Volume 215 **Spring 2013**

MILITARY LAW REVIEW

ARTICLES

THE MILITARY JUSTICE SYSTEM CONUNDRUM: JUSTICE OR DISCIPLINE?
David A. Schlueter

THE *GOTOVINA* ACQUITTAL: A SOUND APPELLATE COURSE CORRECTION
Gary D. Solis

CLUSTER MUNITIONS: RECENT DEVELOPMENTS
Major Erkan Agin

PUTTING COMPULSORY BACK IN COMPULSORY PROCESS
Major Clay A. Compton

BANGLADESH RAPID ACTION BATTALION: SATISFYING THE REQUIREMENTS OF THE LEAHY AMENDMENT WITH A RULE OF LAW APPROACH
Major Michael J. O'Connor

THE FORTIETH KENNETH J. HODSON LECTURE IN CRIMINAL LAW: MILITARY JUSTICE
Major-General Blaise Cathcart

THE EIGHTEENTH HUGH J. CLAUSEN LECTURE IN LEADERSHIP
Brigadier General Tom Kolditz

BOOK REVIEWS

Department of Army Pamphlet 27-100-215

MILITARY LAW REVIEW

Volume 215 **Spring 2013**

CONTENTS

ARTICLES

THE MILITARY JUSTICE SYSTEM CONUNDRUM: JUSTICE OR DISCIPLINE?
David A. Schlueter 1

THE *GOTOVINA* ACQUITTAL: A SOUND APPELLATE COURSE CORRECTION
Gary D. Solis 78

CLUSTER MUNITIONS: RECENT DEVELOPMENTS
Major Erkan Agin 108

PUTTING COMPULSORY BACK IN COMPULSORY PROCESS
Major Clay A. Compton 133

BANGLADESH RAPID ACTION BATTALION: SATISFYING THE REQUIREMENTS OF THE LEAHY AMENDMENT WITH A RULE OF LAW APPROACH
Major Michael J. O'Connor 182

THE FORTIETH KENNETH J. HODSON LECTURE IN CRIMINAL LAW: MILITARY JUSTICE
Major-General Blaise Cathcart 231

THE EIGHTEENTH HUGH J. CLAUSEN LECTURE IN LEADERSHIP
Brigadier General Tom Kolditz 241

BOOK REVIEWS

Terrorism, Ticking Time Bomb, and Torture
REVIEWED BY *Fred L. Borch* III 255

Headquarters, Department of the Army, Washington, D.C.

Pamphlet No. 27-100-215, Spring 2013

MILITARY LAW REVIEW—VOLUME 215

Since 1958, the *Military Law Review* has been published at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The *Military Law Review* provides a forum for those interested in military law to share the products of their experience and research, and it is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import to military legal scholarship. Preference will be given to those writings having lasting value as reference material for the military lawyer. The *Military Law Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

BOARD OF EDITORS

CPT LAURA A. O'DONNELL, *Editor*
CPT MARCIA STEWARD, *Assistant Editor*
CPT JOSEPH D. WILKINSON II, *Assistant Editor*
MAJ KEIRSTEN H. KENNEDY, *Assistant Editor*
MR. CHARLES J. STRONG, *Technical Editor*

The *Military Law Review* (ISSN 0026-4040) is published quarterly by The Judge Advocate General's Legal Center and School, 600 Massie Road, Charlottesville, Virginia, 22903-1781, for use by military attorneys in connection with their official duties.

SUBSCRIPTIONS: Interested parties may purchase private subscriptions from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402, at (202) 512-1800. See Individual Paid Subscriptions form and instructions to the *Military Law Review* on pages vi and vii. Annual subscriptions are $20 each (domestic) and $28 (foreign) per year. Publication exchange subscriptions are available to law schools and other organizations that publish legal periodicals. Editors or publishers of these periodicals should address inquiries to the Technical Editor of the *Military Law Review*. Address inquiries and address changes concerning subscriptions for Army legal offices, ARNG and USAR JAGC officers, and other federal agencies to the Technical Editor of the *Military Law Review*.

Judge Advocates of other military services should request distribution through their publication channels. This periodical's postage is paid at Charlottesville, Virginia, and additional mailing offices.

POSTMASTER: Send address changes to *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781.

CITATION: This issue of the *Military Law Review* may be cited as 215 MIL. L. REV. (page number) (2013). Each issue is a complete, separately numbered volume.

INDEXING: *Military Law Review* articles are indexed in *A Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.)*; *Index to Legal Periodicals*; *Monthly Catalogue of United States Government Publications*; *Index to United States Government Periodicals*; *Legal Resources Index*; four computerized databases—the JAGCNET, the *Public Affairs Information Service*, *The Social Science Citation Index*, and *LEXIS*—and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current United States Government Periodicals on Microfiche* by Infordata International Inc., Suite 4602, 175 East Delaware Place, Chicago, Illinois 60611. The *Military Law Review* is available at http://www.jagcnet.army.mil/MLR.

SUBMISSION OF WRITINGS: Anyone may submit for publication consideration articles, comments, recent development notes, and book reviews in Microsoft Word format to the Technical Editor, *Military Law Review*, at usarmy.pentagon.hqda-tjaglcs.list.tjaglcs-tech-editor. If electronic mail is not available, please forward the submission in duplicate, double-spaced, to the Technical Editor, *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia 22903-1781. Written submissions must be accompanied by an electronic copy on a CD, preferably in Microsoft Word format.

Footnotes should be typed double-spaced and numbered consecutively from the beginning to the end of the writing, not chapter by chapter. Citations should conform to *The Bluebook: A Uniform System of Citation* (19th ed. 2010), copyrighted by the *Columbia*, *Harvard*, and *University of Pennsylvania Law Reviews* and the *Yale Law Journal*, and to the *Military Citation Guide* (TJAGLCS 18th ed. 2013).

Masculine pronouns appearing in the text refer to both genders unless the context indicates another use.

Typescripts should include biographical data concerning the author or authors. This data should consist of branch of service, duty title, present and prior positions or duty assignments, all degrees (with names of granting schools and years received), and previous publications. If submitting a lecture, or a paper prepared in partial fulfillment of degree requirements, the author should include the date and place of delivery of the lecture or the date and source of the degree.

EDITORIAL REVIEW: The *Military Law Review* does not purport to promulgate Department of the Army policy. The opinions and conclusions reflected in each writing are those of the author and do not necessarily reflect the views of the Department of Defense, The Judge Advocate General, the Judge Advocate General's Corps, or any other governmental or non-governmental agency.

The Editorial Board of the *Military Law Review* includes the Chair, Administrative and Civil Law Department, Lieutenant Colonel Luis O. Rodriguez; and the Director, Professional Communications Program, Major Keirsten H. Kennedy. The Editorial Board evaluates all material submitted for publication, the decisions of which are subject to final approval by the Dean, The Judge Advocate General's School, U.S. Army. We accept submissions from military and civilian authors, irrespective of bar passage or law school completion. In determining whether to publish an article, note, or book review, the Editorial Board considers the item's substantive accuracy, comprehensiveness, organization, clarity, timeliness, originality, and value to the military legal community. No minimum or maximum length requirement exists.

When the Editorial Board accepts an author's writing for publication, the Editor of the *Military Law Review* will provide a copy of the edited text to the author for prepublication approval. Minor alterations may be made in subsequent stages of the publication process without the approval of the author.

Reprints of published writings are not available. Authors receive complimentary copies of the issues in which their writings appear. Additional copies usually are available in limited quantities. Authors may request additional copies from the Technical Editor of the *Military Law Review*.

BACK ISSUES: Copies of recent back issues are available to Army legal offices in limited quantities from the Technical Editor of the *Military Law Review* at TJAGLCS-Tech-Editor@conus.army.mil. Bound copies are not available and subscribers should make their own arrangements for binding, if desired.

REPRINT PERMISSION: Contact the Technical Editor, *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781.

INDIVIDUAL PAID SUBSCRIPTIONS TO THE *MILITARY LAW REVIEW*

The Government Printing Office offers a paid subscription service to the *Military Law Review*. To receive an annual individual paid subscription (4 issues), complete and return the order form on the next page.

RENEWALS OF PAID SUBSCRIPTIONS: You can determine when your subscription will expire by looking at your mailing label. Check the number that follows "ISSDUE" on the top line of the mailing label as shown in this example:

When this digit is 7, you will be sent a renewal notice.

MILR SMITH212J ISSDUE007 R1
JOHN SMITH
212 BROADWAY STREET
SAN DIEGO, CA 92101

The numbers following ISSDUE indicate how many issues remain in the subscription. For example, ISSDUE001 indicates a subscriber will receive one more issue. When the number reads ISSDUE000, you have received your last issue and you must renew.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

INQUIRIES AND CHANGE OF ADDRESS INFORMATION: The Superintendent of Documents is solely responsible for the individual paid subscription service, not the Editors of the *Military Law Review* in Charlottesville, Virginia.

For inquires and change of address for individual paid subscriptions, fax your mailing label and new address to (202) 512-2250, or send your mailing label and new address to the following address:

United States Government Printing Office
Superintendent of Documents
ATTN: Chief, Mail List Branch
Mail Stop: SSOM
Washington, DC 20402

United States Government INFORMATION
PUBLICATIONS ★ PERIODICALS ★ ELECTRONIC PRODUCTS

Army Lawyer and Military Review
SUBSCRIPTION ORDER FORM

Order Processing Code: **5937**

Easy Secure Internet: **bookstore.gpo.gov**

Toll Free: 866 512-1800
Phone: 202 512-1800
Fax: 202 512-2104

Mail: Superintendent of Documents
PO Box 371954
Pittsburgh, PA 15250-7954

☐ **YES,** enter my subscription(s) as follows:

_____subscription(s) of the *Army Lawyer* (ARLAW) for $50 each ($70 foreign) per year.

_____subscription(s) of the *Military Law Review* (MILR) for $20 each ($28 foreign) per year. The total cost of my order is $_____.

Prices include first class shipping and handling and is subject to change.

Personal name (Please type or print)

Company name

Street address City, State, Zip code

Daytime phone including area code

Purchase Order Number

Check method of payment:

☐ Check payable to Superintendent of Documents

☐ SOD Deposit Account ☐☐☐☐☐☐☐ — ☐

☐ VISA ☐ MasterCard ☐ Discover/NOVUS ☐ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

Thank you for your order!

Authorizing signature

11/02

MILITARY LAW REVIEW

Volume 215 **Spring 2013**

THE MILITARY JUSTICE CONUNDRUM: JUSTICE OR DISCIPLINE?

DAVID A. SCHLUETER*

Table of Contents

I. Introduction 4

II. Overview of the Military Justice System 7
- A. Pretrial Procedures 7
- B. Trial Procedures 11
- C. Post-Trial Procedures and Appellate Review 13
- D. Summary 14

III. Analyzing the Military Justice Conundrum 14

IV. Thematic Approaches to the Conundrum 16
- A. The "Deference" or "Hands-Off" Theme 16
- B. The "Separatist" Theme 18
- C. The "Primarily Discipline" Theme 19
- D. The "Justice-Based" Theme 23
- E. The "Competing Interests" Theme 26
- F. The "Inseparable" Theme 27
- G. The "Two Sides of the Same Coin" Theme 28
- H. The "Middle Ground" Theme 29
- I. The "Fair and Delicate Balance" Theme 31
- J. The "Emasculation" Theme 33
- K. The "Un-American" Theme 33
- L. The "Justice and Discipline Are Not Opposites" Theme 35
- M. The "Justice and Discipline Are Not Synonymous" Theme 36
- N. The "Oxymoron" Theme 37
- O. The "Hybrid" Theme 38

P. The "Legitimation" Theme 38
Q. The "Paternalistic" Theme 39
R. The "Civilianization" Theme 40
S. The "Judicialization" Theme 41
T. The "Can't Get No Respect" Theme 42
U. The "No Perfect Solution" Theme 43
V. Summary of Thematic Approaches 44

V. The Crime Control and Due Process Models' Approach to the Conundrum 45
A. In General 45
B. The Crime Control (Discipline) Model 47
C. The Due Process (Justice) Model 48
D. Summary of the Models 50
E. Application of the Models to the Military Justice System 50
1. Features That Reflect the Crime-Control-Discipline Model 51
a. In General 51
b. Court-Martial Personal Jurisdiction 51
c. Defining Military Offenses 52
d. Role of the Commander 55
e. Nonjudicial Punishment 59
f. Guilty Pleas 60
g. Nonunanimous Verdicts 61
h. Sentencing 62
2. Features That Reflect the Due Process-Justice Model 63
a. In General 63
b. Application of Bill of Rights Protections to Commander's Control of Servicemembers 63
c. Application of Bill of Rights Protections During Pretrial Processing of Cases 63
d. Military Discovery Practices 64
e. Appointment and Role of Counsel 66
f. Use of Military Judges 66
g. Guilty Plea Inquiries 67
h. Trial Procedures 68
i. Sentencing 68
j. Appellate Review of Court-Martial Convictions 70
3. Summary of Application of the Models 71

VI. The Primary Purpose Approach to the Conundrum..... 71

VII. Conclusion and Recommendations 74

> *The point of proper accommodation between the meting out of justice and the performance of military operations—which involved not only the fighting, but also the winning of wars—is one which no one has discovered. I do not know of any expert on the subject—military or civilian—who can be said to have the perfect solution.*[1]

---

[*] Hardy Professor of Law and Director of Advocacy Programs, St. Mary's University School of Law. B.A., 1969 Texas A & M University; J.D., 1971, Baylor University School of Law; LL.M., 1981, University of Virginia; Army's Government Appellate Division (1972–1975), Chief of Criminal Law, Fort Belvoir, Virginia (1975–1976); Student, 25th Advanced Class (1976–1977); Faculty member, Criminal Law Division, The Army's Judge Advocate General's School, Charlottesville, Virginia (1977–1981); Legal counsel to the Supreme Court of the United States (1981–1983). He retired with the rank of lieutenant colonel in 1997, from the U.S. Army Reserve, Judge Advocate General's Corps.

From 1988 to 2005, Professor Schlueter served as the Reporter to the Federal Rules of Criminal Procedure Advisory Committee, a position to which Chief Justice Rehnquist appointed him. He is a Fellow in the American Law Institute and is a Life Fellow of the American Bar Foundation and the Texas Bar Foundation.

Professor Schlueter's publications include numerous law review articles and eleven books: MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE (8th ed. 2012, LexisNexis); MILITARY RULES OF EVIDENCE MANUAL (7th ed. 2011, LexisNexis) (with Stephen A. Saltzburg & Lee D. Schinasi); MILITARY CRIMES AND DEFENSES (2d ed. 2012, LexisNexis) (with Charles H. Rose, Victor Hansen & Christopher Behan); MILITARY CRIMINAL PROCEDURE FORMS, (3d ed. 2009, LexisNexis) (with Kenneth V. Jansen, Kevin J. Barry & Kenneth A. Arnold); MILITARY EVIDENTIARY FOUNDATIONS (4th ed. 2010, LexisNexis) (with Stephen A. Saltzburg, Lee D. Schinasi & Edward J. Imwinkelried). FEDERAL EVIDENCE TACTICS (1997, LexisNexis) (with Edward J. Imwinkelried), TEXAS RULES OF EVIDENCE MANUAL (9th ed. 2012, Juris Pub.) (with Jonathan D.Schlueter); TEXAS EVIDENTIARY FOUNDATIONS (4th ed. 2011, LexisNexis) (with John F. Onion, Jr. Edward J. Imwinkelried); TEXAS RULES OF EVIDENCE TRIAL BOOK (2d ed. 2010, LexisNexis) (with Stephen A. Saltzburg); FEDERAL CRIMINAL PROCEDURE LITIGATION MANUAL (2013, Juris Pub.) (with Stephen A. Saltzburg); and EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE (3d ed. 1998, ABA Section on Litigation and LEXIS Law Pub., Editor-in-Chief). In addition he has three self-published texts which he uses in his courses.

The author is deeply grateful to Ms. Whitney Howe, J.D., 2013, for her assistance in preparing this article and to Captain Joseph D. Wilkinson II and Mr. Charles J. Strong for their invaluable editorial assistance.

I. Introduction

Nearly three million servicemembers are subject to the Uniform Code of Military Justice (UCMJ), a comprehensive statutory framework for investigating and prosecuting the offenses it defines. The UCMJ was enacted in 1950 as a response to concerns about the existing Articles of War.[2] In enacting the UCMJ, Congress struggled to balance the need for the commander to maintain discipline within the ranks against the belief that the military justice system could be made fairer, to protect the rights of servicemembers against the arbitrary actions of commanders. The final product could be considered a compromise.

The UCMJ replaced the Articles of War, which had governed military justice since 1775. It was designed to provide a fair system of procedures and substantive rules to oversee the administration of justice in the ranks, to the end of promoting discipline. The commander remained an integral part of the military justice structure. But the Code expanded due process protections to servicemembers and created a three-judge civilian court to review court-martial convictions. Congress has amended the UCMJ many times, sometimes to favor the prosecution of offenses and at other times to expand the protections to the accused.[3]

---

[1] Testimony of Secretary of Defense James Forrestal, House of Representatives, Committee on Armed Services, Subcommittee No. 1, Wash. D.C., March 7, 1949 (Index and Legislative History, Uniform Code of Military Justice 597 (1950)).

[2] A number of commentators have written on the history and background of the Uniform Code of Military Justice (UCMJ). *See, e.g.*, ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES (1956); BRIGADIER GENERAL JAMES SNEDEKER, A BRIEF HISTORY OF COURTS-MARTIAL (1954); Walter T. Cox, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987) (presenting an overview of development of military justice in the United States and the applicability of the Constitution to various rules and practices); Major Gerald F. Crump, *Part II: A History of the Structure of Military Justice in the United States, 1921-1966*, 17 A.F. L. REV. 55 (Fall 1975) (presenting brief overview of the military justice developments from the period following World War I until the period preceding the changes to the system in the 1968 changes to the UCMJ and the 1969 *Manual for Courts-Martial* (*MCM*)); Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953) (transcribing part of symposium on military justice, presenting an overview of the 1950 UCMJ and proposals leading to its passage); David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129 (1980).

[3] *See, e.g.*, Military Justice Act of 1968, 82 Stat. 1335 (1968); Major Howard H. Hoege III, *"Overshift": The Unconstitutional Double Burden Shift on Affirmative Defenses in the New Article 120*, ARMY LAW., May 2007, at 2, 4 (describing Congress's effort to reverse the burden of proof on consent in sexual assault cases).

The military justice system has been described as a "rough form of justice,"[4] a system providing more rights than its civilian counterparts,[5] a system of "drumhead justice,"[6] a system incapable of dispensing justice,[7] an evolving system,[8] a system that has been civilianized,[9] a system in need of modernization,[10] and a system in search of respect.[11] However one describes or views the system, there has always been, and will always be, a debate over the exact purpose and function of the military justice system.

How one describes the system's chief function may depend on what themes or concepts take the fore. The poles—as they always have been—are two: justice and discipline. These two values are often in competition with each other.[12] In that competition rests a conundrum that is not easily answered or solved. How do you fit together the two

---

[4] *See* United States v. Denedo, 556 U. S. 904, 918 (2009) (Roberts, C.J., dissenting) (noting that traditionally military justice has been a rough form of justice).

[5] *See* Lieutenant Homer E. Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 ME. L. REV. 105 (1970), *reprinted at* 51 MIL. L. REV. 1 (1971); Robert Poydasheff & William K. Suter, *Military Justice? Definitely!*, 49 TUL. L. REV. 588 (1975).

[6] *See, e.g.*, Robinson O. Everett, *The New Look in Military Justice*, 1973 DUKE L.J. 648 (1973) (responding to allegations of "drumhead justice" in the military).

[7] *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

[8] *See, e.g.*, Cox, *supra* note 2; Andrew M. Ferris, *Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439, 440 (1994) (noting that like other divisions of the government, the military justice system has evolved).

[9] *See, e.g.*, Delmar Karlen, *Civilianization of Military Justice: Good or Bad*, 60 MIL. L. REV. 113 (1973) (arguing against blind application of civilian system to military justice); Edward F. Sherman, *Civilianization of Military Justice*, 22 MAINE L. REV. 3 (1970) (describing how system has been civilianized through the years).

[10] *See, e.g.*, Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237 (2000) (offering suggestions for modernizing the procedures for amending the *MCM*; Gregory E. Maggs, *Cautious Skepticism About the Benefit of Adding More Formalities to the Manual for Courts-Martial Rule-Making Process: A Response to Captain Kevin J. Barry*, 166 MIL. L. REV. 1 (2000); Kevin J. Barry, *A Reply to Captain Gregory E. Maggs's 'Cautious Skepticism' Regarding Recommendations to Modernize the Manual for Courts-Martial Rule-Making Process*, 166 MIL. L. REV. 37 (2000).

[11] David A. Schlueter, *Military Justice in the 1990s: A Legal System in Search of Respect*, 133 MIL. L. REV. 1 (1991) (discussing features of military justice system that typically draw criticism).

[12] *See, e.g.,* General William C. Westmoreland & General George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J.L. & PUB. POL'Y 1, 5 (1980) ("A second problem for military codes is to identify and adopt those procedures which ensure fairness and 'due process' while preserving the ability of the forces to achieve their mission. This brings into conflict the commander's responsibility for mission accomplishment and the serviceman's rights.").

competing values of justice and discipline? Should one predominate? If so, which one?

Historically, it was assumed that the primary purpose of military justice was to enforce good order and discipline. The Articles of War, the predecessor to the UCMJ,[13] recognized the commander's broad authority to prosecute and punish any servicemember accused of an offense. Punishment was generally swift and sure and was sometimes harsh or arbitrary.[14] The "justice" component—which in the early days of the military justice system was much less than today's system—required the commander to provide basic due process while enforcing discipline.[15] Over time, the system has evolved. In many ways its evolution has reflected the expansion of individual rights in the civilian criminal justice systems.[16]

The *Manual for Courts-Martial* (*MCM*) lists the purposes of "military law" and places justice first:

> 3. Nature and purpose of military law.
>
> Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.[17]

---

[13] The Continental Congress enacted the original Articles of War in 1775. Through the years they were amended until the UCMJ finally replaced them in 1950.

[14] *See* United States v. McCarty, 29 C.M.R. 757, 760–61 (C.G.B.R. 1960) (noting severity of punishments during World War II and that sometimes there would be proposals to discipline court members for adjudging inadequate sentences); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 567 (2d ed. 1920 Reprint).

[15] Schlueter, *supra* note 2, at 145–50 (discussing protections for servicemembers subject to court-martial).

[16] *Id.* at 165 (noting due process developments reflecting extant views of justice).

[17] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pmbl. (2012) [hereinafter MCM].

Notwithstanding this language in the *MCM*, there is an ongoing debate over the relationship between justice and discipline the military. This article explores that debate.

Part II provides a brief summary of how the military justice system works, as a prelude to identifying the elements of the debate. Part III explores the various thematic approaches to the military justice conundrum. Those themes are sometimes in competition and sometimes complementary. They reflect the views of courts and commentators that have addressed the conundrum. Part IV discusses an approach to the conundrum by drawing from similar analyses of civilian criminal justice systems, which recognize the debate over whether a criminal justice system should reflect a crime control model or a due process model. Part V attempts to resolve the conundrum using a "primary purpose" analysis of the military justice system. Finally, Part VI offers some recommendations for solving the conundrum.

II. Overview of the Military Justice System

Before addressing in more detail the debate over the relationship between justice and discipline, it is important briefly to review how the military justice system works.

A. Pretrial Procedures

The statutory framework for military justice is the UCMJ. Article 36 provides that the President may adopt procedures for the conduct of courts-martial.[18] Those procedures are spelled out in the *MCM*. In addition, the Department of Defense, the service secretaries, and commanders may promulgate regulations to provide additional guidance.

Courts-martial, which are only temporary tribunals,[19] are created to determine the guilt or innocence of persons accused of committing offenses while subject to the jurisdiction of the Armed Forces. Some

[18] UCMJ art. 36 (2012).
[19] McClaughry v. Deming, 186 U.S. 49, 63 (1902).

would argue that they are designed to enforce discipline and others, to ensure that justice is done.[20]

Currently, a commander convenes a court-martial to hear a specific case.[21] It is not a part of the federal judiciary. However, the Supreme Court of the United States may ultimately review a military conviction.[22] In some points, the court-martial provides greater safeguards than its civilian counterparts do. A brief survey of current practice demonstrates this point.

Before swearing to and preferring court-martial charges, a commander is responsible for conducting a thorough and impartial inquiry into the charged offenses.[23] This almost always involves obtaining legal advice from a judge advocate.[24] During that investigation, an accused is entitled to the protections of the Fourth Amendment vis-a-vis searches and seizures,[25] the privilege against self-incrimination as guaranteed by the Fifth Amendment and Article 31 of the UCMJ,[26] and the Sixth Amendment right to counsel, for example, at a pretrial lineup. These constitutional protections are implemented not only by case law, which has concluded that they extend to servicemembers, but by the Military Rules of Evidence (MRE).[27]

---

[20] *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE, § 1-1 (8th ed. 2012).

[21] *See* UCMJ arts. 22–24 (2012) (designating those with power to convene general, special, and summary courts-martial); MCM, *supra* note 17, R.C.M. 504 (providing procedure for convening court-martial). The UCMJ provides that the President of the United States and a Service Secretary may convene a general court-martial. UCMJ art. 24(a), (2012).

[22] UCMJ art. 67(h) (2012); 28 U.S.C. § 1259 (2012). *See generally* Andrew Effron, *Supreme Court of Review of Decisions by the Court of Military Appeals: The Legislative Background*, ARMY LAW., Jan. 1985, at 59 (reviewing the Military Justice Act, which placed the Court of Military Appeals directly under the U.S. Supreme Court's review); Bennett Boskey & Eugene Grossman, *The Supreme Court's New Certiorari Jurisdiction Over Military Appeals*, 102 F.R.D. 329, 105 S. Ct. at XCII (1984) (discussing the Military Justice Act and the resulting certiorari jurisdiction the Supreme Court has over military appeals).

[23] MCM, *supra* note 17, R.C.M. 1205.

[24] UCMJ art. 37 (2012) (listing the requirement that before convening a general court-martial the convening authority must consider the advice of the staff judge advocate). This is generally referred to as the "pretrial advice."

[25] MCM, *supra* note 17, MIL. R. EVID. 311–21.

[26] UCMJ art. 31 (2012); MCM, *supra* note 17, MIL. R. EVID. 301–05.

[27] *See* MCM, *supra* note 17, MIL. R. EVID. 301 (noting the privilege against self-incrimination); *id.* MIL. R. EVID. 304 (listing the procedures for determining admissibility of accused's statements); *id.* MIL. R. EVID. 305 (stating the Article 31(b) warnings and

The commander has broad discretion in deciding how to dispose of misconduct. First, the commander may decide that under the circumstances simply counseling the servicemember or issuing a reprimand is sufficient.[28] Second, the commander may decide to begin administrative proceedings to discharge the servicemember.[29] Third, the commander may decide to impose nonjudicial punishment. Under this third option, which is intended to be used for "minor" offenses, the commander decides whether the servicemember is guilty and, if so, adjudges the punishment. Unless the servicemember is assigned to a vessel,[30] the servicemember may demand a court-martial in lieu of the nonjudicial punishment.[31] Finally, the commander may decide to initiate court-martial proceedings by formally preferring charges against the servicemember.[32]

If charges are preferred, commanders move them up the chain of command for recommendations and actions. If the commander believes that the charges are serious enough to warrant a general court-martial (roughly equivalent to a civilian felony trial), the commander orders an Article 32 investigation.[33] At that investigation the accused is entitled to be present, to have the assistance of counsel, to cross-examine witnesses, and to have witnesses produced. Although the Article 32 investigation is

---

right to counsel warnings); *id.* MIL. R. EVID. 311–16 (enumerating the rules addressing requirements for searches and seizures); and *id.* MIL. R. EVID. 321 (discussing the admissibility of eyewitness identifications).

[28] SCHLUETER, *supra* note 20, § 1-8, at 6 (listing various options available to military commander).

[29] *Id.* § 1-8(B), at 6.

[30] The term "vessel" is defined in 1 U.S.C. § 3 (2012). "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

[31] *See* UCMJ art. 15 (2012) (setting out procedures for nonjudicial punishment).

[32] *Id.* art. 30. Technically, any person subject to the UCMJ may prefer charges against another; however, in current practice, the preferral is almost always done by the servicemember's immediate commander, and only a commander may actually send charges to a court-martial. In the past, charges were apparently more often brought by an accuser who was not the commander. *See* Bradley J. Nicholson, *Courts-Martial in the Legion Army: American Military Law in the Early Republic, 1792-1796*, 144 MIL. L. REV. 77, 103–04 (1994) (recounting a case in which each of two officers accused the other of slights to his own honor, resulting in three courts-martial, to the consternation of their commanding general); LOUISE BARNETT, UNGENTLEMANLY ACTS 53 (2000) (stating that in the post-Civil War U.S. Army, filings of charges and countercharges were common and absorbed a great deal of the time and energy of commanding officers).

[33] UCMJ art. 32.

often equated with a civilian grand jury, in many ways it is far more protective of an accused's rights than a grand jury.[34]

If the decision is made to refer the charges to a court-martial, the convening authority—a commander authorized by the UCMJ to "convene" a court-martial—selects the court members, but does not select either the counsel or the military judge. Specific provisions in the UCMJ prohibit a convening authority from unlawfully influencing the participants in the court-martial or the outcome of the case.[35] In many cases, the accused and the convening authority engage in plea bargaining and execute a pretrial agreement.[36] Typically, those agreements require the accused to plead guilty in return for a guaranteed maximum sentence.[37]

---

[34] SCHLUETER, *supra* note 20, ch. 7 (discussing and analyzing features of Article 32 pretrial investigation).

[35] *See* UCMJ art. 37 (2012) (prohibiting unlawful command influence). Unlawful command influence is a perpetual threat to the military justice system and is the subject of considerable case law and commentary. *See generally* Major Martha Huntley Bower, *Unlawful Command Influence: Preserving the Delicate Balance*, 28 A.F. L. REV. 65 (1988) (discussing unlawful command influence); Anthony P. DeGiulio, *Command Control: Lawful Versus Unlawful Application*, 10 SAN DIEGO L. REV. 72 (1972) (examining "the disciplinary policies established by command directives, the prohibition against the accuser as convening authority, and the command control over court personnel, counsel, military judges, and case review"); Major Larry A. Gaydos & Major Michael Warren, *What Commanders Need to Know About Unlawful Command Control*, ARMY LAW., Oct. 1986, at 9 (presenting a methodology to "teach commanders about lawful and unlawful command and control"); Lieutenant James D. Harty, *Unlawful Command Influence and Modern Military Justice*, 36 NAVAL L. REV. 231 (1986) (discussing the corrective measures that must be taken when commanders "step over the line and undermine [the] right to a fair trial"); Joseph Hely, *Command Influence on Military Justice*, 15 ST. LOUIS U. L.J. 300 (1970) (noting inherent tendency for command influence); Lieutenant Richard C. Johnson, *Unlawful Command Influence: A Question of Balance*, THE JUDGE ADVOCATE GEN. (NAVY) J. 87, 88 (Mar.–Apr. 1965) (considering command control "and the problem arising therefrom"); Craig Schwender, *Who's Afraid of Command Influence; or Can the Court of Military Appeals Be This Wrong?*, ARMY LAW., Apr. 1992, at 19 (reviewing appellate cases involving instructional issues); Captain Samuel J. Rob, *From Treakle to Thomas: The Evolution of the Law of Unlawful Command Influence*, ARMY LAW., Nov. 1987, at 36 (assessing the impact of case law on the evolution of laws regarding unlawful command influence); James Thwing, *An Appearance of Evil*, ARMY LAW., Sept. 1983, at 13 (reviewing the problem with establishing limits over command influence); Luther C. West, *A History of Command Influence on the Military Judicial System*, 18 U.C.L.A. L. REV. 1 (1970) (discussing command influence).

[36] SCHLUETER, *supra* note 20, ch. 9.

[37] *Id.*

B. Trial Procedures

At trial, the accused is entitled to virtually the same procedural protections he would have in a state or federal criminal court—largely because Article 36(a) requires that the rules of procedure for military courts parallel the procedures used in federal courts. For example, a military accused has:

- The right to a speedy trial (under the Sixth Amendment and under a 120-day speedy trial provision in the Manual for Courts-Martial);[38]
- The right to extensive discovery, including a right to access witnesses and documents that is supposed to be equal to the prosecution's;[39]
- The right to production of evidence for examination and testing;[40]
- The right to request witnesses, including expert witnesses at Government expense;[41]
- The right to request the assistance of experts at Government expense in preparing for trial;[42]
- The right to confront witnesses;[43]
- The right to select either trial with members or trial by judge alone;[44]
- The right to request inclusion of enlisted members if the accused selects trial by members (effectively a jury trial);[45]
- The right to full voir dire of the court members and the right to exercise both challenges for cause and peremptory challenges;[46]
- The right to challenge the military judge for cause;[47] and

---

[38] UCMJ art. 10 (2012); MCM, *supra* note 17, R.C.M. 707 (speedy trial rule). The 120-day rule does not include delays requested by the defense; thus, a case may take much longer than 120 days if the defense requests delays.
[39] UCMJ art. 46 (2012); *see* MCM, *supra* note 17, R.C.M. 701 (setting out rules for discovery by both prosecution and defense counsel).
[40] MCM, *supra* note 17, R.C.M. 701(a)(2)(B).
[41] *Id.* R.C.M. 703(d)(B)(i) (right to request employment of expert witness at government expense).
[42] *Id.* R.C.M. 702.
[43] U.S. CONST. amend. VI.
[44] UCMJ art. 16 (2012).
[45] *Id.* art. 25.
[46] MCM, *supra* note 17, R.C.M. 912.
[47] *Id.* R.C.M. 902. For grounds for possible challenges to the military judge, see UCMJ art. 26 (2012); MCM, *supra* note 17, R.C.M. 502, 503 and 902.

- The right to file motions in limine, motions to suppress, and motions to dismiss the charges on a wide range of grounds (for example invoking constitutional privacy rights to dismiss rules or regulations governing personal conduct).[48]

If an accused enters a guilty plea to any charges, the military judge is required to conduct a detailed "providency" inquiry to insure that the accused is pleading guilty voluntarily and knowingly,[49] and that any pretrial agreement accurately reflects the intent of both the government and the accused[50] and is consistent with public policy.[51]

If the accused pleads not guilty, and the case is tried on the merits, the MRE apply during the trial.[52] Those rules generally mirror the Federal Rules of Evidence but include a number of rules not found there. For example, Section III of the Military Rules includes very specific guidance on searches and seizures (including evidence seized during military inspections), confessions, eyewitness identification, and interception of oral and wire communications. Section V contains fourteen detailed rules governing privileges. In particular, Military Rule of Evidence 505 provides very detailed guidance on disclosure of classified information and Rule 506 provides equally specific guidance of disclosure of government information that would be detrimental to the public interest.

Sentencing is a separate phase of the court-martial, though it typically occurs immediately after a finding of guilty.[53] The Military Rules of Evidence (unlike the federal rules) apply at the sentencing phase.[54] During sentencing, the accused is entitled to present witnesses and other evidence for the court's consideration, and to challenge the prosecution's evidence.[55]

---

[48] MCM, *supra* note 17, R.C.M. 905. *See generally* SCHLUETER, *supra* note 20, ch. 13.
[49] MCM, *supra* note 17, R.C.M. 910; *see* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (setting out requirements for what has become known as the *Care* inquiry).
[50] United States v. King, 3 M.J. 458 (C.M.A. 1977); United States v. Green, 1 M.J. 453 (C.M.A. 1976).
[51] MCM, *supra* note 17, R.C.M. 910 (listing provisions which may make a pretrial agreement impermissible).
[52] *See generally* STEPHEN A. SALTZBURG, LEE D. SCHINASI & DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL (7th ed. 2011).
[53] SCHLUETER, *supra* note 20, ch. 16 (discussing sentencing procedures at courts-martial).
[54] MCM, *supra* note 17, R.C.M. 1001; *id.* MIL. R. EVID. 1101.
[55] *Id.* R.C.M. 1001(c).

C. Post-Trial Procedures and Appellate Review

Post-trial procedures are extremely detailed. A copy of the record of trial is given to the accused, at no cost.[56] Depending on the level of punishment imposed, a formal legal review of the proceedings is prepared.[57] The post-trial review and recommendations are presented to the convening authority for consideration.[58] During that process the accused has the right to present formally clemency matters.[59] The convening authority has the discretion to approve or disapprove any findings of guilt and approve, suspend, or reduce the severity of the sentence.[60]

For certain courts-martial, appellate review is automatic in the one of the service Courts of Criminal Appeals.[61] Appellate counsel is provided free of charge.[62] Members of those courts are high-ranking military officers.[63] Those courts are given fact-finding powers[64] and have the authority to reassess a court-martial sentence.[65]

An accused may petition for further review by the U.S. Court of Appeals for the Armed Forces (CAAF), which sits in Washington, D.C.[66] That court is composed of five civilian judges, who are appointed by the President for fifteen-year terms.[67] The entire process from the initial trial to review by the CAAF can take several years.[68] During appellate review, it is not unusual for one of the appellate courts to reverse a court-martial conviction for violation of one of the many procedural rules summarized above.

---

[56] UCMJ art. 54(c) (2012); MCM, *supra* note 17, R.C.M. 1104.
[57] UCMJ art. 60(d) (2012); MCM, *supra* note 17, R.C.M. 1106.
[58] MCM, *supra* note 17, R.C.M. 1106.
[59] *Id.* R.C.M. 1105.
[60] UCMJ art. 60 (2012); MCM, *supra* note 17, R.C.M. 1107.
[61] UCMJ art. 66 (2012).
[62] *Id.* art. 70.
[63] *Id.* art. 66.
[64] MCM, *supra* note 17, R.C.M. 1203(b) discussion.
[65] *Id*.
[66] UCMJ art. 67 (2012).
[67] *Id*.
[68] *See generally* SCHLUETER, *supra* note 20, § 17-11, at 1150–60 (discussing post-trial and appellate delays).

In certain cases, a servicemember may seek certiorari review by the Supreme Court of a decision by the CAAF.[69]

D. Summary

For purposes of this article, it is important to note several key points from the foregoing discussion:

- First, the commander is deeply involved in, and is an integral part of, the military justice system.
- Second, lawyers and judges are heavily involved at all levels in the system.
- Third, a military accused is entitled to most, if not all, of the constitutional and statutory protections that are available to someone being tried in a civilian court.
- Fourth, the system provides a comprehensive right to appeal a conviction.

III. Analyzing the Military Justice Conundrum

For the last sixty years, many commentators have vilified the military justice system,[70] defended it,[71] and recommended reforms.[72] For

---

[69] UCMJ art. 67(h) (2012); 28 U.S.C. § 1259 (2012). *See generally* Effron, *supra* note 22, at 59 (overviewing the developments that led to the Military Justice Act).

[70] Michael I. Spak, *Military Justice: The Oxymoron of the 1980s*, 20 CAL. W. L. REV. 436 (1984); Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps*, 28 SW. U. LAW REV. 481 (1999).

[71] *See* Joseph W. Bishop, *The Case for Military Justice*, 62 MIL. L. REV. 215 (1973) (rejecting calls for abandonment of the military justice system); Major General William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed?*, 48 A.F.L. REV. 185 (2000) (reaffirming military justice); Louis B. Nichols, *The Justice of Military Justice*, 12 WM. & MARY L. REV. 482 (1971) (discussing need for separate system); Poydasheff & Suter, *supra* note 5 (attempting to dispel misconceptions of military justice).

[72] *See* Kevin J. Barry, *A Face Lift (And Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. REV. M.S.U.-D.C.L. 57 (describing the origin and development of military justice and the recommendations of the Cox Commission in 2001, and arguing that the current system contains marks of an older system, which was primarily disciplinary in nature); Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39 (2009) (proposing statutory reforms for military sentencing to remedy the problem of unreasonably light sentences for very serious crimes); Henry B. Rothblatt,

example, they have raised questions about the commander's role in selecting members to hear the case or about the role of the appellate courts in reviewing courts-martial convictions. Virtually every one of these commentators, whether addressing one part of the system or the system as a whole, has discussed the relationship of the concepts of justice and discipline.

Often the debate about the functions and purposes of a criminal justice system is cast in terms such as "liberal," conservative," "prosecution oriented," "defense oriented, "or "law and order."[73] Those terms, while effective as sound bites, are not particularly helpful in understanding the fundamentals of the debate. Something is missing. At one level they may accurately capture a person's viewpoint about criminal justice generally, or military justice specifically. But they do not define the criteria or values for measuring the purposes and effectiveness for a criminal justice system.

In examining the military criminal justice system, the terms "justice" and "discipline" are often used to describe the two competing ideals or values which inform the system. Although those terms, in themselves, are ambiguous and fluid, they are very familiar to those working within the system (commanders, lawyers, judges) and those responsible for its structure (Congress). These terms frame the military justice conundrum.

Surprisingly, the UCMJ itself is silent on the issue of identifying the purposes of the military justice system.[74] Thus, one is left to review secondary sources, such as the *MCM* and case law.

The following sections discuss three possible approaches to analyzing the conundrum. Part IV discusses the various thematic approaches that courts and commentators have used to address the relationship between justice and discipline. Part V focuses on the

---

Military Justice: The Need for Change, 12 WM. & MARY L. REV. 455 (1971) (recognizing and rejecting the often emotionally charged criticisms of the system, but offering constructive comments on proposals that would improve the military justice system); Schlueter, *supra* note 11 (exploring the criticisms often leveled at the military justice system and targeting a number of areas where the system seems most vulnerable, such as size and composition of the courts-martial, and offering suggested changes).

[73] *See, e.g.*, Madhavi McCall & Michael McCall, *Chief Justice William Rehnquist: His Law and Order Legacy and Impact on Criminal Justice*, 39 AKRON L. REV. 323 (2006) (discussing Chief Justice Rehnquist's impact on criminal justice).

[74] *See* Westmoreland & Prugh, *supra* note 12, at 40 (noting the UCMJ's failure to address what the military justice system should accomplish).

application of the crime control and due process models discussed in Professor Packer's law review article on that subject. Finally, Part VI suggests using a purpose and functions approach to resolving the conundrum.

IV. Thematic Approaches to the Conundrum

In addressing the military justice system, courts and commentators often fall into one of several themes in deciding the purposes and functions of the system. In many instances the themes overlap. Two or more may be reflected in the same quote, testimony, or court opinion. In other instances, the themes reflect diametrically opposed viewpoints.

The following discussion addresses those themes. Those who use them may recognize the conundrum, but do not always attempt to resolve the conflict between discipline and justice.

A. The "Deference" or "Hands-Off" Theme

The Supreme Court of United States has generally expressed an attitude of deference in addressing issues arising under the military justice system. Rarely does Court actually address the purpose or function of military justice. Instead, a continuing theme is recognition of the critical role that Congress plays in dealing with the competing values of military justice and military discipline.[75] From time to time the Court

---

[75] There has been considerable commentary on the subject of review of courts-martial convictions by federal courts, and the deference they usually pay to the military. *See generally* Barney F. Bilello, *Judicial Review and Soldiers' Rights: Is the Principle of Deference a Standard of Review?*, 17 HOFSTRA L. REV. 465 (Winter 1989) (providing review of the Supreme Court's role in reviewing constitutional challenges to various military regulations and procedures); Donald S. Burris & David Anthony Jones, *Civilian Courts and Courts-Martial—The Civilian Attorney's Perspective*, 10 AM. CRIM. L. REV. 139 (1971) (exploring remedies that servicemembers have used in attempting to secure relief in civilian courts from adverse court-martial determinations); John K. Chapman, *Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review*, 57 VAND. L. REV. 1387 (2004) (suggesting that courts should apply standard and scope of review of the state habeas as under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) to the military); Joshua E. Kastenberg, *Cause and Effect: The Origins and Impact of Justice William O. Douglas's Anti-Military Ideology from World War II to* O'Callahan v. Parker, 26 T.M. COOLEY L. REV. 163 (2009) (analyzing sources and effects of Justice Douglas's

says something about the nature of military justice, but for the most part it defers to Congress and the President in this area. In *Chappell v. Wallace*,[76] the Supreme Court commented:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the . . . control of a military force are essentially professional military judgments.

The deference theme does not really address the conundrum. It simply reflects the view that the military justice system is different, and

---

aversion to the legal construct of the military, particularly trial by court-martial); Major Stanley Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. L. REV. 3 (1980) (discussing the Supreme Court's recognition of controlling principle of "military necessity" in assessing the lawfulness of military regulations, orders, and laws); Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918–2004*, 65 MD. L. REV. 907 (2006) (cataloging the Supreme Court's tradition of deference to the military dating back to cases in World War I to the more recent Guantánamo Bay case decisions); John F. O'Connor, *Statistics and the Military Deference Doctrine: A Response to Professor Lichtman*, 66 MD. L. REV. 668 (2007) (responding to article written by Professor Steven B. Lichtman regarding the Military Deference Doctrine); John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000) (exploring historical application of the military deference doctrine); Richard Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5 (1985) (examining the relationship between civilian and military courts and proposing a standard of collateral review that would define and equalize the roles of the federal judiciary and the military courts); Edward Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 VA. L. REV. 483 (1969) (discussing historical basis for limited review and addressing those cases, particularly Supreme Court decisions where a servicemember's court-martial conviction has been reviewed); Scott Silliman, *The Supreme Court and Its Impact on the Court of Military Appeals*, 18 A.F. L. REV. 81 (1976) (commenting on the "philosophy" of the Supreme Court and the Court of Military Appeals); Thomas Strassburg, *Civilian Judicial Review of Military Criminal Justice*, 66 MIL. L. REV. 1 (1974) (discussing the role of civilian courts in reviewing military courts-martial); Captain Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 MIL. L. REV. 1 (1994) (suggesting legislation to provide meaningful review of whether constitutional error occurred at the court-martial); Donald T. Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 MIL. L. REV. 1 (1971) (examining traditional deference paid by the federal courts to unique military needs in the sensitive areas of due process and constitutional rights and proposing guidelines to determine when federal review of military proceedings is necessary).

[76] Chappell v. Wallace, 462 U.S. 296, 302 (1983) (citing Gilligan v. Morgan, 413 U.S. 1, 10 (1973)).

that civilian judges should not attempt to resolve the issue of whether the system is designed to promote discipline or justice.

B. The "Separatist" Theme

The military justice system is often described as a system separate and apart from civilian justice systems. For example, in *Parker v. Levy*,[77] the Court stated:

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or ready to fight wars should the occasion arise . . . " In *In re Grimley,* the Court observed: "An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." *More recently we noted that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian," and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . ."*[78]

In *United States v. Brown*,[79] the accused was charged with organizing a strike and encouraging others to do so during Desert Storm. In affirming his conviction, the court stated:

> This court has been sensitive to First and Sixth Amendments rights of servicemembers. But we are mindful that [j]udges are not given the task of running the Army . . . . The military constitutes a specialized

[77] 417 U.S. 733 (1974). In *Parker*, the Court held that Articles 133 and 134, UCMJ, were not unconstitutionally void for vagueness. *Id.*
[78] *Id.* at 749 (citations omitted) (emphasis added).
[79] 45 M.J. 389 (C.A.A.F. 1996).

> community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.[80]

In *United States v. Hawthorne*,[81] the court addressed the issue of whether a command-issued directive amounted to unlawful command influence on the accused's court-martial.[82] The Court of Military Appeals concluded that such influence had taken place and set aside the conviction. In his concurring opinion, Judge Latimer commented that "[i]n various areas involving disciplinary problems—of which judicial procedure is a necessary part—the convening authority has certain powers of his own, and unless he exceeds his authority he has a right to control his subordinates without interference by this Court . . . ."

And in *United States v. Borys*,[83] a case about the subject matter jurisdiction of courts-martial, the court recognized the need for military justice and that less favorable treatment of the defendant is necessary to an effective fighting force. The court stated that "the justification for such a system rests on the special needs of the military and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty."[84]

C. The "Primarily Discipline" Theme

From the beginnings of the United States' military justice system, courts[85] and most commentators[86] agreed that the system was designed to

---

[80] *Id.* at 393 (citing Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953)).
[81] 22 C.M.R. 83 (C.M.A. 1956).
[82] The Commanding General of the Fourth Army had issued a directive stating that repeat Regular Army offenders should be removed from the military. *Id.* at 87.
[83] 40 C.M.R. 259 (C.M.A. 1969).
[84] *Id.* at 260 (citing O'Callahan v. Parker, 395 U.S. 258, 265 (1969)). Under *O'Callahan*, and therefore under *Borys*, courts-martial did not have jurisdiction over "civil crimes committed in the United States against the civilian community when the local courts are open and functioning," unless the crimes were "military-connected." This "military connection" test has since been overturned. Solorio v. United States, 483 U.S. 435, 447–49 (1987).
[85] *See, e.g.*, O'Callahan v. Parker, 395 U.S. 258, 265 (1969). Justice Douglas noted that "a court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military

protect and promote military discipline. The "discipline" theme is generally reflected in court decisions addressing "purely military" crimes established by the UCMJ, such as absence without leave. But courts and commentators have also reflected this theme in discussing such issues as UCMJ jurisdiction over ex-servicemembers[87] and the authority of a commander to impose nonjudicial punishment.[88]

In 1776, Congress directed John Adams to revise the 1775 Articles of War. In addressing the new articles and the need for discipline, Adams wrote to his wife, Abigail:

> If I were an officer, I am convinced that I should be the most decisive disciplinarian in the army . . . . Discipline in an army is like the laws in a civil society. There can be no liberty in a commonwealth where the laws are not revered and most sacredly observed, nor can happiness

---

discipline is preserved." *Id*. He cited an article by Glasser, *Justice and Captain Levy*, 12 COLUM. F. 46, 49 (1969), who had asserted that "none of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice." United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328, 333 (C.M.A. 1988) (pointing out that a major objective of the military justice system is to obtain obedience by subordinates to orders of their superiors).

[86] *See, e.g.*, Joseph W. Bishop, *The Case for Military Justice*, 62 MIL. L. REV. 215 (1973) (rejecting calls for abandonment of the military justice system and noting the need for discipline); Stephen J. Carrol, *A Proposal for Streamlining the Military Justice System*, 36 NAVAL L. REV. 187, 188 (1986) (noting that prompt but fair discipline is a goal of any criminal justice system); Ferris, *supra* note 8, at 445 (noting that "disciplinary function of the court-martial cannot be overstated"). *Cf.* R. Rivkin, GI RIGHTS AND ARMY JUSTICE: THE SERVICEMAN'S GUIDE TO MILITARY LIFE AND LAW 336–38 (1970) (indicating that studies showed that in a combat setting the fear of punishment is not a significant motivation).

[87] *See, e.g.*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955) ("We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses . . . . [T]rial of soldiers to maintain discipline is merely incidental to an army's primary fighting function.").

[88] For example, in United States v. Gammons, 51 M.J. 169 (C.A.A.F.1999), the court addressed the question of whether trying a servicemember for a minor offense for which the servicemember had already received nonjudicial punishment under Article 15, UCMJ, violated the double jeopardy clause. The court held that that clause did not apply because Article 15 proceedings are not criminal proceedings—they are disciplinary in nature. *Id*. at 173–74. *See also* Middendorf v. Henry, 425 U.S. 25, 31–31 (1976) (pointing out that nonjudicial punishment is an administrative method of dealing with minor offenses).

> or safety in an army for a single hour when discipline is not observed.[89]

General Sherman's oft-quoted statement in a 1879 letter addressed the issue of the role of the military legal system:

> The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. *The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation*.
>
> These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by even grafting on our code their deductions from civil practice.[90]

Following World War I, there was a great debate among members of the armed forces and commentators about the role of military justice and the unjust treatment that servicemembers received under the system.[91] In response to calls for changes in the military justice system, Professor John Henry Wigmore wrote:

---

[89] PAGE SMITH, JOHN ADAMS 289 (1962), *quoted in* JONATHAN LURIE, ARMING MILITARY JUSTICE 6 (1992).

[90] Letter to General W. S. Hancock, President of Military Serv. Inst., from W.T. Sherman (Dec. 9, 1879), *reprinted in* GENERAL WILLIAM T. SHERMAN, MILITARY LAW 130 (1880) (reprinted from The Journal of the Military Service Institution of the United States); Frederick Bernays Weiner quoted this language in his testimony before the House of Representatives, Committee on Armed Services, March 16, 1949. *Hearings on H.R. 2498 Before a Spec. Subcomn. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. 780 (1949).

[91] Schlueter, *supra* note 2, at 157–58; *see also* JOHN M. LINDLEY, "A SOLDIER IS ALSO A CITIZEN": THE CONTROVERSY OVER MILITARY JUSTICE, 1917–1920 (1990); MAJOR GENERAL ENOCH H. CROWDER, MILITARY JUSTICE DURING THE WAR (1919), *available at* www.loc.gov/rr/frd/Military_Law/MJ_during_war.html.

> The military system can say this for itself: It *knows what it wants;* and it systematically *goes in and gets it.* Civilian criminal justice does not even know what it wants; much less does it resolutely go it and get anything. *Military justice wants discipline—that is, action in obedience to regulations and orders; this being absolutely necessary for prompt, competent, and decisive handling of masses of men.* The court-martial system supplies the sanction of this discipline. It takes on the features of Justice because it must naturally perform the process of inquiring in a particular case, what was the regulation or order, and whether it was in fact obeyed. *But its object is discipline*.[92]

In its decision in *O'Callahan v. Parker*,[93] the Supreme Court established the service connection requirement for court-martial jurisdiction over offenses committed by servicemembers.[94] The Court addressed the criticisms of military justice and wrote that "[n]one of the travesties of justice perpetrated under the UCMJ is really very surprising, for *military law has always been and continues to be primarily an instrument of discipline, not justice*."[95]

More recently, the three authors of a text on military justice noted in their teachers' manual for that text that:

> Chapter 1 attempts to convey *the raison d'être for military law: the need to control the violence of war and impose discipline in the ranks*. Its central theme is the tension between armed conflict and the rule of law, a

---

[92] John H. Wigmore, *Lessons from Military Justice*, 4 J. AM. JUD. SOC'Y 151 (1921) (emphasis added), *reprinted in* Joseph W. Bishop, *The Case for Military Justice*, 62 MIL. L. REV. 215, 218 (1973). Regarding this quote, Professor Bishop observed that the clarity of purpose in the military justice system "compared favorably to the uncertainty of the civilian penal system as to whether it wants retribution, or prevention, or deterrence." *Id*.

[93] 395 U.S. 258 (1969).

[94] After a historical review, the court came to this conclusion so that the Fifth Amendment exception to the right of grand jury indictment ("except in cases arising in the land or naval forces . . . when in actual service . . .") would not "be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers." *Id.* at 272–73.

[95] *Id.* at 266 (emphasis added) (quoting Glasser, *Justice and Captain Levy*, 12 COLUM. F. 46, 49 (1969)).

> tension that the substantive law and procedural rules of military law attempt to resolve.[96]

In context, some of the foregoing statements reflecting the discipline theme were made at times when there was a perceived threat that the military justice system would be revised to more closely resemble, or be replaced by, a civilian justice system.[97]

D. The "Justice-Based" Theme

In stark contrast to the "discipline" theme is the "justice-based" theme. Some form of the "justice" theme has appeared in one form or another for decades—at least since the early Twentieth Century when, following World War I, there were concerted efforts (not always successful) to include more procedural protections for servicemembers.[98] In the 1980s the Department of Defense took bold steps to engraft the Federal Rules of Criminal Procedure and the Federal Rules of Evidence into military justice to the greatest extent possible.[99] Those efforts

---

[96] EUGENE R. FIDELL, ELIZABETH L. HILLMAN & DWIGHT H. SULLIVAN, MILITARY JUSTICE CASES AND MATERIALS, TEACHERS' MANUAL 1 (2d ed. 2012) (emphasis added). *See* Colonel (Retired) Henry G. Green, *Military Justice and Discipline: The Role of Punishment in the Military*, THE REPORTER, June 1997, at 9 (observing that "discipline" is the *sine qua non* of an effective fighting force, the author presents a wide range of thoughts and perspectives on the role of military justice and punishment); Dennis Hunt, *Trimming Military Jurisdiction: An Unrealistic Solution to Reforming Military Justice,* 63 CRIM. L.C AND P.S. 23 (1972) (arguing that discipline is the only way to preserve law and order and expanded jurisdiction of courts-martial is the only way to preserve discipline).

[97] *See generally* Lindsy Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Justice Systems*, 16 DUKE J. COMP. & INT'L L. 169 (2006) (providing an overview of the role of the commander in the military justice system); Spak, *supra* note 70 (noting that military discipline does not require a broad military justice system that encroaches upon the constitutional rights of military personnel); Westmoreland & Prugh, *supra* note 12 (observing that the UCMJ is "too slow, too cumbersome, too uncertain, indecisive, and lacking in power to reinforce accomplishment of the military mission, to deter misconduct, or even to rehabilitate").

[98] In what is often referred to as the "Ansell-Crowder" dispute, General Crowder took a position that emphasized the need for a strong system that focused on the discipline component of military justice. Major Terry W. Brown*, The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967); LINDLEY, *supra* note 92, *passim*; CROWDER, *supra* note 91, *passim.*

[99] *See* George R. Smawley, *In Pursuit of Justice, A Life of Law and Public Service: United States District Court Judge and Brigadier General (Retired) Wayne E. Alley (U.S.*

resulted in the adoption of the Military Rules of Evidence in 1980[100] and four years later, the 1984 *MCM*.

In the 1984 *MCM* the drafters added a Preamble, which addressed in part the nature and purpose of military law.

> 3. Nature and purpose of military law.
>
> * * *
>
> *The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States*.[101]

The fact that this language first addressed the purpose of promoting justice and then second, the purpose of "maintaining good order and discipline" signaled a shift, apparently resolving the military justice conundrum in favor of the "justice" component.

Commentators citing the preamble have stated that the military justice system is now "justice based." For example, in their treatise on court-martial practice, Colonel Gilligan and Professor Lederer have stated that:

> *Insofar as our fundamental goal is concerned, it is clear that military criminal law in the United States is justice-based*. This is not, however, incompatible with discipline. Congress has, at least implicitly, determined that discipline within the American fighting force requires that personnel believe that justice will be done. In short, the United States uses a justice-oriented system to ensure discipline; in our case, justice is essential to discipline.[102]

Army 1952–1954, 1959–1981), 208 MIL. L. REV. 213 (2011) (recounting General Alley's role in the drafting of the Military Rules of Evidence (MRE)).

[100] *See* Fredric I. Lederer, *The Military Rules Of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5 (1990) (discussing origins of MRE).

[101] MCM, *supra* note 17, pmbl. (emphasis added).

[102] 1 FRANCIS A. GILLIGAN & FREDRIC LEDERER, COURT MARTIAL PROCEDURE § 1-20.00, at 2 (1991) (emphasis added).

More recently, the Judge Advocate General of the Air Force, Lieutenant General Harding, addressed the question of instilling good order and discipline and its important role in creating an effective combat power. He wrote:

> **Due process enhances discipline**. *America's mothers and fathers send their sons and daughters to us to join our all-volunteer force because they believe their children will be fairly treated.* They believe and expect that we will adhere to due process in judging their children, should they violate our code; otherwise, they would not have sent them to us. As a result, when we adhere to due process, we send a message to those parents, parents of other prospective Airmen and all Airmen everywhere that they can trust the Air Force to treat its Airmen fairly and to protect and promote justice within our service. By protecting our recruiting and retention pipelines, due process safeguards our combat effectiveness. Conversely, when we permit due process to suffer, we discourage enlistment of America's best and brightest; we demoralize and discourage the retention of currently-serving Airmen, who worry they will likewise be treated unfairly, and as a consequence, we degrade military discipline and combat effectiveness.[103]

This view seems to take the justice-based theme to a new level. While it usually accepted that the lack of due process in the military justice system can adversely affect morale,[104] it is quite another thing, and certainly more difficult to prove, that due process actually enhances discipline and is a motivation for individuals to join the armed forces.

It would be incorrect to assume that the conundrum can be resolved by simply adopting either the discipline theme approach or the justice

---

[103] Lieutenant General Richard C. Harding, *A Revival in Military Justice*, REPORTER, Summer 2010, at 4 (bold heading in original, emphasis added).

[104] *See, e.g.*, Timothy W. Murphy, *A Defense of the Role of the Convening Authority: The Integration of Justice and Discipline*, 28 No. 3 THE REPORTER 3 (2001) (stating that if troops perceive that courts-martial are arbitrary and unjust, disciplinary effect will be destroyed); Westmoreland & Prugh, *supra* note 12, at 66–67 (noting results of survey of officers attending the Army War College).

theme approach.[105] Many of the following themes reflect an attempt to reconcile the two main components.

E. The "Competing Interests" Theme

A number of themes attempt to consider both justice and discipline together. The first of these is the "competing interests" theme. The accused in *United States v. Perry*[106] was convicted of violating a lawful general regulation. The accused argued that the regulation had been promulgated by the base commander who had then convened the court-martial to try the accused. The Air Force Board of Review concluded that the convening authority's interest in the case was only official and stated that:

> Actually the question is more basic than appears for it concerns the official duties of a commander as well as the right of an accused to be tried by an impartial court. There is no question but that a commander is required by law, regulation or custom to issue such orders and publish such regulations or directives as may be necessary for the proper administration of his command. *His official duties require that he not only maintain discipline but also compel compliance with such official orders, regulations and/or directives he has found necessary, in his sound discretion, to promulgate. On the other hand there is no question but that an accused is entitled to a fair trial by an impartial court.*[107]

The court concluded that the convening authority's interest in the case was official rather than personal, and as such did not render the trial unfair.[108] But in using this language, it implicitly recognized that the

---

[105] *See, e.g.*, Ferris, *supra* note 8, at 446 (stating that historically, the "primary purpose of the courts martial [sic] *was* to regulate the military conduct of servicemen," signaling that under the current military justice system the primary function is provide justice) (emphasis added). Any implication in the justice theme that the military justice system is no longer concerned with governing the conduct or misconduct of servicemembers is not true. As noted in the discussion at Part V.E.1.d., above, elements of the current military justice system clearly represent the need for a commander to be able to deal with servicemembers who engage in misconduct.
[106] 12 C.M.R. 894 (A.F.B.R. 1953).
[107] *Id.* at 896 (emphasis added).
[108] *Id.* at 897.

needs of justice (having the case tried by an impartial tribunal) were in competition with the needs of discipline (having the commander both issue orders and send Airmen to trial for violating those orders).

F. The "Inseparable" Theme

Another thematic approach to the conundrum is to view the discipline and justice components as interrelated, integrated, or inseparable.

In the Powell Report to the Secretary of the Army in 1960 on the status of the Uniform Code of Military Justice, the Committee (composed of distinguished high-ranking Army officers) noted:

> Discipline—a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed—is not a characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity. *In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable . . .*
>
> Once a case is before a court-martial it should be realized by all concerned that the sole concern is to accomplish justice under the law. This does not mean justice as determined by the commander referring a case or by anyone not duly constituted to fulfill a judicial role. It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.[109]

[109] AD HOC COMMITTEE TO STUDY THE UNIFORM CODE OF MILITARY JUSTICE, REPORT TO HON. WILLIAM R. BRUCKER, SECRETARY OF THE ARMY 11–12 (18 Jan. 1960) (emphasis added), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Powell_report.pdf.

In *United States v. Littrice*,[110] the Court of Military Appeals addressed the question of unlawful command influence on the accused's court-martial. The court addressed Congress's concerns about that issue in adopting the UCMJ. Writing for the court, Judge Latimer stated:

> *It was generally recognized that military justice and military discipline were essentially interwoven.* Nevertheless, a sharp conflict arose between those who believed the maintenance of military discipline with the armed forces required that commanding officers control the courts-martial proceedings and those who believed that unless control of the judicial machinery was taken away from the commanders military justice would always be a mockery.[111]

G. The "Two Sides of the Same Coin" Theme

Related to the "inseparable" theme, discussed *supra*, is the theme that views the justice and discipline components as different sides of the same coin. In his article on the role of the Court of Military Appeals in the 1970's, Captain John Cooke wrote:

> The precept [of the relationship of justice and discipline] has generally been reflected in the tendency of the court to distinguish and separate functions exercised by the commander and other line personnel. The commander is permitted to retain his disciplinary functions, but his functions in administering justice (*i.e.* judicial functions) have been taken from him. This dichotomization has been effectuated in other ways as well, as the court has attempted to guard against what it perceives as undue infringement of the integrity of the administration of justice by disciplinary activities and attitudes. *This tendency deserves close scrutiny, for it must be recognized that justice and discipline are properly but two sides of the same coin; to the extent that the court*

[110] 13 C.M.R. 43 (C.M.A. 1953).
[111] *Id.* at 47 (emphasis added).

> *separates them unnecessarily, it risks devaluing the whole system.*[112]

However, Generals Westmoreland and Prugh, in a later article, presented a different view of this theme:

> *It is misleading to regard justice and discipline as different sides of the same coin,* if the statement is to imply that the two concepts are opposites or complementary; that discipline must be balanced by justice, and vice versa. Discipline is but one tool for a commander, albeit an important, even essential, one; its essential focus addresses mission accomplishment. Justice encompasses fairness to the individual who may be accused of military wrongdoing and prosecution of such an accused only in accordance with the law. *The two ideas are quite disparate—if one is an apple, the other is an orange.*
>
> It is submitted that the other side of the coin from justice should more accurately be called *military exigency*. This is very different from *discipline,* which envisions conduct responsive to established rules.[113]

H. The "Middle Ground" Theme

In 1946, the Secretary of War appointed a War Department Advisory Committee on Military Justice, whose members were nominated by the American Bar Association. A "middle ground" theme appears in the report of this committee, sometimes referred to as the Vanderbilt Report after the chair of the committee, Arthur Vanderbilt. The Committee was formed to study the extant system of military justice and to make recommendations for changes. In its report, the Committee stated:

> A high military commander pressed by the awful responsibilities of his position and the need for speedy

---

[112] Captain John S. Cooke, *The United States Court of Military Appeals, 1975–1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43, 52 (Spring 1977) (emphasis added).
[113] Westmoreland & Prugh, *supra* note 12, at 48 (emphasis added).

> action has no sympathy with legal obstructions and delays, and is prone to regard the courts-martial primarily as instruments for enforcing discipline by instilling fear and inflicting punishment, and he does not always perceive that the more closely he can adhere to civilian standards of justice, the more likely he will be to maintain the respect and the morale of troops recently drawn from the body of the people
>
> Some of the critics of the Army system err on the other side and demand the meticulous preservation of the safeguards of the civil courts in the administration of justice in the courts of the Army. We reject this view for we think there is a middle ground between the viewpoint of the lawyer and the viewpoint of the general.[114]

---

[114] REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 5 (13 Dec. 1946) [hereinafter VANDERBILT REPORT] (emphasis added), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/report-war-dept-advisory-committee.pdf.. The Report, commonly referred to as the Vanderbilt Report, was submitted by an Advisory Committee appointed by Edward F. Witsell, Sec'y of War, War Dep't Memorandum No. 25–46 (25 Mar. 1946). Arthur T. Vanderbilt chaired the committee (later he became Chief Justice of the New Jersey Supreme Court) which consisted of members and judges of the civilian bar, from various states. The appointing memorandum stated:

> The function of the Committee will be to study the administration of military justice within the Army and the Army's courts-martial system, and to make recommendations to the Secretary of War as to changes in existing laws, regulations, and practices which the Committee considers necessary or appropriate to improve the administration of military justice in the Army.

Id. at 2. The Advisory Committee heard testimony from numerous senior military officials at hearings conducted in Washington, D.C., heard additional testimony at regional public hearings and considered hundreds of letters, the results of a questionnaire sent to officers and enlisted men, and statistical and result studies prepared by the Judge Advocate General's Department. *Id.* at 5.

Attachments to the Committee's report include answers by respondents to a number of questions posed by the Committee. The first question focused on "The purposes of the court-martial system: maintenance of discipline or administration of justice?" The Committee reported that "Fifty-two [general officers] indicated that the purpose was a combination of justice and discipline. Only four listed discipline as the primary purpose, and six emphasized justice." *Id.* at 1 (Compilation of Answers), located at http://www.loc.gov/rr/frd/Military_Law/pdf/Vanderbilt-B_Outline.pdf. For results from a similar survey taken at the Army War College in 1971–72. *See* Colonel Joseph N. Tenhet & Colonel Robert B. Clarke, *Attitudes of US Army War College Students Toward the Administration of Military Justice*, 59 MIL. L. REV. 27 (1973).

The Advisory Committee was one of several bodies considering changes to the military justice system. In 1948, Secretary of Defense James Forrestal appointed a special committee, chaired by Professor Edmund Morgan, to consider drafting a uniform code of justice that would apply to all of the services.[115]

Professor Morgan's subsequent testimony regarding the proposed uniform code presented yet another theme—"the fair and delicate balance" theme, *infra*.

I. The "Fair and Delicate Balance" Theme

In his statement to Congress in 1949, concerning the proposed Uniform Code of Military Justice, Professor Edmund Morgan[116] stated:

> We are convinced that a Code of Military Justice cannot ignore the military circumstances under which it must

---

Similarly, the Committee received responses to the same question from judge advocates (combat, regular Army judge advocates, Board of Review judge advocates, and staff judge advocates). The Committee reported their answers to that question in chart form. *See* http://www.loc.gov/rr/frd/Military_Law/pdf/Vanderbilt-B_Outline.pdf. In contrast to the responses from the general officers, thirty-five judge advocates indicated that the purpose of the court-martial system was to maintain discipline and administer justice; ten judge advocates listed discipline as the primary purpose and six listed justice as the primary purpose. Interestingly, of the six listing justice, three were on the Army Board of Review.

In its report the Committee also stated,

> We desire to make it clear at the outset that our findings are not based on the testimony of convicted men or their friends. Complaints from that source were considered by the committee headed by Justice Owen J. Roberts who examined court-martial sentences for severity after the war and many instances reduced them.

VANDERBILT REPORT, *supra*, at 2.

[115] The appointment of this committee resulted from correspondence from Senator Chan Gurney, Chairman of the Senate Armed Services Committee, to Secretary Forrestal. Senator Gurney had written that his Committee was considering a number of proposals for changing the military justice system but that there had been no proposal to consider and recommend a uniform system of military justice. The correspondence between Senator Gurney and Secretary Forrestal can be viewed at http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-I_correspondence.pdf.

[116] In 1948, Secretary of Defense James Forrestal appointed Professor Morgan to serve as the chair of a special committee to draft a uniform code of justice that would apply to all of the armed services.

> operate but we were equally determined that it must be designated to administer justice.
>
> We therefore, aimed at providing functions for the command and appropriate procedures for the administration of justice. *We have done our best to strike a fair balance, and believe that we have given appropriate recognition of each factor*.[117]

Five years later the Court of Military Appeals recognized this theme in *United States v. Littrice*,[118] a case addressing the issue of command influence. The court stated:

> Thus, confronted with the necessity of maintaining a delicate balance between justice and discipline, Congress liberalized the military judicial system but also permitted commanding officers to retain many of the powers held by them under prior laws. While it struck a compromise, Congress expressed an intent to free courts-martial members from any improper and undue influence by commanders which might affect an honest and conscientious consideration of the guilt or innocence of an accused. Both the Code and the Manual announce the same caveat. . . .
> On the command side of the ledger, we find some provisions which indicate that [the commander] is not to be too tightly fettered by the new Code.
>
> * * *
>
> *The same delicate balance which beset Congress now confronts us. Justice can be dispensed and discipline maintained if one is not permitted to overwhelm the other.* Both should be given recognition and both must be governed and guided by the necessities peculiar to the military service.[119]

---

[117] INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE 606 (2000 Reprint, Hein).
[118] 13 C.M.R. 43 (C.M.A. 1953).
[119] *Id.* at 47–48 (emphasis added). *See also* United States v. Coates, 25 C.M.R. 559, 564 (A.B.R. 1958) (quoting this language from *Littrice*).

J. The "Emasculation" Theme

Regardless of how one views the military justice conundrum, it is clear that lawyers have been deeply involved in addressing military justice issues.[120] In a letter to General W.S. Hancock, in 1879, General William T. Sherman addressed the role of lawyers in military justice. He stated:

> I agree that it will be a grave error if by negligence we permit the military law to become *emasculated* by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.[121]

General Sherman, a lawyer himself, continued by stating that the needs of the military are unique and that civil justice systems standards and procedures can threaten the military.[122] This theme, while colorful, may be still be shared by some who view lawyers with skepticism—especially by those who are concerned that the role of the commander has been replaced by armed forces lawyers and judges.

K. The "Un-American" Theme

As noted above, after World War I there was heated debate about the function and role of military justice in what has become known as the "Ansell-Crowder" dispute.[123] The controversy centered in part, on the question of whether courts-martial were actually judicial bodies or

---

[120] Brigadier General (Retired) John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY LAW, Mar. 2000, at 1, 1 (noting participation of judge advocates in development of military justice system).

[121] Letter to General W. S. Hancock, *supra* note 90; *See also* THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 12 (1975) [hereinafter JAGC HISTORY].

[122] *Id*. Professor Turley notes that Sherman's concern was that the military "should resist external influences, particularly legal values," and emphasized the "cultural necessities of the military community in contrast to those of the larger republic." Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 97 (2002).

[123] *See* Frederick B. Weiner, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1989) (recounting what has been labeled the "Crowder-Ansell" dispute concerning court-martial practices during World War I). *See also* Major Terry W. Brown*, The Crowder-Ansell Dispute: The Emergence of General Samuel T Ansell,* 35 MIL. L. REV. 1 (1967).

instead agencies of the Executive Branch. The latter position was taken by Colonel Winthrop in his treatise[124] and by General Crowder. In sharp contrast, General Ansell[125] took the position that courts-martial were judicial in nature and that it was important to create an appellate court to review courts-martial convictions to insure that abuses did not occur at the trial level. In a 1919 law review article General Ansell wrote that:

> I contend—and I have gratifying evidence of support not only from the public generally but from the profession—*that the existing system of Military Justice is un-American*, having come to us by inheritance and rather witless adoption out of a system of government which we regard as fundamentally intolerable; that it is archaic, belonging as it does to an age when armies were but bodies of armed retainers and bands of mercenaries; that it is a system arising out of and regulated by the mere power of Military Command rather than Law; and that it has ever resulted, as it must ever result, in such injustice as to crush the spirit of the individual subjected to it, shock the public conscience and alienate public esteem and affection from the Army that insists on maintaining it.[126]

---

[124] WINTHROP, *supra* note 14, at 48. Colonel Winthrop stated that courts-martial did not belong to the judicial department and were thus simply "instrumentalities of the executive power."

[125] At the time of the internal dispute between the two generals, Ansell was informally acting as the Judge Advocate General, in the absence of Crowder, the Judge Advocate General, who had been assigned the task of running the Selective Service System. LURIE, *supra* note 89, at 48.

[126] Samuel Ansell, *Military Justice, 5* CORNELL L.Q. 1 (1919) (emphasis added). *See also* Samuel Ansell, *Some Reforms in Our System of Military Justice*, 32 YALE L.J. 146 (1922) (discussing proposed amendments to the Articles of War). In his Yale Law Journal article, General Ansell cited the preface to the proposed bill:

> The primary principle of this Bill is to establish Military Justice, and regulate it by Law rather than by mere Military Command; or, stating it differently, to supersede personal Military Power over Military Justice by Public Law, to be effective for this purpose, must be law in its primary sense—a rule established beyond the control of the Department and the Army which are to administer it. . . .

Id. at 151 (citing *Senate Committee Print of S. 64, 66th Congress, 1st Session* 2 *et seq.* (1919)).

General Ansell's ideas about creating appellate courts to review courts-martial did not come to fruition until almost three decades later,[127] with the adoption of the UCMJ.[128]

L. The "Justice and Discipline Are Not Opposites" Theme

In his testimony before Congress in 1949 on the proposed UCMJ, Colonel Frederick Bernays Wiener testified as follows:

> Colonel Weiner. *It is sometimes asked what is the object of military law. It is generally put as a personal question. Do you consider that the object of military law is to maintain discipline or to maintain justice? My answer always is that those are not opposites.* You cannot maintain discipline by administering justice. The standards of guilt and innocence in military law are not different from civil law. Possibly there is a little more relaxation on what is harmless error than in the civil courts. But the real difference is the object and the amount of punishment. The object of the civilian criminal court generally is to reform and rehabilitate the offenders. The object of the military law is not vindictiveness. It is to act as a deterrent so that when the first man steps out of line and gets a hard sentence it will deter others.
> Mr. Rivers. In that connection there is no use for us to confuse the basic objective of keeping morale with the ultimate disposition of justice.
>
> Colonel Wiener. Precisely.

---

[127] In his book, *Arming Military Justice: The Origins of the United States Court of Military Appeals*, *1775–1950*, Jonathan Lurie notes that in contrast to General Crowder, who was "reflective, somewhat hesitant in manner, and comfortable in a bureaucratic environment," General Ansell was "much more aggressive in manner," "impatient to get results," and "believed very deeply in his causes." That might explain, at least in part, his strident and overreaching comments about military justice. JONATHAN LURIE, ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775–1950, at 50–51 (1992).

[128] Ironically, Professor Edmund Morgan (who was then teaching at Harvard) had served as an Army Judge Advocate under General Ansell and three decades later chaired the committee that drafted the new uniform code, which created the Court of Military Appeals—one of life's ironies.

> Mr. Rivers. *And they need not be opposites*.[129]

Colonel Weiner continued by testifying that the purpose of military justice was to act as a deterrent to other servicemembers:

> Colonel Wiener. But the military justice has to be swift and its punishment will frequently be more severe. There is always an irreducible number in any group, particularly in a large number raised by selective service, who can only be ruled by fear and compulsion. If you have a system of military justice which minimizes a possibility that a guilty man can "beat the rap," then you have an effective system of military justice. The more loopholes you inject the more the man feels, "Oh, well, I can get a lawyer; I can appeal it on up; I can get off." To that extent you impair the object of military law. I am not suggesting that anybody be sent to the guardhouse on general principles or anything like that. You do have the irreducible minimum that can only be ruled by fear. You do have the necessity for swift and sure punishment, and you do have to have a feeling in the sense of the individual, "Well, maybe I had better not, because dire punishment will follow.[130]

M. The "Justice and Discipline Are Not Synonymous" Theme

In contrast to the "not opposites" theme, *supra*, is the opinion of the Coast Guard Board of Review in *United States v. McCarty*.[131] In that case, the board addressed the aims of punishment in the military criminal justice system in a desertion case. The court noted that

> [s]ociety, whether military or civilian, still insists on punishment for crimes and offenses. In the military where approximately 75% of all offenses involve unauthorized absence (which is no crime at all in civil

---

[129] INDEX AND LEGISLATIVE HISTORY, UNIFORM CODE OF MILITARY JUSTICE 780 (2000 Reprint, Hein) (emphasis added).
[130] *Id.* at 781. For a discussion about the role of deterrence in sentencing, see Part V.E.1.h, *infra*.
[131] 29 C.M.R. 757 (C.G.B.R. 1960).

> life) punishment is thought necessary in the interest of military discipline. Even so, the Navy long since recognized that *"Discipline and punishment are not always synonymous* . . . . The question of punishment can be considered only when the cause of the offense has been correctly determined. Severity of punishment alone has never provided an answer to penal and disciplinary problems."[132]

N. The "Oxymoron" Theme

In his law review article objecting to any expansion of court-martial jurisdiction over servicemembers, Professor Spak wrote:

> Under the Uniform Code of Military Justice (UCMJ) military personnel are denied the right to grand jury indictment, trial by impartial jury, and bail. In addition, military personnel are denied the right to independent counsel. There is no doubt that military personnel enjoy less constitutional rights than their civilian counterparts. It is this author's aim to extend all of the constitutional rights traditionally enjoyed by United States citizens to military personnel absent compelling justification. Therefore, it is contended that court-martial jurisdiction should be limited to those statutory offenses that *require* military status and therefore should apply exclusively to members of the armed forces. *In sum, it is the author's thesis that military justice is the oxymoron of the 1980's*.[133]

---

[132] *Id.* at 762 (quoting NAVAL JUSTICE 48, 51 (1949)) (emphasis added).

[133] Spak, *supra* note 70, at 437–38 (footnotes omitted) (emphasis added). He also stated:

> An additional reason to restrict court-martial jurisdiction is found in the very nature of procedural military justice. Although not all aspects of military criminal procedure are narrower than their civilian counterpart, on balance, *Military Criminal Procedure is so ineffective in protecting the constitutional rights of military personnel, that it passes the point of being obscene.*

Id. at 457 (emphasis added). To support this proposition, Professor Spak cited L. WEST, THEY CALL IT JUSTICE (1977) and R. SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS

O. The "Hybrid" Theme

One commentator has recommended that the military justice system could be streamlined by, for example, eliminating the right of a servicemember to refuse nonjudicial punishment and by addressing delays in the Article 32 investigation. In addressing those issues, he noted:

> Throughout history, members of the military have been subjected to a separate criminal justice system oriented toward reinforcement of proper behavior and punishment of misbehavior. Initially, commanding officers had complete control over the courts-martial process. A formal criminal court system consisting of trial and appellate judges did not exist. Over the course of United States history, civilian notions of criminal justice and criminal trial practice have been fused into the court-martial system. Following World War II, many of these notions were statutorily imposed on the armed forces. *Today the court-martial is a hybrid criminal trial with remnants of the earlier command-controlled model*.[134]

The hybrid theme, at least as it is presented in the quote, assumes that the role of the commander is no longer what it once was. That is not entirely true, as noted in Part V.E.1.d, below.

P. The "Legitimation" Theme

One writer—in focusing on the legitimacy of the military justice system—made the following observation:

> *Legitimacy is an essential feature of an effective system of criminal justice. In order to maintain authority over those it regulates, a criminal justice system must remain legitimate in the eyes of those people.* When people

---

MILITARY MUSIC IS TO MUSIC (1971), which in the '70s and '80s were often cited by critics of the military justice system.

[134] Stephen J. Carrol, *A Proposal for Streamlining the Military Justice System*, 36 NAVAL L. REV. 187, 187–88 (1986) (emphasis added).

> perceive the criminal process as fair and legitimate, they are more likely to accept its results as accurate and are more likely to obey the substantive laws that the system enforces. Moreover, such people are more likely to cooperate with police and prosecutors, who necessarily rely on the trust of the community to carry out their roles in the criminal justice system.[135]

The author continues by noting that the legitimacy of a criminal justice system is enhanced when "observers and defendants believe that prosecutors are pursuing justice."[136]

This theme relates to the view often expressed in conjunction with the "justice-based" theme, *supra*, that regardless of the commander's need to maintain good order and discipline, if the command perceives that a servicemember has not been treated fairly by the system, discipline may actually suffer in the long run.

Q. The "Paternalistic" Theme

Some have viewed the military justice system as being paternalistic. For example, in *United States v. Sunzeri*,[137] the court concluded that a provision in the accused's pretrial agreement that he could not present the testimony of certain witnesses during sentencing violated the *MCM*.[138] In dissent, one of the judges wrote:

> The military justice system, as it is currently designed and has developed—with its post-World War II philosophy, revisions, and implementation of the Uniform Code of Military Justice—*is quite paternalistic in some regards*, with its numerous built-in safeguards to protect the individual servicemember in his or her quest to navigate, in his or her best interests, the treacherous

---

[135] Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937, 941–42 (2010) (citations omitted, emphasis added).
[136] *Id*. at 942. *See also* Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105 (2005) (discussing legitimacy of criminal justice systems from subjective viewpoint of observers).
[137] 59 M.J. 758 (N-M. Ct. Crim. App. 2004).
[138] MCM, *supra* note 17, R.C.M. 705(c)(1)(B).

> waters of military discipline. While there is, of course, absolutely nothing wrong with this approach, I think sometimes we may let it color too much our reading and interpretation of those safeguards.[139]

In contrast to that position, the court in *United States v. Rivera*,[140] five years earlier had observed that the military justice system had grown less paternalistic.[141]

R. The "Civilianization" Theme

Commentators who recommend reforms to the military justice system typically compare the system to civilian counterparts, whether in the United States or other countries. Apparently the belief is that the civilian system reflects qualities that should be applied to pretrial, trial, and appellate proceedings in the military. For example, Professor Sherman has observed:

> The American court-martial, with its command-dominated structure, all military personnel, commander-selected jury primarily from the officer class, inadequate pre-trial procedures, and limited appeals, provides servicemen with an inferior form of criminal justice. Proposed reforms of the UCMJ would remedy some of these problems but would leave intact the structure of court-martial, with its intrinsic relationship to military

---

[139] *Sunzeri*, 59 M.J. at 762 (emphasis added).
[140] 44 M.J. 527 (A.F. Ct. Crim. App. 1996).
[141] *Id.* at 530. *See* United States v. Shelwood, 15 M.J. 222, 224 n.1 (C.M.A. 1983) (noting that MRE 103(a)(1) is less paternalistic than pre-Rule standards); United States v. Means, 20 M.J. 522, 528 (A.C.M.R. 1985) (stating that development of independent defense counsel system was a fundamental change in policy that "transformed an excessively paternalistic system for litigating criminal cases into a truly adversarial one"). *See also* Captain John A. Schaefer, *Current Effective Assistance of Counsel Standards*, ARMY LAW., June 1986, at 7, 16 (pointing out that the military justice system has transformed courts-martial from being excessively paternalistic to adversarial); Corey Wielert, *Affecting the Bargaining Process in Pretrial Agreements: Waiving Appellate Rights in the Military Justice System*, 79 UMKC L. REV. 237, 254 (2010) (arguing that military justice has transformed from paternalistic system to more adversarial, especially regarding waiver of Article 32 investigations); Major Eugene Milhizer, *Curing Variance on Appeal*, ARMY LAW., July 1991, at 32 (proffering that the trend is to rely on counsel rather than on paternalistic protection of trial and appellate judges).

> disciplinary policies and control. *Reforms along the lines of either the British or West German-Swedish models, resulting in the separation and civilianization of military justice functions, appear to be a feasible way to provide American servicemen with greater justice*.[142]

The suggested reforms, which many believe would truly "civilianize" the military justice system, generally focus on removing the commander from the equation.[143] In contrast to that position, Judge Raby of the Army Court of Criminal Review wrote:

> [I] wish to muse whether we gatekeepers of military law are not inadvertently finding more and more novel ways in which gradually to ease line officers and commanders out of the military system—*moving it ever closer to the civilian justice model.* Quarere: If this trend continues, could we reach a point, in futuro, where the military justice system is no longer unique, and thus is no longer necessary?[144]

S. The "Judicialization" Theme

The judicialization theme is used to describe the process of treating the commander as a judicial officer for some functions in the military

---

[142] Edward F. Sherman*, Military Justice Without Military Control, 82* YALE L. J. 1398, 1425 (1973) (emphasis added). *See also* Robinson O. Everett, *Some Comments on the Civilianization of Military Justice*, ARMY LAW., Sept. 1980, at 1 (noting that if by "civilianization" it meant ignoring the uniqueness of military justice, he was opposed but that he favored civilianization if it meant an "acknowledgement that certain basic ethical norms apply to the military as well as the civilian"). *Cf.* Karlen, *supra* note 9 (questioning whether military justice system should import problems often encountered in civilian system).

[143] Recently, there have been suggestions that the prosecution of sexual assault offenses by servicemembers should be handled by civilian prosecutors. Statement by Professor Beth Hillman before the Civil Rights Commission, January 11, 2013, *available at* http://www.c-span.org/Events/Military-Commission-Holds-Forum-on-Sexual-Assault/10737437187/. Professor Hillman states that when compared to military justice systems in other countries, the United States' system is an "outlier." *Id.*

[144] United States v, Ralston, 24 M.J. 709, 711 (A.C.M.R. 1987) (appendix to opinion). *See also* Cox, *supra* note 2, at 28–30 (commenting on the civilianization of military justice).

justice system[145] and to stress the important role of military judges.[146] In addition, it reflects the growing role of the appellate courts in interpreting, and at times expanding, the due process protections available to an accused servicemember. In commenting on the role of the Court of Military Appeals in the 1970's, then-Captain John Cooke summarized this theme by observing:

> [T]he court has substantially shifted the balance of power in the system by invalidating or restricting powers previously exercised by commanders and other line personnel, and by depositing greater ultimate authority in the hands of lawyers and judges. More subtly, the court has endeavored to adjust the attitudes with which all participants in the system exercise their particular authority.[147]

T. The "Can't Get No Respect" Theme

As demonstrated by some of the themes presented in this section, critics of the military justice system often show a complete lack of respect for its purpose, content, or operation. As one writer has observed:

> The true depth and breadth of the [criticisms] is unknown. As far as I know, no recent national surveys have been conducted among the citizenry about their perceptions or feelings about military justice. Nevertheless, I do feel safe in believing that a broad cross-section of intelligent people either know very little about military justice or, if they do know something

---

[145] Major Donald W. Hansen, *Judicial Functions of the Commander*, 41 MIL. L. REV. 1 (1968); Victor M. Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from This Revolution?* 16 TUL. J. INT'L & COMP. L. 419, 423 (2008).

[146] Henry A. Cretella & Norman B. Lynch, *The Military Judge: Military or Judge*, 9 CAL. W. L. REV. 57 (1972) (discussing evolution of military judge's role); Major Fansu Ku, *From Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century*, 199 MIL. L. REV. 49 (2009) (suggesting methods of cultivating judicial independence); Major Gilbert D. Stevenson, *The Inherent Authority of the Military Judge*, 17 A.F. L. REV. 1 (1975) (discussing emerging importance of military judges); Westmoreland & Prugh, *supra* note 12, at 18 (discussing role of military judges).

[147] Cooke, *supra* note 112, at 44.

> about the system, they believe that it is still in the dark ages, void of any full legal recognition, and certainly not deserving of a full membership in the family of enlightened jurisprudence. *Clearly, it does not deserve "respect."*[148]

U. The "No Perfect Solution" Theme

The final theme reflects the view that while everyone understands the importance of striking some sort of balance between discipline and justice, there is no real solution. For example, in his statement to the House Armed Services Subcommittee on the proposed UCMJ, Secretary of Defense James Forrestal addressed the process of drafting the proposed code: He stated:

> Another problem faced by the [special committee charged with preparing a draft of the code] was to devise a code which would insure the maximum amount of justice within the framework of a military organization. We are all aware of the number of criticisms which have been leveled against the court-martial system over the years . . . .The point of proper accommodation between the meting out of justice and the performance of military operations—which involved not only the fighting, but also the winning of wars—is one which no one has discovered. *I do not know of any expert on the subject—military or civilian—who can be said to have the perfect solution.* Suffice it to say, we are striving for maximum military performance and maximum justice. I believe the proposed code is the nearest approach to those ideals.[149]

---

[148] David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect,* 133 MIL. L. REV. 1, 4–5 (1991) (emphasis added).

[149] *Uniform Code of Military Justice: Hearings before a Subcomm. of the Comm. on Armed Services*, 81st Cong. 597 (Mar. 7, 1949) (statement of James Forrestal, Secretary of Defense) (emphasis added), *available at* http://pds.lib.harvard.edu/pds/view/13963097?n=4875&printThumbnails=no.

V. Summary of Thematic Approaches

The foregoing themes reflect a variety of approaches to the military justice conundrum. They cover more than a hundred years of commentary on the American military justice system. While the theme of "discipline" seems to have dominated the discussion in the early and mid-years of the system, more recent court decisions and commentaries seem to favor the "justice" component.[150]

There are several reasons for that. First, since the nineteenth century, but especially since the 1930s, there has been a movement in the United States to codify the country's legal systems. That is, there has been a move to codify a growing body of law, such as state criminal law and the Federal Rules of Procedure and Evidence.[151] The expansion of rules, in turn, tends to emphasize procedural due process concerns in both civil and criminal procedure. The military justice system reflects that trend. While the UCMJ has remained fairly static, the *MCM* has grown in scope and coverage exponentially.

Second, the shift in themes reflects the reality that the CAAF and the service Courts of Criminal Appeals have played a strong and persistent role in the factual and legal review of courts-martial. This was especially so during the 1970s when the then Court of Military Appeals took bold

---

[150] *See generally* Ferris, *supra* note 8, at 442–52 (noting the that history of the court-martial reflects an evolution from discipline to justice).

[151] *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 83–86 (1977) (noting process of adopting Uniform Commercial Code); Colin Miller, *Virginia to Codify Its Rules of Evidence Effective July 1, 2012*, EVIDENCEPROF BLOG (Apr. 22, 2012), http://lawprofessors.typepad.com/evidenceprof/2012/04/virginia-to-codify-its-rules-of-evidence-effective-july-1-2012.html (noting that Virginia was codifying its common-law rules of evidence effective July 1, 2012, leaving Massachusetts as the last state not to have done so); Fred L. Borch, *The Military Rules of Evidence: A Short History of Their Origin and Adoption at Courts-Martial*, ARMY LAW., June 2012, at 1, 1 (noting that the adoption of the Military Rules of Evidence was driven by the codification of the Federal Rules of Evidence in 1975); Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine form Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 757–66, 809–10 (2003) (discussing the codification movement in criminal law); Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098 *passim* (1978) (tracing the movement in the United Kingdom and the United States from Jeremy Bentham's writings in the nineteenth century).

steps to engraft civilian due process standards on the military justice system.[152]

Finally, Department of Defense and military lawyers have played an increasingly important role in crafting policies and procedures which reflect concern about ensuring that the military justice system does not become simply a system of discipline.[153]

Regardless of the reasons for the shift, the foregoing themes present a somewhat abstract view of the military justice conundrum. Terms such as "indispensible," "delicate balance," "justice," and even the term "discipline" are abbreviated sound bites or metaphors that might be used in any discussion about military justice. But there are other ways of analyzing and answering the conundrum.

V. The Crime Control and Due Process Models' Approach to the Conundrum

A. In General

In analyzing the military justice conundrum, it is helpful to draw from those commentators who have conducted similar analyses of the civilian criminal justice system. One of the leading commentators on this subject is Professor Herbert L. Packer, who constructed two models for analyzing the purposes and functions of a criminal justice system.[154] In

---

[152] *See* LURIE, *supra* note 89, at 247 (noting that Chief Judge Fletcher had stated in an interview with the Army Times in November 1977 that the Court of Military Appeals was interested in civilianizing military justice); Major Andrew W. Flor, *Post-Trial Delay: The Möbius Strip Path*, ARMY LAW., June 2011, at 4, 7–9 (noting that in the late 1970s, the Court of Military Appeals began *sua sponte* dismissing cases with prejudice if the convening authority took more than ninety days after conviction to take action, so as to enforce constitutional speedy trial rights).

[153] *See* Cooke, *supra* note 120, at 6 (noting that armed forces lawyers "have the responsibility to manage and mold the system so that it serves the needs and expectations of the American people and their sons and daughters in the armed forces"); Eugene Fidell, *The Culture of Change in Military Law,* 126 MIL. L. REV. 125, 130–31 (1989) (commenting on key role of armed forces lawyers in effecting change in the military justice system); Brigadier General Patrick Finnegan, *Today's Military Advocates: The Challenge of Fulfilling Our Nation's Expectations for a Military Justice System That Is Fair and Just*, 195 MIL. L. REV. 190, 198 (2008) (commenting on roles of armed forces lawyers).

[154] Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). *See* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and*

his view, the two models reflect the competing perspectives at play in such legal systems.[155]

Packer believed that it was necessary, in his words, to "build a model" to better assess the potential for change in the criminal justice system and predict its probable direction. To do so, he explained, would move from the abstract to reality.[156]

The first model is the crime control model, which prioritizes the ability, and need, of the government to prohibit specified conduct.[157] The second is the due process model. It upholds those attributes of the system which serve as a check on the ability of the government to investigate, charge, and try those accused of criminal conduct.[158] One commentator has described Packer's two models as follows:

> Both models describe a set of values, beliefs, attitudes, and ideas about our criminal justice system that are held by many legal actors within the system and that are reflected in some of its institutions and practices. Both models are prescriptive as well as descriptive. They make competing normative claims about the validity of procedural functions and the relative weight that should be attached to valid procedural objectives when they conflict with each other. Finally, both ideologies have programmatic content because they suggest doctrinal

---

Burger Courts' Competing Ideologies, 72 GEO. L. J. 185, 209–13 (1983) (providing a critique and reconstruction of Professor Packer's models). In reconstructing Professor Packer's models, Professor Arenella states that they create an erroneous impression that criminal procedure is concerned solely with whether the government or the individual should get the advantage in an adversarial proceeding. *Id.* at 211. *See also* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968). Professor Packer's law review article, and later book, were an attempt to provide some perspective on the Supreme Court decisions under Chief Justice Warren. Professor Arenella's work "reconstructed" Packer's two models in addressing the decisions of the Court under Chief Justice Burger. *See also* John Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 360–67 (1970) (examining Packer's prevailing ideology of criminal procedure); Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 158 (1980) (criticizing the Warren and Burger Courts for being erratic in applying criminal procedure doctrines), *reprinted at* 10 ANN. REV. CRIM. PROC. 151.

[155] Packer, *supra* note 154, at 5.

[156] *Id*.

[157] *Id.* at 9–10.

[158] *Id.* at 13–14.

> courses of action that would implement their vision of how the process should function. Consequently, both ideological models provide a source for legitimate arguments that courts may use to shape legal doctrine in criminal procedure.[159]

The following discussion briefly describes the key features of Packer's two models, which can then be used to analyze the military justice conundrum. The crime control model translates into the discipline component of the military justice system. The due process model translates into the justice component.

B. The Crime Control (Discipline) Model

The crime control model views the most important function of the criminal process to be the repression of criminal conduct.[160] The model puts a premium on the speed and efficiency with which the process operates to punish the guilty.[161] Packer describes efficiency as "the system's capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders whose offenses become known."[162]

To be efficient and speedy in a system that lacks sufficient resources to deal with the vast number of cases that must pass through it, the crime control model prefers the informal, ex parte, administrative fact-finding of the police and prosecutor to the more cumbersome adversarial determination of guilt at trial.[163] The model trusts government officials to screen out the "probably innocent."[164] The screening process operated by police and prosecutors is considered a reliable indicator of probable guilt. Those not screened out are presumptively guilty.[165]

---

[159] Arenella, *supra* note 154, at 189–90. Professor Arenella states, however, that while Packer's models identify some of the values furthered by trial adjudication and plea bargaining, neither model identifies the specific functions of American criminal procedure nor fully explains how these functions would be served or thwarted by a "due process" or "crime control" value perspective. *Id.* at 211.
[160] Packer, *supra* note 154, at 9.
[161] *Id*. at 10.
[162] *Id.*
[163] *Id*. Packer writes that under this model, "The process must not be cluttered with ceremonious rituals that do not advance the progress of a case." *Id*.
[164] *Id.* at 11.
[165] *Id.*

Once a person has been arrested and investigated without being found to be probably innocent, or, to put it differently, once a determination has been made (by police and prosecutors) that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty. This "presumption of guilt" approach, according to Professor Packer, allows the Crime Control Model to deal efficiently with large numbers.[166] Professor Packer argues that "presumption of guilt" in this model is not the opposite of "presumption of innocence." What he calls the "presumption of guilt" is a factual judgment about what probably happened (based on implicit trust of government officials). The presumption of innocence, by contrast, is a rule that does not depend on probabilities, but requires the accused to be *treated* as innocent until he has been adjudged otherwise. Thus, the presumption of innocence directs the government on how to proceed in a case, whereas the presumption of guilt predicts the outcome.[167]

In the military setting, the discipline component takes on attributes similar to Professor Packer's crime control model. The military's screening process generally reflects a desire to expedite investigations of alleged misconduct[168] and is thorough enough that if the evidence against a servicemember is weak, the command is not likely to begin court-martial procedures. Instead, a commander may choose any number of options for dealing with the issue outside the military justice arena.[169]

C. The Due Process (Justice) Model

Packer's due process model concentrates on the problem of how best to limit official power over the individual.[170] He refers to this model as

---

[166] *Id.*
[167] *Id.*
[168] *See, e.g.*, Mitsie Smith, *Adding Force Behind Military Sexual Assault Reform: The Role of Prosecutorial Discretion in Ending Military Sexual Assault*, 19 BUFF. J. GENDER, L. & SOC. POL'Y 147, 153 (2011) (stating the "essence of military justice is swift punishment to ensure discipline").
[169] Schlueter *supra* note 20, § 1-8, at 48, discusses various options available to the commander. These include taking no action or administrative action, and "administrative action" covers everything from a verbal counseling through extra training to administrative reduction in rank or separation from the service. *See also* MCM, *supra* note 17, R.C.M. 306(c)(1), (2).
[170] Packer, *supra* note 154, at 14.

an "obstacle course."[171] This preoccupation with limiting government power reflects the due process model's concern with "the primacy of the individual," the stigma of the criminal sanction, and the possibilities of abuse inherent in official power.[172]

The concern with government power and its abuses explains why the due process model uses the criminal process to police itself by its formal commitment to the concept of "legal guilt."[173] Packer explains:

> According to this doctrine, an individual is not to be held guilty of crime merely on a showing that in all probability, based upon reliable evidence, he did factually what he is said to have done. Instead, he is to be held guilty if and only if these factual determinations are made in procedurally regular fashion and by authorities acting within competencies duly allocated to them. Furthermore, he is not to be held guilty, even though the factual determination is or might be adverse to him, if various rules designed to safeguard the integrity of the process are not given effect.[174]

The due process model prefers adversarial adjudication to an administrative determination of guilt for two reasons. First, trial adjudication is seen as a more reliable fact-finding mechanism. Second, the police and prosecutor lack the competence and willingness to apply factual guilt-disabling doctrines when they make their administrative determination of guilt.[175]

The due process model limits government power over all suspects, including the factually guilty, by forcing the state to prove its case in an adjudicative forum that will provide maximum protection to the factually innocent and maximum assurance that the state has respected the

---

[171] *Id.* at 13.
[172] *Id.* at 16.
[173] *Id. See also* Tumey v. Ohio, 273 U.S. 510, 535 (1927) (rejecting argument that because evidence showed the defendant was clearly guilty, he could not complain of a lack of due process; "[n]o matter what the evidence was against him, he had the right to an impartial judge").
[174] Packer, *supra* note 154, at 16. Professor Packer lists the various rules as including jurisdiction, venue, statute of limitations, double jeopardy, and criminal responsibility (i.e., the defendant must not be insane or underage). *Id*. at 16–17.
[175] *Id.* at 15.

defendant's rights in securing its evidence and proving its case.[176]

In the military context, the concept of a justice or a justice-based system describes this model.[177] It generally reflects a distrust of a commander's powers and recognition of the potential for abuse. Under Packer's approach, the procedural protections available to a servicemember charged with a crime fall within this model. The "justice" approach to military justice might better be referred to as the "due process" approach—the latter term better describes what is really at stake. However, this article will continue to apply the term "justice," as that is the term usually used in discussing military criminal procedures.

D. Summary of the Models

The following chart provides a summary of the two models for analyzing the military justice conundrum.

Crime Control—Discipline	**Due Process—Justice**
Efficient and Speedy	Efficiency Not Critical
Factual Guilt	Legal Guilt
Nonadversarial Procedures	Adversarial Procedures
Trust Government to Screen	Limits on Government's Function in Acting as Screener
Primacy of Public Interest	Primacy of Individual

E. Application of the Models to the Military Justice System

The following discussion applies the foregoing models to the current military justice system. The first section focuses on those features of the system that reflect concern about maintaining discipline. The second

[176] *Id.* at 14.
[177] In fact, we might better refer to it as the due process model—it better describes what is really at stake.

section focuses on those features that reflect concern about providing justice.

Not every aspect of military justice is addressed here. This discussion focuses on those features that are most readily identified with one model or the other. Even so, it will be apparent that some features, like the military's guilty plea procedures, reflect both models.

1. Features That Reflect the Crime-Control-Discipline Model

a. In General

From the beginning, the Articles of War and then the UCMJ focused on the military commander's ability to maintain good order and discipline by imposing disciplinary measures on members of their command. The primary vehicle was trial by court-martial. Military law now also includes more informal measures, such as nonjudicial punishment under Article 15.

The Code contains several features that reflect the crime control-discipline model.

b. Court-Martial Personal Jurisdiction

Normally, in applying the crime control and due process models, commentators focus on the procedural aspects of criminal justice systems. But the fact that Congress has provided for court-martial jurisdiction over a wide range of individuals, including civilians,[178]

---

[178] UCMJ art. 2(a)(10) (2012). In 2006, Congress amended Article 2 to provide for court-martial jurisdiction over persons serving with or accompanying an armed force in the field, during times of war or contingency operations. *See* United States v. Ali, 71 M.J. 256, 263–65 (C.A.A.F. 2012) (detailing how the accused was a non-US citizen, civilian interpreter, working in Iraq for the military; he was court-martialed for committing the offenses of false official statement, wrongful appropriation, and impeding an investigation in the field during Operation Iraqi Freedom). *See generally* Lieutenant Colonel Charles T. Kirchmaier, *Command Authority Over Contractors Serving with or Accompanying the Force*, ARMY LAW., Dec. 2009, at 35, 39–41 (examining command authority over contractors); Major Joseph R. Perlak, *The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel*, 169 MIL. L. REV. 92, 105–06 (2001) (noting that under the Military Extraterritorial Jurisdiction Act, Department of Defense personnel may arrest civilians for crimes committed in certain

reflects the crime control model in the UCMJ and the ability of the commander to regulate and if necessary, punish, behavior that is considered a threat to good order and discipline. Just within the last decade Congress has taken steps to fill what it perceived to be jurisdictional gaps.[179] Thus, rather than restricting the commander's authority to enforce crime control within his or her area of operations, Congress has actually expanded that authority[180]—thus rejecting civil libertarian arguments that civilians should not be subjected to court-martial jurisdiction.

c. Defining Military Offenses

Perhaps one of the most striking features of the current military justice system is in the substantive law aspects of the UCMJ. Articles 77 through 134 are considered the "punitive articles"[181] and proscribe criminal offenses.

The punitive articles include offenses that are clearly related to good order and discipline, such as disobedience of orders,[182] desertion,[183]

---

areas, and a commander has considerable discretion about whether to turn these civilians over to foreign authorities).

[179] UCMJ art. 2(a)(10) (2012) (jurisdiction over civilians); 18 U.S.C. §§ 3261–3267 (offenses committed overseas).

[180] *See* Katherin J. Chapman, *The Untouchables: Private Military Contractors' Criminal Accountability Under the UCMJ*, 63 VAND. L. REV. 1047, 1059–67 (2010) (recommending that military law should be used to hold private civilian contractors criminally accountable under UCMJ); Matthew Dahl, "*Runaway Train": Controlling Crimes Committed by Private Contractors Through Application of the Uniform Code of Military Justice*, 14 BARRY L. REV. 55, 77 (2010) (endorsing amendment to Article 2(a)(10), UCMJ, as necessary for controlling crimes committed by private contractors and other civilians accompanying U.S. armed forces overseas); David A. Schlueter, *Court-Martial Jurisdiction: An Expansion of the Least Possible Power*, 73 J. CRIM. L. & CRIMINOLOGY 74, 78–80 (1982) (discussing 1979 amendment to Article 2, UCMJ, codifying doctrine of constructive enlistments); *Cf.* Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military-Criminal Jurisdiction Over Civilian Augmentees*, 62 U. OF MIAMI L. REV. 491, 497–98 (2008) (arguing that military's interests did not justify extension of jurisdiction over civilians by Military Extraterritorial Jurisdiction Act of 2000 and amendment to Article 2a(10), UCMJ).

[181] *See* DAVID A. SCHLUETER, CHARLES H. ROSE, VICTOR HANSEN & CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES, § 3-1[5], at 50 (2d ed. 2012).

[182] UCMJ art. 92 (2012).

[183] *Id.* art. 85 (2012).

disrespect,[184] insubordination,[185] and mutiny.[186] The military-related offenses also include the sometimes maligned general articles—Articles 133 and 134. These articles epitomize the discipline-crime control model of criminal law, because they hold a servicemember criminally responsible for actions that are not always specifically proscribed by law.[187] The military courts have held, however, that an accused must have been on fair notice that his actions violated a statute, regulation, or even custom of the service.[188]

The UCMJ also includes civilian offenses such as murder,[189] robbery,[190] and forgery.[191] The Supreme Court has abolished its prior "service connection" test, and held that the military can punish *any* violation of the UCMJ—just as long as the accused is personally subject to its jurisdiction.[192] While the nexus between the commander's ability to punish a servicemember for violating a lawful order and the need to maintain discipline is more readily apparent, the same nexus often exits when a "civilian" offense is involved, and the commander does not need to demonstrate that it does in order to exercise his or her jurisdiction.

---

[184] *Id.* art. 86 (2012).
[185] *Id.* art. 91 (2012).
[186] *Id.* art. 94 (2012).
[187] Thus, in *United States v. Sadinsky*, 34 C.M.R. 343, 345–46 (C.M.A. 1964), the Court of Military Appeals upheld a conviction for jumping from the deck of an aircraft carrier into the sea—conduct that had not been specifically proscribed either by law or regulation. "To superimpose a requirement that the conduct be prohibited by some order, regulation, or statute in order to fall within the proscription of . . . Article 134 would be contrary to the clear and fair meaning of its terms." *Id.* at 346. Afterwards, the President added "Jumping from Vessel into the Water" as an enumerated offense under Article 134. MCM, *supra* note 17, at A23–24.
[188] *See* SCHLUETER, ROSE, HANSEN & BEHAN, *supra* note 181, § 7-3[3][c][i] (discussing requirement that accused must be on fair notice that his conduct is chargeable as a violation of Article 134).
[189] UCMJ, art. 118 (2012).
[190] *Id.* art. 122.
[191] *Id.* art. 123. The process of adding "civilian-type" offenses to military law was a gradual one. The Articles of War did not cover "civilian-type" crimes until 1863, and the process of including them was not complete until the UCMJ was adopted in 1951. Thus, under the Articles of War, murder and rape cases could not be tried at court-martial if the crime was alleged to have happened in the American homeland during peacetime. Sherman, *supra* note 9, at 39.
[192] Solorio v. United States, 483 U.S. 435, 451 (1987), *overruling* O'Callahan v. Parker, 395 U.S. 258, 265 (1969).

Consider the following examples[193]:

- First, the servicemember is charged with throwing butter onto the ceiling of a mess hall, a violation of Article 134.[194] At first blush this offense seems so trivial to be ignored. Yet, commanders are constantly faced with minor delicts that threaten the good order and discipline of a unit and could, if left unaddressed, lead to additional delicts and a lack of respect for command authority. It is important to note that although this offense, standing alone, would normally not give rise to a court-martial, at its core, the commander should have the authority to take disciplinary action, whether it be in the form of a reprimand, nonjudicial punishment, or a court-martial.

- Second, a servicemember is charged under Article 118 with killing servicemembers and civilians at an off-base convenience store.[195] The command's interest in crime control is clear in this instance. But the command also must have the authority to deal with this horrific offense under the UCMJ. Servicemembers are involved and the need to maintain good order may depend heavily on how the command handles the killings.[196]

- Third, a civilian contractor, working overseas for the military, is charged with sexual assault of a servicemember under Article 120.[197] As noted *supra*, in 2006, Congress amended Article 2 of the UCMJ to provide for court-martial jurisdiction over "persons serving with or accompanying an armed force in the field" during "contingency operations."

---

[193] It is assumed in these examples that the military has appropriate personal and subject-matter jurisdiction over the servicemember.

[194] *See* United States v. Regan, 11 M.J. 745 (A.C.M.R. 1981). In *Regan*, the accused was charged with various offenses, including throwing butter onto the mess hall ceiling. The court concluded that the specification alleging the behavior failed to include the requisite words of criminality, e.g., failure to allege that the accused's conduct was "disorderly." Interestingly, the court did not conclude that the accused's actions could not be considered a violation of the UCMJ.

[195] UCMJ art. 118 (2012).

[196] Even assuming the command has a very high interest in handling a murder case, there may be an existing agreement with local authorities that requires that all murders be handled in the state or federal courts.

[197] UCMJ, art. 120 (2012).

Congress apparently believed that the need to control criminal activity by civilians accompanying the military was important enough to entrust that power to do so in a military commander.

- Finally, a servicemember is charged with violating a no-contact order under Article 92.[198] This offense, while raising issues of the ability of a commander to infringe on a servicemember's liberty interests,[199] reflects the view that in order to maintain good order and discipline, even if not strictly criminal activity, a commander should be able to order a servicemember to avoid contact which might in turn lead to criminal activity or other threats to the unit.

In each of the foregoing examples, the Congress has recognized that it is critical that the commander have the ability to address a wide range of misconduct—some of which would not be a crime in a civilian setting—in order to maintain good order and discipline.

d. Role of the Commander

The commander's role in military justice perhaps best reflects the crime control and discipline model, and prevents it from being viewed as a truly justice-based system. Critics and supporters of military justice have one thing in common. They recognize the pivotal role of the commander as a feature that distinguishes the military and civilian systems of criminal justice.[200] This role reflects the broad trust in the

---

[198] *Id.* art. 92.

[199] *See* SCHLUETER, *supra* note 20, § 13-3(O)(5), at 728–32 (discussing rights of privacy in the military setting).

[200] Weiss v. United States, 510 U. S. 163, 175 (1994) (listing the powers of the military commander and concluding that "by contrast to civilian society, nonjudicial military officers play a significant part in the administration of military justice"). *See generally* Alleman, *supra* note 97; Brigadier General Paul R. Dordal, *The Military Criminal Justice System: A Commander's Perspective*, THE REPORTER, June 1997, at 3; Hansen, *supra* note 145, at 423 ("First and foremost, military justice is one of the primary tools a military commander has to maintain discipline within the ranks." But "it is not the be all and end all of military justice, particularly in a democracy."); William Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5 (1971).

judgment of government officials that characterizes the crime control model.[201]

A brief review of the commander's broad powers makes the point. First, the commander has very broad discretion to conduct investigations into allegations of misconduct.[202] The actual investigations are almost always conducted either by the law enforcement branches of the armed forces, who in turn report their findings to the commander, or by investigating officers appointed by the commander himself. The commander's powers include the authority to authorize searches and seizures, conduct inspections, and question suspects. While the commander's authority to do so is limited by the *MCM* and judicial opinions, the power is nonetheless broad and reflective of the crime control and discipline models.

Second, the commander has broad prosecutorial discretion.[203] Commanders, not lawyers, ultimately decide whether to take administrative actions, impose nonjudicial punishment, or commence court-martial proceedings. If a commander, after receiving legal advice and the advice and recommendations of subordinate commanders, decides to convene a court-martial, the commander personally selects the members of the court-martial panel.[204] This controversial feature of the military justice system draws support,[205] criticism,[206] and calls for

---

[201] In Professor Packer's formulation, these officials may be police or prosecutors; in military justice, they are commanders.

[202] *See* SCHLUETER, *supra* note 20, § 5-2, at 265–66.

[203] *See, e.g.*, United States v. Baker, 14 M.J. 361, 365 (C.M.A. 1983) (stating the "convening authority . . . is free to decide the number of offenses to charge . . ."); United States v. Hagen, 25 M.J. 78 (C.M.A. 1987) (noting that courts are hesitant to review decisions whether to prosecute; there is a strong presumption that convening authorities perform their function without bias); *See also* SCHLUETER, *supra* note 20, § 6-1[A], at 355–61 (discussing commander's discretion).

[204] UCMJ art. 25 (2012). Timothy W. Murphy, *A Defense of the Role of the Convening Authority: The Integration of Justice and Discipline*, 28 THE REPORTER No. 3, at 3 (2001). The composition of the court-martial panel itself, quite aside from the commander's role in choosing it, manifests the crime control model. The panel always consists of servicemembers senior to the accused, whether officers or enlisted. If the accused requests that enlisted members be appointed to the court, the convening authority appoints noncomissioned officers from the command. Thus, regardless of whether the case is judge alone or panel, the accused's fate is decided by *government officials* (in the form of military leaders), and *not* by private citizens. Because the crime control model includes "trust in the judgment of government officials" the composition issue is a manifestation of that model.

[205] *See* Christopher Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV.

reform.[207] One popular proposal is to adopt a random system of selecting the members.[208] Nonetheless, the system remains intact. Third, after the court-martial is convened, the commander may decide such questions as to whether to grant immunity to witnesses, and whether to provide witnesses and expert assistance to the defense.[209] Again, although those

---

190 (2003) (offering a strong defense for the current system of selecting court members); Charles W. Schiesser, *Trial by Peers: Enlisted Members on Courts-Martial*, 15 CATH. U. L. REV. 171 (1966) (stating the system is an ethical and pragmatic success).

[206] Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998) (criticizing process).

[207] *See* Major R. Rex Brookshire, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71 (1972) (proposing reforms); Frank J. Chmelik, *The Military Justice System and the Right to Trial by Jury: Size and Voting Requirements of the General Court-Martial for Service-Connected Civilian Offenses*, 8 HASTINGS CONST. L.Q. 617 (1981) (discussing Sixth Amendment right to jury trial should apply for non-military offenses); Victor M. Hansen, *Avoiding the Extremes: A Proposal for Modifying Court Member Selection in the Military*, 44 CREIGHTON L. REV. 911 (2011) (proposing a change to the military's panel selection system by using the accused's peremptory challenges to address the unfairness of stacking a court-martial panel); Major James T. Hill, *Applying Transparency in the Military Panel Selection Process with the Preselection Method*, 205 MIL. L. REV. 117 (2010) (recommending new system for selecting members); Major Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103 (1992) (proposing reforms); Daniel Maurer, *The Unrepresentative Military Jury: Deliberate Inclusion of Combat Veterans in the Military's Venire for Combat-Incidental Crimes*, 6 OHIO ST. J. CRIM. L. 803 (2009) (recommending greater inclusion of combat servicemembers in cases involving combat-related charges); Major Gary C. Smallridge, *The Military Jury Selection Reform Movement*, 19 A.F. L. REV. 343 (1977) (discussing proposed reforms); Dwight W. Sullivan, *Playing the Numbers Game: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1 (1998) (proposing changes).

[208] *See* Matthew J. McCormack, *Reforming Court-Martial Panel Selection: Why Change Makes Sense for Military Commanders and Military Justice*, 7 GEO. MASON L. REV. 1013 (1999) (recommending adoption of random selection process); Joseph Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 IND. L.J. 193 (1973) (concluding that there would be little or no loss to discipline if the military adopted a random process of selecting members); Captain John D. VanSant, *Trial by Jury of Military Peers*, 15 A.F. L. REV. 185 (1973) (proposing random selection); Colonel James A. Young, *Revising the Court-Martial Selection Process*, 163 MIL. L. REV. 91 (2000) (recommending random selection process).

[209] However, a military judge may order the Government to provide expert assistance even if the commander refuses, and under Rule for Courts-Martial 703 may enforce the order with abatement if the Government refuses. *See* Major Dan Dalrymple, *Make the Most of It: How Defense Counsel Needing Expert Assistance Can Access Existing Government Resources*, ARMY LAW., May 2013, at 35, 35 & n.6. A military judge may also order the live production of other witnesses, even if it is not militarily convenient for the commander to produce them. United States v. Allen, 31 M.J. 572, 610–11 (N.M.C.M.R. 1990); United States v. Willis, 3 M.J. 94, 95–96 (C.M.A. 1977).

decisions are subject to judicial review, the commander's authority to be involved in that process is broad.

Finally, commanders have broad post-trial powers and duties. Following a court-martial conviction, the commander who convened the court-martial is charged with, among other things, reviewing the results, considering any post-trial clemency matters the servicemember may have submitted, and deciding whether to approve the findings and the sentence.[210]

A commander's broad powers can lead to serious problems if a commander unlawfully exercises influence on the system. As noted above, the crime control model places trust in the ability of law enforcement personnel and prosecutors to efficiently and speedily resolve alleged criminal activity. While the military justice systems place some trust in the commanders to function similarly, unfettered discretion and power can tempt the commander to "fix" the outcome of a case being processed in the system. To that end, Article 37 of the UCMJ expressly forbids commanders, and others, from exercising unlawful influence on a case.[211] And Article 98 makes it an offense to not promptly dispose of charges or to enforce any provision in the UCMJ.[212] Unlawful command influence is considered the "mortal enemy of military justice,"[213] and the authorities that establish it check the commander's power in accordance with the due process model of criminal law. However, in general, the commander's broad discretion is a "crime control" rather than a "due process" feature of military justice.

Ultimately, it is the commanders, not the lawyers or the judges, who are responsible for good order and discipline in the Armed Forces.

---

[210] The system recognizes that at the end of the day, the case goes back to where it started—on the commander's desk: To ensure that the system works.
[211] UCMJ art. 37 (2012).
[212] *Id.* art. 98.
[213] United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986). *See generally* SCHLUETER, *supra* note 20, § 6-3, at 387–15 (discussing command influence).

e. Nonjudicial Punishment

Another feature that clearly reflects the crime control-discipline model is Article 15 of the UCMJ.[214] That provision authorizes commanders to impose nonjudicial punishment on members of their commands for minor offenses.[215] The Supreme Court has recognized these procedures as administrative in nature[216] and Congress has recognized that using nonjudicial punishment reduces the number of courts-martial for minor offenses that affect discipline.[217]

Under Professor Packer's crime control model, administrative procedures in a criminal justice system can efficiently and quickly dispose of criminal allegations and reduce the need for adversarial proceedings.[218] Nonjudicial punishment procedures fit hand-in-glove with that model. Because of their summary nature—where only minimal due process is provided[219]—nonjudicial punishment procedures have been challenged as being unconstitutional.[220]

---

[214] UCMJ art. 15 (2012). Various terms are used for this procedure. In the Air Force and Army, it is referred to as an "Article 15," in the Coast Guard and Navy, "Captain's Mast," and in Marine Corps, "Office Hours." *See* SCHLUETER, *supra* note 20, §§ 3-5(A), 3-5(C), 3-5(D), and 3-5(E).

[215] *See generally* SCHLUETER, *supra* note 20, ch. 3 (discussing nonjudicial punishment procedures in the armed forces); Captain Harold L. Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37 (1965) (reviewing the history of nonjudicial punishment and discussing the fact that it is a much-needed disciplinary tool). *See also* Burress M. Carnahan, *Comment—Article 15 Punishments*, 13 A.F. JAG L. REV. 270 (1971) (discussing Air Force Article 15 procedures); Dwight Sullivan, *Overhauling the Vessel Exception*, 43 NAVAL L. REV. 57 (1996) (discussing extensively the vessel exception).

[216] *See* Middendorf v. Henry, 425 U.S. 25, 31–31 (1976) (stating that nonjudicial punishment is an administrative method of dealing with minor offenses).

[217] *See* S. REP. NO. 1911, 87th Cong., 2d Sess., *reprinted in* 1962 U.S.C.C.A.N. 2379, 2380–82:

> Article 15 . . . provides a means whereby military commanders may impose nonjudicial punishment for minor infractions of discipline. Its use permits the services to reduce substantially the number of courts-martial for minor offenses, which result in stigmatizing and impairing the efficiency and morale of the person concerned.

Id.

[218] Packer, *supra* note 154, at 13. Professor Packer's thesis is that unencumbered administrative fact-finding, similar to a guilty plea, can reduce adjudicative proceedings. *Id*.

[219] Each of the services provide guidance to commanders on imposing nonjudicial punishment. In each service, to one degree or another, a servicemember receives notice of the pending proceeding, the right to consult with an attorney, a nonadversarial hearing

f. Guilty Pleas

In developing his two models for analyzing the criminal justice system, Professor Packer highlighted plea bargaining and guilty pleas as a prime example of the crime control model. In his view, the desire to use the criminal justice system to control crime was best reflected in the ability of the system to deal quickly and efficiently by permitting a defendant to plead guilty. He writes:

> The pure Crime Control Model has very little use for many conspicuous features of the adjudicative process and in real life works a number of ingenious compromises with it. Even in the pure model, however, there have to be devices for dealing with the suspect after the preliminary screening process has resulted in a determination of probable guilt. The focal device, as we shall see, is the plea of guilty; through its use adjudicative fact-finding is reduced to a minimum. It might be said of the Crime Control Model that, reduced to its barest essentials and when operating at its most successful pitch, it consists of two elements: (a) an administrative fact-finding process leading to exoneration of the suspect, or to (b) the entry of a plea of guilty.[221]

Critics of this view point out that Professor Packer's recognition of the finality and efficiency of plea bargaining and guilty pleas does not demonstrate that guilty pleas promote criminal law objectives any better than trials.[222]

---

before the commander (conducted by the commander), the right to demand a trial in lieu of the nonjudicial punishment (unless the servicemember is attached to embarked on, a vessel), and the right to appeal the punishment to a superior commander.

[220] *See* Note, *The Unconstitutional Burden of Article 15*, 82 YALE L.J. 1481 (1973) (taking position that servicemember faces dilemma of accepting punishment or demanding trial where constitutional protections would be available); Edward J. Imwinkelried & Francis A. Gilligan, *The Constitutionality of Article 15: A Rebuttal*, 83 YALE L.J. 534 (1974) (rejecting arguments that Article 15 procedures are unconstitutional).

[221] Packer, *supra* note 154, at 13. *See also* Frank Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 316–17 (1983) (asserting that because of variables in an adjudicary proceeding, trials cannot convey "truth" with regularity).

[222] Arenella, *supra* note 154, at 216–17.

Court-martial charges against servicemembers typically result in plea bargaining between the commander and the accused and entry of a guilty plea in return, for example, for a reduced charge or sentence.[223] Thus, the military's practice of permitting plea bargaining and guilty pleas reflects the crime control-discipline model. It permits the system to assign guilt, sentence the offender, and send a signal to others in the command that such conduct is not tolerated, with a minimum of administrative difficulty (unless the Government is seeking the death penalty, in which case a guilty plea is not allowed).

On the other hand, there are real dangers lurking in taking guilty pleas from accused servicemembers who may not fully appreciate their options or otherwise feel the pressure from the command to plead guilty. To guard against coerced or uniformed guilty pleas, the military judge must first conduct a full inquiry into the basis of the plea[224] and an inquiry into any pretrial agreement between the commander and the accused.[225] Those requirements are thus due process limits on a feature of military justice which reflects the crime control-discipline model.

g. Nonunanimous Verdicts

In the military justice system, only a two-thirds vote of the court-martial members is required to convict, unless the case is being tried as a capital case.[226] The verdict is set by the first vote of the members, which is by secret written ballot.[227] Thus, there are no hung juries in military practice. This feature furthers the crime control-discipline model in two ways. First, the prosecution need not convince all of the members of the

---

[223] *See* SCHLUETER, *supra* note 20, ch. 9 (discussing pretrial agreements), ch. 14 (discussing entry of guilty pleas).

[224] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969). This inquiry is referred to as the *Care* providency inquiry. The "paternalistic" thoroughness of this process has been criticized on the grounds that it places too great a burden on Military Judges and counsel to extract all the necessary facts from the accused. Major Terry L. Elling, *Guilty Plea Inquiries: Do We Care Too Much?*, 134 MIL. L. REV. 195, 240 (1991). This critique thus represents a crime control-discipline response to a due process-justice practice, advocating greater trust in the trial judge and fewer "formalities" before finding the accused guilty.

[225] United States v. King, 3 M.J. 458 (C.M.A. 1977); United States v. Green, 1 M.J. 453 (C.M.A. 1976).

[226] UCMJ art. 52 (2012).

[227] MCM, *supra* note 17, R.C.M. 921(c). The *MCM* provides for procedures for reconsideration of a verdict by the members. *Id.* R.C.M. 924.

court-martial that an accused is guilty. Thus, the chances of a conviction seem higher. Second, this rule reflects efficiency, one of the features of the crime control model—even if the trial ends in an acquittal.

h. Sentencing

If an accused is convicted by a court-martial, either a military judge or the court-martial members who found the accused guilty, decide the sentence. The presentencing phase of trial typically happens immediately after guilty findings are announced, on the same day or the next day; there is no delay while presentencing reports are prepared or additional evidence is gathered. The commander who sent the case to the court-martial does not set the sentence. During sentencing, an accused is permitted to introduce evidence in extenuation and mitigation, and may make an unsworn statement. The type and amount of maximum punishment that may be imposed are generally determined by the jurisdictional limits of the court-martial involved[228] the nature of the proceeding,[229] and limits spelled out in the *MCM*.[230] The sentencing authority's discretion is otherwise unfettered; there are no "sentencing guidelines" and (except in certain very serious cases) no mandatory minimum sentences.[231]

In arguing for an appropriate sentence, the prosecution may make a general deterrence argument—which reflects the commander's interest in deterring others in the command from engaging in the same sort of behavior.[232] However, as noted at Part V.E.2.i below, some features of the sentencing process clearly reflect the due process approach.

---

[228] SCHLUETER, *supra* note 20, § 16-2(B) at 983-84 (discussing jurisdictional limits on punishments).

[229] MCM, *supra* note 17, R.C.M. 810(d) (limits on punishments in rehearings, new trials, and other trials).

[230] *Id.* pt. IV. Part IV of the *MCM* lists the various punitive articles and the maximum sentence that may be imposed for each offense. In addition, the *MCM* includes "escalator" provisions. *See id.* R.C.M. 1003(d).

[231] Colonel Steven J. Ehlenbeck, *Court-Martial Sentencing With Members: A Shot in the Dark?*, 35 THE REPORTER 33, 34 (2008) (the minimum sentence for certain types of murder is life; the minimum sentence for spying is death).

[232] *See* United States v. Meeks, 41 M.J. 150, 158–59 (C.M.A. 1994) (holding prosecutor's argument was fair comment on preserving good order and discipline and general deterrence). Deterrence is one of several utilitarian justifications for punishment. *See* PACKER, *supra* note 154, at 39–45.

2. Features That Reflect the Due Process-Justice Model

a. In General

As noted above, a number of commentators have stated that the current military justice system is justice based.[233] While that point is debatable, some features of the military justice system clearly reflect the due process-justice model. The following discussion addresses substantive and procedural protections.

b. Application of Bill of Rights Protections to Commander's Control of Servicemembers

A commander has considerable control over the lives of servicemembers in his or her unit—a feature that reflects the crime control-discipline model. But case law recognizes constitutional limits to that control, for example, when a commander issues an order that infringes on a servicemember's freedom of speech[234] or religion[235] or a servicemember's privacy interests.[236] Those limits reflect the due process (substantive and procedural) justice model.

c. Application of the Bill of Rights Protections During Pretrial Processing of Cases

During the pretrial investigation and processing of charges, an accused benefits from a number of constitutional, statutory, and regulatory protections. The Fifth Amendment privilege against self-incrimination applies to any interrogations of a suspect or to any request to produce incriminating information.[237] The Fourth Amendment applies to any search and seizure conducted by military or civilian authorities.[238] And the Sixth Amendment right to counsel applies to any eyewitness

---

[233] *See* Part IV.D, *supra*.
[234] SCHLUETER, *supra* note 20, § 13-3(O)(4), at 717–28 (First Amendment rights).
[235] *Id*. § 13-3(O)(4), at 724–25.
[236] *Id*. § 13-3(O)(5), at 728–32.
[237] U.S. CONST. amend V; MCM, *supra* note 17, MIL. R. EVID. 301. The privilege against self-incrimination at court-martial is actually older than the Bill of Rights itself, and was afforded to Major John André during his Revolutionary War trial for spying. United States v. Tempia, 37 C.M.R. 249, 254 (1967).
[238] U.S. CONST. amend IV; MCM, *supra* note 17, MIL. R. EVID. 311–17.

identification procedures.[239] In each of these areas, however, the courts have recognized that the demands of good order and discipline may prevail.[240]

d. Military Discovery Practices

The military's pretrial discovery rules clearly reflect the due process-justice model.[241] First, under Article 46, the accused has discovery rights that equal those available to the prosecution. The accused is entitled to compulsory process to obtain both military and defense witnesses, sometimes at government expense.[242] That might include obtaining immunity for a defense witness.[243] Second, an accused may request that the government provide an expert consultant to assist the defense in preparing its case[244] and to testify at trial on behalf of the accused.[245] If an expert is assigned to assist the defense, that person becomes part of the defense team.[246] Third, the accused is entitled to have the prosecution automatically disclose the following information: names and contact information of prosecution witnesses,[247] evidence which is favorable to the accused,[248] evidence of any prior convictions,[249] and evidence of

---

[239] U.S. CONST. amend VI; MCM, *supra* note 17, MIL. R. EVID. 321.

[240] *See, e.g.*, Burns v. Wilson, 346 U.S. 137, 140 (1953) ("the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty").

[241] *See generally* Ronald S. Thompson, *Constitutional Applications to the Military Criminal Defendant*, 66 U. DETROIT L. REV. 221 (1989) (noting that although modifications have been made to substantive constitutional law rights, in order to maintain good order and discipline, an accused servicemember has enhanced protections in other areas such as discovery and witness production).

[242] Francis A. Gilligan & Frederick Lederer, *The Procurement and Presentation of Evidence in Courts-Martial: Compulsory Process and Confrontation*, 101 MIL. L. REV. 1 (1983); Major Calvin M. Lederer, *Warrants of Attachment—Forcibly Compelling the Attendance of Witnesses*, 98 MIL. L. REV. 1 (1982).

[243] Major Steven W. Myhre, *Defense Witness Immunity and the Due Process Standard: A Proposed Amendment to the Manual for Courts-Martial*, 136 MIL. L. REV. 69 (1992).

[244] United States v. Short, 50 M.J. 370 (C.A.A.F. 1999); Major Will A. Gunn, *Supplementing the Defense Team: A Primer on Requesting and Obtaining Expert Assistance*, 39 A.F. L. REV. 143 (1996).

[245] MCM, *supra* note 17, R.C.M. 703(d).

[246] *See* SCHLUETER *supra* note 20, § 11-5, at 589–90 (noting that in that instance, communications between the defense and expert consultant may be privileged).

[247] MCM, *supra* note 17, R.C.M. 701.

[248] *Id.* R.C.M. 701(a)(6); United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963).

[249] MCM, *supra* note 17, R.C.M. 701(a)(4).

statements by the accused,[250] evidence seized from the accused,[251] and evidence of any eyewitness identifications.[252] Fourth, if the command intends to convene a general court-martial to try an accused, it must first hold an Article 32 hearing to determine if there is a basis for the charges.[253] During that hearing, which is sometimes equated with a civilian grand jury,[254] the accused is entitled to be present, to present evidence, but perhaps more importantly, to hear the testimony of witnesses who will likely testify against him at a later trial.[255] Furthermore, even in a special court-martial, "[e]ach party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence."[256] Thus, unlike in some civilian jurisdictions, the Government may not encourage its witnesses to refuse to talk to the defense outside of court.[257]

In addition, an accused may request production of evidence and information such as the results of any tests or reports,[258] tangible evidence and documents,[259] Jencks Act materials,[260] and sentencing information.[261]

---

[250] *Id.* MIL. R. EVID. 304(d)(1).
[251] *Id.* MIL. R. EVID. 311(d)(1).
[252] *Id.* MIL. R. EVID. 321(c)(1).
[253] UCMJ art. 32 (2012). *See generally* Major Larry A. Gaydos, *A Comprehensive Guide to the Military Pretrial Investigation,* 111 MIL. L. REV. 49 (1986) (discussing of Article 32 procedures); Brian C. Hayes, *Strengthening Article 32 to Prevent Politically Motivated Prosecution: Moving Military Justice Back to the Cutting Edge*, 19 REGENT U. L. REV. 173 (2006) (recommending that Congress revise Article 32 to require independent establishment of probable cause); Lieutenant Colonel Timothy A. Murphy, *The Formal Pretrial Investigation*, 12 MIL. L. REV. 1 (1961) (examining Article 32 procedures).
[254] Lawrence J. Sandell, *The Grand Jury and the Article 32: A Comparison*, 1 N. KY. ST. L.F. 25 (1973) (comparing Article 32 to grand jury).
[255] *See* SCHLUETER, *supra* note 20, § 7-2(C), at 426–31 (discussing accused's rights at Article 32 investigation).
[256] MCM, *supra* note 17, R.C.M. 701(e).
[257] *See* United States v. Irwin, 30 M.J. 87, 93–95 (C.M.A. 1990).
[258] MCM, *supra* note 17, R.C.M. 701(a)(2)(B).
[259] *Id.* R.C.M. 701(a)(2)(A).
[260] 18 U.S.C. § 3500 (2012). United States v. Jarrie, 5 M.J. 193 (C.M.A. 1978). *See generally* Don Burnette, *Workshopping the Jencks Act*, ARMY LAW., June 1987, at 22; First Lieutenant Stephen T. Lynch, *Possession Under the Jencks Act*, 10 A.F. JAG R. 177 (Dec. 1981); Major Orlan G. Waldrop, *The Jencks Act*, 20 A.F. L. REV. 93 (1978); Daniel Bogart, *Jencks Act*, 27 JAG J. 427 (1973); Major Luther C. West, *Significance of the Jencks Act in Military Law*, 30 MIL. L. REV. 83 (1965).
[261] MCM, *supra* note 17, R.C.M. 701(a)(5)(A).

These procedural protections strongly reflect the due process-justice model in that they are designed to ensure that an accused has access to any evidence which he may introduce on his behalf or which may be introduced against him at trial by the prosecution.

e. Appointment and Role of Counsel

Throughout the military justice system, lawyers play a pervasive and essential role. Their participation clearly reflects the due process-justice model. Lawyers advise commanders at all levels of command, for example on promulgation of lawful orders and policies, pretrial investigations,[262] decisions concerning prosecutorial discretion, responding to defense requests, and post-trial disposition of courts-martial.

On the defense side, lawyers represent the accused at virtually every stage of the proceedings—from pretrial investigation to appellate review. Defense counsel are typically assigned to separate legal chains of command, so that they are not directly responsible to the local commanders.[263]

The military system takes the role of counsel very seriously. The appellate courts review, and act upon, allegations of unprofessional or ineffective representation by both the prosecution[264] and the defense.[265]

f. Use of Military Judges

Another feature of the military justice system that reflects the due process-justice model is the appointment of military judges to preside over courts-martial. Their role is critical in ensuring that the rules of

---

[262] Although we usually focus on the appointment of defense counsel, the fact that the system involves prosecutors at the early stage to advise commanders is also another factor that, whether intended or not, could have justice implications for the defendant. Lawyers can be effective in dissuading a commander from proceeding with baseless charges that run the risk of demoralizing the command.

[263] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 6 (3 Oct. 2011) (discussing U.S. Army Trial Defense Service).

[264] *See* SCHLUETER, *supra* note 20, § 13-3(N), at 704–08 (discussing prosecutorial misconduct).

[265] *See id.* § 15-2(C)(3), at 835–59 (discussing ineffective assistance of defense counsel).

procedure and evidence are applied and enforced. While the commander can control what takes place outside the courtroom, it is the judge who is charged with the responsibility of ensuring that an accused receives a fair trial.

g. Guilty Plea Inquiries

As noted in Part V.E.1.f, above, the ability of the prosecution and defense to efficiently resolve pending charges through entry of a guilty plea—most often accompanied by a pretrial agreement—reflects the crime control-discipline model. But there are concerns that the government may coerce an accused into pleading guilty and thus waive important constitutional rights that would be available in a contested trial.[266] To address that concern, the military courts and the *MCM*[267] require the military judge to conduct an inquiry into the voluntariness and factual basis of a guilty plea.[268] In addition, the military judge is required to determine if there is any agreement between the accused and the commander and, if so, review the agreement to ensure that it comports with law and sound policy.[269] Failure to conduct the inquiry may result in the guilty plea later set aside by an appellate court.[270] Accordingly, the requirement to conduct these inquiries reflects the due process-justice model.

---

[266] *See* Stephen A. Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265 (1978) (proposing a new rule that would allow a defendant to issue proper notice of his constitutional claims, plead guilty, and claim on appeal the violation of those rights); Note, *Conditional Guilty Pleas*, 93 HARV. L. REV. 564 (1980) (noting that conditional guilty pleas are an appropriate compromise between the benefits of the plea bargain system and the need to provide defendants with an adequate forum for the consideration of their constitutional claims).

[267] MCM, *supra* note 17, R.C.M. 910.

[268] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969). *Cf.* Elling, *supra* note 224 (recommending changing the law so that courts will not be always required to reject a guilty plea whenever an inconsistency arises).

[269] United States v. King, 3 M.J. 458 (C.M.A. 1977); United States v. Green, 1 M.J. 453 (C.M.A. 1976).

[270] *See, e.g.*, United States v. Turner, 35 M.J. 787 (A.C.M.R. 1992) (guilty plea improvident where element of offense was missing).

h. Trial Procedures

Virtually every aspect of a court-martial itself reflects the due process-justice model. As outlined in Part II.B, *supra*, an accused is entitled to the same protections and rights that exist in federal and state criminal trials. The court-martial is an adversarial proceeding and is designed, as is its civilian counterpart, to determine whether an accused is guilty of the charged offense—both factually and legally.

While most courts-martial are conducted quickly and efficiently, they sometimes reflect what Packer refers to as the "obstacles" of due process. For example, a military accused is entitled to file motions to dismiss, motions to suppress evidence, motions for appropriate relief, and motions for continuances. The motions practice in the current military justice system, in keeping with the due process-justice model, can slow things down. For commanders and others who are concerned about the good order and morale of the military community, the process can sometimes be very frustrating—especially if the proceedings are protracted.[271]

i. Sentencing

If an accused is convicted by a court-martial, either the military judge or the court-martial members who found the accused guilty will determine the sentence. During sentencing, the commander's interest in ensuring that the accused does not return to the command (the crime control-discipline model) is restricted by two rules: First, prosecution witnesses on sentencing are not permitted to testify that in their opinion the accused should be discharged.[272] Second, the prosecutor may not urge the court or the military judge to impose a discharge as part of the

---

[271] For example, the court-martial of Major Nidal Hasan at Fort Hood has drawn negative comments from the surviving victims of that shooting. *See, e.g.*, Jim Forsyth, *Trial Delays Vex Fort Hood Survivors Three Years Later*, CHI. TRIB., Nov. 4, 2012, http://articles.chicagotribune.com/2012-11-04/news/sns-rt-us-usa-crime-fort-hoodbre8a403y-20121104_1_major-nidal-hasan-fort-hood-trial-delays.

[272] MCM, *supra* note 17, R.C.M. 1001(b)(5)(B); United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989). This approach, which seems to reflect interests in the individual's rehabilitation versus the command's interests, clearly fits Packer's due process model. The one thing the command might not want, because it could adversely affect good order and discipline, is for a convicted servicemember to return to the unit. As a practical matter, if a servicemember did not receive a punitive discharge, the command would have the option of administratively separating that person. *See also* PACKER, *supra* note 154, at 53–58 (discussing rehabilitation as a justification for punishment).

sentence.[273] In sentencing an accused, the court-martial or the military judge may consider not only the impact of the accused's actions on the military community and any victims, but also the rehabilitative potential of the accused.[274] To that extent, military sentencing reflects the due process-justice model.

Furthermore, Rule for Court-Martial 1001, which governs presentencing procedures,[275] is broadly asymmetrical in favor of the defense. The Government is generally limited to evidence in aggravation of the crimes of which the accused was convicted, plus evidence of prior convictions and punishments, uncharged misconduct, information about the victim, and a *very* limited form of testimony about the accused's rehabilitative potential.[276] The Government is also bound by the Military Rules of Evidence.[277] The defense, in contrast, is allowed to introduce nearly anything about the accused himself (as well as the crimes) that may tend to reduce the punishment. The defense also has the option to relax the rules of evidence,[278] and if the convicted servicemember chooses to make an unsworn statement, he is not only not subject to cross-examination,[279] but his "allocution" rights allow him to speak about almost anything he wishes to try to influence his sentence.[280]

Once the accused has been sentenced, a commander may not increase the punishment.[281] The commander may, however, take action to reduce[282] or suspend the sentence.[283]

---

[273] *See, e.g.*, United States v. Motsinger, 34 M.J. 255 (C.M.A. 1992).
[274] MCM, *supra* note 17, R.C.M. 1001(b)(5).
[275] *Id.* R.C.M. 1001.
[276] *Id.* R.C.M. 1001(b)(5); *see also* Edward J. O'Brien, *Rehabilitative Potential Evidence—Theory and Practice*, ARMY LAW., Aug. 2011, at 5, 11 & n.58 (calling into question whether the "rehabilitative potential" evidence the Government may introduce is ever really useful in enhancing a sentence).
[277] MCM, *supra* note 17, R.C.M. 1001(c)(3), (d), and (3). *See also* MCM, *supra* note 17, MIL. R. EVID. 1101.
[278] *Id.* R.C.M. 1001(c)(3). If the judge has relaxed the rules of evidence for the defense, the prosecution may request that the rules of evidence be relaxed for any rebuttal evidence. *Id.*
[279] *Id.* R.C.M. 1001(c)(2)(C).
[280] *Id.* R.C.M. 1001(c)(2).
[281] *Id.* R.C.M. 1107(d)(1).
[282] *Id.* R.C.M. 1107(d)(1).
[283] *Id.* R.C.M. 1108.

j. Appellate Review of Court-Martial Convictions

Finally, the one feature of the military justice system that perhaps best reflects the due process-justice model is the system's appellate review of courts-martial.[284] The system of appellate review is sometimes described as "paternalistic," a reference to the view that the crime control-discipline model may lead to incorrect results (at the command level) and that the appellate courts can correct such results.

As noted in Part II.C, above, court-martial convictions can be appealed to the relevant service's Court of Criminal Appeals,[285] and review by that court is automatic in certain cases.[286] An adverse decision by those courts may be reviewed by the CAAF.[287] And that court's decisions may be reviewed by the Supreme Court of the United States.[288] This system ensures that whatever may have occurred at the command level, appellate courts (both military and civilian) can review a court-martial conviction to ensure that the conviction comports with the Constitution, the UCMJ, and the *MCM*.

Within that structure are sub-elements that further the due process-justice model. First, the accused is entitled to representation by a military appellate attorney at no cost to the accused.[289] Second, the service appellate courts have independent fact-finding powers which provide a convicted servicemember with an opportunity to argue that the conviction should be set aside because the evidence was insufficient.[290] Occasionally a court-martial conviction is reversed on those grounds.[291]

Third, in reviewing court-martial convictions, the appellate courts apply standards of review similar to those used in civilian courts.[292] Fourth, the service appellate courts have the power to review and, if

---

[284] *See generally* Daniel T. Ghent, *Military Appellate Process*, 10 AM. CRIM. L. REV. 125 (1971) (reviewing the military appellate process).
[285] UCMJ art. 66(a) (2012). The Judge Advocate General of each service must establish a Court of Criminal Appeals.
[286] A case *must* be referred to the service's court of criminal appeals if the sentence includes death, a punitive discharge, or confinement of one year or more. *Id.* art. 66(b).
[287] *Id.* art. 67.
[288] *Id.* art. 67 (2012); 28 U.S.C. § 1259 (2012).
[289] UCMJ art. 70 (2012).
[290] *Id.* art. 66(c) (2012); MCM, *supra* note 17, R.C.M. 1203(b) discussion.
[291] *See, e.g.*, United States v. McDuffie, 65 M.J. 631 (A.F. Ct. Crim. App. 2007) (evidence insufficient to sustain conviction).
[292] *See* SCHLUETER, *supra* note 20, § 17-14, at 1166–75 (discussing standards of review).

necessary, to reassess the sentence.[293] In doing so, they may consider sentences adjudged in similar cases.[294] Fifth, the appellate courts may return the case to the trial level for a hearing on a specified issue.[295] And finally, the CAAF has used its review powers to conclude that a particular statute or provision is not enforceable.[296]

3. Summary of Application of the Models

While application of the crime control-discipline model and the due process-justice model to features of the military justice system is instructive, there seems to be no way to objectively determine how the two models fit together, or relate to each other. And one cannot simply add up the features that appear to reflect each model and come to a conclusion about whether one or the other predominates. At the most, they can provide some insight into how courts and commentators view one or more features of the system. In themselves they do not resolve the conundrum.

VI. The Primary Purpose Approach to the Conundrum

While the thematic approach[297] and the models approach[298] help in identifying the competing ideologies and approaches to the conundrum, neither approach provides a satisfactory answer to the core question: What is the primary purpose of the military justice system? The answer usually depends on one's ideological approach to the purposes of any criminal justice system. The models approach identifies and explores the different ideologies. The thematic approach reflects the writer's "sound bite" views on those ideologies.

---

[293] MCM, *supra* note 17, R.C.M. 1203(b) Discussion.
[294] *See, e.g.*, United States v. Smith, 15 M.J. 948 (A.F.C.M.R. 1983) (in some cases comparing sentences is appropriate); *Cf.* Lieutenant Colonel Jeremy Stone Weber, *Sentence Appropriateness Relief in the Courts of Criminal Appeals*, 66 A.F. LAW. REV. 79 (2010) (suggesting that comparing sentences leads to inconsistent results).
[295] United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967). *See also* Andrew Effron, United States v. Dubay *and the Evolution of Military Law*, 207 MIL. L. REV. 1 (2011) (discussing the history and application of *DuBay* hearings).
[296] *See generally* Cooke, *supra* note 112 (analyzing the shift in balance of power from the military commanders to the judges and lawyers).
[297] *See* Part IV, *supra*.
[298] *See* Part V, *supra*.

But the question remains. What is the primary purpose of the military justice system? The answer lies in part in an objective analysis of the history and development of military justice. Historically, starting with the Articles of War, the system was treated as a way to permit the commander to exercise his powers to provide good order and discipline in his unit.[299] Through the decades the Articles of War were amended to reflect concern about the extent of that power and abuses in exercising that power. But the charter for the military justice system, if you will, remained. The system was established and retained for the primary purpose of discipline. The fact that Congress has placed limits on the commander's discretion does not change the ultimate purpose and function of the system.

When Congress enacted the UCMJ in 1950, it created a unified military justice system, which reaffirmed the commander's power and authority to enforce good order and discipline. For example, the commander's authority to impose nonjudicial punishment was reaffirmed.[300] The UCMJ included new provisions that addressed concerns about abuse of those powers—limits which we now consider to be due process, or justice, protections. Those provisions—though they inured to the benefit of persons accused of crimes—did not negate or diminish the primary purpose of military justice.

In the succeeding decades Congress has tweaked the UCMJ, for example by providing for Supreme Court review of court-martial convictions. But it has not in way signaled a change in the basic, primary, purpose of the Code. The fact that some functions which were originally assigned to a commander are now assigned to lawyers or judges[301] does not alter the primary function of military justice: promoting good order and discipline.

---

[299] *See generally* EDWARD M. BYRNE, MILITARY LAW 1 (2d ed. 1976) ("Military justice must, of necessity, promote good order, high morale, and discipline."); WINTHROP, *supra* note 14, at 21 (noting that preamble to 1775 Articles of War stated that Articles of War were intended for the "due order and regulating of the military"); Ferris, *supra* note 8, at 446 (stating the primary purpose was to regulate military conduct of servicemen). In his treatise, Colonel Winthrop included a listing of other statutes under the heading, "Other Statutory Enactments Relating to the Discipline of the Army." WINTHROP, *supra* note 14, at 24.

[300] *See* Part V.E.1.e, *supra*.

[301] *See generally* Cooke, *supra* note 112 (analyzing the shift in balance of power from the military commanders to the judges and lawyers).

The preamble to the current *MCM* incorrectly signals to the casual reader that the first purpose of the military justice system is to provide justice and the secondary purpose is to promote good order and discipline.[302] The order of the list of purposes is a threat to the true primary purpose because it can be used by those espousing a stronger justice model to justify additional limits on the commander's powers—or even divesting the commander of essential powers and responsibilities needed to insure good order and discipline.

And focusing primarily on the justice component could be used to justify transferring powers traditionally held by the commander to a civilian prosecutor. The current military justice system reflects the principle that the commander is responsible for fighting and winning wars—a view expressed by the Supreme Court in *United States ex rel. Toth v. Quarles*.[303] Thus, the commander should have the power to maintain good order and discipline through the military justice system. The commander should not have to depend on a civilian justice system to enforce good order and discipline.[304]

---

[302] MCM, *supra* note 17, pmbl.

[303] 350 U.S. 11, 17 (1955).

[304] The use of civilian prosecutors was recently addressed in the Appeals Chamber decision in Prosecutor v. Ante Gotovina & Mladan Markač. Gotovina and Markač had been tried and convicted by the International Criminal Tribunal for the Fomer Yugoslavia. In overturning their convictions, the Appeals Chamber considered whether Markač, as commander of the Special Police during Operation Storm in the 1990s, could be held liable for crimes committed by them. The court observed:

> Turning first to superior responsibility, the Appeals Chamber notes that the Trial Chamber did not explicitly find that Markač possessed effective control over the Special Police. The Trial Chamber noted evidence indicative of a superior-subordinate relationship and found that commanders of relevant Special Police units were subordinated to Markač. *However, the Trial Chamber was unclear about the parameters of Markač's power to discipline Special Police members, noting that he could make requests and referrals, but that "crimes committed by members of the Special Police fell under the jurisdiction of State Prosecutors*."

Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Appeal Judgment ¶ 148 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (citations omitted, emphasis added). In effect, Markač was exonerated in part because he lacked the power to discipline those under his command. He had to depend on civilian authorities to enforce the discipline in his command. For further discussion of this decision, see Gary D. Solis, *The* Gotovina *Acquittal: A Sound Appellate Course Correction*, 215 MIL. L. REV. 78 (2013).

If the primary purpose and function of the military justice system is to promote good order and discipline, then what of the "justice" or "due process" element? The answer lies in recognizing the difference in laws that authorize or grant powers, and those that serve as limitations on the exercise of that power. The thrust of the Code—as of the Articles of War—is to recognize the commander's authority to exercise good order and discipline. Provisions in the Code, the *MCM*, service regulations, and case law provide checks on the commander's exercise of that authority. But those "justice" checks do not change the primary purpose and function of the system.

VII. Conclusion and Recommendations

Applied together, the thematic approach, the models approach, and the primary purpose approach summarize the relationship between the "discipline" and "justice" elements as follows:

- First, the primary purpose of the military justice system is to enable commanders to enforce good order and discipline in their units.

- Second, the military justice system imposes due process protections on the exercise of those powers by the commander, the prosecutor, the court-martial, and the appellate courts reviewing a court-martial.

- Third, the due process limitations—although critical to any criminal justice system—must not overwhelm the primary purpose of military justice.

Using those principles, I offer two recommendations for addressing the conundrum: First, developing a template to apply the foregoing principles and second, amending the UCMJ and the *MCM* to reflect those principles.

The tensions evident in the conundrum will appear any time there is a proposal to amend the UCMJ or the *MCM*. In finding the right balance and combination of the two elements, the policy makers and those charged with considering changes or amendments to the military justice system must follow some sort of principled template. A helpful starting point in looking for a principled template is the approach the Supreme

Court used in deciding how much procedural due process is due to a person who is threatened with a deprivation of life, liberty or property. In *Matthews v. Eldridge*,[305] the Court provided a three-pronged balancing test:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[306]

In *United States v. Weiss*,[307] the Supreme Court addressed the question of whether the military accused had been denied due process because the military judge did not have a fixed term of office. The accused argued that the Court should apply the three-pronged *Matthews* test. The government argued that the Court should apply the test adopted by the Court in *Medina v. United States*.[308] The Court rejected both arguments, stating that those tests were inapplicable in the military context. The test, said the Court, was set out in *Middendorf v. Henry*[309]: The question is whether the factors militating in favor of a particular right are so extraordinarily weighty as to overcome the balance struck by Congress.[310]

---

[305] 424 U.S. 319, 335 (1976).
[306] *Id*. at 335.
[307] 510 U.S. 163 (1994).
[308] 505 U.S. 437 (1992). In *Medina*, the defendant had argued that the Court should apply the *Matthews* test in the context of a challenge to a state procedural law which placed the burden of showing incompetency on the defendant. The Court said that the *Matthews* test should be limited to civil cases and that the appropriate test for criminal cases was whether "the [rule in question] offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id*. at 445. The Court noted that the Bill of Rights provide explicit guidance for criminal procedure rules and that expansion of those guarantees under the Due Process Clause would "invite undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Id*. at 443. The Court assumed that the states would decide how best to adjust their procedural rules.
[309] 425 U.S. 25 (1976).
[310] *Weiss*, 510 U.S. at 177.

This approach, however, assumes that Congress has applied some sort of test or template in crafting the UCMJ and in considering any subsequent amendments. Thus, the Court left to Congress the task of addressing the conundrum and deciding how to balance the military's interest in good order and discipline and the rights of a servicemember to due process of law. Congress, in Article 36 of the UCMJ, authorized the President to formulate policies and procedures for implementing the UCMJ. In considering changes to the military justice system the policy makers—whether in Congress, the White House, or in the Department of Defense—should consider the following questions.

- First, what military interests, e.g., good order and discipline, will be furthered by the provision in the UCMJ, the Manual, or the regulation?[311]

- Second, what benefits, if any, will the provision provide to the servicemember?[312]

- Third, what burdens, if any, will the provision place on the military justice system?[313]

---

[311] The attention of those suggesting reforms or changes almost always focuses on expanding the rights of an accused. But in reality, there have been changes to the UCMJ over the years that recognized the need of commanders to maintain good order and discipline by expanding jurisdiction, see Part V.E.1.b, *supra*. The same is true for changes to the *MCM*. For example, the Military Justice Act of 1983 and the 1984 version of the Manual simplified greatly the requirements for preparing legal post-trial recommendations. Those reviews could properly be included in those features of the military justice system that protected the accused; but they consumed a great deal of time and were a constant source of problems, which resulted in many courts-martial records being returned to the trial level for corrective action. *See* SCHLUETER, *supra* note 20, § 17-8(B)(2), at 1117 (discussing problems with post-trial recommendations). The process was further streamlined in 2008 and 2010. *Id*. at 1120–21.

[312] This, in effect, is the flip side of the cost factor, listed above. Consider the example of the changes in the *MCM* that resulted in greatly simplifying of post-trial recommendations. Arguably, the accused lost a chance to challenge the technical failures in the recommendation, but the government was able to reduce the amount of time and resources in preparing what had become a very complicated and detailed report.

[313] For example, in 2009, the Cox Commission recommended that all general and special courts-martial be reviewable by the service appellate courts, regardless of the sentence adjudged and that a servicemember could seek review at the Supreme Court, even if the Court of Appeals of the Armed Forces did not hear the case. NAT'L INST. OF MILITARY JUSTICE AND THE MILITARY JUSTICE COMM., CRIMINAL JUSTICE SECTION OF THE AM. BAR ASS'N, REPORT OF THE COMMISSION ON MILITARY JUSTICE (Oct. 2009), *available at* http://www.stripes.com/polopoly_fs/1.128855.1292429643!/menu/standard/file/coxreport.pdf. Those changes would certainly expand the due process rights of an accused. But it

This model roughly approximates the *Matthews v. Eldridge* test. Although the Supreme Court has said that this test was inapplicable to its review of military justice provisions, it should still remain useful to those charged with considering changes to the military justice system.[314] Addressing these questions helps frame the policymaker's approach to the conundrum—keeping in mind that the primary function of the military justice system is to promote good order and discipline.

With regard to the second recommendation—to amend the UCMJ and the *MCM* to reflect the three principles stated above—Congress should add a clear statement of purpose to the Code. It could be included in Article 1 and generally follow the form used in the preamble to the *MCM*.

In that regard, the Preamble to the *MCM* should be amended to put good order and discipline in first place, as the true primary purpose of military justice, but also recognize the need to provide due process of law to those accused of committing offenses in the Armed Forces:

> The purpose of military law is to assist in maintaining good order and discipline in the armed forces, to provide due process of law, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.[315]

Changing the preamble and including similar language in the UCMJ would be a step in the right direction. In doing so, Congress and the President have an opportunity to resolve the military justice conundrum.

---

would result in additional costs of time, personnel, and financial resources. Given the Supreme Court's record of granting full review in very few cases each year, those costs would be difficult to justify. The accused would still be able to seek collateral relief in the federal courts.

[314] Medina v. California, 505 U.S. 437, 453 (1992) (O'Connor, J, concurring) (noting that "the balancing of equities that *Mathews v. Eldridge* outlines remains a useful guide in due process cases".

[315] This proposal uses the term "due process" of law. Although the term can be ambiguous, it is preferable to the more ambiguous term, "justice."

THE *GOTOVINA* ACQUITTAL: A SOUND APPELLATE COURSE CORRECTION

GARY D. SOLIS*

I. Introduction

The International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber announced a landmark ruling in November 2012, which reversed the convictions of two Croatian general officers and set an important international precedent for the use of indirect fires in international armed conflict. Despite some criticism, the appellate acquittal of Generals Gotovina and Čermak was consistent with established tenets of the law of armed conflict and provides valuable guidance for future cases in which the use of indirect fires are at issue.

In 1995, Gotovina and Čermak were senior commanders in *Operation Storm*, conducted to retake certain areas of the self-proclaimed Republic of Serbian Krajina, formerly part of Croatia, from Serbian forces. Colonel General Gotovina was the overall commander of Operation Storm. Čermak was an Assistant Minister of the Interior and a commander of civilian police. A third accused, Mladen Markač, was also an Assistant Minister of the Interior and commander of the Special Police, which during *Operation Storm* included some artillery assets.[1] In

---

* Gary Solis is an Adjunct Professor of Law at Georgetown University Law Center, and George Washington University Law School, where he teaches the law of armed conflict. He is a retired Professor of Law, U.S. Military Academy, where, for six years, he directed West Point's law of war program. J.D., University of California at Davis; LL.M., George Washington Law; Ph.D. (law of war) The London School of Economics & Political Science. He is also a retired U.S. Marine Corps lieutenant colonel, having served seventeen months in the Vietnam conflict as an armor officer and company commander before becoming a judge advocate and, later, a military judge.

The author notes his sincere appreciation for the legal research and drafting provided for this article by John P. "Jack" Einwechter, a retired Army officer who served in both Military Intelligence and the Judge Advocate General's Corps in a wide range of legal positions, and as a senior War Crimes Prosecutor for the Office of Military Commissions, Department of Defense. He is a graduate of Cornell University Law School, where he was on the Law Review.

[1] Prosecutor v. Gotovina & Markaĉ, Case No. IT-06-90-T, Trial Judgment, ¶¶ 6, 177 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012). As noted by the Appeals Chamber, the trial judgment did not make an explicit finding on the disciplinary authority Markač had over the Special Police, noting for example that as commander he could not court-martial Special Police but had to rely on State Prosecutors to try them. Prosecutor

2001, Gotovina was indicted for grave breaches of the law of armed conflict and in 2004, Čermak and Markač were similarly indicted. In April, 2011, Čermak was acquitted of all charges and released. Markač was convicted of numerous international crimes and sentenced to eighteen years of confinement. Gotovina was convicted of serious charges and was sentenced to twenty-four years confinement. Gotovina and Markač appealed their convictions and sentences.

The central issue of their appeal was the alleged unlawful shelling, by artillery and rocket fire, of four towns, and an associated joint criminal enterprise (JCE) indicated by the shelling. The trial court employed a "200 meter" standard, finding that any artillery fire impacting 200 meters or more beyond a military target was *prima facie* evidence of the unlawful targeting of civilians and civilian objects[2]—a violation of both distinction[3] and military necessity,[4] and arguably indicative of a violation of proportionality.[5]

The 200-meter test is a very high standard of accuracy for an area weapon such as artillery, and it immediately raised concern in the military communities of many states that could be subjected to its application by some future tribunal. The core principles of distinction,

---

v. Gotovina & Markač, Case No. IT-06-90-A, Appeal Judgment, ¶ 148 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

[2] Discussed and critiqued in Walter B. Huffman, *Margin of Error: Potential Pitfalls of the Ruling in* The Prosecutor v. Ante Gotovina, 211 MIL. L. REV. 1, 29–51 (2012).

[3] Defined in 1977 Additional Protocol I, art. 48: "[T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives. . . ." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

[4] Defined in U.S. Dept. of the Army, Field Manual (FM) 27-10, *The Law of Land Warfare*,"[M]ilitary necessity' . . . defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. . . ." U.S. DEPT. OF ARMY, FM 27-10, THE LAW OF LAND WARFARE ¶ 3.a (18 July 1956).

[5] AP I, *supra* note 3, art. 57.2(b).

> [A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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.(b) (complementing Article 57.2(b)).

military necessity, and proportionality, as well as the 200-meter criterion, would be tested through the appeal.

On November 16, 2012, the Appeals Chamber (AC) of the ICTY[6] reversed the convictions of Gotovina and Markač for war crimes and crimes against humanity in furtherance of the alleged JCE during *Operation Storm*.[7] Both defendants, acquitted of all charges, were released,[8] over the dissents of two of the panel's five judges.[9]

The AC found that the convictions were inextricably based on an invalid 200-meter standard of artillery accuracy, which the five appellate judges unanimously rejected as factually groundless. The "200 meter standard" was "the cornerstone and organizing principle"[10] of the trial chamber's impact analysis, upon which it based its finding that the two accused leaders ordered unlawful artillery and rocket attacks during *Operation Storm*. The AC ruled that, absent the flawed inferences from this 200-meter standard, no reasonable trier of fact could conclude that Gotovina or Markač intended unlawful shelling attacks on civilians or civilian objects. The AC also ruled that without the finding of unlawful artillery attacks, no court could reasonably decide that the alleged JCE had existed. Further, if Gotovina and Markač were not JCE participants, they could not lawfully be charged under extended JCE liability[11] for

---

[6] The International Criminal Tribunal for the Former Yugoslavia 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 had occurred within the former Yugoslavia.

[7] *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶ 158.

[8] Unqualified acquittal and release of Defendants by the Appeals Chamber has ample precedent. *See* http://www.icty.org/sid/9984 (listing thirteen ICTY full acquittals since 2000, including nine at the appeals level).

[9] The Appeals Chamber includes seven permanent judges along with *ad litem* judges who hear appeals in five-judge panels. The permanent judges elect the Appeals Chamber's President and Vice President. The panel for the Gotovina and Markač appeal included the Court's most senior members, including the ICTY President, Judge Meron, and former President, Judge Robinson, who were in the majority here, and Vice President Judge Agius and former President, Judge Pocar, both of whom dissented.

[10] *Gotovina & Markač*, Appeal Judgment, Case No. IT-06-90-A, Appeal Judgment, ¶ 64.

[11] *See generally* Allison Danner & Jenny Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005) (tracing the evolution of JCE liability in ICTY jurisprudence, including the extended form of JCE liability, JCE 3). Under JCE 3 liability, "a defendant who intends to participate in a common design may be found guilty of acts outside that design if such acts are a 'natural and foreseeable consequence of the effecting of the common purpose.'" *Id.* at 106 (citing Prosecutor v. Tadić, IT No. 94-1-A, Appeal Judgment, ¶ 183 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999)).

other foreseeable crimes committed in executing a JCE. Finally, the AC evaluated whether the convictions could be sustained on any alternative theory of liability, and found that they could not be. The dissenting Judges in this case agreed with the majority that the 200-meter standard was invalid, but urged that the convictions be sustained based either on other evidence or on an alternative theory of superior responsibility.

Reversal of these high-profile convictions was greeted in the international community by reactions ranging from jubilation to condemnation. Serbian leaders condemned the ruling, while Gotovina and Markač returned to Croatia and a city-wide celebration in Zagreb.[12] Former ICTY Chief Prosecutor Carla Del Ponte, who oversaw the 2004 indictment of the two Croatians, declared, "I am shocked, very surprised and astonished because it is absolutely unbelievable . . . . I cannot accept that. I am really shocked because this is not justice."[13] Other commentators speculated about political motives and predicted that the Appeals Chamber's credibility as an impartial agent of international justice and reconciliation would be undermined.[14] The political controversy surrounding the verdicts, and forecasts of adverse impact on ICTY credibility, invite analysis of this ruling, which is the goal of this article.

---

[12] *Hague War Court Acquits Croat Generals Gotovina and Markač*, BBC NEWS, Nov. 16, 2012, http://www.bbc.cp.uk/news/world-europe-20352187.html. Serbia's Deputy Prime Minister said the ICTY has "lost all credibility" and the decision "is proof of selective justice which is worse than any injustice." *Id.*

[13] Tamara Spaic, *Carla Del Ponte: This is Not Justice, This is Denial of a Huge Crime*, BLIC ONLINE, Nov. 20, 2012, http://english.blic.rs/In-Focus/9224. In response to Del Ponte's comments, Gotovina's lawyers filed a complaint with UN Secretary General, requesting an investigation of Del Ponte's comments as violations of professional standards. *See* http://daily.tportal.hr/230034/Gotovina-s-lawyers-request-probe-and-penalties-against-Del-Ponte.html. Current Chief Prosecutor Brammertz had a more measured view of the ruling, expressing "disappointment," promising to consider seeking review of the ruling in the event new evidence emerges. Author? *Hague Prosecutor Disappointed at Croats' Acquittal*, ASSOCIATED PRESS, Nov. 21, 2012.

[14] *See, e.g.*, Elizabeth Pond, *A Dangerous Precedent in the Balkans*, WORLD POL'Y BLOG, Dec. 13, 2012, http://www.worldpolicy.org/blog/2012/12/13/dangerous-precedent-balkans. Some related commentary includes politically charged rhetoric and dire predictions of political fallout and impact on international relations. *See, e.g.*, Julie Biro, *Following the ICTY Verdict, What Does the Future Hold for Those Working Towards Reconciliation in the Balkans?,* HUFFINGTON POST, Nov. 28, 2012, http://www.huffingtonpost.com. Some pronounced the Court's credibility destroyed. Of those inferring political motives or anti-Serb bias, none offer evidence to support their charges. *See, e.g.*, David Harland, *Selective Justice for the Balkans*, N.Y. TIMES.COM, Dec. 7, 2012.

Contrary to some of the politically-charged commentary, the ruling stands as an affirmation of the tribunal's commitment to justice. The ICTY was created to administer justice based on legally sufficient proof of individual culpability. Thus, the UN resolution that created the ICTY established its "sole purpose" as "prosecuting persons [i.e., individuals, not groups] responsible for serious violations of international humanitarian law."[15] The ICTY statute establishes the presumption of innocence for such individuals.[16] The standard is proof beyond reasonable doubt.[17] In the event it finds legal error, if necessary, it will review the factual findings affected by the error and affirm them only if it is itself convinced of them beyond a reasonable doubt.[18] Thus, the duty of the ICTY is to deliver individual justice based on the facts and the evidence, not apportion national or ethnic blame for Balkan atrocities.

The Gotovina-Markač trial judgment rested heavily on a flawed standard of artillery accuracy, which the AC unanimously found to have no support in either the record of trial or the real world of armed conflict. The record also confirmed conspicuous gaps in evidence (e.g., no confirmed fatalities from Croatian artillery fire, and no witness who fled from Krajina due to shelling). Nevertheless, after the trial court's decision, the two defendants were imprisoned for seven years based primarily on allegations of unlawful artillery strikes that the Appeals Chamber would later find erroneous.[19] An impartial reading of the Appeals Chamber's opinion strongly indicates that it represents the

---

[15] S.C. Res. 827 ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993).

[16] Statute of the International Criminal Tribunal (Former Yugoslavia), art. 21.3, May 25, 1993, 32 I.L.M. 1159 [hereinafter ICTY Statute].

[17] Prosecutor v. Delalic, Case no. IT-96-21-A, Judgment, ¶ 458 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

[18] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Appeal Judgment, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (citing *inter alia*, Prosecutor v. Haradinaj, No. IT-04-84-A, ¶ 11 (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2010)). The Appeals Chamber also reviews factual findings absent legal error, but under a more deferential standard, by which factual findings are reversed only if no reasonable person could have come to the same conclusion. Mark C. Fleming, *Appellate Review in the International Criminal Tribunals*, 37 TEX. INT'L. L.J. 136–37 (2002) (citing *inter alia* Prosecutor v. Tadic, Case No. IT-94-1-A, Appeal Judgment, ¶ 64 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999)). Prosecutor v. Jelisic, Case No. IT-95-10, Appeal Judgment, ¶ 36 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001).

[19] The Trial Chamber was only able to determine impact locations for 154 of the 1205 rounds it estimated were fired at the four towns; and of that small number it found that eighty landed within 200 meters of legitimate targets. Of the seventy-four that did not, only nine landed more than 400 meters from such targets. Huffman, *supra* note 2, at 30–31, 34 n.146.

thoughtful product of good-faith analysis by five highly qualified jurists, who disagreed on particular facts of the case, but whose individual commitments to international justice were clear.[20]

Following a summary of the trial and appeals chamber judgments and dissenting opinions, this article briefly discusses the decision's application of the ICTY standard of appellate review and its impact on the law of targeting, with emphasis on the use of impact analysis in cases dealing with allegations of unlawful shelling.

II. Background and Trial Chamber Judgment

Early on August 4, 1995, Colonel General Gotovina ordered Croatian Army forces to commence military operations against Serbian defenses in the self-proclaimed Republic of Serbian Krajina. Croatian forces launched artillery and rocket strikes on previously identified Serbian military targets and defensive positions, including key command, control, and communications assets placed by Serbian forces in the town of Knin and other populated areas.[21] Croatian forces defeated the Serbian forces within forty-eight hours and established Croatian control of the Krajina region, ending the struggle for Croatian independence and setting the stage for a successful conclusion of the Dayton Peace Accords a few months later, in December 1995.

Allegations of war crimes and ethnic cleansing arose from all sides even before the fighting ended, spawning both national and international investigations. Not until 2004—nine years after *Operation Storm*—did ICTY prosecutors indict Gotovina and Markač, charging crimes against humanity and violations of the laws and customs of war, based on their participation in an alleged JCE of high-ranking Croatian leaders, including the late President Tudjman.[22] According to the indictment, Gotovina and Markač shared the JCE's criminal intent to persecute and forcibly remove ethnic Serbs from the Krajina region. The indictment

---

[20] Judge Meron currently is serving a second term as the Appeals Chamber's president, and recently was appointed to a four-year term as the President of the Mechanism for International Criminal Tribunals, created by the UNSC to oversee completion of the work of the ICTY and ICTR. *See* http://www.icty.org/sections/About the ICTY/Chambers.

[21] Huffman, *supra* note 2, at 5–12 (summarizing the planning and execution of military operations in *Operation Storm*).

[22] Prosecutor v. Gotovina, Čermak & Markač, Case No. IT-06-90-PT, Amended Joinder Indictment (Int'l Crim. Trib. for the Former Yugoslavia May 17, 2007).

further charged that they contributed to the JCE by ordering illegal artillery attacks, and failed to prevent or punish crimes committed by Croatian soldiers in their area of operations,[23] and that they aided and abetted these crimes and were liable for them under a theory of command responsibility.[24]

After a three-year trial, Gotovina and Markač were found guilty of participating in a JCE.[25] The Trial Chamber further found that Gotovina and other JCE members persecuted and forcibly removed ethnic Serbs from the Krajina region through illegal artillery attacks and by failing to prevent or punish crimes of Croatian soldiers committed against the area's Serbian population.[26] Convictions for murder, wanton destruction, and plunder were based upon extended JCE liability ("JCE 3") on the theory that subordinates' crimes, while not intended, were foreseeable consequences of the initial JCE.[27] The Trial Chamber declined to make findings regarding either command responsibility or aiding and abetting theories of complicity.[28]

Much of the Trial Chamber's judgment was devoted to a review of evidence about the planning of *Operation Storm*, artillery impact locations, gun positions, firing orders, and other technical and factual issues. The court confirmed that lawful military targets existed in all four towns at issue, including Serbian logistical and command and control assets. Of course, by placing significant military targets in the towns, Serb forces exposed the towns to lawful attack, in potential violation of the concept of distinction, as well as the law of armed conflict.[29] While

---

[23] *Id*. ¶¶ 12–20. An earlier indictment was registered against the Defendants in 2001, which made no allegation of unlawful shelling.
[24] *Id.* ¶ 46.
[25] *Id.* Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Appeal Judgment, ¶ 2370 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (finding "unlawful attacks formed an important element in the execution of the JCE").
[26] *Id.* ¶ 2373.
[27] *Id.* ¶¶ 2372–75.
[28] *Id.* ¶ 2375 ("On the basis of all of the above findings and considerations, the Trial Chamber finds that Gotovina is liable pursuant to the mode of liability of JCE. Consequently, it is not necessary for the Trial Chamber to make findings on the other modes of liability alleged in the indictment.").
[29] Placement of military assets in civilian areas does not render them immune from attack. *See* FM 27-10, *supra*, note 4, ¶ 41. *See also* AP I, *supra* note 3. *See also id.* arts. 51(7), 85(a). The Trial Chamber did confirm the lawfulness of artillery rounds that impacted within the 200 meter radius surrounding lawful military targets, however. Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Appeal Judgment, ¶ 1911 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012). *Id.*

the Court found intentional attacks on "civilian areas" the primary means of forced deportation, it did not identify any victim of Croatian artillery fire and the record contains no testimony of anyone who fled the region due to Croatian shelling.[30]

After a detailed analysis of the evidence, the Trial Chamber found that approximately 1,205 artillery and rocket rounds were fired on August 4 and 5, 1995, by Croatian forces in or near the four towns at issue,[31] but it could establish the approximate impact locations of only 154 rounds (about 13%). Of these 154 impact locations, 74 rounds (6.1% of 1,205) fell outside 200 meters, while 9 rounds (less than 1%) fell more than 400 meters from military targets.[32] For unexplained reasons, the Court ruled that rounds landing more than 200 meters from a lawful target were presumed to have been intentional or indiscriminate attacks on civilians. Comparing the locations of known impact points with known Serbian military targets, the court applied its 200-meter presumption and concluded that "too many projectiles impacted in areas too far away from identified military targets . . . to have impacted in these areas as a result of errors or in the HV [Croatian] artillery fire."[33] The Court concluded, therefore, that the defendants either intentionally attacked civilian targets or treated entire towns as targets for indiscriminate fire, both violations of the law of armed conflict.[34]

The trial court also found the unlawful shelling to be the *actus reus* of persecution, forcible deportation, wanton destruction, inhumane acts, and mistreatment,[35] and evidence of the JCE's existence and the Defendants' main contribution to the JCE, both of which are elements of

---

[30] The Trial Chamber found that there were dead bodies in the general vicinity of HV artillery attacks in Knin, but conspicuously stopped short of finding that these casualties were caused by the shelling. *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶¶ 1375, 77, 1388. In the one case where the court found that casualties were caused by a mortar attack, it was unable to determine if the victims were combatants or civilians and whether the source of fire was Croatian or Serb. The court used this same approach to assess collateral damage to civilian houses. *See, e.g. id.* ¶ 1716.

[31] *Id*. ¶¶ 1909, 1916, 1928 and 1939 (finding 900 shells were fired on Knin, 150 on Benkovac, 150 on Gracac and at least 5 on Obrovac).

[32] *Id. Cf.* ¶¶ 1909, 1922, 1934 and 1942.

[33] *Id.* ¶ 1898.

[34] Additional Protocol I, *supra* note 3, art. 51(1), (2) (defining alternative crimes, both embraced by the Trial Judgment. The 200 meter standard was particularly alarming in international humanitarian law circles, and to law of war specialists), *E.g*., Huffman, *supra* note 2 (citing adverse commentary by law of war experts).

[35] *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶ 135.

JCE liability.[36] In short, the 200-meter standard was central to the Trial Chamber's findings and verdict. To buttress its artillery impact analysis, the Trial Chamber also relied on an order by Gotovina to "place the towns under attack"[37] as evidence of his intent to target civilians indiscriminately. The Court's interpretation of the order, however, was also dependent on the faulty 200-meter standard and impact analysis. Gotovina's artillery chief, Marko Rajčić, testified that Gotovina's order was intended and understood to commence lawful attacks on pre-planned military targets in the towns.[38] The Court acknowledged that the order, on its face, could be interpreted in that lawful sense, but rejected that interpretation and Rajcić's testimony, based explicitly on its own faulty impact analysis.

The defendants appealed the convictions and sentences primarily on grounds that the unprecedented 200-meter accuracy standard had no support in the evidence or in expert opinions, and it had not been asserted at trial by any party as a relevant or controlling legal standard.[39] Appellants argued that, absent impact analysis based on the 200-meter standard, their convictions for participating in a JCE based on unlawful shelling could not be sustained.[40] On appeal, the prosecution conceded the invalidity of the 200-meter standard but argued that the Trial Chamber's impact analysis was not essential to its findings of unlawful artillery attacks and urged the Appeals Chamber to uphold the

---

[36] *Id.* ¶ 2370. Other proofs of the alleged JCE relied on by the Court are the transcript of a meeting in Brioni, where Gotovina was a minor participant, and the discriminatory policies against Serbs and inflammatory statements by Croatia's president after *Operation Storm* was completed, neither of which was linked to Gotovina.

[37] *Id.* ¶ 70. Gotovina's August 2 order stated, in relevant part: "[F]ocus on providing artillery support to the main forces in the offensive operation through powerful strikes against the enemy's front line, command posts, communications centers, artillery firing positions and by *putting the towns of . . . Knin, Benkovac, Obrovac and Gracac under artillery fire*." (italics added).

[38] *Id.* ¶ 1183, 1188. Defense witness Rajcić also testified that Gotovina gave clear and unequivocal orders to avoid civilian casualties and property damage, and to comply strictly with the law of war.

[39] Prosecutor v. Gotovina, Čermak & Markač, Case No. IT-06-90-T, Gotovina Brief, ¶¶ 11–13 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2011).

[40] The Prosecution did not appeal any aspect of the Judgment, including the Trial Chamber's decision not to enter findings on aiding and abetting or command responsibility. The Appeals Chamber denied defense requests to admit additional evidence, including expert reports demonstrating the invalidity of the 200 meter standard. The Chamber also rejected an amicus brief offering the opinions of eminent artillery and law of war experts explaining why the 200 meter standard was invalid and posed a potentially dangerous precedent for future conflicts. *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶¶ 1–2, annex A (Procedural History).

convictions based on other evidence of the defendants' JCE participation. Following oral argument, the Appeals Chamber requested additional briefs on whether the convictions could be sustained based on alternate modes of liability.[41]

III. The Appeals Chamber Judgment

Following eighteen months of appellate litigation, the Appeals Chamber reversed both convictions, rejected alternate modes of liability, and ordered the defendants' immediate release. The Appeals Chamber unanimously rejected the 200-meter standard, finding that it had no support in the trial record.[42] The majority further found the 200-meter standard to be the linchpin of the Trial Chamber's reasoning, and that other trial evidence was insufficient to support either the findings of unlawful shelling or JCE liability.[43] Two dissenting Appeals Chamber judges concluded that the evidence was adequate to sustain the Trial Chamber's key findings and the convictions, even without the 200-meter rule.[44]

A. Ruling of the Court

The Appeals Chamber's logic parallels that of the Trial Chamber Judgment. Because the convictions rested solely on JCE liability, the Appeals Chamber first examined the legal and factual basis for the existence of contributions by Gotovina and Markač to the alleged JCE. The Appeals Chamber observed that existence of a JCE hinged on "several mutually reinforcing findings" of the Trial Chamber, including its impact analysis of Croatian artillery attacks, Gotovina's orders, a high-level meeting of Croatian leaders, and evidence of discriminatory Croatian laws or policies, if any, that prevented Serb refugees from

---

[41] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Order for Additional Briefs, ¶¶ 1–2 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2012).

[42] *Id.* ¶ 58 (noting that "the Trial Judgment contains no indication that any evidence . . . suggested a 200 metre margin of error," and "the Trial Chamber made no attempt to justify the 200 Metre Standard").

[43] President, Judge Meron, former President Judge Robinson, and Senior Judge Guney formed the Majority. In ICTY practice, unlike concurring and dissenting opinions, the author of the majority opinion is not indicated.

[44] Current ICTY Vice President Judge Agius, along with former President Judge Pocar, dissented.

returning to Krajina after *Operation Storm*.[45] The Appeals Chamber found that the Trial Chamber's finding that the defendants participated in and contributed to a JCE rested heavily on its finding of unlawful shelling of the four towns at issue.[46] The Appeals Chamber acknowledged that the finding of unlawful shelling was also based on a number of factors, but concluded that without the flawed impact analysis, and the 200-meter test, all other factors combined could not sustain the convictions.

All five appellate judges agreed that the Trial Chamber failed to provide a valid basis for adopting its 200-meter standard.[47] The Court also identified two additional errors fatal to the 200-meter standard and its application to the evidence. First, it observed that, even if a 200-meter standard could apply in some circumstances, the Trial Chamber failed to explain how a single standard of accuracy could apply to the differing circumstances of each attack on four different towns by different batteries at different distances.[48] Second, the Court ruled that the Trial Chamber did not justify its rejection of the possibility that mobile targets, or "targets of opportunity," such as Serb military vehicles in motion, might account for some of the artillery impact points more than 200 meters from stationary military targets in the town of Knin.[49] Because the record contained credible evidence of mobile vehicular targets and Croatian forward observers in the vicinity of Knin,[50] the Appeals Chamber held that the prosecution had the burden of disproving that outlying impacts could be attributed to Croatian engagement of targets of opportunity, and had failed to do this. The Chamber further ruled that "it was unreasonable to conclude that no artillery attacks on Knin were aimed at targets of opportunity."[51] Unless the evidence excludes

---

[45] *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶ 24.
[46] *Id.*
[47] *Id.* ¶¶ 61, 64.
[48] *Id.* ¶ 60.
[49] *Id.* ¶¶ 62–63 (faulting the Trial Chamber for failing to "explain how, in these circumstances, it could exclude the possibility that HV [Croatian] artillery attacks were aimed at mobile targets").
[50] *Id.* ¶ 63.
[51] Impact analysis based on an accuracy standard cannot logically proceed until impact points are correlated with the locations of lawful targets. The trial chamber held that "the evidence does not establish whether the HV had artillery observers" who could have called for fire, and therefore assumed that they did not. In so doing, they impermissibly reversed the burden of proof. Huffman, *supra* note 2, at 35; *Gotovina & Markač*, IT-06-90-A, Appeal Judgment, ¶ 63 (citing Prosecutor v. Zigiranyirazo, Case No. IT-01-73-A, Appeal Judgment, ¶¶ 38, 42, 49 n.136 (Int'l Crim. Trib. for the Former Yugoslavia Nov.

engagement of targets of opportunity, impact analysis cannot reliably conclude that any impact point was more than 200 meters from a legitimate static or mobile target.[52]

The Appeals Chamber next considered whether the convictions could be sustained on the basis of two alternative modes of liability alleged in the indictment, but explicitly left undetermined by the Trial Chamber. The indictment charged the defendants with (a) aiding and abetting crimes committed by Croatian soldiers against Serb civilians after the artillery attacks were over, and (b) command responsibility, under ICTY statute Article 7(3), for not preventing or punishing these crimes.[53] The Appeals Chamber held that it was empowered to revise the Trial Chamber's findings and enter findings of guilt based on alternate theories of liability, with or without a prosecution appeal,[54] provided such action would not "substantially compromise the fair trial rights of the accused."[55] The Court held that appellate analysis of alternative modes of liability would require assessment of "the Trial Chamber's findings and other evidence *de novo*."[56] Since the Trial Chamber had based the convictions solely on JCE liability, without findings on alternative theories of liability, the Appeals Chamber ruled that it would consider, but not defer to, the Trial Chamber's findings and analysis.[57]

16, 2009)). "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." Prosecutor v. Delalić et al., Case No. IT-96-21-A, Appeal Judgment, ¶ 458 (Int'l Crim. Trib. For the Former Yugoslavia Feb. 20, 2001).

[52] *Id.* ¶ 458.

[53] *Id.* ¶¶ 117, 120.

[54] *Id.* ¶ 108. Defendants argued that the Appeals Chamber lacked jurisdiction to entertain these alternative theories of culpability because the Prosecution had not appealed the judgment and because entering such convictions on appeal would deprive Defendants of their statutory right of appeal. The Prosecution argued that the Appeals Chamber had legal authority and precedent to enter convictions on these theories, and Defendants would not be prejudiced by its consideration of alternative theories, which had been fully litigated at trial and on appeal. *Id.* ¶¶ 100–02.

[55] *Id.* ¶¶ 107–08. The Appeals Chamber rejected the defense arguments that it was empowered to enter findings on alternate modes of liability if the prosecutor appeals the Trial Chamber's findings on alternate modes. The Trial Chamber here explicitly declined to make findings on alternate theories of aiding and abetting and command responsibility and the prosecutor failed to appeal that aspect of the Trial judgment.

[56] *Id.* ¶ 110.

[57] *Id.*

The Appeals Chamber concluded that the evidence failed to support convictions on either basis.[58] Both theories required a finding that the defendants had failed to take sufficient measures to prevent the crimes of subordinates. The Appeals Chamber reviewed eight specific measures taken by General Gotovina to "prevent and minimize crimes and general disorder" throughout *Operation Storm*[59] and found that his alleged failure to take additional measures, like his orders for shelling, could not serve as the *actus reus* for either alternative theory of guilt.[60] With respect to General Markač, the Appellate Chamber noted that the trial court had failed to find explicitly that he had "effective control" over the Special Police, as would be required for superior liability. In particular, he had lacked the authority to court-martial them for misconduct, since only the State Prosecutors could prosecute them.[61] It also found that the trial court had failed to establish that he himself had made any "substantial contribution" to their crimes, as would be required for aiding and abetting.[62] Absent such findings from the trial court, it refused to engage in "excessive factfinding" of its own to explore these theories against him, lest it prejudice his fair trial rights.[63] Accordingly, it found neither defendant guilty under either alternative theory.[64]

B. Concurring Opinions

The concurring opinions both focused on the alternative theories of liability, and the standards used by the Appeals Chamber in considering them.

---

[58] *Id*. ¶¶ 136, 157.
[59] *Id*. ¶ 133. These included approving training to familiarize his soldiers with the requirements of the Geneva Conventions, "limit[ing] movements of Croatian soldiers in occupied areas so as to prevent theft or undisciplined conduct," and ordering commanders to collect and store weapons that he heard were being used to fire on inhabited settlements. The court also noted an increase in prosecutions for disciplinary infractions during *Operation Storm*. *Id.*
[60] *Id.* ¶ 135.
[61] *Id.* ¶ 148 (noting that only State Prosecutors had the power to prosecute Special Police). One of the dissenting judges argued that he still had sufficient control to be held liable, in part because he had access to "parallel disciplinary proceedings" against them. *Id.* ¶¶ 77–80 (Agius, J., dissenting).
[62] *Id.* ¶ 149.
[63] *Id.* ¶ 150.
[64] *Id*. ¶¶ 134, 150.

Judge Meron's opinion agreed that the Appeals Chamber had the power to consider alternative theories of guilt, but cautioned it to be sparing in its consideration of them. He expressed his view that the Appeals Chamber should limit itself, both in drawing additional inferences from the Trial Chamber's findings and in pronouncing convictions different from the ones appealed.[65] He cautioned that these issues require case-by-case analysis and the authority to sustain a conviction on alternative theories is not "a license for wholesale reconstruction or revision of approaches adopted or decisions taken by a trial chamber."[66]

In this case, Judge Meron wrote, the Appeals Chamber should not have analyzed the alternative theories to the extent that it had, because these "were almost entirely absent from core trial and appeal briefing," and because it had reversed "the fundamental conclusions of the Trial Chamber, including the finding that the JCE existed." If the Appeals Chamber had entered convictions under those circumstances, the appellants would have been found guilty of crimes "very different from those they defended against at trial or on appeal," and this would have been unfair to them.[67] Judge Meron was opposed to having such an option on the table.

Appellate Judge Robinson went further. Focusing on the additional theories as applied to Markač, he thought the Appellate Chamber should have adopted a "bright line" test by which it would *never* draw factual inferences from the Trial Chamber's findings, and would enter a conviction on an alternate theory *only* if such a conviction was supported by the specific factual findings of the Trial Chamber. "In my view, when the Appeals Chamber enters a conviction for an alternative mode of liability it must do so on the basis of the findings of the Trial Chamber and those findings alone; the Appeals Chamber is not free to draw inferences from the evidence."[68] Under this approach the Appeals

---

[65] *Id.* ¶ 4 (Meron, J., concurring).

[66] *Id.* ¶¶ 5, 7 ("This authority must be wielded sparingly, in appropriate circumstances, and only where its exercise does not impinge on the rights of the appellants.").

[67] *Id.* ¶ 6.

[68] *Id.* ¶ 3 (Robinson, J., concurring). In espousing this view of the role of the Appeals Chamber, Judge Robinson drew not only on ICTY precedent, but on case law from the United Kingdom and Australia. *Id.* ¶¶ 6–9. He wrote that the ICTY, like the United Kingdom and Australia, has "a basis in the common law adversarial system which establishes a distinction between the trial and appellate functions. . .[in which]. . .an appeal is not a re-hearing of the trial, one consequence of which is that those bodies do not indulge in fact finding. . . ." *Id.*

Chamber's "task is confined to ensuring that the Trial Chamber's findings support the conviction for the alternative mode of liability."[69] Applying this standard, Judge Robinson likewise found no basis to convict the defendants on alternative modes of liability. He objected to the fact that the Appeals Chamber had "declined" to draw additional inferences against Markač, instead of pronouncing such inferences off limits.[70]

Judge Robinson also considered whether a new trial would be appropriate. He noted that the ICTY had ordered a new trial in only one case, and on that occasion had not set forth any standards to indicate when such a measure would be permissible.[71] Drawing on case law from the International Criminal Tribunal for Rwanda, and from Australia, he concluded that such an extraordinary action would not be warranted in this case.[72]

C. Dissenting Opinions

The dissenting opinions of Judges Agius and Pocar agreed with the majority that the 200-meter standard was unsupportable, but nonetheless opposed the decision to reverse the convictions. They rejected the majority's view that impact analysis under the 200-meter standard served as the cornerstone of the Trial Chamber's finding of JCE liability. They

---

[69] *Id.* ¶ 16 (Robinson, J., concurring).
[70] *See id.* ¶ 3 (Robinson, J., concurring).
[71] *Id.* ¶ 18 (Robinson, J., concurring) (citing Prosecutor v. Haradinaj et al., Case No. IT-04-84-A, ¶ 50 (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2010)).
[72] *Id.* ¶¶ 18–19 (Robinson, J., concurring) (citing Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-A, Appeal Judgment, ¶ A.1.(a) (Int'l Crim. Trib. for Rwanda Aug. 29, 2008)); Gilham v. Regina [2012] NSWCCA 131 (Austl.). Judge Robinson identified the overriding consideration to be "whether the interests of justice require a new trial." *Gotovina & Markač*, No. IT-06-90-A, Appeal Judgment, ¶ 19 (Robinson, J., concurring) (*Gilham*, NSWCCA, para. 662). He concluded that retrial was not warranted because:

> (i) it would be unduly oppressive to put the Appellants to the burden of a retrial; (ii) a fair part of the sentences imposed upon convictions has already been served--in Gotovina's case, approximately one-third (7 years), and in Markač's case, approximately one half (8 and ½ years); (iii) a retrial would be lengthy and expensive; and (iv) an unduly long time would have elapsed between the date of the alleged offense (1995) and the new trial.

Gotovina & Markač, No. IT-06-90-A, Appeal Judgment, ¶ 19 (Robinson, J., concurring).

also argued that the majority failed to identify and properly apply a correct standard of accuracy.

Judge Agius argued that the 200-meter standard was incorrect but not fatal to a conviction, based on the totality of the evidence. "The Majority erroneously regards the 200 Metre Standard as the critical piece underpinning all of the Trial Chamber's findings regarding the unlawfulness of the attacks."[73] He stated that "the Majority has impermissibly tied all of the Trial Chamber's findings to the 200 Metre Standard,"[74] thereby "misinterpret[ing] the Trial Judgment."[75] He thought that overturning this standard left enough facts in place to sustain the convictions.

Judge Agius expressed confusion over whether the majority had overturned the 200-meter standard as a legal error or a factual error. If it was the former, he argued, the correct approach was to identify a legally correct accuracy standard, and then apply that to the impact analysis.[76] If the latter, they should have reviewed the evidence deferentially under a standard of "reasonableness" rather than *de novo*, and affirmed if a reasonable factfinder could have established guilt from the totality of the remaining evidence. Under this standard, Judge Agius would have sustained the finding of unlawful shelling (and thus the JCE convictions) even without the 200-meter standard.[77] Judge Agius, alone among the appellate judges, would also have affirmed the convictions based on an alternative theory of command responsibility.[78]

Judge Pocar's dissent focused on standards of appellate review and how, in his view, the Court had deviated from those established standards.[79] Like Judge Agius, he criticized the majority for not specifying whether the Trial Chamber's 200-meter standard was an error of fact or of law.[80] Casting it as an error of law, he argued that it was the

---

[73] *Id.* ¶ 4 (Agius, J., dissenting).
[74] *Id.* (Agius, J., dissenting).
[75] *Id.* ¶ 17 (Agius, J., dissenting).
[76] *Id.* ¶ 14 (Agius, J., dissenting). The majority in fact described the Trial Chamber's *failure to explain the reasoning* behind its 200–meter standard as a legal error, *id.* ¶ 64, and justified *de novo* review on that basis; but in conducting this review made a fact-based critique of the standard. *Id.* ¶¶ 52–60.
[77] *Id.* ¶ 15–16 (Agius, J., dissenting). Judge Agius summarizes the other evidence of unlawful shelling and a JCE in paragraphs 18–23 of his dissent.
[78] *Id.* ¶¶ 70, 79–81.
[79] *Id.* ¶ 5 (Pocar, J., dissenting).
[80] *Id.* ¶ 6 (Pocar, J., dissenting).

Appeals Chamber's duty to articulate the correct standard and apply it to the evidence to determine whether the shelling was or was not lawful.[81] Also like Judge Agius, he reviewed the other evidence cited by the trial court, and stated that the court should not have reversed the convictions unless it "demonstrate[d] that *all* the other remaining findings of the Trial Chamber establishing the unlawfulness of the attacks *cannot stand* in the face of the quashing of the . . . 200 Metre standard."[82]

Judge Pocar sharply criticized the majority's approach to the issue of alternative modes of liability. He wrote that they had mischaracterized what they could have done in this regard as "entering new convictions" on appeal instead of "revising" the trial convictions, arguing that the latter is permissible but the former is not.[83] He stopped short of taking a position on whether the convictions could have been properly "revised" and thus sustained on those grounds.[84]

IV. Analysis of the Appeals Chamber Ruling

The Appeals Chamber's ruling is largely devoted to interpretation of the Trial Judgment and analysis of factual issues of the case, but it also includes guidance for courts, international bodies, and practitioners on issues of substantive and procedural law. Significantly, it also sets parameters for the use of artillery accuracy standards and impact analysis in future cases.

A. The Use of "Impact Analysis" Is Subject to Important Limitations

The Appeals Chamber unanimously ruled that the 200-meter standard was an invalid legal standard. While the Chamber's decision

---

[81] *Id.* ¶¶ 10–14 (Pocar, J., dissenting). Judge Pocar went further, declaring the 200-meter standard as a "presumption of legality—which was generous and to the benefit of Gotovina." *Id.* ¶ 10 (Pocar, J., dissenting).

[82] *Id.* ¶¶ 16–17 (Pocar, J., dissenting). Yet Judge Pocar also admitted that the finding of a JCE was supported by "four *mutually reinforcing* groups of factual findings," of which the allegedly unlawful artillery attacks were one, *id.* ¶ 19, thus implicitly recognizing that the Trial Chamber's findings on these other grounds relied in part on the 200-meter rule. That the Trial Chamber itself also implicitly acknowledged this will be shown below.

[83] *Id.* ¶¶ 32–38 (Pocar, J., dissenting). This has apparently been the theme of many of Judge Pocar's dissenting opinions. *Id.* ¶ 37 (Pocar, J., dissenting).

[84] *Id*. ¶¶ 31–38. Like the Trial Chamber, he did not consider alternate modes of liability a basis for the convictions.

does not offer a comprehensive treatment of issues relating to impact analysis, it does yield guidelines for the use of such analysis and accuracy standards for future cases alleging unlawful shelling.

1. Four Minimum Prerequisites for Use of Accuracy Standards in Impact Analysis

The appellate ruling demonstrates that any standard of artillery accuracy adopted for impact analysis first must be clearly established by competent evidence. When an otherwise sharply divided panel finds common ground on a key point, as it did here, that point takes on added significance. In this case, the five appellate judges agreed that the Trial Chamber did not lay an adequate foundation in the record for a controlling 200-meter standard. The Appeals Chamber did not rule that standard patently erroneous in all circumstances, but that in this case it was unsupported by expert testimony, evidence at trial, legal justification, or a discernible methodology.[85] Testimony going to generalized factors that may influence the accuracy of indirect fire, as provided at trial, is insufficient to withstand review. Any accuracy standard requires support by expert testimony, relevant technical data about the weapons systems involved, gun crews' training, atmospheric conditions, tactical circumstances, and other factors affecting the accuracy of indirect fire.[86]

Second, accuracy standards must be tailored to the facts and circumstances of each attack by indirect fire. The Appeals Chamber noted that the lower court's findings indicated that the various attacks at

---

[85] On appeal, nine eminent artillery experts for both the prosecution and defense agreed that the 200 meter standard was technically and tactically invalid, and a virtually impossible standard to achieve. *See also* Huffman, *supra* note 2, apps. A, B (providing reports of two experts who reach the same conclusion).

[86] *Gotovina & Markač*, Case No. IT-06-90-A, Appellate Motion to Admit Additional Evidence, exhibit 20, at 6, 7–10 (Nov. 2011). Factors analyzed in a report by retired U.S. Army Major General Robert Scales (Scales Report), a career artilleryman, 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. Major General Robert Scales, U.S. Army, addressing the lawfulness of accused's artillery fire and reasonableness of the 200-meter rule in *Gotovina & Markač*, IT-06-90-A, Public Redacted Version of the 21 June 2014 Decision on Ante Gotovina's and Mladen Markač Motions for the Admission of Additional Evidence on Appeal, ¶ 32 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 2012).

issue were carried out by different artillery batteries, at different times, from different distances, using different weapon systems and crews.[87] The varying distances from gun positions to targets in the towns were particularly significant, where expert testimony confirmed the effect of range on dispersion patterns of artillery rounds impacting in the target area.[88] Given the differences between the attacks, the Trial Chamber's use of a single standard for all targets, the basis of which was unclear, was unsupportable. Where the evidence confirms differences in accuracy factors, targeting standards must be tailored to the circumstances of each attack.

Third, any method of impact analysis is only as good as the data upon which it is based. The finding of unlawful artillery attacks in this case rested on a small sample of known impact points. The Trial Chamber found that approximately 1,205 total rounds were fired by Croatian forces in or near the four towns at issue, but was able to estimate the approximate impact points of only 154 rounds. Only seventy-four of those exceeded even the flawed 200-meter standard.[89] Because accuracy-based impact analysis depends on the relative locations of impact points and lawful targets, any lack of information regarding either variable undermines the probative value of the impact analysis. Had no lawful military targets existed, then even the small sample of impact locations might have been indicative of intent to shell civilians and civilian objects, but the Trial Chamber found multiple legitimate static military targets in each town, which rendered invalid the Trial Chamber's impact analysis and its resulting finding of unlawful targeting of civilians.

Finally, in battlefield situations in which enemy forces occupy populated areas, prosecutors cannot rely on accuracy-based impact analysis without addressing mobile targets of opportunity—and using the correct burden of proof to do so. Where the evidence indicates the possibility of calls for fire on such targets, courts should not give meaningful weight to an impact analysis unless the prosecution bears its burden of disproving that targets of opportunity could explain impacts outside customarily acceptable distances from lawful targets. Here the

---

[87] *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶ 60.
[88] *Id. Gotovina, Čermak & Markač*, Case No. IT-06-90-T, Trial Judgment, ¶ 1898 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 5, 20111) (discussing the expert testimony at trial regarding the effect of range on dispersion of rounds at impact).
[89] Huffman, *supra* note 2, at 12.

Appeals Chamber ruled that the trial court erred by assuming Croatian forces did not engage targets of opportunity in Knin.[90] This violated the presumption of innocence by imposing on the defendants the burden of proving the absence of targets of opportunity, which could have explained the few outlying impacts in and around Knin. A similar problem may arise in other cases in which the defendant is not the only force employing indirect fires and the evidence does not clearly establish the source of fire for each known impact point.

2. Dissenting Opinions Illustrate the Pitfalls of Inadequate Impact Analysis

While the two dissenting judges agreed that the 200-meter standard had no factual or legal support, both argued that impact analysis might yet offer support to sustain the convictions. The dissenters appear to have assumed that impact analysis is a necessary predicate to any judgment regarding the legality of indirect fire. Additionally, both judges fault the majority for failing "to formulate its own margin of error or other standard to assess the evidence regarding impact sites and thus the lawfulness of the attacks."[91] By not offering an alternative to the 200-meter standard, the Appeals Chamber, writes dissenting Judge Agius, "effectively raise[s] the margin of error ad infinitum,"[92] rendering it "impossible to classify any attack as indiscriminate on the basis of evidence regarding impact sites, in the absence of an established margin of error."[93]

Such comments overstate the importance of impact analysis in targeting law, which requires proof of intent to attack civilians at the time of attack[94] and rejects an inference of intent based solely on battle

---

[90] *Id. Gotovina & Markač*, Case No. It-06-90-A, Appeal Judgment, ¶ 63 (Int'l crim. Trib. for the Former Yugoslavia Nov. 16, 2012).
[91] *Id.* ¶ 5 (Agius, J., dissenting), ¶ 10 (Pocar, J., dissenting) (asserting the 200 meter standard was "generous").
[92] *Id.* ¶ 8 (Agius, J., dissenting).
[93] *Id.*
[94] United States v. List ("The Hostage Case"), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, Oct. 1946–Nov. 1949 (1950). Nazi General Lothar Rendulic was charged with unlawful attacks on civilians and civilian objects during the Nazi retreat from Finland at the end of WWII. He was acquitted based on a finding that his decision to attack civilians and their property resulted from an honest but mistaken belief that Soviet armed forces were in hot pursuit—military necessity. *Id.* at 1296 ("But we are obliged to judge the situation as it

damage, civilian casualties, or other terminal effects at the impact point.[95] The law of armed conflict gives commanders considerable leeway in the use of artillery, requiring evidence of a specific intent to attack civilians or a wanton disregard for the core principle of distinction between combatants and civilians. This high standard of proof helps explain why convictions for unlawful shelling have been few in modern warfare.

Factors that might support an inference of culpability include an absence of lawful military targets in the impact area; an abuse of proportionality in the form of excessive civilian casualties or collateral damage to civilian objects compared to the military advantage gained; or evidence of an unlawful intent to attack civilians.[96] If complemented by such evidence, impact analysis would be probative, but it cannot serve as the sole basis for conviction. As one commentator observed, had it not been reversed, the Trial Chamber's undue reliance on impact analysis could have distorted the law of targeting, encouraging defending forces to locate military assets in populated areas, and ultimately endangering civilians.[97]

---

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.").

[95] Huffman, *supra* note 2, at 26. An example of this principle was the American air strike on the Al Firdus bunker in central Baghdad during the First Gulf War, which killed several hundred Iraqi civilians. Intelligence sources indicated that the Iraqi high command was using the bunker. It was protected by camouflage, military guards, sandbags, and barbed wire. Based on these factors, Coalition authorities targeted the bunker, unaware that at night it was used as a civilian bomb shelter. An inquiry determined that the bunker was a lawful target and Coalition commanders acted properly, based on the information available to them at the time the bunker was slated for attack. *Id.* at 26 n.111 (citing U.S. DEPT. OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 702 (1992)).

[96] The ICTY has considered a range of factors relevant to determining the legality of shelling in other cases, including: (1) scale of casualties; (2) extent of damage to civilian objects; (3) means and methods of attack; (4) widespread or systematic nature of the attacks; (5) heavy fighting in the target area; (6) the 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) and status and appearance of victims. *See* Prosecutor v. Galić, IT-98-29-A, Appeal Judgment ¶¶ 132–33 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (listing factors based on other Appeals Chamber shelling cases).

[97] Huffman, *supra* note 2, at 49–51 (citing expert opinions as to how the Trial Chamber impact analysis could adversely affect future military practice and incentivize commanders to co-mingle military assets with civilians to avoid attacks by indirect fire).

Dissenting Judge Agius argued that the dispersion of impact points here supported an inference of indiscriminate attacks. He suggested that a broader 400-meter standard had some support in the evidence[98] and devoted a page to discussing the rounds found by the Trial Chamber to have exceeded a 400-meter radius. [99] Judge Agius urged as a fall-back standard: "the further away an impact site from a legitimate target, the higher the probability that the relevant projectile was not fired at that legitimate target."[100] Impacts beyond 400 meters, Agius writes, would support an inference of unlawful intent by the attacking force, because "the chance of projectiles falling more than 400 meters from a legitimate target as a result of the inaccuracy of the HV [Croatian] weaponry is extremely small."[101] He offered no evidentiary basis for a 400-meter standard, however, and did not explain how the trial record could support a finding of unlawful shelling beyond a reasonable doubt when less than 1% of the rounds fired fell beyond 400 meters.[102]

Judge Agius then suggested a form of impact analysis based on volume of fire, reasoning that the total number of impact points was excessive in relation to the military value of Knin.[103] He again cited no evidence or expert opinion to support his rather odd assertion that the volume of fire was excessive in these circumstances. The Trial Chamber certainly made no finding that the volume of fire was excessive. More troubling to law of war experts, Judge Agius argued that the volume of fire was indicative of illegal intent because "at least 900 projectiles fell on Knin in just one and a half days, and there are no findings of any

---

[98] *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶ 19 (Agius, J., dissenting).

[99] *Id.* ¶ 23. Judge Agius also stressed the testimony of several non-expert witnesses who formed a general impression that rounds were being fired indiscriminately or dangerously close to their locations in Knin. Such non-expert testimony of frightened persons in the impact area would seem to be of limited probative value, as the Trial Chamber acknowledged in *Prosecutor v. Gotovina, Čermak & Markač*, Case No. IT-06-90-T, Trial Judgment, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011) (The court was "necessarily cautious in drawing conclusions…based on general impressions" of eyewitnesses during the "chaotic picture of events on the ground").

[100] *Id.* ¶ 19.

[101] *Id.* Indeed, this assertion repeats the Trial Chamber's error by failing to explain the evidentiary basis for such a rule, and by applying a uniform standard regardless of the conditions.

[102] *See supra* note 86 and accompanying text.

[103] *See Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶ 18 n.6 (Agius, J., dissenting) (arguing that at least 900 projectiles fell on Knin in just one and a half days, and there are no findings of any resistance coming from the town, implying that this volume of fire was excessive).

resistance coming from the town."[104] But the law of war has never required "resistance" as a condition of lawful attack, and Judge Agius offered no authority that would support a contrary view. This statement also ignores the Trial Chamber's finding of legitimate military targets in Knin, including an operational command center and the physical presence of the enemy's military leader of Serbian Krajina, upon whom the Serbian defense relied heavily.[105]

Attempts to salvage convictions at the appellate level by advancing novel theories suggested by neither the prosecutor nor the trial court, and inconsistent with the Trial Chamber's findings and the law of armed conflict, is, to put it gently, problematic. Nor does the Appeals Chamber have a duty to endorse a particular accuracy standard absent any supporting evidentiary record. Once the trial court's accuracy standard was ruled invalid, the Appeals Chamber's responsibility was to determine whether the convictions could be sustained on the basis of other evidence in the record on appeal. As the Appeals Chamber majority ruled, the record provided no valid basis to support the convictions.

B. The Appeals Chamber Applied the Correct Standard of Review

Appellate courts are relatively new to international criminal law. For example, none of the international criminal tribunals, or Nuremberg's "subsequent trials" following World War II provided for appellate review. The verdicts and sentences of those tribunals were final, and sentences were usually carried out expeditiously, other than in a few cases of collateral review in U.S. federal courts.[106] Since Nuremburg, an international consensus has developed that the right of appeal is a fundamental requirement of justice, and the International Covenant on Civil and Political Rights identifies it as a fundamental right.[107] The standards of appellate review taken for granted in domestic legal systems

---

[104] *Id.* ¶¶ 18–20 n.6 (Agius, J., dissenting).

[105] *See Gotovina, Čermak & Markač*, Case No. IT-06-90-T, Trial Judgment, ¶ 1175.

[106] *E.g.*, *In re Yamashita* 327 U.S. 1 (1946) (A sharply divided U.S. Supreme Court denied a habeas corpus petition from General Yamashita, who was sentenced to death by a U.S. military commission for widespread war crimes committed by his troops in the Philippines) and *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (denying habeas corpus petitions of German prisoners of war convicted of war crimes by U.S. military commissions in China).

[107] *See* The International Covenant on Civil and Political Rights, art. 15, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368. Appeals are also suggested in 1977 Additional Protocol I. Additional Protocol I, *supra* note 3, art. 75.4 (j).

are still evolving in international criminal tribunals, including the ICTY.[108] While the dissenting judges here criticize the majority for violating established standards of appellate review,[109] the central issues dividing the Appeals Chamber actually were the Trial Chamber's 200-meter standard, and the role of impact analysis in the law of armed conflict relating to use of indirect fire.

1. Standards of Review and Deference

The dissenters argued that on questions of fact, the appellate court was bound to defer to the trial judgment, and overturn its findings only "when no reasonable trier of fact could have reached the original decision."[110] According to the dissenting judges, this deferential standard of factual sufficiency review should have governed the Appeals Chamber's review, except for those findings narrowly related to the 200-meter standard and the impact analysis. The two dissenting appellate judges concluded that the other evidence was sufficient to sustain the findings of unlawful shelling and the defendants' JCE liability.[111] The majority ruled that such a degree of deference was unwarranted.[112]

The dissenting judges further faulted the majority for failing, after identifying an error of law, to "apply the correct legal standard to the evidence contained in the trial record."[113] In their view, the Court was duty-bound to identify and apply a correct standard of artillery accuracy or some other legal basis for impact analysis.[114] The dissenters' proposed new standard was premised on an interpretation of the trial judgment rejected by the Majority and, as previously discussed, was based upon a mistaken application of impact analysis.

---

[108] *See* Fleming, *supra* note 18, at 111–12 (noting that appellate bodies in international tribunals are a recent development).
[109] *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶¶ 5–6 n.6 (Pocar, J., dissenting) ("the Majority's approach is wholly erroneous and in violation of our standard of review on appeal. . .").
[110] *Id.* ¶ 13.
[111] *Id.* ¶ 12 (Agius, J., dissenting).
[112] *Id.* ¶ 64.
[113] *Id.* ¶ 14 (Agius, J., dissenting).
[114] *Id.* (The Appeals Chamber "has the duty to formulate its own margin of error or other standard with which to assess the evidence regarding impact sites and thus the lawfulness of the artillery attacks.").

Dissenting Judge Pocar also faulted the majority for failing to articulate a correct standard in place of the 200-meter standard. Unlike Judge Agius, he made no attempt to define an alternative standard but instead defended the Trial Chamber's finding that the defendants were parties to a JCE, even without a finding of unlawful shelling, relying instead on crimes committed by Croatian soldiers during and after Operation Storm as proof of the JCE: "The Majority ignores that the existence of the JCE was also based on evidence of . . . (ii) the crimes committed by the Croatian military forces and special police against the remaining Serb civilian population and property after August 5. . . ."[115] But that overlooked the Trial Chamber's specific finding that such crimes were not intended by members of the JCE, and that Gotovina and Markač could only be held responsible for such crimes through JCE 3 liability—as foreseeable but unintended consequences of the JCE. Judge Pocar does not explain how such conduct could simultaneously prove the existence of the JCE and also be an unintended consequence of the same JCE.

The dissenters were mistaken. Article 25 of the ICTY statute provides that "the Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice."[116] But under its own case law the Appeals Chamber then applies the correct standard to the relevant findings of fact, and affirms those findings only if *it is itself convinced beyond a reasonable doubt* that those factual findings are still correct.[117] As an American appellate court might put it, the court is testing to see if the legal errors are harmless beyond a reasonable doubt.[118]

---

[115] *Id.* ¶ 25 The judge reiterates this when he asserts that these crimes "were evidence of the *existence* of the JCE." *Id.* ¶ 27 (emphasis in original).

[116] *Id.* ¶ 10. The Appeals Chamber held that the appropriate standard of review for errors of law is a *de novo* review ("[T]he correct standard to the evidence contained in the trial record and determines whether it is itself convinced beyond a reasonable doubt."); the standard for errors of fact is reasonableness ("[T]he Appeals Chamber will only substitute its own findings for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision.").

[117] *Id.* ¶ 12. As articulated by the majority this is not a deferential standard at all; the Appeals Chamber "determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged. . . ." *Id.* ¶ 12 & n.36 (citing *inter alia*, Prosecutor v. Haradinaj, No. IT-04-84-A, ¶ 11 (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2010)).

[118] This is the U.S. Supreme Court standard for constitutional errors, as set out in *Chapman v. California*, 386 U.S. 18, 24 (1967); the court declared this standard to be

The Appeals Chamber properly recognized the Trial Chamber's failure to *articulate* its derivation of the 200-meter rule as a "legal error."[119] It then examined "the remaining evidence on the record to determine whether the conclusions of the Impact Analysis [were] still valid,"[120] and implicitly did so under the strict standard of proof beyond reasonable doubt—a review that is factual in nature, but not deferential.[121]

With respect to the true legal error, the majority *did* articulate the correct standard—namely, that the Trial Chamber should have provided a "reasoned opinion."[122] With respect to the resulting insufficiency of the Trial Chamber's findings, the Appeals Chamber was not required to articulate a standard *or even to assume there was one* for inferring criminal intent from impact locations alone.[123] The Appeals Chamber could not provide an alternative accuracy standard based on trial evidence because there no such evidence had been introduced at trial, and any attempt to now do so would replicate the very error of the Trial Chamber that led to reversal. It would also have required excessive factfinding on the Appeals Chamber's own part, something both the majority opinion and Judge Robinson's concurrence warned against.

Having rejected the 200-meter standard, the Appeals Chamber could hardly defer to the trial court's core findings of unlawful shelling, or that the defendants had participated in a JCE through such unlawful shelling. These facts simply were not established beyond reasonable doubt. The real question at that point was whether to enter verdicts of acquittal or to order a new trial; and as Judge Robinson articulated in his concurrence, there were excellent reasons for eschewing the latter course.[124]

---

equivalent to determining "whether there is a reasonable probability that the evidence complained of might have contributed to the conviction."

[119] *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶ 64.

[120] *Id.* ¶¶ 62–67.

[121] The deferential common law standard, *supra* note 20, is appropriate when the facts being reviewed do not result from a serious legal error that prejudices the accused's right to a fair trial (such as a failure to explain a new and dangerous standard for inferring intent).

[122] *Id.* ¶ 64.

[123] *See* Huffman, *supra* note 2, at 26 (suggesting that there may not be). "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." *Id.*

[124] *Gotovina & Markač*, No. IT-06-90-A, Appeal Judgment, ¶ 19 (Robinson, J., concurring). Judge Robinson concluded that retrial was not warranted because:

2. Role of the 200-Meter Standard

The two appellate camps also disagreed on the role of the 200-meter standard in the Trial Judgment. The majority ruled that invalidation of the 200-meter standard affected the entire judgment, destroying the trial court's core premise, thereby requiring a *de novo* assessment of whether the remaining findings and evidence could sustain the convictions. The Appeals Chamber ruled that the 200-meter error was too interrelated with the trial court's other findings and rationales to warrant deference to its findings.[125]

The dissenting judges, by contrast, viewed the erroneous 200-meter standard as but one non-essential element in the Trial Chamber's reasoning, so that invalidation of the standard should not upend the entire judgment.[126]

The majority was correct. As an example, Judge Agius thought the majority should have considered the order by General Gotovina to place the four towns "under fire" as supporting the JCE.[127] But the Trial Chamber itself had acknowledged this order was ambiguous. On its face it might have referred to either attacking legitimate military targets in these towns,[128] or attacking the civilian populations of these towns. The trial court resolved this patent ambiguity by referring to impact locations in light of the 200-meter rule.[129] Without such reasoning, the order was too ambiguous to serve as evidence one way or the other.

> (i) it would be unduly oppressive to put the Appellants to the burden of a retrial; (ii) a fair part of the sentences imposed upon convictions has already been served–in Gotovina's case, approximately one-third (7 years), and in Markač's case, approximately one half (8 and ½ years); (iii) a retrial would be lengthy and expensive; and (iv) an unduly long time would have elapsed between the date of the alleged offense (1995) and the new trial.

Id.

[125] *Id.* ¶ 64.

[126] *Id.*, ¶ 12 (Agius, J., dissenting).

[127] *Id.* ¶¶ 36–37 (Agius, J., dissenting).

[128] As noted above, Gotovina's chief of artillery, Marko Rajčić, gave the latter interpretation, stating that the order implicitly included a limitation to lawful targets that had been discussed earlier. Prosecutor v. Gotovina, Čermak & Markač, Case No. IT-06-90-T, Judgment, ¶ 1188 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

[129] *See id.* ¶ 2583. "The trial Chamber found in Chapter 5.8.2.(i) [which introduces and, at considerable length, uses the 200-meter rule] that these were orders to treat whole towns

Judge Pocar thought the Appeals Chamber should have considered "the crimes committed by armed units . . . against the remaining Serb civilian population" after the shelling was over as evidence of the JCE.[130] But in deciding these crimes were part of a JCE (as opposed to criminal acts by individual soldiers and special police), the Trial Chamber itself said that it was considering "its conclusions in chapters 5.8.2."—i.e., the conclusions based on the 200-meter rule, which is found in that chapter.[131] And in deciding that there was a JCE at all, the Trial Chamber referred back to these crimes,[132] which it had interpreted using the 200-meter rule. Judges Agius and Pocar both referred to the minutes of a meeting on the Island of Brioni, where various ambiguous statements were made that the Trial Chamber ultimately interpreted as supporting a JCE.[133] But the Trial Chamber made this interpretation "in light of subsequent events [as shown by] chapters 4.4 and 5.8.2.(i),"[134] and chapter 5.8.2.(i) is the very one that introduces the 200-meter rule.[135] Thus, as the Appeals Chamber noted and Judge Pocar acknowledged, the major items of evidence used by the Trial Chamber *were* "mutually reinforcing."[136] That is precisely why the convictions could not stand when a major prop of this mutual reinforcement was removed.

. . . as targets when firing artillery projectiles during Operation Storm." Judge Pocar recognized this in paragraph 10 of his dissent.

[130] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Appeal Judgment, ¶ 19(iv) ((Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (Pocar, J., dissenting).

[131] Prosecutor v. Gotovina, Čermak & Markač, Case No. IT-06-90-T, Judgment, ¶¶ 1757, 1898 ((Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

[132] *Id.* ¶¶ 1969, 2303

[133] *See id.* ¶ 1977. General Gotovina commented that a large number of Serb civilians were evacuating Knin *before* Operation Storm, and he thought it was a good idea to leave them a way to escape if they wished "because the army would follow them." What he did *not* say was that the Croatian Army should attack Serb civilians or force them out on purpose. *See id. See Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment ¶ 19(i) (Pocar, J., dissenting); *id.* ¶ 34 (Agius, J., dissenting) (referring to this meeting as evidence the majority should have considered in affirming the Trial Chambers judgment).

[134] *Gotovina, Čermak* & *Markač*, Case No. IT-06-90-T, Judgment, ¶ 2305.

[135] *See id. id.* ¶ 1898.

[136] *Gotovina* & *Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶ 91; *id.* ¶ 3 (Pocar, J., dissenting).

V. Conclusion

The Appeals Chamber ruling fulfilled the purposes of appellate review. The Trial Chamber's decision had relied on a substantial error. Apart from the injustice to the accused individuals, failure to correct that error at the appellate level would have left the law of armed conflict as to attacks by indirect fire in a state of confusion, exposed civilians in future conflicts to increased dangers, and damaged the ICTY's legitimacy in the eyes of many in the international community. It would also have blurred the core law of armed conflict standards of distinction and military necessity—the requirement to distinguish between civilians and combatants, to distinguish between civilian objects and military objectives, and not to employ measures forbidden by international law in seeking to defeat the enemy.

Courts of law respect the presumption of innocence and require a rigorous evaluation of the competent evidence before deciding guilt or innocence. The credibility of all courts resides in their fidelity to the law and the evidence. Courts must be protected from political pressures and, where they are present, not accede to them. Reversing a conviction grounded on inadequate evidence and invalid legal standards preserves the credibility of the Court that is essential to justice. It also fulfills the ICTY Article 25 mandate for an independent appellate court.

When his fellow judges elected him to a second term as the ICTY's president, Judge Meron noted:

> I know that the crimes over which the Tribunal has jurisdiction are not without precedent. Horrific war-time atrocities appear throughout recorded history. What has changed in the past two decades, however, is the international community's commitment to ending impunity for such acts. The Tribunal is the manifestation of this commitment. . . . I know I speak for all judges . . . in reiterating our pledge that the Tribunal will continue to serve as an embodiment of the international community's noblest aspirations for justice.[137]

[137] Judge Theodor Meron, *Statement of the President of the Tribunal*, Nov. 17, 2011, *available at* http://www.icty.org/sid/10856.

Fulfilling such a lofty vision demands rigorous investigation, prosecution, and, where the evidence warrants, conviction of the guilty. Fulfilling this vision also requires the courage to acquit those wrongly accused, even when to do so may be unpopular or politically fraught with risk. Some critics lament the potential political fallout of the Gotovina-Markač decision. Fortunately for the cause of justice, the Court here ignored politics and confined its focus and its judgment to the requirements of the law.

CLUSTER MUNITIONS: RECENT DEVELOPMENTS

MAJOR ERKAN AGIN*

Several months after the end of the conflict, Ahmed was walking with his nine-year-old brother when they were attracted by a shiny object. Ahmed picked it up and the cluster bomb exploded.[1]

I. Introduction

Cluster munitions (CMs) are one of the most effective and efficient weapons against a range of targets for armed forces.[2] However, their drawbacks (i.e., large area effects and high failure rates) which cause civilian casualties and property damage have consistently raised valid humanitarian concerns over the years.[3] A recent effort to overcome these concerns produced the Convention on Cluster Munitions (CCM),[4] which prohibits the use, development, production, stockpiling, and transfer of CMs. The CCM is the result of a dramatic rise in the number of States believing that the only way to stop unnecessary harm to civilians by CMs is their total abolition.[5]

---

* Judge Advocate, Turkish General Staff. Presently assigned as Assistant Legal Advisor, Ankara, Turkey. LL.M., 2012, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2000, University of Ankara, Turkey; LL.M., 2004, Institution of Social Sciences, University of Ankara. Previous assignments include Assistant Legal Advisor, Turkish General Staff Legal Advisory (OTJAG), Ankara, Turkey 2009–2011, Disciplinary Officer, 6th Motorized Infantry Brigade, Şirnak, Turkey, 2007–2009; Military Prosecutor, 6th Major Command, Adana, Turkey, 2002–2007. This article was submitted in partial completion of the Master of Laws requirements of the 60th Judge Advocate Officer Graduate Course.

[1] *Victims' Stories*, HANDICAP INT'L UNITED STATES, http://www.clusterbombs.us/victims-stories/ (describing twelve-year-old Ahmed Kamel's experiences and casualties due to unexploded ordnance (UXO) of cluster munitions in Iraq).

[2] Memorandum from Robert M. Gates, U.S. Sec'y of Def., to the Secretaries of the Military Departments et al., subject: DoD Policy on Cluster Munitions and Unintended Harm to Civilians 1 (June 19, 2008), *available at* http://www.defense.gov/news/d20080709cmpolicy.pdf [hereinafter Defense Policy Memorandum].

[3] *See* Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law*, 22 MICH. J. INT' L. 85, 87 (2000–2001).

[4] Convention on Cluster Munitions, *opened for signature* Dec. 3, 2008, 48 I.L.M. 357, http://treaties.un.org/doc/Publication/CTC/26-6.pdf [hereinafter CCM].

[5] *See* Etian Barak, *None to Be Trusted: Israel's Use of Cluster Munitions in the Second Lebanon War and the Case for the Convention on Cluster Munitions*, 25 AM. U. INT'L L. REV. 423, 425 (2010).

While the CCM provides an absolute ban on CMs, a parallel effort to solve the problem by regulation[6] attempted to strike a balance between military necessity and humanity. This effort aimed to regulate CMs with a new Protocol to the Certain Conventional Weapons Treaty (CCW),[7] rather than eliminate them outright.[8] However, the new process, led by the United States, ended with no agreement in the Fourth Review Conference of the CCW. As a result, the CCM remains the only international agreement specifically addressing CMs.

A major reason the CCM has fallen short in actually minimizing the dangers of CMs is the lack of participation of the major producer, stockpiler, and user states, including the United States.[9] The United States argues that any meaningful and lasting agreement on the limitation of CMs' unnecessary harm must include the major producers and suppliers.[10] However, the CCM has already had a stigmatizing effect.[11] Whether or not because of the CCM, the United States has issued a national policy[12] on CMs, and has also supported regulating them under the auspices of the CCW[13] to minimize the unintended harm to civilians caused by CMs.

United States policy heavily rests on the argument that CMs are legal weapons under current International Humanitarian Law (IHL).[14] The

---

[6] *Id.* at 429.
[7] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137, 19 I.L.M. 1523 [hereinafter CCW].
[8] *See* Barak, *supra* note 5, at 423.
[9] *See* Jeff Abramson, *CCW Considers Limits on Cluster Munitions*, ARMS CONTROL TODAY, Oct. 2008, at 43 (arguing that ninety percent of world stockpiles are not covered by the CCM, according to the chairman of the Group of Governmental Experts on CMs).
[10] *See* Melanie Khanna, Legal Advisor, U.S. Mission to the UN and Other Int'l Orgs. in Geneva, Opening Statement for the United States Delegation, Aug. 22, 2011, *available at* http://geneva.usmission.gov/2011/08/23/ccw-protocol/; *see also* Joseph Anzalone, *The Virtue of a Proportional Response: The United States Stance Against the Convention on Cluster Munitions*, 22 PACE INT'L L. REV. 204 (2010).
[11] *See* Jessica Corsi, *Towards Peace Trough Legal Innovation: The Process and the Promise of the 2008 Cluster Munitions Convention*, 22 HARV. HUM. RTS. J. 145, 156 (2009) (arguing that opponent States of Convention on Cluster Munitions (CCM) will likely find it increasingly difficult to continue using CMs after ratification of the convention). *See Cluster Munitions Information Chart*, HUMAN RIGHTS WATCH (2010), http://www.hrw.org/news/2009/07/17/cluster-munition-information-chart (listing notable examples of policy and practice among current non-signatory states to the CCM).
[12] Defense Policy Memorandum, *supra* note 2, at 1.
[13] *See* Khanna, *supra* note 10.
[14] Defense Policy Memorandum, *supra* note 2, at 1.

credibility of this argument relies on the proper use of CMs. To evaluate it, one must not only know the U.S. stance, but also be aware of the latest developments and concerns about CMs. This article provides information to help practitioners understand the current state of the law with regard to CMs. Part II presents a short description and history of CMs, to include the problems they cause. Part III surveys the process of the CCM, its key provisions, and the U.S. policy on CMs after CCM. Part IV analyzes the recent developments to regulate CMs under the proposed CCW Draft Protocol, which also reflects U.S. policy. Part V concludes that U.S. Judge Advocates should keep in mind all humanitarian concerns and the latest developments regarding CMs while implementing national policy.

II. Background

A. How Cluster Munitions Work

In general terms,[15] cluster munitions are weapons designed to disperse or release multiple explosive submunitions,[16] targeting an area rather than a single point.[17] They can be dropped by aircraft or delivered by artillery or missiles.[18] After being launched or dropped, CMs do not explode, but break up into submunitions which cover a large area.[19] These bomblets usually arm themselves as a result of rapid spinning during their descent.[20] Once armed, they explode either at a certain height above the ground, on impact, or after landing.[21] Submunitions can be as small as "hockey pucks, tennis balls or soda cans."[22] Despite their

---

[15] *See* Nout Van Woudenberg, *The Long and Winding Road Towards an Instrument on Cluster Munitions*, 12 J. CONFLICT & SECURITY L. 447, 454 (2008) (highlighting that there is no uniform definition of cluster munition).

[16] *See* Bonnie Docherty, *The Time Is Now: A Historical Argument for a Cluster Munitions Convention*, 20 HARV. HUM. RTS. J. 53, 61 (2007); Tommaso Di Ruzza, *The Convention on Cluster Munitions: Towards a Balance Between Humanitarian and Military Considerations?*, 47 MIL. L. & L. WAR REV. 405, 407–08 (2008).

[17] *See* Wiebe, *supra* note 3, at 85, 89 (making an analogy between cluster munitions and shotgun, "[a] cluster bomb 'shotgun' delivers hundreds of small exploding bomblets to a target . . . a unitary bomb 'rifle' fires a single, much larger 'bullet' at a target").

[18] *Id.* at 89.

[19] *See* Van Woudenberg, *supra* note 15, at 450.

[20] Wiebe, *supra* note 3, at 89–90.

[21] *See* Lieutenant Colonel Michael O. Lacey, *Cluster Munitions: Wonder Weapon or Humanitarian Horror?*, ARMY LAW., May 2009, at 28, 28.

[22] Wiebe, *supra* note 3, at 89.

small size, submunitions are powerful and multi-talented,[23] and their known effective radius can be up to 150 meters.[24] Most CMs are designed to cover at least the size of an American football field.[25] However, the exact size of the footprint made by CMs varies, depending on altitude, wind, the number of CMs launched, and the amount of submunitions they contain.[26]

Cluster munitions can engage "area targets that include massed formations of enemy forces, individual targets dispersed over a defined area, targets whose precise locations are not known, and time-sensitive or moving targets."[27] Cluster munitions can also deliver anti-personnel shrapnel, anti-materiel shaped charges, and incendiary bombs in the same combined package.[28] These multiple effects make CMs very useful against forces comprised of both personnel and light armor simultaneously.[29] Additionally, they are relatively cheaper[30] and safer[31] than other weapons. Since they can be delivered from fewer platforms to attack multiple targets, they reduce "the logistical burden and the exposure of forces to hostile fire."[32]

---

[23] *See* Daniel Joseph Raccuia, *The Convention on Cluster Munitions: An Incomplete Solution to the Cluster Munition Problem*, 44 VAND. J. TRANSNAT'L L. 465, 469 (2011).
[24] Wiebe, *supra* note 3, at 90.
[25] *See* Thomas Michael McDonnell, *Cluster Bombs Over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31, 47 (2002). The standard size for an American football field is 360 feet in length and 160 feet in width. *See* ROGER GOODELL, OFFICIAL PLAYING RULES AND CASEBOOK OF THE NATIONAL FOOTBALL LEAGUE 1 (2011), *available at* http://static.nfl.com/static/content/public/image/rulebook/pdfs/4_Rule1_The_Field.pdf.
[26] *See* Wiebe, *supra* note 3, at 109–10 (giving example that "the U.S. Army's Multiple Launch Rocket System can fire twelve rockets together, covering roughly sixty football fields in size. A fully loaded B-52 bomber, delivering forty cluster bombs, can cover over 27,000 football fields"); McDonnell, *supra* note 25, at 47 n.57
[27] Defense Policy Memorandum, supra note 2, at 1.
[28] *See* Wiebe, *supra* note 3, at 109–10.
[29] *See* Thomas J. Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F. L. REV. 229, 235 (2001) (giving example of the U.S. Air Force's BLU 97/B Combined Effects Bomb which combines "anti-armor, incendiary, and fragmentation effects").
[30] *See* Karen Hulme, *Of Questionable Legality: The Military Use of Cluster Bombs in Iraq in 2003*, 42 CAN. Y.B. INT'L L. 143, 152 (2004) (providing cost of each submunition as approximately $30 to $60).
[31] *See* Mark Hiznay, *Operational and Technical Aspects of Cluster Munitions*, DISARMAMENT FORUM, 4th Quarter 2006, at 15–16, *available at* http://www.unidir.org/pdf/articles/pdf-art2530.pdf.
[32] *Id.*

B. Two Problems: Large Area Effects and High Failure Rates

Despite their value for armed forces, cluster munitions are the subject of debates in IHL due to their large area effects and high failure rates.[33] Especially when the target is located close to urban areas, as submunitions scatter some may injure or kill civilians and damage infrastructure needed for daily life.[34] Also, many submunitions do not explode as designed. Generally, some percentage of any ordnance fails to detonate, like firework duds, leaving unexploded ordnance (UXO) on the battlefield.[35] Official estimates for failure rates of older versions of submunitions are about 5 percent.[36] However, in practice, this rate may reach as high as 30 percent,[37] depending on such things as manufacturing defects, long storage spans, flight conditions, submunitions dispersal and arming failures, wrong landing angles, and soft terrain or vegetation (soft surfaces may not provide the resistance needed to deonate the bomblets).[38] Thus, submunitions may remain unexploded on the ground more frequently than normally estimated.[39]

The size and color of unexploded submunitions may create other problems. While a large unexploded unitary bomb might be easily identifiable as dangerous, smaller submunitions are difficult to detect and can lie hidden in mud, water, or sand, or even hang from trees.[40] In effect, they become land mines.[41] Visible submunitions also create danger. In order to aid clearance efforts, modern militaries paint their submunitions bright colors. Children confuse them with toys[42] and

---

[33] *See* Wiebe, *supra* note 3, at 112.
[34] *See* Corsi, *supra* note 11, at 147.
[35] *See* Herthel, *supra* note 29, at 265, 266.
[36] *See* Hulme, *supra* note 30, at 149–52 (presenting example of CMs used in Iraq in 2003, such as 1970 model British-made RBL-755).
[37] *See* Docherty, *supra* note 16, at 63.
[38] *See* REA MCGRATH, CLUSTER BOMBS: THE MILITARY EFFECTIVENESS AND IMPACT ON CIVILIANS OF CLUSTER MUNITIONS 25–27 (2000), *available at* http://www.land-mineaction.org/resources/Cluster_Bombs.pdf.
[39] *See, e.g.*, John Borneman, *The State of War Crimes Following the Israeli-Hezbollah War*, 25 WINDSOR Y.B. ACCESS JUST. 273, 275 (2007) (estimating over 100,000 unexploded bomblets leftover from the Israel-Hezbollah war).
[40] *See* Docherty, *supra* note 16, at 63.
[41] *See* Wiebe, *supra* note 3, at 90. *But see* Herthel, *supra* note 29, at 252–55 (distinguishing submunitions from mines).
[42] *See* Docherty, *supra* note 16, at 63.

sometimes even adults confuse them with humanitarian aid packages.[43] As a result, unexploded submunitions are a great danger to civilians[44] and even sometimes to friendly soldiers.[45]

These problems led to production of newer generation sensor-fuzed CMs, which include guidance systems and self-destruct or self-deactivate mechanisms.[46] The guidance systems are designed to sense and destroy armored vehicles without creating wide-area anti-personnel effects.[47] If CMs do not explode when intended, self-destruct or self-deactivate mechanisms prevent later harm to civilians.[48] However, this solution creates problems of its own,[49] and may also encourage more widespread use of CMs by soldiers who believe they are safer.[50]

C. The Use of Cluster Munitions in History

British[51] and German[52] forces first used CMs in World War I. Several states used CMs in World War II.[53] During NATO operations in Yugoslavia in 1999, NATO forces delivered over 1,500 CMs containing

---

[43] *See* Karl C. Ching, *The Use of Cluster Munitions in the War on Terrorism*, 31 SUFFOLK TRANSANT'L L. REV. 127, 140 (2007–2008) (describing Afghan civilians mistaking submunitions for humanitarian food rations).

[44] *See* HANDICAP INT'L, FATAL FOOTPRINT: THE GLOBAL HUMAN IMPACT OF CLUSTER MUNITIONS 42 (2006), *available at* http://www.mineaction.org/downloads/1/Fatal_Footprint_HI_report_on_CM_casualties.1.pdf (showing that ninety-eight percent of registered victims of CMs are civilians, and children account for twenty-seven percent of casualties, according to a survey conducted in twenty-four different countries and regions).

[45] *See* Herthel, *supra* note 29, at 240 (noting the example of Operation Desert Storm during which "at least twenty-five U.S. military personnel were killed by improperly handling submunitions fired by [coalition] forces").

[46] *See* Hiznay, *supra* note 31, at 16, 17.

[47] *Id.* at 17.

[48] *Id.*

[49] *See* McGrath, *supra* note 38, at 27 (explaining that "the self-destruct mechanism itself introduce one or more additional critical junctures in to the chain" and the "introduction of a potential self-destruct failure adds considerably to the danger of the non-functioned submunition"). Wiebe, *supra* note 3, at 118 (arguing that "any secondary system, once failed, has tendency to be especially sensitive to any disturbance or movement").

[50] *See* Wiebe, *supra* note 3, at 119.

[51] *See* Herthel, *supra* note 29, at 235.

[52] *See* Barak, *supra* note 5, at 430.

[53] *See* HUM. RTS WATCH, FACT SHEET: TIMELINE OF CLUSTER MUNITIONS USE (2010) [hereinafter TIMELINE OF CLUSTER MUNITIONS USE], *available at* http://www.stopcluster-munitions.org/wp/wp-content/uploads/2010/07/timeline-of-use.pdf.

nearly 300,000 submunitions.[54] The U.S. armed forces also deployed CMs in Vietnam, Iraq, and Afghanistan.[55]

Cluster munitions are not used only by industrial powers or large militaries.[56] Relatively small States and non-state actors also stockpile and use CMs.[57] For example, Ethiopia and Eritrea used CMs against each other in 1998.[58] Hezbollah also used CMs against Israel in 2006.[59] Georgia deployed them against Russia in the 2008 conflict.[60] Thailand launched CMs on Cambodian territory during the February 2011 border conflict.[61] Government forces loyal to the Libyan leader, Muammar Gaddafi, fired cluster munitions into residential areas in the western city of Misrata, Libya on the night of April 14, 2011.[62]

D. The Road to Oslo

The Convention on Cluster Munitions follows several earlier attempts to ban CMs. First, CMs were one of the weapons attempted to be banned in the 1970s under what became the CCW.[63] However, major military powers, especially the United States and its allies, initially blocked any ban of or restriction on CMs.[64] A second attempt to restrict CMs occurred after the NATO bombing campaign against the Federal Republic of Yugoslavia resulted in a high rate of civilian casualties.[65]

---

[54] Wiebe, *supra* note 3, at 85, 95.
[55] *See* TIMELINE OF CLUSTER MUNITIONS USE, *supra* note 53.
[56] *See* Raccuia, *supra* note 23, at 472–73.
[57] *See* TIMELINE OF CLUSTER MUNITIONS USE, *supra* note 53.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *See CMC Condemns Thai Use of Cluster Munitions in Cambodia*, CLUSTER MUNITION COALITION (Apr. 5, 2011), http://www.stopclustermunitions.org/news/?id=3130.
[62] *See* U.N. Hum. Rts. Council, Report of the International Commission of Inquiry on Libya, 19th Sess., Mar. 2, 2012, 18, U.N. Doc. A/HRC/19/68. *See also Libya: Cluster Munitions Strike Misrata*, HUM. RTS. WATCH (Apr. 15, 2011), http://www.hrw.org/news/2011/04/15/libya-cluster-munitions-strike-misrata.
[63] Certain Conventional Weapons Treaty, *supra* note 7 (CCW and its five protocols prohibit or restrict the use of certain conventional weapons that are considered to cause excessive injuries and unnecessary suffering, or that have indiscriminate effects. The CCW itself is actually confined to general provisions as such scope, its entry into force process, while the separate five additional protocols regulate concerning conventional weapons). Barak, *supra* note 5, at 431 (indicating that Egypt, Mexico, Norway, Sweden, Switzerland, Yugoslavia, and Sudan support the proposal for outright ban of CMs).
[64] *See* Barak, *supra* note 5, at 432.
[65] *Id.*

This attempt brought about the Protocol on Explosive Remnants of War (Protocol V) to the CCW, which does not specifically address CMs.[66] However, several States and many NGOs did not consider this Protocol adequate to solve the problems associated with CMs, as it focused solely on post-conflict requirements and did not regulate the use of CMs during armed conflict.[67]

Israel's use of CMs in 2006 in the Lebanon War drew the attention of the international community to the problem again. During the last week of the war, Israel launched numerous CMs, some U.S.-made, into southern Lebanon, in response to Hezbollah's use of over 100 cluster rockets.[68] Israel dispersed nearly four million submunitions over South Lebanon.[69] More than 153,942 unexploded submunitions were found between August 2006 and December 2008.[70] Unexploded submunitions killed 20 and wounded 197 people[71] and contaminated 26 percent of Lebanon's cultivable land.[72] The Israeli Government issued two official statements on its use of CMs in the Lebanon War. Both statements argued that international law did not prohibit the use of CMs, and that Israel had used CMs in accordance with IHL principles. [73]

---

[66] Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Protocol V), Nov. 27, 2003, U.N. Doc. CCW/MSP/2003/2 [hereinafter Protocol V], *available at* http://www.unog.ch/80256EDD006B8954/(httpAssets)/5484D315570AC857C12571DE005D6498/$file/Protocol+on+Explosive+Remnants+of+War.pdf. Eighty states have signed onto Protocol V as parties. Disarmament: States Parties, UNOG, http://www.unog.ch/89256EE600585943/(httpPages)/3CE7CFC0AA4A7548C12571C00039CB0C?OpenDocument (last visited Nov. 21, 2012).

[67] *See* Barak, *supra* note 5, at 433 (arguing that this protocol's provisions "suffer from an over-abundance of ambiguities and weaknesses")

[68] *See* Anzalone, *supra* note 10, at 198.

[69] *See* Barak, *supra* note 5, at 439.

[70] *See* U.N. MINE ACTION COORDINATION CENTRE, SOUTH LEBANON, QUARTERLY REPORT OCTOBER-DECEMBER 2008, at 1 (2009), *available at* http://www.mineaction.org/downloads/1/MACC%20SL%20Quarterly%20Report%20Oct%20-%20Dec%2008.pdf.

[71] *Id.* at 3.

[72] *See* Anzalone, *supra* note 10, at 198; Jan Egeland, *Israel's 'Immoral' Use of Cluster Bombs in Lebanon Poses Major Threat—UN Aid Chief*, U.N. NEWS CENTRE (Aug. 30, 2006), http://www.un.org/apps/news/story.asp?NewsID=19670&Cr=Leban&Cr1 (reporting that U.N. Under-Secretary-General says that "what [was] shocking and . . . completely immoral, [was] that 90 percent of the cluster bomb strikes occurred in the last 72 hours of the conflict when . . . there would be a resolution").

[73] *See Behind the Headlines: Legal and Operational Aspects of the Use of Cluster Munitions*, ISRAEL MINISTRY OF FOREIGN AFF. (Sep. 5, 2006), *available at* http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Legal+and+operational+as

These debates after the Lebanon War "served as a catalyst" to the banning of CMs by international agreement.[74] In November 2006, NGOs[75] and states led by Norway called for a ban on CMs via a new protocol to the CCW.[76] However, due to the objections of Australia, China, India, Japan, Pakistan, the Russian Federation, the United Kingdom, and the United States, this attempt did not provide any resolution to the issue beyond an agreement to assemble a group of governmental experts to study the possibility of a new protocol on CMs.[77] Foreseeing a slow-moving process and that objections from major military powers would block the effort to ban CMs, Norway announced its intention to organize a conference to do so outside of the CCW.[78] Although the United States changed its position that no new agreement was necessary on CMs,[79] the road to Oslo was unavoidable.

III. The Convention on Cluster Munitions

A. The Oslo Process

Upon Norway's call to develop a legally binding instrument on CMs, the first conference was held in Oslo on February 22, 2007.[80] Forty-nine States and various international organizations attended the Oslo Conference. However, many important producer states did not

---

pects+of+the+use+of+cluster+bombs+5-Sep-2006.htm; Opinion of the Military Advocate General Regarding Use of Cluster Munitions in Second Lebanon War, ISRAEL MINISTRY OF FOREIGN AFF. (Dec. 24, 2007), http://www.mfa.gov.il/ MFA/Government/Law/Legal+ Issues+and+Rulings/Opinion%20of%20the%20Military%20Advocate%20General%20re garding%20use%20of%20cluster%20munitions%20in%20Second%20Lebanon%20War %2024.

[74] *See* Barak, *supra* note 5, at 428.

[75] *Id.* at 441 (such as Human Rights Watch and Landmine Action).

[76] Third Review Conference of the High Contracting Parties to CCW, Nov. 7–17, 2006, Documents of the Third Review Conference 41, CCW/CONF.III/11.

[77] Third Review Conference of the High Contracting Parties to CCW, Nov. 7–17, 2006, Final Declaration 6, CCW/CONF.III/11 [hereinafter Third Review Conference of the High Contracting Parties to CCW]. *See infra* Part IV.

[78] *See* Louis Maresca, *Introductory Note to the Convention on Cluster Munitions*, 48 INT'L LEGAL MATERIALS 354, 354 (2009).

[79] *See* Eliane Engeler, *U.S. Ready to Negotiate on Cluster Bombs*, ARMY TIMES (June 18, 2007), http://www.armytimes.com/news/2007/06/ap_clusterbombs_070618/ (quoting the head of the U.S. delegation to a CCW meeting as saying the U.S. had changed its position and now favored a negotiation within the framework of the CCW "due to the importance of this issue, concerns raised by other countries, and our own concerns about the humanitarian implications of these weapons").

[80] *See* Van Woudenberg, *supra* note 15, at 477.

participate. These included China, India, Iran, Israel, Pakistan, the Russian Federation, and the United States.[81]

The major issues debated during the Conference were: (1) "the appropriate forum for work on cluster munitions—within the CCW or outside through the Oslo process," (2) "technical solutions such as self-destruction mechanisms and accurate testing," (3) "existing instruments of IHL versus elements of a new treaty," and (4) the "nature and scope of commitments for future action."[82] However, in their final declaration, the Oslo Conference attendees committed themselves to complete a legally binding treaty by 2008 that would prohibit CMs.[83]

After several conferences,[84] 107 States adopted the CCM,[85] and 93 states signed it on December 3, 2008.[86] While 111 States have joined the CCM, only 77 States have become party to it so far.[87] Although NGOs argue that participation in CCM is growing, this may not actually be the case, as only nine states that were not initially involved in the Oslo Process changed their positions and signed it, and only five of these have become parties to it.[88]

---

[81] *Id.*

[82] REPORT: OSLO CONFERENCE ON CLUSTER MUNITIONS, 22–23 FEBRUARY 2007, CLUSTER MUNITION COALITION (2007), http://www.stopclustermunitions.org/calendar/?id=1108.

[83] *See* Oslo Conference on Cluster Munitions, 22–23 Feb. 2007, Declaration *available at* http://www.regjeringen.no/upload/UD/Vedlegg/Oslo%20Declaration%20(final)%2023%20February%202007.pdf.

[84] *See* LIMA CONFERENCE ON CLUSTER MUNITIONS, 23–25 MAY 2007, NORWEGIAN PEOPLE'S AID (Nov. 6, 2007), http://www.undp.org/cpr/documents/we_do/cpr_cluster_munitions.pdf; CLUSTER MUNITION COALITION, CMC REPORT ON THE VIENNA CONFERENCE ON CLUSTER MUNITIONS, DECEMBER. 5–7, 2007, *available at* http://www.stop-clustermunitions.org/wp/wp-content/uploads/2008/05/report-on-the-vienna-conference-5-7-december.pdf; CLUSTER MUNITION COALITION, REPORT FROM THE WELLINGTON CONFERENCE ON CLUSTER MUNITIONS, 18–22 FEBRUARY 2008 (2008), *available at* http://www.stopclustermunitions.org/wp/wp-content/uploads/2008/05/wilpf-report-on-wellington-conference-18-22-february.pdf.

[85] *See* Cluster Munitions, Dublin Diplomatic Conference 19–30 May 2008: Opening Statements, Ireland Dep't of Foreign Aff. (2008), http://www.cluster-munitionsdublin.ie/general-statements.asp.

[86] *Convention Status*, CONVENTION ON CLUSTER MUNTIONS—CCM, http://www.clusterconvention.org/ratifications-and-signatures/ (last visited Nov. 21, 2012). The CCM became binding for State Parties on August 1, 2010.

[87] *See* Appendix (providing the current signatory and party states to the CCM).

[88] *Id.* These States are Antigua & Barbuda (party), Cyprus, Djibouti, Grenada (party), Haiti, Iraq, Saint Vincent, and Grenadines (party), Trinidad and Tobago (party), and Tunisia (party).

Non-state international organizations also played a major role in drafting and negotiating the CCM during the Oslo Process.[89] These brought "important perspectives to the discussions and were powerful factors in the success of the process and the Convention's content."[90] The Oslo Process showed that like-minded states, NGOs, and "other interested parties can achieve concrete legal results by removing themselves from consensus-based models in which the opposition of a few States can halt negotiations."[91] This treaty-making model is likely to provide solutions for long-standing international problems by generating new treaties.[92]

B. Important Provisions of the Convention on Cluster Munitions

The Convention on Cluster Munitions prohibits using, developing, producing, otherwise acquiring, stockpiling, retaining, or transferring cluster munitions to anyone directly or indirectly.[93] It defines a "cluster munition" as a "conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms."[94] It excludes the following three types of munitions from its definition:

(a) A munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;
(b) A munition or submunition designed to produce electrical or electronic effects;
(c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
(i) Each munition contains fewer than ten explosive submunitions;

[89] *See* Di Ruzza, *supra* note 16, at 407 (including the United Nations, ICRC and NGOs, especially the Cluster Munition Coalition). The Cluster Munition Coalition is an international coalition of nearly 350 civil society organizations, including large NGOs such as Amnesty International and Human Rights Watch working on changing government policy and practice on cluster munitions, as well as to raise public awareness of the problem. Cluster Munitions Coalition, *available at* http://www.stopclustermunitions.org/the-coalition/members/ (last visited Dec.16, 2011).
[90] Maresca, *supra* note 78, at 355.
[91] Corsi, *supra* note 11, at 149.
[92] *Id.* at 154–55.
[93] CCM, *supra* note 4, art.1.
[94] *Id.* art.2 (2).

> (ii) Each explosive submunition weighs more than four kilograms;
> (iii) Each explosive submunition is designed to detect and engage a single target object;
> (iv) Each explosive submunition is equipped with an electronic self-destruction mechanism;
> (v) Each explosive submunition is equipped with an electronic self-deactivating feature.[95]

Article 3 requires State parties to destroy stockpiles of CMs "as soon as possible but not later than eight years after the entry into force of the Convention," with an extension of up to four years being obtainable.[96] However, it permits "the retention or acquisition of a limited number of cluster munitions and explosive submunitions for the development of and training in cluster munition and explosive submunition detection, clearance or destruction techniques, or for the development of cluster munition counter-measures." Article 4 requires state parties to clear and destroy cluster munition remnants under their control within ten years.

Article 21, also called the interoperability provision, regulates relations between state parties and non-party states.[97] The draft CCM had not contained any provision about interoperability before the Dublin Conference. During the negotiations in Dublin, Germany—supported by a number of NATO members—proposed an amendment to enable parties to participate in joint military operations with states not parties to the treaty.[98] This was one of the issues that most divided the delegates at the Dublin Conference.[99] A ban on the participation of states in international operations would have hindered some militarily powerful States from signing the CCM.[100] Conversely, the absence of any limitation on participation in international military operations would have undermined

---

[95] *See* Maresca, *supra* note 78, at 356 n.6 (explaining that such weapons are excluded from the scope of the CCM because "they are unlikely to cause the kinds of problems traditionally associated with cluster munitions").
[96] CCM, *supra* note 4, art. 3.
[97] *Id.* art. 21. *See* Di Ruzza, *supra* note 16, at 425.
[98] *See* Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, Proposal by Germany, Supported by Denmark, France, Italy, Slovakia, Spain, the Czech Republic, and the United Kingdom for the Amendment of Article 1 (May 19, 2008), *available at* http://www.clustermunitionsdublin.ie/pdf/CCM13_001.pdf.
[99] *See* Di Ruzza, *supra* note 16, at 425.
[100] *See* Raccuia, *supra* note 23, at 293 (arguing that "convincing the major Western powers to join the Convention without such a provision would have given the CCM much more force, but was unrealistic given the importance of the NATO alliance").

the ban on CMs.[101] In the end, "the CCM adopted an intermediate solution."[102] According to Article 21, "State Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party."[103] On the other hand, this same article provides that interoperability does not allow a state party to develop, produce, acquire, stockpile, transfer, use, or "expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control."[104] This provision is quite important for the United States and NATO members while participating in joint military operations with States who are parties to the CCM.[105]

C. The U.S. Policy on Cluster Munitions After the CCM

The United States attempts to strike a balance between humanitarian concerns and its security interests.[106] While recognizing the need to minimize the unintended harm to civilians by CMs, the U.S. Department of Defense (DoD) states that "cluster munitions are legitimate[107] weapons with clear military utility."[108] According to the DoD, not only are CMs "effective weapons" but also they "can result in less collateral damage than unitary weapons."[109] "Large-scale use of unitary weapons, as the only alternative to achieve military objectives, could result, in some cases, in unacceptable collateral damage . . ." when CMs would not. Therefore, "DoD recognizes that blanket elimination of cluster munitions

---

[101] *Id.*
[102] *See* Di Ruzza, *supra* note 16, at 425.
[103] CCM, *supra* note 4, art. 21(3).
[104] *Id.* art. 21(4).
[105] *See* Anzalone, *supra* note 10, at 203–04.
[106] *See* Defense Policy Memorandum, *supra* note 2, at 3; Steven Groves & Ted R. Bromund, *U.N. Convention on Certain Conventional Weapons: What the U.S. Should Do*, HERITAGE FOUNDATION (Dec. 16, 2011), http://report.heritage.org/wm3434; Anzalone, *supra* note 10, at 208.
[107] *See* Herthel, *supra* note 29, at 249–69; Ching, *supra* note 43, at 154; Anzalone, *supra* note 10, at 188–90; Lacey, *supra* note 21, at 33 (arguing that CMs do not violate IHL principles per se). *But see* Virgil Wiebe, *For Whom the Little Bells Toll: Recent Judgement by International Tribunals on the Legality of Cluster Munitions*, 35 PEPP. L. REV. 895, 899–03 (2008); Van Woudenberg, *supra* note 15, at 454–64 (arguing that CMs are illegal weapons under the IHL).
[108] Defense Policy Memorandum, *supra* note 2, at 1.
[109] *Id.*

is unacceptable due not only to negative military consequences but also due to potential negative consequences for civilians."[110]

While the DoD argues that CMs are legal under IHL and may cause less collateral damage than unitary weapons, it restricts the use of CMs in order to reduce unintended harm to civilians.[111] It requires CMs employed after 2018 to have less than 1 percent UXO. Until 2018, CMs with UXO rates more than 1 percent may only be used with approval from the combatant commander.[112] The policy also restricts the transfer of CMs with UXO rates over 1 percent to foreign governments after 2018, with the understanding that states receiving such munitions before 2018 will not use them after 2018.

IV. Draft Protocol on Cluster Munitions to the CCW

States opposing a total ban on CMs initiated an alternative multinational process to the CCM under the auspices of the CCW in 2007.[113] Led by the United States, these states sought regulation of CMs in accordance with a more balanced approach between humanitarian concerns and military considerations.[114] Within this process, the Group of Governmental Experts of High Contracting Parties to the CCW drafted a protocol on cluster munitions,[115] which was placed on the agenda of the Fourth Review Conference of the CCW in 2011.[116] At the end of the Conference, the Draft Protocol was rejected because it had

---

[110] *Id.* at 3.
[111] *Id.* at 2.
[112] *Id. See also* JOINT CHIEF OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (JP 1-02), at 55 (Nov. 8, 2010) (as amended through January 15, 2012) (defining combatant commander as "a commander of one of the unified or specified combatant commands established by the President).
[113] Third Review Conference of the High Contracting Parties to CCW, *supra* note 79, at 6.
[114] *See* Barak, *supra* note 5, at 426.
[115] *See* Group of Governmental Experts of the High Contracting Parties, Draft Protocol on Cluster Munitions Submitted by the Chairperson (Aug. 26, 2011) [hereinafter Draft Protocol], *available at* http://www.unog.ch/80256EDD006B8954/(httpAssets)/65A1309ABEE8EF50C125792C0033A369/$file/ConfIV_PVI+draft_110826-B.pdf.
[116] *See Fourth Review Conference of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects: Documents*, UNOG: UNITED NATIONS OFFICE AT GENEVA, http://www.unog.ch/80256EE600585943/(httpPages)/43FD798E770CE5AC12578B20032B630?OpenDocument (last visited Nov. 22, 2012).

two different draft texts,[117] because the CCW requires unanimous consent among the parties for a decision, and because some State parties (which were also parties to the CCM) opposed it, as did some NGOs.[118] Regardless of its failure to become a legally binding agreement, the Draft Protocol is still important because it encapsulates recent international debates on CMs and may guide future domestic and international policy.

A. Cluster Munitions Produced Before January 1, 1980

The Draft Protocol would have prohibited using, acquiring, stockpiling, retaining,[119] or transferring[120] any CMs produced before January 1, 1980, and would have required them to be removed or destroyed.[121] This rule alone would "prohibit more CMs for the United States than the Oslo Convention has prohibited for all of its member States combined."[122] Additionally, Ukraine[123] and Russia[124] announced that this rule would ban millions of CMs in their stocks. The International Committee of the Red Cross (ICRC) welcomed this step;[125]

---

[117] *See* Permanent Missions of Austria, Mexico, and Norway, Cover Letter to the Draft Alternative Protocol on Cluster Munitions (June 2011), *available at* http://www.unog.ch/80256EDD006B8954/(httpAssets)/D60CB73BCC7BB5C8C12578CE0064B521/$file/Letter+&+Draft+Proposal_AustriaMexicoNorway.pdf (stating Draft Alternative Protocol's aim as "ensure that the outcome is complementary to and compatible with the commitments that have been taken by CCM signatory and ratifying states, of which a significant number are also High Contracting Parties to the CCW").

[118] *See* Groves, *supra* note 106, at 2.

[119] Draft Protocol, *supra* note 115, art.4.

[120] *Id.* art. 7.

[121] *Id.* art. 6(1).

[122] Statement of Philip Spector, Head of United States Delegation, Fourth Review Conference of the Convention on Certain Conventional Weapons 2 (Nov. 14, 2011), *available at* http://www.unog.ch/80256EDD006B8954/(httpAssets)/AA39A701F5D863C9C1257965003B6737/$file/4thRevCon_USA_Rev2.pdf (also stating that this rule would "prohibit over 2 million cluster munitions . . . of the total U.S. stockpile of more than 6 million cluster munitions").

[123] *See* Statement of Mykola Maimeskul, Ambassador of Ukraine to the U.N. Office in Geneva, to the Fourth Review Conference of the Convention on Certain Conventional Weapons (Nov. 14, 2011), *available at* http://www.unog.ch/80256EDD006B8954/(httpAssets)/E5EEA813CB3CEBA5C1257957004A8FA1/$file/4thRevCon_UKRAINE.pdf.

[124] *See* Statement of Vladimir Yermakov, Deputy Head of the Russian Delegation, to the Fourth Review Conference of the Convention on Certain Conventional Weapons (Nov. 14, 2011), *available at* http://www.unog.ch/80256EDD006B8954/(httpAssets)/2809BB94361FE3B1C1257965004B00F8/$file/4thRevCon_RUSSIA_Rev2.pdf.

[125] *See* Statement of Jakob Kellenberger, President, Int'l Comm. of the Red Cross to the Fourth Review Conference of the Convention on Certain Conventional Weapons (Nov.

however, other NGOs, such as the Cluster Munition Coalition, argued that this rule would not "have a significant impact on the ground in offering greater protections to civilians."[126] They maintained that: (a) these more-than-thirty-year-old weapons had already reached or were nearing the end of their shelf-lives and would have had to be destroyed anyway; (b) the newer cluster munitions were the ones that militaries most desired to keep; and (c) most of the cluster munitions used in the past decade were produced after 1980.[127]

B. Cluster Munitions Produced on or After January 1, 1980

The Draft Protocol would also have prohibited using, acquiring, stockpiling, retaining, producing, developing,[128] or transferring many CMs produced on or after January 1, 1980, and would have required their removal or destruction.[129] However, it would have excluded those CMs which possessed at least one of the "safeguards that effectively ensure that unexploded submunitions will no longer function as explosive submunitions."[130] This rule also would have banned millions of American CMs.[131] However, NGOs argued that it was insufficient, because it would have allowed the indefinite use of some notorious CMs, such as BLU97,[132] M85, and 9N210,[133] whose safeguards reportedly do not work effectively, contrary to their producers' claims.

15, 2011), *available at* http://www.unog.ch/80256EDD006B8954/(httpAssets)/C3DE092D8814F07BC1257965005C058B/$file/4thRevCon_ICRC.pdf.

[126] Cluster Munition Coalition, General Statement to the CCW Fourth Review Conference (Nov.15, 2011), *available at* http://www.unog.ch/80256EDD006B8954/(httpAssets)/487E02B97BDB3918C12579650036EA37/$file/4thRevCon_CLUSTERMUNITIONCOALITION.pdf [hereinafter CMC CCW Statement].

[127] *Id.*

[128] Draft Protocol, *supra* note 115, art. 5.

[129] *Id.* art. 6(1).

[130] *Id.* art. 5 and Technical Annex B.

[131] Spector, *supra* note 122, at 3 (stating that "the ban on weapons produced after 1980 without safeguards would prohibit . . . the vast majority of its remaining operational stocks").

[132] *See* Kellenberger, *supra* note 125, at 1; Statement of Grethe Osten, Cluster Munition Coalition, to the CCW Fourth Review Conference (Nov. 17, 2011), *available at* http://www.stopclustermunitions.org/wp/wp-content/uploads/2011/11/article-5-statement-17-nov.pdf (stating that "the BLU97 has two fuzes. The secondary fuze is the 'all-ways acting' fuze. It was designed to ensure the submunition's reliable function, but . . . the BLU97 still fails in huge numbers. And instead the all-ways acting fuze has a disturbing tendency to function as an anti-disturbance device. And this is the reason why BLU97 is one of the munitions most dreaded by disposal teams").

In addition, the Draft Protocol would have permitted States to defer these prohibitions on CMs without safeguard mechanisms for up to twelve years after the Protocol's entry into force.[134] During this period, these CMs could only have been used after approval by a "State's highest-ranking operational commander in the area of operations or by the appropriate politically mandated operational authority."[135] While proponents of the Draft Protocol argued that the deferral period was necessary for military reasons,[136] opponents criticized it for being too long[137] and permitting the continued use of CMs that parties had already agreed to ban.[138]

C. One Percent Failure Rate Exemption of the Draft Protocol

The Draft Protocol would not have applied to any CMs that had failure rates of one percent or less, regardless of their production dates or safeguard mechanisms.[139] The United States argued that "this [1 percent] criteria is a specific, objective, measurable criteria that actually is, in many ways, more targeted to the humanitarian concerns . . . than even some of other criteria."[140] Human Rights Watch criticized an exemption based on failure rate for being "fatally flawed by its dependence on unverifiable national implementation measures," which dependence

---

[133] *See* HUM. RTS. WATCH, CLUSTER MUNITIONS AND THE CONVENTION ON CONVENTIONAL WEAPONS: MYTHS AND REALITIES 2 (2011) [hereinafter MYTHS AND REALITIES], *available at* http://www.stopclustermunitions.org/wp/wp- content/uploads /2011/03/cluster-munitions-and-the-ccw-myths-and-realities.pdf (maintaining that "post-conflict clearance of dud submunitions equipped with these [safeguard] features has demonstrated that they do not 'effectively ensure that unexploded submunitions no longer function.' If an agreement includes this loophole, states would still be able to produce, stockpile, and use cluster munitions with submunitions like the artillery and rocket delivered M85 self-destructing dual-purpose improved conventional munition used in Iraq, Lebanon, and Georgia, and the rocket delivered 9N210 submunition used in Georgia").

[134] Draft Protocol, *supra* note 115, art. 5(3).

[135] *Id.* art. 5(4).

[136] *See CCW Protocol on Cluster Munitions Would Have Immediate and Tangible Humanitarian Effect*, MISSION OF THE UNITED STATES, GENEVA, SWITZERLAND (Nov. 16, 2011), http://geneva.usmission.gov/2011/11/17/ccw-protocol-2/ (statements by Harold Koh, Dep't of State Legal Advisor and Bill Lietzau, Deputy Assistant Sec'y of Def. on the U.S. Position on the Convention on Conventional Weapons Negotiations on Cluster Munitions Protocol) [hereinafter *CCW Protocol on Cluster Munitions*].

[137] *See* Kellenberger, *supra* note 125, at 1.

[138] *See* CMC CCW Statement, *supra* note 126, at 3.

[139] Draft Protocol, *supra* note 115, art. 5, Technical Annex A.

[140] Third Review Conference of the High Contracting Parties to CCW, *supra* note 136.

made it impossible "to certify global compliance with the norm."[141] Therefore, depending on national standards, certain types of CMs could be "considered to be prohibited by one State and exempted by another."[142]

D. Complementarity of the Draft Protocol

The Draft Protocol provisions above would provide less protection to civilians than the CCM's strict ban on CMs.[143] Non-Governmental Organizations have argued that enacting a less protective international instrument after already having one with higher standards would endanger the "positive trend of ever greater protection for civilians under IHL," and that this regression would be a "terrible precedent to set."[144] They maintain that the Draft Protocol "could re-legitimize a weapon already prohibited by the CCM; revive acceptance of a technical approach to improving the weapon as opposed to a complete prohibition; weaken or delay the stigmatization of CMs being created by the CCM; and harm efforts to universalize the CCM, as some States would opt to join the lower standard of the CCW."[145] Non-government organizations have also accused those state parties to CCM that actively participated in the Draft Protocol of violating their obligations by supporting lower standards than the CCM's and by giving non-party states an excuse to stay out of the CCM indefinitely.[146]

These critics, however, have ignored the fact that the Draft Protocol was designed to be complementary with the CCM.[147] First, the Draft Protocol would not undermine other applicable IHL rules and

---

[141] MYTHS AND REALITIES, *supra* note 133, at 1–2.
[142] *Id.* at 2.
[143] *See* Kellenberger, *supra* note 125, at 3; MYTHS AND REALITIES, *supra* note 133, at 1 (blaming Draft Protocol having too many "exceptions, loopholes, and deferral periods that concretely undermine any impact of an effective prohibition").
[144] CMC CCW Statement, *supra* note 126, at 1; Kellenberger, *supra* note 125, at 3, HUM. RTS. WATCH, FROM GOOD TO BAD: THE THREAT POSED TO INTERNATIONAL LAW BY THE DRAFT CCW PROTOCOL ON CLUSTER MUNITIONS, MEMORANDUM TO DELEGATES TO THE FOURTH REVIEW CONFERENCE OF THE 1980 CONVENTION ON CONVENTIONAL WEAPONS 7 (2011), *available at* http://www.hrw.org/sites/default/files/related_material/CCWProtocol.pdf.
[145] MYTHS AND REALITIES, *supra* note 133, at 4.
[146] *Id.* at 5 (such as Australia, France, Germany, and Ireland).
[147] *See* Spector, *supra* note 122, at 3.

principles.[148] Second, it would not "affect any rights or obligations of that States Parties to" the CCM.[149] These provisions were particularly designed to disperse the notion that the Draft Protocol's aim was to lessen the impact of the CCM.[150]

However, despite the efforts of proponent states[151] and new proposals to alleviate further concerns,[152] the Fourth Review Conference could not produce a legally binding agreement.[153] Though CCM advocates count this as a victory, the result is that there is no international regulation at all on the vast majority of the world's CMs.[154] Whatever concessions it has offered in the CCW process, the United States is free to implement its own national policy regarding CMs without further reference to the failed Draft Protocol.[155] It has declared that it will continue to implement its own voluntary policy to eliminate CMs with UXO rates over one percent by 2018, and encourages other countries to take similar steps.[156]

---

[148] Draft Protocol, *supra* note 115, art. 3(1).
[149] *Id.* art. 1(3).
[150] *See* Spector, *supra* note 124, at 3.
[151] The United States, Argentina, Belarus, China, and Estonia offered full support for the Draft Protocol. States also party to the CCM like Croatia, Germany, Italy, the Netherlands, Portugal, Sweden, and Switzerland acted as facilitators, and "they viewed the Draft Protocol as a step in the right direction, even if more needed to be done." On the other hand, India, Israel, Pakistan, Russia, and Ukraine had some concerns while still supporting it. Cluster Munition Coalition, *Going Nowhere Slowly*, CCW NEWS 1–2, Nov. 24, 2011, *available at* http://www.stopclustermunitions.org/wp/wp-content/uploads/2011/11/ccw-news-24-november.pdf.
[152] *See* Hum. Rts. Watch and Harvard Law Sch. Int'l Hum. Rts. Clinic, Cluster Munition Analysis of CCW Draft Protocol VI on Cluster Munitions (Nov. 22, 2011), *available at* http://www.hrw.org/sites/default/files/related_material/2011_Arms_CCW4draftchairtext3.pdf (tracking changes on Draft Protocol proposals).
[153] *See* Farrah Zughni, *Cluster Munitions Protocol Fails*, ARMS CONTROL TODAY (Dec. 2011), http://www.armscontrol.org/act/2011_12/Cluster_Munitions_Protocol_Fails.
[154] *See* Groves, *supra* note 106, at 2 (arguing that the outcome of the Fourth CCW Conference is in the interests of neither the United States nor the victims of UXO).
[155] *Id.* at 3.
[156] *See U.S. Deeply Disappointed by CCW's Failure to Conclude Protocol on Cluster Munitions*, MISSION OF THE UNITED STATES, GENEVA, SWITZERLAND (Nov. 25, 2011), http://geneva.usmission.gov/2011/11/25/u-s-deeply-disappointed-by-ccws-failure-to-conclude-procotol-on-cluster-munitions/.

V. Conclusion

The problems caused by CMs and attempts to resolve them have been discussed over the years, and it seems these discussions are not going to end soon. The outright prohibition on CMs by the CCM has discouraged major user and producer States from joining and ratifying it. Since these states possess 90 percent of the world's supply of CMs, their reluctance limits the desired humanitarian effect of the CCM, which therefore seems inadequate to solve the problems by itself.

Nevertheless, the CCM's stigmatizing effect has already started to change the policies of some non-party States, including the United States. Non-CCM states have attempted to enact a different international agreement under the auspices of the CCW to balance humanitarian concerns and the military utility of the weapons. Despite the United States' strong efforts, this initiative failed because of opposition from prominent NGOs and States party to the CCM.

For now the United States has not entered into any legally binding international agreement specifically banning CMs. Nevertheless, any argument that cluster munitions remain legal and serve a legitimate military purpose depends on careful legal assessment, while keeping in mind their military utility and balancing relevant humanitarian concerns.

Appendix

The Convention on Cluster Munitions Status

Country	Adopting States in Dublin*	Signature	Ratification/ Accession	Entry into force date
Afghanistan		03-Dec-08	08-Sept-1	1-Mar-12
Albania	30-May-08	03-Dec-08	16-Jun-09	1-Aug-10
Angola	30-May-08	03-Dec-08		
Antigua & Barbuda		16-Jul-10	23-Aug-10	1-Feb-11
Australia	30-May-08	03-Dec-08	08-Oct-12	01-Apr-13
Austria	30-May-08	03-Dec-08	02-Apr-09	1-Aug-10
Belgium	30-May-08	03-Dec-08	22-Dec-09	1-Aug-10
Benin	30-May-08	03-Dec-08		
Bolivia	30-May-08	03-Dec-08		
Bosnia and Herzegovina	30-May-08	03-Dec-08	07-Sep-10	1-Mar-11
Botswana	30-May-08	03-Dec-08	27-Jun-11	1-Dec-11
Bulgaria	30-May-08	03-Dec-08	06-Apr-11	1-Oct-11
Burkina Faso	30-May-08	03-Dec-08	16-Feb-10	1-Aug-10
Burundi	30-May-08	03-Dec-08	25-Sep-09	1-Aug-10
Cameroon	30-May-08	15-Dec-09	12-Jul-12	01-Jan-13
Canada	30-May-08	03-Dec-08		
Cape Verde		03-Dec-08	19-Oct-10	1-Apr-11
Central African Republic		03-Dec-08		
Chad	30-May-08	03-Dec-08		
Chile	30-May-08	03-Dec-08	16-Dec-10	1-Jun-11
Colombia	30-May-08	03-Dec-08		
Comoros	30-May-08	03-Dec-08	28-Jul-10	1-Jan-11
Congo, Democratic Republic of	30-May-08	18-Mar-09		
Congo, Republic of	30-May-08	03-Dec-08		
Cook Islands	30-May-08	03-Dec-08	23-Aug-11	1-Feb-12
Costa Rica	30-May-08	03-Dec-08	28-Apr-11	1-Oct-11
Côte d'Ivoire	30-May-08	04-Dec-08	12-Mar-12	01-Sep-12

Côte d'Ivoire	30-May-08	04-Dec-08	12-Mar-12	01-Sep-12
Croatia	30-May-08	03-Dec-08	17-Aug-09	1-Aug-10
Cyprus		23-Sept-09		
Czech Republic	30-May-08	03-Dec-08	22-Sep-11	1-Mar-12
Denmark	30-May-08	03-Dec-08	12-Feb-10	1-Aug-10
Djibouti		30-Jul-10		
Dominican Republic	30-May-08	10-Nov-09	20-Dec-11	1-Jun-12
Ecuador	30-May-08	03-Dec-08	11-May-10	1-Nov-10
El Salvador	30-May-08	03-Dec-08	10-Jan-11	1-Jul-11
Fiji	30-May-08	03-Dec-08	28-May-10	1-Nov-10
France	30-May-08	03-Dec-08	25-Sep-09	1-Aug-10
Gambia		03-Dec-08		
Germany	30-May-08	03-Dec-08	08-Jul-09	1-Aug-10
Ghana	30-May-08	03-Dec-08	03-Feb-11	1-Aug-11
Grenada			29-Jun-11	1-Dec-11
Guatemala	30-May-08	03-Dec-08	03-Nov-10	1-May-11
Guinea	30-May-08	03-Dec-08		
Guinea Bissau	30-May-08	03-Dec-08	29-Nov-10	1-May-11
Haiti		28-Oct-09		
The Holy See	30-May-08	03-Dec-08	03-Dec-08	1-Aug-10
Honduras	30-May-08	03-Dec-08	21-Mar-12	01-Sep-12
Hungary	30-May-08	03-Dec-08	03-Jul-12	01-Jan-13
Iceland	30-May-08	03-Dec-08		
Indonesia	30-May-08	03-Dec-08		
Iraq		12-Nov-09		
Ireland	30-May-08	03-Dec-08	03-Dec-08	1-Aug-10
Italy	30-May-08	03-Dec-08	21-Sep-11	1-Mar-12
Jamaica	30-May-08	12-Jun-09		
Japan	30-May-08	03-Dec-08	14-Jul-09	1-Aug-10

Kenya	30-May-08	03-Dec-08		
Lao PDR	30-May-08	03-Dec-08	18-Mar-09	1-Aug-10
Lebanon	30-May-08	03-Dec-08	05-Nov-10	1-May-11
Lesotho	30-May-08	03-Dec-08	28-May-10	1-Nov-10
Liberia		03-Dec-08		
Liechtenstein		03-Dec-08		
Lithuania	30-May-08	03-Dec-08	24-Mar-11	1-Sep-11
Luxembourg	30-May-08	03-Dec-08	10-Jul-09	1-Aug-10
Macedonia, FYR	30-May-08	03-Dec-08	08-Oct-09	1-Aug-10
Madagascar	30-May-08	03-Dec-08		
Malawi	30-May-08	03-Dec-08	7-Oct-09	1-Aug-10
Mali	30-May-08	03-Dec-08	30-Jun-10	1-Dec-10
Malta	30-May-08	03-Dec-08	24-Sep-09	1-Aug-10
Mauritania	30-May-08	19-Apr-10	1-Feb-12	1-Aug-12
Mexico	30-May-08	03-Dec-08	06-May-09	1-Aug-10
Moldova, Republic of	30-May-08	03-Dec-08	16-Feb-10	1-Aug-10
Monaco		03-Dec-08	21-Sep-10	1-Mar-11
Montenegro	30-May-08	03-Dec-08	25-Jan-10	1-Aug-10
Mozambique	30-May-08	03-Dec-08	14-Mar-11	1-Sep-11
Namibia		03-Dec-08		
Nauru		03-Dec-08		
Netherlands	30-May-08	03-Dec-08	23-Feb-11	1-Aug-11
New Zealand	30-May-08	03-Dec-08	22-Dec-09	1-Aug-10
Nicaragua	30-May-08	03-Dec-08	02-Nov-09	1-Aug-10
Niger	30-May-08	03-Dec-08	02-Jun-09	1-Aug-10
Nigeria	30-May-08	12-June-09		
Norway	30-May-08	03-Dec-08	03-Dec-08	1-Aug-10
Palau	30-May-08	03-Dec-08		

Panama	30-May-08	03-Dec-08	29-Nov-10	1-May-11
Paraguay	30-May-08	03-Dec-08		
Peru	30-May-08	03-Dec-08	26-Sep-12	01-Mar-13
Philippines	30-May-08	03-Dec-08		
Portugal	30-May-08	03-Dec-08	09-Mar-11	1-Sep-11
Rwanda		03-Dec-08		
Saint Vincent and the Grenadines		23-Sept-09	29-Oct-10	1-Apr-10
Samoa	30-May-08	03-Dec-08	28-Apr-10	1-Oct-10
San Marino	30-May-08	03-Dec-08	10-Jul-09	1-Aug-10
São Tomé and Principe	30-May-08	03-Dec-08		
Senegal	30-May-08	03-Dec-08	3-Aug-11	1-Feb-12
Seychelles	30-May-08	13-Apr-10	20-May-10	1-Nov-10
Sierra Leone	30-May-08	03-Dec-08	03-Dec-08	1-Aug-10
Slovenia	30-May-08	03-Dec-08	19-Aug-09	1-Aug-10
Somalia		03-Dec-08		
South Africa	30-May-08	03-Dec-08		
Spain	30-May-08	03-Dec-08	17-Jun-09	1-Aug-10
Swaziland	30-May-08		13-Sep-11	01-Mar-12
Sweden	30-May-08	03-Dec-08	23-Apr-12	01-Oct-12
Switzerland	30-May-08	03-Dec-08	17-Jul-12	01-Jan-13
Tanzania	30-May-08	03-Dec-08		
Togo	30-May-08	03-Dec-08	22-Jun-12	01-Dec-12
Trinidad and Tobago			21-Sep-11	1-Mar-12
Tunisia		12-Jan-09	28-Sep-10	1-Mar-11
Uganda	30-May-08	03-Dec-08		
United Kingdom	30-May-08	03-Dec-08	4-May-10	1-Nov-10

Uruguay	30-May-08	03-Dec-08	24-Sep-09	1-Aug-10
Zambia	30-May-08	03-Dec-08	12-Aug-09	1-Aug-10

*States which adopted the CCM in Dublin, but have not signed it yet:

Morocco, Sudan, Argentina, Belize, Venezuela, Brunei Darussalam, Kyrgyzstan, Malaysia, Timor-Leste, Estonia, Finland, Serbia, Slovakia, Bahrain, Qatar, Papua New Guinea, and Vanuatu.

PUTTING COMPULSORY BACK IN CUMPULSORY PROCESS

MAJOR CLAY A. COMPTON*

In questions of power, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.[1]

I. Introduction

Private (PVT) Smith is accused of raping a fellow Soldier by force.[2] Defense counsel is detailed to the case and subsequently interviews numerous witnesses, including the doctor who performed the sexual assault examination on the alleged victim and the doctor who examined PVT Smith for defensive wounds the alleged victim claims she inflicted upon him.

Pursuant to Rule for Courts-Martial (RCM) 703(c)(2)(B),[3] the defense provides the prosecutor a synopsis of expected testimony of all witnesses requested for trial. In doing so, the defense is forced to reveal its theme and theory of the case. Specifically, the defense must reveal its theory as to the alleged victim's motive to fabricate and PVT Smith's

---

* Judge Advocate, U.S. Army. Presently assigned as Brigade Judge Advocate, 2d Armored Brigade Combat Team, 1st Infantry Division, Fort Riley, Kansas. LL.M., 2012, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2003, University of Oklahoma; B.B.A., 1999, University of Oklahoma. Previous assignments include Office of the Staff Judge Advocate, 7th Infantry Division and Fort Carson, Fort Carson, Colorado, 2003–2006 (Legal Assistance Attorney, Administrative Law Attorney, Operational and International Law Attorney, and Special Assistant United States Attorney); Defense Counsel, Bamberg, Germany, and Baghdad, Iraq, 2006–2009; Training Officer, Defense Counsel Assistance Program, Arlington, Virginia, 2009–2011. Member of the bars of the State of Oklahoma, the United States Court of Appeals for the Armed Forces and the United States Supreme Court. This research paper was submitted in partial completion of the Master of Laws requirements of the 60th Judge Advocate Officer Graduate Course.

[1] THOMAS JEFFERSON. THE PAPERS OF THOMAS JEFFERSON, VOLUME 30: 1 JANUARY 1798 TO 31 JANUARY 1799—RESOLUTIONS ADOPTED BY THE KENTUCKY GENERAL ASSEMBLY (1798), *available at* http://www.princeton.edu/~tjpapers/kyres/kyadopted.html (last visited Sept. 3, 2013).

[2] Private Smith's case is a real case, not a hypothetical. The author was detailed to represent this Soldier facing multiple charges, the most serious being rape. The name of the accused has been changed in this article to protect his privacy, but the facts are real.

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703 (2012) [hereinafter MCM].

personality traits which led him to "confess" to a crime he did not commit. The prosecution promptly denies the majority of requested witnesses, including the doctor who performed the sexual assault examination of the alleged victim and the doctor who examined PVT Smith for defensive wounds.

These denials are not based on the defense's lack of compliance with RCM 703. Rather, the prosecutor determines, in his sole discretion, that the requested witnesses are not needed for trial. Specifically, the two requested doctors and other character and fact witnesses are denied by the prosecutor because he deems these witnesses irrelevant to the rape case. The prosecutor provides no further explanation or detail as to why these witnesses are irrelevant; he simply denies each witness.

The case is then delayed while defense counsel submits a motion to compel production of these crucial witnesses under RCM 906(b)(7).[4] After the motions hearing, the military judge orders the government to produce each witness requested by the defense. After this back-and-forth, PVT Smith is finally able to present his witnesses at trial and is ultimately vindicated by the panel who finds him not guilty of all charges and specifications. This seemingly random denial of necessary witnesses prompts the question: should a military accused be forced to subject himself to this level of gamesmanship from the government who is seeking to deprive him of his liberty and property? Is it fair to the accused that he be forced to provide the prosecutor a synopsis of the witnesses' expected testimony when the government does not have to reciprocate? The Constitution says no, and so should our sense of fairness and decency.

The Compulsory Process Clause of the Sixth Amendment (Compulsory Process Clause) mandates that the accused, in a criminal trial, have the right "to have compulsory process for obtaining witnesses in his favor."[5] However, RCM 703 significantly and unconstitutionally

---

[4] *Id.* R.C.M. 906(b)(7) (Motions for appropriate relief. Discovery and production of evidence and witnesses).

[5] U.S. CONST. amend VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

restricts this fundamental constitutional right. For a military accused to actually be afforded an opportunity to invoke the right of compulsory process, the President has mandated that the accused submit his witness list, along with a summary of the expected testimony, to the prosecutor. After obtaining a preview of the defense case through the synopses of every defense witness, the prosecutor is empowered to determine whether the witnesses will actually be produced for the accused at trial. If the witness is denied, the accused can litigate the matter before the trial judge, but only *after* tipping off the prosecutor to the defense's trial strategy.

Part II of this article discusses the history of compulsory process as it found its way into the adversarial process at common law and its importance to the drafters of the U.S. Constitution. It details the application of compulsory process during colonial times to help discern the intent behind the drafters' inclusion of this right in the Sixth Amendment. It addresses the notion that the Compulsory Process Clause represents the teeth behind which a criminal defendant actually exercises his "right to present a defense."[6] It also explores the Supreme Court's modern interpretation of the Compulsory Process Clause.

Part III of this article examines current procedures for implementing the Compulsory Process Clause. It analyzes the requirements set forth in the Federal Rules of Criminal Procedure (FRCP), and contrasts them with the restrictions imposed on a military accused under the Rules for Courts-Martial. It discusses RCM 703's violations of the Sixth Amendment's Compulsory Process Clause, the Fifth Amendment's Due Process Clause[7] (Due Process Clause), and Articles 36[8] and 46[9] of the

---

> witnesses against him; *to have compulsory process for obtaining witnesses in his favor*, and to have the Assistance of Counsel for his defence.

Id. (emphasis added). Forty-eight states have also implemented provisions in their state constitutions that provide for compulsory process. *See* Peter Westen, *The Compulsory Clause*, 73 MICH. L. REV. 71, 73 n.1 (1974).

[6] Washington v. Texas, 388 U.S. 14, 19 (1967); *see also* Janet C. Hoeffel, *The Sixth Amendment's Lost Clause: Compulsory Process*, 2002 WIS. L. REV. 1275, 1276 (2002).

[7] "No person shall be . . . deprived of life, liberty, or property without due process of law." U.S. CONST. amend V.

[8] UCMJ art. 36 (2012) provides:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military

Uniform Code of Military Justice (UCMJ). Additionally, this article will detail the unlawful encroachment on attorney work-product and attorney-client privilege, as well as the appearance of unfairness that undermines public confidence in the military justice system. Although this paper primarily focuses on the Compulsory Process Clause, it addresses each of these additional unlawful restrictions because they are all bound together in the accused's constitutional right to present an adequate defense at trial.

Finally, Part IV of this article offers several constitutionally sound solutions to protect the military accused's rights under the Compulsory Process Clause. It provides three separate approaches that satisfy the constitutional mandates of the Fifth and Sixth Amendments, the requirements of Articles 36 and 46 of the UCMJ, the sacrosanct protections afforded by the attorney-client and attorney work-product privileges, and the public policy concerns of projecting a fair system of justice, while still addressing the needs of the military justice system.

> commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable.

Id.

[9] *Id*. art. 46 provides:

> The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Commonwealths and possessions.

Id.

II. History of Compulsory Process

To appreciate the necessity of repairing the scheme in which military accused secure trial witnesses, it is important to understand the historical significance of compulsory process. The framers of the United States Constitution embarked on an unprecedented endeavor to establish a government controlled by the very people it regulated.[10] In doing so, the framers placed specific burdens and restrictions upon the government to ensure it could not trample on the freedoms of its citizenry. In particular, the framers recognized the significant power the government can wield over an accused at trial, and therefore implemented numerous provisions in the Constitution to protect the accused. One such provision is the Compulsory Process Clause. A brief historical analysis is helpful to understand why this protection was so important that the Constitution was amended to include its provisions.

A. Compulsory Process—Development at Common Law

Compulsory process was a relative late-comer to English common law. The modern notion of witnesses at trial did not exist in the 1400s, and did not become an important part of the fact-finding process until the 1500s.[11] During this time, courts began to allow independent witnesses to testify before the jury. Until then, witnesses served the dual role of providing evidence in the case as a witness and deciding the outcome as a juror.[12]

The accused's rights, however, were still in their infancy as the Inquisitional Process thrived in Tudor England (1485–1603). Most of the constitutional protections provided to today's accused did not exist. For example, the State did not provide the accused notice of the charges facing him until the day of his trial.[13] Likewise, the accused was not allowed to be represented by counsel, nor did the accused have any right

---

[10] Patrick Henry stated, "The Constitution is not an instrument for the government to restrain the people, it is an instrument for the people to restrain the government—lest it come to dominate our lives and interests." FOUNDERS' QUOTES, http://foundersquotes.com/?s=The+constitution+is+not+an+instrument+for+the+government (last visited Sept. 3, 2013).

[11] 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2190 (1905).

[12] Hoeffel, *supra* note 6, at 1279.

[13] Westen, *supra* note 5, at 82.

to discovery.[14] Further, the accused did not have the ability to confront witnesses against him or offer testimony from his own witnesses. Additionally, the accused was not allowed to testify under oath in his defense.[15] The accused was allowed to make an unsworn statement to the jury, but this lacked the legal weight of sworn testimony, as it does today.[16]

"The most dominant feature of the emergent criminal trial"[17] during this period "was the imbalance of advantage between the State and the accused. The prosecution had a marked advantage both in preparing its case and in presenting its case at trial."[18] This disparity persisted into the seventeenth century.[19] A shift began when Parliament adopted a statute in 1606 which allowed English subjects accused of committing crimes in Scotland to present witnesses at trial.[20] The accused was allowed to present his own witnesses to testify in his defense, and the witnesses were allowed to be sworn.[21]

Although some significant restrictions were placed on the type of testimony the accused could introduce,[22] the ability to present testimony of defense witnesses began to spread beyond the confines of the 1606 statute and into the mainstream English courts.[23] However, the accused still had no formal means to compel the presence of his witnesses;[24] but his fortunes changed with the development of the Adversarial Process.

In 1695, Parliament passed a statute expanding procedural protections for an accused facing charges of treason and related crimes.[25] An accused now had the ability to obtain a copy of the indictment against him, the right to counsel, the right to produce witnesses and have them

---

[14] *Id.*
[15] Hoeffel, *supra* note 6, at 1280.
[16] Westen, *supra* note 5, at 82.
[17] *Id.* at 81.
[18] *Id.*
[19] *Id.*
[20] Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 719 (1976).
[21] *Id.*
[22] Defense witnesses, unlike witnesses for the Crown, were not allowed to be sworn. Likewise, they could not directly contradict the Crown's witnesses, but rather offer testimony as to facts inconsistent with the defendant's guilt. *Id.*
[23] *Id.*
[24] *Id.* at 720.
[25] *Id.*

testify, the right of compulsory process to compel attendance of witnesses, and the right to obtain a list of the jurors prior to trial.[26] By the eighteenth century, the limited exception of the 1606 statute—allowing sworn testimony of defense witnesses—had crystallized in the law and become the rule in England in all criminal cases.[27] The only remaining imbalance between the State and the accused regarding witnesses was the refusal to allow the accused to provide sworn testimony himself.[28] This slow expansion of rights for the criminal accused in England was enjoying a similar development for the American accused.[29] However, they did not initially endeavor to improve these procedures.[30] By the eighteenth century, the colonies, in a reflection of their dissatisfaction with English colonial rule, expanded the accused's rights even further.[31] A concerted effort developed to alleviate the unfair and harsh seventeenth century criminal procedures regarding witnesses for the accused.[32] The colonies deemed these expansive rights so indispensable that many of them included the protections in their state constitutions. Thus, the underlying principles that form the Compulsory Process Clause were well-established before American independence came about.[33]

By 1700 in New York and 1750 in Maryland, Massachusetts, Pennsylvania, and Virginia, many states afforded the accused the right to subpoena witnesses and have them testify under oath.[34] After independence, eight states explicitly afforded the accused the right to produce witnesses in his favor.[35] Most of these state constitutions contained bills of rights that provided certain protections to the accused.[36] Many states followed Virginia's lead and adopted language similar to section 8 of the Virginia Bill of Rights.[37] Section 8 provides

---

[26] *Id.*
[27] Westen, *supra* note 5, at 87. *See also* Clinton, *supra* note 20, at 720.
[28] Westen, *supra* note 5, at 87 n.63.
[29] Hoeffel, *supra* note 6, at 1281.
[30] Clinton, *supra* note 20, at 723.
[31] *Id.* at 725.
[32] *Id.* at 726.
[33] Westen, *supra* note 5, at 91.
[34] *Id.* at 93.
[35] *Id*. at 94; Hoeffel, *supra* note 6, at 1284–85.
[36] Clinton, *supra* note 20, at 728.
[37] *Id.* at 729 n.86.

> That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose

that in all criminal prosecutions, an accused has, among other rights, the right "to call for evidence in his favor."[38] Pennsylvania,[39] Delaware,[40] Maryland, [41] North Carolina,[42] and Vermont[43] adopted nearly identical

---

> unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

Id.

[38] *Id.*

[39] PENNSYLVANIA DECLARATION OF RIGHTS § 176 (1776), *reprinted in* Clinton, *supra* note 20, at 729 n.87:

> IX. That in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial, by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers.

Id.

[40] DELAWARE DECLARATION OF RIGHTS § 14 (1776), *reprinted in* Clinton, *supra* note 20, at 729 n.88:

> SECT. 14. That in all prosecutions for criminal offences, every man hath a right to be informed of the accusation against him, to be allowed counsel, to be confronted with the accusers or witnesses, to examine evidence on oath in his favour, and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

Id.

[41] MARYLAND DECLARATION OF RIGHTS art. XIX (1776), *reprinted in* Clinton, *supra* note 20, at 729 n.89:

> XIX. That, in all criminal prosecutions, every man hath a right to bc informed of the accusation against him; to have a copy of the indictment or charge in due time (if required) to prepare for his defence: to be allowed counsel: to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses, for and against him, on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

Id.

[42] NORTH CAROLINA DECLARATION OF RIGHTS arts. VII–IX (1776), *reprinted in* Clinton, *supra* note 20, at 729 n.90:

provisions.[44] Likewise, Massachusetts[45] and New Hampshire[46] adopted similar language to section 8 of the Virginia Bill of Rights in their

---

> VII. That, in all criminal prosecutions, every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony, and shall not be compelled to give evidence against himself.
> VIII. That no freeman shall be put to answer any criminal charge, but by indictment, presentment, or impeachment.
> IX. That no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used.

Id.

[43] VERMONT DECLARATION OF RIGHTS art. X (1777), *reprinted in* Clinton, *supra* note 20, at 729 n.91:

> X. That, in all prosecutions for criminal offences, a man hath a right to be heard, by himself and his counsel—to demand the cause and nature of his accusation—to be confronted with the witnesses—to call for evidence in his favor, and a speedy public trial, by an impartial jury of the country; without the unanimous consent of which jury, he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty, except by the laws of the land or the judgment of his peers.

Id.

[44] Clinton, *supra* note 20, at 729.

[45] MASSACHUSETTS DECLARATION OF RIGHTS art. 12 (1780), *see* Clinton, *supra* note 20, at 730 n.93:

> XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially, and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

Id.

[46] NEW HAMPSHIRE DECLARATION OF RIGHTS art. XV (1784), *see* Clinton, *supra* note 20, at 730 n.94:

> XV. No subject shall be held to answer for any crime, or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence

respective state constitutions.[47] New Jersey adopted the language of the Pennsylvania colonial Frame of Government, which guaranteed "that all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to."[48]

Though not uniform in language, these constitutions all reflected the fundamental notion that the accused must be granted "a meaningful opportunity, at least as advantageous as that possessed by the prosecution, to establish the essential elements of his case."[49] This also reflects a common vision among the states that it is essential to ensure the guaranteed liberties of those at the mercy of the government—the accused. This notion was so deeply rooted in the American psyche that many states refused to ratify the U.S. Constitution without amending it to include these protections.[50]

B. Compulsory Process—A Constitutional Guarantee

Prior to the adoption of the U.S. Constitution, America was governed by the Articles of Confederation. The Articles of Confederation contained no individual liberty guarantees because the states were thought to be powerful enough to protect their citizens and the Confederation was thought too weak to actually encroach on an individual's liberties.[51] The Constitution, however, created a federal government powerful enough to cause concern.[52] Many states refused to ratify the Constitution without amending it to include a bill of rights similar to those contained in existing state constitutions.[53]

> against himself. And every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, and counsel. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land.

[47] Clinton, *supra* note 20, at 730.
[48] *Id.*
[49] Westen, *supra* note 5, at 95.
[50] *Id.* at 96.
[51] *Id.*
[52] *Id.*
[53] Clinton, *supra* note 20, at 731.

Four states—Virginia, Pennsylvania, North Carolina, and New York—specifically advocated for language guaranteeing the accused the right to present witnesses in his favor.[54] Each state recommended slightly different language, but all agreed that the inclusion of some form of guarantee in this regard was vital to the success of the new government. The slow response from Congress in addressing these concerns prompted Virginia and New York to actually call for a new constitutional convention to modify the Constitution.[55]

In 1789, James Madison, a member of the Virginia ratifying convention in 1788,[56] informed the House of Representatives of his desire to address the issue of constitutional amendments before them.[57] The House agreed, and Madison delivered a speech proposing nine changes to the language of the Constitution.[58] Many of these changes represent what became the Fifth and Sixth Amendments to the Constitution.[59] In fact, Madison would draft much of the Bill of Rights.[60] Many of his proposals, including what would become the Sixth Amendment, were adopted with little debate.[61]

---

[54] Westen, *supra* note 5, at 96.
[55] Clinton, *supra* note 20, at 733.
[56] Westen, *supra* note 5, at 97.
[57] Clinton, *supra* note 20, at 733.
[58] *Id.*
[59] *Id.* at 733–34.
[60] Westen, *supra* note 5, at 96.
[61] 1 ANNALS OF CONG. 784–85 (1789), *reprinted in* Clinton, *supra* note 20, at 734–35:

> The committee then proceeded to consider the seventh proposition, in the words following:
>
> Article 3, section 2. Strike out the whole of the third paragraph and insert, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."
>
> MR. BURKE moved to amend this proposition in such a manner as to leave in the power of the accused to put off the trial to the next session, provided he made it appear to the court that the evidence of the witness, for whom process was granted but not served, was material to his defense.
>
> MR. HARTLEY said, that in securing him the right of compulsory process, the Government did all it could; the remainder must lie in the discretion of the court.

It is important to note that Madison used the term compulsory process to describe the accused's right to obtain witnesses in his favor. Madison drafted the guarantees of the Sixth Amendment following the model set forth in the Virginia Bill of Rights,[62] which were nearly identical to the amendment proposed by Virginia when ratifying the Constitution.[63] However, the language Madison used regarding witness production differed from that of the Virginia Bill of Rights and the earlier proposed amendment.[64] Instead of using the language, to call for evidence, Madison described the accused's right "to have compulsory process for obtaining witnesses in his favor."[65] Congress adopted the

---

> MR. SMITH, of South Carolina, thought the regulation would come properly in, as part of the judicial system.
>
> The question on MR. BURKE's motion was taken and lost; ayes 9, noes 41.
>
> MR. LIVERMORE moved to alter the clause, so as to secure to the criminal the right of being tried in the State where the offence was committed.
>
> MR. STONE observed that full provision was made on the subject in the subsequent clause.
>
> On the question, MR. LIVERMORE's motion was adopted.
>
> MR. BURKE said he was not so much discouraged by the fate of his former motions, but that he would venture upon another. He therefore proposed to add to the clause, "that no criminal prosecution should be had by way of information."
>
> MR. HATLEY only requested the gentleman to look to the clause, and he would see the impropriety of inserting it in this place.
>
> A desultory conversation arose, respecting the foregoing motion, and after some time.
>
> MR. BURKE withdrew it for the present.
>
> The committee then rose and reported progress, after which the House adjourned.

Id.

[62] Clinton, *supra* note 20, at 735.

[63] Westen, *supra* note 5, at 97.

[64] Clinton, *supra* note 20, at 735–36; Westen, *supra* note 5, at 97.

[65] Westen, *supra* note 5, at 97.

Compulsory Process Clause as part of the Sixth Amendment without modifying Madison's language.[66]

Given the rivalries and power struggle among the states, the fact that Madison alone could draft the guarantees contained in the Compulsory Process Clause, and have them adopted without objection or modification, is a substantial feat.[67] Madison achieved this success because the language was understood to address the critical concerns of each individual state:[68] the right to call for evidence,[69] the right to compel witnesses,[70] and the right to parity with the government.[71]

C. Compulsory Process—Post-Constitutional Development

The treason trial of Aaron Burr[72] provided an early opportunity to address the meaning and significance of the Compulsory Process Clause. Presiding as circuit judge in what some call "the greatest criminal trial in American history,"[73] Chief Justice John Marshall issued a comprehensive review of the Compulsory Process Clause.[74] Marshall was a Virginia lawyer during the Constitutional Convention.[75] He was also a member of the Virginia Convention that ratified the Constitution and proposed an amendment to provide the accused "the right to call for evidence in his favor."[76] Marshall was on the front lines in the battle to ensure the

---

[66] *Id*. at 98; Clinton, *supra* note 20, at 734–37.
[67] Clinton, *supra* note 20, at 736.
[68] *Id*. at 738; Hoeffel, *supra* note 6, at 1286.
[69] Hoeffel, *supra* note 6, at 1286.
[70] *Id.*
[71] *Id.*
[72] Aaron Burr was elected and served as vice president under Thomas Jefferson from 1800–1804. *See Aaron Burr—Biography*, BIOGRAPHY, http://www.biography.com/people/aaron-burr-9232241 (last visited Sept. 3, 2013). Aaron Burr was prosecuted for treason in 1807, stemming from an alleged plot between him and General James Wilkinson, Commander-in-Chief of the U.S. Army. Burr's alleged desire was to split off the western part of the United States, including the Louisiana Territory, by attacking Texas with Wilkinson's Army. When the plan appeared futile, Wilkinson informed President Jefferson of the conspiracy. Burr was eventually captured and returned to Virginia to face trial for treason and was eventually acquitted. *See The Burr Conspiracy*, PBS, http://www.pbs.org/wgbh/amex/duel/sfeature/burrconspiracy.html (last visited Sept. 3, 2013).
[73] Westen, *supra* note 5, at 101 n.128.
[74] *Id.* at 101.
[75] *Id.* at 102.
[76] *Id.*

Constitution provided the accused compulsory process for his witnesses. Chief Justice Marshall's opinion regarding the significance and power of the Compulsory Process Clause represents a rare look into the framers' intent in adopting this protection and thus should be given "special weight in construing" its meaning.[77]

Burr, on trial for treason, sought to subpoena President Thomas Jefferson to present evidence that "may be material in his defense."[78] Jefferson objected on the following grounds: the accused could not invoke the protections of the Compulsory Process Clause against the President of the United States; the Compulsory Process Clause applied only to the production of witnesses and not evidence; Burr did not make an adequate showing of how he intended to use the evidence; and the motion was premature because Burr had yet to be indicted.[79]

Chief Justice Marshall, at his own peril, decided these issues in favor of the accused, Burr, and against Jefferson.[80] Marshall construed the protections of the Compulsory Process Clause in broad terms, rejecting the literal distinction between the accused's right of process for witnesses rather than evidence[81] and held there existed "no exception whatsoever" to its protections.[82] Marshall declared that the constitutional right of the accused to obtain subpoenas vests before and after indictment[83] because the rights contained within the Compulsory Process Clause work to provide the accused a meaningful opportunity to present a defense.[84] Marshall warned that the rights contained within the Compulsory Process Clause "must be deemed sacred by courts" and they "should be so construed as to be something more than a dead letter."[85] Marshall's warning seems to have fallen on deaf ears because the Compulsory Process Clause was addressed by the Supreme Court on only five occasions between Chief Justice Marshall's opinion in the 1807 Burr trial

---

[77] *Id*. at n.129 (citing Adamson v. California, 332 U.S. 46, 64 (1947) for the proposition that "the opinion of judges in the founding era is entitled to special weight in construing the Constitution").
[78] Westen, *supra* note 5, at 103.
[79] *Id*.
[80] *Id.* at 102.
[81] *Id.* at 104.
[82] *Id.* at 105.
[83] *Id.* at 104.
[84] *Id.* at 105.
[85] *Id.* at 102.

and 1967.[86] These five occasions resulted in the Court addressing this provision two times in dictum and three times in declining to interpret it.[87]

Much of the Court's focus during the nineteenth and twentieth century in the area of criminal law was on implementing rules of evidence and criminal procedure, many of which resulted in the exclusion of evidence central to the accused's defense.[88] This expansion of rules was likely not foreseen by the framers. When the states adopted the Sixth Amendment, no complicated code of evidence and criminal procedure existed as they do today.[89] Until the late 1960s, many courts and accused seemed content to address these constitutional encroachments under the more vague fundamental fairness protections of the Fifth Amendment's Due Process Clause.[90]

1. Waking a Sleeping Giant—Washington v. Texas

The Supreme Court breathed new life into the Compulsory Process Clause with its sweeping review and broad interpretation in *Washington v. Texas*.[91] While Chief Justice Marshall concluded in the *Burr* trial that the Compulsory Process Clause's protections vested pre-trial, the Supreme Court's interpretation in *Washington* makes clear that the protections ensure not just the production of the accused's witnesses, but

---

[86] *Id.* at 108. *See* Pate v. Robinson, 383 U.S. 375, 378 n.1 (1966); Blackmer v. United States, 284 U.S. 421, 442 (1932); United States v. Van Duzee, 140 U.S. 169, 173 (1891) (dictum); *Ex parte* Harding, 120 U.S. 782 (1887); United States v. Reid, 53 U.S. 361, 363–65 (1851) (dictum); Rose v. United States, 245 U.S. 467 (1918) (overruled by Washington v. Texas, 388 U.S. 14, 21–22 (1967)).
[87] Westen, *supra* note 5, at 108.
[88] Clinton, *supra* note 20, at 739.
[89] Hoeffel, *supra* note 6, at 1288.
[90] Westen, *supra* note 5, at 108–09.
[91] *Washington*, 388 U.S. at 19.

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.

Id. See also Westen, *supra* note 5, at 112.

that they will be heard as well.[92] The Court's interpretation reflects the overall purpose of the Compulsory Process Clause: promoting fairness to the accused throughout the adversarial process.[93]

Washington presented the Court in 1967 with the opportunity to address the conflict between the ever expanding arena of evidentiary and criminal procedure rules with the constitutional protections of the Compulsory Process Clause.[94] Washington was convicted of murdering his ex-girlfriend's boyfriend and was sentenced to fifty years in prison.[95] He was prohibited at trial from presenting testimony that would have, at a minimum, lessened his culpability.[96] Washington's accomplice would have testified that he, and not Washington, had shot the victim.[97] Additionally, the accomplice would have testified that, at the last minute, Washington attempted to prevent him from firing the weapon.[98] Texas law, however, prevented individuals charged or convicted as co-participants in the same crime from testifying for one another.[99]

At the same time, Texas law did not prohibit co-participants from testifying for the state.[100] The Court noted the government's interest in preventing unreliable evidence from tainting the jury, but it directed that this rule could not be rationally defended in this manner because the co-participant would have an even greater motive to lie when testifying for the state.[101] The Supreme Court reversed Washington's conviction and held that an accused's rights under the Compulsory Process Clause are violated when an evidentiary rule is arbitrary.[102] The Court further directed that a rule is arbitrary when its application is too drastic under the circumstances[103] and objected to the over-broad nature of the evidentiary rule.[104] The Court paid close attention to the lack of parity in the Texas law and inferred that evidentiary rules must apply evenly

---

[92] Westen, *supra* note 5, at 111.
[93] Hoeffel, *supra* note 6, at 1289.
[94] *Washington*, 388 U.S. at 15.
[95] *Id.*
[96] *Id*. at 15–16.
[97] *Id*. at 16.
[98] *Id.*
[99] *Id.*
[100] *Id.* at 16–17.
[101] *Id.* at 22.
[102] *Id*. at 23. *See also* Hoeffel, *supra* note 6, at 1291–92; Westen, *supra* note 5, at 115.
[103] Westen, *supra* note 5, at 115 n.200.
[104] *Washington*, 388 U.S. at 22 (discussing Rosen v. United States, 245 U.S. 467). *See also Hoeffel*, *supra* note 6, at 1292.

between the prosecution and defense in order to survive a constitutional challenge.[105]

2. Arming the Giant

Although only a handful of cases since *Washington* have addressed this friction between the Compulsory Process Clause and evidentiary/procedural rules, courts have further refined the limits which these rules can impose on fundamental constitutional rights, such as an accused's right to compulsory process. The Supreme Court in *Chambers v. Mississippi*[106] was faced with state evidentiary rules which worked to deprive the accused of a fair trial.[107] Chambers was charged and convicted of murdering a police officer who was executing a warrant for the arrest of a local youth.[108] Before the police officer died, he fired his weapon into an alley hitting Chambers.[109] Although one of the officers on the scene testified that he witnessed Chambers shoot the officer,[110] the evidence also pointed to another suspect, McDonald.[111] McDonald, after transporting Chambers to the hospital, confided to three friends on separate occasions that he had shot the officer.[112] McDonald subsequently signed a written confession to the murder, which he later recanted.[113]

At trial, Chambers was not allowed to flesh out this exculpatory evidence. The trial court ordered the testimony of McDonald's friends inadmissible as hearsay.[114] Chambers was forced to call McDonald as a witness because the state failed to do so.[115] The court rejected Chambers's request to treat McDonald as an adverse witness to discredit the repudiation because of the state's party witness or voucher rule.[116] This voucher rule prohibited a party from impeaching his own witness.[117]

---

[105] Martin A. Hewett, *A More Reliable Right to Present a Defense: The Compulsory Process Clause After Crawford v. Washington*, 96 GEO. L.J. 273, 285 (2007).
[106] Chambers v. Mississippi, 410 U.S. 284 (1973).
[107] *Id.* at 302.
[108] *Id.* at 285.
[109] *Id.* at 286.
[110] *Id.*
[111] *Id.* at 287.
[112] *Id.* at 292–93.
[113] *Id.* at 287–88.
[114] *Id.* at 292–93.
[115] *Id.* at 291.
[116] *Id.* at 294.
[117] *Id.* at 295.

The Court looked at the historical justification for implementing a voucher rule, but declared that whatever purpose it may have served in the past no longer exists.[118] This, coupled with the application of the state's hearsay rule, violated Chambers's right to a fair trial.[119]

Although *Chambers* was decided on due process grounds and not compulsory process, the Court declared that "few rights are more fundamental than that of an accused to present witnesses in his own defense."[120] The Court recognized that fundamental constitutional rights are not absolute and "may bow to accommodate other legitimate interests in the criminal trial process."[121] However, the Court warned that the denial or restriction of such a right "calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined."[122]

In *United States v. Valenzuela-Bernal*,[123] the Supreme Court further refined the limitations of compulsory process by directing that more than a "mere absence of testimony is necessary to establish a violation" of the Compulsory Process Clause.[124] The accused must show that the testimony would have been "material and favorable to the defense."[125] The federal policy in question directed that illegal aliens be deported as soon as possible, at or near the border.[126] The defense claimed that this violated the accused's constitutional rights to compulsory and due process because two potential defense witnesses were deported under this policy before the defense had an opportunity to interview them.[127]

Recognizing that the Executive Branch has a responsibility to fully execute immigration policy adopted by Congress,[128] the Court declared that this "prompt deportation" policy was justified and did not violate

---

[118] *Id.* at 296.
[119] *Id.* at 302–03.
[120] *Id.* at 302.
[121] *Id.* at 295.
[122] *Id*. (quoting Berger v. California, 393 U.S. 314, 315 (1969)).
[123] United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).
[124] *Id.* at 867.
[125] *Id*. It is important to note that the Court relies on Rule 17(b) of the Federal Rules of Criminal Procedure (FRCP), which requires the defense to provide an *ex parte* application to the court establishing the necessity of the witness.
[126] *Id*. at 864.
[127] *Id.* at 861.
[128] *Id.* at 872.

Valenzuela-Bernal's due process or compulsory process rights.[129] The Court fully examined the governmental interests furthered by the policy and weighed them against the necessity of the denied testimony.[130] The Court recognized that this policy served several legitimate purposes.[131] First, a prompt deportation policy "constitutes the *most effective* method for curbing the enormous flow of illegal aliens across our southern border."[132] Second, overcrowding conditions at federal detention facilities in the Southern District of California required the government to secure many detainees in other federal or state prisons.[133] Third, the "detention of alien eyewitnesses imposes *substantial* financial and physical burdens upon the Government, not to mention the human cost to potential witnesses who are incarcerated though charged with no crime."[134] Justice O'Conner, in her concurrence, stated this interest another way: "because most of the detained aliens are never called to testify, we should be careful not to permit either needless human suffering or *excessive* burdens on the Federal Government."[135]

The Court, after detailing these significant governmental interests, noted that the accused failed to show how the testimony of these two witnesses would be material.[136] It recognized that the deportation encumbered the accused's ability to interview these witnesses, but noted that Valenzuela-Bernal should have some idea as to their testimony since he "was present throughout the commission of this crime."[137] Additionally, the Court noted that the accused was only charged with transporting the third illegal alien who remained "fully available" for questioning.[138]

---

[129] *Id.* at 872–73.
[130] *Id.* at 864–67.
[131] *Id.* at 864–65.
[132] *Id.* at 864 (emphasis added).
[133] *Id.* at 865.
[134] *Id.*
[135] *Id.* at 877 (emphasis added).
[136] *Id.* at 867–74.
[137] *Id.* at 871.
[138] *Id.*

In *Rock v. Arkansas*,[139] the Supreme Court was faced with another evidentiary rule that, as in *Washington*[140]and *Chambers*,[141] prohibited the *per se* admission of certain testimony.

Vickie Rock was charged and convicted of killing her husband.[142] The couple had been engaged in an ongoing dispute involving whether to move from their apartment to a trailer outside of town.[143] That night, a fight broke out when her husband refused to let her eat, or leave the home.[144] Police arrived to find the husband shot in the chest and Rock pleading for them to save his life.[145] Rock told the police that she had tried to leave, but her husband grabbed her by the throat and began choking her and threw her against the wall.[146] After they struggled, Rock grabbed a gun and told him to leave her alone.[147] He hit her again and the gun went off.[148] One of the officers testified that Rock told him it was an accident.[149]

Rock's memory was rather vague regarding the exact details of the shooting. Thus, Rock's attorney arranged for her to be hypnotized to refresh her memory.[150] She was hypnotized twice by a licensed neuropsychologist with hypnosis training.[151] After these sessions, Rock was able to recall additional details of the shooting, which were corroborated by independent evidence.[152] However, the trial judge precluded Rock from testifying as to the portions of her memory that had been hypnotically refreshed.[153] The Arkansas Supreme Court upheld the conviction by declaring that "the dangers of admitting this kind of testimony outweigh whatever probative value it may have."[154] The Supreme Court reversed, holding that the *per se* exclusion of this type of

---

[139] Rock v. Arkansas, 483 U.S. 44 (1987).
[140] Washington v. Texas, 388 U.S. 14 (1967).
[141] Chambers v. Mississippi, 410 U.S. 284 (1973).
[142] *Rock*, 483 U.S. at 45, 48.
[143] *Id*. at 45.
[144] *Id.*
[145] *Id*. at 45–46.
[146] *Id.* at 46.
[147] *Id. See also id*. at 46 n.1.
[148] *Id*. at n.1.
[149] *Id.*
[150] *Id.* at 46.
[151] *Id.*
[152] *Id.* at 47.
[153] *Id.*
[154] *Id.* at 48.

testimony violated Rock's constitutional right to compulsory and due process.[155]

The Supreme Court struck down Arkansas's *per se* prohibition of hypnosis refreshed testimony in *Rock* because the rule was arbitrary and disproportionate to the purposes it was designed to serve.[156] The rule in *Rock* was intended to bar the admission of unreliable evidence at trial.[157] Although this is a legitimate government interest, the means in which it was affected was disproportionate to its purpose. The Court noted that other less restrictive means can be employed to serve this purpose.[158] Safeguards can be put in place to reduce the risk of unreliable evidence reaching the fact finder.[159] Additionally, the Court instructed that "traditional means of assessing accuracy of testimony," such as verifying through corroborating evidence and attacking through cross-examination, are always available.[160]

The Court recognized that the right to compulsory process is not unfettered. It may be forced to bend to other legitimate interests in the criminal justice system.[161] However, the Court further defined the line to which these rules cannot cross. The Court put further meat on the bones of *Washington's* arbitrary rule standard by mandating that the interests served by a rule must be closely examined to determine whether it justifies the limitation of compulsory process.[162] The Court declared that when a rule "conflicts with the right to present witnesses, the rule may 'not be applied mechanistically to defeat the ends of justice,' but *must* meet the fundamental standards of due process."[163] Additionally, the Court mandated that restrictions that encroach upon an accused's right of compulsory process cannot "be arbitrary or disproportionate to the purposes they are designed to serve."[164] Thus, the government must

---

[155] *Id*. at 62.
[156] *Id*. at 61.
[157] *Id.*
[158] *Id.* at 60–61.
[159] The safeguards included: requiring hypnosis be performed only by specially trained individuals who are independent of the litigation to ensure established protocols are followed; recording of all interview sessions before, during, and after the hypnosis to determine if suggestive or leading questions were asked; and educating the fact finder on hypnosis through expert testimony and instructions to reduce confusion. *Id.*
[160] *Id*. at 61.
[161] *Id.* at 55 (citing *Chambers*, 410 U.S. at 302).
[162] *Id.* at 56.
[163] *Id.* at 55 (quoting *Chambers*, 410 U.S. at 302).
[164] *Id.* at 55–56.

evaluate the application of rules that encroach upon compulsory process to ensure its interests justify the restriction.[165]

III. Compulsory Process Today

A. Compulsory Process in the Federal Courts

This line of Supreme Court decisions, from *Burr* to *Rock*, as well as the framers' intent in adopting the Compulsory Process Clause, illustrates that the adversarial system only works when there is a fundamental balance between the prosecutor and the accused. The federal district courts recognized this issue decades ago and amended its rules to comply with this principle and allay public criticism in the fairness of the criminal justice system.

The Federal Rules of Criminal Procedure (FRCP) provide measures that ensure the accused's rights under the Compulsory Process Clause[166] are protected in federal court.[167] The subpoena power of the federal government extends to the accused in all cases in federal district court. Rule 17 of the FRCP directs that the clerk of court must provide the accused subpoenas for the witnesses he wishes to compel to testify.[168] When the accused lacks the financial resources to pay for witness fees,

---

[165] *Id.* at 56.
[166] U.S. CONST. amend VI.
[167] FED. R. CRIM. P. 17, provides:

> (a) CONTENT. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.
>
> (b) DEFENDANT UNABLE TO PAY. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

Id.
[168] *Id*. at 17(a).

the government must fund the witnesses in the same manner in which it funds prosecution witnesses, so long as the defense shows the necessity for the witness.[169] The witness must appear at trial after being served the subpoena or face potential criminal sanctions.[170]

At first glance, this rule may appear similar to the requirements of RCM 703. In fact, FRCP 17 was nearly identical, in application, to RCM 703 until FRCP 17 was amended in 1966.[171] Prior to the 1966 amendment, FRCP 17 required the accused to establish the necessity of the witness to the prosecutor before the witnesses would be funded by the government.[172] This policy of requiring the accused to justify his witnesses to the prosecution was the subject of much criticism.[173]

---

[169] *Id*. at 17(b).
[170] *Id*. at 17(g).
[171] *Id.* at 17 (Notes of Advisory Committee on Rules—1966 Amendment) detailing the changes to the language of subsection (b):

> The amendment makes several changes to the 1945 version. The references to a judge are deleted since applications must be made to the court and an ex parte application, followed by a satisfactory showing, is substituted for the requirement of a request or motion supported by affidavit. The court is required to order the issuance of a subpoena upon finding that the defendant is unable to pay the witness fees and that the presence of the witness is necessary to an adequate defense.

Id.
[172] *Id.* at 17(b) (1945) (amended 1966) provided,

> (b) Indigent Defendants. The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of the witness subpoenaed in behalf of the government.

Id. *See also* Westen, *supra* note 5, at 270.
[173] FED. R. CRIM. P. 17 (Notes of Advisory Committee on Rules—1966 Amendment).

Attorney General Robert F. Kennedy led the fight to level the litigation playing field in this arena.[174] In 1966, FRCP 17 was modified to ameliorate the constitutional and public policy concerns of requiring the accused to provide the prosecutor a preview of the defense's case when the government did not have to reciprocate.[175]

The 1966 amendment to subsection (b) of FRCP 17, which remains in effect today, removes compulsory process from the adversarial process by directing that the accused's application for government-funded witnesses be made *ex parte* to the court.[176] The determination of necessity now falls to an independent arbiter—the clerk of court.[177] "The manifest purpose of requiring that the inquiry be *ex parte* is to insure that the defendant will not have to make a premature disclosure of his case."[178]

> Subdivision (b).—Criticism has been directed at the requirement that an indigent defendant disclose in advance the theory of his defense in order to obtain the issuance of a subpoena at government expense while the government and defendants able to pay may have subpoenas issued in blank without any disclosure. See Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice (1963) p. 27. The Attorney General's Committee also urged that the standard of financial inability to pay be substituted for that of indigency. Id. at 40–41. In one case it was held that the affidavit filed by an indigent defendant under this subdivision could be used by the government at his trial for purposes of impeachment. *Smith v. United States*, 312 F.2d 867 (D.C.Cir. 1962). There has also been doubt as to whether the defendant need make a showing beyond the face of his affidavit in order to secure issuance of a subpoena. *Greenwell v. United States*, 317 F.2d 108 (D.C.Cir. 1963).

Id.

[174] *See* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE (1963).

[175] FED. R. CRIM. P. 17 (Notes of Advisory Committee on Rules—1966 Amendment).

[176] *Id.* at 17.

[177] *Id*.

[178] Marshall v. United States, 423 F.2d 1315, 1318 (1970).

This procedure represents a sound and constitutional solution to the clash between the accused's rights guaranteed by the Compulsory Process Clause and the government's "legitimate interest in preserving public funds from frivolous requests for immaterial witnesses."[179] It provides the accused a means to secure the presence of witnesses at trial without infringing on the ability to prepare and present a defense. If the court determines the accused's assertions are not credible, it can deny the request, or if the court finds the defense counsel is playing fast and loose with the truth, it can sanction the attorney.[180]

B. Compulsory Process for the Military Accused

While FRCP 17 requires the defendant to establish the necessity of his witness to the court *ex parte* before the government will fund the production costs, as discussed below, RCM 703 stands in stark contrast by requiring the accused to reveal trial strategy to the trial counsel to justify the need for a particular witness. Although not all constitutional rights are fully available to service members, the right to compulsory process under the Sixth Amendment flows fully to the military accused at courts-martial.[181] Not only does the Compulsory Process Clause guarantee the military accused compulsory process for witnesses in the merits portion of a court-martial, but in presentencing as well.[182] Additionally, military case law is clear that "who these witnesses shall be is a matter for the accused and his counsel."[183]

The military rule implementing compulsory process, RCM 703, violates not only the Compulsory and Due Process Clauses of the U.S. Constitution, but also federal statutory provisions of the UCMJ. Also, RCM 703 unlawfully encroaches upon the sacred legal principles of attorney-client and attorney work-product privileges. Further, the application of RCM 703 undermines the public confidence in the military judicial system.

---

[179] Westen, *supra* note 5, at 270.
[180] *See* MODEL RULES OF PROF'L CONDUCT R.8.4. *See also* Westen, *supra* note 5, at 271.
[181] United States v. Sweeney, 34 C.M.R. 379, 382 (C.M.A. 1964).
[182] United States v. Manos, 37 C.M.R. 274, 278 (C.M.A. 1967).
[183] *Sweeney*, 34 C.M.R. at 382.

1. RCM 703 Violates the Compulsory Process Clause[184]

a. Subpoena Power

The Compulsory Process Clause stands for nothing less than the accused's right to require the government to use its substantial power to compel witnesses to appear and testify for the accused.[185] The subpoena power in the military rests solely with the government.[186] The accused is forced to request the government's assistance to obtain witnesses in his favor. The accused does so only by waiving certain privileges and providing the prosecution a preview of its case.

Some may argue that the restrictions of RCM 703 merely limit the production of defense witnesses where the defense requests funding from the government. Their solution, when the defense does not wish to be burdened by the synopsis requirement, is for the defense to simply foot the bill to produce the witness.[187] This position misses two important points. First, unlike the federal rules, the military rules do not provide

---

[184] Although no court has specifically ruled on the constitutionality of Rule for Courts-Martial (RCM) 703, its implications have been recognized for some time. *See* U.S. DEP'T OF ARMY, PAM. 27-22, MILITARY CRIMINAL LAW—EVIDENCE para. 33-5 (15 July 1987) [hereinafter DA PAM 27-22] (recognizing that RCM 703's requirement for the accused to provide adequate justification for his witnesses to the trial counsel presents a "potential compulsory process problem."). *See also* United States v. Carpenter, 1 M.J. 384, 386 n.8 (1976) (declaring that the process of requiring the accused to submit its request to a "partisan advocate" appears to be inconsistent with Article 46, UCMJ); United States v. Arias, 3 M.J. 436, 438 (1977) (holding that the military rule implementing compulsory process will be *applied* "in ways that leave *no* doubt that an accused's right to secure the attendance of a material witness is free from substantive control by trial counsel") and Captain Richard H. Gasperini, *Witness Production and the Right to Compulsory Process*, ARMY LAW., Sept. 1980, at 22. *But see* United States v. Breeding, 44 M.J. 345, 354–55 (1996) (Judge Sullivan, in his concurring opinion, sought to declare that RCM 703 does not violate compulsory or due process, nor that it violated Article 46, UCMJ. In reaching this conclusion, Judge Sullivan completely ignored the disparity of the rule and declared that the rule "simply allows for judicial review of denial of subpoenas on relevance and materiality grounds before they are enforced by court order." He referred to the synopsis requirement as "judicial review." Likewise, he did not address the arbitrariness or disproportionality of the rule, nor did he discuss the implications RCM 703 has on attorney work-product. However, the CAAF majority did not join in Judge Sullivan's opinion and refused to rule on the constitutionality of RCM 703.).

[185] Westen, *supra* note 5, at 265–66. *See also* Colonel Francis A. Gilligan & Major Fredric I. Lederer, *The Procurement and Presentation of Evidence in Courts-Martial: Compulsory Process and Confrontation*, 101 MIL. L. REV. 1, 62 (1983).

[186] MCM, *supra* note 3, R.C.M. 703(e)(2)(C).

[187] Applying compulsory process in this manner amounts to the exact practice of FRCP 17 prior to the 1966 amendment that received such resounding criticism.

two separate standards for issuing subpoenas based on who is footing the bill.[188] Thus, the accused is specifically precluded by the rules from even entertaining this notion. Second, many defense witnesses require no funding for production, but simply the power of the government to ensure their attendance. Local witnesses, servicemembers, and government civilian employees serve under the local military command. Often witnesses are servicemembers in the same command as the accused. Even where the witness wishes to appear on behalf of the accused, the witness must obtain permission from the command to be absent from duty.[189] The accused lacks the authority to direct a service member to appear as a witness at his court-martial. It is often even difficult for the defense to arrange, with the accused's command, a few hours to interview members within the command. The defense is at the mercy of the very command who has decided to prosecute the accused.

If the accused had independent subpoena power, he would still often lack the financial resources to ensure the witness' attendance at trial, be they expert or lay witnesses. Even when the expenses involve only travel and per diem, as with lay witnesses, these expenses are often prohibitively high. Recall PVT Smith who was stationed overseas. One of the critical defense witnesses resided in the United States and was needed to attack the credibility of the alleged victim's account of the alleged crime. The cost of the airline ticket alone would require PVT Smith to receive assistance from the government in presenting this vital testimony. Thus, PVT Smith's defense would be faced with the dilemma of handing over work-product to the trial counsel in the hope his compulsory process rights will be honored, or risk trial without the testimony of this crucial witness.

b. A Process of Parity

Although the Compulsory Process Clause contains within its protections the accused's right to have witnesses subpoenaed on his behalf, it goes well beyond that. If the framers simply wanted an accused to have subpoena power, they would have so directed. However, in drafting the language of the Compulsory Process Clause, Madison used

---

[188] MCM, *supra* note 3, R.C.M. 703(e)(2)(C). *See also* Major Arnold I. Melnick, *The Defendant's Right to Obtain Evidence: An Examination of the Military Viewpoint*, 29 MIL. L. REV. 1, 3 (1965).
[189] United States v. Sweeney, 34 C.M.R. 379, 386 (C.M.A. 1964).

language which encompasses the protections provided by each of the ratifying state's Declaration of Rights.[190] This includes the notion "that all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to."[191] At its core, the Compulsory Process Clause stands for the proposition that the accused be entitled to the same ability to compel witnesses as the prosecutor. This parity guarantee has been stripped from the military accused by the provisions of RCM 703.

The language of RCM 703 begins by directing that the accused be placed on equal footing with the prosecution regarding witness production.[192] However, it then proceeds to effectively write out the equality of the rule.[193] While RCM 703 mandates equal footing and compulsory process regarding witness production, it establishes two vastly different rules for determining which witnesses will actually be produced for trial. When the government desires to produce a witness against the accused, such consideration is left to the sole discretion of the trial counsel.[194] There is no requirement for the trial counsel to obtain permission from defense counsel, nor does the trial counsel have to provide the accused with a synopsis of the witness's expected testimony. Rather, the trial counsel must simply provide the defense the names and contact information of those witnesses the government intends to present at trial.[195]

The analysis section to RCM 703 is devoid of any substantive discussion because the procedure makes perfect sense.[196] The trial counsel is in the best position to determine which prosecution witnesses are relevant and necessary to the prosecution. This logic, however, does not flow in similar fashion to the defense.[197] While RCM 703 emboldens

---

[190] *See supra* Part II.C.
[191] Clinton, *supra* note 20, at 730.
[192] MCM, *supra* note 3, R.C.M. 703(a) (providing that "[t]he prosecution and defense and the court-martial *shall* have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process") (emphasis added).
[193] *Id*. R.C.M. 703(c) (establishing two separate standards for witness production depending on whether the witness is testifying for the government or the accused, with the more onerous standard placed on the accused).
[194] *Id*. R.C.M. 703(c)(1) (directing that "[t]he trial counsel shall obtain the presence of witnesses whose testimony the trial counsel considers relevant and necessary for the prosecution").
[195] *Id*. R.C.M. 701(a)(3).
[196] *Id*. R.C.M. 703(c)(1) analysis, at A-21.
[197] *Id*. R.C.M. 703(c)(2) analysis, at A-21.

trial counsel to determine the relevance of his own witnesses, the same discretion is not entrusted to the defense. To the contrary, the relevance of the defense's witnesses is determined by the very person endeavoring to take the accused's liberty, property, and life in a capital case.[198] This practice runs counter to the very spirit and letter of the Compulsory Process Clause. The Court of Military Appeals, now the Court of Appeals for the Armed Forces (CAAF), in *Manos*, citing the Supreme Court in an analogous case, directed that although the right to compulsory process is not absolute, the system must "assure to the *greatest* degree possible . . . *equal* treatment for every litigant before the bar."[199] The rationale for the disparate treatment of witness production imposed by RCM 703, and its departure from the Federal Rules of Criminal Procedure, hinges on granting greater weight to the needs of the government to conserve fiscal resources than the accused's constitutional rights to present an adequate defense. This overly onerous restriction is unconstitutional: it is an arbitrary standard which violates the mandate set forth in *Washington* and its progeny.

c. Synopsis Requirement—An Arbitrary Standard

As evidentiary and procedural rules have proliferated since the passing of the Bill of Rights, these rules have necessarily encroached on constitutional rights. The Supreme Court has routinely declared that these rights are not absolute and can be restricted.[200] In fact, the Court has declared that "rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials."[201] To pass constitutional scrutiny, however, these rules "may not be arbitrary or

---

[198] *Id*. R.C.M. 703(c)(2)(D).

> The trial counsel shall arrange for the presence of any witness listed by the defense unless the trial counsel contends that the witness' production is not required under this rule. If the trial counsel contends that the witness' production is not required by this rule, the matter may be submitted to the military judge. If the military judge grants a motion for a witness, the trial counsel shall produce the witness or the proceedings shall be abated.

Id.

[199] United States v. Manos, 37 C.M.R. 274, 279 (1967) (citing Coppedge v. United States, 369 U.S. 438, 446 (1962)).

[200] *See supra* Part II.D.2.

[201] United States v. Scheffer, 523 U.S. 303, 308 (1998).

disproportionate to the purposes they are designed to serve."[202] The Supreme Court has established a three-part test for determining whether an evidentiary or criminal procedure rule passes this scrutiny. First, the rule in question must be analyzed to determine if it implicates a constitutional right.[203] Second, knowing that constitutional rights are not absolute and can be forced to "bow to accommodate" legitimate government interests, the rule must be analyzed to determine if it serves a legitimate governmental interest.[204] Third, the rule must then be closely examined to determine if the interests served by the rule justifies the constitutional limitation.[205] When approaching a rule that implicates compulsory process, CAAF has instructed that "it is important that all concerned be impressed with the undoubted right of the accused to secure the attendance of witnesses in his behalf," and this right must be scrupulously honored "if such can be done without *manifest* injury to the service."[206]

The Supreme Court, in *Rock*, applied this three-part test to a rule which imposed a *per se* ban on admission of testimony refreshed by hypnosis.[207] The Court noted that the Arkansas rule restricted the right of the accused to compulsory process.[208] *Rock* recognized that a state has a "legitimate interest in barring unreliable evidence."[209] However, the rule was declared unconstitutional as an arbitrary rule because this legitimate interest could be served without imposing such a strict rule.[210] Thus, even when a rule furthers a legitimate governmental interest, it will be deemed arbitrary when a lesser restrictive rule can protect the same interest. As in *Rock*, RCM 703 is overbroad in its application and violates the accused's protections guaranteed by the Compulsory Process Clause because the legitimate governmental interests furthered by RCM 703 can be accomplished to the same degree without requiring the accused to reveal trial strategy to the prosecutor prior to trial.

---

[202] *Id. See also* Rock v. Arkansas, 483 U.S. 44, 56 (1987); Washington v. Texas, 388 U.S. 14, 22–23 (1967).
[203] Chambers v. Mississippi, 410 U.S. 284, 294 (1973).
[204] *Id.* at 295.
[205] *Rock*, 483 U.S. at 56; *Chambers*, 410 U.S. at 295.
[206] United States v. Manos, 37 C.M.R. 274, 279 (1967).
[207] *Rock*, 483 U.S. at 55–62.
[208] *Id.* at 52.
[209] *Id.* at 61.
[210] *Id.* at 60–61.

The plain reading of RCM 703 implicates the accused's constitutional right to compulsory process because it imposes hurdles that the accused must clear before his witnesses will be produced.[211] The Executive Branch has a legitimate governmental interest to conserve its fiscal resources. Likewise, it has a "responsibility to prevent an abuse of the right of process."[212] However, the restrictions found in RCM 703 regarding the accused's compulsory process rights are overly broad, as lesser restrictive means, discussed below, are available to ensure the government's interest in preserving its resources.

2. RCM 703 Violates the Fifth Amendment's Due Process Clause

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.[213]

The Fifth Amendment's Due Process Clause mandates that no person will be "deprived of life, liberty, or property without due process of law."[214] The Supreme Court has held that the Due Process Clause provides individuals *equal* protection guarantees.[215] This protection works to ensure the accused receives a fair trial and provides him "a fair opportunity to defend against" the charges.[216] A fair trial cannot exist when the procedures in place establish a framework of unfairness.

---

[211] Before an accused is afforded his right of compulsory process, he *must* provide a justification for each witness to the trial counsel so that the trial counsel can determine whether the accused really needs the witness. MCM, *supra* note 3, R.C.M. 703(c).
[212] United States v. Sweeney, 34 C.M.R. 379, 386 (C.M.A. 1964).
[213] Washington v. Texas, 388 U.S. 14, 19 (1967).
[214] U.S. CONST. amend. V.
[215] Bolling v. Sharpe, 347 U.S. 497 (1954).
[216] Chambers v. Mississippi, 410 U.S. 284, 294 (1973); *Washington*, 388 U.S. at 19.

Rather, the process in which the government exercises its power to prosecute the accused must be fair and the rules cannot be arbitrary.[217]

The provisions of RCM 703 tip the scales greatly in favor of the prosecution. The synopsis requirement of RCM 703 is a glaring example of unfairness. While the accused must reveal his trial strategy to the prosecutor in order to be afforded his right of compulsory process, the government need not reciprocate. Justice Harlan, in his concurrence in *Washington*, posed that the Due Process Clause is "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[218] Justice Harlan went on to declare that a rule violates due process when it discriminates between the prosecution and the defense "in the ability to call the same person as a witness."[219]

The provisions of RCM 703 do just that. Recall again PVT Smith. The witnesses that the prosecution denied were only produced because the trial judge was satisfied by the defense's motion to compel. Had PVT Smith not provided, in open court, a justification for each witness, the judge would have denied the request and PVT Smith would have been denied the witnesses in support of his defense. However, nothing prevented the prosecutor from calling one of these denied witnesses to testify for the government.

3. RCM 703 Violates Articles 36 and 46 of the UCMJ

Beyond the constitutional violations, RCM 703 violates federal statute. Congress, through its power to raise and support armies under the United States Constitution,[220] has enacted the Uniform Code of Military Justice (UCMJ), which provides the code of military criminal laws applicable to all U.S. servicemembers.[221] Congress has further authorized

---

[217] *Washington*, 388 U.S. at 22. *See also* Rock v. Arkansas, 483 U.S. 44, 55–56 (1987); United States v. Scheffer, 523 U.S. 303, 308 (1998).
[218] *Washington*, 388 U.S. at 24.
[219] *Id.* The Court agreed with Justice Harlan, but chose to rest its holding on the more specific Compulsory Process Clause. *See* Westen, *supra* note 5, at 116.
[220] U.S. CONST. art. I, sec 8. "The Congress shall have power . . . to raise and support armies" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States, or in any Department or Officer thereof." *Id.*
[221] R. CHUCK MASON, CONG. RESEARCH SERV., R 41739, MILITARY JUSTICE: COURTS-MARTIAL, AN OVERVIEW (2011).

the President, under Article 36, UCMJ, to prescribe rules in order to implement the UCMJ.[222] In doing so, Congress has specifically directed that unless deemed impractical, these implementing rules must mirror those rules established for criminal trials in United States district courts.[223] Thus, the plain meaning of Article 36, UCMJ, directs that the rules codified in the RCMs must be the same as those codified in the Federal Rules of Criminal Procedure (FRCP), unless there is a determination that the application of the federal rule would be impractical in the military justice system.[224] The federal rule implementing compulsory process, FRCP 17, is not impractical for the practice of military justice, as the Department of Justice[225] is no less diverse than the respective Judge Advocate General's Corps. The Department of Justice (DOJ) employs over 9,500 attorneys at more than

---

[222] *Scheffer*, 523 U.S. at 308 n.2.

[223] UCMJ art. 36 (2012). "The President may prescribe rules:

> (a) Pretrial, trial, and post trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
> (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress."

Id.

[224] The court in *Manos* declared that the government must take measure to ensure full compliance with the Compulsory Process Clause if they "can be done without *manifest* injury to the service." United States v. Manos, 37 C.M.R. 274, 279 (C.M.A. 1967) (emphasis added) (defining the balancing test in *United States v. Sweeney*, 34 C.M.R. 379, 382 (C.M.A. 1964)).

[225] The Department of Justice (DOJ) is charged with the following mission:

> To enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.

See About DOJ—Our Mission Statement, JUSTICE.GOV, http://www.justice.gov/about/about.html (last visited Sept. 3, 2013).

160 locations nationwide, making it the largest law firm in the world, and hires more than 750 attorneys per year.[226]

The RCM 703 analysis acknowledges that RCM 703 differs from FRCP 17.[227] However, it states that the use of such rules would not be practicable, as witnesses in federal court are produced through a process administered by the court and no such process is available in the military trial judiciary.[228] Further, the analysis goes on to declare that it would be impracticable to establish such an administrative infrastructure since military judges do not always sit in fixed locations and must be available to serve in several places.[229] In today's era of digital technology and efficient transportation, this argument makes little sense. Courts increasingly rely on digital technology to conduct business to an extraordinary degree. Federal district courts require all court filings to be made online,[230] and most courts-martial rely on this same technology to operate efficiently.[231] In fact, the Army Judge Advocate General's Corps (JAGC) continues to explore more ways to leverage technology to aid in the efficient and effective practice of law.[232] This is due, in part, to the fact that the JAGC is so widely dispersed. Often supervisors are not co-located with their subordinates, and prosecutors are often not co-located with defense counsel, especially overseas and while deployed. The contention in the analysis that the prosecutor is more readily available to the defense is simply untrue. Most communication regarding administrative details of the court-martial are accomplished via electronic mail and thus the physical location of the individual—be it the prosecutor, the defense counsel, or the judge—is largely irrelevant in

---

[226] A CAREER COUNSELOR'S GUIDE TO LATERAL HIRING AT DOJ, U.S. DEP'T OF JUST. OFFICE OF ATTORNEY RECRUITMENT AND MGT., http://www.justice.gov/oarm/images/lateralhiringguideforweb.pdf (last visited Sept. 6, 2013).

[227] MCM, *supra* note 3, R.C.M. 703(c) analysis, at A-21.

[228] *Id.*

[229] *Id.*

[230] *Electronic Case Filing in the Federal Court System*, ECF RESOURCE GUIDE, http://www.uscourts.gov/FederalCourts/CMECF/AboutCMECF.aspx (last visited Sept. 6, 2013).

[231] All docketing requests are now done electronically. Additionally, most witness lists, discovery requests, and motions are submitted, at least initially, in electronic form.

[232] The author developed a SharePoint platform for the U.S. Army's Defense Counsel Assistance Program (DCAP) to serve as a central repository for all Trial Defense Service-related materials. This allowed DCAP to provide reliable and Boolean searchable material to all Army defense counsel world-wide. Defense counsel are able to watch demonstration videos, search for motions, and read information papers on a wide range of criminal procedure and litigation topics.

today's environment. However, this is not the only fundamental flaw in the MCM's analysis of RCM 703.

Most telling in the analysis is the declaration that, when the defense requests a witness, the trial counsel "stands in a position similar to a civilian clerk of court for this purpose."[233] Private Smith would disagree. When PVT Smith submitted his witness list to the trial counsel requesting the presence at trial of the doctor who examined the alleged victim, it was summarily denied. It was denied, not because the defense failed to provide a proper synopsis of expected testimony, but because that witness was deemed by this impartial "clerk of court," the trial counsel, to be irrelevant. The government's actions in post-referral, pre-trial processing are part of the adversarial process; to suggest otherwise is disingenuous.

Although the Compulsory Process Clause provides the accused with a valuable weapon to present a defense,[234] Congress has granted service members even greater access to witnesses under Article 46, UCMJ.[235] This statute provides that "the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses," subject to regulations prescribed by the President.[236] The equal opportunity mandate is in line with the broad application of the Compulsory Process Clause that Madison intended and Chief Justice Marshall directed in the Burr trial and, if anything, provides greater protection to the accused than FRCP 17. However, what Article 46, UCMJ has given, RCM 703 taketh away.

---

[233] MCM, *supra* note 3, R.C.M. 703(c)(2) analysis, at A-21.
[234] Washington v. Texas, 388 U.S. 14, 19 (1967).
[235] Gasperini, *supra* note 184, at 22.
[236] UCMJ art. 46 (2012).

> The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court- martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the Unites States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

Id.

Although Article 46, UCMJ mandates *equality* between the trial counsel and the accused in the production of witnesses, RCM 703 imposes two separate rules for witness production depending on who calls the witness. As discussed above, RCM 703 entrusts the trial counsel to determine which witnesses are relevant and necessary to prosecute the accused. Likewise, the trial counsel is entrusted to determine which witnesses are relevant and necessary to defend the accused. Although no court has specifically addressed the legality of RCM 703, CAAF has spoken unfavorably of the burden it places on the accused.[237] In *United States v. Carpenter*, CAAF recognized the impropriety of the burden imposed by RCM 703, in violation of the right granted by Article 46, UCMJ.[238] The court noted:

> Some comment on the provisions of paragraph 115a, MCM (the predecessor to RCM 703), are appropriate. The paragraph requires the defense to submit his request for a defense witness to the trial counsel for approval. In case of disagreement, the issue is presented to the convening authority or the military judge, depending on the state of proceedings. To the extent that this paragraph requires the defense to submit its request to a

[237] *But see* United States v. Breeding, 44 M.J. 345, 354–55 (1996) (Sullivan, J., concurring) (asserting that RCM 703 does not violate the rights of compulsory process). The CAAF determined the propriety of the trial judge's denial of certain defense witnesses based purely upon the judge's determination that the contested witnesses were not relevant and necessary. The defense was willing to fund the witness fees of these witnesses, but CAAF reiterated that the trial judge's role as "gate keeper" requires him to ensure only relevant, necessary, and non-cumulative testimony is presented at trial. Judge Sullivan, concurring with the result but not the majority opinion, confronted the constitutionality of RCM 703. Judge Sullivan posed that RCM 703 does not violate compulsory or due process, nor does it run afoul of Article 46, UCMJ, because both government and defense requests are "evaluated in terms of relevance and necessity" and that RCM 703 "simply allows for judicial review of denial of subpoenas on relevance and materiality grounds." However, Judge Sullivan does not address the fact that, under RCM 703, the prosecutor, not the military judge, is empowered to make all judgments regarding not only prosecution witnesses, but defense witnesses as well. This requires the defense to justify to the prosecution why a witness is relevant and necessary by telling the prosecutor what the witness will testify to, without requiring the prosecutor to provide the same advance notification to the accused. While the trial judge can grant a defense motion to compel a witness previously denied by the prosecutor, the prosecution has already been tipped off as to the defense case without having to provide similar information to the accused.

[238] United States v. Carpenter, 1 M.J. 384, 386 n.8 (1976).

> *partisan advocate* for a determination, the requirement appears to be inconsistent with Article 46, U.C.M.J.[239]

A year later, when presented with a challenge to the unfair burden placed on the accused by application of paragraph 115a, MCM, CAAF declared, "While we have never approached the question directly from the standpoint of the present challenge, we have applied the paragraph in ways that leave no doubt that an accused's right to secure the attendance of a material witness is free from substantive control by trial counsel."[240] Thus, it is clear that CAAF is uncomfortable with the burden placed on the accused by RCM 703 and recognizes that it is inconsistent with Article 46, UCMJ. However, instead of trying to apply RCM 703 in a manner that is consistent with Article 46, UCMJ, RCM 703 should be amended to actually come into compliance therewith.

4. 703 Unlawfully Restricts the Attorney Work-Product Privilege

Under RCM 703, an accused and his assigned defense counsel cannot obtain the presence of crucial witnesses without revealing trial strategy and work-product[241] to the prosecution prior to trial.[242] This requirement to surrender work-product does not even guarantee the accused's rights will be honored, but rather, provides him the possibility to have them honored.[243]

---

[239] *Id.*

[240] United States v. Arias, 3 M.J. 436, 438 (1977). Although the propriety of RCM 703 has not been resolved, this issue continues to be litigated at the trial level. The author received one such motion, which contributed to this argument (on file with author).

[241] The Federal Rules of Criminal Procedure defines work-product protection as the "protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial." FED. R. CRIM. PROC. P. 502(g). *See also* Hickman v. Taylor, 329 U.S. 495 (1947) (limiting inquiry into an attorney's case file). *See also* Melnick, *supra* note 188, at 31.

[242] *See* FED. R. CRIM. P. 17 (Notes of Advisory Committee on Rules—1966 Amendment) (The pre-1966 version of Rule 17 required the defendant to disclose a proffer similar to RCM 703's requirement. The committee recognized that this requirement forced the defendant to disclosure the theory of his case prior to trial.).

[243] Milton Hirsch, *The Voice of Adjuration: The Sixth Amendment Right to Compulsory Process Fifty Years After* United States *ex rel.* Toughy v. Ragen, 30 FLA. ST. U.L. REV. 81, 117 (2002). Where a regulation would "entitle a federal prosecutor to be told before the fact what testimony his adversary hoped to adduce as a condition precedent to his adversary's adducing that testimony, observed that 'it would be Valhalla for a private lawyer to be able to get a preview of an adverse witness's cross-examination.'" United States v. Feeney, 501 F. Supp. 1324, 1325 (D. Colo. 1980).

Work-product materials are divided into two categories: tangible and intangible. Tangible work-product includes "memoranda notes, witness statements, and the like."[244] Intangible work-product, often referred to as opinion work-product, "refers to an attorney's conclusions, legal theories, mental impressions, or theories."[245] The degree of protection from forced compulsion the material receives depends upon which category the material falls within.

Tangible work-product is discoverable when the opposing party "demonstrates substantial need of the materials to prepare its case and it is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[246] Intangible, or opinion work-product, receives nearly complete protection. To be discoverable, the opposing party must "demonstrate something far greater than the substantial need and undue hardship necessary to obtain tangible work product. Discovery of opinion work product may be permitted only where the attorneys' conclusions, mental impressions or opinions are at issue in the case and there is a compelling need for their discovery."[247] Where materials are bound up together, the court, when ordering discovery of tangible work-product, must ensure to protect against exposure of intangible work-product.[248] Thus, it is important to determine what type of work-product is being sought to determine whether it is actually discoverable.

The Supreme Court has acknowledged that the doctrine of work-product privilege applies in criminal trials just as it does in civil trials.[249] The Supreme Court detailed the importance of this privilege in *United States v. Nobles*[250]:

---

[244] Douglas R. Richmond & William Freivogel, Remarks at the Section of Business Law American Bar Association Annual Meeting: The Attorney-Client Privilege and Work Product in the Post-Enron Era 5 (Aug. 7, 2004), *available at* http://apps.americanbar.org/buslaw/newsletter/0027/materials/11.pdf (last visited Sept. 3, 2013).
[245] *Id*. at 5.
[246] *Id*.
[247] *Id. See also* Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 577 (9th Cir. 1992).
[248] Richmond & Freivogel, *supra* note 244, at 5. *See* LaPorta v. Gloucester Cnty. Bd. of Chosen Freeholders, 774 A.2d 545, 548 (N.J. Super. Ct. App. Div. 2001) (quoting Hickman v. Taylor, 329 U.S. 495 (1947)).
[249] United States v. Nobles, 442 U.S. 225, 236 (1975). *See also* Hickman v. Taylor, 329 U.S. 495 (1947).
[250] *Nobles*, 442 U.S. at 237.

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.[251]

The Court went on to recognize that if this privilege were not scrupulously honored, "inefficiency, unfairness, and sharp practices would inevitably develop"[252] and "the effect on the legal profession would be *demoralizing*."[253] Thus, the role of the work-product doctrine is vital to the "proper functioning of the criminal justice system."[254]

A synopsis of expected witness testimony, as required by RCM 703, amounts to an infringement on the work-product privilege. The synopsis actually amounts to opinion, or intangible work-product, as it is the attorney's distillation of the witness's statements, verbal or written, and the attorney's interviews of the witness.[255] It amounts to the attorney's mental impressions on how the witness will testify and how that will benefit the accused. In the case of PVT Smith, each synopsis was developed based upon interviews and interactions between defense counsel and the witness. Thus, not only does the requirement to provide the trial counsel a synopsis of expected testimony violate compulsory and due process,[256] it also violates the work-product privilege.

---

[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.* at 238. The Court went on to say that "the interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case."
[255] *Id.* at 237–38. The Supreme Court noted that work-product "is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." It further went on to hold that "[a]t its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case."
[256] DA PAM. 27-22, *supra* note 184, para. 33-5a. This guide, although no longer published, represented the seminal guide for evidentiary practice in courts-martial. The drafters of this official publication recognized that the provisions of RCM 703 requiring the defense to submit adequate justification to the trial counsel with the witness request potentially violate compulsory process.

5. RCM 703 Undermines Public Confidence in the Court-Martial Process

No system of justice operates effectively unless the public perceives it to be fair.[257] Many questions regarding the propriety of the military judicial system exist; its practitioners must guard against maintaining the status quo at the expense of public perception. The United States has been at war for over a decade. Hundreds of thousands of parents have entrusted their children to their nation. It is imperative that they see the military justice system as a fair system; one which values the fundamental rights of their children.

The UCMJ has been under attack for many years regarding perceptions of unfairness and, at times, outright unfairness.[258] It has been, and continues to be, attacked for the panel selection process,[259] the command-driven charging decision,[260] the lack of unanimous verdict requirements,[261] and more recently the witness production process.[262] The military justice system is under constant scrutiny and its advocates must be proactive in ensuring it is perceived as effective, efficient, and fair. Often military justice practitioners get caught up in the effectiveness and efficiency of the system, but lose sight of the fairness. The federal criminal judicial system faced this same issue nearly half a century ago and improved its system to ensure fairness is not trumped by effectiveness or efficiency.[263]

---

[257] United States v. Cruz, 20 M.J. 873, 880 (1985).

[258] Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237 (2000). *See also* Bradley J. Huestis, *You Say You Want a Revolution: New Developments in Pretrial Procedures*, ARMY LAW., Apr./May 2003 at 17.

[259] Huestis, *supra* note 258, at 17–18.

[260] Beth Hillman, *Chains of Command: The U.S. Court-Martial Constricts the Rights of Soldiers—And That Needs to Change*, LEGAL AFFAIRS, May/June 2002, *available at* http://legalaffairs.org/issues/May-June-2002/review_hillman_mayjun2002.msp (last visited Sept. 3, 2013).

[261] Henry B. Rothblatt, *Military Justice: The Need for Change*, 12 WM. & MARY L. REV. 455, 469–70 (1971).

[262] The Cox Commission II recommended changes be made to the military witness production process prohibiting the trial counsel from objecting to the credentials of a defense expert witness who is provided by the government as an adequate substitute to the witness actually requested. Dwight Sullivan, *The Cox Commission II Report*, CAAFLOG (Oct. 19, 2009). *See* http://www.caaflog.com/2009/10/19/the-cox-commission-ii-report/ (last visited Sept. 3, 2013).

[263] FED. R. CRIM. P. 17(b).

IV. Recommended Changes

The military justice system must be revised to comply with the constitutional mandates of compulsory and due process. The current restrictions imposed by the President in RCM 703 fly in the face of Chief Justice Marshall's warning that the rights guaranteed by the Compulsory Process Clause are "sacred" and must be not be restricted in a manner which circumvents their purpose.[264] The arbitrary nature of RCM 703, as defined by the Supreme Court in *Washington* and its progeny, prohibits the accused from exercising his rights without first disclosing a portion of his case to the prosecutor. As in *Washington* and *Rock*,[265] the restrictions imposed by RCM 703 may serve a legitimate governmental interest, but the rule is arbitrary and disproportionate to the purposes it was designed to serve. It is overbroad because the rule is too onerous on the accused as the government's interest can be satisfied in a less restrictive fashion. The following recommendations present three approaches that serve both the government's requirements to conserve resources and prevent an abuse of the process, and adhere to the constitutional mandates of the Compulsory and Due Process Clauses.

A. Level the Playing Field: Remove the Synopsis Requirement of RCM 703

The framers adopted the Compulsory Process Clause to ensure the accused had the same power to compel witnesses in his favor as the prosecutor. As discussed above, this is no longer the case for the military accused.[266] To fully comply with both the spirit and letter of the Compulsory Process Clause, the military accused must be placed on equal footing with the prosecutor in the terms of witness production. A solution to achieve this parity is to amend RCM 703 to exclude the witness synopsis requirement placed on the military accused. This would provide the military accused the broad protections of the Compulsory Process Clause envisioned by Madison and intended by Chief Justice Marshall's interpretation in the Burr treason trial.

---

[264] Westen, *supra* note 5, at 102.
[265] Washington v. Texas, 388 U.S. 14, 22 (1967); Rock v. Arkansas, 483 U.S. 44, 61 (1987).
[266] MCM, *supra* note 3, R.C.M. 703.

The witness synopsis requirement of RCM 703 lies at the heart of the unconstitutional implementation of compulsory process for the military accused. Removing this requirement brings the military criminal procedure and evidentiary rules into compliance with the constitutional mandates.[267] Likewise, it would comply with Article 46, UCMJ, while also fully honoring the sacred protection of the work-product privilege and projecting a balanced and fair system of justice to the public.

To achieve this end, RCM 703(c)(2) must be amended to read as follows:

> *Witnesses for the defense,*
>
> (A) *Request.* The defense shall submit to the trial counsel a written list of witnesses whose testimony the defense considers relevant and necessary for the defense.
>
> (B) *Contents of the Request.* A list of witnesses whose testimony the defense considers relevant and necessary on the merits, sentencing, or interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence.
>
> (C) *Determination.* The trial counsel shall arrange for the presence of any witness listed by the defense.

The provisions of RCM 703(c)(2)(C), which address the timing of witness requests, would not need to be modified. However, RCM 1001(e)(2), which places additional restrictions on government funded defense witnesses for presentencing proceedings, would need to be stricken in its entirety. These modifications would provide the accused equal access to the production of witnesses while fully satisfying the mandates of the Compulsory Process Clause, as well as the legal and policy concerns discussed above.

While completely eliminating the witness synopsis requirement represents the best result for advocates who believe procedural and evidentiary rules should not infringe upon the accused's constitutional rights in any manner, this position is likely not the most practical because

---

[267] U.S. CONST. amends. V & VI.

it does not address the government's necessity to operate with constrained resources. The federal district court has squarely addressed this issue and modified its rules and procedures to provide the accused his constitutional rights of compulsory and due process while still ensuring that it guards its scarce resources from unreasonable expenditures.[268] It has done so by implementing FRCP 17.[269]

B. FRCP 17 Equivalency

As discussed above, prior to amending the Federal Rules of Criminal Procedure in 1966, a defendant in United States district court was required to prove the necessity of his requested witnesses to the government, which resulted in the accused providing the prosecutor a preview of his case prior to trial.[270] After much public criticism of this process, the rules were amended to remove this unfair advantage to the prosecution.[271] Rule for Courts-Martial 703 should be amended in a similar fashion. As noted above, since there is no compelling interest for the military to deviate from the federal rules, RCM 703 must be amended to come into compliance with Article 36 of the UCMJ.

1. Clerk of Court

The military justice system should adopt the clerk of court model of the United States district courts. This would require creating clerk of court positions at each judicial region in which a military judge is located. The clerk of court would assume the role of securing witnesses, likely for both the prosecution and defense. Under this system, as in U.S. district court, instead of the accused providing his witness request and synopsis of expected witness testimony to the prosecutor, the accused would provide the documentation to the clerk, *ex parte*. The clerk would then make any relevancy and necessity determination, which the accused could appeal by way of an *ex parte* motion to the military judge after referral.

---

[268] FED. R. CRIM. P. 17.
[269] *Id.*
[270] FED. R. CRIM. P. 17(b) (1945).
[271] FED. R. CRIM. P. 17 (Notes of Advisory Committee on Rules—1966 Amendment).

This process would fully satisfy the constitutional mandates of the Compulsory and Process Clauses, as well as the statutory directives of Articles 36 and 46, UCMJ. Likewise, since the synopsis of expected testimony would be provided *ex parte* to the court, the defense counsel would no longer be forced to reveal information that would otherwise be protected by work-product privilege. Additionally, public confidence would be elevated because the prosecutor would no longer be guaranteed a preview of the defense case, while not having to reciprocate to the accused. Employing a clerk of court at the trial level would provide great efficiencies for the military justice system beyond simply witness production. This system would also provide a central repository for filing motions and scheduling court dates. Beyond these duties, the clerk of court could also assist in the panel selection process by coordinating panel questionnaires, provide budgetary and administrative oversight for the judicial region, assist in securing expert witnesses, provide training to court-reporters and bailiffs, and act as property book officer for the court.

2. Military Judge as Initial Arbiter of Relevance

Should the establishment of a clerk system prove too difficult in today's times of decreasing budgets and personnel draw-downs, RCM 703 can still comply with constitutional, statutory, and public policy concerns by eliminating the initial request from the accused to the trial counsel and instead have the accused make his initial request to the military judge *ex parte*. This satisfies the overall purpose and intent behind FRCP 17, as it levels the playing field between the prosecution and the accused while still providing a check in the system to protect against frivolous requests and abuse of process.[272]

This would involve two simple changes. First, the accused would no longer have two bites at the production apple. This is a very small trade-off as it is hard to imagine that the military judge would render a different decision as the initial arbiter under this system than he would as the appeal authority. Second, all witness requests would be made *ex parte*. This would not cause any concern for the government since the synopsis requirement satisfies only two legitimate interests: guarding against frivolous requests and preventing abuse of process.[273]

---

[272] Westen, *supra* note 5, at 271.
[273] *Id.* at 271. *See also* United States v. Sweeney, 34 C.M.R. 379, 386 (C.M.A. 1964).

The unfair advantage the prosecution receives under the current system from obtaining a preview of the defense case is a byproduct of the system, not a legitimate interest. Amending RCM 703 to mirror FRCP 17, whether by establishing a clerk of court or going straight to the trial judge *ex parte*, provides another advantage: it would actually improve the efficiency of the process. Knowing that the synopsis would be provided *ex parte* to an independent arbiter, the accused would be more inclined to provide a greater detailed synopsis of expected testimony to justify his request. This would allow for greater candor and analysis of the relevance and necessity of each witness and decrease the delays that inevitably ensue with pre-trial litigation over witness production.

C. Relevancy Determination Made by Military Magistrate

The unlawful and improper restrictions imposed by RCM 703 can also be eliminated by shifting the initial arbiter of relevance from the prosecutor to the local military magistrate, *ex parte*. This scenario would mirror the clerk of court option above regarding witness production. This would allow the government to ensure the defense does not have the ability to hold the command hostage by requiring it to allocate resources for witnesses that are requested for potentially nefarious reasons. It also provides the accused an independent arbiter who does not have a vested interest in the outcome of which defense witnesses are produced for trial. This *ex parte* submission by the accused to the military magistrate also alleviates RCM 703's conflict with the statutory requirements of Article 46, UCMJ, the protection of work-product privilege, and the public's perception of the military justice system.

The military magistrate is a legally trained officer who is supervised in those duties by the servicing military judge. The military magistrate is already entrusted to make important, independent pre-trial decisions. Such decisions include: rendering probable cause determinations, approving search, seizure, and apprehension authorizations, as well as determining the propriety of pre-trial confinement of the accused.[274] The military magistrate is not beholden to the prosecutor or the accused. This would place the military magistrate in a position similar to the clerk of

[274] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 8 (3 Oct. 2011) [hereinafter AR 27-10].

court in federal court while providing the accused a means to compel the attendance of his witnesses.

Should the accused disagree with the decision of the military magistrate, he can raise the issue with the military judge. To ensure the fundamental rights of the accused are protected, the synopsis submitted to the military judge in support of the accused's motion to compel must be done *ex parte*. To accomplish this approach, RCM 703(c)(2) should be modified to read as follows:

> *Witnesses for the defense,*
>
> (A) *Request.* The defense shall submit to the military magistrate a written list of witnesses whose production by the Government the defense requests.
>
> (B) *Contents of the Request.* A list of witnesses whose testimony the defense considers relevant and necessary on the merits, sentencing, or interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of expected testimony sufficient to show its relevance and necessity.[275]
>
> (C) *Time of Request.* A list of witnesses under this subsection shall be submitted in time reasonably to allow production of each witness on the date when the witness' presence will be necessary. The military judge may set a specific date by which such lists must be submitted. Failure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such a denial may be granted for good cause shown.[276]
>
> (D) *Determination.* The trial counsel shall arrange for the presence of any witness listed by the defense unless the military magistrate contends that the witness'

[275] MCM, *supra* note 3, R.C.M. 1001(e)(2) (detailing the limitations on the production of defense witnesses at presentencing proceedings, which should be deleted).
[276] This provision remains unchanged.

> production is not required by this rule. If the military magistrate contends that the witness' production is not required by this rule, the matter may be submitted to the military judge ex-parte. If the military judge grants a motion for the production of a witness, the trial counsel shall produce the witness or the proceedings shall be abated.

While all three of these approaches ensure the accused receives the constitutional protections guaranteed by the Compulsory and Due Process Clauses, as well as the statutory protections of Article 46, UCMJ, the military magistrate option is likely the easiest fix. The military does not usually embrace change openly and this system presents the least amount of change while still providing the accused the full benefit of real compulsory process. Army Regulation (AR) 27-10 will need to be updated[277] and RCM 703 will need to be amended slightly, but this process accomplishes what RCM 703 is commonly understood to embrace. The intent behind RCM 703 may be noble, but its application is anything but.

V. Conclusion

The rights provided an accused in a criminal trial are not absolute and must be measured against legitimate governmental interests. The government does have a vested interest in guarding its fiscal resources. However, RCM 703's protection of this fiscal governmental interest arbitrarily restricts an accused's ability to mount an adequate defense. This interest must yield to the protections afforded by the Fifth and Sixth Amendments of the Constitution, as "our measure should be the scales of justice, not the cash register."[278]

Thomas Jefferson warned of the perils in trusting man over the virtues of the Constitution.[279] His admonition has been made manifestly clear with the edicts contained in RCM 703, which undermine the very tenets of the Compulsory Process Clause. Jefferson and Madison, with

---

[277] AR 27-10, *supra* note 274, ch. 8 (proposing that AR 27-10 be amended, should the military magistrate option be implemented, to include the responsibilities and powers of the military magistrate regarding the ex parte review of defense witness requests for relevance and necessity).
[278] United States v. Scheffer, 44 M.J. 442, 448 (1996).
[279] JEFFERSON, *supra* note 1.

their fellow constitutional framers, instituted a system to guarantee individuals protection from an over-reaching government. They drafted and adopted rules to crystallize certain fundamental rights that no one may be deprived of without due process of law. Of particular concern to the drafters was the vulnerability of those facing criminal prosecution. The Bill of Rights, in particular the Fifth and Sixth Amendments, was so vital to this country's tapestry that many of the states refused to ratify the Constitution without their implementation.

Rule for Courts-Martial 703 unconstitutionally restricts one of the sacred rights[280] and must be amended. The President does not have the power to implement arbitrary evidentiary and procedural rules that impose unnecessary burdens on the accused.[281] The provisions of RCM 703 are overly broad because lesser restrictive means are available to the government to secure its interest in conserving resources. If the government does not trust the detailed military defense counsel, who is qualified, certified, and sworn in the precise manner as the prosecutor, to make good-faith witness requests, other options are available to the government besides forcing the defense to reveal a portion of its case to the prosecution prior to trial.

Although PVT Smith fully complied with RCM 703, and effectively waived work-product privilege for the information revealed to the prosecution while complying therewith, he should not have been placed in that position. Likewise, had RCM 703 complied with the solutions provided above, PVT Smith's trial would have been conducted more efficiently and timely. Had the synopsis been provided *ex parte* to an independent arbiter from the beginning, pre-trial litigation to compel the denied witnesses would have been avoided, as evidenced by the military judge ruling in favor of PVT Smith's motion to compel.

Simple modifications to RCM 703 can be made to satisfy these constitutional, statutory, and public policy concerns.[282] The modifications are neither difficult nor resource intensive. Shifting to an FRCP 17 model will significantly increase the efficiency and effectiveness of the witness production process specifically, as well as the military justice system at large. However, making these changes will take a conscious effort to move beyond the status quo, and will require a recognition that the

---

[280] Westen, *supra* note 5, at 102.
[281] *Id*. at 116.
[282] *See supra* Part IV.

system must be fixed. The U.S. district courts did so nearly half a century ago; it is time for the military justice system to do the same.

BANGLADESH RAPID ACTION BATTALION: SATISFYING THE REQUIREMENTS OF THE LEAHY AMENDMENT WITH A RULE OF LAW APPROACH

MAJOR MICHAEL J. O'CONNOR*

Our words must be judged by our deeds; and in striving for a lofty ideal we must use practical methods; and if we cannot attain all at one leap, we must advance towards it step by step, reasonably content so long as we do actually make some progress in the right direction.[1]

I. Introduction

Security forces throughout the world are confronting asymmetrical threats unlike any in modern history.[2] Terrorist organizations are using

---

* Judge Advocate, U.S. Army. Presently assigned as Deputy Chief, International and Operational Law, U.S. Army-Europe, Wiesbaden, Germany. LL.M., The Judge Advocate General's School, U.S Army, Charlottesville, Virginia; J.D., 2002, Suffolk University Law School, Boston, Massachusetts; B.A., 1999, University of Massachusetts, at Boston. Previous assignments include Brigade Judge Advocate, 3d Stryker Brigade Combat Team, Joint Base Lewis-McChord, Washington, 2011–2013; Brigade Judge Advocate/Combined Task Force Judge Advocate, 3d Stryker Brigade Combat Team and Combined Task Force–Arrowhead, Kandahar Province, Afghanistan, 2011–2012; Deputy Staff Judge Advocate, Special Operations Command, Pacific, Camp H.M. Smith, Hawaii, 2008–2010; Battalion Judge Advocate, 2d Battalion, 5th Special Forces Group (Airborne), Fort Campbell, Kentucky, 2006–2008; Task Force Judge Advocate, Special Operations Task Force–Central, Baghdad, Iraq, 2007–2008; Command Judge Advocate, 2d Combat Aviation Brigade, Camp Humphreys, South Korea, 2005–2006; Intelligence Attorney, Joint Interrogation and Debriefing Center, Multi-National Forces–Iraq, Abu Ghraib, Iraq, 2004–2005; Office of the Staff Judge Advocate, Fort Bliss, Texas, 2003–2005 (Acting Chief, Administrative Law, 2004; Labor Attorney, 2004; Chief, Claims, 2003–2004). Member of the Bars of Massachusetts, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 59th Judge Advocate Officer Graduate Course.

[1] Theodore Roosevelt, Nobel Lecture, Nobel Peace Prize of 1906 (May 5, 1910), *available at* http://nobelprize.org/nobel_prizes/peace/laureates/1906/roosevelt–lecture.html (last visited Aug. 18, 2013).

[2] *See* BRUCE VAUGHN ET AL., CONG. RESEARCH SERV., RL 34194, TERRORISM IN SOUTHEAST ASIA (Oct. 16, 2009) (detailing the spread of terrorist organizations, such as Jemaah Islamiyah, Lashkar–e–Taiba and al Qaeda in Pakistan, Indonesia, and other Southeast Asian nations); BRUCE VAUGHN, CONG. RESEARCH SERV., RS 22591, ISLAMIST EXTREMISM IN BANGLADESH 10 (Jan. 31, 2007). *See also* Symposium, *Dealing with Today's Asymmetric Threat to U.S. and Global Security: The Need for an Integrated National Asymmetrical Threat Strategy*, SOURCE 2 (May 2008), stating,

technology, international financial and criminal networks, and the Internet to decentralize their command and control structure, increase their mobility, obscure their intentions, and increase their lethality.[3] These organizations are constantly evolving their tactics, techniques and procedures, while seeking out safe havens in developing nations and border regions.[4] Foreign security forces need to develop their capabilities to address these threats.

In developing nations, such as Bangladesh, Indonesia, and Malaysia, security forces are struggling to meet their internal security needs while also attempting to counter these terrorist groups.[5] Some of these nations have experienced recent political upheaval, such as coups, military instability, and religious division.[6] Typically, these security forces are inexperienced, underfunded, and undertrained compared to the threats that they face.[7] Without adequate training, these security forces will be unable to maintain advantages against constantly evolving terrorist organizations.

> This terrorist threat, grown on a foundation of instability and religious extremism, has capably and creatively leveraged technology, strategic communications, and divergent Western policies and priorities to enhance both its credibility and efficacy. As a result, the U.S. must rethink the policies, structures, and processes that have guided its national security strategy for the past 60 years.

[3] *See, e.g.*, UNITED STATES ARMY TRAINING AND DOCTRINE COMMAND, MILITARY GUIDE TO TERRORISM IN THE TWENTY–FIRST CENTURY, G2 HANDBOOK (2007) (detailing the evolving threat of terrorism); *The Use of the Internet by Islamic Extremists, Testimony before the House Permanent Select Committee on Intelligence*, 109th Cong. (2006) (statement of Bruce Hoffman), *available at* http://www.rand.org/pubs/testimonies/2006/RAND_CT262–1.pdf (last visited Feb. 10, 2011) (detailing use of technology by terrorist groups); and DR. MARTIN J. CETRON & OWEN DAVIES, 55 TRENDS NOW SHAPING THE FUTURE OF TERRORISM 39–42 (Feb. 2008), *available at* http://www.carlisle.armyh.mil/proteus/docs/55–terror.pdf (last visited Feb. 1, 2011) (detailing evolving threat and trends in terror).

[4] *See* OFFICE OF THE COORDINATOR FOR COUNTER–TERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM, 2009, at 208–12 (Aug. 2010) [hereinafter COUNTRY REPORTS], *available at* http://www.state.gov/documents/organization/141114.pdf (last visited Aug. 22, 2013) (providing annual congressional report on terrorism).

[5] *Id.* at 212–14 (describing efforts to counter terrorist organizations). *See also* Taj Hashmi, *Bangladesh: The Next Taliban State?*, SIMON FRASER UNIV. (Vancouver, Can. (Feb. 9, 2005), *available at* http://www.muktomona.com/Articles/taj_hashmi/ (last visited Aug. 18, 2013); and VAUGHN ET AL., *supra* note 2 at 6.

[6] *See infra* Parts II and III (discussing the challenges of security forces in South America, Asia and Africa).

[7] *See infra* Part IV (describing deficiencies of Bangladesh security forces).

In Bangladesh, for example, a caretaker government was instituted in 2006 to stabilize the government, deal with corruption, run the general election, and provide internal security.[8] In response to political instability and increasing criminality, the government granted a paramilitary security force, the Rapid Action Battalion (RAB) (barely three years old), extensive powers to curtail criminal and terrorist activities.[9] This unit provided much-needed law enforcement and security as the nation stabilized, but, due to poor training and tactics, received numerous complaints of excessive use of force, misconduct, and human rights violations.[10]

Current U.S. law, known as the Leahy Amendment, prohibits U.S. forces from training a nation's security forces that have a history of human rights violations and have failed to take appropriate corrective actions to address these violations.[11] Problematically, these nations frequently experience significant internal and transnational threats, while attempting to implement democratic and legal reforms to improve their limited abilities to adequately address past violations. As a result, these nations cannot overcome the requirements of the Leahy Amendment, which has impeded the ability of U.S. forces to conduct military and security force training for host nation security forces, such as the RAB, without undergoing significant Rule of Law efforts.

---

[8] RAPID ACTION BATTALION, http://www.rab.gov.bd/about_us.php?page=2 [hereinafter RAPID ACTION BATTALION] (last visited Aug. 23, 2013); *see also* Abu Sufian, *RAB Comes into Being in a Month*, NEWS FROM BANGLADESH, Feb. 19, 2004, *available at* http://www.bangladesh–web.com/ (last visited Aug. 18, 2013). JOYEETA BHATTACHARJEE, A YEAR OF CARETAKER GOVERNMENT IN BANGLADESH (2008). The Bangladesh Constitution institutes a caretaker government, designed to maintain basic public services and law enforcement, during a time of transition to a democratic government, or when the Parliament is desolved. *Id.*

[9] HUM. RTS. SCHOOL, LESSON 1: BANGLADESH'S STATE OF EMERGENCY AND RELATED LEGISLATION (Feb. 2008), *available at* http://www.hrschool.org/doc/mainfile.php/lesson52/193/ (last visited Aug. 18, 2013); *see also* Sufian, *supra* note 8.

[10] *See generally* HUM. RTS. WATCH, JUDGE, JURY AND EXECUTIONER: TORTURE AND EXTRAJUDICIAL KILLINGS BY BANGLADESH'S ELITE SECURITY FORCE (Dec. 2006) [hereinafter JUDGE]; Shamim Ashraf, *Extra–judicial Killings Call for Unbiased Probe*, DAILY STAR, May 21, 2005, http://www.thedailystar.net/2005/05/21/d5052101033.htm (last visited Feb. 1, 2011).

[11] The Department of Defense and Full-Year Continuing Appropriations Act of 2011, § 524, states "None of the funds made available by this Act may be used to support any training program involving a unit of the security forces of a foreign country if the Secretary of Defense has credible evidence from the Secretary of State that a member of such unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken." Pub. L. No. 112–10, § 8058(c), 125 Stat. 38 (2011).

This article focuses on the current state of the law, offering model approaches for meeting the requirements of the Leahy Amendment, and recommending solutions to address human rights violations while allowing U.S. forces to train security forces to counter emerging threats. Part II provides a historical background for the enactment of the Leahy Amendment, its legislative history, current application, and its impact on current training opportunities. Part III analyzes the Rule of Law, its current use, previous Rule of Law efforts, and its applicability to Leahy-prohibited security forces. Part IV describes a novel, inter-agency engagement with the Bangladesh RAB that endeavored to help the unit develop a transparent system to investigate, report, and prosecute human rights violators. Part V provides a recommended Rule of Law methodology that could be applied to Security Force Assistance (SFA)[12] to enable host nations to address human rights violations while receiving training. Finally, Part VI discusses the need to strike the correct balance of national interests while ensuring an appropriate response to the continuing threat of international terrorism.

II. The Leahy Amendment

In 1997, Senator Patrick Leahy, a Democrat from Vermont, introduced legislation to limit funding for training nations with a history of human rights violations.[13] Senator Leahy and other members of Congress were concerned that recipients of American funding and military training were using these resources in support of repressive regimes in South America.[14] While admirable in its intent, the Leahy Amendment, as it became known, has limited the ability of U.S. forces to train security forces in developing nations in support of our national security interests.[15]

---

[12] *See infra* note 53. Security Force Assistance is a DOD program that allows DOD elements to train other nations' Security Forces in areas regarding Foreign Internal Defense, policing, law enforcement and other security-related matters to improve stability.

[13] § 8058(c), 125 Stat. 38.

[14] *See infra* Part II.A.

[15] NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1–2 (2010) (detailing current threats).

A. The School of the Americas and the Development of the Leahy Amendment

In order to develop Partner Nation capability,[16] the U.S. Army founded the School of the Americas (SOA) in 1946.[17] The purpose of the SOA was to train select military officers and senior non-commissioned officers of South and Central American military and security forces.[18] The Spanish-taught training included mission planning, infantry tactics, foreign internal defense, and international human rights standards.[19] Through 2000, the SOA had trained over 60,000 students.[20]

Following a reported massacre in El Salvador, human rights groups and members of Congress became concerned with U.S. training of foreign military forces.[21] The "Massacre at El Mozote" involved

---

[16] *See* U.S. DEP'T OF DEF., QDR EXECUTION ROADMAP: BUILDING PARTNERSHIP CAPABILITY 4 (May 22, 2006).

> Partnership capacity includes, but is not limited to, the capability to: defeat terrorist networks, defend the US homeland in depth, shape the choices of countries at strategic crossroads, prevent hostile states and non–state actors from acquiring or using WMD, conduct irregular warfare (IW) and stabilization, security, transition and reconstruction (SSTR) operations, conduct "military diplomacy," enable host countries to provide good governance, and enable the success of integrated foreign assistance.

See also Fred Kaplan, *Secretary Gates Declares War on the Army Brass, Unfortunately He Doesn't Have Time to Fight the Battle*, SLATE MAG. 2 (Oct. 12, 2007). Secretary Gates asserts "the most important military component in the War on Terror is not the fighting we do ourselves, but how well we enable and empower our partners to defend and govern their own countries."

[17] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/NSAID–96–178, SCHOOL OF THE AMERICAS 5–8 (Aug. 1996) [hereinafter SCHOOL OF THE AMERICAS] (providing history of the SOA). The School of the Americas was originally located in Panama. *Id.* In 1984, the school relocated to Fort Benning, Georgia. *Id.* In 2001, the School of the Americas changed its name to the Western Hemisphere Institute for Security Cooperation. *Id. See also* LESLEY GILL, THE SCHOOL OF THE AMERICAS: MILITARY TRAINING AND POLITICAL VIOLENCE IN THE AMERICAS 62–89 (2004) (detailing origins and history of SOA).

[18] SCHOOL OF THE AMERICAS, *supra* note 17, at 10 (stating purpose of the SOA).

[19] *Id.* at 10–12 (detailing the course curriculum).

[20] *Id.*

[21] *See* JAMES HODGE & LINDA COOPER, DISTURBING THE PEACE: THE STORY OF FATHER ROY BOURGEOIS AND THE MOVEMENT TO CLOSE THE SCHOOL OF THE AMERICAS 1–4 & 148–67 (2004) (describing the events that led to the creation of SOA Watch).

members of the Salvadoran military who had received training at SOA.[22] The massacre occurred when Salvadoran military opened fire in the village of El Mozote and killed hundreds of people, including women, children, and the elderly.[23] Reporters discovered that the Salvadoran military, along with other Central American militaries involved in atrocities, had received training from the U.S. military.[24]

In 1982, Father Roy Bourgeois, a Colombian priest, formed SOA Watch.[25] The purpose of this organization is to bring attention to allegations of human rights abuses by SOA graduates.[26] SOA Watch members began collecting information on human rights abuses throughout Central America.[27] In particular, SOA Watch collected significant evidence of long-term, systematic human rights atrocities by the Colombian military throughout the 1980s and 1990s.[28] Subsequently, Non-Governmental Organizations (NGOs) and Human Rights Organizations (HROs) advocated for investigations into Colombia's human rights record.[29] They also began to lobby for congressional action

---

[22] *See* MARK DANNER, THE MASSACRE AT EL MOZOTE 3–10 (1993); *see also* JACK NELSON–PALLMEYER, SCHOOL OF ASSASSINS: GUNS, GREED, AND GLOBALIZATION 1–13 & 21–32 (2003).

[23] HODGE & COOPER, *supra* note 21, at 91 (stating that Father Bourgeoius frequently talked about "the massacre at El Mozote where U.S.-trained Salvadoran troops shot, hanged, and decapitated more than nine hundred peasants").

[24] *Id.*

[25] *Id.*

[26] SCHOOL OF THE AMERICAS WATCH, http://www.soaw.org (last visited Aug. 18, 2013) (providing history of SOA Watch and reports related to atrocities).

[27] *Id.*

[28] *Id.*

[29] *See* LINDA CORAL ET AL., REDUCING THE INCIDENCE OF MASSACRES IN COLOMBIA 10–11 (2004) (quoting Interview with Paul Paz y Mino, Colombia Specialist, Amnesty Int'l (Feb. 18, 2004)) [hereinafter Paz Interview], *available at* http://www.washington-post.com/wp-dyn/content/article/2008/01/24/AR2008012402532.html (last visited Sept. 3, 2013). The author also details an incident involving Colombian security forces.

> In the cool hours before sunrise on January 17, 50 members of the United Self–Defense Forces of Colombia marched into this village of avocado farmers. Only the barking of dogs, unaccustomed to the blackness brought by a rare power outage, disturbed the mountain silence. For an hour, under the direction of a woman known as Comandante Beatriz, the paramilitary troops pulled men from their homes, starting with 37–year–old Jaime Merino and his three field workers. They assembled them into two groups above the main square and across from the rudimentary health center. Then, one by one, they killed the men by crushing their heads with heavy stones and a sledgehammer. When it was over, 24 men lay dead in pools of

to limit funding to the Salvadoran and Colombian militaries.[30] Senator Leahy answered the call of advocates by proposing legislation to tie human rights compliance to the receipt of military aid.[31]

Originally introduced in 1997 as an amendment to the Foreign Operations Appropriations Act of 1997, the Leahy Amendment sought to limit U.S. government foreign assistance to countries that did not comply with international human rights standards.[32] As stated on Senator Leahy's website:

> [T]he Leahy Law makes it clear that when credible evidence of human rights violations exists, U.S. aid must stop. But, it provides the necessary flexibility to allow the U.S. to advance its foreign policy objectives in these countries. The law gives the Secretary of State the authority to determine when the law applies. In addition, it gives foreign governments an incentive to correct the problem: U.S. aid can resume if they bring to justice people who commit such crimes.[33]

The Amendment restricted foreign aid, including training and support, on the basis of a nation's human rights record.[34] Nations with a history of human rights violations, or with unresolved human rights allegations, are prohibited from receiving foreign aid.[35] Under the amendment, the Department of State (DoS) has primary responsibility for ensuring that the Leahy Amendment restrictions are properly applied.[36]

> blood. Two more were found later in shallow graves. As the troops left, they set fire to the village. (Chengue Massacre, 2001)

See also HODGE & COOPER, *supra* note 21, at 91; HUM. RTS. WATCH, COLOMBIA'S KILLER NETWORKS: THE MILITARY–PARAMILITARY PARTNERSHIP AND THE UNITED STATES 45 (1996), and HUM. RTS. WATCH, THE "SIXTH DIVISION": MILITARY-PARAMILITARY TIES AND U.S. POLICY IN COLOMBIA 10, 61 (2001).

[30] *See* CORAL ET AL., *supra* note 29, at 10–11 (quoting Paz Interview, *supra* note 29.

[31] *Senator Patrick Leahy*, http://leahy.senate.gov/issues_and_legislation/issues/issue/ (last visited Sept. 9, 2013).

[32] Limitation on Assistance to Security Forces, 22 U.S.C. § 2378d (2006).

[33] *Senator Patrick Leahy*, *supra* note 31.

[34] Limitation on Assistance to Security Forces, 22 U.S.C. § 2378d.

[35] *Id.*

[36] *Id.*

B. Application of the Leahy Amendment

The Leahy Amendment requires that the Secretary of State (SECSTATE) certify that the foreign units to be trained do not have a history of human rights violations.[37] Upon request, the appropriate embassy will vet the units for any reports or allegations of human rights violations.[38] While the Leahy Amendment, and subsequent guidance from the DoS, have failed to provide an exact definition of "unit," in practice, the smallest military unit or individual to be trained is submitted for vetting.[39]

The vetting process involves a background check, records search, and certification of individuals or units before approving of any training plan or funding.[40] The requesting agent submits a list of the individuals to be trained, which is checked through local and DoS databases for any allegations.[41] If the individual or unit is cleared, then training may commence. If not, training is prohibited. The requesting agent will notify the host nation with possible remedies, such as selecting a new unit, restricting training to individuals cleared in the vetting process, or withdrawing the request.[42]

For those nations with human rights violations, they must demonstrate that "all necessary corrective steps" have been taken to address outstanding allegations.[43] Unfortunately, the definition of this statutory term remains unclear. The DoS has simply avoided seeking or promulgating a clear definition of this term.[44] For the most part, DoS officials have denied training and assistance if there is credible evidence

---

[37] *Id.*
[38] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/NSAID–05–739, SOUTHEAST ASIA: BETTER HUMAN RIGHTS REVIEWS AND STRATEGIC PLANNING NEEDED FOR U.S. ASSISTANCE TO FOREIGN SECURITY FORCES 20 (July, 2005) [hereinafter SOUTHEAST ASIA] (describing the vetting process).
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] U.S. GOV'T SEC'Y OF STATE, REVISED GUIDANCE REGARDING LEAHY AMENDMENTS AND U.S. FOREIGN ASSISTANCE (July 14, 2006).
[44] *See* AMNESTY INT'L, MILITARY ASSISTANCE AND HUMAN RIGHTS: COLOMBIA, U.S. ACCOUNTABILITY, AND GLOBAL IMPLICATIONS (Fellowship of Reconciliation, U.S. Office of Colombia) 7 (July 2010) [hereinafter MILITARY ASSISTANCE AND HUMAN RIGHTS: COLUMBIA] (arguing for a clearer definition of all necessary corrective steps, and a stronger Leahy Amendment to further restrict U.S. foreign assistance).

of violations without regard to any measures taken by the host nation.[45] On the other hand, the Department of Defense (DoD) has continued to provide training by tailoring training events only to individuals and units that have passed the vetting process.[46]

C. Waivers of the Leahy Amendment

Included in the Leahy Amendment is a provision that allows for waiver of the training prohibition against a nation.[47] It states that "the Secretary of Defense (SECDEF), after consultation with the Secretary of State, may waive the prohibition in subsection (a) if he determines that such a waiver is required by extraordinary circumstances."[48] After granting a waiver, the SECDEF must report to Congress within fifteen days, specifying the extraordinary circumstances, the details of the approved training, the military units involved, and the information regarding human rights violations that necessitated the waiver.[49]

It is difficult to provide a detailed definition of when a situation constitutes "extraordinary circumstances." The Leahy Amendment only requires a determination of the need for a waiver and the notification of Congress, without providing further information regarding the basis.[50]

---

[45] SOUTHEAST ASIA, *supra* note 38, at 20.

[46] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/NSAID–99–173, MILITARY TRAINING: MANAGEMENT AND OVERSIGHT OF JOINT COMBINED EXCHANGE TRAINING 11 (Aug. 1999) [hereinafter MILITARY TRAINING] (finding that training to vetted units and individuals has continued under the DOS–approved vetting process).

[47] *See* Limitation on Assistance to Security Forces, 22 U.S.C. § 2378d (2006).

[48] *See id.*; MILITARY TRAINING, *supra* note 46, at 11 (providing overview of waiver process). *See also* Limitations on Assistance to Security Forces (The "Leahy Law"), *available at* http://ciponline.org/facts/leahy.htm (last visited Feb. 11, 2011) (detailing concerns with application of Leahy Amendment).

[49] *See* Limitation on Assistance to Security Forces, 22 U.S.C. § 2378d. (This Act requires that DOD provide the names and personnel of all military units, both U.S. and foreign, involved in the training.). *Id.*

[50] *See* National Interest Determination and Waiver of § 620(q) of the Foreign Assistance Act of 1961, as amended, Relating to Assistance to Honduras, 64 Fed. Reg. 60 (Mar. 30, 1999); National Interest Determination and Waiver of § 620(q) of the Foreign Assistance Act of 1961, as amended, Relating to Assistance to Ethiopia, 69 Fed. Reg. 199 (Oct. 15, 2004); National Interest Determination and Waiver of § 620(q) of the Foreign Assistance Act of 1961, as amended, Relating to Assistance to Egypt, 73 Fed. Reg. 55 (Mar. 20, 2008); and National Interest Determination and Waiver of § 620(q) of the Foreign Assistance Act of 1961, as amended, Relating to Assistance for the Independent States of the Former Soviet Union, 73 Fed. Reg. 72 (Apr. 14, 2008). The actual notice states:

Administrations have thus granted limited waivers based on "extraordinary circumstances," presumably based on the recommendations of the country team involved, emerging threat projections, intelligence, and the national security interests.[51] This uncertainty makes it difficult to ascertain what constitutes "extraordinary circumstances" because it is dependent on the national security view of a particular administration. This has, in turn, led to inconsistency between administrations and resulted in a limited approach to planning and conducting security force training.[52]

The current U.S. approach to granting waivers is insufficient. It requires forecasting threats well in advance of training to allow for adequate planning and training time with host nation forces. This type of combined training requires the building of relationships and trust at every level between U.S. and host nation forces.[53] In addition, training must be incremental, continuous, and long-term.[54] For example, training for an immediate threat, such as training with security forces immediately prior to a Mumbai-style attack,[55] would be inadequate; while long-term

---

> Pursuant to the authority vested in me by section 620(q) of the Foreign Assistance Act of 1961, as amended (FAA), and by Executive Order 12,163, as amended, I hereby determine that assistance to COUNTRY is in the national interest of the United States and thereby waive, with respect to that country, the application of section 620(q) of the FAA. This determination shall be reported to Congress and published in the Federal Register.

No further information is provided. *Id.*

[51] *Id.*

[52] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO–08–860, COMBATING TERRORISM: ACTIONS NEEDED TO ENHANCE IMPLEMENTATION OF TRANS–SAHARA COUNTERTERRORISM PARTNERSHIP 20–28 (July 2008); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO–10–962T, NATIONAL SECURITY: INTERAGENCY COLLABORATION PRACTICES AND CHALLENGES AT DOD'S SOUTHERN AND AFRICA COMMAND 10–21 (July 10, 2010) (finding interagency difficulties in planning). *See also* CONG. RESEARCH SERV., RL 34639, THE DEPARTMENT OF DEFENSE ROLE IN FOREIGN ASSISTANCE: BACKGROUND, MAJOR ISSUES, AND OPTIONS FOR CONGRESS 16–18 (Aug. 25, 2008) [hereinafter DOD ROLE].

[53] HEADQUARTERS, UNITED STATES ARMY, SECURITY FORCE ASSISTANCE, at v and 1–1 to 1–6 (May, 2009) [hereinafter SECURITY FORCE ASSISTANCE]. *See also* COMMANDER'S HANDBOOK FOR SECURITY FORCE ASSISTANCE, JOINT CENTER FOR INTERNATIONAL SECURITY FORCE ASSISTANCE 2–1 to 2–3 (July 14, 2008) [hereinafter COMMANDER'S HANDBOOK].

[54] SECURITY FORCE ASSISTANCE, *supra* note 53, at 2–1 to 2–3.

[55] K. ALAN KRONSTADT, CONG. RESEARCH SERV., RL40087, TERRORIST ATTACKS IN MUMBAI, INDIA, AND IMPLICATIONS FOR U.S. INTERESTS 1–6 (Dec. 19, 2008) (detailing Mumbai attacks). The nature of the attacks in India reflect long-term planning by the

perpetrators that may have been discovered with developed intelligence capabilities. The report summarizes the attack and response.

> At approximately 9:30 p.m. local time on the evening of November 26, 2008, a number of well trained militants came ashore from the Arabian Sea on small boats and attacked numerous high profile targets in Mumbai, India, with automatic weapons and explosives. By the time the episode ended some 62 hours later, about 174 people, including nine terrorists, had been killed and hundreds more injured. Among the multiple sites attacked in the peninsular city known as India's business and entertainment capital were two luxury hotels–the Taj Mahal Palace and the Oberoi– Trident–along with the main railway terminal, a Jewish cultural center, a café frequented by foreigners, a cinema house, and two hospitals.1 Six American citizens were among the 26 foreigners reported dead. Indian officials have concluded that the attackers numbered only ten, one of whom was captured. Some reports indicate that several other gunmen escaped.
>
> According to reports, the militants arrived in Mumbai from sea on dinghies launched from a larger ship offshore, then fanned out in southern Mumbai in groups of two or three. Each was carrying an assault rifle with 10–12 extra magazines of ammunition, a pistol, several hand grenades, and about 18 pounds of military–grade explosives. They also employed sophisticated technology including global positioning system handsets, satellite phones, Voice over Internet Protocol (VoIP) phone service, and high–resolution satellite photos of the targets. The attackers were said to have demonstrated a keen familiarity with the Taj hotel's layout in particular, suggesting that careful advanced planning had been undertaken.
>
> Home Minister Shivraj Patil (who resigned in the wake of the attacks) reportedly ordered India's elite National Security Guard commandos deployed 90 minutes after the attacks began, but the mobilized units did not arrive on the scene until the next morning, some ten hours after the initial shooting. The delay likely handed a tactical advantage to the militants. . . [T]he militants made no demands and had killed most of their hostages before being engaged by commandos on the morning of November 27. Two full days passed between the time of that engagement and the episode's conclusion when the two hotels were declared cleared of the several remaining gunmen. Along with domestic political recriminations, the Mumbai attack has fueled already existing concerns about India's counterterrorism policies and capabilities.

Id. at 14.

> Subsequent parliamentary investigations found serious weaknesses in the ability of Indian security forces to protect against such infiltration. Others worry that expanding anti–terrorism commando

training, such as with the Philippine National Police and the Armed Forces of the Philippines, is proving successful in combating threats from transnational terrorists, like the Abu Sayyaf Group.[56]

> forces will not resolve more fundamental problems within such forces, including what may be inadequate training and equipment.

Id.

> Washington and New Delhi have since 2004 been pursuing a "strategic partnership" based on shared values such as democracy, pluralism, and rule of law. One facet of the emerging [United States and India] partnership is greatly increased counterterrorism cooperation. The U.S. State Department's Country Reports on Terrorism 2007 identified India as being "among the world's most terror afflicted countries" and counted more than 2,300 Indian deaths due to terrorism in 2007 alone. . . Despite lingering problems, the scale of the threat posed by Islamist militants spurs observers to encourage more robust bilateral intelligence sharing and other official exchanges, including on maritime and cyber security, among many more potential issue–areas.

Id. at 17.

[56] Sumit Ganguly, *Lessons from Mumbai: Preventing Another Terrorist Attack*, NEWSWEEK, Oct. 29, 2009, *available at* http://www.thedailybeast.com/newsweek/2009/10/28/lessons-from-mumbai.html.

> [I]nstitutional changes do not do enough to address the terrorist threats India faces nationwide. Local police forces remain woefully underequipped in terms of forensic and investigative capabilities, electronic surveillance, and even adequate firepower. During the initial phase of the Mumbai crisis, police constables arrived on the scene armed with bolt–action, single–shot, World War II–vintage rifles. Tackling the menace of terror will require India's policymakers to fill these critical gaps on a war footing. The lethargic approach that the country has long taken to addressing critical issues of domestic security simply invites the possibility of yet another disaster.

Id. This type of attack requires long-term training to identify and respond to threats. *See also America's Forgotten Frontline: The Philippines*, NBC NEWS (Oct. 1, 2010), *available at* http://www.msnbc.msn.com/id/39444744/ (last visited Aug. 18, 2013) (detailing joint U.S.–Philippines counterterrorism training). In addition to training, U.S. forces are deployed to the Philippines under *Operation Enduring Freedom–Philippines* (*OEF–P*) to "advise and assist" the Armed Forces of the Philippines (AFP) and the Philippine National Police (PNP) in conducting ongoing counterterrorism missions. *Id.*

D. Impact on Military-to-Military Counter-Terrorism and Counter-Narcotics Training

The Leahy Amendment's restrictions have had a significant impact on military-to-military training. The DoD has continuously sought to train the security forces of nations that have been determined to be in the best interest of the national security of the United States.[57] The DoD routinely conducts SFA with host nation forces to enhance security force capabilities of designated nations.[58] Security Force Assistance consists of building partner capacity, supporting efforts to build partner legitimacy, and transitioning after conflict.[59] The term SFA is further defined as "the unified action to generate, employ, and sustain local host nation, or regional security forces in support of legitimate authority."[60] Under U.S. policy, security forces include military, police, border police, coast guard, paramilitary forces and other forces "that provide security

---

[57] DOD ROLE, *supra* note 52, at 11. *See also* Abraham M. Denmark with Rizal Sukma & Christine Parthemore, *Crafting a Strategic Vision: A New Era of U.S.–Indonesia Relations*, CTR. FOR NEW AM. SECURITY (June 2010), *available at* http://www.cnas.org/files/documents/publications/ (last visited Aug. 18, 2013) (stating that "[A] robust military–to–military relationship is . . . in the interests of both sides [U.S. and Indonesia]. For Jakarta, normal military relations . . . bring access to advanced military technologies as well as world–class professional military education and training. For the United States, improving Indonesia's military capabilities would allow it to play a more substantial role in its efforts to combat terrorism. . . .").

[58] *See generally* U.S. DEP'T OF DEF. AND DEP'T OF STATE, FOREIGN MILITARY TRAINING, FISCAL YEARS 2008 AND 2009, JOINT REPORT TO CONGRESS, VOL. 1 (2010) [hereinafter FOREIGN MILITARY TRAINING) (reporting detailed information on all U.S. Government training provided to foreign militaries).

[59] SECURITY FORCE ASSISTANCE, *supra* note 53, at v (defining elements of SFA). *See also* SHANNON D. BEEBE & MARY KALDOR, THE ULTIMATE WEAPON IS NO WEAPON: HUMAN SECURITY AND THE NEW RULES OF WAR AND PEACE 8–9 (2010) (arguing that security force assistance and reform is an essential part of human security). The authors define human security, which is significantly broader than physical security, as economic security, health security, environmental security, food security, personal security, community security, and political security. *Id.* at 8. The authors identify six principles of human security that should be part of security efforts. These principles are: the primacy of human rights, legitimate political authority, a bottom–up approach, effective multilateralism, regional focus, and clear civilian command. *Id.* at 9.

[60] SECURITY FORCE ASSISTANCE, *supra* note 53, at v (detailing purpose of SFA. The field manual states "the United States supports the internal defense and development of international partners, regardless of whether those partners are highly developed and stable or less developed and emerging."). *Id. See also* Harsch, *infra* note 146 (quoting U.N. Secretary-General Ban Ki-moon as stating "Security forces that are untrained, ill equipped,, mismanaged and irregularly paid are often part of the problem, and perpetrate serious violations of human rights.").

for a host nation and its relevant population."[61] Several other programs will often complement SFA, including security cooperation, foreign military sales, foreign military financing program, foreign internal defense, and international military education and training.[62] All of these programs are subject to the restrictions of the Leahy Amendment.[63]

Several nations, including Bangladesh and Indonesia, are combating Islamic militants and other transnational threats, but their primary counter-terrorism forces are Leahy-prohibited and therefore prohibited from receiving SFA.[64] Based on previous human rights allegations, sometimes decades-old, numerous countries have been prohibited from receiving valuable counter-narcotics and counter-terrorism training.[65] For example, in Indonesia, the Komando Pasukan Khusus (KOPASSUS), Indonesia's elite security force, is restricted from receiving training.[66] Numerous members of the KOPASSUS were involved in human rights violations during operations in East Timor.[67] Currently, the Obama Administration is advancing requests for support to Indonesian security forces on the basis of a waiver due to the growing militant threat within Indonesia.[68]

---

[61] SECURITY FORCE ASSISTANCE, *supra* note 53, at v. *But see* BEEBE & KALDOR, *supra* note 59, at 181 ("The West should support a shift in training and manning philosophies away from creating defense forces aimed at armed threats to a . . . model oriented around combating the conditions of instability and hindrances to development.").

[62] *Id.* at 1–2 to 1–4.

[63] SECURITY FORCE ASSISTANCE, *supra* note 53, at B–3 to B–6.

[64] COUNTRY REPORTS, *supra* note 4, at 208–12 (providing annual congressional report on terrorism). *See also* Denmark, *supra* note 57, and VAUGHN ET AL., *supra* note 2, at 45.

[65] *See* ANGEL RABASA & JOHN HASEMAN, THE MILITARY AND DEMOCRACY IN INDONESIA: CHALLENGES, POLITICS AND POWER 139–141 (Dec. 2, 2002). *See generally* MARCUS MIETZNER, THE POLITICS OF MILITARY REFORM IN POST–SUHARTO INDONESIA: ELITE CONFLICT, NATIONALISM, AND INSTITUTIONAL RESISTANCE 45 (July 3, 2006); COUNTRY REPORTS, *supra* note 4, at 208–12; and Denmark, *supra* note 57.

[66] Denmark, *supra* note 57, at 14–15.

[67] *Id.* (stating that Indonesian special forces unit Komando Pasukan Khusus (KOPASSUS) was "a key force in the 1975 invasion of East Timor and participated in the surge of violence in 1999 as East Timor voted for independence").

[68] *See, e.g.*, *U.S. Resumes Military Relations with Indonesian Special Forces*, WALL ST. J. (July 22, 2010) (stating that "U.S. officials said they are restoring relations with Indonesia's military special forces after a decade–long freeze over alleged human-rights abuses, brushing aside a dispute that has poisoned relations between the two countries for years."); *U.S.–Indonesia Military Relations Uncertain Ahead of Obama Visit*, REUTERS (Mar. 16, 2010) (The Obama administration "has been preparing the way to resume training an elite Indonesian military unit as part of growing counter-insurgency and intelligence cooperation with Jakarta."); Denmark, *supra* note 57, at 17 (stating that the Obama administration "offered . . . support for [the] comprehensive partnership [between

Granting waivers is an important tool to provide flexibility to the President and the Secretaries of Defense and State to address critical national security needs.[69] However, the United States stands committed to addressing human rights violations with our training partners. As such, the U.S. Government rarely grants waivers, but focuses on providing non-lethal training and assistance to host nations to address outstanding allegations.[70] This assistance can involve human rights exchanges, advice, and support to host nation governments while they continue to address their human rights records.[71]

According to Senator Leahy, a nation must demonstrate that all "necessary steps" have been taken and that "offenders are brought to justice."[72] However, in many developing nations, this process can prove problematic. Frequently, the Rule of Law is a relatively new concept and there is a complete absence of true justice in any form in the host nation.[73] These societies may be complicit with the government's use of power in the interest of security. Their justice systems may be corrupt, compromised, inadequate, or ineffective. They may lack the capability to investigate and prosecute incidents. Without the Rule of Law, as evidenced by an absence of a valid justice system, it would be difficult for a nation to satisfy the requirements of the Leahy Amendment.

III. The Modern Rule of Law Approach

The Rule of Law has been an effective means of ensuring democratic reforms, improving access to the judicial system, and protecting basic

---

the U.S. and Indonesia] based on environmental, economic, social and security issues"). *But see* Victoria Garcia & Rachel Stohl, *U.S. Foreign Military Training: A Shift in Focus* (Terrorism Project), CTR. FOR DEF. INFO. 10 (Apr. 8, 2002) (arguing that terrorism has existed prior to 9/11 and that military training can cause long-term strategic problems).

[69] *See generally supra* note 50 and accompanying text. For the previous decade, there have only been five waivers, for the Congo, Egypt, Ethiopia, former Soviet Union, and Honduras. In addition, there was also a waiver of country conditions placed on aid to Colombia. *Id.*

[70] *See generally* DOD ROLE, *supra* note 52 (detailing all types of DOD assistance, including humanitarian and disaster relief and assistance); FOREIGN MILITARY TRAINING, *supra* note 57.

[71] *Id.*

[72] *Senator Patrick Leahy*, *supra* note 31.

[73] WEIGHING, *infra* note 79.

human rights.[74] The Rule of Law concept focuses on ensuring that societies have fair, impartial, respected, and transparent systems for creating, implementing, and enforcing laws that have been duly enacted by a recognized authority.[75] Ultimately, the Rule of Law provides the basic foundation for democratic and economic reform.[76]

The U.S. and coalition partners have made Rule of Law the primary focus of effort in Afghanistan and Iraq.[77] Significant effort has been made on the transition to democratic governance, including judicial reform, legislative assistance, training, and security sector reform.[78] Despite its "new" importance, Rule of Law efforts have existed outside of traditional post-conflict operations.[79] While much-needed in Iraq and Afghanistan, other nations have benefitted, or could benefit, from Rule of Law efforts.[80]

---

[74] The Secretary-General, *Report of the Secretary–General: The Rule of Law and Transitional Justice in Conflict and Post–Conflict Societies*, ¶ 5, U.N. Doc. S/2004/616, at 4 (Aug. 23, 2004).

[75] *Id.*

[76] *Id.*. *See also* CONG. RESEARCH SERV., R 41484, AFGHANISTAN: U.S. RULE OF LAW AND JUSTICE SECTOR ASSISTANCE 3 (Nov. 9, 2010) [hereinafter AFGHANISTAN]

> ROL is often understood to be a foundational element for the establishment and maintenance of democracy and economic growth, and the vehicle through which fundamental political, social, and economic rights are protected and enforced. The concept assumes the existence of effective and legitimate institutions, primarily a country's national government, to administer the law as well as to guarantee personal security and public order.

Id.

[77] *Id.* at 4–5; U.S. DEPT' OF STATE OFFICE OF THE INSPECTOR GENERAL, REPORT OF INSPECTION: RULE OF LAW PROGRAMS IN AFGHANISTAN, REPORT NUMBER ISP–I–08–09, at 1–2 (Jan. 2008); MEASURING STABILITY AND SECURITY IN IRAQ, REPORT TO CONGRESS 7–9 (Nov. 2006) [MEASURING STABILITY] (detailing progress and limitations in security and stability operations in Iraq); ESTABLISHING JUSTICE AND THE RULE OF LAW IN IRAQ: A BLUEPRINT FOR ACTION, U.S. INSTITUTE OF PEACE 1, 7–10 (May 21, 2003).

[78] U.S. DEP'T OF ARMY, RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES 18 (2010) [hereinafter RULE OF LAW HANDBOOK].

[79] UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT (USAID) WEIGHING IN ON THE SCALES OF JUSTICE (Feb. 1994) [hereinafter WEIGHING] (detailing early Rule of Law efforts).

[80] *Id.* (detailing early Rule of Law efforts). *See generally* OFFICE OF DEMOCRACY AND GOVERNANCE, BUREAU FOR DEMOCRACY, CONFLICT, AND HUMANITARIAN ASSISTANCE, U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT (USAID), ACHIEVEMENTS IN BUILDING AND MAINTAINING THE RULE OF LAW: MSI'S STUDIES IN LAC, E&E, AFR, AND ANE 47–50 (Nov. 2002) [hereinafter ACHIEVEMENTS]; *see generally* VAUGHN ET AL., *supra* note 3

A. The Rule of Law Defined

There are varying definitions of the Rule of Law. Nations, international agencies and organizations have adopted their own definitions.[81] The concept of the Rule of Law continues to evolve. The most common view is that Rule of Law includes the following: properly enacted laws, fairness of legal process, transparency and stability of law, legal equality and access, predictability, and supremacy of law for the state and individuals in the disposition of legal disputes.[82]

The United Nations (UN) defines Rule of Law as follows:

> The Rule of Law . . . refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.[83]

This definition is aspirational. It does not provide a means for ensuring Rule of Law compliance, or measures for its successful application. This definition also fails to provide any guidance on the types of laws to be enacted or the means for its promulgation. The United States has added a "means and measures" element to its Rule of Law definition in order to address some of these concerns.[84]

In addition to the UN definition, the United States includes the following:

> It [Rule of Law] also requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decision making, and legal certainty. Such measures also

---

(detailing the spread of terrorist organizations, such as Jemaah Islamiyah, Lashkar–e–Taiba and Al Qaeda in Pakistan, Indonesia, and other Southeast Asian nations).

[81] SAMUEL L. BUFFORD, *Defining the Rule of Law*, JUDGES' J., Fall 2007, at 9.

[82] *Id.*

[83] The Secretary–General, *Report of the Secretary–General: The Rule of Law and Transitional Justice in Conflict and Post–Conflict Societies*, ¶ 5, U.N. Doc. S/2004/616, at 4 (Aug. 23, 2004).

[84] RULE OF LAW HANDBOOK, *supra* note 78, at 11.

> help to avoid arbitrariness as well as promote procedural and legal transparency.[85]

The U.S. approach focuses on the advancement of human rights principles and justice in compliance with international standards. These principles are difficult to categorize. Some may simply require systemic or procedural changes, while others may require broader societal changes.[86] In addition, nations may have different definitions of the fundamental elements of a society based on the Rule of Law.[87] This is why Rule of Law efforts require sustained action to implement changes necessary to the furtherance of democratic ideals.

The Rule of Law is an "incremental endeavor."[88] Success in the Rule of Law takes time and cannot be easily quantified.[89] Success is based on the advancement of the stated principles, not on the achievement of one at the expense of others. Nations will have varying degrees of success in satisfying these principles.[90] This can make the definition of the fundamental attributes of the Rule of Law, its attainment, and "successful" efforts difficult to articulate and measure.

In response to these issues, the United States uses an effects-based approach to measure progress of the Rule of Law.[91] The effects are helpful for planning Rule of Law efforts, as well as for monitoring progress on societal reforms. The effects correlate to the principles contained in the U.S. Government view of the Rule of Law. The seven effects are:

1. The state monopolizes the use of force in the resolution of disputes
2. Individuals are secure in their persons and property

---

[85] U.S. DEP'T OF ARMY, FIELD MANUAL 3–07, STABILITY OPERATIONS 1–9 (6 Oct. 2008) [hereinafter STABILITY OPERATIONS].
[86] RULE OF LAW HANDBOOK, *supra* note 78, at 93–125 (detailing the systemic and societal structures that may be part of a Rule of Law effort).
[87] BUFFORD, *supra* note 81, at 10 (stating "it is important to recognize that the Rule of Law is not an international or apolitical matrix that can be imposed on a particular culture in a particular country"). *Id.*
[88] JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 309 (2007).
[89] STABILITY OPERATIONS, *supra* note 85, at 1–9.
[90] *Id.*
[91] *Id.*

3. The state is itself bound by law and does not act arbitrarily
4. The law can be readily determined and is stable enough to allow individuals to plan their affairs
5. Individuals have meaningful access to an effective and impartial legal system
6. The state protects basic human rights and fundamental freedoms
7. Individuals rely on the existence of legal institutions and the content of law in the conduct of their daily lives.[92]

These effects are difficult to define and equally difficult to attain.[93] Progress in the Rule of Law will take many shapes. Nations will make progress on these effects at different times and rates.[94] In addition, some nations will make progress along all of the elements; while others will make progress on some while having little or no progress on others.[95] The ultimate success of a Rule of Law program depends on forward progress toward the Rule of Law, while taking societal factors into consideration.[96]

B. Rule of Law and Security Sector Reform

The Rule of Law takes many forms. There is no "cookie-cutter" Rule of Law program that can be applied in all cases.[97] A country's unique societal attributes and limitations will factor into how the Rule of Law is developed and evolves to meet the changing needs of the populace.[98] The Rule of Law approach requires an analysis of the nation's existing judicial and law enforcement elements, as well as the laws being instituted and enforced.[99] Despite the approach used in a particular

---

[92] *Id.*
[93] RULE OF LAW HANDBOOK, *supra* note 78, at 11–12.
[94] *Id.* at 11–12.
[95] *Id.* at 12.
[96] *See* U.S. AGENCY FOR INT'L DEV. (USAID) GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK: A GUIDE FOR USAID DEMOCRACY AND GOVERNANCE OFFICERS 38 (Jan. 2010) [hereinafter COUNTRY ANALYSIS].
[97] *See* BUFFORD, *supra* note 81, at 10.
[98] *Id.*
[99] COUNTRY ANALYSIS, *supra* note 96, at 38; and WEIGHING, *supra* note 78 (detailing early Rule of Law efforts).

nation, the Rule of Law remains essential to ensuring basic human rights in all societies, whether at peace, conflict or post-conflict.

Similar to SFA, DoS undertakes Security Sector Reform (SSR) to address deficiencies in the Rule of Law in developing nations.[100] Security Sector Reform "is the set of policies, plans, programs, and activities that a government undertakes to improve the way it provides safety, security, and justice."[101] This involves efforts to establish or improve bureaucracies, organizations, and structures that support the maintenance of civil society.[102] Security Sector Reform efforts can include drafting legislative and administrative policies, planning and supporting law enforcement and corrections, developing civilian oversight agencies, and reforming judicial systems.[103]

Security Sector Reform complements DoD efforts in improving security force capabilities. Both programs aim to provide effective and legitimate governmental agencies that are "transparent, accountable to civil authority, and responsive to the needs of the public."[104] However, DoS efforts are much broader than DoD efforts.[105] Department of State personnel can engage security elements, including military and paramilitary forces involved in the security sector.[106] The DoD is limited to recognized security forces.[107] But, as demonstrated below, a concerted effort—involving DoS *and* DoD is essential to establishing the Rule of Law while developing professional, accountable security forces.

---

[100] UNITED STATES AGENCY FOR INT'L DEV., UNITED STATES DEPARTMENT OF DEFENSE, AND UNITED STATES DEPARTMENT OF STATE, SECURITY SECTOR REFORM 1–6 to 1–8 (Feb. 2009) [hereinafter SECURITY SECTOR REFORM]; Sarah Meharg & Aleisha Arnusch, *Security Sector Reform: A Case Study to Transition and Capacity Building* (U.S. Army Strategic Stud. Inst.) (Jan. 2010).
[101] *Id.* at 1–7.
[102] *Id.*
[103] *Id.*
[104] SECURITY FORCE ASSISTANCE, *supra* note 53, at 1–1 to 1–10; and SECURITY SECTOR REFORM, *supra* note 100, at 1–6.
[105] *Compare* SECURITY FORCE ASSISTANCE, *supra* note 53, at B–1 to B–6 & 2–1 to 2–12 (detailing the tasks and authorities of DOD to conduct assistance to military forces), *with* SECURITY SECTOR REFORM, *supra* note 100, at 1–1 to 1–6 (providing an inclusive list of DOS activities in Rule of Law and Security Sector and judicial reform).
[106] SECURITY FORCE ASSISTANCE, *supra* note 53, at B–1 to B–6 (detailing legal limitations on DOD operations, including fiscal restraints, such as the Leahy Amendment, and policy restraints on the use of DOD personnel for DOS functions).
[107] *Id.*

C. Current Approaches in Afghanistan and Iraq

The Rule of Law has been a critical element in stabilization efforts in Afghanistan and Iraq.[108] Current operations in those countries focus on developing the Rule of Law, establishing governmental structures, (such as the judiciary, the police, security forces, and the military), training, and working toward a stable government that can meet the needs of the populace while ensuring basic human rights.[109] These operations involve joint, interagency, and coalition partners with differing definitions of the Rule of Law and differing views of "successful" achievement of the Rule of Law.[110]

Despite the size and complexity of the Rule of Law effort, these operations highlight the need to incorporate societal norms, values, and judgment into Rule of Law efforts. The United States has specifically tailored its efforts to implement a Rule of Law that is societally-acceptable and sustainable by the host nation.[111] The ongoing effort has incorporated existing legal and quasi-legal systems into the effort.[112] For example, the tribal-focused Rule of Law effort in Afghanistan is unique to the culture and traditions of the Afghan people.[113] By contrast, in Iraq, there was an established (although corrupt), legal system before to the 2003 invasion.[114] The Iraqi people were familiar with the Iraqi legal

---

[108] AFGHANISTAN, *supra* note 76, at 4–5. *See also* MEASURING STABILITY, *supra* note 77, at 7–9 (detailing progress and limitations in security and stability operations in Iraq).
[109] RULE OF LAW HANDBOOK, *supra* note 78, at 93–125 (detailing elements of society that can be involved in a Rule of Law effort).
[110] *Id.* at 25–78.
[111] *Id.* at 12.

> Every society will satisfy the list of factors more or less completely, and what one person thinks satisfies one factor another person may not. Societies can abide by the rule of law to different degrees according to geography (the rule of law may be stronger in some places than others), subject matter (the rule of law may apply more completely with regard to some laws than others), institutions (some may be more efficient or corrupt than others), and subjects (some individuals may have greater access to the rule of law than others).

[112] *See* AFGHANISTAN, *supra* note 76, at 7–15. *See also* MEASURING STABILITY, *supra* note 77, at 7–9.
[113] AFGHANISTAN, *supra* note 76, at 60.
[114] *See* MEASURING STABILITY, *supra* note 77, at 7 (detailing limitations of Iraqi legal systems).

system and its shortcomings and were generally supportive of Rule of Law efforts designed to improve its fairness and transparency.[115]

It is important to note that Congress has specifically authorized the security forces of Iraq and Afghanistan to receive funding without Leahy Amendment restrictions.[116] With input from the Bush Administration and the DoD, Congress determined that the necessity for trained security forces in these countries warranted an exemption from the requirements of the Leahy Amendment. These forces are considered "new" with new structure, personnel, and governance. With the establishment of new democratically elected governments, prior regime crimes, including previous human rights violations and atrocities, are being investigated and adjudicated. As such, these security forces do not have the "history" of other Leahy-prohibited forces, such as Colombia, Bangladesh, and Indonesia, regarding human rights.[117]

D. Prior Rule of Law Engagements

The Rule of Law is frequently deficient or absent in some developing nations, yet it is still essential for ensuring adherence to international human rights.[118] The Rule of Law is also noticeably deficient in countries that are Leahy-prohibited, such as Indonesia or Bangladesh, or those that otherwise have histories of human rights violations or political repression.[119] In Leahy-prohibited nations, there are common deficiencies in the legal systems, including limited investigatory capacity, lack of legal resources and funding, poor oversight, political stagnation, legislative deficiencies, and limited prosecutorial ability.[120] By making noticeable advancements in these areas through a sustained Rule of Law effort, these nations can make significant progress on the successful investigation and prosecution of human rights violations.

---

[115] *Id.*
[116] 2010 National Defense Authorization Act, Pub. L. No. 110–181, § 1501–12, 122 Stat. 368 (Afghanistan Security Forces Fund and Iraq Security Forces Fund).
[117] *See generally* Parts III.D.1.–2, III.E., IV.
[118] COMMANDER'S HANDBOOK, *supra* note 53, at 20. Many rule of law operations will take place as components of stability operations, helping to establish (or reestablish) the host nation's capacity to maintain the rule of law.
[119] ACHIEVEMENTS, *supra* note 80, at 47–50.
[120] *Id.* at 47.

Despite its new relevance, there is a long history of U.S. Rule of Law efforts in the past century-and-a half.[121] In places such as Colombia and El Salvador, Rule of Law efforts have shown positive results in improving basic human rights compliance and improved legal remedies for victims of government abuse.[122] These efforts provide valuable insights on applying Rule of Law programs to Leahy-prohibited nations in contemporary times and will be explored in the subsections below.

1. Colombia

In the late twentieth century, Colombia struggled with drug and politically -motivated violence, corruption, and government inaction.[123] The Colombian government is battling left-wing insurgents and drug cartels. There are large parts of the nation that are practically ungoverned. Columbian security forces were under-trained, ill-equipped, and under constant threats from insurgents and cartels. In addition, individuals and groups have alleged numerous human rights violations, including coercion, kidnappings, and threats and intimidation of the Colombian people.[124]

Recognizing that the Colombian legal system was inadequate to meet the needs of the Colombian people, the United States Agency for International Development (USAID) began Rule of Law efforts in 1986.[125] The primary focus was on justice reform, increasing judicial access, improving the public defender's office, and building relationships between the respective branches of government.[126] Initially, the Columbian government, with USAID help, made great strides toward judicial reform and the Rule of Law. However, efforts tended to stall in subsequent years.[127] With the passage of Plan Colombia, a U.S.-funded initiative to increase security and stability in Colombia, USAID efforts increased with visible improvements at the local and national levels.[128]

---

[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.* at 51.

This has led to the international community recognizing that the Colombian government is working to address human rights concerns.[129]

Under Plan Colombia, and the approved Country-Specific Conditions, DoS/DoD approved an "exceptional circumstances" waiver to allow training.[130] Since the implimentation of Plan Colombia, the Columbian government addressed numerous allegations of human rights violations.[131] The government began to properly investigate and prosecute human rights violations against its own military and police forces.[132] The Columbian government implemented all necessary corrective measures and those suspected of violations were brought to justice.[133] These steps allowed the United States to resume training and funding Colombian security forces, without the need for a waiver.

2. El Salvador

In 1983, following a twelve-year civil war, El Salvador held elections and drafted a new constitution.[134] This constitution focused on ensuring basic human rights and judicial independence.[135] The following year, the U.S. Government began operations to assist the new El Salvadoran government in establishing the Rule of Law.[136] For the next decade, U.S. efforts focused on the following improvements: supporting legal reform, modernization, and enhancement of legal institutions; creating investigative capabilities; increasing judicial freedom and independence; improving judicial procedure and structure; demilitarizing the police; and conducting public education and outreach.[137]

---

[129] *Id. But see supra* note 44, at 7 (arguing that Colombia still has outstanding human rights violations that need to be addressed).
[130] ACHIEVEMENTS, *supra* note 80, at 51.
[131] *Id. But see* MILITARY ASSISTANCE & HUMAN RIGHTS: COLUMBIA, *supra* note 44, at 7 (finding that Colombia security forces continue to have human rights issues), and AMNESTY INT'L, ASSISTING UNITES THAT COMMIT EXTRAJUDICIAL KILLINGS: A CALL TO INVESTIGATE U.S. MILITARY POLICY TOWARD COLOMBIA 4–8 (Fellowship of Reconciliation, U.S. Office of Colombia) (Apr. 9, 2008).
[132] ACHIEVEMENTS, *supra* note 80, at 51.
[133] *Id.*
[134] *Id.* at 65.
[135] *Id.*
[136] *Id.*
[137] *Id.* at 65–68.

These efforts increased the credibility of the Salvadoran judicial system and the executive branch.[138] The government now held officials responsible, both politically and legally, for their actions. The government reformed its investigative procedures, disbanded a military-linked investigative commission, and increased police training and accountability.[139] The government implemented measures to ensure greater transparency involving investigations into police and military misconduct, which resulted in higher popular support for these entities.[140] The government routinely investigated and prosecuted allegations of misconduct, and U.S. training resumed.[141]

E. Areas in Need

Throughout the developing world, many nations are struggling to establish or maintain the Rule of Law while confronting histories of authoritative rule.[142] Civil disruption, social disintegration, and lawlessness have destabilized these countries and undermined security and reform efforts.[143] As a result, nations have often initially empowered their security forces with broad authority to enforce laws and maintain order.[144] In many cases, this has been to the detriment of their citizens'

---

[138] *Id.* at 69.
[139] *Id.* at 51.
[140] *Id.*
[141] *Id.*
[142] Getacchew Teklemariam, *Project Management in Africa: Failed States, Terrorism and Bad Governance, Regional Report—Ethiopia*, PM FORUM 1 (Feb. 2010) (finding that "most of the nations of the continent [Africa] are extremely poor, devastated by unjustifiable wars, ravaged by corruption and lack of good governance, failing to meet basic needs for their citizens, and governed by authoritarian dictators").
[143] Zachary Devlin–Foltz, *Africa's Fragile States: Empowering Extremists, Exporting Terrorism, Africa Security Brief*, AFRICA CTR. FOR STRATEGIC STUD. 4 (Aug. 2010) (detailing nations, such as Nigeria and Somalia, with a "security vacuum" that has existed since the "complete collapse" of the Somali state, and arguing that a "multisectoral approach," including, but not limited to security improvements could stabilize failed or failing states.); Teklemariam, *supra* note 142, at 4 (describing the "enormous" need for reform. The author states "the demand for economic and social infrastructures, which are essential for poverty reduction, economic growth, human capital development . . . and good governance, is enormous). *Id.* at 4; BEEBE & KALDOR , *supra* note 59, at 4 (stating that African security requires: "reform of the security sector, including law-and-order reform, police reform, judicial reform, penal-code and penal-system reform, and the transformation of standing military forces into a value-added instrument for social development").
[144] Peter S. Moore, *Taming the Wounded Lion: Transforming Security Forces in West Africa*, INT'L DEV. RES. CENTRE 1 (Dec. 2010) (detailing interaction between new civilian

human rights.[145] In Africa, many countries, including Ethiopia, Nigeria, and the Democratic Republic of the Congo, are implementing democratic reforms while transitioning from more repressive regimes.[146] Their security forces have documented histories of human rights violations.[147] Similarly, in Asia, Bangladesh, and Cambodia, governments are emerging from decades of civil strife compounded by numerous allegations of repression and human rights violations.[148]

Similar to Columbia and El Salvador in the 1990s, economic and other factors are forcing developing nations to devote limited resources to their security needs and "increasing [its] military capacity as opposed to implementing a progressive social policy."[149] Paradoxically, they are making the choice between security and human rights, when a Rule of Law effort would demonstrate that they do not have to sacrifice the one to protect the other.[150] In fact, these nations will improve security, obtain much needed international training and support, and deny terrorists the chance to exploit the victimized populace by maintaining the Rule of Law and addressing human rights allegations.

While a Rule of Law assessment and engagement strategy can address a host nation's shortcomings, implement societal Rule of Law improvements, and recommend courses of action for future efforts, many Leahy-prohibited nations lack the capability to make these changes by

---

democratic officials and military and security forces). However, the author recognizes that "civilians who have lived in repressive societies often fear the security forces." *Id.*

[145] U.S. DEP'T OF STATE, SUPPORTING HUMAN RIGHTS AND DEMOCRACY, THE U.S. RECORD 2006, at 20–23, 28 & 47 (2006) [hereinafter U.S. RECORD] (detailing human rights records and histories of African nations).

[146] *Id.*; Ernest Harsch, *Reforming Africa's Security Forces: For Armies and Police That Protect Citizens, Not Abuse Them*, AFRICA RENEWAL, vol. 23, at 6 (Apr. 2009) (The article highlights ongoing efforts to reform security forces. The author states, "From South Africa to Burundi and Cote d'Ivoire, a number of other countries in Africa are also seeking to restructure and professionalize their armies, police and intelligence services. The process is fraught with difficulties, but is increasingly seen as vital for the continent's long–term peace and stability. . . . The momentum for such reform is growing as more countries seek to consolidate democracies or rebuild after debilitating wars.").

[147] *Id.*

[148] U.S. RECORD, *supra* note 145.

[149] CTR. FOR STRATEGIC AND INT'L STUD., INTEGRATING 21ST CENTURY DEVELOPMENT AND SECURITY ASSISTANCE, FINAL REPORT OF THE TASK FORCE ON NONTRADITIONAL SECURITY ASSISTANCE 17 (Jan. 2008) [hereinafter INTEGRATING 21ST CENTURY DEVELOPMENT].

[150] *Id.* at 15.

themselves; they require assistance.[151] As demonstrated below, a concerted Rule of Law effort can provide a valuable roadmap for the DoS and DoD and other agencies to provide this assistance, thereby advancing the Rule of Law, meeting the Leahy Amendment's "necessary corrective measures" requirements, and allowing host nations to satisfy international human rights standards.

IV. The Bangladesh Rapid Action Battalion Engagement

The National Security Strategy and the National Counter-Terrorism Strategy recognized the need to engage developing nations, such as Bangladesh, that were combating Islamic terrorists.[152] In response, DoS and DoD developed an approach to implement a Rule of Law program to address human rights allegations.[153] The initial plan, endorsed by Senator Leahy, called for an engagement strategy that would identify a means of providing training to the Bangladesh RAB while supporting the Rule of Law and human rights.[154] This model approach can serve as a template for other efforts to advance human rights, improve the Rule of Law, meet U.S. interests, and satisfy the requirements of the Leahy Amendment.

A. The Rapid Action Battalion

Following a period of political upheaval and instability, the Bangladesh government enacted the Armed Police Battalions Act of 1979, as amended in 2003, and the Armed Police Ordinance, which established the RAB.[155] Pursuant to the Armed Police Ordinance, the RAB's primary duties include the following: provide internal security;

---

[151] *See generally* ACHIEVEMENTS, *supra* note 80 (highlighting persistent shortfalls in the Rule of Law).

[152] *See generally* NAT'L SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002); NAT'L SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006); NAT'L SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2010); DENNIS BLAIR, ANNUAL THREAT ASSESSMENT OF THE INTELLIGENCE COMMUNITY FOR THE SENATE ARMED SERVICE COMMITTEE 3–8 (Mar. 10, 2009).

[153] *See* OFFICE OF THE COMMAND HISTORIAN, SOCPAC COMMAND HISTORY, FISCAL YEAR 2009, at 22 (2009) [hereinafter COMMAND HISTORY] (on file with SOCPAC Command Historian).

[154] *Id.*

[155] *See* Armed Police Battalions Ordinance 1979, art. 6 (Bangl.), *available at* http://www.askbd.org/RAB/Law_4.pdf (last visited Sept. 9, 2013).

conduct intelligence and investigations into criminal activity; recover illegal arms; arrest criminals and members of armed gangs; assist other law enforcement agencies; and investigate any offenses as ordered by the government.[156] In June 2004, the RAB began operations.[157]

The RAB, clad in all black clothes, black sunglasses, and black bandanas, police Dhaka's crime-riddled neighborhoods and present an imposing symbol of the seriousness of the Bangladeshi government's "war on crime."[158] Empowered to address the growing threat of criminal organizations, the RAB initially thrived on the fear and intimidation that followed in their wake.[159] The immediate impact of the RAB is without dispute: crime rates fell dramatically; counter-smuggling and counter-terrorism efforts were well-received by the general populace; and there was public support for RAB activities.[160] But these successes did not come without concern. Several human rights groups filed allegations of human rights violations concerning the deaths and torture of criminals and civilians.[161]

1. Structure of the RAB

The name "Rapid Action Battalion" is a misnomer; there are actually twelve RABs throughout Bangladesh.[162] Each battalion is divided into operational companies. At the department level, there is also a headquarters element. The RAB Headquarters is divided into four wings: operations, administration, legal and media, and intelligence.[163]

---

[156] *Id.* (stating that the RAB is frequently tasked with investigating high profile cases).
[157] *Id.*
[158] *See* RAPID ACTION BATTALION, *supra* note 8; *see also* Sufian, *supra* note 8.
[159] Maher Sattar, *Dhaka's "Death Squad" Shoots for a Makeover*, GLOBAL POST.COM, *available at* http://www.globalpost.com/dispatch/news/regions/asia- pacific/120128/ bangladesh-dhaka-death-squad-RAB-rapid-action-battalion-FBI-terrorist (last visited Aug. 23, 2013).
[160] JUDGE, *supra* note 10, at 19–20.
[161] *See* AMNESTY INT'L, BANGLADESH: DEATH IN CUSTODY AND REPORTS OF TORTURE 1–4 (May 10, 2007). *See also* TORTURE IN BANGLADESH 1971–2004: MAKING INTERNATIONAL COMMITMENTS A REALITY AND PROVIDING JUSTICE AND REPARATIONS TO VICTIMS 16 (2004), *available at* http://www.univie.ac.at/bimtor/dateien/bangladesh_redress_2004_ report_tortureinbangladesh.pdf (last visited Sept. 9, 2013); Roland Buerk, *Bangladesh's Feared Elite Police*, BBC NEWS, DHAKA (Dec. 13, 2005), *available at* http://news.bbc.co.uk/2/hi/south_asia/4522734.stm (last visited Jan. 20, 2011).
[162] *See* RAPID ACTION BATTALION, *supra* note 8.
[163] *Id*. Of note, there is only one person with legal training within the Legal and Media Wing. The director has one semester of legal training. *Id.*

The operations wing focuses on conducting interdiction, apprehension and direct action against suspected criminal and terrorist elements.[164] The administrations wing focuses on finance, personnel, and training.[165] The legal and media wing deals with public affairs, media interaction, and news releases (favorable to the RAB), and limited legal issues.[166] The intelligence wing is tasked with investigating criminal activity, to include interrogation operations, human intelligence exploitation, and technological exploitation.[167]

The RAB is comprised of personnel from the military branches and law enforcement.[168] The personnel remain under the administrative control of their parent organizations while they are assigned to the RAB.[169] The RAB maintains day-to-day control over all personnel assigned, including training, tasking, and routine discipline.[170] There is significant turnover within the RAB since the average length of assignment is two to three years.[171]

2. Allegations of Human Rights Violations

Since the founding of the RAB, there have been numerous allegations of human rights violations against its members, ranging from unlawful detention, coerced interrogation, physical abuse, to rape and murder.[172] Rapid Action Battalion officials routinely describe deaths of criminals as being the result of law enforcement "encounters" or "crossfires."[173] These reportedly occur when RAB personnel escort a detained person to recover weapons or to identify a criminal location and the detainee dies when a "shootout" or "encounter" occurs between RAB forces and the detainee's fellow criminals.[174] This explanation is so commonplace that the term "crossfire" has become shorthand within Bangladeshi culture

---

[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *See id.*. However, many of the intelligence functions and activities are frequently conducted by RAB team members on sight. This has led to misuse of force and abuse allegations. *Id*.
[168] *Id.*
[169] *Id.*
[170] COMMAND HISTORY, *supra* note 153, at 23.
[171] *Id.*
[172] JUDGE, *supra* note 10, at 19–20.
[173] *Id.*
[174] *Id.*

for death while in custody "helping" the RAB with their investigation.[175] By some accounts, there have been over 1200 crossfire deaths since 2004.[176]

For example, in 2004, RAB forces in Dhaka arrested three men for criminal activity and took them to the RAB Headquarters. One of the men, named Pichchi Hannan, was wounded. After six weeks in custody, Hannan was reported to have died in "crossfire." Rapid Action Battalion officials maintained that Hannan had provided information on a meeting of suspected criminals and had agreed to go with RAB forces to assist them in identifying the specific location. Upon arrival, the criminals began to "shoot away" and Hannan was killed. No RAB members were injured in the exchange.[177]

In another example in 2005, Mahimuddin Mohim, a businessman and leader of the opposition party's student wing was arrested on suspicion of criminal activity. Again, while in custody, Mohim provided information and was taken to an area to assist in searching for illegal weapons. While at the location, his "fellow criminals" attacked and killed him in "crossfire." The RAB allowed his family to view the body they reported evidence of torture, including broken fingers, bruises, and a broken elbow.[178] In 2005, in response to these allegations, the DoS prohibited training under the Leahy Amendment.

Following a divisive election in 2008, the new government began a number of reforms aimed at improving human rights for all Bangladeshis. The new government focused on limiting police authority, providing legal and political access to all, and addressing allegations of human rights violations.[179] After a significant decrease in allegations, the

---

[175] *See* Buerk, *supra* note 161; *see also* HUMAN RTS. WATCH, BANGLADESH: BRING PARAMILITARY UNIT TORTURERS TO JUSTICE 15 (Oct. 23, 2009) [hereinafter HUMAN RTS. WATCH, BANGLADESH], *available at* http://www.hrw.org/en/news/2009/10/23/bangladesh–bring–paramilitary–unit–torturers–justice (last visited Sept. 9, 2013).
[176] *See* HUMAN RTS. WATCH, BANGLADESH, *supra* note 175.
[177] JUDGE, *supra* note 10, at 26–30.
[178] *Id.* at 26–30.
[179] *See* HUMAN RTS. WATCH, BANGLADESH, *supra* note 175. *But see* ACHIEVEMENTS, *supra* note 80, at 25 ("The presence or absence of political will influenced the course of ROL activities. . . . Without the requisite commitment for reform from appropriate government or court officials, USAID feared that working with formal justice system institutions risked failure . . ."). *See also id.* at 153 ("Without question, Bangladesh has far to go before its legal and other institutions are effective in meeting the overwhelming

DoS began to engage the Bangladesh government regarding the possibility of assisting the RAB in fulfilling its human rights obligations.[180] The DoS determined that an assessment of the current state of RAB compliance was needed in order to meet future DoS objectives.[181]

B. Assessment

In 2008, DoS requested DoD assistance to evaluate the current state of the RAB and its efforts to address allegations of human rights abuses.[182] A team, comprised of legal and operational experts, was assembled and tasked with conducting an assessment of the military justice system of the RAB. Conducted in September 2008, the initial assessment, modeled after the DoS Rule of Law assessment procedure, focused on the sufficiency of the policies, procedures, and systems needed to properly receive and investigate allegations.[183] The team reviewed all available information to gain a better understanding of the workings of the RAB.[184]

Focusing on the RAB's ability to "police its own," the assessment team collected statistical information on case disposition, monitoring efforts, and judicial capabilities.[185] The military justice assessment team

---

needs of its citizens . . . [any] pockets of progress have been described as "patches of green" in an otherwise desolate landscape.").

[180] *See generally* BUREAU OF DEMOCRACY, RTS. AND LABOR, DEP'T OF STATE, 2007 HUMAN RIGHTS REPORT: BANGLADESH (Mar. 11, 2008); *see also* BUREAU OF DEMOCRACY, RTS. AND LABOR, DEP'T OF STATE, 2008 HUMAN RIGHTS REPORT: BANGLADESH (Feb. 25, 2009).

[181] COMMAND HISTORY, *supra* note 153, at 29.

[182] *Id.* at 31.

[183] COUNTRY ANALYSIS, *supra* note 96, at 38. *See also* WEIGHING, *supra* note 79 (detailing early Rule of Law efforts). The information involved: the sufficiency of the military justice system, the policies and procedures for investigating complaints, the policies and procedures for receiving complaints, the application of recognized human rights to law enforcement, transparency of the justice system, level of training on human rights, the ability of civilians to submit complaints without fear of reprisal, statistical analysis of complaint/incident trends, and current and previous efforts and/or ROL and HR activities. *Id.*

[184] COMMAND HISTORY, *supra* note 153, at 31.

[185] OFFICE OF THE STAFF JUDGE ADVOCATE, BANGLADESH TRIP REPORT 4 (2009) [hereinafter TRIP REPORT] (on file with SOCPAC Command Legal Office). The information included: active and closed cases, availability of prosecutors, judges, and support staff, number of complaints versus number of cases referred to court, number of specific types of cases (human rights violations, crossfires, excessive use of force, etc.),

evaluated the information and applied a modified version of the USAID Rule of Law assessment.[186] Applying this method, the team focused on the primary elements to achieve human rights compliance and accountability for offenders.[187] The primary elements for human rights compliance are as follows: a credible investigation/prosecution mechanism; transparency in the process; and effective application of justice.[188]

The first element, identified by the team, was to focus on the credibility of the investigative process.[189] The RAB did not have the legal authorities and policies to investigate and prosecute cases in a fair and appropriate manner.[190] Credibility requires both a subjective and objective determination of trustworthiness and validity.[191] The people of Bangladesh, as well as the government and international community, must have faith that their officials are not "beyond the law" and are subject to the same legal process as the regular citizen.[192]

Credibility in the process requires the following components: all allegations are taken seriously; all allegations are investigated; all investigations are forwarded to the appropriate authority; appropriate action is taken on the complaint; and the complainant and the public are kept informed of the results.[193] Credibility further requires the ability to hold offenders accountable for their actions.[194] In addition, all incidents of "crossfires" and human rights violations should be documented and reported to the local public.

The second primary element of transparency is necessary to achieve human rights because it allows visibility of the workings of government

---

NGOs that monitor RAB activities, ability of Bangladeshi locals to render complaints against the RAB, transparency of the process, current military justice system, disposition of cases (conviction rate, acquittal rate, etc.), investigation policies and procedures (internal affairs guidance), rules on the use of force, command policies, training (Human Rights, Ethics in Law Enforcement, and Tactical), and personnel and assignment policies and procedures. *Id.*

[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] COUNTRY ANALYSIS, *supra* note 96, at 35.
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.* at 35.

and "guarantees rights and the democratic process."[195] In assessing the RAB, this element focused on the "transparency" of the process. Transparency occurs when there are procedures that ensure visibility of the RAB's operations and investigations.[196] The rights of all Bangladeshis are better protected when the activities of the RAB withstand independent scrutiny from outside entities and organizations, such as DoS and Human Rights Watch.

The third element posits that justice requires accountability, which translates to effective legal systems for handling criminal and civilian cases.[197] In all democracies, justice must be effectively applied to all sectors of society, including members of law enforcement and the military.[198] Law enforcement personnel cannot act with impunity.[199] In order for a democracy to survive, there must be a viable system of accountability for government abuses, to include misuse of authority, violations of citizens' rights, and other offenses.[200]

The assessment team produced a RAB Engagement Plan, approved by the U.S. Embassy–Bangladesh, that focused on assisting the RAB in developing mechanisms to report accurate information and transparency regarding allegations of human rights violations.[201] The DoS, with concurrence of Senator Leahy, tentatively approved future engagements with the RAB if they could demonstrate positive steps toward a transparent reporting process; credible investigation process; and accountability for offenders.[202] The engagement plan focused on developing an internal capability to receive, investigate, and prosecute human rights violations.[203] In particular, the plan included the creation of a human rights office, development of a process to receive complaints, and revisions to current RAB policy to investigate allegations in order to establish accountability.[204]

---

[195] *Id.* at 38.
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.* at 35.
[200] *Id.*
[201] OFFICE OF THE STAFF JUDGE ADVOCATE, RAB ENGAGEMENT PLAN 3 (Nov. 15, 2008) [hereinafter ENGAGEMENT PLAN] (on file with SOCPAC Command Legal Office). *See also* COMMAND HISTORY, *supra* note 153, at 32.
[202] ENGAGEMENT PLAN, *supra* note 201, at 2.
[203] *Id.*
[204] *Id.*

C. Findings

The initial RAB assessment noticed areas, such as training and tactical exercises, which the RAB could improve upon to prevent violations and reinforce human rights-compliant behavior.[205] However, the RAB is reliant on other agencies, particularly the Law and Justice Ministry and the Legislative Branch, to enforce human rights laws.[206] The government seemed to lack the political will, motivation, and expertise required to make significant changes.[207] All of the Bangladeshi agencies involved, including the military and the judiciary, have procedural and personnel deficiencies that undermine the effort to address human rights violations.[208] In particular, the governmental agencies had deficiencies in the systems needed to receive, investigate, and prosecute RAB members suspected of committing human rights violations.[209] A brief overview of these deficiencies follows.

1. Training

The RAB has a detailed human rights training program for all of its members.[210] New recruits receive over sixteen hours of classroom training on human rights.[211] However, there is no annual or continuing training beyond the initial training requirement.[212] Additionally, there is no mechanism to train RAB members in real-world situations.[213] According to most professional police forces, current training paradigms should incorporate "shoot/don't shoot" tactical situations to train the individual to respond properly in stressful situations.[214]

---

[205] TRIP REPORT, *supra* note 185, at 3.
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.* at 7.
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *See generally* LIEUTENANT COLONEL (RETIRED) DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (2009); LIEUTENANT COLONEL (RETIRED) DAVE GROSSMAN & LOREN W. CHRISTENSON, ON COMBAT: THE PSYCHOLOGY AND PHYSIOLOGY OF DEADLY CONFLICT IN WAR AND PEACE (2008).

In addition to human rights training, the RAB is deficient in tactical planning and execution of missions. During the assessment, the RAB conducted a training simulation to demonstrate their tactics:

> A man screams, "If you come in here, I am going to kill her!" out a second floor window. The window is in the middle of a large building, with approximately five rooms on each side of the hostage scene. The man is visible in the window holding a female hostage. He is clearly unstable and brandishing a weapon. Negotiators try to reason with the man. This only increases his agitation. As negotiations continue, the RAB arrive on scene. They begin to infiltrate the building using ropes to scale to the second floor. Once inside the building, members of the assault team begin to clear the building using "flash bangs."[215] The RAB members begin at opposite ends of the building and move towards the room containing the hostage-taker. As they approach the room, the sounds of numerous "flash bang" explosions rip through the air. A total of ten or more explosions indicate the progress of the assault team. The hostage-taker surrenders as the RAB prepare the final assault on the room.[216]

This simulation demonstrates that the tactics employed by the RAB would just as likely result in the death of the hostage. The means of clearing other rooms would only increase the stress on the hostage-taker and could cause him to kill the hostage and himself. There was no indication of other criminals on scene and the unnecessary clearing of the

---

[215] *See* http://www.globalsecurity.org/military/systems/munitions/xm84.htm. The flash bang grenade is a "Stun Grenade is a non-fragmentation, non-lethal "Flash And Bang" stun grenade that is intended to provide a reliable, effective non-lethal means of neutralizing & disorienting enemy personnel. The M84 non-lethal stun grenade is a non-lethal, low hazard, non-shrapnel producing explosive device intended to confuse, disorient or momentarily distract potential threat personnel. The device produces a temporary incapacitation to threat personnel or innocent by standers. This device will be used by military personnel in hostage rescue situations and in the capture of criminals, terrorists or other adversaries. It provides commanders a non-lethal capability to increase the flexibility in the application of force during military operations."

[216] TRIP REPORT, *supra* note 185, at 4 (explaining the tactical demonstration that the RAB considered "successful"). RAB officials spoke highly of the proficiency of their forces and their ability to handle hostage situations without using lethal force. RAB officials also used this demonstration for all visiting foreign officials.

other rooms put civilians at risk of death or serious injury. This simulation indicates that the RAB simply does not have appropriate training on tactical operations. Until this training deficiency is addressed, human rights violations will likely continue.

2. Legal Deficiencies

In most nations, "the military and civil judicial systems are meant to work together effectively to deter security members from committing abuses."[217] However, in the case of the Bangladeshi government, these systems do not work together effectively. There are procedural and statutory limitations that negatively impact the effective administration of justice for RAB members.[218] In addition, all agencies within the Bangladesh government have limited resources, to include attorneys and support staff, to provide for the growing demands of a burgeoning democracy.[219]

a. Military Justice System

Within the RAB, there are no assigned prosecutors.[220] In units of similar size, American, British, and Australian militaries assigned at least one or two prosecutors and numerous support staff to handle disciplinary offenses.[221] When an incident occurs, the RAB involved refers the case to an administrative judge for action.[222] The RAB Headquarters have limited ability to conduct an internal investigation.[223] Unlike Western law enforcement and military agencies, the RAB does not have an internal affairs-type unit or criminal investigation capability that is empowered to look into allegations against its members. Instead, the local RAB commander has the ability to independently determine whether an allegation warrants referral to an administrative judge. Numerous RAB commanders have used this ability to summarily dispose

---

[217] CORAL ET AL., *supra* note 29, at 23.
[218] TRIP REPORT, *supra* note 185, at 4.
[219] COUNTRY REPORTS, *supra* note 4.
[220] TRIP REPORT, *supra* note 185, at 4.
[221] U.S. DEP'T OF ARMY, FIELD MANUAL 1–04, LEGAL SUPPORT TO THE OPERATIONAL ARMY, 3–1 to 3–4 (Apr. 15, 2009) (detailing assignment of judge advocates to operational units, like brigades).
[222] ENGAGEMENT PLAN, *supra* note 201, at 2.
[223] *Id.*

of allegations before forwarding outside of the RAB, thereby maintaining the "blue wall" of impunity.[224]

In addition, because the RAB is comprised of all Bangladeshi military services and law enforcement personnel, issues commonly arise regarding jurisdiction over assigned personnel.[225] The RAB Headquarters routinely transfers alleged violators to their assigned service, such as the Army or Air Force, for prosecution.[226] Once this occurs, RAB officials treat it as out of their hands and the responsibility of that respective service.[227] This process removes the incentive for the RAB to investigate and prosecute offenders.

b. Civilian Judiciary

In addition, there is a significant backlog in the handling of criminal and civil cases.[228] Bangladesh suffers from a critically understaffed judiciary that has responsibility for all cases, a problem that has led to a significant delay in the disposition of cases.[229] For example, the RAB investigated a murder that occurred at a dining facility on a RAB base.[230] The alleged murderer was charged in 2005 and granted bail.[231] The case has yet to proceed to trial.[232] Rapid Action Battalion officials stated that this is not unusual in the Bangladeshi judicial system.[233]

Besides concerns for due process and timely justice, from a practical view, a flawed civilian judiciary results in no visible consequences for criminal behavior. The civilian judiciary does not take an active involvement in the disposition of human rights cases.[234] According to

---

[224] TRIP REPORT, *supra* note 185, at 4.
[225] ENGAGEMENT PLAN, *supra* note 201, at 2.
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] TRIP REPORT, *supra* note 185, at 4.
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *See generally* BUREAU OF DEMOCRACY, RTS. AND LABOR, DEP'T OF STATE, 2007 HUMAN RIGHTS REPORT: BANGLADESH (Mar. 11, 2008); BUREAU OF DEMOCRACY, RHTS. AND LABOR, DEP'T OF STATE, 2008 HUMAN RIGHTS REPORT: BANGLADESH (Feb. 25, 2009).

some NGOs, there are political reasons for their lack of involvement.[235] Many in Bangladesh remember the violence and instability of the last decade. Consequently, there is a tacit acceptance of the "strong arm" tactics of law enforcement, to include the RAB, in response to this violence, and a prevailing fear of its return.[236] The judiciary is not immune to this fear. This is demonstrated in its reluctance to appear "anti-government" or "anti-law and order."[237]

The results of this assessment remain unknown. Despite being forthcoming with information and recognizing their international obligations, Bangladeshi officials are hampered by political and fiscal limitations in their attempts to improve the Rule of Law within Bangladesh, and incidents of human rights violations continue to surface.[238] These incidents continue to be a significant matter of concern to the U.S. government and international agencies.[239] Since the RAB and the Bangladesh government have begun implementing changes to their procedures, there have been several allegations of "crossfires," for example, several alleged criminals were killed while opposing RAB forces, in October of 2010.[240] Clearly, it is too early to tell if this engagement will be successful.

However, the RAB assessment indicates that, without foreign assistance, the RAB will be unable to overcome its history of human rights violations and obtain valuable counterterrorism training.[241] It also demonstrates that developing nations will not be able to overcome

---

[235] *See* HUM. RTS. WATCH, BANGLADESH, *supra* note 179. *But see* ACHIEVEMENTS, *supra* note 79, at 25 ("The presence or absence of political will influenced the course of ROL activities . . . Without the requisite commitment for reform from appropriate government or court officials, USAID feared that working with formal justice system institutions risked failure:" *Id.* at 153 ("Without question, Bangladesh has far to go before its legal and other institutions are effective in meeting the overwhelming needs of its citizens . . . [any] pockets of progress have been described as "patches of green" in an otherwise desolate landscape.").

[236] TRIP REPORT, *supra* note 185, at 7 (summarizing interviews with RAB personnel and local Bangladeshis).

[237] *Id.*

[238] *See* notes 238–41 and accompanying text.

[239] BRUCE VAUGHN, CONG. RESEARCH SERV., R41194, BANGLADESH: POLITICAL AND STRATEGIC DEVELOPMENTS AND U.S. INTERESTS 15–16 (Apr. 1, 2010).

[240] *See Two Killed in "Encounter" with RAB in Berguna* (Oct. 23, 2010), *available at* http://www.bdnews24.com/pdetailes.php?id=176873 (last visited Feb. 1, 2011); *Alleged Mugger Killed in "Shoot Out" with RAB* (Feb. 10, 2011), *available at* http://www.bdnews24.com/pdetails.php?id=176698 (last visited Sept. 9, 2013).

[241] *See supra* Part IV.C.

obstacles in investigating and prosecuting human rights violators without a sustained Rule of Law effort.[242] This engagement provides a potential framework to foster human rights awareness and compliance while allowing host nations to improve their counterterrorism capability.

V. U.S. Rule of Law Challenges and Recommendations

The RAB Engagement demonstrates that an inter-agency approach can assist developing nations in addressing human rights while maintaining internal security. However, there are significant challenges that must be addressed. Currently, U.S. Rule of Law efforts are limited by a lack of unified purpose as well as by systemic limitations. In particular, several challenges need to be overcome to allow for meaningful Rule of Law efforts with our partners. They include a lack of strategic planning, inadequate funding and authorities among the various agencies, an imbalance of manpower and funding between DoS and DoD, and the pressing need to confront emerging threats.[243]

In order to address the compelling training needs of our partners, the following recommendations are helpful: redefine "necessary corrective actions" as a committed enrollment in a Rule of Law effort; increase authorities and funding for DoS and DoD to conduct Rule of Law efforts; and formulate a comprehensive strategic plan for Rule of Law efforts. This article details each of these recommendations.

A. Enrollment in a Rule of Law Effort, Which Includes Military and Security Forces, Should Be Considered "Necessary Corrective Action" Under the Leahy Amendment

A dedicated and committed Rule of Law effort should be considered as a factor in meeting the Leahy requirement for necessary corrective action. Together, the DoD and DoS should work with Congress to establish the criteria regarding "all necessary corrective actions" to include: (1) a commitment to a Rule of Law program; (2) removal of all suspected violators from positions of power or authority; (3) initiation of transparent investigations into all outstanding allegations, with

---

[242] *See supra* Parts II, III.

[243] Gregory J. Dyekman, *Security Cooperation: A Key to the Challenges of the 21st Century* (U.S. Army Strategic Stud. Inst.) (Nov. 2007).

international assistance and oversight; (4) training to international standards of all training participants troops on human rights; and (5) submission to U.S. monitoring. These agreed-upon criteria should allow for counterterrorism training to commence conditioned on adherence to and progress in a Rule of Law effort.

As demonstrated in Bangladesh, developing nations frequently lack the resources and infrastructure to properly administer the Rule of Law.[244] Deficiencies within the law enforcement and judicial structures prevent nations from properly investigating and prosecuting criminal activities, to include human rights violations.[245] Without the capability to carry out these activities, these nations will never be able to demonstrate that they have responded to allegations and "brought those responsible to justice."[246]

With a comprehensive plan and sustained effort, many uneligible countries will be able to overcome the restrictions of the Leahy Amendment.[247] More importantly, victims of human rights violations will be able to obtain justice and see those responsible held accountable. However, without much needed tactical training, the abuses that occurred due to poor training will only reoccur, thereby creating new victims.[248] By combining Rule of Law with appropriate training, professionalism and accountability of security forces will increase, as will the populace's trust in its government. This human rights-focused effort, coupled with training, will increase security and stability, and deprive transnational terrorist groups of fertile ground to plant seeds of hatred and violence.

B. Lack of Strategic Planning

As is true of most bureaucracies, the U.S. Government faces challenges in formulating a long-term, comprehensive vision and plan.[249]

---

[244] *See supra* Parts II, III.
[245] *Id.*
[246] *Senator Patrick Leahy*, *supra* note 31.
[247] *See* Denmark, *supra* note 57 (stating that "enhancements of military and non–military cooperation between the United States and Indonesia in recent years coincided with a marked improvement in Indonesia's human rights practices").
[248] *Id.*
[249] SOUTHEAST ASIA, *supra* note 38, at 28 (stating that "U.S. government lacks an integrated national security assistance strategy covering all U.S. training and assistance provided to foreign security forces"). *See also* U.S. DEP'T OF DEF., DIR. 3000.05, DIRECTIVE ON MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND

Each individual department, whether it is DoD, DoS, or USAID, has its own internal mission statement, plan, authorities, and limitations.[250] National Security Presidential Directive 44, signed by President George W. Bush on December 7, 2005, attempts to correct this deficiency by promoting "the security of the United States through improved coordination, planning, and implementation of reconstruction and stabilization assistance for foreign states and regions at risk of, in or in transition from conflict or civil strife."[251] This directive focuses on integrated U.S. responses to nations at risk, and provided for an increased civilian response capability within DoS.[252]

In order to overcome these obstacles, the United States must develop a strategic plan, involving all agencies and all elements of national power, to address the national security needs of the nation. The government must "bring all instruments of statecraft to bear, in a calibrated fashion, through coordinated interagency strategy."[253] The DIMES (diplomatic, intelligence, military, economic, and social) approach seeks to use all elements of national power by employing the unique attributes and capabilities of the individual agencies to advance a common agenda.[254] In particular, DoS provides diplomatic access, intelligence, and information on local conditions, and the ability to project economic power in the form of aid, programs, and grants, while DoD contributes primarily military and intelligence capabilities to the national effort.[255]

At the national level, U.S. agency efforts should be guided by the National Security Strategy, the strategic plans for developing areas, and the ongoing national security needs of the nation. At the host country and regional level, these efforts should be under the purview of the

---

RECONSTRUCTION (SSTR) OPERATIONS (Nov. 2005) [hereinafter DODD 3000.05]. *But see* DOD ROLE, *supra* note 52, at 25–29 (recommending "enhanced" civilian capabilities).

[250] *See generally* U.S. DEP'T OF DEF., MISSION STATEMENT, *available at* http://www.defense.gov/about/#mission (last visited Nov. 12, 2011), U.S. DEP'T OF STATE, MISSION STATEMENT, *available at* http://www.state.gov/s/d/rm/index.htm (last visited Nov. 12, 2011), and U.S. AGENCY FOR INT'L DEV., MISSION STATEMENT, *available at* http://www.usaid.gov/about_usaid/primer.html (last visited Sept. 9, 2013).

[251] NATIONAL SECURITY PRESIDENTIAL DIRECTIVE 44 (Dec. 7, 2005).

[252] *Id.*

[253] INTEGRATING 21ST CENTURY DEVELOPMENT, *supra* note 149, at 5.

[254] Anton K. Smith, *Turning on a Dime: Diplomacy's Role in National Security*, STRATEGIC STUD. INST. 2–10 (Oct. 2007), *available at* http://www.strategicstudiesinstitute.army.mil/ (last visited Sept. 9, 2013).

[255] *Id.*

respective Embassy's country team and the Geographic Combatant Commander (GCC).[256] Through close coordination between country teams and the GCC staff, emerging needs and trends will be identified and resources will be applied to address them, allowing for the adjustment of the larger strategic picture.[257]

By synchronizing efforts based on the National Security Strategy, all agencies will be focused on a single purpose. This may require the creation of new interagency task forces or working groups to synchronize efforts. In addition, there may need to be a new position at the department, agency, or cabinet level to oversee this effort. However, without interagency efforts based on a common goal at the national and regional level, there will continue to be difficulty in providing the means for "at risk" nations to overcome Leahy restrictions.

C. Inadequate Funding and Authorities among the Various Agencies

In security force assistance and security sector reform, there is a disparity between the assets and authorities of the agencies involved. The DoD has the funding and assets, but no authority; the DoS has authority, but extremely limited funding and assets.[258] There is a common belief that the majority of engagements should be civilian-based, such as Rule of Law reform, and that DoD involvement should be limited to providing support.[259] This belief has even been incorporated into policy.[260] Despite such recognition, country teams often rely on the assets and funds of the Combatant Commands to meet Embassy needs.[261]

---

[256] *Id.*

[257] U.S. DEP'T OF DEF., NATIONAL DEFENSE STRATEGY 17 (June 2008) ("[G]reater civilian participation is necessary both to make military operations successful and to relieve stress upon the men and women of the armed forces. Having permanent civilian capabilities available and using them early could also make it less likely that military forces will need to be deployed in the first place.").

[258] DODD 3000.05, *supra* note 249.

[259] *Id. But see* DOD ROLE, *supra* note 52, at 5 (quoting Defense Secretary Gates as stating "until our government decides to plus up our civilian agencies . . . Army soldiers can expect to be tasked with reviving public services, rebuilding infrastructure, and promoting good governance. All these so–called 'nontraditional' capabilities have moved into the mainstream of military thinking, planning, and strategy"). *Id.*

[260] DODD 3000.05, *supra* note 249.

[261] SOUTHEAST ASIA, *supra* note 38, at 28 (stating that "U.S. government lacks an integrated national security assistance strategy covering all U.S. training and assistance provided to foreign security forces").

In addition, there is a conflict between the authorities needed, and the funding and manpower available, to conduct these operations. The DOS has the authority and mandate to conduct Rule of Law efforts, as well as to conduct numerous other types of training with host nations.[262] The respective embassies have significant discretion to develop civil operations, such as Acquired Immune Deficiency Syndrome (AIDS) awareness outreach, disaster construction, and other actions targeting the host nation populace.[263] By contrast, with the exception of very specific civil military operations, the DoD is limited to military engagements and training.[264] Under Section 1206 of the National Defense Authorization Act (NDAA), DoD is specifically authorized to train host nation military, but prevented from training security forces.[265] Currently, funding and authorities, both at DoD and DoS, are insufficient to meet the growing non-conflict Rule of Law needs, both military and civilian, of developing nations.[266]

The funding authorized under Section 1206 of the National Defense Authorization Act, is considered "train and equip" funding.[267] It allows the DoD to provide training and equipment to foreign military and maritime security forces.[268] In 2006, Congress initially authorized Section 1206 funding for three years; however, it has been subsequently renewed in the 2010 NDAA.[269] The DoD continues to advocate for Section 1206 as a valuable tool in the war on transnational terrorism.[270] However, there are significant shortfalls with this funding, including that it: is extremely limited, and cannot be used to train non-military security forces, such as the RAB; limited activities to those authorized for DoS under the Foreign Assistance Act; and subject to poor coordination with DoS and a lack of larger strategic planning.[271]

---

[262] *See generally* U.S. DEP'T OF STATE, MISSION STATEMENT, *available at* http://www.state.gov/s/d/rm/index.htm (last visited Nov. 12, 2011); U.S. AGENCY FOR INT'L DEV., MISSION STATEMENT, *available at* http://www.usaid.gov/about_usaid/primer.html (last visited Sept. 9, 2013).
[263] *Id.*
[264] National Defense Authorization Act of 2009, Pub. L. No. 109–163, § 1206, 119 Stat. 3136, 3456–58 (2009). However, the NDAA specifically authorized the training of Iraqi and Afghan security forces.
[265] *Id.*
[266] *See supra* Part V.C.
[267] *See supra* note 266 and accompanying text.
[268] *Id.*
[269] § 1206, 119 Stat. 3136, 3456–58.
[270] *Id.*
[271] DOD ROLE, *supra* note 52, at 73–77.

The Bush Administration recognized the shortcomings of these current funding sources and drafted the Building Global Partnership Act of 2007 (BGPA).[272] The BGPA's purpose is to provide the DoD with permanent 1206-like authority to train and equip military and security forces for counterterrorism and stability enhancing operations.[273] This Act would allow for the GCCs to spend up to $750 million annually, and to carry funds over fiscal years.[274] In addition, it would allow the DoD to transfer funds to other agencies, such as DoS, to fund their participation in those specified activities.[275] Numerous organizations have opposed this act, and the bill is currently languishing in Congress.[276] Congress should enact the BGPA, thereby providing valuable authority and funding to the DoD to conduct Rule of Law activities on behalf of DoS.

However, there also needs to be a funding source that is available to DoS and DoD to allow for Rule of Law and other cross-agency national security activities. An authorized DoS/DoD fund, with appropriate Congressional oversight, should be created that will fund these types of engagements. This funding source should be available to all GCCs and country teams in coordination with SECDEF and SECSTATE. Included in this fund should be a provision that allows the Geographical Combatant Commands (GCCs), with the concurrence of DoS, to authorize and fund Rule of Law activities, or contract/fund them for Leahy-prohibited security forces.

D. The Roles of DoS and DoD with Foreign Security Forces

There is now additional concern regarding the growing role of the DoD in Rule of Law and traditional DoS/USAID activities.[277] Due to the availability of personnel and assets, DoD has taken on greater DoS-type activities, such as Rule of Law efforts in Iraq and Afghanistan and humanitarian relief in Haiti.[278] There is concern that these efforts have

---

[272] Building Global Partnership Act of 2007, *available at* http://www.dod.mil/dodgc/olc/docs/BGPA.pdf (last visited Sept. 9, 2013).
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *See* LETTER OF OPPOSITION, FRIENDS COMMITTEE ON NATIONAL LEGISLATION, *available at* http://www.etan.org/news/2007/05global.htm (last visited Sept. 9, 2013) (detailing the groups and reasons for opposing the BGPA).
[277] DOD ROLE, *supra* note 52, at 2–6.
[278] *Id.*

undermined the traditional warfighting role of the DoD and usurped DoS mandated activities.[279] To address these concerns, the U.S. Government must reconsider the appropriate roles of each agency in 21st century operations.

In particular, USAID has the lead for Security Sector Reform (SSR).[280] Security Sector Reform focuses on all of the "institutions, processes and forces that provide security and promote the Rule of Law."[281] This program focuses on the civilian side of law enforcement and internal security. The United States Agency for International Development's policies recognize that "forces enhanced through traditional security assistance comprised of equipment and training can better carry out their responsibilities if the institutional and governance frameworks necessary to sustain them are equally developed."[282] The U.S. Government efforts are made to improve or reform civilian institutions, such as the judiciary, improve budgeting and staffing, and to ensure coordination between security organizations and civilian entities.[283]

In regard to Leahy-prohibited nations, DoS and USAID have an interest in ensuring that the security forces are properly conducting their operations.[284] However, this interest is based on the larger society impact of security sector reform efforts.[285] In security sector reform, the concern is on the wider impact that inadequate security has on the greater population.[286] In comparison, DoD has a different interest in security force training.[287] The DoD recognizes that places with inadequate military and security forces are prone to be exploited by identified threats, such as al Qaeda.[288] There is also an interest in forming "strategic alliances" at the operational level and interoperability in the event that the DoD and the host nation must confront a common enemy in a coalition setting.[289]

---

[279] *Id.* at 6–12. *See also* INTEGRATING 21ST CENTURY DEVELOPMENT, *supra* note 149, at 3.
[280] SECURITY SECTOR REFORM, *supra* note 100, at 1.
[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] SECURITY FORCE ASSISTANCE, *supra* note 53, paras. 1–1 to 1–6, at v.
[288] *See* U.S. DEP'T OF DEF., NATIONAL DEFENSE STRATEGY 17 (June 2008).
[289] SECURITY FORCE ASSISTANCE, *supra* note 53, paras. 1–1 to 1–6, at v.

These varied interests can result in vastly different approaches to dealing with security force issues. The DoS frequently views security engagements from the importance of human rights protection, and stability and responsiveness to democratic rule.[290] The DoD, by contrast, views it from the need to build capability in response to national security threats.[291] These are ingrained cultural views that are perceived as mutually exclusive, but rather are complimentary.[292] Both views are focused on the stated U.S. national interests of stable governments with properly trained forces. However, the focus of efforts and the application of limited resources will vary.

As noted in the RAB engagement, the majority of issues regarding "holding those responsible accountable" under the Leahy Amendment are beyond the control of the RAB.[293] These are issues that will only be addressed through security sector and judicial capability reform.[294] The RAB leadership cannot hold offenders responsible under the current system.[295] There are significant changes that need to be made to allow for successful investigations and prosecutions.[296] This will require a long-term allocation of resources, under the USAID authority, to make these changes. Unfortunately, USAID has limited resources for countless missions and must prioritize efforts, with the majority of effort being in Iraq and Afghanistan.[297]

E. Compelling Need to Confront Emerging Threats

The National Threat Assessment recognizes the emerging threats from transnational terrorist organizations, like Jemaah Islamiyah, al Qaeda, and Lashkar-e-Taiba.[298] These organizations are intentionally

---

[290] SECURITY SECTOR REFORM, *supra* note 100, at 1.
[291] SECURITY FORCE ASSISTANCE, *supra* note 53, paras. 1–1 to 1–6, at v.
[292] *See supra* Parts II, III.
[293] *See supra* Part IV.
[294] *See supra* Part IV.
[295] *See supra* Part IV.
[296] *Id.*
[297] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10–496, FOREIGN ASSISTANCE: USAID NEEDS TO IMPROVE ITS STRATEGIC PLANNING TO ADDRESS CURRENT AND FUTURE WORKFORCE NEEDS 7–28 (July 2010) (detailing USAID staff challenges involving Iraq and Afghanistan).
[298] BLAIR, *supra* note 152, at 3–7.

targeting and exploiting developing nations and lawless areas.[299] They operate where governments are unable or unwilling to exercise control and provide basic services for their citizens.[300] They count on the absence of the Rule of Law, government atrocities, and marginalization of the civilian populace in order to bolster local support, create safe havens and solidify recruitment.[301]

Rule of Law efforts require significant time and persistent engagement with host nations to solidify advances and bring about long term societal changes.[302] Rule of Law efforts take significant time to take root.[303] Many of these nations are decades away from having a fully functional legal system.[304] The United States' Rule of Law efforts, in places such as Colombia and El Salvador, have taken several years, or more, to produce demonstrated results.[305] Meanwhile, security forces are in a "catch 22": they have no training to improve tactics and ensure human rights compliance, because they have unresolved human rights allegations due to poor tactics.

In Leahy-prohibited nations, the United States is withholding vital training on the condition that the nation addresses human rights violations. Thus, Leahy-prohibited nations' security forces are unable to receive training and must take necessary corrective actions prior to receiving training. This training could help counter the threat of transnational terrorists, increase professionalism of security forces, reduce misuse of force, and add to societal stability.[306] Without a

---

[299] *Id. See also* CHRISTOPHER G. PERNIN ET AL., UNFOLDING THE FUTURE OF THE LONG WAR: MOTIVATIONS, PROSPECTS, AND IMPLICATIONS FOR THE U.S. ARMY 129–132 & 145 (2008).
[300] *Id.*
[301] *Id.*
[302] *See* AFGHANISTAN, *supra* note 76. *See also* MEASURING STABILITY, *supra* note 77.
[303] *See infra* Part II.
[304] *See generally* ACHIEVEMENTS, *supra* note 80 (describing deficiencies in the Rule of Law).
[305] *See generally id.* (detailing duration of Rule of Law efforts).
[306] SETH G. JONES ET AL., SECURING TYRANTS OR FOSTERING REFORM: U.S. INTERNAL SECURITY ASSISTANCE TO REPRESSIVE AND TRANSITIONING REGIMES 161 (2006), *available at* http://www.rand.org/pubs/monographs/2006/RAND_MG550.pdf (last visited Sept. 9, 2013).

> [I]nternal security forces should be judged by their ability to respond effectively terrorist organizations, insurgents, criminal groups, and other security threats that fall within their area of responsibility. In the interest of long–term sustainability, however, they must also be

balanced Rule of Law effort, coupled with additional counter-terrorism training, security forces will be forced to deal with new, evolving threats by relying on their often outdated training. This lack of current training may have contributed to human rights violations, or waiting to receive U.S. training. Unfortunately, the enemy is not waiting.

VI. Striking the Correct Balance (The Way Ahead)

Geopolitical changes and the evolving threat of Islamic terrorists compel our elected officials to constantly reevaluate the national security interests of this nation. As noted by the USAID, "the increasingly complex threats facing our partners and our own nation urgently require that we [the United States] address the linkages among security, governance, development, and conflict . . ."[307] The Government cannot view these developments in isolation; it must consider these developments to strike a balance between our national ideals and international obligations to ensure human rights and the national security threats posed by transnational terrorist organizations.

Two seemingly juxtaposed strategic goals, security and democratic reforms and human rights, confront officials in developing national policy. The adherence to human rights norms requires stability; the law, and efforts to advance it, also requires stability. With proper planning and coordination, these strategic goals can both be met. Ultimately, stable, lawful nations, free from the threat of transnational terrorists, are in the national security interest of the United States. As noted in the U.S. National Security Strategy, the U.S. goal is "to help create a world of democratic, well-governed states that can meet the needs of their citizens and conduct themselves responsibly in the international system."[308]

As Senator Richard Lugar, a Republican from Indiana, stated, "The threats associated with terrorism and weapons of mass destruction necessitate American engagement and security cooperation, and provision of military assistance with countries that would otherwise be

---

> judges by their accountability and human rights practices. The goals of effectiveness, accountability, and human rights are interlinked and mutually reinforcing.

[307] SECURITY SECTOR REFORM, *supra* note 100.

[308] *See* NAT'L SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1–3 (2010) (detailing current threats).

subjected to a very different policy approach."[309] However, with a combined Rule of Law and counterterrorism training effort, the United States can improve the ability of host nations to fight terrorist organizations, as well as to prevent human rights abuses.

Security Force Assistance, in a time of global terrorism, will remain a challenge from both a tactical and strategic perspective until the U.S. Government can reach an appropriate balance between national security needs and legal and moral requirements. Ultimately, as noted by Judge James E. Baker, "Rule of Law is the West's alternative to jihadist terrorism. Law, and respect for law, offers the structure of democracy, the opportunity for individual fulfillment . . . and a process for the impartial administration of justice. Sustained commitment to the Rule of Law in practice and perception will serve as a positive national security tool . . . ."[310]

VII. Conclusion

The current restriction on counter-terrorism training, imposed by the Leahy Amendment, is impeding the Nation's ability to work proactively with our partners to counter emerging threats. Throughout the world, developing nations are confronting threats that far exceed their capabilities. In responding to these threats, the potential for human rights violations will only increase absent some capacity building and counter-terrorism training. In order to meet our current threats and satisfy our national ideals, the U.S. Government should undertake an expanded inter-agency Rule of Law effort to help the security forces of developing nations complete their assigned duties while ensuring the right of their people to be safe. Ultimately, "[L]aw, like homeland security, is an incremental endeavor. It is dependent on sustained action, not rhetoric, and perceptions can be swept aside . . . Law, like this conflict [the war on terrorism], requires sustained sacrifice and sustained support."[311]

---

[309] INTEGRATING 21ST CENTURY DEVELOPMENT, *supra* note 149, at 3.
[310] BAKER, *supra* note 88, at 309.
[311] *Id.* at 309.

FORTIETH KENNETH J. HODSON LECTURE IN CRIMINAL LAW[1]

MILITARY JUSTICE

MAJOR-GENERAL BLAISE CATHCART[*]

---

[*] Major-General Blaise Cathcart was a Brigadier-General when he gave this lecture but was promoted to Major-General on October 29, 2012. Major-General Blaise Cathcart was born in Exeter, Ontario, in 1961. He is a graduate of Saint Mary's University in Halifax, NS, (Bachelor of Arts (Hons)), University of Ottawa (Master of Arts), and Dalhousie Law School (Bachelor of Law). Major-General Cathcart articled with the law firm of Huestis Holm, Dartmouth, NS, in 1988.

Major-General Cathcart was called to the Bar of Nova Scotia in August 1989. He worked in private practice with the law firm of Boyne Clarke in Dartmouth until he enrolled in the Canadian Forces as a member of the Office of the Judge Advocate General (JAG) in 1990.

Since 1990, Major-General Cathcart has served in a number of positions with the Office of the JAG, including: Assistant Judge Advocate Atlantic Region (1990–91); Directorate of Law/Claims (1991–92); Directorate of Law/Human Rights and Information (1992–93); Deputy Judge Advocate Pacific Region (1993–96); Deputy Judge Advocate Prairie Region (1996–97); Director of Operational Law (1997–2003); post-graduate studies (LL.M.) in International Law at the London School of Economics and Political Science, London, England (2003–2004); the Special Assistant to the JAG (2004–2005); and Director of International Law (2005–2006). He was promoted to the rank of Colonel in June 2006 and served as the Deputy Legal Advisor and General Counsel–Military in the Office of the Legal Advisor to the Department of National Defence and the Canadian Forces (2006–2007); Second Language training (2007–2008); the Deputy Judge Advocate General/Operations (2008–2010). He was promoted to the rank of Brigadier-General in April 2010, before to his appointment to the position of Judge Advocate General on April 14, 2010.

He has deployed as legal advisor to the Commander, Canadian Contingent UN Protection Force (UNPROFOR) and the UN Peace Forces (UNPF) in the former Yugoslavia in 1994 and 1995. Major-General Cathcart deployed as the Senior Legal Advisor to the Commander, Canadian Task Force Bosnia-Herzegovina (SFOR) from February to September 2000. He was the legal advisor to Joint Task Force 2, the Canadian Forces Counter-Terrorism/Special Operations unit from 1997 -- 2000. Major-General Cathcart is eternally grateful for the many years of support from his family and spouse, Ms. Valerie Jones. He and Valerie currently live in Ottawa.

[1] Established at The Judge Advocate General's School on June 24, 1971, the Kenneth J. Hodson Chair of Criminal Law was named after Major General Hodson who served as The Judge Advocate General, U.S. Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and he was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

I. Introduction

Many thanks to Brigadier General Ayres, distinguished guests and the JAG School for the kind invitation to be here today. I believe this is the first time the Canadian Forces JAG has been asked to deliver the Hodson Lecture. It is truly a great privilege and honor to be the 40th Hodson speaker.

I must admit that I was not too familiar with Major General Hodson and the impressive legacy he left in his service careers. After some research and validation with Wikipedia (not Wiki Leaks!), I can say that he was a true scholar, legal officer, and legal trailblazer. I hope I can do him justice here today.

I am thrilled to be back in Charlottesville and at the JAG School. When I was a captain and major, I had the great fortune to benefit from several courses here. I attended the Law of War Course, the Operational Law Course, and, the always stimulating, Contract Attorney's Course. I learned a lot and made many lasting friends.

Each time I return to Charlottesville, I enjoy the great hospitality and collegial exchange of views. However, as a Canadian, I feel a little self-conscious when I hear some locals talking not so warmly of those ”Northerners” and the “War of Northern Aggression.” I politely interject with such folks and indicate that I do appreciate the sensitivities and emotions of the past war but I wonder when you folks are going to get over the War of 1812! Apparently there was some other war in these parts with a different set of “Northerners” and a different type of “Northern Aggression.” I suppose it always a matter of perspective!

Speaking of perspective, I would like to offer a few thoughts today on military justice generally and, more specifically, on the Canadian Forces military justice system.

With the time I have, I will first provide a brief overview of our military justice system. Then I will turn to the issue of military justice more globally. When I wrap up, I will do my best to allow sufficient time for some questions on any military justice or military law matter.

II. Discussion

Okay, first I will start with a few slides on our system in Canada.[2]

As just mentioned in my slide presentation, as Judge Advocate General of the Canadian Forces, I have many responsibilities. One is to act as legal adviser to the Governor General, the Minister of National Defence, the Department of National Defence, and the Canadian Forces in matters relating to military law.

But another crucial statutory responsibility of the Judge Advocate General under the National Defence Act is the superintendence of the administration of military justice in the Canadian Forces.

Because of this statutory responsibility, I have had occasion to reflect often as JAG about the topic of military justice—about why it exists, about what it means, and about what it requires to effectively achieve its goals.

Together with my senior officers in the Office of the JAG who work in the area of military justice, we have recently articulated in various public contexts what we think about this important subject.[3]

I would therefore like to speak to you today about military justice. I have just given you a quick look at the Canadian military justice system. However, my main aim is not to deal with the nuts and bolts or particular structural arrangements of national systems, for each state will ultimately have to arrive at the particular arrangements that best suit its national law and circumstances, but, rather, I want to focus on what we perceive to be the *fundamental first principles* that should be considered to underpin any legitimate and credible military justice system.

This is a topical subject and we are very passionate about it. Military justice can often be controversial. Members of the general public may know little about it. Legislators may also be largely unfamiliar with it. Many frequently approach it, at best, with a healthy degree of ignorance

---

[2] The Powerpoint slides used during the lecture have been omitted from this printed lecture.

[3] *E.g.*, Colonel Michael Gibson, *Military Tribunals*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW, *available at* http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e336?rskey=e5pof5&result=1&q=&prd=EPIL (last visited Sept. 5, 2013).

and indifference and, at worst, with disdain and cynicism. No doubt most of us have heard the widely-cited and often disparaging maxim attributed to the French Prime Minister Georges Clemenceau that "military justice is to justice what military music is to music."[4]

In my view, such cynicism is misplaced and should be vigorously and professionally challenged.

On one level, it is easy to understand why there may or should be distrust and cynicism. In many states around the world over the past century, military justice systems have been misused, misapplied, and abused. They have been used as instruments of power and control over civilians in circumstances that were clearly a perversion of justice and a gross violation of fundamental human rights.

But even in places such as Canada and the United States with strong democratic traditions and where civilian control over the military is an incontrovertible norm of public life—and which possess legitimate military justice systems—there are many who advocate reducing to a minimum the differences between military law and civilian criminal law, or narrowly constraining the scope of jurisdiction of military justice systems.

In some European countries, military justice systems now exist only as secondary or residual systems dealing with minor disciplinary offences. In others, military justice systems have been abolished altogether in peacetime.

This is not the way that we intend to go in Canada. And I strongly suggest that there are important and proper reasons why it should not be the chosen path.

In our view, simply put, an effective military justice system, guided by the correct principles, is a prerequisite for the effective functioning of the armed forces of a modern democratic state governed by the rule of law. This is especially true for the armed forces of states that are deployed on international operations.

---

[4] French politician (1841–1929), http:www.quotationspage.com/quote/21464.html (last visited Sept. 3, 2013).

It is also vital to ensuring the compliance of states and their armed forces with the normative requirements of international human rights law and international humanitarian law.

Some criticize differences between the military and civilian justice systems. These differences exist for a reason. The fundamental point that must be made is that differences do not mean that one system is inherently inferior to the other, nor constitutionally deficient. Differences must be assessed on their merits.

The real question is not whether there are differences, but, rather, whether a military justice system is fair, compliant with constitutional requirements, and effective in fulfilling its purpose.

Separate military justice systems exist because of the unique needs of armed forces to fulfill their mission of defending the state. This was recognized by the Supreme Court of Canada in its seminal 1992 judgment in the case of *R. v. Généreux.*

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need

> for separate tribunals to enforce special disciplinary standards in the military.[5]

The paramount need to maintain discipline in a State's armed forces has long been recognized. However, in the popular imagination, this recognition is frequently accompanied by an often unreflective notion that military justice systems give insufficient regard to fairness or justice to accomplish this.

Such a view is inaccurate. The ends of discipline and justice are not mutually exclusive. The conclusion in the Powell Report of 1960 incorporates much wisdom in recognizing this:

> Discipline—a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed—is not a characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable.[6]

Rather than running down rabbit holes where rigid positions can reflect narrow ideological predispositions about military justice, we consider that the clear basic question that should be posed is: what is it that a state needs its military justice system to do? And, once this is identified, what functional elements does such a system need to possess in order to effectively accomplish these ends?

If this analysis is undertaken, then one will be in a much better position to understand and determine what the scope of the jurisdiction of the military justice system should be in terms of offences, persons, territory, and time, and what differences in procedure may be required.

---

[5] R. v. Généreux, [1992] 1 S.C.R. 259 at 293.

[6] U.S. DEP'T OF DEF., REPORT TO THE HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY, BY COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, GOOD ORDER AND DISCIPLINE IN THE ARMY ('POWELL REPORT') (OCLC 31702839) 11 (18 Jan. 1960).

Let me elaborate what answers we have arrived at in the context of the Canadian military justice system.

We consider that the Canadian military justice system has two fundamental purposes:

> 1. to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and
> 2. to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

Accordingly, it serves the ends of both discipline and justice.

These purposes are stated in the statutory articulation of purposes, principles, and objectives of sentencing in the military justice system contained in Bill C-15, the *Strengthening Military Justice in the Defence of Canada Act*, which is currently before the Canadian Parliament.[7]

Our proposed legislation recognizes that it is most acutely in the process of sentencing on the basis of objective principles that there is an obligation to directly face the question: what is it that a state is actually trying to accomplish in trying someone in the military justice system?

The synthesis of the classic criminal law sentencing objectives of denunciation, specific and general deterrence, rehabilitation and restitution, with those targeted at specifically military objectives, such as promoting a habit of obedience to lawful commands and orders and the maintenance in a democratic state of public trust in the military as a disciplined armed force, illustrates that military law has a more focused need and purpose than the general criminal law in seeking to mold and modify behavior to the specific requirements of military service.

In order to achieve these fundamental aims and purposes, we consider that service tribunals must possess certain functional elements:

- the requisite jurisdiction to deal with matters pertaining to the maintenance of discipline and operational effectiveness;

[7] Since this lecture, Bill C-15 has received Royal Assent (S.C. 2013, c. 24).

- those doing the judging must possess an understanding of the necessity for, role of, and requirements of discipline;

- they must operate in a legally fair manner, and be perceived to be fair;

- they must be compliant with national constitutional and applicable international law; and

- they must be prompt, portable, and flexible.

That is why the two types of service tribunals in the Canadian military justice system, courts-martial, and summary trials are designed the way that they are.

Of course, no justice system should or can remain static and expect to remain relevant to its users. Military justice systems are no exception. In order to ensure that military justice systems continue to evolve to keep pace with changes in the law and societal expectations, they need regular and careful attention from lawmakers.

But it is important to recognize that legislative reform of the military justice system involves a process of continuous improvement over time, just as is the case with civilian criminal systems. It should not be considered a "one off" or a "one-shot deal," to be accomplished once in a generation, then neglected.

Such change may be incremental, but it needs to maintain momentum. In our experience, we have found that a statutorily mandated, regular independent review can help ensure that this is accomplished.

In our context, we recognize that the Canadian military justice system is not perfect. No system is. Nonetheless, it is a fair, effective, and essential element in promoting the operational effectiveness of the Canadian Forces and ensuring justice for its members. We are passionately committed to ensuring its continuing improvement and vitality.

Constructive criticism, debate, and suggestions for improvement of the military justice system are necessary and welcome. However, these need to be informed by recognition of the fundamental first principles that underpin the military system. In my presentation today I have sought to set out for you our view as to what these are.

Complacency about this would be unwise, and the Office of the Judge Advocate General is in fact the leading advocate and voice in Canada for continuous improvement of the military justice system. It conducts regular surveys and reviews and engages in comparative law research concerning the systems of other countries on an ongoing basis in order to identify issues and advance improvements.

There is much that we can learn from one another in continuing to adapt and evolve our respective national military justice systems.

We believe there is an emerging international discourse on military justice, much of it increasingly informed by international human rights law. We certainly welcome the discourse and constructive comments that seek to validate and reinforce the need for separate tribunals to enforce special disciplinary standards in the military.

It is clear that there are many common themes and challenges that repeat across our respective national discussions. I would therefore like to encourage the further development of a vigorous international discussion in this area, and undertake that the Canadian Office of the Judge Advocate General is eager to play a constructive part in it.

III. Conclusion

I sincerely urge all who are committed to military justice to remain vigilant in defending the requirement for, and legitimacy of, military justice against those who believe that military justice should not and cannot exist as a separate system. Such people often advocate for the complete civilianization and abolishment of military justice. To my mind, this would indeed be a mistake.

In the end it is simple, we owe it to all of our respective soldiers, airmen, sailors, and special forces troopers, our nations' sons and daughters, our nations' national treasures who willingly put themselves in harm's way to establish, evolve, and maintain a fair and effective

military justice system that recognizes the unique requirements of a professional military force which is founded upon service to country and self-sacrifice. Moreover, the system must always fiercely promote and protect the very democratic values and the rule of law that our men and women in uniform are willing to die for.

Thank you for the privilege and honor of having this opportunity to be the 40th Hodson speaker.

THE EIGHTEENTH HUGH J. CLAUSEN LECTURE IN LEADERSHIP*

BRIGADIER GENERAL TOM KOLDITZ[1]

---

* This is an edited transcript of a lecture delivered by Brigadier General (Retired) Kolditz to members of the staff and faculty, their distinguished guests, and officers attending the 61st Judge Advocate Officer Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia, on October 15, 2012.

The Clausen Lecture is named in honor of Major General Hugh J. Clausen, who served as The Judge Advocate General, U.S. Army, from 1981 to 1985 and served over thirty years in the U.S. Army before retiring in 1985. His distinguished military career included assignments as the Executive Officer of The Judge Advocate General; Staff Judge Advocate, III Corps and Fort Hood; Commander, U.S. Army Legal Services Agency and Chief Judge, U.S. Army Court of Military Review; The Assistant Judge Advocate General; and finally, The Judge Advocate General. After his retirement from active duty, General Clausen served for a number of years as the Vice President for Administration and Secretary to the Board of Visitors at Clemson University.

[1] Tom Kolditz is Professor in the Practice of Leadership and Management and Director of the Leadership Development Program at the Yale School of Management. His experience as a leader development expert spans four decades in the public, private, and social sectors.

A retired brigadier general and titled Professor Emeritus by the U.S. Military Academy, General Kolditz led the Department of Behavioral Sciences and Leadership at West Point for twelve years. In that role, he was responsible for teaching, research, and outreach activities in Management, Leader Development Science, Psychology, and Sociology. A highly experienced global leader, General Kolditz has served more than twenty-six years in leader roles on four continents. His career has focused on either leading organizations himself or studying leadership and leadership policy across sectors. He served for two years as a leadership and human resources policy analyst in the Pentagon, and a year as a concept developer in the Center for Army Leadership. General Kolditz was the founding director of the Thayer Leader Development Group, and is the managing member of Saxon Castle LLC, a leader development consultancy.

General Kolditz is an internationally recognized expert on crisis leadership and leadership in extreme contexts, and in the development of programs to inculcate leadership and leader development in everything from project teams to large organizations. He has published extensively across a diverse array of academic and leadership trade journals, and serves on the editorial and advisory boards of several academic journals. He is a Fellow in the American Psychological Association and is a member of the Academy of Management. He is a founding member of the Board of Advisors for the Department of Psychology at the University of Missouri, on the Council of Senior Advisors for the Future of Executive Development Forum, and is an Academic in Residence for the Global Leadership Strategy Network. His consultancies include Google and GE.

A skydiving instructor since 1980, Kolditz weaves his personal experiences and abilities as a Soldier, skydiver, and scholar into the first-hand study, analysis, and practice of leadership in dangerous circumstances—*in extremis* leadership—and how such leadership can inform the practice of leading in more ordinary settings. His most recent book, *In Extremis Leadership: Leading as if Your Life Depended on It*, was based on more than 175 interviews taken on the ground in Iraq during combat operations. He

Well, thank you so much, General Darpino, for that incredible introduction and what an honor it is for me to come here and be able to talk to you all a little bit about leadership. It's something that has always touched me and it's been the focus of my entire career.

But before I get started talking about leadership, I'd just like to talk to you a little bit about what people like you have done for me and for my career, because quite frankly I would not have gotten off the ground in the Army without an association with Army lawyers. And then going forward I really saw Army lawyers as sort of Vanguards of innovation for me in the jobs that I had. Because moving an organization forward and trying new things, means you get pretty close to the [ethical] line, , and when you do, you need a lawyer there.

But, first, I'd just like to try to describe to you how impactful this has been. I started my career at Fort Sill, Oklahoma, in the Officer Basic Course. And I was coming there out of the first four years of undergraduate at Vanderbilt and then four years in graduate school in psychology. And so you can imagine when I got there I found the place perhaps not quite as enlightened [laughter] as some of the places I had been. But luckily for me—and I was in a late summer course because I had this oddball career progression. Luckily for me there were other first lieutenants in the course as well and they were Army lawyers. They were Army lawyers who were going to do artillery for a little bit and then get started on their legal careers. They were an absolute font of sanity and wit and we were inseparable. Two of them I remember in particular.

---

has been named as a leadership Thought Leader by the Leader Institute and as a Top Leader Development Professional by Leadership Excellence.

General Kolditz has presented leadership content to more than 150 governmental, corporate, and social sector audiences worldwide. As a professor, he has led academic seminars and given lectures to students from Babson, Wellesley, and Olin Colleges, the University of Missouri, Columbia University, Duke University, Yale University, the Military Psychology Center of the Israel Defense Forces, Peking University, the Beijing International MBA program, and Harvard's Center for Public Leadership. Kolditz has appeared on *ABC World News*, *ABC 20/20*, *al Jazeera*, MSNBC, CBS, NPR, Calgary Today, Morning Ireland, and interviews with reporters from the *New York Times*, the *Chronicle of Higher Education*, the *Associated Press*, *Time*, *Discovery*, the *Atlanta Journal Constitution*, the *Washington Post*, *La Razón*, and more than a dozen national and international news agencies.

He holds many degrees, including a Bachelor's degree in Psychology and Sociology from Vanderbilt University, as well as Masters and Ph.D. degrees in Social Psychology, a Master of Military Arts and Science, and a Master in Strategic Studies.

One of them is named Keith Sickendick who later went on to be a judge in Kansas City; And the other was a guy named Karl Goetzke [laughter].

And so if you can imagine going through manual gunnery with these brilliant people who could not do math [laughter] and finding that the Army is literally, or figuratively at least, a zombie apocalypse of conventional thinking, they were the defenders. And then, fast-forward to preparing for battalion command in the middle 1990s. I was getting ready to go take a battalion in Korea, and I came here to the Senior Officer Legal Orientation. The class was mostly full of colonels, but I was working for the DCSPER (ACS G-1) at the time and talked them into sending me. It was hugely eye-opening for me en route to command. And it was not because the lawyers who taught me imposed a lot of restrictions or described things, as they needed to be. It's because as I listened to them speak and in the spirit of their instruction they taught me about what I *could* do. They taught me about what commanders could do and how we could get the job done. Without the course, my command would have been much different. I just cannot even imagine having commanded without having some degree of legal background and education. I got it here and it was just a great experience at the time. Because that is what defends you when you are up against the zombies, you know, on a daily basis [laughter]. Later I discovered, though, that they were all over. I remember I went to do a briefing on artillery in Korea—and Korea is different—how many of you have been to Korea? So you know that everything in Korea is a little bit different and artillery tactics are as well. There was a need for a really special solution in order to deliver the volume of fires in the tightly compressed area that was required by the mission. Army doctrine would not get us there this day. There was no doctrinal way of doing what we wanted to do. So we worked really hard and figured it out. We figured out how to put about 360 rounds of 155 millimeter artillery in a 300 by 300 box in eighteen minutes. And it was a really powerful technique.

I was briefing a new division commander on the procedure, and we had a unique term for it, for that particular type of fire mission. And after he listened to us he said, "Use the doctrinal term." And I told him, "Well, sir, because of what we have to do here, there really is not a doctrinal solution. And so we figured this thing out in order to get this job done." And he looked at me and he said, "Use the doctrinal term." [laughter] And I thought, "Oh, my God, the division commander is a zombie." [laughter]. Innovation and change is not always welcome

where you are. And so when you are doing innovative things, it's always really handy to have a lawyer with you.

As soon as I got to West Point, which is like most educational institutions in the military—it is a great place to try new things and to innovate and to write and to do things—it seems like I was in and out of the SJA's office all of the time. The first important thing that we were able to accomplish was to open up on publishing a little bit. I worked very closely with a JAG officer named Sarah Holland. Sarah helped me figure out how to get visibility for a book I published on leadership in dangerous contexts. We called it *In Extremis* Leadership.

We had to get this book visible enough so that other people would start doing research in this area. I was very disappointed in the amount of leadership knowledge we had about leading in dangerous places. It was mostly just kind of history and war stories and things like that. And the war had begun in Iraq in earnest and it was pretty clear that all of our graduates were going to go out and they were going to lead people in dangerous contexts. So I wanted a lot of research done on that and it was far too much for us to do in our department at West Point. So the idea was to jumpstart this research nationwide or even worldwide. And in order to do that we had to get out and speak about it, we had to travel, we had to have a marketing company push this out into the public view, and as you might imagine, there were a lot of ways to get crossways with the Joint Ethics Regulation when you are trying to do gain visibility. But the stakes were pretty high.

And so really, Sarah was the one who helped figure that out. I mean, I went to seven countries and spoke at other service academies. Most of the marketing support was from John Wiley & Sons. In the end, we stayed legal and got the visibility that helped our cause. If you go to Google "scholar" now, and you type in "In Extremis Leadership," there are over 90 articles out there, three books, and six doctoral dissertations. People now study leadership in dangerous contexts and they are not Army people. They are scholars all over the world: Norway, Israel. So now there is a body of knowledge developing around what soldiers do. That was the point of writing that book and none of that would have happened without an Army lawyer's help; none of it. The work included an article published in a journal called *Leader to Leader*. And that journal, that year, won the best magazine or journal in the United States and it was a huge feather in West Point's cap. Once again we were

stymied as to how to do that legally and in line with the regulations, but Army JAGs were able to figure it out for us.

It got into things that were even more unusual. One of the things I did at West Point, for 11 years, was coach the parachute team. We wanted a tandem program. But as you might expect, even in a military organization the ability to strap people to your chest and run out of the back of an airplane is something that the commander takes interest in. I mean, [laughter] you know, he wants to know how exposed he might be in particular, because in order to do what that team does, we used civilian aircraft; jumped at civilian drop zones; consulted civilian coaches; competed with civilian competitors. It created this complexity that challenged us, but the SJA at the time really worked with us to develop a tandem SOP for the Military Academy. We celebrated the completion of the project by my strapping the SJA, who was [COL] Robin Swope, to my chest [laughter] and running out the back of an airplane with her. That's as close as I have ever been to one of my lawyers [laughter]. But, you know, it was a lot of fun and made skydiving safer at West Point. It could not have been done without Army JAG.

We explored various kinds of corporate connections while we were at West Point. Most schools—business schools, like the one I am at right now, are incredibly well connected to business, with other leaders, with other organizations. And that is more difficult when you are in the Army to do that in the ethical way and to do it in a way that you can survive. But Lori Doughty and others helped us work in ways of making those connections proper and effective for our management program. And it resulted in some interface with corporations. And a week ago, West Point completed its first Cadet Leadership Conference sponsored by a $2.5 million endowment from [Procter & Gamble CEO] Bob McDonald. He is a West Point graduate, but he was introduced to the department and to leadership instruction there through the kind of program Lori helped us design. We also were able to stand up the West Point Leadership Center—an endowed center run through the West Point Association of Graduates. As you know, the role of an Army officer in interfacing with organizations that might donate to a place like a West Point is really complex. It all has to happen through the Association of Graduates, with legal review by Army JAGs.

A military person can never make a request or propose a gift coming from a person, but what we can do is articulate Academy needs and describe what is important to us in the accomplishment of our mission at

West Point. To figure that out, I took a couple thousand dollars of my own money, went on leave to Indiana University, and took a course on nonprofit fundraising. Armed with that knowledge, I was able to figure out (based on my discussions with the JAG officers) what we could or could not do. Working cautiously and deliberately, in two years we were able to get $5.5 million in direct donations and a $10 million testamentary gift for the Leadership Center. It is now driving that center and gives it a consistent funding stream. And we in the department were able to do that all without going to jail because of our [laughter]—because of our close association, really daily, with JAG officers.

It is pretty clear in my own mind that many of the innovations that I was able to pursue, many of the things that I wanted to do in my career, would not have gotten off the ground without Army lawyers. And so as your speaker, the first expression that I wanted to give to you all here is just gratitude. Thank you so much for being out there. I appreciate the wisdom that you all bring, not only when I was in command and running a department at West Point, but at other times. To do these things right is really, really important. For those of us who work in leadership, to be on the wrong side of an ethics line or certainly of the law, would be horrifying. But at the same time, unless we go up to that line sometimes, we fall short of our capability. So thank you for that. Thank you for that very much.

Let's turn to leader development. I'm going to begin by just talking about leader development in general terms, and then I'll talk about a specific way of getting it done. The program that I'm going to discuss, the way of approaching leader development, it seems to me could have a high degree of utility for all of you. You have a bright and capable group of people that you work with and work for. You have not only an academic foundation in education, but you are also engaged in practical activity in the Army. It turns out to be a really rich environment in order to accomplish leader development. But unfortunately, at least in my experience, people tend to go about it backwards. They do it in the wrong way. So I just want to be able to make you think a little bit about leader development. And that's what professors get paid to do. We get paid to make people think. And so we're going to start off with that.

The first question for me to answer is, "can this stuff be taught?" I mean, what makes us think that it is worth putting resources and time behind leader development in our organizations? And it comes down to whether leaders are born or made. And I get asked that question a lot. It

is not an issue on which we have to speculate. There's actually been very good research done on heritability of leadership traits and leadership factors. The best research on that was done at the University of Minnesota and using identical twins that were separated at birth. Due to circumstances, they were raised in different households and different environments, but with identical genetics. As it turns out, heritability is about 31% of an individual's capacity to lead. So the answer to whether leaders are born or made is, well, partly, it's like 30% "born." It's a pretty fundamental 30%.

What do you inherit that makes you more likely to be a good leader? Well, how about intelligence? Anybody want to follow a dumb leader? [Laughter]. Of course not. So intelligence is a heavy heritability factor, part of the leadership equation. Physical attractiveness, as it turns out, if you're better looking it's easier for you to lead. And I can see that the personnel who determine who is going to be a JAG or not is already way ahead on that, because everybody out here [laughter] is good-looking. Being tall helps. It's funny, especially in American business, being tall has a heritability factor; makes it easier for an individual to lead. Not true in all cultures, but in American business culture, it is. And is that ever silly but it's just the way it is.

So if that's the news, if 30% is inherited, does that mean we really have to select people on that basis? My argument is no. I would say that everyone in this room is smart enough; everyone in this room is good-looking enough. But what that means is about 70% of leadership capacity is not inherited. Seventy percent is learned behavior that is developed environmentally. That's the part that we can work on.

So in that respect it does make sense to pursue leader development. So with that as a backdrop, then, how do people learn to lead? There is a strong body of research on how people learn to lead. About 10% of it comes from classroom activities, studying, reading. About 20% is feedback and coaching, and 70% is doing it. Seventy percent is experience. Seventy percent is running organizations, leading, and maybe failing at it a little bit. It's coaching your kid's T-ball team, leading them, and then being unsure as to why they are all crying [laughter] when you're such a great leader. And they are supposed to learn from failure, but then ice cream is a solution, obviously. But remember: 70% learned. So with that as a backdrop, let us think a little bit about how leadership is usually taught. And I certainly discovered this when I went to Yale. Leadership at Yale was classroom instruction

followed by group discussion. But that fits into only 10% of how people learn. So there has to be a better way.

The best leader development programs start by asking what causes people to develop at all. And when I say develop, I really do mean change the way they are thinking in a progressive and sequential way as they pass through their adult years. It means that you take people's experience and you enhance it using two things: new knowledge, which can be that 10% piece; and reflection. And that has some similarities to coaching, getting people to think about their experience in relation to that new knowledge. Do that over time not on a sixteen-hour offsite, but over a number of years it causes people to advance in their development. People will be better leaders in the end. Unfortunately, that is not how many institutions approach leadership or leadership development; usually it is much more academic.

I want to talk now about what we are doing at Yale and how this might look when it is applied to an academic setting. What you see on the top half of this chart, is the first-year progression of an MBA student.[2] There are about 290 per class at the Yale School of Management; most of them have been out in business six to ten years. They have GMAT scores in the mid-700s and they come to Yale to become business leaders. Some of them are running their own businesses while they are in business school. Many of them have nonprofits that they've founded and that are up and running; it's a busy place.

In the first year, everything you see in pink is part of a core curriculum that you would see at most every business school. A course on careers and career progression, a course on managing groups and teams, and courses on negotiation. All of these things are incredibly important for leaders, but we have added to that a classroom component. The classroom component is seven lectures on personal leadership—personal development. Topics include self-control, self-monitoring, goal-setting, how to deliver feedback to subordinates, and honing their personal leadership. Then the next semester they get another seven lessons on cross-cultural and organizational leadership, and that concludes the classroom component of a two-year program., This was a shock to my fellow Yale professors, because they are professors. In their mind, what professors do is teach classes. But when I said it was a core

[2] *See* Appendix (Yale Leader Development—2 Years).

program with only fourteen lessons, I referred them back to the 10%. I referred them back to how people develop as leaders.

I mean, think about it. Thirty percent is heredity, so the most we can effect is the 70%. And now when we look at how people learn to lead, we know that the classroom component is only 10%. So it is 10% times 70%; 7%. And that's if you do everything perfectly in the classroom. So if you do an average job, you've probably provided a 5% solution on a the whole problem. A nickel solution to a dollar problem. So you have got to have a way to get people engaged in leadership and coached on how they are doing. That is what you have to do if you want to move people's needle on leadership over time. I require students to build their own 360 degree assessment using software. They create this tool to get feedback on their personality, on their behavior, and then they deploy it to the people they choose. Why don't we just give them a prepared assessment?

Because more than a third of these people are not from the United States, and many of them are going to lead in other cultures. I give them a 360 assessment that was validated in Minneapolis, Minnesota. It's probably not going to apply very much to their circumstances when they are in Ghana running a nonprofit with local nationals. So a tremendous amount of tailorability is built in so that they get culturally sensitive feedback.

The other thing students do in that advanced leadership course (and this is the part that I think is really relevant to you all) is build a self-directed leader development plan. They put together a plan that articulates three development opportunities. The first is what they are going to do over the next year in terms of developing themselves in the context of their education. They are running their own nonprofits, in student government, in clubs, helping advise undergraduate clubs, working for community organizations downtown and all of these are rich in potential for developing their own leadership. So they plan for their development in those activities.

The second thing part of their plan is a six- ten-year timeline. They describe where they want to be in six to ten years in a strengths, weaknesses, opportunities, threats (SWOT) analysis. How are they going to get there? What's in their way? What's going to help them get there?

And the last part of the plan is a well-being component, where they articulate how they're going to reach their own personal goals in areas like physical fitness, mental state of affairs, relationships, spirituality, anything that's deeply personal to them—those parts of our lives that we usually forget about. I have more than fifteen years of experience with these plans because in every Army organization that I've led since 1999, every officer has created one of these plans for me. They shared them with their raters (who in business we would call coaches), and then those raters would bring the plans to me and we would figure out how to enable the officers' development.

First-year Yale students develop their plan and in their second year, they execute that plan. They join organizations; they do some leadership with peers, with undergraduates, in nonprofits around New Haven—wherever lies their passion. If you look up there in blue, you see leader development groups one, two, and three. These are eight-person groups—eight first-year students who are led by two second-years. The mission of those second-year students in those groups is to add value. That is all we tell them; add value. And they are evaluated by the first-years, which is a rude awakening for some of the MBA students who may have thought that if they were the leader they get a lot of perks.

This practicum creates the conditions for Yale students to lead, to have varying degrees of success at leading, and then to talk to coaches. I have hired a small corps of professional coaches who coach these second-years during this practicum. There is also a peer coaching program. Every student coaches someone else; every student is coached by someone else. And the point with these coaches, more than anything else, is accountability. One of the best coaches in this country, Marshall Goldsmith, who helped me hire my coaches, has a technique that he has used for many years where he calls someone, a friend of his whom he has known for a long time, whom he trusts. Calls them every evening, every single night, and all they do when that phone rings is they ask ten questions of each other. And it's questions like: Did you have more than two drinks today? How many push-ups did you do today? Did you do sixty minutes of cardio today? Have you told your wife and your family that you love and appreciate them today?

And it's ten quick questions; he says it takes about two minutes in the evening. And every single evening they make this call. But it is accountability. It is accountability for the kind of development that he wants to do because he got to pick the questions. Coaching and feedback

is very powerful in leader development. It changes people's behavior. Successful leader development programs load on three variables; the knowledge component, a reflection component, and experience. And when in doubt, add more experience at leading, because that's the 70% solution.

We are also building a feedback culture in the Yale School of Management. MBA students arrive at Yale as 290 individuals, and within two or three weeks they are closely bonded. When they see one another doing things in the classroom and they are working on teams, it's just all love and light. No one ever criticizes anyone's performance. No one ever says, "well, that was really a lame presentation." Its excessive and negative cohesion. Most people think of cohesion as a good thing, but when it creates intellectual dishonesty in your organization, it is a problem. I drove the point home in a business case competition that the school held during first-year orientation. Students were in eight-person groups. They had been there less than a week, just getting to know one another. The task was to take a business case that had been presented by Yale, and they would figure out how to build a successful business. They only had a day to complete their business plan, to come together as a team to do all of the research, analyze the business model presented, put it into a PowerPoint show, and then they presented it to us. A couple other professors and I did the judging. We finished the judging, figured out who was best and as we were walking out, I was supposed to announce the winner. Just before I announced the winner, a professor leans in to me and says, "Be sure you tell them that they all did well." [laughter] They have not even started business school. They are a pickup team. They spent a day on this enormous, challenging project, and we just saw this stuff and it is not good [laughter]. Good work for the constraints, but objectively, not ready for prime time.

So I walked out and looked at the students assembled in the auditorium; they are eagerly awaiting the win. And I said, "Look, you all are great students. We want you all to be at Yale. You competed heavily to come here but I have to tell you that every one of those presentations was bad." [laughter]. Their eyes got big, and there was nervous laughter, but, you know what? It was the truth. And they were bad because they were thrown together quickly. All of the plans would have failed. It was important to kind of send the message that you cannot go home yet, you have to go to business school and then when you graduate, you'll be good. Feedback and intellectual honesty in reality is key to personal growth. You have the same challenge here at

the JAG School. Your students are very well-educated, bright, capable people, many of them have never failed at anything in their lives, but you have to make them better. And sometimes you have to be honest about their performance and that was key in this program and would be key in any other leader development activity.

I used the self-development framework at West Point and it made a big difference. I also briefed the framework at the War College in 2003 and 2004. We were really able to transform people by paying attention to what their goals were and tried to help them get there, even if those goals seem to be indirect. I mean, one of the guys that we developed under the system was an aviator. He was able to get 325 hours of helicopter time and qualify in a second helicopter while he was there. One might say, "Well, how does that make him a better teacher at West Point? Shouldn't you be developing him as a faculty member, as a teacher?" And my response to that was, "No, not really." What I want to put in front of students is a strong, capable, well-developed individual and they will take care of the teaching.

We used this to put people into medical school. We had one person go to clinical psych grad school and get a Ph. D. and now they are a clinical psychologist. People did all kinds of things focused on their own developmental goals and they were the best instructors I had on the platform. So part of making this work was loosening it up a bit.

It is not rocket science to create a self-directed leader development plan; I never required a specific format. A single sheet of paper with a timeline at the bottom is sometimes enough.

I told them, I never wanted any of my faculty at West Point to stand up when I am giving them their award as they are leaving and say, you know, we said we were going to go to all of these Broadway shows and really take advantage of New York, but really my family just kind of hung around West Point. The key person who ensured successful quarterly reviews of the leader development plans was a GS-5 named Joanne Wright.

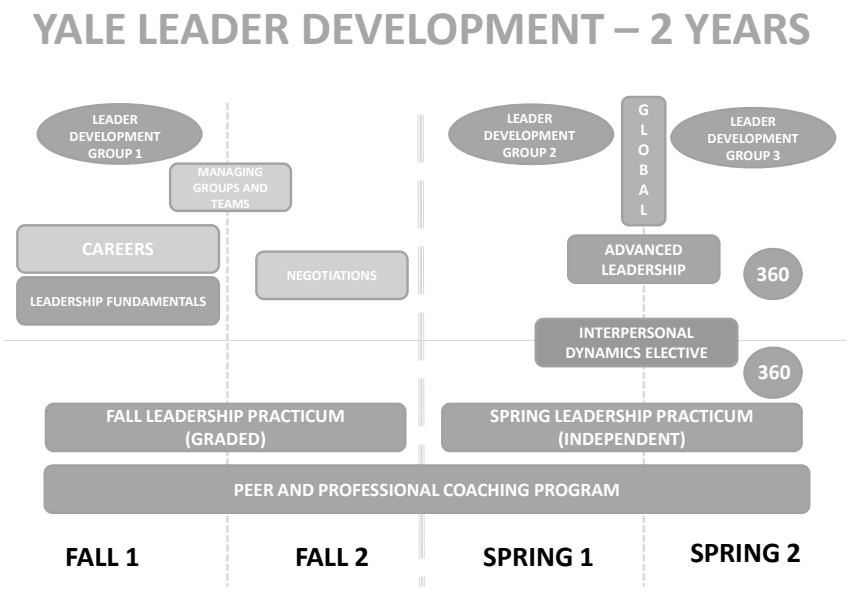
Joanne Wright was my administrative assistant. Joanne would get my directors lined up to come in every quarter and this would get done. I told her, "If you wait for me to tell you that it's time to bring people in to talk about these plans, it never will happen." I just told her that wouldn't happen because I am killing twenty-five meter zombie targets. But she

got them in there and it made a huge difference. Now my team and I are fielding an entire program at Yale built on this model. Recently I got a visit from two professors from the Darden School of Business here at the University of Virginia, and they were interested in Yale's leader development program. But like most professors, they have an academic frame towards how to deliver this kind of effect. Maybe this is the artilleryman in me coming out, but it's less about the execution of a curriculum and more about delivering effects. the effects come from, personal experiences at leading by individuals who are graded and fed back and coached by people in honest dialogue. That is what develops leaders.

And so as you think about how you develop people in your organization, remember the nickel solution on a dollar problem. Remember to focus your efforts in ways that are going to have impact on how people actually learn to lead. Many of us believe that by applying these sorts of principles where it hasn't been done before, like business schools, like other kinds of schools, that we can really change the world. Because when you take a person who has strong technical skills, whether it is somebody that is going to be a financial analyst down on Wall Street or somebody who is going to be an attorney for a senior leader, when you take someone who has those kinds of technical skills and you add to that the capacity to lead, now you have a person who can change the world. Now you have a person who can really leave their footprint in the world where they operate.

So I will end the same way I started, with just a tremendous amount of gratitude to you all. To folks like you all who touched so many Army officers along the way and make the Army run, make it run better, make it run more ethically, make it run legally, but also enable the innovation. Because without your input, the Army would be a walking dead-zone of innovation. The zombies would win. And when you all are in the mix, we know what we can accomplish, we know how to do it the right way, and we can sleep well at night knowing that we did a good job. So thank you all very much. I appreciate you.

Appendix


YALE LEADER DEVELOPMENT – 2 YEARS
LEADER DEVELOPMENT GROUP 1
MANAGING GROUPS AND TEAMS
CAREERS
LEADERSHIP FUNDAMENTALS
NEGOTIATIONS
LEADER DEVELOPMENT GROUP 2
GLOBAL
LEADER DEVELOPMENT GROUP 3
ADVANCED LEADERSHIP
360
INTERPERSONAL DYNAMICS ELECTIVE
360
FALL LEADERSHIP PRACTICUM (GRADED)
SPRING LEADERSHIP PRACTICUM (INDEPENDENT)
PEER AND PROFESSIONAL COACHING PROGRAM
FALL 1
FALL 2
SPRING 1
SPRING 2

TERRORISM, TICKING TIME-BOMBS, AND TORTURE[1]

REVIEWED BY FRED L. BORCH III[*]

Does the end sometimes justify the means? May the United States torture a terrorist in order to save lives? May U.S. agents even torture an *innocent* man, woman or child to save other innocent lives? The answers to these questions—and more—are in this compelling book, which argues that it is morally permissible for a state to torture an individual in order to save innocent lives, albeit only in exceptional circumstances. Precisely because the intellectual arguments in *Terrorism, Ticking Time-Bombs, and Torture* are seductive, this also is a dangerous book, because it fails to provide real-world solutions to issues that arise from the use of torture. Additionally, it provides a philosophical basis for disregarding the basic moral norms that have made the United States "the greatest force for freedom and security that the world has ever known."[2]

Judge advocates should read this book for both personal and professional reasons: for personal reasons because all American citizens should understand that a cogent, rational argument exists for using interrogational torture; for professional reasons because as long as the military is involved in counter-terrorism operations, Army lawyers will be asked about the legality of alternative interrogation techniques.

---

[*] Mr. Borch is the Regimental Historian and Archivist for the U.S. Army Judge Advocate General's Corps. He graduated from Davidson College (A.B., 1976), from the University of North Carolina (J.D., 1979), and from the University of Brussels, Belgium (LL.M, *magna cum laude*, International and Comparative Law, 1980). Mr. Borch also has advanced degrees in military law (LL.M, The Judge Advocate General's School, 1988), National Security Studies (M.A., *highest distinction*, Naval War College, 2001), and history (M.A., University of Virginia, 2007). From 2012 to 2013, Mr. Borch was a Fulbright Scholar in the Netherlands, where he was a Visiting Professor at the University of Leiden and a Visiting Researcher at the Netherlands Institute of Military History.

Fred Borch is the author of a number of books and articles on legal and non-legal topics, including *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti (2001)*, and *Judge Advocates in Vietnam: Army Lawyers in Southeast Asia (2004)*. His latest book, *Medals for Soldiers and Airmen: Awards and Decorations of the United States Army and Air Force* was published by McFarland Press in 2013.

[1] FRITZ ALLHOF, TERRORISM, TICKING TIME-BOMBS, AND TORTURE (2012).

[2] Presidential Statement on Sustaining U.S. Global Leadership: Perspectives for the 21st Century Defense, DEP'T OF DEF.GOV. (Jan. 3, 2012), http://www.defense.gov/news/Defense_Strategic_Guidance.pdf (last visited Aug. 21, 2013).

Terrorism, Ticking Time-Bombs, and Torture explores the question of whether it is ever "morally permissible to torture"[3] a terrorist in order to save innocent lives. For author Fritz Allhof, an Associate Professor of Philosophy at Western Michigan University, "torture" refers to "interrogational torture"[4] and it means the interrogational torture of terrorists. Consequently, Allhof's book distinguishes between torture used to obtain actionable intelligence that will save lives, and other forms of torture, which Allhof identifies as "sadistic, confessional, punitive, and terroristic" in nature.[5]

Terrorism, Ticking Time-Bombs and Torture begins by defining terrorism, and then discusses the morality of using torture to counter terrorism. Allhof insists that, while torture is a moral wrong (because it causes pain and suffering), its use in an interrogation of a terrorist is morally permissible if it saves innocent lives, because such torture "aims at a positive moral good, namely, the disarming of some threat."[6] In his view, those who object to the use of torture place too much emphasis on the rights of suspected terrorists, when it is the lives of innocents that should be the focus of any philosophical discussion on the use of torture. Interrogational torture may be a moral wrong, but it is permissible in exceptional cases because it represents the lesser of two evils.

While Allhof says "that virtually any plausible moral theory could defend the permissibility of torture in exceptional cases,"[7] the philosophical foundation of *Terrorism, Ticking Time-Bombs and Torture* relies chiefly on the 19th century English philosophy of "utilitarianism" developed by Jeremy Bentham and John Stuart Mill. At its core, utilitarianism is the idea that the "purpose of government and its system of law is to provide the citizenry with the greatest possible amount of happiness."[8] It follows that if the purpose of the state is to maximize

---

[3] ALLHOF , *supra* note 1, at 113.
[4] *Id.* at xi.
[5] *Id.* at 77. Allhof does not devote much space to defining these terms, but he gives some examples. While "sadistic" torture might be inflicted to give the torturer pleasure, torture inflicted as part of a "well-received public spectacle" also would qualify as "sadistic." Torture inflicted on a criminal as punishment would be "punitive"; that same torture would also be "terroristic" if it scared other potential criminals from committing crimes. Torture used to obtain admissions used to convict an accused would be "confessional." *Id.* at 66–67.
[6] *Id.* at 76.
[7] *Id.* at 195.
[8] GEORGE L. ABERNETHY & THOMAS A. LANGFORD, INTRODUCTION TO WESTERN PHILOSOPHY: PRE-SOCRATICS TO MILL 319 (1970). *See also* JOHN STUART MILL,

pleasure (and minimize pain), then the yardstick for measuring its success is whether the state has achieved the greatest good for the greatest number of people. Consequently, Allhof's central argument is that torture, even if a moral wrong, is morally permissible if the good accomplished by that torture is of sufficient value.

Perhaps the most interesting part of Allhof's book is his discussion of five "ticking time-bomb" scenarios. He has constructed these scenarios so each explores whether it is "morally permissible" to torture a terrorist based on the terrorist's guilt or innocence and the likelihood of obtaining intelligence from torture:[9]

> Scenario No. 1: State law enforcement agents have apprehended a terrorist who has planted a bomb in a crowded city. An explosive ordnance demolition team has examined the bomb but is unable to diffuse it. Unless the terrorist provides the deactivation code, the bomb will explode and kill 100 innocent men, women, and children. If "moderate torture" is used on the terrorist, "he will surely provide the deactivation code" in time to disarm the device.
>
> Scenario No. 2: Same as Scenario No. 1, except that, the bomb will kill 10,000 innocent people. If "moderate torture" is used on the terrorist, there is only a one percent chance that he will reveal the deactivation code; there is a 99 percent chance that the torture will fail and that the bomb will explode.
>
> Scenario No. 3: Same as Scenario No. 1 (bomb will kill 100 people if not defused) except that torturing the terrorist will be ineffective, because he has been trained to resist torture. The terrorist's young and completely innocent daughter, however, is in custody. She knows nothing about her father's terrorist activities. A psychological profile of the terrorist shows that if "moderate torture" is applied to his innocent child (and

---

"UTILITARIANISM," THE ENGLISH PHILOSOPHERS FROM BACON TO MILL 895, 900 (1939) ("actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness").

[9] ALLHOF, *supra* note 1, at 104.

> he is aware of this torture), the terrorist "will surely provide the deactivation code" for the bomb.
>
> Scenario No. 4. Same as Scenario No. 3, except that 10,000 innocent men, women and children will lose their lives if the bomb is not deactivated, and there is only a one percent chance that, if his innocent daughter is subjected to "moderate torture," that the terrorist will provide the code to deactivate the bomb.
>
> Scenario No. 5. Same as Scenario No. 1, except that government officials know only that the terrorist who planted the bomb was wearing a red sweatshirt. Law enforcement teams set up check-points and apprehend two men wearing red sweatshirts. Both deny that they are terrorists or that they know anything about the bomb, but one of the men is lying. May "moderate torture" be used on both men, one of whom is innocent, in order to obtain the code to deactivate the bomb?[10]

In Allhof's discussion of the first four scenarios, he concludes that "it is morally permissible" to use "moderate torture" on the terrorist and his innocent daughter, even in those situations where the chance of obtaining the necessary information is only one percent. As for the fifth scenario involving men dressed in red sweatshirts, Allhof concedes that while it is wrong to torture an innocent person, "this torture could still be justified if there are enough people at risk."[11] Stated different, Allhof argues that while torture is "a moral wrong," it is morally permissible to torture "in the pursuit of a greater moral good."[12]

While there are no known real-world cases of ticking time-bombs,[13] Allhof argues, convincingly, that this does not make these five scenarios (or any similar scenarios) any less important to a discussion of the morality of using interrogational torture. There is, however, a major problem with Allhof's reliance on utilitarianism: this philosophical

---

[10] *Id.* at 141.
[11] *Id.* 104–05, 141.
[12] *Id.* at 202.
[13] *Frontline, The Torture Question* (PBS television broadcast Oct. 18, 2005) http://www.pbs.org/wgbh/pages/frontline/torture/justify/ (last visited Aug. 21, 2013) (*Frontline* gathered a group of experts and scholars to debate whether a "ticking time-bomb" terrorist can be tortured.).

viewpoint either envisions or relies upon a common understanding of what is "good" for a society. Consequently, when "good" is perverted (e.g., in Germany under the Nazis from 1933 to 1945), the utilitarian viewpoint is similarly corrupted. Moreover, while *Terrorism, Ticking Time-Bombs and Torture* defines "good" in terms of saving innocent lives, could not "good' also be saving revered cultural property? Would it be morally permissible to inflict 'moderate torture' on a terrorist to prevent his bomb from destroying the Declaration of Independence, Lincoln Memorial, Washington Monument or the White House?

Assuming *arguendo* that Allhof's philosophical rationale for permitting interrogational torture is sound, there are significant practical difficulties associated with using such torture. This is an important point, as constructing a clever philosophical argument justifying the use of torture is of little value if its application to the real world is problematic.

To his credit, Allhof recognizes that he must address the issues raised by the use of interrogational torture in the real world, and his book devotes more than sixty pages to these concerns.[14] Despite the book's attempts to show how interrogational torture could work in practice, *Terrorism, Ticking Time-Bombs, and Torture* fails to satisfactorily overcome a number of critical issues. First, what types of torture may be used? Allhof acknowledges that U.S. law and the UN Convention Against Torture define torture in terms of "severe physical or mental pain or suffering"[15] and he identifies a variety of techniques that fall into the category of torture, including whipping, cuffing the ears, eyeball pressing, and simulated drowning. But what is the "moderate torture" that Allhof says would be used in his five scenarios? Does it include extinguishing a lighted cigarette on the face of the terrorist's daughter? Using an electric cattle prod on her genitals? Perhaps more importantly, why should only "moderate torture" be used if inflicting a higher degree of pain and suffering will result in information that saves thousands and thousands of lives? Allhof does not endorse the use of "highly brutalized torture" and he suggests that a check on the use of such torture will be the philosophical premise that "we should torture no more than is necessary to elicit our goal" of obtaining actionable intelligence.[16] But

---

[14] ALLHOF , *supra* note 1, at 139–204.

[15] *Id.* at 61; 18 U.S.C. § 2340 (2006) (Definitions). Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 1, para. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987, in accordance with Article 27(1)), *available at* http://www.hrweb.org/legal/cat.html (last visited Aug. 21, 2013).

[16] ALLHOF , *supra* note 1, at 199.

this is not how the real world works and a torturer who sincerely believes that his subject will talk if just a little more pain is inflicted is likely to do just that. Additionally, if Allhof's point is that torture is morally permissible because it achieves a greater moral good, a logical extension of Allhof's argument is that an interrogation technique that often results in the death of the subject is permissible if there are sufficient lives at stake. Would saving a million innocent lives permit such torture?

Second, if the state may torture a terrorist, who will inflict the torture? Allhof rejects the idea that an "institutional apparatus" is needed for torture, although he concedes that an institution, if necessary, would simply be "a necessary cost."[17] He also is "skeptical as to how much training is actually required for torture."[18] As for who would inflict the torture, Allhof seems to believe that "torturers should . . . be drawn . . . from special forces like Delta Force, Green Berets or Navy SEALs." In his view, members of the special operations community will be the best torturers because they are trained in interrogation and interrogation resistance, including waterboarding.[19] But suggesting that members of this community are best able to inflict torture on terrorists shows that Allhof does not understand the purpose of special operations, much less the type of person who joins that unique community. Who will be the most "effective torturers" in the Green Beret community? Officers? Noncommissioned officers? Will torturers be volunteers? If so, will these men and women torture the terrorist's innocent young daughter, or the innocent man wearing the red sweatshirt?

Finally, and most alarming, is his discussion of who should decide when torture is permissible. *Terrorism, Ticking Time-Bombs and Torture* rejects the idea that lawyers should be involved in the process. He argues that Harvard law professor Alan Dershowitz's idea that "torture warrants" could be used to ensure that the use of torture was justified by the circumstances is wrongheaded.[20] Allhof reasons that intelligence officers contemplating torture will "have nothing to lose by applying for a [torture] warrant and, once such a warrant were issued, would have reasonably wide latitude in their application of torture."[21] He also insists

---

[17] *Id.* at 150.
[18] *Id.* at 152.
[19] *Id.* at 151.
[20] *See* ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002); Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y. L. SCH. REV. Nos. 1 & 2, at 275–94 (2003/2004).
[21] ALLHOF, *supra* note 1, at 193.

that the judge issuing the torture warrant "is not trained to evaluate circumstances of life-threatening catastrophe"[22] like those discussed in the five scenarios. Instead, the judicial officials must rely almost exclusively on the information provided to him by the official desiring authority to torture. Although Allhof does not conclude that this means judicial oversight of the torture process will be a 'rubber stamp,' he does believe that torture warrants would not lower incidents of unjustified torture and that the warrants are "more trouble than they are worth."[23]

Allhof's solution for guarding against unjustified torture is to permit the person inflicting the torture to defend his actions using the "necessity defense" as defined in the *Model Penal Code*.[24] Consequently, a field officer who tortures will suffer no legal liability for his actions if he clearly establishes "that he chose the lesser of two evils." If this "lesser evil argument cannot be clearly established, then the torturer is criminally liable."[25]

But again, this is both naïve and impractical. In the real world, no Soldier, Sailor, Airman or Marine will rely on a *Model Penal Code* provision when deciding to inflict torture on a terrorist. Even if the torturer is convinced in his own thinking that the torture is morally permissible, that torturer will want authorization from his chain of command on the type of torture to be used, its duration, and whether his superiors agree that torture is justified to save innocent lives. Will that chain of command make those decisions without consulting with a judge advocate? Will that legal advisor opine that the necessity defense will be a complete bar to a prosecution for aggravated assault or the grievous bodily harm resulting from the torture? In the real world, agents of the government want to know that what they are asked to do as part of their official work is legal. Military personnel, who are wedded to the idea that they act under orders from their superiors, are no different. Witness the infamous August 2002 memorandum written by Jay S. Bybee, who now serves as a judge on a federal appellate court. Judge Bybee's memo told Central Intelligence Agency (CIA) officers that any interrogation technique (including torture) was legal if it did not produce pain equal to that caused by "organ failure, impairment of bodily function, or even

[22] *Id.* at 182.
[23] *Id.* at 185.
[24] *Id.* at 188.
[25] *Id.* at 194.

death."[26] The purpose of Bybee's memo was to give legal cover to CIA agents obtaining "time-sensitive, threat-related information where lives hang in the balance."[27] An American Soldier torturing a terrorist's innocent young daughter will want similar assurances from his superiors that what he is doing is both authorized and legal.

Terrorism, Ticking Time-Bombs and Torture is a dangerous book because it offers the reader an intellectually sophisticated and seductive argument that fails the real world test. But the book is doubly dangerous because, in claiming that torture can be morally permissible, the book asks Americans to jettison, temporarily at least, the basic and invariable moral norms that have made the United States the exceptional nation that it is today and must remain. The moral standard upon which the country was created was first expressed in 1776, when the Continental Congress decreed that "all men are created equal" and that they have certain unalienable rights, including "Life, Liberty and the Pursuit of Happiness."[28] While the United States has failed in its history to always live up to this moral standard, the American people have held steadfast to this declaration as a guiding principle in the administration of justice, and it is what sets the nation apart from all others in the world. Torture is a violation of international law, and it is a violation of U.S. law. Since Americans believe in the Rule of Law, the idea that laws are the foundation of the United States, and not men or religious beliefs, using torture is unacceptable because it is unlawful. It also is immoral and, as such, is incompatible with American ideas about equality, fairness, justice, dignity and respect. During the Vietnam War, when U.S. military personnel were subjected to horrific torture at the hands of their North Vietnamese and Viet Cong captors, no responsible U.S. government official suggested that U.S. and South Vietnamese forces should reciprocate by intentionally inflicting pain and suffering on enemy prisoners of war. This is because, regardless of what North Vietnamese or Viet Cong officials did to American prisoners, the United States adhered to a higher standard of moral behavior. Opening the door to

---

[26] Memorandum from Jay S. Bybee, Assistant Attorney Gen, for Alberto R. Gonzales Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. § 2340–2340A (Aug. 1, 2002). *See also* DAVID COLE, TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE (2009); JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (2009).

[27] David Ignatius, *Interrogators Left Out in the Cold*, WASH. POST, Sept. 22, 2006, at A17.

[28] DECLARATION OF INDEPENDENCE (1775).

interrogational torture would mean that the ends do justify the means, and that committing a moral wrong can be morally right.

A final problem with Allhof's argument in favor of interrogational torture is his insistence that it is wrong to focus on the rights of a terrorist when the lives of innocents should be the paramount concern of the state. But this flies in the face of the Rule of Law and our system of jurisprudence. The English jurist William Blackstone wrote in *Commentaries on the Laws of England* "it is better that ten guilty persons escape than one innocent suffer"[29] and America's legal framework is built on this principle. Americans do not balance needs of society against the rights of the accused and, when Allhof claims that it is proper to inflict pain and suffering on one person for the benefit of others, he necessarily asks Americans to reject this fundamental moral norm. While ticking time-bomb scenarios are worthy of discussion, the arguments espoused in *Terrorism, Ticking Time-Bombs, and Torture* are not the answer.

[29] 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND IN FOUR BOOKS (1753).

By Order of the Secretary of the Army:

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

Official:

GERALD B. O'KEEFE
Administrative Assistant to the
Secretary of the Army
1326709

U.S. GOVERNMENT PRINTING OFFICE: 1994-300-757:00001