ch. 978, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title 9/crm00978.htm.

to pay for its debt collection efforts, including supporting the U.S. Attorney Office's Financial Litigation Units.[120]

One potential area to consider as a possible vehicle for a self-generating anti-fraud fund is a reinvigorated voluntary disclosure program for not only DoD, but for most of the Executive Branch as well. The DoD initiated the program in 1986 to "facilitate contractor self-governance and to encourage contractors to adopt a voluntary disclosure policy . . . "[121] To be accepted into the program, the disclosing contractor "must (1) not be motivated by the recognition of imminent detection; (2) have status as a business entity; (3) take prompt and complete corrective actions; and (4) fully cooperate with the government in any ensuing investigation or audit."[122] In return, the contractor was to receive several benefits, including "(1) its liability in general to be less than treble damages, (2) action on any suspension to be deferred until after the disclosure is investigated, (3) the overall settlement to be coordinated with government agencies, (4) the disruption from adversarial government investigations to be reduced, and (5) the information may be kept confidential to the extent permitted by law and regulation."[123]

Initially, the program was a success. "During the first few years, the number of self-disclosures by contractors averaged almost sixty per year, and all the major DoD contractors participated."[124] The number of disclosures peaked in 1988, but slowly declined until by 2000 they never reached ten a year.[125] Eventually, the program fell into disuse and appears to have been eclipsed by the new mandatory disclosure rule.

Several factors contributed to the failure of the program. First, the Government took too long to resolve the disclosures.[126] Further, DOJ oftentimes demanded significant FCA damages despite the contractor

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[120] DAVIDSON, *supra* note 89, at 108 (Pub. L. No. 107-273, § 11013, 116 Stat. 1823 (2002)).
[121] U.S. GOV'T ACCOUNTING OFFICE, GAO/NSIAD-96-21, DOD PROCUREMENT: USE AND ADMINISTRATION OF DOD'S VOLUNTARY DISCLOSURE PROGRAM 2 (1996).
[122] *Id.* at 3.
[123] *Id.* at 4.
[124] James Graham, *The Twenty-First Major Frank B. Creekmore, Jr. Lecture*, 205 MIL. L. REV. 204, 207 (2010).
[125] DAVIDSON, *supra* note 89, at 56–57 (listing disclosures by year).
[126] Graham, *supra* note 124, at 207 ("It is undisputed that DoJ took too long to process the disclosures . . . .").

having voluntarily disclosed misconduct.[127] The program provided little financial incentive for disclosure. Additional problem areas included "(1) the lack of guarantees against prosecution or debarment for both the corporation and its employees, (2) the possibility of derivative litigation, [and] (3) the possibility and ramifications associated with privilege waiver . . . ."[128]

On December 12, 2008, the Federal Acquisition Regulation's (FAR's) mandatory disclosure requirements went into effect. The FAR requires federal contractors to disclose certain violations of criminal law (i.e., fraud, conflict of interest, bribery and gratuities), violations of the Civil False Claims Act (FCA), and receipt of significant overpayments.[129] Further, the knowing failure to disclose such violations, and significant overpayments, constitute grounds for suspension and debarment.[130]

Initial criticisms of the new FAR rule have focused largely on the ambiguity of its terms.[131] For example, the reporting requirement is triggered by "credible evidence" of violations of certain criminal laws and the FCA or significant overpayments,[132] but the term "credible evidence" is undefined.[133] Similarly unclear, according to critics of the rule, are the requirements for a "timely" disclosure and "full cooperation" with the Government.[134]

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[127] *Id.* at 207 ("[I]t is also undisputed that it too often punished the disclosing contractors, as opposed to rewarding them, by demanding inflated False Claims Act damages.").
[128] DAVIDSON, *supra* note 89, at 59.
[129] FAR 3.1003(a)(2)-(3); 3.1004, 52.203-13(b)93) (Jan. 2012) [hereinafter FAR].
[130] *Id.* 3.1003(a)(2)-(3); 9.406-2(c)(vi); 9.407-2(a)(8).
[131] *See, e.g.*, Elizabeth Newell, *Acquisition Lawyers Say Mandatory Disclosure Rule Is Opaque*, GOV'T EXEC. (Feb. 12, 2009) ("[R]ife with complicated and often ambiguous terminology"), *available at* http://www.govexec.com/story_page.cfm?filepath=/dailyfed/0209/021209e1.htm.
[132] FAR, *supra* note 129, 3.1003(a)(2)-(3).
[133] Jeremy A. Goldman, *New FAR Rule on Compliance Programs and Ethics: A Hidden Assault on the Corporate Attorney-Client Privilege?*, 39 PUB. CONT. L.J., Fall 2009, at 71, 87 ("When does 'credible evidence' become ripe for reporting?"); Alice Lipowicz, *Analysis: Contractor Self-Disclosure Rules Raise Questions*, WASH. TECH. (Feb. 2, 2009) ("What is credible evidence"), *available at* http://washingtontechnology.com/Articles/2009/02/02/New-federal-contracting-rules.aspx?p=1.
[134] Newell, *supra* note 131, at *1; *see* Goldman, *supra* note 133, at 88 ("[Q]uestions remain concerning the practical boundaries of full cooperation."). FAR, *supra* note 129, 3.1003(a)(2)-(3) (requiring the "timely" disclosure of violations of certain laws and of significant overpayments, respectively). *Id.* 52.203-13 (requiring "full cooperation" with the Government's investigators, auditors, and those responsible for corrective actions).

It is premature to gauge the success of the mandatory disclosure rule. Agency OIGs have received disclosures,[135] but at this junction it is unclear how meaty those disclosures have been or whether the required disclosures are being reported. Further, the private sector has yet to challenge the rule. Regardless, a voluntary disclosure program serves as one of several possible vehicles for the creation of a self-sustaining anti-fraud fund. Here, it is a convenient basis for discussion in the event the Government elects to return in the future to a system based on voluntary contractor disclosures of misconduct or simply because those in the federal procurement are familiar with the earlier DoD model and, as such, it provides a familiar platform.

Opponents of a new DoD procurement fraud fund may raise PAYGO as one ground for objection. The current statutory version of PAYGO, which means "pay-as-you-go," was signed into law by President Obama on February 12, 2010[136] as part of the Public Debt Limit Increase.[137] The President characterized the legislation as "a return to what he called 'a simple but bedrock principle: Congress can only spend a dollar it if it saves a dollar elsewhere.'"[138]

The Statutory Pay-As-You-Go Act was designed "to enforce a rule of budgetary neutrality on new revenue and direct spending legislation."[139] Under the Act, new laws that increase spending or decrease revenue must be deficit neutral in the aggregate.[140] The Act is enforced through sequestration, which means that if the upcoming year projects a net cost, the President must "issue an order temporarily

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[135] *See, e.g.*, Office of Inspector Gen., U.S. Gen. Servs. Admin'n, Semiannual Report to the Congress, October 1, 2010–March 31, 2011, at ix (2011) ("[T]he OIG received nine disclosures, which related to timekeeping system errors, compliance failures, contractor employee fraud/inappropriate behavior, misuse of task order funds, and overbilling, both deliberate and unintentional"); Graham, *supra* note 124, at 214 (over 100 received of various types, including a large number of individual employee time card cases that will unlikely be prosecuted or subject to the Civil False Claims Act).

[136] Walter Alarkon, *Pay-Go Gets Passed, Then It Gets Bypassed*, THE HILL, Feb. 17, 2010, at 1, 10 ("[S]igned the pay-go bill into law on Feb. 12.").

[137] Pub. L. No. 111-139, 124 Stat. 8 (2010).

[138] David Rogers, *House Hikes Debt Ceiling But Returns to 'Pay-Go,'* POLITICO, Feb. 5, 2010, at 1.

[139] § 2, 124 Stat. 8.

[140] Testimony of Peter R. Orszag, Dir. of the Office of Mgmt. & Budget, Before the Committee on the Budget, U.S. House of Representatives 2 (June 25, 2009), *available at* http://www.whitehouse.gov/omb/assets/testimony/director_062509_paygo.pdf. Pay-go legislation is examined against a ten year base line established by OMB. *Id.*

sequestering resources," which triggers "automatic cuts in non-exempt mandatory programs" until the PAYGO debit is satisfied.[141]

How the legislation creating a DoD procurement fund would be scored for PAYGO purposes depends on whether it is viewed as a new tool, in which case it receives credit for the money it will generate, or as simply an administrative effort, in which case it receives no such credit.[142] Since no formal DoD program currently exists, a statutorily created DoD (or Executive Branch) voluntary disclosure program designed to serve as a self-sustaining anti-fraud fund should be treated as a new program, and scored as a surplus for purposes of PAYGO.

Based on their long history of investigating fraud, the DoD should be able to generate data to support a net-gain program. For example, in 2005 the Taxpayers Against Fraud produced a health care fraud study establishing that for every dollar the Government spent on anti-fraud efforts, it received thirteen dollars in return.[143] Similarly, in support of its Three Percent fund DOJ projected that "for each additional dollar applied to civil debt collection activities, between $15 and $32 in additional debt can be collected."[144]

Like the DOJ Three Percent fund, the DoD fund enacting legislation should provide an exception to the Miscellaneous Receipts Act, 31 U.S.C. § 3302(b), so that an agency may retain funds received, and treat money collected as no-year funds (remain available until expended), to maximize their period of availability. Funds recovered through disclosures could be put back into the program in the form of training, agents, and support personnel, to investigate and timely resolve disclosures.

Such a program should appeal to the private sector as it returns many of the benefits found in the earlier program, but are missing from the

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[141] *Id.* at 3.

[142] *See* EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MGMT. & BUDGET, CIR. NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET app. A, r. 14 (10 Nov. 2011).

[143] Jack A Meyer, *Fighting Medicare Fraud: More Bang for the Federal Buck*, Apr. 2005, at 3, *available at* http://www.taf.org/MedicareFraud040805.pdf. More recently, DOJ noted that "[f]or every dollar Congress has provided for health care enforcement over the past three years, we have recovered nearly seven." *Deputy Attorney General James M. Cole Speaks on a Press Conference Call Regarding the Campaign to Cut Waste*, JUST. NEWS, Dec. 13, 2011.

[144] Conf. Rep. on H.R.2419, CONG. REC. H7974 (daily ed. Oct. 14, 1993).

mandatory disclosure rule. Significantly, the contractor would receive favorable consideration for purposes of suspension and debarment, and for sentencing. If monetary recoveries are put back into the program, the Government should be able to timely resolve disclosures. A new program should also provide a financial incentive to contractors, such as capping any associated Civil FCA liability at double damages—a result the defendant may be able to achieve through negotiation with DOJ without disclosure.[145]

C. Executive Order TBD: Campaign Finance Reform Meets Fraud Control

Federal contractors have been subject to restrictions on campaign contributions since at least 1940.[146] Although federal contractors are limited in their ability to contribute funds to political candidates and parties, the restriction is not absolute. It is illegal for a federal contractor[147] "to make, either directly or indirectly, any contribution or expenditure of money or other thing of value, or to promote expressly or impliedly to make any such contribution or expenditure to any political party, committee, or candidate for Federal office or to any person for any political purpose or use."[148] However, this broadly worded prohibition does not apply to personal contributions by employees of a federal contractor, including its partners, officers and shareholders.[149] Further, the restrictions do not apply "to separate segregated funds established by contributions or labor organizations with government contracts."[150] These separate segregated funds are commonly known as Political

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[145] *See* Lahman, *supra* note 5, at 903 (noting that when settling a civil FCA case, the government is willing "to waive penalties and accept less than triple damages or even less than 'doubles'. . .").

[146] Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK 16 (2005) (The 1940 amendments to the Hatch Act "prohibited political contributions to candidates and to party committees by federal contractors.").

[147] 11 C.F.R. § 115.1 (Jan. 1, 2001) defines a federal contractor for purposes of this prohibition as essentially any person who enters into a contract with the federal government for services, goods or the selling of land or a building, and the contract is funded with appropriated funds.

[148] *Id.* § 115.2(a).

[149] FEDERAL ELECTION COMMISSION, CONTRIBUTIONS 6 (2005 ed.) (updated April 2009) ("[D]oes not apply, however, to personal contributions by employees, partners, shareholders or officers of businesses with government contracts . . . .").

[150] *Id.*

Action Committees (PACs).[151] Subject to contribution limits and reporting requirements, PACs may collect voluntary contributions from corporate employees and their families and then make contributions to political candidates.[152] Finally, the prohibition does not extend to contributions and expenditures made for state and local elections.[153]

In April 2011, the Obama Administration began to circulate a draft executive order requiring federal contractors to disclose political contributions.[154] The draft executive order followed in the wake of the Administration's failure to pass the Disclose Act, [155] which in turn was in response to *Citizens United v. Federal Election Commission*.[156] The Disclose Act would have required corporations, unions and various other groups to disclose their contributions to federal political campaign

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[151] Joe Reeder & Dave Hickey, *Defense Industry Political Activities: Do's and Don'ts*, NAT'L DEF., at *1 (Feb. 2006), *available at* http://www.nationaldefensemagazine.org/archive/2006/February/Pages/EthicsCorner5446 ("[C]ontractors may establish a separate fund known as a political action committee, or PAC."); *cf.* Trevor Potter, *The Current State of Campaign Finance Law*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK 60 (2005) ("[F]ederal contractors that are corporations can establish federal PACs.").

[152] Reeder and Hickey, *supra* note 151, at *1. During the 2010 elections, defense industry PACS contributed $16,809,037 to various federal candidates and political parties. Jen DiMascio, *Defense Goes All-In For Incumbents*, POLITICO, Sept. 27, 2010, at 26.

[153] 11 C.F.R. § 115.2(a) (Jan. 1, 2011).

[154] T.W. Farnam, *Obama Urged to Make Contractors Disclose Donations*, WASH. POST, Jul. 29, 2011, at A4 ("In April, the White House first circulated a draft of the executive order, which would have required companies bidding on federal contracts to disclose political donations from their corporate coffers and top executives, including contributions to nonprofit advocacy groups that would not otherwise be a part of the public record.").

[155] Dan Eggan, *Bill on Political Ad Disclosures Falls Short in the Senate*, WASH. POST, July 28, 2010, at A3; *see also* Hans A. von Spakovsky, *DISCLOSE Executive Order Would Politicize Contracting*, WASH. EXAMINER, Apr. 27, 2011, at 28 (draft executive order sought to implement portions of the Disclose Act, which in turn was designed to overturn the *Citizens United* decision). In *Citizens United* the Court held unconstitutional the statutory prohibition on corporations and unions using their general treasury funds for independent expenditures for electioneering communications. An independent expenditure expressly advocates for the election or defeat of a clearly defined candidate, but it is "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17) (2006). Electioneering communications refers to "any broadcast, cable, or satellite communication" that refers to a clearly identified federal candidate within a certain period of time before the various types of elections. *Id.* § 434(f)(3). Following the issuance of the Supreme Court's decision, the President took the unusual step of publicly criticizing the decision in his State of the Union address. Eggan, *supra*, at A3.

[156] 558 U.S. 50 (2010).

advertising and would have banned political advertisements from federal contractors.[157]

Significantly, the draft executive order represents an effort to inject campaign finance reform into the procurement fraud control regime, and highlights a federal pay-to-play problem. Entitled "Disclosure of Political Spending by Government Contractors," the document was designed "to ensure the integrity of the federal contracting system to produce the most economical and efficient results for the American people" and to "increase transparency and accountability to ensure an efficient and economical procurement process . . . ."[158] Further, the draft document emphasized the need for the entire contracting process, including the appropriations stage, to "be free from the undue influence of factors extraneous to the underlying merits of contracting decision making, such as political activity or political favoritism."[159] The document recognized the existing restrictions on contributions by federal contractors, and the diligent effort of the federal acquisition community, but posited that additional measures were needed to address "the perception that political campaign spending enhanced access to or favoritism in the contracting process."[160]

The draft Executive Order would "require all entities submitting offers for federal contracts to disclose certain political contributions and expenditures that they have made within two years prior to submission of their offer," with a disclosure certification being required as a condition of award.[161] The draft Executive Order mandated the disclosure of:

> All contributions or expenditures to or on behalf of federal candidates, parties or party committees made by the bidding entity, its directors or officers, or any affiliates or subsidiaries within its control; and . . .

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[157] Stephen Dinan, *Senate GOP Blocks Campaign-Finance Bill*, WASH. TIMES, July 28, 2010, at A3.; Eggan, *supra* note 155, at A3; Meredith Shiner, *Fate of Campaign Finance Bill Still Unclear*, POLITICO, July 27, 2010, at 8.

[158] Executive Order, Draft 4/13/11; 4:00 pm, Disclosure of Political Spending by Government Contractors, intro. & sec. 2 (2011), *available at* http//www.federalnews radio/pdfs/EO-contractspending.pdf [hereinafter Executive Order].

[159] *Id.* § 1.

[160] *Id.*

[161] *Id.* § 2.

> Any contributions made to third party entities with the intention or reasonable expectation that parties would use those contributions to make independent expenditures or electioneering communications.[162]

The disclosure requirement was triggered "whenever the aggregate amount of such contributions and expenditures made by a bidding party, its officers and directors, and its affiliates and subsidiaries exceeds $5000 to a given recipient during a given year."[163] Finally, the disclosed information would "be made publicly available in a centralized, searchable, sortable, downloadable and machine readable format on data.gov as soon as practicable upon submission."[164]

Significantly, the draft executive order was designed to impose disclosure obligations on contractors beyond what the law currently requires be reported to the Federal Election Commission.[165] The order's requirement to report all contributions to third party entities intended or reasonably expected to be used for campaign-related purposes would expand the disclosure requirement to several entities that "have spent millions on political advertising in recent congressional campaigns but have fought to keep their donors secret."[166] For example, the draft executive order would expand the disclosure requirement to the U.S. Chamber of Commerce, which has approximately 300,000 corporate members and is "[o]ne of the biggest spenders on election ads . . . ."[167]

The draft executive order quickly proved controversial. Critics of the draft document charged that it would have a chilling effect on First

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[162] *Id.* § 2(a), (b).
[163] *Id.* § 2.
[164] *Id.* § 3.
[165] Kenneth P. Doyle, *Reformers Press for Obama Executive Order on Contractor Contributions as GOP Fights It*, 95 FED. CONT. REP. (BNA) No. 18, at 482, 483 (May 10, 2011). Currently, only "hard money" (i.e., regulated money) is required to be reported to the FEC. *Id.*
[166] *Id.* at 483 ("Tens of millions of dollars in such contributions to entities that do not disclose their donors were used to fund political advertising in the 2010 congressional elections and other, previous campaigns."); *see also* Perry Bacon Jr. & T.W. Farnam, *Obama Looks at Contractors' Donations*, WASH. POST, Apr. 21, 2011, at A4 ("It is not known how many government contractors contribute to interest groups active in elections because many of those contributions don't need to be disclosed, but the number of companies with government contracts means that could be significant.").
[167] Bacon & Farnam, *supra* note 166, at A4; *see also* Doyle, *supra* note 165, at 483 ("including the U.S. Chamber of Commerce and others").

Amendment rights and political contributions;[168] would politicize the acquisition process, making campaign contributions a factor in contract awards;[169] would reduce competition by discouraging contractors from bidding;[170] would provide irrelevant information to the contracting officer[171] and "would circumvent the legislative process."[172] Critics also questioned its motivation (transparency), pointing out that "political donation information is already publicly online."[173]

Supporters of the draft executive order declared "that it 'attacks the perception and reality of . . . pay-to-play arrangements by shining a light on political spending by contractors.'"[174] One small-business advocate praised the disclosure requirements as a means of leveling the playing field: "small businesses do not have the resources 'to compete with the enormous amount of capital, influence, and lobbyist activity' that large businesses can use to help win Government contracts."[175] Defenders of

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[168] Susan M. Collins, *A Wrong Turn for Contracting*, WASH. POST, May 20, 2011, at A17 ("[c]hilling effect on the First Amendment rights of individuals to contribute to the political causes and candidates of their choice"); *see also* Mike Lillis, *Hoyer Sides with GOP Against Obama's Order*, THE HILL, May 11, 2011, at 1, 6 (GOP leaders concerned that effect of order "would be stifled political speech"); Doyle, *supra* note 164, at 483 ("chilling effect on campaign contributions").

[169] Collins, *supra* note 168, at A17 ("[P]roposal violates the fundamental principle that federal contracts should be awarded free from political considerations and be based on the best value to taxpayers.") ("Requiring disclosure of one's political activities and leanings as part of the process would make it inevitable that politics would play a role in the award of federal contracts."); *see also* Lillis, *supra* note 168, at 6 ("could politicize the bidding process"); Doyle, *supra* note 165, at 483 ("would make the contributions a factor in awarding contracts"); von Spakovsky, *supra* note 155, at 28 ("introduce political gamesmanship into the government contracting business"); Bacon & Farnam, *supra* note 166, at A4 (Trade association posited that the proposed order would "inject politics into the source selection process").

[170] Collins, *supra* note 168, at A17.

[171] Bacon & Farnam, *supra* note 166, at A4 ("irrelevant information to government contracting officers"). Significantly, the draft Executive Order does not identify to whom the disclosure must be made.

[172] Doyle, *supra* note 165, at 483.

[173] Carly Cox, *Draft Executive Order on Political Donations: Emphasizing Transparency or Politicizing Acquisitions?*, CONT. MGMT. 25, 26 (Sept. 2011); *see* Collins, *supra* note 168, at A17 ("Campaign contributions to candidates and political committees already are required to be reported to the Federal Election Commission and, with a click of a mouse, can be viewed on FEC.gov."). However, the draft executive order appears to require disclosure of contributions beyond that currently mandated by law. *See supra* note 164.

[174] Doyle, *supra* note 165, at 482, 483.

[175] *Officials, Witnesses Stake Positions on Draft Contractor Disclosure EO*, 53 GOV'T CONTRACTOR ¶ 169 (May 20, 2011). She also opined that the draft EO "could bring

the rule noted that "the only significant expansion of disclosure rules would be the requirement to disclose campaign contributions to third parties."[176]

On June 14, 2011, the Congressional Research Service issued a report entitled "Presidential Authority to Impose Requirements on Federal Contractors."[177] The report appeared to support the President's authority to issue such an executive order, noting the President's "broad authority under the Federal Property and Administrative Services Act of 1949 (FPASA) to impose requirements upon contractors."[178] The report concluded: "In sum, Congress appears to have granted the President wide latitude to issue executive orders on federal procurement. Courts seeking to uphold such orders may use the presidential findings in the executive order itself to determine that the requisite nexus exists between an order issued under the authority of the FPASA, or executive branch actions taken pursuant to that order, and the FPASA's goals of economy and efficiency in procurement."[179]

In part, the executive order is an attempt to address, or at least highlight, a perceived federal pay-to-play problem. Specifically, the draft executive order states: "additional measures are appropriate and effective in addressing the perception that political campaign spending provides enhanced access to or favoritism in the contracting process."[180] Further, the document noted that several states had adopted remedial pay-to-play laws that limit "not only contributions by the contracting entity itself, but also by certain officers and affiliates to prevent circumvention and in other cases by requiring disclosure."[181] The document then called on the Federal Government to "draw from the best practices developed by the states."[182]

The practice of "pay to play" refers to businesses buying political access through campaign contributions or other forms of compensation

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transparency, de-politicize the contracting process [and] help prevent pay-to-play schemes . . . ." *Id.*

[176] *Id.*

[177] VANESSA K. BURROWS & KATE M. MANUEL, CONG. RESEARCH SERV., R41866, PRESIDENTIAL AUTHORITY TO IMPOSE REQUIREMENTS ON FEDERAL CONTRACTORS (2011).

[178] *Id.* at 22.

[179] *Id.* at 24.

[180] Draft Executive Order, *supra* note 158, § 1.

[181] *Id.*

[182] *Id.*

in order to favorably influence the award of a contract or to otherwise obtain some measure of favoritism.[183] Within the federal system, there is the unsettling, but apparently not always illegal, connection between campaign contributions and earmarks.[184] That a pay-to-play problem exists within the federal system is not subject to serious debate. One need only look to the Supreme Court's opinion in *McConnell v. Federal Election Commission*[185] for support.

In *McConnell*, the Court upheld the constitutionality of the bulk of the Bipartisan Campaign Reform Act of 2002.[186] In its opinion the Court discussed the corrupting influence of campaign contributions. Stating what should be considered obvious, the Court determined that "[i]t is not only plausible, but likely that candidates would feel grateful" to large donors to the national parties, which spend significant sums of money to positively influence the candidate's election, and that "donors would seek to exploit that gratitude."[187] The Court went further, however, determining that some donors contributed soft-money contributions specifically "to create debt on the part of officeholders "[188] and to secure "influence over federal officials."[189] Not surprisingly, the Court also determined that "large *soft-money* contributions to national party committees have a corrupting influence or give rise to the appearance of corruption."[190]

The factual record that the Court relied upon provides compelling support for recognition of a federal pay-to-play problem. The Court

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[183] *See* Tom Lindenfeld, *How to Drive Corruption Out of D.C.*, WASH. POST, July 6, 2011, at A13 ("[C]ontributions . . . that has or intends to seek a city government contract."); Diana H. Jeffrey, *Pay to Play: Big Money, Politics, and the Vote*, N.J. LAW., Aug. 2008, at 28 ("[P]ay to play usually involves a business entity buying political access for consideration of a government contract.").

[184] MARCHUS STERN ET AL, THE WRONG STUFF 87 (2007) ("Members of Congress routinely, though covertly, exchanged multimillion-dollar earmarks for tens of thousands of dollars in campaign checks contributed by earmark recipients and lobbyists."); *id.* at 201 ("there is no law against a congressman's providing earmarks to a political supporter"); *see* Robert Brodsky, *Earmark Offensive*, GOV'T EXECUTIVE, Oct. 2008, at 14 (Oct. 2008) ("The congressional earmarking process is often decried by critics as a shady system in which lawmakers seek to reward contributors and attract voters by cutting backroom deals to direct federal dollars to a favored few.").

[185] 540 U.S. 93 (2003).

[186] Pub. L. 107-155, 116 Stat. 81.

[187] *McConnell*, 540 U.S. at 144.

[188] *Id.* at 146.

[189] *Id.* at 147.

[190] *Id.* at 144 (emphasis in original). "Soft" money refers to unregulated money.

referenced an extensive Senate Committee on Government Affairs report on the campaign practices of federal elections in 1996, which, among other things, examined "the effect of soft money on the American political system, including elected officials' practice of granting special access in return for political contributions."[191] The report "concluded that both parties promised and provided special access to candidates and senior Government officials in exchange for large soft-money contributions."[192] The Court further determined that the record before it established that national party committees regularly "peddl[ed] access to federal candidates and officeholders in exchange for large soft-money donations."[193] As an example of the pervasiveness of the problem, the Court noted that "six national party committees actually furnish their own menus of opportunities for access to would-be soft-money donors, with increased prices reflecting an increased level of access."[194]

The Court found as "[p]articularly telling, "the fact that in both the 1996 and 2000 elections, "more than half of the top 50 soft-money donors gave substantial sums to *both* major national parties, leaving room for no other conclusion but these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology."[195]

Significantly, the Court did not limit its view of corruption to that misconduct addressed by criminal laws directly, such as "simple cash-for-votes corruption," but also recognized Congress' interest in curbing the "'undue influence on an officeholder's judgment and the appearance of such influence.'"[196] Although it appeared to create a safe zone from Government regulation for the "mere political favoritism or opportunity for influence alone," the Court clearly recognized the Government's interest in combating the appearance of corruption associated with the sale of access, with the implication that "money buys influence."[197]

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[191] *Id.* at 129.
[192] *Id.* at 130. One party's promotional materials for two major donor programs "promised 'special access' to high-ranking . . . elected officials, including governors, senators, and representatives." *Id.*
[193] *Id.* at 150.
[194] *Id.* at 151.
[195] *Id.* at 148.
[196] *Id.* at 150 (citation omitted).
[197] *Id.* at 153–54; *see also id.* at 143 ("Of 'almost equal' importance has been the Government's interest in combating the appearance or perception of corruption endangered by large campaign contributions.").

As noted in the draft executive order, many states have enacted laws designed to curb pay-to-play.[198] New Jersey stands out as a state that enacted tough pay-to-play legislative reforms[199] following a series of contract fraud-related scandals.[200] Mirroring the Supreme Court's recognition of a similar federal interest in combating corruption from *McConnell*,[201] as a legislative finding, the New Jersey Campaign Contributions and Expenditures Reporting Act states that the State "has a compelling interest in preventing the actuality or appearance of corruption . . . ."[202]

New Jersey law requires contractors receiving public contracts worth more than $50,000 annually to report political contributions to the New Jersey Election Law Enforcement Commission.[203] Further, the New Jersey Act prohibits award of any contract valued at over $17,500, which is not awarded "pursuant to a fair and open process," to a person or corporation that has contributed, within the preceding year, to a state or county political committee, with similar restrictions on contractors contributing to a gubernatorial candidate.[204] For contracts valued in excess of $17,500, which is not publicly advertised, bidders must submit "a list of political contributions" made during the preceding year at least ten days prior to contract award.[205] Significantly, New Jersey makes it a

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[198] *See* Mark Renaud, *Pay-to-Play Laws: Play Fair or Pay the Consequences*, CONT. MGMT., June 2009, at 24 (June 2009) (discussing laws in Illinois, Vermont, Colorado, Connecticut, New Mexico, and New Jersey); *Philadelphia Targets 'Pay to Play' Politics*, WASH. POST, May 27, 2005, at A8 ("[T]he City Council voted . . . for the first time to impose limits on campaign contributions by people seeking municipal contracts.").

[199] Lindenfeld, *supra* note 183, at A13 ("Other states, notably New Jersey, have taken this step (end "pay-to-play") after their own scandals became too corrosive and damaging to public trust."); Beth DeFalco, *'Pay to Play' Curtailed in NJ After Reforms*, WASH. TIMES, Apr. 7, 2010, at A4 ("The laws-hailed as among the toughest in the nation . . . ."). In addition to state law, "more than 90 municipalities and all 21 counties have passed some version of pay to play reform." Jeffrey, *supra* note 183, at 30.

[200] Jeffrey, *supra* note 183, at 27 (Essex County official convicted of proving no-show jobs and county contracts to contributors, mayor convicted of accepting bribes from FBI agent posing as corrupt contractor, Hudson County official convicted of taking bribes in exchange for awarding county contracts), 28 (state contract awarded to incapable contractor after lobbyist contributes significant campaign contributions to influential lawmakers).

[201] 540 U.S. at 143, 150, 153–54.

[202] N.J. STAT. ANN. § 19:44A -2.1(d) (2011).

[203] DeFalco, *supra* note 199, at A4; N.J. STAT. ANN. § 19:44A-20.27.

[204] *See* Jeffrey, *supra* note 183, at 28; DeFalco, *supra* note 197, at A4; *see also* N.J. STAT. ANN. §§ 19:44A-20.3 (state); § 19:44A-20.4 (county); § 19:44A-20.5 (municipality); § 19:44A-20.14 (state).

[205] N.J. STAT. ANN. § 19:44A-20.26.

breach of contract for a business entity to violate the Act's prohibitions directly or through intermediaries.[206] Further, violations of the Act may result in debarment, penalties up to the value of the contract, criminal conviction, and forfeiture of public office.[207]

One of the most notorious recent illegal pay to play scandals involved the defense contractors MZM, Inc. and ADCS, Inc., and former Congressman Randy "Duke" Cunningham. In 2005, Cunningham pled guilty "to conspiring to commit Bribery, Honest Services Fraud, and Tax Evasion, as well as Tax Evasion involving more than $1 million of unreported income . . ."[208] As part of his plea, Cunningham admitted receiving "at least $2.4 million in bribes" from defense contractors in return for which he used his office "to influence the appropriations of funds and the execution of government contracts in ways that would benefit two of the coconspirators, who were the majority owners of defense contracting companies."[209] In some cases, Cunningham arranged for government funding beneficial to these defense contractors and then pressured defense officials to award contracts to the contractors.[210] In one instance, a defense official informed Cunningham that invoices submitted by a defense contractor (ADCS) appeared fraudulent, prompting Cunningham to contact the official's supervisor to complain about how the defense contractor was being treated.[211]

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[206] *Id.* § 19:44A-20.21.

[207] *Id.* §§ 19:44A-20.10; 19:44A-21 (conviction); § 19:44A-22 (civil penalty and forfeiture of office); *see also id.* § 19:44A-20.1 (penalties for reimbursing contributions of corporate employees).

[208] News Release, Office of the U.S. Attorney, S. Dist. of Cal., Congressman Randall "Duke" Cunningham Pleads Guilty to Receiving Millions in Bribes (Nov. 28, 2005).

[209] *Id.* at 2. The court sentenced Cunningham to federal prison for eight years and four months. Sonya Geis & Charles R. Babcock, *Former GOP Lawmaker Gets 8 Years*, WASH. POST (Mar. 4, 2006), at A4. He was also ordered to "pay $1.8 million in back taxes and penalties plus $1.85 million in restitution based on the bribes he received." *Id.* at A7.

[210] Charles R. Babcock & Jonathan Weisman, *Congressman Admits Taking Bribes, Resigns*, WASH. POST, Nov. 29, 2005, at A1, A4. During the late 1990s, Cunningham reportedly intervened with Pentagon officials on behalf of another defense contractor (ADCS, Inc.) that had provided him with "numerous campaign contributions . . . " *Id. See also* Charles R. Babcock & Walter Pincus, *Maximum Sentence Used for Cunningham*, WASH. POST, Mar. 2, 2006, at A8 ("The prosecutors also cited several instances in which Cunningham and his staff pressured Pentagon officials to release earmarked money to the contractors' companies.").

[211] Charles R. Babcock & Pincus, *supra* note 209, at A8. The contract involved computerizing military maps and engineering drawings at military installations. Stern, *supra* note 184, at 130–31. Many of the documents were of no value to the military. *Id.* at 131. Although a military project, the work was performed through an interagency

MZM, who "donated generously to Cunningham's campaigns,"[212] was one of these defense companies.[213] In February 2006, MZM's founder, Mitchell Wade, pled guilty to conspiring to bribe Cunningham, "in order to: receive special consideration in Cunningham's use of his special defense appropriations; and to pay for Cunningham's use of power in an effort to steer funds and contracts to MZM."[214] Wade also admitted to "corrupting defense officials and election fraud."[215] Wade provided benefits to DoD procurement officials in order to obtain procurement sensitive information, favorable performance evaluations and additional work.[216] For example, in an effort to get task orders from the Army's National Ground Intelligence Center in Charlottesville, Virginia, Wade hired the son of a program manager who oversaw MZM's work, "the cost of which was ultimately paid for by the government in reimbursable agreement with MZM," and then hired the program manager.[217] Further, Wade made illegal campaign contributions to two additional members of Congress "in hopes that they, like Cunningham, would 'earmark' federal money for MZM."[218]

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agreement with the Department of Veterans Affairs. *Id.* at 132. When a contracting specialist at Veterans Affairs noticed that ADCS was charging for goods at twice the GSA-recommended price and billing for work performed at locations where the contract specialist knew no work had been performed, she refused to pay the invoices. *Id.* at 135. Cunningham reportedly complained to the DoD project manager. *Id.* at 135–36. When a second submission of invoices were refused by a DoD logistics officer as suspect, Cunningham reportedly contacted the officer's supervisor, an assistant undersecretary for defense, to complain. *Id.* at 136.

[212] Jerry Seper, *Cunningham Pleads Guilty in Bribe Case*, WASH. TIMES, Nov. 29, 2005, at A4.

[213] Carol D. Leonnig & Charles R. Babcock, *Contractor Plans Guilty Plea for Bribe-Case Role*, WASH. POST, Feb. 24, 2006, at D1, D4 ("[I]dentifiable in Cunningham's plea agreement as Wade's MZM").

[214] Press Release, U.S. Attorney for the D.C., Defense Contractor Mitchell Wade Pleads Guilty to Bribing Former Congressman "Duke" Cunningham, Corrupting Department of Defense Officials, and Election Fraud (Feb. 24, 2006).

[215] *Id.*

[216] *Id.*; Charles R. Babcock, *Contractor Pleads Guilty to Corruption*, WASH. POST, Feb. 25, 2006, at A1, A6.

[217] Press Release, *supra* note 214, at 2; Babcock, *supra* note 216, at A6; STERN ET AL., *supra* note 184, at 209.

[218] Babcock, *supra* note 216, at A6. "Wade gave the funds for the donations to 19 of his employees and their spouses, who then wrote $2,000 checks to the members . . . ." *Id.* In July 2006, MZM's facility director pled guilty to violating the Federal Election Campaign Act by entering into a scheme with Wade to "unlawfully reimburse MZM employees for campaign contributions to a congressman." Press Release, U.S. Attorney for the D.C., Former Senior Employee of Military Contractor Pleads Guilty to Making Illegal Congressional Campaign Contributions (July 21, 2006).

The ADCS, which also contributed generously,[219] was another defense contractor that bribed Cunningham. In 2008, its founder, Brent Wilkes, was convicted of "conspiracy, bribery, honest services wire fraud and money laundering."[220] According to the Department of Justice, "Wilkes provided more than $700,000 in bribes to Cunningham [and] . . . [i]n return, Cunningham . . . directed more than $80 million in defense contract funds to Wilkes's company, ADCS, Inc. . . ."[221]

Cunningham, a Vietnam War hero[222] who rose to become a member of both the House Appropriations defense subcommittee and the intelligence committee,[223] reportedly inserted earmarks valued at as much as $80 million in classified intelligence authorization bills for the benefit of contractors who were bribing him.[224] Some of these contracts involved significant services for the military.[225] In one meeting with

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[219] STERN ET AL., *supra* note 184, at 124 (ADCS's founder, his family, and associates donated over $80,000 to Cunningham and his political action committee), at 147 (ADCS's founder "donated $150,000 to Cunningham's campaign and political action committee").

[220] News Release, Office of the U.S. Attorney, S. Dist. of Cal., Defense Contractor Brent R. Wilkes Sentenced to 12 Years Imprisonment for Bribing Former Congressman Randall "Duke" Cunningham (Feb. 19, 2008).

[221] *Id.* Also indicted at the same time as Wilkes, former CIA Executive Director Kyle Foggo was charged with, among other things, using "his seniority and influence within the CIA to influence the awarding of contracts to his life-long friend, Brent Wilkes." News Release, Office of the U.S. Attorney S. Dist. of Cal., Indictments Charge Defense Contractor Brent Wilkes with Corruption Involving CIA Executive Director Kyle "Dusty" Foggo and Former Congressman Randy "Duke" Cunningham (Feb. 14, 2007). Eventually, Foggo pled guilty to defraud the United States. Press Release, Dep't of Justice, Former CIA Executive Director Kyle "Dusty" Foggo Pleads Guilty to Defrauding the United States (Sept. 29, 2008).

[222] Cunningham was the recipient of the Navy Cross, two Silver Stars, fifteen Air Medals, and the Purple Heart. STERN ET AL., *supra* note 184, at 7. On May 10, 1972, Cunningham became a Navy "ace," the first since the Korean War, when he shot down three North Vietnamese MiGs. *Id.* at 23 (he had shot down two MiGs earlier in the year); Lois Romano, Cunningham Friends Baffled by His Blunder into Bribery, WASH. POST, Dec. 4, 2005, at A6 ("Navy's first ace pilot of the Vietnam War").

[223] Babcock & Weisman, *supra* note 210, at A4.

[224] Shaun Waterman, *Bribes Cost Millions In Earmarks*, WASH, TIMES, Oct. 18, 2006, at A3 ("[a]ccording to an interim report from a special House investigation"); *see also* STERN ET AL., *supra* note 184, at 295 ("[T]he Intelligence Committee had approved $70 million to $80 million in Cunningham defense and intelligence earmark requests that benefited his co-conspirators."). *But cf.* Sonya Geis & Charles R. Babcock, *Former GOP Lawmaker Gets 8 Years*, WASH. POST, Mar. 4, 2006, at A1, A7 (indicating Cunningham used his influence to earmark funds for ADCS and MZM, resulting in contracts worth $80 million and $150 million, respectfully).

[225] One "multimillion-dollar, classified sole-source earmark" awarded to MZM through Cunningham's influence involved the Counter-IED Targeting program. Brodsky, *supra*

MZM, Cunningham sketched out a bribe menu on his congressional stationary. On the left side of the menu, Cunningham listed the federal contracts, in millions of dollars, that he would direct to the defense contractor; and on the right side he listed the amount of bribe required to obtain the contracts.[226] The first entry reflected a $16 million dollar contract that Cunningham would provide in exchange for a yacht valued at $140,000.[227] Cunningham then expected an additional $50,000 in bribes for each additional million dollars in contracts, up to $20 million in contracts, at which point the required bribe would reduce from $50,000 to $35,000 per additional million in contracts.[228]

Thank you for the opportunity to speak here today. Are there any questions?

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note 184, at 14. MZM was required to deliver "intelligence to troops on the ground about the location of roadside bombs, so American forces could root them out," but after the program failed Army officials reported that "MZM had hired only a third of the employees it had been paid for, and the money it spent under the contract was misdirected." *Id.*

[226] Charles R. Babcock, *Prosecutors Urge 10-Year Sentence for Cunningham*, WASH. POST, Feb. 18, 2006, at A2; STERN ET AL., *supra* note 184, at 3.

[227] Babcock, *supra* note 226, at A2; STERN ET AL., *supra* note 184, at 3.

[228] Babcock, *supra* note 226, at A2; STERN ET AL., *supra* note 184, at 3.

FIFTH ANNUAL GEORGE S. PRUGH LECTURE IN MILITARY HISTORY

JOSEPH HOLT: LINCOLN'S JUDGE ADVOCATE GENERAL[1]

SUSAN B. DYER[*]

Thank you for all of the kind words. It's an honor to be here today, and I have enjoyed the touring and seeing the beautiful grounds of the University of Virginia and the JAG School and these memories will forever be pressed in my heart as I return to my small rural community and share them with everyone I see. Thank you so very much.

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[*] This is an edited transcript of a lecture delivered on April 27, 2011, by Susan B. Dyer to the members of the staff and faculty, distinguished guests, and officers attending the 59th Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. The chair lecture is named in honor of Major General George S. Prugh (1920–2006).

Born at Fort Knox, Susan Dyer was educated at Western Kentucky University with a B.S., M.A., and Rank I in Education. Formerly a Language Arts teacher, Susan has been included numerous times in *Who's Who Among America's Teachers*.

Ms. Dyer lives in Breckinridge County, Kentucky, with her husband. They have two sons. Undertaking two projects at the same time, she has written the sensational story of Judge Joseph Holt, Judge Advocate General under President Lincoln, while working with various groups to save and restore Holt's boyhood home as part of the Lincoln Bicentennial Celebration.

Susan has received the following honors in relation to her work with the Judge Joseph Holt House: Outstanding Citizen of the Commonwealth, Kentucky House of Representatives, 2008; Volunteer of the Year, Breckinridge County Chamber of Commerce, 2008–2009; Cooperative Hero, *Kentucky Living Magazine*, March 2010; and most recently, an Ida Lee Willis Memorial Foundation 2010 Service to Preservation Award.

Susan Dyer, supporter of the Judge Joseph Holt House, serves on three committees for the house: The Holt House Steering Committee, The Friends of the Holt House, and is Vice-Chair of the Kentucky Lincoln Heritage Trail Alliance. Dyer is a featured speaker of the Speakers Bureau of the Kentucky Humanities Council.

Recent reviews and articles have appeared in the *Kentucky Civil War Bugle* Book Review, January–March, 2011; Bernson's Corner: A piece of American heritage Fox41-TV; Fall *Kentucky Humanities Magazine* Holt Article, and an interview on Wave 3TV. Susan continues advocating for the preservation of the Judge Joseph Holt House in rural Breckinridge County to educate others about his legacy and role in President Lincoln's administration. On July 14, 2010 the second printing of *Lincoln's Advocate* was released by Acclaim Press and the book is in major book stores across Kentucky. Susan B. Dyer, *Lincoln's Advocate: The Life of Judge Joseph Holt* (Morley: Acclaim Press, 2009).

[1] SUSAN B.DYER, LINCOLN'S ADVOCATE: THE LIFE OF JUDGE JOSEPH HOLT (Morley: Acclaim Press, 2009).

I am not a lawyer, but what I am is a person who one day decided that the story of this most forgotten man deserved to be told; and in the process of researching that man's life, I began to pursue not only his history but his loves and his interests as well. This is a story put on my heart by God that has led to unpredictable rebirth and fresh discovery, so let's go on a voyage of discovery concerning Joseph Holt and see where it takes us.

During the time of the Civil War, most Americans knew the name Joseph Holt; however, his history has been mostly suppressed and overlooked at times by historians and writers for the past 150 years. Only recently has Holt's history been reclaimed.

So who is this man? Understandingly, his grandfather and his parents quickly influenced him. Joseph Holt was raised in rural Breckinridge County, Kentucky, on the banks of the Ohio River, and his parents encouraged him at an early age to pursue his education. He had a wonderfully devoted mother, Eleanor, who prepared all of her children for the classics. Early childhood exposed him to loving relatives who helped him to develop strong character, self-pride, and honor. Once he walked seventy-five miles home when one of his college professors shared a work of Holt's in class and caused embarrassment to him because it was read without his permission. Later, he joined the debate team at Centre College, located in Danville, in central Kentucky. He excelled there excellently. Debating proved to be one of Holt's most favorable experiences because he had a talent for speaking and he could make words come to life. He also had ambition and he worked harder and longer and more tireless than most.

He soon chose law as his profession. A case study done by Jim Gordon about mid-19th century lawyers in Kentucky shows that Holt's associates in the Kentucky Bar in the 1850s were all white males , most native born, with an average age of thirty-four, and half of them owned slaves. Most of them who could afford slaves owned more than one. A sizeable majority owned enough property to qualify them as substantial landowners, and most members of the Bar had received their legal education either in offices of established lawyers and some had pursued the curriculum at universities like Transylvania, in Lexington, Kentucky.

At that time, the American Bar was open to men of talent from all social backgrounds. It was democratic. It was demanding. In a society of limited entertainment, people flocked the courtrooms to watch and to

listen. They praised the skills of some and ridiculed those of others. They mimicked the voices and recounted the arguments and retold the stories. Lawyers could be cast as defenders of the weak and of minorities. Looking at all the issues, they could be admired for keeping their heads when under fire. But the lawyer was also a target of humor and some ridicule. The critics seemed to be saying that if the profession was going to claim special intelligence and wisdom, then its members should thus be intelligent and wise.

Among the most important aspects of the popular image of the Bar were those matters which concerned the lawyer's personal character. Could a lawyer be a moral man? Could he be a true Christian? Could he be anything but a money-grubbing parasite who fed upon the misfortune of others? A long history of anti-lawyer sentiment remained strong. What then made a great lawyer? Lawyers and judges would respond "talent and poverty," but as society diverged, the opportunities for lawyers increased. Some of those opportunities involved politics. Young men of ambition chose law to facilitate the quest for office. Participation in public life was not a required part of the profession; however, practicing law was not necessarily perceived as a part of being a politician but it seemed that way to many.

Some sought to serve not through politics but through service on the bench, and in fact if a lawyer had aspirations to be a judge, he had to become involved in politics. And before 1850, all judges were appointed in Kentucky. Judges didn't earn their robe simply because they'd had success at the Bar, and in short, the practice of law in 1850 in Kentucky could often be very painful and poverty filled. It could also be, though, exciting. It offered an attractive path to young and ambitious Kentuckians, such as Joseph Holt. In June of 1828, at age twenty-one, Holt appeared before a judge and took the oath as an attorney, and for the next two years, he worked in a partnership with the famous Ben Hardin, one of the foremost trial lawyers of Kentucky. A brilliant orator, he also served in Congress for over a decade, and once with his ability he was able to dissect an opponent with his blunt oratory that won him the nickname of "Kitchen Knife" Hardin.[2] Soon though, however, Joseph started his own practice and became very successful in Elizabethtown. He traveled widely and gave an influential speech there preceding the 1828 presidential election. Having prospered with his practice, Joseph

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[2] LUCIUS P. LITTLE, BEN HARDIN: HIS TIMES AND CONTEMPORARIES, WITH SELECTIONS FROM HIS SPEECHES 63 (1887).

moved to the more inviting, intriguing, and faster paced city of Louisville in 1831, and he proudly hung his shingle on Jefferson Street, between 5th and 6th. He soon gained the attention of the powers that be in Frankfort, the capital. Holt was appointed to Commonwealth Attorney at the salary of three hundred dollars by Governor Breathitt in 1833, and 26-year-old Joseph held the office until 1835 when his friend died. Not having been reappointed because the new Whig governor, James Morehead, quickly removed all Jacksonian Democrats, and having no political ties with this new administration, Holt then closed his practice and headed to the very first National Democratic Convention held on May 21, 1835, in Baltimore, Maryland.

Joseph Holt, the delegate from the Jackson wing of the Democratic Party, carried with him letters of introduction to the eventual presidential nominee, Martin Van Buren, the choice of that branch of the party; however, the party did not agree on the nomination for Vice President. War hero Richard M. Johnson, of Kentucky, promised the nomination by Jackson, found strong opposition from the Virginia delegation. The southern men opposed Johnson because he openly lived with a slave mistress and raised their mulatto daughters as his own. Johnson's name was placed in nomination but some delegates blocked the move to make it unanimous. Several others attempted to talk but the chair refused them. At that moment and critical point, Holt was recognized and he began speaking for his fellow Kentuckian. Joseph Holt got the delegates' attention with his well chosen words. His speech touched the audience's deepest emotions as he offered a heartfelt message. He stressed the values and the ethics of the nation and the party:

> If, Mr. President, you at this moment transport yourself to the far west you would find upon one of her green and sunny fields a person, a person who had sprung from the people. He was one of them in his heart and all its recollections and its hopes and its sympathies was blended with the fortunes of toiling millions. When this nation was agonizing and bleeding in every pore, when fire had desolated your northern frontier, he rallied about them the chivalry of his state and dashed with his gallant volunteers to the scene of hostilities resolved to perish or to retrieve the national honor.[3]

[3] DYER, *supra* note 1, at 83.

Holt vividly described Johnson's heroism in the War of 1812, and on that day, Joseph Holt secured the nomination for Richard M. Johnson.

After Holt's brilliant delivery, the delegates wanted to meet the young man, and soon the 29-year-old Joseph Holt's words graced the headlines of all the important papers of the day. The story would spread across periodicals about the 1835 Democratic Convention's success in building strong principles for the nation to support in the upcoming election of 1836; and on his return home in 1835, Joseph Holt decided to move south, seeking to secure a fortune in the cotton lands of the southwest. Arriving late in the fall at Port Gibson, Mississippi, he resided there for two years and then moved on to Vicksburg, where he enjoyed the competition there at the Southern Bar.

Over the next several years, Holt's law practice thrived. His reputation grew. He could draw observers who were entertained by his unique, skillful, and powerful talks. His performances left juries spellbound. Always well prepared for his clients, he presented substantial evidence supporting his cases, and if that failed, then he fell back on oratory; and one of his most noted cases was *Vick Newitt versus the Mayor and Aldermen of Vicksburg*. The case involved land that the founding father had dedicated to the public. The case carried into the highest courts with Holt, the winning lawyer, representing the city and the losing side represented by the noted orator Seargent S. Prentiss; that case made Joseph Holt a highly respected lawyer, and he realized very quickly his dream of becoming wealthy in four or five years to retire.

But hard work brought very dull living in a strict, routine life. He longed for someone to share his success. Now at thirty-two, he wanted a spark in his life and Kentucky called him home. A young lady named Mary Harrison had been corresponding with him for a few years and he returned to Kentucky and he soon married her on April 24th, 1839. This union helped to promote his career as Mary was the daughter of the very distinguished Dr. Burr Harrison, of Bardstown; however, Mary became quite ill with tuberculosis and Joseph retired from the fast-paced, demanding schedule to help care for her. He showed signs of tuberculosis himself but recuperated. However, Mary did not. And after her death, Holt traveled to Europe trying to ward off his depression. He gradually succeeded for upon returning to Kentucky he soon won the heart of former governor Charles Anderson Wickliffe's daughter Margaret **[sic]** and they married on April 2nd, 1850. This union also helped to boost his political career and help him gain connections.

Despite his hopes though, Holt had problems with his finances, especially in the late 1850s when he sought political office in earnest, and in one of his letters to his second wife, Margaret, he said, "I'm sending you two hundred dollars to furnish the house in Philadelphia but please be careful with this money and take care of it because it's all I can spare until I have a regular paycheck."[4]

Holt believed that office holders had responsibilities to uphold, and when James Buchanan was elected President, Holt became the Commissioner of Patents and held that office until 1859. Immediately after taking office, Holt started to reorganize the agency. The Patent Office had been inefficient since the very beginning due to lack of communications between the departments and there had been some disorganization because of a huge fire in 1836. Holt also believed that agency administrators had been taking bribes from people who were wanting patents. Holt quickly made a name for himself. In his first annual report, he lambasted the holders of profitable patents who were building up with the powerful Washington lobbyists who had sought political favoritism. He refused to renew Samuel Colt's patent on the revolver and Cyrus McCormick's patent on the reaper. Instead, the commissioner went with underdogs, such as Charles Goodyear and his rubber processing plant. During that year, Holt had received letters from investors saying that Goodyear had only made a profit of thirty-three dollars and it was for the good of the country for him to approve this patent. Holt, who had lost money himself from bad investments and the stock market, had empathy for hard luck stories, especially like Goodyear's, and he seemed willing to give hardworking individuals more of a break.

In 1859, President James Buchanan commissioned Joseph Holt to be the Postmaster General of the United States, and at that time all across the country newspapers praised this appointment. In general, they stated that Holt would be fair, honest, and dependable; that he could not be led astray; and that his high intelligence would help him and allow him to head the United States Postal Service in such a professional way. Examining Judge Holt's own scrapbook shows how proud Kentucky was of this new cabinet minister. He kept clippings that praised his moral character, as they noted him as being an advocate before the courts when he was prosecuting attorney in Louisville, where he'd been a terror to all

[4] Letter from Joseph Holt, to Margaret Holt (Sept. 1857), (Holt Collection, Box 17, Manuscript Division, Library of Congress).

the evildoers where he had helped to clean up that corrupt city. The new Postmaster General, they said, wanted to do justice and to promote national interest to all areas of our nation; high praise indeed but would that translate into success?

In large part, he did succeed. Later, newspapers praised him for saving our country over one million dollars for the U.S. Post Office for providing faster and better service and for eliminating delays caused by handling the mail so many times. All of that made him a rising man in the Democratic Party. With standards set extremely high by the press and with the weight of this responsible position, Holt realized that his past career with the Bar where he acquired fame as an orator and a jurist in the southwest meant that now he was starting all over again.

Holt enjoyed working and finding errors in the system and rooting out abuses in government. How we need men like Holt today. He showed such high levels of energy and he displayed the highest integrity. Holt was his own man. It is not easy making a commitment to serve the nation, especially when you have to leave behind the ones who are dear to you, and letter writing helped Holt to stay in touch and to share his personal thoughts, especially with his second wife, Margaret, whose father had served as Postmaster General under President Tyler. Reading those letters shows a very frustrated personal side of a public man. .

Unfortunately, Holt found corruption within the U.S. Post Office. One widely publicized case during Holt's term as Postmaster General involved Gideon Westcott. He was the Postmaster at Philadelphia, and in the second quarter of 1857, Westcott discovered a deficit of the cash in hand of over fifteen hundred dollars. Not knowing if the money had been taken by the clerks or others, Wescott held the clerks responsible for the loss and withheld the money from the salary of fifty-seven employees while concealing it from the Government.

The cover-up stayed concealed for over two years until it was discovered deep in the archives of the Post Office in 1859. President Buchanan quickly removed Westcott from office. Holt defended the President. He explained that Westcott was an officer charged with the disbursement of public monies. He concealed his actions from the Government for over two years, and when the deception was exposed, he was simply removed. It was as simple as that. Yet as all of this was occurring, a more serious threat loomed on the nation. The nation could not solve its problem of slavery. Holt took a mostly pro-Southern

position. A slaveholder, Joseph Holt still argued that slavery was contrary to all principles of justice, every precept of reality, every feeling of humanity, every sentiment of honor. Color determined whether a man or a woman was free or a slave. He favored a gradual end to the institution, but an end nevertheless, yet he also spoke out against personal liberty laws in the North, which protected runaway slaves. He stressed that slaves under the law were property; property must be returned. The legal won out over the moral, and as Postmaster General, he banned abolitionist literature from entering Virginia. This action infuriated critics, such as Edward C. Bates, Lincoln's first Attorney General. At that stage of his career, Holt was a state rightist who believed that no constitutional provision enabled the Government to force a state into submission. But as Ralph Waldo Emerson wrote, "A foolish consistency is the hobgoblin of little minds."[5]

Holt changed. He began a political shift as the North and the South came closer to war. With his birth placing him closer to the Southern camp, the death of Holt's second wife became a turning point in his life in the summer of 1860. He began to distance himself from his family. He believed that secession represented a serious danger to law and to order, to the promise of America, and to the future. Holt feared that the secessionists had taken states' rights too far and had become dangerous extremists threatening the Union's stability.

During his final weeks in office, President Buchanan was confronted with a new crisis over the Confederate efforts to take Forts Pickens in Florida and Sumter in South Carolina. Joseph Holt believed that the Southerners were using tactics of delay to secure more arms. He favored immediate reinforcement of the forts and Buchanan's indecision upset Holt; as a result, Joseph Holt then shifted his support toward Lincoln and cooperated fully with General Winfield Scott to prevent hostile demonstrations during the inaugural ceremony.

Holt's political change infuriated his brother Robert, who accused Holt of abandoning his birthplace. His family remained torn apart during the Civil War, and even after the Civil War when his family traveled to Washington, D.C., to see him, he refused to see them if they had supported the South. It was a brothers' war, as well as a decidedly uncivil one. And on December 31, 1860, with only a few months left before the controversial new President-elect Abraham Lincoln would

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[5] RALPH WALDO EMERSON FROM ESSAYS: FIRST SERIES SELF- RELIANCE (1841).

take the oath, the pro-Southerner Secretary of War John Floyd, of Virginia, resigned after being charged with illegal diversion of Government funds, and the following day the President quietly placed Joseph Holt in charge of the War Department on an interim basis while continuing to serve as the Postmaster General. Shortly afterwards, the President asked Holt to accept this post permanently, but Holt argued that he shouldn't do this, as it would probably just lead to an angry and fruitless debate and that he could serve the administration quite well under the provisional appointment which he now held. But after some further conversations he accepted, though apparently with some reluctance.

On January the 9th, 1861, John Slidell of Louisiana offered a resolution requesting information on whether the Secretary of War's office was vacant, and if so to inform the Senate how and by whom the duties of said office was discharged and if an appointment had been made of a provisional Secretary of War he wanted to know how it has been; how, when, and by which authority it had been made; and why this appointment was not communicated to the Senate. The resolution forced the President to act, and on Thursday, January 17th, 1861, the Senate received a message nominating Joseph Holt of Kentucky as the Secretary of War of the United States.

It was an uncivil, dangerous time. Holt worked to keep the country from turmoil. Numerous memos came across his desk daily. Each note, each telegram, each personal interview were all taken with stride; all correspondence was quickly analyzed and carefully answered about the concerns of the day. Many Southerners had resigned their positions and had gone home; however, Holt stayed and became one of the first strong leaders of the Civil War.

On March 21, 1861, soon after the inauguration of Lincoln, Lincoln wrote to Holt for a personal interview. This new Republican President needed Holt's support. He hoped that Holt could help the administration establish an alliance with the modern Democrats. Besides that, Holt's shifting native Kentucky would hold doubts. As it turned out, Joseph Holt proved instrumental in preventing the secession of his beloved Kentucky. He gave speeches and wrote a pamphlet titled *Policy of the General Government, The Pending Revolution, Its Objects, Its Probable Results If Successful, and the Duty of Kentucky in Crisis*. If Kentucky went with the South, it would take a sizeable population, great agricultural wealth, and the national defense line of the Ohio River. It

could mean the difference in the Union's success or failure and Lincoln knew this—Holt's native state, Lincoln's wife's home state, and his place of birth crucial to success. In his appeals for the Union, Joseph Holt used words that burned, leaving unique quotes in people's minds. His words told, the consequences that could face Kentucky if they chose to go with the South. Holt wrote to his and Lincoln's good friend, James Speed of Louisville, and expressed his feelings in a letter that Speed published in all of the major newspapers of Kentucky before the Kentucky legislature would vote.

Kentucky declared itself neutral in May of 1861, and at that time there were almost three nations: the United States, the Confederate States, and Kentucky; and in 1861, most Kentuckians wanted both Union and slavery. Holt also helped to set up a recruiting station across the Ohio River from Louisville, in Jeffersonville, Indiana, called "Camp Joe Holt."[6] It was established to sign up Kentucky troops, many of them from Louisville, for the Union Army. Since the state had declared itself neutral, the Kentucky Unionists, encouraged by Joseph Holt, worked to keep Kentucky from seceding. Holt's elegant voice helped to capture the serious mood of the Commonwealth. His words made people think as families became torn apart, including his own. This Civil War was dividing not only a nation, but also the basis upon which the family was built. He asked the people of Kentucky to appeal to their neighbor, to honor their patriotism, to protect their country's flag, the flag of freedom, and life or death.

Joseph Holt was instrumental in Kentucky with his letters and his speeches. Would the state go the next step and support the Union that Henry Clay had so loved or would they support another Kentuckian, Jefferson Davis? Would they support the flag that had always protected them? Would they keep Kentucky from becoming a battleground of the South? Holt felt that Kentucky should take its rightful place of defending the Union, and on July 13th, 1861, Holt delivered one of the most important speeches of his entire life:

> I wish solemnly to declare before you and the world that I am for this Union without conditions, one and indivisible, now and forever. I am for its preservation at any cost of blood and treasure against its assailants. I

[6] LOWELL HARRISON & JAMES C. KLOTTER, A NEW HISTORY OF KENTUCKY (LEXINGTON: UNIVERSITY PRESS OF KENTUCKY 66 (1997).

> know no neutrality between my country and its foes, whether they be foreign or domestic; no neutrality between the glorious flag which floats over us and the ingrates and traitors who would trample it in the dust.[7]

The words had been spoken; the appeals written. It was decision time. Which uniform would Kentuckians choose, blue or gray? By not choosing either, they chose both, and on September 1861, the pro-Union legislature reacted to Confederate troop incursion and officially declared Kentucky a Union state. Some 100,000 citizens would fight for the Union and 40,000 for the South. Joseph Holt's efforts had helped convince Kentucky to abandon its stance of neutrality and to support the Union. While some of Lincoln's cabinet members gave him more headaches than help while in office, Joseph Holt was a person who worked and served without complaint.

Lincoln knew that to be successful he needed the support of the slave border states of Kentucky, Missouri, Delaware, and Maryland. He had said that he'd hoped that God would be on his side but he knew he must have Kentucky. Kentucky had produced leaders. The importance of Kentucky on the national scene could be seen in the fact that in ten presidential elections from 1824 and 1860, Kentuckians had run for President or Vice President in eight out of ten races. The state had one of the three largest cities in the South and was in the top four in population. Holt had won a great prize for the Union and a great prize for Lincoln.

Lincoln's respect and confidence in Joseph Holt grew. Holt joined the Army as a colonel, but on September 3, 1862, President Lincoln appointed him the first Judge Advocate General to hold general's rank of the Union Army for his renown legal skills and his activist role in turning the Commonwealth of Kentucky towards the Union. Holt's appointment as JAG was also due to his recent service as a chairman of a military commission that had audited the accounts of Ordnance Department in the West and eventually the commission's investigation would save the Federal Government over seventeen million dollars in gun contracts. Holt went on to serve in that position for thirteen years until he retired in 1875 at his own request.

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[7] ELIZABETH D. LEONARD, LINCOLN'S FORGOTTEN ALLY: JUDGE ADVOCATE GENERAL JOSEPH HOLT OF KENTUCKY 145–46 (2011).

Holt quickly consolidated authority and organizations within the JAG Department, but he never reformed the Military Justice System fundamentally or made drastic changes in policy. He never thought he should change the law, but worked to clarify it within the framework of the existing congressional legislation, presidential proclamations, and articles of war. He helped devise the plan to employ former slaves as Union soldiers and gave Lincoln the needed troops that he had to have to be successful in the Civil War, and Congress recognized this plan by an act of July 17, 1862, that authorized President Lincoln to receive into service to the United States persons of African descent.

Holt had many duties as Judge Advocate General. He oversaw court-martial and military commissions. He supervised all military investigations of political prisoners. He used military commissions to try controversial civil cases. He investigated members of possible disloyal organizations, such as the Sons of Liberty and the Knights of the Golden Circle. Holt proved effective and received the rank of brigadier general in June of 1864. That same year Lincoln offered him two positions, the Secretary of the Interior or Attorney General, but Holt declined. When offered one of these cabinet posts, Holt told President Lincoln that he could serve him better in the position which he now held and begged the President to be assured that he was most grateful for this distinguished offer of the President's confidence and good will, but responded, "In it I cannot fail to the public duties with which you have already charged me."[8] Holt was also one of many considered for the Republican vice-presidential ticket.

The end of the Civil War brought relief to the people, but it also brought many challenges to a very tired and a tried nation; a nation that had been broken apart and now faced reconstruction that would test its people. The North rejoiced as most fighting had ended on April 9, 1865, with Lee's surrender to Grant but little did the country know what the future would bring when Judge Advocate General Joseph Holt was asked to deliver an address in South Carolina on the evening of April 14, 1865, at the Charleston Hotel. He had been invited by the Secretary of War to witness the ceremony of the raising of the United States flag that day on Fort Sumter. The former commander Kentuckian Robert Anderson made a warm tribute to the Secretary of War, and the Honorable Joseph Holt for the support they had given him while in command of that fort.

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[8] Letter from Joseph Holt, to Abraham Lincoln (Nov. 30, 1864) (The Abraham Lincoln Papers, Library of Congress, Series 1, General Correspondence.1833–1916).

Joseph Holt began his part of the program by saying he was most grateful for all the kind words and for the generous reception they had received but talked about the ruins of Fort Sumter, and how they had been pressed at his feet as he viewed the historic surroundings. "I experienced emotions too profound and was deeply conscious that silence would best express the awe and the wonder and the ambition and the thanksgiving with which I was filled and so I feel now. Holt continued,

> We all thank the President of the United States for his delicate and earnest appreciation of the craving of hearts which has instructed him to order the flag which for four long years was lowered before the treacherous foe would be once again flying today among the breezes with salutes and honor restoring to the nation.[9]

That same night Holt received a telegram saying that President Abraham Lincoln had been shot.

The event that followed would challenge Holt and our nation and ultimately damage his reputation. The decision was made for a military trial; that now gave Holt the tremendous responsibility of prosecuting the conspirators who had slain the very President who had appointed him to that office. Members of the court sought a speedy result, as did the country. However, the haste to have a military trial caused hostile newspapers to demand more access. Holt agreed, wanting to change the negative public opinion about the legitimacy of the military trial. On the third day of the trial, he opened the doors to the courtroom.

Historians have raised fundamental questions about the relationship between civil and military authority. It's been asserted that the military commission acted illegally in trying civilians and the court was composed of a vindictive group of Army officers who were eagerly looking for victims. However, on a closer examination of facts, it reveals that such a view is misleading. At the end of the Civil War, the assassination unleashed deep emotions. There's no indication that a civil jury would have been more lenient than a military commission.

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[9] Joseph Holt, Remarks of Hon. J. Holt, Dinner at Charleston, South Carolina on Evening of 14th April 1–8 (1865).

Holt's career up to this time as Judge Advocate General had been full of accomplishments with bright promise, but the tragic incident of Lincoln's assassination forever changed the life of Joseph Holt, who probably would have achieved everlasting recognition had his name not been associated with all of the controversy surrounding the death of Lincoln. Much of this controversy focused on whether Joseph Holt came across as a vindictive and dishonorable man when he refused the clemency petition for Mary Surratt because of her sex and age.

What's the real story? Judge Advocate General Joseph Holt prosecuted the people accused of Lincoln's assassination. On June 19, the officers of the military commission went into closed session to deliberate the future of Mary Surratt and her fellow defendants, and subsequently found them guilty. But after the commission finalized the investigation, five of the members of the commission signed a recommendation of a lighter sentence for Surratt. Both the verdicts and the sentence were kept away from the public until President Andrew Johnson could examine and sign the papers. Five of the men on the commission signed the petition and it was attached to the assassination investigation. Brigadier General Holt delivered the papers personally to President Johnson. With the illness of the President, it was not until July 5 that Joseph Holt could be seen by the President, who quietly and without attention slipped into the White House through one of the side doors. Holt brought an abstract of the proceedings from the trial. Exactly what happened at the meeting will never be known except by the two. President Johnson did approve death sentences for all; execution day was then planned for July 7, only two days later.

One of the most intriguing mysteries of the Lincoln conspiracy trial involves the military tribunal's actions regarding the execution of Mary Surratt. Controversy surrounded Holt's presentation of the case to President Andrew Johnson. In his signing of the death warrants for Surratt and the other three conspirators, Holt insisted that President Johnson had read, discussed, and refused the petition for clemency. The President issued a statement denying he'd ever seen the recommendation. Holt thus seemed to be the villain.

But there seemed to be a rush to judgment, and if Holt had been lying about the clemency papers, how did he remain Judge Advocate General for ten additional years, until 1875, when he retired upon his own? Judge Advocate General Joseph Holt believed he conducted the Lincoln conspiracy trial fairly and worked for the rest of his life for the

honor of his name. After eight years of humiliation, Holt was finally vindicated of the dishonorable accusations by President Johnson. In a letter to Holt dated 1873, General R.D. Mussey wrote:

> President Johnson told me of that recommendation for Mary Surratt's clemency. I'd seen this attempt to stigmatize you, an act for which then Andrew Johnson was proud, and which now declines with deep pain and still deeper shame. I'm pained because it's unjust and it's untrue and because it seeks to acquit him by charging a fearful crime of violated trust and of inhumanity to you.[10]

Holt was a man of the century who prompted Buchanan, a Democrat, and then Lincoln, a Republican, to appoint him to prominent posts in their administrations, yet his career ended in controversy and left him intentionally forgotten. He died nineteen years after his resignation.

With Holt's death, his spirit lived on. And like Holt, a forgotten man, his home became forgotten, sitting empty for over forty years, but now a new interest is returning; a new memory of Holt will live again. Joseph Holt's home in rural Breckinridge County is the only home remaining that represents the story of the Lincoln conspiracy trial. After the war, Kentucky became more pro-Southern. Holt's home state turned against him. He was a prophet without honor in his own state. He could never go home again.

Now is my chance to revisit history and explore the spirit and the man, Joseph Holt: Kentuckian, hero, attorney. The state historian, Dr. James C. Klotter, says it best when he stated, "Holt deserves better than history has given him." This year, 2011, marks the 200th anniversary of the Holt Plantation, and Holt's last wish was for his home to always stay in the family. How unique that 2011 will also be the beginning of the anniversary of 150 years when Holt served President Abraham Lincoln as Judge Advocate General of the United States.

We near the end of the discussion of Holt's story. This is also a story of how a school teacher from a rural county chose to be an advocate for a man and a cause. On a Sunday afternoon back in 1997, my husband and I were driving along Kentucky Highway 144, and I asked him to stop the

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[10] DYER, *supra* note 1, at 223–24.

car. As I stood in the middle of the road and gazed upon this most beautiful home—and I know it sounds strange but it's true—I could feel the pain from this home as if its last visitor had stopped and it was seeking me to help it. That day God put on my heart to do something and I could not get peace until I did. So everything started happening at the same time. I started talking to people. I started having meetings in my home, writing grants, giving talks, going to the Lincoln Bicentennial, writing mountains of letters and e-mails and phone calls, and if no one would listen to me or talk to me, then I was just a nice lady and went to someone else. And since that day, we have become an official Lincoln site, a legacy project of the Kentucky Lincoln Bicentennial. My county now owns the Holt House. I'm a go-between with the Kentucky State Preservation Office in Frankfort and our local Government, and we are working with the National Parks. A feasibility study is being done now, and we've been told by Don Wojeik from the Denver Service Center Planning Division, of Colorado that because of the Holt House and it's not preserved yet there's an eighty percent chance this will become a Kentucky Lincoln National Heritage Area and, yes, it's going to happen; I know it's going to happen.

For the past fourteen years, I have traveled many times to Holt's grave to sit in silence and just imagine what it was like when he was here. Many times as I would observe the surroundings and I would take notes I would put out all the modern-day sounds. As I listened to sounds of the past, sounds that Judge Holt would have heard, the setting produced ideas and strong emotions. One day when I went there to write the ending of my book, I walked inside the graveyard and stood beside Judge Holt's grave, as I often do, and as I stood there, a whirlwind of leaves started twirling around me and I'm trying to write and it just kept swirling and swirling around me and then it was a cloudy, dark, dreary day and the clouds opened and the light was shining down upon me like a silhouette. This really happened. It's in my book. It brought a quote to my mind from Joseph Holt: "It's encouraging to know that behind every cloud the sun's still shining; that if we're patient every cloud shall see its light again."[11] And, yes, we're patient. We're a rural area with not much money but with a big heart, and everything we do have, 19.5 acres and Joseph Holt's home, belongs to the people. It doesn't just belong to my people, to the region, and to the state, but it belongs to the nation. It belongs to everyone. His legacy has been saved for the future.

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[11] *Id.* at 250.

In conclusion, this forgotten man's life deserves to be better remembered, and the saving of his home will help his legacy be rediscovered. This is not just a story of words on paper alone, but it's also an account of restoration and a rebirth for a home and a reputation. Truth speaks to all of those who know it. Joseph Holt lived a life that nurtured a torn nation, but in his efforts to unite it, he made enemies and he left the people of his own state behind. Because of that, history has for too long forgotten a very important leader. The power of the past and of the people and the strength of knowledge, the trial of time eventually triumphs. Life as it was will never be again but the forgotten moments must be recaptured. Joseph Holt's spirit can rest knowing he did make the world a better place and lived life to the fullest. His fate was changed forever by the broken promise of a President, but to the end Joseph Holt loved his Kentucky and gave his heart to his government and to his America and I ask you for words of wisdom for my community because I'm always asking. If you have contacts or anyone who can help with Joseph Holt's legacy being remembered in his home, I welcome e-mails. I welcome addresses. I welcome anything. I will talk. I will write. I will bake cakes. I will do whatever it takes. Thank you so very much.

PUTIN, PIPES, AND ALEXSANDR SOLZHENITSYN'S *ONE DAY IN THE LIFE OF IVAN DENISOVICH*[1]

REVIEWED BY MAJOR DANA M. HOLLYWOOD[*]

Putin is life; Putin is the light; love Putin and your life will have meaning; Putin will give you happiness; Putin will open your eyes.[2]

I. Introduction

This year marks the 50th anniversary of the publication of Aleksandr Solzhenitsyn's *One Day in the Life of Ivan Denisovich*. The novel recounts a single day in the life of an ordinary prisoner, Ivan Denisovich Shukhov, in a Soviet labor camp during the 1950s. According to the final page of the novel, Shukhov would serve ten years for allegedly committing treason during World War II.[3]

While judge advocates may question the utility of reading a half-century-old historical novel exposing the evils of Soviet Communism two decades after the collapse of the Soviet Union, this review argues that the work has relevance for three reasons. First, as a work of art, the novel is beautifully written. Solzhenitsyn's spare prose, punctuated by vivid descriptions of the harsh conditions and tedium the prisoners endured, brings a forcefulness and truthfulness to this slim work of fiction.

Second, *Ivan Denisovich* was an immensely influential work in exposing the lie that was the Soviet Union. In this regard, the novel played a quiet, yet significant, role in the ultimate demise of that ignominious regime. Indeed, Richard Pipes, a Russian scholar and a

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[1] ALEKSANDR SOLZHENITSYN, ONE DAY IN THE LIFE OF IVAN DENISOVICH (H.T. Willetts trans., F.S.G. Classics 3d ed. 2005) (1978).

[2] Michael Schwirtz, *Russia Allows Protest, but Tries to Discourage Attendance*, N.Y. TIMES, Dec. 10, 2011, at A8 (quoting a robocall placed by the Kremlin to organizations critical to the regime in anticipation of the March 2012 presidential elections).

[3] SOLZHENITSYN, *supra* note 1, at 182.

frequent critic[4] of Solzhenitsyn, has acknowledged that the effect of *Ivan Denisovich* and Solzhenitsyn's later work, *The Gulag Archipelago*, "was immense" and "[i]n this manner, Solzhenitsyn contributed to the Soviet Union's ultimate collapse."[5]

Finally, Solzhenitsyn himself, as well as his only work published in the Soviet Union, are critical to both an understanding of contemporary Russia and one of the United States' most important bilateral relationships.[6] As Justice Holmes explained in a celebrated passage beginning *The Common Law*, "In order to know what it is, we must know what it has been."[7] Today's Russia—an increasingly authoritarian[8]

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[4] *See* discussion *infra* Part III. Additionally, Pipes has accused Solzhenitsyn of being an ultra-nationalist and has made veiled accusations of anti-Semitism. In a review of Solzhenitsyn's novel, *August 1914*, Pipes wrote:

> Every culture has its own brand of anti-Semitism. In Solzhenitsyn's case, it's not racial. It has nothing to do with blood. He's certainly not a racist; the question is fundamentally religious and cultural. He bears some resemblance to Dostoevsky, who was a fervent Christian and patriot and a rabid anti-Semite. Solzhenitsyn is unquestionably in the grip of the Russian extreme right's view of the Revolution, which is that it was the doing of the Jews.

Richard Grenier, *Solzhenitsyn and Anti-Semitism: A New Debate*, N.Y. TIMES, Nov. 13, 1985, at C21 (quoting Richard Pipes).

[5] Richard Pipes, *Solzhenitsyn's Troubled Prophetic Mission*, ST. PETERSBURG TIMES (Aug. 8, 2008), http://www.sptimes.ru/index.php?action_id=2&story_id=26779 (the Russian scholar, Richard Pipes, describing Solzhenitsyn).

[6] While President Obama has recently proclaimed the United States a "Pacific power" and the importance of the U.S.-Sino relationship continues to expand, the U.S.-Russian relationship remains one of the United States' most critical bilateral relationships. *See, e.g.*, Jackie Calmes, *President Hits His Stride on Foreign, but Familiar Territory*, N.Y. TIMES, Nov. 21, 2011, at A6. In addition to possessing the ninth-largest population and the seventh largest economy, Russia's nuclear arsenal consists of more than 7,000 nuclear warheads, many of which are unsecure. *See, e.g.*, Graham T. Allison, *How to Stop Nuclear Terror*, 83 FOREIGN AFF. 64 (Jan./Feb. 2004); CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/rs.html.

[7] OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1948).

[8] The terms "authoritarian" and "totalitarian" must be distinguished. Jean Kirkpatrick, President Reagan's first ambassador to the United Nations, provided a useful clarification in an article highly critical of the Carter administration's foreign policy in a 1979 issue of *Commentary Magazine*. Kirkpatrick argued that authoritarian regimes (El Salvador and Iran under the Shah, in the late 1970s for example), do not rule by an overarching ideology and therefore "do not disturb the habitual rhythms of work and leisure, habitual places of residence, habitual patterns of family and personal relations." In contradistinction, totalitarian regimes (the Soviet Union and China in the late 1970s, for

police state[9] waging war on an independent media[10]—should be of grave concern to all. Tragically, the slide to autocracy will likely continue with the recent election of Vladimir V. Putin as Russian President in the March 2012 elections.[11]

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example) govern by ideology, thereby "claim[ing] jurisdiction over the whole life of the society. . . ." *See* Jean Kirkpatrick, *Dictatorships and Double Standards*, 68 COMM. MAG., 34, 41–42 (1979). By Kirkpatrick's construct, the Soviet Union would have been a totalitarian regime, whereas Putin's Russia is an authoritarian regime.

[9] *See, e.g.*, LILI'IA FEDOROVNA SHEV'TSOVA & ANTONINA W. BOUIS, PUTIN'S RUSSIA 226 (2005) (quoting Anatoly Chubais, an influential member of the Yeltsin administration, as warning, "Russia is turning into a police state."). *See also* Alvaro Vargas Llosa, *Putin the Terrible*, NEW REPUBLIC (Aug. 19, 2008, 12:00 AM), http://www.tnr.com/article/politics/putin-the-terrible ("Putin made sure his country's feeble democratic institutions were replaced with autocratic rule. Most checks and balances were neutered; the judiciary, political parties, local governments, the media, private corporations, separatist regions."); Nancy Dewolf Smith, *Richard Pipes: A Cold Warrior at Peace*, WALL ST. J. ONLINE, Aug. 20, 2011, http://online.wsj.com/article/SB10001424053111903596904576516652848445180.html ("By 2000, ex-KGB strongman Vladimir Putin was in charge, and . . . he began rolling back new freedoms in Russia, eliminating the election of governors, taking over television networks, and reinstating a culture in which free-speaking journalists get murdered.").

[10] The Committee to Protect Journalists, a non-profit organization responsible for tracking deaths, imprisonments, and intimidation of journalists, ranked Russia as the fourth-most dangerous country in the world for journalists in 2010. *See The Five Most Dangerous Countries for Journalists*, CHRISTIAN SCI. MONITOR, Nov. 8, 2010, http://www.csmonitor.com/World/Global-Issues/2010/1108/The-five-most-dangerous-countries-for-journalists/Russia. The tragic and still unresolved death of Russian journalist and human rights activist Anna Politkovskaya is perhaps the best known example of the dangers journalists face in Putin's Russia. Politkovskaya was known for her staunch opposition to the War in Chechnya and President Putin. On October 7, 2006, the day she was scheduled to deliver a revealing report to her newspaper on torture in Chechnya, she was murdered. *See Justice for Anna?*, N.Y. TIMES, Sept. 6, 2009, at A7. Two years before her death, Politkovskaya presciently wrote in an article for the *Guardian*:

> We are hurtling back into a Soviet abyss, into an information vacuum that spells death from our own ignorance. All we have left is the [I]nternet, where information is still freely available. For the rest, if you want to go on working as a journalist, it's total servility to Putin. Otherwise, it can be death, the bullet, poison, or trial—whatever our special services, Putin's guard dogs see fit.

Anna Politkovskaya, *Poisoned by Putin*, GUARDIAN, Sept. 9, 2004, http://www.guardian.co.uk/world/2004/sep/09/russia.media.

[11] Amid allegations of widespread electoral fraud, Vladimir Putin won the March 4, 2012, Russian Presidential elections with sixty-four percent of the vote. *See, e.g.*, Anne Applebaum, *Behind Putin's Victory*, N.Y. TIMES, Mar. 7, 2012, at A17. Vladimir Putin succeeded Boris Yeltsin as President of the Russian Federation in May 2000, and served two four-year terms in that position. As the Russian Constitution forbade Putin from

This review posits that while Solzhenitsyn's *Ivan Denisovich* was an enormously influential work, Solzhenitsyn's omissions, manifested primarily in his romanticized views of his motherland, ultimately render it an imperfect guide to the future. While this has long been a criticism of Solzhenitsyn's work,[12] contemporary events in Russia, exposed largely through the personage of Putin, have accentuated these shortcomings. Part I of this review focuses on the implausible publication of *Ivan Denisovich* and the novel's resulting influence. Part II of the review considers Solzhenitsyn's shortcomings, primarily through the lens of the Pipes-Solzhenitsyn debate—a clash of ideas over authoritarianism in Russian history and the roots of Soviet Communism.

II. *Ivan Denisovich's* Implausible Publication and Influence

> *Of all the drama that Russia has lived through, the deepest was the tragedy of the Ivan Denisovichs. I wanted to set the record straight concerning the false rumors about the camps.*[13]

An understanding of *Ivan Denisovich* begins with an understanding of its remarkably complex author, the winner of the 1970 Nobel Prize for literature.[14] Although not a memoir, *Ivan Denisovich* benefits greatly from Solzhenitsyn's own eight-year ordeal in Stalin's Gulag system. Like his protagonist, Ivan Denisovich, Soviet authorities arrested Solzhenitsyn during his military service in World War II and charged him with fomenting anti-Soviet propaganda.[15]

Solzhenitsyn served his sentence in several different work camps, to include Ekibastuz, a labor camp for political prisoners in Kazakhstan,

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running for a third consecutive term, he served as Prime Minister under President Dmitry Medvedev from 2008–2012 with the agreement that Medvedev would step aside as President in 2012 and allow Putin to run. *See, e.g.*, Ellen Barry, *Putin Once More Moves to Assume Russia's Top Job*, N.Y. TIMES, Sept. 25, 2011, at A1 (quoting President Medvedev as explaining, "I want to say directly: An agreement over what to do in the future was reached between us several years ago."). Per the agreement, Medvedev will now serve as Putin's Prime Minister.

[12] *See* discussion *infra* Part III.

[13] JOSEPH PEARCE, SOLZHENITSYN: A SOUL IN EXILE 142 (2001).

[14] *See, e.g.*, Michael T. Kaufman, *Solzhenitsyn, Literary Giant Who Defied Soviets, Dies at 89*, N.Y.TIMES, Aug. 4, 2008, at A1.

[15] PEARCE, *supra* note 13, at 75.

where he served as a bricklayer, like his protagonist.[16] As Joseph Pearce has written, it was here, "at Ekibastuz which would be the sufferings of which became the inspiration for *Ivan Denisovich*."[17] As Solzhenitsyn would later tell his biographer:

> It was an ordinary camp day—hard, as usual, and I was working. I was helping to carry a hand-barrow full of mortar, and I thought that this was the way to describe the whole world of the camps. Of course, I could have described my whole eight years there, I could have done the whole history of the camps that way, but it was sufficient to gather everything into one day, all the different fragments . . . and to describe just one day in the life of an average and in no way remarkable prisoner from morning till night.[18]

Solzhenitsyn's inspiration, gained at Ekibastuz, resulted in a remarkably easy book to write. As Solzhenitsyn further explained to his biographer:

> *One Day* came out of me in one breath, in one flow. I wrote it in forty days. In fact, I was surrounded by so much material . . . that I was not in a position of a writer wondering what to put in. . . . It was like the whole life of the camps fitted into one day of one person's life.[19]

Having written *Ivan Denisovich* in May and June 1959, Solzhenitsyn added it to a growing heap of unpublished manuscripts, certain the Soviet authorities would never publish such an incendiary work.[20] While it is true that the process of de-Stalinization was underway[21] by the time Solzhenitsyn completed *Ivan Denisovich*, "literature [continued to] operate[] within a clearly defined framework of restrictions that curtailed any truthful discussion of the central events that had shaped Soviet history."[22] This changed, however, in the personage of Aleksandr

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[16] *Id.* at 110.
[17] *Id.* at 112.
[18] *Id*. at 141.
[19] *Id.* at 142.
[20] *Id*. at 143.
[21] *See, e.g.*, ALAN BULLOCK, HITLER AND STALIN: PARALLEL LIVES 461 (1992) (describing Nikita Khrushchev's speech at the Twentieth Party Congress denouncing Stalin).
[22] Alexis Klimoff, *Foreword* to SOLZHENITSYN, *supra* note 1, at xiv.

Tvardovsky, the editor of the Soviet literary journal, *Novy Mir* (*New World*).

In 1961 Tvardovsky gave a speech to the twenty-second Congress of the Communist Party beseeching the delegates to "show the labours and ordeals of our people in a manner that is totally truthful to life."[23] Encouraged by Tvardovsky's speech, Solzhenitsyn sent his manuscript to the well-connected editor.[24] Tvardovsky, in turn, showed the manuscript to several political friends in the hopes that Khrushchev would ultimately receive it and approve of publication as a means of enervating his political enemies by sullying them with the crimes of the past.[25]

Khrushchev in fact began distributing copies of the novel to party members and in November 1962 announced that it was "an extremely important work."[26] That month, *Ivan Denisovich* appeared in *Novy Mir*, and the daily newspaper *Izvestia* ("News") wrote that Solzhenitsyn "has shown himself a true helper of the Party."[27] Solzhenitsyn's status as a "true helper of the Party" would be short-lived, however. With the fall of Khrushchev in a bloodless coup in 1964 and a resulting conservative backlash, Solzhenitsyn would quickly fall out of favor.

Publication in 1973 in the West of his magnus opus, *The Gulag Archipelago*, [28] sealed his fate. *Ivan Denisovich* had placed the blame of the gulag system on Josef Stalin. In an age of de-Stalinization, this was tolerable, even useful to Soviet apparatchiks.[29] *The Gulag Archipelago*, however, committed sheer blasphemy by directly criticizing Vladimir Lenin, the Soviet Union's most revered leader.[30] In a 1974 Politburo meeting, General Secretary Leonid Brezhnev exclaimed, "He has tried to undermine all we hold sacred: Lenin, the Soviet system, Soviet Power,

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[23] PEARCE, *supra* note 13, at 148.
[24] *Id*.
[25] ANNE APPLEBAUM, GULAG: A HISTORY 520 (2003).
[26] PEARCE, *supra* note 13, at 154.
[27] *Id*. at 155.
[28] While *Ivan Denisovich* focused on a single day in the life of a political prisoner in Stalin's camps, the three-volume *Gulag Archipelago* was a sprawling history of the Soviet forced labor and concentration camp system. *See* APPLEBAUM, *supra* note 25, at 363–63.
[29] A term for powerful functionaries of the Communist Party. *See, e.g.*, JAMES BILLINGTON, FIRE IN THE MINDS OF MEN: ORIGINS OF THE REVOLUTIONARY FAITH 455 (1999).
[30] *Literary Giant Solzhenitsyn Dies at 89*, MOSCOW TIMES, Aug. 5, 2008, 2008 WLNR 20894995.

everything dear to us. This hooligan Solzhenitsyn is out of control."[31] From there, events spiraled out of control at a dizzying pace. Within a year the State-run newspaper, *Pravda* ("Truth"), had labeled Solzhenitsyn a "traitor," and the State had charged him with treason, stripped him of his citizenship, and deported him to the West.[32] *Ivan Denisovich* would be his first and last published work in the Soviet Union, and until Gorbachev's policy of *Glasnost* ("Openness") would be the only one of his major works to appear in the Soviet Union.[33]

While the scope of *Ivan Denisovich* is modest, this short novel serves a majestic indictment of the Soviet Union. Its importance cannot be overstated. As one scholar of the gulag system explains, it represented a stark departure from the prevailing discourse of the time:

> Instead of speaking vaguely about "returnees" and "repressions" as some other books did at the time, *Ivan Denisovich* directly described life in the camps, a subject which had not, until then been discussed in public. . . . The official Soviet literary creed of that time, "socialist realism" was not realism at all, but rather the literary version of Stalinist political doctrine . . . . *Ivan Denisovich*, by contrast, was genuinely realistic. . . .[34]

As another scholar aptly explained, "Solzhenitsyn's message can be summarized. . . . There is something worse than poverty and repression and that something is the Lie. . . . "[35] In exposing "the Lie," Solzhenitsyn's work of fiction is transformed into "one of the most influential books ever written in terms of its socio-political impact on the world."[36] Thus, although *Ivan Denisovich* is arguably not the most powerful work to emerge from the bewildering inhumanity of the

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[31] *Id.*

[32] *Id.* Solzhenitsyn would spend the next twenty years in exile. In 1990, a year before the Soviet Union collapsed, the state restored his citizenship and Solzhenitsyn returned to Russia in 1994 to a hero's welcome. A year before his death in 2008, President Putin personally visited Solzhenitsyn in his home to award him Russia's highest honor, the State Prize. *Id.*

[33] APPLEBAUM, *supra* note 25, at 525; WAYNE ALLENSWORTH, THE RUSSIAN QUESTION: NATIONALISM, MODERNIZATION, AND POST-COMMUNIST RUSSIA 66 (1998).

[34] APPLEBAUM, *supra* note 25, at 522–23.

[35] DANIEL J. MAHONE, ALEKSANDR SOLZHENITSYN: THE ASCENT FROM IDEOLOGY 2 (2001).

[36] PEARCE, *supra* note 13, at 141.

Gulag,[37] it is undoubtedly the most influential as it was the first work published in the Soviet Union to expose "the Lie."

Nonetheless, despite *Ivan Denisovich's* extraordinary impact, the novel, along with Solzhenitsyn's abundant corpus of work, incorrectly delineates the sources of Soviet Communism, leaving contemporary readers with a false sense of security vis-à-vis present-day Russia. It is to this subject that the review now turns.

III. The Pipes-Solzhenitsyn Debate

> *Although Solzhenitsyn vehemently rejected communism, in many ways he retained a Soviet mind-set. Anyone who disagreed with him was not merely wrong but evil. He was constitutionally incapable of tolerating dissent.*[38]

The Pipes-Solzhenitsyn debate provides a useful paradigm for examining Solzhenitsyn's views of the origins of Soviet Communism. The first salvos in the debate were fired by the Russian scholar Richard Pipes of Harvard University. Pipes was born in 1923 in Polish Silesia to an upper-middle class Jewish family.[39] He became a naturalized U.S. citizen during World War II while serving in the Army Air Corps.[40] Professor Pipes's lifetime scholarship has focused on the question of why Marxism first gained an intractable foothold in Russia while other nations of Europe embraced the Enlightenment and the rights of man.

Pipes's primary thesis—the roots of Soviet Communism can be found in Russia's past—rests upon two related theories. First, the history of serfdom in Russia allowed for a totalitarian ideology to take hold. As serfs, Russians carried a "patrimonial mentality" manifested in complete subservience to the Tsar and a failure to develop civil society.[41] As Pipes explained in an interview in 2011:

> First of all, not only were the Russians peasants, which there were in Europe too, but they were serfs, which is

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[37] *See, e.g.*, EUGENIA SEMYONOVA GINZBURG, JOURNEY INTO THE WHIRLWIND (1967) (recounting in haunting detail the author's eighteen-year ordeal in Stalin's Gulag).
[38] Pipes, *supra* note 5.
[39] *See* RICHARD PIPES, VIXI: MEMOIRS OF A NON-BELONGER 14–15 (2003).
[40] *Id.* at 48–51.
[41] *See, e.g.*, RICHARD PIPES, RUSSIA UNDER THE OLD REGIME 71, 79 (1974).

> not exactly slaves but close to it. They had no rights. They had no civil rights, no legal rights, no property rights. They were chattel. So that meant they did not develop any sense of belonging to a community.[42]

Solzhenitsyn has taken great offense to Pipes's "patrimonial mentality" theory and equated it with the proposition that Russians have a "slave mentality."[43]

Second, Pipes contends that a history of Russian authoritarianism allowed totalitarianism Marxism to germinate there. By contrast, according to Pipes, "Marxism in other European countries led not to the gulag but to the welfare state."[44] But Stalinism was merely a reversion to Tsarism.[45] Pipes's view helps to explain the paradox of why a brutally repressive regime such as Putin's United Russia party continues to enjoy widespread support among average Russians. As Pipes has explained, "Russians like strong leaders, autocratic leaders: Ivan the Terrible, Peter the Great, Stalin. They have contempt for weak leaders, leaders who don't impose their will but who listen to the people."[46]

Largely in response to Pipes, Solzhenitsyn penned an article in *Foreign Affairs* in 1980. At times, Solzhenitsyn's article is polemical and petty with personal attacks on Pipes. Solzhenitsyn first argues that Western academics and policy-makers have perverted Russia's image by equating the terms "Russian" and "Soviet."[47] Taking direct aim at Pipes, Solzhenitsyn writes:

> Richard Pipes' book *Russia Under the Old Regime* may stand as typical of a long series of such pronouncements

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[42] Smith, *supra* note 9.

[43] *See, e.g.*, Alexsandr I. Solzhenitsyn, *The Mortal Danger*, *in* THE SOVIET POLITY IN THE MODERN ERA 8 (Erik P. Hoffmann & Robbin F. Laird eds., 1984) ("But ever since communism has had to be condemned, it has been ingeniously ascribed to the age-old Russian slave mentality.").

[44] Pipes, *supra* note 5.

[45] *See, e.g.*, JAMES F. PONTUSO, ASSAULT ON IDEOLOGY: ALEXSANDR SOLZHENITSYN'S POLITICAL THOUGHT 33 (2004).

[46] Smith, *supra* note 9.

[47] Alexsandr Solzhenitsyn, *Misconceptions about Russia Are a Threat to America*, 26 FOREIGN AFF. 798 (Spring 1980) ("A certain American diplomat recently exclaimed, 'Let Brezhnev's Russian heart be run by an American pacemaker!' Quite wrong! He should have said 'Soviet heart.' Nationality is determined not by one's origins alone but also by the direction of one's loyalties and affections.").

> that distort the image of Russia. . . . The author willfully ignores those events, persons or aspects of Russian life which would not prove conducive to his thesis, which is that the entire history of Russia has had but a single purpose—the creation of a police state. He selects only that which contributes to his derisive and openly hostile description of Russian history and the Russian people. The book allows only one possible conclusion to be drawn: that the Russian nation is anti-human in its essence, that it has been good for nothing throughout its thousand years of history, and that as far as any future is concerned it is obviously a hopeless case.[48]

Not surprisingly, Solzhenitsyn takes a starkly different view from Pipes of Russian history. In subsequent writings, Solzhenitsyn has argued that the evils of Communism were not confined to Russia and therefore Russian tendencies toward authoritarianism could not account for the horrors experienced in countries such as Cambodia, China, or North Korea under Communist regimes.[49] In his *Foreign Affairs* article, Solzhenitsyn emphasizes this point and attempts to dismiss the history of authoritarianism in Russia:

> There are two names, which are repeated from book to book and article to article with a mindless persistence by all the scholars and essayists of this tendency: Ivan the Terrible and Peter the Great, to whom implicitly or explicitly—they reduce the whole sense of Russian history. But one could just as easily find two or three kings no whit less cruel in the histories of England, France or Spain, or indeed of any country, and yet no one thinks of reducing the complexity of historical meaning to such figures alone.[50]

In particular, Solzhenitsyn criticizes Pipes's theory of the legacy of Russian autocracy:

> Pipes even bestows upon Emperor Nicholas I the distinction of having invented totalitarianism. Leaving

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[48] *Id.* at 801–02.
[49] PONTUSO, *supra* note 45, at 148.
[50] Solzhenitsyn, *supra* note 47, at 802.

> aside the fact that it was not until Lenin that totalitarianism was ever actually implemented, Mr. Pipes, with all his erudition, should have been able to indicate that the idea of the totalitarian state was first proposed by Hobbes in *Leviathan*. . . .

Finally, Solzhenitsyn takes offense to Pipes's argument that Stalinism was a reversion to Tsarism. Solzhenitsyn argues that the roots of Stalinism were imposed upon Russia by foreign (Jewish) entities. He writes:

> Just what "model" could Stalin have seen in the former, tsarist Russia. . . . Camps there were none; the very concept was unknown. Long-stay prisons were very few in number, and hence political prisoners—with the exception of terrorists extremists . . . were sent off to exile, where they were well fed and cared for at the expense of the State, where no one forced them to work, and from whence any who so wished could flee abroad without difficulty.[51]

In response to these assertions, Pipes has argued that Solzhenitsyn's "knowledge of Russian history was very superficial and laced with a romantic sentimentalism."[52] Moreover, according to Pipes, Solzhenitsyn's denial that tsarist Russia "condemned political prisoners to hard labor . . . was absurd."[53]

IV. Conclusion

Until the collapse of the Soviet Union in 1991, the Pipes-Solzhenitsyn debate was a largely academic disputation with no clear winner. With the hopeful transformation of a totalitarian Soviet Union to a liberal Russia, however, the debate took on a new prominence as policymakers sought to reconceptualize the complicated bilateral relationship. With the hindsight of the past twenty years—twelve of which have been under the leadership of Vladimir Putin—clearly Pipes's

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[51] *Id.* at 804.
[52] Smith, *supra* note 9.
[53] Pipes, *supra* note 5.

position has prevailed. What's past is prologue[54] and while there is no denying the horrors of Soviet Communism, Russia's complicated past has clearly influenced the post-Soviet slide toward autocracy. It is no coincidence, for example, that in naming Putin its person of the year in 2007, *Time* magazine titled its cover story "A Tsar is Born."[55]

None of this should discredit Solzhenitsyn's extraordinary contributions. As the first published work to expose the lie that was the Soviet Union, the simple story of a day in the life of an ordinary political prisoner helped to defeat a monstrous regime and change the world. In this regard, Solzhenitsyn rightly stands alongside others, such as Ronald Reagan and Pope John Paul II, whose contributions helped hasten the demise of Soviet Communism. Indeed, as Pipes stated three years after Solzhenitsyn's death, "No one can deprive Solzhenitsyn of this honor."[56] Nevertheless, Solzhenitsyn's and *Ivan Denisovich's* failure to honestly reconcile the past with the present ultimately renders the novel a hazardous guide to the future.

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[54] WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1.
[55] Adi Ignatius, *Person of the Year: A Tsar is Born*, TIME, Dec. 19, 2007, http://www.time.com/time/specials/2007/personoftheyear/article/0,28804,1690753_1690757_1690766,00.html.
[56] Pipes, *supra* note 5.

MONSOON: THE INDIAN OCEAN AND THE FUTURE OF AMERICAN POWER[1]

REVIEWED BY MAJOR DAVID J. KRYNICKI[*]

[A]s China and India compete for ports and access routes along the southern Eurasian rimland, and with the future strength of the U.S. Navy uncertain, because of America's own economic travails and the diversionary cost of its land wars, it is possible that the five-hundred year chapter of Western Preponderance is slowly beginning to close.[2]

I. Introduction

If you build it, they will come.[3] While not speaking of building a baseball diamond in a farm field, the basic premises of building and thinking big are at the heart of Robert Kaplan's *Monsoon: The Indian Ocean and the Future of American Power*. Kaplan asserts that the United States must build its foreign policy in the Indian Ocean region in order to capitalize on big economic opportunities. Current U.S. foreign policy ignores the region due to the primary focus on terrorism and the wars in Iraq and Afghanistan.[4] This unfocused foreign policy is allowing other countries to capitalize on the region's economic opportunities.[5]

Kaplan posits that the countries surrounding the Greater Indian Ocean are the future frontiers of global economic development.[6] International law attorneys, foreign policy experts, business investors,

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[1] ROBERT D. KAPLAN, MONSOON: THE INDIAN OCEAN AND THE FUTURE OF AMERICAN POWER (2010).

[2] *Id.* at xii.

[3] FIELD OF DREAMS (Universal 1989) (The author's adaptation of the quote, "If you build it, he will come.").

[4] KAPLAN, *supra* note 1, at xii, 229, 249, 251, 270.

[5] *Id*. at 13.

[6] *Id*. at xi.

and anyone interested in the future economic growth of the Indian Ocean Region would be well served by reading Kaplan's latest work.

Kaplan, a national correspondent for *The Atlantic* and a senior fellow at the Center for a New American Security, draws from his experiences as a consultant to the U.S. Army's Special Forces, the U.S. Air Force, and the U.S. Marines when developing his argument for a foreign policy focus on the Indian Ocean region.[7] These experiences, along with extensive research and travel,[8] reinforce his writing and premise that the region, ignored throughout history,[9] continues to be ignored by the United States. America must shift its obsession[10] with al Qaeda and focus its policy on the new, middle classes of Asia, [11] using soft power.[12]

Robert D. Kaplan's work succeeds in showing how building the playing field of "the new Great Game in geopolitics" is in the Indian Ocean region "where global power dynamics will be revealed."[13] The current U.S. game plan maintains the status quo by continuing its naval presence, which protects trade routes or "sea lines of communications"[14] in the Indian Ocean and provides humanitarian assistance. America needs to refocus its foreign policy plan in order to join the power hitters of the region, India and China, as both rise to greater power.[15] Unfortunately, Kaplan's work fails to address just how the United States should do this and instead only raises the difficulties in the region.[16]

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[7] Robert D. Kaplan—Biography, THE ATLANTIC, http://www.theatlantic.com/robert-d-kaplan#bio (last visited May 29, 2012).
[8] KAPLAN, *supra* note 1, at xi–xiii.
[9] *Id*. at 6 (describing how common world maps typically split the Indian Ocean region and lose the area to the edges of these maps and how Americans are barely aware of the Indian Ocean because of geography).
[10] *Id*. at 229.
[11] *Id*. at 103, 323.
[12] JOSEPH S. NYE, JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS (2004) (describing soft power as influencing others to want what you want without the use of force as persuasion). KAPLAN, *supra* note 1, at 290 (soft power as used by China), 183 (soft power as used by India).
[13] *Id*. at 13 (discussing India and China becoming connected to South East Asia and the Middle East through trade, energy, and security agreements).
[14] *Id*. at 283.
[15] *Id*. at 9, 125, 289.
[16] *Id*. at 321–23 (describing that "so many of the challenges—and hopes and dreams—of this new middle class are personal and materialistic, there will be increasing calls for better government and, yes, democracy").

II. The United States' Unfocused Foreign Policy Game Plan

Kaplan critiques the United States' foreign policy approach, arguing that it is unfocused and has long ignored the region, and has allowed China[17] to be at the forefront of infrastructure development by utilizing its vertical expansion strategy.[18] Using this strategy, China is drawn to the Indian Ocean where historically the monsoon was used for expansion in trade.[19] Kaplan provides the reader with a lengthy history that compares old sea trade against modern trade that deals with crowded trade routes, employs high-tech ports, and seeks to protect both with a powerful navy.[20]

As Kaplan points out, current U.S. policy may be focused elsewhere, but as a the leader in the world, the United States should engage in a multi-pronged foreign policy approach and effectively join China's and India's economic and political efforts in the region. Ultimately, Kaplan's pessimistic view of American foreign policy becomes clear when he argues that the United States must make peace with billions in the region, many of them Muslim, in order for American power to be seen as wholly legitimate.[21]

Kaplan's cynicism of U.S. policy on Iraq and Afghanistan[22] is misplaced since the current administration continues its efforts to strengthen ties to the Indian Ocean region.[23] Kaplan's recurrent theme is

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[17] *Id*. at 11.

[18] *Id*. at 10 (describing the vertical strategy of China's efforts to "expand its influence vertically, that is, reaching southward down to the warm waters of the Indian Ocean") and 283 (describing how China seeks to reach the Indian Ocean in order to achieve a two-ocean strategy).

[19] *Id*. at 137 (explaining the meaning of "[t]he monsoon—from the Arabic *mausim*, meaning 'season'—is one of the earth's 'greatest weather systems,' generated by the planet's very rotation, and also by climate") and xiv (describing how the monsoon allowed explorers and empires to travel the ocean using the "climatic phenomenon" of the monsoon for "trade, globalization, unity, and progress").

[20] *Id*. at xiv, 9–11.

[21] *Id*. at 322.

[22] *Id*. at 249 (discussing that "[t]he democracy that Bush tried to build violently in Iraq is developing peacefully in Indonesia without his help"), 251 (stating that "[i]f the first term of President George W. Bush was about the war on terrorism and the second about spreading freedom and democracy, then Indonesia is the world's best example of what Bush advocated, in the same sequence, although his administration often was too preoccupied to notice").

[23] *See* Sameer Jafri, *Obama's Visit to India*, Nov. 16, 2010, http://www.worldpress.org/Asia/3654.cfm (discussing President Obama's visit to India in November 2010); *U.S.*

that America's land wars[24] and its economic travails[25] have been a distraction that delays U.S. foreign policy influence in the region. This theme of cynicism detracts from an otherwise insightful examination of the region's economic opportunities.

A. The United States' Game Plan for China

Kaplan argues that China is taking advantage of the United States' preoccupation with terrorism by capitalizing on economic opportunities available in the Region. [26] Economic opportunities in the form of fossil fuels[27] and trade of manufactured goods[28] have encouraged China to invest into airports,[29] shipping ports,[30] and pipelines[31]—strategic avenues that will allow China to exert influence and prosper economically from the region.[32] Kaplan clearly believes that the United States needs to assert its power in order to benefit from the region.[33] Perhaps this approach is a result of "Kaplan once believ[ing] that something called 'amoral self-interest' should be the defining aspect of American foreign policy."[34] Such an unprincipled approach to foreign policy is not the type

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Sec'y of State Hillary Clinton Begins India Visit; Terror, Afghan-Pakistan, Nuclear Deal Top Agenda, ECON. TIMES, Jul. 18, 2011, 11:24 PM, http://articles.economictimes.indiatimes.com/2011-07-18/news/29787370_1_counter-terrorism-india-visit-state-hillary-clinton (discussing Secretary of State Hillary Clinton's visit to India on July 18, 2011); Howard LaFranchi, *Hillary Clinton: Don't Be Suspicious of US-China Relationship*, CHRISTIAN SCI. MONITOR, Jan. 14, 2011, http://www.csmonitor.com/USA/Foreign-Policy/2011/0114/Hillary-Clinton-Don-t-be-suspicious-of-US-China-relationship(discussing visit to China in January 2011).

[24] KAPLAN, *supra* note 1, at xii.

[25] *Id*. at xii.

[26] *Id*. at 277. "[A]s the Cold War recedes into the past China rises economically and politically, taking advantage, in effect, of America's military quagmires in Iraq and Afghanistan, a new and more complex order is gradually emerging in the maritime rimland of Eurasia . . . ."

[27] *Id*. at 164 (describing the future of a "natural gas alliance between India, China, Bangladesh, and Burma").

[28] *Id*. at 129.

[29] *Id*. at 164.

[30] *Id*. at 10 (discussing the large port facility at the Pakistani ort of Gwadar along with another port in Pasni, Pakistan as well with a highway linking the seventy-five miles between the two ports).

[31] *Id*. at 132.

[32] *Id*. at 7.

[33] *Id*. at 125–29, 237–38.

[34] Tom Bissell, *Euphorias of Perrier: The Case Against Robert D. Kaplan*, VA. Q. REV., Summer 2006, http://www.vqronline.org/articles/2006/summer/bissell-euphoria-perrier/

of policy the United States needs. Instead of seeking to benefit from the region, the United States' typical strategy is to assist the region first, and then accept any rewards of the good created. For example, the United States may assist in stabilizing a region and then accepting the economic benefits.

While skillfully describing the importance of naval domination in the region,[35] Kaplan relies too heavily on the idea that the United States and China are headed toward an adversarial relationship.[36] This type of writing mimics Kaplan's prior works, as described by David Lipsky, who "laments that Kaplan 'appears to have become someone who is too fond of war.'"[37] Kaplan's "future war" also has Islamic radicals supporting China[38] against the United States. Kaplan's work would be better served using war as the last resort approach.[39] Kaplan's position that the United States needs to stop China's development in the region reflects a short-sighted and unnecessary "us versus them" mentality. Such a mentality is not advantageous to the United States, China, or India.

B. The United States' Game Plan for India

Kaplan's strategy is for the United States to attain more allies in order to beat its top rival, China. In order for the United States to be able to compete with China, he argues that the United States will need to "leverage[] allies like India and Japan against China" and will have to "to gradually and elegantly cede great power responsibilities to like-minded others . . . as part of a retreat from a unipolar world."[40] Such a plan has the United States seeking to partner with India, which "can play the role

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(last visited May 29, 2012) (asserting that that Kaplan once stated "the world is too vast and its problems too complicated for it to be stabilized by American authority").

[35] KAPLAN, *supra* note 1, at xi, 16, 217, 283–93.

[36] *Id*. at 291 (noting that China and the United States are adversaries because "both require imported energy in large amounts" and because the "philosophical systems of governance . . . [are] wide apart")

[37] Bissell, *supra* note 34.

[38] KAPLAN, *supra* note 1, at 258 (discussing the radicals "wish[ing] China well when it clashes with the United States")

[39] Colin Powell, U.S. Sec'y of State, *Powell: War with Iraq Is 'Last Resort,'* CNN.COM, Oct. 9, 2002, http://articles.cnn.com/2002-10-09/politics/powell/transcript_1_assessments-rise-weapons-deputy-cia-director?_s=PM:ALLPOLITICS.

[40] KAPLAN, *supra* note 1, at 293 ("A peaceful transition away from American unipolarity at sea toward an American-Indian-Chinese condominium of sorts would be the first of its kind.").

of the chief balancer vis-à-vis China."[41] Teaming India and the United States versus China simply should not be the focus of American foreign policy. While correct in his assertion that "India will emerge as the key 'swing' state in international politics,"[42] it does not mean that the United States is currently or should in the future align itself only with India. A balanced foreign policy approach[43] is best.

Kaplan supports his proposal by arguing that the United States and India are alike historically.[44] He seeks to link the United States to India since "India is perhaps China's most realistic strategic adversary."[45] Kaplan argues the adversarial relationship exists because the region "does not have a single focal point,"[46] forcing India to gain economic advantages by horizontal expansion.[47] Such expansion ultimately puts India on a path to clash with China as each country seeks to protect sea going products and assert a presence in the region.[48] The United States should be cautious, however, so as to not team with India or China independently, but instead maintain diplomacy through a balanced foreign policy approach that develops relationships by using both public and private international law[49] principles.

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[41] *Id*. at 125.
[42] *Id*. at 124.
[43] Daryl Press & Benjamin Valentino, *A Balanced Foreign Policy*, 2006, http://www.tobinproject.org/sites/tobinproject.org/files/assets/Make_America_Safe_Balanced_Foreign_Policy.pdf (last visited June 13, 2012).
[44] KAPLAN, *supra* note 1, at 124 n.10 (discussing the "argu[ment] that New Delhi officials since the time of the Cold War have inculcated the precepts of George Washington's Farewell Address of 1796: that India, like the United States, inhabits its own geographical sphere, in India's case between the Himalayas and the wide Indian Ocean, and thus is in a position of both dominance and detachment") (citing STEPHEN P. COHEN, INDIA: EMERGING POWER 55 (2001)).
[45] KAPLAN, *supra* note 1, at 126 n.12.
[46] *Id*. at 15.
[47] *Id*. at 10 ("India seeks to expand its influence horizontally, reaching eastward and westward . . . parallel to the Indian Ocean.").
[48] *Id*. at 15. "A combined naval task force, comprised of the Americans, Canadians, French, Dutch, British, Pakistanis, and Australians, patrols permanently off the Horn of Africa in an effort to deter piracy." *Id.*
[49] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW OF WAR DESKBOOK 1–2 (2001) [hereinafter LAW OF WAR DESKBOOK]. "Public international law . . . deals mainly with intergovernmental relations. Private International law is primarily concerned with the 'foreign transactions of individuals and corporations.'" (citing MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES & COMMENTARY 2 (1997)).

III. The Best Offense is a Good Defense[50]

The U.S. Navy's reign over the seas allows America to subtly influence the region without using force to overtly affect the dynamics of the region. This soft power approach has the United States "play[ing] a more modest political role" in the region. By providng security, the United States assists other countries to rise up.[51] Kaplan demonstrates how this flexible policy. For example, when the tsunami afflicted Indonesia and Sri Lanka in December 2004, the United States, India, Japan, and Australia sent aid to the region without discussions with the United Nations.[52] This type of foreign policy would more aptly rest under the theory of "smart power"[53] as opposed to using hard or soft power.[54] In short, being the power hitter in the world means that the United States is expected to pinch hit when needed, such as providing humanitarian intervention.[55]

Kaplan uses China's efforts to build its Navy as support for his belief that the United States and China are adversaries. He argues that China is motivated by smart power, which fuels China's already existing desire for access to, and its quest for a presence in, the Indian Ocean.[56] As China builds its navy "in order to protect [its] merchant fleet across the Indian Ocean and western Pacific," China seeks to end its reliance on the protection provided by the U.S. Navy.[57] Kaplan's arguments lose

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[50] William Safire, *The Best Defense*, N.Y. TIMES, Apr. 14, 2003, http://www.nytimes.com/2003/04/14/opinion/the-best-defense.html (playing off the quote attributed to the heavyweight boxer Jack Dempsey who is believed to have said, "The best defense is a good offense") (last visited May 29, 2012).

[51] KAPLAN, *supra* note 1, at 16 (comparing the U.S. position in the Indian Ocean region with the U.S. position in Asia) (citing Greg Sheridan, *East Meets West*, NAT'L INT., Nov./Dec. 2006)).

[52] *Id*. n.16 (discussing that the "old construct [of the United Nations] with France having a seat on the Security Council but not India" should not be confused with a world where "Asia's politicians . . . appreciate hard power") (citing James R. Holmes & Toshi Yoshihara, *China and the United States in the Indian Ocean: An Emerging Strategic Triangle?*, NAVAL WAR C. REV., Summer 2008, at 41).

[53] Hillary Rodham Clinton, U.S. Sec'y of State, *American Smart Power: Diplomacy and Development Are the Vanguard*, May 4, 2009, http://www.state.gov/r/pa/scp/fs/2009/122579.htm ("We must use what has been called smart power: the full range of tools at our disposal—diplomatic, economic, military, political, legal, and cultural—picking the right tool, or combination of tools, for each situation.").

[54] KAPLAN, *supra* note 1, at 290.

[55] LAW OF WAR DESKBOOK, *supra* note 49, at 33.

[56] KAPLAN, *supra* note 1, at 11.

[57] *Id*. (currently China relies heavily upon the "'public good' that the U.S. Navy provides"). *But see* Tom Plate, *Asia's Rising Superpower Floats and Aircraft Carrier*,

focuswhen he states that China's efforts to increase its global economic footprint should concern the United States and India.[58] Such an assertion ignores the fact that the United States remains the top trading partner with China.[59]

Kaplan supports China's rationale for control in the region, especially in the critical part of the new global playing field, that is, where the Indian Ocean meets the Pacific Ocean. The combination of oil deposits in the South China Sea and the congestion of shipping lanes with oil tankers and merchant fleets "make this region at the Indian Ocean's eastern gateway among the most critical seascapes of the coming decades."[60]

This confluence of India meets China has caused India to continue "expanding its military and economic ties" with neighboring countries to the east and west.[61] The Indian Ocean, as a central trade route, will be the center of economic progress and the key to global power.[62] *Monsoon* shows that the United States will remain influential as long as the U.S. Navy patrols the area and as long as the Chinese remain reticent toward assistance. But, it is clear that China's acquiescence will come to a close.[63] At that time, the United States would be well served to have already positioned itself in the region using other foreign policy methods.

DAILY PROGRESS, Sept. 4, 2011, at B5 (discussing China's completion of its first ever aircraft carrier).

[58] KAPLAN, *supra* note 1, at 286 (discussing how China is increasing its ties to "[c]ountries like the Philippines and Australia [that] will have China as their number-one trading partner").

[59] THE US-CHINA BUS. COUNCIL, https://www.uschina.org/statistics/tradetable.html (last visited May 29, 2012).

[60] KAPLAN, *supra* note 1, at 286.

[61] *Id.* at 12.

[62] *Id*. at 13.

[63] *Id*. at 283 n.2 (citing James Mulvenon that the Chinese "may be content to 'free ride' on the 'public good' that the U.S. Navy provides" since the Chinese are "many years away from having such a navy") (citing Gabriel B. Collins et al., eds., *China's Energy Strategy: The Impact on Beijing's Maritime Policies* (Annapolis, Md: Naval Inst. Press, 2008)).

IV. Conclusion

Monsoon is an insightful look into the policies of the United States with India and China, and how these nations walk a fine line of cooperation militarily, economically, and diplomatically.[64] However, Kaplan falls short when he fails to explain how the United States could better develop its foreign policy in the region, and instead blames the U.S. preoccupation with the land wars[65] of Iraq and Afghanistan as the primary reason China and India have taken the lead in the region.[66]

While there is no discussion of international law concepts,[67] or any specific foreign policy plan for the United States, *Monsoon* does provide a thought-provoking view for international law attorneys, foreign policy experts, and investors to consider. *Monsoon* also provides a substantial analysis of the U.S. Navy's presence and influence in the region. The lesson learned from *Monsoon* is that the United States must continue to develop foreign policy in the region in order to reap future economic and political gains.

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[64] *Id*. at xi ("For the sum-total effect of U.S. preoccupation with Iraq and Afghanistan has been to fast-forward the arrival of the Asian Century, not only in the economic terms that we all know about, but in military terms as well.").
[65] *Id*. at xii.
[66] *Id*. at xi (discussing "the arrival of the Asian century, not only in economic terms that we all know about, but in military terms as well").
[67] LAW OF WAR DESKBOOK, *supra* note 49, at 1–2.

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