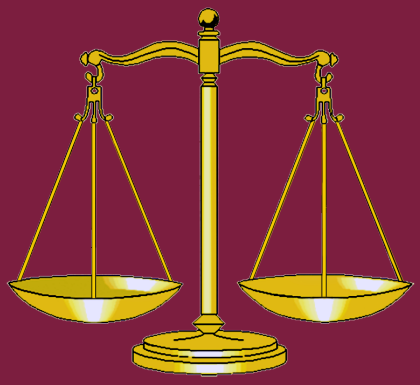
Volume 217 Fall 2013



MILITARY LAW REVIEW

ARTICLES

Seven Years Later: The Struggle with *Moreno* Continues
Major Jennifer L. Venghaus

We've Talked the Talk, Time to Walk the Walk: Meeting International Human Rights Law Standards for U.S. Military Investigations
Major Colin Cusack

A Jury of One's Peers: An Empirical Analysis of the Choice of Members in Contested Military Courts-Martial
John A. Sautter and J. Derek Randall

Human Rights Boon or Time Bomb: The Alien Tort Statute and the Need for Congressional Action
Major William E. Marcantel, Jr.

The Use of Plea Statement Waivers in Pretrial Agreements
Major Alexander Farsaad

Cyber "Hostilities" and the War Powers Resolution
Allison Arnold

"CLAMO" at 25: The Center for Law and Military Operations Celebrates Twenty-Five Years
Fred L. Borch

The Fourteenth Annual Sommerfeld Lecture: The Wrong Questions About Cyberspace
Gary D. Brown

BOOK REVIEWS

Department of Army Pamphlet 27-100-217

U.S. DEP'T OF ARMY PAMPHLET 27-100-217 MILITARY LAW REVIEW VOLUME 217 • 2013

MILITARY LAW REVIEW

Volume 217 **Fall 2013**

CONTENTS

ARTICLES

Seven Years Later: The Struggle with *Moreno* Continues
Major Jennifer L. Venghaus 1

We've Talked the Talk, Time to Walk the Walk: Meeting International Human Rights Law Standards for U.S. Military Investigations
Major Colin Cusack 48

A Jury of One's Peers: An Empirical Analysis of the Choice of Members in Contested Military Courts-Martial
John A. Sautter and J. Derek Randall 91

Human Rights Boon or Time Bomb: The Alien Tort Statute and the Need for Congressional Action
Major William E. Marcantel, Jr. 113

The Use of Plea Statement Waivers in Pretrial Agreements
Major Alexander Farsaad 141

Cyber "Hostilities" and the War Powers Resolution
Allison Arnold 174

"CLAMO" at 25: The Center for Law and Military Operations Celebrates Twenty-Five Years
Fred L. Borch 193

The Fourteenth Annual Sommerfeld Lecture: The Wrong Questions About Cyberspace
Gary D. Brown 214

BOOK REVIEWS

Revolutionary Summer: The Birth of American Independence
REVIEWED BY *Major Ronald T.P. Alcala* 234

The Red Circle: My Life in the Navy SEAL Sniper Corps and How I Trained America's Deadliest Marksmen
REVIEWED BY *Major Takashi Kagawa* 242

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

Pamphlet No. 27-100-217, Fall 2013

MILITARY LAW REVIEW—VOLUME 217

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

BOARD OF EDITORS

CPT LAURA A. O'DONNELL, *Editor*
MAJ RONALD T. ALCALA, *Assistant Editor*
MAJOR JOSEF DASKAL, *Assistant Editor*
MAJ ELIZABETH A. RAMSEY, *Assistant Editor*
MAJ KEIRSTEN H. KENNEDY, *Assistant Editor*
MR. CHARLES J. STRONG, *Technical Editor*

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

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

federal agencies to the Technical Editor of the *Military Law Review*. Judge Advocates of other military services should request distribution through their publication channels. This periodical's postage is paid at Charlottesville, Virginia, and additional mailing offices.

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

CITATION: This issue of the *Military Law Review* may be cited as 217 MIL. L. REV. (page number) (Fall 2013). Each issue is a complete, separately numbered volume.

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

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

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

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

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

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

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

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

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

BACK ISSUES: Copies of recent back issues are available to Army legal offices in limited quantities from the Technical Editor of the *Military Law Review* at usarmy.pentagon.hqda-tjaglcs.list.tjaglcs-tech-editor. Bound copies are not available and subscribers should make their own arrangements for binding, if desired.

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

INDIVIDUAL PAID SUBSCRIPTIONS TO THE *MILITARY LAW REVIEW*

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

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

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

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

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

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

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

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

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

United States Government INFORMATION
PUBLICATIONS ★ PERIODICALS ★ ELECTRONIC PRODUCTS

Army Lawyer and Military Review
SUBSCRIPTION ORDER FORM

Order Processing Code: **5937**

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

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

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

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

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

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

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

Personal name (Please type or print)

Company name

Street address City, State, Zip code

Daytime phone including area code

Purchase Order Number

Check method of payment:

☐ Check payable to Superintendent of Documents

☐ SOD Deposit Account ☐☐☐☐☐☐☐ — ☐

☐ VISA ☐ MasterCard ☐ Discover/NOVUS ☐ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

Thank you for your order!

Authorizing signature

11/02

MILITARY LAW REVIEW

Volume 217 **Fall 2013**

SEVEN YEARS LATER: THE STRUGGLE WITH *MORENO* CONTINUES

MAJOR JENNIFER L. VENGHAUS*

Not only is untimely post-trial processing unfair to the soldier concerned, but it also damages the confidence of both soldiers and the public in the fairness of military justice, thereby directly undermining the very purpose of military law.[1]

I. Introduction

In 1999, a military panel convicted Marine Corps Gunnery Sergeant (GySgt) Brian Foster of rape, aggravated assault and wrongfully communicating a threat. Sergeant Foster was sentenced to seventeen years of confinement, forfeiture of all pay and allowances, reduction to the grade of E-1, and a dishonorable discharge. In February 2009, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) found the evidence of rape "legally and factually insufficient." As a result, the

---

* Judge Advocate, U.S. Army. Presently assigned as Personnel Law Attorney, Office of The Judge Advocate General, U.S. Army, Washington, D.C. LL.M., 2012, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2003, University of Richmond; B.A., 2000, Southwestern University. Previous assignments include Chief, Criminal Law, 82d Airborne Division, Fort Bragg, North Carolina, 2009–2011; Command Judge Advocate, 18th Engineer Brigade, Iraq and Germany, 2007–2009; Command Judge Advocate, Joint Task Force–East, Mihail Kogalniceanu Airbase, Romania, 2007; Operational Law Attorney, United States Army Europe, Heidelberg, Germany, 2006–2007; Command Judge Advocate, 513th Military Intelligence Brigade, Fort Gordon, Georgia, 2005–2006; Operational Law Attorney, Task Force 134, Multi-National Forces–Iraq, Baghdad, Iraq, 2004–2005; Legal Assistance Attorney, Office of the Staff Judge Advocate, Fort Gordon, Georgia, 2004. Previous publications include: *Tax Incentives: A Means of Encouraging Research and Development for Homeland Security?*, 37 U. RICH. L. REV. 1213 (2003). Member of the bars of Virginia, the U.S. Court of Appeals for the Armed Forces, and the U.S. Supreme Court. This articles was submitted in partial completion of the Master of Laws requirements of the 60th Judge Advocate Officer Graduate Course.

[1] United States v. Bauerbach, 55 M.J. 501, 506 (A. Ct. Crim. App. 2001) (citing United States v. Williams, 42 M.J. 791, 794 (N-M Ct. Crim. App. May 22, 1995).

court dismissed the charge of rape and set aside the remaining findings and sentence.[2]

United States v. Foster represents a perfect example of the importance of speedy post-trial processing. In *Foster*, over nine years had elapsed between the completion of trial and his appeal to the NMCCA. As a result, Sergeant Foster served almost ten years in confinement for an offense that the court ultimately dismissed.[3] Now that he has secured his release from confinement, he "must salvage his personal life and relationship with his sons, and fight to save his career, regain his NCO rank and recoup thousands in back pay and benefits he believes are owed to him."[4]

In October 2009, in response to the "travesty of justice"[5] in *United States v. Foster*, Congress established an independent panel to "review the judge advocate requirements of the Department of the Navy for the military justice mission"[6] and ordered the Department of Defense Inspector General "to review the systems, policies, and procedures currently in use to ensure timely and legally sufficient post-trial reviews of courts-martial within the Department of the Navy."[7] The Department of Defense Inspector General put together a team of experts who examined the post-trial process in the Navy and Marine Corps and concluded "that Navy JAGs have not fully accomplished their post-trial military justice mission as required in statute and regulation."[8]

---

[2] United States v. Foster, No. 200101955, 2009 WL 382002 (N-M. Ct. Crim. App. Feb. 17, 2009).

[3] Sergeant Foster's sentence was adjudged on December 3, 1999, and the Navy-Marine Corps Court of Criminal Appeals opinion was issued on February 17, 2009. *Id.*

[4] Gidget Fuentes, *Innocent Marine Freed After 9 years in Prison*, MARINE CORPS TIMES, (Apr. 20, 2009), http://www.marinecorpstimes.com/news/2009/04/marine_foster_042009w/.

[5] *Hearing to Receive Testimony on Providing Legal Services by Members of the Judge Advocate General's Corps Before the S. Subcomm. on Personnel, Comm. On Armed Services*, 112th Cong. 2 (2011) [hereinafter *Hearing*].

[6] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506, 123 Stat. 2190, 2278–79 (2009).

[7] *Hearing*, *supra* note 5, at 3.

[8] U.S. DEP'T OF DEF. INSPECTOR GEN., EVALUATION OF POST-TRIAL REVIEWS OF COURTS-MARTIAL WITHIN THE DEPARTMENT OF THE NAVY, REP. NO. IPO2010E003 (10 Dec. 2010) [hereinafter DODIG REPORT].

The case of *United States v. Foster* resulted in scrutiny of post-trial processing within the Department of the Navy,[9] but the case also served to prompt all military services to examine their post-trial processes and reduce unnecessary delays in order to ensure post-trial due process for servicemembers. According to the Court of Appeals for the Armed Forces (CAAF), "[d]ue process entitles convicted servicemembers to a timely review and appeal of court-martial convictions."[10] While the nearly ten years of post-trial delay in *Foster* clearly represents a violation of Sergeant Foster's post-trial due process rights, what constitutes "timely" post-trial processing? Pursuant to *United States v. Moreno*, a presumption of unreasonable delay exists when the convening authority does not take action within 120 days of the completion of trial.[11] This presumption of unreasonable delay triggers a four-part *Barker* analysis, balancing: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice."[12] To rebut the presumption of unreasonable delay, the government must show "justifiable, case-specific delays supported by the circumstances of [the] case and not delays based upon administrative matters, manpower constraints or the press of other cases."[13]

The CAAF has made it clear they believe delay in post-trial processing poses a problem.[14] Although not as extreme as the post-trial delay in *United States v. Foster*, as depicted in Figure 1, post-trial processing in the Army has gradually increased over the years, and the average processing time from completion of trial to convening authority action has exceeded 120 days since 2000.[15]

---

[9] *Id.*; *Hearing*, *supra* note 5, at 2–3; Memorandum from The Judge Advocate General, U.S. Navy, to Distribution, subject: Report on the Status of Military Justice in the Navy (4 Aug. 2009).

[10] United States v. Moreno, 63 M.J. 129, 132 (C.A.A.F. 2006) (citing Toohey v. United States, 60 M.J. 100, 101 (C.A.A.F. 2004)).

[11] *Id.* at 142.

[12] *Id.* at 135 (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)).

[13] *Id.* at 143.

[14] *Id.* at 142 (noting that "Moreno's case is not an isolated case that involves excessive post-trial delay issues").

[15] E-mail from Homan Barzmehri, Mgmt. & Program Analyst, Office of the Clerk of Court, Army Court of Criminal Appeals, to author (Dec. 1, 2011, 3:49 P.M. EST) [hereinafter Barzmehri e-mail] (on file with author).

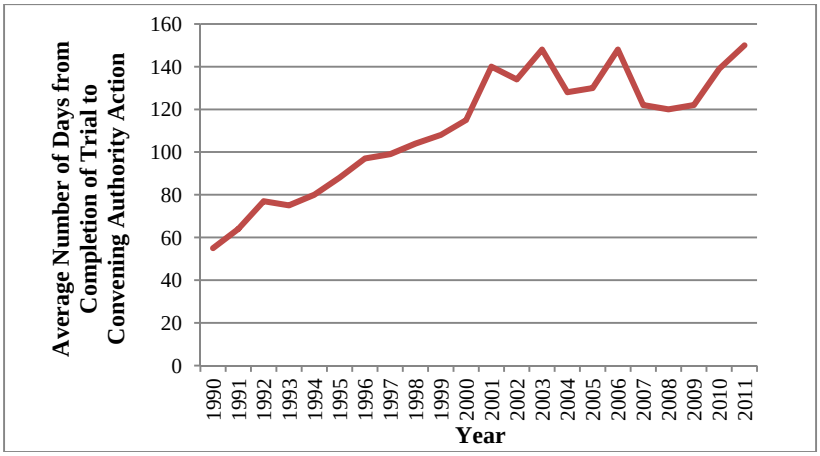


Figure 1. Army Average Number of Days from Completion of Trial to Convening Authority Action Per Year[16]

In 2011, the average number of days between completion of trial and convening authority action in the Army was 150 days,[17] with 60% of Army courts-martial not meeting the requirement of convening authority action within 120 days.[18] Of the 63 general court-martial convening authority (GCMCA) jurisdictions in the Army in 2011, 41 had processing time averages of over 120 days from completion of trial to convening authority action.[19]

While other services may suffer from lack of "institutional vigilance" and "leadership failures,"[20] in general, Army criminal law offices diligently process post-trial actions, yet continue to struggle with timely post-trial processing.[21] Although administrative constraints hinder timely post-trial processing in the Army, the failure of appellate courts to consider case circumstances and exclude periods of delay beyond the control of the government results in an inaccurate evaluation of post-trial delay. In order to compel the appellate courts to accurately evaluate

---

[16] *Id.* Data was formatted by the author to create this chart.
[17] *Id.*
[18] *Id.* Data was re-formatted by the author to calculate percentage of trials with convening authority action within 120 days.
[19] E-mail from Homan Barzmehri, Mgmt. & Program Analyst, Office of the Clerk of Court, Army Court of Criminal Appeals, to author (Jan. 4, 2012, 3:49 P.M.) [hereinafter Barzmehri e-mail 2] (on file with author).
[20] DoDIG REPORT, *supra* note 8.
[21] United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006).

post-trial delay, the Rules for Courts-Martial should be amended to define timely post-trial processing and excludable periods of delay. A more accurate evaluation of post-trial delay by the appellate courts, combined with a reduction in administrative constraints to post-trial processing, would best serve the interests of justice and contribute to timely post-trial processing in the Army.

II. History of Convening Authority Post-Trial Delay

While the appellate courts have expressed frustration for several decades over post-trial delay, they courts have struggled to develop an effective deterrent to post-trial delay.

A. Early History

Although the issue of post-trial delay has been discussed in appellate cases as early as 1958,[22] the early post-trial delay cases addressed delay in the appellate process rather than delay between completion of trial and convening authority action.[23] In 1971, after a ten-month delay without convening authority action, the Court of Military Appeals (CMA) started the trend of appellate review of delay in convening authority action by issuing a writ of mandamus directing the convening authority to take action in the case of *Montavon v. United States*.[24] Following *Montavon*,

---

[22] United States v. Tucker, 26 C.M.R. 367 (C.M.A. 1958) (Delay of more than one year in forwarding the petition for review to The Judge Advocate General of the Navy: "There may be good reason for the delay in the appellate processes, but it does not appear in the record before us. Unexplained delays of the kind presented here should not be tolerated by the services, and they will not be countenanced by this Court.").

[23] *See, e.g.*, *id.* (over one-year delay in forwarding the petition for review to The Judge Advocate General of the Navy); United States v. Richmond, 28 C.M.R. 366 (C.M.A. 1960) (two-year delay to reach Court of Military Appeals (CMA) after two rehearings); United States v. Ervin, 42 C.M.R. 289 (C.M.A. 1970) (delay in service of the decision of the board of review); United States v. Fortune, 43 C.M.R. 133 (C.M.A. 1971) (twenty-month delay in service of the decision of the board of review); United States v. Adame, 44 C.M.R. 3 (C.M.A. 1971) (over one-year delay in service of the decision of the board of review); United States v. Sanders, 44 C.M.R. 10 (C.M.A. 1971) (nineteen-month delay in service of the decision of the board of review). For a review of post-trial delay cases, to include appellate delay, see Major Andrew D. Flor, *Post-Trial Delay: The Möbius Strip Path*, ARMY LAW., June 2011, at 4.

[24] ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION PURSUANT TO THE UNIFORM CODE OF MILITARY

appellate courts expressed even stronger concern with delay in convening authority action and addressed the issue more frequently.[25] However, they rarely granted relief because the court found that "post-trial delay, standing alone without prejudicial error in the trial proceedings, will not require relief on otherwise proper findings and sentences."[26]

By 1972, post-trial delay from trial to convening authority action caught the attention of not only the courts but the service Judge Advocates as well. In their Annual Report, the service Judge Advocates noted that "instances in which the transcription of a record of trial and action by the convening authority were prolonged over several months occur often enough that this part of the appellate process needs further attention and action to assure that the accused is afforded the speediest possible justice consistent with due process."[27]

Although the service Judge Advocates recognized the problem of post-trial delay, a change to Army regulation in 1973 exacerbated the problem. Before 1973, Army regulation did not allow for the transfer of an accused to the disciplinary barracks until promulgation of the convening authority's action.[28] However, in January 1973, the Army

---

JUSTICE FOR THE PERIOD JAN. 1, 1971 TO DEC. 31, 1971 (1971) (citing Montavon v. United States, Miscellaneous Docket No. 70-3).

[25] *See, e.g.*, United States v. Prater, 43 C.M.R. 179 (C.M.A. 1971) (nine-month delay between trial and convening authority action was excessive but not prejudicial); United States v. Davis, 43 C.M.R. 381 (C.M.A. 1971) (187-day delay between trial and supervisory authority action was excessive but no error); United States v. Wheeler, 45 C.M.R. 242 (C.M.A. 1972) (holding that the 231-day delay from trial to action "did not evidence a desirable standard of expeditiousness" but finding no prejudice); United States v. Timmons, 46 C.M.R. 226 (C.M.A. 1973) (180-day delay between trial and convening authority action was unreasonable but granted no relief); Rhoades v. Haynes, Commanding Gen., 46 C.M.R. 189 (C.M.A. 1973) (finding 116-day delay from completion of trial unreasonable and ordering the convening authority to complete his review of the record of trial); United States v. Gray, 47 C.M.R. 484 (C.M.A. 1973) (212-day delay between trial and convening authority action was "deplorable and unreasonable," but granted no relief because there was no prejudice); United States v. Jefferson, 48 C.M.R. 39 (C.M.A. 1973) (244-day delay between trial and convening authority action was unreasonable, but no relief because there was no prejudice).

[26] *Timmons*, 46 C.M.R. at 227.

[27] ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD JAN. 1, 1972 TO DEC. 31, 1972 (1972).

[28] U.S. DEP'T OF ARMY, REG. 190-4, UNIFORM TREATMENT OF MILITARY PRISONERS para. 1-3(b)(2)(b) (25 June 1971) ("A detained prisoner or officer prisoner whose sentence has

eliminated this restriction and began allowing the transfer of convicted servicemembers to confinement before the convening authority took action.[29] While the change "relieve[d] the convening authority from the pressures of dealing effectively with a convicted accused,"[30] the change also reduced the pressure for convening authorities to take action quickly, thus adding to the post-trial delay problem.

B. *Dunlap v. Convening Authority, Combined Arms Center*[31]

By 1974, timeliness of convening authority action had deteriorated so much that the CMA finally addressed the issue. In *Dunlap v. Convening Authority, Combined Arms Center*, the court cautioned that post-trial delay "should not be tolerated" and held that "the failure of the Uniform Code or the Manual for Courts-Martial to condemn directly unreasonable delay by the convening authority in acting on the record of trial does not mean that relief against such delay is unobtainable."[32]

The *Dunlap* court compared post-trial delay to the presumption of unreasonable pre-trial delay in violation of Article 10 of the Uniform Code of Military Justice (UCMJ) when the accused was in pre-trial confinement.[33] Applying the pre-trial delay standard to post-trial delay, the court found that there is a presumption of unreasonable post-trial delay when "the accused is continuously under restraint after trial and the convening authority does not promulgate his formal and final action within 90 days of the date of such restraint after completion of trial."[34]

The *Dunlap* presumption served as an immediate deterrent to post-trial delay because it required dismissal of charges when the presumption was met and the government failed to show diligence.[35] Between 1974

---

not been approved by the convening authority will not be confined in a disciplinary barracks.").

[29] Dunlap v. Convening Auth., Combined Arms Ctr. and Commandant, 48 C.M.R. 751, 754 (C.M.A. 1974).

[30] *Id.*

[31] *Id*. at 751.

[32] *Id.* at 754.

[33] *Id.* ("We deem it appropriate that this guideline be the same as that applicable when the accused is in arrest or confinement before trial." Since the court established 90 days as the presumption for an Article 10 violation in *United States v. Burton*, the court applied the same 90-day standard to post-trial delay.).

[34] *Id.*

[35] *Id.*

and 1979, courts strictly applied the rule, dismissing charges when convening authority action took longer than ninety days,[36] regardless of the seriousness of the offense,[37] length or complexity of the case,[38] or lack of other prejudicial error. Although effective at deterring post-trial delay, the *Dunlap* presumption received harsh criticism due to the inflexibility of the rule and its rigid application by appellate courts.[39]

In 1979, the CMA abandoned the *Dunlap* presumption of unreasonable delay in the case of *United States v. Banks*.[40] Following *Banks*, the court reverted to a standard of prejudice when determining whether to grant relief for post-trial delay in convening authority action.[41] For the next two decades, courts examined each case individually to determine if the delay was unreasonable, and, if so, whether the unreasonable delay prejudiced the appellant. Using this

---

[36] *See, e.g.*, United States v. Larsen, 1 M.J. 300 (C.M.A. 1975) (137-day delay, 1000+ page record of trial); United States v. Montgomery, 50 C.M.R. 860 (A.C.M.R. 1975) (91-day delay); United States v. Philpott, 2 M.J. 494 (C.M.A. 1976) (195-day delay); United States v. Young, 2 M.J. 524 (C.M.A. 1976) (100-day delay); United States v. Puckett, 2 M.J. 1228 (N.M.C.M.R. 1976) (91-day delay); Bouler v. United States, 1 M.J. 299 (C.M.A. 1976) (98-day delay); United States v. Brantley, 2 M.J. 594 (N.M.C.M.R. 1976) (91-day delay); United States v. Garrett, 2 M.J. 1283 (C.G.C.M.R. 1976) (98-day delay); United States v. Miller, 1 M.J. 1081 (N.M.C.M.R. 1977) (99-day delay); United States v. Campbell, 6. M.J. 809 (N.M.C.M.R. 1979) (97-day delay); United States v. Mitchell, 6 M.J. 851 (N.M.C.M.R. 1979) (92-day delay); United States v. Spiesman, 7 M.J. 819 (N.M.C.M.R. 1979) (95-day delay).

[37] *See, e.g.*, *Brantley*, 2 M.J. at 595. Lance Corporal Brantley was convicted of stabbing a fellow Marine in the throat. Despite the seriousness of the offense, in accordance with *Dunlap*, the Navy Court of Military Review dismissed the charges because the convening authority did not take action until 91 days after imposition of post-trial confinement. *Id.*

[38] For example, in *United States v. Larsen*, the CMA dismissed the charges pursuant to the *Dunlap* rule due to 137 days of post-trial confinement prior to convening authority action even though the record of trial exceeded 1,000 pages. *Larsen*, 1 M.J. 300.

[39] *See, e.g.*, *Dunlap*, 48 C.M.R. at 756–57 (Duncan,J., dissenting) (pointing out the "dissimilarity between pretrial delay and delay in a convening authority's action and the harm that may result from each" and explaining that he was "reluctant, under these circumstances, to decide that 3 months is a more appropriate time than 2 months, 4 months, or some other period"); *Brantley*, 2 M.J. 595 (N.M.C.M.R. 1976) (expressing frustration with *Dunlap* because of the inability to "balance the rightful expectation of society to be protected by its judicial system against the actual harm suffered by a convicted felon because of delays in the review of his conviction").

[40] United States v. Banks, 7 M.J. 92 (C.M.A. 1979). In accordance with *Dunlap v. Convening Authority, Combined Arms Center*, the Army Court of Military Review (ACMR) dismissed charges of larceny, assault and battery due to 91 days of post-trial confinement before the convening authority took action. The CMA affirmed the decision of the ACMR but abandoned the *Dunlap* presumption for future cases. *Id.*

[41] *Id.* at 94 (citing United States v. Gray, 47 C.M.R. 484 (C.M.A. 1973)).

standard, courts rarely granted relief even for extremely long periods of delay.[42] Although the courts infrequently granted relief, the Army seemed to be on track with post-trial processing and, until 1996, the average number of days from completion of trial to convening authority action in the Army remained under 90 days.[43]

C. The Years Leading up to *United States v. Moreno*

From 1996 to 2000, post-trial processing time in the Army crept upward,[44] and courts struggled to find an effective remedy for post-trial delay. During this time period, the courts interpreted Articles 59(a) and 66(c), UCMJ, narrowly and felt constrained to grant relief only when "the error materially prejudice[d] the substantial rights of the accused."[45]

---

[42] *See, e.g.*, United States v. Gauvin, 12 M.J. 610 (N.M.C.M.R. 1981) (227-day delay); United States v. Williams, 14 M.J 994 (N.M.C.M.R. 1982) (302-day delay); United States v. Milan, 16 M.J. 730 (A.F.C.M.R. 1983) (237-day delay); United States v. Dillon, 17 M.J. 501 (A.F.C.M.R. 1983) (269-day delay); United States v. Bolden, 17 M.J. 1046 (N.M.C.M.R. 1984) (628-day delay); United States v. Mansfield, 33 M.J. 972 (A.F.C.M.R. 1991) (423-day delay); United States v. Jenkins, 38 M.J. 287 (C.M.A. 1993) (six-and-a-half-year delay); United States v. Henry, 40 M.J. 722 (N-M. Ct. Crim. App. 1994) (eight-year delay); United States v. Lizama, No. 30703, 1995 WL 61111 (A.F. Ct. Crim. App. Feb. 10, 1995) (231-day delay); United States v. Lang, No. 9301561, 1995 WL 934977 (N-M. Ct. Crim. App. May 5, 1995) (five-and-a-half-year delay); United States v. Agosto, 43 M.J. 853 (N-M. Ct. Crim. App. 1996) (eight-month delay); United States v. Hudson, No. 9401691, 1996 WL 927616 (N-M. Ct. Crim. App. Feb. 26, 1996) (twenty-seven-month delay); United States v. Hughes, No. 9500870, 1996 WL 927765 (N-M. Ct. Crim. App. Apr. 17, 1996) (twenty-nine-month delay); United States v. Humphrey, No. 9501245, 1996 WL 927736 (N-M. Ct. Crim. App. Aug. 14, 1996) (14-month delay); United States v. Deville, No. 32433, 1997 WL 184781 (A.F. Ct. Crim. App. Apr. 8, 1997) (eight-month delay); United States v. Bell, 46 M.J. 351 (C.A.A.F. 997) (two-year delay); United States v. Burkett, No. 9700203, 1998 WL 764074 (N-M. Ct. Crim. App. Aug. 31, 1998) (eight-month delay); United States v. Moser, No. 9500310, 1999 WL 179610 (N-M. Ct. Crim. App. Mar. 16, 1999) (eight-year delay).

[43] The average number of days from completion of trial to convening authority action per year from 1990 to 1995 was 55 days in 1990, 64 days in 1991, 77 days in 1992, 75 days in 1993, 80 days in 1994, and 88 days in 1995. Barzmehri e-mail, *supra* note 15.

[44] Average post-trial processing time for the Army from completion of trial to convening authority action was: 97 days in 1996, 99 days in 1997, 104 days in 1998, 108 days in 1999, and 115 days in 2000. *Id.*

[45] United States v. Tardif, 57 M.J. 219, 220 (C.A.A.F. 2002) (quoting UCMJ art. 59(a) (2000)). Article 59(a) provides: "A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." UCMJ art. 59(a) (2008). Article 66(c) states,

> the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It

In those cases where excessive post-trial delay prejudiced the accused, the courts believed that dismissal was the only authorized remedy pursuant to Article 59(a).[46]

By 2000, the average number of days between completion of trial and convening authority action in the Army had increased to 115 days.[47] Concerned that "the dilatory habits that led to the adoption of *Dunlap* [were] once again creeping into post-trial processing,"[48] appellate courts searched for other methods to remedy the problem without reverting back to the "inflexibility of the *Dunlap* rule."[49] In *United States v. Collazo*, the Army court abandoned the interpretation that dismissal was the only authorized remedy and granted relief by affirming only part of the accused's sentence to confinement pursuant to Article 66(c).[50] Although the Army court found no actual prejudice, they reduced the sentence based on their "broad power to moot claims of prejudice"[51] because they found that "fundamental fairness dictates that the government proceed with due diligence to execute a soldier's regulatory and statutory post-trial processing rights and to secure the convening authority's action as expeditiously as possible."[52]

Two years later, in *United States v. Tardif*, the CAAF ratified the Army court's interpretation of available remedies.[53] Concluding that

---

> may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.

Id. art. 66(c).

[46] *See* United States v. Tardif, 55 M.J. 666, 668–69 (C.G. Ct. Crim. App. 2001); *Tardif*, 57 M.J. at 220 ("Because the court below considered itself constrained from granting relief by Article 59(a) and did not consider the impact of the post-trial delays in its review under Article 66(c), we remand the case for further consideration.").

[47] Barzmehri e-mail, *supra* note 15.

[48] United States v. Collazo, 53 M.J. 721, 725 (A. Ct. Crim. App. 2000).

[49] *Id.*

[50] *Id.* at 727.

[51] *Id.* (quoting United States v. Wheelus, 49 M.J. 283, 288 (C.A.A.F. 1998)).

[52] *Id.*

[53] *See generally* United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002). In *United States v. Tardif*, the Coast Guard Court of Criminal Appeals (CGCCA) found that the twelve-month delay was unreasonable, but "prejudice directly attributable to the delay in this case [had] not been established, and thus no relief [was] warranted." United States v. Tardif, 55 M.J. 666, 669 (C.G. Ct. Crim. App. 2001). The CAAF set aside the decision of the CGCCA and held that "the court's authority to grant relief under Article 66(c) does not require a predicate holding under Article 59(a) that 'the error materially prejudices the substantial rights of the accused.'" *Tardif*, 57 M.J. at 220.

"appellate courts are not limited to either tolerating the intolerable or giving an appellant a windfall," the CAAF empowered the service courts to devise remedies that provide appropriate relief to the accused for excessive post-trial delay without dismissing charges.[54]

Despite the court's application of the additional remedies authorized under *Collazo* and *Tardif*,[55] post-trial processing in the Army continued to deteriorate. In 2001, one year after *Collazo*, the Army average post-trial processing time from completion of trial to convening authority action increased from 115 days in 2000 to 140 days in 2001.[56] By 2003, the average had increased to 148 days,[57] indicating that the new remedies had not effectively decreased post-trial delay.

In 2003, in the case of *Diaz v. Judge Advocate General of the Navy*, the CAAF held that an accused not only has a right to a full, fair and timely review of his findings and sentence under Article 66,[58] but also that he "has a constitutional right to a timely review guaranteed him under the Due Process Clause."[59]

---

[54] *Tardif*, 57 M.J. at 225.

[55] After *Collazo* and *Tardif*, courts frequently reassessed sentences as a result of post-trial delay. *See, e.g.*, United States v. Bauerbach, 55 M.J. 501 (A. Ct. Crim. App. 2001) (288-day delay); United States v. Pursley, No. 200101280, 2002 WL 31656105 (N-M. Ct. Crim. App. Nov. 14, 2002) (four-year delay); United States v. Spratley, No. 20010191, 2003 WL 25945988 (A. Ct. Crim. App. Jan. 22, 2003) (twelve-month delay); United States v. Chisholm, 58 M.J. 733 (A. Ct. Crim. App. 2003) (sixteen-month delay); United States v. Hairston, No. 9900811, 2003 WL 25945626 (A. Ct. Crim. App. Feb. 24, 2003) (twelve-month delay); United States v. Nicholson, No. 20010638, 2003 WL 25945841 (A. Ct. Crim. App. Apr. 15, 2003) (twelve-month delay); United States v. Warner, No. 20010190, 2004 WL 5866344 (A. Ct. Crim. App. Jan. 29, 2004) (over one-year delay); United States v. Bell, 60 M.J. 682 (N-M. Ct. Crim. App. 2004) (seventeen-month delay); United States v. Michael, No. 200300102, 2004 WL 2608262 (N-M. Ct. Crim. App. Nov. 18, 2004) (five-year delay); United States v. Easter, No. 20030693, 2005 WL 6520242 (A. Ct. Crim. App. Feb. 15, 2005) (over ten-month delay); United States v. Frames, No. 20010796, 2005 WL 6519751 (A. Ct. Crim. App. Apr. 26, 2005) (545-day delay); United States v. Bodkins, No. 20010107, 2005 WL 6520751 (A. Ct. Crim. App. May 10, 2005) (412-day delay); United States v. Chebaro, No. 20030838, 2005 WL 6520463 (A. Ct. Crim. App. Sept. 21, 2005) (twelve-month delay); United States v. Bishop, No. 200500613, 2005 WL 2704971 (N-M. Ct. Crim. App. Oct. 17, 2005) (two-year delay); United States v. Geter, No. 9901433, 2005 WL 3115333 (N-M. Ct. Crim. App. Nov. 8, 2005) (sixteen-month delay); United States v. Sanchezcruz, No. 200500313, 2006 WL 235325 (N-M. Ct. Crim. App. Jan. 24, 2006) (500-day delay); United States v. Kelly, No. 20040214, 2006 WL 6624100 (A. Ct. Crim. App. Mar. 31, 2006) (209-day delay).

[56] Barzmehri e-mail, *supra* note 15.

[57] *Id.*

[58] Diaz v. Judge Advocate Gen. of the Navy, 59 M.J. 34, 37 (C.A.A.F. 2003).

[59] *Id.* at 38 (citing Harris et al. v. Champion et al., 15 F.3d 1538 (10th Cir. 1994)).

A year later, the court took the due process analysis one step further in the case of *Toohey v. United States*.[60] In determining whether Toohey's due process rights had been violated by the delay, the court found that "[f]ederal courts generally consider four factors to determine whether appellate delay violates an appellant's due process rights: (1) length of the delay; (2) reasons for the delay; (3) the appellant's assertion of his right to a timely appeal; and (4) prejudice to the appellant."[61] The court explained that the first factor, length of delay, serves as a "triggering mechanism" for the other factors if the delay "appears, on its face, to be unreasonable under the circumstances."[62] While the court in *Toohey* did not set a standard for triggering the four-part analysis, the concept of using the first factor as a triggering mechanism would eventually lead to the presumption of unreasonable delay created by *United States v. Moreno*.

D. *United States v. Moreno*[63]

Although the Army Court of Criminal Appeals warned staff judge advocates in *Collazo* to fix post-trial processing,[64] it did not improve. By 2006, only 41% of the Army's 1,149 records of trial reached convening authority action within 120 days,[65] and the average time between completion of trial and convening authority action was 148 days—nearly triple the average from 1990.[66] However, the Army was not alone with the post-trial delay problems and the CAAF was growing concerned with the timeliness of post-trial processing.

---

[60] Toohey v. United States, 60 M.J. 100 (C.A.A.F. 2004). In *Toohey*, the petitioner filed a request for extraordinary relief because the convening authority did not take action on the case until 644 days after the court-martial adjourned, and yet, six years after the trial, the first appeal had not been completed.

[61] *Id.* at 102 (referring to six federal cases and stating that "[t]hese factors are derived from the Supreme Court's speedy trial analysis in *Barker v. Wingo.*").

[62] *Id.* (citing United States v. Smith, 94 F.3d. 204, 208–09 (6th Cir. 1996)).

[63] United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006).

[64] United States v. Collazo, 53 M.J. 721, 725 (A. Ct. Crim. App. 2000) (The court reminded staff judge advocates of the "draconian" *Dunlap* rule and warned that they "can forestall a new judicial remedy by fixing untimely post-trial processing now.").

[65] Barzmehri e-mail, *supra* note 15. Data was re-formatted by the author to calculate percentage of trials with convening authority action within 120 days.

[66] The Army average post-trial processing time from completion of trial to convening authority action was 55 days in 1990. *Id.*

The facts in *United States v. Moreno* clearly explain the court's frustration. On September 29, 1999, a military panel convicted Corporal Moreno of rape and sentenced him to confinement for six years, forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and a dishonorable discharge.[67] The government did not complete authentication of the 746-page record of trial until 278 days after the completion of trial. Upon authentication, it took the convening authority an additional 212 days (for a total of 490 days after completion of the trial) to approve the sentence. After action by the convening authority, 76 additional days elapsed before the NMCCA docketed the case. The service court granted the appellate defense attorney eighteen motions for enlargement of time, and he finally filed the defense brief 702 days after docketing. The government took 223 days to file an answer brief, and the NMCCA affirmed the findings and sentence 197 days later. The CAAF noted that "[f]our years, seven months and fourteen days (1,688 days) elapsed between the completion of trial and the completion of Moreno's appeal of right under Article 66, UCMJ."[68]

Due to the extremely long delay in *United States v. Moreno*, the CAAF believed that post-trial processing had declined so much that "some action [was] necessary to deter excessive delay in the appellate process and remedy those instances in which there [was] unreasonable delay and due process violations."[69] For this reason, the court created a presumption of unreasonable delay again. However, the court explained that this presumption was "less draconian" than the presumption created in *Dunlap*.[70] Rather than triggering dismissal of charges for denial of speedy disposition as required by *Dunlap*, the presumption of unreasonable delay in *Moreno* only triggered further analysis using the four-part test of *Barker v. Wingo*.[71]

The *Moreno* court broke down the post-trial process into three different stages and created a presumption of unreasonable delay for each stage of the post-trial process: (1) convening authority action, (2) docketing by the service Court of Criminal Appeals, and (3) appellate review. For convening authority action, the court created "a presumption of unreasonable delay that will serve to trigger the *Barker* four-factor

---

[67] *Moreno*, 63 M.J. at 132.
[68] *Id.* at 133.
[69] *Id.* at 142.
[70] *Id.*
[71] *Id.* (referring to Barker v. Wingo, 407 U.S. 514 (1972)).

analysis where the action of the convening authority is not taken within 120 days of the completion of trial."[72]

Unlike *Dunlap*, in *United States v. Moreno*, the CAAF gave no explanation for setting 120 days as the standard for the presumption of unreasonable delay from completion of trial to convening authority action.[73] While some members of the CAAF have expressed disagreement with the arbitrary nature of the 120-day standard set in *Moreno*,[74] the number appears to derive from the *Dunlap* presumption. Consideration of clemency matters by the convening authority presents one possible explanation for the increase from the ninety-day presumption created in 1974 by *Dunlap*[75] to the 120-day presumption created in 2006 by *Moreno*.[76]

Although the *Moreno* presumption of unreasonable delay serves as precedent that the service courts must follow, their inconsistency in granting relief in the years following *Moreno* may indicate that the criticisms of the *Moreno* presumption have become more persuasive in the appellate judiciary.

---

[72] *Id.*

[73] *See generally Moreno*, 63 M.J. 129.

[74] *See id.* at 151 (Crawford, J., dissenting); United States v. Arriaga, 70 M.J. 51, 61 (C.A.A.F. 2011) (Stucky, J., dissenting).

[75] Dunlap v. Convening Auth., Combined Arms Ctr., 48 C.M.R. 751 (C.M.A. 1974).

[76] *Moreno*, 63 M.J. at 142. Before 1983, the Rules for Court-Martial did not specifically authorize the accused to submit clemency matters to the convening authority for consideration. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. XVI–XVII (1969); Lieutenant Michael J. Marinello, *Convening Authority Clemency: Is It Really an Accused's Best Chance of Relief*, 54 NAVAL L. REV. 169, 192 (2007). The Military Justice Act of 1983 allowed the accused to submit "matters for consideration by the convening authority with respect to the findings and sentence" within thirty days of announcement of the sentence or seven days after receiving a copy of the record of trial. Military Justice Act of 1983, Pub. L. No. 98-209, § 860, 97 Stat. 1393 (codified as amended at 10 U.S.C. § 860); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1105(c) (1984). In 1987, Congress changed the time period for clemency matters, allowing the accused to submit clemency matters ten days after receipt of a copy of the authenticated record of trial or the post-trial recommendation of the staff judge advocate. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 806, 100 Stat. 3816 (1986). The change also authorized the convening authority or staff judge advocate to extend the time period by twenty days for good cause. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1105(c) (2008) [hereinafter 2008 MCM]. By 2006, defense counsel routinely requested an extension for clemency matters in every case, thereby adding thirty days to the post-trial process. *See infra* Part V.B.

E. After *United States v. Moreno*

Three months after the decision in *United States v. Moreno*, the court expanded on their analysis of prejudice, the fourth *Barker* factor, in the case of *United States v. Toohey*.[77] Despite the NMCCA finding of no prejudice, the CAAF found that a due process violation has occurred when "the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system."[78]

Following the 2006 decisions in *Moreno* and *Toohey*, "there was great concern that appellate courts would apply the 120-day rule strictly and bludgeon the government into timeline compliance by granting widespread and significant relief to otherwise undeserving appellants."[79] Immediately following the *Moreno* decision, the concern of practitioners seemed justified as the court found due process violations and granted relief in several cases.[80]

A few months later, however, the courts shifted away from granting relief, even in the most egregious cases, unless prejudice was clearly established.[81] In one case, the CAAF held that an accused "was not denied his due process right to timely post-trial review and speedy appeal" despite a delay of 1,263 days between sentencing and the first appeal (including 783 days between sentencing and convening authority action).[82] In subsequent cases between 2006 and 2010, the CAAF continued to find due process violations, but generally granted no relief after finding that the violations were harmless beyond a reasonable doubt.[83] The service courts have followed the lead of the CAAF, rarely granting relief for post-trial delay in recent years.[84]

---

[77] United States v. Toohey, 63 M.J. 353 (C.A.A.F. 2006).

[78] *Id.* at 362.

[79] Lieutenant Colonel James L. Varley, *The Lion Who Squeaked: How the* Moreno *Decision Hasn't Changed the World and Other Post-Trial News*, ARMY LAW., June 2008, at 80.

[80] *See generally id.*; United States v. Dearing, 63 M.J. 478 (C.A.A.F. 2006); United States v. Harvey, 64 M.J. 13 (C.A.A.F. 2006).

[81] *See generally* Varley, *supra* note 79; Major Andrew D. Flor, *"I've Got to Admit It's Getting Better": New Developments in Post-Trial*, ARMY LAW., Feb. 2009, at 10.

[82] United States v. Canchola, 64 M.J. 245 (C.A.A.F. 2007).

[83] *See, e.g.*, United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006) (over five-year delay between trial and completion of service court appeal); United States v. Rodriguez-Rivera, 63 M.J. 372 (C.A.A.F. 2006) (over six-year delay between trial and completion of service court appeal); United States v. Young, 64 M.J. 404 (C.A.A.F. 2007) (1637-day delay

Despite the criticism and dissenting opinions, post-trial processing in the Army improved for several years after *Moreno*. From 2007 to 2009, the average number of days between completion of trial and convening authority action was between 120 days and 122 days.[85] However, even when the average processing time was 120 days, convening authorities failed to take action within 120 days in 44 to 46 % of trials within the Army.[86]

---

between trial and completion of service court appeal); United States v. Roberson, 65 M.J. 43 (C.A.A.F. 2007) (1524-day delay between trial and completion of service court appeal); United States v. Allende, 66 M.J. 142 (C.A.A.F. 2008) (2484-day delay between trial and completion of service court appeal); United States v. Bush, 68 M.J. 96 (C.A.A.F. 2009) (seven-year delay between trial and docketing with service court); United States v. Ashby, 68 M.J. 108 (C.A.A.F. 2009) (2970-day delay between trial and completion of service court appeal); United States v. Schweitzer, 68 M.J. 133 (C.A.A.F. 2009) (eight-year delay between trial and completion of service court appeal); United States v. Mullins, 69 M.J. 113 (C.A.A.F. 2010) (over 360-day delay between trial and convening authority action); United States v. Luke, 69 M.J. 309 (C.A.A.F. 2011) (over eleven-year delay between trial and completion of service court appeal). *But see* United States v. Arriaga, 70 M.J. 51 (C.A.A.F. 2011) (remanded the case for appropriate relief because the 243-day delay from trial to convening authority action deprived the accused of his due process rights).

[84] *See, e.g.*, United States v. Arindain, 65 M.J. 726 (A.F. Ct. Crim. App. 2007) (404-day delay from trial to action); United States v. Ackley, No. 36703, 2007 WL 2499287 (A.F. Ct. Crim. App. Aug. 16, 2007) (244-day delay from trial to action); United States v. Ogunlana, No. 36848, 2008 WL 818332 (A.F. Ct. Crim. App. Mar. 21, 2008) (150-day delay from trial to action); United States v. Smith, No. 20060139, 2008 WL 2252771 (N-M. Ct. Crim. App. May 27, 2008) (344-day delay from trial to action); United States v. Harris, 66 M.J. 781 (N-M. Ct. Crim. App. 2008) (334-day delay from trial to action); United States v. Sojda, No. 200401746, 2009 WL 347477 (N-M. Ct. Crim. App. Feb. 12, 2009) (237-day delay from trial to action); United States v. Bradley, No. S31559, 2009 WL 690073 (A.F. Ct. Crim. App. Mar. 17, 2009) (168-day delay from trial to action); United States v. Bailon, No. 36912, 2009 WL 1508111 (A.F. Ct. Crim. App. Apr. 29, 2009) (244-day delay from trial to action); United States v. Lobsinger, No. 200700010, 2009 WL 3435922 (N-M. Ct. Crim. App. Oct. 27, 2009) (299-day delay from trial to action); United States v. Yammine, 67 M.J. 717 (N-M. Ct. Crim. App. 2009) (214-day delay from trial to action); United States v. Ney, 68 M.J. 613 (A. Ct. Crim. App. 2010) (174-day delay from trial to action); United States v. Dunn, No. S31584, 2010 WL 3981682 (A.F. Ct. Crim. App. Aug. 31, 2010) (136-day delay from trial to action); United States v. Medina, 69 M.J. 637 (C.G. Ct. Crim. App. 2010) (167-day delay from trial to action); United States v. Bernard, 69 M.J. 694 (C.G. Ct. Crim. App. 2010) (272-day delay from trial to action); United States v. Williams, No. 20091067 (A. Ct. Crim. App. May 9, 2012). *Cf.* United States v. Scott, No. 20091087 (A. Ct. Crim. App. Dec. 23, 2011) (reducing the sentence to confinement by 30 days); United States v. Weaver, No. 20090397 (A. Ct. Crim. App. Mar. 28, 2012) (reducing the sentence to confinement by two months for a 294-day delay from trial to action).

[85] Barzmehri e-mail, *supra* note 15.

[86] *Id.* Data was re-formatted by the author to calculate percentage of trials with convening authority action within 120 days.

Although the average post-trial processing time for the Army decreased during those few years, the scare created by the *Moreno* presumption did not last long. By 2011, the Army's average post-trial processing time from completion of trial to convening authority action had increased to 150 days, more than the pre-*Moreno* average processing time.[87] The continued increase in post-trial delay raises the question, does 120 days represent a reasonable amount of time for post-trial processing from completion of trial to convening authority action?

III. Is 120 Days Reasonable?

Regardless of the reason that the court established 120 days as the presumption of unreasonable delay in *Moreno*, Army jurisdictions do not consistently meet the standard of 120 days from completion of trial to convening authority action.[88] An examination of each step in the post-trial process and the processing of an average case may help determine whether the 120-day *Moreno* presumption represents a reasonable period of time to accomplish post-trial processing from completion of trial to convening authority action.

A. The Post-Trial Process

As illustrated in Figure 2, the post-trial process from completion of trial to convening authority action has many steps that require action from a minimum of six individuals.[89] Since the courts consider the entire period of time from completion of trial to convening authority action as "completely within the control of the Government,"[90] the courts attribute the time required for each step in the post-trial process to the government as post-trial delay.

---

[87] In 2005, the average number of days from completion of trial to convening authority action in the Army was 130. In 2006, the year of the *Moreno* decision, the average was 148 days. *Id.*

[88] *Id.*

[89] The post-trial process from completion of trial to convening authority action involves the court reporter, trial counsel, defense counsel, military judge, staff judge advocate, and convening authority.

[90] United States v. Moreno, 63 M.J. 129, 136 (C.A.A.F. 2006).

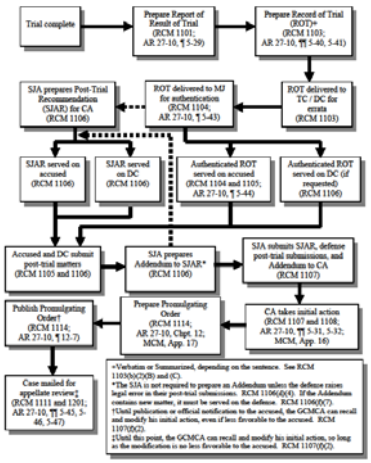


Figure 2. Typical General/Special Court-Martial Post-Trial Processing[91]

The first step in the post-trial process after completion of the trial consists of preparation of the record of trial.[92] Generally considered the most time-consuming part of the post-trial process,[93] preparation of the record of trial requires the court reporter to create a verbatim transcript of the trial[94] and assemble the transcript, exhibits, and other documents into a record of trial.[95]

Court reporters use two methods to produce a transcript of a trial: redictation and manual transcription. During manual transcription, the older model of transcription, the court reporter listens to the audio recordings and then manually types the transcript. During redictation, the court reporter "listens to the audio recordings and repeats it back into

---

[91] CRIM. LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, CRIMINAL LAW DESKBOOK, vol. I, at S-69 (Fall 2011).

[92] This analysis omits some steps, such as Appellate Rights, Report of the Result of Trial, and Deferments/Waivers, because these actions are taken at the same time as the production of the record of trial, and therefore do not add time to the process. For a more complete discussion of all actions during the post-trial process, see Lieutenant Colonel Timothy C. MacDonnell, *Tending the Garden: A Post-Trial Primer for Chiefs of Criminal Law*, ARMY LAW., Oct. 2007, at 1 (For a discussion on the necessity of post-trial processing and a proposal to simpligy the post-trial process, see Captain David E. Grogan, *Stop the Madness! It's Time to Simplify Court-Martial Post-Trial Processing*, 62 NAVAL L. REV. 1 (2013).

[93] *Id.* at 13.

[94] 2008 MCM, *supra* note 76, R.C.M. 1103(b)(2)(B).

[95] *Id.* R.C.M. 1103(b)(2)(D).

a speech recognition engine (software)" and the software "converts the reporter's speech into text."[96] The Army still authorizes manual transcription, but redictation has become the preferred method.[97] Using the redictation method, within six months of graduation from court reporter school, a court reporter can produce five verbatim pages of transcript per hour. As court reporters gain experience in redictation, their production rate increases and they can produce at least ten verbatim pages of transcript per hour. Using the manual transcription method, court reporters can produce seven verbatim pages of transcript per hour.[98]

Upon completion of the verbatim transcript of the trial, the court reporter must assemble the transcript with the exhibits and other allied documents to create the record of trial.[99] Although court reporters spend an average of between three and four hours per week on assembly of records of trial,[100] for post-trial processing purposes, a criminal law office should generally factor approximately one full day for assembly of each record of trial.

After assembly, the court reporter sends the record of trial to trial and defense counsel for review (frequently referred to as "errata") in accordance with Rule for Court-Martial (RCM) 1103(i).[101] Although this rule does not prescribe a time requirement for trial defense counsel to review the record of trial, pursuant to the *Rules of Practice before Army Courts-Martial*, "counsel should be able to review at least 150 pages of double-spaced typing per calendar day."[102]

Once the court reporter receives errata from trial and defense counsel, he must make corrections to the transcript before submitting it to the military judge for authentication. Corrections will usually take

---

[96] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 25-4(a) (3 Oct. 2011) [hereinafter AR 27-10].
[97] *See generally id.* ch. 25.
[98] *Id.* para. 25-5.
[99] 2008 MCM, *supra* note 76, R.C.M. 1103(b)(2)(D).
[100] For this paper, the author conducted a survey of Army court reporters. Major Jennifer L. Venghaus, Court Reporter Survey (2011) [hereinafter Court Reporter Survey] (results on file with author).
[101] 2008 MCM, *supra* note 76, R.C.M. 1103(i).
[102] U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL para. 28.5 (26 Mar. 2012) [hereinafter RULES OF PRACTICE], *available at* http://www.jagcnet.army.mil (follow "Courts" hyperlink; then follow "U.S. Army Trial Judiciary Website" hyperlink; then follow "Rules of Court" hyperlink).

less than one day, but may take several days, depending on the length of the transcript and the number of errors.

Upon correction, the court reporter gives the record of trial to the military judge for review and authentication.[103] A standard for military judge review and authentication does not exist, but military judges "are strongly encouraged to complete authentication within 7 days of receipt of the record of trial" and must inform the Chief Circuit Judge and Chief Trial Judge if they do not complete authentication within twenty-one days of receipt of the record of trial.[104]

After authentication of the record of trial by the military judge, the staff judge advocate must review the record of trial and prepare a post-trial recommendation (frequently referred to as the "staff judge advocate recommendation" or "SJAR").[105] In accordance with RCM 1104 through 1106, the government must serve the post-trial recommendation and authenticated record of trial on the accused and the defense counsel.[106] While the criminal law office may serve the post-trial recommendation and authenticated record of trial on the accused and defense counsel in as quickly as one day, service on the accused in confinement may take up to sixty days due to confinement facility inspection rules.[107]

Upon receipt of the record of trial and staff judge advocate's post-trial recommendation, the accused and defense counsel have ten days to submit clemency matters pursuant to RCM 1105 and comments to the post-trial recommendation pursuant to RCM 1106.[108] As previously mentioned, the rules also provide that the convening authority or staff judge advocate may grant an extension of twenty additional days if the accused and defense counsel demonstrate good cause for needing additional time.[109] Since defense counsel routinely request additional time for clemency matters, criminal law offices should plan for clemency matters to take the full thirty days.[110]

---

[103] 2008 MCM, *supra* note 76, R.C.M. 1104.

[104] U.S. ARMY TRIAL JUDICIARY, STANDING OPERATING PROCEDURES ch. 18(6)(b) (17 Aug. 2010) [hereinafter TRIAL JUDICIARY SOP], *available at* http://www.jagcnet.army.mil (follow "Courts" hyperlink, then "U.S. Army Trial Judiciary Website" hyperlink, then "SOPs and Codes" hyperlink, then "Trial Judiciary SOP").

[105] 2008 MCM, *supra* note 76, R.C.M. 1106.

[106] *Id.* R.C.M. 1104–1106.

[107] *See infra* Part VI.B.

[108] 2008 MCM, *supra* note 76, R.C.M. 1105(c), 1106(f).

[109] *Id.* R.C.M. 1105(c)(1), 1106(f)(5).

[110] *See infra* Part V.B.

Upon receipt of clemency matters, the criminal law office prepares the case for convening authority action.[111] In an ideal situation, the convening authority would take action immediately upon receipt of the clemency matters. However, preparation of the action and the schedule of the convening authority frequently delay convening authority action. In practice, it takes an average of twelve days for convening authority action upon receipt of clemency matters.[112]

B. Post-Trial Processing Timeline for an "Average" Case

Pursuant to *United States v. Moreno*, all of the post-trial steps from completion of trial to convening authority action must occur within 120 days in order to avoid a presumption of unreasonable delay. To accomplish this, a criminal law office must adhere to a very strict schedule. Figure 3 shows an example of how to accomplish post-trial processing through convening authority action within 120 days.

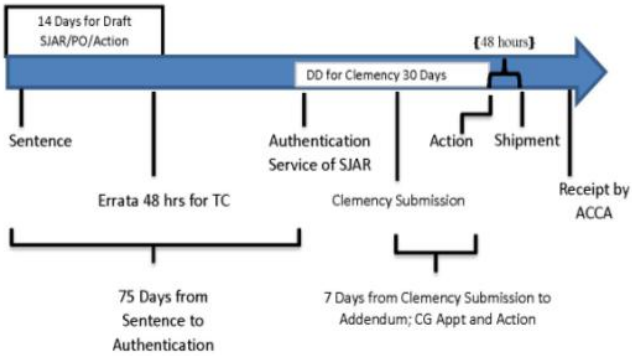


Figure 3. Sample Timeline for Post-Trial Case Processing[113]

---

[111] 2008 MCM, *supra* note 76, R.C.M. 1107.

[112] This data was derived from a review of 150 cases in 2010, as annotated on the post-trial reports of three different jurisdictions (82d Airborne Division, Fort Hood, and Fort Stewart) [hereinafter Post-Trial Reports] (on file with author).

[113] This sample timeline was created by the Criminal Law Division, Office of the Judge Advocate General, as a recommendation for completing post-trial processing within 120 days. The timeline represents merely a recommendation; the processing times in the timeline are not required by regulation or any other source. Telephone Interview with Captain Jacqueline DeGaine, Operations Branch, Criminal Law Div., Office of the Judge Advocate Gen. (Jan. 19, 2012).

Applying this sample timeline to an average case will assist in determining the possibility of completing post-trial processing through convening authority action within 120 days. Since the time required to complete several steps in the post-trial process depends on the length of the transcript, this analysis will use the 2011 Army average transcript length of 204 pages.[114]

A court reporter can transcribe five to ten pages per hour,[115] so it will take a court reporter twenty to forty hours to produce a transcript of average length. Since court reporters spend an average of twelve to sixteen hours per week on transcription,[116] even an inexperienced court reporter should complete the transcript within four weeks after completion of the trial. Assembly of a 204-page record of trial should take no more than one duty day. Given the Army standard for counsel review of 150 pages per day,[117] the trial and defense counsel should complete their review and errata within two duty days. After allowing the court reporter one duty day to make corrections, the military judge would receive the record of trial for review and authentication. Assuming the military judge reviews and authenticates the record of trial within seven days,[118] completion of the post-trial process through authentication of the record of trial would take fewer than forty days.

Depending on the circumstances, the staff judge advocate should sign the post-trial recommendation within two days, and service of the post-trial recommendation and authenticated record of trial on the accused takes approximately seven days. After allowing thirty days for receipt of clemency matters,[119] the convening authority could take action within twelve days.[120] Given this strict timeline, as depicted in Figure 4, post-trial processing for this case from completion of trial to convening authority action would take approximately 90 days.

---

[114] Barzmehri e-mail, *supra* note 15.
[115] AR 27-10, *supra* note 96, para. 25-5.
[116] Court Reporter Survey, *supra* note 100.
[117] RULES OF PRACTICE, *supra* note 102, para. 28.5.
[118] TRIAL JUDICIARY SOP, *supra* note 104, ch. 18(6)(b). *See infra* Part V.A.
[119] *See infra* Part V.B.
[120] *See supra* Part III.A. & note 112.

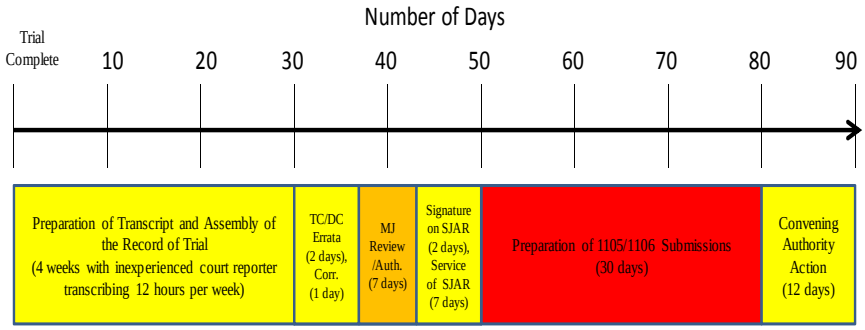


Figure 4. Post-Trial Processing Time for an "Average" Case

Although this analysis demonstrates that 120 days may represent a reasonable time period for post-trial processing of an average 204-page transcript, the analysis fails to consider the reasonableness of post-trial processing for other-than-average cases, such as transcripts of different lengths. For example, a shorter transcript may require fewer than 120 days for reasonable post-trial processing, whereas a longer transcript may require more than 120 days for reasonable post-trial processing.

IV. Reasonable Under the Circumstances

Although appellate courts do not currently consider the circumstances of a case when determining whether the *Moreno* presumption of unreasonable delay has been met, the circumstances of each case have an enormous impact on the time required for post-trial processing. A comparison of post-trial processing statistics with transcript page length—and a look at several case examples—will demonstrate that the circumstances of each case should be considered when determining the reasonableness of post-trial delay.

A. Average Page Count

While difficult to quantify the circumstances of each case for comparison purposes, the length of a transcript generally depicts the circumstances of each case and provides a tool for comparison. For example, a short transcript of fewer than 150 pages generally indicates a relatively simple case, such as a guilty plea, whereas an extremely long transcript would indicate a lengthy, complex, contested court-martial.

Therefore, while the Army average transcript length in 2011 was 204 pages, transcript lengths fluctuate greatly depending on the circumstances of each case.

As demonstrated in Figure 5, over the last few decades, even the average page count per year has fluctuated greatly.

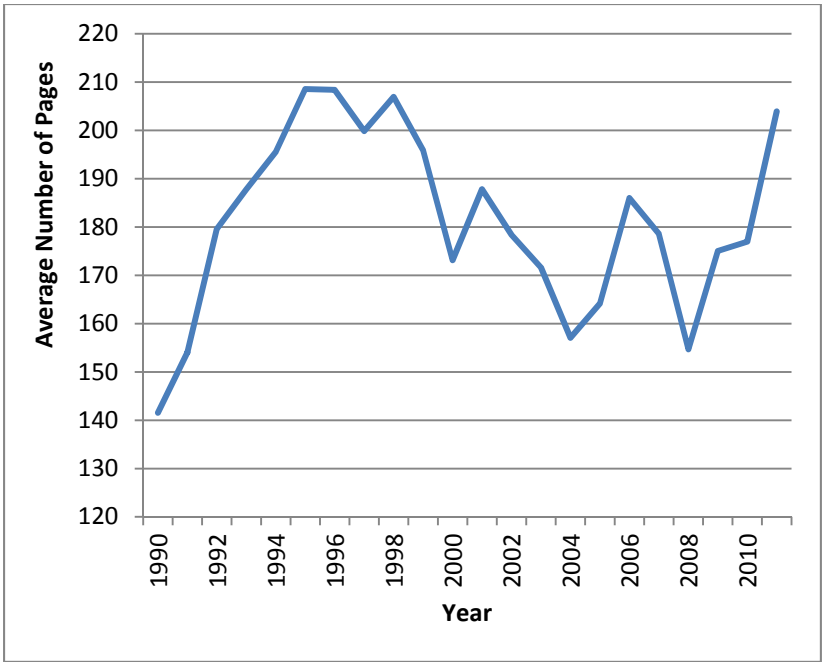


Figure 5. Army Average Page Count Per Year[121]

In 1990, the average page count for an Army transcript was 142 pages. By 1995, the average page count was 209 pages, the highest average between 1990 and 2011. Although the average dipped in 2008 to 155 pages, the average page count for the Army has been steadily increasing since 2008, and by 2011, it had reached 204 pages.[122]

[121] Barzmehri e-mail, *supra* note 15. Data was formatted by the author to create this chart.
[122] *Id.*

Interestingly, as shown in Figure 6, while the average page count per year varies, since 2000 the variance of page count and post-trial processing times form nearly identical trends, thus demonstrating that post-trial delay correlates to page count.

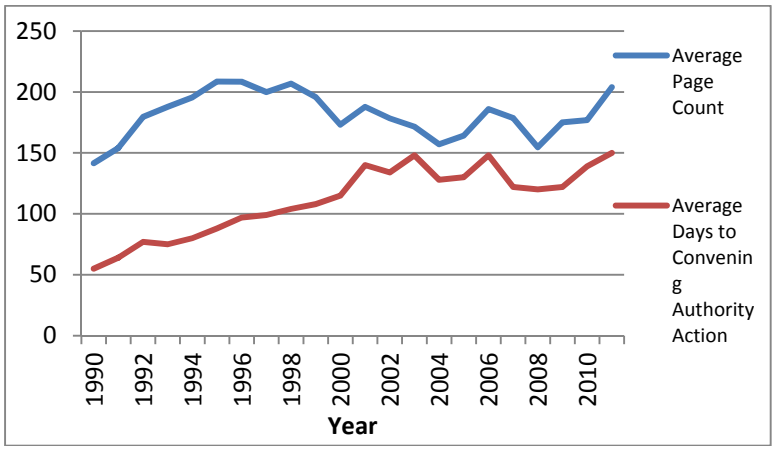


Figure 6. Average Number of Days to Convening Authority Action Compared to Average Page Count Per Year[123]

The 2011 statistics of average page count and average days to convening authority action also show a correlation. As illustrated in Figure 7, while the overall average page count in the Army for 2011 was 204 pages, the average page count for cases in which action was completed within 120 days was only 124 pages.[124] The average page count increases substantially for cases in which action was not completed within 120 days, and the average page count was 419 pages for cases with post-trial processing times of over a year.[125]

---

[123] *Id.* Data was formatted by the author to create this chart.
[124] *Id.*
[125] *Id.*

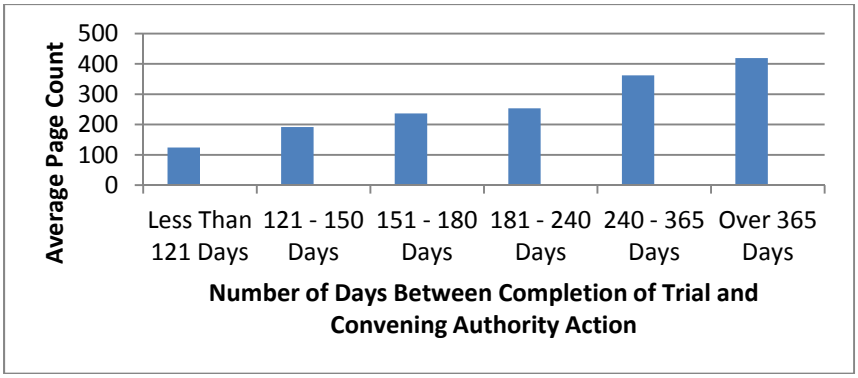


Figure 7. Average Page Count by Post-Trial Processing Time (Army, 2011)[126]

The correlation between page count and number of days of post-trial delay presents a clear indication that the circumstances of a case play a big role in the post-trial processing of a case and therefore should be considered when determining the reasonableness of post-trial delay. The *Moreno* presumption, however, forces appellate courts to ignore the case circumstances and determine the reasonableness of delay based solely on whether the convening authority took action more than 120 days after completion of the trial.[127] While the CAAF carefully notes that "the presumptions serve to trigger the four-part *Barker* analysis—not resolve it," and that "[s]ome cases will present specific circumstances warranting additional time,"[128] post-trial processing in excess of 120 days automatically satisfies the first *Barker* factor without consideration for the circumstances of the case, and it then becomes the burden of the government to demonstrate that the delay was reasonable under the circumstances.[129] Amending the RCM to prescribe time periods for post-trial processing based on the length of the trial would mitigate this problem.

---

[126] *Id.* Data was formatted by the author to create this chart.
[127] United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006).
[128] *Id.*
[129] *See id.*

B. Circumstances of a Case

In his dissent in *United States v. Arriaga*, Judge Stucky articulated the problem with ignoring the circumstances of a case when determining the reasonableness of post-trial delay:

> There is no reason to expect that a fixed period of post-trial delay should trigger heightened review regardless of the length of the trial record or other factors, such as whether the case involves a simple, judge alone plea of guilty to a single specification crime such as wrongful use of cocaine, or for example, a contested case heard by a panel involving premeditated murder, multiple conspiracies and co-accuseds, and the possibility of the death penalty.[130]

For this reason, a look at different case scenarios will demonstrate why ignoring the circumstances of an individual case presents a major flaw in determining the reasoanbleness of post-trial delay.

Case A: A military judge convicted the Accused, pursuant to his plea, of one specification of desertion and sentenced him to eleven months confinement, forfeiture of all pay and allowances, reduction to E-1, and a bad-conduct discharge. The trial took two hours, and the trial transcript was 100 pages.

Case B: A military panel convicted the Accused, contrary to his pleas, of multiple specifications of rape of a child and indecent acts. The panel sentenced him to twenty years confinement, forfeiture of all pay and allowances, reduction to E-1, and a dishonorable discharge. The trial lasted five days, with thirty hours of recorded testimony, and the trial transcript was 1,500 pages.

Case C: A military panel convicted the Accused, contrary to his pleas, of three specifications of premeditated murder and sentenced him to death. The trial took five weeks with over 100 hours of testimony on the record, and the trial transcript was 7,000 pages.

---

[130] United States v. Arriaga, 70 M.J. 51, 61 (C.A.A.F. 2011) (Stucky, J., dissenting).

Pursuant to *United States v. Moreno*,[131] the convening authority must take action in all three of the above cases within 120 days in order to avoid a presumption of unreasonable delay. As depicted in Figure 8, more than 120 days of post-trial processing for a case of average length, such as Case A, may include unreasonable delay. However, post-trial processing of longer cases, such as Cases B and C, could very easily take more than 120 days without any unreasonable government delay due to the circumstances of those cases.

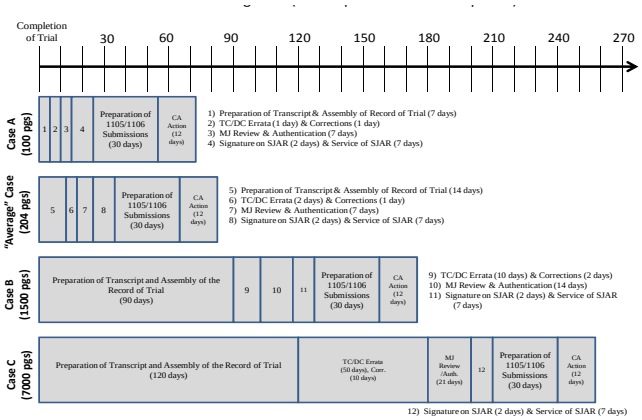


Figure 8. Post-Trial Processing Time for Different Cases (with Experienced Court Reporter)

For Case B, if the court reporter starts transcribing the case immediately upon completion of the trial, it would take an experienced court reporter 150 hours to prepare the transcript.[132] Given that the average court reporter spends twelve to sixteen hours per week on transcription,[133] it would take the court reporter nine to twelve weeks to complete the transcript alone. Adding thirty days for clemency matters would exhaust the 120-day clock, leaving no time for errata, authentication, service of the post-trial recommendation, or action by the convening authority.

For Case C, even with one court reporter who can spend forty hours per week on transcription of only this case, transcription will take over

---

[131] *Moreno*, 63 M.J. at 129.

[132] This number is calculated by dividing 1500 pages by 10 pages per hour, which equals 150 hours. *See* AR 27-10, *supra* note 96, para. 25-5.

[133] Court Reporter Survey, *supra* note 100.

seventeen weeks.[134] Therefore, this case would already fall into the category of "unreasonable delay" before completion of the record of trial.

As demonstrated above, "'there is no talismanic number of years or months [of appellate delay] after which due process is automatically violated.' Whether appellate delay satisfies the first criterion [of the *Barker v. Wingo* analysis] is best determined on a case-by-case basis."[135] The court's use of a presumption of unreasonable delay as a trigger for the four-part *Barker* analysis improperly shifts the emphasis to the first *Barker* factor, length of the delay, rather than balancing all the factors.

To alleviate this problem, the President should amend the RCM to define timely post-trial processing. An amendment to RCM 1103 could set time periods for preparation of the record of trial based on the length of the trial. For example, 30 days could be set as the time period for preparation of a record of trial plus 15 additional days for each day the court-martial was in session. An amendment to RCM 1107 could also prescribe the time periods for action by the convening authority.[136] Prescribing time periods in the RCM for post-trial processing based on the length of the trial would not only give staff judge advocates an achievable standard, but it would also require the appellate courts to consider case circumstances when determining whether the period of post-trial delay was reasonable.

V. Calculating the Length of Post-Trial Delay

In addition to not considering case circumstances when determining the reasonableness of post-trial delay, the current methodology of the appellate courts in calculating post-trial delay also leads to an inaccurate evaluation of post-trial delay. Currently, the calculation of post-trial delay includes the entire period from the completion of trial to the day

---

[134] This number is calculated by dividing 7000 pages by 10 pages per hour, which equals 700 hours for transcription. *See* AR 27-10, *supra* note 96, para. 25-5. Assuming the court reporter could spend 40 hours per week on transcription, the 700 hours of transcription would take 17.5 weeks.

[135] Toohey v. United States, 60 M.J. 100, 103 (C.A.A.F. 2004) (citing Coe v. Thurman, 922 F.2d 528, 531 (9th Cir. 1990)).

[136] *See* Appendix (proposing language to change RCM 1103 and RCM 1107).

the convening authority takes action.[137] Despite the CAAF assertion that "processing in this segment is completely within the control of the Government,"[138] the government does not have control over all delay within this time period. In order to more effectively measure post-trial delay caused by the government, calculations of post-trial delay should not include any delay caused by the military judge, defense counsel, or the accused. An amendment to RCM 1107 could address this concern by prescribing excludable periods of post-trial delay.[139]

A. Military Judge

The military judge's major role in the post-trial process consists of review and authentication of the record of trial.[140] While the review and authentication may only take only a few days in some cases, the amount of time required for authentication of a record of trial can vary. For example, in *United States v. Arriaga*, "[i]t took the military judge twenty-five days to authenticate the record of trial."[141] Delay in review and authentication of a record of trial can be explained by many factors, such as transcript length, complexity of the case, number of military judges, schedule, and location of the military judge.[142]

When more than one military judge presided over different stages of a case (arraignment, motions, or trial), the record of trial requires review and authentication by multiple military judges,[143] which could add to the time required for authentication. In addition, while large installations usually have an assigned military judge, smaller installations may have traveling military judges,[144] thus requiring the office of the staff judge

---

[137] United States v. Arriaga, 70 M.J. 51, 57 (C.A.A.F. 2011) ("To ensure that there are no further misunderstandings, for this period of appellate delay, the clock starts to run the day that the trial is concluded and stops when the convening authority completes his action.").

[138] United States v. Moreno, 63 M.J. 129, 136 (C.A.A.F. 2006).

[139] *See* Appendix (proposing language to amend RCM 1107).

[140] 2008 MCM, *supra* note 76, R.C.M. 1104.

[141] *Arriaga*, 70 M.J. at 56.

[142] *See* MacDonnell, *supra* note 92, at 1, 15–16.

[143] 2008 MCM, *supra* note 76, R.C.M. 1104(a)(1) ("If more than one military judge presided over the proceedings, each military judge shall authenticate the record of the proceedings over which that military judge presided, except as provided in subsection (a)(2)(B) of this rule.").

[144] For example, military judges from Fort Bragg travel to Fort Jackson. *See Fort Bragg Docket*, U.S. ARMY TRIAL JUDICIARY DOCKET (Jan. 5, 2012), http://www.jagcnet.army.

advocate to mail the record of trial to the military judge for authentication.[145]

Regardless of the location of the military judge, the military judge's schedule could impact authentication as well. For example, while conducting a lengthy trial or series of trials, a military judge may not have time to immediately review and authenticate the record of trial. A review of the Fort Bragg docket shows that during a three-week period in January 2012, one military judge had court scheduled every duty day except one, thus limiting his time to review and authenticate records of trial.[146]

For these reasons, the military judge's review and authentication of the record of trial may take several weeks, yet the appellate courts will attribute this time to the government as post-trial delay. However, due to the independence of the military judiciary and their exercise of judicial discretion, any time spent by the military judge to authenticate the record of trial should not count against the government for purposes of post-trial delay.

1. Judicial Independence

Well-rooted in American history,[147] the philosophy of judicial independence also exists in military jurisprudence, and it has been noted that "[a]n independent judiciary is indispensable to our system of justice."[148] Consistent with this philosophy, the military judiciary

---

mil [hereinafter *Fort Bragg Docket*] (follow "Courts", then U.S. Army Trial Judiciary website" hyperlink, then "Army Courts-Martial Internet Docket (ACMID)" hyperlink, then "Enter Docket" hyperlink, then "2nd Judicial Circuit" hyperlink, then "Fort Bragg" hyperlink) (copy on file with author).

[145] Although military judges are authorized to authenticate an electronic version of a record of trial, electronic authentication has not yet become the widely accepted practice of trial judges in the Army. For this reason, many staff judge advocate offices are still required to mail records of trial to non-local military judges. *See* RULES OF PRACTICE, *supra* note 102, para. 28.7; TRIAL JUDICIARY SOP, *supra* note 104, ch. 18(5).

[146] *Fort Bragg Docket*, *supra* note 144.

[147] THE FEDERALIST NO. 78 (Alexander Hamilton).

[148] U.S. ARMY JUDICIARY, CODE OF JUDICIAL CONDUCT FOR TRIAL AND APPELLATE JUDGES (16 May 2008) [hereinafter CODE OF JUDICIAL CONDUCT], *available at* http://www.jagcnet.army.mil (follow "Courts" hyperlink, then "U.S. Army Trial Judiciary Website" hyperlink, then "SOPs and Codes" hyperlink, then "Code of Judicial Conduct").

exercises authority completely independent of convening authorities,[149] and the UCMJ prohibits convening authorities from influencing military judges in any manner.[150]

The Army currently has 23 active duty military judges and 24 Army Reserve military judges.[151] Assigned to the U.S. Army Judiciary, an element of the U.S. Army Legal Services Agency,[152] The Judge Advocate General organizes military judges into judicial circuits, and each judicial circuit includes all of the general court-martial jurisdictions within a designated geographic area.[153] A Chief Circuit Judge supervises all of the military judges within a circuit, and the Chief Trial Judge oversees all of the Army judicial circuits.[154] Although technically part of the "government," since the Chief Circuit Judge and the Chief Trial Judge supervise each military judge, the staff judge advocate and convening authority have no role in regulating any delay caused by the military judge in his review and authentication of the record of trial.

2. Judicial Discretion

Although independent of the convening authorities, it is expected that military judges will use judicial discretion in their review and authentication of the record of trial to ensure the accuracy of the record

---

[149] *See* UCMJ art. 26(c) (2008) ("A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member . . . ."). *See also* Weiss v. United States, 510 U.S. 163 (1994); CODE OF JUDICIAL CONDUCT, *supra* note 148; Major Fansu Ku, *From Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century*, 199 MIL. L. REV. 49 (2009). *But see* Frederic I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629 (1994).

[150] UCMJ art. 37 (2008).

[151] *U.S. Army Trial Judiciary*, JAGCNet, http://www.jagcnet.army.mil (follow "Courts" hyperlink, then "U.S. Army Trial Judiciary Website" hyperlink) (last visited Nov. 27, 2013) [hereinafter *U.S. Army Trial Judiciary*].

[152] AR 27-10, *supra* note 96, para. 7-1.

[153] *Id.* para. 7-3. There are currently five judicial circuits in the Army: 1st Judicial Circuit (Northeastern and Middle Atlantic States), 2d Judicial Circuit (Southeastern States), 3d Judicial Circuit (Southwestern and Midwestern States), 4th Judicial Circuit (Western States (JAGCNet calls this "Far West" and Far East), and 5th Judicial Circuit (Europe and Southwest Asia). *U.S. Army Trial Judiciary*, *supra* note 151.

[154] AR 27-10, *supra* note 96, para. 7-5.

of trial while also affording speedy post-trial processing to the accused in accordance with his rights. Judicial discretion is "[t]he exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law."[155] Appellate courts generally afford trial judges judicial discretion in trial decisions and only set aside judicial discretion "when the judicial action is arbitrary, fanciful or unreasonable."[156] To some extent, the American system of criminal jurisprudence relies on the judicial discretion of trial judges to ensure the fairness of trials. For example, an accused has a right to a speedy trial, and therefore, pursuant to RCM 707, an accused must "be brought to trial within 120 days" after preferral of charges or imposition of restraint.[157] For purposes of RCM 707, an accused is "brought to trial" at arraignment.[158] Arraignment stops the speedy trial clock because "[a]fter arraignment, the power of the military judge to process the case increases, and the power of the convening authority to affect the case decreases."[159] With respect to pre-trial processing, appellate courts presume that the military judge will use his discretion to ensure that the accused receives a speedy trial in accordance with his rights.

While the concept of judicial discretion prevails in the pre-trial and trial stages of criminal law, the appellate courts give trial judges very little, if any, discretion in their processing of a case post-trial. Although the CAAF has specifically granted appellate judges more flexibility with respect to post-trial delay due to the "exercise of the court of Criminal Appeals' judicial decision-making authority,"[160] the court has failed to extend the same flexibility and judicial decision-making authority to the trial judiciary for purposes of post-trial delay. For this reason, trial judges must limit their review and authentication of a record of trial and have little flexibility to determine when they need more time for additional review.

Despite the disparity created by the CAAF, all judges must perform their duties "impartially, competently, and diligently."[161] Therefore, one would expect that when reviewing and authenticating a record of trial,

---

[155] BLACK'S LAW DICTIONARY 479 (7th ed. 1999).
[156] Delno v. Market St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942).
[157] 2008 MCM, *supra* note 76, R.C.M. 707(a).
[158] *Id.* R.C.M. 707(b)(1).
[159] United States v. Doty, 51 M.J. 464 (C.A.A.F. 1999).
[160] United States v. Moreno, 63 M.J. 129, 137 (C.A.A.F. 2006).
[161] CODE OF JUDICIAL CONDUCT, *supra* note 148, canon 2.

trial judges will conduct their duties in accordance with the accused's rights, and without unnecessary delay.[162] Since the same professional rules of judicial conduct[163] apply to trial judges as well as appellate judges, trial judges should receive the same degree of flexibility in post-trial processing as judges at the appellate level. Accordingly, military trial judges should have the discretion to balance the accused's right to timely post-trial processing against the need for a thorough review of a record of trial in order to ensure that it fairly and accurately portrays the trial proceeding. If given more discretion, a trial judge may find that some cases require additional review, while they may conduct a quicker review in other cases.

Regardless of the time required, military judges should have the discretion to decide the amount of time required for their review and authentication, and the time used by the military judge for review and authentication should not count as post-trial delay against the government.

B. Defense Counsel

From the date of service of the authenticated record of trial or staff judge advocate's post-trial recommendation on the accused, in accordance with RCM 1105, until receipt of clemency submissions by the staff judge advocate, the timeliness of post-trial processing resides solely within the control of the defense counsel and the accused. Although completely within the control of the defense counsel and the accused, the appellate courts still attribute this time to the government as post-trial delay.

Current rules allow the accused to submit clemency matters "within the later of 10 days after a copy of the authenticated record of trial or, if applicable, the recommendation of the staff judge advocate or legal officer, or an addendum to the recommendation containing new matter is served on the accused."[164] The rules also state that if the accused requests additional time to submit clemency matters, "the convening authority or that authority's staff judge advocate may, for good cause,

---

[162] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK para.1-1 (1 Jan. 2010).
[163] CODE OF JUDICIAL CONDUCT, *supra* note 148.
[164] 2008 MCM, *supra* note 76, R.C.M. 1105(c)(1).

extend the 10-day period for not more than 20 additional days; however, only the convening authority may deny a request for such an extension."[165] Due to the restriction on denying an extension request and the fear that denial of an extension request will result in the appellate courts returning the case for new action,[166] most staff judge advocates liberally grant extensions for clemency matter submissions.[167]

Therefore, based on the current rules and the liberal grant of extensions, an accused and his defense counsel generally have little incentive to submit matters in fewer than 30 days. In fact, a review of 150 cases completed in 2010 revealed that defense counsel submitted clemency matters in ten days or less in only 28 of the 150 cases.[168]

Defense counsel also have little incentive to submit matters in accordance with the established time limits due to lack of consequences for late clemency submissions. Despite the 30-day time limit for clemency matters, of 150 cases reviewed from 2010, the average number of days for submission of clemency matters was 35 days.[169] In some cases, the delay in submission of clemency matters totaled as much as 149 days.[170]

Although RCM 1105(d)(1) states that "[f]ailure to submit matters within the time prescribed by this rule shall be deemed a waiver of the right to submit such matters,"[171] appellate courts have shown reluctance to deny the accused his right to submit clemency matters, regardless of timeliness.[172] While the appellate courts recognize the "dilemma" of

---

[165] *Id.*

[166] *See* United States v. Beckelic, No. 27973, 1990 WL 8393 (A.F.C.M.R. Jan. 5, 1990); United States v. Hairston, No. 29365, 1993 WL 52408 (A.F.C.M.R. Feb. 3, 1993).

[167] *See* United States v. Lane, No. S29537, 1999 WL 167124 (A.F. Ct. Crim. App. Jan. 14, 1999) ("We are aware that routine practice in the Air Force has been quite liberal in granting extensions . . . .").

[168] Post-Trial Reports, *supra* note 112.

[169] *Id.*

[170] *Id.*

[171] 2008 MCM, *supra* note 76, R.C.M. 1105(d)(1). *See also* United States v. Angelo, 25 M.J. 834 (A.C.M.R. 1988); United States v. Maners, 37 M.J. 966 (A.C.M.R. 1993).

[172] United States v. Smith, No. 9801026, 2000 WL 35801879 (A. Ct. Crim. App. Jan. 27, 2000); United States v. Luquette, No. 20050745, 2007 WL 7264310 (A. Ct. Crim. App. Nov. 30, 2007); United States v. Palmer, No. 20050769, 2007 WL 7263006 (A. Ct. Crim. App. Aug. 7, 2007); United States v. Farfan, No. 20070467, 2008 WL 8086423 (A. Ct. Crim. App. May 21, 2008).

untimely submissions for staff judge advocates ,[173] they routinely set aside convening authority actions and return cases for new action when the convening authority takes action prior to receipt of clemency matters, even when the time limit for submission of clemency matters expired.[174] For this reason, staff judge advocates frequently delay convening authority action until receipt of clemency matters, even if it results in a long period of delay. For example, in a review of 150 cases completed in 2010, 32 of the 150 cases had delays of over 50 days between service of the staff judge advocate's post-trial recommendation and submission of clemency matters, and 6 of those 32 had a delay of over 100 days.[175]

Although the accused and his defense counsel control the timeliness of clemency matters, the appellate courts attribute the time that the government waits for submission of clemency matters to the government for purposes of post-trial delay. In order for calculations of post-trial delay to more accurately reflect the delay caused by the government, the period of delay from service of the staff judge advocate's post-trial recommendation on the accused to submission of clemency matters should not count as post-trial delay attributed to the government.

However, while excluding delay caused by the military judge, accused, and defense counsel results in a more accurate calculation of post-trial delay actually caused by the government, administrative constraints will continue to hinder the government from reducing post-trial processing delay.

---

[173] United States v. Pereznieves, No. 20070653, 2008 WL 8086428 (A. Ct. Crim. App. Aug. 14, 2008); United States v. Grier, No. 20070943, 2009 WL 6835713 (A. Ct. Crim. App. Feb. 27, 2009).

[174] *See, e.g.*, United States v. Sosbee, 35 M.J. 892 (A.C.M.R. 1992); United States v. Smith, No. 9801026, 2000 WL 35801879 (A. Ct. Crim. App. Jan. 27, 2000); United States v. Luquette, No. 20050745, 2007 WL 7264310 (A. Ct. Crim. App. Nov. 30, 2007); United States v. Palmer, No. 20050769, 2007 WL 7263006 (A. Ct. Crim. App. Aug. 7, 2007); United States v. Pereznieves, No. 20070653, 2008 WL 8086428 (A. Ct. Crim. App. Aug. 14, 2008); United States v. Farfan, No. 20070467, 2008 WL 8086423 (A. Ct. Crim. App. May 21, 2008); United States v. Grier, No. 20070943, 2009 WL 6835713 (A. Ct. Crim. App. Feb. 27, 2009); United States v. Mercado, No. 20080912, 2009 WL 6827251 (A. Ct. Crim. App. Sept. 30, 2009); United States v. Beckner, No. 20080605, 2010 WL 3952904 (A. Ct. Crim. App. May 7, 2010).

[175] Post-Trial Reports, *supra* note 112.

VI. Administrative Constraints

The CAAF has clearly articulated that "personnel and administrative issues . . . are not legitimate reasons justifying otherwise unreasonable post-trial delay."[176] The court explained further that "[t]o allow caseloads to become a factor in determining whether appellate delay is excessive would allow administrative factors to trump the Article 66 and due process rights of appellants."[177] Despite the fact that administrative issues do not serve as legitimate excuses for post-trial delay, administrative issues, such as court reporter manpower and service of documents on the accused while in confinement, have a large impact on post-trial processing in the Army. Minimizing the effect of these administrative issues would significantly improve post-trial processing time in the Army.[178]

A. Court Reporter Manpower

Court reporters play the largest role in preparation of the record of trial, yet comprise less than three percent of personnel in the U.S. Army Judge Advocate General's Corps.[179] Enlisted soldiers with a military occupational specialty of 27D become Army court reporters and earn the additional skill identifier of C5 by going through additional training at

---

[176] United States v. Arriaga, 70 M.J. 51, 57 (C.A.A.F. 2011).

[177] United States v. Moreno, 63 M.J. 129, 137 (C.A.A.F. 2006).

[178] It should be noted that while post-trial processing times have been increasing, statistics show that the overall number of cases tried per year is substantially lower than it was prior to 1994. In 1990, the Army reported 2065 records of trial received by the Army Court of Criminal Appeals. By 1994, the number had decreased to 978. Between 1995 and 2010, the number of records fluctuated between 822 and 1283, and the number hit a record low in 2011 with only 763 records received by the Army Court of Criminal Appeals. Barzmehri e-mail, *supra* note 15. The CAAF has noticed this trend as well: "This increase in processing time stands in contrast to the lower number of cases tried in the military justice system in recent years." *Moreno*, 63 M.J. at 142. However, it is not clear to the author as to why post-trial processing time has been increasing while the number of trials per year has been decreasing.

[179] The active duty component of the U.S. Army Judge Advocate General's Corps consists of approximately 1,900 judge advocates, 100 warrant officers, and 1,600 enlisted personnel. The U.S. Army Judge Advocate General's Corps also includes over 500 civilian attorneys and approximately 600 civilian paraprofessionals. E-mail from Lieutenant Colonel Joseph B. Berger, Plans Officer, Personnel Plans and Training Office, to author (Nov. 25, 2013, 1:34 PM EST). Of those 3,600 personnel, the Army is only authorized 95 military court reporters. E-mail from Thomas Chilton, Combat Devs. Directorate, The Army Judge Advocate Gen.'s Legal Ctr., to author (Nov. 25, 2013, 9:09 AM EST) [hereinafter Chilton e-mail] (on file with author).

The Army Judge Advocate General's Legal Center and School.[180] Although the Army is authorized 95 military court reporters, there are currently only 68 military court reporters on active duty.[181] Additionally, 28 Department of the Army civilian court reporters work in Army commands.[182] Most GCMCAs have between one and three court reporters, although several small jurisdictions rely on another jurisdiction for court reporter support, and a few large jurisdictions have more than three court reporters.[183]

Based on court reporter performance standards,[184] it may seem reasonable for a court reporter to complete transcription and assembly of the record of trial within a few weeks or even days. However, court reporters have many other duties besides transcription. As depicted in Figure 9, on average, a court reporter only spends 30 percent of his time (twelve to sixteen hours per week) on transcription.[185] A court reporter spends the remainder of his time assembling records of trial, managing errata, preparing for court, working with counsel and military judges, working in court, and performing other non-court reporter tasks, such as Soldier training.[186] On average, a court reporter spends between 8 and 10 hours per week in court and spends between 8 and 11 hours per week preparing for court and working with counsel and military judges on cases.[187]

---

[180] AR 27-10, *supra* note 96, para. 25-2(d).
[181] E-mail from Master Sergeant Arlene A. Chatman, Office of the Judge Advocate General Liaison to Human Resources Command, to author (Nov. 25, 2013, 1:49 PM EST) (on file with author).
[182] E-mail from Thomas Chilton, Combat Devs. Directorate, The Army Judge Advocate Gen.'s Legal Ctr., to author (Dec. 1, 2011, 4:18 PM EST) (on file with author).
[183] Court Reporter Survey, *supra* note 100; Chilton e-mail, *supra* note 179.
[184] AR 27-10, *supra* note 96, para. 25-5.
[185] Court Reporter Survey, *supra* note 100.
[186] *Id.*
[187] *Id.*

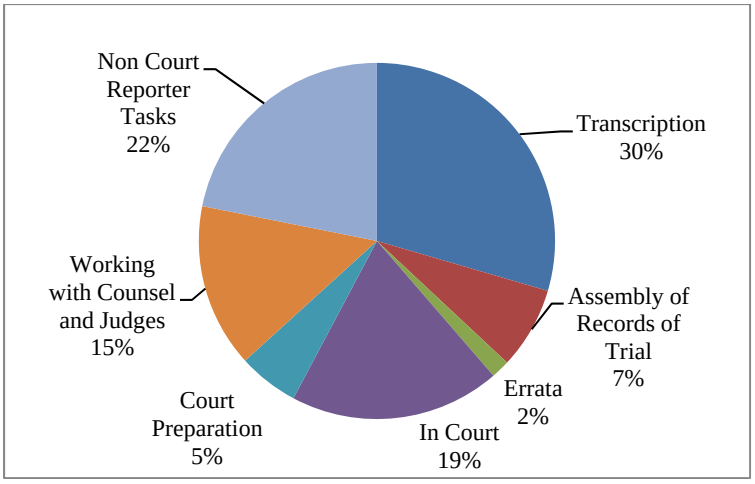


Figure 9. Percentage of Time Court Reporters Spend on Various Tasks[188]

Since all cases within a jurisdiction fall within the responsibility of the court reporter assigned to that jurisdiction, other cases within the jurisdiction may delay the transcription of a particular case. In large jurisdictions, several trials may occur consecutively or simultaneously in different courtrooms, leaving no time for the court reporters to transcribe one case before sitting in court for another case. For example, Fort Hood has four military judges and two courtrooms. On some days, the jurisdiction has three trials scheduled in one day.[189]

Given the other responsibilities of court reporters and the number of cases tried in some large jurisdictions, many jurisdictions have become so back-logged that court reporters can rarely start transcribing a case immediately upon completion of the trial. In a recent survey of court reporters, one court reporter described the difficulty faced by large jurisdictions to keep up with transcription:

> It's hard to keep the backlog clear when you've got court reporters in court at least two days a week, participating

---

[188] *Id.*

[189] *Fort Hood Docket*, U.S. ARMY TRIAL JUDICIARY DOCKET (Jan. 9, 2012), http://www.jagcnet.army.mil (follow "U.S. Army Trial Judiciary" hyperlink, then "Army Courts-Martial Internet Docket (ACMID)" hyperlink, then "Enter Docket" hyperlink, then "3rd Judicial Circuit" hyperlink, then "Fort Hood" hyperlink) (copy on file with author).

> in "Sergeant's Time Training" on Thursdays, and performing normal soldier duties; when you turn in two or maybe three records of trial a week after authentication but have five new cases in the file for transcription, and have received five more packets awaiting docketing. . . . This isn't a marathon. This isn't a sprint. We're not even able to run as fast as we can and stay in one piece, even with help from other jurisdictions. . . .[190]

Every day that a case sits after completion of trial without a court reporter available to start preparing the transcript adds to the time attributed to the government as post-trial delay. Until jurisdictions reduce current backlogs and keep up with transcription of new cases, court reporters will continue to struggle with timely transcription and assembly of records of trial.

1. Court Reporter Manpower Per Jurisdiction

Court reporters serve a unique role in a criminal law office, and no other personnel can perform their duties. Unlike attorneys or paralegals, where the staff judge advocate can move personnel from one section to another to meet the demands of that section, staff judge advocates must manage the demand for court reporting with the number of court reporters authorized for the jurisdiction.

Currently, the type of unit or installation determines the number of court reporters authorized. For example, pursuant to current modified tables of organization and equipment (MTOE), the Army authorizes three military court reporters for each combat division.[191] While this model provides court reporter authorizations based on the proportionate size of the unit, not all units of the same size have the same number of courts-martial per year. Even in units of approximately the same size, the number of courts-martial per year can vary greatly depending on the location of the unit, size of the installation, location of subordinate units, and deployment cycle of the unit. In 2011, for example, the number of

---

[190] Court Reporter Survey, *supra* note 100.
[191] Chilton e-mail, *supra* note 179.

courts-martial per year in combat divisions ranged from 19 to 55.[192] For this reason, the Department of the Army must re-assess court reporter manpower to ensure that each jurisdiction has enough court reporters to handle the caseload of the jurisdiction.

2. Assistance from Other Jurisdictions

Even if the Army increases court reporter manpower in the busiest jurisdictions, some jurisdictions will still need more court reporter manpower than authorized at certain times due to the ebb and flow of trial scheduling. Currently, some jurisdictions resolve this problem by seeking assistance from court reporters in other jurisdictions when they experience a higher case-load than usual. In a recent survey of court reporters and chiefs of military justice, half responded that they occasionally seek assistance from court reporters in other jurisdictions.[193] Most jurisdictions only seek assistance once or twice a year, but some jurisdictions seek assistance more than once per month.[194]

Although "[s]taff judge advocates are highly encouraged to . . . [w]here feasible, and to the maximum extent practicable, allow their court reporters to assist other jurisdictions in transcribing backlogged cases,"[195] a system does not exist for requesting assistance from other jurisdictions. While the court reporter training program at The Judge Advocate General's Legal Center and School provides some transcription assistance and assists jurisdictions in finding available court reporters, most jurisdictions resort to seeking assistance from other court reporters they know.[196] In order to more effectively utilize court reporters in slower jurisdictions to assist busier jurisdictions, the Judge

---

[192] The 10th Mountain Division and Fort Drum had 19 general courts-martial and 36 special courts-martial (for a total of 55). The 1st Cavalry Division had seventeen general courts-martial and two special courts-martial (for a total of nineteen). Barzmehri e-mail 2, *supra* note 19.

[193] Court Reporter Survey, *supra* note 100; Major Jennifer L. Venghaus, Chiefs of Justice Survey (2011) [hereinafter Chiefs of Justice survey] (results on file with author).

[194] Of 22 Chief of Justice survey respondents, 8 seek court reporter assistance once or twice per year, 2 seek court reporter assistance more than once per month, and 1 seeks court reporter assistance in every trial. *Id.* Of 36 court reporter survey respondents, 13 seek court reporter assistance once or twice per year, 1 seeks court reporter assistance once per month, and 4 seek court reporter assistance more than once per month. Court Reporter Survey, *supra* note 100.

[195] AR 27-10, *supra* note 96, para. 25-7(b)(3).

[196] Court Reporter Survey, *supra* note 100.

Advocate General's Corps should develop a system to centrally manage requests for transcription assistance and identify available court reporters to provide that assistance.

Resolving the dearth of court reporter manpower and creating a system to centrally manage requests for transcription assistance will only alleviate one of the two major administrative constraints on post-trial processing. Service of documents on an accused in post-trial confinement presents another administrative issue that has an effect on post-trial delay.

B. Service on the Accused While in Confinement

Upon authentication of the record of trial, the government must serve a copy of the authenticated record of trial on the accused.[197] In addition, before the convening authority takes action, the staff judge advocate must serve a copy of his post-trial recommendation on the accused and defense counsel.[198] While the staff judge advocate generally signs the post-trial recommendation within a few days after authentication of the record of trial, service of the post-trial recommendation and record of trial frequently takes longer. If the sentence of the accused does not include confinement or if the accused has already completed his sentence, service of the post-trial recommendation and record of trial may take only a few days. However, while in post-trial confinement, the staff judge advocate must mail the documents to the accused, and the time period for the accused to submit clemency matters does not begin until the accused actually receives the documents.[199]

The act of mailing the documents does not add very much time to post-trial processing. However, once the documents arrive at the confinement facility, Army Regulation 190-47 and local confinement rules require confinement facility personnel to review all mail or correspondence addressed to a prisoner before giving it to the inmate.[200] Although the confinement facility may complete its review in as quickly as a few days, most cases have a delay of at least two weeks, and the

---

[197] 2008 MCM, *supra* note 76, R.C.M. 1104(b)(1).
[198] *Id.* R.C.M. 1106(f).
[199] *Id.* R.C.M. 1105(c).
[200] *See generally* U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 10-10 (15 June 2006) [hereinafter AR 190-47].

review of some cases can take several months depending on the length of the record of trial.[201]

Privileged mail[202] provides the only exception to the inspection rule. Army Regulation 190-47 defines "privileged mail" as "all mail between a prisoner and the President, Vice President, Members of Congress, Attorney General, TJAG (or their representatives), State and Federal Courts, defense counsel, or any military or civilian attorney of record."[203] Privileged mail also includes "correspondence addressed to, or received from, the appropriate appellate agency of TJAG or the department concerned."[204] Privileged mail does not require inspection before delivery to the prisoner unless "there is a reasonable basis for confinement facility personnel to believe that the mail contains contraband or when there is reason to doubt its authenticity."[205]

Although Army Regulation 190-47 creates an exception for "privileged mail,"[206] an exception does not exist for mail from the office of the staff judge advocate to the accused. Therefore, confinement facility personnel must review the mailed copy of the record of trial and staff judge advocate's post-trial recommendation before delivering it to the accused. Simply revising Army Regulation 190-47, paragraph 10-10(b)(10) to broaden the definition of "TJAG" to include the office of the staff judge advocate for purposes of "privileged mail" would resolve this problem and eliminate the period of post-trial delay caused by the confinement facility.

Although the Army currently struggles with administrative constraints on post-trial processing, correcting the problems with court reporter manpower and service of documents on the accused while in confinement would significantly reduce post-trial delay in the Army.

---

[201] Post-Trial Reports, *supra* note 112.
[202] Use of the term "privileged" in the paragraphs that follow does not refer to the legal concept of privileged communications, but to "privileged mail" as defined by Army Regulation 190-47.
[203] AR 190-47, *supra* note 200, para. 10-10(b)(10)(a).
[204] *Id.* para. 10-10(b)(10)(b).
[205] *Id.* para. 10-10(b)(10)(a).
[206] *Id.* para. 10-10(b)(10).

VII. Conclusion

"Due process entitles convicted servicemembers to a timely review and appeal of court-martial convictions."[207] Although the UCMJ and the Manual for Courts-Martial do not define "timely" for purposes of post-trial processing, by creating a presumption of unreasonable delay, the appellate courts have defined "timely" as 120 days.

While the presumption of unreasonable delay created by *United States v. Moreno* effectively reduced post-trial delay for several years, it does not serve as an effective long-term deterrent for post-trial delay because it fails to consider that the circumstances of each case have an effect on the reasonableness of post-trial delay. Although it is possible to complete post-trial processing from completion of trial to convening authority action within 120 days in some cases, specific case circumstances may make more than 120 days of post-trial delay reasonable in other more complex or lengthy cases. Therefore, in order to compel the appellate courts to consider the effects of case circumstances on post-trial delay, the President should amend the RCM to prescribe time periods for post-trial processing based on the length of trial. Prescribed time periods for post-trial processing would require the appellate courts to consider case circumstances in determining the reasonableness of post-trial delay before triggering further analysis using the four *Barker v. Wingo* factors.

In addition to prescribing time periods for post-trial processing based on the circumstances of the case, in determining the reasonableness of the period of delay, courts must look carefully at the period of delay and consider only those periods of delay under the government's control. Accordingly, the courts should exclude periods of delay caused by the military judge, defense counsel, and the accused in any analysis of post-trial delay because the convening authority and staff judge advocate have little or no control over that delay.

By considering the circumstances of each case and excluding periods of delay beyond the control of the government, the appellate courts would create a more realistic and accurate approach to post-trial delay. As a result, convening authorities and staff judge advocates could shift

---

[207] United States v. Moreno, 63 M.J. 129, 132 (C.A.A.F. 2006) (citing Toohey v. United States, 60 M.J. 100, 101 (C.A.A.F. 2004)).

their focus to improving their post-trial processing systems in order to further reduce any periods of unnecessary post-trial delay.

While changing the evaluation of post-trial delay by the appellate courts would lead to a more accurate analysis of post-trial delay, the Army will continue to struggle with post-trial delay until the effects of administrative constraints are reduced. Specifically, the Army must evaluate court reporter manpower in order to ensure each jurisdiction has enough court reporters to meet the normal demands for transcription and other court reporter responsibilities in that jurisdiction. In order to reduce transcription backlog and assist jurisdictions in times of increased demand for transcription, the Army should develop a system to ensure the equitable distribution of requests for court reporter assistance to court reporters throughout the Army. Lastly, a revision of confinement facility regulations would eliminate unnecessary delay in the service of documents on the accused while in confinement.

United States v. Foster represents an extreme example of post-trial processing delay, but it has resulted in scrutiny of post-trial processing by Congress and the media that will not subside until servicemembers receive timely post-trial processing. While the scrutiny is currently focused on the Department of the Navy, the Army should take this opportunity to make changes to post-trial processing, and the appellate courts should change how they analyze due process challenges based on timeliness of post-trial delay. The suggested changes in this article would not only create a more accurate and realistic analysis of post-trial delay in the appellate courts but would ultimately decrease post-trial processing in the Army and better serve the interests of justice.

Appendix

The following is proposed language to be added to R.C.M. 1103:

(k) ***Time Periods.***

(1) The time period for preparation of the record of trial shall be calculated as follows: 30 days plus 15 additional days for each day the court-martial was in session.

(2) The time period for preparation of the record of trial shall begin on the day following final adjournment of the court-martial and end on the day the record of trial is received by the military judge for authentication in accordance with R.C.M. 1104.

The following is a proposed revision to R.C.M. 1107(b)(2) (new language is bold):

(2) ~~*When action may be taken*~~***Time periods.***

(A) ***When action may be taken.*** The convening authority may take action only after the applicable time periods under R.C.M. 1105(c) have expired or the accused has waived the right to present matters under R.C.M. 1105(d), ~~whichever is earlier,~~ subject to regulations of the Secretary concerned.

(B) ***When action shall be taken.*** **Action shall be taken by the convening authority within 30 days of the date of authentication of the record of trial pursuant to R.C.M. 1104.**

(C) ***Excludable delay.*** **The following time periods shall be excluded when determining whether the period in subsection (B) of this rule has run:**

(i) All periods of time during which appellate courts have issued stays in the proceedings,

(ii) When a post-trial session is ordered pursuant to R.C.M. 1102, the period of time between the day the post-trial session is ordered and the day the post-trial session concludes,

(iii) All periods of time when the accused is absent without authority,

(iv) The entire period of time from the date a copy of the authenticated record of trial or the recommendation of the staff judge advocate or legal officer is served on the accused to the date matters are submitted by the accused pursuant to R.C.M. 1105,

(v) The entire period of time from the date an addendum to the recommendation containing new matter is served

on the accused to the date matters are submitted by the accused pursuant to R.C.M. 1105,

(vi) Any period of time in which the convening authority delays action at the request of the accused.

The following is a proposed revision to Army Regulation 190-47, paragraph 10-10(b)(10)(a) (new language is bold):

(10) Privileged correspondence is defined as follows:
(a) Privileged mail is defined as all mail between a prisoner and the President, Vice President, Members of Congress, Attorney General, TJAG (or their representatives**, to include offices of the staff judge advocate**), State and Federal Courts, defense counsel, or any military or civilian attorney of record. Correspondence with any attorney, for the purpose of establishing an attorney-client relationship, or for any purpose once an attorney-client relationship is formed, and all correspondence with the inspector general or members of the clergy, will be regarded as privileged. Privileged mail may be opened by a certified mail handler when there is a reasonable basis for confinement facility personnel to believe that the mail contains contraband or when there is reason to doubt its authenticity. Privileged mail must be opened in the presence of the prisoner and the correspondence may not be read by anyone other than the prisoner without the prisoner's permission.

WE'VE TALKED THE TALK, TIME TO WALK THE WALK: MEETING INTERNATIONAL HUMAN RIGHTS LAW STANDARDS FOR U.S. MILITARY INVESTIGATIONS

MAJOR COLIN CUSACK*

I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times.[1]

I. Introduction

Syria, 2014: After more than two years of watching the Assad regime commit horrendous human rights abuses against his people, the North Atlantic Treaty Organization (NATO) decides it has to act. Despite lacking United Nations (UN) Security Council authorization, NATO, along with a small coalition of supporting Arab League countries, enters Syria in January 2014, with the mission of stopping the violence against the Syrian people and apprehending President Bashar al-Assad. NATO expects the mission to be completed within a six-month timeframe. Although al-Assad is killed in an airstrike, the violence continues unabated. As a result, NATO commits more troops to ensure Syria's eventual stabilization.

---

* Judge Advocate, U.S. Army. Presently assigned as Administrative Law Attorney, Administrative Law Division, Office of The Judge Advocate General, Washington, D.C. LL.M., 2012, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2003, Ave Maria School of Law; B.A., 1999, University of Dayton. Previous assignments include Chief of Administrative and Civil Law, Fort Leonard Wood, Missouri, 2010–2011; Command Judge Advocate, Joint Task Force–Bravo, Soto Cano Airbase, Honduras, 2009–2010; Trial Counsel and Special Assistant United States. Attorney, Fort Sam Houston, San Antonio, Texas, 2007–2009; Trial Defense Attorney, Fort Meade, Maryland, 2006–2007; Administrative Law Attorney, 1st Cavalry Division, Fort Hood, Texas, 2005–2006; Chief of Legal Assistance and Detention Operations Attorney, 1st Cavalry Division, Baghdad, Iraq, 2004–2005. Member of the bars of Ohio and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 60th Judge Advocate Officer Graduate Course. I would like to thank my wife, Beth, for her support during the writing of this article, as well as Major Andrew Gillman for his assistance and thoughtful comments on earlier drafts.

[1] THOMAS JEFFERSON, 10 THE WRITINGS OF THOMAS JEFFERSON 42–43 (Paul L. Ford ed., 10th ed. 1899).

During a combined patrol, American and British troops come under fire from a rooftop sniper. The NATO troops promptly return fire, killing the sniper along with an unrelated civilian father eating dinner in a room just below the sniper's position. The story receives continuous coverage on Al Jazeera, featuring the dead father's picture, and on various news programs and the Internet.

United States Central Command (USCENTCOM) initiates an Army Regulation (AR) 15-6 informal investigation, and the British military initiates its own separate investigation.[2] Each country appoints a military officer to conduct its own investigation. Both investigators gather statements from every soldier on the patrol. Both conclude the soldiers intended to shoot the sniper, a lawful target under the law of armed conflict, and classify the civilian father's death as collateral damage. Both appointing authorities approve the respective investigations.

Approximately eight months later, the deceased's next-of-kin files a lawsuit against the United Kingdom, claiming the lack of an effective investigation into the death of the father, as required by Article Two of the European Convention on Human Rights (ECHR). Ultimately, the European Court of Human Rights (ECtHR) agrees that the British troops failed to conduct an effective investigation and awards substantial monetary damages to the deceased's next-of-kin. Additionally, the UN Human Rights Committee expresses concerns regarding the inadequacy of the U.S. investigation in its concluding observations in response to the United States' periodic report.[3] Several non-governmental organizations

---

[2] Telephone Interview with Lieutenant Colonel (Retired) Kurt Mieth, then-Chief, Administrative Law, Headquarters, U.S. Central Command (USCENTCOM) (Jan. 4, 2012) [hereinafter USCENTCOM Attorney Interview] (explaining that USCENTCOM invites other countries to participate in investigations that involve both countries; however, the investigations remain USCENTCOM investigations in which the USCENTCOM Commander retains exclusive appointing and final approval authority). Army Regulation (AR) 15-6 provides for two separate administrative fact-finding procedures: an "investigation" or a "board of officers." The vast majority of AR 15-6 fact-finding procedures utilized involve a single investigating officer using informal procedures and are designated "investigations." *Id.* Therefore, this article will focus exclusively on AR 15-6 investigations, as opposed to AR 15-6 boards of officers, which are "proceedings that involve more than one investigating officer or a single investigating officer using formal procedures." U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 1-5 (2 Oct. 2006) [hereinafter AR 15-6]. Additionally, it is possible USCENTCOM could direct an investigation and reference the Navy JAGMAN or Air Force Instruction instead of AR 15-6; however, the scope of this article's review will be limited to AR 15-6 investigations.

[3] *Universal Periodic Review*, UN PERIODIC REV., http://www.ohchr.org/en/hrbodies/upr/

also publicly criticize the United Kingdom and United States for their investigations into the incident.

While the above scenario may seem far-fetched to some, recent legal events suggest otherwise. International Human Rights norms are increasingly applied on the battlefield.[4] The United States should therefore consider international human rights law standards in situations involving armed conflict, particularly because a central goal of U.S. foreign policy is the promotion of human rights.[5] The conduct of investigations into alleged law of war violations is one area the United States is deficient in under certain international human rights norms, particularly the ECtHR's standard. Although ECtHR decisions are not binding on the United States, they bind many of our closest allies. As a leader in human rights, the United States should strive to meet international human rights law standards for investigations, such as the standards provided by the ECtHR, particularly for investigations involving alleged unlawful killings.

This article is divided into six parts. Part II details how international human rights law norms are applied increasingly on the battlefield, as occurred in a recent ECtHR case, *Al-Skeini*. It also explains why the United States should endeavor to meet these norms. Part III shows there are consequences for failing to follow international human rights law as demonstrated in the *Al-Skeini* decision. Part IV will discuss current U.S. regulations and their dual approach to investigating alleged law of war violations. Part V explains how U.S. Army Criminal Investigation Command (CID) investigations meet the ECtHR's investigatory standards, but informal AR 15-6 investigations do not. This is a problem, as often only an AR 15-6 investigation is conducted into

---

upr/pages/uprmain.aspx (last visited Mar. 6, 2012). The Universal Periodic Review "is a unique process which involves a review of the human rights of all 192 UN Member States every four years. . . . [It] provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfill their human rights obligations." *Id.*

[4] Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 320, 310–48 (2007).

[5] *Human Rights*, U.S. DEP'T OF STATE, http://www.state.gov/j/drl/hr/index.htm [hereinafter *Human Rights*] (last visited Mar. 6, 2012). The U.S. Department of State's website proclaims: "The protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago. Since then, a central goal of U.S. foreign policy has been the promotion of respect for human rights as embodied in the Universal Declaration of Human Rights." *Id.*

serious allegations of law of war violations. Finally, Part VI recommends how future AR 15-6 investigations might fulfill the ECtHR's investigatory standard. This could be accomplished by updating the Department of Defense Directive (DoDD) 2311.01E (Law of War) to delineate which law of war violations require expeditious reporting and provide clear standards for investigators. Part VI also recommends DoDD 2311.01E mandate a fully resourced investigative team for future ground conflicts. The sole mission of this team should be to investigate serious alleged law of war violations, such as those involving alleged unlawful killings. Investigations conducted by this team would result in better investigations overall. Implementing these two recommendations would help the administrative investigations meet the ECtHR's investigatory standard.

II. International Human Rights Law Increasingly Is Applied on the Battlefield

International human rights law is more commonly applied on the battlefield due to the application of customary international law and the extraterritorial application of international human rights treaties to military operations abroad. In its recent *Al-Skeini* decision, the ECtHR applied the ECHR to the British military because the United Kingdom was an occupying power in Iraq.[6] Additionally, the law of armed conflict is no longer a *lex specialis* that solely and exclusively occupies the field. The emerging view, which the United States subscribed to in its Fourth Periodic Report to the UN Human Rights Committee, is that the relationship between international human rights law and the law of armed conflict is "complementary and mutually reinforcing."[7] As a major proponent of human rights, the United States and its military should consider international law norms and strive to meet their standard.

---

[6] Al-Skeini v. United Kingdom, 53 Eur. Ct. H.R. 18, 41–42 (2011).

[7] U.S. DEP'T OF STATE, FOURTH PERIODIC REPORT OF THE UNITED STATES TO THE UNITED NATIONS COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS para. 507 (Dec. 30, 2011) [hereinafter FOURTH PERIODIC REPORT], *available at* http://www.state.gov/j/drl/rls/179781.htm.

A. ECtHR Applied ECHR Extraterritorially to Military Operations Abroad

International human rights law increasingly is applied on the battlefield due to the application of customary international law, as well as the extraterritorial application of international human rights treaty law.[8] The ECtHR is particularly active in this area of law. The ECtHR is an authority for European human rights law and rules on individual and State complaints that allege violations of rights established by the ECHR.[9] Ratification of the ECHR is a prerequisite for joining the Council of Europe. The ECtHR's decisions are binding upon the states concerned.[10]

In *Al-Skeini*, the ECtHR applied the ECHR extraterritorially to British military operations in and around Basrah, Iraq in 2003.[11] The court then reviewed the investigations the British chain of command conducted into civilian deaths that occurred during those military operations.[12] The court determined the investigations did not meet the ECHR's standards and, therefore, awarded monetary damages to the complainants.[13]

Before to *Al-Skeini*, the ECtHR's general rule was that jurisdiction of the ECHR was primarily territorial. In *Banković*, the ECtHR held, "A state may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation, or acquiescence, unless the former is an occupying State in which it can be found to exercise

---

[8] *See* UN H. R. COUNCIL, REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON LIBYA 188–97 (2012) [hereinafter UN HUM. RTS. REPORT]. The UN Human Rights Council (Council) investigated alleged violations of international human rights law in Libya, the circumstances of such violations, and where possible, identified those responsible. The Council referenced international customary law in determining that both the Libyan government and the anti-government *thuwar* had violated international humanitarian and human rights law. The Council also examined NATO's actions in Libya and concluded that "NATO conducted a highly precise campaign with demonstrable determination to avoid civilian casualties. On limited occasions, the Commission confirmed civilian casualties and found targets that showed no evidence of military utility . . . . [It] recommends further investigations." *Id.*

[9] EUR. CT H. R., THE COURT IN BRIEF, *available at* http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_en_bref_EN.pdf (last visited Mar. 6, 2012) (a European Court of Human Rights brochure).

[10] *Id.*

[11] *Al-Skeini*, 53 Eur. Ct. H.R. at 56–62.

[12] *Id.*

[13] *Id.*

jurisdiction in that territory, at least in certain respects."[14] The court then reviewed jurisdictional bases, other than the territorial basis, and concluded they are "exceptional and [require] special justification in the particular circumstances of each case."[15]

Thus, the court emphasized the primarily territorial reach of Article One of the ECHR, while allowing for exceptional circumstances to this general rule.[16] In so doing, the court highlighted the ECHR's regional nature, stating that "the Convention is a multi-lateral treaty operating . . . in an essentially regional context and notably in the legal space (*espace juridique)* of the Contracting States. . . . The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States."[17]

However, the ECtHR's decisions in *Issa* and *Al-Skeini* have eroded the court's primarily territorial rule. In the *Issa* case, Turkish soldiers carrying out military operations in Iraq allegedly abused and killed Iraqi shepherds near the Turkish border.[18] The primary issue in this case was whether the applicants and their deceased relatives fell within Article One of the ECHR for jurisdictional purposes. The ECtHR reiterated that "a State's jurisdictional competence is primarily territorial," but then stated "the concept of 'jurisdiction' within the meaning of Article One of the Convention is not necessarily restricted to the National territory of

---

[14] Banković v. Belgium 44 Eur. Ct. H.R. SE5, 15, paras. 59–73 (2001).

[15] *Id*. paras. 67–73. The European Court of Human Rights (ECtHR) held the Convention could be applied extraterritorially in the following four "exceptional" types of cases: (1) cases involving acts of diplomatic and consular agents abroad; (2) when a Contracting State exercises jurisdiction through the acquiescence of the government of that territory; (3) when a Contracting State is an occupying State and exercises all or some of the public powers normally to be exercised by the government; and (4) cases involving the use of force by a State's agents operating outside its territory, such as when State agents take an individual into custody abroad.

[16] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. Article One of the European Convention on Human Rights (ECHR) is a jurisdictional provision that states that all parties shall "secure to everyone within their jurisdiction the rights and freedoms defined in Section One."

[17] *Banković*, 44 Eur. Ct. H.R. SE5, at 22.

[18] Issa and Others v. Turkey, 41 Eur. Ct. H.R. 27, 3–4 (2005). This case involved Iraqi shepherds who, on April 2, 1995, were alleged to have encountered Turkish soldiers carrying out military operations in Iraq, near the Turkish border. According to the applicants, the Turkish soldiers assaulted and abused the Iraqi shepherds. Once the Turkish troops withdrew from the area, the shepherds' bodies were found riddled with bullet wounds and severely mutilated.

the High Contracting Parties."[19] The court could "not exclude the possibility, that as a consequence of military action, the respondent State [Turkey] could be considered to have exercised, temporarily, effective overall control of a particular portion of northern Iraq."[20] The court ultimately held that insufficient evidence existed to find the Turkish troops conducted operations in the area where the victims had been found. As such, the court determined the applicants' relatives did not fall within Turkey's jurisdiction within the meaning of Article One of the Convention.[21] However, *Issa*'s significance was the court's willingness to apply the Convention to individuals in a State not party to the Convention based on the Contracting State's temporary, effective overall control of an area based on military operations.[22]

In *Al-Skeini*, the ECtHR further eroded the primarily territorial rule as it applied the ECHR to British military operations in Iraq. In this case, six Iraqi families sued the United Kingdom, claiming the British failed to conduct an adequate investigation into the deaths of their family members killed by British troops operating in and around Basrah, Iraq.[23] Five of the six Iraqis were shot by British troops on patrol or died in the course of British military operations.[24] The British disposition of these cases was determined by a brigadier general who considered written statements from the Soldiers involved, reviewed a written report from the subordinate commanders, and consulted with a legal advisor.[25] The Iraqi

---

[19] *Id.* at 16.
[20] *Id.*
[21] *Id.* at 18.
[22] *Id.* at 16.
[23] Al-Skeini v. United Kingdom, 53 Eur. Ct. H.R. 18, 15–21 (2011).
[24] *Id*. at 27–28. The sixth applicant, Baha Mousa, was taken by British troops to a British base in Basrah. He was beaten and died in British custody. On July 19, 2005, the unit charged seven British soldiers in connection with Mousa's death. One of the soldiers pled guilty to the war crime of inhumane treatment. The command dropped charges against four of the seven soldiers, and a court-martial acquitted the remaining two soldiers. In May 2008, the British Secretary of State for Defence said that there would be a public inquiry into Mousa's death. This inquiry was ongoing at the time of the *Al-Skeini* decision.
[25] *Id.* at 20–28. The case of the fourth applicant was sufficiently complex that the brigade commander thought it should be investigated by the Special Investigation Branch (SIB). After reviewing the report and discussing it with his legal advisor, the brigadier general decided the conduct fell within the rules of engagement. However, SIB had already begun an investigation into the case. The brigadier general and brigade commander requested SIB terminate the investigation, which SIB agreed to do. After the fourth applicant applied for judicial review, senior investigating officers within SIB decided to re-open the investigation. Upon completing the investigation, SIB reported the results to the soldier's commanding officer. The commanding officer referred the

families claimed the British violated Article Two of the Convention by failing to adequately investigate the circumstances surrounding their relatives' deaths.[26]

The ECtHR determined the United Kingdom was an occupying power during this time "within the meaning of Article Forty-Two of the Hague Regulations."[27] The ECtHR held,

> In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.[28]

The ECtHR also addressed the confusion concerning *espace juridique*, holding where one State party to the Convention occupies another State party, the occupying State is responsible for any breaches under the Convention, because to hold otherwise would create a "vacuum" of protection within that legal space.[29] The ECtHR clarified that that this "does not imply, *a contrario*, that jurisdiction under Article One . . . can never exist outside the territory covered by" the member states.[30]

The *Al-Skeini* decision is not inconsistent with the court's decision in *Banković*, where the court held that "a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, *unless the former is an occupying State* in which case it can be found to exercise jurisdiction in that territory, at

---

case to the Army Prosecuting Authority (APA). When a senior independent counsel advised there was no realistic prospect of a conviction, the APA and Attorney General decided not to file charges.

[26] *Id.* at 42. Article Two of the ECHR states "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 16, art. 2.

[27] *Id.* at 143.

[28] *Id.* at 39.

[29] *Id.* at 41.

[30] *Id.*

least in certain respects."[31] Thus, the ECtHR's *Issa* and *Al-Skeini* decisions allowed for extraterritorial application of the ECHR to its member States conducting military operations abroad, thereby eroding the ECHR's "primarily territorial" rule.

B. The Law of Armed Conflict and International Human Rights Law Are Complementary and Mutually Reinforcing

A primary objective of human rights law is to protect individuals from the abuse of State power, by imposing limits "on its abuse through the mechanism of 'rights.'"[32] The relationship between the law of armed conflict and international human rights law is "frequently described as a relationship between general and specialized law, in which humanitarian law is the *lex specialis*."[33] The concept of *lex specialis* is derived from a Roman principle of interpretation whereby an applicable specific rule displaces a more general rule ("*lex specialis derogat legi generali*").[34]

In the past, the United States maintained that the law of armed conflict, governed by international humanitarian law, was the appropriate

---

[31] Banković v. Belgium 44 Eur. Ct. H.R. SE5, 60 (2007) (emphasis added); *see also* Marko Milanovic, *European Court Decides Al-Skeini and Al-Jedda*, EJIL TALK! (Jul. 7, 2011), http://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/. Marko Milanovic argues that the ECtHR

> applied a *personal* model of jurisdiction to the killing of all six applicants, but it did so only *exceptionally*, because the UK exercised public powers in Iraq. . . . But, *a contrario*, had the United Kingdom not exercised such public powers, the personal model of jurisdiction would not apply. In other words, *Banković* is according to the court still perfectly correct in its result. While the power to kill is 'authority and control' over the individual if the State has public powers, killing is not authority and control if the State is merely firing missiles from an aircraft. Under this reasoning, drone operations in Yemen or wherever would be just as excluded from the purview of human rights treaties as under *Banković*.

Id.

[32] Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT'L SECURITY J. 31, 51 (2011).

[33] Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INT'L REV. RED CROSS 501, 522 (2008).

[34] *Id.*

and exclusive *lex specialis* for armed conflicts.[35] An ongoing debate exists concerning the relationship between the law of armed conflict and human rights law;[36] however, the complementary approach to the law of armed conflict and human rights law has gained ground due to the weight of expert opinion and state practice, as well as decisions issued through various international bodies, such as the ECtHR.[37]

In its Fourth Periodic Report to the Human Rights Committee, the United States discussed the relationship between the law of armed conflict and international human rights law.[38] The United States significantly softened its position concerning the application of international human rights law to the conduct of hostilities during armed conflict.[39] After discussing the principle of *lex specialis*, the Fourth Periodic Report noted that "it is important to bear in mind that international human rights law and the law of armed conflict are in many respects complementary and mutually reinforcing. These two bodies of law contain many similar protections [such as the prohibitions on torture and cruel treatment]."[40] It then argued that "determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is a fact-specific determination, which cannot be easily generalized, and raises especially complex issues in the context of non-international armed conflicts occurring within a State's own territory."[41] Notably, the United States used key words like "complementary" and "mutually reinforcing" to describe the relationship between the law of armed conflict and international human rights law, while at the same time "presenting its *lex specialis* argument in less drastic terms than before."[42]

Thus, these passages suggest that the United States' position is "there may be aspects of a State's conduct that are, in fact, governed by human

---

[35] *See, e.g.*, Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT'L HUMANITARIAN LEGAL STUD. 52 (2010).
[36] *Id.*
[37] *Id.*
[38] FOURTH PERIODIC REPORT, *supra* note 7, at 507.
[39] Marko Milanovic, *US Fourth ICCPR Report, IHRL and IHL*, EJIL: TALK! (Jan. 19, 2012), http://www.ejiltalk.org/us-fourth-iccpr-report-ihrl-and-ihl/.
[40] FOURTH PERIODIC REPORT, *supra* note 7, at 507.
[41] *Id.*
[42] Milanovic, *supra* note 39.

rights law, even in a state of armed conflict."[43] This additional body of law can therefore supplement the law of armed conflict as "an interpretive aid to add content to undefined terms in [the law of armed conflict] . . . or to expound upon treaty obligations."[44]

The International Covenant on Civil and Political Rights (ICCPR) is a source of international human rights law and, under the complementary approach, should be considered in situations involving armed conflict. It further elaborates on the rights and freedoms detailed in the Universal Declaration of Human Rights and is administered by the UN Human Rights Committee.[45] Article Two of the ICCPR requires each State Party to "undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized" within the Covenant.[46] States in which the United States has operated militarily (Iraq and Afghanistan) or may operate in the future (Syria) are parties to the ICCPR.[47] Therefore, despite the U.S. position that the ICCPR does not apply extraterritorially, as a proponent of human rights, the United States should consider abiding by the ICCPR in states where it operates so as to set an example.[48]

Therefore, international human rights law, including human rights treaties such as the ICCPR and customary international law, should be considered in armed conflict, as opposed to simply resorting to the law of armed conflict under the principle of *lex specialis*. Additionally, because the ICCPR and the ECHR share significant similarities, a State attempting to follow the ICCPR may wish to consider the ECHR and

---

[43] *United States Adjusts View on Human Rights Law in Wartime*, INTLAWGRRLS.COM, (Jan. 21, 2012) http://www.intlawgrrls.com/2012/01/us-adjusts-view-on-human-rights-law-in.html#more.

[44] *Id.*

[45] *Summary of ICCPR and ICESCR*, COMPASS, http://eycb.coe.int/compass/en/pdf/6_5.pdf (last visited Mar. 5, 2012).

[46] International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[47] *Id.*

[48] Although "extraterritorially" and "complementary" are separate issues, the longstanding U.S. legal position is that the International Covenant on Civil and Political Rights (ICCPR) does not apply extraterritorially. In its Fourth Periodic Report to the Human Rights Committee, the United States restated its position that the Convention does not apply extraterritorially, but it did clarify that "the United States has not taken the position that the Covenant does not apply 'in time of war.' Indeed, a time of war does not suspend the operation of the Covenant to matters within its scope of application." *See* FOURTH PERIODIC REPORT, *supra* note 7, at 506.

how the ECtHR has implemented it in its decisions, particularly as it relates to military operations conducted abroad.

One key right that both the ICCPR and the ECHR seek to protect is the right not to be arbitrarily deprived of one's life. The ICCPR guarantees a person's "inherent right to life" shall not be arbitrarily deprived.[49] Similarly, Article Two of the ECHR requires "everyone's right to life . . . be protected by law. No one shall be deprived of his life intentionally save in the execution of a court following his conviction of a crime for which this penalty is provided by law."[50] Additionally, Article Thirteen of the ECHR provides that everyone whose Convention rights and freedoms are violated "shall have an effective remedy before a national authority . . . ."[51] Article Two of the ICCPR requires State Parties to "take the necessary steps . . . to adopt such laws or other measures as may be necessary to give effect to the rights recognized in" the ICCPR.[52] Thus, both the ICCPR and the ECHR prohibit the arbitrary deprivation of life and require a State to provide a remedy when it violates an individual's rights. This is particularly relevant in determining the investigatory standard for serious law of war violations, such as unlawful killings, as will be discussed below.

C. The U.S. Government Should Strive to Meet International Human Rights Law Norms

As international human rights law increasingly is applied on the battlefield, the U.S. government should strive to meet international human rights law norms. The extraterritorial application of international human rights treaties by judicial bodies such as the ECtHR will have a considerable impact on our closest allies. The United States "has often shared common security interests and participated in [military] operations with other nations. Typically, multinational operations are performed within the structure of a coalition . . . [which] is an ad hoc arrangement between two or more nations for common action."[53] Since

---

[49] International Covenant on Civil and Political Rights, *supra* note 46, at 6.
[50] European Convention on Human Rights, *supra* note 16.
[51] *Id.*
[52] UN HUM. RTS. REPORT, *supra* note 8, at 2; *see also id.* at 189 (citing the ICCPR and Article 2's requirement that States provide an effective remedy to any person whose rights or freedoms are violated).
[53] JOINT CHIEFS OF STAFF, JOINT PUB. 3-16, MULTINATIONAL OPERATIONS, at vii (5 Apr. 2000).

the end of the Cold War, the United States increasingly has engaged in this "ad hoc approach to coalition-building for contingency operations," which is only likely to increase in the future.[54] Thus, the United States will likely continue to conduct future military operations with other coalition allies (such as our NATO partners), many of which are subject to the ECtHR's decisions.

Furthermore, according to the U.S. Department of State,

> [A] central goal of U.S. foreign policy has been the promotion of respect for human rights . . . . Because the promotion of human rights is an important national interest, the United States seeks to . . . [h]old governments accountable to their obligations under universal human rights norms and international human rights instruments; [p]romote greater respect for human rights . . . ; [and] [p]romote the rule of law, seek accountability, and change cultures of impunity . . . .[55]

Additionally, the Department of State submits annual reports to the U.S. Congress as required by the Foreign Assistance Act of 1961.[56] These reports review and document the human rights conditions in over 190 countries.[57] According to the Department of State, the reports are important "because we believe it is imperative for countries, including

---

[54] Christopher J. Bowie et al., *Future War: What Trends in America's Post-cold War Conflicts Tell Us About Early 21st Century Warfare*, ANALYSIS CTR. PAPERS 13 (2003).

[55] *Human Rights*, *supra* note 5.

[56] This law requires the U.S. Secretary of State to

> transmit to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate, 'a full and complete report regarding the status of internationally recognized human rights, . . . [of] countries that receive assistance [from the United States] . . . and in all other foreign countries which are members of the United Nations and which are not otherwise the subject of a human rights report under this Act.'

The Foreign Assistance Act of 1966, 22 U.S.C. §§ 116(d), 502B(b) (2012).

[57] U.S. DEP'T OF STATE., 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES para. 1 (Apr. 8, 2011), *available at* http://www.state.gov/j/drl/rls/hrrpt/2010/frontmatter/154329.htm.

our own, to ensure that respect for human rights is an integral component of foreign policy."[58]

Since it is U.S. policy to actively work to hold other governments accountable for their obligations under universal human rights norms and international human rights instruments, the United States should strive to meet those same standards, particularly when conducting military operations with our close allies. As a major proponent of human rights, the United States should be rather circumspect about simply continuing business as usual under the *lex specialis* banner of the law of armed conflict, particularly when our close European allies, and fellow NATO members, will have to operate under a higher standard required by international human rights law. Although the United States does not agree that the ICCPR applies extraterritorially, it does concur that international human rights norms should be considered even in states of armed conflict. To be a leader on human rights and to set a proper example, the United States should strive to meet the ICCPR's standards when conducting military operations.

III. There Are Consequences for Failing to Follow International Human Rights Law, as Demonstrated in the ECtHR's *Al-Skeini* Case

Once the ECtHR resolved the jurisdictional issue in *Al-Skeini*, the second issue was whether the United Kingdom breached Article Two by failing to conduct a proper investigation into the circumstances surrounding each of the six deaths. The United Kingdom emphasized the challenging security operations its troops faced at the time, as well as the fact that it did not have full control over Iraq's territory or governmental institutions.[59] The British government accepted that the first three applicants' investigations were insufficiently independent for Article Two's purpose as they were "carried out solely by the commanding

---

[58] *Id.*; *see also* Harrold H. Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1408 (1999) *(*providing an example of a theory of "transnational legal process" in which the United States seeks to encourage China to abide "by core norms of international human rights law."). Koh explains that the United States "seeks to enforce international norms by motivating nation-states to obey international human rights law—out of a sense of internal acceptance of international law—as opposed to merely conforming to or complying with specific international legal rules when the state finds it convenient." *Id.*

[59] Al-Skeini v. United Kingdom, 53 Eur. Ct. H.R. 18, 43 (2011).

officers of the soldiers alleged to be responsible."[60] However, the government argued its military police investigators were institutionally independent of the armed forces and, therefore, its investigation into the fourth and fifth applicants' cases complied with Article Two.[61] The government also argued the investigation into the fourth applicant's case "was reasonably prompt, in particular when regard was had to the extreme difficulty of investigating in the extra-territorial context."[62] Regarding the sixth applicant's case, the United Kingdom emphasized that the applicant confirmed he did not claim that the government had violated his Convention rights given the ongoing public inquiry.[63]

The applicants argued that security conditions in a conflict zone were not an excuse to modify Article Two's procedural obligations under ECtHR case law.[64] They also maintained that the Royal Military Police were not independent from the military chain of command and highlighted the fact that a Special Investigation Branch (SIB) investigation was discontinued at the military chain of command's request.[65]

The ECtHR held the United Kingdom violated Article Two of the Convention by failing to conduct proper investigations into the six deaths. It found five major deficiencies with the investigations, although not every deficiency applied to each investigation. The first significant flaw was that the investigators were not operationally independent from the military chain of command.[66] The first three investigations "remained entirely within the chain of command and were limited to taking statements from the soldiers involved."[67] The British government accepted this conclusion.[68] Regarding the investigations conducted by the SIB into the fourth and fifth applicants' complaints, the ECtHR held that while the military police, including the SIB, had a separate chain of

---

[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 44.
[64] *Id.*
[65] *Id.* at 45. The SIB falls within the purview of the Royal Military Police and is responsible for investigating serious crimes committed by British soldiers while on service, incidents involving contact between the military and civilians, and any special investigations tasked to it, including incidents involving civilian deaths caused by British soldiers. *Id.*
[66] *Id.* at 47.
[67] *Id.*
[68] *Id.*

command from the soldiers it was investigating, the SIB was not sufficiently independent from the chain of command. The court noted it was up to the commanding officer to decide whether to call in SIB to investigate and the investigation could be closed at the request of the military chain of command, as it was in the fourth applicant's case.[69] Additionally, the ECtHR pointed out that SIB reported to the military chain of command, not the relatively independent Army Prosecuting Authority.[70]

The second major flaw was the lack of eyewitness testimony taken by independent investigators.[71] The court held that in each case "eyewitness testimony was crucial."[72] Expert and independent investigators should have questioned witnesses, particularly alleged perpetrators and Iraqi eyewitnesses, as soon as possible after each event. Every effort should have been made to identify the Iraqi eyewitnesses and "persuade them that they would not place themselves at risk by coming forward" and assure them that their statements would be acted upon in an expeditious manner.[73]

The third major deficiency was the lengthy and unexplained delays in some of the investigations.[74] In the case of the fourth applicant's brother, approximately nine months passed before the soldier who shot the applicant's brother was questioned about the incident. This lengthy interval, "combined with the delay in having a fully independent investigator interview the other military witnesses, entailed a high risk that the evidence was contaminated and unreliable by the time the Army Prosecuting Authority" considered it. Regarding the fifth applicant's son's death, the ECtHR noted the government provided no explanation for the twenty-eight-months delay between the death and the court-martial of some of the soldiers allegedly responsible. The court found that as a result of the delay, some of the soldiers could no longer be located, which undermined the investigation's effectiveness.[75]

---

[69] *Id.*
[70] *Id.* at 48.
[71] *Id.*
[72] *Id.* at 47.
[73] *Id.*
[74] *Id.* at 48.
[75] *Id.* The court-martial did not convene until September 2005. By that time, three of the seven soldiers accused of killing the fifth applicant's son had been discharged from the Army, and two were absent without leave. *Id.* at 19.

The fourth major inadequacy was that the investigation into the fifth applicant's son's death was scoped too narrowly.[76] Article Two required a broader examination given the *prima facie* evidence that the applicant's son was taken into British custody where he was mistreated and drowned. Thus, the investigation should have examined the broader issues of "State responsibility for the death, including the instructions, training and supervision given to soldiers that were undertaking tasks such as this in the aftermath of the invasion."[77]

The fifth and final deficiency also related to the fifth applicant's son. The court held that the investigation should have been made accessible to the victim's family and to the general public. This case is contrasted with the sixth applicant's case where the court noted that a "full, public inquiry" was ongoing in that case and no deficiency was noted.[78]

As a result of the *Al-Skeini* decision, the ECtHR awarded approximately 17,000 Euros in damages to each of the five applicants whose relatives' deaths were inadequately investigated.[79] More significantly, the decision will clearly impact the way the British conduct future investigations into alleged serious law of war violations, specifically, unlawful killings.[80] Additionally, since the investigatory standard enumerated in *Al-Skeini* applies not only to the United Kingdom but to all ECHR members, the case will also impact how other NATO allies conduct similar investigations as well.

IV. U.S. Regulations Anticipate Dual Investigations (Administrative and Criminal) into Law of War Violations, But Dual Investigations Are Not Followed in Practice

United States regulations concerning the investigation of alleged law of war violations anticipate that two investigations will be conducted, one administrative and one criminal. When the alleged law of war

---

[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 49.
[80] Interview with Senior British Judge Advocate, Ctr. for Law and Military Operations, in Charlottesville, Va. (Jan. 27, 2012) (explaining that the British Army Provost Marshal was currently reviewing how the British conducts such investigations and considering changes to conform with the ECtHR's decision). No decision had been made as of the date of the interview. *Id.*

violation is serious or felony-level, it becomes more critical that CID conduct an investigation. However, in practice, usually only an AR 15-6 investigation is conducted.

A. DoDD 2311.01E and CJCSI 5810.01D Contemplate That CID Will Investigate Alleged Law of War Violations

Department of Defense Directive (DoDD) 2311.01E requires "all reportable incidents by or against U.S. personnel . . . [to be] reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action."[81] A reportable incident is defined as "a possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict."[82] Department of Defense Directive 2311.01E also requires higher authorities that receive an initial report to "request a formal investigation by the cognizant military criminal investigative organization."[83]

Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 5810.01D implements the DoD Law of War Program. It requires reportable incidents to be reported concurrently through combatant command and military department chains of command.[84] Additionally, CJCSI 5810.01D requires a commander, upon learning of a reportable incident, to "initiate a formal investigation in accordance with Service regulations, and . . . at the same time notify the cognizant military criminal investigative organization (MCIO)," which is then responsible for the criminal incident reporting.[85] Thus, the Instruction contemplates that two investigations, one administrative and one criminal, occur for alleged law of war violations.

Army Regulation 195-2 (Criminal Investigation Activities) requires CID to "investigat[e] suspected war crimes when a violation of [the War Crimes Act], . . . when a violation of the law of land warfare is indicated,

---

[81] U.S. DEP'T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.4 (9 May 2006) (C1, 15 Nov. 2010) [hereinafter DODD 2311.01E].
[82] *Id.* para. 3.2.
[83] *Id.* para. 6.5.1.
[84] CHAIRMAN JOINT CHIEFS OF STAFF, INSTR. 5810.01D, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM para. 6(f)(4)(b) (30 Apr. 2010) [hereinafter CJSI 5810.01D].
[85] *Id.*

or when otherwise directed by HQDA."[86] This was reiterated in U.S. Army Criminal Investigation Command (USACIDC's) Operational Memorandum 008-003 (Initiation of Reports of Investigation and Rights Advisements in Current Deployed Situation in CENTCOM AOR). It states,

> CID usually investigates the felony crimes identified in AR 195-1 and the associated civilian equivalent crimes. As noted in AR 195-1[,]however, CID's investigative purview can be adjusted to include lesser crimes if it would serve a better or overall law enforcement goal . . . . Further, the investigation of war crimes, atrocities, or terrorist allegations is within CID investigative purview.[87]

Field Manual (FM) 3-19.13, *Law Enforcement Investigations*, also defines war crimes and provides instruction to the CID agent who is tasked to investigate an alleged war crime.[88]

Additionally, Criminal Investigation Command Regulation (CID-R) 195-1, *Criminal Investigation Operational Procedures*, implements DoDD 2311.01E, by requiring a CID "Report of Investigation (ROI)" be initiated "when there is credible information that a crime has or may have occurred and CID has investigative authority and responsibility."[89]

Thus, if credible information exists that a law of war violation or war crime has occurred, the regulations contemplate that two investigations will be conducted. One investigation is administrative and is conducted by the command; the other is criminal and is conducted by USACIDC.

---

[86] U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES para. 3-3(a)(6) (6 Sept. 2011) [hereinafter AR 195-2].

[87] Memorandum from Deputy Chief of Staff of Operations for CID, to General Distribution, subject: Operational Memorandum 008-03, Initiation of Reports of Investigation (ROIs) and Rights Advisements in Current Deployed Situation in CENTCOM AOR (4 Apr. 2003). Army Regulation 195-2 consolidated AR 195-1 and AR 195-7.

[88] U.S. DEP'T OF ARMY, FIELD MANUAL 3-19.13, LAW ENFORCEMENT INVESTIGATIONS paras. 18-1 to 18-28 (10 Jan. 2005) [hereinafter FM 3-19.13].

[89] U.S. ARMY CRIMINAL INVESTIGATION COMMAND, REG. 195-1, CRIMINAL INVESTIGATION OPERATIONAL PROCEDURES para. 4-6 (6 Jan. 2012) [hereinafter CID-R 195-1].

These investigations of the same incident may occur simultaneously because they serve different purposes.[90]

B. In Practice, Many Alleged Law of War Violations Are Not Investigated by CID

While DoDD 2311.01E, CJCSI 5810.01D, and AR 195-2 require that a criminal investigation into credible reports of law of war violations be conducted, criminal investigations often are not initiated in practice.[91] In Iraq, CID simply lacked enough agents to investigate alleged law of war violations in locations where violations had been reported. Special Agents in Charge (SACs) also struggled with the issue of transportation. Because transportation in Iraq could be difficult, SACs never knew when an agent sent into the battlespace might be able to return. Thus, a SAC who had a limited number of CID agents assigned to him, with numerous personal protection and other missions, often choose not to send an agent to investigate law of war allegations. As a result, the AR 15-6 investigations into alleged unlawful killings (similar to situations described in the *Al-Skeini* case) may have consisted of little more than a platoon leader interviewing various squad members involved in the incident.[92] Such an inquiry fails to meet the ECtHR's investigatory standards.

V. Although CID Investigations Satisfy the ECtHR's Investigatory Standard, AR 15-6 Investigations Do Not; This Is a Problem, Given Current Practice

Given the increasing trend of applying international human rights law to the battlefield, and given the United States striving to be an execmplary leader in human rights, future U.S. military investigations into alleged unlawful killings could be compared to the *Al-Skeini* standard. As such, a comparison of the current Army investigatory standard set forth in criminal and administrative regulations and the ECtHR's is useful.

---

[90] Schmitt, *supra* note 32, at 81.
[91] USCENTCOM Attorney Interview, *supra* note 2.
[92] *Id.*

This part examines the five criteria cited in *Al-Skeini* that are necessary for an effective investigation into unlawful killings. It will also examine additional investigatory steps the ECtHR has said are required in previous cases. Finally, it will demonstrate that the ECtHR criteria are more defined and precise than the standard set forth in AR 15-6. In contrast, CID's regulatory requirements generally meet the ECtHR's standard for investigations into alleged unlawful killings.

A. Independence of the Investigators

The ECtHR held investigators "must be independent and impartial," in both law and practice, which is a factor in determining an investigation's effectiveness.[93] The ECtHR explained that this means "not only that there should be no hierarchical or institutional connection, but also clear independence."[94]

In *Al-Skeini*, the ECtHR held that since the United Kingdom occupied Iraq, it was "particularly important that the investigating authority was, and was seen to be, operationally independent from the chain of command."[95] Some of the investigations into the deaths of Iraqi civilians were conducted entirely within the military chain of command and were "limited to taking statements from the soldiers involved."[96] The ECtHR ruled this fell short of Article Two's requirements due to the investigation's lack of independence. SIB conducted the other investigations. While the SIB did have a separate chain of command, it was not "operationally independent from the military chain of command" for several reasons.[97] First, the commanding officer decided whether the SIB should be called to investigate. Second, even if the SIB initiated an investigation on its own accord, the investigation could be closed at the military chain of command's request.[98] The court held that this lack of independence violated Article Two of the ECHR, which required an independent examination into the civilians' deaths.[99]

---

[93] Nachova v. Bulgaria, 39 Eur. Ct. H.R. 37, 17 (2004).
[94] McKerr v. United Kingdom., 34 Eur. Ct. H.R. 20, 24 (2002).
[95] Al-Skeini v. United Kingdom, 53 Eur. Ct. H.R. 18, 47 (2011).
[96] *Id.*
[97] *Id.*
[98] *Id.* at 48.
[99] *Id.*

An investigation conducted by an investigating officer appointed pursuant to AR 15-6 would likely fail to meet the requisite independence established by the ECtHR. An appointing authority selects an AR 15-6 investigating officer based on who the appointing authority thinks is "best qualified for the duty by reason of their education, training experience, length of service, and temperament."[100] Only commissioned officers, warrant officers, or Department of Army civilian employees General Schedule 13 and above may be appointed, and they must be senior to the person whose conduct is investigated.[101] Only a general courts-martial convening authority may appoint an investigating officer in a case involving a death.[102] Because the AR 15-6 investigating officer can be from within the same unit and is appointed within the military chain of command, an AR 15-6 investigation into an unlawful killing would fall short of the operational independence required by the ECtHR.[103]

In contrast, while similarities exist between the SIB and CID, an investigation conducted by CID would likely withstand the ECtHR's operational independence test. Criminal Investigation Command Regulation 195-1 states that "Investigative activity does not depend only upon the receipt of a complaint from an outside source. Complaints may be developed within CID field elements from sources, target analysis files, crime prevention surveys, criminal intelligence reports, or extracted from another ROI."[104] Regarding the termination of an investigation, CID-R 195-1 states, "A decision to terminate investigative leads will be made entirely within CID channels. The decision will not be based upon directions or pressures from person(s) outside of CID."[105] Therefore, since CID does not have to wait to receive a complaint to initiate an investigation, and because the decision to terminate an investigation is made entirely within CID channels, a CID investigation likely would meet the ECtHR's standard for operational independence.

---

[100] AR 15-6, *supra* note 2, para. 2-1.
[101] *Id.*
[102] *Id.*
[103] *See Al-Skeini*, 53 Eur. Ct. H.R. at 171. In *Al-Skeini*, the ECtHR held that one of the reasons why the investigations failed to meet the Convention's standard was that "the investigation process remained entirely within the military chain of command." *Id.*
[104] CID-R 195-1, *supra* note 89.
[105] *Id.* para. 4-10.

B. Interviewing Key Witnesses

In several decisions, including *Al-Skeini*, the ECtHR faulted investigators for failing to interview key witnesses in a timely manner or for not interviewing them at all. In *McKerr v. The United Kingdom*, the ECtHR stated that for an investigation to be effective, investigators must take "whatever reasonable steps they can to secure . . . eyewitness testimony."[106]

In *Güleç v. Turkey*, the court criticized the investigating officer for failing to interview key witnesses, such as the warrant officer who fired into the crowd, or a witness who was standing at the deceased's side when the victim was hit by the round which caused his death.[107] The court also indicated that all investigators should interview the complainant, which the investigator failed to do in *Güleç*.[108] The court held that a breach of Article Two occurred due to the "lack of a thorough investigation into the circumstances of the applicant's son's death."[109] Thus, the ECtHR likely will find fault with an investigation that fails to take all reasonable steps necessary to ensure an effective, independent investigation, to include interviewing key or relevant witnesses, including cases involving difficult security conditions.

Army Regulation 15-6 requires the investigating officer to "ascertain and consider the evidence on all sides of each issue."[110] Implicit in this requirement is interviewing key witnesses. If the investigating officer fails to interview any particularly relevant witnesses, the legal advisor should highlight the omission in the legal review.[111] Thus, on the issue of witness interviews, AR 15-6 administrative investigations appear to meet the ECtHR's standard, provided the investigating officer takes all reasonable steps to interview key witnesses.

Once initiated, a CID investigation is generally required to be completed until "all logical and practical investigative leads [are]

---

[106] McKerr v. United Kingdom, 34 Eur. Ct. H.R. 20, 24 (2002).
[107] Güleç v. Turkey, 28 Eur. Ct. H.R. 121, 40 (1999).
[108] *Id.* at 41.
[109] *Id.*
[110] AR 15-6, *supra* note 2, para. 1-6.
[111] *Id.* para. 2-3. Army Regulation 15-6 requires a legal review of "all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action, or will be relied upon by higher headquarters." *Id.*

exhausted."[112] This requirement implies that agents will interview all critical witnesses and this language is stronger than the requirement in AR 15-6. FM 3-19.13 provides direction on how to conduct witness interviews and emphasizes the importance thereof, stating "The solution to many crimes is the direct result of leads and testimonial evidence developed through interviews and interrogations."[113] Thus, the CID investigation standards comply with the ECtHR's investigatory standard.

C. Length of Investigation

The ECtHR has held that a "prompt and effective response by authorities in investigating the use of lethal force is essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion or tolerance of unlawful acts."[114] Investigations into alleged unlawful killings require "promptness and reasonable expedition."[115] Although the ECtHR recognized that "obstacles or difficulties [may] prevent progress," it nevertheless reiterated the importance of conducting a "prompt and effective" investigation.[116] Furthermore, authorities "must act of their own motion once the matter has been brought to their attention."[117] They cannot simply wait for the next-of-kin to file a complaint or conduct their own investigation.[118]

The appointing authority determines the amount of time allotted to an AR 15-6 investigation and is responsible for approving any delays requested by the investigating officer.[119] The reason for any unusual delays must be included as an enclosure to the investigative report.[120] Thus, as with the scope and purpose of the investigation, the appointing

---

[112] CID-R 195-1, *supra* note 89, para. 4-3. CID-R 195-1, paragraph 4-10 enumerates certain limited situations in which a criminal investigation may be terminated prior to exhausting all investigative leads and "the CID investigative resources could be better employed on other investigations." *Id.* para. 4-10.
[113] FM 3-19.13, *supra* note 88, para. 1-63.
[114] Nachova v. Bulgaria, 39 Eur. Ct. H.R. 37, 17 (2004); *see also* McKerr v. United Kingdom, 34 Eur. Ct. H.R. 20, 24.
[115] *McKerr*, 34 Eur. Ct. H.R. at 24.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] AR 15-6, *supra* note 2, fig.2-4
[120] *Id.* para. 3-15.

authority is ultimately responsible for establishing the timeframe in which the investigation will be completed.

Once initiated, CID investigations must be "actively pursued."[121] Select investigations are monitored by the G-3, CID Headquarters "to keep the Commanding General, USACIDC and higher level Army officials fully advised of the investigative developments and ensure the expeditious completion of such investigations."[122] The priority that CID gives to a particular investigation depends on how it is classified.[123] Category I investigations take "precedence over all other investigative activities and require immediate action by all affected CID field elements."[124] The status of Category I investigations must be provided to a case monitor on a weekly basis "until the investigation is completed or monitorship is terminated."[125] Alleged war crimes would likely be assigned Category I monitorship status, particularly since AR 190-45, *Law Enforcement Reporting*, categorizes war crimes as Category I reportable serious incidents.[126] As Category I investigations, CID investigations into alleged unlawful killings must be conducted in an expeditious manner, as the standard set forth by the ECtHR contemplates, and established procedures should help ensure this occurs.

D. The Scope of the Investigation and the Investigation's Findings

The ECtHR held that an investigation of an alleged unlawful killing by State agents must examine all relevant matters, even if a *prima facie* case exists that the State agents acted in accordance with their regulations.[127] Thus, the investigation's scope is critical to its sufficiency. The investigation must ensure "strict scrutiny of all material circumstances," not just whether the State agents or soldiers acted in accordance with their prescribed regulations.[128] Investigators should not ignore significant facts and should seek proper explanations from

---

[121] CID-R 195-1, *supra* note 89, para. 4-3.
[122] *Id.* para. 4-15.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] U.S. DEP'T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING para. 8-2(b) (30 Mar. 2007).
[127] Nachova v. Bulgaria, 39 Eur. Ct. H.R. 37, 17 (2005).
[128] *Id.*

witnesses.[129] Because one of the purposes for investigating an alleged unlawful State killing is to hold State agents accountable, the ECtHR unsurprisingly has held that the findings must be "capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible."[130] However, this requirement is "not an obligation of result, but of means," meaning the investigators must "take whatever reasonable steps they can to secure the evidence concerning the incident."[131] Additionally, the investigation's findings must "be based on thorough, objective, and impartial analysis of all relevant elements."[132]

The ECtHR requires that the scope of the investigation be broad enough to discover the underlying factual circumstances. Meanwhile, under AR 15-6, the appointing authority determines the scope of an AR 15-6 investigation. The regulation stipulates that "whether oral or written, the appointment will specify clearly the purpose and scope of the investigation . . . and the nature of the findings and recommendations required."[133] Although the ECtHR has indicated that the investigation must consider and examine all relevant matters (regardless of any formal appointment memorandum or other procedural aspect), an AR 15-6 Investigating Officer "will normally not exceed the scope of the findings indicated by the appointing authority."[134] The findings of an AR 15-6 investigation must be "necessary and sufficient to support each recommendation."[135]

In comparison, a CID investigation "will normally extend to all aspects of the case, including related offenses, lesser included offenses, attempts, conspiracies to commit the primary or lesser included offenses, and accessories after the fact."[136] Thus, the scope of an investigation by CID may be broader and more in line with the standard set forth by the ECtHR than an AR 15-6 investigation, which can be as broad or as narrow as the appointing authority desires. Therefore, while an appointing authority could specifically limit the Investigating Officer to

---

[129] *Id.*
[130] McKerr v. United Kingdom, 34 Eur. Ct. H.R. 20, 24 (2002). This is similar to one of the CID investigation's purposes of determining whether an offense occurred.
[131] *Id.*
[132] *Nachova*, 39 Eur. Ct. H.R. 37, 137.
[133] AR 15-6, *supra* note 2, para. 2-1.
[134] *Id.* para. 3-10.
[135] *Id.*
[136] CID-R 195-1, *supra* note 89, para. 4-2.

certain matters and exclude others, a CID investigator has an inherent obligation to investigate other criminal matters discovered during the course of the investigation, whether or not those matters relate to or fall within the original scope of the investigation.

E. Public Scrutiny and Next-of-Kin Involvement in the Case

Two significant aspects that the ECtHR considers when reviewing an investigation are the degree of public scrutiny the investigation received and the extent to which any next-of-kin were involved in the investigation. The court held that "there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory."[137] The necessity for public scrutiny touches on one of the fundamental purposes of the investigation, namely, assuring appropriate accountability of the State agents involved. The court also stated that "the degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."[138] The next-of-kin involvement should include access to the investigation, being informed of any decision to prosecute, and the opportunity to review court documents.[139] The family of the deceased should be afforded the right to be involved in any procedure to the extent necessary to safeguard their interests.[140]

On the other hand, the court recognized that the disclosure of investigative materials to the next-of-kin is not an absolute requirement. It held that because the "disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations," disclosure is not an automatic right under Article Two of the ECHR.[141]

A provision of AR 15-6 specifically precludes an investigating officer from sharing the contents of the investigation with anyone, including the next-of-kin or members of the public, other than the appointing authority. It states, "No one will disclose, release, or cause to be published any part

---

[137] McKerr v. United Kingdom, 34 Eur. Ct. H.R. 20, 25 (2002).
[138] *Id.*
[139] *Id.*; *see also* Gul v. Turkey, 34 Eur. Ct. H.R. 28 (2002).
[140] *Id.* at 31.
[141] *Id.* at 27.

of the report, except as required in the normal course of forwarding and staffing the report or as otherwise recognized by law or regulation, without the approval of the appointing authority."[142] Unlike the ECtHR's standard, AR 15-6's default standard is not to share the investigative report unless the appointing authority directs otherwise or required by law or regulation.[143]

While CID-R 195-1 and AR 600-8-1, *Army Casualty Program*, address the manner in which to cooperate with next-of-kin in death investigations, neither regulation addresses working with the next-of-kin of an individual allegedly killed in violation of the law of war. Army CID will release investigations to the general public (subject to exemption) in accordance with requests pursuant to the Freedom of Information Act.[144]

Although AR 15-6 and CID-R 195-1 would not necessarily meet the standard established by the ECtHR concerning public scrutiny of investigations into unlawful killings and next-of-kin cooperation, the DoD has implemented a comprehensive Victim-Witness Program that meets the ECtHR's standard.[145]

F. Investigatory Steps that Should Be Taken When Appropriate

The ECtHR has emphasized that certain investigative steps should be taken in cases involving alleged unlawful killings. These steps include preparing detailed sketch maps, conducting a reconstruction of events as

---

[142] AR 15-6, *supra* note 2, para. 3-18(b).

[143] Another problem in practice is that much of the evidence and information contained within an AR 15-6 investigation into alleged law of war violations bears classification markings. Many recent reviews of approved investigations that were subsequently required by congressional requests for information or Freedom of Information Act requests determined that some or much of the initially classified information was actually over-classified. In any event, evidence and information bearing classification markings, unless subsequently declassified, would not be subject to public scrutiny as envisioned by the ECtHR. *See* USCENTCOM Attorney Interview, *supra* note 2.

[144] CID-R 195-1, *supra* note 89, at 27–26.

[145] 32 C.F.R. § 635.34 (2007); U.S. DEP'T OF DEF., DIR 1030.01, VICTIM AND WITNESS ASSISTANCE (13 Apr. 2004); U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (3 Oct. 2011) [hereinafter AR 27-10]. The victim witness program involves multi-disciplinary participants which "include, but are not limited to, investigative and law enforcement personnel, chaplains, health care personnel, Family Advocacy/services personnel, judge advocates, and other legal personnel." AR 27-10, *supra* note 145, para. 17-2.

well as a ballistic test and autopsy, and reviewing the planning, operational control, and guidance provided in the military operation alleged to have caused the death.

In several decisions, the ECtHR repeatedly has mentioned the importance of preparing sketch maps with detailed terrain characteristics.[146] The ECtHR has also discussed the importance of staging a reconstruction of events. In *Nachova and Others v. Bulgaria*, the ECtHR criticized the lack of event reconstruction.[147] In the absence of a reconstruction, it was impossible to verify the arresting officers' version of what transpired. In *Guleç v. Turkey*, the ECtHR held that "a reconstruction of the events would have made it possible to determine the trajectory of the bullet fragment and the position of the weapon that had fired it."[148] The ECtHR also criticized the investigation's failure to conduct a metallurgical analysis of the bullet fragments.[149]

Autopsies are another key part of any death investigation according to the ECtHR.[150] Autopsies provide "a complete and accurate record of injury and an objective analysis of clinical findings, including the cause

---

[146] Nachova v. Bulgaria, 39 Eur. Ct. H.R. 37, 17 (2004). In *Nachova*, the military investigator appended a sketch map to the report, but the map only gave some of the measurements of the neighboring yards in the area where the unlawful killing allegedly took place. "The gradient and other characteristics of the terrain and the surrounding area were not described." *Id.* As a result, "relevant measures were missed." *Id.*

[147] *Id.*

[148] Güleç v. Turkey, 28 Eur. Ct. H.R.121, 40. This case involved an incident on March 4, 1991, in which approximately 3000 people demonstrated in support of Kurdistan. When they reached the town square in Idil, Turkey, some of the demonstrators became violent, and the security forces, who were trying to disperse the crowd, called for back-up. A warrant-officer said he fired into the air, but the evidence suggests he fired shots at the crowd. In the course of events, Ahmet Güleç, a senior in high school, was killed. The court noted that

> [a] reconstruction of the events would have made it possible to determine the trajectory of the bullet fragment and the position of the weapon that had fired it. Similarly a metallurgical analysis of the fragment would have made it possible to identify its maker and supplier, and consequently the type of weapon used. Furthermore, no one seems to have taken any interest in the course of the bullet which passed through Ahmet Gulec's body, following a downward trajectory, which is perfectly consistent with fire having been opened from the . . . turret.

Id.

[149] *Id.*

[150] McKerr v. United Kingdom, 34 Eur. Ct. H.R.20, 24.

of death."[151] The court has also highlighted the importance of securing forensic evidence in cases involving alleged unlawful killings.[152]

In addition to completing a reconstruction of events, conducting a ballistic test, and securing forensic evidence, the ECtHR stressed the significance of examining the planning and control of the actions under investigation.[153] The court held that

> in keeping with the importance of [Article Two] in a democratic society, the court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.[154]

For example, in *Ergi v. Turkey*, the ECtHR held that even though it was determined beyond any reasonable doubt that the deceased had been killed by rounds fired by the security forces, the court also "must consider whether the security forces' operation had been planned and conducted in such a way as to avoid or minimize, to the greatest extent possible, any risk to the lives of the villagers."[155] This requirement is consistent with the ECtHR's emphasis on the need to investigate all relevant circumstances, not just what happened on the day of the alleged unlawful killing, including the events and planning leading up to the incident. The rules of engagement, planning meetings, operational control, and any guidance issued to the soldiers should be examined as part of the overall investigation.[156]

---

[151] *Id. But see* Aziz Sheikh, *Death and Dying—A Muslim Perspective*, 91 J. ROYAL SOC'Y MED. 139 (1998) (noting the fact that the next of kin of Muslims killed during a military operation may not grant permission for an autopsy to be conducted on their loved one and that the majority of Muslim fatwas hold that autopsies are forbidden by Islamic religious belief).
[152] *Id.*
[153] *McKerr*, 34 Eur. Ct. H.R. at 26.
[154] McCann v. United Kingdom, 47 Eur. Ct. H.R. 40, 26 (2008).
[155] Ergi v. Turkey, Eur. Ct. H.R. 28 (1998).
[156] *McCann*, 47 Eur. Ct. H.R. at 27.

Although the ECtHR's decisions detail several investigatory steps that should be taken, AR 15-6 does not specify similar requirements. Rather, the regulation simply states that "it is the duty of the investigating officer . . . to ascertain and consider the evidence on all sides of each issue, thoroughly and impartially, and to make findings and recommendations that are warranted by the facts and that comply with the instructions of the appointing authority."[157] It also states that "all evidence will be given such weight as circumstances warrant."[158] The investigating officer is responsible for seeking out and deciding which evidence is relevant to the investigation.[159]

CID-R 195-1 refers CID agents to Field Manual 3-19.13, which directly addresses death and war crime investigations, for detailed guidance on scene and evidence processing. Given this guidance, CID-R 195-1 is more specific in its requirements and suggestions than AR 15-6, which is generic enough to cover all types of Army administrative investigations. While FM 3-19.13 does not require a sketch map with terrain characteristics, it mentions that "an investigator should know the requirements necessary to document a crime, to include notes,

---

[157] AR 15-6, *supra* note 2, para. 1-6.
[158] *Id.* para. 3-7.
[159] Army Regulation 15-6 is in the process of being updated. The unapproved draft AR 15-6 would provide the investigating officer additional guidance concerning obtaining evidence. The proposed draft language states:

> The investigating officer may need to collect documentary and physical evidence such as applicable regulations, existing witness statements, accident or police reports, video/audio evidence such as UAS/Apache camera, and photographs up front. This information can save valuable time and effort. Accordingly, the investigating officer should obtain this information at the beginning of the investigation. In some cases, the information will not be readily available, so the request should be made early so the investigating officer may continue to work on other aspects of the investigation while the request is being processed. The investigating officer should, if possible and appropriate, personally inspect the location of the events being investigated and take photographs or prepare measured diagrams, if they will assist the appointing authority. The investigating officer should also determine what other organizations might be helpful during the course of the investigation (e.g., CID for polygraph or forensic assistance)

(on file with author).

photographs, and sketches."[160] Chapter 6 of FM 3-19.13 provides detailed instructions on the proper way to utilize notes, photographs, and sketches. Chapter 6 further states that the investigator "must consider himself the 'artist' of the crime scene, because all three of these tools are necessary to successfully reconstruct the scene."[161] Ultimately, FM 3-19.13 encourages CID agents to use notes, photographs, and sketches to reconstruct the events as part of any death investigation. In this respect, FM 3-19.13's guidance matches the ECtHR's requirement for detailed sketch maps and reconstructions of the event.

The ECtHR has emphasized the importance of ballistic tests in death cases involving firearms. FM 3-19.13 also recognizes that "the solving of a crime involving firearms depends largely on how the investigator collects and preserves firearm evidence."[162] Chapter 21 of FM 3-19.13 addresses the ECtHR's concern regarding a bullet's trajectory and the location of a weapon, noting that "[s]olving a crime that involves firearms often depends on the scientific examination of evidence by a qualified examiner at USACIL [United States Army Criminal Investigation Laboratory]."[163] It lists the many ways a ballistic test and other examinations at the laboratory can benefit the death investigation.[164] The actual testing is not performed by the agents in the field, but rather by USACIL firearms examiners, who "do the identification tests at the laboratory, and give the test results to the investigator in the field."[165] The various tests the laboratory can conduct, including proximity and gunshot residue tests, can greatly assist firearms cases.[166] By explicitly providing for the use of ballistic and other laboratory tests, CID investigations take into account the concerns of the ECtHR regarding the necessity of scientific tests where appropriate.

As with the standard established by the ECtHR, CID investigations recognize the benefits of an autopsy. A CID agent conducting a death investigation is encouraged to "set up a liaison with the pathologist who does the autopsy. Investigators must tell the pathologist the known facts of the death and the initial investigative findings before the autopsy."[167]

---

[160] FM 3-19.13, *supra* note 88, ch. 6.
[161] *Id.*
[162] *Id.* para. 21-1.
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.* para. 25-4.
[167] *Id.* para. 12-4.

However, conducting an autopsy for someone allegedly killed in violation of the law of war may be difficult.

CID-R Regulation 195-1 meets the ECtHR's requirement to secure all forensic evidence by emphasizing the "proper processing of crime scenes," which includes the "detection, description, collection, preservation and evaluation of physical evidence necessary for the identification and conviction of criminal offenders."[168] Additionally, FM 3-19.13, Chapters 5 and 6, provide details on how best to process and collect evidence at the scene. Thus, a CID investigation into a death case would address the ECtHR's concerns about securing forensic evidence.

As noted above, the ECtHR has emphasized the critical nature of examining the planning and operational control of the incident at issue. While the CID regulations do not explicitly address this particular concern, since the scope of a CID investigation extends "to all aspects of the case," the scope of the investigation can readily be broadened to cover the planning and operational control of the incident. Given the specificity with which CID regulations address the investigation of war crimes, and death cases in particular, CID investigations are much more likely to address the investigatory concerns of the ECtHR than an AR 15-6 administrative investigation.

G. Investigation Must Be Conducted Despite Difficult Security Conditions

Although an investigation of an alleged unlawful killing in violation of the law of war may occur in a dangerous area, the ECtHR has held that an effective investigation must still occur. The court ruled "neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article Two to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces."[169] The ECtHR acknowledged in *Al-Skeini* the "practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region . . . ."[170] Given the circumstances at the

---

[168] CID-R 195-1, *supra* note 89, para. 5-11.
[169] Güleç v. Turkey, 28 Eur. Ct. H.R. 121, 41.
[170] Al-Skeini v. United Kingdom, 53 Eur. Ct. H.R. 18, 47 (2011). The ECtHR acknowledged that the deaths in *Al-Skeini* occurred in Basrah City in the aftermath of the

time the investigations were conducted, the court "consider[ed] that in circumstances such as these the procedural duty under Article Two must be applied realistically, to take account of specific problems faced by investigators."[171] However, in that same decision, the court reaffirmed the obligation under Article Two to take all reasonable steps "even in difficult security conditions . . . to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life."[172]

Notably, AR 15-6 does not address security concerns or difficult investigatory operating conditions within the regulation. However, the appointing authority could always provide the investigating officer with an appropriate security detail if the investigating officer is required to work in a threatening security environment. In contrast, CID regulations explicitly contemplate conducting investigations in challenging environments. Thus, FM 3-19.13 explains that agents may be called upon to investigate alleged war crimes, such as unlawful killings in violation of the law of war,[173] yet FM 3-19.13 also cautions that "[a]t war crime scenes, investigators must be aware of potential environmental hazards, such as areas devastated by war that may have unexploded munitions present. Investigators must exercise due caution in moving in and around the scene and ensure that onlookers are carefully removed from the scene."[174]

By addressing the need to conduct investigations in challenging environments, CID regulations provide more direction than AR 15-6. Furthermore, because of this guidance, a CID investigation is much more likely than an AR 15-6 administrative investigation to meet the standard set forth by the ECtHR. However, CID investigations into such matters are not a common practice.[175]

---

invasion, "during a period when crime and violence were endemic". The Coalition forces, "including British Soldiers and military police, were the target of over a thousand violent attacks in the subsequent thirteen months." *Id.* at 45.

[171] *Id.*

[172] *Id.* at 46.

[173] FM 3-19.13, *supra* note 88, para. 18-1.

[174] *Id.* at 18-22. FM 19-20, which FM 3-19.13 superseded, explicitly addressed the security threat that could confront war crime investigators. It specifically designated a "security force from the supporting unit . . . assigned to protect the investigators and witnesses when interviews must be in hostile areas." U.S. DEP'T OF ARMY, FM 19-20, LAW ENFORCEMENT INVESTIGATIONS 256–57 (25 Nov. 1985).

[175] USCENTCOM Attorney Interview, *supra* note 2.

VI. Recommend Future AR 15-6 Investigations Fulfill the ECtHR Standard

As demonstrated above, an investigation into an alleged unlawful killing conducted by CID in accordance with CID-R 195-1 would likely meet the ECtHR's standard. However, often only an AR 15-6 investigation is conducted into a law of war violation. Because of the preference for AR 15-6 investigations, and given the limited number of available CID agents, these administrative investigations should conform to the ECtHR's investigative standards, which embody developing human rights world norms.

Two actions should be taken to help ensure administrative investigations meet the ECtHR's standard for investigations into serious alleged law of war violations. First, as the Department of Defense Executive Agent for DoDD 2311.01E, the Army should update the Directive to provide clear guidance to the units in the field concerning investigations into alleged law of war violations.[176] Second, a fully resourced investigative team whose sole mission is to conduct administrative investigations into serious law of war violations should be created in future ground conflicts.

A. Recommend Updating DoDD 2311.01E

The U.S. policy articulated in DoDD 2311.01E is broad and "intentionally sets the standard low to ensure that the chain of command and other U.S. officials are fully informed as to any incidents that might possibly amount to an International Humanitarian Law violation."[177] However, as a result of its broad nature, all possible or alleged law of war violations are treated the same. This risks diluting the distinction between truly serious law of war violations and relatively minor violations. For example, failing to allow a prisoner of war to smoke a cigarette is a violation of the law of armed conflict.[178] Provided there is "credible information" to support such an allegation, DoDD 2311.01E requires the matter be expeditiously submitted through command channels to the Combatant Commander, who in turn must report it to the

---

[176] DoDD 2311.01E, *supra* note 81.
[177] Schmitt, *supra* note 32, at 70.
[178] Geneva Convention Relative to the Treatment of Prisoners of War, art. 26, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

Chairman of the Joint Chiefs of Staff, the Secretary of the Army, and the Secretary of Defense.[179] If the unit addresses the situation directly and elects not to report it, the unit has violated DoDD 2311.0E. The directive risks diluting the impact and visibility of more serious law of war allegations by requiring all alleged law of war violations be reported, no matter the degree of severity of the allegation. Therefore, the directive needs to clearly outline exactly what types of alleged law of war violations (such as unlawful killings and detainee abuse) need to be reported and require a criminal investigation in addition to any administrative investigation.

Additionally, DoDD 2311.01E fails to provide specific guidance as to how to investigate alleged law of war violations. In addition to requesting a formal investigation by the cognizant MCIO, it requires Combatant Commanders to "issue directives to ensure that reportable incidents involving U.S. or enemy persons are reported promptly to appropriate authorities and are investigated thoroughly, and that the results of such investigations are promptly forwarded . . . ."[180] However, DoDD 2311.01E neglects to provide any guidance on how to conduct the administrative investigation or what standard to use to review it.

Chairman of the Joint Chiefs of Staff Instruction 5810.01D also does not provide any specific information on how to conduct the investigation. It requires the commander of the unit involved to perform a preliminary inquiry into the matter. If it is determined that U.S. personnel may be involved in or responsible for the reportable incident, then the commander "shall initiate a formal investigation by command investigation in accordance with Service regulations, and shall at the same time notify the cognizant MCIO."[181] Thus, a combatant command is free to choose which Service regulation it will use when it conducts the administrative investigation. However, there is no clear guidance on how the investigation is to be conducted or to be reviewed. This lack of regulatory guidance and standard of review would fail to meet the ECtHR's investigatory standard for unlawful killings.

Furthermore, DoDD 2311.01E requires Combatant Commands to "provide for the central collection of reports and investigations of reportable incidents alleged to have been committed by or against

---

[179] DoDD 2311.01E, *supra* note 81, paras. 6–4 to 6–5.
[180] *Id.* paras. 5.11.6, 6.5.
[181] CJCSI 5810.01D, *supra* note 84.

members of their respective Combatant Commands, or persons accompanying them."[182] The Combatant Commands are not currently following these requirements.[183] This is likely a result of the lack of clear guidance and standards contained within DoDD 2311.01E. As a result, the directive as a whole is undermined by current non-compliance.

Department of Defense Directive 2311.01E should be updated to make it more practical and helpful to units in the field. By requiring every "possible, suspected, or alleged violation of the law of war, for which there is credible information" to be reported, units are confronted with the burden of reporting minor incidents that are technically violations of the law of war, or not reporting them at all in violation of the directive.[184] While an inquiry must be conducted into all alleged violations of the law of war for which there is credible information, not all technical violations of the law of war should require expeditious reporting to the Secretary of Defense.

To clarify and reinforce the obligation to report, DoDD 2311.01E should provide clear instructions detailing what kinds of law of war violations should be investigated at the unit level and should be reported to the Combatant Command for recording in the central repository. It should also specifically outline the violations that require expeditious reporting through command channels to the Secretary of Defense and that require outside investigation. Allowing the units to conduct inquiries into relatively minor, albeit technical, violations of the law of war will empower them to immediately correct such violations without the additional burden of reporting to the Secretary of Defense. On the other hand, requiring a report to the combatant command and respective military department will ensure proper visibility of all alleged law of war violations for which credible information exists and will help the combatant commands maintain the central repository as required by the directive. Additionally, DoDD 2311.01E should provide a clear standard and well-defined criteria to assist the officer assigned to conduct the investigation to produce a high quality investigation capable of withstanding outside scrutiny.

---

[182] DoDD 2311.01E, *supra* note 81, para. 5.11.3.
[183] USCENTCOM Attorney Interview, *supra* note 2.
[184] DoDD 2311.01E, *supra* note 81, para. 3.2.

B. Recommend Resourcing a Team to Investigate Serious Law of War Violations

Department of Defense Directive 2311.01E should be updated to mandate the creation of an investigative team whose sole mission would be to conduct administrative investigations in future ground conflicts. A well-resourced investigative team would produce better quality investigations likely to meet the scrutiny of the international community, as well as the ECtHR's investigatory standard. At a minimum, this investigative team should consist of a general officer as investigating officer, a CID special agent advisor, a field grade judge advocate, a court reporter, and an interpreter.

A general officer should be appointed by the relevant combatant commander as the investigating officer for the investigative team. This general officer would ensure appropriate cooperation from units throughout the theater on investigatory and logistical matters. Additionally, the general officer would be able to adequately investigate the planning and operational control aspects of any incident under investigation to enhance the effectiveness of the investigation. Compared with a more junior investigating officer, the general officer's experience conducting investigations, as well as his military experience, would improve the overall quality of the investigation.[185]

The appointment of a general officer as the investigating officer would help the investigations meet several of the ECtHR's criteria for an effective investigation. First, provided the appointment memorandum is

---

[185] For example, the initial investigation into the combat action at Wanat Village, Afghanistan, on July 13, 2008, conducted by Combined Joint Task Force (CJTF) 101 provided a comprehensive examination of the actual combat action. The investigating officer was a colonel appointed by the CJTF 101 Chief of Staff. A U.S. Marine Corps lieutenant general was then appointed on October 7, 2009 by the Commander of Central Command. This investigation expanded its scope beyond just the events of July 13, 2008, to include examining the decisions and actions of the commanders and staffs at the company, battalion, brigade, and joint task force/division levels. Ultimately, the Secretary of the Army appointed General Charles Campbell to review both investigations and take appropriate action with regard to the Army officers involved. General Campbell determined "the U.S. casualties did not occur as a result of deficient decisions, planning, and actions of the chain of command . . . . The U.S. casualties occurred because the enemy decided to attack the combat outpost at Wanat and battle resulted." General Charles C. Campbell, Army Regulation 15-6 Report of Investigation of Action on the Re-Investigation into the Combat Action at Wanat Village, Wygal District, Nuristan Province, Afghanistan (on file with author).

properly scoped, it would allow the investigation to examine not just the events of the day in question, but also the planning and decisions made at the battalion, brigade, and division levels. This broadened scope would more likely enable the investigation to examine the accountability of all individuals who may have been responsible, an aspect the ECtHR and the international community consider when reviewing investigations. Second, although the general officer would be a member of the military, his independence would likely not be questioned given his seniority, as well as the fact that he is outside the immediate chain of command. Third, the investigation would probably be completed in a more expeditious manner. A general officer appointed by a combatant commander would receive immediate assistance, such as priority air travel and other travel-related assistance, and as well as greater cooperation throughout theater compared with the level of cooperation a field or company grade officer appointed by a brigade or battalion commander could expect. Finally, the overall quality of investigations would likely improve given the general officer's prodigious military experience and knowledge. Since conducting investigations would be this officer's full time duty, the investigating officer would continue to gain experience conducting investigations, which would result in better quality investigations. Having one investigating officer conduct the most serious or high-visibility investigations would also ensure that an array of different investigations achieved a certain level of consistency. Therefore, the appointment of a standing general officer investigating officer by the respective combatant commander would greatly enhance the quality of investigations.

As demonstrated above, an investigation conducted in accordance with CID regulations would likely withstand international scrutiny and meet the ECtHR's investigatory standard. Although the investigating officer would operate pursuant to AR 15-6, he would benefit by having a CID agent that is in-country specifically designated as an advisor to the investigative team. This designation would ensure adequate cooperation from CID with the investigations. The agent could assist the investigating officer with any questions he may have and provide recommendations on the conduct of the investigation. This assistance would be particularly beneficial in those cases that the MCIO decides not to investigate yet that are assigned to the investigative team. It would also provide for better synchronization in cases where administrative and criminal investigations are conducted. The CID agent could also serve as a liaison between the investigative team and resources specifically available to CID, such as the USACIL. For example, if the investigating

officer determines he requires a forensics test, he could contact his CID advisor who would then immediately coordinate the test with USACIL. The CID agent would help assist with those investigatory tasks that the ECtHR has determined are necessary for a legally sufficient investigation. These could include reconstructing scenes, producing sketch maps, obtaining autopsy reports, and preserving evidence. Finally, since CID has its own separate chain of command, having a CID agent specifically designated to advise and assist the investigative team would add another independent and professional resource to the team, thereby increasing the likelihood that the investigation would be determined to be "sufficiently independent" when subjected to scrutiny.

A field grade judge advocate should also be assigned to the investigative team. This judge advocate would assist the investigating officer from the moment the investigating officer receives his appointment memorandum per case until he completes his final report. Ideally, the judge advocate would travel with the investigating officer as he conducts his interviews. The judge advocate would assist the investigating officer by ensuring the investigation is properly scoped, formulating witness questions, ensuring the investigation leads to logical endpoints, critically examining the evidence, and reviewing and providing comments to the final written report.[186]

The investigative team should also include a court reporter. Court reporters were extremely difficult assets to obtain for investigations in Iraq and remain so in Afghanistan.[187] Although AR 15-6 does not require transcripts of witness interviews, given the likely attention and high-level visibility the investigations conducted by this investigative team would receive, a court reporter should be assigned to the team to transcribe interviews. While witness statements are often written or typed by the witness, a witness statement might not capture everything that was discussed during the interview. A court reporter could record everything each witness said to ensure the investigation's exhibits and

---

[186] Major General Joseph L. Votel, Army Regulation 15-6 Report of Investigation on 8 Oct. 2010 Hostage Rescue Operation in Konar Province, Afghanistan (9 Nov. 2010) [hereinafter MG Votel, AR 15-6 Investigation] (on file with author). Major General Votel investigated a hostage rescue operation that resulted in the death of Ms. Linda Norgrove. The investigation recommended that the composition of its investigatory team "be considered as a model for future investigations of incidents that have overlap between the United States and other nations." *Id.* Included in the team was a "well connected and serving legal officer." *Id.*

[187] USCENTCOM Attorney Interview, *supra* note 2.

findings were accurate. A dedicated court reporter could also help compile, prepare, and package the investigation report to save the investigating officer valuable time and help ensure a professional look to the investigation.[188] While those scrutinizing the investigation might disagree with the investigating officer's findings or recommendations, a court reporter's involvement would greatly reduce the possibility of disagreement concerning the substance of the witness testimony or accuracy of exhibits themselves.

The next most challenging investigatory resource to obtain after a court reporter in a contingency environment is a qualified interpreter.[189] While interpreters may be assigned to individual investigations, it is difficult to ensure that interpreters have accurately translated an interviewer's questions or a witness's responses.[190] Therefore, an accurate and qualified interpreter should be selected to be a member of the standing investigative team.

In addition to the benefits described above, a fully resourced investigative team would be able to quickly respond to events and obtain statements from witnesses who might otherwise disappear or who may no longer wish to cooperate given the lengthy amount of time investigating officers normally take to obtain witness statements. In *Al-Skeini*, the British soldiers had difficulty obtaining key witness statements in a timely manner. A lengthy period of time between the incident and the time an investigating officer is ready to take statements allows witnesses to leave the area or possibly become intimidated into not cooperating with the investigation.[191] A standing investigative team would likely be able to obtain crucial witness statements that otherwise might have gone unrecorded.

Although standing up such an investigating team will require significant, and often scarce, resources, the team would likely save time and money in the long term. If a brigade, battalion, or company level officer conducts a single critical investigation without appropriate guidance, the outcome could necessitate an additional investigation once the original investigation has been scrutinized by next-of-kin, the press,

---

[188] *See* MG Votel, AR 15-6 Investigation, *supra* note 186. The investigation explained that "the provisioning of a two-person court-reporter team was invaluable to accurate testimony transcription and overall speed of the investigation." *Id.*
[189] USCENTCOM Attorney Interview, *supra* note 2.
[190] *Id.*
[191] *Id.*

Congress, or other outside agencies. A single well-resourced investigative team would produce quality AR 15-6 investigations up front, which would save time and money in the long term by avoiding the need to supplement or entirely redo deficient investigations.

VII. Conclusion

The current trend of applying international human rights law to the battlefield is likely to continue and increase in the future. At times it may be a court applying a human rights treaty to military operations extraterritorially, such as the ECtHR in *Al-Skeini*. Other times it may be a government affirmatively looking to apply sources of international human rights law like the ICCPR in a complementary and mutually beneficial manner with the *lex specialis* of the law of armed conflict. The application of human rights norms to the battlefield will have real-world consequences for States, as the British learned in *Al-Skeini*. The impact will be magnified for our NATO partners, given that they are subject the ECtHR's jurisdiction.

While the United States is not a member of the ECtHR and takes the position that the ICCPR does not apply extraterritorially, the United States should not ignore the trend and simply argue the *lex specialis* of the law of armed conflict. As a leader in the world of human rights, the United States should welcome the challenge of applying international human rights norms to the battlefield and should set the example by meeting emerging international human rights standards.[192]

One area in which the United States can work to meet these standards is military investigations into serious law of war violation allegations, such as unlawful killings. Although CID investigations meet the ECtHR's standard for such investigations, in practice, serious law of war violations are typically investigated via the procedures of AR 15-6, which do not meet the ECtHR's requirements or developing human rights world norms. Two actions would help ensure U.S. military administrative investigations meet the standard. First, DoDD 2311.01E

---

[192] *See also* Koh, *supra* note 58, at 1416. Koh would likely agree that judge advocates are lawyers with "knowledge of the body politic acquire a duty not simply to observe transnational legal process, but to try to influence it . . . to try to change the feelings of that body politic to promote greater obedience with international human rights norms." *Id.*

should be updated to specify exactly what should be expeditiously reported, as well as to provide a clear standard and well-defined criteria for investigating officers. Second, an investigative team should be created and resourced to investigate serious allegations of law of war violations in future ground conflicts. By working to meet international human rights norms on the battlefield, the United States will truly be "committed to holding everyone to the same [human rights] standard, including ourselves."[193]

[193] Sec'y of State Hillary Clinton, *2009 Country Reports on Human Rights Practice* U.S. DEP'T OF STATE., Mar. 11, 2010), *available at* http://www.state.gov/j/drl/rls/hrrpt/2009/frontmatter/135934.htm (Secretary of State Clinton explaining that "Human rights are universal, but their experience is local"). This is why the United States is committed to holding everyone, including the United States, to the same human rights standard. *Id.*

A JURY OF ONE'S PEERS: AN EMPIRICAL ANALYSIS OF THE CHOICE OF MEMBERS IN CONTESTED MILITARY COURTS-MARTIAL

JOHN A. SAUTTER* AND J. DEREK RANDALL**

This article explores the question of panel choice in a contested military court-martial. In the military system an accused can choose one of three options: trial by judge alone, trial by officer panel members or trial by officer panel members with at least 1/3 enlisted representation. A common assumption among many military practitioners is that an enlisted accused will fare better when tried by a members' panel (the military term for jury) that is composed of both officers and enlisted members as opposed to trial by judge alone or by officers only. Using statistical analysis of cases occurring in the US Marine Corps between 1 January 2011 and 1 July 2011, this article shows there is no marked difference in outcomes between the three sorts of fact finders allowed at trial. Furthermore, the evidence suggests that following a contested court-martial member panels composed of at least 1/3 enlisted members tend to award confinement sentences that are longer in time than trial by judge alone or officer only panels.

I. Introduction

Does a jury of one's peers always offer the best outcome for a defendant? This article sheds light on the effects of having enlisted members on a court-martial "panel" (the military name for a jury) during contested trials and during sentencing.[1] Data was collected from all

---

* B.A., New York University, 2001; M.A., University of Nebraska, 2002; Ph.D., University of Nebraska, 2005; J.D., 2008, Vermont Law School; LL.M., Vermont Law School, 2009. Captain in the U.S. Marine Corps and presently serving as a military prosecutor at Marine Corps Base Camp Pendleton, California. The views herein should not be attributed to any of the author's institutional affiliates, including the U.S. Department of Defense. The author can be contacted at jas276@nyu.edu.

** B.A., Texas A & M University, 2008; Captain in the United States Marine Corps; Captain Randall is currently assigned as Assistant Professor of Naval Science at Marquette University. The views herein should not be attributed to any of the author's institutional affiliates, including the U.S. Department of Defense. The author can be contacted at jdrandall08@hotmail.com.

[1] MANUAL FOR COURTS MARTIAL, UNITED STATES, R.C.M. 907(2)(C)(i) (2008) [hereinafter MCM] ("The role of members in a military has become somewhat more analogous to that of a jury."). *See, e.g.*, UCMJ art. 39(a) (2008). *See also infra* note 5 (visiting the composition of courts-martial panels).

cases in the Marine Corps from 1 January to 1 July 2011. Information on each case came from the United States Marine Corps (USMC) Trial Counsel Assistance Project weekly case reports during this time period.[2] These reports offer a brief description of each special and general court-martial, totaling 218 cases during the six month time period.[3] A statistical analysis was conducted using this data. Results from this sample of cases suggest that there is no significant difference between the outcomes of cases decided by a judge alone, officer member panels or panels with enlisted representation.[4] Finally, a regression analysis was employed to test the hypothesis that panels with enlisted representation give lower sentences as compared to sentencing by a judge alone or a members' panel of officers. Findings indicate that members' panels composed of at least 1/3 enlisted members tended to give higher sentences at a statistically significant rate.

II. Enlisted Representation and Military Juries

A. Juries in the Military

Juries are difficult.[5] Whether a litigator is attempting to pick the right jurors, decide how to phrase voir dire questions or whether to choose a jury trial, it all comes down to a complex set of calculations that the trial lawyer must make.[6] Oftentimes, there are certain variables that a lawyer can know at the outset of a case.[7] For example, a good defense counsel might take into account the skill level of the prosecutor they are facing, the strength of the evidence against their client, or whether the

---

[2] Trial Counsel Assistance Project, *available at* http://www/marines.mil/unit/judge advocate/Pages/JAM/JAM_home/TCAP.aspx (The Marine Corps Trial Counsel Assistance Project's mission is to "develop and provide litigation training, develop and maintain litigation support resources, and provide military justice advice for prosecutors").

[3] Each weekly report provided the name, judge, type, Uniform Code of Military Justice (UCMJ) article violated, sentence and place of court martial.

[4] UCMJ art. 25 (2008) (As explored further in the article, there are three different trial options within special and general courts-martial: judge alone, officer only panel, and officer and enlisted panel.).

[5] James K. Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 30–31 (1994) (purporting the unpredictability of member panels).

[6] Voir dire is the French word for "speaking the truth."

[7] *See, e.g.*, GEORGE R. DECKLE, PROSECUTION PRINCIPLES: A CLINICAL HANDBOOK (Thomas West Publishing, 2007) (describing the initial analysis of a case done by any lawyer preparing to be in court).

trial judge has a history of being "defense friendly."[8] However, when it comes to jurors, it is much more difficult for litigators to make strategic calculations.[9] A litigator can never really know how a juror will react once presented the evidence in a criminal trial.[10] Some of the inherent difficulties in jury assessment stem from the varied nature of the individual jurors, and similarities or dissimilarities with the accused.[11] Namely, how will a jury more closely resembling the accused, carrying with it the perspectives and diversity of the community from which it was derived, view a particular case?

The notion a "jury of one's peers," though not constitutional, was first formally introduced by the Magna Carta in 1215.[12] It is premised on the concept that one's peers will provide a more equitable and just legal venue than that provided by members of a disassociated aristocracy.[13] From this logic it can be further inferred that an intrinsic understanding of the dynamics of an individual's particular community-standing and

---

[8] *Id.*

[9] *See* Lovejoy, *supra* note 5, at 30–31 (purports unpredictability of member panels). *See also* Megan N. Schmid. *This Court-Martial Hereby (Arbitrarily) Sentences You: Problems with Court Martial Sentencing in the Military and Proposed Solutions*, 67 A.F. L. REV. 245, 254–55 (2011) (describing difficulty in predicting jury behavior).

[10] *See* Lovejoy, *supra* note 5, at 30–32. *See also* Schmid, *supra* note 9, at 254–55 (Both visit the general unpredictability in member sentencing and greater disparity between member sentencing and judge-alone decisions within similar cases.).

[11] MATTHEW L. FERRARA THE PSYCHOLOGY OF VOIR DIRE 137 (2011) (Ferrara asserts that a jury does not deliberate on the facts and arguments, but rather the juror's subjective perception of facts and arguments. Further positing that perception is inherently based on belief systems, those belief systems can be excessively advantageous or disadvantageous to an accused, particularly if they reflect or do not reflect those evident in the accused.).

[12] *The Magna Carta*, affirmed by King John in 1215, is generally accepted as the first written guarantee of trial by jury and is still acknowledged for this virtue. LLOYD E. MOORE, THE JURY 49 (1973). The 39th clause purports that "[n]o freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way ruined; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers. . . ." MAGNA CARTA para. 39 (Eng. 1215), *reprinted in* J.C. HOLT, MAGNA CARTA 461 (2d ed. 1992).

[13] *See* Charles L. Wells, *Early Opposition to the Petty Jury in Criminal Cases*, 30 L.Q. REV. 97, 105 (1914) (stating that jury's representative character was most important because jury used members of community with knowledge of parties and dispute.). *See also* Jefferson Edward Howeth, Holland v. Illinois*: The Supreme Court Narrows the Scope of Protection Against Discriminatory Jury Procedures*, WASH. & LEE REV. 579, 588, 592–96 (1991) (reviewing the roots of the employment of trial by jury in early Anglo-Saxon England, Howeth states: "By enlisting neighbors of an individual who had knowledge of the facts in issue to return an accusation or resolve a dispute, these progenitors of the jury provided a more certain source of knowledge than that available to a distant government official.").

circumstances is a necessary condition to just findings and sentencing.[14] This notion supports the concept that one's peers *should* provide a more just, and potentially, fair forum for a trial when compared to one composed strictly of members of a different socio-economic class.[15] Subsequent generations, to include the authors of the United States Constitution, came to regard this provision within the Magna Carta as one of the principal guarantees of liberty under the common law.[16] They felt the phrase "but by lawful judgment of his peers" ensured a fair trial by a community cross-section—safeguarding the subject against unwarranted interference in an individual's intrinsic rights and liberties.[17]

The sixth amendment governs jury composition within the United States.[18] It requires that juries be "impartial" and composed of a fair

---

[14] *See* Howeth, *supra* note 13, at 588; Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (The primary assertion here is the importance granted to the community cross-section requirement of jury venire. Being members of the same community in which a crime was committed grants jury members provide/grant/bring/have/possess a privileged perspective on the effect of that crime within the community.).

[15] *See* Wells, *supra* note 13, at 105; Howeth, *supra* note 13, at 92. For an example within the U.S. civilian legal system, see *Duncan v. Louisiana*). 391 U.S. 145, 149 (1968) (In *Duncan,* a Louisiana court tried and convicted the defendant, Gary Duncan, of simple battery without a jury in accordance with Louisiana law.). *Id.* at 156 (As noted by Howeth, "the *Duncan* Court noted that trial by a jury of peers gives the accused an "inestimable safeguard" against a corrupt or overzealous prosecutor or a biased judge by substituting the common sense judgment of the jury for the professional, but possibly less sympathetic, reaction of the judge.").

[16] *See* Toni M. Massaro, *Peremptories or Peers? Rethinking Sixth Amendment Doctrine, Images, and Procedures,* 64 N.C. L. REV. 508 (1986) (stating one of the principal reasons that colonists valued the right to jury trial was their belief that juries of laymen would prevent the arbitrary exercise of government authority). *See also* J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 6 (1977) (American colonists considering the right to jury trial fundamental to an individual).

[17] *See supra* notes 13, 14 and 17. *See also* Smith v. Texas, 311 U. S. 128, 130 (1940). A unanimous Court stated that '[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.' In this particular instance it was stated that racial group exclusion from jury duty was 'at war with our basic concepts of a democratic society and a representative government.'"), *see also* Peters v. Kiff, 407 U.S. 493 503–04 (1972) (stating that the deliberate exclusion of particular cognizable groups of people "deprives the jury of a perspective on human events").

[18] The U.S. Constitution, Amendment VI states that

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

cross section of the community in which the crime took place.[19] Legal doctrine in the United States is premised on the notion that impartial juries are necessary for a fair trial.[20] A common idea being that "impartiality" is at least in part dependent on proportional demographic representation over time within the jury venire.[21] The Supreme Court has ruled that when demographic qualifiers like race or sex are a determining factor in jury selection, a defendant's right to equal protection under the law has been violated.[22] The logic follows that proportionally representative diversity over time in race, sex, creed and socioeconomic class amongst jury members, should increase the potential for impartiality, and subsequent just rulings.[23] This notion is also implicit in the Sixth Amendment, which requires that juries be representative of the community in which the crime was committed or, more informally stated: a jury of one's peers.[24] With such focus on the importance of nondiscriminatory community representation in jury venire, it can only be assumed that the sixth amendment's community

---

> nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

[19] *See* Howeth, *supra* note 13, at 594–95. *See also infra* note 26 (In *Taylor v. Louisiana* the Court interpreted that the Sixth Amendment's guarantee of trial by an impartial jury requires that the jury be derived from a representative cross-section of the community.).

[20] Examples of the extent that courts have gone to preserve the necessary cross-section community representation and subsequent impartiality requirement are rife throughout U.S. legal history. *See* Duncan v. Louisiana, 391 U.S. 145, 156 (1968); Howeth, *supra* note 13, at 598–99, 604; Ballard v. United States, 329 U.S. 187, 193–94 (1946).

[21] *See* Howeth, *supra* note 13, at 594–96.

[22] *See* Taylor v. Louisiana, 419 U.S. 522, 524 (1975) (stating that "[t]he Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross-section of the community. *See also Ballard*, 329 U.S. at 193–94 (ruling that both sexes contribute "a flavor, a distinct quality" requisite and valuable to jury deliberations.); Batson v. Kentucky, 476 U.S. 79 (1986) (A prosecutor used peremptory challenges after the completion of voir dire to remove all members of color from a jury that convicted a black defendant. On appeal, the U.S. Supreme Court held that a state denies a black defendant equal protection under the fourteenth amendment when it puts him on trial before a jury from which members of his race have been purposefully excluded.)

[23] *See* Howeth, *supra* note 13, at 598–99 & 607–08.

[24] Richard Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. (2007) (This community participation is a guarantee to the defendant under the Sixth Amendment). *See also* Beavers v. Henkel, 194 U.S. 73, 77 (1904) (ruling that that the place where the offense is charged to have occurred determines the trial's location).

cross-section requirement is meant to facilitate more just, and potentially more advantageous, outcomes for the defendant.[25]

Courts-martial panels within the military legal system are vastly different compared to civilian juries.[26] In a typical criminal case in the civilian legal system, the accused can elect one of two trial options; trial by judge alone, or trial by a jury of randomly selected members of the community.[27] However, the military system introduces additional panel compositions: one composed entirely of officers, or one composed of officers with 1/3 enlisted representation; the last type hereinafter referred to as an "enlisted panel."[28] The military is unique in its systematic inclusion of enlisted members to a panel.[29] In no United States civilian system—state or Federal—is there a trial option that actively reserves a portion of the jury for a particular faction of the represented community.[30] The civilian legal system only requires that the venire from which a jury is derived is not adjusted in scope to the particular excessive inclusion or exclusion of a cognizable group of people; with disregard for the eventual composition of jurors in any individual case.[31] The uniqueness of the military system of the choice of inclusion of enlisted members in courts-martial panels naturally elicits curiosity in the effect of that bloc within proceedings.

---

[25] *See* Howeth, *supra* note 13, at 598–99 & 604.

> The exclusion of distinct groups from the jury undermines the fair cross-section requirement and distorts the common sense judgment of the jury, causing the defendant injury in fact by denying the defendant a decision reflecting the common sense judgment of the community. The defendant also is the proper proponent of the right asserted because the right to trial by a jury drawn from a cross-section of the community is a personal right of the defendant guaranteed by the Sixth Amendment.

[26] Discussions within the *Manual for Courts-Martial* (*MCM*) often provide explanations of military deviations from the civilian legal system.

[27] *See supra* note 19 and accompanying text.

[28] *See supra* note 5 & *infra* note 33.

[29] *See* MCM, *supra* note 1, R.C.M. 903 (Accused election of compositions of courts-martial).

[30] *See* Re, *supra* note 24, at 6–12 (providing examples for exceptions to the individual case assertion, as well as elaborates on the cross sectionality requirement of the venire and not necessarily the resultant jury).

[31] *Id*. Also, *Venire* is a Latin word meaning "cause to come." Its common legal usage refers to the summoned pool of potential jurors for trial.

There is a common conception amongst many military justice practitioners of both the defense and prosecution bars that enlisted panel members are more deferential to an enlisted accused. Some practitioners have made the argument that enlisted panel members have a higher threshold of reasonable doubt and are harder to convince of guilt.[32] Others have verbalized a belief that enlisted panel members connect more to an enlisted accused and can more easily see his or her perspective. All justifications for these beliefs have been based on anecdotal evidence from the litigator's experience during their career as a prosecutor or defense counsel. Ultimately, this common conception raises the question of whether there is empirical evidence that enlisted members are in fact deferential to an enlisted accused?

B. The Military System & Its Uniform Code

The Uniform Code of Military Justice (UCMJ) drives the military justice process.[33] It prescribes that the commander of an accused's parent unit is the convening authority, or the authority that refers an investigation to a prosecutor for charges and potentially trial.[34] Once a request for legal services is made by a convening authority (the unit commander), the military prosecutor then assumes an obligation to ensure that the case is tried in a fair manner[35]. The convening authority is not allowed to be involved in the prosecution, but should maintain a neutral disposition in regards to the case in order to give the accused service member the benefit of the doubt and allow the military justice process to go forth unencumbered by the command's influence.[36] While it is the convening authority who might initiate proceedings, or investigate a potential crime, the convening authority also has an obligation to treat the accused in a fair manner that gives him the benefit of the doubt until proven guilty through the justice system.[37]

The military justice process begins once charges are brought against the accused.[38] By law, the UCMJ grants the accused a defense counsel

---

[32] *See infra* note 60.
[33] *See* MCM, *supra* note 1, app. 2.
[34] *See id.* R.C.M. 504 (who may convene courts-martial).
[35] *See id.* R.C.M. 502 (obligations of the trial counsel).
[36] *See id.* R. C. M. 104 (unlawful command influence and convening authority disposition within the court-martial process).
[37] *Id.*
[38] *See id.* R.C.M. 301–08 (initiation of charges, apprehension, and pretrial restraint).

once charges are brought against him.[39] At this time, a military judge is given authority over a case in order to hear motions by the prosecutor or the defense counsel, and to make the court available for a court-martial.[40] For their part the defense counsel and the prosecutor develop a case timeline and set a trial date.[41] The prosecutor can either seek to refer the charges to a special court-martial or a general court-martial.[42] The primary difference between a special and general court-martial is that a special court-martial caps the potential sentence for the accused at one year.[43] Therefore, major crimes (e.g., capital offenses) are most commonly associated with a general court-martial; lesser crimes with a special court-martial.[44] Under the UCMJ, if the case proceeds to a contested court-martial, and if the accused is an enlisted military member, they are granted the option of choosing the finder of fact for the trial.[45] Each option available to an accused offers potential advantages. Judge alone trials offer the defense an informed and intellectual fact finder who might be less swayed by emotional evidence.[46] A panel of officer only members ensures that each fact finder usually maintains at least a baccalaureate-level education.[47] Finally, a panel of at least 1/3 enlisted representation offers increased potential for representation of a faction with similar characteristics and professional experience.[48]

If the accused chooses a members' panel, the members are from the same unit as the accused.[49] The unit might be as large as 5,000 military personnel for a general court-martial, or as small as 800 military

---

[39] *See id.* R.C.M. 405 (right to defense counsel during pretrial investigations).
[40] *See id.* R.C.M. 401–07 (forwarding and disposition of cases).
[41] *See id.* R.C.M. 502 (duties of personnel of courts-martial).
[42] *See id.* R.C.M. 504 (convening courts-martial).
[43] *See id.* R.C.M. 201 (general jurisdiction).
[44] *Id. See also id.* R.C.M. 103 (3) (definition of capital offense).
[45] *See id.* R.CM. 805 (selection of members to court-martial panel); *id.* R.C.M. 903 (accused election of court-martial composition); UCMJ art. 25(d) (2008) (who may serve on courts-martial).
[46] Lovejoy, *supra* note 5, at 50, 63 (discussing that judges maintain a higher level of objectivity amongst the various panel types).
[47] 10 U.S.C. § 532 (2013) (qualifications for original appointment as a commissioned officer). (The baccalaureate education standard usually does not extend to include warrant officers.).
[48] As discussed above, electing this representation is analogous to the implicit community cross-section provision within the sixth amendment; except that this option guarantees that at least one-third of the panel all share very specific characteristics.
[49] "Unit" is defined as anybody larger than "company, squadron, ship's crew, or body composing one of them". UCMJ art. 25(b)(2) (2008).

personnel for a special court-martial.[50] A "general" court-martial is called such because a commanding general is the convening authority.[51] Normally, a special court-martial will have a Lieutenant Colonel or Colonel as its convening authority, commanding a battalion or regiment, respectively.[52]

C. Why Empirical Analysis of Military Justice?

The question of whether to choose enlisted representation is an important feature of any contested trial with an enlisted accused.[53] A statistical analysis is an appropriate investigative tool to explore this question because it gives the researcher the ability to compare the way fact finders decided trials across many types of violations, judges and jurisdictions, while controlling for variables that might affect the outcome.

Military justice practitioners can benefit from empirical legal research. The empirical legal studies discipline has exploded over the last decade.[54] The approach offers a way to statistically test hypotheses

---

[50] These numbers generally represent U.S. Marine Corps division and battalion sizes respectively.

[51] *See* MCM, *supra* note 1, R.C.M. 504 (b)(1) & UCMJ art. 22 (2008) (overview of general courts-martial convening and composition).

[52] *See* UCMJ art. 23 (special courts-martial convening requirements).

[53] *See* Lovejoy, *supra* note 5, at 29–30 (panel options becoming so disparate in their rulings as to cause forum shopping amongst litigators.). *See also* Major Guy P. Glazier *He Called for His Pipe, He Called for His Bowl and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 102–03 (1998) (In Major Glazier's proposal for a modified random selection process for courts-martial panel members, he identifies a problem that can arise when a minority fraction demographically representative of the accused becomes a part of the court-martial panel: "Further, unlike purposefully engineering a jury to achieve proportional race or gender representation, members who are selected under this (random selection) model are unlikely to view themselves as advocates or voting blocks for a particular cognizable group." (Though Major Glazier does not directly state the presence of such voting block identification or advocacy within the enlisted component of a court-martial panel, the logic can be extended to its inclusion.)).

[54] *See* Shari Seidman Diamond & Pam Mueller, *Empirical Scholarship in Law Reviews*, 6 ANN. REV. LAW SOC. SCI. 581, 587 (2010) (45.85 of a sample of law review articles from 1998 to 2008 included some empirical content); Michael Heise, *An Empirical Analysis of Empirical Legal Scholarship Production, 1990–2009*, 2011 U. ILL. L. REV. 1739, 1743(2011) (Figure 2 (showing substantial growth in empirical legal scholarship from 2000 to 2009)). Univ. of Wisconsin Law Sch., Inst. for Legal Stud., *The New Legal Realism Project*, http://www.law.wisc.edu/ils/newlegal.htm (last visited Oct. 9, 2013);

developed by litigators, military policy makers and legal academics.[55] There have been few, if any, statistical reviews or empirical military law articles published in academic journals to date.[56] Traditionally, military legal researchers have relied on analysis of single cases, or comparisons of important cases to find answers to important legal questions. This more conventional legal analysis has always been and likely will always be the cornerstone of solid legal scholarship. The use of statistical analysis is a way to complement conventional legal studies with different research tools.[57] Empirical legal examinations requires researchers to aggregate and synthesize large amounts of information about military justice cases and draw conclusions based on potentially hundreds of observations.

There are many different topics that an empirical legal analysis can explore. Some examples of topics that academic researchers have looked into include: appellate judge voting patterns, the effect of political ideology on U.S. Federal Court decisions and the effects of elected versus appointed judges on judicial decision making.[58] Empirical legal research topics tend to center on questions that require comparisons across a breadth of observations or over the span of many years. The military justice field could possibly benefit from the application of these research ideas and statistical tools. Some possible research questions

---

Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. LAW SOC. SCI. 555 (2010) (noting the return of interest in empirical legal research within the U.S. legal academy).

[55] *E.g.*, Leslie A. Gordon, *The Empiricists: Legal Scholars at the Forefront of Data-Based Research*, 82 STAN. LAW. (May 11, 2010), *available at* http://stanfordlawyer.law.stanford.edu/2010/05/the-empiricists/ (last visited Oct. 9, 2013); Linda Brandt Myers, *The Journal of Empirical Legal Studies: Finding the Facts that Challenge Our Assumptions about the World*, 34 CORNELL L. FORUM 10 (Spring 2008), *available at* http://www.lawschool.cornell.edu/research/upload/Spring2008LawForum2.pdf.

[56] A Boolean query using the Westlaw Legal Research Search Engine, revealed no military justice articles with the words "Empirical" in their title (search conducted on April 17, 2012).

[57] *Id.*

[58] *E.g.*, Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. R. 831 (2008) (noting the different types of hypotheses tested by empirical legal research); Christopher Zorn & Jennifer Barnes Bowie, *Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment*, 72 J. OF POL. 1212 (2010) (exploring the effects of political ideology on judicial decision making); John A. Sautter & Kari Twaite, *A Fractured Climate? The Political Economy of Public Utility Commissions in an Age of Climate Change*, 22 ELECTRICITY J. 68 (2009) (testing the effects of appointed versus elected judges in public service board decisions).

include: the effect of pretrial agreements on sentence outcomes, how rank effects sentences or the factors that make an acquittal more likely.

D. The Data Set and Cases

The cases used in this analysis occurred between 1 January and 1 July 2011. Case summaries were collected from the USMC Trial Counsel Assistance Project (TCAP) Weekly Case Updates. At the end of each week during the time period in question, TCAP requested case summaries from each trial counsel that prosecuted a case during the previous week. In most cases, these summaries include descriptions such as the judge, the military base where the court-martial occurred, charges, rank of the accused, sentence given, type of fact finder chosen by the accused and whether there was a pretrial agreement (PTA). TCAP publishes this data to prosecutors to give them information on various cases throughout the USMC trial circuit.

There were a total of 218 cases that occurred between 1 January and 1 July 2011 that were prosecuted by Marine Corps Trial Counsel. These cases included 58 general courts-martial and 160 special courts-martial. Of these, a total of 28% of cases during this period were contested and went to trial; 17 general and 44 special courts-martial. The remaining 72% of cases had PTAs, which allowed the accused to plead guilty to some or all of the charges in exchange for negotiated provisions such as a sentencing cap, disallowance of fines or the characterization of the service member's discharge. There was only one officer case during the entire six month period, where the accused decided to negotiate a pretrial agreement. Therefore, the entire sample of contested cases consisted of enlisted accused.

The 61 total contested cases were the only cases examined in this analysis of outcomes and sentencing. Table 1 displays the break down between special and general courts-martial for each type of fact finder. First, the table indicates that there was a preference among accused to choose the option of having at least 1/3 of the panel made up of enlisted members. Out of 61 contested cases, defendants chose enlisted panels 41 times, or 67% of the time. This supports the general contention posited at the outset of this investigation: accused and defense counsel tend to believe that enlisted representation will be more favorable to the enlisted

accused when compared to judge alone or officer only panels.[59] Second, the table indicates that there is a proportional amount of general court-martials for each of the three types of fact finders. General court-martials accounted for 20% to 30% of contested cases for each panel type.

Contested Courts-Martial: Special versus General, 1 January to 1 July 2011				
	Special	General	Total	Percent GCM
Enlisted Representation	29	12	41	29%
Officer Members	7	3	10	30%
Judge Alone	8	2	10	20%
Totals	**44**	**17**	**61**	**28%**

Table 1

Table 1 displays the number of contested general and special court-martial cases per type of fact finder occurring in the sample. "Enlisted Representation" means all contested cases where the member's panel consisted of at least 1/3 enlisted members. "Officer Members" means all contested cases where the member's panel consisted of entirely officers. "Judge Alone" means all contested cases tried before a judge alone as fact finder. All accused in these contested cases were enlisted U.S. Marines in either special or general courts-martial.

III. Do Members Make a Difference?

A. Acquittals versus Convictions: Enlisted Members Are No Different

There is no evidence that enlisted members give any sort of advantage to an accused when looking at acquittals. Table 2 displays the outcomes of cases broken down by the number of acquittals versus the number of convictions for cases. In total there were 25 acquittals during the six month period in question. This accounted for 41% of all contested cases. Acquittal rates for each type of judicial fact finder are

[59] *See* Lovejoy, *supra* note 5, at 28–29 (stating that it is a general consensus among defense counsel that a member's panel has a higher likelihood of acquitting the accused).

relatively proportional, falling roughly between 40% to 50%. Indeed, cases with enlisted representation demonstrated the lowest acquittal rate of all three types of fact finders at 39%. This evidence contradicts the assertion that enlisted representation leads to better outcomes for the accused. In fact, there is no evidence that there is much difference between the three types of fact finders across all cases, even when controlling for other variables—e.g., judge trying case, type of crime and whether the case was a general or special court-martial—across all contested cases.[60]

Contested Case Outcomes and Acquittal Percentages				
	Special	General	Total	Percent GCM
Enlisted Representation	16	25	41	39%
Officer Members	4	6	10	40%
Judge Alone	5	5	10	50%
Totals	**25**	**36**	**61**	**41%**

Table 2

Table 2 displays the number of contested case outcomes per type of fact finder occurring in the sample. "Enlisted Representation" means all contested cases where the member's panel consisted of at least 1/3 enlisted members. "Officer Members" means all contested cases where the member's panel consisted of entirely officers. "Judge Alone" means all contested cases tried before a judge alone as fact finder. All accused in these contested cases were enlisted U.S. Marines in either special or general courts-martial.

---

[60] In order to rule out the possibility that the choice of fact finder could be a significant variable in acquittals when controlling for other variables not presented in Table 1, a dichotomous logistic regression was estimated with the following equation:

$$Acquit(0,1) = \sum_{i}^{n} UCMJ\ Article_i + CP + Drug\ Distro + \sum_{j}^{n} Judge_j + GCM + Total\ Charges + Enlisted\ Rep$$

Enlisted representation was not a statistically significant predictor of whether an accused would receive an acquittal or conviction at a contested trial. The control variables used in this regression are identical to those explained in Part III.C, below.

B. Enlisted Members & Sentencing: Are Peers Harder on Their Own?

If member panels with enlisted representation do not acquit enlisted defendants at a higher rate, do they at least give them more lenient sentences? Extending the logic that a jury of one's peers will be more likely to represent the interests of the accused it follows that they shouldn't grant harsher sentences if they do convict. Figure 1 shows the results of a comparison of means analysis between panels with enlisted representation and panels with officer members only and judge alone. The cases counted in this analysis were only contested sentencing cases. The first column in the graph shows that the average number of days awarded during sentencing for a trial with a jury of enlisted representation is 830 days. For officer member only panels and judge alone, the average is approximately 85 days. The comparison of means test is significant at the $p<.05$ level.

A "p value" is a probability value between 0 and 1.[61] It measures the probability that the relationship being observed would at least stay consistent (or become stronger) if more random sampling was done. In this case, it measures the certainty of how different the two means are in this comparison. The test allows us to conclude that if 100 different samples of cases were taken, 95 of those samples would have at least the same difference in means as the difference in means reported here.

This comparison of means test conveys a couple of important points. First, judging by this graph alone enlisted members would seem to award sentences on average about 10 times larger than officer members or judge alone. The second important point to take away from Figure 1 is that it supports the argument that defense counsel tend to advise their clients to choose enlisted representation during the most pressing cases. When the stakes are high, for example during a rape or murder trial, enlisted defendants choose enlisted panels. As a result, this graph most likely shows higher sentences because a panel with enlisted representation is being chosen when higher sentences are on the table.

---

[61] Mark J. Schervish, *P Values: What They Are and What They Are Not*, 50 AM. STATISTICIAN 203 (1996).

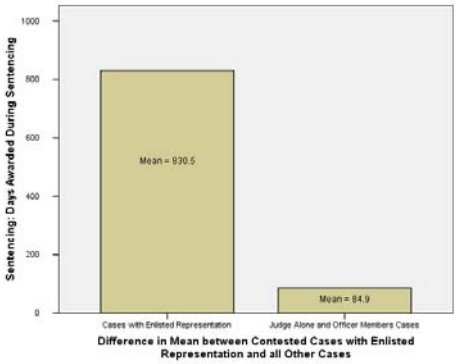


Figure 1. Difference in Mean between Contested Cases with Enlisted Representation and all Other Cases

Figure 1. Difference in means test between cases with Enlisted Representation. Judge Alone cases mean sentencing = 92.3 days. Officer members mean sentencing = 77.5 days. The chart shows that the difference in means is statistically significant at the $p<.05$ level. $t = 2.34$, $p < .05$.

Essentially, the graph suggests that enlisted representation on a panel is always present during trials where more serious crimes are charged. Therefore, it might not be that enlisted representation on a panel leads to higher sentences, but that the cases which panels with enlisted representation are asked to decide warrant more confinement. For example, it could be that officer only panels are more frequently chosen for illegal drug use cases, whereas accused choose enlisted representation for sexual assault and murder cases. Statisticians call this "correlation without causation." Two variables tend to share a pattern, but for reasons that are not related to each other. In this case, without testing the data in order to control for variables that could account for the higher sentences, there is no way to identify whether there is a cause and effect relationship between higher sentences and panels with enlisted representation.

C. Sentencing: Showing Causation

Does the presence of enlisted members lead to higher sentences when controlling for other explanatory variables? In order to explore this question a regression model was developed with control variables to

eliminate the possible effect these variables might have on sentencing. Some of these control variables include controlling for the judge that presided over the trial, the UCMJ article that the accused was convicted of violating and the total number of charges levied against the accused.

A regression model is a statistical estimation that calculates the significance of a relationship between a dependent variable and one or more independent variables.[62] The independent variables are those factors that explain changes in the dependent variable. In this investigation the amount of confinement awarded is the dependent variable. Independent variables can be added to the regression equation in order to control for variation that is expected to occur as a result of that particular variable. For example, in this analysis it is important to control for the type of UCMJ violation that an individual has been convicted because each article in the UCMJ proscribes differing amounts of maximum confinement. If the particular UCMJ article that the accused was convicted of was not controlled for, it leaves open the possibility that changes in which article is being charged could explain resulting changes in the dependent variable, or confinement. Therefore, by controlling for the variable it eliminates the possibility that this variable is causing the changes seen in the dependent variable.

The following regression model was developed with control variables:

$$Sentence = \sum_{i}^{n} \quad UCMJ\ Article\ キ_i\ + CP + Drug\ Distro + \sum_j\text{^}n▒ガJudge\ キ_j\ + GCM + Total\ Charges + Enlisted\ Rep$$

1. Dependent Variable

The dependent variable in this case is the number of days awarded by a fact finder during the sentencing phase of a contested case. This sample does not include sentencing cases where the accused pled guilty under a PTA and then was sentenced by a judge alone. Only contested cases were included in the regression estimation.

---

[62] *See, e.g.*, JACOB COHEN, APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES (Psychology Press 2003); JOHN FOX, APPLIED REGRESSION ANALYSIS, LINEAR MODELS AND RELATED METHODS (Sage Publishing 1997).

2. UCMJ Article Violated

The first variable in this equation represents each UCMJ Article controlled for in the equation. The UCMJ Articles for which there were control variables include: Article 86 (Absent Without Leave), Article 92 (Violation of a Lawful Order), Article 107 (False Official Statement), Article 112a (use or distribution of a controlled substance), Article 120 (sexual assault), Article 121 (Larceny), Article 128 (Assault) and Article 134 (Conduct Unbecoming). The regression equation also has two more variables to control for charges of drug distribution (Drug Distro) and child pornography (CP); which were added because they are common, and each typically elicits a higher sentencing from violation of Articles 112a and 134 respectively as compared to other forms of these charges.[63]

3. Judges

Judges can also make a difference. An individual judge's philosophy can affect pre-trial motion rulings, sentencing motions and the overall atmosphere of a court. A control variable for each judge in the Marine Corps trial judiciary was created in order to eliminate the possibility that individual differences between judges are not causing the differences in sentencing amongst the two panel types and judge alone decisions. If judges did not try a contested case that ended with a conviction, then the variable for that judge was dropped from the model.

4. Control Variables

Next, the regression model included variables that reflect the general disposition of the case, including a control variable for whether the case was a general court-martial and for the number of charges the accused faced during trial. Unlike a general court martial, which can potentially levy the maximum penalty during the sentencing phase of a trial, a special court-martial caps its confinement sentences at twelve months. Therefore the choice of court-martial type can directly affect sentencing. The model also controlled for the number of total charges that the

---

[63] *See, e..g.*, UCMJ art. 112(a) (2008). The maximum sentence for distribution of a controlled substance is fifteen years as opposed to possession of a controlled substance, which is five years.

accused was charged with. A larger quantity of charges can be an indication of a more serious crime that could lead to a higher sentence.

5. Enlisted Representation

The final variable in the equation is a dichotomous (0,1) variable denoting that the contested case had a members' panel with enlisted representation. In this regression estimation, the cases with enlisted representation on their panels are being compared to those with no enlisted representation. Ultimately, the hypothesis tested here is that the variable denoting enlisted representation will have a statistically significant positive correlation with higher sentences, even when controlling for all of the other independent variables that could explain differences in sentencing outcomes. In other words, based on the previous comparison of means tests, it is expected that a members' panel with enlisted representation would award higher sentences.

IV. Sentencing: Enlisted Members Give Higher Sentences

The regression results are displayed in Table 3. Over all, the results are what might be anticipated. First, the model was able to explain 49.9 % of the variation in the dependent variable, which is reported by the adjusted R^2 measurement in Table 3. The coefficient for the general court-martial, GCM, variable was positive and statistically significant at the $p<.05$ level.[64] This indicates that a general court-martial tended to have higher sentences as compared to special court-martials at a statistically significant level. On the other hand, the variable for the number of charges (Number Charges) against the accused is not significant at all. The variables for Judges Daugherty and Richardson both had coefficients that were negative and significant at the $p<.05$ level.

[64] In a regression equation the coefficient of a variable is the slope of a regression line describing the relationship between the independent variable and its effect on the dependent variable. For example, if ($y = ax + b$) is the regression equation, the regression coefficient is the constant (a) that represents the rate of change of the dependent variable (y) as a function of changes in the dependent variable (x). The closer the slope is to 1, the more significant the relationship between the dependent variable (y) and.200 the dependent variable (x).

Next, the variable denoting a conviction for violating UCMJ Article 107 (false official statement) is the only UCMJ Article variable that was statistically significant. The UCMJ Article 107 variable was positive and significant at the p<.01 level. In other words, if an accused was convicted of committing a false official statement he was very likely to have had a higher sentence than in cases where the accused was not convicted of a false official statement. Both the variables for child pornography and drug distribution, specific crimes as opposed to Articles violations, were also statistically significant at the p<.05 level.

OLS Regression of Sentence Awarded at Contested Trials		
OLS Regression—Dependent Variable: Sentence Awarded		
Variables	**Beta Coefficient (Stand)**	**p-value**
(Constant)		.672
Art 86 Conviction	.007	.962
Art 86 Conviction	.174	.454
Art 107 Conviction	.679	.002
Art 112a Conviction	.251	.361
Art 120 Conviction	-.346	.111
Art 121 Conviction	.077	.703
Art 128 Conviction	-.026	.889
Art 134 Conviction	.230	.236
Child Porn Case	.627	.015
Drug Distribution Case	-.517	.031
Judge Daugherty	-.606	.002
Judge Hale	-.109	.468
Judge Jones	-.170	.436
Judge Keane	-.086	.584
Judge Miracle	.012	.940
Judge Mori	.019	.883
Judge Palmer	-.231	.200
Judge Plummer	.033	.826
Judge Richardson	-.368	.041
Judge Riggs	.018	.898
Unknown Judge	-.240	.152
GCM	.742	.020
Number Charges	-.191	.342
Enlisted Members	**.465**	**.011**
Adj. R-squ.	**.499**	
N	**39**	

Table 3. OLS Regression of Sentence Awarded at Contested Trials

Dependent variable is the total number of days awarded by the finder of fact during the sentencing portion of the accused's trial. Analysis was run on SPSS 13.[65] This analysis only used contested cases that resulted in a conviction. All guilty pleas and acquittals and were dropped from the analysis.

Finally, the results of the regression estimation show that even when controlling for other variables that may explain differences in sentencing after a contested trial, enlisted members on a panel were still a statistically significant factor in predicting higher sentences as compared to judge alone or officer only sentencing. The coefficient for the enlisted representation variable was positively correlated with higher sentences and significant at $p<.05$ level. In other words, if we were to take another 100 samples of cases from the USMC trial circuit at least 95% of them would have the same or stronger relationship between enlisted member panels and higher sentences. We can safely conclude that if an enlisted accused chose to have enlisted representation on a court-martial panel and was convicted, they were likely to have had a higher sentence than if they had chosen trial by judge alone or officer only panels.

V. Discussion

Military defense counsels have many calculations that they make when advising their clients. Pending charges, the accused's personal history, and disposition of the evidence in the case all factor into the decision on whether to elect enlisted representation on a panel. The analysis conducted here suggests that when making this decision defense counsel should not view it as a hard and fast rule that enlisted members will always produce better results for the enlisted accused. To the contrary, enlisted panels may prove disadvantageous to an enlisted accused.

The results shown here do not mean that in every case enlisted representation on a panel should not be sought. Empirical analysis is about the aggregation of data, pattern analysis, and hypotheses testing. These results should be viewed as suggestive in nature. The results

---

[65] Statistical Package for the Social Sciences (SPSS) 13 is the thirteenth version of a computer program used by social scientists to conduct statistical analysis. For the most current specifications, see http://www-01.ibm.com/software/analytics/spss/. For history, background and use, see G. ARGYROUS, STATISTICS FOR RESEARCH: WITH A GUIDE TO SPSS (3d ed., SAGE Publishing, London, 2011).

offered here, while persuasive, are not all encompassing. They suggest that on average there are general trends reflected in contested trials that enlisted members may not be a good choice for an enlisted accused at all times.

The results show that a judge sitting alone or an officer only panel tended to have as many or more acquittals than panels with enlisted members. The higher frequency of choosing an enlisted panel is demonstrated by the data. In the sample cases of the data set used in the analysis 67% (41/61) of all contested cases had enlisted representation. However, though there existed a generalized preference by enlisted accused for other enlisted service members on their court-martial panel, there was no clear benefit. Each of the other two fact finders acquitted accused service members at a higher rate. This analysis also showed that once convicted, enlisted members tend to award a more severe confinement sentence. The results paint a potentially ominous picture for an enlisted accused who chooses a panel with enlisted representation: In these cases, enlisted members chose an enlisted panel intuiting that selection would present a higher likelihood of acquittal. However paradoxically, the accused receives no statistical benefit towards a higher chance of acquittal, and actually statistically increases the chance of a higher sentence if convicted.

It is also important to note the limitations of the conclusions being drawn here. The analysis only covers cases from a six month period. Furthermore, the cases are only from the United States Marine Corps, and are not indicative of how military justice actors perform in other service branches. While there is no reason to believe that this sample is biased or not indicative of trends across all cases, further investigations should attempt to verify these findings as more trial data becomes available. Ideally, more data will become available from other service branches that will allow for confirmation or rejection of the findings presented here. Indeed, the insights of empirical legal analysis will always be confined by the constraints of limited data. The collection of data and the testing of other hypotheses will add to the military's understanding of the military justice process.

VI. Conclusion

This article began with the question of whether a jury of one's peers always offers the best outcome for a defendant. In order to answer this

question data used was collected from all cases in the Marine Corps from 1 January to 1 July 2011. Using statistical analysis, this article concludes that: no, a court-martial panel including one's peers does not produce better outcomes in terms of acquittals or confinement periods for an enlisted accused.

HUMAN RIGHTS BOON OR TICKING TIME BOMB: THE ALIEN TORT STATUTE AND THE NEED FOR CONGRESSIONAL ACTION

MAJOR WILLIAM E. MARCANTEL, JR.*

It is nearly always the most improbable things that really come to pass.[1]

I. Introduction

In August 2014, U.S. forces, under a request for assistance from the governments of Mali and France, are heavily involved in counterinsurgency operations in northern Mali against the Movement for Oneness and Jihad in West Africa (MOJWA) and other extremist Islamist groups who have controlled the area for over two years. The local Tuareg population actively supports MOJWA and the insurgency, whose ultimate goal is to create an independent state of Azawad in northern Mali. After repeatedly failing to control Tuareg population centers, the Malian government authorizes the U.S. Joint Task Force–Mali (JTF–M) commander to relocate by force certain groups of civilians into internment centers in an attempt to separate insurgents from the

---

* Judge Advocate, U.S. Marine Corps. Presently assigned as the Assistant Staff Judge Advocate, U.S. Marine Corps Forces, Central Command. LL.M., 2013, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2009, University of Missouri; B.A., 2001, Northwestern University. Previous assignments include Defense Counsel, Camp Lejeune Branch, Eastern Region, Marine Corps Defense Services Organization, Camp Lejeune, North Carolina, 2011–2012; Office of the Staff Judge Advocate, Marine Corps Base, Camp Lejeune, North Carolina, 2009–2011 (Deputy Staff Judge Advocate, 2010–2011; Civil Law Officer, 2009–2010); Student Judge Advocate, Funded Law Education Program, Columbia, Missouri, 2006–2009; Inspecting Officer / Logistics and Assistant Operations Officer, Company C, Marine Security Guard Battalion, Bangkok, Thailand (2005–2006); Platoon Commander, 1st Battalion, 1st Marine Regiment, Camp Pendleton, California (Combined Anti-Armor Team Platoon, Weapons Company, 2004–2005; Weapons Platoon, Company C, 2002–2004). Member of the bar of Missouri. Previous publications include: *Preemption of Tort Lawsuits: The Regulatory Paradigm in the Roberts Court*, 40 STETSON L. REV. 793 (2011) (with Dave Winters and Professor Christina Wells); *Protecting the Predator or the Prey? The Missouri Supreme Court's Refusal to Allow Past Sexual Misconduct as Propensity Evidence*, 74 MO. L. REV. 211 (2009); *Is it Hot in Here? The Eighth Circuit's Reduction of Fourth Amendment Protections of the Home*, 73 MO. L. REV. 881 (2008). This article was submitted in partial completion of the Master of Laws requirements of the 61st Judge Advocate Officer Graduate Course.

[1] ERNST HOFFMANN, THE SERAPION BRETHREN 48 (Alex Ewing trans., George Bell and Sons 1908).

civilians who are not directly participating in hostilities. Additionally, the JTF–M implements the practice of destroying neighborhoods from which rockets or mortars are fired at coalition forces by evicting residents and bulldozing their homes.

The daily operation of the internment centers is conducted by Malian military forces with JTF–M oversight and logistics support. Since the inception of these centers, Non-Governmental Organizations (NGOs) have criticized the U.S. and Malian governments over the poor sanitation, inadequate living conditions, and near nonexistent healthcare that contribute to hundreds of deaths from disease in the internment centers. Additionally, internees are forced to work in fields to grow crops for themselves and the Malian army. Finally, the international press reports on credible allegations detailing the rampant abuse and torture of interned civilians, including claims that U.S. counterintelligence personnel are involved in enhanced interrogations of internees suspected of affiliation with Al-Qaeda in the Islamic Maghreb (AQIM).

In the fall of 2014, Tifrat Amazigh, a Tuareg woman, escapes from an internment center where she is detained with her family after coalition forces destroy their home following a rocket attack from their neighborhood. When she flees, she leaves behind her 13-year-old son and her husband, who are interned in a "special housing unit" for suspected AQIM members where internees are allegedly tortured and abused. She subsequently enters the United States as a refugee and files suit against the JTF–M commander and the Secretary of Defense in their personal and official capacities seeking injunctive relief and damages under the Alien Tort Statute (ATS) on behalf of her husband, son, and herself. The court issues a preliminary injunction, ordering an immediate cessation of U.S. support to the internment centers and the practice of destroying neighborhoods as reprisal against insurgent attacks. As the litigation drags on and the injunction remains in effect, Malian forces are pushed back by insurgent groups after the JTF–M is limited to serving in an advisory role near the capitol, Bamako. U.S. maneuver battalions await strategic lift to redeploy to the United States due to the inability to conduct effective combat operations within the parameters of the injunction.

Within this hypothetical scenario lies the potential power of a lone sentence buried within the codification of jurisdictional statutes for federal courts: "[t]he district courts shall have original jurisdiction of

any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[2] Largely forgotten until 1980,[3] this single sentence has been the subject of hotly contested legal debates and litigation as to what these words mean and how they should be applied.[4] The vast majority of this debate has focused on tortious activity by non-U.S. individuals or non-state entities;[5] however, since September 11, 2001, some of this focus shifted to actions by the U.S. government and is at the intersection of international humanitarian law (IHL) and international human rights law (IHRL).[6] Despite the U.S. government's traditional view that IHL is a *lex specialis* that occupies the field during armed conflict,[7] the ATS presents the distinct possibility that IHRL could be injected into traditional IHL arenas as *lex lacunae*, complementing—if not completely replacing—IHL during military

---

[2] 28 U.S.C. § 1350 (2006).

[3] Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1127–28 (2011) (discussing the recent rise of Alien Tort Statute litigation).

[4] *Compare* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816–17 (1997), *and* Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007) *with* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687 (2002), *and* William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. FORUM 19 (2007).

[5] *See* USA*Engage, *Alien Tort Statute Case List*, http://usaengage.org/default/Documents/Litigation/ATS Case List.pdf (last visited Mar. 12, 2013).

[6] *See, e.g.*, Rasul v. Bush, 542 U.S. 483 (2004) (ATS suit against the President regarding Guantanamo detention); Ali v. Rumsfeld, 649 F.3d 762 (D.C. Cir. 2010) (ATS suit against the Secretary of Defense regarding detention in Iraq and Afghanistan); Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2010) (ATS suit against defense contractor who participated in abusive interrogations of Iraqi citizens); El-Masri v. United States, 479 F.3d. 276 (4th Cir. 2007) (ATS suit for abusive treatment deriving from plaintiff's extraordinary rendition and subjection to enhanced interrogation); Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (ATS suit to remove son's name from CIA kill list). For a brief summary of the definitions, similarities and differences of international humanitarian law (IHL) and international human rights law (IHRL) as used in this article, see The International Committee for the Red Cross (ICRC), *International Humanitarian Law and International Human Rights Law: Similarities and Differences* (Jan. 2003), http://www.ehl.icrc.org/images/resources/pdf/ihl_and_ihrl.pdf. Key to the discussion herein is when and whom IHL and IHRL binds, as understood through treaty and customary international law.

[7] "*Lex specialis derogat legi generali*" means the specific law prevails over general law. INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 197 (2012), *but see* U.S. DEP'T OF STATE, U.S. FOURTH PERIODIC REP. TO THE U.N. COMM. ON HUMAN RIGHTS paras. 506–07 (30 Dec. 2011), *available at* http://www.state.gov/g/drl/rls/179781.htm (indicating shifting U.S. position to one of complementarity regarding IHL and IHRL interplay).

operations.[8]

Consequently, there is a risk that the courts could interpret the ATS to apply traditional IHL and IHRL in ways that would limit or alter the discretion and options available to battlefield commanders. In particular, the ATS could be used by the judiciary to second-guess commanders' actions and the exclusive application of firmly entrenched IHL standards if courts choose to enforce certain customary international laws that were not meant to apply to the battlefield.[9] Ultimately, the potential for judicial interference and the adverse impacts that this could have on U.S. national security requires Congress to take action and clarify the scope of

---

[8] "*Lex lacunae*" means law of the gaps. For a discussion of *lex lacunae* in a modern IHL/IHRL context, see Iain D. Pedden, Lex Lacunae*: The Merging Laws of War and Human Rights in Counterinsurgency*, 46 VAL. U. L. REV. 803 (2012). *See also* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'s LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 46–47 (2012) (citing U.S. DEP'T OF STATE, U.S. FOURTH PERIODIC REP. TO THE U.N. COMM. ON HUMAN RIGHTS para. 506 (30 Dec. 11), at http://www.state.gov/g/drl/rls/179781.htm) (expressing the emerging U.S. official view of complementarity between IHL and IHRL); Oona Hathaway et al., *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883 (2012) (analyzing three models for understanding the relationship between IHL and IHRL: displacement, complementarity, and conflict resolution).

[9] Admittedly, this has not yet occurred in the context of ATS suits against U.S. officials; however, courts may grow weary as the Executive continues to expand its authority while conducting the War on Terror. *See, e.g.*, Robert Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. 163 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138623 (discussing the likely rise in judicial intervention as the current legal framework erodes due to the withdrawal of combat forces from Afghanistan); Hedges v. Obama, 890 F. Supp. 2d 424, (S.D.N.Y. 2012) (order granting injunction against U.S. Government enforcement of § 1021(b)(2) of the National Defense Authorization Act for Fiscal Year 2012); New York Times Co. v. U.S. Dept. of Justice, 915 F. Supp. 2d 508, 515–16 (S.D.N.Y. 2013) ("The FOIA requests here in issue implicate serious issues about the limits on the power of the Executive Branch under the Constitution and laws of the United States, and about whether we are indeed a nation of laws, not of men. . . . However, this Court is constrained by law, and under the law, I can only conclude that the Government has not violated FOIA by refusing to turn over the documents sought in the FOIA requests, and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States. The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules—a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret.").

the ATS.

Part II of this article discusses the history and background of the ATS. Part III applies the above hypothetical fact pattern to a potential litigation scenario involving the most common bars to these types of cases, including: a failure to state a claim that is a sufficiently recognized violation of the law of nations or an insufficient pleading under *Ashcroft v. Iqbal*;[10] a lack of standing; the political question doctrine; a claim of sovereign immunity by the U.S. government; and the state secrets privilege. Part IV briefly discusses how Amazigh's claims might still be successful in order to highlight the need for Congressional action to minimize the likelihood that such an outcome could unreasonably hamper the U.S. military's ability to fight and win the nation's wars.[11]

---

[10] Ashcroft v. Iqbal, 556 U.S. 662 (2009) (discussed in detail *infra* pp. 126–27).

[11] The debate as to how the ATS should be prospectively interpreted is beyond the scope of this article, as is much of the discussion regarding corporate liability recently addressed by the U.S. Supreme Court in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013). The decision leaves open several questions that impact how the United States fights wars due to the Justices, though concurring 9-0 in the decision upholding the Second Circuit's dismissal of Esther Kiobel's ATS claims, split 4-1-4 as to the application of the presumption against extraterritoriality. *Compare Kiobel*, 133 S. Ct. at 1669, *with id.* (Kennedy, J., concurring), *with id.* at 1671 (Breyer, J., concurring). This split regarding the application of the presumption against extraterritoriality of a statute actually cuts in favor of finding that action by a military member that violates an international norm so widely recognized as those set forth in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 694 (2004), does rebut the presumption, because in such a case "(2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." *Kiobel*, 133 S. Ct. at 1671 (J. Breyer concurring). There is no other recourse within the U.S. legal system currently that would allow for recovery such as through the Federal Tort Claims Act, see *infra* Part III.D or the Torture Victim Protection Act, 28 U.S.C. § 1350 note (2006) (statute limits liability only to an individual who acts "under actual or apparent authority, or color of law, of any *foreign nation*"). 28 U.S.C. § 1350 note, § 2, ¶ a (emphasis added). *See Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring). Additionally, the Court did not find that the ATS could not encompass violations of the law of nations committed by corporations, as would have occurred had the Court accepted the reasoning of the Second Circuit, thereby leaving open the question as to the application of the ATS to defense contractors acting on behalf of the United States. Such action would also meet the same criteria set forth by Justice Breyer and the open question left by Justice Kennedy's analysis. However, this issue is also beyond the scope of this article. In short, the concerns with the ATS raised herein and the impact that it might have on the U.S. military and foreign policy remain unanswered.

II. Background—A Legal Lohengrin[12]

As part of the necessary legislation to establish the federal judiciary's lower courts and their jurisdictional bounds, the First Congress passed the Judiciary Act of 1789.[13] This act also codified the ATS, which has remained relatively unchanged over the past 223 years.[14] Yet, despite its long history, only a handful of ATS cases arose before 1980.[15] In that year, the U.S. Court of Appeals for the Second Circuit "breathed life"[16] into the once dormant statute in *Filartiga v. Pena-Irala*,[17] giving rise to a groundswell of subsequent ATS litigation.[18]

In *Filartiga*, Paraguayan citizens filed suit under the ATS against the former Inspector General of Police in Asuncion, Paraguay for the torture and extrajudicial killing of their son and brother, Joelito Filartiga.[19] The Second Circuit held that federal jurisdiction existed over the Filartigas' claims, and that torture and extrajudicial killing under color of law was a violation of the law of nations.[20] Though the Second Circuit did not recognize a cause of action as to what specific tort applied based upon a choice of law,[21] it opened the door to foreign litigants to bring suit for IHRL violations by recognizing the right of aliens to sue within the federal courts for such violations.

---

[12] IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (1975) (Judge Friendly references the ATS and compares it to Richard Wagner's title character, Lohengrin, whose origins remain a mystery until the very end of the opera—"no one seems to know from whence it came.").

[13] Anthony Bellia, Jr. & Bradford Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 449 (2011).

[14] *Compare* Judiciary Act of 1789 § 9, 1 Stat. 73, 7 (The federal district courts "shall also have cognizance, concurrent with the courts of the several states, or the circuit courts, as the case may be, of all causes where an alien sues for tort only in violation of the law of nations or a treaty of the United States."), *with* 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

[15] Carolyn A. D'Amore, Sosa v. Alvarez-Machain *and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 AKRON L. REV. 593, 600 (2006).

[16] Donald J. Kochan, *No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 111 (2005).

[17] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[18] D'Amore, *supra* note 15, at 603. *See also* USA*Engage, *supra* note 5.

[19] *Filartiga*, 630 F.2d at 878–79.

[20] *Id.* at 885, 889.

[21] *Id.* at 889.

After the *Filartiga* decision, ATS suits became increasingly more frequent. The U.S. Courts of Appeal added to the ATS jurisprudence. Most notably, the U.S. Court of Appeals for the District of Columbia Circuit *Tel-Oren v. Libyan Arab Republic*[22] decision and the U.S. Court of Appeals for the Ninth Circuit *In re Estate Marcos, Human Rights Litigation*[23] decision laid the groundwork for the U.S. Supreme Court's first ATS decision in 2004 with *Sosa v. Alvarez-Machain*,[24] addressing the potential hazards to commanders' and the United States' ability to act on the battlefield.

In *Tel-Oren*, survivors and representatives of persons killed in a terrorist attack on an Israeli bus filed an ATS claim against Libya and the Palestinian Liberation Organization seeking compensatory and punitive damages for tortious acts in violation of the law of nations.[25] The D.C. Circuit issued a unanimous decision to dismiss the plaintiffs' claims; however, the sitting panel issued three separate concurrences with differing conclusions as to why the suit should be dismissed.[26] Judge Edwards agreed with the Second Circuit's reasoning and construct developed in *Filartiga*, but he did not believe that terrorism in 1984 constituted a violation of the law of nations and therefore was not cognizable under the ATS.[27] Judge Bork not only agreed with Judge Edwards that terrorism was not a violation of the law of nations, but wholly rejected the *Filartiga* holding and opined that the ATS provided no right of action within federal courts. Writing that Congress must affirmatively create a cause of action in order for an alien to bring a cognizable suit under the ATS within the federal courts, Judge Bork concluded that the ATS was merely jurisdictional in nature.[28] Finally, Judge Robb rested his opinion to dismiss the plaintiffs' claims on nonjusticiability grounds based on his finding that the issue presented a political question.[29]

---

[22] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).
[23] *In re* Estate Marcos, 25 F.3d 1467 (9th Cir. 1994).
[24] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
[25] *Tel-Oren*, 726 F.2d at 775.
[26] *Id.*
[27] *Id.* at 795.
[28] *Id.* at 820–23.
[29] *Id.* at 823. *See, e.g.*, *infra* Part III.3 (discussing the political question doctrine).

The *Tel-Oren* decision is significant because it laid out the three primary arguments for how the majority of courts have dealt with ATS litigation since *Filartiga*. Judge Bork's reasoning that would bar gross violations of IHRL under the ATS appears to have persuaded Congress to pass the Torture Victim Protection Act (TVPA).[30] In doing so, Congress created a federal cause of action against torture, thereby statutorily recognizing the Second Circuit's judicial determination in *Filartiga* that torture under color of law is a violation of the law of nations.[31]

In *In re Estate of Marcos, Human Rights Litigation*, Philippine citizens sued the estate of Ferdinand Marcos, the former president of the Philippines, for his ordering and supervision of human rights violations, such as torture and extrajudicial killings.[32] The Ninth Circuit explicitly joined with the Second Circuit in recognizing the ability for an alien to bring suit under the ATS, and declared that the ATS "creates a cause of action for violations of specific, universal and obligatory international human rights standards which 'confer. . . . fundamental rights upon all people vis-à-vis their own governments.'"[33] Most significantly, this was the first exercise of equitable relief in an ATS decision. Specifically, the court affirmed the district court's preliminary injunction preventing the movement or transfer of funds within the estate in order to preserve the availability of funds for redress to victims.[34]

With varying opinions in the lower courts, but with a general movement toward adopting the *Filartiga* court's approach to the ATS, the U.S. Supreme Court, in *Sosa v. Alvarez-Machain*, finally weighed in on the ATS after remaining silent for 215 years.[35] In 1990, Alvarez-Machain was indicted by a grand jury in California for the torture and murder of a Drug Enforcement Agency (DEA) agent in Guadalajara, Mexico.[36] Due to the inability to obtain his official extradition from Mexico, DEA agents hired a group of Mexican nationals, including Jose Francisco Sosa, to abduct Alvarez-Machain, hold him overnight in a local hotel, and place him on a private plane that delivered him to agents

---

[30] 28 U.S.C. § 1350 note (2006).
[31] Wiwa v. Royal Dutch Petroleum, Co. (*Wiwa II*), 226 F.3d 88, 104–05 (2d Cir. 2000).
[32] *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1469 (9th Cir. 1994) (citing Filartiga v. Pena-Irala, 630 F.2d. 876, 885–87 (2d Cir. 1980).
[33] *Id.* at 1475.
[34] *Id.* at 1480.
[35] 542 U.S. 692 (2004).
[36] *Id.* at 697.

in El Paso, Texas.[37] Nevertheless, Alvarez-Machain was acquitted at trial in 1992 and returned to Mexico.[38] In 1993, he filed suit under the ATS against the Mexican nationals who had abducted and detained him, and the Ninth Circuit upheld his claim after finding that there was a "clear and universally recognized norm prohibiting arbitrary arrest and detention."[39]

However, the Supreme Court rejected Alvarez-Machain's ATS claim, holding that the arbitrary arrest and detention for a period of less than 24 hours did not rise to the level of wrongdoing that would violate the law of nations.[40] Despite this holding, the Court did not shut the door for other plaintiffs to bring suit under the ATS. Rejecting Judge Bork's interpretation of the ATS that Congress needed to affirmatively act in order to give plaintiffs a right of action under the ATS, the Court recognized a handful of international norms from 1789 that still provided recourse to the federal courts, including violations of safe conducts, infringement of the rights of ambassadors, and piracy.[41] Additionally, the Court held that the ATS was not limited to these long recognized international norms, but also included norms "of [an] international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms,"[42] leaving the door to the courthouse for ATS litigants "still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms."[43] In other words, the Court explicitly recognized a right of action in tort for violations of the law of nations as recognized through federal common law.[44]

---

[37] *Id.* at 698.
[38] *Id.*
[39] *Id.* at 699 (citing Alvarez-Machain v. United States, 331 F.3d 604, 620 (9th Cir. 2003)).
[40] *Id.* at 738.
[41] *Id.* at 724–25.
[42] *Id.* at 725.
[43] *Id.* at 729.
[44] ERWIN CHEMERINSKY, FEDERAL JURISDICTION 391 (5th ed. 2007). Taking their cues from the *Sosa* decision, lower courts have continued to recognize causes of action under the principle that the door to the courthouse remains open for ATS litigants, which has at times resulted in victory for ATS plaintiffs. *See, e.g.*, BETH STEPHENS ET AL. INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 139–205 (2d ed. 2008) (describing different norms recognized as cognizable under the ATS by courts); Susan Simpson, *Alien Tort Statute Cases Resulting in Plaintiff Victories*, THE VIEW FROM LL2 (Nov. 11, 2009), http://viewfromll2.com/2009/11/11/alien-tort-statute-cases-resulting-in-plaintiff-victories/ (cataloging ATS cases and the underlying tort for which relief was sought).

III. Amazigh's Claim and Hurdles to ATS Litigation

Despite the holding in *Sosa* that the door to the courthouse remains open to ATS plaintiffs, there are several hurdles that an ATS plaintiff must overcome before the courts would consider a case on the merits. Some of the difficulties for ATS claimants are the same that all plaintiffs face, including jurisdiction and standing. However, in addition to the common obstacles of any civil suit, ATS litigants who sue U.S. officials in their individual and official capacities for violations of the law of nations during an armed conflict, such as the fictional Tifrat Amazigh, would face other significant hurdles.[45]

From the outset, many lower courts have struggled with *Sosa* in attempting to determine whether an alleged act would constitute a violation of a sufficiently recognized international norm to give rise to a claim under the ATS.[46] Indeed, this uncertainty concerning the sufficiency of a recognized norm is just one of the many obstacles that have stood in the way of attempts by aliens to obtain relief for what have primarily been violations of IHRL. Other obstacles faced by ATS litigants like Amazigh who file claims against U.S. officials for acts done during a time of armed conflict include: failure to state a claim based on a lack of subject-matter jurisdiction or to claim a cognizable violation under the ATS; standing; the political question doctrine; sovereign immunity; and the state secrets privilege. Although these obstacles have come together to present a near total bar to previous ATS litigants like Amazigh, they are not insurmountable. If she and others like her are able to overcome these potential pitfalls and reach the case on its merits, the ATS may well shape how and if the United States will be able to fight wars unless Congress passes affirmative legislation to limit this danger.

A. Failure to State a Claim

As with any suit, an ATS plaintiff must state a claim for which the court may grant relief.[47] Inherent within the *Sosa* formulation for stating a claim is a search through international law to define an international

---

[45] It should be noted that unlike many ATS litigants who sue other aliens or foreign corporations, ATS claims against U.S. officials are not likely to be barred by personal jurisdiction issues, because the defendants are already present within the United States.

[46] *See* 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3661.1 (3d ed. 1998) (providing an overview of ATS litigation).

[47] FED. R. CIV. P. 12(b)(6) (2012).

norm that gives rise to a right of action under the ATS. Courts have looked to the standard sources of international law in attempting to determine whether a claim is as widely recognized as were those specified in *Sosa*.[48] In making this determination, courts have invoked the caution directed by the *Sosa* Court when identifying new norms of binding international law that give rise to an action under the ATS. However, this caution, depending on the court, may merely be perfunctory as courts continue to find new and emerging norms, such as aiding and abetting theories for the commission of violations of human rights by simply doing business with oppressive regimes.[49] As a result of this mixed bag of recognized norms, recent cases demonstrate that plaintiffs are apt to do best when they allege as much tortious activity as possible, and then attempt to categorize it within the language of international human rights.[50]

Yet the ability to articulate an actionable violation of the law of nations under the ATS is still a formidable task[51] because of IHRL's relative novelty and recent recognition under international law.[52] As

---

[48] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 733–38; Filartiga v. Pena-Irala, 630 F.2d 876, 881–84 (2d Cir. 1980) (reviewing international treaties and respective traveaux prepatoires). *See also* Jonathan B. Lancton, *The Alien Tort Statute and Customary International Law: The Judicial Albatross Hanging Around the Executive's Neck*, 47 HOUS. L. REV. 1081 (2010).

[49] *See, e.g.*, Sarei v. Rio Tinto, PLC (*Rio Tinto IV*), 671 F.3d 736 (9th Cir. 2011); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).

[50] *See, e.g.*, Wiwa v. Royal Dutch Petroleum, Co. (*Wiwa I*), 96 CIV. 8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002), *cited in* 626 F. Supp. 2d 377, 384 (S.D.N.Y. 2009)) (example of how plaintiffs have successfully pleaded ATS claims).

[51] *See, e.g.*, *Sosa*, 542 U.S. at 737–38 (brief arbitrary detention not a violation of the law of nations); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795–96 (D.C. Cir. 1984) (Edwards, J., concurring) (terrorism not a law of nations violation); Kiobel v. Royal Dutch Petroleum Co., 456 Supp. 2d 457, 460, 467 (S.D.N.Y. 2006) (forced exile and violation of right of assembly not violations of the law of nations under *Sosa*); Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285, 1299 (S.D. Fla. 2003) (violation of right of association in the context of labor unions not a violation of the law of nations); Sarei v. Rio Tinto, PLC (*Rio Tinto I*), 221 F. Supp. 2d 1116, 1158–59 (C.D. Cal. 2002), *reversed on other grounds*, 456 F.3d 1069 (9th Cir. 2006) (violation of right to life and health due to environmental degradation not a cognizable norm).

[52] *See* Samuel Moyn, *Human Rights in History*, NATION, Apr. 6, 2010, *available at* http://www.thenation.com/article/15399
3/human-rights-history. Additionally, international law has historically primarily dealt with only state-to-state relations. Even with the shift in the post-World War II era to recognize IHRL as a recognized body within international law, international law has focused primarily on how a state treats its own citizens, not the more novel concept of allowing civil recourse by applying human rights to relations between actual and/or juridical individuals. Much less has international law or the domestic application of

such, IHRL's constantly changing face has frustrated plaintiffs because it is difficult for a plaintiff to identify an IHRL norm that is as widely accepted as those norms of 1789 discussed in *Sosa*.[53] This task is even more arduous when alleging tortious conduct committed by U.S. state actors acting under government-sanctioned policies. This is in part due to the inherent difficulty for a domestic court to declare that a violation of the law of nations has occurred when its own government has a demonstrable state practice to the contrary, unless that court is willing to declare that the state practice is in violation of recognized international law *jus cogens* and must therefore cease.[54]

The difficulty of even identifying a cognizable wrong under the ATS increases even more following the Supreme Court's holding in *Ashcroft v. Iqbal* which places a heightened pleading requirement upon plaintiffs.[55] *Iqbal* requires a plaintiff's pleading to:

> contain a short and plain statement of the claim showing that the pleader is entitled to relief. . . . [This] does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.[56]

Although *Iqbal* dealt with a *Bivens* action[57] brought by a Pakistani-American placed in confinement in New York,[58] the case has been

---

international law dealt with bringing suit in a state with little to no contacts to the nucleus of facts giving rise to the suit, as the jurisprudence of ATS has recently allowed; ATS has become a theory teetering on a recognition of universal jurisdiction in tort. *See generally*, Bellia & Clark, *supra* note 13.

[53] *Sosa*, 542 U.S. at 732.

[54] *See generally* Harbury v. Hayden, 522 F.3d 413 (D.C. Cir. 2008); Ali v. Rumsfeld, 649 F.3d 762 (D.C. Cir. 2011); Rasul v. Meyers (*Rasul I*), 512 F.3d 644 (D.C. Cir. 2008); Al-Zahrani I v. Rumsfeld, 684 F. Supp. 2d 103 (D.D.C. 2010). These cases all found torture to be within the scope of employment of intelligence and military officers, thereby implicitly condoning such action.

[55] Ashcroft v. Iqbal, 556 U.S. 662, 687 (2009).

[56] *Id.* at 677–78 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 557 (2007)).

[57] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (creating a federal cause of action allowing for recovery in tort for violations of an individual's constitutional rights).

[58] *Iqbal*, 556 U.S. at 666.

applied to ATS cases and has resulted, in some instances, in dismissal for a failure to plead sufficient facts that set forth a cognizable ATS violation.[59]

In the hypothetical case of Tifrat Amazigh, she has potential claims for violations of the law of nations involving her forced relocation to an internment center;[60] exposure to cruel, inhuman, and degrading treatment (CIDT) by forcing her to live in humiliating, unsanitary conditions;[61] forced / slave labor to produce food for the center;[62] and violations of the Geneva Conventions.[63] On behalf of her son and husband who are unable to bring suit themselves due to their internment, she may also raise a claim of torture[64] in addition to the aforementioned injuries that also apply to her family. Amazigh's claims would have to allege specific facts that sufficiently demonstrate the tortious actions by the defendants to "'nudg[e]' [her claims]. . . . 'across the line from conceivable to plausible.'"[65] This may prove difficult if she has not had the benefit of discovery to ascertain and plead sufficient facts, especially with regard to claims of torture on behalf of her husband and son since she has not been the actual subject of the torture and has not witnessed such behavior in the first person. In this case, she would likely rely on rumor and media reports, and such reliance on secondhand accounts may result in dismissal of some of her claims.[66]

---

[59] George D. Brown, *Accountability, Liability, and the War on Terror—Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 FLA. L. REV. 193, 223–227 (2011); al-Kidd v. Ashcroft, 580 F.3d 949, 977–70 (9th Cir. 2009) (*rev'd on other grounds*, 131 S. Ct. 2074 (2011)); Mamani v. Berzain, 654 F.3d 1148, 1156 (11th Cir. 2011).

[60] *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 96 CIV. 8386, 2002 WL 319887, at *8 (S.D.N.Y. Feb. 28, 2002) (recognizing forced exile as cruel, inhuman, and degrading treatment); Mujica v. Occidental Petroleum Corp. 381 F. Supp. 2d 1164, 1183 (C.D. Cal. 2005) (holding forced displacement of civilians through widespread and systematic attacks on civilians is a crime against humanity and a cognizable ATS violation).

[61] *See, e.g.*, STEPHENS ET AL., *supra* note 44, at 181–87 (discussing cruel, inhuman, and degrading treatment) (CIDT) ATS claims as considered in several U.S. courts).

[62] *See, e.g.*, *In re* World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001); Doe v. Unocal Corp., 395 F.3d 932, 946 (9th Cir. 2002), *vacated by, rehearing en banc granted by* 395 F.3d 978 (9th Cir. 2003); Doe v. Unocal Corp., 963 F. Supp. 880, 891–92 (C.D. Cal. 1997).

[63] *See* STEPHENS ET AL., *supra* note 44, at 222–25 (discussing a violation of the Geneva Conventions as a cognizable violation of the law of nations under the ATS).

[64] *Id.* at 140 n.44.

[65] Ashcroft v. Iqbal, 556 U.S. 662, 682 (2009), *cited in* Mamani v. Berzain, 654 F.3d 1148, 1156 (11th Cir. 2011)).

[66] *See generally* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).

Additionally, her claims may fall on deaf ears if the court hearing her case determines that the alleged violations do not rise to the level of international recognition as the norms mentioned in *Sosa*. The court will sift through sources of international law to decipher whether the norm claimed by Amazigh rises to the level required by *Sosa*. It is uncertain how a court would rule on this issue, as courts have routinely split on these determinations with no consensus, largely due to the amorphous nature and description of IHRL norms.[67] Moreover, even if Amazigh is able to overcome the hurdles of pleading, there still remain several other questions, such as whether or not she has standing to bring suit on behalf of her husband and son.

B. Standing

Standing is a jurisdictional question, ensuring that the right person is bringing the claim before a court.[68] Standing requires that the plaintiff "allege that he or she has suffered or imminently will suffer an injury . . . that the injury is fairly traceable to the defendant's conduct . . . [and] that a favorable federal court decision is likely to redress the injury."[69] A party who has not suffered the actual injury alleged may also bring suit on behalf of a third party not before the court "if there are substantial obstacles to the third party asserting his or her own rights and if there is reason to believe that the advocate will effectively represent the interests of the third party," or if the relationship between the individual and the third party is so close that the court will allow the next-friend representation.[70]

---

[67] *See* STEPHENS ET AL., *supra* note 44, at 181 n.262 (comparing opinions that recognized and did not recognize CIDT as a violation of the law of nations under the ATS). *See generally* Jeremy Waldron, *Cruel, Inhuman, and Degrading Treatment: The Words Themselves* (N.Y.U. Pub. L. and Legal Theory Working Papers, Paper No. 98, 2008), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1098&context=nyu_plltwp (discussing the definition of CIDT); ICRC, CUSTOMARY IHL DATABASE, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule90#Fn_95_1 (last visited Mar. 12, 2013) (discussing the ICRC interpretation of CIDT and listing sources from which definition was derived despite differing definition between sources). Even on the issue of forced or slave labor, which has in most cases been determined to be a violation of the law of nations cognizable under the ATS, it would be uncertain if a court would find the facts Amazigh pleads rise to meet the domestic interpretation of a sufficient degree of forced labor. *See* STEPHENS ET AL., *supra* note 44, at 169–72.

[68] *Al-Aulaqi*, 727 F. Supp. 2d at 9.

[69] CHEMERINSKY, *supra* note 44, at 60. *See Al-Aulaqi*, 727 F. Supp. 2d at 14–15.

[70] CHEMERINSKY, *supra* note 44, at 85–89; *Al-Aulaqi*, 727 F. Supp. 2d at 16.

For Amazigh, the constitutional and judicially prudential standing requirements may prove fatal to some of her claims. She will likely be deemed to meet the constitutional requirements for standing to pursue her claims for damages stemming from the direct harms to her person, such as her forced relocation and labor, and CIDT claims. In order to meet these requirements Amazigh will need to adequately allege what the injury was that she suffered; that the JTF–M commander and the Secretary of Defense proximately caused her injuries; and that the court may provide a remedy in the form of compensatory and/or punitive damages. Ultimately, the *Iqbal* pleading requirement will rear its head to force her to provide sufficient facts for the court to grant standing.

Nevertheless, Amazigh's other claims and relief sought are more problematic because she is seeking relief for future injury and remedies on behalf of others. For a court to grant injunctive relief, the plaintiff will need to demonstrate that some future harm will occur.[71] More specifically, if Amazigh is to garner a preliminary injunction immediately ceasing the tortious activities, such as torture against her husband and son, she will need to demonstrate to the court that "there exists the likelihood of success on the merits; irreparable injury will result if temporary relief is not granted; the balance of hardships (or equities) lies with the plaintiff; and ordering temporary relief will serve the public interest."[72]

Of course, for Amazigh to achieve final victory in staying the hand of the U.S. Government, she would need the court to issue a permanent injunction. A court will issue a permanent injunction only when the plaintiff "has a valid claim against the defendant . . . future harm is imminent and irreparable, and . . . the hardship to defendant of compliance is not disproportionate to the benefit to plaintiff of compliance."[73] Moreover, the injunction must also be in the public interest.[74]

---

[71] JAMES M. FISCHER, UNDERSTANDING REMEDIES 260, 299 (2d. ed. 2006). *See also In re* Estate of Marcos, 25 F.3d 1467, 1479–80 (9th Cir. 1994) (providing standard for a preliminary injunction to issue even when damages are sought in an ATS case).

[72] *See* FISCHER, *supra* note 71, at 260–71 (providing an in-depth discussion of the requirements for preliminary injunction).

[73] *Id.* at 299.

[74] *Id.*

Amazigh will have difficulty demonstrating she will suffer a future harm because she already escaped the internment center and, therefore, the defendants are no longer harming her or likely to cause future harm to her. One strategy that may allow her success on the merits is if she alleges that she will return to Mali, that she believes the Malian or U.S. government will place her in an internment center upon arriving in Mali, and that she actually purchases a plane ticket to return to Mali. Though somewhat tenuous, such a strategy might work because she will have a concrete, future harm, which she can allege in the pleadings.[75] Amazigh may also have difficulty in meeting the requirement that the injunction be in the public interest, as this determination will require the court to make a judgment call as to the propriety of U.S. military and foreign affairs decisions. However, as with many of the decisions underlying the determination to grant equitable relief, the decision is largely left to the discretion of the court hearing the case as it balances the equities of the parties.

As for her claims on behalf of her husband and son, the issue of next-friend and injunctive relief in this hypothetical fact pattern are more reasonable and likely to meet the standing requirement than in other recent cases.[76] In the recent *Al-Aulaqi* case, the court found that Anwar Al-Aulaqi's father did not have standing to sue on behalf of his son to remove him from the "kill lists" managed by the national security staff because, in the court's opinion, he was free to avail himself of the U.S. court system if he merely surrendered to U.S. authorities.[77] Unlike *Al-Aulaqi* facts, Amazigh's husband and son are being held in a foreign country by a foreign power with the assistance of the U.S. government; therefore, they either are already in the hands of the U.S. government or are not at liberty to avail themselves of the U.S. courts due to actions by U.S. officials. Additionally, Amazigh's son is a minor and courts have been willing to allow third-party or next-friend standing when the

---

[75] Lujan v. Defenders of Wildlife, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring) (discussing the fact that had plaintiffs simply purchased a plane ticket to once again view wildlife, then their harm would be sufficiently concrete); *but see* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013) (standing requires that the "threatened injury must be certainly impending to constitute injury in fact" and that "respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending" (internal citations omitted)).

[76] *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (denying standing for Al-Aulaqi on behalf of his son on the grounds that his son could avail himself of U.S. courts if he so desired).

[77] *Id.* at 12, 17–20, 35, 40.

individual whose rights are being protected is a minor.[78] Yet even though Amazigh may have standing on behalf of her family, injunctive relief may be too extraordinary for a court to grant due to the balancing of equities, as previously discussed.[79] However, this issue will likely not arise if Amazigh is able to overcome other hurdles including the political question doctrine discussed below, because they would be based on similar constitutional concerns regarding the separation of powers.

C. Political Question Doctrine

The political question doctrine may also prevent Amazigh's claims from moving beyond the preliminary stages based on prudential grounds intertwined with separation of powers concerns.[80] The Supreme Court created the modern political question doctrine in 1962 in its decision in *Baker v. Carr*.[81] The doctrine sets forth six criteria wherein a court will not hear a case due to its nonjusticiable nature.[82] A court's determination that the question presented in a case or controversy is of a political nature such that "constitutional issues concerning the distribution of authority among the federal branches" would bar the court from resolving the issue on constitutional and prudential grounds.[83] However, the *Baker* factors are not a list that can be strictly applied, but rather a murky balancing effort that often results in disparate outcomes depending on the composition of the court. As such, the political question doctrine has

---

[78] *Id.* at 27.

[79] *Supra* p. 129–303.

[80] For an in-depth analysis and critique of the doctrine of nonjusticiability generally and its origins in separation of powers doctrine, see Robert J. Pushaw, *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 497–510 (1996) (providing an historical understanding and critique of modern political question doctrine as a subset of nonjusticiable issues).

[81] Baker v. Carr, 369 U.S. 186 (1962).

[82] *Id.* at 217 ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question").

[83] CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 3–5 (2013) (explaining nonjusticiability and the political question doctrine generally).

been described as a "doctrine notorious for its imprecision."[84] Amazigh's claims, similar to any ATS claim against a U.S. official, are ripe for dismissal due to their nature of touching on the foreign affairs powers and exercise of military authority of the political branches.[85] As a result, the court may be more willing to punt on the issues presented in Amazigh's ATS claims rather than allow her case to go forward on the merits.[86] However, as previously stated, this is more a matter of discretion by a court rather than a strict application of certain factors; therefore, a court may just as likely find that there is no political question in Amazigh's case and let the case continue on the merits.[87]

D. Sovereign Immunity

Even if Amazigh is successful in litigating the issues of cognizable causes of action and sufficient pleadings, standing, and the political question doctrine, she will still likely face a defense of sovereign immunity, which may bar her recovery of any monetary relief for damages, but likely will not prevent injunctive relief.

---

[84] Harbury v. Hayden, 522 F.3d 413, 418 (D.C. Cir. 2008); *see also* CHEMERINSKY, *supra* note 44, at 147–50.

[85] *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1 (1973) (holding nonjusticiable the question of whether there is "a pattern of training, weaponry and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that nonlethal force would suffice to restore order and the use of lethal force is not reasonably necessary?"). *Id.* at 4. *But see* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct 1421 (2012) (holding that the State Department's refusal to follow statute regarding listing Israel as a place of birth when born in Jerusalem was a justiciable question); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986) (holding that Executive decision to not certify Japan pursuant to international agreement and statute was justiciable).

[86] *See, e.g.*, *Harbury*, 522 F.3d at 418–21; Gonzalez-Vera v. Kissinger, 449 F.3d 1260 (D.C. Cir. 2006); Bancoult v. McNamara, 445 F.3d 427 (D.C. Cir 2006); Schneider v. Kissinger, 412 F.3d 190 (D.C. Cir. 2005); El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836 (D.C. Cir 2010); Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007). All cases found the question presented as nonjusticiable. *See also* Gwynne L. Skinner, *Roadblocks to Remedies: Recently Developed Barriers to Relief for Aliens Injured by U.S. Officials, Contrary to the Founders' Intent*, 47 U. RICH. L. REV. 555, 614–20 (2013).

[87] *See, e.g.*, Sarei v. Rio Tinto, PLC (*Rio Tinto IV*), 671 F.3d 736 (9th Cir. 2011); Sarei v. Rio Tinto, PLC (*Rio Tinto II*), 487 F.3d 1193 (9th Cir. 2007); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); *Japan Whaling Ass'n*, 478 U.S. at 221. All found the claims to be justiciable and not barred by the political question doctrine as raised by defendants.

To sue a U.S. employee in his or her official capacity is the same as suing the United States.[88] In order for such an action to occur, the United States must affirmatively waive its sovereign immunity, which it has done in limited circumstances under the Federal Tort Claims Act (FTCA) and the Administrative Procedures Act (APA).[89] Furthermore, in order to receive monetary damages against the U.S. Government where it has waived its sovereign immunity, a plaintiff must use the FTCA claims process.[90]

A plaintiff may also sue a federal official in his or her individual capacity. By doing so, the plaintiff is still normally limited to recovery through the FTCA due to the Westfall Act, which amends the FTCA and substitutes the U.S. Government for its employee if the employee is acting within the scope of his or her employment.[91] The D.C. Circuit has heard the majority of ATS cases against U.S. officials, and its district and circuit court opinions have consistently found that monetary suits against U.S. officials must rely on the FTCA due to the Westfall Act's substitution clause.[92] Moreover, the leading ATS cases seeking damages against U.S. officials have been dismissed due to the failure by plaintiffs to exhaust the administrative remedies under the FTCA.[93] The final issue that an ATS plaintiff would encounter is that an exception to the FTCA waiver of sovereign immunity likely bars a plaintiff's claim.[94]

---

[88] CHEMERINSKY, *supra* note 44, at 633, 636.

[89] *Id.* at 634. *See* Skinner, *supra* note 86, at 581–83.

[90] CHEMERINSKY, *supra* note 44, at 635. *See generally* PAUL FIGLEY, A GUIDE TO THE FEDERAL TORT CLAIMS ACT (2012) (providing background and procedural requirements to make an Federal Tort Claims Act (FTCA) claim).

[91] CHEMERINSKY, *supra* note 44, at 636; Rasul v. Meyers (*Rasul I*), 512 F.3d 644, 654–55 (D.C. Cir. 2008).

[92] *See, e.g.*, Ali v. Rumsfeld, 649 F.3d 762 (D.C. Cir. 2011); Rasul v. Meyers (*Rasul II*), 563 F.3d 527 (D.C. Cir. 2009); *Rasul I*, 512 F.3d at 644 (all substituting the United States under the Westfall Act). *See* Karen Lin, *An Unintended Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 108 COLUM. L. REV. 1718 (2008) (describing the absurdity of the effect of the Westfall Act on ATS claims).

[93] *Ali*, 649 F.3d at 775; *Rasul I*, 512 F.3d at 661.

[94] Brown, *supra* note 59, at 215 ("[E]ven assuming exhaustion is satisfied, the FTCA contains a number of exceptions that can bar relief . . . These include, for example, activities that took place in a foreign country and those that involve exercise of a discretionary function." (internal quotations omitted)). *See* Harbury v. Hayden, 522 F.3d 413, 423 (D.C. Cir. 2008) (barring plaintiffs ATS suit for torture by CIA). *But see Ali*, 649 F.3d at 787–93 (Edwards, J., dissenting) (explaining the application of the Westfall Act exceptions to violations of the Constitution and statute and the applicability of these exceptions to ATS suits).

Despite the mental gymnastics that allowed the courts to reach the conclusion that even acts of torture are considered within the scope of employment for certain federal employees,[95] the precedent is set within the D.C. Circuit that ATS claims for monetary relief fall within the scope of the Westfall Act, resulting in the United States being substituted for the named official even in cases of torture.[96] What this means for Amazigh's claims is that there is a strong likelihood that her claims for damages will be denied until she has exhausted her FTCA administrative remedies. Even then, a court may likely bar her suit for damages because the acts occurred in a foreign country and as a result of combat activities—two exceptions to the United States' waiver of sovereign immunity.[97] However, a court may alternatively find that such claims are not barred, as did Judge Edwards in *Ali v. Rumsfeld*, finding that the ATS claims for egregious violations of the law of nations, such as torture, do not fall within the scope of the Westfall Act and a U.S. official may not cloak himself in official immunity.[98]

Additionally, even if Tifrat Amazigh's claim for damages is denied, her suit against U.S. officials in their official capacities requesting injunctive relief may still go forward on the merits, because the APA has affirmatively waived the United States' sovereign immunity regarding injunctive relief.[99] This reality gives rise to the most dangerous course of action for a court to take, as discussed below, because the injunctive relief would either stop or force action by the U.S. Government, thereby allowing the court to direct military and foreign affairs activities of the political branches. Running afoul of limits to judicial authority as set forth in traditional conceptions of separation of powers, there would be no way to check such judicial activism beyond an appeal that stays such

---

[95] *See* Brown, *supra* note 59, at 216 (discussing the absurdity of allowing agency law intended to allow plaintiffs recovery even in what might be considered *ultra vires* acts by an employee to bar recovery when applied against the U.S. Government).

[96] *See Rasul I*, 512 F.3d at 654–55.

[97] Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 116 (D.D.C. 2010). *See* William R. Casto, *The New Federal Common Law of Tort Remedies Violations of International Law*, 37 RUTGERS L.J. 635, 662–64 (2006).

[98] *Ali*, 649 F.3d at 787–93 (Edwards, J., dissenting).

[99] CHEMERINSKY, *supra* note 44, at 634 (quoting 5 U.S.C. § 702 (2006) ("An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.")).

an order, or, failing that, a constitutional crisis in which the Executive ignores the court order and undermines the legitimacy of both branches.

E. State Secrets

Finally, even if Amazigh is successful on the above pretrial issues, she will likely have to overcome the invocation of the state secrets privilege by the U.S. government. The state secrets privilege exists in two strains: an absolute privilege known as the *Totten* bar, and a partial privilege deriving from *United States v. Reynolds*.[100] The invocation by the U.S. Government of the *Totten* bar results in a case being dismissed in the pleadings phase of a case, because the subject-matter deals with state secrets so critical to national security that any judicial inquiry is precluded.[101] In contrast, a *Reynolds* state secrets privilege invoked by the Government carves out only that evidence that necessarily may not be revealed in order to protect state secrets, and the case may proceed unless the excised evidence is so central to the claim that the case cannot go forward.[102] The courts have not defined what constitutes a state secret that allows the government to invoke the privilege beyond "matters which, in the interest of national security, should not be divulged."[103] However, the Supreme Court has limited the privilege by stating that it should "sweep no more broadly than clearly necessary," and a court

---

[100] Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077 (9th Cir. 2010) (citing Totten v. United States, 92 U.S. 105, 107 (1875); United States v. Reynolds, 345 U.S. 1 (1953)). *See also* Jessica Slattery Karich, *Restoring Balance to Checks and Balances: Checking the Executives Power Under the State Secrets Doctrine*, Mohamed v. Jeppesen Dataplan, Inc., 114 W. VA. L. REV. 759 (2012) (describing the state secrets privilege).

[101] *Jeppesen Dataplan, Inc.*, 614 F.3d at 1078 (citing Tenet v. Doe, 544 U.S. 1, 7 n.4 (2005)).

[102] *Id.* at 1079–80.

> For the *Reynolds* privilege to apply: A court faced with a state secrets privilege question is obliged to resolve the matter by use of a three-part analysis. At the outset, the court must ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied. Second, the court must decide whether the information sought to be protected qualifies as privileged under the state secrets doctrine. Finally, if the subject information is determined to be privileged, the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim.

El-Masri v. United States, 479 F.3d 296, 304 (4th Cir. 2007).

[103] United States v. Reynolds, 345 U.S. 1, 8 (1953).

should conduct its own *in camera* review to make the proper determination instead of blindly accepting the government's assertion.[104]

Amazigh's claims on behalf of her husband and son regarding torture by or under the supervision of U.S. government agents are likely the only claims in danger of dismissal as a result of the government invoking the state secrets privilege. Her other claims arguably revolve around open and notorious action by U.S. military officials. Even though past claims involving espionage and intelligence have been dismissed,[105] the courts may be wary of unnecessary claims of privilege by the U.S. government and may look hard at whether such claims are valid. As such, if the interrogation techniques applied in the internment centers are already public, all of Amazigh's claims may survive a summary judgment for resolution on the merits.[106]

IV. Case on the Merits and the Need for Congressional Action

Despite the potential bars to Amazigh's claims, nothing is certain in litigation. The application of each of the potential bars to an ATS suit brought against a U.S. official for actions during an armed conflict is entirely based on the discretion of the sitting court and, as demonstrated by recent litigation during the War on Terror, some courts appear to be growing more and more hostile toward questionable practices of the political branches.[107]

Tifrat Amazigh will likely plead many of her claims with sufficient facts, as she was the subject of or witnessed the tortious conduct that constituted violations of the law of nations. Additionally, because courts exercise discretion in choosing which violations rise to the level of a

---

[104] *Jeppesen Dataplan*, Inc., 614 F.3d at 1093–96 (Bea, J., concurring).

[105] *See, e.g.*, Tenet v. Doe, 544 U.S. 1 (2005) (suit based on covert espionage agreement barred by *Totten*); *El-Masri*, 479 F.3d at 296 (discovery regarding CIA rendition program privileged under *Reynolds*); Korczak v. United States, 124 F.3d 227 (Fed. Cir. 1997) (dismissing plaintiff's claim for breach of contract against the CIA for failure to pay him for services rendered during the Cold War as a secret agent).

[106] *Jeppesen Dataplan, Inc.*, 614 F.3d at 1090.

[107] *See supra* note 9. *See also* Boumediene v. Bush, 553 U.S. 723 (2008) (rejecting Congress's attempt through the Military Commissions Act of 2006 to deprive Guantanamo detainees of the constitutional right to habeas corpus for review of the legality of their detention by an Article III court).

Sosa violation of the law of nations,[108] Amazigh may find a court willing to hold that her claims are cognizable, especially those involving forced labor and torture.[109] Due to the unique circumstances of Amazigh's husband and son allegedly being in U.S. custody and the fact that her son is a minor, a court could also grant her third-party or next-friend standing to sue on their behalf.

She may also be able to proceed on her request for equitable relief, especially if she intends to return to Mali and could demonstrate as much by simply buying a plane ticket home. Such action could be sufficient to demonstrate future irreparable injury. The balancing of equities may also favor Amazigh if the court finds that torture is occurring, and that such gross misconduct is so contrary to law that it orders an immediate cessation to the practice and the circumstances allowing for such acts. A favorable court may also find that it does have jurisdiction over her case if it adopts the reasoning of the *Ali* dissent in which Judge Edwards held that the Westfall Act did not apply to ATS claims of gross misconduct such as torture.[110] Amazigh may likewise prevail over an invocation by the government of the political question doctrine, because the court may, in its discretion due to the murky nature of the *Baker* factors, determine that a political question does not exist, as claims for tortious conduct are common for courts to hear and adjudicate. Finally, the state secrets privilege is a limited privilege, especially if a court finds that legally tenuous justifications of state practice are contrary to American legal principles and if the court refuses to accept executive branch assertions of secrets so essential to national security used to justify a cover up of torture by or under the supervision of U.S. government agents.

Despite all of the maybes regarding Amazigh's hypothetical claims, almost all of the potential bars to Amazigh's ATS suit require extreme deference to the executive branch. Yet such deference may not be due when the executive branch is responsible for gross human rights

---

[108] *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (finding arbitrary detention for twenty-four hours not to be a violation of the law of nations); Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007) (allegations of vicarious liability of war crimes by foreign sovereign actionable under ATS); Wiwa v. Royal Dutch Petroleum, Co., 226 F.3d 88 (2d Cir. 2000) (arbitrary detention, torture, extrajudicial killing violations of the law of nations).

[109] *See* STEPHENS ET AL., *supra* note 44, at 140–52, 169–73 (discussing ATS claims of torture, slavery, and forced labor).

[110] Ali v. Rumsfeld, 649 F.3d 762, 787–93 (D.C. Cir. 2011) (Edwards, J., dissenting) (explaining the application of the Westfall Act exceptions to violations of the Constitution and statute and the applicability of these exceptions to ATS suits).

violations. Thus, depending in large part on the public and political climate, a court may take up Amazigh's suit and hear it on the merits. If the case were to go to the merits and the evidence met the moderate hurdle of a preponderance of the evidence demonstrating the tortious conduct, Amazigh would prevail and receive an award of damages and/or injunctive relief.

Some internationalist IHRL proponents may herald such a decision as a watershed moment in IHRL. They would likely proclaim that the United States was finally abiding by its international obligations by recognizing certain emerging norms as violations of the law of nations so universally recognized that they are cognizable within domestic courts. These internationalists would likely praise the integration of U.S. domestic law with what was once deemed to be mere aspirational language from IHRL treaties such as the United Nations Declaration of Human Rights. Additionally, such a decision would win praise because it would demonstrate the United States' adoption of the radical view that IHRL applies during armed conflict and cannot be displaced by IHL, which goes even beyond the emerging view of complementarity, as recently expressed by the Department of State[111] and championed by the International Committee of the Red Cross.[112] However, these internationalist IHRL proponents fail to realize the danger presented by a precedent of a victory by Tifrat Amazigh or similarly situated plaintiffs.

The ATS, as currently written and understood through case law, enables an alien plaintiff to not only receive an award of damages from a battlefield commander, but also to potentially enjoin military action, thereby checking U.S. national security strategy in mid-stride. Placing ATS liability upon commanders is also dangerous, as it may prevent some commanders from taking necessary risks for fear of the potential for personal liability and public condemnation by the courts.

---

[111] U.S. DEP'T OF STATE, U.S. FOURTH PERIODIC REP. TO THE U.N. COMM. ON HUMAN RIGHTS para. 506 (30 Dec. 11), *available at* http://www.state.gov/g/drl/rls/179781.htm. *See* Hathaway et al., *supra* note 8, at 1898–02 (describing the model of complementarity and its relative pros and cons as compared to a displacement and a conflict resolution model of understanding the relationship between IHL and IHRL).

[112] *See, e.g.*, Int'l Comm. of the Red Cross (ICRC), *Customary International Human Rights Law Database* Rules 89, 90, 105, http://www.icrc.org/customary-ihl/eng/docs/v1_rul (last visited Oct. 21, 2013) (applying IHRL in interpreting IHL rules as collected an updated by the ICRC; these rules are but a few of the many listed within the database that apply a complementary approach to IHL and IHRL).

Even though many scholars may argue that there does not appear to be much of a threat of this under the current state of the law, the threat still exists because the ATS allows the courts to determine what is and is not a violation of the law of nations and whether a plaintiff will have recourse to the courts. Additionally, the courts could significantly alter the United States' strategic posture if it began to hold military officials accountable for authorized action under current U.S. policy and understanding of the law, forcing a shift in how the United States fights and wins wars. The U.S. Government's understanding of IHL as a *lex specialis* that either wholly displaces IHRL or acts in a complementary fashion in armed conflict is moot in a scenario in which Tifrat Amazigh prevails. For the judiciary to use ATS litigation in order to adopt the majority world view that IHRL and IHL are complementary and certain practices may not be derogated creates a hierarchy in which IHRL actually trumps IHL.[113] Such action would result in several issues that do not correspond with constitutional principles of judicial restraint and the separation of powers.

For Amazigh to prevail, the courts would be judicially mandating the adoption of an emerging norm instead of allowing the political branches to make the choice to push the nation in a certain direction. This classic example of judicial activism leaves commanders in the lurch as they attempt to decipher whether their conduct on their last deployment is now barred by judicial decree based on federal common law and an arcane statute only recently revived.

Courts are poorly situated to make these determinations due to their limited resources and competencies,[114] and although judicial action may align the United States with the majority of nations in their view of the application of IHRL, such action is dangerous because of the lack of control over potentially overly progressive or zealous judges. This is not to say that the judiciary should not review the constitutionality of actions by the political branches. However, to do so through the ATS, a jurisdictional statute with limited federal common law application, is dangerous as it opens the door for freewheeling interpretations of international law, which is difficult enough to define for scholars, who

---

[113] *See* Al-Jedda v. The United Kingdom, 53 Eur. Ct. H. R. 789 (2011); Legal Consequences of the Construction a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 36; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226.

[114] *See generally* Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153 (2004).

concentrate solely in this area of the law.

To solve this potential danger, Congress and the President should enact legislation that would circumscribe not only the threat of judicial activism, but also the threat of lawfare as understood as the use of the U.S. legal system and respect for the rule of law to "achieve an operational objective," such as preventing the attack on military objectives through injunctive relief.[115] In doing so, the political branches will place commanders on more sure footing by clearly setting forth which norms are to be recognized as violations of the law of nations, if any, and what recourse an alien should have in the U.S. courts. Like all statutes, the ATS can be changed, and, for the reasons set forth herein, it should be.

This call for legislative action is not intended to foreclose access to U.S. courts for aliens like Amazigh who bring suit for egregious violations of international human rights. Rather, it would place the decisions regarding foreign policy and military action in the more appropriate hands of the political branches vice the unelected judiciary, still to be administered by the courts in keeping with other tort claims. An appropriate change that would still meet the goals of the United States to support and further IHRL would be to set forth an enumerated list of actionable violations and to define each of these violations.[116] Such clarification through enumeration would not only prevent extreme judicial activism that unduly impinges upon foreign policy and the authority of the executive branch and Congress, but it would set forth clear standards to guide military commanders on the battlefield. The statute should also clarify the scope of employment that has proven fatal to many a national security ATS case: by defining whether a federal employee's actions are considered *ultra vires* by statute again keeps the

---

[115] A discussion of using the ATS as lawfare, as defined by Major General Dunlap as "the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective," is beyond the scope of this article. Charles J. Dunlap, *Lawfare Today: A Perspective*, 3 YALE J. OF INT'L AFF. 146 (2008). A slight change to the hypothetical of Amazigh's ATS claims can illustrate how her claims could be conceptualized as lawfare and it is easy to see the potential impact that such a claim might have on U.S. military action. However, the focus of this article remains on controlling ATS litigation through legislation in order to place foreign policy and military decisions squarely in the hands of the political branches.

[116] Such an effort was made by Senator Diane Feinstein in 2005; however, her efforts were swiftly opposed and criticized by liberal IHRL proponents. *See* Daniel Swearingen, *Alien Tort Reform: A Proposal to Revise the Alien Tort Statute*, 48 HOUS. L. REV. 99 (2011).

door open for alien plaintiffs alleging human rights abuses while clearly defining the expected conduct of commanders. To legislate the scope of the ATS as not only a jurisdictional, but also a substantive statute, will undo the confusing and conflicting common law built around current ATS litigation.

Finally, by reforming the ATS through legislation vice judicial action, the political branches will control the direction that the United States should head in foreign affairs and would actually push the United States toward a majority view of the IHRL/IHL nexus of complementarity. This is because such legislative action would create non-derogable international human rights within the U.S. system of laws through statutory means. Such an adoption of *jus cogens* norms affirmatively recognizes universal jurisdiction over certain wrongs that will allow any violator, U.S. or foreign, to be called before a court to answer for their actions.

V. Conclusion

The ATS has seemingly arisen out of the ether. The early history of the nation and over two hundred years of legal practice shed little more light on the subject. Scholars and the courts continue to disagree as to how the ATS should be applied. Although the modern emergence of the ATS as a tool for enforcing IHRL is positive in theory, it is potentially dangerous in execution.

As the hypothetical with Tifrat Amazigh reveals, an ATS litigant who sues a U.S. official during a time of armed conflict has enormous hurdles to clear just to get to the merits of his or her case. However, the potential fallout from a claim that goes to the merits and results in an award of damages or, even worse, an injunction is far too great to leave to the whims of the judiciary. Litigation resulting in an injunction could freeze military action or force a constitutional crisis as the judiciary and the Executive standoff over appropriate action in the realm of national security and foreign affairs. Holding commanders liable for acts that were authorized under traditional conceptions of IHL, but illegal in the eyes of a court who adopts a principle of overarching IHRL that trumps the necessities of combat, is not only unfair to commanders, but may also cause commanders greater hesitation to act when it is most essential due to the fear of additional personal liability.

An appropriate solution to this problem is for the political branches to act immediately and reform the ATS through substantive and jurisdictional amendments. This would further the United States' goal supporting IHRL while protecting its foreign policy interests. By legislating reform, the political branches will firmly direct foreign affairs and not rely on the unelected judiciary to define IHRL, and thereby set the boundaries as to how the United States and its personnel practice and engage in it. This ATS reform will give commanders greater freedom on the battlefield, as they will not have to fear being brought before a court for actions that were legal under traditional U.S. conceptions of international law. Also, ATS reform will further IHRL because the United States would affirmatively recognize, through law, certain norms as being so egregious as to constitute *jus cogens* and allow for universal jurisdiction and remedy. Most importantly from the perspective of a military practitioner, a duty is owed by our government to commanders to clearly define acceptable norms and behaviors on the battlefield, and a failure to close the gap that may be created by the courts through ATS litigation ultimately fails in this regard.

THE USE OF PLEA STATEMENT WAIVERS IN PRETRIAL AGREEMENTS

MAJOR ALEXANDER FARSAAD*

I. Introduction

In *United States v. Mezzanatto*,[1] the Supreme Court upheld the use of a pretrial waiver of Federal Rule of Evidence (FRE) 410 and Federal Rule of Criminal Procedure (FRCP) 11(e)(6) ("federal Rules").[2] The federal Rules provide that statements made in the course of (1) guilty pleas that are later withdrawn or (2) plea negotiations that do not result in a guilty plea are inadmissible against the defendant who made the statements.[3] After Gary Mezzanatto was charged with possession of methamphetamine with intent to distribute, he and his attorney attempted to enter into plea negotiations with the prosecutor.[4] Before the negotiations began, the prosecutor told Mezzanatto that he "would have to agree that any statements he made during the meeting could be used to impeach any contradictory testimony he might give at trial" if negotiations fell through.[5] When negotiations did not result in a guilty plea and the case went to trial, the prosecutor cross-examined Mezzanatto on his inconsistent statements during the plea negotiations, arguing that Mezzanatto had waived the protections of the federal Rules.[6] In a 7-2 decision, the Supreme Court upheld the practice of demanding a waiver of the federal Rules before entering into plea negotiations. Since

---

* U.S. Marine Corps. Presently assigned as Assistant Deputy Director, Judge Advocate Division, Community Development Strategy & Plans, Headquarters, Marine Corps. This article was submitted in partial completion of the Master of Laws requirements of the 61st Judge Advocate Officer Graduate Course at The Judge Advocate General's Legal Center and School, U.S. Army. The author would like to thank Major Rebecca Kliem, U.S. Army, who helped tremendously in the preparation of this article.

[1] United States v. Mezzanatto, 513 U.S. 196 (1995).

[2] FED. R. EVID. 410; FED. R. CRIM. P. 11. At the time of *Mezzanatto*, the language of the Federal Rules of Civil Procedure (FRCP) 11(e)(6) was identical to Federal Rule of Evidence (FRE) 410. In 2002, FRCP 11(e)(6) was renumbered as FRCP 11(f) and the text was amended to refer the reader to FRE 410. *See infra* note 48 and accompanying text.

[3] FED. R. EVID. 410. Military Rule of Evidence (MRE) 410 is substantially identical. *See infra* Part II.C.

[4] *Mezzanatto*, 513 U.S. at 198.

[5] *Id.*

[6] *Id.* at 199.

that decision, commentators have widely criticized both the case and the practice.[7]

Although *Mezzanatto* dealt with a waiver that allowed a prosecutor to use plea negotiation statements only for impeachment, federal prosecutors have since expanded the practice to include demands for a waiver of the federal Rules in order to allow the prosecutor to use the accused's statements in rebuttal or in the government's case-in-chief. Federal courts of appeals have uniformly upheld these expanded uses of federal Rules waivers.[8] Nevertheless, despite the extensive use of federal Rules waivers in federal courts, the military justice system has not adopted this practice. The implementation of such waivers is long overdue in military practice. Using a waiver of Military Rule of Evidence (MRE) 410 and Rule for Courts-Martial (RCM) 705(e) ("military Rules")[9] in courts-martial comports with notions of freedom of contract, is required by the UCMJ, and improves both the efficiency and reliability of military criminal prosecutions.

Part II of this article covers the legal background and the current state of the law. It discusses the context of plea bargaining, including the recognition of pretrial agreements (PTAs)[10] as contracts, and the

---

[7] *See, e.g.*, Michael S. Gershowitz, *Waiver of the Plea-Statement Rules*, 86 J. CRIM. L. & CRIMINOLOGY 1439 (1996); Eric L. Dahlin, Note, *Will Plea Bargaining Survive* United States v. Mezzanatto*?*, 74 OR. L. REV. 1365 (1995); Julia A. Keck, Note, United States v. Sylvester*: The Expansion of the Waiver of Federal Rule of Evidence 410 To Allow Case-in-Chief Use of Plea Negotiation Statements*, 84 TUL. L. REV. 1385 (2010); Pamela Bennett Louis, Note and Comment, United States v. Mezzanatto*: An Unheeded Plea to Keep the Exclusionary Provisions of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) Intact*, 17 PACE L. REV. 231 (1996); Christopher P. Siegle, Note, United States v. Mezzanatto*: Effectively Denying Yet Another Procedural Safeguard to "Innocent" Defendants*, 32 TULSA L. J. 119 (2006); Note, *Waiver—Plea Negotiation Statements*, 109 HARV. L. REV. 249 (1995).

[8] *E.g.*, United States v. Rebbe, 314 F.3d 402 (9th Cir. 2002) (rebuttal); United States v. Mitchell, 633 F.3d 997 (10th Cir. 2011) (case-in-chief). *See infra* Part II.E.

[9] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 410 (2012) [hereinafter MCM]; *id.* R.C.M. 705. Throughout this article, the term "federal Rules" will be used for FRE 410 and FRCP 11(e), and the term "military Rules" will be used for MRE 410 and RCM 705(e). However, when generically referring to both federal and military Rules, the article will use the term "Rules."

[10] Both the UCMJ and the Manual for Courts-Martial refer to "pretrial agreements." *See, e.g.*, UCMJ art. 63 (2012); MCM, *supra* note 9, R.C.M. 705. Civilian practice refers to pre-trial agreements (PTAs) as "plea agreements." *See, e.g.*, FED. R. CRIM. P. 11. The drafters of RCM 910 and its analysis left the term "plea agreement" in place through almost all of the rule when adapting it from the FRCP. *See* MCM, *supra* note 9, R.C.M. 910; *id.* R.C.M. 705 analysis at A21-40–42. Consistent with military usage, this article

different types of agreements made. Part II also addresses the history behind the federal and military Rules, as well as guilty plea procedures in the military. Part III of this article delves into the controversy surrounding the use of Rules waivers, advancing three main arguments for allowing the practice and discussing some procedural protections. Finally, Part IV offers a means of analyzing waivers of the military Rules in military courts.

II. Background

A. Plea Bargaining, Pretrial Agreements, and Contract Law

Beginning in the 1970s, the Supreme Court stressed the importance of plea bargaining because, among other things, the practice allows for a "prompt and largely final disposition of most criminal cases."[11] To arrive at an agreement that results in a final disposition, the parties must engage in negotiations. These negotiations do not occur in a vacuum, but in the context of the potential sentence and charges. These two situations are referred to as penalty bargaining and cooperation bargaining.[12]

---

uses the term pretrial agreement or PTA throughout.

[11] Santobello v. New York, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons."); *accord* Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."); Brady v. United States, 397 U.S. 742, 752 (1970) (listing the benefits to both the accused and the government in guilty pleas); Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159, 161–62 (2008) ("The reality is that the prosecutor, the government, and society in general reap tremendous benefits from plea bargaining . . ."); *see also* Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials."); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) ("To a large extent . . . horse trading determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system."). In federal district court in fiscal year 2012, 89% of all accused pled guilty and 97.6% of convictions resulted from guilty pleas. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.D-4 (2012), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/D04Sep12.pdf.

[12] Eric Rasmussen, Mezzanatto *and the Economics of Self-Incrimination*, 19 CARDOZO L. REV. 1541, 1552–54 (1998); *see also* Transcript of Oral Argument, United States v. Mezzanatto, 513 U.S. 196 (1995) (93-1340), *available at* http://www.supremeobserver.com/cases/US/513/513US196/oat-513us196-19941102.htm (argument of Solicitor General) (describing charge bargaining and cooperation bargaining).

Penalty bargaining is where the prosecutor either agrees to dismiss charges, sometimes called charge bargains, or agrees to some form of sentence limitation, sometimes called sentence bargains.[13] Penalty bargaining generally occurs when the accused does not have any information that the government would need or find useful.[14] Thus, negotiations revolve entirely around the charges, sentence limitations, and avoidance of the risk and cost of trial.[15]

Cooperation bargaining involves situations where the accused has information valuable to the government, often for use in another case.[16] Here, the negotiations focus on the accused attempting to get the best result in exchange for his information, testimony, or other support, such as undercover activities.[17] So while penalty bargaining results in a "compromise sentence," cooperation bargaining can result in immunity from prosecution.[18]

Whether engaged in penalty or cooperation bargaining, agreements mainly occur in two scenarios. The first is the standard PTA with which criminal justice practitioners are familiar. The second type of agreement, used in civilian federal practice, occurs before the accused makes a proffer.[19] The prosecutor will require that the accused sign a "proffer agreement"[20] before the prosecutor will listen to the proffer and allow the

---

[13] *See, e.g.*, United States v. Carrigan, 778 F.2d 1454, 1462 (10th Cir. 1985); United States v. Miller, 722 F.2d 562, 563 (9th Cir. 1983); Louis, *supra* note 7, at 234. Of course, an agreement may involve both dismissal of charges and sentence limitations, but rejection of either part invalidates the entire agreement. *E.g.*, United States v. Self, 596 F.3d 245, 249 (5th Cir. 2010); United States v. Perron, 58 M.J. 78, 82 (C.A.A.F. 2003).

[14] Rasmussen, *supra* note 12, at 1552.

[15] *Id.*

[16] *Id.*; *see also* Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 2 (1992) ("In cooperation agreements the defendant trades information and testimony, with the promise of enabling the State to make a case against other defendants . . . .") (footnotes omitted); Miriam Hechler Baer, *Cooperation's Cost*, 88 WASH. U. L. REV. 903, 920 (2011).

[17] Hughes, *supra* note 16, at 2–3; Baer, *supra* note 16, at 905. Cooperation agreements can go against one of the benefits of plea bargaining in that they can prevent a quick disposition of the case because the government will wait for the accused to complete his cooperation before sentencing. *See* Hughes, *supra* note 16, at 2–3.

[18] Rasmussen, *supra* note 12, at 1552–53.

[19] Courts also recognize a third scenario called a post-trial agreement. *See, e.g.*, United States v. Smith, 56 M.J. 271, 279 (C.A.A.F. 2002); United States v. Reyes-Bosque, 596 F.3d 1017, 1025 (9th Cir. 2010).

[20] "A 'proffer agreement' is generally understood to be an agreement between a defendant and the government in a criminal case that sets forth the terms under which the defendant will provide information to the government during an interview, commonly

plea negotiations to begin.[21] These proffer agreements serve as a waiver of the Rules and allow the prosecutor to use the accused's statements against the accused at trial. Proffer agreements generally arise in cooperation cases because if the accused does not have valuable information, he has no need to speak personally in the plea negotiations and can rely on his attorney to negotiate a lesser sentence.[22]

Since the 1970s, the Supreme Court has also recognized PTAs as essentially commercial contracts, but subject to constitutional constraints.[23] A PTA, at its most basic level, is an exchange of promises between the accused and the government.[24] As part of those promises, the Court has recognized that the accused can waive even the most fundamental rights.[25] When looking at constitutional, statutory, or

---

referred to as a 'proffer session.'" United States v. Lopez, 219 F.3d 343, 345 n.1 (4th Cir. 2000).

[21] *See, e.g.*, United States v. Mezzanatto, 513 U.S. 196, 198 (1995); United States v. Rebbe, 314 F.3d 402, 404 (9th Cir. 2002); *see also* United States v. Orm Hieng, 679 F.3d 1131, 1138 (9th Cir. 2012) (recognizing that "prosecutors will routinely require, as a condition for holding a proffer meeting, that suspects agree that their statements may be used for impeachment").

[22] Rasmussen, *supra* note 12, at 1553; Transcript of Oral Argument, *supra* note 12 (argument of Solicitor General) (arguing that a proffer agreement will be used in cooperation cases, but that "it is a waste of time" in a charge bargaining case since the defense attorney will simply call the prosecutor to negotiate).

[23] *See, e.g.*, Puckett v. United States, 556 U.S. 129, 137 (2009) ("Although the analogy may not hold in all respects, plea bargains are essentially contracts."); Ricketts v. Adamson, 483 U.S. 1, 16 (1987) (recognizing that "the law of commercial contract may in some cases prove useful," but that such "constitutional contracts . . . must be construed in light of the rights and obligations created in the Constitution"); Blackledge v. Allison, 431 U.S. 63, 75 n.6 (1977) ("An analogy is to be found in the law of contracts."); *see also* Mabry v. Johnson, 467 U.S. 504, 508 (1984) ("[B]ecause each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange.") (footnote omitted); Cicchini, *supra* note 11, at 173–74 ("[A] plea bargain is not *like* a contract; it *is* a contract."); Derek Teeter, Comment, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains*, 53 U. KAN. L. REV. 727, 729–38 (2005) (summarizing contract law background and analysis of PTAs).

[24] *See* MCM, *supra* note 9, R.C.M. 705(b); FED R. CRIM. P. 11; *Mabry*, 467 U.S. at 508; Santobello v. New York, 404 U.S. 257, 262 (1971); Cicchini, *supra* note 11, at 160–61, 173; Teeter, *supra* note 23, at 733.

[25] *See, e.g.*, United States v. Ruiz, 536 U.S. 622 (2002) (impeachment evidence); *Ricketts*, 483 U.S. at 1 (double jeopardy); Boykin v. Alabama, 395 U.S. 238 (1969) (self-incrimination, jury trial, and confrontation); Singer v. United States, 380 U.S. 24 (1965) (public trial); Johnson v. Zerbst, 304 U.S. 458 (1938) (counsel); Shutte v. Thompson, 82 U.S. (15 Wall.) 151, 159 (1872) ("A party may waive any provision, either of a contract or of a statute, intended for his benefit."); *see also* United States v. McFadyen, 51 M.J. 289 (C.A.A.F. 1999) (pretrial punishment); United States v. Weasler, 43 M.J. 15

evidentiary rules, there is a "presumption of waivability," and the accused has the responsibility of identifying the basis for departing from that presumption.[26] However, the Supreme Court has recognized that some rules are so "fundamental to the reliability of the factfinding process that they may never be waived."[27]

Military courts took longer to adopt the contract analogy,[28] but the Court of Appeals for the Armed Forces (CAAF) eventually made the transition.[29] Consistent with the Supreme Court, the CAAF has held that PTAs are contracts subject to the Due Process Clause.[30] Despite both academic and public opposition to plea bargaining, courts are content to

---

(C.A.A.F. 1995) (unlawful command influence).

[26] *Mezzanatto*, 513 U.S. at 200–02.

[27] *Id.* at 204; *accord* United States v. Rivera, 46 M.J. 52, 54 (C.A.A.F. 1997). In *Mezzanatto*, the Court listed the "right to conflict-free counsel" and the right not to be tried by of a jury of "12 orangutans" as examples of non-waivable rights. 513 U.S. at 204 (citing Wheat v. United States, 486 U.S. 153, 162 (1988) and United States v. Josefik, 753 F.2d 585, 588 (7th Cir. 1985)); *see also* Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994) ("[S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want . . ."); Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, LAW & CONTEMP. PROBS., Autumn 1988, at 243, 245 ("[W]e could submit our cases to an oracular examiner of chicken entrails. An answer would emerge. But such decision processes would quickly erode public confidence . . .").

[28] *See generally* Major Mary M. Foreman, *Let's Make a Deal! The Development of Pretrial Agreements in Military Criminal Justice Practice*, 170 MIL. L. REV. 53 (2001) (summarizing the evolution of PTAs and the military justice system's history of paternalistic approaches to the subject).

[29] *See, e.g.*, United States v. Acevedo, 50 M.J. 169, 172 (C.A.A.F. 1999) ("A pretrial agreement is created through the process of bargaining, similar to that used in creating any commercial contract. As a result, we look to the basic principles of contract law when interpreting pretrial agreements."). This change came after years of resistance. *See, e.g.*, *Weasler*, 43 M.J. at 21 (Sullivan, C.J., dissenting) ("[T]he 'contract' rationale proffered by the majority is dead wrong."); United States v. Kazena, 11 M.J. 28, 33–34 (C.M.A. 1981) ("Contract-law principles or the letter of the contract will not be permitted to operate in the military justice system in a manner unaffected by . . . important public interests."); United States v. Dawson, 10 M.J. 142, 150 (C.M.A. 1981) ("This Court on numerous occasions has attempted to discourage a marketplace mentality from pervading the plea-bargaining process and to prevent contract law from dominating the military justice system.").

[30] United States v. Lundy, 63 M.J. 299, 301 (C.A.A.F. 2006); *Acevedo*, 50 M.J. at 172. *But cf.* Teeter, *supra* note 23 (arguing for a contracts-only analysis, as opposed to a contracts-Due Process hybrid analysis, for waivers of the right to appeal). The Due Process requirements are codified in RCM 705 and 910, which prohibit involuntary terms or terms that deprive the accused of certain rights and require certain actions by the military judge during the providence inquiry. *See* MCM, *supra* note 9, R.C.M. 705; *id.* R.C.M. 910; United States v. Smead, 68 M.J. 44, 59 (C.A.A.F. 2009).

allow the practice to continue under the general principles of contract law, where the parties are free to bargain for those terms they see fit.[31] Given that the military Rules are modeled after the federal Rules,[32] the history surrounding the federal Rules provides valuable background in understanding why the military Rules are waivable.

B. Federal Plea Statement Rules

The Supreme Court prescribed the FRE in November 1972.[33] As originally drafted, FRE 410 was only one sentence long and prohibited the use of withdrawn guilty pleas, offers to plead guilty, and "statements made in connection" with such pleas or offers.[34] Exclusion of withdrawn guilty pleas arose from the case of *Kercheval v. United States*, which held that when a judge allows the accused to withdraw a plea, that plea is "held for naught," and allowing its admission would be "in direct conflict with that determination."[35] However, excluding plea discussions did not have such case law to support it. The drafting committee added it to the federal Rules as a policy matter to promote "disposition of criminal cases by compromise" because "free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it."[36]

The House of Representatives was content with the rule as proposed by the Supreme Court, but added the phrase, "[e]xcept as otherwise provided by Act of Congress," to "preserve congressional policy

---

[31] *See* Scott & Stuntz, *supra* note 11, at 1909–13; Louis, *supra* note 7, at 249–50; *see also* H.R. REP. NO. 94-247, at 6 (1975) (House Judiciary Committee Report on amendments to FRCP) ("No observer is entirely happy that our criminal justice system must rely to the extent it does on negotiated dispositions of cases. However, crowded court dockets make plea negotiating a fact that the Federal Rules of Criminal Procedure should contend with."), *reprinted in* 1975 U.S.C.C.A.N. 674, 678.

[32] *See infra* notes 51–52 and accompanying text.

[33] Order of November 20, 1972, 409 U.S. 1132, 56 F.R.D. 183 (1972); H.R. DOC. NO. 93-46 (1973).

[34] Order of November 20, 1972, 56 F.R.D. at 228–29; H.R. DOC. NO. 93-46, at 9.

[35] Kercheval v. United States, 274 U.S. 220, 224 (1927).

[36] FED. R. EVID. 410 advisory committee's note; *see also* FED. R. CRIM. P. 11 advisory committee's note ("[T]he purpose of [the federal Rules] is to permit the unrestrained candor which produces effective plea discussions."); United States v. Barunas, 23 M.J. 71, 76 (C.M.A. 1986) ("The general purpose of Mil.R.Evid. 410 and its federal civilian counterpart, Fed.R.Evid. 410, is to encourage the flow of information during the plea-bargaining process and the resolution of criminal charges without 'full-scale' trials.").

judgments" on the use of pleas in antitrust cases.[37] The Senate, concerned that there would be an absolute bar on the use of statements, added exceptions for impeachment and in prosecutions for perjury or false statement.[38] The Conference Committee adopted the Senate version, but added that FRE 410 would not take effect immediately and would be "superseded by any subsequent Federal Rule of Criminal Procedure or Act of Congress with which it is inconsistent."[39]

While Congress was considering the FRE, the Supreme Court transmitted changes to the FRCP.[40] The changes to FRCP 11 included a new subdivision (e)(6) that exactly mirrored the original FRE 410 proposal from the Supreme Court.[41] The House added an exception for prosecution of perjury and false statement, but left out the exception for impeachment.[42] The Conference Committee adopted the House version of FRCP 11(e)(6),[43] and then Congress enacted an amendment to FRE 410 to make it identical to FRCP 11(e)(6), that is, with only an exception for perjury and false statement prosecutions, but no exception for impeachment.[44]

In 1979, the federal Rules were amended to add another exception for when plea statements are admissible.[45] The new exception allowed admission of the accused's statements when other "statement[s] made in the course of the same plea or plea discussions [have] been introduced."[46] Except for a stylistic amendment, FRE 410 remains the same,[47] while FRCP 11(e)(6) is now 11(f) and its text merely refers the

---

[37] H.R. REP. NO. 93-650 (1973) (citing 15 U.S.C. § 16(a)), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082.
[38] S. REP. NO. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7057–58.
[39] H.R. REP. NO. 93-1957, at 6–7 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7100.
[40] Order of April 22, 1974, 416 U.S. 1001, 62 F.R.D. 271 (1974); H.R. DOC. NO. 93-292 (1974).
[41] Order of April 22, 1974, 62 F.R.D. at 286; H.R. DOC. NO. 93-292, at 6.
[42] H.R. REP. NO. 94-247, at 7 (1975), *reprinted in* 1975 U.S.C.C.A.N. 674, 679.
[43] H.R. REP. NO. 94-414, at 10 (1975) (Conf. Rep.), *reprinted in* 1975 U.S.C.C.A.N. 713, 714.
[44] Pub. L. No. 94-149, 89 Stat. 805 (1975). Without explanation, Congress changed the language at the beginning of the rule to "Except as otherwise provided in this rule." *Id.*
[45] *See* Order of April 30, 1979, 441 U.S. 987, 992, 77 F.R.D. 507, 533 (1979); H.R. DOC. NO. 96-112 (1979).
[46] Order of April 30, 1979, 441 U.S. at 992, 77 F.R.D. at 533; H.R. DOC. NO. 96-112, at 19.
[47] H.R. DOC. NO. 112-28, at 19 (2011). Among the stylistic changes was the removal of the "Except as otherwise provided" language at the beginning of the rule. *Id.*

reader to FRE 410.[48] On the military side, MRE 410 is nearly identical to FRE 410, but the military equivalent to FRCP 11(f) is somewhat different.

C. Military Plea Statement Rules

Article 36(a) of the Uniform Code of Military Justice (UCMJ) requires the military to follow the "law and rules of evidence generally recognized" in federal courts to the extent practicable and not inconsistent with the UCMJ.[49] Following the enactment of the FRE, work began on the MRE, leading to their promulgation in 1980.[50] Based on Article 36, the guidance was to make the MRE "as similar to civilian law as possible."[51] To ensure that this link to civilian law remained, MRE 1102 requires amendments to the FRE to apply automatically to the MRE after eighteen months, unless contrary action is taken.[52]

Besides terminology changes specific to military practice, MRE 410 is almost identical to FRE 410.[53] The only substantive difference is an additional paragraph in MRE 410 that extends the rule's protection to requests for administrative discharge in lieu of court-martial.[54] The Court of Military Appeals (CMA), precursor to the CAAF, adopted an expansive interpretation of this provision, finding that the rule applies to any request "for disposition of charges outside formal plea negotiations."[55] The CMA repeatedly stated that it will not apply an

---

[48] *See* Order of April 29, 2002, 535 U.S. 1157, 207 F.R.D. 89 (2002); H.R. DOC. NO. 107-203 (2002).

[49] UCMJ art. 36(a) (2012).

[50] Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (Mar. 12, 1980). *See generally* Frederic I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5 (1980) (summarizing the history and drafting of the MRE); Fred L. Borch, *The Military Rules of Evidence: A Short History of Their Origin and Adoption at Courts-Martial*, ARMY LAW., June 2012, at 1 (same).

[51] Lederer, *supra* note 50, at 12–13; *accord* Borch, *supra* note 50, at 1.

[52] MCM, *supra* note 9, MIL. R. EVID. 1102.

[53] *Compare* FED. R. EVID. 410, *with* MCM, *supra* note 9, MIL. R. EVID. 410.

[54] MCM, *supra* note 9, MIL. R. EVID. 410(b). This additional protection was added because such requests require a confession. *Id.* MIL. R. EVID. 410 analysis, at A22-35; Lederer, *supra* note 50, at 20.

[55] United States v. Barunas, 23 M.J. 71, 75 (C.M.A. 1986) (letter to commanding officer admitting guilt, expressing regret, requesting forgiveness, and asking for punishment short of court-martial excluded under MRE 410); *see also* United States v. Brabant, 29 M.J. 259, 261 (C.M.A. 1989) (spontaneous statement by accused that he will "take an Article 15, lose a stripe, whatever it takes" excluded under MRE 410). *But see* Lederer,

"excessively formalistic or technical approach" to MRE 410.[56]

The closest military equivalent to FRCP 11(f) is RCM 705(e). Rule 705(e) reflects military-specific differences by prohibiting the panel members from being notified of the existence of a PTA or of any statements made in connection with a plea or providence inquiry.[57] This provision was new in the 1984 Manual for Courts-Martial and has never been amended.[58] To better understand the effects of the federal and military Rules, one must be familiar with the other procedural rules relating to pretrial agreements and plea inquiries.

D. Federal and Military Pretrial Agreement and Plea Inquiry Rules

Federal Rule of Criminal Procedure 11 deals with pleas in general, covering all aspects of guilty pleas, including PTAs.[59] Originally, the FRCP 11 limited itself to listing the types of pleas, requiring the court to personally address the accused, and requiring a factual basis for the plea.[60] The rule received extensive modification during the 1974–1975 amendments.[61] These changes had "two principal objectives," (1) to describe "the advice that the court must give" before accepting a plea; and (2) to provide "a plea agreement procedure."[62] This plea agreement procedure lays out in general the matters that can be bargained for, the requirement for disclosing the agreement to the court, and rules on acceptance or rejection of the PTA.[63] Rule 11 has gone through numerous changes since then, but its general outline and two objectives have remained the same.[64]

---

supra note 50, at 20 n.58 ("We did not discuss, nor did we intend to reach, the type of conduct that the Court of Military Appeals subsequently has protected via Rule 410.").

[56] *E.g.*, United States v. Grijalva, 55 M.J. 223, 227 (C.A.A.F. 2001); United States v. Vasquez, 54 M.J. 303, 305 (C.A.A.F. 2001); *Barunas*, 23 M.J. at 76.

[57] MCM, *supra* note 9, R.C.M. 705(e).

[58] *See id.* R.C.M. 705 analysis, at A21-40–42.

[59] *See* FED. R. CRIM. P. 11.

[60] *See* Order of February 28, 1966, 383 U.S. 1087, 1097, 39 F.R.D. 69, 171–72 (1966).

[61] *See* Order of April 22, 1974, 416 U.S. 1001, 62 F.R.D. 271, 277 (1974); H.R. DOC. NO. 93-292, at 27 (1974).

[62] FED. R. CRIM. P. 11 advisory committee's note.

[63] FED. R. CRIM. P. 11.

[64] The rule has been amended nine times since 1975. *See* FED. R. CRIM. P. 11 advisory committee's note.

The military has divided these two objectives into two rules: RCM 910 and RCM 705. Rule for Courts-Martial 910 deals with the providence inquiry, including the military judge personally addressing the accused, the voluntariness of and the factual basis for the plea, and the military judge inquiring into the terms of the PTA.[65] The rule is similar to FRCP 11, but with changes that are unique to the military.[66] Some of these changes reflect the higher standards for military judges accepting a guilty plea than for federal court judges.[67] The basis for this higher standard is statutory,[68] reflecting the unique nature of the military and the desire to "enhance[] public confidence in the plea bargaining process."[69] The primary difference is the military judge's added responsibility when inquiring into the factual basis of the plea.[70] Additionally, case law prohibits a military judge from accepting any terms in a PTA that violate public policy or basic notions of fundamental fairness.[71]

Rule for Courts-Martial 705 deals specifically with PTAs by regulating the terms and conditions, the procedure for arriving at the agreement, and the circumstances under which each party can withdraw.[72] However, RCM 705 has no precise equivalent in the FRCP. Although parts of FRCP 11 and RCM 705 are similar, RCM 705 reflects very specific military practices. In particular, the rule explicitly prohibits certain terms and conditions and specifies that neither party can propose

---

[65] MCM, *supra* note 9, R.C.M. 910.

[66] *See id.* R.C.M. 910 analysis, at A21-60 (including references to FRCP 11 throughout and stating that RCM 910 is based on and follows the format of FRCP 11).

[67] *See* United States v. Soto, 69 M.J. 304, 306 (C.A.A.F. 2011) ("It is axiomatic that '[t]he military justice system imposes even stricter standards on military judges with respect to guilty pleas than those imposed on federal civilian judges.'") (quoting United States v. Perron, 58 M.J. 78, 81 (C.A.A.F. 2003)).

[68] *See* UCMJ art. 45 (2012).

[69] *Soto*, 69 M.J. at 307 (citing United States v. King, 3 M.J. 458, 459 (C.M.A. 1977)); *see also Perron*, 58 M.J. at 81–82; United States v. Outhier, 45 M.J. 326, 331 (C.A.A.F. 1996).

[70] *Soto*, 69 M.J. at 306–07; *Perron*, 58 M.J. at 81–82. When the UCMJ was being drafted, the requirement for inquiring into a factual basis for an accused's guilty plea was added into Article 45 to provide additional protection to an accused, who was often a young man, and to avoid future complaints by the accused that he did not understand what he was doing. *See* United States v. Chancelor, 36 C.M.R. 453, 455-56 (C.M.A. 1966); *Uniform Code of Military Justice: Hearings Before a Subcomm. of the H. Comm. on Armed Services on H.R. 2498*, 81st Cong. 1052–57 (1949).

[71] *See infra* note 177 and accompanying text.

[72] MCM, *supra* note 9, R.C.M. 705.

any terms or conditions prohibited by law or public policy.[73] Assuming the parties can waive the federal and military Rules described so far, to what extent can the prosecutor use the statements made by the accused?

E. Extent of Waiver

Federal prosecutors have taken three approaches to the extent of an accused's waiver of the federal Rules.[74] These three approaches to waiver can appear in either a proffer agreement or a PTA. The first approach is to allow the prosecutor to use the accused's plea statements to impeach him if he takes the stand during trial.[75] The second is to allow the prosecutor to use the plea statements in rebuttal to anything that the accused, any witness, or his counsel says or argues.[76] The third and final type is a waiver that allows the prosecutor to offer the plea statements in the government's case-in-chief.[77] The text of the waivers will also include language allowing the government to use the accused's statements for other purposes, including investigation.[78] No military

---

[73] *Id.*

[74] Rasmussen, *supra* note 12, at 1546–47.

[75] *E.g.*, United States v. Mezzanatto, 513 U.S. 196 (1995).

[76] *E.g.*, United States v. Roberts, 660 F.3d 149 (2d Cir. 2011); United States v. Hardwick, 544 F.3d 565 (3d Cir. 2008); United States v. Rebbe, 314 F.3d 402 (9th Cir. 2002); United States v. Krilich, 159 F.3d 1020 (7th Cir. 1998); United States v. Artis, 261 F. App'x 176 (11th Cir. 2008) (unpub).

[77] *E.g.*, United States v. Mitchell, 633 F.3d 997, 1006 (10th Cir. 2011); United States v. Sylvester, 583 F.3d 285 (5th Cir. 2009); United States v. Young, 223 F.3d 905 (8th Cir. 2000); United States v. Burch, 156 F.3d 1315 (D.C. Cir. 1998); United States v. Stevens, 455 F. App'x 343 (4th Cir. 2011) (unpub).

[78] Prosecutors likely use this provision to protect against a finding that derivative use immunity applies to plea related statements, whether under the Rules, or under *de facto* or informal immunity. *See, e.g.*, United States v. Plummer, 941 F.2d 799 (9th Cir. 1991); United States v. Jones, 52 M.J. 60 (C.A.A.F. 1999). The federal witness immunity statute, 18 U.S.C. § 6002 (2012), prohibits the use or derivative use of any information obtained pursuant to a grant of immunity. *See* Kastigar v. United States, 406 U.S. 441 (1972); *cf.* MCM, *supra* note 9, R.C.M. 704; United States v. Mapes, 59 M.J. 60 (C.A.A.F. 2003). The federal circuit courts that have addressed the issue have found that derivative use immunity does not apply to the federal Rules. *See, e.g.*, United States v. Rutkowski, 814 F.2d 594 (11th Cir. 1987); United States v. Cusack, 827 F.2d 696 (11th Cir. 1987); United States v. Ware, 890 F.2d 1008 (2d Cir. 1989); United States v. Rivera, 6 F.3d 431 (7th Cir. 1993); United States v. Millard, 235 F.3d 1119 (8th Cir. 2000).

For military practitioners, however, the CMA has found that derivative use immunity does apply to MRE 410. *See* United States v. Ankeny, 30 M.J. 10 (C.M.A. 1990); *cf.* 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 410.09[4] (Joseph M. McLauglin ed., 2d ed. 2012) ("It would seem that, to enforce the policy underlying Rule 410, the better approach would be to import the 'fruit of the

court has addressed the issue of using the statements for other purposes.

III. Analysis

The case for allowing waivers of the military Rules is relatively straightforward. It is justified by the principle sometimes referred to as the freedom of contract.[79] This freedom lies unspoken at the heart of permitting any waiver and allows a person to exercise control over his own life and maximize his benefits. Although no public policy arguments outweigh the existence of this right, its exercise is not absolute and protections are present to protect the accused. Before evaluating the technical legal and public policy arguments, one must examine the broader context of U.S. society and the legal system as reflected in the somewhat abstract notion of freedom of contract.

A. Freedom of Contract

The foundation of the U.S. adversarial system is the ability of parties to control the legal process.[80] The ability to control the process takes its shape in the form of the freedom to contract, or more broadly, to exchange entitlements. The freedom to contract and exchange entitlements lies within the value of autonomy or individual freedom.[81]

---

poisonous tree' doctrine into this area."). *But see* United States v. Anderson, No. 9900586, 2000 WL 339943 (N-M. Ct. Crim. App. 2000) (unpub) (stating that MRE 410 does not prohibit derivative use, without discussing *Ankeny*), *aff'd on other grounds*, 55 M.J. 182 (C.A.A.F. 2001).

[79] This phrase may cause some to hark back to the Supreme Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905). The intent is not to argue that there is a constitutional right to freedom of contract, though one can certainly make the case. *See generally* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011); DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT (2011).

[80] *See generally* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986) (describing the "reactive state" that tends to enforce parties' bargains and allow them broad control over the legal process). *See also* Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 17 n.53 (2002) (collecting sources); John W. Strong, *Consensual Modification of the Rules of Evidence: The Limits of Party Autonomy in an Adversary System*, 80 NEB. L. REV. 159, 160–61 (2001).

[81] Scott & Stuntz, *supra* note 11, at 1913; Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1969 (1992); *cf.* Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 971 (1985) (arguing that individual freedom

For autonomy to be meaningful, one's entitlements have to include the right to exploit and trade them.[82] If denied such a right, there is an "unnecessary constraint" on one's choices.[83] On the other hand, the more entitlements that one is able to exchange, the greater his autonomy. In the plea bargaining context, each side has a number of entitlements or rights. The greater the number of entitlements that an accused has to freely trade, the lower the sentence (or charges) he can get—he can maximize his bargaining power.[84] Ultimately, the freedom to contract, and the surrounding body of contract law, is better at protecting an individual's rights in plea bargaining than constitutional rights.[85]

However, the question is not whether the accused should be prohibited from waiving any rights, but only whether the accused is prohibited from waiving one specific right, that provided by the Rules. One could easily cast aside the freedom to exchange entitlements argument above "by simply redefining the entitlement."[86] In other words, the protection of the Rules are not entitlements that are subject to an exchange, either because they are an inalienable right, or because they are a right that belongs to society and are not subject to individual trading.

The very nature of rights in this system, and specifically the rights under the Rules, argues against inalienability. The rights protected by the Rules differ significantly from those rights considered inalienable.

---

prohibits alienation of property).

[82] Scott & Stuntz, *supra* note 11, at 1915; Timothy Sandefur, *In Defense of Plea Bargaining*, REGULATION, Fall 2003, at 28, 30 ("Once each side possessed those rights and liabilities, they had the right to exchange them.").

[83] Scott & Stuntz, *supra* note 11, at 1913.

[84] United States v. Mezzanatto, 513 U.S. 196, 208 (1995) (arguing against "any arbitrary limits on [the parties'] bargaining chips" because "[a] defendant can 'maximize' what he has to 'sell' only if he is permitted to offer what the prosecutor is most interested in buying"); United States v. Gansemer, 38 M.J. 340, 342 (C.M.A. 1993) ("If we take away an important bargaining chip of an accused, . . . what have we accomplished other than denying an accused the right to bargain for his or her freedom?"); Easterbrook, *supra* note 81, at 1975 ("Defendants have many rights that they sell off, receiving concessions they esteem more highly than the rights surrendered. . . . Defendants can use or exchange their rights, whichever makes them better off."); Rasmussen, *supra* note 12, at 1549; Scott & Stuntz, *supra* note 11, at 1909–17.

[85] *See* Cicchini, *supra* note 11, at 173–74 (listing three primary reasons why contract law "is the superior body of law to apply in the enforcement of plea bargains"); *cf.* Teeter, *supra* note 23, at 752–66 (arguing for a pure contract law approach to analyzing waivers of the right to appeal).

[86] Scott & Stuntz, *supra* note 11, at 1915.

Some rights are undoubtedly inalienable, such as life, liberty, and the pursuit of happiness.[87] Rights such as conflict-free counsel and the human composition of a jury are also not waivable because they are required for proper factfinding.[88] The Rules are simply not on the same level as these rights. First, unlike life, liberty, and property, the Rules are civil rights, not natural rights.[89] The protection of one's plea-related statements is not inherent in nature or such that it exists outside of what is granted by government. Second, a lack of protection for one's plea-related statements does not destroy the reliability of the factfinding process in a court; it enhances it.[90]

On the other hand, one could argue that the rights under the Rules are inalienable because they belong to society instead of to the accused.[91] The protection of the Rules is like the right to vote; individuals control its exercise, but the right belongs to society and one cannot trade it.[92] Taking a step back, one must ask why some rights are inalienable. The only sound justification is to prevent negative externalities, that is, costs imposed on third parties.[93] A waiver of the Rules does not impose such costs because an accused who waives his rights does not waive the rights of all other accused. It only makes sense that the parties are internalizing any risks and costs.[94] Looking at it differently, what costs would be

---

[87] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); B.A. Richards, *Inalienable Rights: Recent Criticism and Old Doctrine*, 29 PHIL. & PHENOMENOLOGICAL RES. 391 (1969) (arguing that the founding fathers saw inalienable rights as not being subject to waiver); *see also* Sandefur, *supra* note 82, at 28 ("[A]lthough some natural rights are inalienable, most rights only make sense if they can be bought and sold.").

[88] *Mezzanatto*, 513 U.S. at 204; United States v. Rivera, 46 M.J. 52, 54 (C.A.A.F. 1997).

[89] *See* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 442–52 (2004).

[90] *See infra* notes 154–60 and accompanying text.

[91] *See, e.g.*, *Mezzanatto*, 513 U.S. at 214 (Souter, J., dissenting); Gershowitz, *supra* note 7, at 1455–56; Dahlin, *supra* note 7, at 1379; Keck, *supra* note 7, at 1397–98.

[92] *See* 18 U.S.C. § 597 (2006); Epstein, *supra* note 81, at 987–88; Scott & Stuntz, *supra* note 11, at 1916.

[93] *See* Epstein, *supra* note 81, at 970–71; Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113 (1999); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 316 (1983); Scott & Stuntz, *supra* note 11, at 1916; *see also* JOHN STUART MILL, ON LIBERTY 22 (2d ed. 1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."). *But cf.* Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 DUKE ENVTL. L. & POL'Y F. 253, 260 n.33 (2013) (arguing that externalities do not automatically justify government intervention).

[94] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979) ("In an adversary system of criminal justice, the public interest in the administration of justice is protected by the

imposed by allowing waiver? The only possible cost is that the plea negotiation will be chilled,[95] causing the case to go to trial. The fact that a case goes to trial cannot be a negative externality in a system where the presumption is that cases will go to trial.[96]

The argument that the Rules are rights that belong to society also conflicts with the U.S. criminal justice system, which presumes that rights belong to the accused.[97] The nature of the adversarial process and belief in individual autonomy means that most rights in this system are personal and subject to waiver.[98] Party control over the evidentiary process is widely recognized and occurs regularly, resulting in a "presumption of waivability."[99] Without some indication from Congress or the President, evidentiary rules are subject to waiver.[100] The accused can even forfeit the most basic rights without knowing, merely by failing to object.[101]

---

participants in the litigation.").

[95] This, of course, is subject to dispute. *See infra* Part III.C.

[96] *See* Rasmussen, *supra* note 12, at 1571–72. *But cf.* Lafler v. Cooper, 132 S. Ct. 1376, 1385–86 (2012) (having a full and fair trial does not cure deficient performance by defense counsel in advising accused to refuse a PTA).

[97] Scott & Stuntz, *supra* note 11, at 1917.

[98] *See* United States v. Mezzanatto, 513 U.S. 196, 200–02 (1995); Shutte v. Thompson, 82 U.S. (15 Wall.) 151, 159 (1872); Note, *Contracts to Alter the Rules of Evidence*, 46 HARV. L. REV. 138, 139–40 (1933). That personal rights are waivable is a long-standing rule in military courts as well. *See* United States v. Hounshell, 21 C.M.R. 129, 132 (C.M.A. 1956) ("The right to a speedy trial is a personal right which can be waived."). An accused even has the constitutional right to waive his constitutional right to counsel under the Sixth Amendment. *See* Faretta v. California, 422 U.S. 806 (1975).

[99] *See Mezzanatto*, 513 U.S. at 202–03 ("[E]videntiary stipulations are a valuable and integral part of everyday trial practice. Prior to trial, parties often agree in writing to the admission of otherwise objectionable evidence, either in exchange for stipulations from opposing counsel or for other strategic purposes."); United States v. Rivera, 46 M.J. 52, 53–54 (C.A.A.F. 1997) (finding that "the rules of procedure and evidence," including "evidentiary objections," are "presumptively waivable" in a PTA, subject to those terms "expressly prohibited" by rule); *see also* United States v. Gibson, 29 M.J. 379 (C.M.A. 1990) (upholding a PTA with a waiver of "any and all evidentiary objections based on the Military Rules of Evidence"); Gold v. Death, 79 Eng. Rep. 325 (K.B. 1616); Strong, *supra* note 80, at 160–61; Note, *supra* note 98, at 139–40.

[100] *See Mezzanatto*, 513 U.S. at 201 ("[A]bsent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement . . . .").

[101] MCM, *supra* note 9, MIL. R. EVID. 103 (without timely objection or offer of proof, error is forfeited, unless plain error); *id.* R.C.M. 905(e) (failure to raise objection, other than to jurisdiction or failure to allege an offense, constitutes waiver); Salinas v. Texas, 133 S. Ct. 2174, 2183 (2013) (opinion of Alito, J.) ("[I]t is settled that forfeiture of the privilege against self-incrimination need not be knowing.") (citing Minnesota v. Murphy,

In *Mezzanatto*, the Court found that the text of FRE 410, identical to that of MRE 410, reflected a presumption of party control over the rule.[102] The plain language of the rule only prohibits plea-related statements introduced "against" the accused, thus allowing the accused to introduce the plea-related statements if it fits the defense's trial strategy.[103] Additionally, one of the exceptions within both FRE 410 and MRE 410 allows admission of plea-related statements when other parts of the statements have been introduced, "contemplat[ing] a degree of party control that is consonant with the background presumption of waivability."[104]

Since there is an infinite number of ways to order one's life, society allows parties to make arrangements among themselves, a form of private lawmaking.[105] If the parties fail to regulate one of the infinite

---

465 U.S. 420, 427-28 (1984) and Garner v. United States, 424 U.S. 648, 654 n.9 (1976)); Peretz v. United States, 501 U.S. 923, 936 (1991) (collecting cases); Yakus v. United States, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal . . . cases by the failure to make timely assertion of the right . . . ."); United States v. Joseph, 11 M.J. 333, 335 (C.M.A. 1981) ("[N]onjurisdictional errors are normally waived when they are not timely raised at trial . . . ."). The important difference here is that with forfeiture, you still get appellate review for plain error, but with waiver, you get no review on appeal. *See* United States v. Olano, 507 U.S. 725, 732–33 (1993); United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009).

[102] *Mezzanatto*, 513 U.S. at 205–06.

[103] MCM, *supra* note 9, MIL. R. EVID. 410; *Mezzanatto*, 513 U.S. at 205. The federal circuit courts that have considered this issue have prohibited the defense from introducing statements made during plea negotiations, except when the statement is a refusal of a grant of immunity. *See, e.g.*, United States v. Verdoon, 528 F.2d 103 (8th Cir. 1976) (refusing to allow defense use); United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990) (allowing defense use when accused refused grant of immunity). *Compare* Colin Miller, *Deal or No Deal: Why Courts Should Allow Defendants to Present Evidence that They Rejected Favorable Plea Bargains*, 59 U. KAN. L. REV. 407 (2011) (arguing for allowing defense use), *with* Mark T. Pavkov, Note, *Closing the Gap: Interpreting Federal Rule of Evidence 408 to Exclude Evidence of Offers and Statements Made by Prosecutors During Plea Negotiations*, 57 CASE W. RES. L. REV. 453 (2007) (arguing against defense use).

The CAAF has not directly addressed this question, although it has indirectly suggested that defense use of providence statements would not be permitted unless the military judge independently advises the accused on the rights he gives up. *See* United States v. Resch, 65 M.J. 233, 237 (C.A.A.F. 2007) (finding that the military judge did not sufficiently obtain a waiver of the right against self-incrimination, despite the defense's request to consider the accused's statements). *But see infra* note 169 (discussing two unpublished Navy-Marine Court of Criminal Appeals (NMCCA) cases that seem to go against this reasoning).

[104] *Mezzanatto*, 513 U.S. at 205–06; FED. R. EVID. 410; MCM, *supra* note 9, MIL. R. EVID. 410.

[105] *See* Friedrich Kessler, *Contracts of Adhesion-Some Thoughts About Freedom of*

number of possibilities in an agreement, any default rules established by the legislature will apply.[106] For plea-related statements, the default rule is that they are inadmissible. However, that does not speak to when the parties agree to waive the Rules. The fact that a default rule exists does not preclude the parties from agreeing to alter it.[107] In addition to this broad notion of freedom of contract, more practical, legal reasons support a rule that accused can waive their protections under the military Rules.

B. Parity Between Federal and Military Systems

Military courts should allow waivers of the military Rules because it would be consistent with practice in federal courts. Article 36(a) allows the President to prescribe rules that shall "apply the principles of law and the rules of evidence generally recognized" in federal courts.[108] The only deviations allowed are if the federal rules are either found not "practicable" by the President, or are "contrary to or inconsistent with" the UCMJ.[109] Since waivers of the federal Rules are both generally recognized in federal courts and practicable and consistent with the UCMJ, Article 36(a) requires that an accused be allowed to waive his rights under the military Rules.

From the initial creation of the MRE, the driving force was to make them as similar as possible to the FRE.[110] The drafters made sure to incorporate uniformity with federal practice wherever they could.[111] They included MRE 101(b)(1) to require the use of "the rules of evidence generally recognized" in federal court as a secondary source.[112]

Contract, 43 COLUM. L. REV. 629, 641 (1943).

[106] *See id.* at 629; Scott & Stuntz, *supra* note 11, at 1913.

[107] *Cf. Mezzanatto*, 513 U.S. at 208 n.5 ("The Advisory Committee's Notes *always* provide some policy justification for the exclusionary provisions in the Rules, yet those policies merely justify the default rule of exclusion; they do not mean that the parties can never waive the default rule.").

[108] UCMJ art. 36(a) (2012).

[109] *Id.*; *see also* MCM, *supra* note 9, MIL. R. EVID. 101 analysis, at A22-2 ("[T]o the extent to which the Military Rules do not dispose of an issue, the Article III Federal practice when practicable and not inconsistent or contrary to the Military Rules shall be applied.").

[110] Lederer, *supra* note 50, at 12–13; Borch, *supra* note 50, at 1.

[111] *See* MCM, *supra* note 9, MIL. R. EVID. analysis; Lederer, *supra* note 50.

[112] MCM, *supra* note 9, MIL. R. EVID. 101(b)(1); *see also id.* MIL. R. EVID. 101 analysis, at A22-2.

To require future uniformity with the FRE, the drafters also included MRE 1102(a) to mandate that amendments to the FRE automatically apply to the MRE unless contrary action is taken.[113] The CMA, both before and after the enactment of the MRE, has recognized the need to maintain uniformity of practice with the federal courts.[114]

Initially, there is the question of whether waiver of the federal Rules is generally recognized in federal courts. The uniform holdings by federal courts allowing waivers demonstrate that this principle is generally recognized.[115] However, the extent of the prosecution's use of the waived statements is not generally recognized—does a waiver extend to use of the statements for impeachment, for rebuttal, or for use in the case-in-chief? At the very least, it is generally recognized in federal courts that the accused can waive the federal Rules for use in rebuttal. Five circuits have recognized such use, and five circuits have gone further and allowed it for use in the case-in-chief.[116] Surely, those circuits that allow case-in-chief waivers would allow a more limited rebuttal waiver. Of course, this does not foreclose the adoption of a case-in-chief waiver by the CAAF, as it is free to do in interpreting and applying the MRE.

The next question is whether the text of MRE 410 contains a presidential determination under Article 36(a) that allowing waiver is not practicable.[117] The plain language of the rule is the place to begin this examination.[118] Rule 410 only has two listed exceptions, one for when

---

[113] *Id.* MIL. R. EVID. 1102(a); *see also* Lederer, *supra* note 50, at 13 ("Colonel Alley intended not just that the codification reflect the Federal Rules of Evidence, but that all *future* military evidentiary law echo it as well, unless a valid military reason existed for departing from it.").

[114] United States v. Clemons, 16 M.J. 44, 45–46 (C.M.A. 1983) (admonishing trial judge for his insufficient "deference to the application of Article III Federal court precedent"); United States v. Weaver, 1 M.J. 111, 117 (C.M.A. 1975); United States v. Knudson, 16 C.M.R. 161, 164–65 (C.M.A. 1954).

[115] *See supra* Part II.E; United States v. Orm Hieng, 679 F.3d 1131, 1138 (9th Cir. 2012) (finding waivers of the federal Rules are so generally recognized that the judge "would not be surprised if a defendant does not object to the government's use" of plea related statements).

[116] *See supra* notes 76–77 and accompanying text.

[117] Courts should give "complete deference" to the President's practicality determination. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 623 (2006). However, in *Hamdan* the Supreme Court found that Article 36(b)'s requirement that the prescribed rules must be "uniform insofar as practicable" can act as a limit on the President's rule-making authority. *See id.* at 620.

[118] United States v. Custis, 65 M.J. 366, 370 (C.A.A.F. 2007).

another part of the statement is admitted, and another for perjury or false statement.[119] Arguably, because there is no waiver exception, waiver should not be allowed.[120] However, this only addresses the default rule of what happens when the parties do not agree otherwise; the argument does not address whether the accused can waive the default rule.[121] In other words, the fact that the Rules do not have the word "waiver" in them does not mean that the accused cannot waive them. The parties have deviated from the default by exercising the common law presumption of waivability.[122]

One could look at the introductory language, "[e]xcept as otherwise provided in this rule," to argue for an intent to preclude waiver.[123] This argument fails for three reasons. First, it restates the argument about the existence of only two exceptions. The language lays out the default position; it does not speak to whether the parties can consensually modify it. Second, that language cannot carry the weight attributed to it because it has been removed from both the FRE and the MRE.[124] If the "except as otherwise" language actually intended to limit waivers, it would have a substantive meaning and would not have been removed by a stylistic amendment. Finally, as discussed above, the House originally inserted that language to prevent the rule from interfering with a statute on pleas in antitrust cases.[125] There is nothing in the text of MRE 410 that shows an intent by the President to foreclose waivers.

---

[119] MCM, *supra* note 9, MIL. R. EVID. 410.

[120] *See, e.g.*, Gershowitz, *supra* note 7, at 1451–54; *see also infra* notes 123–25 and accompanying text.

[121] *See supra* note 105–07 and accompanying text.

[122] United States v. Mezzanatto, 513 U.S. 196, 200–03 (1995); *see also* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587–88 (1993) (stating that federal courts look to the background common law in interpreting the FRE); MCM, *supra* note 9, MIL. R. EVID. 101(b)(2).

[123] *See, e.g.*, Gershowitz, *supra* note 7, at 1451–54; Dahlin, *supra* note 7, at 1367 n.9. In *Crosby v. United States*, the Supreme Court relied in part on "except as otherwise provided" language in FRCP 43 to find that an accused could not be tried *in absentia*. 506 U.S. 255, 258–59 (1993). Although both the Court and FRCP 43 used the word "waiver," the case was one of forfeiture since the accused had not affirmatively waived his right to be present. *See id.* at 256. Additionally, FRCP 43 specifically discusses the issue of waiver, so Congress had replaced the common law rule presuming waivability with the procedure spelled out in FRCP 43. *Id.* at 258–59. The analysis in this article deals with an explicit, knowing waiver of the military Rules, not forfeiture. Also, MRE 410 does not discuss "waiver," or even use the term, so the President has not modified or replaced the common law presumption of waivability.

[124] FED. R. EVID. 410; MCM, *supra* note 9, MIL. R. EVID. 410; *see supra* note 47 and accompanying text.

[125] *See supra* note 37 and accompanying text.

Finally, the last question is whether waiver would be contrary to or inconsistent with the UCMJ. There is nothing unique about the UCMJ that would prevent waiver. The CAAF has recognized that all manner of rights are waivable, except those listed in RCM 705.[126] However, Article 45 is important if a waiver allows use of the accused's statements during the providence inquiry.[127] The CMA has stated that allowing evidence from a rejected providence inquiry "would violate the spirit, if not the letter, of Article 45(a)."[128] However, that merely restates the general policy behind the existence of Article 45. It does not answer the question of whether a waiver would be inconsistent with Article 45. As the CMA recognized, nothing in the letter of Article 45 prohibits the subsequent use of providence statements. Besides, like any other statute, Article 45 is susceptible to waiver.

The only remaining issue is whether anything in RCM 705(e) alters this analysis. After all, what good is a waiver if the evidence cannot be "disclosed to the members"?[129] Initially, RCM 705(e) expressly refers to MRE 410.[130] If an accused can waive MRE 410, then the provisions in RCM 705(e) should not apply. More importantly, RCM 705(e) is a rule designed to protect the accused, making it his personal right and within the presumption of waivability. There is nothing different from the analysis of the waivability of MRE 410.

C. Waiver Encourages Settlement

Perhaps the most consistent argument made by opponents to a waiver of the federal Rules in a proffer agreement is the supposed negative effect it will have on plea negotiations.[131] Since proffer

---

[126] *E.g.*, United States v. Gladue, 67 M.J. 311, 314 (C.A.A.F. 2009).

[127] UCMJ art. 45 (2012); United States v. Hayes, 70 M.J. 454, 457 (C.A.A.F. 2012) (Article 45 of the UCMJ "includes procedural requirements to ensure that military judges make sufficient inquiry to determine that an accused's plea is knowing and voluntary, satisfies the elements of charged offense(s), and more generally that there is not a basis in law or fact to reject the plea.").

[128] United States v. Shackelford, 2 M.J. 17, 20 n.6 (C.M.A. 1976) (citing United States v. Kercheval, 274 U.S. 220 (1927)).

[129] MCM, *supra* note 9, R.C.M. 705(e).

[130] *Id.*

[131] *See, e.g.*, United States v. Mezzanatto, 513 U.S. 196, 214–15 (1995) (Souter, J., dissenting); Gershowitz, *supra* note 7, at 1455–56; Benjamin A. Naftalis, Note, *"Queen for a Day" Agreements and the Proper Scope of Permissible Waivers of the Federal Plea-Statement Rules*, 37 COLUM. J.L. & SOC. PROBS. 1, 35–39 (2003).

agreements act as a gateway to negotiations, conditions at this point in the process will arguably reduce plea bargaining. The CMA has stated that the purpose of MRE 410 is to encourage the free flow of information during negotiations to resolve cases without trials.[132] Instead of taking a formal or technical approach, courts should "broadly construe th[e] rule so as to encourage plea negotiations."[133] By broadly construing the military Rules to allow for waivers, military courts will be encouraging settlement in the right cases.

In plea negotiations, both sides are trying to avoid the costs and risks of going to trial.[134] From a practical perspective, prosecutors would not seek Rules waivers if they impeded PTAs.[135] Waivers of the Rules do not make cases more likely to go to trial because both sides have an incentive to waive the default application of the Rules. While this is more likely to be true in cooperation bargaining, it is also true in penalty bargaining.

In large part, plea bargaining is driven by the trustworthiness of the parties.[136] The government has an incentive to maintain a good reputation because it is constantly involved in negotiations.[137] For an

---

[132] *See* United States v. Ankeny, 30 M.J. 10, 15 (C.M.A. 1990); *cf. supra* note 36 and accompanying text.

[133] *Ankeny*, 30 M.J. at 15; *cf.* Easterbrook, *supra* note 81, at 1975 ("Plea bargains are preferable to mandatory litigation . . . because compromise is better than conflict.").

[134] *See generally* Easterbrook, *supra* note 81; Easterbrook, *supra* note 93; Rasmussen, *supra* note 12.

[135] *See* United States v. Mezzanatto, 998 F.2d 1452, 1458 (9th Cir. 1993) (Wallace, C.J., dissenting) ("Given the mutual benefits achieved through plea bargaining, should we expect the government continually to require waivers if such requirements significantly reduce the number of plea agreements reached?"). In fiscal year 1997, 81.8% of all accused pled guilty, whereas in fiscal year 2011, 89% pled guilty. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.D-4 (2012), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/D04Sep12.pdf; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 214 (1998).

[136] *See* Cicchini, *supra* note 11, at 162–63; Easterbrook, *supra* note 81, at 1971; Rasmussen, *supra* note 12, at 1562–63. Although the military has a higher turnover rate of convening authorities, prosecutors, and defense counsel than civilians, the institutional and reputational concerns remain the same.

[137] *See* Rasmussen, *supra* note 12, at 1563. This argument assumes that the government will not abuse its power. In the end, courts must rely on the good faith of prosecutors and invalidate abusive agreements. *See* United States v. Mezzanatto, 513 U.S. 196, 210 (1995); Cicchini, *supra* note 11, at 182; *see also* Rasmussen, *supra* note 12, at 1573 ("The goal of plea bargaining is not for a litigant to do better than his opponent, or to reduce his opponent's welfare, but to do as well for himself as possible."). The U.S.

accused, however, each case is a one-time event, so he does not have the same incentive.[138] He also has the right to withdraw from the PTA at any time, while the government is more limited in its withdrawal options.[139] Given this starting position, in a penalty bargaining scenario, an accused would be willing to waive the Rules in order to increase the credibility of his proffer and obtain access to a busy prosecutor.[140]

In cooperation bargaining, the dilemma becomes especially difficult for a prosecutor. Since he is going to rely on the information provided by the accused in his case against another individual, the prosecutor needs some way to ensure that the information is reliable. This is a real concern because once the accused has a deal in place, he has little incentive to cooperate fully.[141] Additionally, if the prosecutor provides protected information at the negotiations to convince the accused to plead guilty, the accused can end the negotiations and then use that information to alter his testimony at trial. That is precisely what Mezzanatto did when he changed his trial testimony from what he said at the negotiations to make it consistent with the information he learned during the negotiations.[142] Finally, as a precaution, the prosecutor would want a waiver to ensure that derivative use immunity did not apply.[143]

---

adversarial system assumes that each side will zealously pursue its position and prevent overreaching by the other party. For example, an accused can refuse to waive the Rules or negotiate for immunity. *See, e.g.*, United States v. Palumbo, 897 F.2d 245, 247 (7th Cir. 1990); United States v. Stein, No. 04-269-9, 2005 WL 1377851, at *4 (E.D. Pa. June 8, 2005); *see also* David P. Leonard, *Waiver of Protections Against the Use of Plea Bargains and Plea Bargaining Statements After* Mezzanatto, CRIM. JUST., Fall 2008, at 8; Jon May, *Queen for a Day From Hell: How to Handle a Troubling Proffer Letter*, CHAMPION, Sept.–Oct. 2006, at 16. The analysis may be different if the command requires waiver in all cases. *See infra* notes 150–53 and accompanying text.

[138] Rasmussen, *supra* note 12, at 1563. The reputation of the accused's attorney, however, can improve the accused's reputational position. *See* Easterbrook, *supra* note 81, at 1971.

[139] MCM, *supra* note 9, R.C.M. 705(d)(4).

[140] *See* United States v. Krilich, 159 F.3d 1020, 1024–25 (7th Cir. 1998); King, *supra* note 93, at 118–19; Rasmussen, *supra* note 12, at 1569–81; Transcript of Oral Argument, *supra* note 12 (argument of Solicitor General) (arguing that prosecutors have a finite amount of time and need some incentive to divert that time to listen to the accused).

[141] *See* Rasmussen, *supra* note 12, at 1563–66 (describing various means in which an accused could fail to fully cooperate, including minimizing his own role, performing poorly as a witness, or not revealing negative information in his background that the individual against whom he is testifying would know).

[142] Brief for the United States, *Mezzanatto*, 513 U.S. 196 (No. 93-1340), 1994 WL 234577 at *29 n.9.

[143] *See supra* note 78.

Thus, the government has to either delay the accused's sentencing until after he finishes cooperating, or attempt to vacate the sentence and re-try the accused if he fails to fully cooperate.[144] Knowing all this, the prosecutor will be hesitant to spend his time negotiating without some assurance that the information is reliable. He would be safer seeking a sure conviction against the accused.[145] The prosecutor will ask for a waiver of the Rules as an incentive to enter into negotiations and as a form of punishment if the accused fails to provide truthful information or to cooperate fully.[146] The accused would agree to waive the Rules to obtain a more favorable sentence than what he would get at trial.[147]

The discussion so far has focused on waiving the protection of the Rules in a proffer agreement. The question remains about waivers in the PTA itself. Here, the result is straightforward. When a waiver is located in the PTA itself, plea negotiations are already over, so the waiver could not have had a chilling effect.[148] At the time the accused made his statements during the plea negotiations, MRE 410 fully protected them. In the PTA, a waiver only serves to provide another incentive for the accused not to withdraw.[149]

The possibility remains that some prosecutors may want to make a waiver of the military Rules a mandatory provision of any proffer or

---

[144] *See* Ricketts v. Adamson, 483 U.S. 1 (1987). Although the Supreme Court has held that this does not violate Double Jeopardy, *id.* at 9, the time and expense involved in such a process makes this course of action a difficult and cost-prohibitive one to follow.

[145] *See* United States v. Mezzanatto, 513 U.S. 196, 207–08 (1995); *Krilich*, 159 F.3d at 1025; *see also* Easterbrook, *supra* note 93, at 310.

[146] *See* Rasmussen, *supra* note 12, at 1563.

[147] *See* Easterbrook, *supra* note 93, at 297; Rasmussen, *supra* note 12, at 1573; *see also id.* at 1580 ("If plea bargaining would be unsuccessful without the waiver and successful with it, then both prosecutor and defendant gain from the waiver, because both prosecutor and defendant payoffs are bigger from successful settlement than from trial.").

[148] *See, e.g.*, United States v. Mitchell, 633 F.3d 997, 1005–06 (10th Cir. 2011); United States v. Burch, 156 F.3d 1315, 1321–22 (D.C. Cir. 1998).

[149] That the accused has an *incentive* not to withdraw does not prevent his withdrawal "at any time." MCM, *supra* note 9, R.C.M. 705(d)(4). It merely allows the government to present evidence it could not otherwise if he chooses to withdraw. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas.") (citation and internal quotations omitted); *see also* United States v. Velez, 354 F.3d 190, 196 (2d Cir. 2004) (no violation of constitutional right to present a defense, to effective assistance of counsel, or to a fair trial from a waiver of the federal Rules).

PTA.[150] Not only would such a mandatory provision possibly be coercive,[151] but the CAAF has indicated it will strike down mandatory terms.[152] From a practical perspective, the defense can simply refuse to proffer and submit a PTA.[153] Since the convening authority makes the ultimate decision, he can approve an acceptable deal put forth by the defense without any proffer. Also, with no sentencing guidelines, the defense is not dependent on the prosecutor for a reduction in sentence and can always plead guilty without a PTA or force the prosecutor to put on his case at trial.

To encourage settlement, the parties must trust each other. Rules waivers allow for deception by the accused to be punished, increasing trust and improving the chances for a settlement. By punishing deception, Rules waivers also enhance the truth-seeking function of the courts. One of the functions of courts, and trials in particular, is to ascertain the truth.[154] If an accused contradicts his earlier statements at a later trial through his own testimony, testimony elicited from witnesses, or counsel's argument, the accused would be allowed to use "false evidence."[155] A waiver of the Rules helps avoid that potential fraud by allowing the government to point out the inconsistency.[156] Unlike a coerced confession, a voluntary statement, in the presence of counsel, to a prosecutor while in negotiations, or to a judge at a providence inquiry, is inherently likely to be reliable.[157] Defense counsel would also face tricky issues of candor to the court and suborning perjury.[158]

---

[150] *See Mezzanatto*, 513 U.S. at 217–18 (Souter, J., dissenting); Rasmussen, *supra* note 12, at 1582.

[151] *Cf. infra* notes 170–76 and accompanying text.

[152] United States v. Felder, 59 M.J. 444 (C.A.A.F. 2004); United States v. Zelenski, 24 M.J. 1 (C.M.A. 1987).

[153] *See supra* note 137.

[154] *See Mezzanatto*, 513 U.S. at 204; Lopez v. United States, 373 U.S. 427, 440 (1963); United States v. Romano, 46 M.J. 269, 274 (C.A.A.F. 1997) ("[T]he purpose of a criminal trial is truthfinding within constitutional, codal, Manual, and ethical rules."); MCM, *supra* note 9, MIL. R. EVID. 102 (stating the purpose of the MRE is so "that the end that the truth may be ascertained").

[155] *See* Nix v. Whiteside, 475 U.S. 157, 173 (1986).

[156] *See Mezzanatto*, 513 U.S. at 205; United States v. Roberts, 660 F.3d 149, 157 (2d Cir. 2011); United States v. Mitchell, 633 F.3d 997, 1005 (10th Cir. 2011); United States v. Sylvester, 583 F.3d 285, 293–94 (5th Cir. 2009); United States v. Rebbe, 314 F.3d 402, 408 (9th Cir. 2002); Note, *supra* note 98, at 142–43.

[157] *See* Withrow v. Williams, 507 U.S. 680, 703 (1993) (O'Connor, J., concurring in part and dissenting in part) (stating that "involuntary or compelled statements . . . are of dubious reliability," but that "*voluntary* statements are 'trustworthy'" and "their

One commentator has argued that trials do not convey truth accurately because they are filled with rules that inhibit full disclosure of information. If deception can be penalized, bargaining is better at arriving at the truth because the parties can consider all the evidence, admissible or not, and the lawyers involved are more knowledgeable than jurors.[159] This argument serves as a separate justification for allowing waivers of the military Rules. By increasing the evidence in front of the factfinder, a waiver helps alleviate the disparity between bargaining and trial, bringing trials closer to the ideal.[160]

D. Procedural Protections

Although this article has so far dismissed arguments against Rules waivers, in the military the MCM and the courts provide a number of procedural protections that help safeguard the accused against abuse by the government. These protections exist throughout the process, from the requirement of defense counsel to the procedures for accepting the guilty plea. Together, they ensure that any waiver of the military Rules is voluntary and knowing, and limit any abuse.

Perhaps the most important protection that an accused has is counsel. Since the Supreme Court sanctioned plea bargaining, it has required that counsel be part of the process, unless waived, to ensure the plea and its terms are knowing and voluntary.[161] Counsel must give competent but candid advice to the accused,[162] and can negotiate for better terms in the

---

suppression actually *impairs* the pursuit of truth by concealing probative information from the trier of fact").

[158] *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 (1983); *Nix*, 475 U.S. at 173 ("[T]he right to counsel includes no right to have a lawyer who will cooperate with planned perjury. A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment."); *Velez*, 354 F.3d at 192.

[159] *See* Easterbrook, *supra* note 81, at 1971; Easterbrook, *supra* note 93, at 316–17; *Krilich*, 159 F.3d at 1025.

[160] *See generally* Saks, *supra* note 27 (describing increased importance of factfinding and offering suggestions to improve accuracy).

[161] *See* Brady v. United States, 397 U.S. 742, 748 n.6, 758 (1970).

[162] *See Mitchell*, 633 F.3d at 1002 (plea voluntary when competent counsel candidly advised "you would be a fool not to take this offer"); United States v. Carr, 80 F.3d 413, 417 (10th Cir. 1996) (finding guilty plea voluntary despite accused's claim that he was "hounded, browbeaten and yelled at," as well as called "stupid" and "a f[]ing idiot," by his attorney, who thought the government's offer was a good one).

waiver.[163] However, ineffective assistance of counsel can render the accused's plea involuntary and force it to be set aside.[164] If counsel fails to advise the accused on his rights under the military Rules and the consequences of a waiver, then the accused would have a promising claim for ineffective assistance of counsel and withdrawal from the waiver.[165]

Another valuable protection is the military judge and his role in the providence inquiry and review of the PTA. Under RCM 910, the military judge must personally advise the accused of his rights, ensure that the plea is voluntary, obtain a factual basis for the accused's guilt, and inquire into the PTA and its terms.[166] Having the military judge conduct this process ensures not only that the plea is voluntary and knowing, but that the terms of the PTA, including any waivers, are also voluntary and knowing.[167] While obtaining the factual basis for the plea,

---

[163] *See supra* note 137. Additionally, the defense may have the option of introducing the accused's plea-related statements at trial. *See supra* note 103 and accompanying text.

[164] *See* Hill v. Lockhart, 474 U.S. 52, 57 (1985) ("Where [an accused] is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'") (citation omitted); Tollett v. Henderson, 411 U.S. 258, 267 (1973) ("[An accused] may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards" of competence.); United States v. Rose, 71 M.J. 138 (C.A.A.F. 2012).

[165] *See* Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012). There is also the issue of counsel with an actual conflict of interest, which is non-waivable. *See supra* notes 27, 88 and accompanying text.

[166] MCM, *supra* note 9, R.C.M. 910. The purpose of the providence inquiry is to provide "judicial scrutiny" for "reasonableness" due to the possibility of overreaching by the prosecutor. Easterbrook, *supra* note 93, at 320. *But see* Allison D. Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 49, 62 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (arguing that the inquiry may be "a formality that better protects the court than the defendant").

This "elaborate oral exchange" has been compared to a "statute of frauds" because "[i]t is very costly to reopen a case after a plea" due to lost evidence. Easterbrook, *supra* note 93, at 317–18. In this respect, a Rules waiver helps lessen that cost. This is even more relevant in the military because of the nature of the providence inquiry, where the military judge delves deeply into the factual basis of the charges. This will, of course, work to the disadvantage of the accused if the military judge rejects his guilty plea. Should a waiver of the military Rules be contemplated in a particular case, defense counsel must ensure that the accused can plead providently to the charges and specifications, or negotiate a plea by exceptions and/or exceptions and substitutions.

[167] *See* United States v. Soto, 69 M.J. 304, 306–07 (C.A.A.F. 2011); *Mitchell*, 63 F.3d at

the military judge must personally ensure that the accused understands the extent of his waiver of the right against self-incrimination.[168] Thus, the military judge must explain that if the accused answers the questions, but the plea is either not accepted or withdrawn, a waiver of the military Rules would allow the government to use his statements from the inquiry, and any negotiations, against him at a later trial.[169]

Some argue that the government's gross disparity in bargaining power makes waivers of the federal Rules involuntary. This argument relies primarily on the application of the federal Sentencing Guidelines.[170] However, this argument fails to properly apply the Supreme Court's statements regarding what is considered a voluntary and knowing waiver. The voluntary and knowing requirement entails a case-by-case analysis to look for fraud or coercion.[171] A waiver is voluntary if it is "the product of a free and deliberate choice," and it is knowing if "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[172]

1002; United States v. Burch, 156 F.3d 1315, 1323 (D.C. Cir. 1998). *But see* Allison D. Redlich & Alicia Summers, *Voluntary, Knowing, and Intelligent Pleas: Understanding the Plea Inquiry*, 18 PSYCHOL. PUB. POL'Y & L. 626, 640 (2012) (finding that "a significant portion" of accused "may not fully understand and appreciate" their rights when questioned after pleading guilty).

[168] *See, e.g.*, United States v. Resch, 65 M.J. 233, 237 (C.A.A.F. 2007).

[169] In a case not involving a pretrial waiver of MRE 410, the NMCCA found error, but that it was harmless, when the judge allowed the government to use statements from a rejected providence inquiry during trial because the accused's waiver of the right against self-incrimination during that rejected inquiry did not extend to such use. United States v. Cross, No. 200602310, 2007 WL 2846918, at *1–4 (N-M. Ct. Crim. App. 2007) (unpub). However, the court found that the accused had waived the government's use of the earlier PTA, and thus MRE 410, "when, through counsel, he affirmatively declined to object." *Id.* at *5; *see also* United States v. Burch, No. 200700047, 2007 WL 2745706, at *2–3 (N-M. Ct. Crim. App. 2007) (unpub) (finding waiver of MRE 410 when accused agreed that providence inquiry could be used at sentencing, after which judge asked accused about an inquiry from six months earlier), *rev'd on other grounds*, 67 M.J. 32 (C.A.A.F. 2008).

[170] *See, e.g.*, United States v. Mezzanatto, 513 U.S. 196, 209 (1995); Dahlin, *supra* note 7, at 1381–82; Naftalis, *supra* note 131, at 39–43. *But see* Parker v. North Carolina, 397 U.S. 790, 809 (1970) (opinion of Brennan, J.) (explaining that in "the give-and-take negotiation common in plea bargaining," the parties "arguably possess relatively equal bargaining power"); United States v. Velez, 354 F.3d 190, 196 (2d Cir. 2004) ("[T]o the extent there is a disparity between the parties' bargaining positions, it is likely attributable to the Government's evidence of the defendant's guilt."); Rasmussen, *supra* note 12, at 1574 (arguing that disparity in bargaining power does not concern whether an accused gets a benefit, but "only how much it benefits him").

[171] *Mezzanatto*, 513 U.S. at 210.

[172] Moran v. Burbine, 475 U.S. 412, 421 (1986).

The accused does not need to know "every possible consequence,"[173] as long as "he fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though [he] may not know the *specific detailed* consequences."[174] If gross disparity in bargaining power makes a Rules waiver involuntary, then under that reasoning, all waivers would be invalid. That is why this "dilemma . . . is indistinguishable from any of a number of difficult choices that criminal defendants face every day. The plea bargaining process necessarily exerts pressure on defendants . . . to abandon a series of fundamental rights."[175] Regardless, this argument has little traction in the military because there are no sentencing guidelines and an accused can attempt to get a lower sentence than that in the PTA.[176]

Another layer of protection provided by the military courts is the military judge's duty to ensure that the terms in a PTA do not violate public policy or basic notions of fundamental fairness.[177] However, since the adoption of RCM 705(c)(1), the CAAF has routinely refused to find waivers of rights in pretrial agreements as violating public policy.[178] In fact, the CAAF has stated that the question of whether a term in a pretrial agreement violates public policy is limited to whether the term is specifically prohibited in RCM 705; otherwise, the case will turn on whether the waiver is knowing and voluntary.[179] None of the rights

---

[173] Colorado v. Spring, 479 U.S. 564, 574 (1987).

[174] United States v. Ruiz, 536 U.S. 622, 629 (2002); *see also* United States v. Krilich, 159 F.3d 1020, 1026 (7th Cir. 1998).

[175] *Mezzanatto*, 513 U.S. at 209–10.

[176] *See* MCM, *supra* note 9, R.C.M. 1002; United States v. Kinman, 25 M.J. 99, 101 (C.M.A. 1987).

[177] United States v. Soto, 69 M.J. 304, 307 (C.A.A.F. 2011); United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976) (holding that military judge should strike any PTA provisions that "violate either appellate case law, public policy, or the trial judge's own notions of fundamental fairness"). *United States v. Cassity* provides an excellent explanation of the analysis required in determining whether a provision of the PTA violates public policy or notions of fundamental fairness. 36 M.J. 759, 761–63 (N.M.C.M.R. 1992).

[178] *See, e.g.*, United States v. Gladue, 67 M.J. 311 (C.A.A.F. 2009); United States v. McFadyen, 51 M.J. 289 (C.A.A.F. 1999); United States v. Weasler, 43 M.J. 15 (C.A.A.F. 1995).

[179] United States v. Edwards, 58 M.J. 49, 52 (C.A.A.F. 2003). In *Edwards*, the court cited to RCM 705(c)(1)(B) as listing the terms that violate public policy, then stated that "when pretrial agreements are challenged based upon alleged violations of public policy, the cases invariably discuss the issue in the context of waiver." *Id.* This same process was repeated in *Gladue*, where the court dismissed a public policy argument by stating that the rights in question were not ones specifically prohibited in RCM 705(c)(1)(B). 67 M.J. at 314; *see also* Kessler, *supra* note 105, at 630–31 (stating that courts should not

listed in RCM 705(c)(1)(B) come close to being violated by a waiver of the military Rules.[180] Thus, public policy is coextensive with the knowing and voluntary requirement and RCM 705, neither of which prohibits a waiver of the military Rules.[181] By reviewing for ineffective assistance of counsel and ensuring compliance with RCM 705 and 910, courts are providing sufficient procedural safeguards to protect the accused.[182] All of the preceding arguments can be summarized into a straightforward test for courts to apply.

IV. Proposed Means of Analysis

This article proposes a simple three-part test for military courts to use in evaluating waivers of the military Rules. Although the federal circuit courts have limited their analysis solely to the question of whether the waiver was knowing and voluntary, existing military case law and the spirit of Article 45 suggest a slightly more rigorous test for the

---

declare contracts void because "public policy requires . . . that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced") (citation and internal quotations omitted).

[180] The listed rights are the right to counsel, to due process, to challenge the jurisdiction, to speedy trial, to complete sentencing proceedings, and to post-trial and appellate rights. MCM, *supra* note 9, R.C.M. 705(c)(1)(B). These are essentially rights that the President has determined are essential to the credibility of courts-martial and cannot be waived. *See Mezzanatto*, 513 U.S. at 204.

The only possible argument against a waiver of the military Rules would be that it violates due process, but even that argument does not survive scrutiny. First, the accused's due process rights relating to pleas are codified in RCM 705 and 910. *See supra* note 30. Second, due process attacks carry an extremely high burden. *See* United States v. Wright, 53 M.J. 476, 481 (C.A.A.F. 2000) (upholding the admission of evidence under MRE 413 by stating that a exclusion under due process would require a violation of "those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency") (citations and quotation marks omitted). If RCM 705 and 910 are complied with, admitting evidence at a subsequent trial of plea-related statements, with an accused's waiver, does not violate a fundamental notion of justice or offend notions of fair play and decency.

[181] Apart from these reasons, it is also perfectly reasonable for judges to be hesitant to strike terms on public policy or fairness grounds. Judges suffer from "informational poverty" in criminal cases because they do not have access to all of the evidence or knowledge of the accused's motives or calculations in deciding to enter into the PTA. *See* Easterbrook, *supra* note 93, at 322. In an adversarial system, the parties are generally responsible for managing their own case. *See supra* notes 80, 98, 137 and accompanying text.

[182] *See* King, *supra* note 93, at 131.

military.[183] The proposed test has three parts: (1) that the plea is voluntary and knowing; (2) that the text of waiver is unambiguous; and (3) that the waiver does not violate notions of fundamental fairness.[184]

First, the court must review the circumstances surrounding the waiver to ensure that it is voluntary and knowing.[185] This is done through a rigorous application of RCM 705 and 910 and allowing release from the waiver through a valid claim of ineffective assistance of counsel.[186] In particular, a detailed colloquy where the military judge ensures that the accused fully understands the rights that he is waiving and the possible consequences if the accused withdraws or the military judge refuses to accept the plea is necessary.[187] Due to the right against self-incrimination, any waiver that includes a right to use statements from the accused's providence inquiry faces a higher burden. The military judge will have to include the government's ability to use the statements against the accused in a future proceeding when he is obtaining the waiver of the right against self-incrimination.[188]

---

[183] *See* United States v. Grijalva, 55 M.J. 223, 227 (C.A.A.F. 2001); United States v. Shackelford, 2 M.J. 17, 20 n.6 (C.M.A. 1976). Such a heightened test is not unheard of. *See McFadyen*, 51 M.J. at 291 (holding that for Article 13 waivers, "the judge should inquire into the circumstances of the pretrial confinement and the voluntariness of the waiver, and ensure that the accused understands the remedy to which he would be entitled"); *Edwards*, 58 M.J. at 53 (applying *McFadyen* test to a waiver of the accused's right to discuss his interrogation in his unsworn statement during sentencing).

[184] This test is borrowed, in a modified form, from the various tests applied by the federal circuit courts as to appellate waivers. *See, e.g.*, United States v. Hahn, 359 F.3d 1315, 1324–27 (10th Cir. 2004) (en banc); United States v. Andis, 333 F.3d 886, 889–92 (8th Cir. 2003) (en banc); United States v. Teeter, 257 F.3d 14, 21–26 (1st Cir. 2001). *But see* Teeter, *supra* note 23 (arguing against such tests and for a contract law-only analysis).

[185] Of course, a waiver only becomes an issue if the accused withdraws, the military judge rejects the guilty plea, or the case is overturned on appeal, after which the case goes to trial and the government attempts to use the plea-related statements. However, the military judge must ensure that he obtains the waiver of the right against self-incrimination and does a detailed colloquy in case these circumstances come to pass.

Although one could argue that if the military judge refuses to accept the PTA, the waiver provision is also invalid since it is a part of the PTA, this argument does not fare well since the government still retains its remedy for a breach of contract. *See* United States v. Scruggs, 356 F.3d 539, 544–46 (4th Cir. 2004).

[186] *See supra* Part III.D; *cf. Andis*, 333 F.3d at 890.

[187] *See* United States v. Mitchell, 63 F.3d 997, 1002 (10th Cir. 2011); United States v. Burch, 156 F.3d 1315, 1323 (D.C. Cir. 1998); *cf. Hahn*, 359 F.3d at 1325–27; *Andis*, 333 F.3d at 890–91; *Teeter*, 257 F.3d at 24; FED. R. CRIM. P. 11 advisory committee's note.

[188] *See* United States v. Cross, No. 200602310, 2007 WL 2846918, at *1–4 (N-M. Ct. Crim. App. 2007) (unpub). However, use of statements from outside the providence inquiry do not face such a high burden and can be waived. *Id.* at *5. The change to the

Second, the language of the waiver must be clear and unambiguous as to the proposed use by the government. The courts should interpret any ambiguity in favor of the accused.[189] This is a relatively straightforward proposition and exists because of the significant rights of the accused.[190] Nevertheless, courts must be wary not to use this rule as an excuse to create an ambiguity that does not exist in order to arrive at a just result.[191]

Finally, as required by case law, judges should consider whether the provision violates basic notions of fundamental fairness.[192] This broad category allows for consideration of any illegal actions or any egregious case of bargaining disparity.[193] This analysis must be specific to the facts of the particular case, and is to be used rarely.[194] For example, if the government's breach causes the accused's withdrawal, the court could void the waiver.[195] Under this part of the test, the military judge could also evaluate whether the parties freely negotiated the waiver or whether it was a mandatory provision from the government.[196] The military judge

---

providence inquiry will require modifying the trial guides to have the military judge obtain the additional waiver when discussing the waiver of the self-incrimination rights.

The military judge should be careful not to send any contradictory messages about the impact of the waiver to the accused during the colloquy. *Cf. Teeter*, 257 F.3d at 24–25. *But cf.* Untied States v. Partin, 7 M.J. 409, 412–13 (C.M.A. 1979) (holding that military judge's incorrect interpretation of PTA term and advice to accused did not bind either party or make the accused's plea improvident).

[189] *See, e.g.*, United States v. Davis, 20 M.J. 903, 905 (A.C.M.R. 1985); United States v. Newbert, 504 F.3d 180, 185 (1st. Cir. 2007); United States v. Artis, 261 F. App'x 176 (11th Cir. 2008) (unpub). *But see* United States v. Krilich, 159 F.3d 1020, 1025 (7th Cir. 1998) (rejecting "argument that waivers should be construed against prosecutors" and noting that courts should give waivers "a natural reading, which leaves the parties in control through their choice of language").

[190] *See, e.g.*, *Newbert*, 504 F.3d at 185 n.3; *Andis*, 333 F.3d at 890.

[191] *See* Kessler, *supra* note 105, at 633 (describing disadvantages of courts "reaching 'just' decisions by construing ambiguous clauses against their author even in cases where there was no ambiguity").

[192] *See supra* note 177. Several of the federal circuit courts refer to whether there would be a "miscarriage of justice." *See, e.g.*, *Hahn*, 359 F.3d at 1327; *Andis*, 333 F.3d at 891; *Teeter*, 257 F.3d at 25–26.

[193] *See, e.g.*, *Hahn*, 359 F.3d at 1327; *see also* United States v. Sylvester, 583 F.3d 285, 294 (5th Cir. 2009).

[194] *See* United States v. Cassity, 36 M.J. 759, 762 (N.M.C.M.R. 1992); *Andis*, 333 F.3d at 891; *Teeter*, 257 F.3d at 26; *cf.* Carlisle v. United States, 517 U.S. 416, 425–26 (1996) (district court may not use "inherent supervisory power" to correct perceived unfairness if it would "circumvent or conflict with" the existing rules).

[195] *See, e.g.*, United States v. Rosa, 123 F.3d 94, 98 (2d Cir. 1997).

[196] *See supra* notes 150–53 and accompanying text.

could consider the MRE 403 balancing test here.[197]

V. Conclusion

The use of waivers of MRE 410 and RCM 705(e) within the military not only complies with the Constitution and the UCMJ, but also satisfies our notions of individual freedom. Perhaps what gives the validity of such waivers their greatest strength is the sheer weight of authority that supports them. All federal circuit courts that have considered the issue have upheld a waiver in some form. Particularly, they all agree that courts should enforce a knowing, voluntary waiver of the federal Rules. There is no reason for the military to ignore this collective wisdom[198] From a practical perspective, the use of waivers in the right cases will improve both the efficiency and reliability of criminal prosecutions.

Every day, accused waive both constitutional and statutory rights. They waive their right against self-incrimination, their right to jury trials, their protections under certain evidentiary rules, and a host of other rights, in PTAs and guilty pleas. They give up these rights in order to achieve what they feel is a better result; they like what the convening authority has to offer better than the right they are giving up. If an accused feels that he is better off by not exercising a right, the military should defer to his sovereignty as an individual.[199] A fundamental part of any entitlement is the ability to trade it, and a right that cannot be traded is worth significantly less than one that can.[200] For an accused, one less bargaining tool means a potentially longer sentence.[201]

---

[197] *See* MCM, *supra* note 9, MIL. R. EVID. 403.

[198] *Cf. Teeter*, 257 F.3d at 23.

[199] *See* MILL, *supra* note 93, at 22; Easterbrook, *supra* note 81, at 1976 ("Why is liberty too important to be left to the defendant whose life is at stake? Should we not say instead that liberty is too important to deny effect to the defendant's choice?"); King, *supra* note 93, at 131 ("Banning waiver altogether . . . resembles drafting the accused as an unwilling soldier in the fight against error in the criminal process, forcing him to assume a risk that he may have preferred to minimize through a negotiated settlement.").

[200] *See* Easterbrook, *supra* note 81, at 1975 ("Rights that may be sold are more valuable than rights that must be consumed.").

[201] *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 280 (1942) ("[T]o deny [an accused] in the exercise of his free choice the right to dispense with some of [his Constitutional] safeguards . . . is to imprison a man in his privileges . . . .").

CYBER "HOSTILITIES" AND THE WAR POWERS RESOLUTION

ALLISON ARNOLD*

I. Introduction

The Pentagon appears to be advancing toward a more offensive strategy in cyberspace.[1] At the very least, there seems to be a growing acknowledgment of the U.S. military's offensive cyber capabilities. For example, the head of U.S. Cyber Command, General Keith Alexander, announced in March that the Pentagon will have thirteen offensive cyber teams by fall 2015.[2] In April, the U.S. Air Force classified six of its cyber capabilities as "weapons."[3] These recent pronouncements seem to increase the likelihood that the United States may engage in future offensive military activities in cyberspace.

It has become clear in the modern age that the cyber domain is as relevant for military activities as the domains of land, sea, air, and space.[4] The increased use of cyber operations in modern warfare has been well documented by scholars.[5] Much of the legal analysis on the use of cyber operations has focused on international law and the use of force.[6] This article turns from that debate to focus on U.S. domestic law

---

* Research Associate, Defense Policy and Arms Control, Congressional Research Service, Foreign Affairs, Defense, and Trade Division, Washington, D.C. J.D., 2013; B.A., 2001, Brigham Young University. Member of the Virginia State Bar. The author would like to thank Professor Eric Talbot Jensen for his mentoring and encouragement.

[1] Tom Gjelten, *First Strike: US Cyber Warriors Seize the Offensive*, WORLD AFF. J., Jan./Feb. 2013, *available at* http://www.worldaffairsjournal.org/article/first-strike-us-cyber-warriors-seize-offensive.

[2] Ellen Nakashima, *Pentagon Creates Teams to Launch Cyberattacks as Threat Grows*, WASH. POST, Mar. 12, 2013, *available at* http://articles.washingtonpost.com/2013-03-12/world/37645469_1_new-teams-national-security-threat-attacks.

[3] Andrea Shalal-Esa, *Six U.S. Air Force Cyber Capabilities Designated "Weapons,"* REUTERS, Apr. 8, 2013, http://www.reuters.com/article/2013/04/09/net-us-cyber-airforce-weapons-idUSBRE93801B20130409 (designating the cyber capabilities as weapons to help the programs compete for funding and garner more attention and recognition).

[4] *See* U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT 37 (2010).

[5] *See* Eric Talbot Jensen, *Cyber Deterrence*, 26 EMORY INT'L L. REV. 773, 775–76 (2012); Lesley Swanson, *The Era of Cyber Warfare: Applying International Humanitarian Law to the 2008 Russian-Georgian Cyber Conflict*, 32 LOY. L.A. INT'L & COMP. L. REV. 303, 304 (2010).

[6] *See generally* Eric Talbot Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense*, 38 STAN. J. INT'L L.

and the implications of congressional efforts to reach offensive operations in cyberspace.

At the end of 2011, Congress addressed "Military Activities in Cyberspace" in the National Defense Authorization Act for Fiscal Year 2012 (NDAA 2012).[7] As will be discussed in Part II, Congress made an effort to impact the governance of offensive military cyber operations by referring to a piece of domestic legislation known as the War Powers Resolution. The War Powers Resolution was enacted forty years ago over the veto of President Nixon.[8] There is a great deal of literature and scholarly debate about its constitutionality and adequacy.[9] This article will not attempt to revisit those issues, but will instead examine the limitations of Congress's reference to the War Powers Resolution and offensive military cyber operations in the NDAA 2012. This article proffers an in-depth analysis of the interaction between offensive military cyber operations and the "hostilities" triggering language of the War Powers Resolution. The article argues that under current practice, the executive branch is unlikely to deem stand-alone offensive military activities in cyberspace as "hostilities" that trigger the statute.

This article begins with an analysis of the "Military Activities in Cyberspace" section of the NDAA 2012 and its connection to the War Powers Resolution. Part III examines the record of the 1973 Congress to review how the term "hostilities" came to be the operative language of the War Powers Resolution. Part IV explores how the executive branch has explained which type of military activities it considers to be

---

207 (2002); Herbert S. Lin, *Offensive Cyber Operations and the Use of Force*, 4 J. NAT'L SEC. L. & POL'Y 63 (2010); Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885 (1999); Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT'L L. 421 (2011).

[7] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 954, 125 Stat. 1298, 1551 (2011).

[8] *See* Veto of the War Powers Resolution, 5 PUB. PAPERS 893 (Oct. 24, 1973).

[9] *See, e.g.*, Geoffrey S. Corn, *Triggering Congressional War Powers Notification: A Proposal to Reconcile Constitutional Practice with Operational Reality*, 14 LEWIS & CLARK L. REV. 687 (2010); Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149 (2001); Michael J. Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17 (1995); Robert F. Turner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, 17 LOY. L.A. L. REV. 683 (1984); MILLER CTR. OF PUB. AFFAIRS, UNIV. OF VA., NATIONAL WAR POWERS COMMISSION REPORT (2008); THE CONSTITUTION PROJECT, DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES (2005).

"hostilities" under the statute. In Part V, the "hostilities" analysis is then applied in the cyber context using the Stuxnet[10] computer virus attack in Iran as a test case. The article concludes in Part VI.

II. Section 954 of the NDAA 2012: Military Activities in Cyberspace

On 31 December 2011, Congress passed the National Defense Authorization Act for Fiscal Year 2012. In the section, "Military Activities in Cyberspace," Congress refers to offensive military cyber operations as being subject to the War Powers Resolution.[11] Congress appears to anticipate that some military operations in cyberspace could trigger the provisions of the statute. This assessment of congressional understanding is supported by a plain reading of the text, by the accompanying legislative history, and by the positions expressed in communications between the Senate and the Department of Defense (DoD).

The relevant section of the NDAA 2012 states:

> SEC. 954. MILITARY ACTIVITIES IN CYBERSPACE.
> Congress affirms that the Department of Defense has the capability, and upon direction by the President may conduct offensive operations in cyberspace to defend our Nation, Allies and interests, subject to—
> (1) the policy principles and legal regimes that the Department follows for kinetic capabilities, including the law of armed conflict; and
> (2) the War Powers Resolution (50 U.S.C. 1541 *et seq.*).[12]

A plain reading of this section suggests that the War Powers Resolution may govern certain military operations in cyberspace. While it seems reasonable to direct the Department of Defense to follow the same policy principles and legal regimes when operating cyber capabilities as it does with conventional kinetic capabilities, the reference to the War Powers Resolution is a more provocative statement, as will be explained in this article.

---

[10] THE TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 262 (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL].
[11] § 954, 125 Stat. at 1551.
[12] *Id.*

The legislative history for the "Military Activities in Cyberspace" section supports the contention that Congress intends to reach military operations in cyberspace with the War Powers Resolution, and offers insight into Congress's rationale. The relevant portion of the Conference Report accompanying the NDAA 2012 addresses use of force and the possible application of the War Powers Resolution:

> The conferees also recognize that in certain instances, the most effective way to deal with threats and protect U.S. and coalition forces is to undertake offensive military cyber activities, including where the role of the United States Government is not apparent or to be acknowledged. The conferees stress that, *as with any use of force, the War Powers Resolution may apply*.[13]

This piece of legislative history introduces the concept that offensive operations in cyberspace may be considered a use of force, and it is the use of force by the military that may cause the War Powers Resolution to apply. Congress appears to emphasize the military's use of force as the legal trigger for application of the War Powers Resolution to operations in cyberspace. The specific triggering language of the statute will be discussed in more detail in Part III. However, communications between the Senate and the Department of Defense before passage of the NDAA 2012 illustrate the different understandings that the two branches seem to have on this point.

Congress passed the NDAA 2012 shortly after the Department of Defense issued its 2011 "Cyberspace Policy Report" to Congress. This report included responses to thirteen cyber policy questions that had been sent to the Department by the Senate.[14] The final question posed in the report asked, "What constitutes use of force in cyberspace for the purpose of complying with the War Powers [Resolution][?]"[15] The Department of Defense responded, stating:

---

[13] H.R. REP. NO. 112-329, at 686 (2011) (Conf. Rep.) (to accompany H.R. 1540) (emphasis added).

[14] U.S. DEP'T OF DEF. CYBERSPACE POLICY REPORT, A REPORT TO CONGRESS PURSUANT TO THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2011, SECTION 934, at 1–2 (Nov. 2011), http://www.defense.gov/home/features/2011/0411_cyberstrategy/docs/NDAA%20Section%20934%20Report_For%20webpage.pdf [hereinafter CYBERSPACE POLICY REP.].

[15] *Id.* at 9.

> The requirements of the War Powers Resolution apply to "the introduction of United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."
> Cyber operations might not include the introduction of armed forces personnel into the area of hostilities. Cyber operations may, however, be a component of larger operations that could trigger notification and reporting in accordance with the War Powers Resolution. The Department will continue to assess each of its actions in cyberspace to determine when the requirements of the War Powers Resolution may apply to those actions.[16]

The Department of Defense's answer highlights a difference between congressional understanding and DoD interpretation. The Senate plainly asks *what* constitutes use of force in cyberspace for the purpose of complying with the War Powers Resolution. Phrasing the question in this manner suggests that the Senate is asking the question with the belief that some amount of force in cyberspace would trigger the legislation, and the Senate is asking the DoD to give the parameters of what would constitute that type of action in the cyber domain.

The Department of Defense, however, answers by focusing on the "introduction of armed forces" language in the statute to say that the War Powers Resolution might not apply to cyber operations because those operations might not include the actual introduction of armed forces personnel into the area of hostilities. At the same time, the DoD states that the War Powers Resolution could be triggered when activities in cyberspace are "a component of larger operations."[17] This is presumably because these "larger operations" may include the physical introduction of forces into hostilities.

By focusing on the introduction of personnel and not on the use of force question, the DoD implies that cyber operations on their own could not trigger the statute. This interpretation appears to be at odds with the "Military Activities in Cyberspace" section of the NDAA 2012 and

---

[16] *Id.*
[17] *Id.*

Congress's intent that the language "subject to" the War Powers Resolution has some effect. Congress does not appear to take the view that armed forces personnel must be physically introduced into hostilities before the War Powers Resolution applies to the military activity in question. Instead, Congress appears to focus on whether the military action is a use of force subject to the War Powers Resolution, or in other words, a use of force sufficient to be considered "hostilities" that would trigger the statute.

Congress seems particularly interested in understanding what constitutes a use of force in cyberspace, yet the Department of Defense did not offer an explanation when it was asked in connection to the War Powers Resolution. However, in a previous question in the report, the Department of Defense did offer a method for determining a use of force in cyberspace when asked about acts of war and international law. It is important to note that the term "use of force" in international law has a particular meaning and legal effect, and thus does not carry over directly into an analysis of domestic law. However, a brief review of the Department of Defense's characterization may inform the overall analysis of military operations in cyberspace.

The Senate asked for "[t]he definition or the parameters of what would constitute an act of war in cyberspace and how the laws of war should be applied to military operations in cyberspace."[18] The Department of Defense stated, "Without question, some activities conducted in cyberspace could constitute a use of force, and may as well invoke a state's inherent right to lawful self-defense."[19] The DoD further stated that "a determination of what is a 'threat or use of force' in cyberspace must be made in the context in which the activity occurs, and it involves an analysis by the affected states of the effect and purpose of the actions in question."[20]

The Department of Defense emphasized the importance of context and the effect of cyber operations in making the use of force determination. Looking to the effects of the cyber operations is also highlighted in the "use of force" definition proffered by the Tallinn Manual on the International Law Applicable to Cyber Warfare (Tallinn

---

[18] *Id.*

[19] *Id.* Lawful self-defense refers to a State's rights under Article 51 of the United Nations Charter.

[20] *Id.*

Manual).[21] The Tallinn Manual defines a cyber operation as a use of force "when its scale and effects are comparable to non-cyber operations rising to the level of a use of force."[22] These international law explanations of uses of force may be useful when assessing U.S. offensive military operations in cyberspace.

Congress seems to anticipate that some level of military operations in cyberspace could be a use of force sufficient to trigger the War Powers Resolution. This conclusion is supported by a plain reading of section 954 of the NDAA 2012, by the accompanying legislative history, and by the positions expressed in communications between the Senate and the Department of Defense. The executive branch seems to hold a more limited view, according to which stand-alone offensive operations in cyberspace, not involving the physical introduction of armed forces, are not subject to the War Powers Resolution. The positions of these two branches appear to be at odds, with each emphasizing a different portion of the triggering language. The following section examines more deeply the history behind the specific language used in the War Powers Resolution, and how it may have been understood when it was passed in 1973. Part IV turns to the executive branch and its analysis for determining which type of military activities it considers "hostilities" subject to the statute.

III. 1973 Congress and the War Powers Resolution

The War Powers Resolution states that it applies "to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."[23] This section examines the record of the 1973 Congress to review how the term "hostilities" came to be the operative language of the War Powers Resolution. It explores the War Powers Resolution's legislative history and commentary on that history to discover how "hostilities" may have been understood by the 1973 Congress. It seems the 1973 Congress may have changed the operative language from "armed conflict" to the broader term "hostilities" to present a lower threshold for military activity to trigger the statute, and

---

[21] TALLINN MANUAL, *supra* note 10, at 45.
[22] *Id.*
[23] 50 U.S.C. § 1541(a) (2006).

also to avoid legal implications from international law for use of the term "armed conflict."[24] Legislative history also indicates that the 1973 Congress may have intentionally left the term "hostilities" undefined in recognition of Presidential power and in an effort to give the President flexibility in making the determination of "hostilities" on a case-by-case basis.[25]

The War Powers Resolution was passed over the veto of President Nixon on 7 November 1973.[26] It was enacted "in the wake of the Vietnam War" and represented a bold attempt by Congress to "regulate the President's unilateral use of military force."[27] President Nixon vetoed the War Powers Resolution claiming it was unconstitutional, and no President has expressly conceded its constitutionality since.[28] The stated purpose of the War Powers Resolution, however, is "to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities."[29] The term "hostilities" is repeated throughout the statute, and the determination of the existence of "hostilities" plays a key role in triggering the statute's consultation and reporting requirements, as well as its sixty-day automatic-pullout provision.[30]

The first war powers bill considered by Congress did not refer to "hostilities," but rather the involvement of the Armed Forces in "armed conflict."[31] Throughout the legislative history of the War Powers Resolution, congressmen refer to the "armed conflict" language in

---

[24] *Libya and War Powers: Hearing Before the Comm. on Foreign Relations*, 112th Cong. 24–25 (2011) [hereinafter *Libya and War Powers*] (Sen. Corker); *id.* at 31 (prepared statement of Hon. Harold Koh, Legal Adviser, U.S. Dep't of State, Wash., D.C. [hereinafter Statement of Mr. Koh]).

[25] *War Powers: Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the H. Comm. on Foreign Affairs*, 93d Cong. 22 (1973) [hereinafter *War Powers*] (statement of Hon. Jacob K. Javits, U.S. Senator from the State of N.Y.).

[26] *See* Veto of the War Powers Resolution, 5 PUB. PAPERS 893 (Oct. 24, 1973); RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R41199, THE WAR POWERS RESOLUTION: AFTER THIRTY-SIX YEARS 1 (2010).

[27] CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 266 n.7 (4th ed. 2011).

[28] STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 307 (5th ed. 2011).

[29] 50 U.S.C. § 1541(a) (2013).

[30] *See id.* §§ 1541–1544.

[31] *War Powers*, *supra* note 25, at 66 (statement of Sen. Eagleton).

various versions of the bill instead of "hostilities."[32] However, it appears that the 1973 Congress may have made the change from "armed conflict" to "hostilities" in the final version to indicate a lower threshold for military action and to avoid legal implications from international law. This interpretation of the legislative history was recently debated by members of Congress and the executive branch during the 2011 Senate hearing *Libya and War Powers*.[33] Referring to the change in language of the War Powers Resolution, Senator Corker stated his opinion that "they tried to make it a lesser level. They started out with 'armed conflict,' and then they used the word 'hostilities.'"[34] Department of State Legal Adviser Harold Koh recognized that the War Powers Resolution House report "suggested that '[t]he word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope,' but the report provided no clear direction on what either term was understood to mean."[35]

Mr. Koh later explained the change of terms indicating that it had been done to avoid allowing international legal obligations to control the statute:

> Senator Corker had mentioned the House conference report had originally proposed the term "armed conflict." There was an irony in the question which is that "armed conflict" is a term of international law. They deliberately did not import that term into this statute precisely so that international law would not be the controlling factor.[36]

The War Powers Resolution states that it applies "to the introduction of United States Armed Forces into *hostilities*," but the term itself is remarkably unclear. Despite its critical role, "hostilities" was not defined in the text of the War Powers Resolution and has not been defined by Congress in any subsequent legislation or by the courts.[37] There are indications, however, that the 1973 Congress intentionally left the term vague in recognition of Presidential power. The principal sponsor the War Powers Resolution, Senator Jacob K. Javits, was asked at a 1973

---

[32] *See id.* at 70, 77, 78, 84, 200, 229, 293.
[33] *Libya and War Powers*, *supra* note 24, at 13, 24–25.
[34] *Id.* at 24–25.
[35] *Id.* at 13 n.6 (statement of Mr. Koh) (quoting H.R. REP. NO. 93–287, at 7 (1973)).
[36] *Id.* at 31 (statement of Mr. Koh).
[37] *Id.* at 8 (statement of Mr. Koh).

House of Representatives hearing whether the "hostilities" language was problematic because of "the susceptibility of it to different interpretations," making this "a very fuzzy area."[38] Senator Javits acknowledged the vagueness of the language and emphasized that the construction of what is hostilities or the imminent threat of hostilities would be a decision for the President to make.[39] He further clarified that with his bill the President would still have a great deal of power.[40] "No one is trying to denude the President of authority. All that we are claiming is a part in that authority which the Constitution says belongs to Congress."[41]

Again turning to the 2011 *Libya and War Powers* hearing, Mr. Koh acknowledged that "hostilities" is an inherently ambiguous legal standard and stated his opinion that:

> [T]he legislative history of the Resolution makes clear there was no fixed view on exactly what the term "hostilities" would encompass. Members of Congress understood that the term was vague, but specifically declined to give it more concrete meaning, in part to avoid unduly hampering future Presidents by making the Resolution a "one size fits all" straitjacket that would operate mechanically, without regard to particular circumstances.[42]

In 1987, a D.C. District Court gave a similar interpretation stating, "[T]he very absence of a definitional section in the Resolution, coupled with debate suggesting that determinations of 'hostilities' were intended to be political decisions made by the President and Congress, suggest to this Court that fixed legal standards were deliberately omitted from this statutory scheme."[43]

It seems likely that the 1973 Congress intentionally left the term "hostilities" vague in recognition of the powers of the President and in an effort to give flexibility in making a case-by-case "hostilities"

---

[38] *War Powers*, *supra* note 25, at 22 (statement of Hon. Jacob K. Javits, U.S. Sen. from the State of N.Y.).
[39] *Id.* at 21–22.
[40] *Id.* at 22.
[41] *Id.*
[42] *Libya and War Powers*, *supra* note 24, at 13 (statement of Mr. Koh).
[43] Lowry v. Reagan, 676 F. Supp. 333, 340 n.53 (D.D.C. 1987).

determination. The following section focuses the discussion of "hostilities" by exploring how the executive branch has explained which type of military activities it considers to be "hostilities" subject to the War Powers Resolution.

IV. Executive Branch Approach to "Hostilities" Determination

From the beginning, it appears that Congress has largely left the determination of "hostilities" to executive practice.[44] This section will review how the executive branch has explained its determinations in recent years. The executive branch does not consider all situations of U.S. military engagement to be "hostilities" triggering the War Powers Resolution. In determining which type of military activities it considers "hostilities" under the statute, the executive branch appears to make a factual inquiry into the circumstances of the military action and review a set of four limiting factors.

In 1975, Congress asked the executive branch to provide its best understanding of the term "hostilities."[45] Department of State Legal Adviser Monroe Leigh, and Department of Defense General Counsel Martin Hoffmann reported that, as a general matter, the executive branch understood the term "to mean a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces."[46] Since the War Powers Resolution was enacted, executive practice has not considered all situations of military engagement to be "hostilities." The executive branch has distinguished "the full military engagements with which the Resolution is primarily concerned" from "sporadic military or paramilitary attacks on our armed forces stationed abroad."[47] As recently as the 2011 military activity in Libya, the executive branch reiterated the distinction between full military encounters and more constrained operations, stating that "intermittent military engagements" do not require the withdrawal of forces under the War Powers Resolution's 60-day rule.[48] According to Mr. Koh, the executive branch has regularly applied this understanding

---

[44] *Libya and War Powers*, *supra* note 24, at 31 (statement of Mr. Koh).
[45] *Id.* at 13–14 (statement of Mr. Koh).
[46] *Id.*
[47] *Id.*
[48] *Id.*

that "hostilities" requires a certain threshold of military activity to trigger the President's obligations under the War Powers Resolution.[49]

In determining whether the minimum threshold of activity has been met, the executive branch appears to understand the "hostilities" determination to require a factual inquiry into the circumstances and conditions of the military action in question.[50] As Mr. Koh explained in 2011, "[S]ince the Resolution's enactment, successive Administrations have thus started from the premise that the term 'hostilities' is 'definable in a meaningful way only in the context of an actual set of facts.'"[51] When looking at the factual circumstances of the proposed action, the executive branch analyzes four factors to determine whether the military activities are likely to rise to the level of "hostilities" for purposes of the War Powers Resolution: whether the mission is limited, whether the risk of escalation is limited, whether the exposure is limited, and whether the choice of military means is narrowly constrained.[52]

While the executive branch has described the discussion of the meaning of "hostilities" between itself and Congress as "ongoing," executive practice seems to reiterate the factors and understanding it supplied to Congress in 1975.[53] As stated by Mr. Koh, in the years since the executive branch reported its understanding of the term "hostilities" to Congress, "the executive branch has repeatedly articulated and applied these foundational understandings."[54] In 2011, the executive branch analyzed the U.S. military strikes in Libya against these four factors to conclude that the operations were "well within the scope of the kinds of activity that in the past have not been deemed to be hostilities for purposes of the War Powers Resolution."[55] It seems fair to state that current executive practice will likely continue to rely on this four-factor inquiry to determine whether a particular military action constitutes "hostilities" under the War Powers Resolution. With this practice in mind, the following section turns the "hostilities" analysis to the cyber domain.

---

[49] *See id.*
[50] *See id.* at 54 (Responses of Legal Adviser Harold Koh to Questions Submitted by Sen. Richard G. Lugar).
[51] *Id.* at 13 (statement of Mr. Koh).
[52] *Id.* at 14; *id.* at 21 (statement of Mr. Koh).
[53] *See id.* at 54 (Additional Material Submitted for the Record, Responses of Legal Advisor Harold Koh to Questions Submitted by Sen. Richard G. Lugar).
[54] *Id.* at 14 (statement of Mr. Koh).
[55] *Id.* at 21 (statement of Mr. Koh).

V. Cyber "Hostilities" Analysis and Stuxnet

This section argues that under the executive branch's existing rubric for determining "hostilities," the President would be highly unlikely to deem stand-alone military operations in cyberspace as "hostilities" for purposes of triggering the War Powers Resolution. Using Stuxnet as a cyber "hostilities" test case, this section applies the executive branch's "hostilities" analysis to the computer virus attack in Iran to reveal the gap that exists between the War Powers Resolution and offensive cyber operations. It is unlikely the President would have considered the operation as triggering any legal obligations under the War Powers Resolution because the Stuxnet mission would have likely been viewed as limited under each of the four factors.

Stuxnet is a computer virus that was reportedly developed by Israel and the United States to attack Iran and set back its nuclear capabilities.[56] It was discovered in 2010, launched between 2007 and 2009, with a variant in operation possibly as early as 2005.[57] Even though the United States has not officially acknowledged its role in the attack,[58] Stuxnet serves as a useful cyber "hostilities" test case because it was a revolutionary offensive cyber-attack[59] and had a wide ranging potential political-strategic effect.

Stuxnet "became known as the first computer software threat that was used as a cyber-weapon."[60] As Dean Turner, a director of Symantec Corporation told Congress, "Stuxnet is a wake-up call to critical

---

[56] *See* Kim Zetter, *Legal Experts: Stuxnet Attack on Iran Was Illegal 'Act of Force,'* WIRED.COM, Mar. 25, 2013, http://www.wired.com/threatlevel/2013/03/stuxnet-act-of-force/; Ellen Nakashima, *Obama Signs Secret Directive to Help Thwart Cyberattacks*, WASH. POST, Nov. 14, 2012, *available at* http://articles.washingtonpost.com/2012-11-14/world/35505871_1_networks-cyberattacks-defense; Holger Stark, *Stuxnet Virus Opens New Era of Cyber War*, SPIEGEL ONLINE INT'L, Aug. 8, 2011, http://www.spiegel.de/international/world/mossad-s-miracle-weapon-stuxnet-virus-opens-new-era-of-cyber-war-a-778912.html.

[57] Geoff McDonald, Liam O Murchu, Stephen Doherty & Eric Chien, *Stuxnet 0.5: The Missing Link*, version 1.0, SYMANTEC, Feb. 26, 2013, at 1–2, http://www.symantec.com/content/en/us/enterprise/media/security_response/whitepapers/stuxnet_0_5_the_missing_link.pdf.

[58] According to the Conference Report accompanying the NDAA 2012, section 954's reference to offensive military operations in cyberspace includes operations "where the role of the United States Government is not apparent or to be acknowledged." H.R. REP. NO. 112-329, at 686 (2011) (Conf. Rep.) (to accompany H.R. 1540).

[59] *See* McDonald, Murchu, Doherty & Chien, *supra* note 57, at 1.

[60] *Id.*

infrastructure systems around the world. This is the first publicly known threat to target industrial control systems and grants hackers vital control of critical infrastructures such as power plants, dams and chemical facilities."[61] After thorough analysis and reverse engineering, Symantec Corporation declared, "The ultimate goal of Stuxnet is to sabotage that facility by reprogramming programmable logic controllers (PLCs) to operate as the attackers intend them to, most likely out of their specified boundaries."[62] Stuxnet attacked computers at Iran's Natanz uranium enrichment facility and manipulated its centrifuges to make them self-destruct.[63] It damaged approximately 1,000 centrifuges.[64]

As explained in Part IV, executive practice for determining whether a particular military action constitutes "hostilities" relies on a factual inquiry into the circumstances of a military operation analyzed against a set of four factors: whether the mission is limited, whether the risk of escalation is limited, whether the exposure is limited, and whether the choice of military means is narrowly constrained. It is helpful to keep in mind that these factors originated as an analysis of conventional warfare and, as such, may require a certain amount of translation to the cyber context. Each factor will be analyzed against the Stuxnet attack in turn.

A. Whether the Mission Is Limited

The question of whether or not the mission is limited likely stems from the view that the War Powers Resolution is primarily concerned with "full military engagements"[65] and, therefore, a limited mission may not trigger the statute. The inquiry seems to focus on the nature of the mission, including the role and involvement of U.S. forces. In the case of Libya in 2011, the analysis noted that U.S. forces were playing "a

---

[61] *Securing Critical Infrastructure in the Age of Stuxnet: Hearings before Sen. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. (Nov. 17, 2010) (statement by Dean Turner, Symantec).

[62] Nicolas Falliere, Liam O Murchu & Eric Chien, *W32.Stuxnet Dossier*, version 1.4, SYMANTEC, Feb. 2011, at 2, http://www.symantec.com/content/en/us/enterprise/media/security_response/whitepapers/w32_stuxnet_dossier.pdf.

[63] Holger Stark, *Stuxnet Virus Opens New Era of Cyber War*, SPIEGEL ONLINE INT'L, Aug. 8, 2011, http://www.spiegel.de/international/world/mossad-s-miracle-weapon-stuxnet-virus-opens-new-era-of-cyber-war-a-778912.html.

[64] Nakashima, *supra* note 56.

[65] *See Libya and War Powers*, *supra* note 24, at 14 (statement of Mr. Koh).

constrained and supporting role" in an operation that was "tailored to a limited purpose."[66]

Under this analysis, the Stuxnet mission would likely be determined "limited" because the role and involvement of U.S. forces appears small and the operation had an arguably limited purpose. The depth of involvement of U.S. forces is not known, but the secrecy involved may imply the use of a small force. Not much is known regarding the official design of the operation. However, one can argue that the results of the attack indicate Stuxnet was a narrow operation by nature and "tailored to a limited purpose." As the Tallinn Manual noted, Stuxnet only damaged specific enemy technical equipment.[67] Stuxnet was "designed to seek out a specific type of industrial process-control system, operating with a particular combination of hardware and software."[68] Data showed there were approximately 100,000 infected hosts by 29 September 2010,[69] with approximately 60% located in Iran,[70] but no discernible damage was reported apart from the Natanz uranium enrichment facility.[71] Stuxnet was "extraordinarily precise in attacking a specific target while inflicting virtually no damage on any other computer systems."[72] With that level of narrow tailoring and apparent limited purpose, it is likely that the executive branch would have considered the Stuxnet mission limited under this prong of the "hostilities" analysis.

B. Whether the Risk of Escalation Is Limited

According to Mr. Koh, the assessment of the risk of escalation focuses on whether or not the U.S. military operation is likely to escalate into a broader conflict.[73] A broad conflict is one characterized by a

---

[66] *Id.*
[67] TALLINN MANUAL, *supra* note 10, at 146.
[68] *Id.* at 170.
[69] Nicolas Falliere, Liam O Murchu & Eric Chien, *W32.Stuxnet Dossier*, version 1.4, SYMANTEC, Feb. 2011, at 5, http://www.symantec.com/content/en/us/enterprise/media/security_response/whitepapers/w32_stuxnet_dossier.pdf.
[70] *Id.* at 5–6.
[71] John Richardson, *Stuxnet as Cyberwarfare: Applying the Law of War to the Virtual Battlefield*, 29 J. MARSHALL J. COMPUTER & INFO. L. 1, 4 (2011).
[72] *Id. See generally* Jeremy Richmond, Note, *Evolving Battlefields: Does Stuxnet Demonstrate a Need for Modifications to the Law of Armed Conflict?*, 35 FORDHAM INT'L L.J. 842 (2012) (arguing that Stuxnet complied with the law of armed conflict principle of discrimination).
[73] *See Libya and War Powers*, *supra* note 24, at 15 (statement of Mr. Koh).

"large U.S. ground presence, major casualties, sustained active combat, or expanding geographical scope."[74] Like all of the four factors in the "hostilities" analysis, this is an *ex ante* assessment of the risk.

In the case of Stuxnet, the analysis of the risk of escalation would have been made in advance of the operation and likely assessed against Iran's capability of responding to the attack. The operation itself seemed to use few if any U.S. forces and required no active combat. Therefore, whether or not it would escalate into a broader conflict would largely depend on Iran's response. An assessment of another nation's possible response to a military cyber operation would likely review their capability to respond with both kinetic and non-kinetic means. Such an assessment would also likely take into account whether or not the role of the United States was to be acknowledged, as well as other attribution considerations.

With Stuxnet, it is likely that the risk of escalation would have been considered limited. The authors of Stuxnet would have known beforehand that it was designed and tailored to a very particular combination of hardware and software.[75] This could have lessened the estimated risk of escalation because the authors knew that the damage would not expand geographically even if the infection had a large geographical scope.[76] Iran's infected computers were the target, and containing the damage caused by Stuxnet may have lowered the risk of escalation, at least among other nations. Second, there may have been a lower risk of escalation because the attack was so highly cloaked. Stuxnet was not attributed until years after it had been implemented and then discovered.[77] Confidence in the difficulty of attribution and the passage of time between implementation and discovery could lower the risk of escalation. For these reasons, the Stuxnet operation would likely not have been judged as posing a high risk of escalation.

---

[74] *Id.* at 15 (statement of Mr. Koh).
[75] TALLINN MANUAL, *supra* note 10, at 170.
[76] *See* Falliere, Murchu & Chien, *supra* note 69, at 5.
[77] *See* William J. Broad, John Markoff & David E. Sanger, *Israeli Test on Worm Called Crucial in Iran Nuclear Delay*, N.Y. TIMES, Jan. 15, 2011, *available at* http://www.nytimes.com/2011/01/16/world/middleeast/16stuxnet.html?pagewanted=all&_r=0; David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES, June 1, 2012, *available at* http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html?pagewanted=1&_r=2.

C. Whether the Exposure of U.S. Armed Forces Is Limited

The third factor in the executive branch's "hostilities" analysis asks whether the exposure of the U.S. Armed Forces is limited. This question seems to revolve around U.S. casualties or the threat of significant U.S. casualties.[78] As described by Mr. Koh, a situation of limited exposure could involve "sporadic military or paramilitary attacks on our Armed Forces stationed abroad" in which the overall threat faced by the military is low.[79]

In the case of Stuxnet, the exposure of U.S. Armed Forces personnel in the operation would likely have been viewed as extremely limited. The specific details of the operation are not publically available, but there were no reported casualties associated with the Stuxnet attack[80] or reports of active exchanges of fire with hostile forces. Indeed, in the cyber "hostilities" context, the question of exposure to U.S. Armed Forces is likely to always be assessed as "limited" given the nature of cyber operations. Cyber operations may not require any U.S. forces to enter the geographic area of the attack. The operations may be launched and monitored from inside the United States. The exposure to U.S. forces undertaking offensive operations in cyberspace is likely to be determined significantly limited, particularly in comparison to conventional offensive operations.

D. Whether the Military Means Being Used Are Limited

The final factor in the executive branch's "hostilities" analysis looks to whether the military means being used are limited. This appears to be similar to the first factor in that it compares the proposed military action against a "full military engagement."[81] While the first factor focused on the nature of the mission, this final one emphasizes the type of strikes and the particular military means being used by U.S. forces.[82]

Applied to the Stuxnet attack, the military means used were likely limited. There is no indication that it was a full military engagement.[83]

---

[78] *Libya and War Powers*, *supra* note 24, at 14 (statement of Mr. Koh).
[79] *Id.*
[80] Richardson, *supra* note 71, at 4.
[81] *See Libya and War Powers*, *supra* note 24, at 15 (statement of Mr. Koh).
[82] *See id.* at 16 (statement of Mr. Koh).
[83] *Id.* at 15 (statement of Mr. Koh).

If any U.S. Command was involved, it was likely only U.S. Cyber Command. With the exception of how Stuxnet was possibly introduced to computers that were not connected to the internet, the military activities were likely solely conducted in cyberspace. Stuxnet appears to be an example of an offensive military operation in cyberspace that was unassociated with a larger operation.

In light of the combination of these four factors, it appears likely that if the Stuxnet computer virus attack was a U.S. military operation, the executive branch would not have considered it "hostilities" sufficient to trigger the War Powers Resolution. Under each of the four factors the Stuxnet mission would have been viewed as limited, leading the executive branch to conclude that it did not trigger domestic legal obligations under the statute.

Taking this cyber "hostilities" analysis beyond Stuxnet, military cyber operations in general are unlikely to trigger the War Powers Resolution under the executive branch's existing rubrics. Looking at the four limiting factors together, it seems unlikely that a stand-alone military cyber operation would ever reach the threshold of "hostilities" sufficient to trigger the statute because its mission, military means, and exposure to U.S. forces would always appear extremely limited in comparison to a full military engagement or conventional kinetic military action.

VI. Conclusion

The U.S. military appears to be expanding its offensive cyber capabilities. Congress addressed "Military Activities in Cyberspace" in the NDAA 2012 and suggested a connection to the War Powers Resolution. Congress appears to anticipate that some military operations in cyberspace could trigger the provisions of the statute. The Department of Defense, however, focuses on the lack of introduction of armed forces personnel into the area of hostilities to argue that the War Powers Resolution would not apply to cyber operations. When the executive branch determines which type of military activities it considers to be "hostilities" under the statute, it uses a set of four limiting factors. When this analysis is applied in the cyber context, it illustrates another gap that exists between cyber "hostilities" and the War Powers Resolution. In the case of military cyber operations, the mission, military means, and exposure to U.S. forces would nearly always appear extremely limited,

particularly in comparison to conventional actions or full military engagements. For these reasons, it is unlikely that the executive branch would deem stand-alone offensive military operations in cyberspace as "hostilities" triggering the War Powers Resolution.

"CLAMO" AT 25: THE CENTER FOR LAW AND MILITARY OPERATIONS CELEBRATES TWENTY-FIVE YEARS[1]

FRED L. BORCH[*]

I. Introduction

In December 2013, the Center for Law and Military Operations (CLAMO) celebrated its 25th anniversary as an Army institution. Established by then Secretary of the Army John O. Marsh, Jr. in December 1988,[2] CLAMO grew out of the experiences of judge advocates in Grenada during Operation *Urgent Fury* in 1983 and the recognition gained from other similar events that domestic and international law affected the planning for, and conduct and sustainment of, U.S. military operations. This idea behind CLAMO was that it would examine legal issues arising during military operations, and then devise "training strategies"[3] for addressing those issues. Stated another way, CLAMO would gather legal lessons learned from military operations, analyze those lessons, and then disseminate them to judge advocates throughout the Army—and the entire Defense Department.[4] This would ensure that uniformed lawyers advising commanders during operations not only profited from the experiences of their predecessors grappling

---

[*] Regimental Historian and Archivist for the U.S. Army Judge Advocate General's Corps. He graduated from Davidson College (A.B., 1976), from the University of North Carolina (J.D., 1979), and from the University of Brussels, Belgium (LL.M, *magna cum laude*, International and Comparative Law, 1980). Mr. Borch also has advanced degrees in military law (LL.M., The Judge Advocate General's School, 1988), National Security Studies (M.A., *highest distinction*, Naval War College, 2001), and history (M.A., University of Virginia, 2007). From 2012 to 2013, Mr. Borch was a Fulbright Scholar in the Netherlands, where he was a Visiting Professor at the University of Leiden and a Visiting Researcher at the Netherlands Institute of Military History.

Colonel (Retired) Fred Borch is the author of a number of books and articles on legal and non-legal topics, including *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti (2001)*, and *Judge Advocates in Vietnam: Army Lawyers in Southeast Asia (2004)*. His latest book is *Medals for Soldiers and Airmen: Awards and Decorations of the United States Army and Air Force* (2013).

[1] A previous version of this article, titled *Spotlight on: The Center for Law and Military Operations*, appeared in The Judge Advocate General's Legal Center and School's Annual Bulletin, 2012–2013, at 13, *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/AB_2012-2013.pdf.

[2] Memorandum from John O. Marsh, Jr., Sec'y of Army, for The Judge Advocate General, subject: Establishment of a Center for Law and Military Operations (21 Dec. 1988) [hereinafter Marsh Memorandum], *reprinted in* ARMY LAW., Apr. 1989, at 3.

[3] *CLAMO Moves Forward*, REGIMENTAL REPORTER 1 (Fall 1996).

[4] *Id.*

with similar legal issues, but also would help these same judge advocates avoid any legal pitfalls or failures that had occurred in past military operations. What follows is the story of CLAMO's first twenty-five years in operation. It begins with a look at the impetus for the creation of CLAMO before examining the evolution of CLAMO in the 1990s and 2000s. This article concludes with some thoughts on the future of CLAMO. Finally, two appendices contain information on those judge advocates who have been a part of CLAMO and publications produced by CLAMO.

II. Origins of CLAMO

Since the decision to create CLAMO resulted from the emergence of operational law (OPLAW) as a distinct practice area in the Judge Advocate General's Corps (JAGC), a brief discussion of why and how OPLAW came to exist is necessary.

On March 16, 1968, members of Company C, 1st Battalion, 20th Infantry Regiment, an element of the Americal Division, murdered some 350 innocent Vietnamese civilians at the small village of My Lai. After an investigation concluded that First Lieutenant William F. Calley and twelve men under his command were chiefly responsible for the killings, Calley was charged with the murder of 109 civilians.[5] While the twelve other soldiers also were charged with murder, only Calley was convicted.[6] On 29 March 1971, Calley was found guilty of premeditated murder by a general court-martial convened at Fort Benning, Georgia, and sentenced to life imprisonment.[7]

While action taken by the convening authority and others subsequently resulted in Calley being paroled in 1974,[8] the end of "Rusty" Calley's legal problems did not diminish the negative fall-out from what was (and is) popularly called the "My Lai Massacre."[9] On the contrary, the killings at My Lai caused much soul searching and consternation among Americans in general. The ramifications of this

---

[5] WILLIAM M. HAMMOND, PUBLIC AFFAIRS: THE MILITARY AND THE MEDIA, 1968–1973, U.S. ARMY IN VIETNAM 220–24 (1996).
[6] *Id.*
[7] United States v. Calley, 46 C.M.R. 1131 (A.C.M.R. 1973)
[8] HAMMOND, *supra* note 5, at 252.
[9] RICHARD HAMMER, THE COURT-MARTIAL OF LT. CALLEY 18 (1971).

tragedy on the Army also were far-reaching. The Peers Inquiry,[10] so-named because its senior member was Lieutenant General William F. Peers, thoroughly investigated the murders. For the JAGC, the most damning finding of the Peers Inquiry was that inadequate training in the law of war was a contributory cause of the killings.[11] Of particular concern "was the report's finding that Law of War training in Calley's unit was deficient in regards to the proper treatment of civilians and the responsibility for war crimes."[12]

In retrospect, it seems unlikely that deficient law of war training had a direct causal connection with the murders at My Lai. That said, faced with this disturbing criticism from the Peers Inquiry, senior members of the JAGC began looking for ways to correct this deficiency—and ensure that the lack of instruction in the law of war would not contribute to any future My Lai's. In May 1970, the regulation governing law of war training was revised.[13] For the first time, the regulation required that instruction be presented by judge advocates "together with officers with command experience preferably in combat."[14] The idea was to ensure that law of war training "had a firm grounding in real-world experience" while also demonstrating that instruction in the Hague and Geneva Conventions was a command responsibility.[15]

Instructors at The Judge Advocate General's School (TJAGSA) took the lead in developing new and improved training materials, including "detailed Law of War Lesson Plans, training films, self-instructional texts and the timeless Law of War "comic book," *Your Conduct in Combat*.[16] Perhaps more importantly, TJAGSA faculty developed a one-

---

[10] U.S. DEP'T OF ARMY, REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT (14 Mar. 1970).

[11] *Id.* at 10–26.

[12] FREDERIC L. BORCH III, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959–1975, at 54 (2003). For more on Calley and My Lai, see *Calley v. Callaway*, 382 F. Suppl. 650 (1974). *See also* GUENTER LEWY, AMERICA IN VIETNAM 356–58 (1978).

[13] U.S. DEP'T OF ARMY, REG. 35-216; THE GENEVA CONVENTIONS OF 1949 AND HAGUE CONVENTION NO. IV OF 1907 (28 May 1970).

[14] *Id.*

[15] BORCH, *supra* note 12, at 54.

[16] David E. Graham, *My Lai and Beyond: The Evolution of Operational Law*, *in* THE REAL LESSONS OF THE VIETNAM WAR: REFLECTIONS TWENTY-FIVE YEARS AFTER THE FALL OF SAIGON 365 (John Norton Moore & Robert F. Turner eds.) (2002).

week course that focused exclusively on the law of war—a course that still exists today, albeit in slightly different form.[17]

While this improved instruction in the law of war was significant, of greater importance was the initiative taken by retired Colonel (COL) Waldemar A. Solf. In 1972, while serving as Chief of the International Affairs Division at the Office of the Judge Advocate General (OTJAG), Solf suggested to Major General George S. Prugh, then serving as The Judge Advocate General (TJAG), that the Army propose to the Department of Defense (DoD) that it create a DoD-level Law of War Program. As a result of Solf's recommendation, DoD Directive 5100.77, promulgated by the Secretary of Defense on November 5, 1974, not only created a unified law of war program for the armed forces, but made the Army the lead organization in implementing it.[18]

In implementing this new law of war program, Army lawyers initially focused on improving classroom and field instruction given to Soldiers on the law. They also began reviewing operation plans (OPLANS) developed by G-3 (Operations) staff officers at the division and higher levels. This necessarily meant that judge advocates were now involved in the *development* of OPLANS—to ensure that the OPLANS complied with the Law of War. For the first time in the history of the Army, lawyers began "to communicate directly with commanders and their staff principals throughout the course of planning for an operation—identifying and resolving issues that arose during the planning process."[19]

The deployment of Soldiers and Marines to Grenada as part of Operation Urgent Fury in October 1983, however, brought with it the realization that teaching soldiers about their responsibilities in combat and participating in the development of military operations planning was insufficient. While judge advocates had by that time been involved in the detailed review of OPLANs for almost nine years—pursuant to the My Lai-generated DoD Directive 5100.77—Army leaders expected that once an operation was underway, their lawyers would focus only on

---

[17] Today, a two-week course called the "Operational Law of Armed Conflict" or OPLOAC is taught by the International and Operational Law Department at The Judge Advocate General's Legal Center and School (TJAGLCS), as The Judge Advocate General's School, U.S. Army (TJAGSA) is known today.

[18] U.S. DEP'T OF DEF., DIR. 5100.77, DOD PROGRAM FOR IMPLEMENTATION OF THE LAW OF WAR (5 Nov. 1974).

[19] Graham, *supra* note 16, at 367.

specific issues related to the status and treatment of prisoners of war (POWs) and civilian detainees, as well as only those administrative and criminal matters routinely handled at home station.

This expectation about the role judge advocates would play in military operations changed, however, with the deployment of the 82d Airborne Division to Grenada as part of Operation Urgent Fury. When Lieutenant Colonel Quinton Richardson, the division's Staff Judge Advocate, accompanied the Assault Command Post on October 25, 1983, he quickly discovered that there were a variety of legal issues that impacted the conduct of an operation.[20] Such issues included: the preparation of Rules of Engagement (ROEs) and related guidance for both the combat and peacekeeping phases of Urgent Fury; formulating a command policy on war trophies; advising on the treatment of captives; and advising the State Department on the preparation of a Status of Forces Agreement.[21] Richardson and the other judge advocates who deployed to Grenada between October 25 and December 15, 1983 also busied themselves with paying claims for damaged and seized property; advising the Grenadian government on drafting domestic law; and providing liaison with various U.S. government agencies and other non-U.S. organizations such as the International Committee of the Red Cross.

By the end of U.S. operations in Grenada, it was clear that the role of judge advocates needed to undergo a fundamental change if lawyers were to make meaningful contributions to future military operations—and ensure that these operations were conducted in accordance with the law.[22] Judge advocates "must now be trained and resourced to provide timely advice on a broad range of legal issues associated with the conduct of legal operations."[23] It follows that Grenada served as a catalyst for the development of a new military legal discipline that was to be called "operational law," a compendium of domestic, foreign, and international law applicable to U.S. forces engaged in combat or what was then called "operations other than war."[24]

---

[20] FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 78–80 (2001).
[21] *Id.*
[22] *Id.* at 81.
[23] *Id.*
[24] *Id.* "Operational law" covers the full spectrum of military operations, and "operations other than war" was simply one of many monikers given to non-kinetic operations in the late 1980s and early 1990s. Over time, such operations (devoid of combat, at least in theory) have been described by various names, including "peacekeeping,"

By the mid-1980s, a small group of judge advocates recognized that the promulgation of OPLAW was the future of the Corps.[25] Principal among them was then Lieutenant Colonel (LTC) David E. Graham, who was soon to become the Chief of the International Law Division at TJAGSA. After Major General Hugh R. Overholt, who assumed duties as TJAG in 1985, told Graham to "define" OPLAW, develop a curriculum for the study of OPLAW, and produce OPLAW resource materials, Graham looked for ways to show students at TJAGSA that judge advocates who deployed on future operations would face "a wide range of legal issues uniquely associated with the conduct of such operations."[26]

As OPLAW evolved in the TJAGSA curriculum, LTC Graham and others realized that it was not sufficient to simply teach OPLAW. More was needed, including compiling comprehensive resource materials that would help deploying judge advocates with OPLAW issues, with the goal of eliminating "the necessity for every deploying judge advocate to 're-invent the wheel.'"[27] This realization led to the publication of the first *Operational Law Handbook* in 1987. The *Handbook* was intended to be carried on any deployment and included information on military justice, administrative and civil law, legal assistance, claims, procurement law, national security law, fiscal law, international law, and the Law of Armed Conflict (LOAC).[28] As Graham saw it, if legal lessons could be learned from deployments, and made available in handbook form, Army lawyers could learn from the past and quickly become key players on the commander's staff. Perhaps more importantly, the JAGC would be able to play "an essential role in an increasingly contingency-oriented Army."[29]

With this as background, the impetus for CLAMO makes perfect sense: an organization that would "accurately and realistically capture the legal issues that arose in the operational environment of the military attorney."[30] Convinced that a "Center" should be established at TJAGSA

"peacemaking," "stability operations," and "Military Operations Other Than War" (MOOTW).

[25] Graham, *supra* note 16, at 370.

[26] *Id.* at 371.

[27] *Id*. at 372.

[28] While judge advocates in the 1970s and early 1980s spoke of the Law of War, by the end of the 1980s, the preferred term was "Law of Armed Conflict" or LOAC.

[29] Graham, *supra* note 16, at 372.

[30] *Id*. at 373.

that would collect OPLAW lessons and then disseminate them to the field, LTC Graham sought Major General Overholt's support for the establishment of such an institution.[31] Overholt immediately endorsed the idea and obtained the support of the Army leadership.[32] As a result, on December 21, 1988, Secretary of the Army John O. Marsh, Jr. signed a memorandum directing TJAG to create CLAMO.[33] Marsh's memorandum outlined the purpose of the new institution as follows:

> The principal purpose of this Center will be the ongoing examination of legal issues associated with the preparation for, deployment to, and conduct of military operations. Toward this end, and as an integral part of this mission, the Center should periodically host working seminars and topical lectures for military judge advocates, civilian attorneys, and legal scholars from the United States and from allied and friendly countries around the world. In addition, the Center should publish appropriate articles, monographs, and papers.[34]

III. CLAMO Infancy (1988–1995)

Initially established as part of TJAGSA, CLAMO was part of the International Law Division at TJAGSA, and the chief of that teaching division was also the Director of CLAMO.

From the beginning, CLAMO worked to gather information on "current and potential legal issues attendant to military operations."[35] In early 1990, for example, at the direction of Major General William K. Suter, then Acting TJAG, CLAMO sponsored an After-Action Conference following Operation Just Cause in Panama. This conference produced the first-ever After-Action Report (AAR) on the activities of Army lawyers in combat.[36] The Center also conducted its first

---

[31] *Id*.
[32] *Id*. at 374.
[33] Marsh Memorandum, *supra* note 2.
[34] *Id.*
[35] International Law Note, *Center for Law and Military Operations Update*, ARMY LAW., Apr. 1992, at 68.
[36] Major Mark S. Martins, *Responding to the Challenge of an Enhanced OPLAW Mission: CLAMO Moves Forward with a Full-Time Staff*, ARMY LAW., Aug. 1995, at 4 n.10.

symposium in April 1990, when Army, interservice and interagency lawyers gathered in Charlottesville to discuss different service and agency perspectives on OPLAW.[37]

The following year, in September 1991, CLAMO "played an important role in the work of the Desert Storm Assessment Team (DSAT)."[38] Major General John L. Fugh, then serving as TJAG, had created DSAT to collect and analyze legal lessons learned by judge advocates in the recently concluded hostilities with Iraqi dictator Saddam Hussein. This "DSAT Report" became the model for AARs conducted by CLAMO in the years to come.[39]

Two years later, in October 1993, CLAMO also organized a meeting of judge advocates and line officers who, working in concert, authored the first draft of the new *Standing Rules of Engagement for United States Forces*. On October 1, 1994, when the Chairman of the Joint Chiefs of Staff published Instruction 3121.01, *Standing Rules of Engagement for U.S. Forces*, this document contained much of what had been produced by the CLAMO conference on the subject.[40]

By 1995, CLAMO had become the focal point for the development of OPLAW in the JAGC and a depository for OPLAW-related documents. Shelves and filing cabinets soon filled with "memoranda, lessons learned, and after-action materials pertaining to legal support for deployed forces." As then Major (MAJ) Mark S. Martins, the Deputy Director of CLAMO at the time, remembers, "these materials became essential references for degree candidates researching topics involving military deployments."[41] Contributions from attorneys in the field continued to add to CLAMO's database, and CLAMO periodically requested that judge advocates who had deployed on military operations

---

[37] *Id. See also* Operational Law Note, *Proceedings of the First Center for Law and Military Operations Symposium*, ARMY LAW., Dec. 1990, at 47.

[38] Martins, *supra* note 36, at 3.

[39] U.S. ARMY LEGAL SERVS. AGENCY, DESERT STORM ASSESSMENT TEAM'S REPORT TO THE JUDGE ADVOCATE GENERAL OF THE ARMY (22 Apr. 1992). Today, these "Lessons Learned" format of CLAMO's After Action Reviews (AARs) are doctrinally required. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE ARMY app. C, para. 4-50 (Mar. 2013) [hereinafter FM 1-04].

[40] Martins, *supra* note 36, at 4. *See also* International Law Note, *"Land Forces" Rules of Engagement Symposium: The CLAMO Revises the Peacetime Rules of Engagement*, ARMY LAW., Dec. 1993, at 4.

[41] Martins, *supra* note 36, at 4.

"recommend issues that are worth pursuing" as this would help CLAMO to fulfill its mission.[42]

IV. CLAMO Comes of Age (1995–present)

When then LTC Graham published *Operational Law (OPLAW)—A Concept Comes of Age* in 1987,[43] no one could have foreseen the evolution of OPLAW as a legal discipline, much less its movement from the periphery to the center of the JAGC. By 1995, OPLAW was arguably the *raison d'être* for judge advocates in the Army.

The importance of OPLAW in the JAGC was manifested in changes to CLAMO. In March 1995, after recognizing that CLAMO must have more resources if it was to advance the evolution of OPLAW in the JAGC and the Army, then Brigadier General (BG) Walter B. Huffman, The Assistant Judge Advocate General for Military Law and Operations proposed that CLAMO be "augmented" with both personnel and money.[44] With the concurrence of Major General Michael J. Nardotti, then serving as TJAG, CLAMO was re-structured in June 1995.[45] First, CLAMO was removed from TJAGSA and made independent of the school—although CLAMO remained physically located in Charlottesville (it moved to the second floor of the main (and older) building housing TJAGSA).[46] Second, COL Graham, now serving as Chief, International and Operational Law Division, Office of The Judge Advocate General (OTJAG) was made the Director of CLAMO. Third, two judge advocates—one major and one captain—were assigned full-time to CLAMO. Finally, additional judge advocate captains were assigned to the Joint Readiness Training Center (JRTC) at Fort Polk[47] and the Battle Command Training Program (BCTP) at Fort Leavenworth.[48] The Center would oversee the activities of these officers

---

[42] International Law Note, *supra* note 35, at 67.
[43] Lieutenant Colonel David E. Graham, *Operational Law: A Concept Comes of Age*, ARMY LAW., July 1987, at 10.
[44] Martins, *supra* note 36, at 9. *See also* Memorandum from TJAGSA Commandant, for Assistant Judge Advocate for Military Law and Operations, subject: Improving JAGC Effectiveness and Efficiency in International and Operational Law Training and Education (20 Mar. 1995).
[45] Martins, *supra* note 36, at 9.
[46] *Id.*
[47] *Id.* at 11.
[48] *Id.*

at the JRTC and BCTP; they would report to, and be rated by, the CLAMO Deputy Director located in Charlottesville.[49]

Having obtained its own personnel and resources, and with a presence at JRTC in Louisiana and BCTP in Kansas, CLAMO was now more than a "think-tank" where military operations were analyzed and examined. The Center for Law and Operations was now participating in the Army's training environment, with the idea that legal issues could be made part of the realistic training environment at JRTC and BCTP.

Today, the Director of CLAMO synchronizes the work of Observer Coach Trainers (OCTs)[50] at all three maneuver combat training centers[51] to ensure that realistic legal issues are incorporated in training scenarios. Additionally, CLAMO maintains a relationship with the Mission Command Training Program, as BCTP is known today, and with First Army, which provides operational law training to Reserve component judge advocates.[52]

As part of it mission to capture, analyze, and disseminate "legal lessons learned," the new CLAMO began publishing monographs in 1995. The first monograph, *Law and Military Operations in Haiti (1994–1995)*, was published under the leadership of then MAJ Mark Martins, the Deputy Director of CLAMO.[53] Three years later, then MAJ John Miller's CLAMO team produced *Law and Operations in the Balkans (1995–1998)*.[54] These two monographs were followed by *Law and Military Operations in Central America: Hurricane Mitch Relief Efforts (1998–1999)*[55] and *Law and Military Operations in Kosovo*

---

[49] *Id.* at 12.

[50] Initially, these judge advocates were called "Observer Controllers" or OCs. One of the first OCs was then Captain Randall Swansiger, who was assigned to the National Training Center in 1997.

[51] The three maneuver combat training centers are: Joint Readiness Training Center at Fort Polk, Louisiana; National Training Center at Fort Irwin, California; and Joint Maneuver Readiness Center, Hohenfels, Germany.

[52] JAGCNet, https://www.jagcnet.army.mil/CLAMO [hereinafter JAGCNet] (last visited Dec. 4, 2013).

[53] CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI (1994–1995) (1995).

[54] CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN THE BALKANS (1995–1998) (1998).

[55] CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND OPERATIONS IN CENTRAL AMERICA: HURRICANE MITCH RELIEF EFFORTS (1998–1999) (1999).

(1999-2001).[56] Recognizing that a comprehensive monograph synthesizing all lessons learned since Haiti was needed, then LTC Paul Wilson spearheaded the publication of *Forged in Fire: Legal Lessons Learned in Military Operations (1994-2006)*,[57] which was published during the tenure of the CLAMO Director, then LTC Michael Lacey.

The Center continues to produce a variety of important publications, including the well-respected *Rule of Law Handbook* and *Law of Domestic Operations Handbook*. The former, first published in 2007, provides practical guidance for judge advocates involved in efforts promoting stability and rule of law support to fragile democratic governments;[58] it includes many lessons learned from judge advocate experiences in Afghanistan and Iraq. The latter, first issued in 2001, is a working reference for judge advocates involved in providing legal advice to federal, state, and local authorities on law enforcement, natural disaster relief, and civil unrest.[59] The latter also covers a variety of situations that may be encountered by military lawyers providing such advice, including lessons learned from Hurricanes Katrina and Rita, counterdrug operations conducted with the Coast Guard, and rules on the use of force for federal forces.[60]

In 2004, with the transformation of TJAGSA into The Judge Advocate General's Legal Center and School (TJAGLCS),[61] CLAMO became an integral part of the Legal Center, and its direction was transferred from OTJAG to the LCS, with a lieutenant colonel serving as the CLAMO Director.[62]

Today, with its Army, Navy, Marine Corps, and Coast Guard members, along with allied attorneys from the United Kingdom and Germany, CLAMO is a robust joint, interagency, and multinational center. It sees itself as responsible for:

---

[56] CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND OPERATIONS IN KOSOVO (1999–2001) (2001).

[57] CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN FIRE: LEGAL LESSONS LEARNED IN MILITARY OPERATIONS (1996–2006) (2006).

[58] CENTER FOR LAW AND MILITARY OPERATIONS, RULE OF LAW HANDBOOK (2007).

[59] CENTER FOR LAW AND MILITARY OPERATIONS, DOMESTIC OPERATIONAL LAW HANDBOOK (2001).

[60] *Id.*

[61] Headquarters, U.S. Dep't of Army, Gen. Orders 10, Redesignation of the Judge Advocate General's School (22 Sept. 2004).

[62] JAGCNet, *supra* note 52.

- Collecting and synthesizing data relating to legal issues arising in military operations;
- Managing a central depository of information relating to such issues;
- Disseminating resources addressing these issues in order to facilitate the development of "doctrine, organization, training, materiel, leadership, personnel and facilities as these areas affect the military legal community."[63]

While CLAMO does solicit written input from individuals in the field, the chief method used today to collect and synthesize legal lessons learned is through a formal AAR process. Members of CLAMO travel throughout the United States to meet with legal professionals returning from operations, both overseas and domestic, to gather their "lessons learned" and "best practices." In 2013, for example, CLAMO travelled to Fort Bragg, Fort Riley, and Fort Stewart to conduct division-level AARs with the 82d Airborne, 1st Infantry Division, and 3d Infantry Division, respectively. The Center conducted brigade combat team-level AARs at Schofield Barracks, Fort Knox, Fort Campbell, Fort Hood, Joint Base Lewis-McChord, and Fort Bliss.

Ensuring that legal lessons learned were obtained from more than just Soldiers, CLAMO also conducted formal AARs of Marine Corps units at Twenty-nine Palms and Camp Pendleton in California, and at Camp Lejeune in North Carolina. The recently published second edition of the Marine Corps *Deployed MAGTF Judge Advocate Handbook*[64] captures some of what was learned on these missions.

In the domestic operations arena, CLAMO made trips to Colorado to conduct an AAR with military units that had participated in wildfire operations. Members of CLAMO also journeyed to Boston to interview judge advocates who had conducted humanitarian relief operations in the aftermath of Hurricane Sandy, and conducted an AAR at Tinker Air Force Base in Oklahoma to capture legal lessons learned in tornado relief operations.

---

[63] FM 1-04, *supra* note 39, para. 4-49.

[64] MAGTF is an acronym for "Marine Air-Ground Task Force." The *Handbook* is jointly published by CLAMO and the International and Operational Law Branch, Judge Advocate Division, Headquarters, Marine Corps. The *Handbook* was initially published in 2002; the second edition was printed in April 2013.

The Center has recently partnered with the Navy JAGC's "Code 10"[65] to assist it in collecting lessons learned in naval operations; CLAMO also sent an officer to participate in a joint multinational exercise, Talisman Saber, on a Navy ship off the coast of Australia. Deploying CLAMO members on current military operations is nothing new; members of the institution have deployed to Afghanistan[66] and Iraq on more than one occasion. The primary purpose of these CLAMO deployments is to provide assistance to the legal effort on the ground. The secondary purpose is to gain a better understanding of the needs and concerns of deployed legal professionals and to observe first-hand the current best practices and points of friction.

The Center also disseminates its information through a web-based database, with all of its publications available online.[67] In Fiscal Year 2013 (October 1, 2012, to June 30, 2013), there were 1.34 million website hits on all CLAMO products,[68] with the most hits occurring on the 2012 version of the *Operational Law Handbook* (752,261).[69] Other publications with significant website hits include the 2011 edition of the *Domestic Operational Law Handbook* (66,350),[70] the 2011 version of the *Rule of Law Handbook* (76,348)[71] and the 2008 *Forged in the Fire Monograph* (42,883).[72]

---

[65] "Code 10" is the Navy Judge Advocate General's International and Operational Law Department.

[66] In 2009, for example, CLAMO British liaison officer Lieutenant Colonel Nigel Heppenstall deployed to Afghanistan for ten weeks in support of Operation Enduring Freedom. From March 2 to May 19, Heppenstall worked in the Rule of Law cell located with CJTF–101 (Regional Command East-Bagram); his focus was on visiting members of the Afghan judiciary and Afghan prison officials.

[67] Publications are available on JAGCNet in the international law document library, https://www.jagcnet2.army.mil/IODocLib. They also are to be found at the Library of Congress, http://www.loc.gov/rr/frd/Military_Law/CLAMO.html (last visited Dec. 3, 2013).

[68] Library of Congress, *available at* http://www.loc.gov/rr/frd/Military_Law/CLAMO.html (last visited Dec. 4, 2013).

[69] *Id.* Note that the *Operational Law* or "*OPLAW*" *Handbook* was a joint CLAMO/TJAGSA product until 1995, when CLAMO became a stand-alone institution. In years that have followed, the *OPLAW Handbook* has been published by the International and Operational Law Department at TJAGLCS.

[70] *Id.*

[71] *Id.*

[72] *Id.*

V. Conclusion

As CLAMO moves into its second quarter century, there is every reason to believe that it will continue to provide cutting-edge support to men and women supporting military operations both at home and abroad. There is no question that CLAMO continues to adhere to Secretary Marsh's mandate that it "ensure a more effective and comprehensive examination of legal issues associated with military operations."[73]

[73] Marsh Memorandum, *supra* note 2.

Appendix A

CLAMO Personnel (1995–2013)

CLAMO Director: COL David E. Graham	1988-1990; 1995–2003

Deputy Director/Chief—until the founding of the Legal Center & School in Summer 2003:

MAJ Mark S. Martins	1995–1997
MAJ John W. Miller, II	1997–1999
LTC Sharon E. Riley	1999–2001
LTC Stuart W. Risch	2001–2003

Director—previously referred to as Deputy Director/Chief:

LTC Pamela M. Stahl	2003–2005
LTC Paul S. Wilson	2005–2006
LTC Michael O. Lacey	2006–2008
LTC Charles C. Poche	2008–2010
LTC Rodney R. LeMay	2010–2012
LTC Nicholas F. Lancaster	2012–present

Deputy Director—not to be confused with Deputy Director/Chief:

CPT Brent E. Fitch	2004–2006
MAJ Brian Gavula	2009–2010
MAJ Jerome P. Duggan	2010–2012
MAJ Jesse T. Greene	2012–2013
MAJ Ryan Beery	2013–present

Legal Administrator:

CW2 Damon Collier	2003–2004
CW2 Vickie A. Slade	2004–2006
CW3 Edwin Diaz	2009–2012
CW3 Carolyn Y. Taylor	2012–2013

NCOIC:

SSG James W. Smith	2002–2004
SFC Parry Preuc	2005–2007
SGT James M. Kilbane	2007–2008
SFC Billie J. Suttles	2008–2009

Foreign Service Liaison:

AUS:

SLDR Catherine Wallis, Air Force	2004
Maj John Bridley, Army	2004
LCDR Kirk Hayden, Navy	2004–2005

UK:

Lt Col Richard Batty	2004–2006
Lt Col Alex Taylor	2006–2008
Lt Col Nigel Heppenstall	2008–2010
Lt Col Michael P. J. Cole	2010–2012
Lt Col Helen E. Bowman	2012–present

GER:

Mr. Markus Nederkorn	2006–2007
Mr. Nils Kuhnert	2007–2008
Mr. Thomas Nix	2008–2009
Dr. Katharina Ziolkowski	2009–2011
Dr. Bjoern Schubert	2011–2012
Ms. Angelika Maehr	2013–present

CAN:

Maj Marla Dow	2007–2009
Maj Albert Troisfontaines	2009–2011

Sister Services:

Navy:

LCDR Theron Korsak	2008–2010
LCDR Paul Kapfer	2010–2013
LCDR Holly Higgins	2013–present

Marine Corps:

Maj William H. Ferrell	1998–2001
Maj Cody Weston	2001–2004
Maj Todd Enge	2004–2007
Maj William J. Schrantz	2007–2009
Maj John B. Diefenbach	2009–2012
Capt James A. Burkart	2012–present

Coast Guard:

LT Rachel Bralliar	2005–2006
LT Vasilios Tasikas	2006–2007
LCDR Jason Krajewski (Oplaw Fellow/ Deputy Director)	2007–2008
LCDR J. Trent Warner	2008–2009
LCDR Scott Herman	2009–2010
LCDR Brian Robinson	2010–2011
LT Ben Gullo	2011–2012
LCDR Robert Pirone	2012–2013
CDR Dave Sherry	2013–2014

Other Positions:

Director, Training and Support:

CPT Paul Kantwill	1997–1999
CPT Tyler L. Randolph	1998–2000

MAJ Alton L. Gwaltney, III	2000–2003
CPT Patricia D. (Cika) Froehlich	2004–2005
CPT Cynthia Ruckno	2006–2007
CPT Michael P. Baileys	2007–2009
CPT Leah Linger	2008–2009
CPT Brendan Mayer	2009–2011
CPT Michael G. Botelho	2011–2013
CPT Mark Gardner	2013–present

Director, Plans and Operations:

CPT Daniel P. Saumur	2002–2005
MAJ Elizabeth Turner	2013
MAJ Heather Herbert	2013–present

Advanced Operational Law Studies Fellow:

MAJ Keith E. Puls	2001–2002
MAJ Daniel G. Jordan	2001–2002
MAJ Mike Kramer	2002–2003
MAJ Mark Holzer	2002–2003
MAJ Laura Klein	2003–2004
MAJ Russell L. Miller	2003–2004
MAJ Steve Cullen	2004–2005
MAJ Charles T. Kirchmaier	2005–2006

Domestic Operational Law:

LTC Gordon W. Schukei	1999–2002
LTC Joseph S. Dice	2002–2005

Contractor:

Mr. Ben R. Morgan	1999–2001
Mr. Don Fisk	2009–2010

State Legal Advisor Service/Department of State/Interagency Operational Law:

Mr. Bernard L. Seward Jr.	2002–2005
Mr. Charles Oleszycki	2005–2007
Ms. Katherine Gorove	2007–2008

Center for Army Lessons Learned (CALL):

Mr. William Sells	2008–2009

Drilling Individual Mobilization Augmentee (DIMA):

COL Craig Trebilcock	2007
LTC Jeff Spears	2007–2013

Active Guard Reserve:

LTC Patrick Barnett	2008–2010

Appendix B

CLAMO Publications 1988–2013

Deployed Marine Air-Ground Task Force Judge Advocate Handbook (2002, 2013)

Domestic Operational Law Handbook (2001, 2009, 2010, 2011, 2013)

Domestic Operational Law Handbook Supplement

Forged in the Fire: Legal Lessons Learned During Military Operations, 1994–2006 (2006)

Forged in the Fire: Legal Lessons Learned During Military Operations, 1994–2008 (2008)

A Judge Advocate's Guide to the Battle Command Training Program (1996)

Judge Advocate Guide to the Joint Readiness Training Center (1996)

Law and Military Operations in Central America: Hurricane Mitch Relief Efforts, 1998–1999 (2000)

Lessons Learned from Afghanistan and Iraq, 2001–2003
Volume I: Major Combat Operations (2004)
Volume II: Full Spectrum Operations (2005)

Lessons Learned: Balkans, 1995–1998 (1998)

Lessons Learned: Deepwater Horizon (2011)

Lessons Learned: Haiti, 1994–1995 (1995)

Lessons Learned: Hurricane Katrina (2005)

Lessons Learned: Kosovo, 1999–2001 (2001)

Operational Law Handbook (1987-1994)

Rule of Law Handbook (2007, 2008, 2009, 2010, 2011)

Rules of Engagement Handbook for Judge Advocates (2000, 2004)

Tip of the Spear: After Action Reports from July 2008–August 2009 (2009)

Tip of the Spear: After Action Reports from August 2009–September 2010 (2010)

U.S. Government Interagency Complex Contingency Operations Organization and Legal Handbook (2004)

THE FOURTEENTH ANNUAL SOMMERFELD LECTURE[1]

THE WRONG QUESTIONS ABOUT CYBERSPACE

GARY D. BROWN[*]

If they can get you asking the wrong questions, they don't have to worry about answers.
—Thomas Pynchon, *Gravity's Rainbow*[2]

---

[*] Colonel (Retired), U.S. Air Force. Colonel Brown recently retired from a twenty-four-year career as U.S. Air Force Judge Advocate, culminating in his assignment as the first Staff Judge Advocate (SJA), U.S. Cyber Command (USCYBERCOM), Fort Meade, Maryland. The U.S. Cyber Command is responsible for planning and conducting operations in and through cyberspace, as well as operating and defending Department of Defense (DoD) cyber networks.

Before his assignment at USCYBERCOM, Colonel Brown served five tours as a SJA or Senior Legal Advisor at the Combined Air Operations Center, Southwest Asia, Senior Officials Directorate, Air Force Inspector General's Office, 20th Fighter Wing, Shaw Air Force Base, South Carolina; 422d Air Base Squadron, Royal Air Force, Crouhton, England; and 363d Air Expeditionary Wing, Prince Sultan Air Base, Saudia Arabia. He also served as Chief of International and Operational Law at the U.S. Strategic Command and in installation legal offices at Howard Air Force Base, Royal Air Force, England and Whiteman Air Force Base, Missouri.

Colonel Brown is a prolific author and speaker. His work has appeared in the *Military Law Review*, *Naval Law Review*, *Military Review*, *Journal of Military Ethics*, *JAG Magazine*, *Strategic Studies Quarterly* and *Joint Force Quarterly*. He wrote the first chapter on cyber operations for *Air Force Operations and the Law*, a publication similar to *The Judge Advocate General's Legal Center and School Operational Law Handbook*. He frequently presents on cyber issues to military and civilian audiences. He was the keynote speaker at cyber conferences at Berkeley and George Washington University during the past year, in additional to presentations at many other events.

His military decorations include the Defense Superior Service Medal, Bronze Star Medal, Defense Meritorious Service Medal, Meritorious Service Medal (with three oak leaf clusters), and addition expeditionary medals. In 2001, the Air Force selected him as the Albert M. Kuhfeld Outstanding Young Judge Advocate of the Year, and in 2012 honored him with the Thomas P. Keenan, Jr. award for his superior contributions to the development of international law and military operations. Upon retiring from the Air Force, he joined the Washington Delegation of the International Committee of the Red Cross as the Deputy Legal Advisor, where he provides advice on the protection of civilians in armed conflicts, customary international law, new warfare technologies and the scope of the battlefield, among other areas.

[1] Established in 1999, the Sommerfeld Lecture series was created at The Judge Advocate General's Legal Center and School to provide a forum for discussing current issues relevant to operational law. The series is named in honor of Colonel (Ret.) Alan Sommerfeld. A graduate of the 71st Officer Basic Course, Colonel Sommerfeld's Army judge advocate career was divided between the Active and Reserve Components. After six years of active duty, he became a civilian attorney at Fort Carson, Colorado, and then

I. Introduction

One of the first things to learn as one enters the field of cyber law and policy is that there are two ways to look at cyberspeed. On one hand, things happen fast. Packets of data travel incredibly rapidly and the machines that make up the Internet react almost instantly. This kind of speed defies description and human understanding. For example, information traveling through the Internet can make a round trip between the United States and Europe in about 70 milliseconds, or around fourteen times in a second. That means that in the time it takes you to read this sentence, it can cross the Atlantic 140 times. When it comes to Internet speed, superlatives lose their meaning; we can just say "fast."

On the other hand, when we talk about cyber policy and law, rather than a cyber operation that has been launched, "cyberspeed" is fundamentally different. In 1998, the U.S. government officially made critical infrastructure protection a national goal and set out a strategy for cooperation between the government and the private sector to protect systems essential to the nation's security.[3] Sadly, fifteen years later, implementation of a plan to defend critical infrastructure is still pending, although the threat to it has increased. In 2013, the height of cyber policy achievement is an Executive Order and a Presidential Policy Directive that both, at their heart, say U.S. government agencies should cooperate among each other and private industry to ensure the nation's cyber security. The cyber provisions of the Standing Rules of Engagement for the Department of Defense (DoD), due for an update by 2010, were still incomplete as of the date of this writing.[4] Classified Presidential Policy Directive (PPD) 20, as reported by the *Washington*

---

at the Missile Defense Agency. He continued to serve in the Army Reserve, and on September 11, 2001, Colonel Sommerfeld was the Senior Legal Advisor in NORAD's Cheyenne Mountain Operations Center, where he served as the conduit for the rules of engagement from the Secretary of Defense to the NORAD staff. He was subsequently mobilized for two years as a judge advocate for Operation Noble Eagle and became a founding member of the U.S. Northern Command (USNORTHCOM) legal office, where he served as its Deputy Staff Judge Advocate and then interim Staff Judge Advocate. He retired from the Reserves in December 2003.

[2] Thomas Pynchon, Gravity's Rainbow, V262 (1973).

[3] PRESIDENTIAL DECISION DIR./NSC 63, CRITICAL INFRASTRUCTURE PROTECTION (May 22, 1998).

[4] Amber Corrin, *Cyber Rules of Engagement Still Unfinished*, FCW (Nov. 1, 2012), http://fcw.com/Articles/2012/11/01/cyber-rules-of-engagement.aspx?Page=1.

Post, was an attempt by the Executive Branch in 2012 to clear up years of debate over the appropriate role of the military in cyber operations and the definitions of cyber offense and defense. According to an official quoted in the article, the PPD "will spur a more nuanced debate" over cyber policy.[5] So, compared to the technology and the growing threat to national security, the development of policy and law relevant to cyberspace is slow.

My experience with cyber law and policy began in 1998 when the DoD was starting to develop policy on cyber operations. I moved from that assignment in 1999 and had little involvement in cyber operations law after that until I was assigned as Staff Judge Advocate (SJA) of the Joint Functional Component Command–Network Warfare (JFCC-NW)[6] in 2009. I was dismayed to discover that the U.S. government (and academia) was continuing to struggle to answer the same questions. We had made little progress.

Even since 2009, little ground has been gained in developing U.S. cyber policy. The progress made has been driven by outside events, three of which are highlighted below. Three incidents led to the advancement of the cyber discussion in the United States. This should come as no surprise, because history shows in times of challenge, those who do not straighten their own lines have them straightened by the adversary. One might conclude from these three critical situations that the United States was fortunate to have relatively minor incidents to provide the motivation to straighten its cyber lines: Operation Buckshot Yankee in 2008, Stuxnet Reporting in 2010, and Shamoon in 2012

---

[5] Ellen Nakashima, *Obama Signs Secret Directive to Help Thwart Cyber Attacks*, WASH. POST (Nov. 14, 2012), http://www.washingtonpost.com/world/national-security/obama-signs-secret-cybersecurity-directive-allowing-more-aggressive-military- role/2012/11/14/7bf51512-2cde-11e2-9ac2-1c61452669c3_print.html.

[6] Joint Functional Component Command–Network Warfare (JFCC-NW) became U.S. Cyber Command in 2010.

II. Operation Buckshot Yankee (2008)[7]

In 2008, the DoD's classified military computer networks were compromised by malware. A flash drive pre-loaded with targeted malware was inserted into a military computer at a U.S. base in the Middle East. The malicious code copied itself onto U.S. Central Command's computer network, from which it spread across the military system, infecting both classified and unclassified computers. The malware was designed to discover what information resided on the network, report that information back to its controller and then export information chosen by the controller. The DoD concluded the malware was distributed by a foreign intelligence agency.[8]

This operation established beyond a shadow of a doubt there was a cyber threat to U.S. national security, extending even to classified computer systems previously thought to be secure.[9] As a result of this action, the DoD established U.S. Cyber Command to integrate cyber defense activities in the department and changed many procedures regarding cyber security within the DoD. These changes also resulted in a deeper discussion of the connection between cyber security and national defense.

III. Stuxnet Reporting (2010)

The second important event was the Stuxnet incident in 2010, which the U.S. government declines to discuss, but has been widely attributed to the United States and Israel in the press.[10] Because the United States did not publicly disclose anything about Stuxnet, it was not the event itself that drove policy forward. The in-depth reporting of the incident was the relevant factor.

---

[7] William Lynn & Nicholas Thompson, *Defending a New Domain*, FOREIGN AFF. (Sept./Oct. 2010).

[8] *Id.*

[9] Ellen Nakashima, *Cyber-Intruder Sparks Massive Federal Response—and Debate Over Dealing with Threats*, WASH. POST, Dec. 8, 2011, *available at* http://www.washingtonpost.com/national/national-security/cyber-intruder-sparks-response-debate/2011/12/06/gIQAxLuFgO_story.html?hpid=z2

[10] William J. Broad, John Markoff & David E. Sanger, *Israeli Test on Worm Called Crucial in Iran Nuclear Delay*, N.Y. TIMES, Jan. 15, 2011, *available at* http://www.nytimes.com/2011/01/16/world/middleeast/16stuxnet.html?pagewanted=all&_r=0

Simply put, Stuxnet was a precision-guided virus, aimed at the industrial control systems running Iran's uranium enrichment facility at Natanz. It was distributed by a self-replicating worm that propagated over computers running the Windows operating system.[11] Ultimately, the virus found its way to the target and destroyed around a thousand high-tech centrifuges at the Natanz facility, setting back Iran's nuclear weapons program by at least two years.[12] An interesting side note for lawyers is that the collateral damage prevention aspects of Stuxnet that, for example, limited the number of times an infected device could pass on the virus to three and caused the entire virus to delete itself on a given date, telegraphed that it was the work of a Western government. No independent hacker or criminal would bother with such niceties.[13]

Stuxnet was the first time a cyber activity could indisputably be labeled a cyber attack, and provided an actual context in which lawyers, strategists, scholars, and policymakers could debate the issues surrounding the use of cyber as an instrument of national policy.[14] It was one of the first examples, and the best example, of state practice in the area, so it was important for the development of international norms. These advantages came about as a result of reporting on the incident, not because the United States or Israel chose to discuss it.

IV. Shamoon (2012)

In an October 11, 2012, speech, Secretary of Defense Panetta called attention to the August 2012 cyber events experienced by the Saudi Arabian State Oil Company, Aramco and by RasGas of Qatar.[15] He

---

[11] Michael Joseph Gross, *A Declaration of Cyber War*, VANITY FAIR (Apr. 2011), http://www.vanityfair.com/culture/features/2011/04/stuxnet-201104.

[12] David E. Sanger, *Obama Ordered Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES (Jun. 1, 2012), http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html?pagewanted=all&_r=0.

[13] Ralph Langner, *Stuxnet's Secret Twin*, FOREIGN POL'Y, Nov. 21, 2013, *available at* http://www.foreignpolicy.com/articles/2013/11/19/stuxnets_secret_twin_iran_nukes_cyber_attack.

[14] Robert Windrem, *The Worm that Turned: How Stuxnet Helped Heat Up Cyberarms Race*, NBC News Investigations, Jun. 27, 2013, *available at* http://investigtions.nbcnews.com/_news/2013/06/27/19175276-the-worm-that-turned-how-stuxnet-helped-heat-up-cyberarms-race.

[15] Sec'y of Def. Leon Panetta, Remarks on Cybersecurity to the Business Executives for National Security (Oct. 11, 2012), http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5136.

described how the "Shamoon" malware overwrote some system files on about 30,000 computers.[16] These computers, according to the Secretary, were "rendered useless and had to be replaced."[17] Secretary Panetta indicated use of the Shamoon malware against the energy companies marked "a significant escalation of the cyber threat."[18] He went on to state that intruders had gained access to industrial control systems in the United States and the unnamed intruders continue working to develop advanced attack tools against U.S. chemical, electrical, water, and transportation systems.

Even before the DoD weighed in on the issue, a State Department Legal Adviser gave a comprehensive statement on how international law applies to conflicts in cyberspace.[19] Mr. Koh did not specifically tie his statement to Shamoon, but the timing indicates the two may have been related. The Shamoon event served as a wake-up call, as previous incidents had not, that the U.S. government really needed to do something about defending national infrastructure from cyber aggression.[20]

Perhaps the biggest challenge in developing policy and legal guidance for cyber operations is that the people who understand cyberspace and cyber operations are not interested in writing policy, and the lawyers, who are largely responsible for interpreting law and

---

[16] Gregg Keizer, *Shamoon Malware Cripples Windows PCs to Cover Tracks*, COMPUTERWORLD, Aug. 17, 2012, *available at* http://www.computerworld.com/s/article/9230359/Shamoon_malware_cripples_Windows_PCs_to_cover_tracks.

[17] On this point, the Secretary's statement is inconsistent with technical accounts of the incident, which suggest the computers were disabled but not destroyed. Kelly Jackson Higgons, *New Targeted Attack Destroys Data at Middle East Energy Organization*, DARK READING (Aug. 16, 2012), http://www.darkreading.com/advanced-threats/167901091/security/news/240005715/new-targeted-attack-destroys-data-at-middle-east-energy-organization.html.

[18] Ellen Nakashima, *Cyberattack on Mideast Energy Firms was Among Most Destructive, Panetta says*, WASH. POST, Oct. 11, 2012, *available at* http://articles.washingtonpost.com/2012-10-11/world/35502244_1_crucial-system-files-shamoon-secretary-leon-e-panetta.

[19] Harold Koh, *International Law in Cyberspace*, USCYBERCOM Inter-Agency Legal Conference comments (Sept. 18, 2012), http://www.state.gov/s/l/releases/remarks/197924.htm.

[20] Byron Acohido, *Why the Shamoon Virus Looms as Destructive Threat*, USA TODAY, May 16, 2013, *available at* http://www.usatoday.com/storycybertruth/2013/05/16/shamoon-cyber-warfare-hackers-anti-american/2166147/.

authoring policy, are generally blissfully unpossessed of anything but the shallowest understanding of cyberspace. There is a reason for this.

Lawyers love to reason by analogy—even if it is said to be the weakest form of argument. Unfortunately, analogies fail us in cyber operations. Cyberspace is so different from physical space that most attempts to draw analogies are doomed to fail.

One example of how enamored attorneys can be of analogies is offered by Tom Standage's 1998 book *The Victorian Internet*, in which he describes the development and some early uses of the telegraph as similar to the Internet revolution.[21] Standage's book is a pleasant read, but let's face it, the telegraph does not come close to expressing what happens on the Internet (or in cyberspace).

The problem of analogies aside, perhaps the major reason there has been so little progress in answering questions about cyber operations is that we are asking the wrong questions. I often found myself during my career arguing that the legal adviser needed to be in the room with the senior officers asking questions about the operation, rather than having the commander's questions relayed after the meeting of the commanding gray beards. One of the primary roles of a legal adviser is to shape the questions before they are asked, but that is only possible when the lawyer is in the room early in the process.

When the topic of a meeting is cyber operations in any context, one of the inevitable questions that will land on the legal adviser's plate is whether "X" constitutes a cyber attack. Another common question is: does "Y" violate sovereignty?

One of the reasons we have not been able to reach satisfactory conclusions in cyber policy and law dilemmas is that we are asking the wrong questions. The remainder of this lecture suggests why the most common questions are not the best ones to ask, and offers some alternative ways to look at issues that might help jolt us from our intellectual paralysis in the area.

---

[21] TOM STANDAGE, THE VICTORIAN INTERNET: THE REMARKABLE STORY OF THE TELEGRAPH AND THE NINETEENTH CENTURY'S ON-LINE PIONEERS (1998).

In over three years as the senior attorney for the United States military cyber command, I was asked many questions about the law and policy surrounding cyber operations. I was asked these questions because of my position, not because I knew any more about them than anyone else. The mission of a judge advocate is to provide answers to commanders, which I did with the help of a phenomenal staff of young attorneys. Three of the most common question we were asked were:

—What is a cyber attack?
—Do non-destructive cyber activities violate national sovereignty?
—Are we militarizing cyberspace?

The first question on the list was far and away the most common, but the other two were frequently asked as well. Although all of these are thoughtful, reasonable questions, as set out below, our collective obsession with them is one reason advances in the policy and law surrounding cyber operations have been so few.

V. What Is a Cyber Attack?

Perhaps because no one has yet suggested a clever, more accurate term to replace it—that also sells newspapers—"cyber attack" remains the most common way to describe any noxious cyber incident. Our historical perspective is largely in the kinetic realm, where the term attack has fairly specific connotations and consequences, so the choice to use "cyber attack" is not without effect. Excessive concern over this question gets us nowhere, because the real answer is no help at all.

The unsatisfactory answer to "what is a cyber attack?" is: exactly what we decide is a cyber attack at a given time under given circumstances that cannot be determined in advance. As accurate as this answer is, it is completely unhelpful, of course. But if a nation determines it is under attack, it is obligated to respond in some meaningful way or risk losing the confidence of its population or its standing in the international community. The determination that something is an attack, which implicates the history and law relevant to attacks through history, has far-reaching consequences. As a result, both

the attacking and the defending nation have a lot at stake in this determination.

The difficulty inherent in labeling something a cyber attack can be demonstrated by Iran's reaction to the Stuxnet event, described above. Although by most definitions the event constituted an attack because it physically destroyed equipment, Iran did not respond to it as if it were an attack.[22] There are many possible reasons for the nonresponse, but one of them is not that physically destroying something does not constitute an attack.[23] In this case, the government of Iran apparently decided it was not in its best interest to determine that Stuxnet was a cyber attack.

Since the 1990s, the DoD has been determined to use a broad definition of attack in its cyber discussions. It called aggressive cyber events "computer network attacks," or CNAs, which is defined as "actions taken through the use of computer networks to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computers and networks themselves."[24] As related to the international consequences of a real attack, the "dastardly Ds" of deny, degrade, disrupt, or destroy never made any sense. It is difficult to envision a computer operation, whether it is hacking or espionage or Stuxnet, that does not involve some element of at least disrupting or degrading a computer system. This low bar for defining cyber attacks bled any meaning from the phrase, yet made every action the DoD might have proposed sound like the first shot in World War III. The United States has never treated as attacks the relatively low-level cyber incidents it suffers, such as penetrations of the DoD and defense industry classified networks that would meet this definition. Inconsistently, however, U.S. government discussions still tend to define even proposed low-level U.S.-initiated action as "attacks," as that term has traditionally been

---

[22] TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE r. 30 (2013) ("A cyber attack is a cyber operation, whether offensive or defensive in nature, that is reasonably expected to cause injury or death to persons or damage or destruction to objects.").

[23] Gary D. Brown, *Why Iran Didn't Admit Stuxnet Was an Attack*," JOINT FORCES Q. (4th Quarter, 2011).

[24] This DoD term and definition remained nearly unchanged from 1998 until November 2012, when the term was removed from the *DoD Dictionary*. JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY (Nov. 8 2010, as amended through Nov. 15, 2013).

used.[25] This disconnect has led to the United States being unable to mount an appropriate defense to cyber assaults, and unwilling to carry out the same type of operation in response.[26]

In any event, the issue of what constitutes a cyber attack may be a pertinent academic question, but has little meaning in political discussions unless it is in the context of an actual event. Any definition of cyber attack may not align well with political reality, with it sometimes being defined too strictly and sometimes too loosely. For example, if the press reports are correct about Stuxnet, and if the United States is a law-abiding nation, we have to assume the United States has determined that destroying critical pieces of a prime national security facility does not constitute a cyber attack—because then the Stuxnet operation would have been an illegal action by the United States. On the other hand, the United States has taken to complaining about Chinese espionage, threatening a variety of retaliatory actions—even though espionage is not considered to be prohibited by international law, and the United States is widely assumed (even if never proven) to engage in cyber espionage against China.[27]

During my time in the USCYBERCOM legal office, flying in the face of traditional DoD thinking, we tried to distinguish at the theoretical level between cyber operations that would result in kinetic effects, qualifying them as aggression under traditional definitions, and those activities with no direct effects in the physical world.[28] Our suggestion

---

[25] The new set of DoD definitions, unclassified but still unpublished at the date of this writing, include "offensive cyberspace operations," defined as "cyberspace operations intended to project power by the application of force in or through cyberspace." Perhaps time and practice will tell what this definition means; the words do not.

[26] *Pentagon Still Grappling with Rules of Cyberwarfare*, ASSOCIATED PRESS (Jul. 25, 2013), http://www.foxnews.com/us/2012/07/25/pentagon-still-grappling-with-rules-cyberwar/.

[27] *US Considers Firmer Action Against Chinese Cyber-espionage*, ASSOCIATED PRESS (Feb. 1, 2013), http://www.telegraph.co.uk/news/worldnews/asia/china/9841385/US-considers-firmer-action-against-Chinese-cyber-espionage.html; John Reed, *Rogers: U.S. Must Confront China on Cyber Theft and Espionage*," FOREIGN POL'Y (Feb. 13, 2013), http://killerapps.foreignpolicy.com/posts/2013/02/13/rogers_us_must_confront_china_on_cyber_espionage_and_theft; *Cyber War of Words: U.S., China Trade Blame for On-Line Security Threats* (Mar. 12, 2013), http://rt.com/usa/us-urges-china-stop-hacking-123/.

[28] It is important to note here that military units plan for and discuss contingencies that are never expected to occur. USCYBERCOM discussions on this point, and my

of the phrase "cyber disruption" to describe activities that are obnoxious but not forceful was met with cool indifference. We just could not think of a better way to say "undesirable cyber action directed against a friendly system that doesn't damage anything physically." We certainly could not think of one that was catchy enough for a headline.[29]

The United States, to date, has answered or, one might say, avoided the question this way.

> When warranted, the United States will respond to hostile acts in cyberspace as we would to any other threat to our country. All states possess an inherent right to self-defense, and we recognize that certain hostile acts conducted through cyberspace could compel actions under the commitments we have with our military treaty partners.[30]

Even though this statement provides no *definition* of what the United States considers a cyber attack, it does set out a basic understanding that there is a point at which the United States would equate cyber activity hostile enough to merit a response in self-defense. In other words, a cyber event will merit an aggressive response (i.e., will be a cyber attack) when we decide it is. Isn't this good enough? Strategic ambiguity in international relations can further national interests. There really is not a need to define the term. We just have to analyze each event in context, and that really is not much more difficult with cyber events than it is in the kinetic realm.

One example demonstrates the commonality between attacks, regardless of whether the vector is kinetic or cyber. In 2009 at the Shushenskaya dam in Russia, a 1,500 ton piece of equipment blasted through the floor of the dam's power station, shooting 50 feet into the

---

discussion of the point here, were academic and unrelated to any actual or proposed U.S. cyber operation.

[29] Gary D. Brown & Owen W. Tullos, *On the Spectrum of Cyberspace Operations*, SMALL WARS J. (Dec. 11, 2012), http://smallwarsjournal.com/jrnl/art/on-the-spectrum-of-cyberspace-operations (providing a more complete discussion of the way the USCYBERCOM legal office discussed the issues in this regard).

[30] *International Strategy for Cyberspace* (May 2011), http://www.whitehouse.gov/sites/default/files/rss_viewer/international_strategy_for_cyberspace.pdf.

air. The accident ultimately resulted in the death of 75 people and damaged or destroyed all ten giant turbines in the plant. The accident was *not* the result of a cyber attack, but it was partly due to an automatic control system performing poorly.[31] Such automated systems are vulnerable to cyber attacks, which could result in a catastrophe in the future.[32] If an event like this occurred, there just would not be any doubt about whether it merited a response in self-defense. International lawyers would want to discuss the scope, duration, and intensity of the event; political leaders would want to know if it was "an act of war."[33] No one would care about an academic definition of cyber attack.

The intellectual capital we have spent on this essentially unanswerable issue has been considerable, but it has not been wasted. The discussion has served as a vehicle for discussing larger issues in cyber operations, and the discussion will undoubtedly continue. The academic discussion should not prevent the advancement of practical policy and law in the area.

VI. Do Non-destructive Cyber Activities Violate National Sovereignty?

Both in literature and in policy discussions, this question frequently recurs. It is another question that, unless tied to a specific event, is unanswerable—and even then, it is difficult. The problem is, sovereignty is firmly rooted in geography. There is no universally agreed definition, but considerations of international sovereignty revolve around the recognition of a government's right to exercise exclusive control over territory, and this definition is ill-suited for cyber discussions. For convenience we might refer to "the geography of

---

[31] Joe P. Hasler, *Investigating Russia's Biggest Dam Explosion: What Went Wrong*, POPULAR MECHS. (Feb. 2, 2010), http://www.popularmechanics.com/technology/engineering/gonzo/4344681.

[32] Video, *Staged Cyber Attack Reveals Vulnerability in Power Grid* (Sep. 27, 2007), http://www.youtube.com/watch?v=fJyWngDco3g.

[33] Although politicians also often ask what constitutes an "act of war," lawyers usually dismiss the question as an archaic reference to pre-United Nations international law. However, as used by politicians today, it really is a shorthand way of combining the questions of whether something is an aggressive act and whether it is serious enough to merit an aggressive response in self-defense. In those terms, it is a perfectly relevant question, but one that cannot be answered in the abstract and is beyond the scope of this article.

cyberspace," but I challenge you to point to cyberspace. Although cyberspace is all around us, when trying to point at it you will be as unable to as the Square in Abbott's *Flatland* was to point at "up."[34] I always found it troubling to hear military commanders talk in terms of seizing the cyber "high ground" or negotiating "cyber terrain." That was language they were comfortable with, but in any meaningful sense of the word, cyber lacks geography.

United Stated officials have articulated some thoughts on the idea of cyber sovereignty. One instance was in Harold Koh's speech at USCYBERCOM. In response to a question he asked himself on the role of State sovereignty, he answered:

> States conducting activities in cyberspace must take into account the sovereignty of other States, including outside the context of armed conflict. The physical infrastructure that supports the internet and cyber activities is generally located in sovereign territory and subject to the jurisdiction of the territorial State. Because of the interconnected, interoperable nature of cyberspace, operations targeting networked information infrastructures in one country may create effects in another country. Whenever a State contemplates conducting activities in cyberspace, the sovereignty of other States needs to be considered.[35]

Mr. Koh's statement separated the supporting physical infrastructure from the Internet and cyberspace. This separation allows a discussion to take place within the familiar confines of geography. The assertion that physical infrastructure supports the Internet is certainly true, but fails to ascertain a fresh discussion of sovereignty in the modern world, which we might refer to as cyber sovereignty.

If the physical location of Internet infrastructure constituted the entire subject matter of cyber sovereignty, the discussion would be a

---

[34] E.A. ABBOTT, FLATLAND: A ROMANCE OF MANY DIMENSIONS (1884).

[35] Harold Koh, State Dep't Legal Adviser, *International Law in Cyberspace* (Sep. 18, 2012), http://www.state.gov/s/l/releases/remarks/197924.htm (comments at the USCYBERCOM Cyber Law Conference).

short one. Activities that had an effect on infrastructure located in a country would quite often impact sovereignty of the host nation. Unfortunately, it is not the cables, routers, servers, etc., that make the Internet what it is. Is the connection of those pieces of physical equipment to the larger enterprise. A Cisco router might cost $100,000, but if it is used to connect a country to the incredible engine of commerce, art, scholarship, science, and growth that we call the Internet, its value is incalculable. However, along with this connection comes some necessary surrender to common use what might otherwise be considered sovereign space. Activating a connection to the Internet requires allowing packets of all sorts from all over the world to flow through equipment; it is simply the way the Internet works.

By contrast, nations do not allow people, planes, ships, etc. unfettered access and transit across their physical territory.[36] Cyber activities are simply different than traditional physical activities and for this reason, cyber sovereignty is by its nature less complete than traditional sovereignty. Countries that desire to retain full sovereignty over the pieces of Internet infrastructure they own can simply unplug them from the Internet. A country can feel fairly confident in exercising full sovereign control over a router sitting in a box in a government office. If it wishes to add the value of an Internet connection to the router, the reality is the quantum of its sovereign control over the device has changed.

A brief explanation of one aspect of how the Internet operates may help bring all this into focus. Information sent over the Internet is divided into pieces called packets, designed as a method to ensure reliable delivery in an efficient manner. The Internet is designed to route these packets individually by the most efficient route at that time (which constantly varies because of many factors, such as volume of traffic) and reassemble them at the destination. Imagine this: you live in Washington, D.C., and you want to send a letter to a friend in Seattle. Would you ever think of writing out the message, then tearing it into little bits with around two dozen words on each piece, copying the address for the destination and origin on each bit of paper, and then sending them off in multiple different directions, including both west

[36] I recognize that although I criticize reasoning by analogy, I do it, too.

across the United States and east across the Atlantic, Europe, Asia and the Pacific Ocean (i.e., the long way around the globe), all to be reassembled at your friend's house so she can read the message? Of course you would not—but your computer would. This is how the Internet handles information. Each message is split up—packetized—and then sent flying about the planet by the most efficient route as determined by Internet algorithms.

Add to this the complexity of cloud services that store "chunks" of data in various places, and it results in a system that quite simply defies geographic definition.

A final word about sovereignty. Traditionally, the limit of sovereignty was considered to be as much territory as a country could protect. This was embodied by the three mile limit of territorial seas; the distance is said to have been chosen because it was the range of a shore-based cannon.[37] That is, three miles from shore was as far as a country could defend, so it was *de facto* the limit of its sovereignty. This is in fact the situation in cyberspace now. Powerful cyber nations do what they can to defend their own Internet infrastructures, with some success. Weaker nations suffer what they must in cyberspace. Victim nations often, undoubtedly, never even know their Internet infrastructure is being used for foreign espionage or as a staging point for cyber criminals, hacktivists, and foreign government actors. In other words, cyber sovereignty extends exactly as far as each country can make it. That answer is unlikely to satisfy diplomats, but it is the best one available at the present—and is a good indication this is not a question that should stop the discussion of cyber strategy in its tracks.

VII. Are We Militarizing Cyberspace?

It is ironic this question is so common. The Internet started as a military communications platform. The Soviet nuclear threat indirectly led to the creation of the Internet. In the wake of Sputnik, the United States was concerned about a space-based nuclear attack. As a result, the

---

[37] H.S.K. Kent, *The Historical Origins of the Three-Mile Limit*, AM. J. INT'L L. (1954), http://www.jstor.org/discover/10.2307/2195021?uid=3739256&uid=2&uid=4&sid=21102009814067.

Advanced Research Projects Agency (ARPA; now Defense Advanced Research Projects Agency (DARPA)) started designing a nationwide communications network. ARPAnet went live in October 1969, with the first communications between University of California Los Angeles (UCLA) and Stanford. It began as a military project, has always been used by the military and national security infrastructures, and will remain military insofar as it is an essential element of strategic communications until an entirely separate platform is developed, which is farfetched.[38]

Perhaps a better question to ask would be "are we civilianizing military operations?" The increasing United States' use of drones for extraterritorial targeting has generated questions in the public and in Congress about the use of covert authorities to carry out what might be considered military operations. The raid that resulted in the killing of Osama bin Laden serves as an example of how a military operation can be civilianized. That operation was carried out by uniformed military members in the command of a military officer using military equipment, yet it was conducted and characterized as a covert Central Intelligence Agency operation.[39]

One possible reason the Administration used covert authorities for the raid, rather than traditional military authorities, is because there were questions about the propriety of entering Pakistan's sovereign territory, without permission, to kill or capture a terrorist. The same issues might plague proposed cyber operations. As questions surrounding cyber sovereignty and cyber military operations have remained unanswered, it might be appealing to use covert authorities to conduct operations because that will, at least from a United States policy perspective, obviate the need to disclose the legal and policy rationale supporting such operations. Public disclosure of the United States thinking about actual cyber operations would be valuable in the development of international law in the area. However, from a U.S. national perspective, it might be damaging, in that it would allow other countries to employ the same rationale in undertaking actions against the United States.

---

[38] *A Technical History of the ARPANET*, http://www.cs.utexas.edu/users/chris/nph/ARPANET/ScottR/arpanet/timeline.htm.

[39] Nicholas Schmidle, *Getting Bin Laden*, NEW YORKER (Aug. 8, 2011), http://www.newyorker.com/reporting/2011/08/08/110808fa_fact_schmidle?currentPage=all.

It remains to be seen how the United States will conduct military cyber operations in the future. From covert activities, the public will learn little—until something goes wrong. In traditional military operations, the DoD has disclosed its operations, resulting in taking its share of lumps from the scrutiny of the press, politicians and public.[40] In the end, this has made the DoD stronger. That fire-hardening rarely applies to operations undertaken covertly.

Both because of the increasing intermingling of military and intelligence operations and the military origin and continued use of the Internet, questions about militarizing cyberspace simply miss the point.

There is one question the United States government must answer before it can artfully engage in the cyber game—what is the best way to *organize* for cyber operations? The challenge is there are many government organizations that lay claim to portions of cyber activities, and all of them have an interest in preserving their link to cyber because it's one of the few government areas that continues to grow in people and resources.

The Department of Homeland Security (DHS) tells other agencies to keep their hands off cyber security, and tells the DoD, it can only do cyber defense—even though Congress does not think DHS is up to the task of handling cyber security.[41] The DoD says USCYBERCOM must be co-located with the National Security Agency (NSA) and they will

---

[40] Noah Schactman, *Military Stats Reveal Epicenter of U.S. Drone War*, WIRED (Nov, 9, 2012), http://www.wired.com/dangerroom/2012/11/drones-afghan-air-war/. Unfortunately, however, the U.S. Air Force has recently stopped disclosing statistics about its drone operations, presumably because the scrutiny surrounding the targeted killing program has increased. Reuters, *U.S. Air Force Stops Reporting Data on Afghan Drone Strikes*, REUTERS (Mar. 10, 2013), http://www.reuters.com/article/2013/03/10/us-usa-afghanistan-drones-idUSBRE92903520130310.

[41] HOMELAND SECURITY PRESIDENTIAL DIR.-7, CRITICAL INFRASTRUCTURE IDENTIFICATION, PRIORITIZATION & PROTECTION (Dec. 17, 2003), http://www.dhs.gov/homeland-security-presidential-directive-7; Congressional testimony of DHS Secretary Janet Napolitano (Mar. 7, 2013), http://www.dhs.gov/news/2013/03/07/written-testimony-dhs-secretary-janet-napolitano-senate-committee-homeland-security; William Jackson, *McCain Slams DHS, Wants DoD to Defend Cyberspace*, GCN (Mar. 27, 2012), http://gcn.com/articles/2012/03/27/cyber-defense-hearing-mccain-slams-dhs-favors-dod.aspx. Also, DHS Secretary Napolitano stressed at a *Washington Post*-sponsored cyber event on October 31, 2012, that the DoD's role in cyber *defense* was separate from the DHS role of cyber *security*.

handle cyber defense for the whole nation.[42] The nation tells the NSA to stop reading our e-mail.[43] The Department of State (DoS) says the United States will take action to protect the nation from Chinese cyber threats, although the specified "cyber threats" sound a whole lot like spying, and we all know espionage is not unlawful internationally.[44] Congress says we have to do something about cyber security, but cannot pass a bill.[45] The executive branch has been saying "we've got it" (for three-plus years now), and the President has now issued documents that say, in essence, why can't we all just get along?[46]

President Obama's executive order and policy directive on the cyber security of the nation's critical infrastructure essentially follow the same path of previous government studies and documents, which is a "Whole of Government" approach. This concept may sound appealing, but it disguises a lot of confusion.

During my three years as a cyber legal adviser, when I briefed, I often included a slide on what I called perhaps the most important, and definitely the most boring, part of U.S. cyber warfare: command and control (C2) of military cyber forces.

---

[42] General Keith Alexander Congressional Testimony (Sep. 23, 2010), http://www.defense.gov/home/features/2011/0411_cyberstrategy/docs/House%20Armed%20Services%20Subcommittee%20Cyberspace%20Operations%20Testimony%2020100923.pdf; Secretary of Defense Leon Panetta Remarks (Oct. 11, 2012), http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5136.

[43] James Risen & Eric Lichtblau, *E-Mail Surveillance Renews Concerns in Congress*, N.Y. TIMES (Jun. 16, 2009), http://www.nytimes.com/2009/06/17/us/17nsa.html?pagewanted=all.

[44] Tom Donilon, Nat'l Security Advisor to the President Remarks, The United States and the Asia-Pacific in 2013 (Mar. 11, 2013), http://www.whitehouse.gov/the-press-office/2013/03/11/remarks-tom-donilon-national-security-advisory-president-united-states-a.

[45] Benjamin Wittes, *Lawfare* blog, http://www.lawfareblog.com/2013/02/allan-friedman-on-why-the-executive-order-on-cyber/ (quoting Allan Friedman and noting, among other things, that Congress has failed to pass a cybersecurity bill since 2001).

[46] Executive Order, Improving Critical Infrastructure Cybersecurity (Feb. 12, 2012), http://www.whitehouse.gov/the-press-office/2013/02/12/executive-order-improving-critical-infrastructure-cybersecurity; PRESIDENTIAL POLICY DIRECTIVE 21, CRITICAL INFRASTRUCTURE SECURITY AND RESILIENCE (Feb. 12, 2013), http://www.whitehouse.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil.

The United States established Cyber Command and recently announced it would be growing from about 900 personnel to about 4,900 personnel.[47] Given this, it is clear the United States plans for the military to serve a large role in the nation's cyber security. The question that has not been answered is how the military will organize. Cyberspace operations present two specific challenges for a Defense Department largely organized around geographic combatant commands (e.g., Pacific Command, Southern Command, etc.) and kinetic functionality (e.g., 9th Air Force, 1st Infantry Division, 5th Fleet, etc.): cyber is not geographic and it largely is not kinetic. The third great challenge in organizing the DoD for cyber operations is that such operations have an unclear and sometimes uncomfortable relationship with intelligence. This last point is most clearly illustrated by the DoD's insistence that the commander of U.S. Cyber Command be the same person who directs the National Security Agency, which was followed by congressional expressions of concern over that very relationship.[48]

At a minimum, any laydown of cyber military forces must do two things. It must clearly identify precisely who is in charge of all the forces and it must carve out specific mission space for the military forces. In my opinion, the structures proposed do precisely the opposite of these, both obfuscating who is charge and attempting to divide the mission into artificial service functionalities. Illustrations of the USCYBERCOM chain of command include overlapping lines of authority, dual—and even triple-hatted positions, and unclear divisions between military and intelligence operations, among many other issues. The U.S. Government Accountability Office (GAO) made similar observations about the lack of clarity in the cyber command chain in 2010 and 2011.[49]

---

[47] Jason Healey, *Cyber Command Expanding Five Fold*, NEW ATLANTICIST (Jan. 29, 2013), http://www.acus.org/new_atlanticist/cyber-command-expanding-five-fold.

[48] Defense Authorizations Act, Fiscal Year 2013, Pub. L. No. 112-705 § 940 (Jan. 3, 2012), http://www.gpo.gov/fdsys/pkg/BILLS-112hr4310enr/pdf/BILLS-112jr4310enr.pdf (discussing "Sense of Congress on the United States Cybe Command).

[49] *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-10-338, PROGRESS MADE BUT CHALLENGES REMAIN IN DEFINING & COORDINATING THE COMPREHENSIVE NATIONAL INITIATIVE (Mar. 2010), http://www.gao.gov/new.items/d103 38.pdf; U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-11-75, DOD FACES CHALLENGES IN ITS CYBER ACTIVITIES (Jul. 2011), http://www.gao.gov/new.items/d1175. pdf. The cleverly designed mock three-dimensional graph on page 18 of the latter

VIII. Conclusion

A frequently heard complaint at cyber law conferences is that presenters continually point out the same thorny questions, but rarely provide any answers. In that regard, I must apologize for, at least on one level, contributing to that problem.

On the other hand, I hope that by noting the wrong questions that are being asked, I may have furthered the debate a bit. That is, if the wrong questions are being asked, even the correct answers to them will get us nowhere.

Some of the right questions suggested here are: How should the United States organize for cyber warfare? What cyber actions by an adversary would justify and demand an aggressive response from the United States—and what U.S. cyber actions would result in aggressive responses from the victim?

Finally, perhaps sweeping the wrong questions from the table will open debate on the most important question of all. The promise of cyber warfare has always been a more precise, less lethal way to wage war. When nations engage in armed conflict in the future, use of cyber warfare techniques might make the struggle less devastating to the civilian population. Far too little intellectual capital has been spent on this aspect of cyber capabilities, and I will end by asking one final question: How can this new capability best be leveraged to wage war more humanely?

---

reference does not shed much light on how things actually work, but does provide a good illustration of just how confused the organization of cyber forces and leadership is.

REVOLUTIONARY SUMMER: THE BIRTH OF AMERICAN INDEPENDENCE[1]

REVIEWED BY MAJOR RONALD T. P. ALCALA[2]

No event in American history which was so improbable at the time has seemed so inevitable in retrospect as the American Revolution.[3]

I. Introduction

In *Revolutionary Summer*, Pulitzer Prize-winning author Joseph Ellis retraces the events that defined the fateful summer of 1776. Ellis describes that summer as a "crescendo moment" when critical decisions about independence, the political character of the United States, and national defense altered the course of American history.[4] To provide a more complete account of the "crescendo moment," Ellis interweaves both political and military developments into a single, unified narrative, because as Ellis remarks, "the political and military experiences were two sides of a single story, which are incomprehensible unless told together."[5] By placing the two side-by-side, Ellis succeeds in showing how each exerted pressure on the other as political and military leaders alike struggled with the new realities of American independence.

Unfortunately, *Revolutionary Summer*'s reliance on generalities limits its value as a work of historical scholarship. While merging politics and military affairs into a single narrative proves insightful, the "single story" Ellis attempts to tell in 188 brief pages lacks the substance of more thorough histories of the time, including earlier works by Ellis himself.[6] Ultimately, although *Revolutionary Summer*'s perspective on politics and military operations illuminates important points, the book's reliance on generalities diminishes its scholarly appeal. Other, more carefully

---

[1] JOSEPH J. ELLIS, REVOLUTIONARY SUMMER: THE BIRTH OF AMERICAN INDEPENDENCE (2013).

[2] Judge Advocate, U.S. Army. Student, 62nd Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 3 (2000).

[4] ELLIS, *supra* note 1, at ix.

[5] *Id.* at x.

[6] *Id.*

documented histories tell the story of America's existential moment more completely and more engagingly.[7]

II. A Confluence of War and Politics

In the preface to *Revolutionary Summer*, Ellis argues that political and military developments are best understood together, as two sides of a single coin.[8] "[E]vents on one front," he observes, "influenced outcomes on the other, and what most modern scholarship treats separately was experienced by the participants as one."[9] By combining the twin strands of politics and military affairs into a single story, Ellis succeeds in showing how events in one sphere influenced decisions in the other over the course of the summer of 1776. Ellis focuses on two key events to highlight the interplay between political and military decision-making: the declaration of American independence and the Continental Army's defensive military campaign in New York.

Following the withdrawal of British forces from Boston in the spring of 1776, Washington moved his forces south to defend the strategically important, though arguably indefensible, city of New York.[10] As Ellis notes, "Devising a comprehensive strategy for the conduct of the war required an established government with clearly delineated powers and designated decision makers charged with coordinating the quite monumental civil and military considerations."[11] Unfortunately for Washington, the political infrastructure needed to formulate a strategy did not exist when Washington prepared to confront the anticipated

---

[7] *See, e.g.*, DAVID MCCULLOUGH, 1776 (2005); JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON (1998); ELLIS, *supra* note 3; RON CHERNOW, WASHINGTON: A LIFE (2010); BARNET SCHECTER, THE BATTLE FOR NEW YORK: THE CITY AT THE HEART OF THE AMERICAN REVOLUTION (2002).

[8] *See* ELLIS, *supra* note 1, at ix–x.

[9] *Id.* at x.

[10] *Id.* at 33 ("Unquestionably, New York enjoyed enormous strategic significance."), 40 (noting General Charles Lee's conclusion that New York was indefensible). In his authoritative history of the New York campaign, *The Battle for New York*, Barnet Schecter explains that "the British saw New York as the key to subduing the rebellion." SCHECTER, *supra* note 7, at 2. Schecter notes the British believed that gaining control of the Hudson River "would sever the mid-Atlantic and southern colonies from New England." *Id.*

[11] ELLIS, s*upra* note 1, at 40.

British advance.[12] Consequently, "the question of whether New York should be defended had never even been raised."[13]

Nevertheless, political considerations did figure into the military calculus. As the political debate over the question of independence intensified, New York's symbolic importance to the independence movement grew increasingly stark. Ellis asks, "How would it look if just as the political climax to years of debate finally occurred, the military embodiment of that glorious cause fled New York for the security of the Connecticut hills and allowed [British General William] Howe to occupy the city without a fight?"[14] The Americans, Ellis notes, "had profound political reasons to avoid appearing militarily weak and vulnerable at this propitious moment when, at last, independence was about to be declared."[15]

Pressure to ensure an auspicious start to independence may have blinded Washington to the overwhelming challenge of defending the city. After reconnoitering the area around New York, one of Washington's most experienced generals, Charles Lee, concluded that New York was indefensible.[16] Political considerations, however, managed to obscure Lee's finding as Washington struggled to formulate a plan to neutralize the British threat. As a result, New York's vulnerability, at least initially, "dropped out of the strategic equation."[17] Politics had intruded into the military domain.

Military developments influenced political decisions in observable ways as well. Following the Battle of Long Island, the Continental Army

---

[12] *Id.* at 40.
[13] *Id.*
[14] *Id.* at 47.
[15] *Id.*; *see also* SCHECTER, *supra* note 7, at 4 ("The Continental Congress had felt that New York, the second-largest American city, should not be given up without a fight, or the damage to American morale might prove fatal to the cause of independence.").
[16] ELLIS, *supra* note 1, at 33–34; *see also* CHERNOW, *supra* note 7, at 230 ("The same qualities that made New York a majestic seaport turned it into a military nightmare for defenders. There was hardly a spit of land that couldn't be surrounded and thoroughly shelled by British ships."). Ellis describes Lee as "the most experienced and colorful general in the Continental Army." ELLIS, *supra* note 1, at 32.
[17] ELLIS, *supra* note 1, at 40. As Ron Chernow notes in his superb biography of Washington, "[i]n hindsight, the city was certainly doomed, but Washington considered it a 'post of infinite importance' that would be politically demoralizing to surrender without a fight." CHERNOW, *supra* note 7, at 230 (citing MICHAEL STEPHENSON, PATRIOT BATTLES: HOW THE WAR OF INDEPENDENCE WAS FOUGHT 230 (2007)).

had retreated to Manhattan where its position, cut off from the mainland, remained precarious. On September 15, British and Hessian troops crossed the East River from Long Island and assaulted the Americans' defensive positions along the eastern shore of Manhattan at Kip's Bay.[18] The attack was devastating.[19] In the frenzied retreat from Kip's Bay, entire regiments of militia abandoned their weapons and gear and fled pell-mell to Harlem Heights, leaving the city and port of New York in British hands.[20] The debacle forced a reevaluation of the fighting state of the Continental Army.

In the aftermath of Kip's Bay, the Continental Congress sent a committee to meet with General Washington and his staff.[21] They eventually concluded that "the Continental Army was really not much of an army at all," and they recommended reforms, known as a "New Establishment," that would allow the Continental Army to compete against the British Army on an equal footing.[22] In the end, the Continental Congress failed to deliver on its New Establishment recommendations, but as Ellis suggests, "the political gesture itself was important as a statement of commitment during this vulnerable moment."[23] Confronted by the army's military setbacks in New York, the Continental Congress felt forced to act to prevent an "epidemic of fear and disillusionment" from infecting the body politic and jeopardizing the independence of the fledgling nation.[24] Here, military affairs compelled the need for political action.

By juxtaposing political and military events, Ellis manages to highlight relationships often overlooked in more narrowly focused histories. Washington's decision to defend New York and the Continental Congress's response to the Kip's Bay retreat are examples of how Ellis's "single story" approach can reveal hidden influences on historical developments.

---

[18] ELLIS, s*upra* note 1, at 148–49.
[19] *See id.* at 149 (noting that the retreat from Kip's Bay was "one of the low points for the American side in the war").
[20] *Id.* at 149–50.
[21] *Id.* at 157–59.
[22] *Id.* at 158.
[23] *Id.* at 162.
[24] *Id.*

III. Abridged Too Far

On the other hand, *Revolutionary Summer*'s unified narrative relies too heavily on generalities to maintain its brisk pace. Ellis overlooks historical nuances in favor of efficient storytelling, but in doing so, he sacrifices important context and the opportunity to explain events more fully. The narrative he presents, though concise, lacks a certain sophistication and suffers from excessive abridgement of the historical record. Ultimately, after arguing so forcefully for a unified approach to historical storytelling, Ellis undercuts himself by presenting the story of the revolutionary summer in such a slender volume. The stand-alone histories he discounts look compelling in comparison, because they, at least, manage to provide comprehensive coverage of their specialized topics.

To propel the narrative forward, Ellis resorts to broad generalizations that tread uncomfortably close to oversimplification. For example, he repeatedly emphasizes the disdain the two British commanders, General William Howe and his brother, Admiral Richard Howe, felt for General Henry Clinton to explain their repeated rejections of his military proposals. "Both of the Howe brothers detested Clinton and would have rejected his strategic advice even if it had come with endorsements from the gods," Ellis writes to explain why they rejected Clinton's plan to trap Washington's army on Manhattan.[25] Similarly, Ellis asserts that the American press deliberately manipulated the reporting of events to influence public opinion.[26] He writes,

> The press, in short, did not provide an unbiased version of the Battle of Long Island or the glaring problems within the Continental Army. In this highly charged and vulnerable moment, loyalty to "The Cause" trumped all conventional definitions of the truth so completely that journalistic integrity became almost treasonable.[27]

While Ellis generally supports these sweeping statements with appropriate endnotes, the book as a whole suffers from a lack of

---

[25] *Id.* at 147.
[26] *See id.* at 146.
[27] *Id.* Ellis concludes his analysis of the press by declaring that the "partisan American press had concealed the full extent of the demoralized condition of the Continental Army" and by suggesting that "[f]ew Americans knew they were losing the war." *Id.*

foundational material and substantiating references to explain claims made in the text. Did the Howes really discount Clinton's professional judgment simply because he was "obnoxious"?[28] Ellis cites a secondary source, a biography of General Clinton by William B. Willcox, to support this claim, yet surprisingly, he fails to cite the Howes firsthand to establish their true opinion of Clinton.[29]

Similarly, to support his contention that the American press was wildly partisan, Ellis includes a sampling of coverage from various newspapers. In particular, he uses the inaccurate reporting of four geographically dispersed newspapers to illustrate the press's bias in the aftermath of the Battle of Long Island.[30] He admits in an endnote that other newspapers may have reported the battle more accurately but quickly dismisses any conclusion that could be drawn from that evidence. He states, "I realize that this is only a geographically spread sampling and other newspapers might have provided more accurate accounts of the Long Island debacle. But if so, they were the exception rather than the rule."[31] Ellis's reflexive dismissal of other, potentially contradictory sources is disconcerting. Why should we believe that his seemingly random sampling of four newspapers reflected the rule?

Ellis also resorts to descriptive shortcuts to describe his cast of characters, and the resulting portraits are largely unsatisfying. For example, Ellis unhelpfully describes Washington as "a physical specimen produced by some eighteenth-century version of central casting."[32] Benjamin Rush, a contemporary of Washington, managed to evoke Washington much more descriptively and more eloquently. "He has so much martial dignity in his deportment," Rush explained, "that you would distinguish him to be a general and a soldier from among ten thousand people. There is not a king in Europe who would not look like

---

[28] *Id.* at 110. Ellis notes that William Howe had "little respect for Clinton either as a general or as a man," and he suggests that Clinton's "lifelong tendency to make enemies of all his superiors" was at the root of Howe's professional and personal contempt for his second-in-command. *Id.* Clinton, he states, "possessed a truly unique talent for making himself obnoxious." *Id.*

[29] *Id.* at 201 n.7 (citing WILLIAM B. WILLCOX, PORTRAIT OF A GENERAL: SIR HENRY CLINTON IN THE WAR FOR INDEPENDENCE (1964) and noting that Willcox's biography "provides the deepest analysis of any British officer in the war, as well as the most sophisticated psychological analysis of any prominent figure on either side").

[30] *Id.* at 146.

[31] *Id.* at 205 n.26.

[32] *Id.* at 25–26.

a valet de chamber by his side."[33] Ellis also notes that Washington possessed "aggressive military instincts"[34] and states that, following the Declaration of Independence, Washington continued to build up his "networks of defense, both on Long Island and inside his own soul," although he provides scant evidence to support these views.[35]

Ellis paints a somewhat more expressive portrait of Jefferson, although the image he conjures remains largely impressionistic as a result of the quick narrative pace. Jefferson, he explains, stood slightly over six foot two, had reddish blond hair, and possessed a "reedy" voice that "did not project in large spaces."[36] Moreover, he was "also by disposition self-contained, some combination of aloof and shy, customarily standing silently in groups, with his arms folded tightly around his chest as if to ward off intruders."[37]

Ellis draws on his earlier, National Book Award-winning biography of Jefferson, *American Sphinx: The Character of Thomas Jefferson*, for inspiration on Jefferson, and a few recycled thoughts have crept into *Revolutionary Summer*. For example, both books describe Jefferson's distress as he watched a committee methodically revise his original draft of the Declaration of Independence. Jefferson, Ellis writes in *Revolutionary Summer*, "sat silently and sullenly throughout the debate, regarding each revision as a defacement."[38] In *American Sphinx*, Jefferson "sat silently and sullenly, regarding each proposed revision as another defacement."[39]

Comparing the two books more generally, however, it becomes clear how much of Jefferson's essential character is lost in *Revolutionary Summer*'s rush to summarize. Jefferson becomes less sphinx-like—and less interesting—to preserve the book's narrative clarity, but the resulting portrayal feels shallow and incomplete. In the end, by sketching his figures so broadly, Ellis reduces men like Washington and Jefferson to

---

[33] CHERNOW, *supra* note 7, at 182 (quoting Benjamin Rush, *in* PAUL K. LONGMORE, THE INVENTION OF GEORGE WASHINGTON 162 (1988)).
[34] ELLIS, *supra* note 1, at 73.
[35] *Id.* at 72.
[36] *Id.* at 59.
[37] *Id.*
[38] *Id.* at 61.
[39] ELLIS, *supra* note 3, at 50. In *Revolutionary Summer*, Ellis appropriately cites *American Sphinx* as the source for his description of Jefferson.

caricatures, two-dimensional shadows that waft through his story with little substance and little to remember them by.

IV. Conclusion

Throughout history, war and politics have frequently shared a common bond but have not always shared a common history. In *Revolutionary Summer*, Ellis combines the two in a single narrative that highlights how politics influenced military affairs and vice versa during the critical summer of 1776. Ellis's "single story" serves as a reminder that political debate is not conducted in a vacuum and that military decision-making never occurs in strategic isolation. Considerations in the political sphere inevitably intrude into the military decision-making process, and military events have sway in the political realm as Ellis convincingly demonstrates using the Declaration of Independence and the campaign in New York as examples. This message remains applicable even today. Politicians and military leaders who recognize the interplay between these forces may manage expectations more successfully when external pressures arise.

As a chronicle of history, however, *Revolutionary Summer* underperforms. Ellis reduces events and people to sketches, and his heavy use of summation dulls the story he attempts to tell. Those interested in learning about the history of the period or the complex, conflicted men who guided America to independence should instead look to Ellis's other, far more engaging books on the revolutionary period.

THE RED CIRCLE: MY LIFE IN THE NAVY SEAL SNIPER CORPS AND HOW I TRAINED AMERICA'S DEADLIEST MARKSMEN[1]

REVIEWED BY MAJOR TAKASHI KAGAWA[2]

Whatever it is that you do, you are making a stand, either for excellence or for mediocrity. This is what I learned about being a Navy SEAL: it is all about excellence, and about never giving up on yourself. And that is the red circle I will continue to hold, no matter what.[3]

I. Introduction

In October 2013, Sony Pictures released a movie based on the true story of U.S. merchant captain Richard Phillips who was held hostage by Somali pirates and later rescued by Navy SEALs in April 2009.[4] Though the movie focuses on Phillips as the main character, it depicts the extraordinary abilities of the SEAL snipers who shot the three Somali pirates on rolling seas more than 100 feet away with only three shots from another vessel at sea.[5] How does one train to become a SEAL sniper with such deadly accuracy? Brandon Webb, a former Navy SEAL sniper course manager, reveals the making of a SEAL sniper in his personal memoir, *The Red Circle*.

Inspired by Randy Pausch's *The Last Lecture*, a YouTube video with over sixteen million hits, Webb writes this autobiography in a similar fashion as Pausch's lecture: documenting his life and extrapolating

---

[1] BRANDON WEBB, THE RED CIRCLE (2012).

[2] Judge Advocate, U.S. Army. Student, 62d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] WEBB, *supra* note 1, at 380.

[4] Sony Pictures, *About*, CAPTAIN PHILLIPS, http://www.captainphillipsmovie.com/site/#about (last visited Sept. 10, 2013).

[5] *Id.*; Robert D. McFadden & Scott Shane, *In Rescue of Captain, Navy Kills 3 Pirates*, N.Y. TIMES, Apr. 12, 2009, http://www.nytimes.com/2009/04/13/world/africa/pirates.html?pagewanted=all&_r=0.

lessons learned with a "head fake."[6] Readers will find the book enjoyable and credible. Though the author overstates his assertion on asymmetrical warfare, Webb successfully impresses the importance of excellence in one's life and imparts valuable leadership lessons to the military reader. The book is worth the read for military professionals who may be inspired to seek excellence and to learn leadership principles.

II. Readable and Credible Memoir

Brandon Webb served as a Navy SEAL from 1998 to 2006, achieving the rank of chief petty officer.[7] As the SEAL sniper course manager, he trained the SEAL sniper Chris Kyle, who had over 150 confirmed kills in action, and Marcus Luttrell, the bestselling author of *Lone Survivor*, who credits Webb for saving his life by training him how to stalk.[8] Ever since the SEALs caught the public's attention,[9] Webb has become a media expert on SEALs.[10] He is the editor-in-chief of

---

[6] Brandon Webb, *Books*, BRANDON WEBB, http://www.brandontylerwebb.com/books/ (last visited Sept. 7, 2013) ("My desire to write *The Red Circle* was originally inspired by '*The Last Lecture*' by Randy Pausch and his dedication to his own family."). After being declared terminally ill, Randy Pausch, a Carnegie Mellon professor, gave his last lecture on how he achieved his childhood dreams, extrapolating his wisdoms on how to do the same. CarnegieMellonU, *Randy Pausch Last Lecture: Achieving Your Childhood Dreams*, YOUTUBE (Dec. 20, 2007), http://www.youtube.com/watch?v=ji5_MqicxSo. Though a valuable lecture for the attendees, the lecture was Pausch's "head fake" to document his life and pass on his wisdom to his children. *Id.* (referring to "head fake" as a teaching method to teach people materials without having them realize what they are learning until well into the teaching). *Id.*; RANDY PAUSCH, THE LAST LECTURE 39 (2008).

[7] WEBB, *supra* note 1, at 142–44 (becoming Navy SEAL in 1998), 361 (promoted to chief petty officer, E-7), 374 (leaving the service in July 2006).

[8] *Id.* at 362–65 (Chris Kyle), 365–69 (Marcus Luttrell) (quoting Luttrell, "'Brandon, listen. You need to know, that stalking course? That saved my life. If you hadn't pounded that training into me, I wouldn't be standing here today'").

[9] *See* McFadden & Shane, *supra* note 5; Peter Baker et al., *Bin Laden is Dead, Obama Says*, N.Y. TIMES, May 1, 2011, http://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html?pagewanted=all. This publicity has raised concern over the Navy SEALs' overexposure. *See generally* Huma Khan & Luis Martinez, *Navy SEAL Commander Advised to 'Get the Hell Out of the Media,'* ABCNEWS (Feb. 7, 2012, 3:42 PM), http://abcnews.go.com/blogs/politics/2012/02/navy-seal-commander-advised-to-get-the-hell-out-of-the-media/.

[10] WEBB, *supra* note 1, at 377–78 (depicting media seeking insights when Navy SEAL rescued a U.S. merchant captain from Somali pirates in 2009 and when the unit killed Osama bin Laden in 2011).

SOFREP.com[11] and has co-authored books on Navy SEAL snipers and the attack on the U.S. consulate in Benghazi.[12] Unlike his other books, *The Red Circle* is about Webb's personal life. Because of his writing style and organization, the book is quite readable with few distractions.

As a first-person narrative, the book is entertaining and a quick read. The author uses informal prose, skillfully interweaving his recollection of events with his thoughts and perspectives. Like other autobiographies written by former Navy SEALs, the book contains the genre's common elements: the difficulty of becoming a SEAL[13] and the vivid account of one's deployment experience.[14] Despite the numerous naval and sniper terms and concepts, Webb explains them with sufficient detail that a novice can understand and appreciate the SEAL operator's extraordinary abilities and toughness.[15]

Chronologically organized, the book is simple to follow and digest. It covers the author's life from his early childhood to his life in the private sector.[16] The author does, however, deviate from the chronological organization once—the hook. He starts his introduction

---

[11] The website informs the public about the activities of U.S. and coalition special operations units. *SOFREP Explained*, SOFREP, http://sofrep.com/about-sofrep-com/ (last visited Sept. 8, 2013).

[12] Webb, *supra* note 6.

[13] *Compare* WEBB, *supra* note 1, at 89–128 (Basic Underwater Demolition/SEAL (BUD/S) training), 131–44 (SEAL tactical training and receipt of the SEAL "Trident" badge), 168–205 (SEAL sniper course), *with* MARCUS LUTTRELL, LONE SURVIVOR 79–107 (pre-BUD/S training), 108–51 (BUD/S training), 151–59 (SEAL qualification training (SQT) and SEAL sniper course) (2007), *and* CHRIS KYLE, AMERICAN SNIPER 29–50 (BUD/S training), 50–53 (SQT), 128–43 (SEAL sniper course) (2012).

[14] *Compare* WEBB, *supra* note 1, at 207–15 (guarding USS *Cole*), 228–40 (interdicting "terrorist transport boat"), 254–92 (sensitive site exploitation of Zhawar Kili), 293–316 (combined special operations with German and Danish special operations units), *with* LUTTRELL, *supra* note 13, at 160–348 (Operation Redwing and his survival), *and* KYLE, *supra* note 13, at 80–87 (boarding and searching ships for SCUDs), 92–122 (first deployment to Iraq), 156–264 (second deployment to Iraq as sniper), 294–398 (third deployment to Iraq).

[15] *See, e.g.*, WEBB, *supra* note 1, at 56–58 (Navy "A" school), 69 (thermocline), 151–54 (various SEAL trainings), 180–84 (sniper shooting techniques: keep-in-memory, ballistics, and spotting), 197–202 (sniper stalking techniques: dead space and stalking), 348–53 (mental management).

[16] *Id*. at 9–38 (from his parents' background to his decision to join the Navy), 39–68 (his boot camp experience), 69–88 (his experience as Navy's search and rescue swimmer), 89–206 (training to become a Navy SEAL and SEAL sniper), 207–26 (pre-9/11 SEAL deployment), 227–327 (post-9/11 SEAL deployment), 328–69 (SEAL sniper course instructor/manager), 370–80 (life after leaving active duty).

with an event from his deployment to Afghanistan that gleams both his amazing skill as a SEAL sniper and his admirable humanity.

Near the caves of Zhawar Kili, Webb and his teammates encounter a superior Taliban force. Without heavy weapons or a range finder, Webb estimates the enemy's coordinates using a sniper technique of range estimation; he then calls in an airstrike so close that his team have to open their mouths to prevent their lungs from bursting. During the airstrike, he hears a baby cry from the impact area and is immediately troubled, sympathizing with the parent who will no longer hold that baby.[17]

This vivid account elegantly juxtaposes seemingly contradictory qualities of a SEAL: the extraordinary skill and bravery to kill the superior enemy force without remorse and the ability to feel the human frailty.[18] It piques the reader's curiosity as to how one becomes a SEAL sniper while retaining one's humanity. Either for expedience or lack of effort, Webb chooses to repeat the same story word-for-word later in the book, which is distracting but not fatal.[19]

In addition to this hook, Webb uses a form of foreshadowing throughout his book: he hints that a certain individual, information, or event will appear later with a significant impact or connection to him.[20] For example, Webb describes his platoon's conflict with two Air Force combat controllers and then hints that this conflict will result in his downgraded award and his platoon member's early release from theater.[21] This technique spurs readers to read further with interest.

Despite the lack of footnotes or endnotes and the disclaimer that "some details" were altered or modified,[22] the events in the book remain credible in light of the author's established credentials as a former

---

[17] *Id*. at 1–4 (depicting how the author's "stomach twisted" when he heard the baby cry).
[18] *Id*. at 5 ("[L]iving in the crosshairs of split-second decisions with life-or-death consequences makes you *more* acutely attuned to the truest, grittiest realities of human fragility and the preciousness of life.").
[19] *Compare id*. at 1–4 (introduction), *with id*. at 268–72 (chapter nine).
[20] *See, e.g.*, *id*. at 70 (stating, "[a] few years later I would use [thermoclines] to my advantage in a most unexpected circumstances"), 157–58 (using thermoclines to avoid dolphins trained to detect intruders).
[21] *Id*. at 245–46 ("Months down the road, this would come back to bite us. It planted a seed of resentment that ended up costing me a medal and getting Osman sent home.").
[22] *Id*. author's note.

SEAL; SEAL peers' acceptance of his work; the photographs Webb includes; and outside some sources confirming his recitation of events.[23]

Webb delivers a well-organized, entertaining memoir but overstretches when he concludes from his experience that the "age of asymmetrical warfare" has arrived and how it propelled the special operations to the center of U.S. military strategy.[24] Unfortunately, the reader will find Webb's rationale falling short and will prefer him to focus on his personal stories and lessons gleaned.

III. Asymmetrical Warfare

Webb asserts that the attack on the USS *Cole* in 2000 radically changed the "fundamental nature of military strategy," signaling the age of a new kind of war—"asymmetrical warfare"—and that the special operations is now at the "core" of military strategy.[25] Without defining "asymmetrical warfare," Webb supports his assertion somewhat adequately based on his observation that the enemy is a decentralized group of nonaffiliated terrorists and that conventional forces are in the support role for the special operations units.[26] Though plausible, he goes too far in his declaration.

There is no dispute that the attack on the USS *Cole* was an example of asymmetric warfare, defined as "the use of unconventional tactics to counter the overwhelming conventional military superiority of an adversary."[27] Such warfare, however, is not new. In his book, *Invisible*

---

[23] *See supra* notes 9–10, 12–14 and accompanying text (Webb's credibility); Marcus Luttrell, *Foreword* to WEBB, *supra* note 1 (peer's acceptance); *Id*. back cover (endorsements by former SEALs, Chris Kyle and Howard E. Wasdin), photograph sec. (providing thirty-nine photos depicting Webb's accounts in the book); Dwight Jon Zimmerman, *Task Force K-Bar—Special Operations Forces and Operation Enduring Freedom*, DEFENSEMEDIANETWORK (Sept. 19, 2011), http://www.defensemedianetwork.com/stories/operation-enduring-freedom-the-first-49-days-6/ (depicting SEAL recon mission into Zhawar Kili in Jan. 2002); *see also Navy SEALs in Operation Enduring Freedom*, SPECIAL OPERATIONS.COM, http://www.specialoperations.com/Navy/SEALs/OEF.html (last visited Sept. 9, 2013).

[24] WEBB, *supra* note 1, at 5, 217.

[25] *Id*. at 5–6, 217–18 ("It was a new kind of war. . . .").

[26] *Id*. at 217–18.

[27] *"Asymmetric Warfare," The USS* Cole, *and the* Intifada, 12 ESTIMATE, no. 22, Nov. 3, 2000, *available at* http://www.theestimate.com/public/110300.html ("[T]he attacks on the Cole . . . serve . . . as object lessons on what military theorists call 'asymmetric warfare.").

Armies, Max Boot concludes that asymmetric warfare, "a resort of the weak against the strong," has existed since mankind conducted wars.[28] Boot also shows that the United States has faced asymmetric warfare throughout its history facing enemies such as the American Indians in the eighteenth century, Mexican guerrillas in Mexican-American War, Filipino insurgents in the Philippines in the early twentieth century, Vietcong in Vietnam, and many others.[29]

In regards to his claim of special operations being at the center of military strategy, Webb failed to address how the current overall military strategy still relies on conventional forces to conduct stability and counterinsurgency operations.[30] The current National Security Strategy requires the armed forces to "enhance its capacity to defeat asymmetric threats" and to maintain "conventional superiority."[31] The current strategy relies on building regional partnerships with other nations employing conventional forces to conduct "military-to-military cooperation."[32] Hence, Webb's claim regarding the role of special operations in the military strategy is exaggerated. These overreaching statements, however, do not detract from the author's primary assertion that one must pursue excellence and never give up.

IV. Excellence Matters

Webb elegantly uses the sniper scope's electronic aiming point as the symbol of his mental tenacity to achieve excellence: the act of holding the red dot on the target no matter what symbolizes his life lesson that one should always strive for excellence and never give up.[33] Webb supports his claim by juxtaposing the effects of good and bad leadership

---

[28] MAX BOOT, INVISIBLE ARMIES, at xx–xxi, xxiii–xxiv (2013) (referring to asymmetric warfare as the broader category of guerrilla and terrorist tactics under the category of asymmetric warfare).

[29] *Id.* app. (The *Invisible Armies* database).

[30] *See* U.S. DEP'T OF DEF., SUSTAINING U.S. GLOBAL LEADERSHIP 6 (2012).

[31] PRESIDENT OF THE UNITED STATES, NATIONAL SECURITY STRATEGY 5 (2010).

[32] *See* U.S. DEP'T OF DEF., *supra* note 30, at 3; *see also* C. Todd Lopez, *With Drawdown in Afghanistan, Army Regional Alignments Likely to Increase*, www.army.mil (May 31, 2013), http://www.army.mil/article/104/593.

[33] WEBB, *supra* note 1, at 191 (referring to the aiming point on a PEQ (portable laser special) laser sight as "red circle"), 371, 379–80.

traits[34] and by describing his victories through his undaunted tenacity and the defeats of those who gave up.[35] He stresses that both Basic Underwater Demolition/SEAL training and SEAL sniper training are all about mental strength, and not necessarily about physical strength.[36] It implies that one achieves excellence with mental concentration and perseverance. His successful deployment experience and his success as a SEAL sniper course manager serve as proof for the reader of why excellence matters.[37]

In addition to his experience, Webb also relies on two outside sources to support his claim: journalist Malcolm Gladwell's 2008 bestselling book, *Outliers*, and shooting champion Lanny Bassham's mental management training.[38] Relying on Gladwell's "10,000-Hour Rule," which states that one must practice a skill over 10,000 hours to achieve "outstanding (outlying) success," Webb attributes SEAL's excellence to its "eighty hours a week" training for "two and half years"—roughly 10,000 hours.[39] As the sniper course manager, Webb used Bassham's mental management training, in which one must have "complete and total confidence" and practice "mental rehearsal," to train two of his students he mentored.[40] At the class's first shooting test, the two shot "the highest score in U.S. Navy SEAL sniper course history."[41] Readers will find it hard to refute his argument for how to achieve excellence; instead, they will find themselves questioning whether they themselves are pursuing excellence or settling for mediocrity. As Webb successfully impresses the importance of excellence, the reader will appreciate his insight into leadership through his experience as a follower and a leader.

---

[34] *Id*. at 24–26 (Captains Bill and Mike versus George Borden), 74–77 (Lieutenant Burkitt versus Lieutenant Kennedy), 84–85 (USS *Lincoln* versus USS *Kittyhawk*), 265–67 (Cassidy versus Smith).

[35] *Id*. at 92 (Lars, pre-BUD/S buddy, quits the first week), 103–05 (Webb toughs it out in Hell Week), 117 (Travers, Naval Academy grad, quits), 140 (Oldwell, BUD/S Honor Man, quits).

[36] *Id*. at 104 ("What SEAL training really tests is your mental mettle."), 168–69 (asserting that to become a SEAL sniper, "Most of it is mental.").

[37] *See* sources cited *supra* notes 13–14; WEBB, *supra* note 1, at 347 (commended for graduating "highest percentage of qualified snipers in Naval Special Warfare Center (NSWC) history).

[38] WEBB, *supra* note 1, at 214 (Gladwell's 10,000-Hour Rule), 349–53 (Bassham's mental management). *See generally* MALCOLM GLADWELL, OUTLIERS (2008); LANNY BASSHAM, WITH WINNING IN MIND (3d ed. 2011).

[39] WEBB, *supra* note 1, at 214.

[40] *Id*. at 349–53.

[41] *Id*. at 353.

V. Leadership Lessons

Throughout the book, Webb illustrates leadership principles through situations that military professionals will readily identify with: a comparison of the crew's morale between two ships, demonstrating the importance of keeping subordinates abreast of a leader's intent and plans;[42] a superior's failure to properly counsel subordinates before giving a low evaluation;[43] a reorganization of a SEAL platoon, demonstrating that leadership matters even in a unit with highly trained SEALs;[44] an officer's humility to admit his failings and willingness to follow a subordinate's better plan,[45]contrasted with another officer's lack of humility;[46] Webb's moral courage to confront his supervisor's deficiency;[47] and Webb creating a mentor relationship between sniper instructors and students, demonstrating the importance of leaders to invest and care for subordinates' development.[48] These are all superb highlights of Webb's narrative; the reader will become engaged in the stories as he pores over these outstanding portions of *The Red Circle*.

These leadership lessons echo the common leadership principles of the armed forces: "build and sustain" a unit's morale by keeping subordinates informed;[49] set and maintain standards by proper

---

[42] *Id*. at 84–85 ("I often found myself reflecting on the lesson of the two captains: the importance of talking to your people, sharing the plan with them so they know where you're headed and the purpose behind it. . . . Engage your crew. Have a dialogue; let them know that you know they exist and that they're part of what you're all up to.").

[43] *Id*. at 87 (depicting Webb's rating officer correcting Webb's evaluation because Webb "was never given an opportunity to correct the deficiency").

[44] *Id*. at 223 ("[Echo Platoon was] a mess in general. It was so clear that they had never had any really good leadership. They'd had no one to look up to or learn from.").

[45] *Id*. at 250 ("One thing about Cassidy I really appreciated: He wasn't afraid to admit when he'd been wrong. To me, this is one of the strongest marks of great leadership. Nobody is always right. Great leaders use that to learn and improve instead of fighting it."), 267 ("[Cassidy] was our officer in charge, but he also knew he wasn't the most tactically experienced guy there. Like a good leader, he was the first to defer to the person with more experience.").

[46] *Id*. at 257–58 (depicting Lieutenant Commander Smith insisting that team wears armor not heeding the advice of more tactically, operationally experienced subordinates).

[47] *Id*. at 360–61 (depicting Webb risking his Navy career by documenting his supervisor's deficiencies and reporting it to higher) ("I knew it could be the end of my career in the [N]avy—the unfortunate fate of Chief Chris had made that abundantly clear—but we couldn't keep operating like this. Harvey was screwing up the course.").

[48] *Id*. at 346–47 (depicting the mentorship of the students made the instructors take ownership over their mentees, resulting in higher graduation rate).

[49] *See* U.S. DEP'T OF DEF., THE ARMED FORCES OFFICER 57–59 (2007).

counseling;[50] build trusting bonds with subordinates;[51] display moral courage by doing "what is right, even when it is difficult or not in your immediate best interests";[52]and develop subordinates by creating an inspirational organizational culture and environment.[53] Readers will find that immersing themselves in Webb's accounts reinforces these valuable and laudable principles.

VI. Conclusion

The Red Circle is overall an inspiring book, recommended for military professionals; however, like Pausch, Webb succeeds in writing a memoir with a "head fake"—the book is really for his three children.[54] Thus, Webb achieves his purpose in writing, but for the readers not related to Webb, the book makes a great addition to a military reader's professional book collection.

---

[50] *See id*. at 54–55.
[51] *See id*. at 52–54.
[52] *See id*. at 56.
[53] U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP paras. 35–37 (1 Aug. 2012) (C1, 10 Sept. 2012).
[54] *See supra* note 6 and accompanying text (on Pausch's "head fake"); *see also* WEBB, *supra* note 1, dedication ("For my three children"); Webb, *supra* note 6 ("It's written for my own family, who would otherwise not know what I was doing overseas or why when I was gone all the time.").

By Order of the Secretary of the Army:

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

Official:

GERALD B. O'KEEFE
Administrative Assistant
to the Secretary of the Army
1402803