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MILITARY LAW REVIEW

Volume 216 **Summer 2013**

FROM A DREAM TO A REALITY CHECK: PROTECTING THE RIGHTS OF TOMORROW'S CONDITIONAL LEGAL RESIDENT ENLISTEES

MAJOR ALISON F. ATKINS*

Once let the black man get upon his person the brass letter, U.S., let him get an eagle on his button, and a musket on his shoulder and bullets in his pocket, there is no power on earth that can deny that he has earned the right to citizenship.[1]

I. Introduction

A. The Case of Private Robert Gonzales

Robert is part of the 1.5 generation.[2] His parents, both undocumented aliens, crossed the border from Mexico into the United

---

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[1] Fredrick Douglass, Speech at National Hall (July 6, 1863).

[2] *See* Roberto G. Gonzales, *Wasted Talent and Broken Dreams: The Lost Potential of Undocumented Students*, IMMIGR. POL'Y IN FOCUS, Oct. 2007, at 2 (2007). Members of

States in 1986 when he was two years old. His father has steady work installing sheetrock and his mother works as an occasional seamstress and housekeeper.[3] Both earn a paltry hourly wage with no employee benefits.[4] The Gonzales family lives together in a one-bedroom apartment in Texas.[5]

Robert attended Texas public school from kindergarten. He is fluent in English and Spanish and is poised to graduate in the top ten percent of his class. He wants to attend college but knows his parents have little tuition money.[6] Further, because he is undocumented, he is not eligible for federal student aid.[7] Robert is steadfastly determined to help his family have a better life and is desperate for a solution. He thinks the Development, Relief, and Education for Alien Minors (DREAM) Act[8] may be able to help him become a United States citizen. The DREAM Act allows undocumented aliens like Robert to obtain conditional legal residency that can transfer to permanent legal residency if he completes

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the "1.5 Generation" are any first generation immigrant brought to United States at a young age who were largely raised in this country. They are not the first generation because they did not choose to migrate, but do not belong to second generation because they were born and spent part of their childhood outside the United States. *Id.*

[3] *See* JEFFREY S. PASSELL & D'VERA COHN, PEW HISPANIC CENTER, A PORTRAIT OF ILLEGAL IMMIGRANTS IN THE UNITED STATES 15 (2009) (noting that the top five occupations for undocumented workers are in agriculture and construction.).

[4] *See id.* at 16 (stating that low levels of education and low-skilled occupations lead to undocumented immigrants having lower household incomes than either other immigrants or United States born Americans); Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110, 119 (2011) (citing Gonzales, *supra* note 2, at 2) (discussing the emotional and financial struggles undocumented individuals face).

[5] *See* PASSELL & COHN, *supra* note 3, at 18. More than half of unauthorized immigrants had no health insurance during all of 2007. Among their children, nearly half of those were uninsured and 25% of those who were born in the U.S. were uninsured. *Id.*

[6] *See id.* at 17. A third of the children of unauthorized immigrants and a fifth of adult unauthorized immigrants live in poverty. This is nearly double the poverty rate for children of U.S.-born parents (18%) or for U.S.-born adults (10%). *Id.*

[7] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1623(a) (2006) (prohibiting illegal aliens from receiving in-state tuition rates at public institutions of higher education.).

[8] Development, Relief, and Education for Alien Minors Act of 2011, S. 952, 112th Cong. (2011) [hereinafter DREAM Act of 2011]. The complete text of the DREAM Act of 2011 is located at Appendix A. The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 245D (2013), has been introduced in the Senate and includes a version of the DREAM Act but will likely not pass in the House of Representatives. Therefore, this article analyzes the DREAM Act of 2011, which limits the conditional residency to a very select class of individuals and has a higher likelihood of bipartisan support.

at least two years of work towards a bachelor's degree in six years or serves at least two years in the U.S. Armed Forces and is discharged honorably, if at all.[9]

Since college is a financial impossibility for Robert, out of a sense of patriotism for the only country he knows, a desire to learn a marketable skill, and a goal to be a productive, legal member of American society, he enlists in the U.S. Army. Soon, Robert's unit deploys in support of contingency operations in the Middle East. During his deployment, Robert proves to be a dependable, responsible young Soldier. However, upon redeployment, he has difficulty readjusting and receives a citation for driving under the influence. Further, he is involved in a drunken bar fight with several of his squad members. His symptoms are indicative of post-traumatic stress disorder (PTSD)[10] but he neither he nor his leaders recognize it as such. His Brigade Commander, who advocates a zero-tolerance policy for substance abuse, separates him from the Army with a General Discharge[11] under the provisions of Chapter 14-12(b) of Army Regulation (AR) 635-200, *Active Duty Enlisted Administrative Separations*.[12] Since Robert has been serving for fewer than six years, he does not receive the benefit of an administrative separation board.[13]

Under the provisions of the DREAM Act, after the Army separates Robert and without any appellate process for the separation, Robert loses his status as a conditional legal resident. Robert is now an undocumented alien facing an immigration judge at a removal proceeding. At the proceeding, the only evidence the Government sets forth before the immigration judge is the fact that Robert failed to meet

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[9] Dream Act of 2011, *supra* note 8, § 5(a).

[10] *What Is PTSD*?, U.S. DEP'T OF VETERANS AFFAIRS (Jan. 1, 2007), http://www.ptsd.va.gov/public/pages/ what-is-ptsd.asp. There are four types of PTSD symptoms: (1) reliving the event; (2) avoiding situations that remind the patient of the event; (3) feeling numb, and; (4) feeling "keyed up" (hyperarousal). Additional problems include drinking or drug abuse, feelings of hopelessness, shame, or despair, employment problems, and relationship problems. *Id.*

[11] U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS paras. 3-5(a), 3-6(a), and 3-7(b)(1) (14 Dec. 2012) (RAR, 6 Sept. 2011) [hereinafter AR 635-200] (establishing that a Soldier's service at the time of separation may be characterized as Honorable, General, or Other Than Honorable).

[12] *Id*. para. 14-12(b) (authorizing the separation of a Soldier when the command determines that he exhibits a pattern of misconduct).

[13] *Id*. para.1-19(c)(2). A special court-martial convening authority may separate a Soldier without using the separation board procedures under paragraph 14-12(b) if the Soldier's characterization of service is more favorable than other than honorable and the soldier has fewer than six years of service. *Id.*

the conditions required to maintain his conditional residency under the DREAM Act. After more than twenty years in the United States, he is deported to Mexico. As farfetched as this scenario seems, the proposed DREAM Act and the current policies and regulations could make this scenario a common occurrence for separated members of the Armed Services.

B. The 1.5 Generation

Children of undocumented aliens born outside of the United States represent a significant number of American youth.[14] These children have lived in the country for at least five years and received much of their education in United States. They are known as the "1.5" generation, which is any first generation immigrant brought to United States at a young age who was largely raised in this country. They are not the first generation because they did not choose to migrate, but do not belong to second generation because they were born and spent part of their childhood outside the United States.[15] They are culturally American[16] and never breached the law of their own volition.[17] They are also categorically excluded from citizenship because they will never meet the requirements of being a lawful permanent resident of the United States, which is a prerequisite to naturalization.[18]

The issue of the 1.5 generation is hotly debated. Some advocate a hard-line stance on immigration—deport everyone who resides in the country illegally and build a fence on the border[19]—while others support a more measured amnesty program for illegal aliens.[20] Invariably,

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[14] Gonzales, *supra* note 2, at 1 (noting that at least 65,000 undocumented students graduate from United States high schools each year).
[15] *Id*.
[16] IMMIGR. POL'Y CENTER, THE DREAM ACT, CREATING OPPORTUNITIES FOR IMMIGRANT STUDENTS AND SUPPORTING THE U.S. ECONOMY) 1 (2011).
[17] Shachar, *supra* note 4, at 119.
[18] 8 U.S.C. § 1427(a).
[19] *See Republican Presidential Candidate Debate* (CNN television broadcast Sept. 12, 2011). During this debate, former Presidential Candidate Michele Bachmann stated, "I think that the American way is not to give taxpayer subsidized benefits to people who have broken our laws or who are here in the United States illegally. That is not the American way."
[20] *See Republican National Security Debate* (CNN television broadcast Nov. 22, 2011). During this debate, Republican Presidential Candidate Newt Gingrich indicated his support for an amnesty program for long-time illegal aliens.

politicians on either side passionately refer to the DREAM Act when discussing the subject of immigration reform.[21]

The DREAM Act is proposed legislation that would allow members of the 1.5 generation to become legal residents of the United States if they meet certain qualifications, to include: graduating from college within six years; completing two years of college in a program toward a bachelor's degree or higher within six years; or serving at least two years in the military and being discharged honorably, if at all. After the student or servicemember meets all the conditions in the DREAM Act, he can become a permanent legal resident eligible for citizenship. While this proposition seems sensible—granting conditional residency to an undocumented alien who is willing to fight and die for the United States—and is not novel to the United States, application of the DREAM Act as drafted without policy and regulatory changes would raise serious concerns about the fairness of the legislation for Soldiers enlisting under the Act.

C. Roadmap

This article analyzes how the DREAM Act as currently drafted, in conjunction with Department of Defense (DoD) policies and Army regulations, will cause unfair serious consequences for conditional legal resident Soldiers facing separation. In Part II, this article describes the history of the United States Government offering immigration status to certain classes of individuals who performed military service. It analyzes the historical lessons learned and how they would be helpful to Congress, DoD, and the Army. Next, Part II describes the path to citizenship for today's non-citizen United States Soldier. This article concludes Part II with the legislative history of the DREAM Act since its introduction in 2001. Part III describes international service for status

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[21] *See* Lucy Madison, *Obama Pushes DREAM Act, But Says He Needs Congress to Do It*, CBS NEWS (Sep. 28, 2011), http://www.cbsnews.com/8301-503544_162-20112935-503544.html (showing video footage of President Obama's roundtable discussion with Latino journalists, in which he avows his support for the DREAM Act); *see also* Transcript of Interview by Tom Ashbrook with Mike Huckabee, NAT'L PUB. RADIO (Aug. 11, 2010), http://onpoint.wbur.org/2010/08/11/mike-huckabee-on-immigration. Former Republican Presidential Candidate Mike Huckabee said, "Is [the illegal alien] better off going to college and becoming a neurosurgeon or a banker or whatever he might become, and becoming a taxpayer, and in the process having to apply for and achieve citizenship, or should we make him pick tomatoes?"; *Republican National Security Debate*, *supra* note 20.

schemes used as a recruiting tool and analyzes their successes and failures. Specifically, Part III describes the recruitment and performance of non-citizens and foreigners in French, Russian, and Israeli defense forces.

Part IV of this article first provides a brief description of current enlisted separation procedures in the United States Army. Second, this section proposes that respite from deportation is a "heightened interest" for conditional legal residents by analyzing controlling and persuasive judicial precedent. Third, this section illustrates how deportation from the United States is a collateral effect of the separation proceeding, even though the U.S. Government provides the conditional legal resident Soldier with a fundamentally fair removal proceeding subsequent to his separation action. Fourth, this section shows how the current enlisted separation procedures are unfair for a conditional legal resident Soldier facing separation with fewer than two years in service.

In Part V, this article recommends changes to the proposed legislation, policy, and regulations. This section first discusses methods of change, proposes the best method for this situation, and describes the Army's regulatory response to the "Don't Ask, Don't Tell" (DADT) repeal as a model of change. Next, this section proposes changes to the legislation, DoD policy, and the Army's separation proceeding based on lessons learned throughout international and domestic history, the Army's response to the DADT repeal, and the mechanics of alien removal proceedings. This article also periodically revisits Private Gonzales, demonstrating how the proposed changes will protect his rights.

II. Past, Present, and Future Status for Service Laws

A. A Historical Look

The United States has a long history of offering non-citizens immigration status in exchange for military service. The successes and failures of each of these laws are helpful for Congress, the DoD, and the Army to ensure the law is effectively written to further the legitimate goals of the Government and to protect the rights of selected classes of individuals. This section discusses the lessons learned from laws that offered immigration status or citizenship to enslaved persons, Native

Americans, Filipinos, and certain Eastern European veterans of foreign and domestic wars.

1. Enslaved Persons

Emancipation and eventual citizenship through military service in North America is a concept that predates the birth of the United States. During the Revolutionary War, Lord Dunmore, the Royal Governor of Virginia and a loyalist to the British, proclaimed freedom to all the slaves who would repair to his standard and bear arms for the King of England.[22] In response, the Continental Congress promptly prohibited the employment of slaves in the Army, calling such employment "inconsistent with the principles that are to be supported."[23] However, nearly every state had passed a law freeing all slaves who would enlist in the Army and fight against the British.[24]

The number of slaves who enlisted was a testament to their hope for emancipation.[25] Unfortunately, at the close of the war, a large number of slaves who served in the Army with the promise of freedom were promptly re-enslaved.[26] This practice was so common in the loyalist state of Virginia that the state passed a law directing the emancipation of certain slaves who served as Soldiers.[27] Of the half million slaves in the

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[22] JOS. T. WILSON, EMANCIPATION: ITS COURSE AND PROGRESS, FROM 1481 B.C. TO A.D. 1875, WITH A REVIEW OF PRESIDENT LINCOLN'S PROCLAMATIONS, THE XIII AMENDMENT, AND THE PROGRESS OF THE FREED PEOPLE SINCE EMANCIPATION; WITH A HISTORY OF THE EMANCIPATION MONUMENT 38 (1882).
[23] *Id.* at 39.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] An Act Directing the Emancipation of Certain Slaves who have Served as Soldiers in this State, and for the Emancipation of the Slave Aberdeen, Assembly of Virginia (1783).

> [D]uring the course of the war, many persons in the State had caused their slaves to enlist in certain regiments or corps raised within the same . . . and whereas it appears just and reasonable that all persons enlisted as aforesaid, who have faithfully served agreeable to the terms of their enlistment, and have thereby of course contributed towards the establishment of American liberty and independence, should enjoy the blessings of freedom as a reward for their toils and labors . . . .

Id.

colonies at the outbreak of the Revolutionary War, about one-fifth of the slaves became free.[28]

After the Colonial government's treatment of enslaved persons during the Revolutionary War, the United States had an opportunity to draft its own status-for-service laws. Nearly a century later during the Civil War, the Union Government emancipated enslaved men who fought against the Confederacy in the form of enemy property confiscation.[29] Statesmen believed slaves employed to aid the rebellion should be confiscated and dealt with as contraband of war.[30] Further, the Union leaders understood their obligation that in a time of war if certain people are oppressed by the enemy (the Confederacy), and the enemy is conquered, the victorious party cannot return the oppressed people back into bondage.[31] In "An Act to Confiscate Property Used for Insurrectionary Purposes," otherwise known as the First Confiscation Act, a slave owner would forfeit his claim to any slave whom he required or permitted to work or be employed upon any "fort, navy yard, dock, armory, ship, entrenchment, or in any military or naval service whatsoever, against the Government and lawful authority of the United States;"[32] in other words, the slaves who were forced to support the Confederate military effort. On July 17, 1862, the Second Confiscation Act[33] gave freedom to every black man enrolled, drafted, or volunteering into the military service of the United States.[34] The result of the First and Second Confiscation Acts was to free hundreds of thousands of slaves, to include over 200,000 in the Army and Navy during the rebellion.[35]

2. Native Americans

The United States first offered immigration status to enslaved men in exchange for their military service, soon followed by Native Americans. In the early 1800s, the United States government realized the intense

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[28] WILSON, *supra* note 22, at 41.
[29] Confiscation Act of 1861, ch. 60, 12 Stat. 319 (1861).
[30] WILSON, *supra* note 22, at 48.
[31] *Id.* at 49.
[32] *Id.*
[33] An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes, ch. 195, 12 Stat. 589–92 (1862).
[34] WILSON, *supra* note 22, at 60.
[35] *Id*.

demand for the vast expanses of Native American land and sought treaties with the Native Americans.[36] To entice the Native Americans to sign the treaties and cede their land, the United States Government often promised them citizenship.[37] During the early 19th century, few Native Americans were willing to abandon their homelands in exchange for United States citizenship, forcing the United States to take more aggressive measures in the form of the Indian Removal Act.[38] Unfortunately, the Native Americans tribes that signed the treaties and ceded their homelands found their citizenship unequal to other citizens, with federal courts ruling that the 14th and 15th Amendments did not apply to them.[39]

Later in the 19th century, the government passed the Dawes Act, which allowed citizenship for Native Americans who surrendered their land.[40] However, the Dawes Act required eligible Native Americans to

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[36] *See* Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830–1965*, 5 NEV. L.J. 126, 127 (2004–2005).

[37] *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (1994); Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native American: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 111(1999) (discussing the incentives of "citizenship" for Native Americans").

[38] Rollings, *supra* note 36, at 130 (noting that President Jackson passed the Indian Removal Act under intense pressure from Congress).

[39] *See* MacKay v. Campbell, 16 F. Cas. 161 (D. Or. 1871) (finding that a mixed-race Chinook man of "seven-sixteenth white and nine-sixteenth Indian" blood could not vote even though he assimilated and lived as a white man for several years); United States v. Osborn, 2 F. 58 (D. Or. 1880) (finding that assimilation did not allow a Native American to become a citizen of the United States); Elk v. Wilkins, 112 U.S. 94 (1884) (finding that since Native Americans were not taxed, they were not citizens; thus, the 15th Amendment did not apply and the appellant could not vote).

[40] General Allotment Act, ch. 119, § 6, 24 Stat. 388 (1887) [hereinafter General Allotment Act] (codified at 25 U.S.C. §§ 331–333 (1887)) (repealed 2000). Commonly known as the Dawes Act, this law stated:

> [E]very Indian born within the territorial limits of the United States to whom allotments have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of a civilized life, if hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens . . . .

Id.; Rollings, *supra* note 36, at 127.

have "voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein" and to have "adopted the habits of civilized life."[41] To this point, Native American citizenship was conditional on both the surrender of land and assimilation into "white" culture.

The next legislation concerning citizenship for Native Americans was directly linked to military service and did not have the qualifications of allotment or assimilation. During World War I, thousands of Native American citizens and non-citizens volunteered to fight in Europe for freedom and democracy.[42] After the war, the United States Government offered Native Americans citizenship in exchange for their military service through the 1919 American Indian Citizenship Act.[43] The Act did not grant automatic citizenship to American Indian veterans who received an honorable discharge; however, it authorized those American Indian veterans who wanted to become U.S. citizens to apply for and be granted citizenship.[44] Unfortunately, few Native Americans actually followed through on the process for a variety of reasons, to include an unwillingness to abandon their culture or to undergo the competence determination required by the Government prior to naturalization, a lack of knowledge about the law, or an inability to complete the application process.[45] However, it was another step towards citizenship and an

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[41] General Allotment Act, *supra* note 40, § 6 (stating that Native Americans must assimilate into white culture in order to be eligible for citizenship).

[42] Rollings, *supra* note 36, at 134.

[43] An Act Granting Citizenship to Certain Indians, ch. 19, 41 Stat. 350, (1919) [hereinafter Act of 1919]; *see* Rollings, *supra* note 36, at 134 ("Ironically, they were fighting for freedoms they did not have at home.").

[44] Act of 1919, *supra* note 43.

> Be it enacted . . . [t]hat every American Indian who served in the Military or Naval establishments of the United States during the war against the Imperial Government, and who has received or who shall hereafter receive an honorable discharge, if not now a citizen and if he so desires, shall, on proof of such discharge and after proper identification before a court of competent jurisdiction, and without other examination except as prescribed by said court, be granted full citizenship with all the privileges pertaining thereto, without in any manner impairing or otherwise affecting the property rights, individual or tribal, of any such Indian or his interest in tribal or other Indian property.

Id.

[45] Porter, *supra* note 37, at 127.

acknowledgment of the Native American contribution toward the war effort.[46]

Native American military veterans who did not apply or receive citizenship under the provisions of the 1919 act waited five more years to automatically become citizens. In 1924, Congress passed the second Indian Citizenship Act and granted U.S. citizenship to all Native Americans born in the United States, regardless of their military service or lack thereof.[47] However, this victory was still bittersweet for Native Americans who found themselves without the constitutional civil rights guaranteed to other American citizens.[48]

3. Filipinos

After enacting laws conferring citizenship on enslaved person and Native American veterans, the U.S. Government was becoming more experienced in enlisting non-citizens to augment its military ranks. However, during World War II, the United States promised (without legislation) Filipino troops citizenship and full Veteran's benefits in exchange for their service.[49] Following the war, the Government granted full immigration status and Veteran's benefits to Regular Philippine Scouts while limiting eligibility among other veterans.[50]

Ultimately, the U.S. Government failed to provide any other Filipino veteran with immigration status and Veteran's benefits. As a result, 40 years later legislators introduced the Filipino Veteran's Fairness Act.[51]

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[46] *Id*. (citing LAURENCE HAUPTMAN, CONGRESS AND THE AMERICAN INDIAN: EXILED IN THE LAND OF THE FREE 323 (Oren Lyons & John Mohawk eds., 1991)) (stating that even though Congress authorized Native American veterans to become citizens upon judicial application, few Indians refused to turn their backs on their heritage or go through the "demeaning" process of being declared competent for citizenship, which was a qualification of the law).

[47] An Act to Authorize the Secretary of the Interior to Issue Certificates of Citizenship to Indians, ch. 233, 43 Stat. 253 (1924) (declaring all Native Americans to be citizens of the United States).

[48] *See* Rollings, *supra* note 36, at 127 (describing how Native Americans were not allowed to vote in city, county, state, or federal elections, testify in courts, serve on juries, attend public schools, or even purchase beer).

[49] THOMAS LUM & LARRY A. NIKSCH, CONG. RESEARCH SERV., RL 33233, THE REPUBLIC OF THE PHILIPPINES: BACKGROUND AND U.S. RELATIONS 20–21 (2007).

[50] *Id.* at 21.

[51] Filipino Veterans Equity Act of 1993, S. 120, 103d Cong. § 2 (1993). The purpose of this bill was to grant special immigrant status to immediate relatives of Filipino veterans

The Act would "exempt children of certain Filipino World War II veterans from numerical limitations on immigrant visas."[52] Unfortunately for the veterans and their families, the bill never progressed past the committee phase for sixteen years until President Obama signed it into law as a part of the American Recovery and Reinvestment Act of 2009.[53]

4. The Lodge-Philbin Act

The Lodge-Philbin Act was a relatively unknown prescriptive law that the United States used to recruit and enlist highly specialized individuals using the promise of immigration status and subsequent naturalization. During the Cold War, the Government saw an opportunity to recruit and enlist qualified non-resident individuals and drafted proactive legislation to this end. The Lodge-Philbin Act of 1950 initially permitted up to 2,500 non-resident aliens, later expanded to 12,500 non-resident aliens, to enlist in the Armed Services.[54] The official purpose of the Lodge Act was to overcome obstacles to the enlistment of non-citizens in the U.S. Army in 1950.[55] Specifically, the Lodge-Philbin Act targeted certain aliens who had enlisted outside the United States and therefore had not been admitted to the United States as lawful permanent residents.[56] Unofficially, the purpose of the Lodge-Philbin Act was to recruit Eastern European enlistees to form special operation infiltration units in the Soviet Bloc.[57]

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of World War II, and for other purposes. The bill proposed to amend a section of the Immigration and Naturalization Act in order to permit this special status.

[52] *See* LUM & NIKSCH, *supra* note 49, at 21; SIDATH VIRANGA ET AL., CONG. RESEARCH SERV., RL 33876, OVERVIEW OF FILIPINO VETERANS' BENEFITS (2009).

[53] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

[54] Lodge Act, ch. 443, 64 Stat. 316 (1950) (codified as amended at Immigration and Nationality Act of 1952, 8 U.S.C. § 1440 (1952) (commonly known as the Lodge-Philbin Act).

[55] Garcia v. U.S. Immigration & Naturalization Serv., 783 F.2d 953, 954 (9th Cir. 1986) (stating the purpose of the Lodge-Philbin Act and describing eligibility through the original and amended Act).

[56] *See generally* MARGARET MIKYUNG LEE & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL 31884, EXPEDITED CITIZENSHIP THROUGH MILITARY SERVICE: POLICY AND ISSUES (2003) (discussing the Lodge-Philbin Act in the context of the history of the United States offering citizenship to select enlistees in exchange for their military service).

[57] *See generally* Eric T. Olson, *U.S. Special Operations: Context and Capabilities in Irregular Warfare*, 56 JOINT FORCES Q. 68 (2010) (discussing the Military Accessions

The requirements for a servicemember to be eligible for legal residency under the Lodge-Philbin Act were similar to that of the DREAM Act. The Lodge-Philbin Act authorized naturalization of an alien who enlisted or reenlisted overseas under the terms of the Act, subsequently entered the United States or a qualifying territory pursuant to military orders, and was honorably discharged after at least five years of service.[58] Should the veteran meet these qualifications, the Government considered him lawfully admitted to the United States for permanent residence for the purposes of naturalization.[59] The Lodge-Philbin Act was an effective recruiting tool that produced over 2,000 Eastern Europeans enlistees before the program expired in 1959.[60]

5. Lessons Learned

The collective history of certain enslaved men, Native Americans, Filipinos, and Eastern European veterans of foreign and domestic wars provides the United States with three key lessons that Congress and the DoD should consider when codifying and implementing, respectively, the DREAM Act.

First, the concept of the U.S. Government offering some sort of immigration status—whether citizenship or residency status—in exchange for a non-citizen's military service is neither new nor revolutionary.[61] As shown through the experiences of certain selected classes of individuals during the past two centuries, if codified, the DREAM Act would simply exist as another mechanism for the United

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Vital to the National Interest program as compared to the Lodge Act, which provided highly qualified enlistees to Special Operation forces during the Cold War); *The DREAM Act: Hearing before the S. Comm. on the Judiciary, Subcomm. on Immigr., Refugees, and Border Security*, 112th Cong. (2011) (statement of The Honorable Clifford L. Stanley, Under Secretary of Defense (Personnel and Readiness)) (discussing the distinguished history of non-citizens serving in the United States Armed Forces); *10th SFG(A) History*, U.S. SPECIAL OPERATIONS COMMAND, http://www.soc.mil/usasfc/10thSFGA/10thSFG%20History.html (last visited Oct. 8, 2012) In 1951 Congress passed the Lodge-Philbin Act, which provided for the recruiting of foreign nationals, predominantly Eastern Europeans, into the United States military. *Id.*

[58] *Garcia*, 783 F.2d at 954.

[59] *Id.*

[60] CHARLES K. DAGLEISH, A NEW "LODGE ACT" FOR THE US ARMY—A STRATEGIC TOOL FOR THE GLOBAL WAR ON TERRORISM 9 (2005) (stating that between June 30, 1959 and the end of the Lodge Act program, 1969 foreign-born Soldiers enlisted).

[61] *See supra* Part II.A.1.–4.

States to broaden its base of potential enlistees. Historically, the United States has often relied on non-citizens to augment its military ranks, with varying degrees of success for each program.[62]

This fact leads to the second lesson learned, which is that the legislation must be effectively written at the outset to further the Government's interests while protecting the rights of the enlistee. The experiences of enslaved and Native American veterans illustrate how the Government can very easily draft legislation that furthers the legitimate goals of the Government while paying little regard to individual rights of selected classes.[63] Further, as shown by the experiences of Filipino veterans, once the law is codified, it could take decades of remediation for the Government to successfully address the inequities it created.[64]

Similarly, the third lesson is that the Government enjoyed the most success with proactive laws that targeted recruitment of certain selected classes, as compared to reactionary laws intended to compensate a selected class for its service. The Lodge-Philbin Act is a model example of how the Government achieved this balance with a proactive law (albeit on a smaller scale than the DREAM Act).[65] The law benefited the enlistee because it allowed him to understand the requirements for time in service and discharge prior to his departure from the Armed Services.[66] Further, the law was beneficial for the Government because it allowed the Government to recruit the highly-specialized enlistee it was seeking.[67] The DREAM Act has been in the legislative process for eleven years, which is ample time to identify the correct balance between an individual enlistee's rights and the goals of the Government.[68]

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[62] *Id.*

[63] *See supra* notes 36–48 and accompanying text (discussing the history of the Government offering Native American citizenship in exchange for their military service).

[64] *See supra* notes 49–53 and accompanying text (describing the retroactive laws allowing immigration status for certain Filipino veterans of WWII).

[65] *See* Garcia v. U.S. Immigration & Naturalization Serv., 783 F.2d 953, 954 (9th Cir. 1986) (illustrating the small number of potential enlistees under the Lodge-Philbin Act).

[66] *See id*. (stating the qualifications that the enlistee complete five or more years of service and be honorably discharged from the Armed Services).

[67] *See* Olson, *supra* note 57 (asserting that the intent of the Lodge-Philbin Act was to recruit Eastern European enlistees to augment Special Operations units).

[68] *See infra* Part II.C (outlining the history of the DREAM Act).

B. The Future for Today's Non-Citizen Soldier

The path to citizenship is much less complicated for non-citizen members of the U.S. Armed Forces who are lawful residents of the United States. The current laws allow eligible non-citizen servicemembers to receive expedited and overseas naturalization processing under special provisions of the United States Code.[69] However, under the current laws, a non-citizen must lawfully reside in the United States to be eligible to enlist in any branch of the Armed Services.[70] Thus, no avenue currently exists for an undocumented alien to enlist in the Armed Services and obtain citizenship through the established process. Accordingly, this prohibition may change if Congress passes the DREAM Act.[71]

The 2011 version of the DREAM Act provides an avenue for the 1.5 generation to become lawful permanent residents of the United States, eligible for citizenship after meeting all the normal requirements for naturalization. The purpose is to create a special immigration rule for qualified long-term undocumented alien residents of the United States who entered the country as children.[72] Specifically, the alien must have been physically present in the United States for at least five consecutive years prior to applying for conditional status.[73] The applicant must have been no more than fifteen-years old when he entered the country with a history of good moral character from that date.[74] Additionally, the applicant must be no older than thirty-two years at the time the Act is enacted and must be admitted to an institution of higher learning or possess a high school diploma or general equivalency development certificate.[75] If the applicant meets the qualifications, the Department of Homeland Security (DHS) will grant him conditional legal residency status, which legitimizes his status in the United States and permits the

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[69] 8 U.S.C. § 1427 (2011). An alien who has served honorably during a time of hostilities as declared by the President and is discharged honorably if at all may be naturalized according to this provision of the law. For combat veterans, this section specifically waives some requirements for non-servicemember applicants, to include the age limit and minimum time the applicant resided in the United States. *Id.*

[70] *See* 10 U.S.C. § 504 (2006) (stating that an applicant is only eligible for enlistment if (among other requirements) he or she is lawfully in the United States.).

[71] The DREAM Act of 2011 is currently referred to the Committee on the Judiciary, Subcommittee on Immigration, Refugees and Border Security.

[72] DREAM Act of 2011, *supra* note 8, § 3.

[73] *Id.* § 3(b)(1)(A).

[74] *Id.* § 3(b)(1)(B)–(C).

[75] *Id.* § 3(b)(1)(E)–(F).

applicant to enter the Armed Services or enroll in a college or university.[76]

The requirements for the conditional legal resident are continuous throughout the applicant's pendency. The applicant must maintain a history of good moral character and may not abandon his residence in the United States for the duration of his conditional status.[77] Additionally, he must complete two years in good standing toward a bachelor's degree within six years, or serve in the Armed Services for at least two years, and be discharged honorably, if at all.[78] If the applicant meets all these requirements, his conditional status will be removed and he will become a permanent legal resident of the United States.[79]

Should the applicant cease to meet any of the original requirements, he will return to the immigration status he had immediately prior to receiving conditional status. More specifically, the applicant will become an undocumented alien again, subject to deportation.[80] The former DREAM Act Soldier or student may be subject to a removal proceeding, where an Immigration Judge determines whether the former applicant should be deported. At the hearing, the burden of proof is on the alien to prove he is "clearly and beyond doubt" entitled to be admitted and by "clear and convincing evidence" and that he is lawfully present in the United States pursuant to a prior admission.[81] However, the burden of proof is on the service, if alien has been admitted to the United States, to prove the alien is deportable based on "reasonable, substantial, and probative evidence."[82] Accordingly, in the case of a DREAM Act applicant who loses his conditional status and reverts to his illegal status, the burden is on the applicant to prove his admissibility in accordance with the law.

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[76] *Id*. § 4.
[77] *Id*. § 4(c)(1).
[78] *Id*. § 4(c)(1).
[79] *Id*. § 5.
[80] *Id*. § 4 ("The Secretary shall terminate the conditional permanent resident status of an alien, if the Secretary determines that the alien . . . was discharged from the Uniformed Serves and did not receive an honorable discharge."). The plain reading of this language suggests that the government would revoke the conditional residency of a DREAM Act Soldier who receives a General (Under Honorable Conditions) discharge.
[81] 8 U.S.C. § 1427 (2011).
[82] *Id*.

C. The DREAM Act

The DREAM Act legislation has been pending in Congress for more than a decade. Senator Orrin Hatch (R–Utah) first introduced the DREAM Act on August 1, 2001, with eighteen cosponsors.[83] A departure from today's legislation, the bill initially did not include a military service provision.[84] It was placed on the senate legislative calendar on June 20, 2002, and subsequently reintroduced in the108th,[85] 109th,[86] and 110th[87] Congresses. Senator Arlin Spector (R–Pa.) also placed the text of the bill in the Comprehensive Immigration Reform Acts of 2006[88] and 2007.[89] The Act remained pending throughout 2007 and the Senate declined to vote on it.

In 2007, during the height of the Armed Services recruiting crisis, Senator Dick Durbin (D–Ill.) introduced a new version of the DREAM Act.[90] Contrary to the previous versions of the Act, it contained a provision that an eligible undocumented alien could obtain conditional legal residency by serving in the Armed Services.[91] The military provision appealed to members of the Armed Services because recruitment was suffering due to the Global War on Terrorism.[92] However, opponents of the bill claimed that the Act would encourage unauthorized immigration and migration and should be enacted only as

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[83] Development, Relief, and Education for Alien Minors Act, S. 1291, 107th Cong. (2001).

[84] DREAM Act of 2011, *supra* note 8.

[85] Development, Relief, and Education for Alien Minors Act of 2003, S. 1545, 108th Cong. (2003).

[86] Development, Relief, and Education for Alien Minors Act of 2005, S. 2075, 109th Cong. (2005).

[87] Development, Relief, and Education for Alien Minors Act of 2007, S. 774, 110th Cong. (2007).

[88] Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. §§ 621–32 (2006).

[89] Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. §§ 621–32 (2007).

[90] Development, Relief, and Education for Alien Minors Act of 2007, S. 2205, 110th Cong. (2007).

[91] *Id*. § 4(d).

[92] *See* 153 CONG. REC. S12091 (daily ed. Sept. 26, 2007) (statement of Sen. Durbin). Senator Durbin discussed the appeal of the DREAM Act of 2007 to the Pentagon. In particular, he mentioned comments by Bill Carr, the Acting Secretary of Defense for Military Personnel Policy, who said the DREAM Act is "very appealing" to the military because it would apply to the "cream of the crop of students" and would be "good for readiness."

part of broader immigration reform.[93] Ultimately, the Senate again declined to vote on the bill.

In March 2009, Senator Durbin and several co-sponsors reintroduced the bill in both chambers.[94] Aside from some additional requirements for applicants, the bill remained essentially the same. Congress continued to consider the bill throughout 2010, making numerous changes to address concerns raised about the bill.[95] On September 21, 2010, the Senate maintained its filibuster and the bill stopped progress.[96] On September 22, 2010, Senator Durbin and Senator Dick Lugar (R–Ind.) reintroduced the first of three more versions of the bill which was eventually rendered moot in Senate.[97] The House of Representatives passed the DREAM Act on December 8, 2010,[98] but failed in the Senate to reach the 60-vote threshold necessary for it to advance to the floor.[99]

On May 11, 2011, Senator Durbin reintroduced the Act in the Senate[100] and Representative Howard Berman (D–Cal.) concurrently reintroduced the Act in the House of Representatives.[101] On June 22, 2011, Senator Robert Menendez (D–N.J.) introduced it as a part of the Comprehensive Immigration Reform Act of 2011.[102] The House of

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[93] *See* Stephen Dinan, *'Dream' for Illegals Gets a Wake-up Call; Bill Amended to Boost Support*, WASH. TIMES, Sept. 20, 2007, at A1 (citing comments by Senator John Coryn (R–Tx.), who worried that the DREAM Act would create a " 'Trojan horse' to try to find citizenship for a broader group of people").

[94] Development, Relief, and Education for Alien Minors Act of 2009, S. 729, 111th Cong. (2009) (Reintroduced by Senator Durbin); American Dream Act, H.R. 1751, 110th Cong. (2009).

[95] Development, Relief, and Education for Alien Minors Act of 2010, S. 3827, 111th Cong. (2010); Development, Relief, and Education for Alien Minors Act of 2010, S. 3962, 111th Cong. (2010); Development, Relief, and Education for Alien Minors Act of 2010, S. 3992, 111th Cong. (2009).

[96] 156 CONG. REC. S7235-7262 (daily ed. Sept. 21, 2010).

[97] Development, Relief, and Education for Alien Minors Act of 2010, S. 3827, 111th Cong. (2010); Development, Relief, and Education for Alien Minors Act of 2010, S. 3962, 111th Cong. (2010); Development, Relief, and Education for Alien Minors Act of 2010, S. 3963, 111th Cong. (2010); Development, Relief, and Education for Alien Minors Act of 2010, S. 3992, 111th Cong. (2010).

[98] 156 CONG. REC. H8223-8226 (daily ed. Dec. 8, 2010) (passing with a vote of 216 to 198).

[99] 156 CONG. REC. S10665-10666 (daily ed. Dec. 18, 2010) (cloture on the motion not reached with a vote of 55 to 41).

[100] DREAM Act of 2011, *supra* note 8.

[101] Development, Relief, and Education for Alien Minors Act of 2011, H. 1842, 111th Cong. (2011).

[102] Comprehensive Immigration Reform Act of 2011, S. 1258, §§ 141–49 (2011).

Representatives referred the Act to the Subcommittee on Immigration Policy and Enforcement, where it currently resides, and both Senate Acts are before the United States Committee on the Judiciary for review.

On June 15, 2012, the Department of Homeland Security announced it would exercise broad prosecutorial discretion in enforcing the current immigration laws for individuals previously described in the DREAM Act, to include individuals who "are honorably discharged veteran[s] of the Coast Guard or Armed Forces of the United States."[103] Two months later, United States Citizenship and Immigration Services unveiled a formal application for the Deferred Action for Childhood Arrivals process that would allow these individuals to apply for a "discretionary determination to defer removal action of an individual as an act of prosecutorial discretion."[104]

On March 16, 2013, Senator Charles Schumer (D–N.Y) and a bipartisan coalition of seven co-sponsors introduced the Border Security, Economic Opportunity, and Immigration Modernization Act.[105] The Immigration Modernization Act incorporated the bulk of the original DREAM Act legislation; however, it increased the requirement of military service to four years.[106] The Senate is currently considering the legislation[107] while the House of Representatives remains deeply divided

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[103] Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to Acting Comm'r, U.S. Customs & Border Prot. et al., subject: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (15 June 2012) (on file with author).

[104] *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP AND IMMIGRATIONSERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD (last visited Oct. 9, 2013).

[105] Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013). This legislation would permit any qualifying undocumented immigrant to apply for Provisional Resident Immigrant status, whereas the DREAM Act of 2011 only permits certain classes of individuals to become Conditional Legal Residents.

[106] *Id.* § 245D(b)(1)(A)(iv)(II).

[107] 159 CONG. REC. S4518 (daily ed. June 17, 2013).

over immigration reform.[108] It is unlikely that this version of the DREAM Act will become law.[109]

The DREAM Act has supporters and opponents taking stances that are in opposition to the party line.[110] However, with support from both Democrats and Republicans, passage of the DREAM Act becomes more likely. Given that Congress will pass some version of the DREAM Act in the future, it is vital for the drafters to conduct a historical study of the previous laws involving military service for immigration status. International and domestic experiences will provide important lessons and talking points for the drafters as they struggle to create legislation that will garner support from both parties. This article previously outlined the domestic history of similar laws and now provides an international comparison.

III. Status for Service: An International Comparison

As other countries have found, the practice of offering immigration status to non-citizens is a valuable recruiting tool that opens the door to a pool of highly qualified individuals who are otherwise barred from enlistment due to their status as non-citizens.[111] Likewise, the original intent of the military service option of the DREAM Act was to address the recruiting crisis that occurred about five years after the 2001 terrorist

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[108] *See* Fawn Johnson, *House GOP Makes Aggressive Opening Bid on Immigration*, NAT'L J. (Jun. 18, 2013), http://www.nationaljournal.com/daily/house-gop-makes-aggressive-opening-bid-on-immigration-20130618.

[109] Chris Cillizza & Sean Sullivan, *The Senate is Going to Pass Immigration Reform. And the House Doesn't Care*, WASH. POST (Jun. 25, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/25/the-senate-is-going-to-pass-immigration-reform-and-the-house-doesnt-care/.

[110] *CNN/Heritage Foundation Debate* (CNN television broadcast, Nov. 22, 2011). During this debate, Republican Presidential Candidates Michele Bachmann and Mitt Romney vocalized their opposition to the DREAM Act while candidates Newt Gingrich and Rick Perry vocalized their support.

[111] *See Contributions of Immigrants to the United States Armed Forces: Hearing Before the Comm. on Armed Services*, 109th Cong. 7 (2006) [hereinafter *Contributions of Immigrants*] (statement of Sen. Edward Kennedy (D–Mass.), Member, Comm. on Armed Services). Discussing this pool of highly qualified enlistees, Senator Kennedy stated, "The DREAM Act is the right title, since the act will give thousands of bright, hard-working immigrant students a chance to pursue their 'American Dream.' By denying them these opportunities, we deny our country their intelligence, their creativity, their energy, and often their loyalty."

attacks.[112] A decade later, with a poor economy and high unemployment, the Armed Services does not lack the number of prospective enlistees;[113] however, the quality of prospective enlistees has declined.[114] In 2009, only about three in ten Americans of military age could meet the standards for military service.[115] In 2008, 35% of enlistees were medically disqualified, 18% were rejected due to drug or alcohol use or abuse, 5% had disqualifying misconduct or criminal records, 6% had too many dependents, and 9% scored in the lowest aptitude category on the enlistment test.[116] The DREAM Act could help reverse this downward recruiting trend.

The DREAM Act provides the Armed Services an opportunity to recruit the most highly qualified, motivated, and morally sound potential enlistees.[117] As Senator Durbin stated in 2007,

> These children have demonstrated the kind of determination and commitment that makes them successful students and points the way to the significant contributions they will make in their lives. They are

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[112] 153 CONG. REC. S9202 (daily ed. July 13, 2007) (statement of Sen. Durbin). Regarding the benefit of the DREAM Act to the military, Senator Durbin stated, "Some people might ask why the Senate should revisit immigration again and whether an immigration amendment should be included in the Defense authorization bill. The answer is simple: The DREAM Act would address a very serious recruitment crisis that faces our military." *Id.*

[113] *See Development, Relief, and Education for Alien Minors (DREAM) Act of 2011: Hearing Before the S. Judiciary Comm., Subcomm. on Immigration, Refugees, and Border Sec.*, 112th Cong. (2011) [hereinafter *DREAM Act Hearing*] (statement of Margaret Stock) (referring to recruiting officials who stated that the economy has been the most important factor affecting recruiting success).

[114] *Id*.

[115] William H. McMichael, *Most U.S. Youths Unfit to Serve*, ARMY TIMES (Nov. 3, 2009), *available at* http://www.armytimes.com/article/20091103/NEWS/911030311/Most-U-S-youths-unfit-serve-data-show.

[116] Otto Kreisher, *Armed Services Having Trouble Finding Qualified Recruits*, NAT'L J: CONG. DAILY (Mar. 24, 2008), http://www.nationaljournal.com/about/congressdaily.

[117] *See Contributions of Immigrants*, *supra* note 111 (statement of Sen. Kennedy, Member, Comm. on Armed Services) (emphasizing the documented alien contributions to the Armed Services by stating, "In all of our wars, immigrants have fought side by side with Americans—and with great valor. They make up five percent of our military today, but over our history have earned twenty percent of the Congressional Medals of Honor."); *DREAM Act Hearing*, *supra* note 113 (stating that a native-born American can join the Armed Services despite having a felony criminal conviction, whereas a DREAM Act enlistee will not progress beyond the "first gate" at Department of Homeland Security with such a record).

> junior [Reserve Officer's Training Corps] leaders, honor roll students, and valedictorians. They are tomorrow's [S]oldiers, doctors, nurses, teachers, and Senators.[118]

Further, the DREAM Act allows the Armed Services to recruit individuals with specialized linguistic skills, saving the Government the time and expense of language training.[119]

The concept of enlisting highly qualified non-citizen enlistees is hardly novel. France, Russia, and Israel all employ foreigners in their military service with the promise of immigration status or citizenship at the conclusion of the foreigner's honorable military service. Like the original military service amendment to the DREAM Act, all three countries began allowing foreigners to serve as a response to either a qualitative or quantitative recruiting shortage. The countries employ the foreigners in varying degrees of assimilation with regular troops; France maintains an elite unit composed of foreigners separate from its regular army while Russia and Israel augment their regular forces with foreigners. The practice of recruiting non-citizens and aliens to serve in the armed forces has been highly successful, particularly during times of conflict when a country found its forces stretched thin or sought highly specialized individuals.

A. The French Foreign Legion

France provides an example of how the DREAM Act could target highly qualified individuals for specialized service. The French Foreign Legion, one of the world's most elite fighting forces, is premised on the idea that foreigners are a force multiplier in combat.[120] The Legion was originally formed in the 19th century as a way for France to enforce its colonial empire with foreign adventurers.[121] French King Louis Philippe

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[118] 153 CONG. REC. S9202 (daily ed. July 13, 2007) (statement by Sen. Durbin).

[119] *See Contributions of Immigrants*, *supra* note 111 (statement of the Hon. David S.C. Chu, Under Secretary of Defense for Personnel and Readiness) ("One of the benefits of recruiting noncitizens to the military force of the United States is to be able to have a more diverse, and, specifically, a linguistically more competent military force than we could otherwise recruit.").

[120] DOUGLAS PORCH, THE FRENCH FOREIGN LEGION: A COMPLETE HISTORY OF THE LEGENDARY FIGHTING FORCE, at xi (1991).

[121] Simon Romero, *Camp Szuts Journal, Training Legionnaires to Fight (and Eat Rodents)*, N.Y. TIMES, Nov. 30, 2008, at A6 (describing the camp as one of the most "grueling courses in jungle warfare and survival").

issued a decree on March 9, 1831, authorizing the formation of *une compose d'etrangers*.[122] The decree stipulated that all applicants should possess a birth certificate, a "testimonial of good conduct," and a document from a military authority stating that the applicant had the necessary requirements to make a "good soldier."[123] Foreign men volunteered in droves with the promise of French citizenship and with dubious character references, resulting in a roughly organized group of foreign men who deserted the force regularly and drank excessively.[124] However, over the next 30 years, the Legionnaires became stellar and courageous soldiers who conducted some of the most dangerous missions for France.[125]

Today, if a man is physically fit and otherwise suitable for elite military service, he may become a Legionnaire regardless of his nationality.[126] A Legionnaire understands that when he enlists, he effectively signs away his nationality and places himself outside the protections of his home country.[127] A Legionnaire of foreign nationality can ask for French nationality after three years of honorable service.[128] After his service, the Legionnaire rarely declines his citizenship with France and frequently stays in his new homeland.[129]

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[122] JAMES WELLARD, THE FRENCH FOREIGN LEGION 22 (1974).
[123] *Id*. at 22.
[124] *Id.* at 22–23.
[125] *Id*. at 28.
[126] *A New Opportunity for a New Life*, FRENCH FOREIGN LEGION—RECRUITING, http://www.legion-recrute.com/en/?SM=0 (last visited Oct. 9, 2013) [hereinafter FRENCH FOREIGN LEGION—RECRUITING] ("Whatever your origins, nationality or religion might be, whatever qualifications you may or may not have, whatever your social or professional status might be, whether you are married or single, the French Foreign Legion offers you a chance to start a new life . . . .").
[127] WELLARD, *supra* note 122, at 132.
[128] *Questions*, FRENCH FOREIGN LEGION—RECRUITING, *supra* note 126 ("[A candidate for citizenship] must have been through 'military regularization of situation' and be serving under his real name. He must no longer have problems with the authorities, and he must have served with 'honour and fidelity' for at last three years.").
[129] WELLARD, *supra* note 122, at 132. Wellard describes one legionnaire, "Big" Nichols, who served in the United States Army as an officer during World War I. He received the *Legion d'Honneur* for an act of bravery involving a blazing ammunition ship at Marseilles. Nichols remained in the legion until his early 60s, at which point the French Government required him to reenlist for one year at a time. Each year, Nichols pleaded with the Commandant for permission to serve one more year and his final duty was to play the tuba in the Legion's band. *Id.*

The French Foreign Legion has not been without criticism. Some complain that the cadre used to train the Legionnaires could be used to improve *la regulaire* soldiers.[130] Others question a Legionnaire's loyalty towards France.[131] However, no empirical data exists to support either of these criticisms and the Legionnaires continue to perform with great valor in Afghanistan, the Ivory Coast, Chad, and Kosovo.[132]

American scholars and commentators have studied the French Foreign Legion as an example of how to successfully target relatively small numbers of highly qualified enlistees to augment its ranks. During the most recent recruiting crisis, some commentators advocated creating a "foreign legion" using the same premise as the French Foreign Legion.[133] However, such a plan came with concerns, to include attracting human rights abusers and mercenaries, or members of terrorist groups desiring to create sleeper cells in the military.[134] One can mitigate these concerns by examining the past courageous and reliable performance of non-citizen servicemembers in our nation's conflicts, and by considering the experiences of other countries.[135] Further, one can look at the success enjoyed by the French Foreign Legion and the typical Legionnaire's devotion toward France to understand that the non-citizens have a tremendous sense of patriotism. Further, the French Foreign Legion is a model of a successful recruiting tool for France and can serve as a model for the United States in recruiting highly qualified elite Soldiers during a time when the United States has the ability to be more selective in its accessions. Specifically, the DREAM Act has the ability

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[130] PORCH, *supra* note 120, at 632.

[131] *Id*. at 633.

[132] *See Legionnaires Code of Honour*, FRENCH FOREIGN LEGION—RECRUITING, *supra* note 126. The French Foreign Legion has a strict code of honor, with each man swearing allegiance to France, solidarity with his fellow Legionnaire regardless of his nationality, race or religion, promising to be courageous, disciplined, well-mannered, tidy, and proud of his service with the legion as an "elite soldier."

[133] Peter Schweizer, *All They Can Be, Except American*, N.Y. TIMES, Feb. 18, 2003, at A23 (proposing an "American Foreign Legion" akin to the French Foreign Legion, to augment active-duty forces that are stretched thin and reserves that are stressed by prolonged mobilization).

[134] Bryan Bender, *Military Considers Recruiting Foreigners*, BOSTON GLOBE, Dec. 26, 2006, at 1A (discussing how foreign citizens serving in the military is a hotly contested issue but may solve the recruiting crisis).

[135] *See Contributions of Immigrants*, *supra* note 111 (statement of General Peter Pace) ("Not only are [non-citizen servicemembers] courageous, but they bring . . . a diversity, especially in a current environment where cultural awareness, language skills, and just the family environment from which they come, are so important to our understanding of the enemy and our ability to deal with them.").

for the Government to be selective in its recruitment, requiring each enlistee to be even more morally qualified than a non-DREAM Act enlistee.[136]

B. Russian Foreign Legion

In contrast to France's goal of recruiting small numbers of elite fighters, Russia opened its military ranks to foreigners and offered citizenship in exchange for military service in response to a recruiting crisis resulting from its shrinking population.[137] The Ministry of Defense originally created the program in 2004 as an enlistment method for citizens of the former Russian states, now known as the Commonwealth of Independent States (CIS).[138] The Russian government hoped the foreign enlistees would help fill the nearly 150,000 vacancies in their combat units.[139] The original plan offered the "conscientious and diligent soldier"[140] Russian citizenship through a simplified procedure, the opportunity to attend a higher education institution in Russia, and all the benefits afforded a Russian citizen, to include medical insurance, a foreign travel passport, and the right to live and work wherever he desires in the country.[141]

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[136] *Compare* DREAM Act of 2011, *supra* note 8, § 3(b) (requiring the enlistee to possess and maintain "good moral character" since the date he entered the United States and prohibiting an alien from enlisting if he was convicted of any offense that carries a maximum sentence of more than one year of confinement, or three or more offenses and was imprisoned for more than ninety days), *with* U.S. DEP'T OF ARMY, REG. 601-210, ACTIVE AND RESERVE COMPONENTS ENLISTMENT PROGRAM paras. 4-6 and 4-7 (8 Feb. 2011) (RAR 12 Mar. 2013) (allowing a regular enlistee to obtain a waiver for multiple civil and criminal convictions and major misconduct, to include felony offenses such as driving while intoxicated, drug offenses, and domestic abuse).

[137] Lidia Okorokova, *Russia's New Foreign Legion*, MOSCOW NEWS (Nov. 25, 2010), http://themoscownews.com/news/20101125/188233351.html (quoting Alexander Golts, a military expert and an activist with the Solidarnost opposition movement, who said the measure was likely aimed at plugging gaps in the military due to Russia's shrinking population).

[138] Viktor Litovkin, *A Foreign Legion for Russia*, CTR. FOR DEF. INFO. RUSSIA WKLY, http://english.pravda.ru/russia/politics/20-11-2003/4125-army-0/ (last visited Oct. 21, 2013) (discussing the evolution of Russia's foreign legion).

[139] *Id*. (stating the rationale behind opening Russian ranks to foreign troops).

[140] *Id*.

[141] *Id*. (outlining the benefits a foreigner would receive if serving in the Russian foreign legion).

Six years later, the Russian President expanded the program to non-CIS individuals. A foreign-born individual may enlist for five years in the Russian Defense Forces and will become eligible for citizenship after three years.[142] Should an enlistee fail to serve all five years, he loses his eligibility for citizenship.[143] Recent changes to the law ease requirements for these foreign troops to enlist and subsequently apply for citizenship. For example, foreigners would no longer be required to have a Russian passport before signing their enlistment contract. Further enlistment requirements are that an enlistee need only be conversant in Russian and have his fingerprints.[144] However, officials expect a vast influx of impoverished Africans from countries accustomed to fighting, such as Zimbabwe and Somalia, for the chance to become Russian citizens or obtain a Russian passport.[145]

Aside from Russia's military action against Georgia in 2008, there have been very few opportunities to observe the Russian foreign soldiers since the program's inception.[146] However, quantitatively, the program appears to be a success, with non-citizen soldiers filling the ranks and performing as well or better than their citizen contemporaries.[147] Accordingly, the United States could use this data to show that the DREAM Act could be used to boost the number of qualified servicemembers in its ranks should another recruiting crisis occur.

C. Israeli Defense Force

Israel's experience of offering immigration status for military service provides an example of law that meets both qualitative and quantitative recruiting goals. During its War of Independence, Israel opened the Israeli Defense Forces (IDF) to non-citizen foreigners in its IDF *Mahal*

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[142] *Contract Service: Terms of Admission*, MINISTRY OF DEF. OF THE RUSSIAN FEDERATION, http://eng.mil.ru/en/career/soldiering/conditions.htm (last visited Oct. 9, 2013).
[143] *Id.*
[144] Okorokova, *supra* note 137.
[145] *Id.*
[146] *See generally* Clifford J. Levy, *Putin Suggests U.S. Provocation in Georgia Clash*, N.Y. TIMES, Aug. 29, 2008, at A1 (providing background information about the conflict between Russia and Georgia in 2008).
[147] *CIS Servicemen Join Russian Army to Obtain Citizenship* (BBC International Reports television broadcast, Aug. 17, 2006) (stating that in the 138th motor-rifle brigade, there are 20 foreigners who "give their all" to the service, are "motivated," and serve without conflict between them and the Russian servicemen).

program, which offers the opportunity for non-citizens persons of Jewish descent to serve in the Israeli army.[148] During the War, 3,500 volunteers from 37 different countries came to Israel's defense.[149] Many volunteers were experienced World War II combat veterans who served with distinction in every branch of the IDF.[150]

The *Mahal* troops performed with great valor during the War for Independence. Recognizing the importance of non-citizen soldiers in the IDF, Israel's first Prime Minister, David Ben-Gurion, said:

> The participation of . . . men and women of other nations in our struggle cannot be measured only as additional manpower, but as an exhibition of the solidarity of the Jewish people . . . without the assistance, the help and the ties with the entire Jewish people, we would have accomplished naught . . . some of our most advanced services might not have been established were it not for the professionals who came to us from abroad . . .[151]

The *Mahal* troops serve side-by-side with members of the regular IDF, although historically, some units were nearly exclusively composed of *Mahal* soldiers.[152] Today, an applicant who is Jewish or who has Jewish parents or grandparents may join the IDF *Mahal* if he enlists for at least 18 months of service.[153] He or she may make *Aliyah* (immigrate

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[148] *Machal—Volunteers in the IDF*, ALIYAHPEDIA, http://www.nbn.org.il/aliyahpedia/army/584-machal-volunteers- in-the-idf.html (last visited Oct. 9, 2013). These troops are interchangeably referred to as "*Machal*" or "*Mahal*." This article refers to them in the latter.

[149] *Focus on Israeli Volunteers*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (May 1, 1999), http://www.mfa.gov.il/mfa/mfaarchive/1990_1999/1999/5/focus%20on%20israel-%20 machal%20-%20overseas%20volunteers [hereinafter *Focus on Israeli Volunteers*] (providing information about contributions by Mahal soldiers during Israel's 1948 War for Independence).

[150] *Id.* (noting that 119 overseas volunteers lost their lives in the War of Independence, four of whom were women and eight of whom were non-Jewish).

[151] *Id.*

[152] *Id.* For example, the 7th Armored Brigade included about 250 English-speaking Mahal soldiers. The brigade was commanded by Ben Dunkelman, a decorated WWII Canadian veteran who had previously been involved in the preparations of the "Burma Road" to Jerusalem and organized mortar support in the battles for the relief of besieged Jerusalem. *Id.*

[153] *MAHAL: Assistance for Volunteer Enlistees in the IDF*, ISRAEL DEFENSE FORCES, http://dover.idf.il/IDF/English/information/enlistment/Mahal/default.htm (last visited Oct. 9, 2013).

to Israel) at the completion of his or her service, and further eligible IDF *Mahal* members may obtain Israeli citizenship.[154] Similar to the DREAM Act, the *Aliyah* applicant must complete a mandatory time of service in order to successfully immigrate.[155]

As shown by the *Mahal* successes during the War for Independence, the *Mahal* soldier is highly motivated and possesses a strong sense of patriotism—and religious devotion—which results in superior battlefield performance.[156] Israel's success with its *Mahal* program is helpful as an example for the United States to successfully recruit highly qualified non-citizen enlistees.

IV. Analysis

This section describes the Army's procedures for administratively separating a Soldier. Additionally, it proposes that deportation is a collateral consequence of separation for a conditional legal resident with fewer than two years of active duty service. It further analyzes how the courts view respite from deportation, with some viewing it as a heightened interest and others declining to do so. Finally this section suggests that deportation is a collateral effect of a DREAM Act Soldier's separation prior to two years of completed service, concluding that the current administrative separation process is inadequate for a DREAM Act Soldier with fewer than two years of service.

A. Enlisted Separations

In order to understand the issue at hand, the reader must have a basic understanding of the method by which the Army discharges Soldiers. The Army separates Soldiers punitively at a Court-Martial[157] with a dishonorable or bad-conduct discharge or administratively with a characterization of service of honorable (HON), general under honorable conditions (GEN), or other than honorable circumstances (OTH).[158] The different options for the characterization of service afford the separated

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[154] *Id*.
[155] *Id*.
[156] *See Focus on Israeli Volunteers*, *supra* note 149.
[157] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 103 (2012) [hereinafter MCM].
[158] AR 635-200, *supra* note 11, para. 3-7.

Soldier decreasing rights and benefits upon separation. For that reason, the separation authority generally increases in rank. An HON characterization provides the separated Soldier with the most post-service rights and OTH characterization provides him the least.[159] When authorized, the separation authority may issue an administrative separation with a GEN characterization to a Soldier whose military record is satisfactory but not sufficiently meritorious to warrant an HON characterization.[160] Most importantly for a DREAM Act Soldier, the separating authority will not afford a Soldier with fewer than six years of service a formal separation proceeding for an HON or GEN characterization at discharge.[161]

A commander who is a special court-martial convening authority[162] is authorized to *sua sponte* approve or disapprove separation (without a formal separation proceeding) under certain provisions of AR 625-200 when the Soldier's conduct does not warrant an OTH characterization of service.[163] As a result, some battalion and most brigade commanders have tremendous power to approve a Soldier's separation with a characterization of service of HON or GEN if the Soldier has fewer than six years of service—all this without providing the Soldier any meaningful opportunity to be heard aside from the Soldier's written submissions.[164]

If the Soldier has served more than six years of service, he is entitled to a formal separation proceeding. The Army regulation provides some specific rights at this administrative hearing, beginning with notice of the

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[159] *Id*. For further information and a helpful chart on benefits at separation, the reader can visit http://www.knox.army.mil/sja/documents/Adlaw/VA_Benefits_Chart.pdf.

[160] *Id*.

[161] *Id*. para. 2-2(c)(4) (identifying Soldiers who are entitled to a board upon recommendation for separation).

[162] *See* UCMJ art. 19 (2012). Maximum punishment under a Special Court-Martial is generally one year of confinement, forfeiture of two-thirds pay per month for twelve months, and in most circumstances, a Bad Conduct Discharge. *Id.* art. 23. Generally, a brigade commander may convene a Special Court-Martial, although in practice, the General Court-Martial Convening Authority usually reserves authority to do so.

[163] AR 635-200, *supra* note 11, paras. 1-19(c) and 2-2(c)(2). For many bases for separation under this regulation, the approval authority need only notify the Soldier of his rights and provide him an opportunity to submit matters on his own behalf. *Id.*

[164] *Id*. para. 2-2. A Soldier may submit matters in writing to the approval authority for his or her consideration. No in-person meeting is required. *Id.* The author acknowledges that very few battalion commanders possess the requisite qualifications to be the separation authority for these types of discharges; however, it is still a possibility under the regulation and is most commonly seen in headquarter or Special Troops battalions.

potential characterization of service both recommended and possible and notification that the Soldier may consult with military or civilian counsel.[165] At the separation board, the command may call witnesses to prove to the three-member board[166] the allegations of the separation.[167] The Soldier may cross-examine the witnesses and may call witnesses of his own to disprove the allegations or to provide the separation board mitigating and extenuating facts.[168] The board deliberates on the veracity of the allegations and presents its findings and recommendations for retention or separation.[169] The separation authority considers the board's recommendations and may approve them completely, partially, or may disregard them.[170] The separation authority may not separate the Soldier with a characterization of service that is more severe than recommended by the board.[171]

The separated Soldier's appellate rights are minimal. He may first appeal to the Army Discharge Review Board, which has authority to upgrade a discharge or to issue a new discharge, but it does not have authority to reverse or vacate a discharge.[172] His secondary means of appeal is through the Army Board for Correction of Military Records (ABCMR), which has statutory authority to "correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice."[173] Further, the ABCMR may,

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[165] *Id*. The initiating commander must also notify the Soldier that he may submit statements on his or her own behalf and may obtain copies of all documents that will be sent to the separation authority supporting the proposed separation. Finally, the commander must notify the Soldier that he is entitled to an administrative hearing before an administrative separation board if the Soldier has more than six years of active duty service or if the commander is recommending a characterization of service of other than honorable.

[166] *Id.* para. 2-7(a). The composition of the board is at least three experienced commissioned, warrant, or noncommissioned officers in the rank of Sergeant First Class or higher and senior to the respondent.

[167] *Id.* para. 2-12(a). The board makes findings as to whether the allegations are supported by a preponderance of the evidence and if so, whether the findings warrant separation.

[168] *Id*. para. 2-10(d)(3). The Soldier may request witnesses to testify at the board proceeding after a showing that the witness' testimony would be relevant.

[169] *Id*. para. 2-7(b)(2).

[170] *Id*. para. 2-4.

[171] *Id*.

[172] 10 U.S.C. § 1553 (2011). The board consists of five members charged with reviewing discharges and dismissals of any former member of the armed services.

[173] *Id.* § 1552(a)(1).

subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.[174]

The commander has an established method to administratively separate a Soldier from the Army. The Army regulation may afford eligible Soldiers procedural safeguards, to include a formal administrative separation board, but the regulation allows commanders to separate some Soldiers with a procedure as simple as providing notice to the Soldier and obtaining two or three signatures. While not required under the current regulation, this established procedure could easily be expanded to protect the rights of conditional legal resident Soldiers.

B. Respite from Deportation as a Heightened Interest

In general, the courts have found that the Army's separation procedures are constitutionally adequate for Soldiers who are citizens or permanent legal residents.[175] More specifically, the courts declined to name a property or liberty interest that would create a constitutional requirement for more explicit procedural safeguards.[176] However, should the DREAM Act permit conditional legal residents to enlist in the Army, the courts will be forced to reevaluate the interests at stake for these Soldiers facing potential deportation. The following section proposes that deportation is a factor that should be significant enough to warrant additional safeguards in the current administrative separation procedures.

As the courts have found, in order for procedural due process rights to become available to a Soldier, he must demonstrate the potential for a loss of property or liberty.[177] Property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings

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[174] *Id.* § 1553(b). The board can change a discharge or dismissal or issue a new discharge.

[175] *Cf.* Mindes v. Seaman, 453 F.2d 197, 201–02 (5th Cir. 1971). If this article argued that respite from deportation is a liberty interest, at this point it would discuss the two-part threshold requirement and four-part framework for determining whether a court should review a military decision.

[176] *See* Guerra v. Scruggs, 942 F.2d 270, 277–78 (4th Cir. 1991).

[177] *Contra* Major Charles C. Poché, *Whose Money Is It: Does the Forfeiture of Voluntary Education Benefit Contributions Raise Fifth Amendment Concerns?*, ARMY LAW., Mar. 2004, at 1, 17 (suggesting that the immediately vested educational benefits from the G.I. Bill are "property interests" that give rise to procedural due process protections at an administrative separation hearing or a separation action).

that secure certain benefits and that support claims of entitlement to those benefits."[178] In other words, the Soldier must have a legitimate entitlement to some property at the time of the separation in order to claim a right to it, not just a mere expectancy of the property. The courts do not believe continued military service is an entitlement because the Army has broad statutory discretion to discharge Soldiers.[179]

For a DREAM Act Soldier, the collateral effect of an administrative separation is not merely the loss of immediately vested military benefits or the inability to continue his military service; rather, it is probable deportation at his subsequent removal proceeding. The courts have come close to naming respite from deportation as a liberty interest but have thus far declined to name it as such. However, the language used by the Supreme Court in its decisions regarding deportation of undocumented aliens suggest that the act of deporting someone who has deeply embedded roots in the United States is of grave enough significance to warrant due process protections that generally occur when a liberty interest is at stake.

At the heart of this debate is the concept of fundamental fairness and the notion that the U.S. Government may not deprive an individual of life, liberty, or property without adequate notice and an opportunity to be heard.[180] The courts often use the concept of fundamental fairness in conjunction with the concept of procedural due process. As previously noted, procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.[181]

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[178] Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[179] *See* Rich v. Secretary of Army, 735 F.2d 1220, 1226 (10th Cir. 1984) (holding that the petitioner had no property right in continued employment with the Army because of the discretion afforded the Secretary under 10 U.S.C. § 1169(1)).

[180] U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

[181] Matthews v. Eldridge, 424 U.S. 319, 332–34 (1976) (The Court made a three-part test to determine the constitutionality of any deprivation of property or liberty. First, the court must identify the private interest that will be affected by the official action. Second, the court must identify the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. Third, the court must identify the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.).

The Supreme Court has consistently held that some form of hearing is required before depriving an individual of his property or liberty.[182] Further, the courts have generally found that the Fifth Amendment even protects undocumented aliens from invidious discrimination by the Government.[183] The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."[184] The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."[185] For the DREAM Act Soldier like Private Gonzales, he failed to meet the qualifications for conditional residency upon the brigade commander's separation. At his removal proceeding, the Government meets its burden to show there is no basis for him to remain in the country by merely showing he did not complete his two-year service obligation.[186] Therefore, the "meaningful time" for any additional protections was at the time of Private Gonzales's separation proceeding, to which he was not entitled because of his time in service.

Because deportation is a collateral effect of his separation, a DREAM Act Soldier like Private Gonzales has much more at stake in his continued service than a citizen or permanent legal resident servicemember.[187] As previously noted, the courts have declined to find

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[182] *Id.* at 333; Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974).

[183] One must note that most of the cases involving due process for aliens involve petitioners who are not lawfully in the United States. In the case of the DREAM Act Soldier, the alien's presence is lawful, a fact which should afford him even more protections under the Fifth Amendment. *See* Matthews v. Diaz, 426 U.S. 67, 77 (1976); *See also* Christopher Nugent, *Ensuring Fairness and Due Process for Noncitizens in Immigration Proceedings*, 36 HUM. RTS. MAG., Winter 2009, at 18–20 (The author provides a helpful discussion about the struggle for due process rights for non-citizens in immigration proceedings.).

[184] Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

[185] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[186] 8 U.S.C. § 1427 (2011) (discussing basis for removal of a DREAM Act candidate).

[187] *See* Major Richard D. Belliss, *Consequences of a Court-Martial Conviction for United States Servicemembers Who Are Not United States Citizens*, 51 NAV. L. R. 53, 57–58 (2005) (Major Belliss discusses the consequences of a court-martial conviction on lawful permanent residents. The author notes that the Court of Military Appeals found immigration consequences for a drug or crime of moral turpitude conviction is collateral and thus neither the defense attorney nor military judge has any obligation to notify the accused of the potential that he would face deportation as a result of his conviction. Fortunately for lawful permanent resident accused servicemembers, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) changed this requirement and defense attorneys and judges must

a property interest in continued military service for servicemembers who are both citizens and legal permanent residents.[188] However, the stakes become much higher for conditional legal resident enlistees who face the threat of deportation to a foreign country to which they have no ties, should they be separated prior to the requisite two years of honorable military service. The reader should recall the relative ease at which Private Gonzales's brigade commander was able to separate him under the provisions of the Army regulation. His opportunities in the United States are much greater than in Mexico, as evident by his strong desire to engage in combat on behalf of the only country he knows. Given the opportunities he will be denied, the lack of significant criminal or moral wrongdoing, and the lack of notice in the proceeding, and considering that removal is a collateral and inevitable effect of the separation proceeding, the Government is required to afford him the appropriate level of rights at the "meaningful time," which is at his separation proceeding.

Because the DREAM Act is still in its draft form and conditional legal residents may not serve in the military, this issue is not yet ripe for adjudication in court. However, the Supreme Court and some federal courts view deportation very seriously, giving respite from deportation a heightened interest that comes close to a liberty interest.[189] Accordingly, Congress, the DoD, and the Army should recognize this heightened interest and allow for the requisite procedural due process rights at the appropriate time, which is prior to the removal proceeding.

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advise a defendant that his or her plea of guilty may subject them to non-favorable immigration action.)

[188] *See* Guerra v. Scruggs, 942 F.2d 270, 278 (4th Cir. 1991) (denying existence of statutory property interest); Sims v. Fox, 505 F.2d 857, 860–62 (5th Cir. 1974) (denying property right in continued military employment when basis is mere expectancy); Rich v. Sec'y of the Army, 735 F.2d 1220, 1226 (10th Cir. 1984) (denying property right in continued military employment) (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

[189] *See* Cruzan by Cruzan v. Dir., Missouri Dept. of Health, 497 U.S. 261, 279 (1990) (citing Youngberg v. Romeo, 457 U.S. 307, 321 (1982)) (Because this article acknowledges that respite from deportation is not a liberty interest, it will not discuss the second prong of the inquiry to determine whether a Constitutional violation has occurred. Determining that a person has a "liberty interest" under the Due Process Clause does not end the inquiry; "whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." Here, there is little state interest in deporting someone who has no criminal record and desires to be a contributing member of society so much that he or she enlists in the armed services.).

Although declining to name respite from deportation as an official liberty interest, the deprivation of which would trigger Constitutional protections, the Supreme Court has repeatedly used language to convey the significance of deportation to an alien who has deeply embedded roots in the United States. The Court defined a liberty interest as a function of a person's ability to pursue an occupation of his pleasing. In *Butcher's Union Slaughterhouse and Livestock Landing Co. v. Crescent Slaughterhouse Co.*, the Court said:

> The right to follow any of the common occupations of life is an inalienable right, it was formulated as such under the phrase "pursuit of happiness" in the declaration of independence, which commenced with the fundamental proposition that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.[190]

Given this definition, the Supreme Court and some federal courts have come close to identifying relief from deportation as a "liberty interest." In *Bridges v. Wixon*, the Court discussed the significance that must be given to procedures involving the threat of deportation.[191] The Court stated, "Meticulous care must be exercised lest the procedure by which [the detainee] is deprived of [his] liberty not meet the essential standards of fairness."[192] Justice Douglas continued, noting that "it must be remembered that although deportation technically is not criminal punishment it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling."[193] The Court

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[190] 111 U.S. 746, 762 (1884).

> The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the fourteenth amendment. The court assents to this general proposition as embodying a sound principle of constitutional law.

Id.

[191] 326 U.S. 136 (1948).

[192] *Id*. at 154.

[193] *Id*. at 147 (citing Cummings v. Missouri, 71 U.S. 277 (1866); *Ex parte Garland*, 71 U.S. 333 (1866)).

specifically noted that they were dealing with deportation of aliens whose roots may have become "deeply fixed in this land."[194] Most poignantly, as stated by Mr. Justice Brandeis speaking for the Court in the frequently cited case of *Ng Fung Ho v. White*, deportation may result in the loss "of all that makes life worth living."[195]

The federal courts are split in their interpretation of respite from deportation as a liberty interest. The Eighth Circuit expressly found that respite from deportation, even for a conditional legal resident, is not a liberty interest: "As a threshold requirement to any due-process claim . . . [the] alien must show that he or she has a protected property or liberty interest."[196] Further, the court reminded appellant that the court has "held [that] there is no constitutionally protected liberty interest in discretionary relief from removal."[197] The court reasoned that in those circumstances, because there is no liberty interest, the Due Process Clause does not apply, and, because there is no constitutional question or question of law, the court lacked jurisdiction to even hear the claim.[198]

In stark contrast, the Third Circuit adopted a more generous view toward a conditional resident, discussing the alien's liberty interests at stake with deportation. In *Leslie v. Attorney General of the United States*, the petitioner was a conditional legal resident who faced deportation because of a qualifying felony. Identifying the "grave consequences of removal," the court underscored the seriousness of deportation by stating that "the draconian and unsparing result of removal is near-total preclusion from readmission to the United States, with only a remote possibility of return after twenty years."[199] The *Leslie* court recalled Justice Douglas in *Bridges*, citing his comments that removal "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom" and the Court's conclusion that "deportation is a penalty—at times a most serious one—

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[194] *Id.* at 154.
[195] 259 U.S. 276, 284 (1922).
[196] Garcia-Mateo v. Keisler, 503 F.3d 698, 700 (8th Cir. 2007); Etchu-Njang v. Gonzales, 403 F.3d 577, 585 (8th Cir. 2005).
[197] *See Garcia-Mateo*, 503 F.3d at 700 (voluntary departure); *Etchu-Njang*, 403 F.3d at 585 (cancellation of removal); Jamieson v. Gonzales, 424 F.3d 765, 768 (8th Cir. 2005) (adjustment of status); Nativi-Gomez v. Ashcroft, 344 F.3d 805, 808–09 (8th Cir. 2003) (adjustment of status).
[198] *See* Ibrahimi v. Holder, 566 F.3d 758, 766 (8th Cir. 2009); *see also* Pinos-Gonzalez v. Mukasey, 519 F.3d 436, 439 (8th Cir. 2008) (claiming lack of jurisdiction to cancel the removal action).
[199] 611 F. 3d 171, 181 (3d Cir. 2010).

[that] cannot be doubted."[200] Finally, the *Leslie* court recalled the words of Judge Rendell in his dissenting opinion of *Ponce-Leviva v. Ashcroft*: "We must always take care to remember that, unlike in everyday civil proceedings, the liberty of an individual is at stake in deportation proceedings."[201] In sum, although the Supreme Court and some of the federal courts use language suggesting that respite from deportation could be a deprivation of liberty severe enough to warrant full Constitutional protection, no court has officially stated as much.

Revisiting Private Gonzales, he has now been separated from the Army with no administrative separation hearing, DHS removed his conditional residency status, he now faces an alien removal proceeding as an undocumented alien. At the removal proceeding, the Government meets its burden of proof by showing by a preponderance of the evidence that Private Gonzales's immigration status reverted to his previous undocumented status when his command separated him and he no longer meets the requirements for conditional residence under the DREAM Act.[202] Given the administrative separation proceedings and the courts' emphasis on the importance of the decision to deport an individual, this article next discusses why Private Gonzales's administrative separation procedure is effectively his alien removal hearing.

C. Deportation as a Collateral Effect of Separation

Private Gonzales is at risk for deportation if he is separated prior to two years of service or if he is separated with anything but an Honorable Discharge. The language of the DREAM Act is clear: "The Secretary shall terminate the conditional permanent resident status of an alien, if the Secretary determines that the alien . . . was discharged from the Uniformed Services and did not receive an honorable discharge."[203] Further, if the alien "ceases to meet the requirements" of this section, he "shall return to the immigration status the alien had immediately prior to receiving permanent resident status on a conditional basis or applying for such status, as appropriate."[204] In other words, when Private Gonzales is separated from the Army prior to completing two years of service or with

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[200] *Id*. (citing Bridges v. Wixon, 326 U.S. 135, 154 (1945)).
[201] Ponce-Leiva v. John D. Ashcroft, 331 F.3d 369, 381 (3d Cir. 2003) (Rendell, J., dissenting).
[202] *See supra* pp. 15–16; *infra* Appendix A.
[203] DREAM Act of 2011, *supra* note 8, § 4.
[204] *Id*. § 4(d)(1).

a discharge that is not an Honorable Discharge, he will become an undocumented alien whose location is known to the Government, potentially initiating deportation procedures. The Government need only show that Private Gonzales failed to meet the qualifications for his conditional residency and can easily produce the separation paperwork signed by his brigade or battalion commander. Thus, the Army's separation action is effectively Private Gonzales's removal proceeding and should be treated as such.

The courts uniformly agree that any evidence offered during a removal proceeding must be probative and fundamentally fair, invoking notions of due process protections.[205] The majority of these cases involve a conditional legal resident or undocumented alien who commits a felony that makes him ineligible to remain in the United States. Private Gonzales is clearly distinguishable from a felon seeking a stay from deportation. Further, consider his situation with that of another Soldier facing administrative separation. The other Soldier will involuntarily leave the Army and move back to his home state, presumably with his friends, family, and livelihood intact, while Private Gonzales may be deported to Mexico. The difference in the effect of the separation is highly significant.

Another provision exists for Private Gonzales to obtain conditional legal residency under the DREAM Act. He could have entered a college or university, having been granted conditional legal residency for six years. Under this provision, the government would have allowed him six years to complete two years towards at least a bachelor's degree.[206] Any reversion back to his prior status would have occurred at the completion of that six years if he had not either acquired a bachelor's degree or completed at least two years in good standing towards such a degree.[207] However, as stated in the introduction, this option is unlikely for an undocumented alien with limited access to student aid.[208] The DREAM Act student has six years to complete two years of work prior to his status reverting while the DREAM Act Soldier can have his status reverted in fewer than two years.[209] Consequently, the DREAM Act

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[205] *See, e.g.*, Felzcerek v. INS, 75 F.3d 112, 115 (2d Cir. 1996); Baliza v. INS, 709 F.2d 1231, 1234 (9th Cir. 1983); Cunanan v. INS, 856 F.2d 1373, 1374 (9th Cir. 1988); Olabanji v. INS, 973 F.2d 1232, 1234 (5th Cir. 1992).

[206] DREAM Act of 2011, *supra* note 8, § 5.

[207] *Id.*

[208] *See supra* Part I.A.

[209] DREAM Act of 2011, *supra* note 8, § 5.

Soldier needs more protection during any administrative determinations that have the potential to affect his residency status. A modification to the Army's administrative separation procedures can remedy this inequity.

D. The Inadequacy of the Current Proceedings

Understanding deportation is a collateral effect of administrative separation for a conditional legal resident Soldier under the DREAM Act, this article now describes why the protections afforded him under the current regulations are inadequate to protect his rights. As previously described, certain provisions of AR 635-200 allow for a battalion commander with a legal advisor to approve administrative separations with no oversight.[210] The battalion commander who may be authorized to approve some administrative separations usually has little formal legal training and is not bound by any recommendations of his legal advisor.[211] More commonly, a brigade commander will act as the separation authority. Under the current Office of The Judge Advocate General (OTJAG) training model, the brigade commander has limited—if any—training in immigration law.[212] Further, under this same training model, the brigade commander's legal advisor has little to no experience in immigration law aside from routine legal assistance issues and would not have the professional expertise to advise the commander on a separation action that will result in a default removal proceeding.[213]

Recall Private Gonzales's proposed separation action: Since Private Gonzales has served for fewer than six years, he is not entitled to a

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[210] *See supra* Part IV.A.

[211] The author was the legal advisor to a battalion commander for thirteen months from December 2009 until January 2011for a battalion commander who had little legal training whatsoever. Additionally, AR 635-200 does not require a legal review of administrative separations prior to the commander approving the separation.

[212] *See* Memorandum from Dean, The Judge Advocate Gen.'s School, to Students, 218th Senior Officer's Legal Orientation (SOLO) Course, subject: Course Administrative Instructions (22 July 2011) (discussing course content for brigade and select battalion commanders, which does not include any training on immigration law).

[213] This assertion is based on the author's recent professional experiences in the Judge Advocate Officer's Basic Course in 2007, as Chief of Client Services from February 2008 until June 2009, and as a legal assistance attorney from January until May 2011.

separation board.[214] Further, he has no appellate rights under the provisions of AR 635-200.[215] The approving authority has removed the condition he must meet to maintain his conditional legal residency, and DHS may immediately remove his conditional status. Since he reverts to his original status—that of an undocumented alien—he may face a removal proceeding where the Government need only show that he is ineligible to remain in the country. Private Gonzales has just been effectively advised and deported by a host of individuals (commander, government counsel, and defense counsel) who, by no fault of their own, lack specialized training in immigration law, with a limited opportunity to be heard, and without any appellate rights. This scenario underscores why a heightened separation board is the best option for a DREAM Act Soldier facing separation prior to his two years of service.

Given the potential risks at every step in this process, any fiscal and administrative burdens placed upon the Army by requiring additional procedural requirements are more than reasonable.[216] This article has established the DREAM Act Soldier's interest in having more procedural safeguards at the separation proceeding. The Government has an interest in affording servicemembers the rights appropriate to the level of potential deprivation, even if this deprivation does not rise to the level of requiring full Constitutional protection. Most significantly, the Government has an interest in attracting the highest quality undocumented recruits, some of whom would decline to enlist due to the fear of arbitrary separation and subsequent deportation. The next section proposes changes to both the Army regulations and the legislation in order to protect the Soldier's and the Government's interests in the case of a conditional legal resident soldier facing administrative separation.

V. Recommendations

Clearly, the law, policies, and regulations should change and the most advantageous time to plan for the changes is in advance of the law. Private Gonzales suffered a significant injustice after being separated from the Army and subsequently deported. This scenario would not

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[214] AR 635-200, *supra* note 11, para.13-8 (The commander may approve the separation of a Soldier with fewer than six years of service without affording him an administrative separation board.).

[215] *Id.* para. 13 (noting that some chapters of this regulation provide for an appeals process, such as a separation under Chapter 19 for the Qualitative Management Program).

[216] Matthews v. Eldridge, 424 U.S. 319, 334 (1976).

occur today because the Army requires an enlistee to possess either United States citizenship or permanent legal residency. However, given the eventuality of the DREAM Act becoming law, this article proposes changes to both the legislation and the Army regulations to protect Soldiers like Private Gonzales from a situation similar to the hypothetical one in this article. Fortunately, with the repeal of "Don't Ask, Don't Tell" (DADT),[217] the Army has recent experience in rapidly changing the administrative separation procedures for members of a limited group to ensure it protects the rights of its Soldiers facing separation.

A. Methods of Change

This section compares three methods to ensure the Army protects the interests of a DREAM Act Soldier. One method is to change the legislation itself prior to the President signing it into law. Another method is to change Army regulations. The third method is to change both the legislation prior to its passage into law, delegate authority to remove the servicemember's conditional status to the service secretaries, and incorporate intraservice changes at the DoD and service level. Although all three methods are viable, this section concludes that the third method would be the most effective.

There are advantages to the first method of simply changing the legislation and creating additional safeguards within the text of the law.[218] The law would be clear-cut, unequivocal, and would leave no room for interpretation by the separate armed services. However, once the DREAM Act is passed and signed into law, a change to the enacted legislation would require an amendment through Congress.[219] The second method of change is to simply change the regulations at the service-specific level to incorporate additional procedural safeguards into each service's regulations. Although this method of change allows the most flexibility for each service, the possibility exists that a service may not change its regulation at all. Further, the regulatory variance could be too great between the services.

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[217] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2, 124 Stat. 3515 (2010).

[218] For example, the DREAM Act could contain a section called "Implementation at the Armed Service Level." In this section, the text of the legislation could specifically outline the changes to the separation procedures for the services.

[219] The U.S. Code is the compendium of laws currently in force. Any changes to the Code would require a new law.

The third—and preferred—method of regulatory change is a hybrid of the first two methods. DHS should delegate its authority to qualify or remove the conditional residency status of current and former DREAM Act servicemembers to the DoD service secretaries. Likewise, the Secretary of Education should have authority to qualify or remove the conditional residency status for all DREAM Act students.[220] Such a delegation could be written into the legislation, and the DoD could take all appropriate measures to enact the changes. Additionally, DoD could use a DoD Directive (DoDD)[221] and Instruction (DoDI)[222] to create new policy and implement policy change uniformly throughout the services. The DoDD and DoDI could direct the separate services to amend their regulations in a certain manner while maintaining a level of autonomy from the legislative branch. This hybrid option allows the DoD more flexibility to make multiple revisions and allows the separate services the flexibility to tailor their regulations to meet the needs of the service while staying within the boundaries of the DoDD and DoDI.[223]

B. DADT Repeal as a Model for Change

The repeal of DADT is the model of how the DoD and the Army quickly updated their policies and regulations in response to the changing legal landscape. With increasing pressure to end DADT and trial set that year for a federal judge in California to rule on DADT's constitutionality, on February 2, 2010, the Secretary of Defense directed the DoD to quickly review regulations used to implement DADT.[224] The Secretary solicited recommended changes to the service regulations that would enforce the law in a fairer and more appropriate manner for a selected group of servicemembers.[225] On September 9, 2010, Judge

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[220] DREAM Act of 2011, *supra* note 8, § 4.

[221] U.S. DEP'T OF DEF., INSTR. 5025.01, DOD DIRECTIVES PROGRAM (28 Oct. 2007). A DoDD establishes policy.

[222] *Id.* A DoDI implements policy.

[223] *Id.*

[224] Robert M. Gates, Sec'y of Def., Statement on "Don't Ask, Don't Tell" (Feb. 2, 2010) (speaking about the high-level working group he appointed in response to the President's announcement the week prior that he would work with Congress to repeal DADT).

[225] *Id.* ("[T]he working group will undertake a thorough examination of all the changes to the department's regulations and policies that may have to be made. These include potential revisions to policies on benefits, base housing, fraternization and misconduct, separations and discharges, and many others."). Secretary Gates further stated, "Simultaneous with launching this process, I have also directed the Department to quickly review the regulations used to implement the current Don't Ask Don't Tell law

Virginia Phillips of the U.S. District Court for Central California ruled that DADT was unconstitutional.[226] On October 12, 2010, Judge Phillips granted an immediate injunction prohibiting the DoD from enforcing DADT, which included prohibiting separations under the service regulations for homosexual conduct.[227] After a series of stays and appeals, which included the Supreme Court refusal to intervene, the demise of DADT was imminent. On December 22, 2010, President Obama signed legislation that led to the eventual appeal of DADT.[228]

Within one year, the DoD and the Army worked tirelessly to keep abreast of the rapidly changing law by effectively using DoDIs and Rapid Action Revisions to AR 635-200. The DoD issued a series of DoDIs, implementing new policies regarding separations based on homosexual conduct, ordering the separate services to "[i]mplement Service policies, standards, and procedures consistent with [the DoDI] and ensure they are administered in a manner that provides conformity and clarity of separation policy to the extent practicable in a system based on command discretion."[229]

In early 2011, a mere three months after the President signed the DADT Appeal Act, the Under Secretary of Defense published a memorandum regarding the repeal of DADT and its future impact on policy.[230] Included as an attachment to the memorandum were changes to the DoDIs and DoDDs that would be effective upon the date of

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and, and within 45 days, present to me recommended changes to those regulations that, within existing law, will enforce this policy in a fairer manner."

[226] Log Cabin Republicans v. U.S., No. CV 04-08425-VAP (Ex.), 2010 WL 3526272 (C.D. Cal. 2010), *amended and superseded by* 716 F. Supp. 2d 884 (C.D. Cal. 2010), *vacated by* Log Cabin Republicans v. U.S., 658 F. 3d 1162 (9th Cir. 2011).

[227] Order Granting Permanent Injunction (In Chambers) at 14–15, *Log Cabin Republicans*, No. CV 04-08425-VAP, 2010 WL 3526272.

[228] Don't Ask, Don't Tell Repeal Act of 2010, *supra* note 217; *see* President Barack Obama, Remarks at Signing of the Don't Ask, Don't Tell Repeal Act of 2010 (Dec. 22, 2010).

[229] U.S. DEPT. OF DEF., INSTR. 1332.14, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (28 Aug. 2008) (C3, 30 Sept. 2011) (further directing the service secretaries to "[e]nsure enlisted separation policies, standards, and procedures are applied consistently; ensure fact-finding inquiries are conducted properly; ensure abuses of authority do not occur; and ensure that failure to follow the provisions contained in this issuance results in appropriate corrective action."); U.S. DEPT. OF DEF., INSTR. 1332.30, SEPARATION OF REGULAR AND RESERVE COMMISSIONED OFFICERS (11 Dec. 2008) (C2, 20 Sept. 2011).

[230] Memorandum from Under Sec'y of Def., to Sec'ys of the Military Dep'ts., subject: Repeal of Don't Ask Don't Tell and Future Impact on Policy (28 Jan. 2011).

repeal.[231] In preparation for the appeal, on February 23, 2011, the Secretary of the Army issued Department of the Army Directive 2011-1, which detailed Army policy to "ensure consistency with the repeal of [DADT]."[232] Less than six months later, the President certified to Congress that the Armed Forces were prepared to implement the repeal in a manner that was consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.[233] On September 20, 2011, the repeal took effect and DADT no longer existed.[234]

The Army's response throughout these changes was to incorporate two Rapid Action Revisions to AR 635-200 to comply with the DoDIs. The first Rapid Action Revision, dated April 27, 2010, raised the level of the commander authorized to initiate fact-finding inquiries and separation proceedings to the level of a general or flag officer in the Soldier's chain of command.[235] This revision also required a lieutenant colonel or higher to conduct the fact-finding inquiry,[236] and a general or flag officer in the Soldier's chain of command to be the separation authority.[237] Additionally, the revision significantly increased the procedural due process protections afforded the selective group of Soldiers facing separation for homosexual behavior.[238] The second Rapid Action Revision, dated September 6, 2011, implemented the repeal by "deleting all references to separation for homosexual conduct and concealment of pre-service and prior-service homosexual conduct."[239]

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[231] *Id.*

[232] U.S. DEPT. OF ARMY, DIR. 2011-1, REPEAL OF "DON'T ASK, DON'T TELL" (23 Feb. 2011).

[233] Certification (Jul. 21, 2011) http://www.whitehouse.gov/sites/default/files/uploads/dadtcert.pdf (signed and certified pursuant to the DADT Repeal Act by President Obama, Secretary of Defense Gates, and Chairman of the Joint Chiefs of Staff Michael Mullen).

[234] Don't Ask, Don't Tell Repeal Act of 2010, *supra* note 217.

[235] U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS para. 15-6 (14 Dec. 2012) (RAR, 27 Apr. 2010).

[236] *Id.* para. 15-1.

[237] *Id.*

[238] *Id.* The change revised what constituted "credible information" to initiate an inquiry or separation proceeding. For example, it specified that information provided by third parties should be given under oath and discouraged the use of overheard statements and hearsay. It also specified certain categories of confidential information that would not be used for purposes of homosexual conduct discharges. *Id.*

[239] AR 635-200, *supra* note 11, at Summary of Change.

The Army's response to the DADT repeal effectively protected the rights of a selective group of Soldiers throughout the evolving legal landscape. In the span of one year, through the use of DoDDs, DoDIs, and rapid action revision regulatory changes, the DoD and the Army created additional procedural safeguards for a select class of Soldiers and trained an entire force about the new policy.[240] The DREAM Act has been in the legislative process for over ten years with the same two-year military service requirement in the proposed legislation for several Congresses, and the Army has even more time to prepare for the change.

C. Proposed Changes

With the DADT repeal, the Army recently had the opportunity to effect regulatory change in response to a rapidly changing legal environment. Similarly, a hybrid approach to change, using the text of the legislation, a delegation of authority, and instructions, directives, and service-specific regulatory change, will ensure the Government protects a DREAM Act Soldier's rights. After proposing changes at the legislative and DoD level, the majority of this section will address the specific changes to AR 635-200 that will ensure the Army affords a conditional legal resident Soldier the appropriate procedural protections to protect his rights.[241]

First, Congress should amend the DREAM Act prior to its passage by delegating authority to remove the conditional residency status for a former DREAM Act servicemember to the appropriate service secretary. Likewise, Congress should delegate authority to remove the conditional residency status for a former DREAM Act student to the Secretary of

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[240] Specialist Paul Holston, *'Don't Ask Don't Tell' Repeal Training in Progress*, U.S. ARMY (May 23, 2011), http://www.army.mil/article/56925/.

[241] AR 635-200, *supra* note 11, para. 1-20(d). Interestingly, the Army already identified a risk to permanent legal resident Soldiers and built an additional notice provision into the regulation:

> Commanders, in coordination with the servicing staff judge advocate, will counsel permanent resident aliens enlisted in the Army for three or more years who wish to fulfill naturalization requirements through honorable military service . . . . Counseling should include an explanation that voluntary or involuntary separation could affect fulfillment of the naturalization requirements.

Id.

Education. Both Secretaries have specialized experience and knowledge that allows them to make an informed and educated decision based on the facts of each case. For example, the Secretary of the Army could review Private Gonzales's entire separation action with a good understanding of the reasons why the command separated him from the Army, whether the command followed the correct procedures, and what, if any, service-specific mitigating or extenuating circumstances exist that would affect his removal. Conversely, DHS does not have any specialized knowledge about the administrative separation procedures and may not have the same appreciation for mitigating or extenuating circumstances.

Second, in advance of the DREAM Act becoming law, the DoD should issue a DoDI that implements a new policy for enlisted separations in the event of a conditional permanent resident. The DoDI should mandate that the separate services amend their regulations regarding administrative separations and should become effective upon the law's passage.

Third, the Army should make a Rapid Action Revision to AR 635-200, to become effective when the DREAM Act becomes law. The Army should add a chapter to AR 625-200 entitled "Separation Procedures for Conditional Legal Residents of the United States."[242] As this section next describes, the separation procedures for a conditional legal resident should be similar to those at a removal proceeding.

D. Proposed Separation Proceedings

This section proposes a change to AR 635-200 when the Soldier pending separation is a conditional legal resident. At a time when the defense budget is stretched thin, this article acknowledges that the training and procedural requirements proposed would create additional fiscal and administrative burdens on the OTJAG and the commands; however, any hardships are necessary to provide the requisite amount of procedural and substantive protections for our DREAM Act Soldiers. The ideal proceeding should afford the Soldier the same rights and procedures as that of an alien at a removal proceeding.[243] Given the current state of budgetary concerns and the inability to assess the number

[242] *See infra* Appendix D (proposing a new chapter for AR 635-200).
[243] *See infra* Appendix B.

of Soldiers who will enlist under the DREAM Act, this article acknowledges the aspirational nature of such a proposal.

First, as the Army quickly realized during the DADT repeal process, the initiating, investigative, and separation authority for a conditional legal resident should be more senior than for a citizen-Soldier facing separation. The Army can easily sustain this change, which would place no additional fiscal burden on the organization. The initiating commander should be a general or flag officer in the Soldier's chain of command. The risk of erroneous deprivation is so great that it requires the most senior level oversight; therefore, the Secretary of the Army should approve any separation of a conditional legal resident. This authority needs to remain at the highest level and should be non-delegable because of the entrusted experience inherent in officers of such rank and position.[244]

Second, a conditional legal resident Soldier facing separation prior to two years of active duty service, regardless of the proposed characterization of service, should be afforded a separation board. Prior to the board, the commander should show that he provided the Soldier ample rehabilitative opportunities, to include a mandatory rehabilitative transfer.[245] Each Army command should have a highly trained standing board available to conduct this separation proceeding if the DREAM Act results in a high enough number of enlistees to warrant the fiscal burden. General officer commanders should identify a colonel to be the standing president of the board, and the OTJAG should create specialized training for him or her. Such training should include intensive training on immigration law and evidence and discussions with sitting Immigration Judges (IJs). Prior to any board, the OTJAG should assign the president a highly trained legal advisor in the rank of Major or higher who has undergone at least the same immigration law training as the government and defense attorneys involved in the process. Additionally, the OTJAG should identify government and defense attorneys at each installation who can represent the command and the Soldier at a separation proceeding. These specially trained attorneys should attend and

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[244] *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 1-5 (18 Mar. 2008) (RAR, 20 Sept. 2012) (discussing privilege to command and characteristics of command leadership).

[245] *See* AR 635-200, *supra* note 11, para. 1-16(a). The regulation already requires the command to conduct a rehabilitative transfer prior to the command initiating separation. However, the regulation allows the command to waive this transfer. *Id.* In practice, the command generally waives the rehabilitative transfer.

approved immigration law course and should sit through a certain number of civilian removal proceedings as part of the training.[246]

Alternatively, if a minimal number of individuals enlist under the provisions of the DREAM Act, OTJAG should train select individuals to be highly qualified immigration law experts (HQEs) who attend each separation board. These HQEs should be neutral parties who can answer immigration questions from all parties involved. Even if the Army decides that the DREAM Act Soldier will receive a standard board proceeding instead of the heightened procedure this article proposes, the HQE could provide a wealth of knowledge to the government and defense attorneys, the legal advisor, the staff judge advocate, and the president of the board.

Fourth, the rights and procedures at a DREAM Act Soldier's separation board should be similar to that of an alien at a removal proceeding. The courts have found that the Fifth Amendment protects aliens from deprivation of life, liberty, or property by the federal government without due process of law and entitles aliens to removal proceedings that comport with due process.[247] In the context of a removal proceeding, due process requires notice reasonably calculated to provide actual notice of the proceedings and a meaningful opportunity to be heard.[248] This "meaningful opportunity to be heard" includes a reasonable opportunity to present evidence on the alien's own behalf.[249] A removal proceeding may be fundamentally unfair, in violation of due process, if an alien is prevented from reasonably presenting his case.[250]

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[246] *See, e.g.*, Lieutenant Colonel Maureen A. Kohn, *Special Victim Units: Not a Prosecution Program but a Justice Program*, ARMY LAW., Mar. 2010, at 68 (showing that the proposal for specialized attorneys is not novel; the Army trains prosecutors and hires highly qualified experts to advise on sexual assault cases.); *Legal Services During the MEB/PEB Processes*, OFFICE OF THE SOLDIER'S COUNSEL, THE JUDGE ADVOCATE GENERAL'S CORPS, https://www.jagcnet.army.mil/8525740300753073/0/56C016A9D039C927852573F000552C3B (last visited Oct. 21, 2013). The Army determined that soldiers facing a Medical or Physical Evaluation Board did not have adequate representation throughout the process. Therefore, OTJAG trained specialized attorneys to represent these soldiers. The OTJAG could do the same for attorneys specializing in immigration law.

[247] Ramos v. Gonzales, 414 F.3d 800 (7th Cir. 2005); Mohamed v. TeBrake, 371 F. Supp. 2d 1043 (D. Minn. 2005).

[248] Hussain v. Gonzales, 424 F.3d 622 (7th Cir. 2005).

[249] *Id.*

[250] Leslie v. Attorney Gen. of U.S., 611 F.3d 171 (3d Cir. 2010); United States v. Jauregui, 314 F.3d 961, 962–63 (8th Cir. 2003) (establishing that Fifth Amendment due process protections to which an alien is entitled include the right to demand the filing of a

Further, although aliens have no Sixth Amendment right to counsel at deportation hearings, due process requires that such hearings be fundamentally fair.[251]

Accordingly, like the IJ, the president of the board should have the authority to subpoena witnesses[252] that he believes would be helpful for the board's decision.[253] Like a removal proceeding, the burden of proof should be on the command to prove, by clear and convincing evidence,[254] that the allegations upon which the command based the separation action are true and warrant separation.[255] Further, the board should permit a DREAM Act Soldier to offer evidence in extenuation[256] regarding the effect of his removal from the country, and should require in-person testimony by witnesses.[257] The regulation should expressly state that this type of evidence is always relevant to the board's decision.

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written notice, obtain legal representation, examine evidence against him or her, present evidence, cross-examine government witnesses, appeal the immigration judge's decision to the Board of Immigration Appeals, and challenge the constitutionality of removal procedures and standards).

[251] U.S. CONST. amend. V; Rosales v. Bureau of Immigration and Customs Enforcement, 426 F.3d 733, 736–37 (5th Cir. 2005).

[252] *See* UCMJ arts. 47 & 135 (2008) (giving subpoena power to the president of a board of inquiry). This article suggests that this proceeding is a board of inquiry, much like an investigation under the provisions of UCMJ, Article 32.

[253] 8 U.S.C. § 1427(a) (2011). In a removal proceeding, the IJ's responsibilities are significant; he administers oaths, receives evidence, and interrogates, examines, and cross-examines the alien and any witnesses.

[254] *See* BLACK'S LAW DICTIONARY 17 (9th ed. 2009). This language indicates the standard at a removal proceeding is "Clear and Convincing Evidence," which is defined as "Evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials." *Id.*

[255] 8 U.S.C. § 1427(a). At a removal proceeding, if the alien is unlawfully present in the United States, the burden of proof is on the alien to prove he is "clearly and beyond doubt" entitled to be admitted and is not inadmissible and by "clear and convincing evidence" and that he is lawfully present in the United States pursuant to a prior admission. However, the burden of proof is on the service, if alien has been admitted to United States, to prove he is deportable based on "reasonable, substantial, and probative evidence". *Id.*

[256] *See* MCM, *supra* note 157, R.C.M. 1001(C)(1)(b) (establishing that even during a criminal trial, a military accused is permitted wide latitude to present evidence during sentencing that may "lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency"). This article proposes at least that same standard for the separation proceeding.

[257] The Government should be prepared to have translators available for witnesses who do not speak English. The lack of a translator should not be the basis for denying a witness's testimony.

Fifth, a DREAM Act Soldier should have appellate rights similar to that of an alien at a removal proceeding.[258] Should the standing board recommend that the Soldier be separated from the Army with any discharge other than HON, the Soldier should have an immediate and mandatory review through OTJAG to the Secretary of the Army.[259] If the Secretary of the Army affirms the recommendation, the non-delegable authority to separate the DREAM Act Soldier should remain with the Secretary of the Army. The Soldier should remain on active duty and be afforded at least 30 days to submit additional evidence and to assert any claims of prejudice. As in a removal proceeding, a complete record of all testimony and evidence produced at the proceeding should be maintained at U.S. Army Human Resources Command.[260] The former DREAM Act Soldier should have the ability to appeal and overturn a separation action through the Secretary of Defense.

If the Army incorporates these changes into a new provision in AR 635-200, it will adequately protect the rights of its DREAM Act Soldiers. This article acknowledges the significant burdens this change would place on the DoD and the Army; however, any burdens are necessary to ensure the Army complies with the rights and protections that the law should afford this select class of individuals.

VI. Conclusion

> *We should be working on comprehensive immigration reform right now. But if election-year politics keeps Congress from acting on a comprehensive plan, let's at least agree to stop expelling responsible young people who want to staff our labs, start new businesses, and defend this country. Send me a law that gives them the*

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[258] Eta-Ndu v. Gonzales, 411 F.3d 977, 986 (8th Cir. 2005) (finding that the IJ does not have unfettered discretion to remove an alien, whether an undocumented or a lawful resident; if the IJ decides the Government has met its burden of proof by the burden of persuasion and removes the alien, the alien can make a due process challenge based on prejudice if defects in proceedings may well have resulted in deportation that would not otherwise have occurred).

[259] *Compare* 8 U.S.C. § 1427(a) (stating that the alien may file one motion to reconsider within 30 days of final administrative order of removal), *with* AR 635-200, *supra* note 11, ch. 2.

[260] 8 U.S.C. § 1427(a) (2011).

> *chance to earn their citizenship. I will sign it right away.*[261]

The DREAM Act would cause unfair consequences for a conditional legal resident Soldier facing separation should the Act become law without any changes to the legislation, DoD policy, or Army Regulations. Given that this Act has been pending in Congress for over a decade, the Government has no reason why it should not be prepared to fairly apply the law to the individuals who choose to enlist under the provisions of the Act. To fairly draft the DREAM Act, the United States should draw experiences from its own history of offering non-citizens immigration status or citizenship in exchange for their service. History shows that the most successful U.S. laws were carefully drafted to target highly specialized and qualified individuals in advance of their enlistment. Conversely, the least successful laws—those bestowing citizenship to veteran enslaved individuals, Filipinos, and Native Americans—were drafted more as compensation for military service instead of as a recruiting tool and often took years for the beneficiaries to finally obtain immigration status or citizenship.

Although today's non-citizen permanent legal resident Soldier has a streamlined path to citizenship, no such avenue exists for an undocumented individual or a conditional legal resident. The DREAM Act, which has been pending in Congress since 2001, will provide the qualified undocumented alien from the 1.5 generation the chance to enlist in the Armed Services and is a tremendous opportunity for the Armed Services to recruit highly qualified, specialized, and motivated individuals. Any opponents to the DREAM Act need only look at the recruiting successes enjoyed by France, Russia, and Israel to understand the value (both quantitative and qualitative) of opening the United States's military ranks to undocumented aliens. France recruited an entire elite fighting force of foreigners. In response to a recruiting crisis, Russia filled its ranks with motivated Soldiers with the promise of citizenship. Israel recruited foreigners loyal to the country and to the Jewish faith to fight in their War of Independence and has since maintained the highly successful recruiting program.

However, when the DREAM Act becomes law, the Soldiers who enlisted under its provisions are at danger of significant deprivations in the absence of any changes to the law itself, DoD policy, or Army

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[261] President Barack Obama, State of the Union Address (Jan. 24, 2012).

regulations. Specifically, a commander could separate a DREAM Act Soldier without any formal proceeding or meaningful opportunity to be heard prior to his two years of mandatory service. Such a separation would result in the Soldier losing his conditional resident status and reversion to his prior undocumented status. Consequently, the Soldier could face a removal proceeding and deportation based on his failure to complete his service under the provisions of the Act. Therefore, deportation is a direct collateral effect of the DREAM Act Soldier's separation proceeding.

The Supreme Court views respite from deportation as a heightened interest, as do some federal courts. However, no court has labeled an alien's respite from deportation as a liberty interest subject to full Constitutional protections. Given this heightened standard, the fact that deportation is a collateral effect of the DREAM Act Soldier's administrative separation, and the lack of procedural protections during separation proceedings for a Soldier with fewer than two years of service, Congress should amend the legislation and the DoD and the Army should change its policies and regulations to afford the Soldier a meaningful opportunity to be heard at the appropriate time prior to his separation.

Fortunately, the DoD and the Army can draw on their experiences in this exact area of regulatory change using their responses to the DADT repeal of 2011. Drawing upon the lessons learned throughout history, amending the legislation, using DoDIs to implement policy and updating AR 635-200 to create a separation proceeding for a DREAM Act Soldier that affords him the same procedural and substantive rights as an alien at a removal proceeding, the Government can protect its interests in recruiting highly qualified undocumented aliens while protecting the rights of the Soldier facing separation and potential deportation.

This article now revisits Private Gonzales, facing separation for a pattern of misconduct. Under the new policies and regulations, he immediately seeks counsel from a defense or legal assistance attorney specially trained in immigration law. The command convenes the standing administrative separation board, all of whom have received additional training in immigration issues. The legal advisor to the board president is a Major who has received the same immigration law training as the Soldier's attorney and the government counsel. At the board proceeding, Private Gonzales presents evidence regarding his PTSD, in addition to presenting mitigating and extenuating evidence regarding the

effect of his potential deportation to Mexico. The president of the board issues subpoenas for civilian witnesses to testify on Private Gonzales's behalf at the proceedings and was able to obtain documentary evidence for both the government and the Soldier. Private Gonzales secures in-person testimony from his mentor (his high school Advanced Placement English teacher) who testifies about the Soldier's potential in America.

During deliberations, the board concludes that the Government was not able to meet its burden of persuasion to prove the underlying basis for the separation by clear and convincing evidence. In making this determination, the board concludes that even if the Government had met its burden, Private Gonzales's potential, as shown by his mitigating and extenuating evidence was convincing enough that they would have recommended he be retained in the service. However, the command recommends that he receive treatment for his PTSD and alcohol abuse, which he does. After his treatment, Private Gonzales serves honorably and without incident for eighteen more years, retiring as a master sergeant, deploying in support of his country two more times, and eventually obtaining his U.S. citizenship.

Conversely, had the board recommended separation, the Secretary of the Army concurred and removed his conditional status, and DHS removed him from the country, the Army could rest assured that his rights had been protected throughout the entire process. That assurance is what lends the Army credibility in the eyes of its potential enlistees, and is well worth the effort and expense if it results in the ability to access a pool of highly qualified, motivated individuals to augment the military ranks.

Appendix A

Text of DREAM Act of 2011

S. 952

To authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children and for other purposes.

IN THE SENATE OF THE UNITED STATES
MAY 11, 2011

Mr. DURBIN (for himself, Mr. REID, Mr. LEAHY, Mr. SCHUMER, Mr. MENENDEZ, Mr. LEVIN, Mr. LIEBERMAN, Mr. AKAKA, Mr. BEGICH, Mr. BENNET, Mr. BINGAMAN, Mr. BLUMENTHAL, Mrs. BOXER, Ms. CANTWELL, Mr. CARDIN, Mr. CARPER, Mr. COONS, Mrs. FEINSTEIN, Mr. FRANKEN, Mrs. GILLIBRAND, Mr. HARKIN, Mr. KERRY, Ms. KLOBUCHAR, Mr. KOHL, Mr. LAUTENBERG, Mr. MERKLEY, Ms. MIKULSKI, Mrs. MURRAY, Mr. NELSON OF FLORIDA, Mr. REED, Mr. SANDERS, Mr. UDALL of Colorado, and Mr. WHITEHOUSE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To authorize the cancellation of removal and adjustment of status of certain alien students who are long-term United States residents and who entered the United States as children and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Development, Relief, and Education for Alien Minors Act of 2011" or the "DREAM Act of 2011".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 2. DEFINITIONS.

In this Act:

(1) IN GENERAL.—Except as otherwise specifically provided, a term used in this Act that is used in the immigration laws shall have the meaning given such term in the immigration laws.

(2) IMMIGRATION LAWS.—The term "immigration laws" has the meaning given such term in section 101(a)(17) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(17)).

(3) INSTITUTION OF HIGHER EDUCATION.—The term "institution of higher education" has the meaning given such term in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002), except that the term does not include an institution of higher education outside the United States.

(4) SECRETARY.—Except as otherwise specifically provided, the term "Secretary" means the Secretary of Homeland Security.

(5) UNIFORMED SERVICES.—The term "Uniformed Services" has the meaning given the term "uniformed services" in section 101(a) of title 10, United States Code.

SEC. 3. CONDITIONAL PERMANENT RESIDENT STATUS FOR CERTAIN LONG-TERM RESIDENTS WHO ENTERED THE UNITED STATES AS CHILDREN.

(a) CONDITIONAL BASIS FOR STATUS.—Notwithstanding any other provision of law, an alien shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence under this section, to have obtained such status on a conditional basis subject to the provisions of this Act.

(b) REQUIREMENTS.—

(1) IN GENERAL.—Notwithstanding any other provision of law, the Secretary may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence on a conditional basis, an alien who is inadmissible or deportable from the United States or is in temporary protected status under section 244 of the Immigration and Nationality Act if the alien demonstrates by a preponderance of the evidence that—

(A) the alien has been continuously physically present in the United States since the date that is 5 years before the date of the enactment of this Act;

(B) the alien was 15 years of age or younger on the date the alien initially entered the United States;

(C) the alien has been a person of good moral character since the date the alien initially entered the United States;

(D) subject to paragraph (2), the alien—

(i) is not inadmissible under paragraph (2), (3), (6)(E), (6)(G), (8), (10)(A), (10)(C), or (10)(D) of section 212(a) of the Immigration and Nationality Act (8 U.S.C. 1182(a));

(ii) has not ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(iii) has not been convicted of—

(I) any offense under Federal or State law punishable by a maximum term of imprisonment of more than 1 year; or

(II) 3 or more offenses under Federal or State law, for which the alien was convicted on different dates for each of the 3 offenses and imprisoned for an aggregate of 90 days or more;

(E) the alien—

(i) has been admitted to an institution of higher education in the United States; or

(ii) has earned a high school diploma or obtained a general education development certificate in the United States; and

(F) the alien was 35 years of age or younger on the date of the enactment of this Act.

(2) WAIVER.—With respect to any benefit under this Act, the Secretary may waive the grounds of inadmissibility under paragraph (6)(E), (6)(G), or (10)(D) of section 212(a) of the Immigration and Nationality Act (8 U.S.C. 1182(a)) for humanitarian purposes or family unity or when it is otherwise in the public interest.

(3) SUBMISSION OF BIOMETRIC AND BIOGRAPHIC DATA.—The Secretary may not grant permanent resident status on a conditional basis to an alien under this section unless the alien submits biometric and biographic data, in accordance with

procedures established by the Secretary. The Secretary shall provide an alternative procedure for applicants who are unable to provide such biometric or biographic data because of a physical impairment.

(4) BACKGROUND CHECKS.—

(A) REQUIREMENT FOR BACKGROUND CHECKS.—The Secretary shall utilize biometric, biographic, and other data that the Secretary determines is appropriate—

(i) to conduct security and law enforcement background checks of an alien seeking permanent resident status on a conditional basis under this section; and

(ii) to determine whether there is any criminal, national security, or other factor that would render the alien ineligible for such status.

(B) COMPLETION OF BACKGROUND CHECKS.—The security and law enforcement background checks required by subparagraph (A) for an alien shall be completed, to the satisfaction of the Secretary, prior to the date the Secretary grants permanent resident status on a conditional basis to the alien.

(5) MEDICAL EXAMINATION.—An alien applying for permanent resident status on a conditional basis under this section shall undergo a medical examination. The Secretary, with the concurrence of the Secretary of Health and Human Services, shall prescribe policies and procedures for the nature and timing of such examination.

(6) MILITARY SELECTIVE SERVICE.—An alien applying for permanent resident status on a conditional basis under this section shall establish that the alien has registered under the Military Selective Service Act (50 U.S.C. App. 451 et seq.), if the alien is subject to such registration under that Act.

(c) DETERMINATION OF CONTINUOUS PRESENCE.—

(1) TERMINATION OF CONTINUOUS PERIOD.—Any period of continuous physical presence in the United States of an alien who applies for permanent resident status on a conditional basis under this section shall not terminate when the alien is served a notice to appear under section 239(a) of the Immigration and Nationality Act.

(2) TREATMENT OF CERTAIN BREAKS IN PRESENCE.—

(A) IN GENERAL.—An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsection (b)(1)(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(B) EXTENSIONS FOR EXTENUATING CIRCUMSTANCES.—The Secretary may extend the time periods described in subparagraph (A) for an alien if the alien demonstrates that the failure to timely return to the United States was due to extenuating circumstances beyond the alien's control.

(d) APPLICATION.—

(1) IN GENERAL.—An alien seeking lawful permanent resident status on a conditional basis shall file an application for such status in such manner as the Secretary may require.

(2) DEADLINE FOR SUBMISSION OF APPLICATION.—An alien shall submit an application for relief under this section not later than the date that is 1 year after the later of—

(A) the date the alien earned a high school diploma or obtained a general education development certificate in the United States; or

(B) the effective date of the final regulations issued pursuant to section 6.

(e) LIMITATION ON REMOVAL OF CERTAIN ALIENS.—

(1) IN GENERAL.—The Secretary or the Attorney General may not remove an alien who—

(A) has a pending application for relief under this section; and

(B) establishes prima facie eligibility for relief under this section.

(2) CERTAIN ALIENS ENROLLED IN PRIMARY OR SECONDARY SCHOOL.—

(A) STAY OF REMOVAL.—The Attorney General shall stay the removal proceedings of an alien who—

(i) meets all the requirements of subparagraphs (A), (B), (C), (D), and (F) of subsection (b)(1);

(ii) is at least 5 years of age; and

(iii) is enrolled full-time in a primary or secondary school.

(B) ALIENS NOT IN REMOVAL PROCEEDINGS.—If an alien is not in removal proceedings, the Secretary shall not commence such proceedings with respect to the alien if

the alien is described in clauses (i) through (iii) of subparagraph (A).

(C) EMPLOYMENT.—An alien whose removal is stayed pursuant to subparagraph (A) or who may not be placed in removal proceedings pursuant to subparagraph (B) shall, upon application to the Secretary, be granted an employment authorization document.

(D) LIFT OF STAY.—The Secretary or Attorney General may lift the stay granted to an alien under subparagraph (A) if the alien—

(i) is no longer enrolled in a primary or secondary school; or

(ii) ceases to meet the requirements of such paragraph.

(f) EXEMPTION FROM NUMERICAL LIMITATIONS.—Nothing in this section or in any other law may be construed to apply a numerical limitation on the number of aliens who may be eligible for adjustment of status under this Act.

SEC. 4. TERMS OF CONDITIONAL PERMANENT RESIDENT STATUS.

(a) PERIOD OF STATUS.—Permanent resident status on a conditional basis granted under this Act is—

(1) valid for a period of 6 years, unless such period is extended by the Secretary; and

(2) subject to termination under subsection (c).

(b) NOTICE OF REQUIREMENTS.—

(1) AT TIME OF OBTAINING STATUS.—At the time an alien obtains permanent resident status on a conditional basis under this Act, the Secretary shall provide for notice to the alien regarding the provisions of this Act and the requirements to have the conditional basis of such status removed.

(2) EFFECT OF FAILURE TO PROVIDE NOTICE.—The failure of the Secretary to provide a notice under this subsection—

(A) shall not affect the enforcement of the provisions of this Act with respect to the alien; and

(B) shall not give rise to any private right of action by the alien.

(c) TERMINATION OF STATUS.—

(1) IN GENERAL.—The Secretary shall terminate the conditional permanent resident status of an alien, if the Secretary determines that the alien—

(A) ceases to meet the requirements of subparagraph (C) or (D) of section 3(b)(1); or

(B) was discharged from the Uniformed Services and did not receive an honorable discharge.

(d) RETURN TO PREVIOUS IMMIGRATION STATUS.—

(1) IN GENERAL.—Except as provided in paragraph (2), an alien whose permanent resident status on a conditional basis expires under subsection (a)(1) or is terminated under subsection (c) or whose application for such status is denied shall return to the immigration status the alien had immediately prior to receiving permanent resident status on a conditional basis or applying for such status, as appropriate.

(2) SPECIAL RULE FOR TEMPORARY PROTECTED STATUS.—In the case of an alien whose permanent resident status on a conditional basis expires under subsection (a)(1) or is terminated under subsection (c) or whose application for such status is denied and who had temporary protected status immediately prior to receiving or applying for such status, as appropriate, the alien may not return to temporary protected status if—

(A) the relevant designation under section 244(b) of the Immigration and Nationality Act (8 U.S.C. 1254a(b)) has been terminated; or

(B) the Secretary determines that the reason for terminating the permanent resident status on a conditional basis renders the alien ineligible for temporary protected status.

(e) INFORMATION SYSTEMS.—The Secretary shall use the information systems of the Department of Homeland Security to maintain current information on the identity, address, and immigration status of aliens granted permanent resident status on a conditional basis under this Act.

SEC. 5. REMOVAL OF CONDITIONAL BASIS OF PERMANENT RESIDENT STATUS.

(a) ELIGIBILITY FOR REMOVAL OF CONDITIONAL BASIS.—

(1) IN GENERAL.—Subject to paragraph (2), the Secretary may remove the conditional basis of an alien's permanent resident

status granted under this Act if the alien demonstrates by a preponderance of the evidence that—

(A) the alien has been a person of good moral character during the entire period of conditional permanent resident status;

(B) the alien is described in section 3(b)(1)(D);

(C) the alien has not abandoned the alien's residence in the United States;

(D) the alien—

(i) has acquired a degree from an institution of higher education in the United States or has completed at least 2 years, in good standing, in a program for a bachelor's degree or higher degree in the United States; or

(ii) has served in the Uniformed Services for at least 2 years and, if discharged, received an honorable discharge; and

(E) the alien has provided a list of each secondary school (as that term is defined in section 9101 of the Elementary and Secondary Education Act of 1965 that the alien attended in the United States.

(2) HARDSHIP EXCEPTION.—

(A) IN GENERAL.—The Secretary may, in the Secretary's discretion, remove the conditional basis of an alien's permanent resident status if the alien—

(i) satisfies the requirements of subparagraphs (A), (B), (C), and (E) of paragraph (1);

(ii) demonstrates compelling circumstances for the inability to satisfy the requirements of subparagraph (D) of such paragraph; and

(iii) demonstrates that the alien's removal from the United States would result in extreme hardship to the alien or the alien's spouse, parent, or child who is a citizen or a lawful permanent resident of the United States.

(B) EXTENSION.—Upon a showing of good cause, the Secretary may extend the period of permanent resident status on a conditional basis for an alien so that the alien may complete the requirements of subparagraph (D) of paragraph (1).

(3) TREATMENT OF ABANDONMENT OR RESIDENCE.—For purposes of paragraph (1)(C), an alien—

(A) shall be presumed to have abandoned the alien's residence in the United States if the alien is absent from the United States for more than 365 days, in the aggregate, during the alien's period of conditional permanent resident status, unless the alien demonstrates to the satisfaction of the Secretary that the alien has not abandoned such residence; and

(B) who is absent from the United States due to active service in the Uniformed Services has not abandoned the alien's residence in the United States during the period of such service.

(4) CITIZENSHIP REQUIREMENT.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the conditional basis of an alien's permanent resident status may not be removed unless the alien demonstrates that the alien satisfies the requirements of section 312(a) of the Immigration and Nationality Act (8 U.S.C. 1423(a)).

(B) EXCEPTION.—Subparagraph (A) shall not apply to an alien who is unable because of a physical or developmental disability or mental impairment to meet the requirements of such subparagraph.

(5) SUBMISSION OF BIOMETRIC AND BIOGRAPHIC DATA.—The Secretary may not remove the conditional basis of an alien's permanent resident status unless the alien submits biometric and biographic data, in accordance with procedures established by the Secretary. The Secretary shall provide an alternative procedure for applicants who are unable to provide such biometric data because of a physical impairment.

(6) BACKGROUND CHECKS.—

(A) REQUIREMENT FOR BACKGROUND CHECKS.—The Secretary shall utilize biometric, biographic, and other data that the Secretary determines appropriate—

(i) to conduct security and law enforcement background checks of an alien applying for removal of the conditional basis of the alien's permanent resident status; and

(ii) to determine whether there is any criminal, national security, or other factor that would render the alien ineligible for removal of such conditional basis.

(B) COMPLETION OF BACKGROUND CHECKS.—The security and law enforcement background checks required by subparagraph (A) for an alien shall be completed,

to the satisfaction of the Secretary, prior to the date the Secretary removes the conditional basis of the alien's permanent resident status.

(b) APPLICATION TO REMOVE CONDITIONAL BASIS.—

(1) IN GENERAL.—An alien seeking to have the conditional basis of the alien's lawful permanent resident status removed shall file an application for such removal in such manner as the Secretary may require.

(2) DEADLINE FOR SUBMISSION OF APPLICATION.—

(A) IN GENERAL.—An alien shall file an application under this subsection during the period beginning 6 months prior to and ending on the date that is later of—

(i) 6 years after the date the alien was initially granted conditional permanent resident status; or

(ii) any other expiration date of the alien's conditional permanent resident status, as extended by the Secretary in accordance with this Act.

(B) STATUS DURING PENDENCY.—An alien shall be deemed to have permanent resident status on a conditional basis during the period that the alien's application submitted under this subsection is pending.

(3) ADJUDICATION OF APPLICATION.—

(A) IN GENERAL.—The Secretary shall make a determination on each application filed by an alien under this subsection as to whether the alien meets the requirements for removal of the conditional basis of the alien's permanent resident status.

(B) ADJUSTMENT OF STATUS IF FAVORABLE DETERMINATION.—If the Secretary determines that the alien meets such requirements, the Secretary shall notify the alien of such determination and remove the conditional basis of the alien's permanent resident status, effective as of the date of such determination.

(C) TERMINATION IF ADVERSE DETERMINATION.—If the Secretary determines that the alien does not meet such requirements, the Secretary shall notify the alien of such determination and, if the period of the alien's conditional permanent resident status under section 4(a)(1) has ended, terminate the conditional permanent resident status granted the alien under this Act as of the date of such determination.

(c) TREATMENT FOR PURPOSES OF NATURALIZATION.—

(1) IN GENERAL.—For purposes of title III of the Immigration and Nationality Act (8 U.S.C. 1401 et seq.), an alien granted permanent resident status on a conditional basis under this Act shall be considered to have been admitted as an alien lawfully admitted for permanent residence and to be in the United States as an alien lawfully admitted to the United States for permanent residence.

(2) LIMITATION ON APPLICATION FOR NATURALIZATION.—An alien may not apply for naturalization during the period that the alien is in permanent resident status on a conditional basis under this Act.

SEC. 6. REGULATIONS.

(a) INITIAL PUBLICATION.—Not later than 180 days after the date of the enactment of this Act, the Secretary shall publish regulations implementing this Act. Such regulations shall allow eligible individuals to apply affirmatively for the relief available under section 3 without being placed in removal proceedings.

(b) INTERIM REGULATIONS.—Notwithstanding section 553 of title 5, United States Code, the regulations required by subsection (a) shall be effective, on an interim basis, immediately upon publication but may be subject to change and revision after public notice and opportunity for a period of public comment.

(c) FINAL REGULATIONS.—Within a reasonable time after publication of the interim regulations in accordance with subsection (b), the Secretary shall publish final regulations implementing this Act.

(d) PAPERWORK REDUCTION ACT.—The requirements of chapter 35 of title 44, United States Code (commonly known as the "Paperwork Reduction Act") shall not apply to any action to implement this Act.

SEC. 7. PENALTIES FOR FALSE STATEMENTS.

Whoever files an application for any relief or benefit under this Act and willfully and knowingly falsifies, misrepresents, or conceals a material fact or makes any false or fraudulent statement or representation, or makes or uses any false writing or document knowing the same to contain any false or fraudulent statement or entry, shall be fined in accordance with title 18, United States Code, imprisoned not more than 5 years, or both.

SEC. 8. CONFIDENTIALITY OF INFORMATION.

(a) PROHIBITION.—Except as provided in subsection (b), no officer or employee of the United States may—

(1) use the information furnished by an individual pursuant to an application filed under this Act in removal proceedings against any person identified in the application;

(2) make any publication whereby the information furnished by any particular individual pursuant to an application under this Act can be identified; or

(3) permit anyone other than an officer, employee or authorized contractor of the United States Government or, in the case of an application filed under this Act with a designated entity, that designated entity, to examine such application filed under such sections.

(b) REQUIRED DISCLOSURE.—The Attorney General or the Secretary shall provide the information furnished under this Act, and any other information derived from such furnished information, to—

(1) a Federal, State, tribal, or local law enforcement agency, intelligence agency, national security agency, component of the Department of Homeland Security, court, or grand jury in connection with a criminal investigation or prosecution, a background check conducted pursuant to section 103 of the Brady Handgun Violence Protection Act (Public Law 103–159; 18 U.S.C. 922 note), or national security purposes, if such information is requested by such entity or consistent with an information sharing agreement or mechanism; or

(2) an official coroner for purposes of affirmatively identifying a deceased individual (whether or not such individual is deceased as a result of a crime).

(c) FRAUD IN APPLICATION PROCESS OR CRIMINAL CONDUCT.—Notwithstanding any other provision of this section, information concerning whether an alien seeking relief under this Act has engaged in fraud in an application for such relief or at any time committed a crime may be used or released for immigration enforcement, law enforcement, or national security purposes.

(d) PENALTY.—Whoever knowingly uses, publishes, or permits information to be examined in violation of this section shall be fined not more than $10,000.

SEC. 9. HIGHER EDUCATION ASSISTANCE.

(a) IN GENERAL.—Notwithstanding any provision of the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.), with respect to assistance provided under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.), an alien who has permanent resident status on a conditional basis under this Act shall be eligible only for the following assistance under such title:

(1) Student loans under parts D and E of such title IV (20 U.S.C. 1087a et seq. and 1087aa et seq.), subject to the requirements of such parts.

(2) Federal work-study programs under part C of such title IV (42 U.S.C. 2751 et seq.), subject to the requirements of such part.

(3) Services under such title IV (20 U.S.C. 1070 et seq.), subject to the requirements for such services.

(b) RESTORATION OF STATE OPTION TO DETERMINE RESIDENCY FOR PURPOSES OF HIGHER EDUCATION BENEFITS.—

(1) IN GENERAL.—Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is repealed.

(2) EFFECTIVE DATE.—The repeal under paragraph (1) shall take effect as if included in the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

Appendix B

Proposed Amendment to AR 635-200

Chapter 15
Administrative Separation Procedures for Conditional Legal Residents of the United States

Section I
Policy

15-1. General Policy

DoDI [####.##] contains general policies concerning separation proceedings for Conditional Legal Resident (CLR) Soldiers who enlisted pursuant to Public Law [##]. The initiating authority for a CLR Soldier is the first general or flag officer in the CLR Soldier's chain of command and the separation authority for a CLR Soldier is the Secretary of the Army in the following circumstances –

(1) A CLR Soldier with fewer than two years of active duty service is recommended for separation under any chapter except for a discharge under the provisions of Chapter 10 of this regulation and with any characterization of service.

(2) A CLR Soldier with more than two years of active duty service is recommended for separation under any chapter except for a discharge under the provisions of Chapter 10 of this regulation with a characterization of service less favorable than honorable.

15-2. Notice and Action by Initiating Commander

Separation of a CLR Soldier always requires the notification and board procedure described in this chapter. The initiating commander will notify the Soldier in writing that his/her separation has been recommended per this regulation and chapter.

a. The commander will cite specific allegations on which the proposed action is based and will also include the specific provisions of this regulation authorizing separation.

b. The Soldier will be advised of –

(1) Whether the proposed separation could result in discharge or release from custody and control of the Army.

(2) The least favorable characterization of service or description of separation he/she could receive.

(3) The type of discharge and character of service recommended by the initiating commander and that the intermediate commander(s) may

recommend a less favorable type of discharge and characterization of service than that recommended by the initiating commander.

(4) The right to a hearing before an administrative separation board, regardless of his/her years of total active and reserve service.

(5) The right to consult with military counsel who has been specially trained in immigration law procedures within a reasonable time (not less than 3 duty days). Soldiers may also consult with civilian counsel at their own expense.

(6) The impact of a discharge on the Soldier's CLR status in accordance with Public Law [##].

c. The Soldier's commander or other designated individual will personally serve the Soldier with the memorandum of notification. The Soldier is required to sign an acknowledgment of receipt. The acknowledgment of receipt will be signed and dated on the date it is served.

d. If notice by mail is authorized and the Soldier fails to acknowledge receipt or submit a timely reply, that fact will not constitute a waiver of rights.

e. The Soldier will indicate on the Notification/Acknowledge/ Election of Rights (fig 2–4) whether he or she has filed an unrestricted report of sexual assault within 24 months of initiation of the separation action. The Soldier will also indicate whether he or she believes that this separation action is a direct or indirect result of the sexual assault itself or of the filing of the unrestricted report, if the above is true.

15-3. Action by the First General or Flag Officer in the Chain of Command

a. Upon receipt of the recommended action, the first general or flag officer in the chain of command will determine if there is sufficient evidence to verify the allegations. If no sufficient basis for separation exists, the separation authority will disapprove the recommendation and direct retention. If the recommendation is disapproved, the return memorandum will cite reasons for disapproval.

b. If the first general officer in the Soldier's chain of command determines that sufficient factual basis for separation exists, he/she will convene a separation board.

Section II
Administrative Board Procedure

15-4. Waiver
Any waiver of the administrative board procedure for a CLR Soldier must be approved by the Secretary of the Army.

15-5. Composition of the Board

a. A board convened to determine whether a CLR Soldier should be separated under the administrative board procedure will consist of at least three experienced commissioned, warrant, or noncommissioned officers, all of whom have received specialized training in general immigration law procedures. Enlisted Soldiers appointed to the board will be in grade sergeant first class (SFC) or above, and senior to the respondent. At least one member of the board will be serving in the grade of major or higher, and a majority will be commissioned or warrant officers. The senior member will be president of the board. The convening authority will appoint a non-voting recorder. OTJAG will also appoint a legal advisor who has been designated an expert in immigration law.

b. Care will be exercised to ensure that –

(1) The board is composed of experience, unbiased, specially trained officers. The officers should be fully aware of applicable regulations and polices pertaining to CLR Soldiers for whom the board is convened.

(2) If the respondent is a member of a minority group, the board will, upon written request of the respondent,
include as a voting member a member who is also a minority group member, if reasonably available.

(3) The board is provided a competent stenographer or clerk.

(4) The officer initiating the action prescribed in this regulation, or any intervening officer who had direct knowledge of the case, is not a member of the board.

c. The president will preside and rule finally on all matters of procedure and evidence. The rulings of the president may be overruled by a majority of the board. If appointed, the legal advisor will rule finally on all matters of evidence and challenges except to himself/herself. The appointed legal advisor will pay particular attention to cases that involve limited use evidence.

d. OTJAG, Administrative Law Division, will certify that the detailed military defense attorney, recorder, president of the board, and legal advisor received adequate training in immigration law, sufficient to

understand the specialized issues that may be raised during the separation proceeding of a CLR Soldier.

15-6. Witnesses

a. The ETS date or transfer status of each expected witness will be checked. This will ensure that essential military witnesses will be available at the board proceedings.

b. The appropriate commander will ensure that no witness is transferred or separated before the beginning of a board hearing except when an enlistment or period of service fixed by law expires. In such cases, an attempt will be made to obtain the Soldier's consent to retention. If he/she does not consent, the board president should use his subpoena power to compel the former Soldier's production.

15-7. Board procedures

a. A Soldier under military control will be notified in writing of the convening date of the board at least 60 days before the hearing. This will allow the Soldier and the appointed counsel time to prepare the case. The written notice will state that if the Soldier fails to appear before the board when scheduled by willfully absenting himself/herself without good cause, he/she may be discharged from or retained in the Service without personal appearance before aboard by express approval of the Secretary of the Army.

b. The Soldier will be notified of names and addresses of witnesses expected to be called at the board hearing. The Soldier will also be notified that the recorder of the board will, upon request of the Soldier, arrange for the presence of any available witness that he/she desires whose testimony is relevant to the proceedings. Matters in extenuation and mitigation regarding the CLR Soldier's immigration status is always relevant. A copy of the case file, including all affidavits and depositions of witnesses unable to appear in person at the board hearing will be furnished to the Soldier or the counsel as soon as possible after it is determined that a board will hear the case.

c. When, for overriding reasons, the minimum of 60 days cannot be granted, the president of the board will ensure that the reason for acting before that time is fully explained.

(1) The reason will be recorded in the proceedings of the board.

(2) Requests for an additional delay, normally not to exceed 30 days after initial notice, will be granted if the convening authority or president of the board believes such delay is warranted to ensure that the respondent receives a full and fair hearing.

(3) The decision of the president is subject to being overruled by the convening authority upon application by the recorder or the respondent; however, the proceedings need not be delayed pending review.

d. The commander will advise the Soldier, in writing, of the specific basis (subparagraph number and description heading) for the proposed discharge action. The commander will also advise the Soldier that he/she has the following rights:

(1) The Soldier may appear in person, with or without counsel for representation or, if absent, be represented by counsel at all open proceedings of the board.

(a) When the Soldier appears before a board without representing counsel, the record will show that the president of the board counseled the Soldier.

(b) The Soldier will be counseled as to type of discharge he/she may receive as a result of the board action, the effects of such a discharge in later life and on his/her immigration status, and that he/she may request representing counsel. The record will reflect the Soldier's response.

(2) The Soldier may, at any time before the board convenes or during the proceedings, submit any answer, deposition, sworn or unsworn written statement, affidavit, certificate, or stipulation. This includes depositions or affidavits of witnesses not deemed to be reasonably available or witnesses who are unwilling to appear voluntarily.

(3) The Soldier may request the attendance of witnesses. The Soldier may submit a written request for temporary duty (TDY) or invitational travel orders for witnesses. Such a request will contain the following matter:

(a) A synopsis of the testimony that the witness is expected to give.

(b) An explanation of the relevance of such testimony to the issues of separation or characterization.

(c) An explanation as to why written or recorded testimony would not be sufficient to provide a fair determination.

(4) The convening authority may authorize expenditure of funds for production of witnesses only if the presiding officer (after consultation with a judge advocate) or the specially trained legal advisor determines that—

(a) The testimony of a witness is not cumulative.

(b) The personal appearance of the witness is essential to a fair determination on the issues of separation, to include impact on immigration status, or characterization.

(c) Written or recorded testimony will not accomplish adequately the same objective.

(d) The need for live testimony is substantial, material, and necessary for a proper disposition of the case.

(e) The significance of the personal appearance of the witness, when balanced against the practical difficulties in producing the witness, favors production of the witness.

(5) Factors to be considered in the balancing test include the cost of producing the witness; the timing of the request for production of the witness; and the potential delay in the proceedings that may be caused by producing the witness or the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

(6) If the convening authority determines that the personal testimony of a witness is required, the hearing will be postponed or continued, if necessary, to permit the attendance of the witness.

(7) The hearing will be continued or postponed to provide the respondent with a reasonable opportunity to obtain a written statement from the witness if a witness requested by the respondent is unavailable in the following circumstances:

(a) When the presiding officer determines that the personal testimony of the witness is not required and the specially trained legal advisor concurs in writing.

(b) When the commanding officer of a military witness determines that military necessity precludes the witness's attendance at the hearing.

(c) When a civilian witness is unavailable after subpoena attempts by the president of the board.

(8) The Soldier may or may not submit to examination by the board. The provisions of UCMJ, Article 31, will apply.

(9) The Soldier and his/her counsel may question any witness who appears before the board.

(10) The Soldier may challenge any voting member of the board for cause only.

(11) The Soldier or counsel may present argument before the board closes the case for deliberation on findings and recommendations.

(12) Failure of the Soldier to invoke any of the above rights after he/she has been apprised of the same will not have an effect upon the validity of the separation proceedings.

e. When the board meets in closed session, only voting members will be present.

f. Except as modified per this regulation, the board will conform to the provisions of AR 15–6 applicable to formal proceedings with respondents. As an exception to AR 15–6, paragraph 3–7*b*, expert medical and psychiatric testimony routinely may be presented in the

form of affidavits. However, if the Soldier desires to present such evidence, he/she is entitled to have the witnesses appear in person, if they are reasonably available.

g. The proceedings of the board will be transcribed verbatim.

5-8. Evidence

a. *Presentation of evidence.* The rules of evidence for court-martial and other judicial proceedings are not applicable before an administrative separation board under this chapter. Reasonable restrictions will be observed, however, concerning relevancy and competency of evidence.

b. *Newly discovered evidence.* If prior to the beginning of the board hearing, the commander or the board recorder discovers additional evidence, similar in nature to that previously considered by the commander in recommending the separation, that evidence is admissible.

(1) Such evidence may be considered by the board as proof of an amended or new factual allegation in support of a reason for separation that was cited in the commander's recommendation for separation.

(2) When such additional evidence is considered and the board determines that the respondent has not had reasonable time to prepare a response to it, a reasonable continuance must be granted upon the respondent's request.

(3) If the newly discovered evidence constitutes a separate reason for separation that was not included in the notice of proposed separation, the case may be processed without the new evidence or the case must be returned to the commander for consideration as to whether an additional reason for separation should be included in the notice.

c. *Burden of proof and persuasion*. The Government must prove the allegations by clear and convincing evidence.

5-9. Findings and Recommendations of the Board

a. *Findings.*

(1) The board will determine whether each allegation in the notice of proposed separation is supported by clear and convincing evidence.

(2) The board will then determine per chapter 1, section II, whether the findings warrant separation. If more than one basis for separation was contained in the notice, there will be a separate determination for each basis.

b. *Recommendations.*

(1) The board convened to determine whether a Soldier should be separated for misconduct will recommend that the Soldier be—

(a) Separated because of misconduct. The board will recommend a characterization of service of honorable, general (under honorable conditions), or under other than honorable conditions.

(b) Separated because of unsatisfactory performance (except in fraudulent entry actions) if such was a stated basis for separation in the initial memorandum of notification and is included in the board's findings. Type of discharge certificate (honorable or general) to be furnished will be indicated.

(c) Retained in the Service. (See para 14–7 for guidance on retention of Soldiers convicted by civil court.)

(2) The board convened to determine whether a Soldier should be separated for unsatisfactory performance will recommend that he/she be—

(a) Separated because of unsatisfactory performance. The board will recommend a characterization of service of honorable or general (under honorable conditions).

(b) Retained in the Service.

(3) When the Soldier is absent without leave and fails to appear before the board, the discharge authority will be advised of that fact, together with any board recommendation for separation or retention made per (1) or (2) above.

(4) When the board recommends separation, it may also recommend that the separation be suspended per paragraph 1–18. But the recommendation as to suspension is not binding on the separation authority.

(5) If separation or suspension of separation is recommended, the board will also recommend a characterization of service or description of separation as authorized in chapter 3.

(6) Except when the board has recommended separation because of alcohol or drug abuse rehabilitation failure or misconduct (see chaps 9 and 14), or has recommended characterization of service under other than honorable conditions, the board will recommend whether the respondent should be retained in the IRR as a mobilization asset to fulfill the respondent's total military obligation.

c. The completed report of proceedings.

(1) The completed report of proceedings will be forwarded to the separation authority.

(2) If the board recommends separation with any characterization of service prior to the CLR Soldier's two years of active duty service, or at any time after such time when the board recommends separation with a characterization of service any less favorable than honorable, the verbatim transcript, findings and recommendations of the board, with

complete documentation and the recommendation of the convening authority, will be forwarded through OTJAG, Attn: Administrative Law Division, to Headquarters, Department of the Army for approval.

15-10. Separation Authority Action After Board Hearings

a. When the board is completed with a recommendation that the Soldier be separated in accordance with Chapter 15-8 of this regulation, the Secretary of the Army may take one of the following actions:

(1) Approve the board recommendations and direct separation of the Soldier for any basis.

(2) Disapprove the recommendation. Direct retention of the Soldier when the grounds for separation are not documented in the file, if the file does not indicate that the Soldier is without the potential for full effective duty and separation is not otherwise mandatory, or when the extenuating/mitigating evidence presented by the Soldier are severe enough to warrant further rehabilitative attempts.

b. It is the policy of HQDA not to direct separation per this chapter when a duly constituted board has recommended retention unless sufficient justification is provided to warrant separation by the Secretary of the Army, based on all the circumstances, as being in the best interest of the Army.

c. If the Secretary of the Army notes a defect that he deems to be harmless in a case in which separation has been recommended, he may direct separation. If there are substantial defects, he may take one of the following actions:

(1) Direct retention.

(2) If the board has failed to make the findings or recommendations required, return the case to the same board for compliance with this regulation.

(3) If there is an apparent procedural error or omission in the record of proceedings that may be corrected without reconsideration of the findings and recommendations of the board, return the case to the same board for corrective action.

(4) If the board error materially prejudiced a substantial right of the Soldier, the separation authority may act only as can be sustained without relying on the proceedings affected by the error.

15-11. Appellate Procedures

a. Upon an approved separation action by the Secretary of the Army, OTJAG, Administrative Law Division, Military Personnel law will certify that the proceedings were fundamentally fair and in accordance with this chapter.

b. Upon certification by OTJAG, Administrative Law Division, Military Personnel Law, each CLR Soldier will receive a mandatory appeal through the Secretary of Defense.

WHEN A CONVICTED RAPE IS NOT REALLY A RAPE: THE PAST, PRESENT, AND FUTURE ABILITY OF ARTICLE 120 CONVICTIONS TO WITHSTAND LEGAL AND FACTUAL SUFFICIENCY REVIEWS

MAJOR MARK D. SAMEIT*

I. Introduction

It is true rape is a most detestable crime, and therefore ought severely and impartially be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.[1]

Sir Matthew Hale famously offered this quotation in 1680, and it succinctly summarizes the difficulties Western societies have faced with rape laws. On the one hand, rape is truly a detestable crime that can leave lasting scars on a victim. On the other hand, a false accusation of rape can leave equally deep scars on an innocent accused who faces jail time and a lifetime stigma as a sex offender. This delicate balance has led to a battle of ideas between victim's rights groups and Due Process advocates in crafting effective legislation to define rape as well as proper rules of evidence to protect both the victim and the accused.

In large part, the victim's rights groups have triumphed by redefining nearly every state's rape laws since the 1970s[2] and securing passage of

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[1] 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 635 (1st Am. ed. 1847).

[2] Jennifer McMahon-Howard, *Does the Controversy Matter? Comparing the Causal Determinants of the Adoption of Controversial and Noncontroversial Rape Law Reforms*,

specific federal rules of evidence to protect victims and prosecute alleged offenders.[3] The U.S. military has not been immune to these changes and, in 2006 and again in 2011, Congress amended the Uniform Code of Military Justice (UCMJ) to make rape and sexual assault offenses more "offender centric" with less focus on consent and more focus on the alleged offender. Despite significant changes to statutes and rules of evidence, studies of jurors have shown that they are statistically no more likely to convict offenders for rape under these new statutes than they were under the old statutes.[4] Researchers studying these puzzling results have concluded that no matter how the statute is written, jurors will still apply their own beliefs and experiences in judging a case; thus, legal reforms will have minimal effects on conviction rates.[5]

One area unique to the military that has not yet been studied is how rape and sexual assault convictions have withstood the UCMJ's requirement for appellate factual sufficiency review. The U.S. military is unique in requiring service appellate courts to review cases for both legal and factual sufficiency.[6] This means that even if there are no legal errors in a case, and the accused received a fair trial, the service-level appellate court can still overrule the judge or the members and find that in their opinion the government did not prove the case beyond a reasonable doubt.[7] This extraordinary power of the service appellate court cannot be

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45 LAW & SOC'Y REV. 401, 402 (2011) (noting that nearly every state has removed noncontroversial reforms, such as eliminating the resistance requirement, but more controversial reforms have been slower to be adopted).

[3] FED. R. EVID. 412–414 (generally, Rule 412 makes most types of victim sexual predisposition evidence inadmissible; Rule 413 makes evidence of other sexual assaults admissible against the accused in a sexual assault case; and Rule 414 makes evidence of other allegations of child molestation admissible against an accused in a child molestation case).

[4] Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. OF CRIM. L. AND CRIMINOLOGY 554 (1993); Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455 (2010); *see also* Marisa Taylor & Chris Adams, *Military's Newly Aggressive Rape Prosecution Has Pitfalls*, MCCLATCHY NEWSPAPERS, Nov. 28, 2011, *available at* http://www.mcclatchydc.com/2011/11/28/131523/militarys-newly-aggressive-rape.html (documenting the low conviction rate for sexual assaults under the reformed sexual assault statute).

[5] Braman, *supra* note 4, at 1462.

[6] 10 U.S.C. § 866(c) (2008).

[7] This review is based solely on the record of trial. United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987).

overruled by the Court of Appeals for the Armed Forces (CAAF) because it lacks the power to review a case for factual sufficiency.[8]

This article analyzes all of the cases overturned in the U.S. military from the year 2000 until March 2012 for a lack of factual sufficiency and how the changes in the military rape law statute have affected the likelihood a case will be upheld on appeal. Part II of this article analyzes the evolution of sexual assault law within the U.S. military to its present form. Part III identifies and categorizes the military sexual assault cases that have been overturned between January 2000 and March 2012 and explains the pertinent reasoning used by the courts. Part IV explains why the 2007 and 2012 revisions of the military rape and sexual assault statutes create legal uncertainty, but overall make it more likely that a case will be upheld under a factual sufficiency analysis. While the revisions of Article 120 have been a painful process for military justice, the overall effect has been to create a statute that better withstands factual sufficiency review at the appellate level.

II. Evolution of Sexual Assault Law Inside and Outside of the Military

A. Pre-World War II Rape Law

Interestingly, the U.S. Army did not develop any rape jurisprudence during the first eighty years of its existence. The precursors to the UCMJ were the Articles of War for the Army and the Articles for the government of the Navy.[9] When the Continental Congress developed the first Articles of War in 1775, they approved sixty-nine enumerated offenses; however, rape was not among the prohibited offenses triable by a court-martial.[10] This was not an oversight of the Continental Congress, but an intentional decision to defer to the local jurisdiction to handle the prosecution of all capital crimes, including rape.[11] The Articles of War mandated that the commander turn over an accused to the civilian magistrate upon "due application" at the risk of harboring a fugitive

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[8] It can only review whether the service court applied the correct standard for factual sufficiency. *See, e.g.*, *id.* (announcing the standard of review for factual sufficiency).

[9] WILLIAM T. GENEROUS JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 11 (1973).

[10] U.S. DEP'T OF ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 12–13 (1975).

[11] American Articles of War (1776), *reprinted in* WILLIAM WINTHROP, MILITARY LAW & PRECEDENTS 964 (2d ed. 1920 reprint).

otherwise.[12] In contrast, the Articles for the Government of the Navy allowed prosecution of all crimes, including capital crimes, at a general court-martial.[13] This was likely due to the international character of the U.S. Navy versus the Continental focus of the U.S. Army and unwillingness to subject U.S. Sailors to foreign prosecution.[14]

Outside the military, the states developed most of their rape laws from British common-law.[15] In order to prove the crime of rape at common-law, the prosecutor had to prove "the carnal knowledge of any woman above the age of ten years against her will, and of a woman-child under the age of ten years with or against her will."[16] The term "against her will" required proof that the woman did not consent and that the rapist forced himself upon her.[17] These laws remained largely unchanged throughout the American states for the first two hundred years of their existence.[18]

It was not until 1863, in the midst of the Civil War, that Congress finally altered the Articles of War to provide Army commanders the authority to prosecute capital crimes during a time of war.[19] This change filled a gap in the legal system created by the obvious unwillingness to subject Union soldiers to state prosecution within the Confederate states during an active insurrection.[20] The modification covered not only rape,

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[12] Section X of Article 1 mandated turning over the accused and provided that if the accused was not turned over, the commanding officer shall be "cashiered" *Id*. The term "cashiered" is an old term for "dismissed". *Id*.

[13] Articles for the Better Government of the Navy, 2 Stat. 47 (1800) (providing "[i]f any person in the navy shall, when on shore, plunder, abuse, or maltreat any inhabitant, or injure his property in any way, he shall suffer such punishment as a court-martial shall adjudge").

[14] *Id.*

[15] Sally Gold & Martha Wyatt, *The Rape System: Old Roles and New Times*, 27 CATH U. L. REV. 695, 699–701 (1978).

[16] HALE, *supra* note 1, at 627–28.

[17] *See id.* at 633 (describing that if a woman conceals her injuries or a rape occurs in a city and no one hears an "outcry" then there is a "strong presumption that her testimony is false or feigned"; however, if the woman is of "good fame," pursued the rapist, had injuries witnessed by other women, and was in a remote location, then her testimony is more credible).

[18] Gold & Wyatt, *supra* note 15, at 701 (noting that the "typical common law definition of rape states that '[a] person commits rape when he has carnal knowledge of a female, forcibly and against her will'" (citing GA CODE ANN. § 26-2001 (1978) and twenty-one other states)).

[19] 12 Stat. 736 (1863).

[20] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 667 (2d ed. 1920).

but other common law civilian crimes, including murder, arson, and various assaults during a time of war.[21]

While both the Articles for the Government of the Navy and the Articles of War provided some jurisdiction over the crime of rape, neither defined the crime of rape.[22] Instead, both codes looked to British common law for the definition of rape: "the unlawful carnal knowledge of a woman forcibly and against her will or consent."[23] The force required had to be "sufficient to overcome resistance," so a verbal protest or freezing in fear would not be sufficient.[24] The only exceptions to the resistance requirement were if "resistance [was] . . . useless if not perilous" or if the victim was intoxicated or otherwise unconscious.[25]

The next major change in the Articles of War occurred in 1916.[26] Congress significantly increased the jurisdiction of courts-martial to include most common law crimes committed anywhere in the United States; however, rape and murder were both specifically excluded during times of peace.[27] The modification increased jurisdiction over any allegations of rape that occurred overseas in addition to the already existing jurisdiction over rapes occurring during times of war.[28] Despite the amendment, the Articles continued to rely upon British common law for the definition of rape.[29]

Even though both the Army and the Navy had the limited ability to prosecute the crime of rape, there was no independent appellate body to review the cases for legal sufficiency or legal error.[30] Most courts-martial in both the Navy and the Army were simply reviewed by the same officer that appointed the court-martial in the first place.[31] There were limited exceptions—for instance, the courts-martial of general

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[21] 12 Stat. 736 (1836).
[22] WINTHROP, *supra* note 20, at 677.
[23] *Id.*
[24] *Id.*
[25] *Id.* at 678.
[26] 39 Stat. 619, 664 (1916).
[27] *Id.*
[28] Before, the Army did not have jurisdiction over overseas peacetime rapes, nor did the states. *Id.*
[29] *Id.*
[30] *See* William F. Fratcher, *Appellate Review in Military Law*, 14 MO. L. REV. 15 (1949) (detailing an excellent history of the appellate process before the enactment of the UCMJ).
[31] *Id.* at 25.

officers and sentences of death--requiring review by the President; however, Presidential review did not create any type of binding precedent upon future cases.[32] Thus, with respect to rape, the U.S. military did not develop binding legal jurisprudence beyond the inherited common law throughout its first 150 years of existence. It was not until World War II, and the exposure of the UCMJ to such a large number of U.S. citizens, that the lack of binding legal jurisprudence struck home with Congress and the general public.[33]

B. The Evolution of the Uniform Code of Military Justice and Its Handling of Rape Law

1. Creation of the Uniform Code of Military Justice and Article 66 Review.

In the aftermath of World War II, Congress undertook a complete overhaul of both the Articles of War and the Articles for the Government of the Navy, combining them into a single code.[34] This revision was in response to several reports that noted "serious faults" and "flagrant miscarriages of justice" in the court-martial system that existed during World War II.[35] The major criticisms were the unduly large influence that commanding officers played in the court-martial and the lack of qualified defense counsel defending the service member.[36] At the time, the commanding officer could charge a service member with a crime, convene a court-martial, appoint members and officers (including defense counsel) and conduct a review of the proceedings afterward.[37] All of this could occur within days, and if the commanding officer intervened to force a guilty finding, the accused was left with little

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[32] *Id.* There was a brief period from 1862 until 1874 when all sentences to a penitentiary were to be reviewed by the President; however, a wide exception existed during a time of war, for certain specified crimes including rape, when a sentence of death could be carried out by the field general without review by the President. *Id.* at 23–24.

[33] GENEROUS, *supra* note 9, at 15–16 (noting that there were over two million courts-martial convictions during the war and almost 80,000 general courts-martial convictions, an average of sixty per day).

[34] *Id.* at 34.

[35] *Id.* at 16, 18.

[36] *Id.* at 16. There were reports of commanders "who demanded convictions regardless of guilt or innocence" and the defense counsel were not required to be qualified lawyers, which often resulted in "grossly inexperienced" defense. *Id.*

[37] *Id.* at 11.

recourse.[38] The only review available was by the service Judge Advocate General who usually was not even a lawyer himself.[39]

These criticisms, combined with the wide exposure of the public to military justice during World War II, led the Secretary of Defense to create a committee to reform the military justice system.[40] The two primary goals were to unify the service codes of military justice into a single system and to increase public confidence in military justice by "protecting the rights of those subject to the code."[41] This revision ultimately succeeded in creating the UCMJ and increasing the rights of the accused.[42]

The first significant right afforded to an accused under the UCMJ was the right to independent appellate review. In order to accomplish this review, the committee had to create an independent appellate system outside of the chain of command.[43] This appellate system consisted of a board of review for each branch of the service and a Court of Military Appeals (CMA) overseeing all appeals from the service boards.[44] The CMA had the statutory duty to review all cases for legal error. The service appellate courts, however, had the additional duty to review all cases for factual sufficiency as well as legal error.[45]

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[38] *Id.* at 12, 45, 51.
[39] *Id.*
[40] *Id.* at 14, 34.
[41] *Id.* at 34.
[42] *Id.* at 34–53.
[43] Act of 5 May 1950, Pub. L. No. 81-506, 64 Stat. 108, 128 [hereinafter 1950 UCMJ] (codified as amended at 10 U.S.C. § 866).
[44] *Id.* The service boards of review became service courts of criminal review in 1968 and were provided statutory authority and functions. The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. This statutory change was due in part to the perceived abuses of the military justice system by convening authorities. *See* Andrew S. Effron, United States v. Dubay *and the Evolution of Military Law*, 207 MIL. L. REV. 1 (2011) (providing an excellent recounting of the events of that era and the conflict between legal officers (now military judges) and the president of the court-martial, a staff judge advocate and his convening authority, and between the boards of review and the Army Judge Advocate General). Ultimately in 1994, Congress renamed the Court of Military Appeals (CMA) to its current name of the Court of Appeals for the Armed Forces and the courts of criminal review became courts of criminal appeals. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103–337, 108 Stat. 2663 (1994). Due to the confusion of all the name changes, the boards of review will be referred to as the service appellate courts in this article.
[45] *See* 10 U.S.C. §§ 866–867 (2008).

The second significant protection provided to accused service members went hand-in-hand with the first. The UCMJ finally codified all the offenses with which a service member could be charged and the UCMJ, along with the *Manual for Courts-Martial* (*MCM*), defined the legal elements required for a conviction.[46] While the UCMJ did increase the jurisdiction of a court-martial, by including rape and murder during peacetime,[47] it also provided the basis for legal and factual review by the service appellate courts.[48] This meant that a commander could no longer simply instruct the members to find an accused guilty no matter the evidence because it would quickly be overturned on appeal.[49]

When Congress gave the service appellate courts the power to review cases for both legal sufficiency and factual sufficiency, they empowered the courts to review and reverse cases beyond any other criminal appellate court in the country.[50] Every appellate court in the country is required to review cases for legal sufficiency of the evidence as part of the Due Process Guarantee of the Fourteenth Amendment.[51] The standard applied during a legal sufficiency review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[52] This standard is deferential to the fact finder; however, it also protects an accused from being convicted due to factors other than the evidence.[53]

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[46] *See id.*10 U.S.C. §§ 877–934 (1950); MANUAL FOR COURTS-MARTIAL UNITED STATES (1951) [hereinafter 1951 MCM]. For any offense that does not have statutorily defined elements under the UCMJ, the *MCM* defines the elements; however, this definition is not binding on the court's analysis of the offense since it is an executive document rather than a legislative statute. *See, e.g.*, United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011) (holding that Article 134 adultery charges must expressly allege that they are prejudicial to good order and discipline or service discrediting even though not required by the 2008 MCM at the time).

[47] 10 U.S.C. §§ 918, 920 (1950).

[48] *Id.* § 866.

[49] The CMA wasted little time in reversing a case for a lack of legal sufficiency in its first term. United States v. O'Neal, 2 C.M.R. 44 (C.M.A. 1952).

[50] "Let it be said at the outset that probably no one accused of a crime in any state or federal jurisdiction is given more opportunity to assert his innocence or more privileges of appellate review than one convicted by court-martial." Bernard Landman, Jr., *One Year of the Uniform Code of Military Justice: A Report of Progress*, 4 STAN. L. REV. 491, 492 (1952).

[51] Jackson v. Virginia, 443 U.S. 307, 319 (1979).

[52] *Id.* (emphasis added.)

[53] *Id.*

Article 66 of the UCMJ requires more than a legal sufficiency review; it mandates review for factual sufficiency as well.[54] The test for factual sufficiency is "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the judges on the service appellate court are themselves convinced of the accused's guilt beyond a reasonable doubt."[55] This requires the service appellate judges to substitute their own judgment and experiences rather than "any rational trier of fact" when weighing the evidence. Obviously, substituting the judgment of the individual judges, rather than deferring to "any rational trier of fact," creates a subjective standard that can vary with the composition of the service appellate court.[56]

2. 1950–2007: The Evolution of Rape Law Within the United States

While the UCMJ significantly expanded the military's jurisdiction to prosecute rape, the adoption of several common law rules of evidence made it difficult to convict a service member accused of rape.[57] First, unlike every other crime under the UCMJ, the adopted military rules of evidence required corroboration in order to prosecute most rape cases if the victim's testimony was "self-contradictory, uncertain, or improbable."[58] Second, the fresh complaint rule allowed "evidence that the alleged victim failed to make a complaint of the offense within a reasonable time after its commission" to be admissible in court.[59] Third, the military carried over the rule from the 1700s that the victim had to resist to her utmost in order to prove force.[60] Finally, evidence of a victim's "unchaste" behavior was admissible to show that she was likely to consent to sexual advances.[61] This evidence was perhaps the most

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[54] 10 U.S.C. § 866 (2010).
[55] United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987).
[56] *See* discussion *infra* Part III.B.
[57] *See* Sally Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 983–90 (2008) (describing the difficulties in prosecuting a case under the old common law); 1951 MCM, *supra* note 46, pt. XXVII, ¶¶ 142c, 153b, 199a (adopting the common law requirements discussed in the Klein *supra* note 57);
[58] 1951 MCM, *supra* note 46, pt. XXVII, ¶ 199(a) (stating that the exact language required that "[a] conviction cannot be based upon the uncorroborated testimony of an alleged victim in a trial for a sexual offense . . . if such testimony is self-contradictory, uncertain, or improbable").
[59] *Id.* ¶ 142c.
[60] *Id.* ¶ 199a
[61] *Id.* ¶ 153b.

difficult to convict because victims were often publicly humiliated by their entire sexual histories paraded before the public in open court. All of these factors combined to make an unfriendly environment for victims claiming rape.[62]

In the 1970s, women's rights advocates pushed hard to change the requirements for corroboration, resistance, the fresh complaint rule, and to protect the victims from having their sexual histories publicly exposed at trial.[63] These rules seemed to most scholars to be antiquated and discriminatory rules specific to rape crimes that needed to be modernized.[64] Michigan led the reform effort, passing legislation in 1974 to adopt these reforms and eliminating many of the requirements advocates viewed as unfair.[65] Nationally, the requirement for corroboration disappeared the quickest because only fifteen states held onto this requirement by the 1970s.[66] By far the most public national reform came in 1978 when Congress passed the Privacy Protection for Rape Victims Act[67] which prevented the defense from probing a victim's sexual history in federal cases except for limited circumstances.[68] The

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[62] Klein, *supra* note 57, at 983. A search in Westlaw supports this assertion as well, showing 215 Article 120 appeals reviewed before 1980—the year the military adopted the Federal Rules of Evidence (FRE), including FRE 412—and 983 Article 120 appeals reported between 1980 and 2007. The year 2007 was used as the cutoff year since Article 120 was significantly modified that year to encompass a much greater range of offenses. While this search double-counts cases appealed to the CMA after a service court appeal, it demonstrates a four-fold increase in the number of Article 120 convictions over a twenty-seven-year span after the evidentiary rules affecting rape prosecutions were changed. This increased number of prosecutions also corresponds with increasing numbers of women within the military, as well as increased congressional scrutiny over rape prosecutions, which could account for the whole or part of the difference.

[63] *E.g.*, Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L. J. 1365 (1972) (arguing for the repeal of the rape corroboration requirement, which only existed in fifteen states and the military); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977) (arguing for the advent of a rape shield rule).

[64] *See* Klein, *supra* note 57, at 985–86 (discussing the widely agreed upon reform of the requirements of consent, utmost resistance, and the rape shield rule).

[65] Act of August 12, 1974, Pub. L. No. 266, 1974 Mich. Pub. Acts 1025 (codified as amended at MICH. COMP. LAWS ANN. §§ 750.520a–.5201 (West 2011)).

[66] *The Rape Corroboration Requirement*, *supra* note 63, at 1367 (noting that as of 1972 only fifteen states had some form of corroboration requirement); Klein, *supra* note 57, at 987 (noting that as of 2001 no states required corroboration).

[67] Pub. L. No. 95-540, 92 Stat. 2046 (1978) (codified as FED. R. EVID. 412.)

[68] The exceptions are 1. "evidence of specific instances of sexual behavior . . . offered to prove that a person other than the accused was the source of semen, injury, or other

military did not adopt these reforms until 1980 when President Carter updated the Military Rules of Evidence by Executive Order.[69]

In addition to these widely agreed upon reforms, some advocates began pushing to eliminate the requirement that the prosecution prove lack of consent by the victim.[70] These advocates argued that the requirement to prove lack of consent by the victim was a requirement from a bygone era when a woman's chastity was put on trial and she was required to "prove her own innocence as to the requisite lack of consent."[71] The reform advocates argued that the victim of the rape was "treated like any other criminal defendant, but without many of the other substantive and procedural protections."[72] This argument to remove consent from rape statutes did not gain much traction within the states; however, the federal government took up this call.[73]

The military was not averse to the idea of removing consent from its rape statute. The 2005 Defense Authorization Act[74] required the Secretary of Defense to review both the UCMJ and the MCM and make recommendations on how to improve "issues relating to sexual assault" and conform them more closely to other federal laws.[75] The Department of Defense (DoD) conducted an extensive review of over 800 pages and studied six separate options for reforming its rape statute.[76] The study found that the current rape statute requiring both force and lack of consent was adequate and that "no statutory . . . change is likely to significantly increase the number of sexual offenses prosecuted."[77] However, realizing the push for change, the Committee recommended that if Congress required legislative change that it should adopt a new

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physical evidence"; 2. "evidence of specific instances of sexual behavior . . . [with the] accused . . . to prove consent"; or 3. where otherwise constitutionally required. *Id*.

[69] Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (Mar. 14, 1980).

[70] Gold & Wyatt, *supra* note 15.

[71] *Id.* at 695.

[72] *Id.*

[73] Donald Drips, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 966–71 (2008) (noting that sixteen states have eliminated the element of force as an element of rape and focus only on consent and other states are trending in that direction).

[74] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004) [hereinafter 2005 NDAA].

[75] *Id.* § 571, 118 Stat. at 1920.

[76] SEX CRIMES AND THE UCMJ: A REPORT TO JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (Feb. 2005), *available at* http://www.defenselink.mil/dodgc/php/docs/sub-committee_reportMarkHarvey1-13-05.doc.

[77] *Id.* at 208.

statute significantly widening the scope of Article 120.[78] The recommended statute created fourteen separate offenses for various types of sexual crimes and removed the element of lack of consent from all but one of the offenses.[79] It also bifurcated the traditional crime of rape into two separate offenses, rape and aggravated sexual assault.[80] Rape covered five different theories, including the traditional theory where a victim is overpowered by the force of the perpetrator.[81] Aggravated sexual assault covered most situations where the victim was unable to consent due to "substantial incapacity" or where the force was not so great as to overpower the victim.[82] Congress adopted these changes in the 2006 Defense Authorization Act, which removed lack of consent as an element of rape and made consent an affirmative defense.[83]

Removing lack of consent as an element of rape and sexual assault and making consent an affirmative defense drew immediate criticism that Congress went too far and the resulting statute was unconstitutional.[84] The argument advanced by commentators and defense counsel was that lack of consent was an implied element of both rape and sexual assault, so shifting the burden of proving consent to the defense violated the accused's right to due process.[85] The military appellate courts held that

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[78] *Id.*

[79] The element of lack of consent was removed from everything except wrongful sexual contact. *Id.*

[80] *Id.*

[81] *Id.*

[82] The lesser force theory was aggravated sexual assault by causing bodily harm, which includes "any offensive touching, no matter how slight." *Id.*

[83] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3256, 3262 [hereinafter 2006 NDAA].

[84] *See* Howard H. Hoege III, *"Overshift" The Unconstitutional Double Burden-Shift on Affirmative Defenses in the New Article 120*, ARMY LAW., May 2007, at 1 (arguing how the double burden shift is a legal impossibility and unconstitutional); *see also* James G. Clark, *"A Camel is a Horse Designed by Committee": Resolving Constitutional Defects in Uniform Code of Military Justice Article 120's Consent and Mistake of Fact as to Consent Defenses*, ARMY LAW., July 2011, at 14 (recounting the appellate history challenging the burden shift created by the affirmative defense of consent and suggesting that consent should not be an element or an affirmative defense, but should simply be evidence countering the government's theory); Jack Nevin & Joshua R. Lorenz, *Neither a Model of Clarity Nor a Model Statute: An Analysis of the History, Challenges, and Suggested Changes to the "New" Article 120*, 67 A. F. L. REV. 269 (2011) (documenting how the double burden shift led to several reversals on appeal and suggesting fixes to make the statute workable).

[85] Hoege, *supra* note 84, at 2; United States v. Neal, 67 M.J. 675, 678–79 (N-M. Ct. Crim. App. 2009), *aff'd* 68 M.J. 289 (C.A.A.F. 2010) (challenging the statute as

this burden shift did not violate the accused's rights in force cases;[86] however, in 2011, CAAF held that it did violate the accused's due process right in substantial incapacity cases.[87]

In response to CAAF declaring part of the statute unconstitutional, Congress immediately went to work modifying the military's rape statute for a second time in five years.[88] On December 31, 2011, President Obama signed the 2012 National Defense Authorization Act, which completed this modification.[89] Congress went far beyond simply amending the unconstitutional portion of the statute and restructured and redefined Article 120 into four subsections with multiple charging theories under each section.[90] In order to cure the unconstitutional burden shift, Congress removed the burden-shifting scheme for consent, redefined several elements to include consent,[91] and reintroduced lack of consent into sections of Article 120.[92] With an understanding of rape and sexual assault development in the military and civilian community, the next logical question is how effective this reform has been over the past decade.

III. Results of Sexual Assault Reform

A. Studies of Sexual Assault Reform at the Trial Level in Civilian Criminal Courts

In light of the legislation to make state and federal rape statutes and rules of evidence more victim- friendly, several academics undertook

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unconstitutional in force cases); United States v. Prather, 69 M.J. 338, 341–43 (C.A.A.F. 2011) (challenging the statute as unconstitutional in incapacity cases).

[86] *Neal*, 68 M.J. at 304.

[87] *Prather*, 69 M.J. at 343.

[88] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011) [hereinafter 2012 NDAA]. Congress did propose amendments to Article 120 the year before; however, they were not as sweeping as the 2012 revision and were ultimately not adopted in the final bill. *See* S. 3454, 111th Cong. § 920.

[89] *Id.*

[90] *Id*. (The four separate sections are Article 120, Rape and sexual assault generally; Article 120a, Stalking; Article 120b, Rape and sexual assault of a child; and Article 120c, Other sexual misconduct.).

[91] *E.g. id.* (defining a person as incapable of consenting when asleep within the definition of consent).

[92] *E.g*. 2012 NDAA *supra* note 88, § 541 (defining bodily harm as a "nonconsensual sexual act").

studies to determine the effect of these changes. The theory reformists advanced was that by protecting victims' privacy with rape shield statutes, victims would be more likely to come forward with allegations.[93] Additionally, by leveling the evidentiary playing field, alleged rapists would be more likely to be convicted of the crime.[94] Studies of eight major cities around the country and the state of California proved these theories largely incorrect.[95] The only exception was Michigan, where the most comprehensive rape law reform occurred.[96] In both Kalamazoo and Detroit, studies found increases in the number of arrests after the reforms were passed; however, the overall conviction percentage remained relatively unchanged.[97] A study of rape law reform in all fifty states found that reform "has not had a very substantial effect on either victim behavior or actual practices in the criminal justice system."[98]

Since the majority of studies on rape law reform found little to no significant increase in reporting or convictions, academics next explored juror behavior to determine why the reform was not working as expected. Prosecutors hypothesized that even though the law no longer requires corroboration, prompt reporting, or victim resistance, jurors still require this evidence to convict a defendant.[99] Research confirms this hypothesis that a person's world view is more important than the law in determining guilt or innocence in rape cases.[100] For instance, in one study, 1,500

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[93] Bachman & Paternoster, *supra* note 4, at 560.

[94] *Id.*

[95] *Compare* Susan Caringella-MacDonald, *Sexual Assault Prosecution: An Examination of Model Rape Legislation in Michigan*, 4 WOMEN & POL. 65 (1984) (finding a slight increase in rape arrests and sentences in Michigan, but no increase in reporting or conviction percentage), *with* Kenneth Polk, *Rape Reform and Criminal Justice Processing*, 31 CRIME & DELINQ. 191 (1985) (finding no increase in California in reporting or convictions for rape after reform); Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543 (1981) (finding no increase in the conviction rate for rape in Seattle after reform), *and* Julie Homey & Cassia Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, 25 LAW & SOC'Y REV. 117, 138 (1991) (analyzing six different cities around the country and finding an increase in reporting in Detroit and Houston, but no increase in conviction rates, and no significant increase in reporting or convictions rates in the other four cities: Washington, D.C., Chicago, Philadelphia, and Atlanta).

[96] *See supra* note 95.

[97] Caringella-MacDonald, *supra* note 95, at 67; Horney & Cassia, *supra* note 95, at 138.

[98] Bachman & Paternoster, *supra* note 4, at 573.

[99] Horney & Spohn, *supra* note 95, at 139–40.

[100] Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What and Why in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 781 (2009).

mock jurors around the country reviewed a controversial rape fact pattern involving a woman clearly telling a man no, but not physically protesting.[101] The jurors all had the same facts before them and the experiment presented them with five different legal definitions of rape, including no definition at all, the common law definition, and a liberal definition that excluded force and specifically instructed the jurors that the word "no" indicates a lack of consent.[102] The experiment showed that even under the most liberal definition of rape, thirty-five percent of jurors surveyed believed the accused was not guilty despite clear verbal protests.[103] Further, the study found that the jurors' underlying belief structure was much more influential than the law in determining guilt or innocence.[104] Finally, only the most liberal statute had any statistically significant difference, but this impact was far less than the impact of a person's underlying belief system.[105]

B. Results of Sexual Assault Reform at the Trial Level in Military Courts

Undoubtedly, the number of military rape prosecutions has significantly increased over the decades.[106] Simply comparing the number of Article 120[107] convictions appealed between the time periods of 1950–1980 and 1980–2007, demonstrates a fourfold increase in the number of convictions appealed after the evidentiary requirements were changed in 1980.[108] During this time period from 1950-2007, the

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[101] *Id.* at 765. This fact pattern was based off of *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1339 (Pa. Super. Ct. 1992) (per curiam), *aff'd in part and rev'd in part*, 641 A.2d 1161 (Pa. 1994), an extremely controversial case that was convicted at trial and reversed on appeal based on legal sufficiency of the evidence.

[102] *Id.* at 767–68.

[103] *Id.* at 775.

[104] The study divided belief structures into either hierarchal, where a person views the man is the pursuer in sexual situations and women often offer token resistance, or egalitarian, where both women and men are equal sexual partners. The study found that hierarchal women were the most likely to acquit regardless of the law. *Id*. at 777, 781–82.

[105] *Id*. No state has adopted the most liberal version presented to the jurors that excludes mistake of fact as a defense and specifically instructs the jurors that the word "no" indicates a lack of consent. *Id*. at 769.

[106] *See* discussion, *supra* note 62.

[107] Article 120 is the military statute for sexual assault crimes and is codified at 10 U.S.C. § 920 (2010).

[108] *See* discussion, *supra* note 62.

statutory defined elements of rape changed little.[109] However, there are several other potential sources of the increase including the evidentiary changes enacted in 1980,[110] the increase in female service members,[111] and the increased congressional pressure to prosecute sexual assaults within the military.[112]

Nonetheless, there is no accurate public data to measure the effect of the recent statutory reform on the military's conviction percentage in rape cases. Beginning in 2004, Congress required the DoD to report annually on its efforts and results in curbing sexual assault within the military.[113] In its 2004 report, the DoD recounted that there were 1700 reports of sexual assault within the military, but only 113 courts-martial and 51 cases referred to state or foreign governments for prosecution.[114] Unfortunately, the DoD did not provide the results of these 164 courts-martial and civilian prosecutions in the report; therefore, it is missing the conviction percentage for these cases.[115] Likewise, in the annual report for fiscal year 2010, the military received 2410 unrestricted reports[116] of

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[109] *Compare* 1951 MCM, *supra* note 46, pt. XXVIII, ¶ 199a, *with* MANUAL FOR COURTS-MARTIAL UNITED STATES pt. IV, ¶ 45a (2005) [hereinafter 2005 MCM].

[110] Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (Mar. 14, 1980).

[111] The percentage of women in the military has significantly increased over the decades from 1.3% in 1960, 1.4% in 1970, 8.4% in 1980, 11.1% in 1990, 14.6% in 2000, and 14.6% as of 2011. RUTGERS INST. FOR WOMEN'S LEADERSHIP, WOMEN'S LEADERSHIP FACTSHEET (2008), *available at* http://iwl.rutgers.edu/document/njwomencount/Women%20in%20Military%202009%20Final.pdf; WOMEN'S MEMORIAL.ORG, WOMEN IN MILITARY SERVICE FOR AM. MEMORIAL FOUND., INC. (2011), *available at* http://www.womensmemorial.org/PDFs/StatsonWIM.pdf.

[112] *See generally* Marisa Taylor & Chris Adams, *Military's Newly Aggressive Rape Prosecution Has Pitfall*s, MCCLATCHY NEWSPAPERS, Nov. 28, 2011, *available at* http://www.mcclatchydc.com/2011/11/28/131523/militarys-newly-aggressive-rape.html (describing how military rape prosecutions have increased from 113 in 2004 to 532 in 2010 and "commanders sent about 70 percent more cases to courts-martial that started as rape or aggravated sexual-assault allegations than they did in 2009" due to congressional pressure).

[113] 2005 NDAA, *supra* note 74, § 577, 118 Stat. 1927–28.

[114] U.S. DEP'T OF DEF., REPORT ON SEXUAL ASSAULTS WITHIN THE MILITARY FOR ANNUAL YEAR 2004, at 12 (2005), *available at* http://www.sapr.mil/index.php/annual-reports.

[115] *Id.*

[116] In the military, a victim of sexual assault has the option of making a report in either a restricted or unrestricted manner. If the report is restricted, the victim can receive counseling and medical services, but law enforcement and the chain of command is not informed. If the report is unrestricted, the victim receives the same counseling and medical services. Additionally, the chain of command and law enforcement are informed and the case is investigated for potential prosecution. *See* U.S. DEP'T OF DEF., DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM 4 (23 Jan.

sexual assault, prosecuted 532 courts-martial, and ultimately convicted 245 service members.[117] The report notes, however, that these 245 convictions may have been for lesser offenses, such as fraternization or adultery.[118] Thus, while there has clearly been an increase in the number of Article 120 prosecutions, the data does not provide an accurate picture of the number of rape or sexual assault convictions.[119]

C. Overview of Cases Reversed for Lack of Factual Sufficiency

With no data publicly available to measure the effectiveness of statutory reform of the military rape statute at the trial level on convictions, a second place to look to determine the effectiveness of the statute is at the appellate level. As previously discussed, Article 66(b), UCMJ, requires that every sentence that includes a punitive discharge or more than a year of confinement receive appellate review to certify that it is correct in both law and fact.[120] The certification of a case as correct in fact is accomplished through factual sufficiency analysis and it is conducted by the lead appellate judge in every case.[121] Since every case is evaluated for factual sufficiency, an analysis of the quantity and reasoning of cases reversed for a lack of factual sufficiency provides a great measure of a statute's effectiveness at the appellate level. This article uses the year 2000 as a cutoff date for analysis of rape cases reversed for a lack of factual sufficiency in order to capture enough representative cases that have been reversed while limiting the data set to a manageable level.

2012) (C1, Apr. 30, 2013); U.S. DEP'T OF DEF., INSTR. 6495.02, Title 25–31 (28 Mar. 2013).

[117] U.S. DEP'T OF DEF., REPORT ON SEXUAL ASSAULTS WITHIN THE MILITARY FOR FISCAL YEAR 2010, at 3, 76 (2011), *available at* http://www.sapr.mil/index.php/annual-reports.

[118] *Id.* at 76.

[119] *Id.*

[120] As discussed previously, the test for factual sufficiency is "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the judges on the service appellate court are themselves convinced of the accused's guilt beyond a reasonable doubt." United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987).

[121] *See, e.g.*, NAVY-MARINE CORPS CT. OF CRIM. APPEALS RULES OF PRAC. & PROC. 5 (2011) (mandating that the lead judge review the case for factual sufficiency within ten days of assignment).

1. Pre-2007 Reform Cases

From the enactment of the UCMJ until 2007, the military's rape statute under Article 120 defined rape as "sexual intercourse by a person, executed by force and without consent of the victim."[122] The force involved could be actual physical force, such as holding down a victim against her will, or constructive force, such as intimidating a person into submission.[123] Additionally, if the victim was unconscious, the mere act of penetration qualified as sufficient force.[124] Lack of consent could be found through the victim's resistance, lack of resistance due to threats or futility, or inability to consent due to mental capacity.[125] However, if a victim did not resist, the law recognized an inference of consent.[126]

Since the year 2000, the service courts of criminal appeals overturned nine convictions under the pre-2007 Article 120 for lack of factual sufficiency,[127] and the CAAF overturned one Article 120 conviction for lack of legal sufficiency.[128] While all of the cases are factually distinct, they generally fall into one of three categories. First, the service court did not believe the victim's version of the events because they are unreliable and uncorroborated; second, the victim did not resist enough to overcome the inference of consent; and third, alcohol cases where incapacity is not sufficiently demonstrated. The cases that fall into each of these categories are discussed below.

a. The Unreliable Victim

There are two cases that fall into the unreliable and uncorroborated victim category. In reviewing the courts' rendition of the facts in these cases, the court expresses surprise that the members convicted the

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[122] 2005 MCM, *supra* note 109, ¶ 45c(1)(a). There was a change in 1992 in which Congress took out the words "with a female" to make the statute gender neutral, but the elements of force and consent remained unchanged. *See* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315, 2506 (1992).
[123] United States v. Clark, 35 M.J. 432, 436 (C.M.A. 1992).
[124] 2005 MCM, *supra* note 109, pt. IV, ¶ 45c(1)(b).
[125] This includes situations in which mental capacity is lacking due to ingestion of alcohol or other drugs. *Id.*
[126] "If a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent." *Id.*
[127] *See* discussion *infra* Part II.C.1.a.–c.
[128] United States v. Tollinchi, 54 M.J. 80 (C.A.A.F. 2000).

service member at all. Both cases involved victims who had significant delays in their reporting, had consensual sexual intercourse before and after the alleged rapes, had little or no corroboration to the allegation, and had inconsistent statements highlighted on the record. In these cases, the service courts do not simply overturn the case on an inference of consent, but rather on a question of whether the events ever occurred.

The first such case is *United States v. Parker*.[129] Sergeant (SGT) Parker was accused of numerous charges including three separate specifications of rape of two different women. The government brought in evidence of rape of a third woman under Military Rule of Evidence (MRE) 413.[130] The members convicted SGT Parker of two of the specifications of rape against two different women. The Army Court of Criminal Appeals (ACCA) reversed one of the rape specifications because based on the "totality of the evidence casting doubt on [the victim's] credibility . . . [ACCA was] not convinced beyond a reasonable doubt that the appellant raped, forcibly sodomized, or assaulted" the victim.[131]

A brief recounting of the facts demonstrates why the court was left wholly unconvinced of guilt due to "logical and inherent inconsistencies" in the alleged victim's actions.[132] The alleged victim, KD, and SGT Parker were in "a consensual sexual relationship for several months before the first alleged rape" that involved rough consensual intercourse including spanking and hair pulling.[133] KD made two allegations of rape. In the first allegation, KD alleged that she was physically overpowered and raped by SGT Parker, but that she did not realize that she had been raped for several days and continued to spend time with Parker, both alone and with friends.[134] The members acquitted Parker of this specification of rape.[135] The second specification occurred one month later when KD offered SGT Parker a ride home from a friend's house at 0130 by herself.[136] She invited him up to her apartment alone and was overpowered by SGT Parker pulling her hair and he raped and

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[129] 54 M.J. 700 (A. Ct. Crim. App. 2001).
[130] *Id.* at 700–01, 712.
[131] *Id.* at 708.
[132] *Id.* at 707.
[133] *Id.* at 707–08.
[134] *Id.*
[135] *Id.*
[136] *Id.*

sodomized her.[137] After this second alleged rape and forcible sodomy, KD continued to sleep with SGT Parker and wrote a letter to Army investigators stating that she had never been raped or otherwise sexually assaulted "in an attempt to help [Parker]."[138]

Based on the above facts, ACCA reversed all the convicted specifications relating to KD for a lack of factual sufficiency except for consensual sodomy, which Parker freely admitted.[139] The court specifically noted KD's admission of lying to investigators, her inconsistent actions in continuing to spend time alone at night with Parker after the alleged rapes, and the lack of corroboration of any of the events led them to doubt the events even occurred. The court interestingly focused more on KD's lack of credibility in their analysis rather than addressing the potential inference of consent raised by KD's minimal resistance.[140] Because of this focus on credibility rather than consent or lack of consent, it seems unlikely that this case would withstand factual sufficiency review even under the 2007 or 2011 versions of Article 120 where the inference of consent is eliminated.

The second case that falls in this category is *United States v. Foster*.[141] Unlike SGT Parker, SGT Foster faced only a single count of rape against a single victim, his ex-wife.[142] He was also charged and convicted of two specifications of aggravated assault and wrongfully communicating a threat, all against his ex-wife.[143] Ultimately, the Navy-Marine Corps Court of Criminal Appeals (N-MCCA) reversed SGT Foster's rape conviction for a lack of factual sufficiency and reversed the other specifications for cumulative error and unreasonable post-trial delay.[144]

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[137] *Id.* at 708.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] United States v. Foster, No. 200101955 (N-M. Crim. Ct. App. Feb. 17, 2009). The *Foster* case is best known in the military community for the congressional scrutiny it created after the press publicized the fact that Sergeant Foster spent nine years in the brig awaiting appellate review. In response to the unreasonable delay, Congress ordered an investigation of the Department of the Navy "policies and management and organizational practices" over the judge advocate communities of both the Navy and Marine Corps. Fiscal Year 2010 National Defense Authorization Act, Pub. L. No. 111-84, § 506, 123 Stat. 2190, 2278–79 (2009).
[142] *Foster*, No. 200101955, at *3.
[143] *Id.* at *1.
[144] *Id.* at *3.

Much like the *Parker* case, the primary reason N-MCCA reversed the rape specification in SGT Foster's case was "the evidence for his culpability for rape [was] anemic at best."[145] There was no forensic evidence, and the only testimonial evidence was the victim's testimony and a single consistent statement from the victim to a friend two years after the alleged incident occurred.[146] Much like *Parker*, the court highlighted the victim's own actions after the alleged rape, which called into question her credibility.[147] Ms. Foster delayed reporting the rape for over five years, and reported the rape only after negotiations for child custody broke down in the midst of a divorce.[148] The court further highlighted that Ms. Foster had already agreed to joint custody of her children with her alleged rapist before the negotiations broke down.[149] Other factors that the court cited were the victim engaging in numerous instances of consensual sexual activity with SGT Foster after the alleged rape, including a sex video, and that she never reported this alleged rape to her friends or family.[150]

Much like *Parker*, the court focuses on the victim's lack of credibility rather than the inference of consent in reversing the case. The N-MCCA writes that while a "reasonable member could choose to believe the victim,"[151] the facts do not convince the court beyond a reasonable doubt.[152] Interestingly, N-MCCA does not state which specific legal element they found lacking or rely upon an inference of consent, which suggests that the court believed the entire event did not occur beyond a reasonable doubt.[153] The court noted that it "is clear to this court that the prosecution attempted to bootstrap a rape conviction atop several instances of assaultive conduct."[154]

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[145] *Id*. at *5.
[146] *Id*.
[147] *Id*.
[148] *Id*. at *4.
[149] *Id*. at *5.
[150] With the exception of the single consistent statement that occurred two years later. *Id*. at *6.
[151] *Id*. (This is the test for legal sufficiency from *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).).
[152] *Id*. (This is the test for factual sufficiency from *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).).
[153] *Id*.
[154] *Id*. at *5.

b. The Compliant Victim

The second group of cases reversed for a lack of factual or legal sufficiency[155] are perhaps the most peculiar factual circumstances. All six of these cases involve a victim who is sober, largely compliant with the accused's demands, and does little or nothing to voice her lack of consent. Unlike the first group of cases, the reporting is much closer in time to the alleged rape. In these cases the courts question the victim's compliance more than her credibility. The courts primarily reversed the cases based on the statutory instruction that allowed an inference of consent "[i]f a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest."[156] Because of the victim's compliance and failure to take "reasonable steps," the service courts found that the government did not prove the element of lack of consent beyond a reasonable doubt.

The first case that falls into this category is one of very few rape cases overturned by CAAF for a lack of legal sufficiency, *United States v. Tollinchi*.[157] This case is included in this discussion because a case is inherently factually insufficient if it is legally insufficient, and it sets the floor for the factual sufficiency analysis the service courts must apply.[158] Sergeant Tollinchi was a Marine recruiter who recruited a young man referred to as NF.[159] After NF successfully finished his qualification testing, SGT Tollinchi took NF and his girlfriend, EH, back to the recruiting office for drinks.[160] After a few shots, both EH and NF began to feel intoxicated; this is when SGT Tollinchi instructed them to start

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[155] Legal sufficiency is included in this section since it sets the baseline for factual sufficiency analysis. *See* United States v. Tollinchi, 54 M.J. 80 (C.A.A.F. 2000).

[156] 2005 MCM, *supra* note 109, pt. IV, ¶ 45c(1)(b).

[157] United States v. Tollinchi, 54 M.J. 80 (C.A.A.F. 2000). The only other recent rape case overturned for a lack of legal sufficiency was *United States v. Bonano-Torres*, 31 M.J. 175 (C.M.A. 1990).

[158] As discussed, the standard for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. The standard for factual sufficiency is "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the judges on the service appellate court are themselves convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Logically, if "any rational trier of fact" could not have the elements beyond a reasonable doubt than the judges themselves could not be convinced beyond a reasonable doubt.

[159] *Tollinchi*, 54 M.J. at 81.

[160] *Id.*

taking off their clothes and eventually to engage in oral sex.[161] Throughout the entire process, both EH and NF were compliant and never objected to any of SGT Tollinchi's instructions.[162] EH and NF disagree on the exact events that occur next, but both agree that SGT Tollinchi engaged in intercourse with EH and no one resisted verbally or physically at the time.[163]

The CAAF reversed the rape conviction for legal insufficiency of the elements of consent and force after N-MCCA had affirmed the case for both legal and factual sufficiency.[164] The court cited to both the *MCM* standard that consent may be inferred if the victim is capable of resisting and fails to resist[165] and to *United States v. Bonano-Torres* where the court previously held that "more than the incidental force involved in penetration is required for conviction."[166] This case was important because the inference of consent provided that the fact finder "may" draw an inference of consent;[167] in contrast, this case sent a clear message to the service appellate courts that if a sober victim does not resist, physically or verbally, they must draw an inference of consent in factual and legal sufficiency analysis.[168]

A year after CAAF decided the *Tollinchi* case, *United States v. Simpson* came before ACCA for factual sufficiency review.[169] The *Simpson* case was unique simply due to the sheer breadth of sexual misconduct charged and convicted. The members ultimately convicted Staff Sergeant (SSG) Simpson of eighteen specifications of rape, three specifications of sodomy, and twelve specifications of indecent assault among other non-sexual charges.[170] The misconduct occurred over

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[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.* at 82.
[165] MANUAL FOR COURTS MARTIAL UNITED STATES, pt. IV, ¶ 45.c.1.b (2000) [hereinafter 2000 MCM].
[166] United States v. Bonano-Torres, 31 M.J. 175, 179 (C.M.A. 1990).
[167] 2000 MCM, *supra* note 165, ¶ 45.c.1.b.
[168] The CAAF also cited to mistake of fact as to consent, which is a defense that the prosecution must prove does not apply beyond a reasonable doubt; however, service appellate courts picked up on the inference of consent instruction as the larger holding in this case in their factual sufficiency analysis. *Tollinchi*, 54 M.J. at 83.
[169] 55 M.J. 674 (A. Ct. Crim. App. 2001) *aff'd*, 58 M.J. 368 (C.A.A.F. 2002).
[170] *Id.* at 678.

eighteen months while SSG Simpson was a drill instructor at the ordnance school at the Aberdeen Proving Grounds, Maryland.[171]

The ACCA ultimately reversed one of the specifications of rape for a lack of factual sufficiency.[172] This specification involved a trainee who was forced to repeat the school due to imposition of non-judicial punishment and was potentially facing administrative separation.[173] Staff Sergeant Simpson argued for the trainee not to be separated.[174] After the decision was made to retain the trainee, SSG Simpson called her to his office, informed her that she "owed" him and had sexual intercourse with her in his bathroom. A few days later, he instructed her to "go to her room during lunch, take her clothes off, and wait for him" and engaged in sexual intercourse again. The trainee never resisted or verbally refused the SSG's advances, but stated that she was afraid of him and afraid of being discharged if she did not comply. Similarly to *Tollinchi*, ACCA found in this instance, the facts did not overcome the inference of consent because "with the exception of [this victim], every [other] victim resisted the appellant's demands verbally, physically, or both."[175] Additionally, ACCA specifically rejected "the notion that every act of intercourse between a trainee and a drill instructor is inherently nonconsensual,"[176] an important concept in future rank differential cases.

The third case that falls into this category is *United States v. Bell*.[177] Much like SSG Simpson, First Sergeant (1SG) Bell was a senior staff noncommissioned officer (NCO) who abused his position "to target and prey sexually on newly assigned junior enlisted women."[178] In the reversed specification of rape, 1SG Bell was on duty when a newly arrived female Private First Class (PFC) "attempted to sign out on leave" late at night in order to pick up her children from her mother and move them across country. First Sergeant Bell feigned that he could not find her leave papers and invited the PFC back to his quarters to find the papers. He then proceeded to talk to her about her future in the Army while rubbing her shoulders. The shoulder rubbing turned into a full body massage, followed by a request to see her legs, butt, and eventually

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[171] *Id*. at 679.
[172] *Id*. at 710.
[173] *Id*. at 706.
[174] *Id*.
[175] *Id*. at 709.
[176] *Id*. at 707.
[177] United States v. Bell, No. 20060845 (A. Ct. Crim. App. Dec. 31, 2008).
[178] *Id*. at *2.

a request for sexual intercourse. Throughout his sexual advances, the PFC was compliant and never verbally refused the 1SG because she was afraid her "life in the company would have gotten harder" if she had refused.[179]

The ACCA specifically cited to the *Simpson* case in reversing *Bell* as factually insufficient.[180] The court found, much like in *Simpson*, "the record is devoid of any evidence showing [the victim] manifested a lack of consent."[181] The court also held that fearing an individual's position and power does not amount to constructive force sufficient to sustain a rape conviction. Without any evidence of a lack of consent or constructive force, the court applied the inference of consent and reversed the case.[182]

The next case of the compliant victim again involves a senior-subordinate relationship; however, in *United States v. Leak* the ranks were much closer, so the issue of what constituted reasonable steps to resist received greater attention.[183] Staff Sergeant Leak was a small group leader at a NCO academy in Germany and specialist (SPC) M, the victim, was attending the academy. Unlike the previous cases, SPC M had been on active duty for over four years and was not new to the military.[184] Additionally, SSG Leak was not in her platoon, did not rate her, and did not instruct her, but went out of his way to talk to her. During the course of events, SSG Leak solicited her for sex three separate times. On the first occasion, SSG Leak tried to pull off SPC M's pants and SPC M successfully resisted both physically and verbally, so SSG Leak resigned to pleasuring himself in front of SPC M. Two days later, SSG Leak again asked SPC M to meet him alone in his office and she complied. This time, after initially resisting physically and verbally, SPC M gave up and let SSG Leak have sex with her. The members convicted SSG Leak of rape for this second incident.[185]

Despite SPC M's verbal and physical resistance, ACCA found that there was insufficient evidence of force to sustain the case under a

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[179] *Id.*
[180] *Id.* at *5 (citing *Simpson*, 55 M.J. at 707).
[181] *Id.*
[182] *Id.*
[183] United States v. Leak, 58 M.J. 869 (A. Ct. Crim. App. 2003).
[184] *Id.* at 870.
[185] *Id.*

factual sufficiency analysis.[186] The court cited to the fact that SSG Leak never verbally threatened to have SPC M kicked out of the academy and that SPC M had already successfully physically resisted his advances on a prior occasion as evidence that SPC M did not take "such measures of resistance as are called for by the circumstances."[187] This case is perhaps the most curious factual insufficiency case since the victim reported the incident relatively quickly and there was clear testimony of both verbal and physical resistance that the members found sufficient to convict.[188] The only explanation for the court disregarding the victim's physical and verbal protests is the closeness in both age and rank that led the court to require a higher standard of "taking such measures of resistance as are called for by the circumstances"[189] than in prior case.[190]

United States v. Spicer is yet another compliant victim case; however, this time it involved a parent and a step-daughter rather than a military relationship.[191] Gunnery Sergeant (GySgt) Spicer married the mother of the victim, VL, when VL was only 12 years old. By the time VL was 14 years old, GySgt Spicer began a long series of sexually inappropriate acts with his step-daughter.[192] He would ask to see her breasts, masturbate in front of her, and ask her to model lingerie.[193] During the course of the events over the years, sometimes VL would comply with her stepfather's requests and sometimes she would refuse them.[194] Eventually, VL wanted to go away with her boyfriend for a weekend, and GySgt Spicer agreed to convince her mom to let her go if VL agreed to have sex with him. VL agreed.[195] At some point during the intercourse, VL believed that GySgt Spicer was videotaping it and immediately terminated the intercourse.[196]

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[186] *Id.* at 878.
[187] *Id.* at 876. 2005 MCM, *supra* note 109, pt. IV, ¶ 45.c(1)(b).
[188] *Id.*
[189] *Leak*, 58 M.J. at 876 (citing MANUAL FOR COURTS-MARTIAL: UNITED STATES pt. IV, ¶ 45c(1)(b) (1995) [hereinafter 1995 MCM].
[190] *E.g.*, United States v. Simpson 55 M.J. 674, 699–710 (A. Ct. Crim. App. 2001) (upholding numerous rape convictions where the victim's put up minimal resistance, but there was a greater rank differential).
[191] United States v. Spicer, No. 20100241, at *2 (N-M. Crim. Ct. App. 2009) (reversing a conviction for a single specification of sexual assault, but upholding the conviction for false official statement).
[192] *Id.*
[193] *Id.*
[194] *Id.* at *2–3.
[195] *Id.* at *3.
[196] *Id.* at *5.

In reversing the case for a lack of factual sufficiency, N-MCCA recognized that parental compulsion can establish force and consent; however, the court found that it did not exist in this case.[197] Similar to *Leak*, N-MCCA highlighted the fact that VL resisted GySgt Spicer's advances on prior occasions. Moreover, the court noted that VL's mother, not GySgt Spicer, ultimately made the serious decisions in her life, and that VL terminated the intercourse on her own when she believed it was being videotaped. All of these factors led N-MCCA to reject the parental compulsion theory and rely upon the inference of consent to reverse the case.[198]

The sixth and final compliant victim case reversed for factual insufficiency is *United States v. Inlow*.[199] This case is unique because it involves two specifications of rape against the same victim within twenty-four hours, one that was upheld and one that was reversed.[200] The victim, KK, was a deployed Soldier's wife who had held a barbeque at her house.[201] During the course of the night, she and Private (Pvt) Inlow became very intoxicated and flirted very heavily, including "wrestling, roughhousing, tickling, and touching."[202] The flirting became so inappropriate that several of the party goers decided to intervene and talked to both KK and Pvt Inlow.[203] Later that night, KK testified that she "passed out" and awoke to Pvt Inlow having intercourse with her; she immediately resisted both physically and verbally.[204] Private Inlow wrote a statement admitting that KK told him "no" at one point during the night, but claimed the intercourse was consensual.[205] The next morning, when both Pvt Inlow and KK were awake, they engaged in intercourse again, this time KK did not resist because she "figured [she] must have done something to make him think that this was OK."[206] The members convicted Pvt Inlow of rape in both instances.[207]

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[197] *Id*. at *5–6.
[198] *Id*.
[199] United States v. Inlow, No. 20070239 (A. Ct. Crim. App. June 15, 2009).
[200] *Id*. at *10.
[201] *Id*. at *2.
[202] *Id*. at *3.
[203] *Id*.
[204] *Id*. at *3–4.
[205] *Id*. at *5.
[206] *Id*.
[207] *Id*. at *1–2.

The ACCA reversed the second rape for a lack of factual sufficiency, but affirmed the first specification.[208] The court differentiated the two because first, KK was no longer intoxicated during the second rape and "was in control of her mental faculties and physically able to resist [Pvt Inlow's] advances during the second round of sexual intercourse."[209] Second, the court pointed out the KK successfully resisted during the first convicted rape, but "during the second incident KK did not physically or verbally manifest a lack of consent."[210] This case is unique in applying the inference of consent through inaction mere hours after a previous rape.[211]

c. The Memoryless Victim

The final group of cases reversed under the old version of Article 120 are the *memoryless victim* cases. These are cases where the victim knows that she had sex with the accused, but does not know how it occurred. The pre-2007 Article 120 required the government to prove lack of consent beyond a reasonable doubt; however, "[c]onsent . . . may not be inferred . . . where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice."[212] This removed the burden of proving consent and force if the government could prove the victim was lacking "mental or physical faculties," typically due to alcohol.[213]

There are two cases overturned for a lack of factual sufficiency under the pre-2007 Article 120 statute.[214] Both cases presented little evidence of incapacitation except that the victim could not remember what occurred. Additionally, multiple witnesses provided evidence of consciousness in both cases, suggesting to the court that the lack of memory was due to loss of memory rather than unconsciousness.

The first case in this area is *United States v. Nicely*, the only Air Force rape case overturned for a lack of factual sufficiency in the last

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[208] *Id.* at *9.
[209] *Id.*
[210] *Id.*
[211] *Id.* at *8–10.
[212] 2005 MCM, *supra* note 109, pt. IV, ¶ 45c(1)(b).
[213] *Id.*
[214] *Id.*

eleven years.[215] By the time this case went to trial, Airman (Amn) Nicely had already pled guilty to violating numerous articles under the UCMJ, but contested this rape allegation.[216] Airman Nicely and his friend, Amn W, purchased alcohol for two underage female Airmen, Amn G, and the victim, Amn K.[217] The two airmen snuck into the women's room after the final bed check and drank shots of tequila with the women. The victim's last memory was sitting in bed drinking tequila before waking up naked the next morning. Surprisingly, the victim conceded at trial that she may have consented to having intercourse with Amn Nicely. Additionally, Amn W and Amn G were both in the room during the course of the rape.[218] They witnessed Amn Nicely and the victim mutually kissing and heard the victim making noises throughout the intercourse.[219] Airman W even heard the victim talking to Amn Nicely during the intercourse, a further indication of consciousness.[220] Airman Nicely made three statements where he lied about some facts, but claimed the victim was awake and consenting throughout the intercourse.[221]

The Air Force Court of Criminal Appeals (AFCCA) reversed the case for a lack of factual sufficiency.[222] In the court's opinion, there was simply no evidence—except for the lack of memory—that the victim was unconscious or did not otherwise consent to the intercourse.[223] The AFCCA found this lack of memory could easily be explained by alcoholic blackout and all the other evidence pointed to consensual intercourse.[224]

The second intoxication case reversed for a lack of factual sufficiency is *United States v. Wood*.[225] Private First Class Wood attended a party in the barracks that the victim, a visiting college student,

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[215] United States v. Nicely, No. 36730 (A.F. Ct. Crim. App. Aug. 15, 2007).
[216] *Id.* at *1.
[217] *Id.* at *2.
[218] *Id.*
[219] *Id.* at *2–4.
[220] *Id.* at *4.
[221] *Id.*
[222] *Id.*
[223] *Id.* at *5.
[224] *Id.* This point was made by a defense toxicologist that the described amount of alcohol normally would not lead to an alcohol induced loss of memory. He further testified that, assuming a larger alcohol intake than described, it would still be consistent with a loss of memory rather than a pass out. *Id.* at *4.
[225] United States v. Wood, No. 200900436 (N-M. Ct. Crim. App. Jan. 25, 2010).

was attending.[226] The victim testified that she only had three to four drinks and felt mildly intoxicated that night.[227] In spite of this low level of intoxication, the victim lost her memory for a significant portion of the night, and awoke to PFC Wood on top of her, engaged in intercourse.[228] She further testified that she pushed PFC Wood off of her, and he immediately stopped and left the room.[229] An independent witness testified that he saw the victim getting sick during the night; however, after vomiting, he saw her flirting with PFC Wood in a bed.[230] He further testified that he saw the victim and PFC Wood leave the room together and she was walking without assistance.[231] Private First Class Wood claimed in his statement that the intercourse was consensual and confirmed that at one point, the victim pushed him, and he immediately stopped the intercourse.[232]

Based on the above facts, N-MCCA reversed the case for a lack of factual sufficiency.[233] The court found that the evidence pointed more toward the victim's alcohol-induced blackout rather than unconsciousness.[234] The court specifically cited the victim's willingness to go back to PFC Wood's room, her lack of memory, and the fact that both PFC Wood and the victim agree that PFC Wood immediately terminated the intercourse as soon as the victim pushed him away.[235]

Despite the service appellate courts only reversing two *memoryless victim* cases for a lack of factual sufficiency during the relevant time period, these cases prove to be the most difficult cases to uphold for factual sufficiency, even under a reformed statute.[236] This is typically due to the lack of witnesses as well as the reasonable explanation that the victim may have consented during an alcoholic blackout.[237] With these

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[226] *Id.* at *2.
[227] *Id.* at *3.
[228] *Id.*
[229] *Id.* at *1.
[230] *Id.* at *4.
[231] *Id.*
[232] *Id.* at *5.
[233] *Id.*
[234] *Id.*
[235] *Id.* at *2–3.
[236] *See* United States v. Lamb, No. 20100044 (N-M. Ct. Crim. App. June 19, 2009); United States v. Peterson, No. 200900688 (N-M. Ct. Crim. App. Sept. 21, 2010); United States v. Collins, No. 20100020 (N-M. Ct. Crim. App. Aug. 7, 2009).
[237] *Wood*, No. 200900436, at *4.

difficult fact patterns in mind, Congress undertook reform of the military's rape statute in 2007.

2. Post-2007 Cases

As previously discussed, Congress radically changed Article 120 in 2007. The two biggest changes were subdividing Article 120 into fourteen different offenses with multiple theories of liability for several of the offenses.[238] The second major change was removing "lack of consent" as an element of rape and making it an affirmative defense to both rape and sexual assault.[239] Logically, since the prosecution no longer had to prove "lack of consent," there was also no longer an inference of consent if the victim did not resist.[240] Instead, Congress shifted the burden of proving consent to the defense, which the courts upheld as constitutional in rape by force cases,[241] but unconstitutional in incapacity cases.[242] Removing the inference of consent has made it much more likely the courts will uphold *compliant victim* fact patterns; however, the *memoryless victim* cases remain a prevalent problem even under the 2007 Article 120. Indeed, the service appellate courts have already reversed three cases for a lack of factual sufficiency.

The first two cases the service appellate courts reversed for a lack of factual sufficiency under the 2007 revision of Article 120 arise from the same fact pattern involving a single incapacitated victim.[243] Private Peterson and Pvt Lamb were both convicted of aggravated sexual assault of the victim, PFC KR, one evening in Pvt Peterson's room. Private Peterson invited PFC KR over to his room with Pvt Lamb to have some drinks.[244] Over the course of two hours, PFC KR "had two or three shots of Jack Daniels and six or seven shots or 'mouthfuls' of Jaegermeister."[245] At this point, she remembers very little until she is

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[238] *See* MANUAL FOR COURTS-MARTIAL UNITED STATES pt. IV, ¶ 45a (2008) [hereinafter 2008 MCM].
[239] *Id.*
[240] *Id.* (noting that the instruction that the victim must resist was removed).
[241] United States v. Neal, 67 M.J. 675, 678–79 (N-M. Ct. Crim. App. 2009), *aff'd* 68 M.J. 289 (C.A.A.F. 2010).
[242] United States v. Prather, 69 M.J. 338 (C.A.A.F. 2011).
[243] United States v. Lamb, No. 20100044 (N-M. Ct. Crim. App. June 19, 2009); United States v. Peterson, No. 200900688 (N-M. Ct. Crim. App. Sept. 21, 2010).
[244] *Lamb*, No 20100044, at *2.
[245] *Id.*

awakened by the duty NCO. The duty NCO escorts PFC KR back to her room, where she texts her boyfriend that she was raped.[246]

In reversing the case, the court relied heavily upon a blood test conducted within seven hours of the alleged sexual assault that found no detectable drugs or alcohol in PFC KR's blood.[247] Based on this result, a toxicologist testified in both cases that her blood alcohol content at the time of the alleged rape would have been between .10 and .15 (blood-alcohol content (BAC)), enough to potentially blackout, but not to become unconscious. Additionally, the toxicologists opined that PFC KR was not "passed out" if she was capable of waking up and walking unassisted to her own room within thirty minutes of the alleged rape. These facts, coupled with the victim's lack of memory and the absence of reliable evidence of unconsciousness, led the court to reverse the cases because the evidence did not exclude the possibility of a temporary alcoholic blackout.[248]

The final case overturned for a lack of factual sufficiency is *United States v. Collins* and involves the theory of substantial incapacity as well.[249] The victim, Lance Corporal (LCpl) S, attended a barracks party with her roommate, PFC D.[250] At the barracks party, everyone was "drinking, playing beer pong, and having a good time."[251] At some point during the night, PFC D saw that LCpl S was too drunk and escorted her back to her room and put her to bed. After putting her to bed, PFC D checked up on LCpl S three times. The final time she checked on LCpl S, PFC D found LCpl Collins spooning her, naked from the waist down. Private First Class D gathered some Marines to chase out LCpl Collins and during the course of the events, LCpl S exclaimed that "she felt like a slut, [and] that she never hooked up with guys."[252] In a statement admitted by the prosecution, LCpl Collins claimed that he went into LCpl S's room to retrieve a shirt, saw her sleeping on top of her covers, and the LCpl S "pulled him down on top of her," and they engaged in consensual intercourse.[253] Lance Corporal S claimed that she last

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[246] *Id.*
[247] *Id.* at *3.
[248] *Id.*; *Peterson*, No. 200900688, at *4.
[249] United States v. Collins, No. 20100020 (N-M. Ct. Crim. App. Aug. 7, 2009).
[250] *Id.* at *2.
[251] *Id.*
[252] *Id.* at *3.
[253] *Id.* at *5.

remembered playing beer pong and awoke to LCpl Collins on top of her engaged in intercourse.[254]

Collins is unique among the inapacitated victim because there was a witness who saw the victim asleep or unconscious shortly before the sexual assault as well as shortly after.[255] The N-MCCA relied on several inconsistencies to reverse the sexual assault conviction.[256] First, the court found that the victim undermined her credibility when she lied under oath at the Article 32 hearing about underage drinking during the party.[257] Secondly, the court interpreted the victim's initial reaction "that she felt like a slut" as one of embarrassment and not of a crime. A toxicologist testified in this case as well and, similar to *Lamb* and *Peterson*, opined that LCpl S's estimated BAC was consistent with a blackout and not a passout.[258] Finally, the court found that the trial counsel put undue weight on MRE 413 propensity evidence in his closing argument, evidence that N-MCCA did not find persuasive.[259]

Beyond these three cases, the service courts have not reversed any *compliant victim* cases or *unreliable victim* cases under the 2007 Article 120. The next section will explore the 2007 and 2012 statutory changes in Article 120 and the effects they have had on these three categories of cases.

D. Effect of the 2007 Article 120 Revisions

The 2007 modification to Article 120 divided the single crime of rape into fourteen different offenses with multiple theories of criminal liability under each offense.[260] Beyond the increased number of offenses, the most significant change was removing the element of lack of consent from the crimes of rape and aggravated sexual assault.[261] By removing the element of lack of consent, Congress also eliminated the inference of consent where a victim did not take "such measures of resistance as are

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[254] *Id.* at *4.
[255] *Id.* at *2–3.
[256] *Id.* at *6–7.
[257] *Id.*
[258] *Id.*
[259] *Id.* at *7.
[260] 2006 NDAA, *supra* note 83, at 3262.
[261] *Id.*

called for by the circumstances."[262] Instead of focusing on lack of consent, Congress focused on how the sexual act occurred, whether by "force," by "bodily harm," or upon a "substantially incapacitated" victim.[263] Congress then made consent an affirmative defense and placed the burden upon the defense to prove this defense by a preponderance of the evidence.[264]

1. Effect of 2007 Article 120 on Compliant Victim Cases

Removing lack of consent as an element made the greatest impact upon factual sufficiency analysis for the *compliant victim* fact patterns. Looking first at *Tollinchi*,[265] the CAAF reversed the case relying upon the "inference of consent" if the victim does not take "such measures of resistance as are called for by the circumstances."[266] The CAAF also stated that the government did not disprove the defense of mistake of fact as to consent in this case since the victim did not manifest a lack of consent.[267] Under the 2007 statute, the government no longer has to prove "lack of consent" or overcome an inference of consent if the victim does not reasonably resist. Instead the burden is on the defense to prove consent, or mistake of fact as to consent, by a preponderance of the evidence.[268] With the inference of consent removed, and the burden now upon the defense to prove mistake of fact as to consent, the reasoning for reversing *Tollinchi* is clearly inapplicable under the 2007 Article 120.[269]

Simply showing that the court's reasoning in *Tollinchi* is inapplicable is only the first step in analyzing whether the case would withstand legal sufficiency review under the 2007 Article 120. The next

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[262] 2005 MCM, *supra* note 109, pt. IV, ¶ 45c(1)(b).
[263] There are numerous other charging theories; however, these are the three predominant theories that are charged. 2006 NDAA, *supra* note 83, at 3262.
[264] *Id.*
[265] United States v. Tollinchi, 54 M.J. 80, 83 (C.A.A.F. 2000)
[266] *Id.* at 82 (citing 1995 MCM, *supra* note 203, pt. IV, ¶ 45c(1)(b)).
[267] *Id.* at 83.
[268] *See* United States v. Neal, 68 M.J. 289 (C.A.A.F. 2010) (upholding the shifting of the burden of proving consent to the defense as constitutional).
[269] The test for legal sufficiency is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). Since consent and mistake of fact as to consent are now elements of the defense's affirmative defense, and not essential elements of the prosecution's case, they would not be tested for legal sufficiency review.

step is to analyze whether CAAF would likely reverse *Tollinchi* for different reasons under the 2007 Article 120. Judging by the lack of force applied, and the minimal alcohol involved,[270] the government's most likely theory of criminal liability under the 2007 Article 120 for *Tollinchi* would be aggravated sexual assault by causing bodily harm.[271] This theory requires two elements: a sexual act[272] and bodily harm.[273] The term "bodily harm" is drawn from the definition used in Article 128 assault as "any offensive touching of another, however slight."[274] Both of these elements could be met simply by the act of penetration since both the victim and the boyfriend testified that it was unwelcome.[275] There is a potential argument that Sergeant Tollinchi's actions did not "cause" the victim to engage in a sexual act. However, the undisputed testimony was that the sexual acts were initiated by Sergeant Tollinchi, that the victim "was drunk and afraid," and that "she pushed his penis away" at one point.[276] These undisputed facts would almost certainly meet the low standard of legal sufficiency that "any rational trier of fact could have found the essential elements beyond a reasonable doubt."[277]

Similar to *Tollinchi*, charging the *compliant victim* cases as aggravated sexual assault by causing bodily harm under the 2007 Article 120, would lead the service appellate courts to uphold at least two of the other five *compliant victim* fact patterns.[278] As discussed, all these cases

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[270] *Tollinchi*, 54 M.J. at 81.

[271] Rape by force requires the government prove "action to compel submission of another or to overcome or prevent another's resistance by—the use or threat of a weapon or physical violence, strength, power, or restraint . . . sufficient that the other person could not avoid or escape the sexual conduct." From the record, Sergeant Tollinchi did not use a weapon, physical violence, strength, power, or restraint. *Id.* at 81. Additionally, an incapacitation theory would require the government to prove that the victim was "substantially incapacitated or substantially incapable of—appraising the nature of . . . appraising the nature of . . . or communicating an unwillingness to engage in the sexual act." 2008 MCM, *supra* note 238, pt. IV, 45a.(c)(1)(2). There is nothing in the record to suggest that the victim was anything but coherent, aware of the situation, and capable of communicating. *Tollinchi*, 54 M.J. at 81.

[272] A sexual act is defined as "contact between the penis and the vulva . . . or the penetration, however slight, of the genital opening of another." 2008 MCM, *supra* note 238, pt. IV, ¶ 45a.(t)(1).

[273] *Id.* pt. IV, 45b.(3)(b).

[274] *Compare id*. pt. IV, ¶,45a(t)(8), *with* ¶ 54c(1)(a).

[275] *Tollinchi*, 54 M.J. at 81. The boyfriend testified that victim stated during the intercourse with Sergeant Tollinchi "[s]top him, he's inside of me." *Id*.

[276] *Id*.

[277] Jackson v. Virginia, 443 U.S. 307, 319 (1979).

[278] This is assuming the cases are charged as aggravated sexual assault by causing bodily harm. *See* discussion, *supra* note 297 (discussing why compliant victim fact patterns

relied upon the inference of consent in reversing them for a lack of factual sufficiency.[279] Without this inference of consent, all the government would need to prove is a sexual act occurred by "any offensive touching . . . , no matter how slight."[280]

The two cases that would almost certainly withstand factual sufficiency analysis under the 2007 statute are *Leak* and *Inlow*. In the *Leak* case, ACCA found that the victim resisted SSG Leak by wrestling with him and verbally objecting to his advances, but did not take sufficient measures as called for by the circumstances.[281] These verbal and physical protests could certainly be sufficient to show that the sexual act was an "offensive touching . . . no matter how slight."[282] Indeed, ACCA faced a similar fact pattern under the 2007 Article 120 in *United States v. Alston* and upheld an aggravated sexual assault conviction by causing bodily harm where the victim tried to prevent her pants from being pulled down, but put up little other resistance.[283] Additionally, under an aggravated sexual assault by bodily harm theory, the *Inlow* case would likely be upheld for factual sufficiency.[284] In that case, the court affirmed a conviction for rape the previous night and only reversed the rape from the next day due to the victim's lack of resistance.[285] Without the court drawing an inference of consent from a lack of resistance, the court would almost certainly find sexual acts by a rapist of a victim within twenty-four hours of the rape as offensive touching.

The final three cases, *Spicer*,[286] *Simpson*,[287] and *Bell*,[288] would all be much closer decisions on whether they are factually sufficient under an aggravated sexual assault by causing bodily harm theory. In all three cases, the victims were never threatened and merely complied with instructions given by a person in a more powerful position than the

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should be charged as aggravated sexual assault by causing bodily harm rather than rape by force or aggravated sexual assault of a substantially incapacitated person).

[279] *See* discussion, *supra* Part III.C.1.b.

[280] 2008 MCM, *supra* note 238, pt. IV, ¶45a(t)(8).

[281] United States v. Leak, 58 M.J. 869, 878 (A. Ct. Crim. App. 2003).

[282] 2008 MCM, *supra* note 238, pt. IV, ¶ 45a(t)(8).

[283] United States v. Alston, No. 20080504 (A. Ct. Crim. App. 2009) *aff'd* 69 M.J. 214 (C.A.A.F. 2010).

[284] United States v. Inlow, No. 20070239 (A. Ct. Crim. App. June 15, 2009).

[285] *Id.* at *10.

[286] United States v. Spicer, No. 20100241 (N-M. Ct. Crim. App. 2009).

[287] United States v. Simpson, 55 M.J. 674 (A. Ct. Crim. App. 2001).

[288] United States v. Bell, No. 20060845 (A. Ct. Crim. App. Dec. 31, 2008).

victim.[289] The service appellate courts could simply affirm these cases as factually sufficient since the victim's testimony established that the touching was not wanted and therefore "offensive."[290] Alternatively, there is an argument that it was not the bodily harm that "cause[d the victim] to engage in a sexual act," but her compliance with the verbal instructions, and verbal instructions do not constitute bodily harm.[291] Finally, the court could also interpret that these were not offensive touching beyond a reasonable doubt since the victim never manifested displeasure at the touching throughout the entirety of the sexual act. Either way the court decides on cases similar to these, they have wide latitude in their factual sufficiency analysis, and the case is much more likely to be upheld than under the pre-2007 Article 120.

2. Effect of 2007 Article 120 on Unreliable Victim Cases

Beyond, the compliant victim cases, the 2007 Article 120 would likely have little effect on the *unreliable victim* cases. In both *Parker*[292] and *Foster*,[293] the court focused on the lack of corroboration, the motive to fabricate, and the overall unreliability of the victims. In reversing the cases for a lack of factual sufficiency, the court did not rely on the inference of consent, but rather questioned whether the sexual act occurred at all.[294] With the court unconvinced that the sexual act occurred, it would be very unlikely that the service courts would uphold these convictions under any statutory scheme.[295]

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[289] While this is a similar fact pattern to *Tollinchi*, the difference is that they were all reversed for a lack of factual sufficiency rather than legal sufficiency, so it would be a much closer call on whether they are upheld due to the higher standard of factual sufficiency over legal sufficiency.

[290] 2008 MCM, *supra* note 238, pt. IV, ¶ 45a(t)(8).

[291] *Id.* ¶ 45a(c)(2).

[292] United States v. Parker, 54 M.J. 700 (A. Ct. Crim. App. 2001).

[293] United States v. Foster, No. 200101955 (N-M. Ct. Crim. A. Feb. 17, 2009).

[294] *Parker*, 54 M.J. at 708; *Foster*, No. 200101955, at *5.

[295] Both rape and aggravated sexual assault require the element that a sexual act occurred. 2008 MCM, *supra* note 238, pt. IV, ¶ 45a.(a), (c). It would be difficult to imagine any statutory scheme of charging rape or sexual assault would not require proof beyond a reasonable doubt that a sexual act occurred.

3. Effect of 2007 Article 120 on Memoryless Victim Cases

The 2007 Article 120 created uncertainty in the *memoryless victim* fact patterns. First, as discussed, CAAF held that it was unconstitutional to place the burden on the defense to prove consent by a preponderance of the evidence in substantial incapacity cases since the defense would have to affirmatively disprove one of the government's elements, capacity, in order to prove consent.[296]

Second, the 2007 Article 120 introduces the term "substantially incapacitated" to account for an unconscious or sleeping victim; however, the statute does not provide a definition of this term.[297] This leaves it to the judiciary to determine the definition and the members to interpret.[298] The result is that both the prosecution and the defense bring in toxicologists to explain the difference between a "passout" and a "blackout" and what is more likely under the given facts.[299] Looking at the observed blood alcohol content, the description of the number of drinks consumed, and the observed actions of the victim, the toxicologist usually comes to the conclusion that the person was not passed out, and that the described actions are consistent with being blacked out.[300]

This uncertainty is not new, but a continuance of the pre-2007 Article 120 when the government had to prove that the victim was "unable to resist because of the lack of mental or physical faculties."[301] Neither definition is a model of clarity, and both leave room for a toxicologist to inject reasonable doubt into a case through the description of a black out versus a pass out.

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[296] *See* United States v. Prather, 69 M.J. 338 (C.A.A.F. 2011).
[297] *See* 2008 MCM, *supra* note 238, pt. IV, ¶ 45a(c)(2).
[298] *See generally id*. pt. IV, ¶ 45a (leaving out any definition of "substantial incapacity").
[299] *See* United States v. Collins, No. 20100020 (N-M. Ct. Crim. App. Aug. 7, 2009); United States v. Lamb, No. 20100044 (N-M. Ct. Crim. App. June 19, 2009); United States v. Peterson, No. 200900688 (N-M. Ct. Crim. App. Sept. 21, 2010) (expert toxicologist opined in all three cases that the victim's blood alcohol content would be significantly below the level expected for a pass out and consistent with a black out).
[300] *E.g.*, *Collins*, No. 20100020, at *4 (testifying that a "passed out" person could not awaken, dress herself, and play video games a short time after the alleged assault).
[301] 2005 MCM, *supra* note 109, pt. IV, ¶ 45c(1)(b).

IV. The 2012 Reforms to Article 120 and the Likely Effect of Factual Sufficiency Review

A. The Structure of the 2012 Article 120

The 2012 Article 120 continued part of the statutory reform ideas of the 2007 Article 120; however, it also drew away from the unconstitutional portions of the statute.[302] The statute continued the subdivision of sexual crimes by creating an Article 120, 120a, 120b, and 120c with multiple theories of criminal culpability under each Article.[303] Additionally, the 2012 Article 120 steered away from the element of "lack of consent" in rape and most sexual assault theories; however, it reintroduced the element of consent into sexual assault by causing bodily harm.[304] Finally, the 2012 statute did not provide an inference of consent when the victim did not resist as called for by the circumstances.[305]

The largest difference between the 2007 Article 120 and the 2012 Article 120 is in how the 2012 statute deals with consent in rape and sexual assault offenses. The 2012 Article 120 eliminates the consent burden-shifting scheme created by the 2007 Article 120,[306] and instead, handles the issue of consent differently in each charging theory. First, for the offense of rape by "using force causing or likely to cause death or grievous bodily harm," consent is neither an element of the crime, nor a defense.[307] The drafters removed consent as a defense in this theory by affirmatively stating in the definition of consent that a person cannot

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[302] *See* United States v. Medina, 69 M.J. 462 (C.A.A.F. 2011); United States v. Prather, 69 M.J. 338 (C.A.A.F. 2011) (holding that placing the burden upon the accused to prove consent is unconstitutional in substantial incapacity cases since consent because the defense would have the burden to affirmatively disprove the government's element of incapacity).

[303] Article 120 addresses "Rape and Sexual Assault Generally; Article 120a continues to address "Stalking"; Article 120b now covers "Rape and Sexual Assault of a Child"; and Article 120c covers "Other Sexual Misconduct," such as indecent viewing, indecent exposure, or pandering, or prostitution. 2012 NDAA, *supra* note 88, § 541. For purposes of portions of this article, "Article 120" will refer only to the first part of the statute including rape and sexual assault.

[304] *Id*. The 2012 statute defines bodily harm as "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." *Id*.

[305] *Compare* 2012 NDAA, *supra* note 88, § 541(b), *with* 2005 MCM, *supra* note 109, pt. IV, ¶ 45c(1)(b).

[306] *See* Hoege, *supra* note 84 (describing the burden-shifting scheme of the 2007 Article 120).

[307] 2012 NDAA, *supra* note 88, § 541.

consent to force likely to cause grievous bodily harm.[308] Second, for the offense of rape by "using unlawful force," the statute is silent on whether or not consent is a defense.[309] The statute does provide a definition of "unlawful force" as "an act of force done without legal justification or excuse."[310] In interpreting this statute, military judges treat consent as evidence of whether or not the force was "unlawful,"[311] rather than treating it as an affirmative defense, similar to Article 128, with the prosecution bearing the burden of disproving it beyond a reasonable doubt.[312]

For the sexual assault offenses,[313] consent is not a defense since it is incorporated into the definitions of the crimes. As discussed, the definition of "bodily harm" now explicitly includes "any nonconsensual sexual act or nonconsensual sexual contact," in its definition of "offensive touching."[314] This means in a prosecution for sexual assault by causing bodily harm, the prosecution likely has to prove that the sexual act or contact was nonconsensual beyond a reasonable doubt since consent is built into the definition.[315] While the burden of proving "nonconsensual contact" is now on the government, the defense of mistake of fact as to consent is still open to the defense.[316]

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[308] This is drawn from Article 128, assault, case law. *See* United States v. Serrano, 51 M.J. 622, 624 (N-M. Ct. Crim. App. 1999).

[309] 2012 NDAA, *supra* note 88, § 541.

[310] *Id.*

[311] *See* Clark, *supra* note 84, at 11 (arguing that evidence of consent should not be used as a defense, but as evidence of whether or not the prosecution proved the offense).

[312] "The general rule is that while consent may defeat a charge of simple assault and battery, it will not excuse assault that produces death or serious injury." United States v. Bygrave, 40 M.J. 839, 842 (N-M. Ct. Crim. App. 1994), *aff'd* 46 M.J. 491 (C.A.A.F. 1997).

[313] The term "sexual assault offenses" refers to the most likely charged offenses of sexual assault by causing bodily harm, and the two incapacitation theories of sexual assault. 2012 NDAA, *supra* note 88, § 541.

[314] *Id.*

[315] Looking at the term "offensive touching," it seems to imply an element of nonconsent to it. If a person consents to a touching, then it would not be offensive. *Id.* The two exceptions commonly seen in case law are when a sexual act was consensual at the time, but later became an offensive touching is when the accused does not disclose that he has a sexually transmitted disease, such as HIV. This fits under the same exception mentioned in the crime of rape by force likely to cause death or grievous bodily harm, so consent would not be at issue. *See* United States v. Dumford, 28 M.J. 836 (A.F.C.M.R. 1989), *aff'd*, 30 M.J. 137 (C.M.A. 19990). The second exception would be when the accused exceeds the boundaries of consent. *See* United States v. Arab, 55 M.J. 508 (A. Ct. Crim. App. 2001) (sadomasochistic activities caused extreme pain and injury).

[316] 2008 MCM, *supra* note 238, R.C.M. 917(j).

Additionally, for the incapacitation sexual assaults, the statute explicitly states in the definition of consent that "[a] sleeping, unconscious, or incompetent person cannot consent."[317] This places the burden on the government to prove beyond a reasonable doubt that the victim was sleeping or otherwise unconscious and leaves consent as evidence that the victim was not unconscious or sleeping. The second charging theory under the incapacitation fact pattern is when an accused "commits a sexual act upon another person when the other person is incapable of consenting . . . due to . . . drug, intoxicant, or . . . a mental disease or defect."[318] This theory seems to best cover sexual assaults where the government has strong toxicological evidence that the victim was not competent to consent. It explicitly places the burden on the prosecution to prove that the victim was incapable of consenting due to one of several delineated factors.[319] The incapacitation sexual assault theories also place the burden upon the prosecution to prove that there was no mistake of fact as to consent by requiring the government to prove the accused "knew or reasonably should have known" the victim's incapacitated state.[320] By placing the burden on the government to prove the victim was asleep or otherwise could not consent and that the accused "knew or should have known" this fact, the incapacitation sexual assaults eliminate the affirmative defenses of consent and mistake of fact as to consent and place the burden upon the government to prove in its case in chief that the victim did not provide competent consent.

B. Likely Effect of the 2012 Revision on Factual and Legal Sufficiency Review

The 2012 revision of Article 120 is less likely than the 2007 Article 120 to uphold *compliant victim* cases; however, it will be more likely to uphold *memoryless victim* cases for factual sufficiency analysis. While the 2012 statute is not as effective as the 2007 statute at upholding *compliant victim* cases, it is more effective than the pre-2007 Article 120. The primary improvement over the pre-2007 statute is the continued elimination of the "inference of consent" if the victim does not resist as the circumstances warrant.[321]

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[317] 2012 NDAA, *supra* note 88, § 541.
[318] *Id.*
[319] *Id.*
[320] This is the government's counter to a mistake of fact defense that the accused knew or should have known the actual fact. 2008 MCM, *supra* note 238, R.C.M. 917(j).
[321] *See* discussion *supra* Part III.D.1.

First, looking at the *compliant victim* fact patterns, the 2012 statute is more likely to uphold cases than is the pre-2007 statute. As discussed, the most likely theory for charging an accused under a compliant victim fact pattern is as sexual assault by causing bodily harm.[322] This is due to general compliant nature of the victims and the minimal force found in these cases. Cases where the victim physically resists, such as *Leak*[323] and *Inlow*,[324] would almost certainly be upheld without the inference of consent provided in the pre-2007 statute. In both of these cases, the court acknowledged there was clear evidence of prior physical resistance demonstrating the advances were unwanted; however, the court relied on the inference of consent in determining that the resistance was not reasonable.[325] If the court changed its analysis to determine whether or not the touching was "an offensive touching . . . however slight,"[326] not whether the resistance was reasonable, it seems fairly certain the cases would pass factual sufficiency analysis.

However, *compliant victim* cases are less likely to pass factual sufficiency analysis under the 2012 statute than they were under the 2007 statute. Unlike the burden-shifting of the 2007 statute, the government must disprove the defense of mistake of fact as to bodily harm if raised by the defense, including the language of any "nonconsensual contact."[327] Since the burden of disproving mistake of fact as to bodily harm is on the government, it becomes an essential element subject to legal sufficiency review.[328] In *Tollinchi*, the CAAF cited mistake of fact

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[322] *See* discussion, *supra* note 297.

[323] United States v. Leak, 58 M.J. 869 (A. Ct. Crim. App. 2003) (victim physically resisted, but the courts did not believe she overcame the inference of consent because she demonstrated on a previous occasion that she could resist physically resist the accused's sexual advances).

[324] United States v. Inlow, No. 20070239 (A. Ct. Crim. App. June 15, 2009) (court did not believe that sexual intercourse the morning after a rape occurred was rape because the victim previously fought off the accused when she was drunk).

[325] *Leak*, 58 M.J. at 871; *Inlow*, No. 20070239, at *4.

[326] This is the standard for sexual assault by causing bodily harm from the 2012 statute. 2012 NDAA, *supra* note 88, § 541.

[327] The 2007 statute placed the burden of proving mistake of fact as to consent on the defense; therefore, it was not part of the essential elements subject to legal sufficiency review. *See* 2008 MCM, *supra* note 238, R.C.M. 916(j). With this burden no longer on the defense, it will again be an essential element for the government to disprove if reasonably raised by the facts in sexual assault by causing bodily harm cases. *See* United States v. Tollinchi, 54 M.J. 80, 83 (C.A.A.F. 2000) (holding the government failed to disprove mistake of fact as to consent in addition to not overcoming the inference of consent).

[328] *Tollinchi*, 54 M.J. at 83.

as to consent as a secondary basis for reversing the case for legal insufficiency, since the victim complied without objection to all of Sergeant Tollinchi's instructions.[329] The cases of *Spicer*,[330] *Simpson*,[331] and *Bell*[332] also involved victims who complied with the accused's instructions and did not physically or verbally resist. The service courts relied on the inference of consent in reversing these cases initially; however, it is also possible that the service courts could have reversed because of a mistake of fact as to consent defense because the victims were all compliant and did not resist. Alternatively, it is possible that the service courts would not believe that it is not reasonable for individuals in powerful position to believe their subordinates would silently consent to their sexual advances under the given circumstances.[333]

Looking at the *memoryless victim* cases, the 2012 statute is more likely to uphold these cases than the 2007 statute or the pre-2007 statute. The 2007 Article 120 required the prosecution to prove that the victim was "substantially incapacitated" or "substantially incapable of . . . appraising the nature of the sexual act . . . declining participation . . . or communicating unwillingness."[334] In practice, this has been charged as the victim being "substantially incapacitated" and has led to the courts to spend a lot of time analyzing the victim's blood alcohol content, her ability to walk after the event, and her ability to communicate and complete other tasks after the event.[335] As discussed, the 2012 Article 120 allows the prosecution to charge sexual assault upon a person who is "asleep, unconscious, or otherwise unaware."[336] If the victim's blood alcohol content and actions are not consistent with unconsciousness, the government can proceed on a theory that she was asleep and introduce experts to talk about alcohol's effect on sleep and responsiveness.[337] By

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[329] *Id.*
[330] United States v. Spicer, No. 20100241 (N-M. Ct. Crim. App. 2009).
[331] United States v. Simpson, 55 M.J. 674 (A. Ct. Crim. App. 2001).
[332] United States v. Bell, No. 20060845 (A. Ct. Crim. App. Dec. 31, 2008).
[333] *Spicer*, No. 20100241, at *5–6 (stepchild does not resist step father's advances); *Simpson* 55 M.J. at 699–710 (Soldier under instruction does not resist ordnance instructor's advances); *Bell*, No. 20060845, at *2–5 (junior Soldier does not resist advances of her first sergeant).
[334] 2008 MCM, *supra* note 238, ¶ 45a(c)(2).
[335] *See* United States v. Collins, No. 20100020 (N-M. Ct. Crim. App. Aug. 7, 2009); United States v. Lamb, No. 20100044 (N-M. Ct. Crim. App. June 19, 2009); United States v. Peterson, No. 200900688 (N-M. Ct. Crim. App. Sept. 21, 2010).
[336] 2012 NDAA, *supra* note 88, § 541(b).
[337] *See, e.g.*, Timothy Roehrs & Thomas Roth, *Sleep, Sleepiness, and Alcohol Use*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, http://pubs.niaaa.nih.gov/publica-

changing the tenor of the argument from unconsciousness to alcohol-induced deeper sleep, it is certainly possible that it could change the court's analysis in the *memoryless victim* cases.[338]

Finally, as discussed in both the pre-2007 Article 120 and the 2007 revision, cases such as *Foster*[339] and *Parker*[340] will likely continue to be overturned, no matter the statute. In both cases the court focused on the lack of corroboration, the motive to fabricate, and the overall unreliability of the victims. In reversing the cases for a lack of factual sufficiency, the court did not rely on the inference of consent, but rather questioned whether the sexual act occurred at all.[341] With the court unconvinced that the sexual act occurred, there is simply no manner that these cases could be upheld under the 2012 Article 120 without removing the service court's ability to review cases for factual sufficiency.[342]

V. Conclusion

By its very nature, Article 120 is going to continue to be a controversial statute with a delicate balance between the rights of the victim and the accused.[343] Historically, the balance fell heavily in the accused's favor with numerous presumptions falling against the victim.[344] Over the past sixty years, the balance has begun to shift with the Executive Branch implementing numerous rules of evidence in the victim's favor and Congress twice changing the statute to encompass

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ions/arh25-2/101-109.htm (describing how alcohol has a sedative effect and initially causes a person to fall asleep faster, but disturbs the second half of the person's sleep period).

[338] Of course, the defense still has a strong argument that the victim was in "black time" and this accounts for the lack of memory and was not disproven beyond a reasonable doubt. Only time and future case law will tell the effectiveness of this modification in the statute.

[339] United States v. Foster, No. 200101955 (N-M. Ct. Crim. App. Feb. 17, 2009).

[340] United States v. Parker, 54 M.J. 700 (A. Ct. Crim. App. 2001).

[341] *Parker*, 54 M.J. at 708; *Foster*, No. 200101955, at *5.

[342] Both rape and sexual assault require the element of a sexual act. 2012 NDAA, *supra* note 88, § 541.

[343] Michael Doyle & Marissa Taylor, *Bureaucracy has Blossomed in Military's War on Rape*, MCCLATCHY NEWSPAPERS, Nov. 28, 2011, *available at* http://www.mcclatchydc.com/2011/11/28/131524/bureaucracy-has-blossomed-in-militarys.html (describing how the military has taken a lot of action "[u]nder the political gun" and that "[s]ome works" and "[s]ome falls short")

[344] *See* discussion *supra* Part II.

significantly more crimes as sexual crimes and taking away a presumption of consent. These changes, coupled with an increase in the percentage of women in the military, and increased congressional scrutiny, have led to a significant increase in the number of Article 120 convictions and appeals.

While the 2007 modification of Article 120 created constitutional due process problems in certain circumstances, it also decreased the likelihood a case will be reversed for a lack of factual sufficiency. This is due primarily to Congress removing the presumption of consent from the statute when the victim does not resist and instead placing the burden of proving consent on the accused.

As of the writing of this article, the 2012 modification of Article 120 has yet to be tested on appeal, but it appears to solve the significant due process issues of the 2007 version. It deals with consent in numerous different fashions throughout the statute, making it inapplicable in some situations and part of the definition of the offense in other situations. Like the 2007 statute, there is no presumption of consent if the victim does not resist, so the *compliant victims* cases will withstand factual sufficiency analysis much better than under the pre-2007 statute. Additionally, the 2012 modification allows the government to charge the *memoryless victim* fact patterns as asleep rather than "substantially incapacitated," which could make them much more likely to withstand appeal for factual sufficiency. Overall, while the 2007 modification of Article 120 created constitutional due process issues, it also made Article 120 much more likely to withstand factual sufficiency review. The 2012 amendments likely cure the due process issues, while also continuing the trend of making Article 120 convictions more likely to withstand factual sufficiency review.

THE PEN AND THE SWORD: THE PEOPLE'S REPUBLIC OF CHINA'S EFFORT TO REDEFINE THE EXCLUSIVE ECONOMIC ZONE THROUGH MARITIME LAWFARE AND MILITARY ENFORCEMENT

LIEUTENANT COMMANDER ROBERT T. KLINE*

"But more wonderful than the lore of old men and the lore of books is the secret lore of ocean."[1]

I. Introduction

Lieutenant Shane Osborn, USN, thought he was about to die.[2] At the controls of a U.S. Navy EP-3 Aries,[3] Osborn and his co-pilot, Lieutenant

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[1] H. P. LOVECRAFT, H.P. LOVECRAFT: THE COMPLETE FICTION 60 (2011).

[2] *Reliving the U.S. Spy Plane Crisis*, MILITARY.COM, http://www.military.com/Content/MoreContent?file=FL_pilotep3_041701 (last visited Sept. 9, 2013).

[3] *United States Navy Fact File*, NAVY.MIL, http://www.navy.mil/navydata/fact_display.asp?cid=1100 tid=1000&ct=1 (last visited Sept. 9, 2013).

> Four-engine turboprop signals intelligence (SIGINT) reconnaissance aircraft. The EP-3E ARIES II (Airborne Reconnaissance Integrated Electronic System II) is the Navy's only land-based signals intelligence (SIGINT) reconnaissance aircraft. The 11 aircraft in the Navy's inventory are based on the Orion P-3 airframe and provide fleet and theater commanders worldwide with near real-time tactical SIGINT. With sensitive receivers and high-gain dish antennas, the EP-3E exploits a wide range of electronic emissions from deep within targeted territory. During the 1990s twelve P-3Cs were converted to EP3-E ARIES II to replace older versions of the aircraft. The original ARIES I aircraft were converted in the late 1960s and early 1970s. The last EP-3E ARIES II aircraft was delivered in 1997. EP-

Junior Grade Jeffery Vignery, fought desperately to regain control of their severely damaged aircraft as it plunged toward the Pacific Ocean.[4] In the midst of a brutal 8,000 foot inverted dive, Osborn instructed the rest of the twenty-four member crew to prepare to bailout.[5] While Vignery sent out repeated distress calls, Osborn realized that were he able to steady the plane enough so that the crew could bailout, it would not be possible for him to leave the controls unmanned long enough to escape himself.[6] A routine reconnaissance mission had just turned into a death sentence.

Osborn and his crew took off from Kadena Air Base, Okinawa, just before dawn on April 1, 2001.[7] Their assigned mission was to fly a "reconnaissance track in international air space south of China's Hainan Island and north of the Philippines."[8] It was a standard mission that had been performed in one form or another by the U.S. Navy for several years.[9] Included within this routine was the expectation that a pair of Chinese J-8 Finback military jets would intercept the EP-3 upon its acquisition by Chinese radar.[10] This, too, was common practice.[11] These intercepts, however, had become increasingly aggressive since December 2000.[12] In fact, just one week earlier, Chinese fighter jets approached Osborn's aircraft in what he called a harassing manner.[13]

As the nine-hour mission wore on, it appeared that this flight might prove to be the exception. The crew had seen no sign of Chinese military aircraft upon entering the airspace over the South China Sea. Likewise, no sign of Chinese military aircraft appeared on radar during

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> 3Es have been heavily engaged in reconnaissance in support of NATO forces in Bosnia, joint forces in Korea and in Operation Southern Watch, Northern Watch, and Allied Force.

[4] *Lt. Shane Osborn: Looking at a Miracle*, 20 HISTORY.NAVY.MIL, http://www.history.navy.mil/nan/backissues/2000s/2003/so03/osborn.pdf (last visited Jan. 30, 2012).
[5] *Reliving the U.S. Spy Plane Crisis*, *supra* note 2.
[6] *Id.*
[7] SHANE OSBORN, BORN TO FLY: THE UNTOLD STORY OF THE DOWNED AMERICAN RECONNAISSANCE PLANE, at v (2001).
[8] *Id.* at 8.
[9] *Id.*
[10] *Lt. Shane Osborn: Looking at a Miracle*, *supra* note 4.
[11] OSBORN *supra* note 7, at 8.
[12] *Rumsfeld Complains of Harassment by Chinese Pilot*, ABCNEWS.GO.COM, http://abcnews.go.com/International/story?id=81231&page=1#.Txm-LXLQc_N (last visited Sept. 26, 2013).
[13] OSBORN *supra* note 7, at 80.

the majority of their electronic surveillance mission.[14] Just ten minutes before finishing their final sweep and beginning the return trip to Kadena, the Chinese jets appeared.[15] A pair of J-8 Finbacks approached the EP-3, which was flying at an altitude of 22,500 feet at approximately 180 knots.[16] At first seemingly content to trail at a safe distance, the Finbacks soon changed tactics and closed, at times, to within 10 feet of Osborn's aircraft.[17] Such close proximity between aircraft is always exceedingly dangerous, but in this case the difference in aircraft capability increased the risk of collision exponentially. The Finback is a fighter jet designed to operate at speeds far greater than the EP-3's 180 knots.[18] In order for it to parallel the EP-3, the Finback had to slow down immensely, thus severely reducing its maneuverability.[19]

The Finback pulled up just under Osborn's left wing.[20] In an effort to slow down further, the Chinese pilot, Wang Wei, pulled the nose of his aircraft up slightly.[21] He fatally miscalculated the distance between the two aircraft. The main body of the fighter collided with the EP-3's number one rotary engine.[22] The EP-3's propellers cut through the fuselage of the Chinese jet, severing it in half.[23] The jet's higher, incoming velocity caused its forward section to spin up and across the nose of the EP-3.[24] The impact sheared the EP-3's nose cone clean off.[25] The remaining half of the fighter skipped across and underneath the EP-3 toward its right wing, barely avoiding both engines.[26] The collision instantly forced Osborn's aircraft into an inverted dive toward the Pacific Ocean.[27]

Through a sterling display of piloting excellence, Osborn and Vignery managed to pull the critically damaged aircraft out of its dive.[28]

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[14] *Lt. Shane Osborn: Looking at a Miracle*, *supra* note 4.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Reliving the U.S. Spy Plane Crisis*, *supra* note 2.
[19] *Id.*
[20] *Lt. Shane Osborn: Looking at a Miracle*, *supra* note 4.
[21] *Rumsfeld Complains of Harassment by Chinese Pilot*, *supra* note 12.
[22] OSBORN *supra* note 7, at 112.
[23] *Lt. Shane Osborn: Looking at a Miracle*, *supra* note 4.
[24] *Id.*
[25] OSBORN *supra* note 7, at 117.
[26] *Lt. Shane Osborn: Looking at a Miracle*, *supra* note 4.
[27] *Id.*
[28] OSBORN *supra* note 7, at 116–22.

Knowing that it would be impossible to keep the EP-3 in the air long enough to reach Kadena, Osborn evaluated his unenviable options.[29] He could either attempt to ditch the aircraft in the water or request an emergency landing on the Chinese island of Hainan.[30] Despite repeatedly requesting permission to land via the radio and failing to receive a response, Osborn chose to attempt an emergency landing on Hainan.[31] He succeeded and saved the life of every member of his crew.[32]

The collision and resulting emergency landing proved to be an intelligence coup for China. The EP-3 Aries is designed for electronic surveillance.[33] As such, it contained equipment and technology considered highly sensitive by the U.S. Government; thus, the United States strongly demanded that the aircraft was to be considered sovereign territory.[34]

Various accusations and justifications for the events leading up to the incident flowed back and forth across the Pacific.[35] The Chinese government argued, at various times, that the EP-3 was flying in Chinese airspace.[36] The United States adamantly disputed China's claim, as it stated that its aircraft was performing lawful operations well within international airspace boundaries when the Chinese Finback veered into it.[37] Also, while not explicitly stating so at the time, China disputes the

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[29] *Frontline Interview with Lt. Shane Osborn*, PBS.ORG, http://www.pbs.org/wgbh/pages frontline/shows/china/interviews/osborn.html (last visited Sept. 26, 2013).

[30] *U.S. Spy Plane, Chinese Fighter Collide*, CNN.COM, http://articles.cnn.com/2001-04-01/us/us.china.plane.02_1_spy-plane-chinese-fighter-chinese-island?_s=PM:US (last visited Sept. 26, 2013).

[31] OSBORN *supra* note 7, at 122.

[32] *U.S. Spy Plane, Chinese Fighter Collide*, *supra* note 30. While the U.S. aircrew did not suffer any fatalities, the Chinese fighter pilot, Wang Wei, lost his life when his jet crashed into the ocean.; *See also Jiang Gives Missing Pilot New Honor*, CNN.COM, http://articles.cnn.com/2001-04-17/world/china.pilot_1_new-honor-grant-honors-wang-wei?_s=PM:asiapcf (last visited Feb. 3, 2012) (China's Prime Minister conferred upon Wang Wei the honorific, Guardian of the Sea and Sky. "The [Chinese] Navy has already made 33-year-old Wang, a 'revolutionary martyr', an honor designated for communist party members, soldiers and police officers killed in the line of duty.").

[33] *United States Navy Fact File*, NAVY.MIL, http://www.navy.mil/navydata/fact_display.asp?cid=1100&tid=1000&ct=1 (last visited Sept. 26, 2013).

[34] *U.S. Chides China for Holding Spy Plane Crew*, CNN.COM, http://archives.cnn.com/2001/WORLD/asiapcf/east/04/02/china.aircollision.03/ (last visited Nov. 26, 2011).

[35] *Who Caused the Crash?*, BBC.CO.UK, http://news.bbc.co.uk/2/hi/asia-pacific/1260290.stm (last visited Sept. 26, 2013).

[36] *Id.*

[37] *Id.*

United States' contention that operations such as the EP-3's surveillance mission are lawful under the United Nations Convention on the Law of the Sea (UNCLOS).[38]

Despite appearances, however, the true origin of this dispute lies not in an argument over sovereignty of airspace, international or domestic, or even the operations allowed within each, but in one of sovereign rights over water, specifically the South China Sea. The harassment of the EP-3 signaled a marked escalation by China in its attempt to limit foreign maritime (and aviation) traffic within the South China Sea beyond established international legal norms.[39]

For the past half-century, the South China Sea has served as a source of territorial and maritime sovereignty controversy for several nations.[40] Differing national interpretations of island ownership and attendant maritime regimes lie at the heart of the issue.[41] Foremost among these positions is that taken by the People's Republic of China as it asserts full territorial sovereignty over all islands, reefs, atolls, and shoals[42] within an area known as the "nine-dotted line."[43] Most controversial, however, is China's claim to sovereignty over the ocean waters within this area as being a part of its "historic waters."[44] Effectively creating an expansive Exclusive Economic Zone (EEZ), China asserts that its claim to these waters entitles it to a greater ability to restrict certain types of foreign vessel activity than otherwise allowed under customary international law (CIL) and UNCLOS to which it is a signatory.[45] This position is

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[38] Yu Zhirong, *Jurisprudential Analysis of the U.S. Navy's Military Surveys in the Exclusive Economic Zones of Coastal Countries*, *in* Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons, 7 NAVAL WAR C. MAR. STUD. INST. 37, 43 (Naval War College Press, 2010).

[39] *U.S. Chides China for Holding Spy Plane Crew*, *supra* note 34.

[40] Li Jinming & Li Dexia, *The Dotted Line on the Chinese Map of the South China Sea: A Note*, 34 OCEAN DEV & INT'L L. 287, 287–95 (2003).

[41] Robert Smith, *Maritime Delimitation in the South China Sea: Potentiality and Challenges*, 41 OCEAN DEV & INT'L L. 214, 214–36 (2010).

[42] For purposes of clarity and brevity, the term "island" shall encompass islands, reefs, atolls, and shoals unless otherwise specified.

[43] Hasjim Djalal, *Conflicting Territorial and Jurisdictional Claims in South China Sea*, 7 THE INDON. Q., 49, 52 (1979). For the purpose of clarity, the tern "U-shaped line" will be used instead of "nine-dotted line" or "eleven-dotted line" unless required for historical accuracy.

[44] Zou Keyuan, *Historic Rights in International Law and in China's Practice*, 32 OCEAN DEV & INT'L L., 149, 149–68 (2001).

[45] *Chronological Lists of Ratifications of Accessions and Successions to the Convention and the Related Agreements as of 03 June 2011*, UN.ORG, http://www.un.org/depts/los/

contentious and has led to brief armed conflicts with neighboring nations as the South China Sea,[46] in addition to its high strategic value, is believed to have enormous economic resources in the form of oil and natural gas.[47]

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reference_files/chronological_lists_of_ratifications.htm (last visited Sept. 26, 2013). China ratified the Convention on June 7, 1996. It was the ninety-second State to do so. Although it considers UNCLOS to be binding customary international law, the United States has not ratified the treaty.

[46] MYRON H. NORDQUIST, & JOHN NORTON MOORE, SECURITY FLASHPOINTS: OIL, ISLANDS, SEA ACCESS AND MILITARY CONFRONTATION 141–42 (1998). Vietnam occupied various islands within the Paracel chain from the 1950s to 1974 when a naval battle with China ended their physical presence on the islands. *See also China and Vietnam: Clashing Over an Island Archipelago*, TIME.COM, http://www.time.com/time/world/article/0,8599,1953039,00.html (last visited Sept. 26, 2013). In 1988, a brief naval battle between Vietnam and China resulted in the deaths of seventy Vietnamese sailors.

[47] *South China Sea Energy Data, Statistics, and Analysis*, EIA.GOV, http://www.eia.gov/cabs/South_China_Sea/Full.html (last visited Sept. 26, 2013). Per the U.S. Energy Information Administration, "[t]he focus of most attention regarding the South China Sea's (SCS) resources has been on hydrocarbons, especially oil. Oil reserve estimates for the entire SCS region vary. One Chinese estimate suggests potential oil resources as high as 213 billion barrels of oil (bbl). A 1993/1994 estimate by the U.S. Geological Survey estimated the sum total of discovered reserves and undiscovered resources in the offshore basins of the SCS at 28 billion bbl. The fact that surrounding areas are rich in oil deposits has led to speculation that the Spratly Islands could be an untapped oil-bearing province. There is little evidence outside of Chinese claims to support the view that the region contains substantial oil resources. One of the more moderate Chinese estimates suggested that potential oil resources (not proved reserves) of the Spratly and Paracel Islands could be as high as 105 billion bbl. Due to the lack of exploratory drilling, there are no proven oil reserve estimates for the Spratly or Paracel Islands." Furthermore,

> [n]atural gas might be the most abundant hydrocarbon resource in the SCS. Most of the hydrocarbon fields explored in the SCS regions of Brunei, Indonesia, Malaysia, Thailand, Vietnam, and the Philippines contain natural gas, not oil. Estimates by the U.S. Geological Survey and others indicate that about 60 to 70 percent of the region's hydrocarbon resources are natural gas. As with oil, estimates of the SCS'natural gas resources vary widely. One Chinese estimate for the entire SCS estimates natural gas reserves to be 2 quadrillion cubic feet. Another Chinese report estimates 225 billion barrels of oil equivalent in the Spratly Islands alone. If 70 percent of these hydrocarbons are gas as some studies suggest, total gas resources (as opposed to proved reserves) would be almost 900 trillion cubic feet (Tcf). In April 2006, Husky Energy working with the Chinese National Offshore Oil Corporation announced a find of proven natural gas reserves of nearly 4 to 6 Tcf near the Spratly Islands.

Id.

This article discusses China's dual-pronged strategy to limit foreign vessel operations within the South China Sea and its efficacy. This strategy may be divided into two general, but overlapping, categories: the use of maritime lawfare and the use of military enforcement.[48] This article clarifies each Chinese position before addressing their respective legal validity. First, it begins with an exploration of the concept of the EEZ and its development within international law. A brief recitation of competing State claims to EEZs within the South China Sea follows. Second, this article examines China's maritime lawfare effort in support of its claim of historic rights over the South China Sea islands and surrounding waters. It discusses China's strategy to use various aspects of CIL, UNCLOS, and domestic legislation. Third, this article examines China's well-coordinated and consistent military enforcement effort to physically limit foreign vessel operations within the South China Sea to support China's historic rights claim. And fourth, despite any structural flaws in the foundation upon which China is building its legal argument, this article argues that China's strategy of redefining the limits of foreign maritime activities within its contested EEZ in the South China Sea is slowly proving effective.[49]

II. The Exclusive Economic Zone

Apprehension over China's attempt to deviate from internationally accepted norms regarding the EEZ concept are not the isolated overreactions of the scholarly elite of the international legal community. Such deviation has profound consequences for not only local commerce, security, and general oceanic navigation, but global as well. It was concern for consequences similar to these that fostered the creation, development, refinement, and the formal acceptance by the majority of States of modern navigational regimes. Understanding the need for and subsequent development of these regimes, such as the identification and corollary claims of territorial sovereignty by a State within an EEZ, is essential to understanding the gravity of China's effort.

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[48] Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L. AFF. 146, 146 (2008) ("[A] strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.").

[49] China claims sovereignty and jurisdiction over nearly the entirety of the South China Sea. This position is actively disputed by Brunei, Malaysia, the Philippines, Taiwan, and Vietnam.

A. Inception of the EEZ Concept

Concerted efforts by governmental powers to assert formal control over bodies of water, whether coastal or deep sea, stretch back through much of recorded history. Efforts to control dry land extend even further. Even States not considered to be "traditional maritime powers . . . have an interest in unimpeded access to the seas."[50] Accompanying this interest is a desire to preserve this unimpeded access. The desire for preservation may stem from any number of national factors including physical security concerns and commercial or economic needs.

Of course, with the reality that not all great land powers are great sea powers comes an imbalance. "A land power may try to match a maritime power, or it can choose to respond much more cheaply, albeit perhaps less effectively, by attempting to deny its opponents maritime access near its shores."[51] The strategic value in controlling maritime access near a State's coastal areas cannot be overstated. Such strategic value requires a framework of international rules lest disputes, which would be common, devolve into destabilizing armed conflict.[52]

While UNCLOS formally established globally accepted jurisdictional boundaries governing navigation and economic interests at sea, it was not the first international attempt at doing so. Prior to the formation of the United Nations, The Hague Codification Conference of 1930 laid the ground work for formally defined maritime zones by recognizing an area of coastal water as a "universal sovereign territorial sea."[53] This area would extend three miles seaward from the low-water (or low tide) mark of a State's coast.[54]

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[50] JAMES KRASKA, MARITIME POWER AND THE LAW OF THE SEA 95 (2011). *See also A Cooperative Strategy for 21st Century Seapower*, NAVY.MIL, http://www.navy.mil/maritime/Maritimestrategy.pdf (stating that "[t]he oceans connect the nations of the world, even those countries that are landlocked. Because the maritime domain—the world's oceans, seas, bays, estuaries, islands, coastal areas, littorals, and the airspace above them—supports 90% of the world's trade, it carries the lifeblood of a global system that links every country on earth. Covering three-quarters of the planet, the oceans make neighbors of people around the world." Albeit, these neighbors do not always get along.).

[51] KRASKA, *supra* note 50, at 95.

[52] *Id.*

[53] *Id.* at 96.

[54] *Id.*

Building upon this effort, the United Nations convened a Conference on the Law of the Sea (UNCLOS I) in 1958. Its goal was to clarify a State's navigational and economic rights within both its own coastal waters and those of other States.[55] Per Commander James Kraska, the Howard S. Levie Chair of Operational Law at the United States Naval War College, UNCLOS I failed to provide guidelines on "several critical and contentious points."[56] Issues such as the "breadth of the territorial sea" were not formally settled.[57] He rightly argues that failing to resolve this issue fatally impacted subsequent agreements as territorial seas basically serve as the bedrock foundation for all other navigational regimes. Chief among the other failures that Kraska illuminates is the lack of standardization of State claims of sovereignty over areas of the sea. These claims, he points out, "ranged from between 3–200 [nautical miles]" from the coastal State's low-water mark out into the sea.[58]

Besides failing to address key economic questions, which can be viewed more important at times than security, regarding State sovereignty over sea usage, UNCLOS I's disappointing lack of consensus on the coastal claim issue rendered nearly all other agreements highly disputable in actual practice.[59] In 1960, the UN convened the Second United Nations Conference on the Law of the Sea (UNCLOS II) and would, again, fail to meaningfully address the territorial sea issue.[60]

B. Maritime Regime Formulation and Formalization

Although it would not formally open for signature until 1982, UNCLOS[61] grew out of nearly a decade of discussion, negotiation, and compromise begun in 1973 at the Third United Nations Conference on the Law of the Sea.[62] UNCLOS proved to be far more comprehensive than any of the previous efforts. Specifically, UNCLOS addressed the limits of State sovereignty in coastal waters and navigational regimes

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[55] *Id.*
[56] *Id.* at 97.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 98.
[61] For purpose of brevity, though the Third United Nations Conference on the Law of the Sea resulted in the 1982 treaty, it will be referred to as UNCLOS vice UNCLOS III.
[62] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. [hereinafter UNCLOS].

within those limits by establishing measurable boundaries for such activities.[63] The resultant treaty "strikes a balance between the rights and duties of coastal States on the one hand, and of all other States on the other."[64] Appropriately referred to as a "package deal" by Kraska, "seaward of the coastal baselines, [UNCLOS successfully created] distinct and shared functional areas . . . . These functional areas include the territorial sea, the contiguous zone and the EEZ."[65] Each of these areas could not exist without the other. Beginning with the baseline, each regime incorporates its smaller-in-size contemporary. Thus, under UNCLOS, a coastal State's sovereignty decreases as the distance from its shore increases. These areas are overlapping and complementary. UNCLOS "was constructed around an integrated set of mutually supporting regimes pertaining to geophysical areas on, over, or under the oceans."[66] The most important factor, the lynch pin, is the baseline. These areas, and any attendant coastal State sovereignty over such, only exist where a baseline may be established. Thus, States desiring to maximize or extend their sovereignty over the sea must first establish a legitimate baseline.

As discussed in Part III, China relies on a "historic rights" argument to assert varying degrees of sovereignty over the vast majority of the South China Sea. Using this argument to gain a foothold over hotly disputed landmasses within the South China Sea, China seeks to establish a series of baselines, and thus their accompanying regimes.

Being the geographically largest of the regimes, the EEZ provides the coastal State with enormous economic opportunity.[67] Just as each coastal State desired to maximize its economic interests in its claimed EEZ, however, equal desire existed to maintain its navigational and operational freedoms in other States' EEZs. As such, "[i]ntense debates arose [at UNCLOS] regarding the legal nature of coastal States in the same EEZ. The consensus developed that non-resource-related high seas freedoms, including the freedoms of navigation and overflight, and the freedoms to lay pipelines and submarine cables would be preserved in the EEZ."[68] This consensus resulted in UNCLOS stating that "[i]n

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[63] *Id.*
[64] J. Ashley Roach & Robert W. Smith, *Excessive Maritime Claims*, 66 INT'L L. STUD. 109 (1994).
[65] KRASKA, *supra* note 50, at 98.
[66] *Id.*
[67] *See generally* UNCLOS, *supra* note 62, arts. 53–75.
[68] Roach & Smith, *supra* note 64, at 109.

exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention."[69] The manner in which China exercises its "rights" and performs its "duties" undergirds this discussion.

Regarding economic interests in the EEZ, per UNCLOS, coastal States possess

> sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds[70]

Notably, UNCLOS delineates between a coastal State's sovereign rights and its jurisdiction.[71] Specifically, a coastal State has "jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; [and] (iii) the protection and preservation of the marine environment."[72]

Nearly twenty years since UNCLOS entered into force in 1994 one hundred and sixty-two countries have ratified the treaty, a fact that significantly weakens arguments that UNCLOS does not reflect customary international law.[73]

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[69] UNCLOS, *supra* note 62, art. 56.
[70] Roach & Smith, *supra* note 64, at 109.
[71] *Id.*
[72] *Id.*
[73] *Chronological Lists of Ratifications of Accessions and Successions to the Convention and the Related Agreements as of 03 June 2011*, *supra* note 45.

C. One Sea, So Many EEZs

As drawn from a coastal State's baseline, an EEZ extends two-hundred nautical miles seaward.[74] Thus establishment of a legitimate baseline must precede the creation or claim of an EEZ. Not surprisingly, there are many areas of the world where, due to geography, neighboring or adjacent coastal States possess EEZs that extend less than two-hundred nautical miles or lie superjacent. Such locations are often the sites of heavy nautical and aeronautical traffic. The South China Sea is one such place. (See Figure 1.) China's claims of sovereignty and jurisdictional rights within the South China Sea conflict with the established EEZ of Vietnam, Indonesia, Malaysia, Brunei, and the Philippines. China's claim is hotly contested by all parties.

Figure 1. Map of the Overlapping EEZs in the South China Sea.[75]

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[74] UNCLOS, *supra* note 62, art. 57. "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."

[75] *Vietnam Accuses China in Seas Dispute*, BBC.co.uk, http://www.bbc.co.uk.news/world-asia-pacific-13592508 (last visited Feb. 22, 2013). Note the overlapping Exclusive Economic Zones of each State that has a coastline on the South China Sea. *See China and Vietnam: Clashing Over an Island Archipelago*, *supra* note 46. China's claims of territorial sovereignty and historic waters are obviously grossly contentious as nearly eighty percent of the South China Sea falls within its U-shaped line.

III. The Pen: China's Maritime Lawfare Effort

While the term "lawfare" is a western creation that exists more in scholarly circles than in the strategic planning rooms of major military powers, China's espouses it as a formal part of its military doctrine.[76] "In 2003, the CCP [Chinese Communist Party] Central Committee and the CMC [Central Military Committee] endorsed the 'three warfares' concept, reflecting China's recognition that as a global actor, it will benefit from learning to effectively utilize the tools of public opinion, messaging, and influence."[77] The "three warfares" are psychological warfare, media warfare, and legal warfare.[78] "During military training and exercises, PLA [People's Liberation Army] troops employ the 'three warfares' to undermine the spirit and ideological commitment of the adversary. In essence, [the three warfares are a] non-military tool used to advance or catalyze a military objective."[79]

The goals behind China's use of legal warfare (or lawfare) are multi-fold. By using "international and domestic law . . . [i]t can be employed to hamstring an adversary's operational freedom . . . build international support and manage possible political repercussions of China's military actions."[80] China recognizes lawfare as an effective tool of national strategy and formally employs it as such.

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[76] U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 26 (2011) [hereinafter 2011 PRC REPORT], *available at* http://www.defense.gov/pubs/pdfs/2011_cmpr_final.pdf.
[77] *Id.*
[78] *Id.*

> Psychological Warfare seeks to undermine an enemy's ability to conduct combat operations through operations aimed at deterring, shocking, and demoralizing enemy military personnel and supporting civilian populations. Media Warfare is aimed at influencing domestic and international public opinion to build support for China's military actions and dissuade an adversary from pursuing actions contrary to China's interests.

[79] *Id.*
[80] *Id.*

A. Historical Claim[81]

To understand China's claim to a having the right to dictate limitations to foreign maritime navigation and activity within the South China Sea, that is, within the waters surrounded by the "U-shaped line" one must first understand China's underlying lawfare argument for sovereignty over the islands and the basic geography that encompasses the area. This argument comprises three overlapping parts: national history, established customary international law, and self-created precedent.

With an amazing degree of consistency, China is rather unique in that it can trace its cultural origins back over nearly four thousand years.[82] Notably, major political power switches occurred internally rather than through conquest by an external power.[83] Because China sustained only internal switches in power, numerous ancient historical documents survived the centuries.[84] It is from these documents that China and some present-day scholars build the foundation of their sovereignty claim over the South China Sea islands.

China's historical argument cites to supporting documentation and governmental action taken during three time periods: the Pre-Modern Era (2000 Before Christ (B.C.)–1911 *Anno Domini* (A.D.)), the Republic of China Era (1911–1949), and the People's Republic of China Era (1949–present).

1. The Pre-Modern Era (2000 B.C.–1911 A.D.)

Supporters of China's historic right argue that China has maintained control of the islands within the U-Shaped Line for literally thousands of years and that it was not until the last century that this control was contested.[85] Supporters state that control or sovereignty over the islands

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[81] This section does not address the historical accuracy of China's claims due to space limitation, but rather will explain and analyze the merits of China's position taken at face value.

[82] Jianming Shen, *China's Sovereignty over the South China Sea Islands: A Historical Perspective*, 1 CHINESE J. OF INT'L L. 94, 94–157 (2002).

[83] *See generally* FRANZ MICHAEL, CHINA THROUGH THE AGES: HISTORY OF A CIVILIZATION (1986).

[84] *Id.*

[85] Shen, *supra* note 82, at 98.

in the South China Sea began to manifest as early as the 21st century B.C. with the receipt of "tributes" from that area.[86] Ancient historical documents that reference trade records from the Zhou, Xia, and Shang Dynasties are used as evidence that the South China Sea islands were "already destinations of Chinese expeditions and targets of conquest" as early as 770 B.C.[87] In fact, China asserts that it was the first nation to name the South China Sea and its islands.[88] From China's perspective, though dynasties often used different terms to refer to the Sea and its islands, it is the Chinese acts of continuously renaming and referring to the South China Sea and its islands that support its historical claim of sovereignty.[89]

These terms, however, can often change depending upon the context in which they are used.[90] Pro-sovereignty scholars argue that the fluid nature of these name changes is not a weakness in China's claim since the majority of the changes occurred before other States made opposing claims.[91]

In addition, China's geographic proximity to the South China Sea and its islands is a factor in its assertion that it was the "first [nation] to have made expeditions and voyages to and across the South China Sea islands."[92] This proximity makes it probable that China, to at least some extent, used or traversed the South China Sea for trade purposes.[93] Pro-

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[86] *Id.* at 102. *See also Calls Grow in China to Press Claim for Okinawa*. THENEWYORK TIMES.COM, http://www.nytimes.com/2013/06/14/world/asia/sentiment-builds-in-china-to-press-claim-for-okinawa.html (last visited June 13, 2013). A few days prior to a seminar sponsored by Remnim University, a senior member of China's armed forces "argued that the Japanese did not have sovereignty over the Ryukyu Islands because its inhabitants paid tribute to Chinese emperors hundreds of years before they started doing so to Japan. For now, let's not discuss whether they belong to China—they were certainly China's tributary state," the official, Maj. Gen. Luo Yuan, told the state-run China News Service. "I am not saying all former tributary states belong to China, but we can say with certainty that the Ryukyus do not belong to Japan." Outside of China, the Ryukyus is referred to as Okinawa.

[87] *Id.* at 104.

[88] *Id.* at 105.

[89] *Id.* at 105–06.

[90] *Id.* at 106.

[91] *Id.* at 107.

[92] *Id.*

[93] *Id.*

sovereignty scholars argue that these voyages grant a degree of sovereignty to China.[94]

Continuing with its expansion argument, China avers that it was the first organized State-like entity to posses any level of detailed knowledge of the geographic features of the South China Sea islands.[95] This knowledge, China contends, came from the formal establishment of open sea lanes within the Sea through exploration and regular usage.[96] China also takes credit for establishing safe navigational routes within the South China Sea that nearby trade partners benefited from for centuries.[97] Naval patrols, scientific surveys, and mapping by governing powers compromise the final elements of China's ancient history argument.[98]

2. Republic of China Era (1911–1949)

By the early 20th century, the frequent renaming of the islands and heavy reliance upon historical records and foreign maps gave rise to contradictory claims of Chinese sovereignty.[99] To codify its claims, the Chinese government formed a Land and Water Maps Inspection Committee (Committee) in 1933.[100] The Committee's mandate was to assist in the formation of official maps that delineated China's modern national boundaries.[101] Although formal surveys began before the Committee's formation, the endeavor continued though 1947.[102] These efforts represented the Chinese government's first "large-scale" undertaking to survey the South China Sea; it included the renaming of the "islands, reefs, and low tide elevations in the South China Sea."[103] In 1935, the Committee published the first official modern Chinese map of the South China Sea. (See Figure 2.) This map includes the islands

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[94] Supporters portray China as a nascent sea-going State, yet there is disagreement in some scholastic quarters as to the importance ancient China placed upon oceanic exploration.
[95] Shen, *supra* note 82, at 112–17.
[96] *Id.* at 117.
[97] *Id.* at 118.
[98] *Id.* at 122–26.
[99] Li & Li, *supra* note 40, at 288–89.
[100] *Id.* at 289.
[101] *See id.*
[102] Shen, *supra* note 82, at 107.
[103] Li & Li, *supra* note 40, at 289.

within its sphere; notably, the the Spratly Islands, Macclesfield Bank, Pratas Islands, and Paracel Islands.[104]

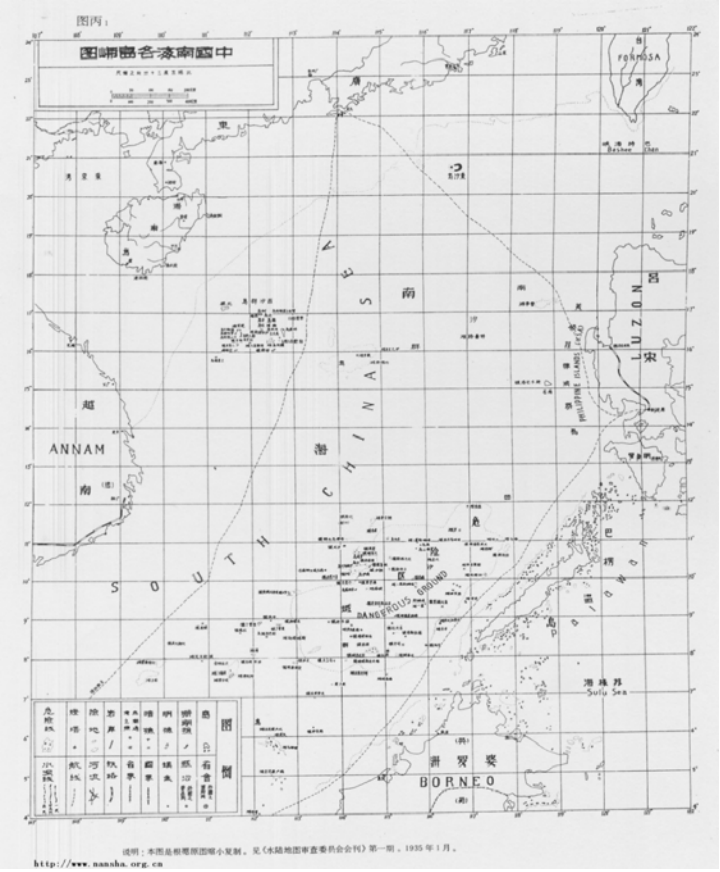

Figure 2. Map of the South China Sea Islands in 1935.[105]

[104] Shen, *supra* note 82, at 128–29.

[105] *Map of South China Sea Islands in 1935*, SPRATLYS.ORG, http://www.spratlys.org/maps/4.htm (last visited Nov. 2, 2012).

At specific issue were the Spratly Islands, Macclesfield Bank, Pratas Islands, and Paracel Islands. And although all four land areas were again included as Chinese territory in a map issued by the Committee in 1936, China's claim over the Spratly Islands and Macclesfield Bank proved particularly contentious. Occupied by France in 1933, China claimed that the Spratly Islands and Macclesfield Bank served as a home for Chinese fishermen.[106] Ultimately, France conceded this assertion[107] and retracted its claim over the Spratly Islands and Macclesfield Bank after the close of World War II.[108] Yet, in the intervening period, Japan forcibly occupied the Spratly and Paracel Islands, effectively removing any control or authority China or any other State had previously exercised over them.[109] Japan "renamed the *Nansha* [Spratly] island chain *Shinnam Gunto* . . . and placed these islands under the jurisdiction of Taiwan, which had been under Japanese rule since 1895."[110] Japan withdrew its forces as World War II ended.[111]

While Japan made no formal declarations to return its captured territory to any one State until 1952, including any islands within the South China Sea, some scholars argue that China's sovereignty over the Spratly and Paracel Islands "would not and should not depend on Japan's renunciation of claims and/or [sic] any international scheme of disposition . . . ."[112] Furthermore, although "the West regarded Japan as the administrator of the entire South China Sea Islands for the period of its occupation, it is highly questionable whether Japan established its title to these island groups at all, because invasion and occupation *per se* do not suffice to acquire title to territory."[113] This stance presumes that China's asserted historic title to the islands within the South China Sea was absolute and internationally accepted before the 1930s.

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[106] Li & Li, *supra* note 40, at 289.
[107] PAO-MIN CHANG, THE SINO-VIETNAMESE TERRITORIAL DISPUTE 14 (1986).
[108] Li & Li, *supra* note 40, at 289.
[109] *See* Shen, *supra* note 82, at 136.
[110] *Id*.
[111] *See id*. at 136–42.
[112] *Id*. at 138.
[113] *Id*.

In 1947 the Chinese government again renamed all of the South China Sea islands.[114] Additionally, as a means to "demonstrate authority" over the islands, China stationed personnel on certain islands and provided security and communication assistance to Chinese fishermen in the area.[115] Today, these actions are offered by pro-sovereignty scholars as further proof that the Chinese government had "defined" its "territorial sphere" thus granting at least some element of sovereignty over the South China Sea and its islands.[116]

Advent of the U-Shaped Line

Chinese scholarly and governmental assertions of sovereignty over the South Sea Islands rely heavily and consistently upon maps, both ancient and modern.[117] In building the case for sovereignty in the historical context, supporters cite dozens, if not hundreds, of individual instances of Chinese interaction or comment on the islands in an effort to build an insurmountable mountain.[118]

In 1947, the Chinese Department of Geography, an agency within the Ministry of Internal Affairs, issued a new map encompassing the South China Sea and its islands. This map included an "Eleven-Dotted Line." Often referred to as the "U-shaped line," located within the boundaries of the Eleven-Dotted Line are the Spratly Islands, the Macclesfield Bank, the Paracel Islands, the Pratas Islands, and the majority of open waters within the South China Sea.[119] (See Figure 3.)

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[114] Li & Li, *supra* note 40, at 289–90 ("The Spratly and the Paracel Islands were renamed on the basis of their geographic location in the South China Sea, and the names of the islands and reefs in other areas of the South China Sea were checked and announced by the Geography Department in the Ministry of Internal Affairs.").
[115] *Id*. at 290.
[116] *Id*. at 289–90.
[117] Shen, *supra* note 82, at 128–32.
[118] *Id*. at 94–157.
[119] Li & Li, *supra* note 40, at 290.

Figure 3. 1947-Issued "Eleven-Dotted Line" Map.[120]

The 1947 map that introduced the Eleven-Dotted Line is one of the most influential and relied-upon references for pro-sovereignty supporters of China's claim over the South China Sea and its islands.[121] Supporters argue that the creation of the "U-shaped line" was meant to indicate and reconfirm China's ownership of the South China Sea islands and the surrounding waters.[122] Yet, the publication of the map and its itinerant versions was not accompanied by any official statement asserting such.[123]

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[120] *1947 Map of South China Sea Islands (Published by Secretariat of Guangdong Province Government)*, NANSHA.ORG.CN, http://www.nansha.org/cn/maps/3/1947_South_China_Sea_Map.html (last visited Sept. 26, 2013).

[121] *See* Li & Li, *supra* note 40. *See also* Shen, *supra* note 82; Keyuan, *supra* note 44.

[122] *Id*.

[123] Shen, *supra* note 82, at 129. There is great dispute within scholarly circles as to the intent behind the creation of the line, the legal effect, if any, of the inclusion of the line on official Chinese government created maps, and its impact upon developing theories of maritime claims vis-à-vis both formal treaty law and customary international law.

3. The People's Republic of China Era (1949–Present)

The Allied forces' defeat of Japan in 1945, and the end of WWII, resulted in a large-scale retreat of foreign forces from China's mainland and claimed islands. Additionally, post WWII, a power vacuum emerged in China in which a burgeoning communist movement led by a fiery, 52-year old, Mao Zedong, challenged the Nationalist government for control of the country.[124]

Mao was strident in his belief that the China of old must be cast away. Yet, through all of the social and, more specifically, governmental purges that followed his rise to power,[125] the official maps of Chinese territory released by Mao's new government remained very similar to those released by Chiang Kai-shek's nationalist regime. Thousands of people did not survive the communist takeover of China, but the Eleven-Dotted Line did.

The Nine-Dotted Line

In 1949, the People's Republic of China (PRC) released its first official map of China.[126] The map showed an eleven-dotted line in the South China Sea that closely mirrored the original map from 1937.[127] In 1953, PRC Premier Zhou Enlai approved the removal of two dotted lines from official maps.[128] (The two dotted lines that were removed encapsulated the Gulf of Tonkin off of the Vietnamese coastline.) Consequently, a new Nine-Dotted line began appearing on Chinese maps that same year. It has appeared on most official Chinese maps since 1953.[129] (See Figures 4 and 5.) Like its Eleven-Dotted Line predecessor, the Nine-Dotted Line still encompasses most of the South China Sea and its islands—including the Spratly Islands, the Macclesfield Bank, the Paracel Islands, and the Pratas Islands.

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[124] JONATHAN SPENCE, THE GATE OF HEAVENLY PEACE 81 (1981).
[125] JOHN KING FAIRBANK, THE UNITED STATES AND CHINA 239–45, 278–303 (1971).
[126] Li & Li, *supra* note 40, at 290.
[127] Shen, *supra* note 82, at 129.
[128] Li & Li, *supra* note 40, at 290.
[129] *Id.*

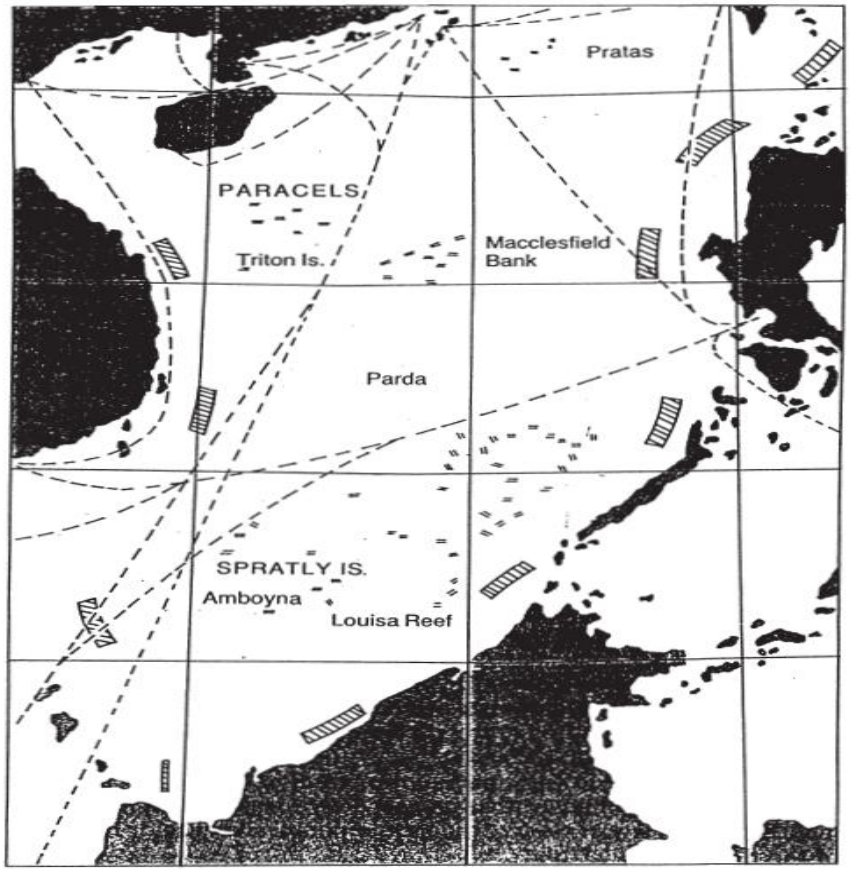

Figure 1. The nine-dotted line on the Chinese map of the South China Sea. (*Source*: Hasjim Djalal, "Conflicting Territorial and Jurisdictional Claims in South China Sea," *The Indonesian Quarterly*, vol. 7, no. 1 (1979), 36 at 52.

Figure 4.[130]

[130] DJALAL, *supra* note 43, at 52.

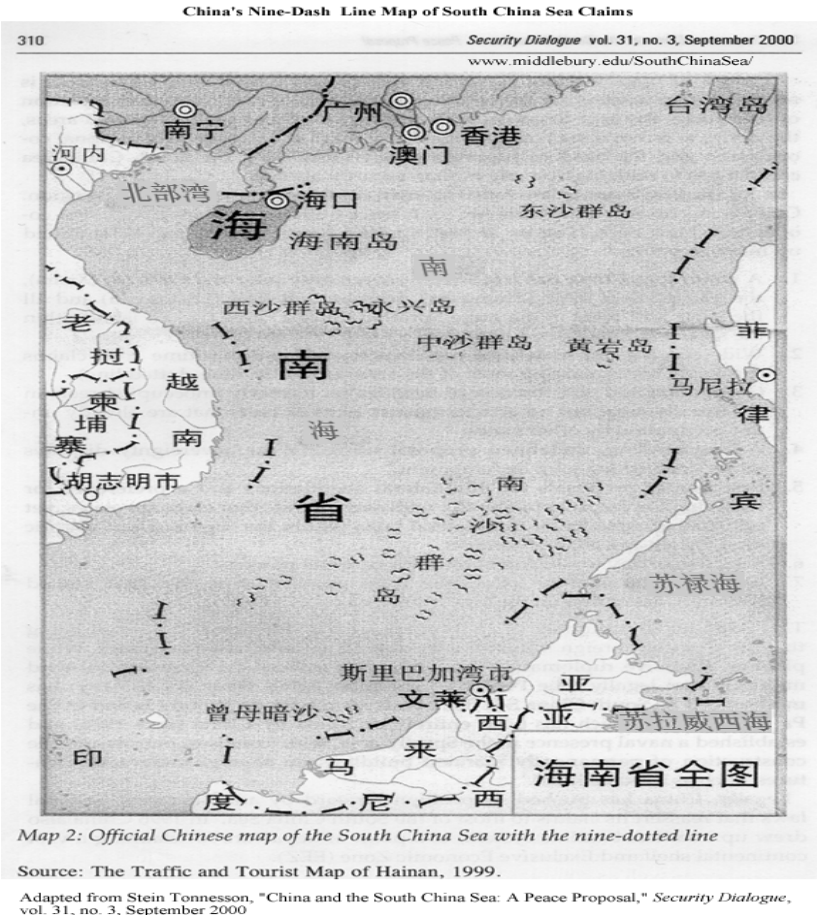

Figure 5. 1999 Map of the Nine-Dotted Line.[131]

B. Customary International Law

It is difficult to fully separate China's history-based claims to sovereignty in the South China Sea from accepted modern notions of prolonged possession or ownership under CIL. The problematic aspect for China in asserting its claim for historic waters lies in the fact that

[131] *1999 Map of the Nine-Dotted Line*, SPRATLYS.ORG, http://www.spratlys.org/maps/1/hainan_map1999.gif (last visited Sept. 26, 2013).

international law does not provide one all-encompassing and accepted definition for such.[132]

Historically, States' claims for historic waters primarily applied to bays or wider gulfs.[133] Often, such claims are highly contested by the international community due to the economic, strategic, and general navigational problems that would be created by having such large areas of water considered the internal waters of any one particular State. A notable example is the Gulf of Sidra.[134]

Bordered entirely by Libya, the Gulf of Sidra covers over 22,000 square miles of water and, at its widest point, extends nearly one hundred and forty miles from its opening to the Libyan coast.[135] After the military takeover of Libya by Colonel Muammar Quaddafi in 1969, the Libyan government made a series of announcements regarding its claims of jurisdiction and sovereignty in its surrounding waters.[136] In 1974, this effort culminated with the Libyan government declaring the Gulf of Sidra to be a historic bay.[137] This meant that Libya considered all waters south of the Gulf of Sidra's two-hundred and ninety-six mile-wide opening to be internal waters.[138] Accordingly, Libya closed the Gulf of Sidra to all foreign navigation absent prior Libyan permission.

As discussed above, one of the key criteria to the establishment of a historic claim is the extent to which other States accept or contest the claim. Thus, it follows that States who wish to contest the claim must take actions commensurate with their stance—as inaction may be viewed as acquiescence to the claim. As a major naval power with global strategic interests, the United States expressly objected to Libya's claim that the Gulf of Sidra was a historic bay.[139] Grave repercussions can result from extraordinary maritime claims: in August, 1981, a Libyan fighter jet fired upon two U.S. Navy F-14 fighters conducting an exercise near the Gulf of Sidra.[140] (The Libyan government considered any

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[132] Zou Keyuan, *South China Sea Studies in China: Achievements, Constraints and Prospects*, 11 SING. Y.B. OF INT'L L. 85, 90 (2007).
[133] *Id.*
[134] *Id.* at 91.
[135] Yehuda Z. Blum, *The Gulf of Sidra Incident*, 80 AM. J. OF INT'L L. 668, 668 (1986).
[136] *Id.*
[137] Keyuan, *supra* note 132, at 91.
[138] *Id.*
[139] John M. Spinnato, *Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra*, 13 OCEAN DEV. & INT'L L. 1, 65 (1983).
[140] *Id.*

previously unauthorized overflight of the Gulf to be a violation of its national airspace—as would be consistent with recognized internal waters.)[141] The U.S. Navy jets engaged the Libyan fighter and shot it down.[142] The United States continued to perform overflight operations (or "operational assertions") in the Gulf of Sidra throughout 1984, 1986, 1997, 1998, and 2000.[143]

Establishing a standard definition or criteria for determining the validity of historic maritime claims is essential to not only avoiding military conflict between States but to strengthening the legitimacy of maritime CIL. Yet no single suggestion stands as fully authoritative over the rest. Zou Keyuan, Harris Professor of International Law at the Lancashire Law School of the University of Central Lancashire, United Kingdom, suggests using the very reasonable and "scholarly definition" espoused by Leo J. Bouchez as a starting point.[144] A former Adjunct Professor of International Law at the University of Utrecht, Professor Bouchez stated that "[h]istoric waters are waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States."[145] This definition bears serious consideration because

> [h]istoric waters are an exception to the general rules governing the sovereignty of coastal states over the adjacent waters. Such an exception cannot be justified by merely invoking a particular geographic configuration of the coast. Claims to historic waters will

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[141] *Id.*

[142] *Id.*

[143] U.S. DEP'T OF DEF., DIR. 2005.1-M, MARITIME CLAIMS REFERENCE MANUAL (June 2008) [hereinafter DOD DIR 2005.1-M], *available at* www.dtic.mil/whs/directives/corres/20051m_062305/libya.doc.

[144] Keyuan, *supra* note 132, at 90. To bolster his argument that the notion of historic waters lacks a foundation treaty law, Professor Keyuan cites the fact that the International Law Commission of the United Nations addressed the juridical regime of historic waters and historic bays in 1962. He points out that the report "did not give a conclusive concept of historic waters and the standard according to which this concept could be applied." He further notes that the "Third U.N. Conference on the Law of the Sea simply dropped the issue for discussion and only left some wordings in the LOS Convention." *Id.*

[145] LEO J. BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW 281 (1964).

> arise only if coastal States seriously show their interest in the water area involved.[146]

The sovereign control criteria that requires the claimant State's control be clear, effective, continuous, and conducted over a substantial period of time is absolutely essential given the ramifications of the claim. What one State possesses, another is denied. While much of international law governs how States interact and communicate with one another, laws and guidelines concerning State ownership or control of lands and seas must be carefully delineated and followed as, from general historic context, wars are waged over such.[147]

Professor Keyuan modifies Bochez's criteria by distilling it into three distinct standards that the claim should be judged by: (1) the time the claimant State has exercised "authority" over the waters; (2) the "continuity over time of this exercise of authority;" and (3) "the attitude of foreign States to the claim."[148] Keyuan's proposal is compelling but lacks any language concerning evidentiary standards. Disagreements over what exercising "authority" means both support and detract from China's position. Therefore, incorporating Bochez's requirements that the exercise of authority must be "clear," but more importantly "effective" is a must.[149] Additionally, Bochez more clearly articulates a measureable standard by using "acquiescence" in reference to the international community than Keyuan does with "attitude."

China argues that its claims to historic rights over the island and waters within the U-shaped line are not without CIL support. Technically, this position is correct. Viewed through Keyuan's lens, China's assertion for historic sovereignty attempts to meet his criteria. The problem is not one of novelty but strength of fact. China does not possess the evidence required to pass Keyuan's test, especially in light of Bochez's guiding evidentiary criteria. In fact, none of the South China

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[146] *Id.* at 297.

[147] It is possible to cite innumerable examples of armed conflicts of both major and minor intensity that had territorial disputes and aims as explicit motivating factors. *E.g.*, WOODRUFF D. SMITH, THE IDEOLOGICAL ORIGINS OF NAZI IMPERIALISM (1986). At the outset and continuing through the bloodiest conflict in history, World War II, Adolf Hitler espoused the concept of "Lebensraum" or "living space" as one of his primary foreign policy goals.

[148] Keyuan, *supra* note 132, at 90.

[149] Bouchez, *supra* note 145, at 281.

Sea nations do. This is, however, something China is strongly seeking to correct or, more accurately, create.

C. The Third United Nations Convention on the Law of the Sea

As discussed above, the United Nations conducted several formal efforts at creating a formal, treaty-based, Law of the Sea.[150] Initiated as an attempt to formalize customary international sea-going practices in effect since the 1600s, UNCLOS's work constitutes the most recent, authoritative, and widely accepted body of international law governing State conduct and use of the world's oceans.[151] UNCLOS fulfills the hope of Conference President Koh that the document be considered a "constitution" for the oceans.[152] The goal in its creation was to establish an international agreement that addressed "as many issues falling under the heading 'law of the sea' as possible."[153]

UNCLOS is specifically relevant to claims of territorial and water sovereignty in the South China Sea as it provides definitions for what legally constitutes an island, rock, shoal, etc.[154] For example, Article 121, Regime of Islands, states the following concerning rocks: "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."[155] Regarding islands, they must be "a naturally formed area of land, surrounded by water, which is above water at high tide."[156] Thus, the distinction between rocks and islands is of enormous importance to the claiming State as Article 121 also provides that "the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory."[157] Simply put, a State may measure and, hence, assert control over the preceding maritime

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[150] *The United Nations Convention on the Law of the Sea (A Historical Perspective)*, UN.ORG, http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (last visited on Jan. 30, 2013).
[151] UNCLOS, *supra* note 62. The treaty entered into force on November 14, 1994.
[152] JAMES KRASKA, CONTEMPORARY MARITIME PIRACY: INTERNATIONAL LAW, STRATEGY, AND DIPLOMACY AT SEA 122 (2011).
[153] Ian Townsend-Gault, *Compliance with the United Nations Convention on the Law of the Sea in the Asia-Pacific Region*, 33 U. BRIT. COLUM. L. REV. 227, 230 (1999-2000).
[154] UNCLOS, *supra* note 62.
[155] *Id.* art. 121.3.
[156] *Id.* art. 121.1.
[157] *Id.* art. 121.2.

zones from the low-water point of an island, but not a rock. Unsurprisingly, it greatly behooves a State to argue that various formations within the sea area in question are in fact islands, not rocks, as the potential strategic and economic gains can be vast.

In theory, UNCLOS provides China with a compelling opportunity. While China proceeds to press its claim for sovereignty over the waters within the U-shaped line from a historical perspective, the fact remains that several of the States with competing territorial claims in the South China Sea can assert, with some level of reliability, variations of their own historic claims.[158] What UNCLOS creates, however, is the opportunity for China to anchor its claim to the waters within formal treaty law. Or, put another way, UNCLOS provides the opportunity for recognized legal validity.

1. UNCLOS as a Weapons System

While far from easily accomplished, China's primary strategy under UNCLOS comprises two sequential steps. The first step, and probably most problematic given other States' competing claims, is to establish sovereignty over any of the land formations in question in the South China Sea.[159] Second, China must settle the issue as to which of the formations may be formally and legally recognized as an island since any such recognized island would serve as a literal foothold for Chinese sovereignty within the South China Sea. Moreover, such a foothold would legally endow China with all UNCLOS-designated maritime zones and their attendant benefits, e.g., natural resources, navigation restrictions, etc.

In reality, there is little chance of States such as Vietnam and the Nation of Brunei, abandoning their asserted claims to certain islands in the South China Sea. Simply stating a claim, however, may not be enough if one of the competing States can demonstrate, over time, a certain amount of control over the lands or waters in question. To this end, China is also attempting to redefine basic navigational and operational freedoms provided for under UNCLOS. By slowly chipping away at what foreign vessels are traditionally allowed to do in the South

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[158] DOD DIR. 2005.1-M, *supra* note 143.
[159] Spratly Islands, Macclesfield Bank, Pratas Islands, and Paracel Islands.

China Sea, China seeks to create a self-enforced precedent under international law.

2. "You Keep Using that Word. I Do Not Think It Means What You Think It Means."[160]

In July 2009, the U.S. Naval War College in Newport, Rhode Island, hosted a workshop intended to "discuss different perspectives held by the United States and China on the legitimacy of foreign military activities in a coastal state's EEZ."[161] The War College published eight papers presented at the conference, four from the United States delegation and four from the Chinese delegation.[162] Scholars and military members from both States comprised the authorship.[163] China's position regarding its intent at the workshop is quite clear as a survey of the papers presented by the Chinese speakers denotes a concerted effort to argue that established Law of the Sea terms used within CIL and UNCLOS actually have different meanings than understood by the United States.[164]

Citing the USNS *Impeccable* incident, Major General Peng Guangqian, PLA (Ret.) raised the issue of military operations in the EEZ. He noted that "the legal status of the [EEZ] is not exactly the same as territorial waters under international law . . . [it] is absolutely not equivalent to the high seas; rather it is a special area governed by the coastal state."[165] While Major General Guangqian did agree that "UNCLOS has no special article to define clearly the limits of military activities in the [EEZ] of other countries," he asserted that the "basic legislative purpose and legislative spirit of UNCLOS is that [military] operations may be undertaken 'only for peaceful purposes.'"[166]

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[160] THE PRINCESS BRIDE (Twentieth Century Fox Film Corporation 1987).

[161] PETER DUTTON, *Introduction*, *in* MILITARY ACTIVITIES IN THE EEZ: A U.S.-CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS, 7 NAVAL WAR C. MAR. STUD. INST. 1, 2 (Naval War College Press, 2010).

[162] MILITARY ACTIVITIES IN THE EEZ: A U.S.-CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS, 7 NAVAL WAR C. MAR. STUD. INST. (Naval War College Press, 2010).

[163] DUTTON, *supra* note 161, at 2.

[164] MILITARY ACTIVITIES IN THE EEZ, *supra* note 162.

[165] Peng Guangqian, *China's Maritime Rights and Interests*, *in* MILITARY ACTIVITIES IN THE EEZ: A U.S.-CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS, 7 NAVAL WAR C. MAR. STUD. INST. 15, 20 (Naval War College Press, 2010).

[166] *Id.*

Although he invokes UNCLOS's provision that "[t]he high seas should be reserved for peaceful purposes," he notes that the *Impeccable* was not sailing on the high seas at the time of the incident.[167] But "even if it had [been]," he argues, UNCLOS's language relating to "peaceful purposes" does not allow for the type of military survey mission conducted by the *Impeccable* regardless of its location.[168] He concludes that absent "consent . . . granted by the coastal state six months in advance . . ." the *Impeccable's* mission is tantamount to "military activity that is harmful to the coastal state's sovereignty or security in the [EEZ] and cannot be tolerated. To do otherwise would be to mock and blaspheme international law."[169] Major General Guangqian's argument signifies an attempt to deny those, like the United States, who support the legality of the *Impeccable's* mission a legal safe harbor.[170]

The United States' position is that the *Impeccable's* mission constituted a military survey activity (MSA).[171] China contends that the mission was one of marine scientific research (MSR) vice MSA.[172] In his argument, Guangqian seeks to deny the United States the legal ability to classify the mission as MSA as he asserts that all such military-type activity is unlawful in the EEZ and on the high seas.[173] If successful, the United States' argument would be legally null, perhaps forcing the United States to redefine its operations as MSR.

Classifying all MSA as MSR would serve China's interests. All MSR in the EEZ is, as Chinese presenter, Wu Jilu, argued, subject to the coastal state's jurisdiction.[174] "It is very clear that in the [EEZ], the convention treats activities related to resource development and

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[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] The argument is also grossly expansive as it purports to prohibit such MSA missions in virtually all waters absent a coastal State's consent, even in waters where no coastal State has authority.
[171] Raul Pedrozo, *Coastal State Jurisdiction over Marine Data Collection in the Exclusive Economic Zone*, *in* Military Activities in the EEZ: A U.S.-China Dialogue on Security and International Law in the Maritime Commons, 7 NAVAL WAR C. MAR. STUD. INST. 23, 27–34 (Naval War College Press, 2010).
[172] ZHIRONG, *supra* note 38, at 37–47.
[173] Guangqian, *supra* note 165, at 20.
[174] Wu Jilu, *The Concept of Marine Scientific Research*, *in* MILITARY ACTIVITIES IN THE EEZ: A U.S.-CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS, 7 NAVAL WAR C. MAR. STUD. INST. 65, 70–71 (Naval War College Press, 2010).

environment protection separately from [MSR] . . . Thus, within the EEZ research activities directly related to resource development and environmental protection are not MSR."[175] Thus it follows, per Jilu, that "[a]ll remaining activities, including . . . military survey activities, are therefore considered part of [MSR], subject to the jurisdiction of the coastal State.[176] In essence, the Chinese argument would prohibit all MSR missions on the high seas and within EEZs absent the coastal State's express consent. Similar to its arguments for sovereignty under theories of historic waters, CIL, and UNCLOS, China's effort to redefine certain terms are an external lawfare mechanism to establish small areas of control over its contested waters.[177] There is, however, an internal (domestic) companion effort that is the most illuminative of China's intentions.

D. Chinese Domestic Law

In the background of China's external lawfare efforts lie two pieces of domestic legislation, the language of each directly aimed at bolstering China's maritime claims. Since their passage, China has cited both international and these domestic Chinese laws when objecting to foreign vessel operations within the South China Sea.

In 1992, China adopted the Law on the Territorial Sea and the Contiguous Zone.[178] The majority of its text codifies into Chinese domestic law many of UNCLOS's provisions relating to coastal State rights in territorial waters and the contiguous zone. Of specific importance is Article 2 of the law which begins by defining China's

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[175] *Id.*

[176] *Id.* at 71.

[177] Zhirong, *supra* note 38, at 37–47. In addition to the arguments already stated, the Chinese delegation also asserted that the United States "denies the existence of the [EEZ]" by at times using the term "international waters," that the EEZ is "free for navigation, overflight, and laying seabed cables" alone, and that the UNCLOS definition of "pollution of the marine environment . . . quite matches the operations mode of the *Impeccable*."; PEDROZO, *supra* note 171, at 25–26. Pedrozo agrees that the semi-regular use of the term "international waters" by officials unnecessarily confuses the situation, but strongly disputes the inference that use of the term equals a denial of the existence of the EEZ.

[178] Law on the Territorial Sea and the Contiguous Zone (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 25, 1992, effective Feb. 25, 1992), *available at* http://www.un.org/depts/los/legislationandtreaties/pdffiles/chn_1992_law.pdf (last visited Sept. 26, 2013).

territorial sea as the "waters adjacent to its territorial land."[179] The text goes on, however, to explicitly list the South China Sea islands and Diaoyu Island (claimed by Japan) as China's territorial land.[180] Additionally, under Article 11 any foreign entity must "seek the consent" of China prior to engaging in "scientific research or marine survey."[181]

The passage of the 1998 Law of the People's Republic of China on the Exclusive Economic Zone and Continental Shelf builds upon its 1992 predecessor.[182] It, too, codifies many UNCLOS provisions, but as a companion to the 1992 Law on the Territorial Sea claims an EEZ extending from each of the South China Sea islands.[183] "Thus, in combination, these two Chinese laws assert an EEZ and therefore jurisdictional control over nearly the entire South China Sea area within the U-shaped line."[184]

To say that China's ability to project both naval and air power is greater than the other South China Sea nations is to grossly understate military reality. China understands this. Over the past twelve years, China has demonstrated a pattern of harassment of foreign military and commercial vessels operating in the South China Sea. Moreover, each incident is strikingly similar; China remains consistent in means, method, and manner as to the foreign targets it chooses to harass.

As noted above, demonstrating extended control or authority over a specific body of water or island is vitally important to claims of sovereignty under theories of historic title, CIL, and UNCLOS. Thus, it should not be surprising that the chosen tool for such demonstration is often militaristic. Yet, there is another aspect to the use of force to exercise control beyond the stated legal theories of ownership, one that is as old as history itself. Specifically, if a State possesses the power to solely control a territory, it effectively controls that territory regardless of legal realities.

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[179] *Id.* art. 2.
[180] *Id.*
[181] *Id.* art. 11.
[182] Exclusive Economic Zone and Continental Shelf Act (promulgated by the Standing Comm. Nat'l People's Cong., June 26, 1998, effective June 26, 1998), *available at* http://www.un.org/depts/los/legislationandtreaties/pdffiles/chn_1998_eez_act.pdf (last visited Sept. 26, 2013).
[183] *Id.*
[184] Peter Dutton, *Three Disputes and Three Objectives: China and the South China Sea*, 64 NAVAL WAR C. REV. 42, 50–51 (2011).

IV. The Sword: China's Military Enforcement Strategy

In recent years, China has escalated its willingness to utilize increasingly provocative and dangerous tactics in the air and at sea. As the following examples illustrate, China is waging a consistent campaign of harassing and interfering with the lawful navigation and operations of foreign military vessels sailing within China's uncontested EEZ (as measured from the mainland) and the disputed water banded by the U-shaped line.

A. Undesiring of the United States

While China's interference and harassment of foreign vessels is not solely targeted at the United States, few countries other than the United States, however, have the maritime resources to consistently challenge Chinese efforts to restrict lawful foreign operations within the South China Sea.

1. EP-3 Aries Incident

As detailed in the introduction, the mid-air collision between the U.S. EP-3 Aries and the Chinese J-8 Finback created an extremely dangerous precedent. China's willingness to aggressively challenge long-standing and firmly established notions of legal flight operations in international airspace directly led to the loss of one its pilot's lives.[185] It nearly cost the United States the lives of twenty-four members of the U.S. Navy.[186] China's subsequent actions in refusing to grant permission for Lieutenant Osborne's beleaguered aircraft to land on the island of Hainan, refusing to release the aircrew for eleven days,[187] and refusing to

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[185] *Collision with China: Washington; Chinese Pilot Reveled in Risk, Pentagon Says*, NYTIMES.COM, http://www.nytimes.com/2001/04/06/world/collision-with-china-washington-chinese-pilot-reveled-in-risk-pentagon-says.html?pagewanted=all&src=pm (visited Sept. 26, 2013).

[186] *Lt. Shane Osborn: Looking at a Miracle*, *supra* note 4, at 20–21.

[187] *See U.S. to Urge Beijing to Reign in Pilots*, CNN.COM, http://articles.cnn.com/2001-04-16/us/uschina.jking_1_surveillance-flights-chinese-fighter-pilots-chinese-side?_s=PM:US (last visited Jan. 30, 2013) (on file with author); *see also China Calls for End to Surveillance Flights*, CNN.COM, http://articles.cnn.com/2001-04-12/world/china.us.surveillance_1_ep-3-spy-plane-chinese-side?_s=PM:asiapcf (last visited Jan. 30, 2013) (on file with author). Chinese foreign ministry spokeswoman, Zhang Qiyue, stated that

return or treat the downed aircraft as sovereign United States territory,[188] sparked a very tense series of exchanges between the two governments.[189] Unfortunately, as the following years would demonstrate, this incident would prove to be more rule than exception. While none of the subsequent incidents of harassment or interference have resulted in the loss of life, the disturbingly confrontational and often reckless manner in which China seeks to enforce its desire to restrict operations in certain waters makes a tragic outcome all the more likely.

2. Harassment of the USNS Victorious[190]

During the early months of 2009, China began to demonstrate an increased willingness to directly confront foreign vessels that it considered to be operating illegally within international waters, but within both its uncontested EEZ and the U-shaped line.[191] Although not occurring within the boundaries of the U-shaped line, Chinese harassment of the USNS *Victorious* (*Victorious*) proved to be demonstrative of its methods of operations and a harbinger for the nature of forthcoming events. The manner in which China conducted these engagements would also bear a chilling similarity to the behavior of its fighter jet pilots that led to the mid-air collision in 2001.

On March 4, 2009, the *Victorious* was conducting normal survey operations[192] in the Yellow Sea, approximately 125 miles off the coast of

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"[t]he U.S. should not make any wrong decisions or do anything which could complicate the matter further."

[188] *U.S. Envoy Holds Brief Talks with China*, CNN.COM, http://articles.cnn.com/2001-04-18/world/china.negotiations.05_1_chinese-officials-chinese-pilot-24-member-crew?_s=PM:asiapcf (last visited Jan. 30, 2013) (on file with author).

[189] *Id.*

[190] *Military Sealift Command Ship Inventory*, MSC.NAVY.MIL, http://www.msc.navy.mil/inventory/ships.asp?ship=165&type=OceanSurveillanceShip (last visited Sept. 26, 2013). The USNS *Victorious* is "one of the five Ocean Surveillance Ships that are part of the 25 ships in Military Sealift Command's Special Mission Ships Program." She is 235 feet long with a draft of 25 feet.

[191] *Pentagon Says Chinese Vessels Harassed U.S. Ship*, CNN.COM, http://edition.cnn.com/2009/POLITICS/03/09/us.navy.china/index.html (last visited Sept. 26, 2013).

[192] *Chinese Boats Harassed U.S. Ship, Officials Say*, CNN.ORG, http://edition.cnn.com/2009/WORLD/asiapcf/05/05/china.maritime.harassment/index.html (last visited Sept. 26, 2013). The USNS *Victorious*' primary mission is to conduct underwater survey and acoustic listening operations in international waters.

China.[193] A Chinese Bureau of Fisheries Patrol vessel approached the *Victorious* in the dark.[194] It then illuminated the *Victorious* with a "high-intensity spotlight."[195] The Patrol vessel then proceeded to cross the *Victorious'* bow without warning "at a range of about 1,400 yards."[196] The following day, a PRC aircraft overflew the ship twelve times.[197] The Chinese Y-12 aircraft, used primarily for maritime surveillance, flew over at an approximate altitude of 400 feet, coming within 500 yards of the Victorious.[198]

The Chinese harassment of the *Victorious* continued on May 1, 2009.[199] At the time of the confrontation, the *Victorious* was operating approximately one hundred and seventy miles off the Chinese mainland in the Yellow Sea.[200] Approached by two Chinese fishing vessels, the *Victorious* engaged in "defensive maneuvers" as the fishing vessels' intentions were unknown.[201] The *Victorious* was forced to ready its fire hoses as the Chinese vessels continued to close the distance.[202] Operating in what the crew of the *Victorious* considered an unsafe manner, one of the Chinese vessels closed to within thirty yards.[203] The *Victorious* sounded her alarms and sprayed their fire hoses near the Chinese vessels, but did not directly target them.[204] At one point, the fishing vessels came to a full stop directly in the *Victorious'* path. An incredibly dangerous maneuver during clear weather, the heavy fog present that day made the tactic even more so. In order to avoid a collision, the *Victorious* was forced to call for an emergency stop. The similarity of operation by the Chinese vessels and aircraft during this incident and that involving the USNS *Impeccable* in the South China Sea are difficult to ignore.

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[193] *Chinese Vessels Shadow, Harass Unarmed U.S. Survey Ship*, DEFENSE.GOV, http://www.defense.gov/news/newsarticle.aspx?id=53401 (last visited Sept. 26, 2013).
[194] *Pentagon Says Chinese Vessels Harassed U.S. Ship*, *supra* note 191.
[195] *Chinese Vessels Shadow, Harass Unarmed U.S. Survey Ship*, *supra* note 193.
[196] *Chinese Boats Harassed U.S. Ship, Officials Say*, *supra* note 192.
[197] *Chinese Vessels Shadow, Harass Unarmed U.S. Survey Ship*, *supra* note 193.
[198] *Chinese Boats Harassed U.S. Ship, Officials Say*, *supra* note 192.
[199] *Chinese Vessels Approach Sealift Command Ship in Yellow Sea*, DEFENSE.GOV, http://www.defense.gov/News/NewsArticle.aspx?ID=54196 (last visited Sept. 26, 2013).
[200] *Id*.
[201] *Id*.
[202] *Chinese Boats Harassed U.S. Ship, Officials Say*, *supra* note 192.
[203] *Chinese Vessels Approach Sealift Command Ship in Yellow Sea*, *supra* note 199.
[204] *Id*.

3. Harassment of the USNS Impeccable[205]

In early March 2009, a Chinese frigate closed to within 100 yards and crossed the bow of the USNS *Impeccable* (*Impeccable*).[206] A few hours later, a Chinese Y-12 aircraft performed "11 fly-bys of [the] *Impeccable* at an altitude of 600 feet and range of 100 to 300 feet."[207] The Chinese frigate then followed the fly-bys by conducting a final crossing of the *Impeccable's* bow at a slightly greater distance.[208] At no point during the encounter did the *Impeccable's* crew receive any communications from either the Chinese vessel or aircraft denoting their intentions.[209]

Two days later, a Chinese intelligence collection ship contacted the *Impeccable's* bridge via radio informing the USNS vessel that its "operations [were] illegal."[210] The Chinese ship then directly threatened the *Impeccable* by directing it to leave the area or "suffer the consequences."[211]

The most serious incident, however, occurred on March 8, 2009, when five Chinese vessels intercepted and engaged the *Impeccable* as she was conducting oceanic surveys in international waters in the South China Sea.[212]

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[205] *Military Sealift Command Ship Inventory*, MSC.NAVY.MIL, http://www.msc.navy.mil/inventory/ships.asp?ship=106&type=OceanSurveillanceShip (last visited Sept. 26, 2013). The "USNS Impeccable is one of the five Ocean Surveillance Ships that are part of the 25 ships in Military Sealift Command's Special Mission Ships Program." It is 281.5 feet long with a draft of 26 feet. *Military Sealift Command* Overview, MSC.navy.mil, http://www.msc.navy.mil/N00P/overview.asp (last visited Jan. 30, 2012). USNS vessels operate differently than traditional U.S. Navy warships. The "Military Sealift Command reports through three distinct and separate chains of command: to U.S. Fleet Forces Command for Navy transport matters, and to U.S. Transportation Command for defense transportation matters,

[206] *U.S. Protests Harassing of Navy Ship by Chinese*, MSNBC.COM, http://www.msnbc.msn.com/id/29596179/ns/world_news-asia_pacific/t/us-protests-harassing-navy-ship-chinese/#.T15RlHLQc_M (last visited Sept. 26, 2013).

[207] *Pentagon Says Chinese Vessels Harassed U.S. Ship*, *supra* note 191.

[208] *U.S. Protests Harassing of Navy Ship by Chinese*, *supra* note 206.

[209] *Id.*

[210] *Chinese Vessels Shadow, Harass Unarmed U.S. Survey Ship*, *supra* note 193.

[211] *Id.*

[212] *Pentagon Says Chinese Vessels Harassed U.S. Ship*, *supra* note 191. "The Chinese ships involved were a Navy intelligence collection ship, a Bureau of Maritime Fisheries Patrol Vessel, a State Oceanographic Administration patrol vessel and two small Chinese-flagged trawlers."

According to the Pentagon, two of the five Chinese vessels closed to within 50 feet of the *Impeccable*, waving Chinese flags and shouting for the USNS vessel to depart the area.[213] With the intentions of the Chinese vessels unknown, crew members aboard the *Impeccable* readied the ships external fire hoses and sprayed the harassing vessels' crewmembers.[214] The Chinese crewmembers disrobed and continued shouting as the vessels closed to within 25 feet of the Impeccable.[215]

After the *Impeccable's* crew announced over the loud speaker that it was seeking a safe route out of the area, two of the Chinese vessels maneuvered directly into the *Impeccable's* path forcing it to make an emergency stop to avoid a collision.[216] At one point, the Chinese vessels went so far as to drop debris into the *Impeccable's* path and attempt to grab the ship's deployed sonar array with long poles.[217]

The brazen and directly threatening nature of the *Impeccable's* encounters with PRC vessels and aircraft caused consternation within United States and Chinese diplomatic circles.[218] The U.S. Department of State lodged a formal protest with the China's Foreign Ministry through the U.S. Embassy in Beijing.[219] Similarly, the U.S. Department of Defense complained to the Chinese Embassy in Washington, D.C.[220] Maintaining its position that the *Impeccable* was conducting its mission in international waters, U.S. defense officials stated that the incident was "serious enough that we believe it requires face-to-face talks to find out what was going on here and to ensure that there are no further incidents of this nature in the future."[221] Reiterating the U.S. position that the Impeccable was conducting lawful operations well within international water boundaries, Pentagon Press Secretary Geoff Morrell said on March

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[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Discussions Aim to Resolve U.S. Survey Ship Incident*, DEFENSE.GOV, http://www.defense.gov/news/newsarticle.aspx?id=53438 (last visited Sept. 26, 2013). *See also Chinese Vessels Shadow, Harass Unarmed U.S. Survey Ship*, DEFENSE.GOV, http://www.defense.gov/news/newsarticle.aspx?id=53401 (last visited Sept. 26, 2013). Defense officials stating, "We expect Chinese ships to act responsibly and refrain from provocative activities that could lead to miscalculation or a collision at sea, endangering vessels and the lives of U.S. and Chinese mariners."

11, 2009 that the United States "hope[s] that the Chinese would behave in a similar way, that is, according to international law.[222] Furthermore, this incident is not at all consistent with the expressed desire of both governments to build a closer relationship, particularly a closer military-to-military relationship."[223] Morrell further stated that due to the *Impeccable's* lawful conduct and position, there was no "reason to interfere with those operations."[224] These incidents showcased the Chinese intention to use its military and quasi-civilian vessels and aircraft to intercept, interfere, and threaten foreign maritime traffic in the South China Sea.

To underscore the seriousness of these incidents, the U.S. Chief of Naval Operations, Admiral Gary Roughead visited China in May 2009 to discuss the "safety of U.S. and Chinese maritime operations."[225] Following the *Impeccable* and *Victorious* incidents, the U.S. Navy began to assign various warships to serve as escorts for some USNS missions.[226] Yet, China is not directing its efforts solely at the United States; its geographic neighbors are targets as well.

B. Interdicting India

From mid to late July, 2011, the Indian Navy Ship (INS) *Airavat* paid a series of port calls to the Vietnamese port of Nha Trang.[227] The port is located on Vietnam's south central coast.[228] On July 22, 2011, the INS *Airavat* departed Nha Trang en-route to Haiphong, another Vietnamese port. When the Indian ship was approximately forty-five miles from the Vietnamese coast, in international waters within the South China Sea, an unsolicited call came in over the bridge's open radio channel.[229] Identifying itself as the Chinese Navy, the voice ordered the

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[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *Chinese Boats Harassed U.S. Ship, Officials Say*, *supra* note 192.
[226] *Id.*
[227] *China Harasses Indian Naval Ship on South China Sea*, TIMESOF INDIA.COM, http://articles.timesofindia.indiatimes.com/2011-09-02/india/30105514_1_south-china-sea-spratly-ins-airavat (last visited Sept. 26, 2013).
[228] Nha Trang is a major military port that was primarily established by the United States during the Vietnam Conflict.
[229] *India, China Navies Face-Off*, THE-DIPLOMAT.COM, http://the-diplomat.com/indian-decade/2011/09/01/india-china-navies-face-off/ (last visited Sept. 26, 2013).

INS *Airavat* to identify itself.[230] When the INS *Airavat* failed to respond, the caller informed the Indian ship that it was "entering Chinese waters" and instructed the ship to "move out of here."[231] The INS *Airavat* could not locate another vessel on its radar nor was any other ship visible on the horizon, thus it continued on its original course toward Haiphong.[232]

At the time, the Indian government downplayed the incident and did not file a formal diplomatic protest with China.[233] It did, however, describe the event as very unusual and reiterated its position that "India supports freedom of navigation in international waters, including in the South China Sea, and the right of passage in accordance with accepted principles of international law."[234] Per the Times of India, almost exactly one month later, China expressed its displeasure with the Indian Navy's visit to Vietnam through a statement issued by its official news agency.[235]

C. Rebuking the Republic of Vietnam

China and Vietnam have a contentious history regarding competing maritime and territorial claims in the South China Sea. The geographic fact that China and Vietnam share overlapping EEZs is a significant contributing factor to this tension. China and Vietnam came to blows in 1974 over the Paracel Islands. China gained control of the islands following a fairly one-sided naval battle in which they defeated Vietnamese forces. Fifteen years later in 1989, the two nations fought a brief naval battle over near the Spratly Islands. There is some consensus

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[230] *Id.*
[231] *Id.*
[232] *China Harasses Indian Naval Ship on South China Sea*, *supra* note 227.
[233] *India, China Navies Face-Off*, *supra* note 229.
[234] *Id.*
[235] *China Harasses Indian Naval Ship on South China Sea*, *supra* note 227.

> China has in the past month expressed serious displeasure about India's growing ties with Vietnam. On August 18, the official Chinese news agency Xinhua analyzed the India-Vietnam relationship, saying it would create 'challenges' for China. It highlighted the Indian Navy's goodwill visit to Vietnam, saying, 'It is a clear indication that Vietnam is attempting to include a third country in the South Sea dispute.'

Id.

that of all of the disputes that China has with other nations regarding economic, military, and other forms of activity within the South China Sea, its confrontations with Vietnam constitute the greatest possibility for true military escalation.

The most recent crisis point occurred in late May and early June 2010. On May 29, 2011, Vietnam's state-owned oil and energy company, PetroVietnam, accused China of purposefully sabotaging its operations.[236] Vietnamese officials alleged that on May 26, 2011, three Chinese patrol vessels approached a PetroVietnam ship at high speed.[237] About an hour prior to the approach, the Vietnamese ship detected the patrol vessels on radar, but the Chinese vessels never communicated a warning or any announcement of their approach.[238] (The PetroVietnam ship, the Binh Minh 02, was conducting seismic surveys where "[t]he encounter took place 120 nautical miles off the coast of Phu Yen province in south-central Vietnam, in waters that are claimed by both China and Vietnam.")[239] The Binh Minh 02 transmitted warnings to the approaching vessels, but they were not acknowledged.[240] At a distance of approximately two kilometers from the Binh Minh 02, one of the Chinese vessels veered off from the group and intercepted the oil exploration vessel's undersea survey cable.[241] The Chinese patrol vessel cut the cable which had been submerged at a depth of 30 meters to avoid crossing ship traffic.[242]

Less than two weeks later, a strikingly similar incident would occur between another of PetroVietnam's survey ships and a Chinese fishing vessel. On June 9, 2011, a Chinese fishing vessel rammed the Vietnamese vessel's seismic survey cables while it conducted an operation similar to that attempted by the Binh Minh 02.[243] At the time

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[236] *Vietnam and China Oil Clashes Intensify*, FT.COM, http://www.ft.com/intl/cms/s/0/4d3badc0-8867-11e0-a1c3-00144feabdc0.html#axzz1kfwIfNLx (last visited Sept. 26, 2013).

[237] *Vietnam Accuses China in Seas Dispute*, BBC.CO.UK, http://www.bbc.co.uk/news/world-asia-pacific-13592508 (last visited Sept. 26, 2013).

[238] *Vietnam and China Oil Clashes Intensify*, *supra* note 236.

[239] *Id*.

[240] *Vietnam Accuses China in Seas Dispute*, *supra* note 237.

[241] *Id*.

[242] *Vietnam and China Oil Clashes Intensify*, *supra* note 236.

[243] *Vietnam Says Chinese Boat Harassed Survey Ship; China Disputes*, BUSINESSWEEK.COM, http://www.businessweek.com/news/2011-06-09/vietnam-says-chinese-boat-harassed-survey-ship-china-disputes.html (last visited Sept. 26, 2013).

of the collision, the Vietnamese ship was located more than six hundred and twenty two miles from the island of Hainan.[244]

The public response from China's state news agency, Xinhua News, was intriguing. It reported that China's Foreign Ministry demanded that Vietnam "halt all acts which violate Chinese sovereignty over the Nansha Islands and the surrounding waters."[245] It described an incident in which armed Vietnamese vessels "chased away" Chinese fishing boats.[246] Differing significantly from the Vietnamese version, Chinese Foreign Ministry spokesman, Hong Lei, claimed that as the Vietnamese chased the Chinese fishing boats out of the area, one of the fishing boats' nets became "tangled with the cables of [a] Vietnamese oil exploring vessel, which was operating illegally in the same water area."[247] This entanglement led to the fishing boats being forcibly dragged, stern forward, for over an hour. Eventually, the crew of the fishing boat was forced to cut their nets away to separate the two vessels.[248]

Although the accuracy regarding the reporting of the facts may be disputed, the specific language used by China's official state news agency in addressing the situation is more important. The Chinese foreign ministry described its sovereignty over the Nansha (Spratly) Islands and surrounding waters as "indisputable."[249] Further, it stated that such sovereignty has been evident "from generation to generation."[250] Chinese officials referred to Vietnam's "exploration on the Vanguard Bank and chasing away of the Chinese boats" as having "grossly infringed the Chinese sovereignty and maritime rights."[251] Another translation uses the word "gravely" instead of "grossly."[252]

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[244] *Id.*

[245] *Vietnam Urged to Halt Acts Violating Chinese Sovereignty over Nansha Islands and Surrounding Waters*, XINHUANET.COM, http://news.xinhuanet.com/english2010/china/2011-06/10/c_13920791.htm (last visited Sept. 26, 2013).

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *Vietnam Says Chinese Boat Harassed Survey Ship; China Disputes*, *supra* note 243.

[251] *Vietnam Urged to Halt Acts Violating Chinese Sovereignty over Nansha Islands and Surrounding Waters*, *supra* note 245.

[252] *China Accuses Vietnam in South China Sea Row*, BBC.CO.UK, http://www.bbc.co.uk/news/world-asia-pacific-13723443 (last visited Sept. 26, 2013). Diplomatic circles are careful to use either word as doing so is often interpreted as drawing a line in the diplomatic sand.

Diplomatic circles are careful to use either word as doing so is often interpreted as drawing a line in the diplomatic sand.

In response, Nguyen Phuong Nga, the Vietnamese foreign ministry spokeswoman, stated that the Vietnamese survey ship was operating within Vietnam's EEZ.[253] She referred to the incident as "premeditated and carefully calculated"[254] and stated that "[t]hese acts are tailored in a very systematic way by the Chinese side with the aim to turn undisputed areas into disputed areas."[255] Indeed, when comparing the Chinese conduct alleged by the various nations, a similar pattern is evident.

D. Jousting with Japan

Demonstrative of its strategy to harass foreign vessels with a combination of state-sponsored boats and aircraft, China's strategy remains consistent in any area where it deems it possesses a water, land, or air sovereignty claim. Similar to Vietnam, Japan shares a contentious history with China, but for different historical reasons altogether. While the two nations have fought various conflicts against one another throughout history, significant land and sea disputes linger as a result of their most recent and bloodiest conflict, World War II.

The Senkaku Islands lie approximately 240 miles southwest of Okinawa. China refers to them as the Diaoyu Islands.[256] Although they lie outside of the U-shaped line, they are the subject of a long-term and tense ownership dispute between China and Japan. Consequently, the Senkaku Islands are demonstrative of China's consistent maritime harassment practice in asserting territorial and water-based sovereignty.

On September 7, 2010, a Chinese fishing trawler collided with one of two Japanese patrol boats just off the Senkaku Islands.[257] In a video leaked to the internet, one can view the Chinese vessel approach the

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[253] *Id.*
[254] *Id.*
[255] *Vietnam Says Chinese Boat Harassed Survey Ship; China Disputes*, *supra* note 243.
[256] *China Demands Compensation over Captured Sailor*, ABC.NET.AU, http://www.abc.net.au/news/2010-09-26/china-demands-compensation-over-captured-sailor/2274458 (last visited Sept. 26, 2013).
[257] *Id.*

patrol boats and bump up against them two times.[258] The Japanese coast guard cutters issued repeated warnings in both Japanese and Chinese prior to the collision, but the fishing vessel did not alter course.[259]

Tensions between the two States escalated dramatically when the Japanese detained the fishing vessel's captain and crew.[260] Japanese authorities released the Chinese crew on September 13, 2010, but the captain remained in detention until September 25, 2010.[261] The Chinese foreign ministry repeatedly demanded that Japan return the trawler's captain during his incarceration. The foreign ministry stated that the captain's detention was illegal as it "seriously infringed upon China's territorial sovereignty and violated the human rights of Chinese citizens."[262] The ship captain personally reiterated the Chinese government's position upon his return to Fuzhou, China, saying, "I am thankful to the party, the government and my fellow citizens for my peaceful return. My detention by Japan was illegal. The Diaoyu Islands are part of Chinese territory. I firmly support the Chinese government's position."[263]

The repercussions from the incident continued well past the repatriation of the Chinese fishing vessel's captain and crew. While the Chinese government denied it, several Japanese companies reported a halt to shipments from China.[264] Some blamed Chinese customs while others stated that their contracts had been cancelled outright by Chinese exporters.[265]

V. Conclusion

China's strategy to control the lands and waters within the U-shaped line fully recognizes the temporal component necessary to the establishment of any authoritative international law. China understands

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[258] *Senkaku Collisions Video Leak Riles China*, JAPANTIMES.COM, www.japantimes.co.jp/text/nn20101106a1.html (last visited Mar. 2, 2012)
[259] *Id.*
[260] *China Demands Compensation over Captured Sailor*, *supra* note 256.
[261] *Id.*
[262] *Id.*
[263] *Id.*
[264] *China Rare Earth Exports to Japan Still Halted*, BUSINESSWEEK.COM, http://www.businessweek.com/ap/financialnews/D9J02PF01.htm (last visited Sept. 26, 2013).
[265] *Id.*

that legal authority within international law is gained by taking the long view. It is a strategy comprised of gaining several small toe-holds rather than one or two major efforts. Each toe-hold represents a small area of control, either in the physical or legal realm.

Basing the foundation of its legal argument for sovereignty over the South China Sea islands and waters in the past is an essential maneuver. The primary problem for China in maintaining this argument is asserting that it has maintained control over the area in question for a period of time significant enough to establish a historic claim under international law.[266]

For example, the number of instances that nations such as France, Japan, and Vietnam can credibly claim to have controlled, in either full or partial measure, some or all of the islands within the South China Sea is a serious impediment to China's historical argument. The required criteria, that possession must be both clear and effective over a substantial period of time, is difficult for China to meet. The Chinese government knows this, thus it seeks to build a step-ladder to legal legitimacy by creating the evidence it needs over the period of time it requires.

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[266] *Alarm as China Issues Rules for Disputed Area*. THENEWYORKTIMES.COM, http://www.nytimes.com/2012/12/02/world/asia/alarm-as-china-issues-rules-for-disputed-sea.html (last visited June 5, 2013). "New rules announced by a Chinese province last week to allow interceptions of ships in the South China Sea are raising concerns in the region, and in Washington, that simmering disputes with Southeast Asian countries over the waters will escalate." These rules, passed as part of an domestic law effort, signify an overt attempt by China to bolster its historic claim by creating a consistent internal position. In essense, at some point in the future it may argue that it controls, thus is sovereign, over the area because it has always acted as if it did. It is a simple, yet clever, argument as it actively accepts the long view required under international law. *See Q&A South China Sea Dispute*. BBC.CO.UK. http://www.bbc.co.uk/news/world-asia-pacific-13748349 (last visited May 5, 2013).

> In July 2012 China formally created Sansha city, an administrative body with its headquarters in the Paracels which it says oversees Chinese territory in the South China Sea - including the Paracels and the Spratlys. Both Vietnam and the Philippines protested against this move. In November 2012, China granted its border patrol police in Hainan the power to board and search foreign ships stopping in its waters or violating other regulations.

Id.

Attempts to redefine specific wording found in UNCLOS and the passage of targeted domestic legislation are part of this effort. The surveillance missions undertaken by the USNS Victorious and USNS Impeccable would be considered unlawful under UNCLOS. Even though the United States has not ratified UNCLOS, the weight that UNCLOS holds as customary international law would create significant limitations for U.S. Navy operations within the South China Sea were China's interpretations of the treaty to gain legal traction. Yet, acceptance of this position through a widespread portion of the international community is highly unlikely in the near term. Still, the effects of acceptance would not be limited to the United States. Vietnam, India, Malaysia, and other South China Sea States would be formally precluded from conducting similar activity within China's EEZ as they are all UNCLOS signatories.

China's employment of military or military-type enforcement in the South China Sea is both the most basic and most dangerous aspect of its strategy. The rationale behind it is simple. If China can deny the use of specific areas to the otherwise lawful transit or operation of foreign vessels, it gains an element of control. Additionally, using quasi-official fishing vessels as enforcement tools alongside military vessels provides the Chinese government with some level of plausible deniability, though the pattern of behavior is easily ascribable to the Chinese government given the specific marine and aeronautical assets involved. Yet, despite all of the significant obstacles inherent to each aspect of its effort, China's strategy is slowly proving effective.

The effectiveness of the strategy has more to do with the military and economic resources of the State employing the strategy than the legal merits of the strategy itself. The scope of China's military, economic, and political capabilities demand that other States, especially regional neighbors, pay close attention to what China says and does. This is evident in the manner in which other States have responded or reacted to China's strategic tactics in expressing its extraordinary maritime claims in the South China Sea.

For example, following the incident with the *Impeccable* in 2009, the U.S. Navy directed the USS *Chung Hoon*, a guided-missile destroyer, to accompany the *Impeccable* when it returned to the South China Sea several days later.[267] The addition of a warship to escort the *Impeccable*

[267] Dutton, *supra* note 184, at 54.

signifies an expenditure of personnel and resources that would otherwise be tasked elsewhere. Mission planning decisions regarding resources allocated to survey missions in the South China Sea must now factor in the possibility of Chinese harassment and how to compensate for it.

Furthermore, the extent to which the Chinese strategy is showing signs of effectiveness is evident by the level of political discussion dedicated to the subject. In 2000, the U.S. Congress created the United States-China Economic and Security Review Commission (Commission) to "review the national security implications of trade and economic ties between the United States and the People's Republic of China."[268] Part of its mandate is to conduct hearings to collect information and to submit an annual report to the U.S. Congress on major issues of concern between the United States and China. In 2011, the Commission heard extensive testimony related to China's strategy in the South China Sea.[269] Such high-level governmental discussions are not limited to the United States.

In the latter half of 2011, Japan held formal talks with the Philippines to discuss the establishment of a "permanent working group" to address issues of "disputes and other Asian maritime concerns."[270] Likewise, Japan and India have recently sought to strengthen their political and economic ties. The two States signed two formal agreements in 2010:

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[268] 22 U.S.C. § 7002 (2006).

[269] *China's Active Defense Strategy and its Regional Impact: Hearing Before the U.S.-China Economic and Security Review Comm'n Before the H. Comm. on the Armed Services*, 112th Cong. 9 (2011) (statements of Lieutenant General David A. Deptula, U.S. Air Force (Retired), Captain Stacy A. Pedrozo, Judge Advocate General's Corps, U.S. Navy).

[270] *Japan Wades into South China Sea Feud*, JAPANTIMES.CO.JP, http://www.japantimes.co.jp/text/nn20110922a7.html (last visited Sept. 26, 2013). "Japanese Ambassador to the Philippines Toshinao Urabe said Tuesday that Tokyo has an interest in ensuring that the vast ocean remains safe and open to commerce. Japanese officials will 'exchange notes' with their Philippine counterparts and assess how they can help ensure that the disputes are resolved peacefully, he said." Additionally,

> '[w]e want a peaceful solution under the international framework, Urabe said. "It is very clear that a lot of traffic goes through that area.' . . . Urabe said any discussion between the two countries about the South China Sea does not mean they are ganging up on Beijing, which is 'a very important partner for both of us.' 'We are not having an alliance against China, Urabe [also] said. 'The objective is to create a win-win relationship among us.'

Id.

the Joint Statement Vision for Japan-India Strategic and Global Partnership in the Next Decade and a Comprehensive Economic Partnership Agreement.

India, for its part, is similarly situated to Japan as a non-South China Sea State with significant economic interests in seeing commercial shipping lanes in the South China Sea remain unimpeded. In late 2011, India likewise engaged a South China Sea State, Vietnam, in diplomatic talks. "Vietnamese President Truong Tan Sang met Indian Prime Minister Manmohan Singh in New Delhi, with both sides pledging to maintain peace and security in the South China Sea while expanding the contents of their strategic partnership."[271] The political subtext underlying the political engagement of these four States is concern over China's South China Sea claims.

China's strategy is causing other nations to react; it is changing, perhaps even directing, the political conversation among States with an interest in the South China Sea, whether that interest is economic or strategic. And, while no State will concede that China has sovereign rights over the islands and waters located within the U-shaped line, China's strategy is beginning to pay off, in small, but tangible ways. The United States and China's neighboring countries have had to allocate greater resources in assets, personnel, and money to combat China's efforts. The assignment of armed escorts to vessels conducting operations, asserted as legal per the vessel's flag State, on the high seas and within foreign EEZs is one example. The formation of high-level government commissions and formal bilateral State agreements are another. Only ineffective strategies may be ignored.

The concern over China's effort to gain sovereignty over the South China Sea has less to do with the specific State behind the effort than with the consequences of any one State possessing hegemonic ownership of the South China Sea. It is China's military and economic resources rather than any particular political or social philosophy that make this a significant concern for other interested States. The fact that South China Sea is the proverbial tinderbox with the potential for a small or minor incident to swiftly ignite into an international crisis only intensifies the concern. China's efforts to gain sovereign control over the islands and

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[271] *India and Japan's Involvement in the South China Sea Disputes*, EASTASIAFORUM.ORG, http://www.eastasiaforum.org/2011/11/10/india-and-japan-s-involvement-in-the-south-china-sea-disputes/ (last visited Sept. 26, 2013).

waters within the South China Sea constitute a grave threat to regional peace and security, as would the efforts of any other single State.

The potentiality for this effort to result in the loss of life is proven.[272] Small scale skirmishes have the potential to re-occur and ignite into larger conflicts. It does not take much imagination for another similar incident to take place given the hazardous and unsafe practices exhibited by China in confronting those it considers to be violating its claimed sovereignty. In order to prevent a future maritime incident from growing into a larger diplomatic, or even armed conflict, some scholars argue for a setting aside of the debates over sovereignty or ownership in favor of a focus on establishing formal safety guidelines.[273] Perhaps this is the answer in the short term, at least in regard to preventing further casualties at sea. Yet, even if China ceases its overt military enforcement tactics, China is unlikely to deviate from its core goal of obtaining sovereignty over the South China Sea islands and waters. If successful, China will have achieved through the use of lawfare what it traditionally would have had to achieve almost solely through military force.

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[272] *U.S. Spy Plane, Chinese Fighter Collide*, *supra* note 30.

[273] *US and China Can't Calm South China Sea*, ASIATIMES.COM, http://www.atimes.com/atimes/China/LF04Ad01.html (last visited Sept. 26, 2013). Raul Pedrozo, a retired U.S. Navy Judge Advocate General's Corps Captain and Associate Professor of International Law at the U.S. Naval War College argues that

> [i]t is time for the 'legal' debate to be put on the shelf, at least in the short term." Referring to Military Maritime Consultative Agreement signed by China and the US in 1998, Pedrozo states that effort should "focus on . . . developing operational safety measures and procedures that limit mutual interference and uncertainty and facilitate communication when US and PLA military ships and aircraft make contact at sea.

Id.

"DEFENSE COUNSEL, PLEASE RISE": A COMPARATIVE ANALYSIS OF TRIAL *IN ABSENTIA*

MAJOR SARAH C. SYKES*

"Run, run as fast as you can. You can't catch me, I'm the Gingerbread Man."[1]

I. Introduction

On May 27, 2007, Private (PVT) Jonathon Medina viciously beat and raped a young enlisted female Soldier in her barracks room.[2] Assigned to the same battalion, PVT Medina and the victim were acquainted with each other and attended the same party earlier in the evening on the night of the attack.[3] After investigators matched DNA recovered from the victim to PVT Medina, his commander charged him with rape,[4] burglary with intent to commit rape, and attempted anal sodomy.[5] On March 17, 2008, the military judge arraigned PVT Medina and advised the Soldier that if he voluntarily failed to appear for trial, he could be tried and sentenced *in absentia*.[6] During the arraignment, Private Medina indicated his understanding.[7] On March 20, 2008, on the eve of his court-martial, PVT Medina voluntarily absented himself from the proceedings.[8] A hearing was held before the commencement of trial

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[1] JIM AYLESWORTH, THE GINGERBREAD MAN 9 (1998).

[2] United States v. Medina, No. 2008-0233 (A. Ct. Crim. App. June 2008), *cert. denied*, United States v. Medina, 09-0775/AR (C.A.A.F. Dec. 4, 2009).

[3] *Id.*

[4] Transcript of Record at 5, United States v. Medina (No. 2008-0233).

[5] *Id.*

[6] *Id.* A "trial *in absentia*" is a "trial held without the accused being present." BLACK'S LAW DICTIONARY 1645 (9th ed. 2009).

[7] Transcript of Record at 24, United States v. Medina (No. 2008-022).

[8] *Id.* at 61.

the following day, wherein the military judge heard testimony from PVT Medina's mother, his roommate, a friend from his unit, and the company first sergeant regarding PVT Medina's actions the last night for which he was accounted.[9] After hearing the evidence, the military judge found that PVT Medina voluntarily absented himself and the Government made all necessary efforts to procure his presence at trial to no avail.[10] The trial proceeded without the accused present and an officer panel the court convicted PVT Medina of rape and unlawful entry,[11] sentencing him to a reduction to the lowest enlisted grade, forfeiture of all pay and allowances, confinement for thirteen years, and a bad-conduct discharge.[12]

Rule for Courts-Martial (RCM) 804(c) allows for trial *in absentia* if an accused voluntarily absents himself before the start of the court-martial but after arraignment.[13] This approach conflicts with the corresponding civilian federal rule and with international law. Under federal law, a civilian accused may not be tried *in absentia* without being present at the beginning of trial which does not include arraignment.[14] States have enacted laws that either adopt the federal view or take the opposite approach to allow for trial *in absentia* once an accused is notified of a court date.[15] In the international arena, trials *in absentia* "are controversial and the subject of critical review by . . . leading human rights bodies. . . ."[16] Internationally, *in absentia* trials are generally not permitted unless the "individual convicted in absentia may obtain a retrial."[17] From an ethical standpoint, trials conducted *in*

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[9] *Id.*
[10] *Id.*
[11] *Id.* at 251.
[12] *Id.* at 290.
[13] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 804(c) (2012) [hereinafter 2012 MCM].
[14] FED. R. CRIM. P. 43(b); Crosby v. United States, 506 U.S. 255 (1993).
[15] Kurtis A. Kemper, Annotation, *Sufficiency of Showing Defendant's "Voluntary Absence" from Trial for Purposes of State Criminal Procedure Rules or Statutes Authorizing Continuation of Trial Notwithstanding Such Absence*, 19 A.L.R. 697 (2006); Gov't of the Virgin Islands v. Brown, 507 F.2d 186 (3d Cir. 1975); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975); United States v. Pastor, 557 F.2d 930 (2d Cir. 1977); Commonwealth v. Hill, 723 A.2d 255 (Pa. Supr. Ct. 1999).
[16] Chris Jenks, *Notice Otherwise Given: Will* In Absentia *Trials at the Special Tribunal for Lebanon Violate Human Rights?*, 33 FORDHAM INT'L L.J. 57, 61 (2009); International Covenant on Civil and Political Rights art. 14, Mar. 23, 1976, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter CPHRFF].
[17] *Id.*

absentia present insurmountable ethical issues for defense counsel representing the accused.[18]

This article examines the rights afforded an accused under military law, civilian federal law, various state laws, and international law with regard to trial *in absentia*. Part I explains the history of military trials *in absentia* and examines the application of the current rule and case law, with particular attention paid to how the unique structure of the military may affect the treatment of an accused who voluntarily absents himself prior to trial. Part II compares the military trial *in absentia* provision to the federal rule to demonstrate the disparity between the two. Part III examines the international stance on trial *in absentia* from both a doctrinal standpoint and a human rights perspective as compared to the military approach. The ethical implications of the current military system governing to trial *in absentia* and how the federal rule ensures a more equitable and ethical process are discussed in Part IV. In conclusion, this article argues for a change in policy in the military criminal justice system to bring it in line with the federal system and international practices to create a more fair and equitable judicial process for the absent accused.

II. Military Trials *In Absentia*

A. History

One of the earliest mentions in American military writing of trial *in absentia* was in *Military Law*, "a comprehensive treatise on the science of Military Law," written by Colonel William Winthrop, former Assistant Judge Advocate General of the Army, in 1886.[19] Colonel Winthrop wrote extensively on the court-martial process and discussed the manner in which to proceed in the event an accused absented himself from custody and was not present for trial.[20] Understanding that the presence of the accused was fundamental to an equitable court-martial, Colonel Winthrop carved out several exceptions:

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[18] *See* Franics A. Gilligan & Edward J. Imwinkelried, *Waiver Raised to the Second Power: Waivers of Evidentiary Privileges by Lawyers Representing Accused Being Tried* In Absentia, 56 S.C. L. REV. 509 (2005); James G. Starkey, *Trial* In Absentia, 53 ST. JOHN'S L. REV. 721 (1979).

[19] WILLIAM WINTHROP, MILITARY LAW, at v (1886).

[20] The Supreme Court recognizes Colonel Winthrop as the "Blackstone of Military Law." Hamdan v. Rumsfeld, 548 U.S. 557, 597 (2006).

> On all days and occasions of the trial on which any material proceeding is had or business is done, the accused, unless he has willfully absented himself, as by escaping from military custody or deserting the service, or has been obliged to be removed on account of drunkenness or disorderly conduct, is entitled to be present and his presence is essential to the legality of the proceedings and sentence.[21]

With regard to when a trial could proceed in the absence of the accused, Colonel Winthrop regarded the time of arraignment as the point of no return as it were. If an accused escapes from custody after entering a not guilty plea, the trial "may proceed and the prosecution completed without regard to his absence."[22] He left no doubt that proceeding to findings and, if necessary, sentencing after the taking of evidence was complete was expected. He later wrote in *Military Law and Precedents* that "[i]f, after the evidence, or the evidence of the prosecution, is all in, the accused escapes from military custody and absconds, the court may proceed to judgment in the usual manner notwithstanding."[23] In fact, Colonel Winthrop succinctly noted:

> The fact that, *pending the trial*, the accused has escaped from military custody, furnishes no ground for not proceeding to a finding, and, in the event of conviction, to a sentence, in his case; and the court may and should thus find and sentence precisely as in any other instance. The court having once duly assumed jurisdiction of the offense and person, cannot, by any wrongful act of the accused, be ousted of its authority or discharged from its duty to proceed fully to try and determine, according to law and its oath.[24]

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[21] WINTHROP, *supra* note 19, at 715; *see also* HARRIS PRENDERGAST, LAW RELATING TO OFFICERS IN THE ARMY 208 (1855) ("[T]he prisoner has a right to be present during the examination of witness . . . [b]ut if he misconducts himself in such a manner as to obstruct the proceedings of the court, he may lawfully be removed, and the trial may be continued in his absence."); THOMAS SIMMONS, THE CONSTITUTION AND PRACTICE OF COURTS-MARTIAL WITH A SUMMARY OF THE LAW OF EVIDENCE 201 (1873) ("No proceedings in open court can take place except in the presence of the prisoner.").

[22] WINTHROP, *supra* note 19, at 403.

[23] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 374 (1896).

[24] WINTHROP, *supra* note 19, at 554 (emphasis added).

In support of his position regarding trial *in absentia*, Colonel Winthrop cited the 1864 military commission of Harrison Dodd.[25] The commission arrested and charged Harrison Dodd, a founding member of the Sons of Liberty, an antiwar group "devoted to the principles of the founding fathers of the country,"[26] with various crimes related to treason against the United States. Dodd, a civilian, and several others faced the military commission assembled to try them in Indianapolis on September 22, 1864.[27]

At the start of the commission, Dodd's attorney argued that Dodd's civilian status, coupled with the operability of civilian courts at the time, obviated the need for trial by a military commission.[28] When that argument failed, the commission began to take evidence against Dodd. Shortly after the commission began, while transferring to another cell, Dodd escaped from custody.[29] Upon learning of the escape, the Judge Advocate of the commission, Major Henry Burnett, recessed the trial only to reconvene two days later and submit the case to the commission for findings based upon the evidence taken up to that point.[30] Despite Dodd's counsel arguing that no precedent in military law existed to allow an accused "to be proceeded against in his absence,"[31] Major Burnett proceeded.

In support of his decision to move forward despite the absence of the accused, Major Burnett relied upon case law from the supreme courts of Ohio and Indiana.[32] In those cases, the courts held that that if the accused voluntarily absents himself after being present at the commencement of the trial, the trial could proceed as though the accused were present, to include the taking of evidence.[33] In Dodd's case, Major

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[25] *Id.*
[26] MICHAL R. BELKNAP, AMERICAN POLITICAL TRIALS 101 (1994).
[27] *Id.* at 103.
[28] *Id.*
[29] *Id.* at 104.
[30] *Id.*
[31] THE TRIALS FOR TREASON AT INDIANAPOLIS, DISCLOSING THE PLANS FOR ESTABLISHING A NORTH-WESTERN CONFEDERACY 53 (Benn Pitman ed., 1865).
[32] *Id.* at 51.
[33] State v. Wamire, 16 Ind. 357 (1861) (if defendant is present at commencement of trial and later voluntarily absents himself, the court may proceed to verdict); McCorkle v. State, 14 Ind. 39 (Ind. 1860) (trial court properly conducted examination of witnesses when defendant deliberately and voluntarily absented himself during testimony of some witnesses); Fight v. State, 7 Ohio 180 (1835) (trial court proceeded as it should have

Burnett reasoned that he did not go as far as the esteemed courts did because he closed the case and did not allow further evidence to be heard once Dodd escaped from custody.[34] Major Burnett found that by voluntarily absenting himself after the commencement of trial, the accused waived his rights to be present and to be heard.[35]

Major Burnett indicated that his finding might be different if the accused escaped before the start of the trial. He relied on *Fight v. State*:[36]

> If on bail, I apprehend, neither the courts of Great Britain nor the United States would proceed to impanel a jury, in a trial for felony, unless the accused were present to look at his challenges. If the trial, however, is once commenced, and the prisoner, in his own wrong, *leaves the Court, abandons his case to the management of counsel, and runs away*, I can find no adjudged case to sustain the position, that in England the proceedings would be stayed.[37]

Interestingly, the very cases cited by Major Burnett and the Dodd Commission and subsequently cited by Colonel Winthrop only provide for trial *in absentia* after the taking of evidence. Moreover, Colonel Winthrop clearly noted some six years earlier that a trial *in absentia* could not occur "after the accused has pleaded guilty, or after he has pleaded not guilty and the evidence for the prosecution has been presented, he effects an escape from military custody and disappears."[38] His writings seem to suggest that his opinion shifted from the allowance of trial *in absentia* only after evidence was presented to permitting it as long as arraignment occurred prior to the absence. It is the latter position that formed the basis for military law regarding trial *in absentia*.[39]

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when defendant voluntarily left during trial and court proceeded to verdict in his absence).

[34] TRIALS FOR TREASON, *supra* note 31, at 52.

[35] *Id.* at 53.

[36] *Id.*

[37] *Fight*, 7 Ohio at 182–83.

[38] WILLIAM WINTHROP, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 205 (1880).

[39] In *Ex parte Milligan*, the Supreme Court overturned the convictions of Dodd's co-conspirators, noting that the military commission did not have jurisdiction over civilians. 71 U.S. 2 (1866).

B. Trial *In Absentia* Rules Evolve in the Manual for Courts-Martial

1. Rule for Courts-Martial 804(c)

Published in 1890, the first *Manual for Courts-Martial* (*MCM*) contained the same language from Colonel Winthrop's *Military Law*:

> A court having once duly assumed jurisdiction of an offense and person, cannot, by any wrongful act of the accused, be ousted of its authority or discharged from its duty to proceed fully to try and determine, according to law and its oath. Thus the fact that, *pending the trial*, the accused has escaped from military custody, furnishes no ground for not proceeding to a finding, and, in the event of conviction, to a sentence, in the case; and the court may and should find and sentence as in any other case.[40]

Thus, an accused could be tried and sentenced *in absentia* if he escaped from custody while "pending" trial, seemingly allowing for trial *in absentia* if an accused absents himself prior to the swearing of a panel or the taking of evidence. Again, the cases cited by Colonel Winthrop are illustrative as they are the same cases cited by Major Bennett in the Dodd Commission. Those cases, *Fight*, *McCorkle*, and *Wamire*, allow for trial *in absentia* only after a trial has commenced.[41]

Further, it is clear from the *1890 MCM* that Colonel Winthrop contemplated proceeding only after arraignment of an accused by his use of the phrase "proceeding to a finding" which supports the supposition that a court-marital already had begun before the accused became absent. As aforementioned, Colonel Winthrop made clear that an accused waives "his right of defence [sic] and the court is authorized to proceed with its finding" if an accused absents himself after pleading guilty or, after pleading not guilty (at arraignment), the prosecution has presented evidence.[42]

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[40] MANUAL FOR COURTS-MARTIAL, UNITED STATES 15 (Jurisdiction) (1890) (emphasis added).
[41] WINTHROP, *supra* note 38, at 393.
[42] *Id.* at 205.

The rule remained the same in the *Manual for Courts-Martial* published in 1891, 1893, 1901, and 1908.[43] In the *1917 MCM*, the phrase "pending the trial" was changed to "after arraignment and during the trial."[44]

> A court-martial having once duly assumed jurisdiction of a case, cannot, by any wrongful act of the accused, be ousted of its authority or discharged from its duty to proceed fully to try and determine according to law and its oath. Thus the fact that, *after arraignment and during the trial*, the accused has escaped from military custody furnishes no ground for not proceeding to a finding, and, in the event of conviction, to a sentence, in the case; and the court may and should find and sentence as in any other case. During such absence it is proper for his counsel to continue to represent him in all respects as though present.[45]

The new language changed the prior rule by clearly solidifying the drafters' intent to ensure that a trial could not proceed in the absence of an accused unless such absence occurred (1) after arraignment or (2) during the trial itself.

The *MCM*s published in 1921, 1928, 1949, 1951, and 1968 (the first *MCM* published for all three services), all contain the same or a similar provision as the one written in the *1917 MCM*.[46] It was not until the *1969 MCM* that the rule regarding trial *in absentia* changed again.[47] The new rule as codified in the *1969 MCM* changed the definition of the beginning of trial from the time of arraignment to the time any Article 39(a) session began.[48]

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[43] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 8, Jurisdiction (1891); MANUAL FOR COURTS-MARTIAL, UNITED STATES, 16, Jurisdiction (1893); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 7 (1901); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 7 (1908).

[44] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 36 (1917).

[45] *Id.* (emphasis added).

[46] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 36 (1921); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 10 (1928); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 11 (1949); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 11 (1951); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 11 (1968).

[47] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 10 (1969) [hereinafter 1969 MCM].

[48] *Id.*

> The accused's voluntary and unauthorized absence after *the trial has commenced in his presence* and he has been arraigned does not terminate the jurisdiction of the court, which may proceed with the trial to findings and sentence notwithstanding his absence. In such a case the accused, by his wrongful act, forfeits his right of confrontation.[49]

According to the drafters, the change was made "to correct the statement that trial commences in the accused's presence 'by arraignment.'"[50] With trial commencement possible at an Article 39(a) session held prior to arraignment, the drafters made clear that "[a]rraignment is retained as the time subsequent to which the accused's voluntary absence does not terminate the jurisdiction of the court."[51] In other words, arraignment was no longer considered the time at which a trial commenced. Thus, as long as an accused had been arraigned and there had been an Article 39(a) session at which the accused was present, a court could proceed to trial.

The *1984 MCM* once again changed the provision regarding trial *in absentia* and encapsulated it in RCM 804(c). The drafters deleted the phrase "after the trial has commenced" as it appeared in the *1969 MCM* and the rule became what it is today.[52] The current RCM 804(c) provides:

> The further progress of the trial to and including the return of the findings and, if necessary, determination of a sentence shall not be prevented and the accused shall be considered to have waived the right to be present whenever an accused, initially present: (1) Is *voluntarily absent after arraignment* (whether or not informed by the military judge of the obligation to remain during the trial) . . . .[53]

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[49] *Id.*

[50] U.S. DEP'T OF ARMY, PAM. 27-2, ANALYSIS OF CONTENTS FOR COURTS-MARTIAL, UNITED STATES 1969, REVISED EDITION para. 11c (July 1970) [hereinafter DA PAM. 27-2].

[51] *Id.*

[52] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 804(c) (1984) [hereinafter 1984 MCM].

[53] 2012 MCM, *supra* note 13, R.C.M. 804(c) (emphasis added).

While the language differs from that in the *1969 MCM*, the meaning remains the same: "Trial in absentia, when an accused voluntarily fails to appear at trial following arraignment, has long been permitted in the military."[54] In order for an accused to be tried *in absentia*, an accused must be present initially, even if only at an Article 39(a) session, and he must be arraigned.[55]

2. Article 36, Uniform Code of Military Justice

Rule for Court-Martial 804(c) differs from Federal Rule of Civil Procedure (FRCP) 43(a) in that arraignment is not the time at which a trial commences in federal court but rather at jury empanelment,[56] whereas in the military, trial begins with any Article 39(a) session.[57] The allowance for variance between two rules is provided for in Article 36 of the Uniform Code of Military Justice (UCMJ). Article 36 mandates that the President will prescribe the rules governing courts-martial, one of which is RCM 804(c), set forth in the *MCM*.[58] Article 36 makes it clear that the "pretrial, trial, and post-trial procedures . . . shall . . . apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[59] This concept of uniformity is of particular importance when dealing with trial procedures. The military rule should be in line with the federal rule "so far as [the President] considers practicable."[60] It is for this reason that the drafters used the language they did in the analysis of RCM 804(c)[61]:

> Fed. R. Crim. P. 43(c) was not adopted since it is not compatible with military practice . . . . [T]rial on the merits may take place when the accused is absent under this rule. Such a construction is necessary in the military because delaying a sentencing determination increases the expense and inconvenience of

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[54] 1984 MCM, *supra* note 51, R.C.M. 804(c) analysis.
[55] 2012 MCM, *supra* note 13, R.C.M. 804(c).
[56] Frost v. United States, 618 A.2d 653, (D.C. 1992) (jury impaneled day prior to defendant's absence); People v. Snyder, 56 Cal. App. 3d 195 (2d Dist. 1976) (if jury trial, commencement occurs when jury is impaneled and sworn and if bench trial, commencement occurs when first witness is sworn).
[57] DA PAM. 27-2, *supra* note 50.
[58] UCMJ art. 36 (2012).
[59] *Id.*
[60] *Id.*
[61] 2012 MCM, *supra* note 13, R.C.M. 804(c) anaylsis.

> reassembling the court-martial and the risk that such reassembly will be impossible. Federal courts do not face a similar problem.[62]

The most obvious issue with the analysis is that the drafters only address the difference as it pertains to sentencing. They do reason that "arraignment" was substituted for "the trial has commenced" because "arraignment is a more appropriate point of reference" since a court session is involved.[63] Such justification is rather weak in that federal criminal courts hold motion hearings, arraignments, and status conferences, yet the point of no return is still considered the time at which a jury is impaneled. Without a strong, logical reason for variance, RCM 804(c) should mirror FRCP 43 and a review of cases involving trial *in absentia* supports this notion.

C. Case Law

Beginning with the commissions in 1864, military courts have held that an accused can be tried, convicted, and sentenced *in absentia*.[64] In 1953, the Court of Military Appeals heard the case of *United States v. Houghtaling* wherein the accused escaped from confinement after the court-martial convened and read the charges.[65] *Houghtaling* established that "one, who by his own act removes himself from the presence of the court trying him on a criminal charge, thereby waives—or at least forfeits—his right to have all phases of the trial conducted in his presence."[66] The court further held that reading of the charges and requesting the accused enter pleas constitute arraignment."[67]

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[62] *Id.*
[63] *Id.*
[64] TRIALS FOR TREASON, *supra* note 31; *see also* United States v. Houghtaling, 8 C.M.R. 30 (C.M.A. 1953); United States v. Sharp, 38 M.J. 33 (C.A.A.F. 1993).
[65] 8 C.M.R. at 30.
[66] *Id.*
[67] *Id.* at 32.

In *United States v. Sharp*, decided in 1993, the court, citing *Houghtaling*, reaffirmed that "under RCM 804, an accused may be tried *in absentia* when there is a voluntary absence after arraignment" and that trial by court-martial begins when an accused is arraigned by a military judge.[68] Holding that "[t]he voluntariness of an absence must be established on the record before trial *in absentia* may proceed," the court reasoned that the prosecution bears the burden in proving voluntariness as the moving party for trial *in absentia*.[69] Additionally, an accused must also be on notice that a trial will commence even if he is not present in order for him to be tried *in absentia*. Thus, "an accused who fails to receive actual notice of the trial date, some 8 months after the case had been continued for an unknown period, could not be tried in absentia."[70] In summation, for an accused to be tried *in absentia* by the military, his absence must be after arraignment and it must be voluntary in contrast to federal law where absence must be voluntary and "commencement of trial . . . apparently denotes commencement of trial on the merits."[71]

D. Analysis

Proponents of the current law argue that the cost of delaying trial combined with issues involved with reassembling the panel distinguish the military and federal systems, thereby justifying a variance in the law regarding trial *in absentia*.[72] It is reasoned that an accused who is given notice that a trial can proceed in his absence and then chooses to absent himself assumes the risk involved.[73] Allowing for trial *in absentia* in the military is deemed "necessary in the military because delaying a sentence determination increases the expense and inconvenience of reassembling the court-martial and the risk that such reassembly will be impossible. Federal courts do not face a similar problem."[74]

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[68] *Sharp*, 38 M.J. at 37.
[69] 2012 MCM, *supra* note 13, R.C.M. 804(c) analysis.
[70] United States v. Peebles, 3 M.J. 177 (C.M.A. 1977).
[71] United States v. Price, 48 M.J. 181, 182 (C.A.A.F. 1998).
[72] *Id.*
[73] United States v. Sharp, 38 M.J. 33 (C.A.A.F. 1993); United States v. Bass, 40 M.J. 220 (C.M.A. 1994).
[74] 2012 MCM, *supra* note 13, R.C.M. 804(c) analysis.

The federal rule does not permit a trial to continue without the accused unless the accused was present after the trial commenced.[75] However, military courts have found that guaranteeing this right to servicemembers would significantly degrade the efficacy of the system. The court in *Houghtaling* held:

> Of necessity military personnel are highly mobile, and on occasion are scattered to the four winds within a matter of hours. In overseas theaters, and particularly in combat areas, witnesses, both military and civilian, are exposed to uncommon hazards which make their assembly for trial difficult always and too often impossible. . . . We discern no reason for impeding—perhaps even defeating—the prosecution of those who choose not to be present for trial, regardless of the offense with which they are charged. This would, we believe, be distinctly in derogation of the just claims of the military society, an interest often disregarded in febrile evaluation of the rights of frequently undeserving individuals.[76]

Another reason behind the military's variance from the federal rule is that arraignment "is a clearer demarcation of the point after which the accused's voluntary absence will not preclude continuation of the proceedings."[77] Thus, if an accused is present for arraignment, which may occur months prior to the start of the court-martial, and does not appear in court for trial, the trial may proceed *in absentia*.

> [A] military accused is arraigned by a military judge, rather than a Federal magistrate, and that gives special force to the argument that the subsequently absent military accused has "by his own act remove[d] himself from the presence of a court trying him on a criminal charge . . . ."[78]

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[75] FED. R. CRIM. P. 43.
[76] 8 C.M.R. 30, 34 (C.M.A 1953).
[77] 2012 MCM, *supra* note 13, R.C.M. 804(c) analysis.
[78] *Sharp*, 8 M.J. 33 (quoting *Houghtaling*, 8 C.M.R. 30).

The court explained that there are

> [d]ifferences between the usual operations of the military justice system and the Federal civilian system . . . [the court found] no compelling reason to deviate from the *Houghtaling* notion that, in the military justice system, arraignment constitutes commencement of the trial for purposes of marking the point after which an accused may be tried though voluntarily absent. . . . [A] military accused who absents himself after arraignment has done so just as knowingly as has a civilian defendant in the midst of trial.[79]

Despite tenable arguments in support of RCM 804(c), its current construction does not fully protect the rights of an accused. Not only is the right of an accused to be present at all trial proceedings rooted in case law, the right is also "grounded in the due process clause of the Fifth Amendment and the right to confrontation clause of the Sixth Amendment of the Constitution."[80] Moreover, this right is encapsulated in the federal rule governing trial *in absentia* and in the Supreme Court's decision in *Crosby v. United States* in 1993:

> As a general matter, the costs of suspending a proceeding already under way will be greater than the cost of postponing a trial not yet begun. If a clear line is to be drawn marking the point at which the costs of delay are likely to outweigh the interests of the defendant and society in having the defendant present, that commencement of trial is at least a plausible place at which to draw the line.[81]

Flight mid-trial is more clearly knowing and voluntary than flight before trial.[82] Additionally, since "the notion that trial may be commenced *in absentia* still seems to shake most lawyers, it would hardly seem appropriate to impute knowledge that this will occur to their clients."[83]

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[79] *Id*. at 39.
[80] 2012 MCM, *supra* note 13, R.C.M. 804(c) analysis.
[81] 506 U.S. 255, 261 (1993).
[82] *Id*.
[83] James G. Starkey, *Trial* In Absentia, 54 N.Y. ST. B.J. 30, 34 n.28 (1982).

Finally, Article 36 requires the President to promulgate rules of procedure that are consistent with the practice of federal district courts unless it is impracticable to apply such rules to courts-martial.[84] Because RCM 804(c) differs from FRCP 43, the drafters' analysis and discussion takes great pains to find a difference between court-martial practice and federal criminal practice.[85] Essentially, the only apparent reason for the failure of the military to adopt the federal rule governing trial *in absentia* is the expense and inconvenience involved in starting anew as seen as by the military courts. That reasoning is flawed in that federal courts face the same issues in restarting the trial process and have chosen to use the beginning of the trial as the "marking point at which costs of delaying trial are likely to increase and helping to ensure that any waiver is knowing and voluntary."[86]

III. Civilian Trials *In Absentia*

A. Federal Approach

Distinct from RCM 804(c), FRCP 43 prohibits holding felony trials *in absentia* unless the defendant leaves after the trial has begun.[87] If that occurs, the trial may continue as if the defendant were present.[88] The federal rule says in part that "the defendant must be present at: the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury impanelment and the return of the verdict; and (3) sentencing."[89] The defendant may waive continued presence and that waiver is in effect through sentencing.[90] Voluntary absence by a defendant is considered to be a waiver of the right to be present.

> A defendant who was initially present at trial . . . waives the right to be present . . . when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial . . . [and] . . . in a

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[84] 2012 MCM, *supra* note 13, art. 36.
[85] *Id.* R.C.M. 804(c) analysis.
[86] *Crosby*, 506 U.S. at 255.
[87] FED. R. CRIM. P. 43(a)(1)—(3).
[88] Diaz v. United States, 223 U.S. 455 (1912).
[89] FED. R. CRIM. P. 43(a)(1)—(3).
[90] *Id.* 43(c).

> noncapital case, when the defendant is voluntarily absent during sentencing . . . .[91]

The development of the current federal rule and the case law which support it date back to the early days of British jurisprudence.

1. History

Early criminal trials were more akin to civil suits in which one individual accused another of a wrongdoing thus establishing the necessity for all parties involved to be present at trial.[92] "The presence of the defendant at his own trial has long been a valued part of the Anglo-Saxon criminal justice system."[93] The presence of a defendant was paramount during all proceedings and trial *in absentia* was simply not possible. For example, "at one time the accused himself had to submit to trial by water or fire ordeal, and his guilt or innocence was determined by his reaction to that test."[94] Used following the Norman Conquest, trial by battle "required the defendant's presence as one of the combatants."[95] As times changed, judges became the chief arbitrators and the accused had to present his case to a judge and open himself up to the testimony of witnesses.[96] The "presence of the accused was still an absolute necessity for the legitimacy of the proceedings."[97] Further, "the accused was not permitted the assistance of counsel"[98] so his presence was a "fundamental aspect of the defense."[99]

2. Case Law

The first American case to address the issue of trial *in absentia* in federal court was *Hopt v. Utah*.[100] In *Hopt*, the defendant was not present during the selection of potential jurors for his capital case.[101]

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[91] *Id.* 43(c)(1)(A)—(B).
[92] Neil P. Cohen, *Trial* in Absentia *Re-Examined*, 40 TENN. L. REV. 155, 167 (1973).
[93] *Id.* at 155.
[94] *Id.* at 167.
[95] Starkey, *supra* note 83, at 722.
[96] Cohen, *supra* note 92, at 168.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] 110 U.S. 574 (1884).
[101] *Id.* at 576.

> The legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.[102]

The Court made it clear that the presence of an accused was vital to every felony trial, thereby establishing the basis for what would become FRCP 43.

The Court next dealt with the issue of trial *in absentia* in *Lewis v. United States* and held that in felony trials an accused could not waive his presence.[103] This is especially true in a capital case like *Hopt* where the Court reasoned that "the dictates of humanity" necessitate the requirement that an accused be present.[104] However, following *Lewis* was another capital case, *Howard v. Kentucky*, where the court upheld a murder conviction despite the defendant's claim that he was not present when the trial judge dismissed a juror. The Court found no due process violation when, during the trial, there was an "occasional absence of the accused" if there was no injury to his substantial rights.[105] This was the first case essentially to allow the "waiver of presence under limited circumstances in felony prosecutions" thus leading the way for waiver and moving away from requiring the presence of the accused during all stages of a trial.[106]

The next non-capital case to deal with trial *in absentia* was *Diaz v. United States* in 1912.[107] In *Diaz*, the defendant was absent during the questioning of two prosecution witnesses, but he did consent to the trial continuing despite his absence as long as his defense counsel was present.[108] The Court held that voluntary absence after the trial in a non-

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[102] *Id*. at 579.
[103] 146 U.S. 370 (1892).
[104] *Id*. at 372.
[105] 200 U.S. 164, 175 (1906).
[106] Cohen, *supra* note 92, at 170.
[107] 223 U.S. 442 (1912).
[108] *Id*.

capital case begins constitutes a waiver of his right to be present and the court may continue with the trial as though the accused were present.[109]

> If, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.[110]

The Court reasoned that the accused's constitutional right to be present "does not guarantee an accused person against the legitimate consequences of his own wrongful acts."[111] The voluntariness of the accused's absence was a decisive factor.

A trial also may continue when an accused is removed from the courtroom due to his own misconduct, as in *Illinois v. Allen*.[112] During Allen's trial for armed robbery, the accused, representing himself, repeatedly disrespected the judge and did not heed the warnings from the judge regarding his questioning of the jurors and his numerous outbursts.[113] The judge ordered Allen removed from the courtroom but permitted his return once Allen promised to conduct himself in accordance with the court's orders.[114] In reviewing the case, the Court held that the accused cannot "be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him."[115]

Following *Allen* and *Diaz*, the Supreme Court next addressed the issue in *Taylor v. United States*.[116] Taylor was present during a morning session of his trial but did not reappear for the afternoon session.[117] Despite his absence, the trial continued and the court ultimately convicted Taylor *in absentia*.[118] In spite of his argument that voluntary absence does not effectuate a valid waiver of his right to be present, the

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[109] *Id.* at 455.
[110] *Id.*
[111] *Id.* at 452.
[112] 397 U.S. 337 (1970).
[113] *Id.* at 339–40.
[114] *Id.* at 337.
[115] *Id.* at 346.
[116] 414 U.S. 17 (1973).
[117] *Id.*
[118] *Id.* at 20.

Court affirmed his conviction, holding that a defendant does not have to be warned of his right to be present or that the trial could continue in his absence, the Court found it inconceivable "that a defendant who flees from a courtroom in the midst of a trial—where judge, jury, witnesses and lawyers are present and ready to continue—would not know that as a consequence the trial could continue in his absence."[119]

In 1993, the Supreme Court again addressed FRCP 43 in *Crosby v. United States*, holding that it does not permit the trial *in absentia* of a defendant who is absent at the beginning of trial.[120] This ruling undermined the analysis set forth in *United States v. Tortora* where the United States Court of Appeals for the Second Circuit held that in federal court voluntary absence prior to the selection of a jury constitutes a waiver.[121] "A defendant's knowing and deliberate absence does not deprive the court of the power to begin the trial and to continue it until a verdict is reached."[122] However, *Crosby* overruled the *Tortora* analysis.

The defendant in *Crosby*, despite notice of the time and date of trial, did not appear.[123] The court delayed the trial several days to undertake a search for Crosby. After a five-day delay, the court found that "Crosby had been given adequate notice of the trial date, that his absence was knowing and deliberate, and . . . that the public interest in proceeding with the trial in his absence outweighed his interest in being present during the proceedings."[124] The trial commenced in Crosby's absence; the court convicted him.[125]

In granting certiorari, the Court succinctly noted that:

> This case requires us to decide whether Federal Rule of Criminal Procedure 43 permits the trial *in absentia* of a defendant who absconds prior to trial and is absent at its beginning. We hold that it does not . . . . The Rule declares explicitly: "The defendant shall be present . . . at every stage of the trial . . . *except as otherwise*

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[119] *Id*.
[120] 506 U.S. 255 (1993).
[121] 464 F.2d 1202 (2d Cir. 1972), *cert. denied sub nom.* Santoro v. United States, 409 U.S. 1063 (1972).
[122] *Tortora*, 464 F.2d at 1209.
[123] *Crosby*, 506 U.S. at 256.
[124] *Id*.
[125] *Id*.

> *provided by this rule"* (emphasis added). The list of situations in which the trial may proceed without the defendant is marked as exclusive not by the "expression of one" circumstance, but rather by the express use of a limiting phrase. In that respect the language and structure of the Rule could not be more clear.[126]

However, the *Crosby* Court reiterated an eighty-year-old precedent that allows for trial *in absentia* if a defendant voluntarily absents himself after the start of trial.

> Where the offense is not capital and the accused is not in custody, . . . if, *after the trial has begun in his presence*, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.[127]

It is noteworthy that the Court distinguishes between "flight before and flight during a trial" in its ruling.[128] Flight before the start of trial does not allow for *in absentia* proceedings while flight after trial begins does.[129] As mentioned above, the start of a trial in federal court is considered to be commencement of jury selection, as opposed to arraignment like in courts-martial, in part because a knowing and voluntary waiver is clearer if made when the defendant is initially present.[130] Having such a rule rightfully "deprives the defendant of the option of gambling on an acquittal knowing that he can terminate the trial if it seems the verdict will go against him—an option that might otherwise appear preferable to the costly, perhaps unnecessary, path of becoming a fugitive from the outset."[131]

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[126] *Id*.
[127] *Id*. at 260 (quoting *Diaz*, 223 U.S. at 455 (emphasis added)).
[128] *Id*. at 261.
[129] *Id.* ("We do not find the distinction between pretrial and midtrial flight so farfetched as to convince us that Rule 43 cannot mean what it says.").
[130] *Id*.
[131] *Id*. at 262.

B. State Approaches to Trials *In Absentia*

1. Overview

Almost all of the states have enacted a procedural rule or statute establishing the legal framework to adjudicate a trial *in absentia*.[132] Despite prohibiting trial *in absentia* in cases where a defendant does not appear at the outset pursuant to FRCP 43, the Supreme Court has not prohibited states from trying cases *in absentia* as long as a compelling enough reason is shown.[133] However, the states are currently divided in how they approach trials *in absentia*. "In a number of states, a rule of criminal procedure or statute provides that when a defendant, who was present at the commencement of trial, voluntarily absents himself or herself from trial, the court may continue with the trial in the defendant's absence."[134] Other states permit the trial of a defendant even if he is not present at the beginning of trial.[135]

2. Trial In Absentia *Permitted if Present at Commencement*

The vast majority of states follow the federal rule wherein a defendant must be present at the beginning of the trial and must voluntarily waive presence thereafter.[136] Statutes or rules authorizing courts to proceed with trial in the event a defendant voluntarily absents

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[132] ALA. R. CRIM. P. 9.1(b); ALASKA R. OF CRIM. P. 38; ARIZ. R. CRIM. P. 9.1; ARK. CODE ANN. § 16-89-103; COLO. R. OF CRIM. P. 43(b); CT. SUPER. CT. R. 44-8; DEL. SUP. CT. CRIM. R. 43(b); D.C. SUPER. CT. CRIM. R. 43; FLA. R. CRIM. P. 3.180; IDAHO CRIM. R. 43; 720 ILL. COMP. STAT. ANN. 5 § 115-4.1; KAN. STAT. ANN. § 22-3405; KY. R. CRIM. P. 8.28; La. CODE. CRIM. P. ANN. ART. 832; ME. R. CRIM. P. 43; MD. R. 4-231(c); MASS. R. CRIM. P. 18; MINN. R. CRIM. P. 26.03; MISS. CODE ANN. § 99-17-9; MONT. CODE ANN. § 46-16-122(3)(b) ; N.J. R. CRIM. R. 3:16; N.M. R. 5-612(B); N.D. R. CRIM. P. 43; OHIO CRIM. R. 43(A); PENN. R. CRIM. P. 602(A); R.I. SUPER. R. CRIM. P. 43; S.D. CODIFIED LAWS § 23A-39-2; TENN. R. CRIM. P. 43; TEX. CODE CRIM. P. ANN. Art. 33.03; VT. R. CRIM. P. 43(b); VA. CODE ANN. § 19.2-259; WYO. R. CRIM. P. 42.

[133] United States v. Tortora, 464 F.2d 1202 (2d Cir. 1972).

[134] Kemper, *supra* note 15, at 697.

[135] AL. R. CRIM. P. 9.1(b); N.J. R. CRIM. P. 3:16; Government of the Virgin Islands v. Brown, 507 F.2d 186 (3d Cir. 1975); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975); United States v. Pastor, 557 F.2d 930 (2d Cir. 1977); Commonwealth v. Hill, 723 A.2d 255 (Pa. Supr. Ct. 1999).

[136] COLO. R. CRIM. P. 43(b); FLA. R. CRIM. P. 3.180; State v. Aceto, 100 P.3d 629 (Mont. 2004); State v. Staples, 354 A.2d 771 (Me. 1976); Reece v. State, 928 S.W.2d 334 (Ark. 1996).

himself after commencement have been recognized as valid.[137] The commencement of trial is uniformly considered to be when selection of a jury begins or when a jury is impaneled.[138]

In *State v. Staples*, the Maine Supreme Court determined that the defendant's failure to return to the court during the taking of evidence was a voluntary absence because of his initial presence during the examination of witnesses.[139] The court reasoned:

> If a mistrial were to be declared whenever the defendant voluntarily absented himself from trial, the defendant could, after evaluating the course of the proceedings against him, simply leave the courtroom whenever he anticipated an adverse verdict. His voluntary absence would then entitle him to a fresh trial and a second chance at acquittal. The defendant's right to his day in court does not permit him unilaterally to select whatever date his pleasure dictates.[140]

Unlike the defendant in *Staples*, the defendant in *State v. Meade* absconded from the courthouse prior to the jury being impaneled and sworn.[141] The trial court proceeded in the defendant's absence, finding that the trial commenced earlier that morning during plea negotiations.[142] The Supreme Court of Ohio disagreed, relying on *Crosby*, *Diaz*, and *Fight* finding that a trial must commence in order to proceed *in absentia*.[143] Ohio Rule of Criminal Procedure 43(A) mirrors FRCP 43 and the court ruled that "[a] jury trial commences after the jury is impaneled and sworn in the presence of the defendant. Here, Meade fled before the jury had been impaneled and sworn."[144]The states that have adopted FRCP 43 clearly follow the reasoning set forth in *Diaz* and

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[137] Kemper, *supra* note 15, at 697; State v. Elliot, 882 P.2d 978 (Idaho Ct. App. 1994); State v. Staples, 354 A.2d 771 (Me. 1976); State v. Thomson, 872 P.2d 1097 (Wash. 1994).

[138] Campbell v. United States, 295 A.2d 498 (D.C. 1972) (jury impaneling commences a trial); State v. Tenney, 828 A.2d 755 (Me. 2003) (selection of jury is when trial begins); State v. Meade, 687 N.E.2d 278 (Ohio 1997) (defendant present when jury impaneled and sworn; therefore, commencement of trial).

[139] 354 A.2d at 771.

[140] *Id*.

[141] *Meade*, 687 N.E.2d at 279.

[142] *Id*.

[143] *Id*.

[144] *Id*. at 282.

Crosby. It is this approach to trial *in absentia* that the majority of states have adopted.[145]

3. Trial In Absentia *Permitted Even if Not Present at Commencement*

Some states permit trial *in absentia* even if the defendant is not present at the start of trial.[146] While these states provide the legal basis for trial *in absentia*, there is still a belief that "a trial in absentia is not favored and it should be the extraordinary case, undertaken only after the exercise of a careful discretion by the trial court."[147] The *1930 Model Code of Criminal Procedure of the American Law Institute* first introduced the notion that a defendant could be tried by a state court *in absentia* if he fled before the commencement of trial.[148] Arizona became the first state to commence trials *in absentia* under the circumstances and the constitutionality of the practice was not challenged for almost three decades.[149]

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[145] State v. Aceto, 100 P.3d 629 (Mont. 2004); State v. Tenney, 828 A.2d 755 (Me. 2003); Reece v. State, 928 S.W.2d 334 (Ark. 1996); State v. Staples, 354 A.2d 771 (Me. 1976); Campbell v. United States, 295 A.2d 498 (D.C. 1972).

[146] Gov't of the Virgin Islands v. Brown, 507 F.2d 186 (3d Cir. 1975); Tweedy v. State, 845 A.2d 1215 (Md. 2004).

[147] *Tweedy*, 845 A.2d 1215.

[148] ALI MODEL CODE CRIM. PROC. § 287 (1930). Section 287 provides:

> Presence of a defendant under prosecution for felony. In a prosecution for a felony the defendant shall be present:
> (a) At arraignment.
> (b) When a plea of guilty is made.
> (c) At the calling, examination, challenging, impaneling and swearing of a jury.
> (d) At all proceedings before the court when the jury is present.
> (e) When evidence is addressed to the court out of the presence of the jury for the purpose of laying
> the foundation for the introduction of evidence before the jury.
> (f) At a view by the jury.
> (g) At the rendition of the verdict.
> If the defendant is voluntarily absent, the proceedings mentioned above except those in clauses (a) and (b) may be had in his absence if the court so orders.

[149] Starkey, *supra* note 83, at 726.

The case challenging the Arizona statute in 1967 was *In re* Hunt.[150] The defendant was tried and convicted in 1964, but the appellate court later granted him a new trial.[151] While awaiting retrial, the defendant left Arizona and moved to Michigan.[152] After failing to appear in court numerous times, the trial court proceeded to convict the defendant.[153] Appealing her conviction, the defendant argued that the Arizona absentia statute was unconstitutional.[154]

The U.S. Court of Appeals for the Sixth Circuit upheld her conviction, finding little difference between the Arizona statute and the federal rule.[155] The court reasoned that the defendant "was present at her first trial and upon remand her attorney was present at every stage of the proceeding, including the trial had in her voluntary absence."[156] In other words, the court completely discounted the fact that the federal rule only allows for trial *in absentia* if the accused was present at the commencement of trial, which was not the case in *Hunt*. The court gave no reason for not distinguishing the Arizona statute from the federal statute. Other states are not distinguishing the commencement of trial from any other stage in a case.

In *Gov't of the Virgin Islands v. Brown*, the court served the defendant with a subpoena to appear in court; he failed to do so.[157] The trial began without him and although he appeared later during the first day of trial, the court found that his absence was voluntary.[158] The court held that there is nothing truly noteworthy to "differentiate the commencement of a trial from later stages."[159]

An analogous case, *Lampkins v. State*, held that "[a] defendant may waive [the] right to be present at all stages of trial, and be tried *in absentia*, if the trial court determines that the defendant knowingly and

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[150] 276 F. Supp. 112 (E.D. Mich. 1967), *vacated sub nom*. Arizona v. Hunt, 408 F.2d 1086 (6th Cir. 1969), *cert. denied*, 396 U.S. 845 (1969).
[151] *Hunt*, 408 F.2d at 1087.
[152] *Id*.
[153] *Id*.
[154] *Id*.
[155] *Id*. at 1095.
[156] *Id*.
[157] 507 F.2d 186 (3d Cir. 1975).
[158] *Id*.
[159] *Id*.

voluntarily waived that right."[160] The court reasoned that "[t]he fact that he knew of his trial date and failed to appear on that set date is evidence that he knowingly and voluntarily was absent."[161] Thus, states that follow Indiana's lead allow a knowing and voluntary standard to determine waiver of the right to be present.

While courts have placed considerable weight on the right of the accused to be present, they also have found that the right to be present is a constitutional right that can be waived.[162] The Supreme Court in *Frank v. Magnum* held that a state may permit waiver of presence pursuant to the due process clause.[163] Focusing on the privilege of confrontation, the Court grounded its position in the Sixth Amendment stating that the privilege is "guaranteed by the sixth amendment and 'assumed' to be reinforced by the fourteenth amendment."[164] The right to presence affords the defendant in a felony trial "the privilege . . . to be present in his own person . . . to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."[165] Consent or misconduct by the accused can cause the loss of the privilege of presence, just as in the federal system.[166]

The states that allow for trial *in absentia* notwithstanding the fact that the accused absented himself prior to commencement of trial do so under the guise of not allowing the accused to forestall justice. While a valid point, such reasoning is not in line with the federal rule, which draws an important distinction between pretrial and midtrial flight. Assurance that an absence of an accused is truly knowing and voluntary does not exist trial if *in absentia* is permitted before to the commencement of trial.

IV. International Trials *In Absentia*

The international community is not immune to the issues surrounding trial *in absentia* and has, likewise, worked to develop a

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[160] 682 N.E.2d 1268, 1269 (Ind. 1997); *see also* State v, Andrial, 375 A.2d 292 (N.J. 1977).
[161] *Lampkins*, 682 N.E.2d at 1273.
[162] Cohen, *supra* note 92, at 171.
[163] *Id*.
[164] *Id*. at 172 (quoting Snyder v. Massachusetts, 291 U.S. 97 (1934)).
[165] *Id*.
[166] *Id*.

system that recognizes those principles established through American jurisprudence. The Rome Treaty does not permit trial *in absentia*, nor does the UN Human Rights Committee (HRC) or the European Court of Human Rights (ECtHR).[167] The international view is that a trial may not begin without the accused present; but like the federal rule, a trial may continue if already commenced, as a trial *in absentia* if the accused is not present.[168] Another "criterion by which the HRC and ECtHR assess the permissibility of such trials is whether an individual convicted *in absentia* may obtain retrial."[169]

A. History

Following World War II, the International Military Tribunal (IMT) at Nuremberg held trials which allowed for total absentia.[170] These trials allowed for the *in absentia* prosecution of war criminals who never appeared before the tribunal: "The Tribunal shall have the right to take proceedings against a person charged with crimes . . . in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence."[171] At least one person, Martin Bormann, secretary of the Nazi Party was tried, convicted, and sentenced to death *in absentia*.[172] Since the Nuremberg trials, "no tribunal . . . has allowed total in absentia trials. Instead, modern tribunals, first by practice and later by rule, generally allow "partial in absentia" proceedings, meaning that the accused initially appears but is absent at subsequent proceedings."[173]

In 1993, the international community established the International Criminal Tribunal for Yugoslavia (ICTY) to prosecute war crimes alleged to have occurred in Yugoslavia.[174] Rejecting the allowance of *in absentia* trials in the tribunal, the UN Secretary-General commented:

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[167] *Id.* at 62.
[168] *Id*.
[169] *Id.* at 61.
[170] U.N. Charter of the International Military Tribunal—Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement"), Aug. 8 1945, *available at* http://www.unhcr.org/refworld/docid/3ae6b396 14.html (last visited July 31, 2013).
[171] *Id*. art. 12
[172] Louise Arbor, *The Prosecution of International Crimes: Prospect and Pitfalls*, 1 WASH. U. J.L. & POL'Y 13, 22 (1999).
[173] Jenks, *supra* note 16, at 68.
[174] *Id*.

> A trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials in absentia should not be provided for in the statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights which provides that the accused shall be entitled to be tried in this presence.[175]

Interestingly, Slobodan Milošević, was present at the start of his trial, but, due to illness, did not appear for subsequent sessions.[176] The ICTY proceeded in his absence reasoning that he was present a the start of the trial but "such proceedings were still in absentia, albeit of the partial variant, the authority for which is not clear under the ICTY statute."[177]

The following year the International Criminal Tribunal for Rwanda (ICTR) "completed a trial without an accused, when, having previously attended, he refused to appear in court."[178] The statute governing the ICTR is analogous to the statute governing the ICTY. They both allowed "partial *in absentia* trials when the accused was unable or unwilling to attend proceedings."[179] Both the ICTY and ICTR were codified in 2000 in the UN Transitional Administration in East Timor (UNTAET).[180] The transitional rules of procedures established by the UNTAET "allowed *in absentia* proceedings if the accused is initially present and then flees, refuses to attend, or disrupts the proceedings."[181] Tribunals established post-2000 used similar language regarding *in absentia* proceedings.[182] Their approach was in line with the Rome

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[175] U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolute 808*, U.N. Doc. S/25704, at 26 (May 3, 1993).
[176] Jenks, *supra* note 16, at 69.
[177] *Id*.
[178] *Id*.
[179] *Id*.
[180] *Id.* at 70.
[181] *Id*.
[182] *See* Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138 (accused has right to be present but trial continues if he flees or refuses to attend); Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 4) (Sept. 11, 2009) (trial *in absentia* permitted if accused initially present but later flees, refuses to attend, or disrupts proceedings); *But see* U.N. Interim Admin. Mission in Kosovo, Reg. No. 2001/1 on the Prohibition of Trials *in Absentia* for Serious Violations of International Humanitarian Law, U.N. Doc UNMIK/REG/2001/1 (Jan. 12, 2001) (trials *in absentia* prohibited).

Statute, which established the International Criminal Court in 1998 in that they allowed trial *in absentia* in limited circumstances.[183]

Article 67 of the Rome Statute provides, in part, that an accused has the right:

> Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.[184]

An "accused shall be present during trial,"[185] and a trial may only continue "outside the presence of the accused if the accused is disruptive."[186] If disruption by the accused causes his removal from the courtroom, "the statute requires that the trial chamber make provisions for the accused to observe the proceedings."[187] In essence, there are no trials *in absentia* in the ICC.

The most recent international tribunal, established following the 2005 car bomb explosion in Beirut that killed the former Prime Minister of Lebanon, Rafic Hariri, is the Special Tribunal for Lebanon (STL), which permits trials *in absentia*.[188] After receiving approval from the Lebanese government, in April 2005, "the United Nations Security Council established a commission to assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices."[189] The STL was established to "prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime

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[183] Rome Statute of the International Criminal Court art. 67, July 17, 1998, 2187 U.N.T.S. 90.
[184] *Id*. art. 67(1)(d).
[185] *Id*. art. 63(1).
[186] Jenks, *supra* note 16, at 71.
[187] *Id*.
[188] *Id.* at 57.
[189] *Id*.

Minister Rafic Hariri."[190] Total trials *in absentia* are permitted under the STL statute. Under the STL, an accused may be tried and convicted "without ever appearing or designating defense counsel, based on notice otherwise given . . . the STL's *in absentia* trial provisions provide for a form of 'total *in absentia*' trial, a departure from the *in absentia* trial provisions of other international tribunals."[191]

B. Human Rights Concerns

There are two primary human rights treaties that cover the most fundamental and basic civil and political rights of the contracting parties: the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for Protection of Human Rights and Freedoms (European Convention).[192]

1. International Covenant on Civil and Political Rights

Relying on the 1948 Universal Declaration of Human Rights, the ICCPR has been ratified by 165 states and is enforced through the HRC.[193] Under the ICCPR, an accused is to "be tried in his presence, and to defend himself in person or through legal assistance of his choosing; to be informed, if he does not have legal assistance, of this right."[194] The HRC enforces the ICCPR.[195] The ICCPR only permits trial *in absentia* if the defendant voluntarily absents himself after being informed of the trial.[196]

In 1997, the HRC held in *Maleki v. Italy* that trials *in absentia* comport with the ICCPR "only when the accused was summoned in a

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[190] Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon art. 1(1), S.C. Res. 1757, Annex, U.N. Doc. S/RES/1757 (May 30, 2007).
[191] Jenks, *supra* note 16, at 57.
[192] *Id.* at 73–85.
[193] *Id.* at 74.
[194] International Covenant on Civil and Political Rights art. 14, Mar. 23, 1976, 999 U.N.T.S. 171.
[195] Jenks, *supra* note 16, at 75.
[196] U.N. Human Rights Comm. [HRC], Commc'n No. 699/1996: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Protections (Maleki v. Italy), U.N. Doc. CCPR/C/66/D.699/1996 (Sept. 13, 1999) [hereinafter *Maleki*].

timely manner and informed of the proceedings against him."[197] Maleki, an Iranian citizen, was tried and convicted *in absentia* in Italy for drug trafficking.[198] While Maleki did not attend the trial, he did have court-appointed counsel.[199] His conviction was appealed to the HRC with the argument that Italy's trial of him *in absentia* violated the ICCPR.[200] Italy argued that Maleki's trial *in absentia* complied with the ICCPR because Maleki, while absent, had a fair trial due to the presence of his court-appointed counsel.[201] The court disagreed, finding that while "*in absentia* trials are not per se impermissible, a state that holds such proceedings assumes a heavy burden to justify the trials."[202] In *Maleki*, Italy failed to verify that Maleki had notice of the trial and Italy's failure to do so violated Maleki's right to be tried in person pursuant to the ICCPR.[203]

2. European Convention for Protection of Human Rights and Freedoms

An international treaty, the European Convention provides that the Council of Europe member states must ensure that the fundamental civil and political rights of all individuals in their jurisdiction are not violated.[204] There are forty-seven member states, all the member states of the council, who have acceded to the convention.[205] While the European Convention does not clearly provide the accused the right to be present at trial like the ICCPR guarantees, "the right to be present is implicit within other stated rights."[206] The European Convention sets forth the following rights: (1) fair and public hearing;[207] (2) in-person defense;[208] (3) witness examination by the accused or his representative;[209] and (4) an interpreter if the accused is unable to

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[197] *Id*.
[198] Jenks, *supra* note 16, at 77.
[199] *Id*.
[200] *Id*.
[201] *Id*.
[202] *Id*.
[203] *Id*.
[204] CPHRFF, *supra* note 16].
[205] *Id*..
[206] Jenks, *supra* note 16, at 85.
[207] CPHRFF, *supra* note 16, art. 6(1).
[208] *Id*. art. 6(3)(c).
[209] *Id*. art. 6(3)(d).

understand or speak the language of the court.[210] Regarding the rights of an accused and trials *in absentia*, the ECtHR has held that an accused cannot exercise the rights afforded by the European Convention if he is not present at trial.[211]

In *Sejdovic v. Italy*, the ECtHR held that while "the European Convention does not per se prohibit *in absentia* trials,"[212] an accused must unequivocally waive the right to be present at trial.[213] Sejdovic was a Yugoslavian national tried and convicted in Italy of murdering another person while at a camp in Rome.[214] Although a court-appointed attorney represented him *in absentia*, the ECtHR held that there was "no evidence that [Sejdovic] knew of the proceedings against him or of the date of his trial."[215] Like the ICCPR, the European Convention requires unequivocal notice to an accused of the charges against him and notice of the trial date similar to the judicial process in the American legal system.

C. Military Personnel and International Trial *In Absentia*

In keeping with RCM 804(c) and its allowance for trial of military members *in absentia*, the Army allows for its Soldiers to be tried *in absentia* by foreign countries if certain requirements are met. As it relates to military personnel and trial *in absentia* internationally, Army Regulation (AR) 27-50 provides some guidance.[216] The Army allows personnel "alleged to have committed offenses subject to primary or exclusive jurisdiction of that country" to be tried by that country *in absentia* if "the accused, after having been advised by proper authorities that the accused may be tried *in absentia* and convicted, consents in writing to removal [from the country] despite trial and conviction *in absentia*."[217] This notice requirement mirrors the standard set forth in RCM 804(c) and the provisions of the ICCPR and European Covention.[218]

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[210] *Id*. art. 6(3)(e).
[211] Sejdovic v. Italy, App. No. 56581/00, 42 Eur. H.R. Rep. 17, 44 (2004) (citing Belziuk v. Poland, 1988-II Eur. Ct. H.R. 558, 570 (2004)).
[212] Jenks, *supra* note 16, at 93.
[213] *Sejdovic*, App. No. 56581/00, 42 Eur. H.R. Rep. at 33.
[214] *Id*. at 8–12.
[215] *Id*. at 34.
[216] U.S. DEP'T OF ARMY, REG. 27-50, STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION para. 1-10 (15 Dec. 1989).
[217] *Id*.
[218] 2012 MCM, *supra* note 13, R.C.M. 803(c).

D. Analysis of Tenets of International Law

Like military, federal, and most state laws within the United States, some tenets of international law allow for the waiver of presence by an accused as long as that waiver is voluntary and unequivocal.[219] The reasoning behind such an approach with the European Convention and the ICCPR is that an accused should be afforded the right to be informed of the charges and date of commencement of trial and if he, after being so informed, fails to appear, a trial may be held *in absentia*.[220] However, no waiver of presence is permitted by the Rome Statute, which governs the ICC.[221] Thus, trials *in absentia* are not permitted in the ICC unless an accused is disruptive, and even then, the accused must be afforded the opportunity to observe the proceedings.[222] Clearly, the rather strict approach by the ICC provides the most protection of an accused's right to be present and ensures the most just and equitable judicial process.

V. Ethical Considerations

In addition to the divide that exists within the military, state, federal, and international legal communities regarding trial *in absentia*, there are ethical concerns with respect to the role of the defense attorney when a trial commences with no defendant present.[223] The ethical standards for military lawyers are encapsulated in AR 27-26, Rules of Professional Conduct for Lawyers, which were modeled after the American Bar Association's Model Rules of Professional Conduct (MPRC).[224] A thorough examination of each pertinent rule, its applicability, and the relevant case law in relation to the representation of a client in a trial *in absentia* will aid in the analysis regarding the ethical implications of representing a client who is not present during a court-martial.

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[219] *Maleki*, *supra* note 193.
[220] *Id*.
[221] Rome Statute of the International Criminal Court art. 67, July 17, 1998, 2187 U.N.T.S. 90.
[222] Jenks, *supra* note 16, at 71.
[223] *See* Gilligan & Imwinkelried, *supra* note 16, at 56; Starkey, *supra* note 83, at 53.
[224] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROF. CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26]; MODEL RULES OF PROF. CONDUCT [hereinafter MRPC].

A. Rules Governing Professional Conduct In Relation to Trial *In Absentia*

The MRPC guide the conduct of counsel and are applicable to military counsel along with the rules set forth in AR 27-26. Several rules promulgated by the ABA are relevant to the discussion of representation of a client being tried *in absentia*. These rules govern informed consent, confidentiality, scope of representation, and expeditious litigation.

Model Rule of Professional Conduct Rule 1.0(e) stresses the importance of informed consent and MPRC Rule 1.4 outlines the need for communication between attorney and client regarding certain courses of action and the consequences thereof.[225] Certainly, when a client is absent for trial, an attorney's ability to communicate and ensure informed consent regarding the case is not possible. While informed consent is not specifically discussed in AR 27-26, the informed decision-making by a client is stressed: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation." [226] Like Rule 1.0(e) in the MRPC, the practicality of this rule decreases when an attorney is representing a client with whom he cannot communicate or inform due to absence.

Model Rule of Professional Conduct 1.6(a) governs confidentiality and states in part that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation."[227] This is identical to the Army's Rule 1.6. When representing an absent client during trial, this rule is of vital importance because a lawyer must understand what the left and right limits of disclosure are with respect to attorney-client communication. Those limits are not always clear if the attorney has information that he wishes to use during trial given to him by the client that he wishes to utilize during trial but may not be permitted to do so without the express consent of his client, who is absent.

Another relevant rule, MPRC Rule 3.2, provides guidance regarding the expeditious handling of litigation. Specifically, the rule mandates that "[a] lawyer shall make reasonable efforts to expedite litigation

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[225] MRPC, *supra* note 224, R. 1.0(e).
[226] AR 27-26, *supra* note 224, R. 1.4(b).
[227] MRPC, *supra* note 224, R. 1.6(a).

consistent with the interests of the client."[228] This is of particular importance due to the role and candor of counsel in addressing the court in the event a client absconds before or during trial. For example, the issue may arise when counsel has to determine whether or not to request a continuance and balance the interests of the client with the need for judicial efficiency.

Army Regulation 27-26 Rule 3.2 differs from the MPRC rule by adding that a lawyer has "responsibilities to the tribunal to avoid unwarranted delay."[229] The reasoning is set forth in the Rule's comment:

> Dilatory practices bring the administration of criminal, civil and other administrative proceedings into disrepute. The interests of the client are rarely well-served by such tactics. Delay exacts a toll upon a client in uncertainty, frustration, and apprehension. Expediting litigation, in contrast, often can directly benefit the client's interest in obtaining bargaining concessions and in obtaining an early resolution of the matter. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.[230]

This differs from MPRC 3.2 in that the military rule stresses that a client's interests are not served by delay, thereby asserting that the sooner a case goes to trial, the better a lawyer serves his client's interests.[231] In the context of a trial *in absentia*, that is not necessarily the case. It could be argued that to postpone a trial until such a time as to secure the client's presence will result in a more comprehensive and collaborative defense effort. Additionally, there is a certain advantage

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[228] *Id.* R. 3.2.
[229] AR 27-26, *supra* note 224, R. 3.2.
[230] *Id.* R. 3.2 (cmt.).
[231] *Id.*

gained by the client in some cases if a trial is postponed, as cases do not usually grow stronger for the prosecution over time but rather weaker due to issues with witness movement, fading memories, and degradation or loss of evidence.[232] So while the rule suggests that swift movement of a case through the judicial system is in the best interests of a client, that may not necessarily be the case when the client is an accused in a criminal matter. To be sure, an accused should not be permitted to "game" the system by deliberately circumventing a trial through absence.[233] However, to place the burden upon a lawyer, particularly defense counsel in the context of an absent client, to expeditiously move a case through the judicial process is nonsensical as that may not, in fact, be in the best interest of the client.

B. Case Law

At the military commission of Harrison Dodd, Dodd's counsel was not permitted to present evidence in defense of the accused following the accused's absence.[234] Finding that counsel of an absent accused in a civilian court "has no authority, the prisoner having abandoned his cause, to introduce evidence and make a defense," the court found that the same held true in a military court.[235] While courts are not as archaic in their thinking anymore, there are still issues with respect to what defense counsel is able to present in the absence of the accused, as illustrated in *United States v. Marcum*.[236]

In *Marcum*, the Court of Appeals for the Armed Forces (CAAF) dealt with the use of an unsworn statement offered by defense counsel in accordance with RCM 1001 during pre-sentencing proceedings in an *in absentia* court-martial.[237] Despite the defendant going AWOL during the court-martial, the court convicted him.[238] During pre-sentencing, defense

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[232] United States v. Houghtaling, 8 C.M.R. 30 (C.M.A. 1953); Starkey, *supra* note 80, at 743 ("Prolonged delay in the commencement of trial frequently means that the case is never tried at all because evidence is lost by accident, or carelessness, witnesses die or drift out of reach. . .").
[233] State v. Staples, 354 A.2d 771, 775 (Me. 1976).
[234] TRIALS FOR TREASON, *supra* note 29, at 54.
[235] *Id*.
[236] 60 M.J. 198 (C.A.A.F. 2004). *But see* United States v. Moss, No. 20110337 (A. Ct. Crim. App. Jan. 17, 2013) (Defense counsel may read unsworn statement of absent accused during presentencing without specific authorization).
[237] *Marcum*, 60 M.J. at 200; 2012 MCM, *supra* note 13, R.C.M. 1001.
[238] *Marcum*, 60 M.J. at 198.

counsel used a written statement provided to him by the appellant during the course of case preparation.[239] The intermediate appellate court, the Air Force Court of Criminal Appeals, found that defense counsel had the authority to waive the privilege belonging to the accused:

> Even if . . . the appellant did not waive the attorney-client privilege himself "the [attorney] generally has implicit authority to waive the privilege as well in the course of representation." Our superior court recognized this authority in *United States v. Province*, 45 M.J. 359 (1996). In that case, the accused gave a copy of 4 1/2 year-old "stragglers' orders" to his trial defense counsel. In effect, these orders documented the accused's prior uncharged period of unauthorized absence. Trial defense counsel used the orders during pretrial negotiations in an attempt to get an administrative separation for the accused. He also gave a copy of the orders to [the prosecutor] out of concern that the information would come out during the providence inquire and complicate the plea . . . Our superior court held that "the disclosure of the stragglers' orders was made in facilitation of representation, and defense counsel would be impliedly authorized to disclose this information for [that] purpose.[240]

The court's use of the *Province* case is not compelling as the disclosure was made during plea negotiations.[241] Additionally, the court did not answer the question as to whether "[c]ounsel representing an accused being tried *in absentia* should have the authority to waive the accused's privilege."[242]

The CAAF found that the appellant waived "his right to make an unsworn statement" unless he specifically authorized defense counsel to make a statement prior to his absence.[243] The court held that "if an accused is absent without leave his right to make an unsworn statement is forfeited unless prior to his absence he authorized his counsel to make a

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[239] *Id*.
[240] United States v. Marcum, No. 34216 (A.F. Ct. Crim. App. 2002).
[241] United States v. Province, 45 M.J. 359 (C.A.A.F. 1996).
[242] Gilligan & Imwinkelreid, *supra* note 18, at 513.
[243] United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004).

specific statement on his behalf."[244] In finding that defense counsel erred in using the statement, the court cited Military Rule of Evidence 511,, which "designat[es] the client as the holder of the attorney-client privilege."[245] In the dissent, Chief Judge Crawford noted "that the appellant had forfeited any right to object to his counsel's use of the statement by appellant's own misconduct in going AWOL."[246]

Not only is a defense attorney not permitted to waive the accused's privilege, as noted above, defense counsel may also not waive other important rights. "In general, the courts have been scrupulous to protect the affected rights, consistent with the policy considerations involved in the practice of conducting trials *in absentia*."[247]

> It has been held, for example, that while the defendant may waive the right to be present, counsel has no authority to do so on his client's behalf and counsel for an absent defendant has no power to waive his client's right to trial by jury. Nor may counsel, during the inquiry concerning the reasons for defendant's absence, properly disclose communications from his client which arose out of the attorney-client relationship and which were clearly meant to be confidential. It also seems that waiver by voluntary absence acts as a waiver of neither the right to counsel nor the requirement that the prosecution adduce evidence sufficient to prove guilt beyond a reasonable doubt.[248]

In *People v. Aiken*, the defendant failed to appear for trial and, after being convicted, argued on appeal that his defense counsel was ineffective because of "counsel's waiver of an opening and closing statement; failure to cross-examine witnesses called by either the People or his codefendant; failure to call witnesses to testify on appellant's behalf; and, finally, failure to object to the introduction of any evidence by either the People or his codefendant."[249] The New York Court of Appeals noted:

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[244] *Id*. at 210.
[245] Gilligan & Imwinkelreid, *supra* note 18, at 513.
[246] *Marcum*, 60 M.J. at 212.
[247] Starkey, *supra* note 83, at 740.
[248] *Id*.
[249] 45 N.Y.2d 394, 397 (1978).

> Although a defendant may not, by absence alone, waive his right to effective legal representation, his absence must, of necessity, be taken into consideration on the issue of counsel's effectiveness. To be sure, a defendant's absence from trial may severely hamper even the most diligent counsel's ability to represent his client effectively.[250]

It also follows that the right to testify may be considered waived if the defendant is tried *in absentia*.[251] Sentencing proceedings also present some issues in that there is no defendant present to actually provide a statement to the court or in any way assist counsel with gathering helpful evidence, thereby limiting the matters defense counsel is able to present.

C. Trials *In Absentia* Present Ethical Challenges for Defense Counsel

The most common issue addressed in case law regarding representation during trial *in absentia* is the claim of ineffective assistance of counsel.[252] The Sixth Amendment to the U.S. Constitution guarantees a defendant's right to effective assistance of counsel.[253] In order to have a fair trial, the assistance of counsel must be effective pursuant to the standard set forth in *Strickland v. United States*.[254]

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[255]

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[250] *Id*. at 399.
[251] *See* Taylor v. United States, 414 U.S. 17 (1973).
[252] *See* People v. Diggins, No. 4637/03, 2009 WL 3461616 (N.Y. Sup. Ct. Oct. 19, 2009); United States v. Sanchez, 790 F.2d 245, 254 (2d Cir. 1986); People v. Aiken, 45 N.Y.2d 394 (N.Y. 1978).
[253] U.S. CONST. amend. VI.
[254] 466 U.S. 668, 684–85 (1984) ("[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.").
[255] *Id*. at 687.

Essentially, when determining whether counsel is ineffective, the court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."[256]

In many cases tried *in absentia*, defense counsel elect not to actively participate in the proceedings.[257] *United States v. Sanchez* involved the trial and conviction of a defendant *in absentia*. Following his conviction, the defendant alleged that his attorney failed to effectively represent him by failing to "make opening or closing statements or objections to the admission of evidence or to cross-examine witnesses."[258]

> [T]he right to counsel does not impose upon a defense attorney a duty unilaterally to investigate and find evidence, or to pursue a fishing expedition by cross examination, or to present opening or closing remarks on the basis of no helpful information, or to object without purpose, on behalf of an uncooperative and unavailable client.[259]

Similar to the defendant in *Sanchez*, the defendant in *People v. Diggins* was tried *in absentia*.[260] After his client failed to appear, defense counsel expressed that the "case is highly dependent on [Diggins'] help to defend himself"[261] and that "he could not effectively represent [the] defendant unless the defendant was present for the proceedings."[262] He requested permission to withdraw from the case; however, his application was denied.[263] With no client present, defense counsel made the tactical decision not to participate in the proceedings. During the course of the trial, defense counsel did not question or challenge any jurors, gave no opening statement, did not call or cross-examine any witnesses, make any motions, object, or make a closing argument.[264] Despite defense counsel's failure to participate, the court held that to find defense counsel

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[256] *Id*. at 690.
[257] United States v. Sanchez, 790 F.2d 245 (2d Cir. 1986); People v. Diggins, No. 4637/03, 2009 WL 3461616 (N.Y. Sup. Ct. Oct. 19, 2009).
[258] 790 F.2d at 247.
[259] *Id*. at 253.
[260] 2009 WL 3461616, at * 1.
[261] *Id*.
[262] *Id*. at *2.
[263] *Id*.
[264] *Id*.

ineffective under the circumstances "would provide an incentive for defendants to abscond and thereby obtain retrials. The adjudicative process cannot be subject to such manipulation. Nor can trials *in absentia* be rendered a nullity by an attorney's strategic decision not to participate in them."[265]

To be fair, when determining whether or not a defense attorney is ineffective in these types of cases, substantial weight is given to the fact that a defendant fails to appear for trial.[266] This analysis is logical because the presence or absence of a defendant significantly affects how a case will be presented by the defense. And while these ethical concerns are not alleviated by merely changing the commencement of trial from the time of arraignment to the swearing of a panel, there is a greater likelihood of collaborative preparation between defense counsel and the accused if the accused is present at least through the initial stages of trial.

VI. Conclusion

The right for an accused to be present at trial is well established in case law and, more importantly, set forth in both the Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment.[267] While "the Constitution neither orders nor prohibits waiver in any cases[,] [d]istinctions based on the severity of the crime or the custody of the defendant are constitutionally acceptable, but not required by the Court."[268] This notion is codified in FRCP 43 and may be waived by a defendant either voluntarily or through his behavior after the commencement of trial.[269]

Through its rulings, the Supreme Court has made it clear that it is permissible for a rule to allow for trial *in absentia* even if the defendant is not present at what is traditionally considered commencement of trial; however, Congress has chosen not to change FRCP 43. By requiring the defendant be present at the beginning of trial, the rule ensures that any departure thereafter is with the full understanding that the trial will

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[265] *Id*. at *16.
[266] Strickland v. United States, 466 U.S. 668, 691 (1984).
[267] Cohen, *supra* note 92, at 173.
[268] *Id*.
[269] FED. R. CRIM. P. 43.

continue in his or her absence. The reasoning is sound in "that a defendant who flees from a courtroom in the midst of a trial—where judge, jury, witnesses and lawyers are present and ready to continue—would . . . know that as a consequence the trial could continue in his absence."[270]

The right to be present at the start of trial in the military is supported by precedent dating back to 1864.[271] It was only in 1969 that the military veered from the precedent set by the Supreme Court and the military commissions when it changed the rule.[272] The only stated reason for the change is the uniqueness of military culture as discussed in *United States v. Houghtaling*.[273] The court held that "undeserving individuals" do not deserve to postpone justice given the difficulty in holding courts-martial in overseas theaters.[274] Referring to defendants as "undeserving individuals" erodes the supposition that one is innocent until proven guilty.. Further, it would be highly unusual, if not near impossible, to absent oneself from court-martial while in a deployed environment. Additionally, civilian society is only slightly less mobile than military society. It is not uncommon to have issues locating and securing the presence of civilian witnesses as criminal defendants and the individuals they associate with are not known for their stability. In the military, due to the nature of accountability for its members, ensuring the presence of servicemember-witnesses would be relatively easy.

Moreover, Article 36, UCMJ, requires the President to promulgate rules of procedure that are consistent with the practice of federal district courts unless it impracticable to apply such rules to courts-martial. This requirement is precisely why the drafters, in their analysis and discussion of RCM 804(c), take such great pains to find a difference between court-martial and federal criminal practice. However, there are no more pressing matters in the military that make its culture so unique as to necessitate a departure from federal law. To suggest that mission operational tempo and frequent movement require a special rule for the military is not persuasive. The holding in *Houghtaling* no longer appears to justify the divergence in military law and federal law with respect to trial *in absentia* as required by Article 36, UCMJ.[275]

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[270] Taylor v. United States, 414 U.S. 17, 20 (1973).
[271] TRIALS FOR TREASON, *supra* note 31, at 52.
[272] 1969 MCM, *supra* note 47.
[273] 8 C.M.R. 30 (C.M.A. 1953).
[274] *Id.* at 35.
[275] UCMJ art. 36 (2008).

A majority of states conform to the federal rule[276] and like the federal government and most states, even the International Criminal Court believes that the best way to ensure an absence is deliberate is to hold the trial *in absentia* only after the defendant has appeared at the beginning to guarantee, to the best of their ability, that a defendant received proper notice of the proceedings.[277]

From an ethical standpoint, the hands of a defense attorney are veritably tied when it comes to representing a client *in absentia*. Moreover, ineffective assistance of counsel claims are most assuredly going to arise out of each case tried *in absentia*, thereby forcing defense counsel to justify his actions, or lack thereof, on behalf of a client who was not even present. As a result, defense counsel are placed in precarious situations in which they must balance ethical and tactical decisions against the best interests of the accused and the judicial system.

History supports changing the current rule governing trial *in absentia* and bringing the military in line with federal criminal courts. The new rule should allow a trial *in absentia* to occur only if an accused is present at the beginning of trial and has waived his right to be present knowingly and voluntarily. The change would define the beginning of a trial as the swearing of a panel.[278] Notice at the arraignment, which may be months in advance of a court-martial is insufficient and does not comport with common sense or precedent set by the Supreme Court.

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[276] State v. Aceto, 100 P.3d 629 (Mont. 2004); State v. Staples, 354 A.2d 771 (Me. 1976); Reece v. State, 928 S.W.2d 334 (Ark. 1996).

[277] Rome Statute of the International Criminal Court art. 67(1)(d), July 17, 1998, 2187 U.N.T.S. 90.

[278] Current RCM 804(c)(1): Is voluntarily absent after arraignment (whether or not informed by the military judge of the obligation to remain during the trial); or

Proposed Revision: Is voluntarily absent after the panel has been sworn; or

INHERENT RIGHT OF SELF-DEFENSE THROUGH THE LENS OF THE 2010 CHEONAN ATTACK

LIEUTENANT COLONEL SANGJAE LEE*

I. Introduction

A Republic of Korea (ROK) Navy ship (*Cheonan*), with 104 crew members on board, sank near the western maritime border with North Korea after a mysterious explosion on March 26, 2010.[1] Forty-six Korean Navy sailors were killed in this unprecedented tragedy, the cause of which could not be immediately identified. After a long and thorough investigation on the cause of the explosion, a ROK-led multinational investigation team—composed of international experts from ROK, United States, United Kingdom, Canada, Australia, and Sweden—concluded that the warship had been sunk by a North Korean torpedo fired by a submarine.[2] Immediately after the investigation report was completed, the President of the ROK vowed to exercise the right of self-defense if North Korea attempted military provocation again.[3]

Academic controversy exists over whether the ROK had a right of self-defense once it determined that North Korea had perpetrated the attack. Understandably, due to the gravity and seriousness of the

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[1] MINISTRY OF NAT'L DEF., REPUBLIC OF KOREA, JOINT INVESTIGATION REPORT ON THE ATTACK AGAINST ROK SHIP CHEONAN (2010).

[2] On May 20, 2010, the team presented a summary of their investigation. On September 13, 2010, the ROK government released the final report, reaffirming that it was a North Korean attack. *See id.*

[3] So-hyun Kim, *Lee Says South Will Invoke Right of Self-Defense*, KOREA HERALD, May 24, 2010, http://www.koreaherald.com/national/Detail.jsp?newsMLId=20100524000740.

incident, the ROK government wanted to conduct a thorough and objective investigation before assigning a cause. This took considerable time (fifty-five days), thereby raising the issue of whether immediacy is a requirement in exercising the right of self-defense.[4] In other words, if immediacy of a military response is required, the right of self-defense would be difficult to exercise where the aggressor in an attack is not identified until after a significant period of time has elapsed.

Traditionally, necessity and proportionality are considered to be the most important criteria comprising the right of self-defense under international law.[5] In addition to these two criteria, some commentators have argued that immediacy is a separate requirement when exercising the right of self-defense.[6] According to this argument, a response may not be undertaken in self-defense after a period of time has elapsed since the armed attack.[7] Rather than emphasizing immediacy as a separate requirement to the exercise of the right of self-defense, timeliness of a response should only be one of many factors when considering the necessity of exercising the right of self-defense.

This article explores how the concept of the right of self-defense has evolved in the field of international law, and also provides the legal analysis of the criteria of the right of self-defense, traditionally referred to as necessity and proportionality in Part II. Part III examines the role of time in the exercise of the right of self-defense. This section focuses on when the right of self-defense is justified after an armed attack by analyzing the immediacy issue, concluding that immediacy is not a separate requirement, but merely one factor in interpreting the necessity criterion. Part IV then applies that conclusion to the *Cheonan* incident, ultimately concluding that the ROK government had the right of self-defense once it identified the cause of the incident and the aggressor. In

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[4] In fact, an academic seminar took place in Seoul on 31 May, addressing the legal issues regarding the *Cheonan* incident. At this event, Sukhyoen Kim, an international law professor at Dankook University, argued that it was impossible to exercise the right of self-defense when considerable time had passed after the armed attack occurred. As part of his reasoning, he mentions the immediacy principle, arguing that the use of military force as an exercise of the right of self-defense should occur immediately after the armed attack. Hongsuk Ahn, *It Is Necessary to Fulfill Immediacy and Necessity Criteria to Exercise the Right of Self-Defense*, YONHAPNEWS, May 31, 2010, at A1.

[5] YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 208 (4th ed. 2005).

[6] *See id.* at 242.

[7] Even though Professor Yoram Dinstein mentions immediacy as one of the requirements in the exercise of the right of self-defense, he acknowledges two exceptions in the immediacy principle. *See infra* note 79.

order to reach this conclusion, the article applies the concept of "a justifiable delay" to the *Cheonan* incident in dealing with the lapse of time occurring as a result of the investigation into the cause.[8] Finally, Part V summarizes the arguments, finding that the ROK government had the right of self-defense in the *Cheonan* attack after it identified the perpetrator.

II. The Right of Self-Defense in International Law

A. History of the Right of Self-Defense

The right of self-defense developed as international law advanced towards the prohibition of war and, eventually, of the use of force.[9] Until the beginning of the twentieth century, the right of self-defense had little meaning. International law permitted states to wage war freely, so that no justification for doing so was required. However, at the beginning of the twentieth century, when the freedom to wage war became more restricted, the right of self-defense gained more significance as an exception to the use of force. Now, the right of self-defense is cited with regard to almost every use of military force.[10]

Today, the law governing a State's use of force is incorporated in the United Nations (UN) Charter.[11] Article 2(3) of the UN Charter mandates that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;"[12] Article 2(4) requires that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."[13] This ban on aggression is considered to be the core of the UN Charter and the fundamental rule of contemporary international law.[14]

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[8] *See infra* note 82.

[9] THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 789 (Bruno Simma ed., Oxford Univ. Press 2d ed., 2002) [hereinafter COMMENTARY].

[10] *See id.*

[11] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 29 (Jan. 2013) [hereinafter LOAC DESKBOOK] ("The UN Charter provides two bases for a State's choice to resort to the use of force: Chapter VII enforcement actions under the auspices of the UN Security Council, and self-defense pursuant to Article 51 . . . .").

[12] U.N. Charter art. 2, para. 3.

[13] *Id.* para. 4.

[14] LOAC DESKBOOK, *supra* note 11, at 30.

However, there are two exceptions that justify a State's recourse to the use of force: (1) actions authorized by the UN Security Council under Chapter VII of the UN Charter, and (2) actions that constitute a legitimate act of individual or collective self-defense pursuant to Article 51 of the UN Charter.[15] Specifically, Article 51 of the UN Charter codifies the right of self-defense, stipulating that "[n]othing in the present Chapter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the UN until the Security Council has taken measures necessary to maintain international peace and security . . . ."[16] The right of self-defense contemplated in Article 51 of the UN Charter has become the pivotal point upon which disputes concerning the lawfulness of the use of force in inter-state relations usually concentrate.[17]

Even though Article 51 of the UN Charter stipulates the right of self-defense, the right of all nations to defend themselves has frequently been exercised in customary international law before the adoption of the UN Charter.[18] In other words, the right of self-defense is not a concept created by the UN Charter, but is a time-honored custom inherent to a State's sovereignty. This inherent right of self-defense is even clear in the language of Article 51 of the UN Charter. It stipulates that self-defense of a State is *inherent*, and that nothing in that Chapter will impair the right of self-defense.[19]

The customary right of self-defense is well expressed in the 1837 *Caroline* case,[20] which is generally regarded as the reference point for any discussion of anticipatory self-defense, as well as for the criteria governing the use of force in self-defense.[21] In this incident, the British and U.S. governments both accepted the principle that self-defense in anticipation of a threatened armed attack must be "instant,

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[15] COMMENTARY, *supra* note 9, at 789.
[16] U.N. Charter art. 51.
[17] COMMENTARY, *supra* note 9, at 790.
[18] LOAC DESKBOOK, *supra* note 11, at 34 ("The right of all nations to defend themselves was well-established in [customary international law] prior to adoption of the UN Charter.").
[19] U.N. Charter art. 51.
[20] LOAC DESKBOOK, *supra* note 11, at 37 (noting that anticipatory self-defense dates back to 1837, beginning with the *Caroline* case).
[21] Terry D. Gill, *The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention and Immediacy*, *in* INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 113, 125 (Michael Schmitt & Jelena Pejic eds., 2007).

overwhelming, leaving no choice of means and no moment for deliberation."[22] This is one example of many specific incidents incorporating the customary right of self-defense.

Here arises the fundamental question regarding the relationship between customary international law and Article 51 of the UN Charter pertaining to the interpretations of the right of self-defense. Some in the international community advocate a restrictive approach based on a purely textual analysis of Article 51.[23] Others argue that Article 51 of the UN Charter does not extinguish the customary right of self-defense.[24] The restrictive approach is intended to encourage a peaceful resolution of disputes and to achieve protection of international order. However, the right of self-defense has been firmly established in customary international law before the inception of the UN Charter; customary international law should be considered as an indispensable method to defend a State's sovereignty. Moreover, the restrictive approach does not fully reflect the reality of the change of paradigm in warfare due to the advent of weapons of mass destruction (WMD), which could result in the total destruction of a State with just one attack.[25] Therefore, rather than using the UN Charter to artificially limit a State's right of self-defense, it is better to conform to historically accepted criteria for the lawful use of force.[26]

B. Armed Attack as a Prerequisite

Article 51 of the UN Charter requires *an armed attack* when exercising the right of self-defense.[27] The notion of an armed attack matters because it is closely related to the justifiable scope of the exercise of self-defense. However, there is no specific definition of an armed attack in the UN Charter. The international community has made considerable efforts to reach a consensus on the concept of an armed

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[22] *Id.*
[23] COMMENTARY, *supra* note 9, at 803.
[24] *See* Gill, *supra* note 21, at 117.
[25] MINISTRY OF NAT'L DEF., REPUBLIC OF KOREA, LAW OF ARMED CONFLICT 82 (2007).
[26] LOAC DESKBOOK, *supra* note 11, at 34 (juxtaposing the restrictive approach with the expansive interpretation of the UN Charter).
[27] Article 51 of the UN Charter clearly mentions that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense *if an armed attack occurs* . . . ." U.N. Charter art. 51.

attack, but a generally recognized definition of armed attack has yet to be determined.[28]

The UN has been striving to find a consensus on the definition of an armed attack, even arriving at a *Definition of Aggression* in the General Assembly Resolution 3314 (XXIX) on December 14, 1974.[29] Although the notions of *armed attack* and *act of aggression* do not exactly coincide,[30] the *Definition of Aggression* could be a worthwhile reference for the understanding of the scope of armed attack. According to the Resolution, acts of aggression include:

> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to

[28] COMMENTARY, *supra* note 9, at 796.
[29] Definition of Aggression, G.A. Res. 3314 (XXIX) (Dec. 14, 1974) [hereinafter Definition of Aggression].
[30] COMMENTARY, *supra* note 9, at 795.

> amount to the acts listed above, or its substantial involvement therein.[31]

In addition, there is a noteworthy judgment by the International Court of Justice (ICJ) on the scope of an armed attack, which could give rise to the self-defense issue. In the *Oil Platforms Case* in 2003,[32] the ICJ discussed armed attack, ultimately deciding that "[t]he Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the inherent right of self-defense."[33] In other words, the court confirmed that just a single mine attack to a military vessel of another State constituted an armed attack which could trigger the exercise of the right of self-defense under the Article 51 of the UN Charter.

The ICJ formulated another meaningful principle in the same case. The ICJ decided that the burden of proof was on the State justifying its own use of force as self-defense to show the existence of an armed attack.[34] This means that if a State wants to exercise the right of self-defense, the State must prove that an armed attack has occurred against its sovereignty. This principle leaves open the possibility that it may take some time for a State to prove the occurrence of an armed attack by another State, thus justifying a delay of military response within a reasonable time, which then raises the question of what a responsible amount of time is.

C. Necessity and Proportionality

The ICJ confirmed in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,[35] that "[t]he submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law."[36] Indeed, the

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[31] Definition of Aggression, *supra* note 29. These seven paragraphs do not purport to encompass the entire spectrum of aggression, and the Security Council may determine what other acts are tantamount to aggression. *See* DINSTEIN, *supra* note 5, at 129.
[32] Oil Platforms (Iran v. U.S.), Judgment (Nov. 6, 2003), *available at* http://www.icj-cij.org/docket/files/90/9715.pdf.
[33] *Id.*
[34] *Id.*
[35] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (July 8, 1996), *available at* http://www.icj-cij.org/docket/files/95/7495.pdf.
[36] *Id.*

two requirements of necessity and proportionality have been considered as traditional criteria of the right of self-defense.

In terms of the necessity requirement, force should not be considered necessary until peaceful measures have been found inadequate or clearly futile.[37] If efforts to resolve the problem amicably are made, they should be carried out in good faith.[38] In short, force should be viewed as a "last resort" to meet the necessity requirement.[39]

The necessity requirement usually does not become an issue when the right of self-defense is triggered by an all-out invasion. However, necessity becomes an issue when conflict continues following an isolated armed attack. In such a case, the State seeking to exercise the right of self-defense has an obligation to verify that peaceful settlement of the conflict is not available before full-scale exercise of the right of self-defense.[40]

Proportionality, as a criterion of self-defense, means that the scale and effects of force and counter-force must be similar.[41] In order to comply with the proportionality criterion, States must limit the magnitude, scope, and duration of any use of force to that level of force which is reasonably necessary to counter a threat or attack.[42] This condition of proportionality is frequently considered to be the essence of self-defense.[43]

Proportional response within the context of self-defense is different from proportionality in the targeting analysis.[44] The former requires a proportional relationship between an armed attack and the subsequent military response in the *jus ad bellum* aspect, whereas the latter requires balance between the civilian sufferings and the military advantage in the

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[37] DINSTEIN, *supra* note 5, at 210 (discussing when force is appropriate in light of necessity).
[38] *Id.*
[39] LOAC DESKBOOK, *supra* note 11, at 35, 36.
[40] DINSTEIN, *supra* note 5, at 237.
[41] *Id.* at 221.
[42] LOAC DESKBOOK, *supra* note 11, at 35.
[43] DINSTEIN, *supra* note 5, at 210.
[44] *See* LOAC DESKBOOK, *supra* note 11, at 35 ("To comply with the proportionality criterion, States must limit the magnitude, scope, and duration of any use of force to that level of force which is reasonably necessary to counter a threat or attack.").

jus in bello aspect.[45] For this reason, the principle of proportionality in the targeting analysis is only applicable when an armed attack has the possibility of affecting civilians.[46]

III. Imminence versus Immediacy

The UN Charter stipulates that the inherent right of self-defense can be exercised "if an armed attack occurs against a Member of the United Nations . . . ."[47] In light of this clear language, it is apparent that a State can exercise the right of self-defense after an armed attack happens. However, it is not clear in the UN Charter if a State may exercise the right of self-defense even before an armed attack occurs; thus, controversy exists on this point.

A. Before an Armed Attack: Imminence Issue

The controversy comes down to the issue of whether the anticipatory right of self-defense is acceptable under the UN Charter. Some argue that the right of self-defense under Article 51 of the UN Charter cannot be exercised before an armed attack occurs. They interpret Article 51 narrowly, concluding that an anticipatory right of self-defense would be contrary to the wording of Article 51 "if an armed attack occurs."[48]

However, advances in warfare technology, such as the advent of weapons of mass destruction (WMD), have resulted in the possibility that just one attack with WMD can cause the total destruction of a State, leaving no means and methods of self-defense. Moreover, the right of self-defense is inherent in a State's sovereignty, and Article 51 of the UN Charter merely confirms the pre-existing customary right of self-defense. The UN Charter also reaffirms the inherency of the right, stipulating that

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[45] Proportionality in the targeting analysis is one of the four key principles of the law of war, which include: military necessity, distinction, proportionality, and avoidance of unnecessary suffering. *See id.* at 131.

[46] The principle of proportionality requires balance between civilian sufferings and the military advantage to be gained. Thus, if civilian casualties or damages are excessive in relation to the concrete and direct military advantage, such an attack violates the principle of proportionality. Therefore, proportionality requires the commander to weigh the expected death, injury, and destruction against the anticipated military advantage. However, the point is whether such death, injury, and destruction are excessive in relation to the military advantage; not whether any death, injury, or destruction will occur. *See id.* at 142.

[47] U.N. Charter art. 51.

[48] COMMENTARY, *supra* note 9, at 803.

"[n]othing in the present Charter shall impair the *inherent* right of individual or collective self-defense . . . ."[49] Therefore, anticipatory self-defense can be justified under the customary international law.[50]

[49] U.N. Charter art. 51.

[50] Anticipatory self-defense was discussed in the 1837 *Caroline* case and subsequent correspondence between then-U.S. Secretary of State Daniel Webster and his British Foreign Office counterpart, Lord Ashburton. *See* LOAC DESKBOOK, *supra* note 11, at 37.

The core criterion of anticipatory self-defense is imminence. As to when an armed attack is imminent, Professor Michael Schmitt argued in 2003 that States may legally employ force in advance of an attack, at the point when (1) evidence shows that an aggressor has committed itself to an armed attack, and (2) delaying a response would hinder the defender's ability to mount a meaningful defense.[51]

B. After an Armed Attack: Immediacy Issue

When is the appropriate time to exercise the right of self-defense after an armed attack? It is clear that self-defense is justified shortly after an armed attack. Also, it is clear that a military response is prohibited long after an isolated armed attack.[52] However, between these two extremes, it is not clear when the right of self-defense expires. For example, in the *Cheonan* incident, fifty-five days passed before the ROK government determined who was behind the attack. In this case, could the ROK government exercise the right of self-defense even though fifty-five days elapsed since the armed attack? This issue is closely related to whether immediacy—specifically, no undue time-lag between the armed attack and the exercise of self-defense—is a requirement to the exercise of the right of self-defense.[53]

Some international law scholars argue that the ROK government could not exercise the right of self-defense at the time the cause of the incident was identified, because of the time that had passed in conducting the investigation.[54] According to this argument, immediacy is required to exercise the right of self-defense, and the *Cheonan* incident could not satisfy the immediacy requirement because such a long time (fifty-five days) had passed after the armed attack.

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[51] Michael Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 534 (2003).

[52] A significantly delayed military response can be considered as an armed reprisal, not an exercise of the right of self-defense. *See* Gill, *supra* note 21, at 151.

[53] DINSTEIN, *supra* note 5, at 210.

[54] One of the scholars of this opinion is Professor Sukhyoen Kim, international law professor at Dankook University, ROK. Professor Kim attended an international law seminar as a panel member on May 31, 2010, arguing the issue of immediacy in the *Cheonan* incident. *See supra* note 4.

Professor Yoram Dinstein is a notable international law scholar who places immediacy on the same level as necessity and proportionality. While he acknowledges that the two conditions of necessity and proportionality have long been recognized as customary international law, he further argues that "[t]he two conditions of necessity and proportionality are accompanied by a third condition of immediacy," and that "these three conditions are distilled from yardsticks set out by the American Secretary of State, D. Webster, more than 160 years ago."[55] He also argues that "[w]ar may not be undertaken in self-defense long after an isolated armed attack."[56] According to this argument, it might be inferred that the ROK government had missed the opportunity to exercise the right of self-defense.

The original source of the idea regarding immediacy as an independent criterion for the exercise of the right of self-defense is not clear. However, Professor T.D. Gill explains the background of this thought, stating that

> the contention that self-defense is subject to a requirement of immediate exercise can be traced to two sources. The first is a common association of the international law of self-defense with the concept of personal self-defense against illegal assault under domestic criminal law. The second is the understandable desire to distinguish between the right of self-defense under the Charter and customary international law from the concept of armed reprisal, which has no legal basis under contemporary international law.[57]

On the contrary, other scholars argue that the timeliness of the response should only be one of many factors when considering the

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[55] DINSTEIN, *supra* note 5, at 209.
[56] *Id.* at 242.
[57] Gill, *supra* note 21, at 151. However, this idea can be criticized with two reasons. First, the right of states to exercise self-defense under international law is totally different from the domestic rights of individuals. Second, illegal armed reprisal can be suppressed effectively through the lens of necessity criterion. Moreover, the language of immediacy might lead to the misconception that the right of self-defense should be exercised immediately after an armed attack. This idea does not reflect the nature of military response.

necessity criterion in the exercise of the right of self-defense.[58] The idea that views "timeliness of a State's response as a factor in determining whether that response is truly necessary" is in line with this opinion.[59] According to these arguments, it is not necessary to use the concept of immediacy as a separate factor when determining whether the delayed military response might be regarded as the exercise of the right of self-defense. In this way, the legitimacy of an isolated military response is determined through the necessity perspective.

There is little difference between the two opposite positions regarding the immediacy issue in that a significantly delayed military response should not be justified as self-defense. Such action constitutes a mere armed reprisal, which is considered illegal under contemporary international law.[60] The only difference is how to explain the logical process of the consequence. The former position concludes that an isolated military response long after an armed attack is illegal because it lacks immediacy as an exercise of self-defense, whereas the latter position may conclude that military response is not justified because it may not be considered to be necessary.[61] Professor Terry D. Gill also admits that there is no significant difference between the two positions.

> Whether one sees immediacy used in this sense as an independent criterion alongside necessity and proportionality, or as forming part of the criterion of necessity is immaterial; the point is that a State exercising self-defense should do so within a reasonable period, on the basis of persuasive evidence and with a view towards thwarting or, where necessity, overcoming the attack and removing the threat of future attack.[62]

In spite of the minor difference between the two opposite positions, it would seem more appropriate to consider the timeliness of a State's

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[58] Chankyu Kim, *Legal Analysis on Cheonan* Incident, 308 KOREAN B. ASS'N NEWS (Seoul), June 14, 2010, at 6.
[59] LOAC DESKBOOK, *supra* note 11, at 35, n.60.
[60] Gill, *supra* note 21, at 151.
[61] Additionally, the possibility of not allowing a significantly delayed military response is much higher in the former perspective than the latter perspective. That is because the former regards the immediacy requirement as a separate criterion, whereas the latter considers the timeliness as just one of many factors in analyzing the necessity requirement.
[62] Gill, *supra* note 21, at 154.

response as a factor in deciding whether that response is really necessary.[63] In other words, rather than emphasizing the importance of immediate military response by considering immediacy as a separate requirement, it is enough to simply consider the timeliness of military response in analyzing the necessity requirement. Three main reasons exist why this position makes more sense. First, customary international law supports this view. Second, the UN Charter has no requirement for immediacy. Third, the decision-making process that States go through in order to take military action is lengthy in nature and further delays response to an armed attack.

1. The Customary International Law Perspective

Unlike imminence, no requirement for immediacy exists in customary international law when exercising the right of self-defense. Under the conditions set up by Webster in the *Caroline* case in 1837, the right of self-defense is justifiable if the circumstances leading to the use of force are "instantaneous, overwhelming and leaving no choice of means and no moment for deliberation."[64] In the customary international law area, the *Caroline* case is often referred to as a prototype describing the conditions under which a military response can be justified as the exercise of the right of self-defense.[65] However, there is no comment about immediacy as a requirement to the exercise of the right of self-defense in the *Caroline* case.[66] Apparently, this case deals with the *imminent* circumstances, introducing the concept of the right of anticipatory self-defense.[67]

Furthermore, it is clear that *imminence* is totally different from *immediacy*. Imminent, by definition, describes the state or condition likely to occur at any moment, whereas immediate means the condition

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[63] LOAC DESKBOOK, *supra* note 11, at 35.
[64] *Id.* at 33.
[65] *See* Gill, *supra* note 21, at 125.
[66] The *Caroline* case deals with the concept of the imminent threat in support of the anticipatory right of self-defense. *Id.*
[67] Secretary Webster assessed that a State need not suffer an actual armed attack before taking defensive action, but may engage in anticipatory self-defense if circumstances leading to the use of force are "instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation." Notably, these circumstances describe the imminent threat, not the condition of immediacy.

occurring or accomplished without delay.[68] The former is related to the "before an armed attack phase," whereas the latter is discussed in the "after an armed attack phase." It is necessary to distinguish these two concepts.[69]

2. The UN Charter Perspective

Today the theory of the right of self-defense is incorporated within the UN Charter. Article 51 of the UN Charter discusses the right of self-defense, stipulating that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . ."[70] However, there is no clear language indicating an immediacy requirement in the exercise of the right of self-defense in Article 51 or any other Articles of the UN Charter. The only condition regarding the right of self-defense expressed in Article 51 is "the occurrence of an armed attack."

Because the right of self-defense has evolved in customary international law, it is almost impossible to understand the concept of the right only within the language of Article 51 of the UN Charter. Nevertheless, Article 51 provides the basic framework for the exercise of the right of self-defense. For example, it gives fundamental guidelines pertaining to the right of self-defense: inherency of the right, when to exercise the right, the time limit of the right, and the reporting process. However, it does not mention immediacy,[71] an issue about which silence speaks loudly in this area of the law.

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[68] RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 956–57 (Stuart Berg Flexner et al. eds., 2d ed. 1998). It can be inferred from these definitions that imminence implies the possibility that something is highly likely to happen, whereas immediacy just describes the very short time frame. In other words, immediacy does not imply a sense of likelihood or possibility, which is different from imminence.

[69] Nevertheless, as described above, Professor Dinstein argues that "the condition of immediacy is also distilled from the yardsticks set out by Webster as well as necessity and proportionality." *See* DINSTEIN, *supra* note 5, at 209. Also, Professor Terry D. Gill argues that "[i]mmediacy in the context of the *Caroline* criteria for anticipatory self-defense is synonymous with the existence of an imminent or immediate threat of an armed attack." Gill, *supra* note 21, at 151. Professor Gill's argument implies that he regards immediacy as synonymous with imminence.

[70] U.N. Charter art. 51.

[71] Also, it does not mention necessity and proportionality. But, as previously discussed, these two criteria of the right of self-defense have been well established as customary international law prior to the inception of the UN Charter. *See supra* note 36.

3. Timeliness of the Decision-Making Process Regarding Military Action

A military response as an exercise of the right of self-defense in Article 51 of the UN Charter is different from the on-the-spot reaction between soldiers on the frontline firing at each other.[72] A military response in Article 51 should be, by nature, an action taken by a State. For a variety of reasons, a State needs time to properly respond to an armed attack. For example, it needs time to communicate through the military chain of command. If the right of self-defense is not allowed in these cases due to lack of immediacy, the scope of the right would be extremely narrowed, possibly resulting in the infringement of the sovereignty of the victim State because the State could not exercise the right of self-defense once time elapses after an armed attack.

Even though Professor Dinstein introduces the condition of immediacy, he acknowledges that "moving forward to a war of self-defense is a time-consuming process, especially in a democracy where the wheels of government grind slowly."[73] He vividly describes the decision-making process.

> A State under attack cannot be expected to shift gear from peace to war instantaneously. A description of a human being under attack as having 'no moment for deliberation' would be accurate. But when such an expression is applied to a State confronted with an armed attack, it is a hyperbolic statement. Frontline officers in the victim country must report to, and receive instructions from, headquarters. The high command is not inclined to embark upon full-scale hostilities, in response to an isolated armed attack, without some deliberation. When there is no military junta in power, the civil government will have to give a green light to the armed forces.[74]

Professor Dinstein also admits that the condition of immediacy ought not be construed too strictly. He mentions that the "[l]apse of time is almost

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[72] *See* Kim, *supra* note 58, at 6.
[73] DINSTEIN, *supra* note 5, at 243.
[74] *Id.*

unavoidable when a tedious process of information gathering or diplomatic negotiations evolves."[75]

In short, a military response as an exercise of self-defense under Article 51 is different from an on-the-spot reaction of ground troops; specifically, the State needs time to assess the situation and move through the decision-making process. Requiring immediacy in the exercise of self-defense by a State could result in the State feeling pressure to act quickly, but without the necessary information.

There is no need to add another requirement—namely immediacy—to the exercise of the right of self-defense to suppress the use of force in the international community. Surely, there is no doubt that the use of force as an exercise of the right of self-defense should be the last resort, and the principle of the ban on aggression reflected in Article 2(4) of the UN Charter should be fully respected. However, suppression of the use of force can be achieved through the lens of the necessity criterion with this question: "is the military response really necessary?" Additionally, the term of immediacy could lead to the misconception that the right of self-defense must be exercised immediately after the armed attack, which is unrealistic considering the decision-making process of a State.

IV. The Right of Self-Defense in the Cheonan Incident

Based on the previous discussion, this part reviews the possibility of exercising the right of self-defense in the *Cheonan* incident. As mentioned above, the legitimate exercise of the right of self-defense requires an armed attack, necessity, and proportionality. Additionally, as this article argues, immediacy should be a factor in assessing the necessity criterion.

A. Armed Attack

Even though there is no specific definition of an armed attack in the UN Charter, it is clear that an attack on a State's warship constitutes an armed attack under Article 51 of the UN Charter, particularly in light of

[75] *Id.* at 210.

the ICJ judgment in the *Oil Platforms Case* in 2003.[76] Also, according to the *Definition of Aggression* in General Assembly Resolution 3314 (XXIX), "[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State" is an act of aggression.[77] Therefore, in the case of the *Cheonan* incident, North Korea's torpedo attack on the *Cheonan* warship clearly constituted an armed attack as a prerequisite for the exercise of the right of self-defense. Additionally, the ICJ pronounced that the State justifying a military response as an exercise of self-defense should bear the burden of proof of the armed attack.[78] In light of this principle, the ROK government proved the existence of an armed attack from North Korea after fifty-five days of thorough investigation. In short, North Korea engaged in an armed attack, and the ROK government proved it.

B. Immediacy

As previously discussed, immediacy is not a separate requirement to the exercise of the right of self-defense. Yet, even in the case that when immediacy might be recognized as another requirement, there must be some exceptions. Professor Dinstein, who is in support of the immediacy requirement, acknowledges two exceptions to the immediacy requirement.[79] Notably, he introduces the concept of "a justifiable delay." He argues that "even when the interval between an armed attack and a recourse to war of self-defense is longer than usual, the war may still be legitimate if the delay is warranted by circumstances."[80] In the case of the *Cheonan* incident, the burden of proof rests with the ROK

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[76] In the *Oil Platform Case* in 2003, ICJ also declared that "the mining of a single military vessel might be sufficient to bring into play the inherent right of self-defense." Oil Platforms (Iran v. U.S.), Judgment (Nov. 6, 2003), *available at* http://www.icj-cij.org/docket/files/90/9715.pdf.

[77] Definition of Aggression, *supra* note 29.

[78] *See supra* Oil Platforms (Iran v. U.S.), Judgment 8, *available at* http://www.icj-cij.org/docket/files/90/9715.pdf.

[79] First, he acknowledges that a State under attack needs some time to communicate and decide whether to exercise the right of self-defense. Second, he also agrees that a delayed military response can be justified and legitimate if the delay is warranted by circumstances, further introducing the concept of a justifiable delay. *See* DINSTEIN, *supra* note 5, at 242–43.

[80] *Id.* at 243.

government.[81] Therefore, fifty-five days of investigation into the cause of the incident might be a good example of "a justifiable delay."[82]

C. Necessity

In order to comply with the necessity criterion, states must consider the exhaustion or ineffectiveness of peaceful means of resolution, the nature of coercion applied by the aggressor State, the objectives of each party, and the likelihood of effective community intervention.[83] In other words, the State is obligated to verify that a reasonable resolution of the conflict in a peaceful manner is not available.[84]

Generally, it is true that after an armed attack the necessity of a military response gradually reduces as time goes by. For example, a diplomatic approach or an economic sanction might be available rather than a military response long after an armed attack. For this reason, it is understandable, in light of the necessity requirement, that a victim State loses its right of self-defense when it does not exercise the right after a considerable amount of time—even if an armed attack really occurred and the aggressor could clearly be identified.

However, in the case of the *Cheonan* incident, the aggressor could not clearly be identified at the time of the attack. Moreover, the ROK government had the burden of proof.[85] For these reasons, the ROK Government launched a thorough investigation, trying to find out and prove the cause of the incident as well as the aggressor. The investigation took the ROK government fifty-five days. Here, it is reasonable to conclude that fifty-five days can be considered to be "a justifiable delay" in proving the cause of the incident.[86] During the investigation period, the ROK government could not exercise the right of self-defense, because there were still collecting information about the incident.[87] Therefore, it is appropriate to allow the ROK government the

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[81] *See supra* note 34.
[82] *See* Kim, *supra* note 58, at 6.
[83] LOAC DESKBOOK, *supra* note 11, at 35.
[84] DINSTEIN, *supra* note 5, at 237.
[85] *See supra* note 34.
[86] *See* Kim, *supra* note 58, at 6.
[87] This is clearly different from the situation in which a victim State does not exercise the right of self-defense for a considerable time when the State could exercise the right.

right of self-defense at the time when it finally identified both the cause of incident and the aggressor.

D. Proportionality

Proportionality requires a State to limit the magnitude, scope, and duration of any use of force to that level of force which is reasonably necessary to counter a threat or attack.[88] This rule is used when determining the legitimacy of exercising the right of self-defense. In the *Cheonan* incident, this rule does not matter because the ROK government resorted to a peaceful settlement instead of a military response by referring the incident to the UN Security Council.[89]

To summarize the *Cheonan* incident, the ROK government had the right of self-defense once it identified the cause of the incident and the aggressor. Clearly, there was an armed attack, and the necessity requirement was met. But, the ROK government did not exercise the right of self-defense after considering the various aspects of the geopolitical situations in the Korean Peninsula. However, there is a clear difference between the inability to exercise the right, due to the lack of the right, and abstention from military response in support of the nonviolent solution. The ROK response to the *Cheonan* incident is the latter case.

V. Conclusion

To address the question of whether immediacy is a separate requirement in the exercise of self-defense, one must examine both the background of the right of self-defense in international law and the analysis of the arguments on immediacy as a requirement of the right. Three sub-parts in the law surrounding self-defense play pivotal roles: the history of the right of self-defense, armed attack as a prerequisite, and necessity and proportionality as traditional criteria of the right of self-

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[88] LOAC DESKBOOK, *supra* note 11, at 35.

[89] Instead of the military response, the ROK government decided to resort to the peaceful settlement, referring the incident to the UN Security Council. Ji-hyun Kim, *Seoul Asks U.N. to Discuss Cheonan*, KOREA HERALD, June 4, 2010, http://www.koreahearld.com/national/Detail.jsp?newsMLId=20100604000472.

defense. The customary right of self-defense and Article 51 make clear the scope of the right of self-defense.

The right of self-defense requires an armed attack as a prerequisite. Of vital importance in that assessment is the meaning of armed attack, as introduced by the *Definition of Aggression* in the General Assembly Resolution 3314 (XXIX). After that, it analyzed the traditional criteria of the right of self-defense: necessity and proportionality. The paper especially looked into the significance of necessity in the exercise of the right of self-defense, providing the steppingstone for the conclusion of the paper.

This article emphasizes the analysis of justifiable time to exercise the right of self-defense. Referring to the controversy over the anticipatory right of self-defense, the question becomes: is immediacy a separate and independent requirement in the exercise of the right of self-defense? Some scholars argue that immediacy can be seen as a separate criterion for the right of self-defense. However, three counterarguments rebut this position: the customary international law perspective, the UN Charter perspective, and the time required for a State to move through the decision-making process. Thus, immediacy is not a separate requirement to the exercise of the right of self-defense, and timeliness of a response should only be one of many factors when considering the necessity of exercising the right of self-defense.

In the case of the *Cheonan* incident, the ROK government had the right of self-defense once it identified who had attacked the warship. The attack to the navy warship is clearly an armed attack stipulated in Article 51 of the UN Charter. The burden of proof was on the ROK government to show that an armed attack took place; the ROK spent fifty-five days in proving the cause of the warship sinking was an armed attack. In this case, fifty-five days is considered a justifiable delay in proving the cause of the incident. There is no need to apply the immediacy criterion to the *Cheonan* incident because it is not a separate prerequisite to the exercise of the right of self-defense. Rather, it is enough to review the incident through the lens of the necessity criterion. Ultimately, the ROK government had the legitimate right of self-defense

at the time it identified both the cause of the incident and the aggressor but selected a diplomatic path to resolution.[90]

[90] Perhaps the only remaining issue is how to draw a clear line between a justifiable exercise of the right of self-defense and a significantly delayed military response which would not be justified under the label of self-defense. This is the area where another rule of customary international law should be developed, though it is outside the scope of this paper. It remains to be seen to what extent the law will dominate the realities of the international community, which is influenced mainly by political power.

THE FIRST SGM JOHN A. NICOLAI LEADERSHIP LECTURE*

MAJOR GENERAL (RETIRED) MICHAEL J. NARDOTTI, JR[1]

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* This is an edited transcript of a lecture delivered by Major General (Retired) Mike Nardotti to members of the staff and faculty, and their distinguished guests, on June 26, 2012.

The Sergeant Major (SGM) John A. Nicolai Leadership Lecture is named in honor of Sergeant Major John A. Nicolai, who served as the Sixth Sergeant Major of the JAG Corps, U.S. Army, from April 1, 1992 to August 16, 1994, during the time Major General (Retired) Nardotti was The Judge Advocate General.

Sergeant Major Nicolai entered the U.S. Army in June 1964 and completed basic training at Fort Leonard Wood, Missouri. He completed advanced individual training at Fort Sam Houston, Texas, as a Medical Corpsman. After serving as a Medic at Fort Hood, Texas; Minneapolis, Minnesota; and Fort George G. Meade, Maryland, he separated from the Army in August 1968. He re-entered the Army in November 1970, and again served as a medic at the Armed Forces Examining and Entrance Station in Fargo, North Dakota and the U.S. Army Medical Department Activity–Korea. His request for reclassification as legal specialist was approved in 1974 and he was assigned in that capacity as the Noncommissioned Officer In Charge (NCOIC), Criminal Law Division, U.S. Army Air Defense Center and Fort Bliss, Texas; Clerk of Court, 3d Judicial Circuit, Fort Bliss, Texas, NCOIC Administrative Law Division, 8th Infantry Division, Germany; Chief Legal NCO, 7th Medical Command, Germany; Chief Legal NCO, U.S. Army Garrison, Fort Huachuca, Arizona; Chief Legal NCO, 8th Infantry Division, Germany; and most recently as Chief Legal NCO, I Corps and Fort Lewis, Fort Lewis, Washington.

He was a graduate of the Sergeants Major Academy, Class 32, and completed the Legal Advanced NCO Course and the U.S. Air Force Advanced Legal Course. He earned an Associate of Arts Degree from the University of Maryland and a Bachelor's Degree in Business Administration from the University of Phoenix.

His awards include four Meritorious Service Medals, the Joint Service Commendation Medal, two Army Commendation Medals, and the Army Achievement Medal.

A native of North Dakota, he was married to Kathleen Schaffer of Minnesota, and had three daughters, Christine, Monika, and Catherine.

On April 1, 1992, Sergeant Major Nicolai assumed the position as Sergeant Major, the Judge Advocate General's Corps, and was the sixth sergeant major to hold this position.

[1] Major General Mike Nardotti (U.S. Army, Retired) is currently in private practice with a large international law firm in Washington, DC and represents clients on a broad range of defense, national security and other significant issues at all levels across the Department of Defense and other federal agencies and on matters of special interest to members of Congress. He also serves as Managing Partner of the firm's Washington DC Office. He previously served as Co-Chair of the firm's Litigation Department, as Chair of the Training and Professional Development Committee, as a member of the Practice Management and Compensation Committees.

Major General Nardotti has extensive experience in sensitive internal investigations for corporate clients and in planning and executing corrective action and ethics and business conduct compliance strategies. He has represented senior government officials and corporate clients in executive branch and congressional investigations and hearings.

Thank you. Thank you very much, Sergeant Major, for that very gracious introduction. I would add my welcome to the distinguished guests. Thank you, Lieutenant General Chipman, The Judge Advocate General, for being here. And I would like to say thank you to Major General Altenburg for making the trip down this morning, and the many other distinguished guests. The distinguished SGMs who are here today, thank you for being here.

We would like to thank the Corps leadership and the school leadership, NCO and officer leadership, for approving this concept of a lecture series to honor a great Soldier, one who many of us have known as a great mentor, teacher, coach, and leader. Thanks also for the school's customary warm hospitality; not only on behalf of myself and my wife Susan, but on behalf of Mrs. Kathleen Nicolai and her daughters: Christine, Monika, and Catherine and SGM Nicolai's sister, Eileen Wilson who also is here. And, finally, thank you too on behalf of my colleagues, Colonels Tim Naccarato, Joe Ross, and Ray Rupert, who

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He also has assisted clients extensively in developing sound approaches for identifying and pursuing business opportunities in the defense and national security arena.

A decorated combat veteran, Major General Nardotti served for more than twenty-eight years on active duty as a Soldier and lawyer. He was The Judge Advocate General from 1993 to 1997, advising military and civilian leaders on sensitive, complex, and high-profile legal and policy issues of importance to the Department of Defense, Congress, and the media.

In that position, Major General Nardotti also served as the leader and senior partner in one of the world's largest law firms, the Army Judge Advocate General's Corps. His team of 4000 full- and part-time military and civilian attorneys and 5000 full- and part-time military and civilian support staff provided comprehensive legal support and services to a worldwide community of more than one million Active, Guard, and Reserve commanders and Soldiers and over one million family members.

Major General Nardotti's military awards and decorations include the Distinguished Service Medal, the Silver Star, the Bronze Star, and the Purple Heart. In 2006, Major General Nardotti was inducted into the U.S. Army Ranger Hall of Fame, a high honor accorded those specially selected from the nominees of Ranger units and associations representing each era of Ranger history.

Within the community, Major General Nardotti serves on the Board of Directors of several charitable and public service organizations, including the United Service Organizations (USO) of Metropolitan Washington, the Vietnam Veterans Memorial Fund, and the Washington Lawyers Committee for Civil Rights and Urban Affairs. He also serves on the Board of Governors of the John Carroll Society the Diocesan Finance Council of the Archdiocese for the Military Services, and the Dean's Planning Council for Fordham University School of Law. Lastly, Major General Nardotti has served as a commentator and analyst on military legal issues on national television and radio and in the print media.

were instrumental in moving this effort forward in recognition of Sergeant Major (SGM) Nicolai.

Before I start into my remarks about leadership, I need to make one comment. We, collectively, assure you that we understand the inherent challenge and difficulty in singling out one person for a special honor, and all of us are very confident that SGM Nicolai would have had some hard words for us about doing this, about singling him out. But as we talk more about him, it will become clear why this recognition is well deserved.

I would like to follow two paths today. First, I would like to talk about NCO leadership generally, and then walk through SGM Nicolai's career before and after he became a member of the Judge Advocate General (JAG) Corps, focusing ultimately on what it is that we believe merits the special recognition today, his accomplishments as the SGM of the JAG Corps.

When an officer comes up to speak to an audience of senior noncommissioned officers (NCOs) about NCO leadership, you might well say and ask "With respect, [laughter] you are an officer and you have never been a NCO. You can read volumes about being a noncommissioned officer and you can hear a thousand stories about NCOs, but do you really know, and do you really appreciate, what NCO leadership is and what it takes?" I believe I can, and others because of what we learned in our formative years. To explain it better, let me take you back to the beginning for me and many of my contemporaries. West Point was my beginning. That was my source of commission. My colleagues may have had a different source, but our experiences with NCOs were common experiences.

I was commissioned a second lieutenant in the Infantry in 1969, but I actually entered the Army in 1965, when I was admitted to West Point. West Point is an educational institution of great distinction, but it is not a college; it is the Army. It is a very specialized entity of the Army, but it is the Army, and it is different and has a different mission than other entities in the Army. It takes respectable academic credentials to get in and some demonstrated ability to excel in leadership. For those of us who went in 1965 at eighteen years of age, however, in terms of maturity and judgment, understanding the Army, understanding Soldiers, understanding what it means to be a Soldier, and what it takes to be a

Soldier, we were not really much different from any other eighteen-year-olds who enlisted at that time.

Clearly, at West Point there were many senior officer examples of great leadership and there were great cadet leaders. But between cadets, there was only about a four-year difference between the new cadets coming in and those who were getting ready to be new lieutenants. The more senior cadets, in most cases, had not been out in the Army. They had not served in the Army, so there were going to be limits on what they could teach us.

From the very beginning, the business of learning the profession and what we needed to know as Soldiers was almost entirely in the hands of noncommissioned officers. The first summer we dealt with the normal pressures of being in the garrison environment, and some of the other graduates of the institution can explain that to you what Beast Barracks really entailed. When we went to the field and learned Soldier skills, however, NCOs taught us those lessons.

We were blessed at the time, in 1965, to have NCOs from the 101st Airborne to teach and mentor us. That was before the entire division deployed to Vietnam in 1968. The second summer at Camp Buckner, we had to go through a more refined level of training--small unit leadership and patrolling. Again, we had great NCOs that year out of the 82nd Airborne Division.

We continued to learn those Soldier skills in our third year. We went out on what was called "Army Orientation Training" and I joined the 172d Mechanized Infantry Brigade in Alaska as a "third" lieutenant (that is, something below a real second lieutenant). We had a great company commander and great officer examples, but we were left in the hands of noncommissioned officers to do the day-to-day mission that we had to do. So through the Military Academy, that essential education as leaders, officer leaders, was really taught by NCOs. It did not end there. Upon graduation, we went to Airborne school. One of my favorite recollections is the first day in the platoon. The platoon sergeant said to a group of lieutenants, "You lieutenants listen up. I run this platoon; everybody else runs around in it." [Laughter.] How true of NCOs! Of course, those NCOs taught us after only two-and-a-half weeks how to jump out of a perfectly good airplane and not break every bone in your body. A formidable training task!

Then on to Ranger school. Yes, there were some great officer instructors in Ranger school, but the majority of the instructors were noncommissioned officers, Vietnam veterans, who taught me the most important lessons that I would learn before going to Vietnam. They are lessons that I remember today, as clear as if they happened yesterday.

After completing Ranger school, I went off to my first unit, the 5th Mechanized Infantry Division at Fort Carson, Colorado, before going to Vietnam. Once again, there was unbelievable NCO support. I was a scout platoon leader for headquarters company. After about three months there was a flurry of new assignment orders. The company commander came down on orders for Vietnam. The next logical person to take command of the company, the XO, also came down on orders for Vietnam. The company commander called me in and said, "Congratulations, you are going to take command of this company." Then he said, "Before you get too big a head, you just remember that the only reason you're getting this job is we have enough good NCOs in this company to keep you out of trouble" (laughter). That was most convincingly demonstrated in the First Sergeant (1SG), 1SG Ellory, who had twenty-six years in the Army, was a veteran of WWII, Korea, and Vietnam. I was twenty-three and a second lieutenant.

Then to Vietnam. I was the only infantry officer in B Troop, 1st Squadron, 9th Cavalry Regiment, 1st Cavalry Division. The old man in our platoon was SFC Eddie Smith. He was all of twenty-eight years old. The next oldest was me, the third was an E5, Sergeant Monty Cates, who was nineteen or twenty, and the rest of the platoon were seventeen to nineteen-year-old. They ultimately saved my life. That is the most important endnote for me to that Silver Star mentioned in the biography—how it all turned out. You have all been to promotion ceremonies or retirements where the honoree would say, "I wouldn't be here today without the help of a whole lot of people." Well, I tell you, I would not be there today—literally—I would not be here today if it were not for the NCOs and young Soldiers in that platoon.

So do I know and appreciate NCO leadership? That was in the first five years of my Army life, starting at West Point. I saw a lot of great NCO leadership. As in any experience, the formative years are probably the most important because they set the foundation for how you will view things later. A great deal of my appreciation and understanding of SGM Nicolai's leadership and importance to the Corps is based on what I'd learned throughout my career, but particularly in the beginning.

One word about NCO leadership in the JAG Corps and its importance—because this is something that SGM Nicolai firmly understood. In the non-JAG Army there is more time to teach young officers how to be leaders, Young officers start as second lieutenants and they can bumble around and make mistakes; second lieutenants are expected to make mistakes. Then they become first lieutenants, and they make fewer mistakes. By the time they get to be a captain, they should know things. They are expected to know things. In the JAG Corps, there is much less time. Our new young officers, when they go to a unit, will be first lieutenants for about three months and then they will be promoted to captain; they are expected to know things but they do not.

Now, please understand, to be selected for the JAG Corps today is extremely competitive. The Corps is getting people who are really smart, very smart. They have the intellect. They are enthusiastic. They are motivated. They have an ethic of service that is truly unique within their generation. They are doing things that many of their contemporaries could not and would do. The Corps is starting with a solid base in many respects, but do these young offices know soldiering? Absolutely not.

When I was in Lieutenant General Chipman's position, I tried to speak at just about every basic course graduation. The most important message I conveyed to the young officers was "know what you do not know." You do not know soldiering, and you need to learn it, and you need to learn it quickly. Lean on your NCOs. If you are not too proud to ask for help from your NCOs, they will take great care of you; they will keep you out of trouble. If you are too proud and too arrogant to ask for help, they will just stand back and let you walk off the cliff. So take advantage of the talent that is out there.

Now, let us get to SGM Major Nicolai. You heard in the biography that he had a life in the Army before coming to the JAG Corps; He entered the Army from Milnor, North Dakota, where it is cold. He had Basic Training at Fort Leonard Wood, Missouri, and AIT at Fort Sam Houston, Texas, to be a medical corpsman; and then he went to Fort Hood–way before it was a great place. [Laughter.] Whether a great place or not, it is a very hot place. So Sergeant Major Nicolai had experience at both ends of the climate spectrum.

Then he served in Minneapolis, Minnesota, at Fort Meade, Maryland. He left the Army for a time but came back in to the Armed

Forces Examination Entrance Station in Fargo, North Dakota. He also served in Korea, which is important to note. He was there with the medical activity. For anybody who served in Korea, it is a unique experience. There is a kind of brotherhood and sisterhood for people who served there. Korea is a special place. As SGM Nicolai used to call it, the land of "almost right."

Then he asked to be reclassified as a legal specialist. He had several assignments as a Noncommissioned Officer in Charge (NCOIC) of Criminal Law at Fort Bliss, Texas, NCOIC of Administrative Law at the 8th Infantry Division in Germany, and then Chief Legal NCO. He had about four opportunities to be a Chief Legal NCO at the 7th MEDCOM in Europe, Fort Huachuca, Arizona, the 8th Infantry Division, and then at I Corps and Fort Lewis in Washington state.

This is important background, and I will talk a bit more about it. But understand that by the time he had been a Chief Legal NCO the fourth time, he had moved up in the organization and had shown us a basic road map of what an NCO needed to do. Beyond that roadmap, what do the people say who served with him at that time? Why was he such an outstanding leader and mentor? He was a model of the person who would go the extra mile. He would spend extra hours with troops. Not just the ones who needed help, but also the ones who could use it, but perhaps did not know it.

He made good NCOs better. Some of them became great warrant officers. He made officers better, particularly the young officers. And as one of my colleagues said, he took these new, young judge advocates and made them proud Army officers. There is an art to that. He was a caring leader. It was obvious in what he did and how he did it. He certainly could be a hard man if he had to be. He is a man of standards, but he had a big heart. When you are an officer and you observe an NCO in your command spending hours working with Soldiers to get them to where they need to be, you know you have a special person who is a part of your team. There were some Soldiers whom he salvaged that would not have had made it but for his help. He made them that much better. As one of my colleagues mentioned; he also was a mentor for senior officers, too. He could mentor you when you did not even know it [laughter] and make you better.

You may say, "Well, okay, all that is great, but can't you say the same thing about a number of other great NCOs that we've served with?"

All of us have great stories about the people we served with personally; what they meant to us in terms of our personal development and upbringing in the Army.

Well, yes, that is true: you can say that about other NCOs, but when you become the SGM of the JAG Corps, the picture changes dramatically. If you are a Chief Legal NCO three, four times, you have the routine down; you should be able to do the job better each time. You are working from the same base point. When you become the SGM, -- SGM of the Corps—however, there is not a script. You can talk to your predecessors and try to figure out what to do and try to look out and see what is going to happen. But when you are at the top of an important organization, the Judge Advocate General's Corps, the top of the corps leadership, in a large and complex Army that is constantly changing, you must think beyond that near term. This is not just a survival game, although it is possible to get into the position, of course, and simply tread water. But the people of vision and purpose like SGM Nicolai see the opportunity and they seize upon it and to move the organization forward.

One of Sergeant Major Nicolai's most important contributions, in my estimation, is what he did with respect to NCO training. Right now, you look around here at the JAG school and you are welcomed as part of the team. The focus here is on the entire team, not just on officers. Clearly, the principal focus has to be on the lawyers that we are training. If we cannot perform the legal mission and provide the best legal advice and counsel, we might as well not be part of the Army. So we have got to get good judge advocates in the first place and train them and make sure they can do the job. But we understand and we know full well that officers cannot do it alone. Not in today's Army; not in any Army without the help of NCOs guiding them along the way and performing an essential piece of the mission as they meet the daily needs of the Army. SGM Nicolai recognized that if we are going to do the mission in an effective way, the officer training and the NCO training has to be synchronized.

In the early '90s and even earlier, with no disrespect to NCOs—the focus here at the school was on officers. The concern was not about NCOs; NCOs take care of NCO stuff; they take care of NCO business. They will train the enlisted force. But when your officer training is done here in Charlottesville, and your NCO training at Fort Benjamin Harrison, Indiana, and later at Fort Jackson, South Carolina and there is never a crossover between the people who are developing training for both officers and NCOs and there are going to be disconnects. It is going

to be harder in the field to get things moving in the same direction than they should otherwise be. Sergeant Major Nicolai recognized that shortcoming and understood that we had to synchronize the training. One of the most important recommendations he made to me was to move the course developers for NCO training here to the school and that was a very sensitive issue at the time.

As you may know, the school is accredited by American Bar Association. There was great concern at the time that if we were not careful in the way that we added on to the training curriculum with the population of non-lawyers versus lawyers, there could be an adverse impact on accreditation. It also could bring the supervision and control of the U.S. Army Training and Doctrine Command (TRADOC) and that was of concern too because it could affect the accreditation. There were legitimate reasons to be concerned, but there were no legitimate reasons not for going forward. It would have to be done carefully. With that initial step of getting the developers here, SGM Nicolai was thinking three moves ahead. Get the developers here. Get the people here who are developing NCO training and who can walk down the hall to the people developing doctrine for the JAG Corps for officers and make sure they are in sync.

Now, there has been a great deal of outstanding work to follow in bringing everything to this point where you have all of our NCO training and education activity here at the school. But it started with SGM Nicolai having the guts to say "We need to do this."

You must understand something about SGM Nicolai: he and I had no prior relationship before I became TJAG. We had never served together. He was Major General Fugh's SGM and one might think that there would be some hesitation on his part to counsel me as a result; I assure you there was none. What I needed to hear, SGM Nicolai, very respectfully but firmly, told me. He got us moving in the right direction with NCO training.

The second point to stress is that while the leadership of the Corps certainly had appreciated what NCOs brought to the overall mission effort, institutionally, we were not saying so. Now, many of my colleagues here, certainly Major General Altenburg and Colonels Naccarato, Ross, and Rupert, are examples of senior officers who fully understood the contributions of NCOs. But that is not the same as when the Corps' senior leadership talks about it.

Sergeant Major Nicolai knew that leaders talk about what is important. At the highest level, what the leadership does and says is important. So one of the first things he said is if we are going to say that the NCOs are important and show it by our actions: ”We have to go out and start paying closer attention. Let’s go out and see some NCO training.” So the first trip we made was out to Fort Benjamin Harrison, Indiana, to Advanced Noncommissioned Officer Course (ANCOC) training and we went to a field exercise. We did a river crossing and wound up in chest-high water, but it was important to do that. I know it was appreciated, not just by the people who were undergoing that training, but other NCOs in the Corps who were paying close attention to what was going on at the Corps leadership level.

The next question Sergeant Major Nicolai asked concerned my first overseas Article VI visit: “Where are we going to go?” He then observed that “Everybody goes to Korea and Alaska in the summer; nobody goes in the winter. There is an Article VI visit for mid-January to early February. Let’s go in the winter; the troops will love it.” So there we were. We showed up in Korea in late January and in Alaska in early February, and it was cold, but the troops loved it and it sent an important message. In this business, the leadership business, you have to pay attention to the entire team. On every Article VI visit I made, SGM Nicolai ensured that I or one of the other general officers had the opportunity to speak to the noncommissioned officers alone, without the officer leadership.

Sergeant Major Nicolai also was attentive to the Guard and Reserve piece as well. We took part in Reserve on-site training in many cities. Traditionally, the Corps leadership had been more focused on officers. But again, at SGM Nicolai’s urging, we pushed and said that at every one of those on-site training events we would expect to see NCO and junior enlisted training. The senior officer, TJAG, or other general officer who attended would visit that training. There was a clear message in that approach. The message was not just to the NCOs, but to the officers as well. This training – and NCOs and enlisted Soldiers - are important. It was not simply a gratuitous opportunity to say “you’re doing a good job”; it was what we needed to do it.

Remember what was happening in the Army—for those of you who are old enough to recall—after *Desert Storm*, operations changed dramatically and we began to deploy in smaller numbers to many places. Frequently, we would send out a judge advocate with an NCO or another

enlisted Soldier. Smaller groups were deploying. We did not have the luxury of having a large SJA office in close proximity for support. We would work in small groups, and that made officers that much more dependent on the NCOs and enlisted Soldiers, who were deploying with them. We had to make this transition. We had to do better training. We had to make a better collective effort to focus on how we were going to accomplish the mission in that new environment. We initiated that focus and it has carried over. That focus recognized that the soldiering piece of our business is much more essential.

The last of Sergeant Major Nicolai's initiatives I will highlight concerns a symbol. In the early '90s, before the proliferation of coins throughout the Army, the Corps had a coin, but it was really the school coin. It was the school's idea. It was a great idea. The coin has a school on it, the Judge Advocate General's Corps; nothing to indicate inclusion of the noncommissioned officers. SGM Nicolai said, "We have to do better. We have to have something that represents everyone." There was an interesting debate at the headquarters about this idea. There was a very distinguished and experienced colonel who said, "Wait a minute. Doesn't the statute that defines the Judge Advocate General's Corps speak of officers?" SGM Nicolai responded, "I may not be a lawyer, but I understand the English language. If you read all the subparagraphs, it lists the Judge Advocate General, the Deputy Judge Advocate General, , three brigadier generals, commissioned officers appointed from the regular army, and other members of the army assigned by the Secretary. The last subparagraph is a pretty broad category. And if it is any question about noncommissioned officers and enlisted Soldiers being assigned by the Secretary, just go to all the regulations that deal with assignments and promotion."

So we said, yes, we need to make that change. We came up with a coin that was more representative of the entire corps with the inscription "Serving the Army since 1775", with the Army crest on it with the JAG Corps crest in the middle of the Army eagle. I still have that first coin. I presented this to SGM Nicolai because it was his idea. He presented it back to me when he retired. And as I mentioned to Brigadier General Ayres earlier, I would be honored to present this to Brigadier General Ayres, and to the Command Sergeant Major, as a memento for the school to remember SGM Nicolai.

I would like to say something about the family, but first allow me a final observation about the initiatives of SGM Nicolai. When I became

TJAG, the Vice Chief of Staff of the Army, General Binnie Peay, called me in and said, "When you get to this level of leadership, you need to be thinking years ahead. You have a four-year tenure, but you cannot be thinking in terms of four years; you need to think about how you are going to make your organization better in the years beyond. And you may start things in process that you are not going to see to completion; somebody else is going to have to pick up the baton. So that means when you have to have a good idea, you have to make believers of the people that are coming behind you to carry it out. And you have to have great faith. You have to train those people well to be able to continue that mission."

The initiatives that SGM Nicolai began, certainly with respect to the training in the school, he knew were not going to be completed in his lifetime in the Army. He had to have great confidence in many people who would follow; people he did not necessarily train, but in whom he had great confidence to carry that mission forward to completion. Those who followed have done that. So today you can see the start point and the end point at which you can declare success. But at the beginning when you are leading the organization in a new and positive direction, you have to have the confidence that those you have coached, mentored and trained will follow through.

As Sergeant Major Nicolai said many times, "You like to think of yourself as doing a good job, but if the next generation does not do it better, you have not truly done your job. You are training the next generation, not to do what you did, not to do it like you did it, but to do it better. That is why our Army and our JAG Corps, is as good as it is.

Lastly, the family. Sergeant Major Nicolai's family remained at Fort Lewis when he came east. No matter how closely you look at that situation at the beginning, no matter how doable it looks, it is hard. It is very hard. Kathleen had, at the time, three little girls who were, between five and ten when dad was a continent away—on the other side of the United States.

I will tell you, the only time I ever saw SGM Nicolai down was when we were on an Article VI visit someplace in the middle of nowhere. It was not like today with the Internet; we were someplace where you could not call, could not communicate. After the normal day of being put through the mill—the Sergeant Major and I normally sat down and tried to put our feet up and relax. But on this day, he was as

close to being emotional as I had ever seen him, almost with a tear in his eye. I said, "SGM what's wrong?" And he said, "Sometimes this is really hard." He said, "Today's my daughter's birthday and I'm not there."

So for those who make great contributions, there is sacrifice. But I hope that in talking about your dad and your husband today, you understand just how important he was to a lot of us and to this organization the JAG Corps. He was a great leader. He was a great man. He had a great sense of humor. The JAG Corps is truly fortunate to have had him, and it was a distinct honor to serve with him.

Thank you very much.

MCCLELLAN'S OTHER STORY[1]

REVIEWED BY COMMANDER MICHAEL CAVALLARO*

The United States has not suffered for lack of charismatic, flamboyant, or controversial military officers. Some of the best known military officers include World War II Generals Douglas MacArthur and George S. Patton, but many other famous names come to mind: General William T. Sherman, General George Custer, and Marine General Smedley Butler, to name just a few.[2]

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[1] WILLIAM B. STYPLE, MCCLELLAN'S OTHER STORY: THE POLITICAL INTRIGUE OF COLONEL THOMAS M. KEY, CONFIDENTIAL AIDE TO GENERAL GEORGE B. MCCLELLAN (2012). The title is an allusion to McClellan's memoir, *McClellan's Other Story*.

[2] Sherman suffered a nervous breakdown early in the Civil War. His decision in 1864 to "March to the Sea" after capturing Atlanta began the era of 'total war" and earned him the opprobrium of generations of Southerners, which was ironic because he had a poor opinion of African-Americans and refused to have them in his army. After the Civil War, he favored a harsh policy against the Western tribes, at one point writing General Ulysses S. Grant, '[w]e must act with vindictive earnestness against the Sioux, even to their extermination, men, women and children." MICHAEL FELLMAN, CITIZEN SHERMAN 264 (1995).

After graduating last in his class (1861) at the U.S. Military Academy, Custer was promoted from Captain to General in 1863 at the age of 23. Earning a reputation for reckless courage during the Civil War, Custer became a controversial figure during the Indian Wars. He was court-martialed and suspended from duty for a year in 1867 for abandoning his troops to visit his wife, and his 1876 testimony detailing War Department corruption before a congressional committee was highly embarrassing to the Grant administration. His last decision—to split his forces and attack the huge Indian encampment at the Little Bighorn—has been the subject of debate ever since, and has earned him a dubious immortality.

After retiring from a career where he saw action in the Philippines, China (Boxer Rebellion), Central America (The Banana Wars), Mexico, and Haiti, Butler famously said, "I spent 33 years and four months in active military service and during that period I spent most of my time as a high class muscle man for Big Business, for Wall Street and the bankers. In short, I was a racketeer, a gangster for capitalism. I helped make Mexico and especially Tampico safe for American oil interests in 1914. I helped make Haiti and Cuba a decent place for the National City Bank boys to collect revenues in. I helped in the raping of half a dozen Central American republics for the benefit of Wall Street. I helped purify Nicaragua for the International Banking House of Brown Brothers in 1902—1912. I brought light to the Dominican Republic for the American sugar interests in 1916. I helped make Honduras right for the American fruit companies in 1903. In China in 1927 I helped see to it that Standard Oil went on its way unmolested. Looking

Perhaps not as well known, but just as fascinating, is General George B. McClellan, commander of the Army of the Potomac from 1861 to 1862 and later, the 1864 Democratic candidate for President of the United States. Simply put, history has not been kind to General McClellan. While most historians give him credit for organizing and training the Army of the Potomac, they have sharply criticized him for his lack of aggressiveness in the field and his antagonistic relationship with President Abraham Lincoln and Secretary of War Edwin Stanton. Stephen Sears, his foremost biographer, wrote that "[n]o one came close to matching him as a center of controversy."[3]

In *McClellan's Other Story: The Political Intrigue of Colonel Thomas M. Key, Confidential Aide to General George B. McClellan*, William Styple[4] offers a new explanation for some of McClellan's most controversial actions during his tenure in command. Styple wrote that he became interested in Colonel Thomas Key "and his peculiar role on McClellan's staff" after he discovered an unpublished letter by General Philip Kearny,[5] in which General Kearny accused Key of treasonable activity.[6] Styple "became convinced that [Kearny's] suspicions were correct," prompting him to "investigate the life and military career of McClellan's so called 'Confidential Aide.'"[7] Styple concluded that Key "effectively influenced and manipulated one of the most powerful men in the Nation," costing McClellan "his military and political career."[8]

It must be stated from the outset that when he was appointed to command the Army of the Potomac in July 1861, the possibility that General McClellan would fail seemed remote. The son of a prominent

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back on it, I might have given Al Capone a few hints. The best he could do was to operate his racket in three districts. I operated on three continents." SAUL LANDAU, THE GUERRILLA WARS OF CENTRAL AMERICA: NICARAGUA, EL SALVADOR AND GUATEMALA 6 (1993).

[3] THE CIVIL WAR PAPERS OF GEORGE B. MCCLELLAN: SELECTED CORRESPONDENCE 1860–1865, at ix–x (Stephen Sears ed., 1989).

[4] Mr. Styple is a graduate of Catawba College. He has published a number of books about the Civil War and is currently working on a biography of General Philip Kearney. He has discussed *MCCLELLAN'S OTHER STORY* on C-Span American History TV, at http://www.c-span.org/History/Events/The-Civil-War-Gen-McClellan-amp-Col-Key/10737436865/.

[5] Kearny commanded a division in III Corps, Army of the Potomac. He was killed at the battle of Chantilly on September 1, 1862.

[6] STYPLE, *supra* note 1, at 17.

[7] *Id.*

[8] *Id.* at 16–17.

Philadelphia surgeon, McClellan had been admitted to West Point at age 15, graduating second in his class. Twice brevetted for gallantry during the Mexican War, McClellan went on to translate French training and tactical manuals, invent the eponymously named McClellan cavalry saddle, and lead exploratory expeditions in the West. In 1854, then-Secretary of War, Jefferson Davis selected McClellan for a plum assignment to observe the Crimean War. After resigning from the Army in 1857, McClellan was appointed Chief Engineer for the Illinois Central Railroad. A few years later, he became Vice-President of the Ohio and Mississippi Railroad. During his time at the Ohio and Mississippi Railroad, he met Abraham Lincoln, who was the railroad's attorney. After the Civil War began, McClellan was appointed a major general of volunteers. He won several small engagements in western Virginia (later West Virginia) before Lincoln summoned him east to organize and command Union forces that had been routed at the Battle of Bull Run.

A conservative Democrat, McClellan had a low opinion of Lincoln, his Administration, Congressional Republicans and abolitionists – indeed, pretty much everyone who saw the conflict as something other than a war limited to the restoration of the Union and the *status quo ante*. Democrats like McClellan rallied around the President at the war's outbreak, when the Administration's goal was simply and solely the restoration of the Union. However, by the time the conflict was only a little more than a year old, Lincoln had to disavow several of his commanders for proclaiming emancipation in their theatres, while fending off the Republicans in Congress who wanted to see the Administration take immediate steps to abolish slavery.[9] Lincoln had to proceed cautiously, notwithstanding his own feelings about slavery, to keep his coalition together, especially since prominent Democrats began to see McClellan as their standard-bearer. For his part, McClellan viewed any attempt to link restoration of the Union and the abolition of slavery as a grave mistake. In July 1862, days after his army had retreated from its position a few miles from Richmond, McClellan felt compelled to hand Lincoln his famous "Harrison's Landing Letter" which outlined his conservative views on war policy.

Historians have considered the letter a remarkable document for several reasons, one of which is that it is a field commander advising

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[9] BRUCE CATTON, MR. LINCOLN'S ARMY 156—157 (1954); *see also* DAVID VON DREHLE, RISE TO GREATNESS: ABRAHAM LINCOLN AND AMERICA'S MOST PERILOUS YEAR (2012).

civil authorities on matters outside his purview, as McClellan himself acknowledged in the opening paragraph. McClellan instructed Lincoln:

> [This rebellion] should not be a war looking to the subjugation of the people of any State in any event. It should not be at all a war upon population, but against armed forces and political organizations. Neither confiscation of property, political executions of persons, territorial organizations of States, or forcible abolition of slavery should be contemplated for a moment . . . . Military power should not be allowed to interfere with the relations of servitude, either by supporting or impairing the authority of the master, except for repressing disorder, as in other cases.[10]

McClellan concluded with a warning: "Unless the principles governing the future conduct of our struggle shall be made known and approved, the effort to obtain requisite forces will be almost hopeless. A declaration of radical views, especially upon slavery, will rapidly disintegrate our present Armies."[11]

That was not all. Before and after the battle of Antietam, rumors abounded that the Army of the Potomac would march on Washington to force the Administration to come to terms with the Confederacy. Sears wrote:

> In these days a sense of crisis was growing across the North as rumor multiplied the Confederate menace . . . . Some believed the crisis went deeper than simply the fear of another Southern military success. He [New York diarist George Templeton Strong] had heard the most "alarming kind of talk" from General McClellan's conservative Democratic supporters predicting that he and his lieutenants would strike a bargain with their opposite numbers in the Rebel army to enforce a compromise peace on the administration. Stories of military conspiracy were also current in Washington. Henry Wilson, chairman of the Senate Committee on Military Affairs told Gideon Welles that he had learned

[10] STYPLE, *supra* note 1, at 165.
[11] *Id.* at 166.

> from a member of McClellan's staff that officers of the Army of the Potomac were plotting revolution "and the establishment of a provisional government."[12]

While most historians have concluded that McClellan never intended to overthrow the Government, they have pointed to those rumors, in addition to his dilatory movements after Antietam, as factors that led to his relief.[13] By late 1862, Lincoln could no longer (and, after the mid-term elections, had no need to) tolerate a general whose views on how the war should be conducted differed so sharply from his own.

"'McClellan is to me,' Ulysses S. Grant remarked in the 1870s, 'one of the great mysteries of the war.'"[14] Trying to explain him, Bruce Catton wrote:

> He was trusted to the point of death by one hundred thousand fighting men, but he himself always had his lurking doubts. The soldiers firmly believed that where he was everything was bound to be all right. They would gladly awaken from the deepest sleep of exhaustion because they felt that way. After Malvern Hill an entire division, underfed for days, deserted the sputtering campfires where in a gloomy rain it was cooking the first hot meal of the week, in order to splash through the mud and hurrah as he galloped down the road, and felt satisfied even though all the fires went out and breakfast was sadly delayed. But it seems McClellan was never quite convinced. It was almost as if some invisible rider constantly followed him, in the brightly uniformed staff that rode with him, and came up

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[12] STEPHEN SEARS, GEORGE B. MCCLELLAN: THE YOUNG NAPOLEON 271 (1988).

[13] *E.g.*, *id*. at 272 ("It cannot be imagined that George McClellan would have lent himself to an attempted military coup. However little loyalty he felt for the Lincoln administration, there was never a doubt of his loyalty to the Union."). *See also* EDWARD H. BONEKEMPER, III, MCCLELLAN AND FAILURE: A STUDY OF CIVIL WAR FEAR, INCOMPETENCE, AND WORSE 170 (2007) ("In the seven post-Antietam weeks, beginning with the day after the Sharpsburg bloodbath, McClellan passed up the opportunity to attack Lee's decimated forces and move the North toward victory. He appears to have been motivated by a lack of desire for any fighting at all, a continuing fear of failure aggravated by his usual misreading of enemy strength, and an anathema for Lincoln and his emancipation policies.").

[14] ETHAN S. RAFUSE, MCCLELLAN'S WAR: THE FAILURE OF MODERATION IN THE STRUGGLE FOR THE UNION 384 (2005).

> abreast every now and then to whisper: "But General, are you *sure*?" Every man tries to live up to his own picture of himself. McClellan's picture was glorious, but one gathers that he was never quite confident that he could make it come to life.[15]

Sears has gone further, writing about, *inter alia*, McClellan's paralyzing caution, egocentricity, paranoia, faulty strategy (while serving briefly as General-in-Chief of Union forces), poor tactics, capacity for intrigue, and want of moral courage in several books.[16] Do one or more of those reasons account for McClellan's decision to write the Harrison's Landing Letter or other decisions or statements that put him increasingly at odds with the Administration? Or might there be another reason to explain "one of the great mysteries of the war?"[17]

Styple's answer to that last question is Colonel Thomas Key, who until now has received only passing mention by historians. Styple's well-researched book argues that Key operated as McClellan's chief advisor in matters related to civil-military affairs and policy. While acknowledging that Key may have meant well, Styple concludes that McClellan's weaknesses "allowed him to be easily manipulated by his alter-ego–Thomas M. Key–the man who carried the confidence, self-righteousness, and personal conviction that McClellan lacked. It was a fatal attraction."[18] Overall, *McClellan's Other Story* is a nice piece of detective work that puts some of General McClellan's most controversial decisions and actions in a new light, even if the author's conclusion did not completely convince this reviewer.

Colonel Thomas Key was a mysterious and eccentric man. A private person, notwithstanding his pre-war occupations as a lawyer, judge, and State senator, as well as his prominent position on McClellan's staff, he was never photographed. Before he died of tuberculosis just a few years after the Civil War ended, Key requested in his will that all his books and papers be destroyed, a request that unfortunately for history was carried out. McClellan himself wrote very little about Colonel Key in his

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[15] CATTON, *supra* note 9, at 55.
[16] *See, e.g.*, SEARS, *supra* note 12, at 132–33, 139, and 141.
[17] RAFUSE, *supra* note 14.
[18] STYPLE, *supra* note 1, at 305.

posthumously published memoir, *McClellan's Own Story*, despite their close association during the war years.[19] Styple muses:

> Explaining why McClellan ignored Key in his personal writings can only be pure supposition; perhaps it was conceit, or contempt, no one will ever know for sure. However in order to give the benefit of the doubt to McClellan, he certainly was well aware that his closest confidant preferred life in the shadows (this is entirely consistent with Key's character) and in turn, McClellan lovingly cloaked his friend with invisibility.[20]

Undaunted, Styple drew on Official Army Records, private correspondence, diary entries, contemporary newspaper accounts, and post-war recollections from Key's close associates to make the case that "Key effectively influenced and manipulated one of the most powerful men in the Nation."[21]

Key's association with McClellan began before the War, when McClellan moved to Cincinnati after accepting the position of Superintendent of the Ohio and Mississippi Railroad. The Kentucky-born Key also resided there, serving as Judge of the Commercial Court of Cincinnati and after 1852 in the Ohio Senate, where the Democrat was known as "The Great Compromiser."[22] When on April 23, 1861, McClellan accepted the Governor of Ohio's offer to command the state's militia, Key's friend and former law partner William Dickson wrote that he immediately "offered his services as a volunteer aide to McClellan . . . ."[23] The historical record is unclear as to what Key's precise role was: official military service records listed him as Aide-de-Camp, but McClellan wrote that "the duties of Judge Advocate were ably performed by Col. Thomas M. Key, A.D.C." [24]

> The most integral part of the relationship between Thomas Key and George McClellan is that they agreed politically. They were conservative Democrats who supported both the Constitution of the United States and

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[19] GEORGE B. MCCLELLAN, MCCLELLAN'S OWN STORY 123, 134 (1887).
[20] STYPLE, *supra* note 1, at 302.
[21] *Id.* at 17.
[22] *Id.* at 21.
[23] *Id.* at 29 (quotation from the William M. Dickson Papers, Clements Library, University of Michigan).
[24] MCCLELLAN, *supra* note 19, at 134.

> the Indivisible Union, and strongly disapproved of the Southern secession movement. At the same time, they also shared a deep contempt for northern radical abolitionists—including newly elected President Abraham Lincoln and his Republican administration.[25]

While McClellan was certainly a conservative Democrat, Key's political views seem harder to pin down. According to Dickson, "Key became a 'sort-of' Democrat—a strange mixture of States' Rights, patriotism, abolitionism, and a binding love of the South. His dream was to abolish slavery with the consent of the master, and this dream had with him a partial realization."[26] His fellow Ohio Democrat and 1864 Vice-Presidential nominee George H. Pendleton was quoted as saying "Key, you are a Democrat two days of the year—on election days—the rest of the year you are a Black Republican."[27]

Whatever Key's exact views were, he and McClellan were of one mind on the question of how slaves would be treated as they embarked on a campaign in western Virginia. Styple wrote that as McClellan's "Confidential Aide" and legal advisor, "Key's primary duty was to uphold Constitutional laws that protected the rights and property of slave holders. The general and his aide certainly did not want slavery to become an issue in this war of rebellion, and both men wanted to put forth a benevolent attitude toward Southern civilians," an approach both men would continue even as it became more untenable.[28] Of course, it was the modest military success McClellan achieved in this campaign that led to his—and Key's—summons to Washington.

Within days of his arrival, McClellan clashed with General in Chief Winfield Scott. The opening salvo was a letter dated August 8, 1861, in which McClellan warned that the capitol was in "imminent danger" and recommended a number of steps to "render Washington perfectly secure."[29] Scott took offense with what he perceived was McClellan's attempt to undermine him. Styple argues that the existence of "an early draft of the letter—in Key's handwriting" is evidence Key "contributed

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[25] STYPLE, *supra* note 1, at 23.
[26] *Id.* at 22 (quotation from the William M. Dickson Papers, Clements Library, University of Michigan).
[27] *Id.*
[28] *Id.* at 30.
[29] *Id.* at 52.

much to the letter," with the goal of frightening the Administration.[30] He also noted that Key was tasked with hand-delivering the letter to Lincoln, along with a note from McClellan telling Lincoln, "[Y]ou can communicate with him unreservedly & can place the utmost reliance in his intelligence & discretion."[31] Scott responded by submitting his resignation, which Lincoln did not accept. At this point, Styple writes, "Key must now find a more subtle way to remove Scott."[32] A few months later, Lincoln did accept Scott's resignation. While admitting that "due to a lack of hard evidence" it would be hard to determine "exactly how much actual influence Key had" in that development, Styple cites an entry from John Hay's diary for what Hay believes was an "artful manipulation":

> Went over to the General's Headquarters; we found Col. Key there. He was talking also about the grand necessity of an immediate battle to clean out the enemy, at once. He seemed to think we were ruined if we did not fight. The President asked what McC. thot [sic] about it. Key answered, 'The General is troubled in his mind. I think he is much embarrassed by the radical difference between his views and those of General Scott.' Here McC. came in – Key went out.[33]

Despite General Scott's resignation and McClellan's elevation to General-in-Chief, by November 1861 it became clear there would be no winter offensive. With McClellan working on a strategy to win the war, Key "was crafting his own plan to restore the Nation by pen. Thomas Marshall Key—the Great Compromiser of the Ohio Senate—was planning to strike at the root cause of the conflict. Using all his legislative skills, Key would personally create the template to satisfy and reunify the warring sides and bring an end to the Civil War."[34]

Key wrote what became the District of Columbia Compensated Emancipation Act, which abolished slavery in the District and compensated owners up to $300 dollars for freeing their slaves. In keeping with his character, Key took no credit for drafting the

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[30] *Id.* at 51.
[31] *Id.* at 53.
[32] *Id.* at 57.
[33] *Id.* at 70 (John Hay was Lincoln's private secretary. He later served as Secretary of State under Presidents McKinley and Theodore Roosevelt.).
[34] *Id.* at 75.

legislation. Massachusetts Senator Henry Wilson introduced the bill, which was approved by House and Senate and signed by President Lincoln on April 16, 1862, despite misgivings by Republicans who termed the compensation "ransom" as well as from Democrats who were opposed to abolition, compensated or not.[35]

While Key's role in the Compensated Emancipation Act is interesting in and of itself, for Style it constitutes the opening move in a plan Key harbored for bringing the Confederacy back into the Union, a notion Style expands on in subsequent chapters.

In the spring of 1862, prodded by Lincoln, McClellan moved his army by water to the Virginia Peninsula. Planning a rapid march to Richmond, he was confronted by a small number of Confederate troops, who fooled him into thinking they were present in much larger numbers. McClellan spent a month digging trenches and emplacing siege guns, only to have General Joseph Johnston order a retreat before bombardment commenced. Progress up the Peninsula was slow, but by mid-June 1862 his army was only a few miles from Richmond. It was at this point, Style writes, that McClellan and Key sought a "parley with the rebels."[36] McClellan wrote to General Robert E. Lee, who was in command of the Confederate Army after General Johnston had been wounded,, to suggest a meeting between subordinates to discuss the exchange of prisoners:

> [w]hether this manifestation of a peace conference was borne from within General McClellan's heart and mind, or, whether it was suggested by his Confidential Aide, no one will ever know for sure; but this was the moment they had been both working for. The time had come to talk reunification.[37]

General Howell Cobb, a former Treasury Secretary, represented General Lee. Key, of course, represented McClellan. During the meeting, Cobb told Key, "[t]he election of a sectional President, whose views on slavery were known to be objectionable to the whole South, evinced a purpose on the part of the Northern people to deprive the people of the South of an equal enjoyment of political rights," to which Key responded:

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[35] *Id.* at 78.
[36] *Id.* at 115.
[37] *Id.* at 120.

> A return to the Union even upon the ground of unequal forces would not involve degradation. The security of the South would be greater than before. The slavery question has been settled. It is abolished in the District and excluded from the Territories. As an element of dissension slavery cannot again enter into our national politics. The President has never gone beyond this in any expression of his views; he has always recognized the obligation of the constitutional provision as to fugitive slaves, and that slavery within and between the slave States is beyond Congressional intervention.[38]

Stephen Sears wrote about what transpired in *George B. McClellan: The Young Napoleon,* though much more briefly, noting, "[w]hether [McClellan] discussed Key's approach with him beforehand is not clear; in any case, nothing Key said at the parlay, held on June 15, was contrary to McClellan's views."[39] In Styple's view, Key, who called himself McClellan's "political advisor" in a letter written days after the meeting, had acted in accordance with "his own plan to construct a war policy for the Administration."[40] Key apparently believed that abolition of slavery by means of compensated emancipation, which he had orchestrated for the District of Columbia, would help persuade Confederate leaders that their rights were secure, although it only seems to show he had badly misjudged the nature of the conflict.

Around the same time Key was having his meeting, General McClellan telegraphed Lincoln for permission to present his "views as to the present state of military affairs throughout the whole country."[41] Unfortunately for him, General Lee chose to attack a few days later, beginning what became known as the Seven Days' Battles, causing McClellan to abandon his supply depot on the York River. Calling it a "change of base" rather than a retreat, McClellan nevertheless ceded the initiative to Lee, and by July 2, 1862, had withdrawn his army to Harrison's Landing along the James River. Shortly after, President Lincoln decided to visit Harrison's Landing to judge the condition of the

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[38] *Id.* at 130 (from the letter written by Colonel Thomas Key to Secretary of War Edwin Stanton dated June 16, 1862).
[39] SEARS, *supra* note 12, at 203.
[40] STYPLE, *supra* note 1, at 133 (The letter referred to was from Key to Secretary of the Treasury Salmon P. Chase, who was a longtime friend of Key's beginning from their days in Ohio politics.).
[41] *Id.*

army for himself. It was during that visit that McClellan presented Lincoln his "views" in the famous Harrison's Landing Letter.

The Harrison's Landing Letter is arguably one of McClellan's most controversial acts during his tenure in command. Thus, whatever role Colonel Key had in it is of considerable historical interest. Styple argues persuasively that Key was the Letter's primary author.

Styple notes that the original Harrison's Landing Letter, currently part of the Abraham Lincoln Papers at the Library of Congress, is in Key's handwriting, and signed by McClellan.[42] Stephen Sears has written that McClellan "wrote a remarkably large share of his military correspondence himself, and almost everything that relates to matters he regarded as important can be found in his own handwriting."[43] While not dispositive (McClellan could have dictated his thoughts to Key), that fact suggests that he and Key at least collaborated in the composition of the Letter. But Styple goes further, asserting that the Letter reflects two distinct voices, with those sections covering civil and military policy, including the warnings that "[m]ilitary power should not be allowed to interfere with the relations of servitude," and any "declaration of radical views, especially upon slavery, will rapidly disintegrate our present Armies," being in Key's voice.[44] In addition, Styple provides quotes from a number of Key's close associates, the majority of whom believed the views expressed in the Letter were those of Key.[45]

If Key was the primary author, it would seem he modified a belief expressed in his letter to Secretary of War Stanton following his meeting with General Cobb. He wrote, "[I]t may be found necessary in particular States, if not all to destroy the class which has created this rebellion, *by destroying the institution which has created them*."[46] While the

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[42] *Id.* at 162.
[43] THE CIVIL WAR PAPERS OF GEORGE B. MCCLELLAN, at xi (Sears, ed., 1989).
[44] STYPLE, *supra* note 1. at 165–66.
[45] *Id.* at 161.
[46] *Id.* at 130 (emphasis added) (Key expressed the same sentiment in a letter to Treasury Secretary Chase a few days later:

> I feel assured that if we beat the rebels out of Virginia and the population does not submit, but military occupation becomes necessary and it becomes apparent that the removal of our forces would be followed by rebellion, then [McClellan] will regard it to be a measure of military security and necessity to disorganize the

Harrison's Landing Letter acknowledges "slaves . . . seeking military protection, should receive it," and "the right of the Government to appropriate permanently to its own service claims to slave labor . . . and the right of the owner to compensation," it is an expression of views on the subject of slavery that appears to be, at least to this reviewer, much more conservative than the sentiment expressed by Key following his meeting. Perhaps this softer language reflects McClellan's beliefs rather than Key's.

But even if it is true that Key was the primary author of the Harrison's Landing Letter, his effort did McClellan no good. Writing of it, Bruce Catton notes, "[McClellan] suddenly switched from military planning to political planning—with disastrous results. . . . [T]here can be no doubt whatever that the final effect of the letter was to convince Lincoln that McClellan was not the general he could use to win the war."[47]

After his visit to Harrison's Landing, President Lincoln made up his mind to remove the Army of the Potomac from the Peninsula. Another Federal Army, under the command of General John Pope, was operating in Northern Virginia. Lincoln reasoned that units from the Army of the Potomac could be used to reinforce Pope. Disagreeing vehemently with Lincoln's decision, McClellan moved slowly and made only a few units available to Pope, who was decisively defeated at the Second Battle of Bull Run. With misgiving, and over the objection of his entire Cabinet, on September 2, 1862, Lincoln directed McClellan to once again take command of demoralized Union forces to defend Washington.[48]

Stephen Sears has noted that from this time until McClellan was removed from command in November 1862, there was a great deal of uncertainty about whether the Army would march on Washington and demand the Administration begin negotiating a settlement with the

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> condition of society which gives rise to disloyalty and to *abolish the institution which creates the disloyal class*.

Id. (emphasis added)); *see also* RICHARD WHEELER, SWORD OVER RICHMOND: AN EYEWITNESS HISTORY OF MCCLELLAN'S PENINSULA CAMPAIGN 285 (1986) (suggesting that McClellan would not have been happy to have heard or read of this sentiment).

[47] CATTON, *supra* note 9, at 155–56.

[48] SEARS, *supra* note 12, at 13–16.

Confederacy, or that certain Administration officials be removed, or simply overthrow the Government.[49]

Before the battle of Antietam, Key apparently squelched talk among a group of "high officers" to "countermarch the army back to Washington in order to intimidate the Administration and impose policy," according to a then-*New York Tribune* reporter who only told the story years after the war ended.[50] This account has appeared in other books on the subject of Antietam.[51] Styple examines the episode more closely.

Less well known is the Antietam Armistice, which Styple describes at length. Writing to General Lee on behalf of General Kearny's widow, who was requesting some of the General's personal effects, McClellan's letter "created quite a stir at Lee's headquarters; some believed that McClellan's communication obliquely suggested an armistice."[52] Styple's account of the Armistice is quite fascinating, although this reviewer discerned that Key's only involvement in it was to deny, in a conversation with a former Confederate officer after the war ended, that "any communication had passed between Lee and McClellan upon the subject of the truce, for he certainly would have known it if there had."[53]

Regarding the Emancipation Proclamation, which Lincoln issued on September 22, 1862 (only five days after the battle of Antietam), Styple noted that "Lincoln completely disregarded McClellan and Key's warnings stated in their July 7 Harrison's Landing Letter. The question now became: would the Army of the Potomac remain loyal to the government, or disintegrate as the Commanding General predicted?"[54] McClellan met with General Jacob Cox, who later wrote, "The total impression left upon me by the general's conversation was that he agreed with Colonel Key in believing that the war ought to end in the abolition of slavery; but he feared the effects of haste, and thought the steps toward the end should be conservatively careful and not brusquely

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[49] *See, e.g.*, *id.* at 271.
[50] STYPLE, *supra* note 1, at 200.
[51] SEARS, *supra* note 12, at 111.
[52] STYPLE, *supra* note 1, at 236–37.
[53] *Id.* at 239 (from a letter that appeared in the February 14, 1872 *Macon Telegraph & Messenger* by Augustus Octavius Bacon, former adjutant in the 9th Georgia Regiment and future U.S. Senator from Georgia).
[54] *Id.* at 257.

radical."[55] It would seem that by this point Key had convinced McClellan; recall that after his meeting with Cobb he wrote that the institution of slavery might have to be destroyed, but the Harrison's Landing Letter made that argument, if at all, very weakly, suggesting to this reviewer that McClellan's opinion was then still dominant.

The last chapter of Styple's book is particularly interesting in that he has assembled a number of newspaper articles and recollections of friends who opine on Key's role and the extent of the influence he had over General McClellan. The *Cincinnati Gazette* wrote, "We suppose that Colonel Key was the writer of McClellan's famous letter of advice to Lincoln, after his retreat from the James river [sic]; a letter which was rather extraordinary under the circumstances . . . ."[56] The *New York Tribune* wrote:

> The country has reason, perhaps, to complain of the large influence he exerted over Gen. McClellan in the inspiration, and also in the actual composition of many of the letters on political subjects with which Gen. McClellan helped to embarrass the Administration and distract the public sentiment concerning the war . . . .[57]

One close friend of Key, Donn Piatt, described him as "McClellan's evil genius," while William Dickson disagreed:

> At this late date Donn Piatt makes the discovery that Key was the "evil genius" of McClellan. Piatt's discourse runneth thus: McClellan's political obtrusiveness caused his ruin. Key caused this obtrusion. Piatt is at fault on both points. Of course McClellan's interference in politics was a glaring weakness, but it was only a single manifestation of a general incompetency, unfitting him for command. Nor was Key responsible for McClellan's politics nor for their offensive assertion. McClellan's politics were his

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[55] *Id.* at 259 (General Cox was a colleague of Key's in the Ohio Senate; a Republican and abolitionist who fully supported the Emancipation Proclamation; he was later a Governor of Ohio.).
[56] *Id.* 297.
[57] *Id.* at 300.

> own, or rather of his school; they were not of a far reaching character.[58]

Although Styple might reject the term "evil genius," he is firmly of the opinion that General McClellan was a weak leader, susceptible to manipulation by Key, which was harmful to McClellan personally and, more importantly, to the Union cause generally.[59] This reviewer tends to agree more with Key's friend Dickson, who placed responsibility for McClellan's political pronouncements and opposition to Lincoln and his Administration primarily with McClellan. However, one does not have to completely agree with Styple's ultimate conclusion to appreciate the importance of the relationship between McClellan and his Confidential Aide, which was not yet fully explored by historians until now. McClellan's trust in Key gave Key an outsized role in the conduct of military affairs as long as McClellan commanded, from his assistance in clearing the way for McClellan's appointment as Commander-in-Chief, to his role as chief negotiator in a peace parley, to the composition of the Harrison's Landing Letter. Styple's well-researched book has brought an obscure figure out from the periphery of Civil War commentary; moreover, it should stoke more discussion and opinion about one of America's most controversial military leaders.

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[58] *Id.* at 302–04 (Donn Piatt served as a Colonel in the war, and later became a journalist. As for Dickson, in addition to being Key's law partner, he too served in the Union army and later became a judge.).

[59] *Id.* at 305 ("Their blended idealism created a ruinous mixture of war and politics that was unrealistic and ultimately doomed to fail, likely prolonging the war they vainly tried to stop.").