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MILITARY LAW REVIEW

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MILITARY LAW REVIEW

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THE SECRET TO MILITARY JUSTICE SUCCESS: MAXIMIZING EXPERIENCE

MAJOR JEFFREY A. GILBERG[*]

"Insanity is repeating the same mistakes and expecting different results."[1]

I. Introduction

Despite the best efforts at all echelons of the Judge Advocate General's (JAG) Corps, the Army's military justice system *continues* to suffer from a lack of litigation experience.[2] Army prosecutors and defense counsel are routinely sent into court with little meaningful

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[1] Narcotics Anonymous World Service Conference Literature Sub-Committee 11 (Nov. 1981). Interestingly, this quotation has often been misattributed to Albert Einstein. *See* Michael Becker, *Einstein on Misattribution: 'I probably didn't say that,'* BECKER'S ONLINE J. (Nov. 13, 2012) [hereinafter Narcotics Anonymous], *available at* http://www.news.hypercrit.net/2012/11/13/einstein-on-misattribution-i-probably-didnt-say-that/ (analyzing and presenting the possible actual sources for this quotation, to include Narcotics Anonymous literature).

[2] *See* Major Derrick W. Grace, *Sharpening the Quill and Sword: Maximizing Experience in Military Justice*, ARMY LAW., Dec. 2010, at 24 ("The Army's military justice system suffers from a lack of experienced practitioners.").

experience and without the benefit of a seasoned practitioner to guide them through the process.[3] This lack of experience often results in substandard litigation and poor professional development of junior judge advocates. The Army JAG Corps' failure to adequately address this problem has exacerbated the issue by creating a perpetual cycle of inexperienced supervisors advising inexperienced litigators on how to try very serious cases.

None of these assertions are novel.[4] In fact, the list of individuals who previously have written or spoken on this topic is both long and distinguished.[5] However, while many identify the lack of litigation experience in the Army JAG Corps as the problem, very few have offered a way to address it. Further, even the ones who have—their proposed solutions are general, lacking any meaningful specificity. This article builds on the ideas of others and picks up where they left off—by combining their ideas with several best practices into one specific and detailed plan to implement immediately.

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[3] *See id.* at 31 (pointing out that "[o]ften, young, untested counsel in the Army are assigned cases with little or no supervision or their supervisors lack the time and experience to provide mentorship").

[4] *See, e.g. id. See also* Major Nathan J. Bankson, *A Justice Manager's Guide to Navigating High Profile Cases*, ARMY LAW., July 2012, at 4; Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1 (1998); Major David L. Hayden, Major Willis C. Hunter & Major Donna L. Wilkins, *Training Trial and Defense Counsel: An Approach for Supervisors*, ARMY LAW., Mar. 1994, at 21; Kenneth J. Hodson, *Military Justice: Abolish or Change?*, 1975 MIL. L. REV. 579 (1975); Lieutenant Colonel Gary J. Holland, *Tips and Observations from the Trial Bench*, ARMY LAW., Jan. 1993, at 9; 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); Major Stephen J. McManus, *TRIALS: Advocacy Training for Courts-Martial*, 35 REP. 16, no. 3 (2008); Lieutenant Colonel Edye U. Moran, *A View from the Bench: The Guilty Plea—Traps for New Counsel*, ARMY LAW., Nov. 2008, at 61; Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 15; Colonel Joe P. Peck, *Critique of Counsel Subsequent to Trial*, 15 A.F. L. REV. 163 (1973); Colonel Charles N. Pede, *Military Justice, The Judge Advocate and the 21st Century*, ARMY LAW., Apr. 2011, at 32; Charles D. Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, Heritage Foundation, Special Report from the Douglas & Sarah Allison Ctr. for Foreign Pol'y Stud., no. 149, Nov. 6, 2013, *available at* http://report.heritage.org/sr149.

[5] *See e.g.*, Grace, *supra* note 2; Bankson, *supra* note 4; Cooke, *supra* note 4; Hayden, Hunter & Wilkins, *supra* note 4; Hodson, *supra* note 4; Holland, *supra* note 4; Ku, *supra* note 4; McManus, *supra* note 4; Moran, *supra* note 4; Morris, *supra* note 4; Peck, *supra* note 4; Pede *supra* note 4; Stimson, *supra* note 4.

As a part of this article, this author conducted a two-part anonymous survey.[6] Part One captured a snapshot of the Army JAG Corps' military justice proficiency by surveying *all* personnel then-occupying military justice litigation positions.[7] Part Two of the survey obtained impressions—both positive and negative—of the Army's special victim prosecutor (SVP) program by surveying (1) SVPs (past and present); (2) those judge advocates who have ever tried a contested case with a SVP; (3) experienced court reporters (CRs); (4) current military judges (MJs); (5) regional defense counsel (RDCs); (6) chiefs of justice (COJs); and (7) senior defense counsel (SDCs).[8] While Part One substantiates the problem of litigation inexperience in the Army's current military justice practice, Part Two emphasizes the benefit of pairing experienced litigators with junior counsel in real cases.

This article first identifies and substantiates the problem of inexperience in the Army's military justice system. Second, it discusses the SVP program as a successful Army initiative already in place that effectively utilizes litigation experience. Third, by building upon the success of the SVP model, as well as the ideas and observations of others, this article proposes a detailed plan that directly addresses and solves the problem of litigation inexperience in the JAG Corps.

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[6] Major Jeffrey A. Gilberg, Criminal Law Survey (2014) [hereinafter Gilberg Survey] (on file with author). The survey was anonymous, meaning that all survey responses have been coded numerically so that nobody other than this author can attribute any comment to any particular person. To the extent that a specific comment is referenced in this article, such reference is merely be to that code, rather than to a name. Additionally, responses are also designated by position. Specifically, chiefs of justice are designated as COJ; regional defense counsel are designated as RDC; senior defense counsel are designated as SDC; special victim prosecutors are designated as SVP; trial counsel are designated as TC; and, court reporters are designated as CR. Therefore, as an example, a comment made by the 117th trial counsel would be cited as TC117. Additionally, when referencing any of the anonymous survey responses in this article, the male pronouns (e.g., he, him) are used over the corresponding female pronouns (e.g., she, her). However, use of the male pronoun thus does not mean that the referenced survey response was provided by a male. Similarly, whenever a survey response references another individual (e.g., an SVP with whom the survey respondent has worked), that other individual is also referenced as a male (e.g., he, him). Again, this does not mean that the referenced individual is actually a male. This choice was made to make the article easier to read by avoiding the use of the terms "he/she" and "him/her."

[7] *Id.* For purposes of this article, military justice litigation positions are those positions that are actively involved with prosecuting or defending courts-martial, to include COJs, SDCs, TCs, DCs, and SVPs.

[8] *Id.*

This plan realigns the Army's geographical jurisdiction, creates new supervisory positions while redefining those that already exist, alters the current military justice additional skill identifier (ASI) system, and codes certain positions with clearly defined prerequisites as part of a newly established military justice career track. None of these proposed changes, by themselves, are original.[9] However, as a whole, this plan offers a new and comprehensive approach to solving the Army JAG Corps' very old problem of inexperience. Together, all of these changes would better utilize the litigation experience within the Corps, while simultaneously improving the development of junior judge advocates, the quality of the Army's litigation practice, and the degree of justice delivered to all.

As Brigadier General John S. Cooke, who was then serving as the Commander of the United States Legal Services Agency, once remarked, the Army's military justice system is fair and works "very well" even though it may not always get the positive recognition that it deserves.[10] Nonetheless, he also recognized that the system is not perfect; therefore, "we can never stop looking for ways to improve it."[11] One of those imperfections continues to be the lack of litigation experience of judge advocates engaged in military justice practice. In order to properly address this problem, systemic changes that maximize the litigation expertise of the Army's law firm are necessary.[12]

II. The Problem: A Lack of Military Justice Litigation Experience

For decades, the Army's military justice system has been plagued by a lack of litigation experience. Over the years, many have identified the problem. For example, in 1973, Major General Kenneth J. Hodson, then serving as Chief Judge of the United States Court of Military Review, recognized that each of the services are always searching "for ways to

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[9] Donald Rumsfeld, the two-time former U.S. Secretary of Defense, once admitted that he was not sure if he had ever had a "truly original thought" in his entire life. DONALD RUMSFELD, RUMSFELD'S RULES: LEADERSHIP LESSONS IN BUSINESS, POLITICS, WAR, AND LIFE, at xii (2013). While Rumsfeld's admission may be an exaggeration, it nonetheless highlights an important point; logical solutions often originate in the best practices of others, building upon their ideas. The plan proposed in this article is no different.

[10] Cooke, *supra* note 4, at 11–12. Brigadier General Cooke retired in 1998 as a brigadier general.

[11] *Id.*

[12] *See id*. at 3 (stating that there is a "necessity for military justice to change if it is to survive and thrive").

provide more independent, more experienced prosecutors and defense counsel."[13] Yet, despite these efforts, there remained "a need to improve the experience of counsel for both sides."[14]

In the 1990s, several judge advocates continued to recognize the problem of litigation inexperience. In 1993, then Lieutenant Colonel Gary J. Holland, who at the time was serving as a military judge at Fort Stewart, cited frequent counsel rotations within Staff Judge Advocate (SJA) offices and "the waning number of courts-martial" as two explanations of why trial counsel (TCs) and defense counsel (DCs) are unable to gain meaningful litigation experience.[15] This, he argued, "can be upsetting not only to counsel, but also to military judges."[16]

In 1994, then Major Lawrence J. Morris, the Deputy Staff Judge Advocate at the 3d Infantry Division, substantiated Lieutenant Colonel Holland's claim that the Army's caseload was waning by examining the number of Army courts-martial each year between 1980 and 1992.[17] Major Morris determined that there was a 69% drop during that timeframe.[18] He concluded that this drop, along with a slight increase in the overall size of the JAG Corps, "translate[d] into a Corps with markedly less trial experience."[19] As fewer cases meant fewer opportunities for judge advocates to learn from experience, Major Morris argued that the problem would only worsen because supervisors and trainers tasked with mentoring junior judge advocates would gradually possess less trial experience to draw upon and share with their

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[13] Hodson, *supra* note 4, at 604. Prior to serving as the Chief Judge of the U.S. Court of Military Review (from 1971 to 1974) Major General Hodson served as The Judge Advocate General (TJAG) of the U.S. Army Judge Advocate General's (JAG) Corps (as 27th TJAG from 1967 to 1971). Major General Hodson retired in 1974 as a major general.

[14] *Id. See also* Peck, *supra* note 4, at 163 (noting that the inexperienced are assisting each other, which often "multiplies the frequency of errors").

[15] Holland, *supra* note 4, at 9. Lieutenant Colonel Holland retired as a colonel.

[16] *Id. See also* Major Matthew McDonald, *A View from the Bench: "You Don't Know What You Don't Know,"* ARMY LAW., July 2010, at 38, 39 (stating that it should not be incumbent upon the military judge "to catch the mistakes" of counsel). Major McDonald remains on active duty and has since been promoted to lieutenant colonel.

[17] Morris, *supra* note 4, at 15. Major Morris retired as a colonel.

[18] *Id*. (noting that the number of total courts-martial went from 5,803 in 1980 to 1,778 in 1992).

[19] *Id*.

subordinates.[20] Regardless, the decreasing number of cases was becoming particularly problematic because—as Brigadier General Cooke remarked in 1998—it forced supervisors to throw inexperienced litigators "into the deep end of the pool before they [were] really good swimmers."[21]

Over the past few years, many have continued to examine the Army's lack of litigation experience. In 2009, then Major Fansu Ku, the COJ for the 101st Airborne Division, discussed military justice experience in the context of the trial judiciary and the selection of MJs.[22] She wrote that the "trial experience level of many [j]udge [a]dvocates has gone down over the years, especially with a high operational tempo and the increasing emphasis on other areas of practice."[23] Major Ku asserted there are many judge advocates who simply do not know how "to effectively practice military justice."[24]

In 2010, then Major E. John Gregory, serving as a professor at the United States Military Academy, emphasized how much of a difference military justice experience can make in a deployed environment.[25] However, he found "the vastly different levels of military justice experience among the TCs" to be a cause for concern.[26] He argued that

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[20] *Id. See also* Hayden, Hunter & Wilkins, *supra* note 4, at 21 (stating that "new trial and defense counsel will not have the benefit of their supervisors' experience to the same extent that their predecessors had").

[21] Cooke, *supra* note 4, at 13. Reduced caseloads have similarly affected the other services as well. *See* McManus, *supra* note 4, at 16 (observing that the decreasing number of courts-martial has contributed "to an overall decrease in litigation experience").

[22] Ku, *supra* note 4. Major Ku remains on active duty and has since been promoted to lieutenant colonel. Since publishing her article, she has served as a Deputy Staff Judge Advocate (DSJA) in Afghanistan, a military judge in the Army's first judicial circuit, and is currently the Chief of the Defense Counsel Assistance Program (DCAP). E-mail from Lieutenant Colonel Fansu Ku, to Major Jeffrey A. Gilberg (Feb. 6, 2014, 14:59 EST) (on file with author).

[23] Ku, *supra* note 4, at 75.

[24] *Id.* at 81 ("[T]he supposition that all [j]udge [a]dvocates know how to effectively practice military justice may no longer be valid.").

[25] Major E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*, ARMY LAW., Jan. 2012, at 6, 8. Major Gregory remains on active duty and has since been promoted to lieutenant colonel. E-mail from Lieutenant Colonel E. John Gregory, to Major Jeffrey A. Gilberg (Mar. 13, 2014, 19:22 EST) (on file with author).

[26] Gregory, *supra* note 25, at 8.

providing necessary training for inexperienced counsel is a challenging endeavor.[27]

And, in 2012, Major Nathan J. Bankson, who was then serving in the Litigation Division at Fort Belvoir, emphasized the importance of leveraging litigation experience in high-profile cases.[28] In that context, Major Bankson discussed the perceived and actual lack of litigation experience of both trial and defense counsel as well as the need to identify and use experienced practitioners to assist those inexperienced counsel develop their advocacy skills.[29] To improve the quality of the Army's litigation in high-profile cases and the consistency with which these cases are disposed, he advocated for more training so that when such a case arises, a local, experienced attorney would be available to litigate it.[30]

However, Major Derrick Grace's 2009 anonymous criminal law survey of judge advocates then serving in military justice positions was the first real attempt to substantiate the Army's problem of inexperience with quantifiable data.[31] His survey was distributed to all SDCs and COJs, as well as to the judge advocates serving under their supervision.[32] It asked each respondent to provide details with respect to their military justice litigation experience (i.e., number of courts-martial litigated, number of contested cases, amount of time spent in a criminal law position).[33] As a result of Major Grace's efforts, 107 judge advocates then serving in military justice positions participated in the survey.[34] The results substantiated what many had been saying for years—that the

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[27] *Id*. at 8–9.

[28] Bankson, *supra* note 4, at 4. Major Bankson remains a major serving on active duty in the Litigation Division at Fort Belvoir, Virginia. E-mail from Major Nathan Bankson, to Major Jeffrey A. Gilberg (Feb. 6, 2014, 09:52 EST) (on file with author).

[29] Bankson, *supra* note 4, at 7, 11.

[30] *Id*. at 26.

[31] Grace, *supra* note 2, at 24. Major Grace remains a major serving on active duty. Since the publication of his article, Major Grace has served as the Assistant Executive Officer at The Judge Advocate General's Legal Center and School (TJAGLCS), a SDC in Afghanistan, and the COJ at Fort Bliss, Texas. E-mail from Major Derrick W. Grace, to Major Jeffrey A. Gilberg (Feb. 6, 2014, 09:56 EST) (on file with author).

[32] Grace, *supra* note 2, at 24 n.3.

[33] *Id*. app.

[34] Of the 107 survey respondents, 32 were TCs, 10 were senior trial counsel (STCs), 21 were COJs, 21 were SDCs, 21 were DCs, and 2 were not in any of the categories listed above. E-mail from Major Derrick W. Grace, to Major Jeffrey A. Gilberg (Nov. 1, 2013, 11:00 EST) (on file with author) [hereinafter Grace e-mail].

Army's military justice system "suffers from a lack of experienced practitioners."[35]

Overall, Major Grace's survey revealed that 41.7% of his survey respondents had tried 10 or fewer total cases and 74.5% had tried 10 or fewer contested courts-martial.[36] Broken down further, 66.7% of the responding TCs (including senior trial counsel (STCs)) had tried 10 or fewer total cases and 89.7% of the participants had tried 10 or fewer contested courts-martial.[37] As Major Grace noted, the experience on the defense bar was not much better.[38] Of the 21 DCs who provided data, 85.7% of them had tried 10 or fewer contested courts-martial.[39]

Equally alarming as the lack of TC and DC experience was that of their supervisors. Only 38.9% of the responding COJs had tried more than 10 contested cases.[40] And, while 55% of SDCs had tried more than 10 contested cases, the effect was the same—in 2009, it appeared to be a

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[35] Grace, *supra* note 2, at 24. The author obtained the raw data from Major Grace's Survey, which was compiled in a Microsoft Excel spreadsheet, via e-mail. Grace e-mail, *supra* note 34. The percentages that are referenced in this article that pertain to Major Grace's Survey were determined by examining this raw data, rather than simply citing the percentages that Major Grace selected for inclusion in his article. This author wished to quantify the survey results in a slightly different way than the manner chosen by Major Grace for his article. It is important to note that the raw data provided by Major Grace includes the responses received from 105 judge advocates, rather than the 107 referenced in Major Grace's final article. This is due to Major Grace receiving responses from two judge advocates who either did not provide their position or the position was outside the focus of Major Grace's analysis. Therefore, although their responses could not be used for the raw data, their experience warranted inclusion in his article. Additionally, some of those 105 judge advocates chose to not respond to all of the questions posed by his survey. For example, only 103 of 105 provided a figure as to how many total cases they had litigated; only 98 of 105 provided data as to how many contested cases they had litigated; and, only 94 of 105 provided data as to how much time they had served in military justice positions during their respective JAG Corps careers. Due to all of the factors described above, the percentages referenced in this article may not perfectly match the percentages referenced in Major Grace's published article.

[36] *See generally* Major Derrick W. Grace, Criminal Law Survey (2009) [hereinafter Grace Survey] (on file with author). Although the conventional rule is to spell out numbers zero to ninety-nine in text and footnotes, this author has elected not to do so in many sections of this paper. This choice was made to make those sections easier to read.

[37] *Id*.

[38] Grace, *supra* note 2, at 26.

[39] Grace Survey, *supra* note 36.

[40] *Id*.

luck of the draw whether any particular TC or DC had access to a mentor with any meaningful experience.[41]

Despite Major Grace's efforts to not only identify the problem but to also quantify it with real data, the problem persisted. Perhaps his survey was ignored because it only represented a small sample of those personnel then serving in military justice positions. Perhaps some believed that if the sample size were larger, the data would reveal more litigation experience than Major Grace's survey exposed. If such doubters do exist, they are mistaken.

To confirm and further substantiate the problem of litigation inexperience, this author conducted a similar survey.[42] However, unlike Major Grace's survey, which considered the responses of a select few, the survey underlying the findings in this article was designed to account for the litigation experience of *all* personnel currently serving in a military justice litigation position—specifically, *all* COJs, SDCs, TCs, DCs, and SVPs.[43]

To do so, it was first necessary to determine exactly how many individuals were serving in those positions. By coordinating with the Trial Counsel Assistance Program (TCAP) and the Defense Counsel Assistance Program (DCAP), this author learned that there are currently 48 COJs, 34 SDCs, and 23 SVPs serving at installations around the world.[44] Second, those 48 COJs supervise a total of 230 TCs while those 34 SDCs supervise a total of 110 DCs.[45] Thus, at the time of the survey

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[41] *Id*. *See also* Grace, *supra* note 2, at 26 ("The fact that a STC at one post has prosecuted more than thirty cases does not assist the TC at a different post whose STC has little experience and whose COJ is at [ILE] for three months."); Peck, *supra* note 4, at 163 (concluding that many counsel are unprepared to litigate because they lack an experienced counsel "from whom they can seek guidance and assistance").

[42] *See generally* Gilberg Survey, *supra* note 6.

[43] *Id*.

[44] After coordinating with the Trial Counsel Assistance Program (TCAP) and the Defense Counsel Assistance Program (DCAP), the accuracy of those lists was confirmed and/or adjusted by directly contacting the individual judge advocates listed through the spring of 2014.

[45] *See generally* Gilberg Survey, *supra* note 6. This was determined by asking each COJ and SDC how many counsel they supervise and adding all of their respective responses together. *Id.* *See* Appendix A (Distributed Surveys).

in early 2014, 445 active duty Army judge advocates were serving in military justice litigation positions.[46]

Next, in order to obtain a snapshot of the military justice experience possessed by *all* 445 of these judge advocates, SVP, COJ, and SDC survey participants were asked to report back on the total number of courts-martial they have litigated, how many of those cases were contested, how many of them were in front of a panel, and how many total months of their JAG Corps careers they have spent serving in military justice positions.[47] Additionally, COJs and SDCs were asked to do the same for the counsel they supervise by polling them individually.[48] Thus, the survey sought to obtain the experiential data of all 230 TCs and all 110 DCs.[49] The survey was successful in achieving 100% participation, meaning that *every* current SVP, COJ, and SDC responded, thereby providing a complete indication of the Army JAG Corps' current military justice experience, as represented by the litigation statistics personally provided by the 445 judge advocates currently serving in military justice litigation positions.[50]

The results are troubling. On average, the 445 judge advocates currently serving in the JAG Corps' military justice litigation positions have tried 16.9 total courts-martial; of those, 7.3 are contested courts-martial and 4.5 are panel cases.[51] Moreover, 48.5% (compared to 41.7% in the Grace Survey[52]) of survey respondents have tried 10 or fewer total cases and 78.0% (compared to 74.5% in the Grace Survey[53]) have tried 10 or fewer contested courts-martial.[54] Broken down further, 71.7% (compared to 66.7% in the Grace Survey[55]) of responding TCs have tried

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[46] *See generally id.* This number was determined by adding the total number of SVPs (23), COJs (48), SDCs (34), TCs (230), DCs (110) to reach the combined total of 445. Additionally, five RDCs also participated in this survey; however, for purposes of this article, those positions, while in the military justice arena, are not considered *litigation* positions.

[47] *See id. See* Appendix A (Distributed Surveys).

[48] *Id.*

[49] *See generally id*.

[50] *Id.*

[51] *Id*. Even more troubling is that the median for these values (total courts-martial, contested courts-martial, panel cases) reflect an even lower level of experience. *Id.*

[52] Grace Survey, *supra* note 36.

[53] *Id.*

[54] Gilberg Survey, *supra* note 6.

[55] Grace Survey, *supra* note 36.

10 or fewer total cases and 89.0% (compared to 89.7% in the Grace Survey) of them have tried 10 or fewer contested courts-martial.[56]

Once again, similar to Major Grace's findings, this survey also revealed that the experience on the defense bar—although better—remains below what it ought to be.[57] While the 230 TCs average 7.4 total courts-martial (of those, 3.2 are contested courts-martial and 2.0 are panel cases), the 110 responding DCs average 18.3 total courts-martial (of those, 7.7 are contested courts-martial and 4.6 are panel cases).[58] Despite the average DC possessing more than double the experience of the average TC, the numbers remain below the level of experience an accused should be provided. Of the 110 DCs, 72.7% (compared to 85.7% in the Grace Survey) of them had tried 10 or fewer contested courts-martial.[59] Simply stated, an accused whose professional and personal livelihood is on the line at court-martial should be afforded legal representation with more experience than this.

Also, just as Major Grace's Survey exposed in 2009, the survey for this article also uncovered an alarming lack of experience possessed by military justice supervisors.[60] While the 48 COJs average 29.0 total courts-martial (11.6 contests and 8.1 panel cases), the 34 SDCs average a comparable 31.8 total courts-martial (11.4 contests and 7.0 panel cases).[61] Moreover, only 39.6% (compared to 38.9% in the Grace Survey[62]) of the responding COJs have tried more than 10 contested cases.[63] Similarly, 55.8% (compared to 45% in the Grace Survey[64]) of SDCs have tried 10 or fewer contested cases.[65] Regardless, the effect is the same; in 2014, just as was the case in 2009, it is a luck of the draw whether any particular TC or DC has access to a supervisor with any meaningful experience (See Table 1, Average and Median of Courts-Martial Litigated and Time in Military Justice.)[66]

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[56] Gilberg Survey, *supra* note 6.
[57] *See generally id*.
[58] *Id.*
[59] *Id*.
[60] *See generally id*.
[61] *Id.* Once again, the median for these values reflect an even lower level of experience. *Id.*
[62] Grace Survey, *supra* note 36.
[63] Gilberg Survey, *supra* note 6.
[64] Grace Survey, *supra* note 36.
[65] Gilberg Survey, *supra* note 6.
[66] *See id*. SDC4 (cautioning that "most Chiefs of Justice have no idea what they are doing").

Position	Total Cases Average / Median	Total Contested Cases Average / Median	Total Panel Cases Average / Median	Total Months in Military Justice Average / Median
230 TCs	7.42 / 5	3.2 / 1	2.0 / 1	13.16 / 11
48 COJs	29.0 / 23	11.6 / 8	8.1 / 6	45 / 45
110 DCs	18.3 / 16.5	7.7 / 7	4.6 / 3	25.9 / 26
34 SDCs	31.8 / 30	11.4 / 10	7.0 / 6	45.5 / 40
23 SVPs	58.7 / 50	30.8 / 25	20.2 / 15	71.5 / 72
Total (445)	16.9 / 10	7.3 / 4	4.5 / 2	25.2 / 18

Table 1. Average and Median of Courts-Martial Litigated and Time in Military Justice

The survey's findings expose two major concerns. First, the quality of the case presented suffers when it is litigated by junior counsel as opposed to experienced practitioners.[67] This is unfair to the Soldier accused of a crime as well as to the government, which deserves justice and accountability. Second, since there is a shortage of supervisory litigation experience, new counsel are deprived of quality on-the-job professional development that they otherwise would have received had their supervisors possessed meaningful litigation experience to pass along.[68]

The 2014 case of *United States v. Hornback* highlights these concerns.[69] In that case, the Court of Appeals for the Armed Forces granted review to consider whether the TC had committed prosecutorial misconduct in a case involving drug use.[70] Overall, the military judge called at least six 39a sessions outside the presence of the members and sustained at least seven defense objections—most of which related to the TC's misunderstanding and disregard of Military Rule of Evidence (MRE) 404b.[71] As the majority opinion summarized, the TC was unable "to either understand or abide by the military judge's ruling and

[67] *See, e.g.*, United States v. Hornback, 73 M.J. 155 (C.A.A.F 2014) (providing an example of just how detrimental it can be to send an inexperienced practitioner into court alone).
[68] *Id.*
[69] *Id.*
[70] *Id.* at 156.
[71] *Id.* at 156–59.

instruction during the two-and-a-half day trial on the merits."[72] Judge Baker's dissent pointed out that there were "eighteen instances of impermissible evidence coming before the members."[73]

Perhaps the most troubling aspect of this case was identified by Judge Ohlson in his dissent.[74] He wrote that "[t]he nagging—if unspoken—question in this case is, 'where was the chief of justice?'"[75] Judge Ohlson also emphasized that the "trial counsel appeared to be not only 'inexperienced' but also 'unsupervised.'"[76] Moreover, as he appropriately concluded, "the responsibility to protect a servicemember's constitutional right to a fair trial does not rest solely with the lone trial counsel advocating in the courtroom; it extends to the chief of justice and to other supervisory officers as well."[77] Although this case was affirmed, it nonetheless represents how a trial counsel's inexperience, combined with a lack of meaningful supervisory guidance, can result in litigation disaster.[78]

III. Solving the Problem by Leveraging Litigation Experience

The best way to compensate for this lack of military justice experience is by pairing junior TCs and DCs with a more seasoned litigator as co-counsel in actual cases.[79] This would enable junior counsel to gain experience under the watchful eye of an experienced practitioner.[80] Not only would this enhance the junior judge advocate's military justice professional development, but it would also maintain the

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[72] *Id*. at 160.
[73] *Id*. at 162.
[74] *Id*. at 164–65.
[75] *Id*. at 165 n.1.
[76] *Id*.
[77] *Id*.
[78] *See id*.
[79] *See* Morris, *supra* note 4, at 36 (stating that one way to "exploit the experience" is to second-chair cases); Bankson, *supra* note 4, at 12 (suggesting that "more experienced counsel can coach, train and mentor the junior counsel as they work on the case together").
[80] *See* Peck, *supra* note 4, at 163 (encouraging counsel to "keep an inquisitive mind and not be ashamed to ask for suggestions and guidance from more experienced counsel"); Colonel Dennis F. Coupe & Major Charles E. Trant, *The Role of Chiefs of Military Justice as Coaches of Trial*, ARMY LAW., Aug. 1987, at 5, 9 (stressing that "[c]onstructive post-trial critiques immediately after trial, with followup after reading the record of trial, stretch the trial experience into a learning continuum").

integrity of the case.[81] In fact, some of the sister services have already launched litigation programs that seek to provide on-the-job professional development to junior judge advocates while also litigating a high-quality case.

In 1972, the Air Force (AF) created the STC program to identify "its best and most experienced litigators to serve as STCs and try the toughest cases."[82] These cases include sexual assault, child abuse, and homicides.[83] Currently, there are 18 AF STCs who are hand-selected litigators stationed across the United States, Europe, and Asia.[84] The program has been "integrated into the fabric of [AF] military justice"[85] and is utilized by AF SJAs from the investigation stage all the way through trial to maximize the quality of the government's case.[86] With an experienced litigator available to SJAs, cases are litigated and litigated well.[87]

Lieutenant Colonel Brian M. Thompson, who currently manages the AF STC program, reports that the AF's overall conviction rate in sexual assault cases last year was 20% higher when a qualified STC was detailed to the case.[88] But, most importantly, these 18 STCs also approach each case as an opportunity to teach, train, and develop the junior judge advocate sitting with them at counsel table.[89] As Lieutenant Colonel Thompson points out, STCs are typically teamed with a judge

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[81] *See* Coupe & Trant, *supra* note 80, at 11 (concluding that quality coaching "will result in cases being tried more effectively and professionally").

[82] Major Brian M. Thompson, Fact Sheet: Senior Trial Counsel . . . The Air Force "Special Victims Unit" (Feb. 20, 2013) [hereinafter AF STC Fact Sheet] (on file with author). Major Thompson remains on active duty in the Air Force and has since been promoted to lieutenant colonel.

[83] *Id*.

[84] E-mail from Lieutenant Colonel Brian M. Thompson, to Major Jeffrey A. Gilberg (Feb. 18, 2014, 11:50 EST) (on file with author).

[85] AF STC Fact Sheet, *supra* note 82. The O-6 Chief of the AF Government Trial and Appellate Counsel Division supervises the program through the O-5 Chief Senior Trial Counsel (CSTCs), who provides mentoring, feedback, and detailing decisions to STCs while also maintaining an active caseload (12 to 15 courts-martial per year). Major Brian M. Thompson, Fact Sheet: The Air Force "Special Victims Unit"—Current Structure In Detail (Feb. 20, 2013) [hereinafter AF SVU Fact Sheet] (on file with author).

[86] AF STC Fact Sheet, *supra* note 82.

[87] E-mail from Lieutenant Colonel Brian M. Thompson, to Major Jeffrey A. Gilberg (Feb. 17, 2014, 12:21 EST) (on file with author).

[88] *Id*. (stating that the AF sexual assault conviction rate is 67% when an appropriately qualified STC is detailed to the case, versus 47% when one is not).

[89] *Id*.

advocate "who has less than two year[s'] experience and likely has prosecuted fewer than five courts-martial."[90] This, he argues, benefits the junior TCs by providing them "one-on-one attention from seasoned [judge advocates], who review and supervise their work during the cauldron of actual courts-martial."[91] As such, the AF has succeeded in implementing a prosecution program that not only results in quality cases litigated by experienced counsel, but also provides effective military justice professional development to inexperienced counsel, thereby developing "the next generation of [AF] litigators."[92]

Similarly, the United States Marine Corps (USMC) carefully details TCs and DCs to courts-martial so that appropriate and qualified individuals litigate cases.[93] Marine Corps judge advocates may be detailed as a TC, ATC, DC, and ADC by their commanding officer, OIC, or designee.[94] Further, detailing TCs must be based upon the perspective, "experience, qualifications, and other traditional officer duties" of the counsel being considered.[95] Likewise, detailing defense counsel, which rests with the Chief Defense Counsel (CDC), also considers the perspective experience of counsel.[96]

However, striving to produce well-litigated cases by detailing competent litigators is only half of the USMC objective; it is also USMC policy to detail ATCs and ADCs to litigate these cases with an assigned first chair.[97] Similar to the AF's STC program, the USMC's detailing policy also strives to present well-litigated cases while also utilizing real cases as training opportunities to teach, train, and mentor co-counsel.[98]

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[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] U.S. MARINE CORPS, ORDER P5800.16A, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION paras. 1204, 2006 (31 Aug. 1999) (C7, 10 Feb. 2014) [hereinafter LEGADMINMAN].
[94] *Id*.
[95] *Id*. para. 1204(2)(b).
[96] *Id*. paras. 2006(1)–(2).
[97] *See id.* ("The detailing of assistant defense counsel to contested and/or complex cases is encouraged.").
[98] *See* U.S. MARINE CORPS, MARINE CORPS MILITARY JUSTICE REPORT FISCAL YEAR 2013, at 9 (6 Mar. 2014) (stating that the USMC provides "mentorship and on-the-job training offered by the [regional trial counsel] and other experienced judge advocates") [hereinafter USMC REPORT].

Like the Marines and the AF, the Army has launched an initiative of its own that seeks to exploit the litigation experience within its Corps. In January 2009, "the Secretary of the Army directed the creation of 15 [SVP] authorizations."[99] These SVPs, from lieutenant colonel to captain, are to "focus exclusively on litigation and training during 3-year tours—with an emphasis on sexual assault."[100] In May 2011, the SVP program was expanded to a total of 23 SVPs.[101] Because of the sensitive and emotional demands of the position, only those individuals "with the right trial skills and people skills" are selected to serve as SVPs.[102] The SVPs are regional positions that—although assigned to the United States Army Legal Services Agency (USALSA) at Fort Belvoir, Virginia—are physically dispersed with duty at various installations across the Army to serve not only that installation but also their entire respective geographic area of responsibility (AOR).[103]

An SVP's mission is twofold.[104] First, it is "to develop and litigate special victim cases within their geographic [AOR]."[105] SVPs should be detailed to prosecute sexual assault cases and family violence cases and must be consulted in *every* sexual assault and special victim case in their respective jurisdictions.[106] Second, the SVPs' mission is to develop, implement, and execute sexual assault and family violence training programs for investigators and TCs in their respective AORs.[107] This twofold mission of litigation and training is managed by TCAP, which requires each SVP to regularly coordinate and report on the number and status of each pending case within their jurisdictions.[108]

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[99] Major General Scott C. Black, *Special Victim Prosecutors and Highly Qualified Experts in Military Justice*, TJAG SENDS, Jan. 2009 [hereinafter SVP Program Announcement].
[100] *Id*.
[101] Lieutenant General Dana K. Chipman, *Expansion of Special Victim Prosecutor Program*, TJAG SENDS, May 26, 2011 [hereinafter SVP Expansion Announcement].
[102] *Id*.
[103] Policy Memorandum 14-06, Office of The Judge Advocate General, U.S. Dep't of Army, subject: Special Victim Prosecutors—POLICY MEMORANDUM 14-06 para. 4. (22 Jan. 2014) [hereinafter SVP Policy Memorandum]. An SVP's rating chain includes both an installation and an OTJAG-level supervisor. *Id*. para. 5.
[104] *Id*. para. 3.
[105] *Id*.
[106] *Id*. paras. 7b-c.
[107] *Id*. para. 3b.
[108] *Id*. para. 3d. The SVPs comply with this requirement by updating the online SVP database as well as submitting a case tracker and significant action slide each month to the Chief of TCAP. Telephone Interview with Lieutenant Colonel Alex Pickands, Chief, TCAP (Mar. 12, 2014) [hereinafter Pickands Interview].

Similar to the AF's STC Program and the USMC's detailing policies, the Army's SVP program also successfully leverages litigation experience by pairing seasoned practitioners with junior counsel in real cases.[109] Each case is a valuable training opportunity for an inexperienced attorney to learn from a battle-tested litigator.[110] For example, as one current SVP noted, a substantial amount of his time is spent "teaching TCs a great deal about how to be a TC."[111] A former SVP noted that at trial, he would take the time to explain to the TC everything they were doing and also why they were doing it.[112] Another former SVP revealed that on cases in which he was detailed in front of the bar, "the TCs received scores of hours of one-on-one live advice, assistance, collaboration, and strategy."[113] These efforts were and continue to be instrumental in TC development.

The SVP program demonstrates that pairing seasoned litigators with new counsel both greatly enhances the professional development of those new counsel and also improves the quality of the case presented. Lieutenant Colonel Alex Pickands, who previously served as SVP at Fort Hood and currently manages the SVP program as Chief of TCAP, reports that "SVPs have significantly increased the quality of our litigation practice."[114] Additionally, one current SVP described an important motion session during which the TC became flustered, leaned over, and whispered "Sir, you've got this right? Because I am way out of my league here."[115] The SVP was able to step in and provide the appropriate response, which the MJ later acknowledged had assisted him in issuing the appropriate ruling.[116] Although the primary motivation behind the SVP program's creation may not have been to pair experienced litigators with junior counsel on real cases, it has nonetheless become a convenient side-benefit of the program.

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[109] Pickands Interview, *supra* note 108.
[110] *See* Gilberg Survey, *supra* note 6, SVP24 ("Every case was a training opportunity.").
[111] *Id.* SVP7.
[112] *Id.* SVP31 ("[A]t trial I have the opportunity to talk through everything we are doing, tell the [TC] what I am doing and why, and allow the [TC] to reflect on it."). *See also id.* SVP9 (reporting that he "always made the TC 1st chair and made him or her do just a little bit more than they were comfortable with"), SVP14 (observing that "there is no substitute for actually getting your hands dirty and showing co-counsel, up close, some of the techniques and strategies that are useful in prosecuting a special victim case").
[113] *Id.* SVP35.
[114] Pickands Interview, *supra* note 108.
[115] Gilberg Survey, *supra* note 6, SVP8.
[116] *Id.*

IV. A Success Story: The Army's Special Victim Prosecutor (SVP) Program

In theory, using real cases and experienced practitioners is an effective way to develop the Army's next generation of litigators. But, how can we be sure? Although the SVP program is still relatively new and but a small part of the Army's military justice practice, it nonetheless provides an opportunity to examine whether pairing experienced practitioners with junior counsel *actually* accomplishes this objective—namely, presenting better litigated cases while also successfully developing the Army's next wave of experienced advocates.

To do so, Part Two of this article's survey was designed to obtain impressions—both positive and negative—of the SVP program by surveying SVPs (past and present); TCs (past and present) who have ever tried a contested case with an SVP; experienced CRs; and, current MJs, COJs, RDCs, and SDCs.[117] In particular, the survey sought feedback pertaining to the program's impact on case presentation, victim care, and the professional development of junior judge advocates.[118] Additionally, the survey asked respondents to provide identifiable strengths and weaknesses of the program.[119] The end result was a survey that obtained specific commentary from 269 individuals that have directly experienced the SVP program.[120] The results reveal that the SVP program has enjoyed considerable success in improving the quality of the Army's prosecution while simultaneously mentoring junior judge advocates simply by pairing them with experienced litigators as co-counsel in real cases.[121]

A. Valuable Professional Development

Of the 269 survey participants, 264 were asked whether SVPs positively contribute to the military justice professional development of junior judge advocates by sitting with them at counsel table in contested

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[117] *See* Appendix A (Distributed Surveys).
[118] *Id.*
[119] *Id.*
[120] *See generally* Gilberg Survey, *supra* note 6. This 269 total comprised of 42 COJs, 33 SDCs, 25 Court Reporters (CRs), 8 MJs, 5 RDCs, 35 SVPs, and 121 TCs—past and present—who have ever tried a contested case with an SVP. *Id.*
[121] *See* Pede, *supra* note 4, at 36 (reporting that initial reviews of the SVP program "have been universally positive").

cases.[122] While 240 (90.9%) of them answered "yes," only 24 (9.1%) answered "no."[123] Interestingly, positive responses were common not only among SVPs,[124] but also among COJs and SDCs. (See Table 2, Whether SVPs Positively Contribute to the Professional Development of Junior Judge Advocates.)[125]

Position (Number of Responses)	Responded Yes	Responded Yes/No	Total of Yes and Yes/No Responses	Responded No
TC Responses (121)	93 (76.9%)	12 (9.9%)	105 (86.8%)	16 (13.2%)
COJ Responses (42)	35 (83.3%)	7 (16.7%)	42 (100%)	0 (0%)
SVP Responses (35)	32 (91.4%)	3 (8.6%)	35 (100%)	0 (0%)
SDC Responses (33)	17 (51.5%)	12 (36.4%)	29 (87.9%)	4 (12.1%)
CR Responses (25)	17 (68%)	4 (16%)	21 (84%)	4 (16%)
MJ Responses (8)	4 (50%)	4 (50%)	8 (100%)	0 (0%)
Total (264)	198	42	240	24
Percentage	75%	15.9%	90.9%	9.1%

Table 2. Whether SVPs Positively Contribute to the Professional Development of Junior Judge Advocates

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[122] Gilberg Survey, *supra* note 6. The five RDCs who participated in this survey were not asked the question. *See* Appendix A (Distributed Surveys).

[123] Gilberg Survey, *supra* note 6. It is important to acknowledge that of those 240 survey respondents that answered "yes," 42 of them noted that they have also observed cases where the SVP's contribution to the professional development of the junior judge advocate sitting with them at trial was less than what it could have been. *Id*. Of the 24 survey respondents that answered "no" to the question of whether SVPs contribute to the military justice development of junior judge advocates, 11 complained that the SVP was not sufficiently qualified, 10 of them critiqued the SVP's lack of involvement in the case, and 7 criticized the SVP for not sharing the case enough at trial. *Id*. Additionally, 6 commented that the SVP was not interested in teaching the TC. *Id*.

[124] *See, e.g.*, *id.* SVP1 ("I've tried to take on a mentorship role to empower them to take ownership of their cases . . . ."), SVP11 (describing himself as a "teaching SVP" who is there to assist TCs in every aspect of their work), SVP24 (characterizing every case as "a training opportunity").

[125] *See generally id*.

For example, several COJs remarked that SVPs give TCs "an example of what right looked like."[126] Another COJ noted that their SVP guides TCs "through the process from the preferral to the end of the case, no matter the outcome."[127] Many COJs described SVP contributions to TC professional development as "invaluable"[128] or "indispensable."[129] As one COJ concluded, "the professional development for the junior counsel was exponentially greater" when an SVP was detailed to the case as co-counsel.[130]

Even members of the defense bar have noticed the positive contributions that SVPs often make towards the professional development of junior judge advocates. One SDC acknowledged that "[t]he SVP's participation has been essential in every court-martial I have ever been a part of."[131] Another SDC observed that "there was always a line in the hallway outside the SVP's office because junior attorneys wanted his advice on the best way to do things at court-martial."[132] Other SDCs praised the SVPs' active role at trial,[133] interest in educating junior TCs,[134] and their contributions to TC preparedness and presentation.[135] As one SDC put it, it is difficult to "see how the SVP's presence can be anything other than an advancement of professional development of the TC."[136]

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[126] *Id.* COJ5 ("The SVP provided an example of what right looked like for the TC, and guided the TC through the challenging parts of the case."), COJ12 ("[H]aving an experienced litigator assisting during the trial showed the TCs 'what right looks like' and provided experience to draw from at future trials.").

[127] *Id.* COJ16.

[128] *Id.* COJ7 (characterizing the SVP as "invaluable"), COJ30 (noting that the SVP has been an "invaluable asset" that "helps to develop the TC not only with the nuances of navigating the complex development/changes in Art[icle] 120 over the last 6 y[ea]rs, but also helps them to understand the court-martial process as a whole"), COJ35 (commenting that their SVP was "invaluable," serving as "a rock that counsel have relied upon").

[129] *Id.* COJ6 (describing the SVP as an "indispensable asset" in mentoring and coaching junior TCs).

[130] *Id.* COJ1.

[131] *Id.* SDC2.

[132] *Id.* SDC5. This SDC even went as far to analogize this scene to that of "a frenzy of baby piglets trying to get to the teat of knowledge." *Id.*

[133] *Id.* SDC22 (noting that the SVP's "[o]n the spot guidance and corrections were evident").

[134] *Id.* SDC27 (stating that the SVP "was helpful and worked through solutions with the trial counsel instead of just telling them what to do").

[135] *Id.* SDC7 ("I have no doubt that the SVP contributed significantly to the TC's level of preparedness and presentation.").

[136] *Id.* SDC19.

Perhaps the best way to determine whether SVPs have actually contributed to TC professional development is to ask those TCs themselves.[137] In order to do so, this author first asked all past and present SVPs to provide a list of those TCs with whom they have prosecuted a contested case during their tenure as an SVP.[138] After identifying those TCs (past and present), an anonymous survey was sent to all of them.[139] In total, 121 of them responded, thereby providing impressions of the SVP program from the perspective of TCs who actually prosecuted a contested case with an SVP sitting next to them at trial.[140]

Of the 121 TCs responding to the survey, 105 of them (86.8%) recognized that their experience of prosecuting a case with an SVP positively contributed to their own military justice professional development.[141] In contrast, only 16 of them (13.2%) believed that working alongside an SVP did not contribute to their professional development.[142] Even more telling was that many of the responding TCs were overwhelmingly passionate about their positive SVP experiences. One TC noted that "[my SVP] did more for my professional development as a young attorney than anyone else. . . . [He] taught me everything."[143] Another TC acknowledged that "[w]ithout [my SVP], I wouldn't be nearly where I am in my litigation and advocacy development."[144] While some TCs have described their co-counsel SVP as "paramount,"[145] "instrumental,"[146] "integral,"[147] and "essential"[148] to

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[137] In one survey response, an SVP encouraged this author to ask the TCs with whom he worked to obtain more accurate information since, in his view, those TCs "are strong willed enough" to provide an honest assessment of the SVP's contribution. *Id.* SVP6.

[138] *See* Appendix A (Distributed Surveys).

[139] *Id*.

[140] *See generally* Gilberg survey, *supra* note 6.

[141] *Id*. It is important to acknowledge that of those 105 survey respondents, 12 of them noted that the SVP program's overall impact upon their professional development was less than what it could have been. *Id.*

[142] *Id*.

[143] *Id.* TC74. *See also id.* TC41 ("If I had to pinpoint one person who developed me the most as a litigator, it would have to be this SVP."), TC51 ("If it wasn't for our SVP, I would have been lost.").

[144] *Id.* TC84. S*ee also id.* TC54 ("I grew leaps and bounds thanks to the participation of the SVP."), TC96 (volunteering that "the SVP was the first lawyer to really mentor me on how to try a case and make me feel confident in the product").

[145] *See, e.g.*, *id.* TC46 (acknowledging that "the SVP was/is paramount to my development").

[146] *See, e.g.*, *id.* TC13 (crediting the SVP's involvement as "instrumental in my professional development.").

their military justice professional development, others have qualified their SVPs' contributions as "vital,"[149] "phenomenal,"[150] "indispensable,"[151] and "immensely helpful."[152] As one TC put it, "[h]aving such an experienced attorney sit with me on the contested case made that trial the single best learning experience I've had as a TC."[153]

B. Competent Case Presentation

With respect to case presentation, 264 of the 269 survey participants were asked whether SVPs positively contribute to the quality of the case that is presented at trial.[154] While 241 (91.2%) answered "yes," only 23 (8.7%) answered "no."[155] Once again, positive responses were common not only among SVPs,[156] but also from COJs and SDCs. (See Table 3, Whether SVPs Positively Contribute to the Quality of the Case Presented at Trial.)[157]

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[147] *See, e.g.*, *id.* TC52 (noting that the SVP "was integral in my preparation").

[148] *See, e.g.*, *id.* TC109 (writing that "having an SVP at the table was essential to my military justice professional development").

[149] *See, e.g.*, *id.* TC68 (labeling the SVP as "vital to my professional development").

[150] *See, e.g.*, *id.* TC16 (describing an SVP as "a phenomenal legal resource, but more importantly, a great officer and person").

[151] *See, e.g.*, *id.* TC44 (writing that the SVP's assistance was "indispensable on a very difficult case").

[152] *See, e.g.*, *id.* TC67 ("The SVP's participation contributed to my [military justice] professional development immensely.").

[153] *Id.* TC47. *See also id.* TC28 ("The SVP's involvement throughout trial preparation opened my eyes to considerations I would not have otherwise made.").

[154] *See* Appendix A (Distributed Surveys). The five RDCs that participated in this survey were not asked this question. *Id.*

[155] Gilberg Survey, *supra* note 6. It is important to acknowledge that of those 241 survey respondents that answered "yes," 37 of them also noted that in at least one case, the SVP's contribution to the quality of the case was less than what it could have been. *Id.* Of the 23 survey respondents who answered "no," 14 of them cited the SVP's busy workload as the reason, whereas 8 of them believe that the SVP(s) they worked with were not sufficiently qualified. *Id.*

[156] *See e.g.*, *id.* SVP6 ("I believe almost no child case would have gone forward or had the minor victim testify if it wasn't for the SVP [p]rogram."), SVP18 (reflecting that a few cases were put "in the win column that perhaps should not have been all because we had the better more logically sound theory"), SVP24 (asserting that "[o]n at least one case I'm convinced that my being on the case was the difference between an acquittal and a conviction"), SVP25 (recalling one case in which important evidence would not have been admitted but for the SVP's presence), SVP29 (estimating that "[i]n approximately one-third of [his] cases, [he] uncovered a victim or victims that law enforcement had never found").

[157] *See generally id.*

Position (Number of Responses)	Responded Yes	Responded Yes/No	Total of Yes and Yes/No Responses	Responded No
TC Responses (121)	98 (81.0%)	8 (6.6%)	106 (87.6%)	15 (12.4%)
COJ Responses (42)	30 (71.4%)	11 (26.2%)	41 (97.6%)	1 (2.4%)
SVP Responses (35)	32 (91.4%)	2 (5.7%)	34 (97.1%)	1 (2.9%)
SDC Responses (33)	22 (66.7%)	8 (24.2%)	30 (90.9%)	3 (9.1%)
CR Responses (25)	19 (76%)	3 (12%)	22 (88%)	3 (12%)
MJ Responses (8)	3 (37.5%)	5 (62.5%)	8 (100%)	0 (0%)
Total (264)	204	37	241	23
Percentage	77.3%	14.0%	91.2%	8.7%

Table 3. Whether SVPs Positively Contribute to the Quality of the Case Presented at Trial

Several COJs commented that SVPs often fill an important void created by their TCs' lack of litigation experience.[158] As Major Bankson wrote, "[SJAs] and COJs should expect their new [TCs] to know little to nothing about military justice practice."[159] In fact, of the 121 responding TCs, 93 of them (76.9%) had not litigated more than three contested courts-martial at the time of the case that they prosecuted with an SVP;[160] 42 of them (34.7%) had *never* litigated a contest prior to their case with the SVP.[161] As one COJ remarked, the SVP "helped ensure our trials move[d] efficiently and our panels [were] able to focus on the evidence being presented."[162] Another COJ noted that the SVP improved the quality of the case by closing "all the rabbit holes that the defense could

[158] *See, e.g.*, *id.* COJ14 (commenting that TCs "generally have little experience, and having a more experienced litigator in the courtroom is essential"), COJ17 (noting that the SVP's experience "was evident during the trial in almost every imaginable event one would expect a junior TC to stumble over").
[159] Bankson, *supra* note 4, at 11.
[160] Gilberg Survey, *supra* note 6.
[161] *Id.*
[162] *Id.* COJ34.

try to use for reasonable doubt."[163] As one COJ concluded, "there is simply no way that a prosecutor with over 100 trials cannot enhance the value of the prosecution of the case."[164]

Once again, even members of the defense bar have noticed the positive impact that SVPs often make upon the quality of the case presentation. For example, one SDC acknowledged that "[t]ypically, contested cases without the SVP are not prepared or presented as well."[165] As another SDC strongly asserted, "100%, beyond any shadow of a doubt, SVP participation improved the quality of the case presented at trial."[166] Other SDCs noted that SVPs improve the case by avoiding "needless presentation of additional witnesses,"[167] assisting TCs "work through difficult issues as they occur in court,"[168] effectively using instructions to present their cases,[169] and coming up with "creative ideas the TCs probably would not have identified."[170] As one SDC commented, "[i]t is nearly impossible to argue that placing a more experienced prosecutor . . . as a government counsel doesn't contribute to the quality of the government case."[171]

With respect to the 121 TCs responding to the survey, 106 of them (87.6%) recognized that the SVP positively contributed to the quality of the case.[172] In contrast, only 15 (12.4%) reported that that the SVP did not improve the quality of the case.[173] Just as was the case with the previous question, TCs were again overwhelmingly passionate about their positive SVP experiences. One TC noted, "I am not sure we would have obtained the same outcome without the SVP's help."[174] Another TC admitted that without the SVP, the case "would have been very, very

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[163] *Id.* COJ47.
[164] *Id.* COJ31. *See also id.* COJ8 (asserting that "the SVP's familiarity with the same experts/issues contributed greatly to the presentation of the government's case").
[165] *Id.* SDC9.
[166] *Id*. SDC5.
[167] *Id.* SDC2 (finding that "the SVPs have streamlined [g]overnment cases and avoided what would have otherwise been a needless presentation of additional witnesses").
[168] *Id.* SDC33.
[169] *Id.* SDC16.
[170] *Id.* SDC19.
[171] *Id.* SDC6.
[172] *Id.* It is important to acknowledge that of those 106 survey respondents, 8 of them also noted that the SVP's contribution to the quality of the case that was presented at trial was less than what it could have been. *Id.*
[173] *Id*.
[174] *Id.* TC16. *See also id.* TC33 ("I am 100% positive that the case would have been lost but for the SVP."), TC88 (wondering what would have happened without the SVP).

ugly."[175] Some TCs even commented on specific skills SVPs brought to trial that improved the quality of the case. These skills included effectively cross-examining an expert witness,[176] delivering a powerful closing argument,[177] quickly and correctly applying the rules of evidence,[178] and presenting the evidence in an orderly and logical manner.[179] As one TC put it, "[f]rom pre-trial preparation . . . to actual execution in the courtroom, the quality of the [court-martial] was far better with the SVP's participation."[180]

C. Strengths and Weaknesses of the SVP Program

The survey also attempted to identify recognizable strengths and weaknesses of the SVP program by polling COJs, SDCs, experienced CRs, MJs, and RDCs.[181] These questions were designed to provide respondents with the freedom to share whatever thoughts they might have related to the SVP program—good or bad. Overall, 42 COJs, 33 SDCs, 25 CRs, 8 MJs, and 5 RDCs responded, thereby providing 113 total responses to these questions.[182] While some of the responses provided a single strength and/or weakness, others provided many.[183]

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[175] *Id.* TC24.

[176] *Id.* TC34 (noting that in the bridge-the-gap session that followed the trial, the military judge commented that he had "never seen a more effective cross of the defense expert forensic psychiatrist" as the SVP had done in that case). *See also id.* TC108 (admitting that without the SVP, "the use of [the government's] experts would have been far less effective").

[177] *Id.* TC43 (crediting the SVP's skill in closing argument with "singlehandedly" winning one of his cases). *See also id.* TC35 (noting that the SVP's closing argument "without a doubt put the nail in the coffin and solidified the guilty verdict").

[178] *Id.* TC3 (acknowledging that "the SVP's handle on the rules of evidence contributed a great deal to allowing the government to get into evidence material that otherwise might have been left out, and to stop defense from entering into evidence improper evidence").

[179] *Id.* TC4 (praising the SVP for developing and executing "a coherent presentation . . . of the case").

[180] *Id.* TC30. *See also id.* TC59 (stating that "at trial, our SVP was one of the best litigators I have seen").

[181] *See* Appendix A (Distributed Surveys).

[182] *See generally* Gilberg Survey, *supra* note 6.

[183] *Id.*

With respect to the program's recognizable strengths, 70.8% of survey respondents identified the experience that SVPs bring as one of the program's biggest strengths.[184] Providing junior judge advocates with needed military justice assistance and mentorship (referenced by 40.7% of survey respondents),[185] increasing the likelihood that cases are disposed of appropriately (referenced by 27.4% of survey respondents),[186] and improving victim care (16.8% of survey respondents)[187] were other strengths of the SVP program that were frequently identified. (See Table 4, Frequently Identified Strengths of the SVP Program.)[188]

Frequently Identified Strength	COJs	SDCs	CRs	MJs	RDCs	Total	Percentage
Adds Valuable Experience / Expertise	32	27	12	6	3	80	70.8%
Provides Quality Mentorship / Guidance	22	11	7	4	2	46	40.7%
Helps dispose of cases professionally, appropriately, and competently	11	11	4	3	2	31	27.4%

[184] *See, e.g.*, *id.* COJ7 ("The strength of the SVP program is the institutional knowledge and subject matter expertise [SVPs] bring to the process."), SDC20 (noting that "having someone who has looked at a number of cases and tried a number of contested courts-martial is the SVP [p]rogram's greatest strength"), CR13 (commenting that one of the program's strengths is that "[e]xperienced litigators are in the courtroom assisting the junior litigators").

[185] *See, e.g.*, *id.* COJ37 ("The TCs like having a seasoned, experienced litigator assist them, especially with issue spotting, making charging decisions, and developing themes for sentencing."), SDC1 (stating that "[m]any SVPs are quality litigators that can be a tremendous asset to new TCs"), CR22 (observing that SVPs mentor trial counsel by sharing sensitive cases).

[186] *See, e.g,. id.* COJ15 (stating that the "harmonizing disposition of cases across the Army" is a strength of the SVP program), SDC15 (observing that "the SVP program allows an experienced litigator to provide an honest assessment of the strengths and weaknesses of a case"), CR13 (finding that "[c]ases are cleaner and flow easier, from start to finish").

[187] *See, e.g.*, *id.* COJ14 (commenting that the SVP program gives victims "more confidence in the system"), SDC7 (noting that a principle strength of the SVP program is that it "prioritizes taking care of victims"), CR4 (asserting that "[t]he additional body to work with that victim is a huge asset").

[188] *See generally id.*

Contributes to better victim care	6	2	11	0	0	19	16.8%
Provides a needed focus to sexual assault in the military	7	4	2	1	0	14	12.4%
Helps retain quality judge advocates by allowing them to remain in the courtroom	2	4	0	1	3	10	8.9%
SVP Selection	2	1	1	1	0	5	4.4%
Undecided / Unsure	0	0	4	0	0	4	3.5%
Continuity	3	0	0	0	0	3	2.7%
There are none	0	1	1	0	0	2	1.8%

Table 4. Frequently Identified Strengths of the SVP Program

On the flip side, 27.4% of survey respondents identified the SVP's busy workload as one of the program's biggest weaknesses.[189] On a similar note, 15.0% of the respondents commented that there are not enough SVPs.[190] Losing sight of justice (21.2%),[191] a lack of local SVP accountability and/or program management (15.0%),[192] poor selection of SVPs (15.9%),[193] ambiguity as to the SVP's actual role (9.7%),[194] and

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[189] *See, e.g.*, *id.* COJ11 (observing that SVPs are often "so over-extended that it's hard for them to keep a hand in everything"), SDC23 (stating that SVPs "are so busy that they cannot get involved in cases early"), CR8 (asserting that "some SVPs have way too much on their plate").

[190] *See, e.g.*, *id.* COJ22 (noting that there are "not enough [SVPs] to go around"), SDC29 (observing that SVPs "are spread thin"), CR7 ("I don't believe there are enough SVPs out there to handle the caseload.").

[191] *See, e.g.*, *id.* SDC24 (remarking that the attitude some SVPs bring "is not simply one of zealously seeking justice but rather one of being on a mission from God"), CR16 (noting that some SVPs are becoming too personally involved with cases and are "[losing] sight of what is important in the case").

[192] *See, e.g.*, *id.* COJ3 (frustrated by his inability to detail the SVP to anything outside the program), COJ13 ("[SVPs] aren't accountable to the chain of command, so when the results aren't what was hoped for, the very junior TC is held to task, and perhaps didn't understand the trial strategies that got to a particular endstate.").

[193] *See, e.g.*, *id.* COJ27 (commenting that "many of the SVPs are not as experienced as I feel they should be"), SDC7 ("One weakness I see with the SVP program is that it does not always recruit experienced prosecutors, especially in smaller jurisdictions."), CR8 (observing that some SVPs "still have issues with basics such as proper demeanor and appearance in court, how to properly enunciate when arguing, coordinating evidence in

providing an unfair advantage to the government (8.9%)[195] were other frequently identified weaknesses.[196] Additionally, 20.4% of survey respondents believe that in many cases, an SVP may actually stunt TC development by not allowing that TC to do enough at trial. (See Table 5, Frequently Identified Weaknesses of the SVP Program.)[197]

Frequently Identified Weakness	COJs	SDCs	CRs	MJs	RDCs	Total	Percentage
SVPs are too busy to work on the case from beginning to end as a co-counsel should	16	7	7	0	5	31	27.4%
Some prosecutors are losing sight of justice (e.g., win at all cost attitude, taking undeserving cases to trial, succumbing to political pressure)	0	16	4	2	2	24	21.2%
Detrimental to TC professional development (e.g. deprives TCs of needed trial experience)	8	9	3	1	2	23	20.4%
SVP Selection	7	5	2	2	1	18	15.9%
There are not enough SVPs	9	1	4	2	1	17	15.0%
Management / Detailing / Local Unaccountable	12	3	1	1	0	17	15.0%
Lack of universal standard of what an SVP is suppose to do / Role Ambiguity	5	4	0	2	0	11	9.7%
Unfair to Defense	2	6	1	0	1	10	8.9%
There are no weaknesses	4	2	2	0	0	8	7.1%
Undecided / Unsure	0	0	4	0	0	4	3.5%

Table 5. Frequently Identified Weaknesses of the SVP Program

Despite the identified weaknesses, the data suggests that the SVP program has been largely successful, particularly when it functions as it

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advance with the court reporters, not placing their hands in their pockets, properly arguing before a panel . . . et cetera").

[194] *See, e.g., id.* COJ10 (opining that "SVPs consistently give TCs wrong information about the SVP's role, which means the SVP is not actually doing what they are supposed to, and the TC is just utterly confused"), SDC6 (citing "role confusion" as a program weakness).

[195] *See, e.g., id.* COJ4 (asking why there aren't any "special defense attorneys" to represent the accused in these cases), SDC5 (arguing that "[a]dding the SVP only stacks the deck further against the accused"), CR9 (advocating "that TDS should have somewhat of a parallel organization").

[196] *See generally id.*

[197] *See, e.g., id.* COJ12 (cautioning that the "[a]ggressive handling of cases results in the potential for SVPs to take over a case, which results in TCs not obtaining the necessary experience to grow"), SDC13 (finding that some SVPs "try to immerse themselves too much into every case rather than work to coach, teach and mentor junior TCs"), CR21 (stressing that in some cases, TC development is a casualty of "SVP takeover").

should. As the vast majority of the survey responses illustrate, detailing experienced litigators to these cases does wonders not only for the quality of the case that is presented at trial, but also for the military justice professional development of the junior judge advocate detailed as co-counsel.[198] The program is at its best when the SVP is able to work side-by-side with his detailed junior co-counsel, from the very beginning of the case all the way through to its conclusion.[199] When this happens, not only does the quality of the case improve, but it also develops the next generation of Army practitioners.[200] As one current COJ related about his supporting SVP, he "not only gives [us] fish but [he also] teaches [us how] to fish."[201]

The main problem with the SVP model—as it is currently set up—is that there are far too many special victim cases in which this does not happen.[202] There are simply not enough SVPs to staff every special victim case in this manner.[203] Put another way, many special victim cases go to trial without a detailed SVP at counsel table. Additionally, all of the *non*-special victim cases (e.g., larceny, fraud, AWOL) are completely ignored.[204] As a result, inexperienced litigators continue to handle serious cases without the benefit of a seasoned practitioner to assist them; the problem of inexperience lives on.

To fully capitalize on all of the SVP program's strengths, the SVP model should be expanded to cover the Army's *entire* litigation practice, thereby guaranteeing that an experienced litigator is detailed to every single contested case—on both sides of the aisle—available to work that case from its inception to its conclusion. This would maximize the litigation experience of our law firm, result in better litigated cases, and facilitate a better tomorrow for the JAG Corps by molding future military justice practitioners.[205]

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[198] *See generally id.*

[199] *Id.* COJ13 (remarking that "[i]f the SVP digs deep, then I think it's a great value added"), COJ14 (finding that "when the SVP is easily available for in-person help, it contributes greatly").

[200] *See generally id.*

[201] *See, e.g., id.* COJ16.

[202] *See id.* SVP6 (admitting that he did have to "quit a few cases").

[203] *See, e.g., id.* COJ20 (describing the recurring problem of SVPs not being involved in cases early or often enough and then "swooping in at the 11th hour acting like the 'good idea fairy' and sharp-shooting the case").

[204] *See id.* TC39 (stating that "[a]s a TC it would have been helpful on any case to have an experienced litigator assisting").

[205] *See id.* TC38 (noting that "the newbie TC today may be the SVP tomorrow").

V. A Proposed Plan: Building upon the Successful SVP Model

In order to address the problem of inexperience within the Army's *entire* military justice practice, substantial systemic changes should be made that build upon the success of the SVP model. First, the Army's criminal litigation program should be restructured to guarantee that both the government and the defense have an experienced litigator detailed to every single contested case.[206] This entails realigning the Army's geographical jurisdiction (regionalizing it), creating new supervisory positions, and redefining those that already exist. Second, the responsibilities of each of those litigation positions must be clearly defined and communicated to all. Third, the current military justice ASI system should be adjusted. Fourth, certain positions should be coded with established prerequisites as part of a newly established military justice career track. All of these changes, together, would maximize the litigation experience of the Corps, while simultaneously improving the development of junior judge advocates, the quality of litigation practice, and the degree of justice delivered to all—*in every single case*.

A. Regionalize the Army's Entire Criminal Litigation Practice

Currently, Trial Defense Service (TDS), the SVP program, and the trial judiciary all operate under a regional framework. Yet, each entity has elected to divide the Army's geographical jurisdiction in different ways. While the trial judiciary is divided into five judicial circuits,[207] TDS is divided into nine regions[208] and the SVP program is organized into 23 AORs.[209] Despite all three organizations prosecuting, defending, and adjudging cases that originate from the same place, each has independently organized itself in a different way. This is confusing and creates the appearance that the Army, as a whole, is disorganized in its criminal litigation practice. To address this issue, the Army's

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[206] The idea that every contested case should be litigated by an experienced counsel is not novel. *See, e.g.*, McDonald, *supra* note 16, at 40 (stating that many trial issues could be resolved by "greater involvement by first-line supervisors"); Grace, *supra* note 2, at 31 (stressing that detailing an experienced litigator to every contested case would provide junior counsel "with quality supervision sitting right next to them in court").

[207] U.S. ARMY TRIAL JUDICIARY, https://www.jagcnet.army.mil/USATJ# (last visited Mar. 19, 2014).

[208] U.S. ARMY TRIAL DEFENSE SERV., https://www.jagcnet.army.mil/8525781C0048C0D5 (last visited Mar. 19, 2014).

[209] SVP Expansion Announcement, *supra* note 101.

jurisdiction should be restructured so that the trial judiciary, TDS, and the government are all universally organized within the same geographical alignment.

To various degrees, the Navy and Marines have already transitioned to a regionally structured litigation practice; the Army should follow suit. For example, in October 2010,[210] the Navy established a centralized TCAP and divided the world into nine prosecutorial regions—each one consisting of a Region Legal Service Office (RLSO).[211] The RLSOs are staffed with an O-6 Commanding Officer, O-5/O-4 Senior Trial Counsel (STC), O-4/O-3 Core Trial Counsel, O-3/O-2 first-tour judge advocates, and paralegal support.[212] While the Commanding Officer "provides oversight and review of major case issues,"[213] the STC serves as a "military justice manager and liaison with other prosecution and law enforcement entities."[214] The Core Trial Counsel is responsible for prosecuting and investigating specific cases"[215] and the first-tour judge advocates assist in case development, legal research, and major processes to include discovery and the victim witness advocacy program.[216]

Similarly, on 1 October 2012, the Marines launched a new regional model, which divides the USMC legal community into four geographic regions—each one consisting of a Legal Services Support Section (LSSS) and several subordinate Legal Services Support Teams (LSST).[217] The four LSSSs and nine subordinate LSSTs were established "to provide legal services, in garrison, beyond the organic capability of a command's cognizant SJA."[218] Each LSSS, co-located

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[210] E-mail from Teresa Scalzo, to Major Jeffrey A. Gilberg (Jan. 29, 2014, 17:26 EST) (on file with author).

[211] PowerPoint Presentation of Commander Aaron C. Rugh, on Navy Prosecution Regions slide 1 (Oct. 10, 2013) [hereinafter Navy Prosecution Regions] (on file with author). The nine regions are: Mid-Atlantic, Naval District of Washington, Southeast, Midwest, Northwest, Southwest, Hawaii, Japan, EURAFSWA. *Id*.

[212] *Id*. slide 2.

[213] *Id*.

[214] *Id*.

[215] *Id*.

[216] *Id*.

[217] PowerPoint Presentation of Major Mark D. Sameit, on Commandant of Marine Corps directed reorganization of USMC legal community slides 1–2 (Oct. 10, 2013) [hereinafter USMC Legal Community] (on file with author). The four regions are: the National Capital Region, East, West, and Pacific. *Id.* slide 1.

[218] Marine Administrative Message, 416/12, 011520Z Aug 12, Commandant, Marine Corps, subject: Provision of Legal Services Support para. 3A [hereinafter MARADMIN 416/12].

with a Marine Corps Installation (MCI) headquarters,[219] "consist[s] of an administrative support office, a regional trial counsel office, a regional defense counsel office, a regional post-trial review office, and a regional civil law office."[220] The subordinate LSSTs include "a trial counsel office, a defense services office, an administrative law office, and a legal assistance office.[221]

Each trial counsel office is "task-organized for specific cases" and "supported by experienced prosecutors, embedded criminal investigators, admin[istrative] support, and civilian Highly Qualified Experts (HQE)."[222] Each trial counsel office also maintains a special victim capability, guaranteeing that experienced and qualified counsel are detailed to every complex case.[223] Under this model, command services are separated from command advice.[224] Additionally, the chain of command for the LSSSs and subordinate LSSTs is "separate from, and independent of, the respective MCI SJA."[225] Although the SJA to the Commandant provides "functional supervision" over the LSSSs and LSSTs, the direction and control of the individual judge advocates' performance rests with the LSSS and LSST OICs.[226] The "exercise [of] exclusive detailing authority for all judge advocates . . . to courts-martial" remains with the LSSS OICs.[227]

The respective regional models implemented by the Navy and the Marines have been effective in ensuring that litigation experience is geographically dispersed to consistently assist junior judge advocates,

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[219] *Id*. para. 3D. The Legal Services Support Sections (LSSS) regional offices are located at MCB Camp Butler (Pacific), MCN Camp Lejeune (East), MCB Camp Pendleton (West), and MCN Quantico (National Capital Region). *Id*.

[220] *Id*.

[221] *Id*. para. 3E. The nine permanent (LSSTs) are located at MCB Camp Butler (Camp Foster), MCB Hawaii (Kaneohe Bay), MCB Camp Lejeune, MCAS Cherry Point, MCRD Parris Island, MCB Camp Pendleton, MCAS Miramar, MCAGCC Twenty Nine Palms, and MCB Quantico. *Id.*

[222] USMC Legal Community, *supra* note 217, slides 1–2.

[223] *Id*. slide 1.

[224] *Id*.

[225] MARADMIN 416/12, *supra* note 218, para. 3F. The chain of command runs from the LSST OIC, up through the LSSS OIC and the respective regional MCI SJA with the OICs of the LSSSs and LSSTs exercising "direction and control over their sections and teams." *Id.*

[226] *Id*. para. 3G.

[227] *Id*. para. 3L.

wherever they may be assigned.[228] Commander Aaron R. Rugh, who currently serves as the Chief of the Navy's TCAP, notes that the Navy's regional organization "support[s] the Navy line community."[229] Similarly, Major General V. A. Ary, who currently serves as SJA to the Commandant of the Marine Corps, acknowledges that the regional "restructuring of the Marine Corps legal community . . . ensure[s] that [the USMC is] well-placed to confront the new military justice landscape."[230]

The Army should borrow from these initiatives and launch a geographical realignment of its own. Using the trial judiciary's circuit approach as a starting point, the Army should divide its world-wide jurisdiction into five judicial circuits, several of which would be subdivided, totaling 11 different geographical regions. This proposed realignment would enable a more consistent disbursement of the Army JAG Corps' litigation expertise around the world to minimize the risk of junior judge advocates trying cases without meaningful mentorship. (See Figure 1, Proposed Military Justice Regional Alignment.)[231]

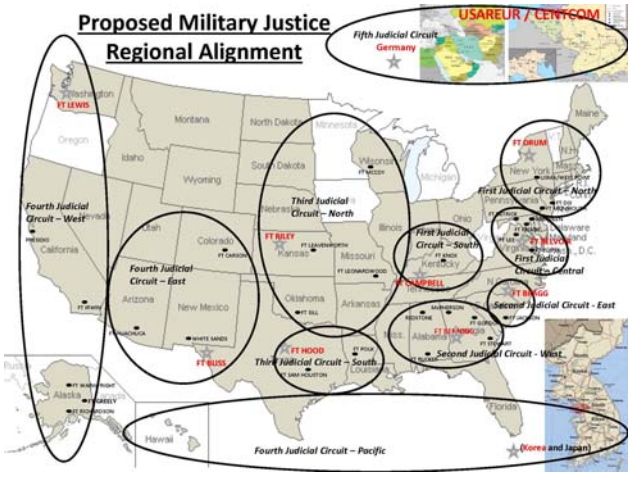

Figure 1. Proposed Military Justice Regional Alignment

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[228] E-mail from Commander Aaron R. Rugh, to Major Jeffrey A. Gilberg (Mar. 11, 2014, 14:59 EST) (on file with author).

[229] *Id*.

[230] Memorandum from Staff Judge Advocate, to the Commandant of the Marine Corps, to Commandant of the Marine Corps (6 Mar. 2014), *included in* USMC REPORT, *supra* note 98.

[231] *See* Appendix B (Proposed Military Justice Regional Alignment).

1. Restructure the Army's Prosecution Program

The Army's prosecution program should be restructured such that the entire program runs through TCAP—similar to how the SVP program currently operates. TCAP, which began operating in August of 1982, was created "to provide advice to and training for trial counsel, or military prosecutors, with the goal of improving the quality of advocacy on behalf of the government."[232] It was envisioned that TCAP would provide regional TC training, assist with difficult cases, advise on administrative problems, and answer TC questions.[233] Today, over 30 years later, TCAP continues to train and assist TCs stationed around the world, serving as a TC's primary source of advice outside his OSJA.[234]

Under this proposed plan, TCAP would maintain its dual mission of litigation and training. The Chief of TCAP[235] would be responsible for overseeing all Army prosecutions in the 11 regions. The Deputy of TCAP[236] would report to the Chief of TCAP and be responsible for scheduling, organizing, and executing all military justice training administered to TCs worldwide. Four TCAP Training Officers[237] would be assigned to assist the Deputy of TCAP in accomplishing the training mission.

Each region would have a Chief Prosecutor (CP)[238] and several SVPs[239] and STCs,[240] all of whom would be assigned to TCAP with duty at various installations around the world.[241] In total, there would be 23

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[232] Major Percival Park, *The Army Judge Advocate General's Corps, 1975–1982*, 96 MIL. L. REV. 5, 34 (1982).
[233] *Id*.
[234] *Id. See also* Pickands Interview, *supra* note 108.
[235] The Chief of TCAP would ordinarily hold the rank of colonel.
[236] The Deputy of TCAP would ordinarily hold the rank of lieutenant colonel.
[237] The TCAP Training Officers would ordinarily hold the rank of major or captain.
[238] The Chief Prosecutors (CPs) would ordinarily hold the rank of lieutenant colonel.
[239] The SVPs would ordinarily hold the rank of major. *See* Gilberg Survey, *supra* note 6, TC84 ("I think SVPs should be MAJs with a particular level of experience"), SDC20 (observing many times where a captain SVP was challenged to explain things in greater detail to senior officers because "even though the words may be the same, if he was a [major], there would be a lot more credibility behind his statements without having to explain his level of trial experience").
[240] The STCs would ordinarily hold the rank of captain.
[241] Every position that operates under the TCAP umbrella would officially be assigned to the U.S. Legal Services Agency (USALSA).

SVPs and 23 STCs dispersed throughout the Army worldwide (See Figure 2, Proposed Government Litigation Model.)[242]

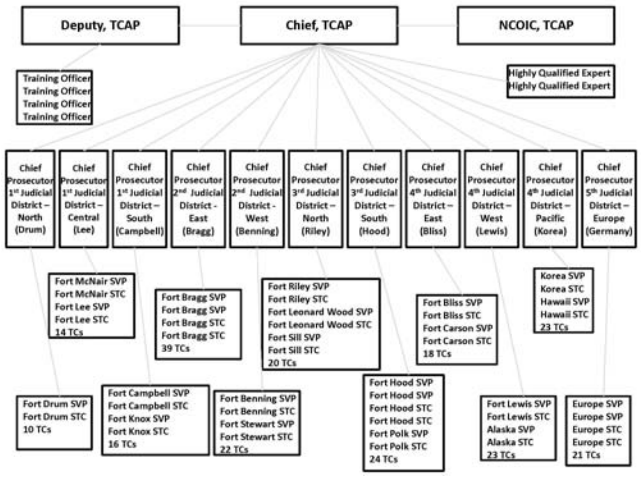

Figure 2. Proposed Government Litigation Model

The 11 CPs—similar to the Navy's 9 RLSO's Commanding Officers, the Marines' LSSS OICs, and the AF's CSTCs—would oversee all prosecution within their region, report all of the region's significant activities to the Chief of TCAP, and prosecute high-profile cases.[243] As a part of their supervisory responsibilities, CPs would guide, mentor, and rate all of the prosecutors (SVPs, STCs, and TCs) within their region. A CP's rating chain would include the SJA from the local installation at which he works and the Chief of TCAP. Additionally, as a default, the SJA's detailing authority would be delegated to the CP—similar to the Marines' LSSS OIC's detailing authority—but with consultation from the servicing COJ.[244]

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[242] There would also be at least two Highly Qualified Experts (HQEs) assigned to TCAP to assist with its dual mission. The HQEs would continue to be utilized as they are now—as both case consultants and conference instructors. *See* Appendix C (Proposed Government and Defense Litigation Models).

[243] Creating a regional litigation position is not a new idea. *See, e.g.*, Grace, *supra* note 2, at 24 (proposing that the Army should add a regional military justice practitioner).

[244] Of course, the SJA would always be free to deviate from this default. But, unless the SJA affirmatively does so in a particular case, such detailing decisions would normally be made by CPs, with consultation and input from the COJ. This is similar to how many offices already function with the COJ handling most detailing decisions.

Under this proposed model, the government would continue to utilize the 23 SVPs in a similar manner to how they are utilized now. The SVPs would continue to be responsible for overseeing, monitoring, tracking, and reporting every special victim case within their respective AOR. They would personally prosecute (along with a local TC) every contested special victim court-martial within their region and consult on all other special victim cases (stepping aside for another local TC to sit at counsel table on a guilty plea).

In the event that an SVP is unable to sit on a contested special victim case within his region, either due to a scheduling conflict or some other reason, that SVP would notify the Chief of TCAP (through the CP) as soon as the conflict is identified and one of the other 23 SVPs or 11 CPs would be detailed to prosecute that case in the conflicted SVP's place.[245] The goal would be to have *every* contested special victim case prosecuted by either a SVP or CP.[246] The SVP's rating chain would include their CP, the SJA from the local installation at which he works, and the Chief of TCAP.

Additionally, under this proposed reorganization, the government would appoint 23 STCs and co-locate them with the 23 SVPs. Similar to SVPs, each STC would be responsible for overseeing, monitoring, tracking, and reporting all *non*-special victim cases within their respective AORs. They would personally prosecute (along with a local TC) every contested *non*-special victim court-martial within their region and consult on all other *non*-special victim cases (stepping aside for another local TC to sit at counsel table on a guilty plea). Also, STCs would be available to backfill SVP responsibilities and assist with special victim cases when circumstances dictated such a necessity.

In the event that an STC is unable to sit on a contested *non*-special victim case within his region, either due to a scheduling conflict or some other reason, that STC would notify the Chief of TCAP (through the CP) as soon as the conflict is identified and one of the other 23 STCs or CPs would be detailed to prosecute that case in the conflicted STC's place.[247]

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[245] The Chief of TCAP would assist the CP with the logistics of ensuring that an attorney is available to be detailed in the conflicted SVP's place.

[246] In the event that there is not an SVP or a CP available, the Chief of TCAP would make one of the STCs or TCAP Training Officers available to the CP to detail to the case in the conflicted SVP's place.

[247] The Chief of TCAP would assist the CP with the logistics of ensuring that an attorney is available to be detailed in the conflicted STC's place.

The goal would be for *every* contested *non*-special victim case to be prosecuted by either a STC or CP.[248] These STCs would be rated by their CP and the SJA from the local installation at which he works. As mentioned above, one critique of the SVP program is that it fails to address all of the cases that do not involve a "special victim."[249] This plan addresses that critique by providing an experienced litigator for *every* kind of case.

Under this model, COJs and TCs would continue to be assigned locally to support the local installation at which they are assigned; COJs would maintain responsibility for post-trial, CG actions, paralegal support, and TC training,[250] while also consulting with the CP on detailing decisions. Moreover, TCs would continue to advise the chain of command on all military justice issues and serve as co-counsel on all courts-martial originating from their jurisdiction. While the COJs' rating chain would not include the CP (or anyone else assigned to TCAP), the TCs' rating chain would; specifically, it would include the COJ, CP, and SJA.

Under this prosecutorial framework, *every* contested court-martial would be prosecuted by a local TC and an experienced litigator (either a CP, SVP, STC, or TCAP Training Officer). Every case would be used as a training opportunity to develop junior counsel while maintaining the integrity of a quality prosecution. Each TC would receive quality on-the-job litigation mentorship that would greatly contribute to their military justice professional development.

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[248] In the event that there is not an STC or a CP available, the Chief of TCAP would make one of the SVPs or TCAP Training Officers available to the CP to detail to the case in the conflicted SVP's place.

[249] *See, e.g.*, Gilberg Survey, *supra* note 6, COJ32 (identifying one of the weaknesses of the SVP program as the SVP's "inability to assist in depth on non-victim cases"), SDC12 (suggesting that "it would be nice to have an experienced prosecutor on staff for all types of cases"), SDC34 (asking why we need an expert for cases with victims "but not for other complex cases, such as BAH fraud?").

[250] The COJs should utilize the CPs, SVPs, and STCs as instructors when designing, scheduling, and executing local TC training. *See* Lieutenant Colonel Maureen A. Kohn, *Special Victim Units—Not a Prosecution Program but a Justice Program*, ARMY LAW., Mar. 2010, at 68, 73 (encouraging SVPs to work closely with COJs "because part of the SVP's role is to mentor and guide the trial counsel"); Hayden, Hunter & Williams, *supra* note 4, 29 (noting that "[r]egularly scheduled in-house training is another important tool that the supervisor can use to enhance the advocacy skills of assigned counsel").

2. Restructure the Army's Criminal Defense Program

As Major Morris once wrote, "[i]t is in the interests of justice, and therefore the government's interests for the Trial Defense Service (TDS) to thrive."[251] Established in November of 1980,[252] TDS's mission is to "[p]rovide competent/ethical defense counsel services for Army personnel, whenever required by law or regulation and authorized by The Judge Advocate General (TJAG)."[253] In order to "thrive" in its pursuit of this mission, TDS must be afforded resources that are comparable to those provided to the government.[254] Not only does this include access to adequate training and support, but also systemic litigation expertise available to guide DCs in providing quality representation to their clients. Therefore, the proposed plan is designed to provide TDS with an equivalent level of litigation expertise as that afforded to the government.

Similar to how the Army's prosecution program would run, the Army's criminal defense program would run through DCAP.[255] And, similar to TCAP, DCAP would also operate under a dual mission of litigation and training. The Chief of DCAP[256] would be responsible for overseeing all of the Army's criminal defense cases in the 11 regions. The Deputy of DCAP[257] would report to the Chief of DCAP and be responsible for scheduling, organizing, and executing all military justice training administered to Army DCs worldwide. Four DCAP Training Officers[258] would be assigned to assist the Deputy of DCAP in completing DCAP's training mission.

Additionally, DCAP's regional alignment would be consistent with that of the trial judiciary and the government. Accordingly, instead of

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[251] Morris, *supra* note 4, at 42.

[252] Lieutenant Colonel R. Peter Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense Service*, ARMY LAW., Mar. 2001, at 1, 2.

[253] U.S. ARMY TRIAL DEFENSE SERVICE STANDARD OPERATING PROCEDURES para. 1-3 (5 Aug. 2013).

[254] *See* Lieutenant Colonel John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4, 27 (1983) (recognizing previous efforts "to equalize trial and defense counsel in terms of experience and support"); Masterton, *supra* note 252, at 29 (emphasizing that "[t]o be effective, TDS attorneys must have proper resources and training").

[255] Every position that operates under the DCAP umbrella would officially be assigned to the United States Army Trial Defense Service (USATDS).

[256] The Chief of DCAP would ordinarily hold the rank of colonel.

[257] The Deputy of DCAP would ordinarily hold the rank of lieutenant colonel.

[258] The DCAP Training Officers would ordinarily hold the rank of major or captain.

nine regions, there would be 11. Similar to the current organization, each region would have a RDC, responsible for supervising all of the DCs within their jurisdiction.[259] Under this proposed reorganization, RDCs would hold exclusive, non-delegable detailing authority to ensure that every contested court-martial within his region has an experienced litigator. Additionally, RDCs would also prosecute high-profile cases—spending more time in the courtroom than they do under the current TDS model. They would be rated by the Chief of DCAP and the Chief of TDS.

Under this proposed plan, there would be 46 SDCs, dispersed around the world, to ensure that DCAP has a comparable level of experience to draw upon when detailing counsel to contested courts-martial.[260] Similar to how the government would utilize SVPs and STCs, DCAP would utilize SDCs as a valuable source of litigation experience. (See Figure 3, Proposed Defense Litigation Model.)[261]

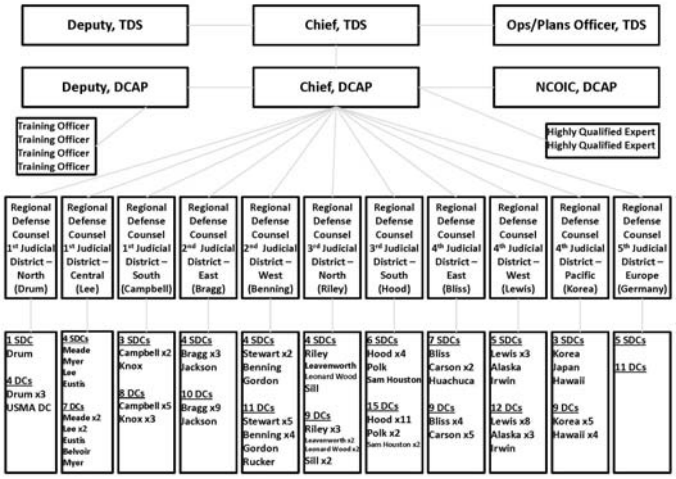

Figure 3. Proposed Defense Litigation Model

The SDCs would monitor, track, and report on all courts-martial within their respective AORs.[262] They would personally litigate (along

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[259] The RDCs would ordinarily hold the rank of lieutenant colonel.

[260] While half of the SDCs would ordinarily hold the rank of major, the other half would ordinarily hold the rank of captain.

[261] *See* Appendix C (Proposed Government and Defense Litigation Models).

[262] Once a case has been preferred, the appropriate SDC would be responsible for tracking it.

with a DC) every contested court-martial within their AOR. As Lieutenant Colonel R. Peter Masterton, who at the time was serving as RDC in Germany, once wrote, "[r]epresenting clients at courts-martial is the most important part of the TDS mission."[263] As such, Soldiers facing court-martial rely upon TDS to meet their need for a "well-trained defense attorney."[264] Just as the government would be equipped with experienced SVPs and STCs to sit on all contested cases, TDS would be outfitted with experienced SDCs to do the same.

In the event that an SDC is unable to sit on a contested case within his AOR, either due to a client conflict, current workload, or some other reason, that SDC would notify the Chief of DCAP (through the RDC) as soon as the conflict is identified and one of the other 46 SDCs, 11 RDCs, or 4 DCAP Training Officers would be detailed to defend that case in the conflicted SDC's place.[265] The RDCs would be responsible for keeping the respective court-martial workloads of their SDCs balanced and proportionate, thereby asking the Chief of DCAP for help when workloads grow too large. The goal would be to have *every* contested case defended by either a SDC or RDC—along with a junior DC. The SDCs would ordinarily be rated by their RDC and the Chief of DCAP.

B. Working Together: Understanding the Responsibilities of Each Position

In order for the proposed system to succeed, it is crucial—particularly for the government—for everyone to know exactly how each position fits in the Army's overall litigation scheme. To facilitate this important understanding, the responsibilities of each position must be clearly defined and communicated to all. Specifically, the following four principles should be firmly established, distributed in a clear policy, and strictly followed.

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[263] Masterton, *supra* note 252, at 16. Lieutenant Colonel Masterton retired as a colonel.
[264] *Id*.
[265] The Chief of DCAP would assist the RDC with the logistics of ensuring that a qualified attorney is available to be detailed in the conflicted SDC's place.

1. Legal Ownership of the Case Remains with the SJA

The SJAs must continue to own the cases.[266] The CPs, SVPs, and STCs should be viewed as SJA assets to assist in the appropriate disposition of every case.[267] A default system should be established in which the SJA utilizes, relies upon, and trusts the experience and expertise of his CP to oversee all of the office's cases—similar to how many SJAs currently trust their COJ to do the same. However, having the CP asset to lean on should not excuse the SJA from knowing about each case and intervening on certain decisions, when appropriate.[268] All CPs must understand that there may be times when the SJA overrules a strategic or tactical decision that he wanted to make. In those instances, CPs must remember that since the SJA is ultimately responsible for the case, it is the SJA who gets to make the final call.[269]

On a related note, TCs would continue to be viewed as a dual asset—both to the OSJA in which he works and also to the unit that he advises. The TCs would continue to serve as a legal advisor to the chain of command, assisting them in making decisions on case disposition. However, prior to advising the command on a particular case, junior TCs should consult their experienced co-counsel, COJ, and CP. Ideally, the prosecution team should already have an "office position" as to the recommended course of action prior to the TC advising the command. Although this much coordination may seem burdensome to TCs, it is extremely beneficial to the case for all government attorneys to be on the same page as early in the case as possible (and certainly prior to advising the chain of command). Moreover, this is already the way it successfully works when an effective SVP is involved.[270]

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[266] *See* Gregory, *supra* note 25, at 17 ("It is therefore imperative that a specific TC and a specific OSJA take ownership of the case.").

[267] *See* Gilberg Survey, *supra* note 6, COJ30 (highlighting the importance of SVPs being an "asset of the SJA and the COJ").

[268] Cooke, *supra* note 4, at 28 (writing that "[m]ore attention also needs to be paid to the role and responsibility of staff judge advocates").

[269] Peck, *supra* note 4, at 163 (stressing the importance of seeking SJA guidance when appropriate).

[270] *See, e.g.*, Gilberg Survey, *supra* note 6, SVP7 (describing the assistance that he provides as encouraging the TCs "to own the case" and helping them with complicated areas without taking the case away from them).

2. The Two-Counsel, 50-50 Cooperation Model

Two counsel—no more, no less—should ordinarily be detailed to every case and function as co-counsel.[271] Functioning as co-counsel should *never* mean that one attorney does all the work and the other attorney just sits next to them in the courtroom.[272] This general rule ought to apply to guilty pleas and contests. For all contested cases, one of those counsel would be an experienced litigator[273] and one of them would be a locally assigned TC or DC. The two of them would function as a *team*, each performing approximately half of the work while regularly keeping the other up-to-date. This two-counsel, 50-50 cooperation model would apply to both the government and the defense.

The experienced litigator would utilize the case as a training opportunity to teach, mentor, and guide the locally assigned counsel through the procedural and substantive challenges of litigating a contested court-martial—much like many SVPs do in our current practice. This cooperation, which requires frequent communication between the experienced litigator and the local counsel, *must* start at the pre-preferral investigative stage and continue all the way through to the end of trial.[274] This means working on the case in some way *every* day.[275] Learning how to properly prepare a case for trial—whether as a prosecutor or a defense counsel—may be the most important litigation skill set to master.[276] As Lieutenant Colonel Masterton noted, "[m]ost

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[271] Morris, *supra* note 4, at 26 ("Too few courts-martial occur for counsel to acquire enough experience by only trying cases solo."); Gregory, *supra* note 25, at 25 n.117 (asserting that in many cases, detailing too many counsel often results in a loss of unity of effort). *See also* Gilberg Survey, *supra* note 6, CR21 (observing multiple cases in which the quality of the case presentation suffered "because there were too many counsel at the government's table").

[272] *See* Gilberg Survey, *supra* note 6, SVP1 (advocating that TCs should be encouraged to "take ownership of their cases").

[273] For the government, this means either a CP, SVP, STC, or TCAP Training Officer. For the defense, this means either a RDC, SDC, or DCAP Training Officer.

[274] *See* Kohn, *supra* note 250, at 76 (emphasizing that "[t]eamwork is the key element in sexual assault investigations and prosecutions").

[275] *See* Morris, *supra* note 4, at 28 (stressing that "[c]ounsel literally should touch every case every day").

[276] *See* Lieutenant Colonel James H. Kennedy, III, *Pragmatic Execution of Foundational Leadership*, 39 REP. no. 1, 4, 6 (2012) ("The most important and hardest part of being a successful military justice attorney: preparation.").

cases are won by careful preparation before trial, not brilliant advocacy during trial."[277]

For the government, the CP would decide whom to detail to the case—although, ordinarily it would be the local TC assigned to the jurisdiction from which the case arose and the geographically closest SVP or STC. In the event that the experienced counsel is unable to assume such an active and early role, he must inform his CP as soon as possible so that another experienced counsel may be detailed in his place immediately. Once a case changes from a contest to a guilty plea, the CP will ordinarily replace the experienced litigator with another local TC to provide that other junior TC with an opportunity to gain additional litigation experience.[278] Even though the case has become a guilty plea, both detailed counsel should continue to work as a team, each performing their share of the work by dividing the labor evenly.

Similarly for the defense, the RDC would decide whom to detail to the case—although, ordinarily it would be the local DC who has established an attorney-client relationship and the geographically closest SDC. In the event that the identified SDC is unable to assume such an active and early role, he must inform his RDC as soon as possible so that another experienced counsel may be detailed in his place immediately (and preferably prior to establishing an attorney-client relationship).[279] However, unlike the government, if a case changes from a contest to a guilty plea, the SDC may remain on the case, depending upon the circumstances.[280]

3. Encouraged Discussion and Debate

Healthy and intelligent debate should be encouraged among co-counsel. There will inevitably be times where co-counsel cannot agree

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[277] Masterton, *supra* note 252, at 22. *See also* McDonald, *supra* note 16, at 39 (suggesting that counsel can overcome basic mistakes with better trial preparation).

[278] However, in certain cases, the experienced litigator would remain on the case even after the case has changed from a contest to a guilty plea. For example, an SVP or STC might remain on a guilty plea if the TC was new, continuity of victim care required it, or the SJA demanded it.

[279] Masterton, *supra* note 252, at 7 (stressing that it is important to identify conflict cases as early as possible).

[280] This is primarily due to the client dynamics making it more difficult for DCs to switch in and out of cases; they are not the "fungible" counsel that TCs are.

on a particular course of action. Such tactical and strategic disagreements are beneficial to the case and must not become personal. When a disagreement does occur, the two of them should first try to resolve the issue themselves. Ordinarily, the local TC/DC should defer to the experienced counsel's judgment.[281]

On occasion, the local TC/DC may feel so strongly that he is unwilling to give in. When this happens, it is important for the experienced litigator to set the tone, ensure that the local TC/DC understands that the disagreement is not personal, and bring the issue to the CP/RDC, who would break the tie.[282] Once the CP/RDC makes the call, both counsel need to accept that decision, move on, and once again work as a team in their pursuit of justice.[283]

4. Results Do Not Define Success

A successful case is defined by the process that is employed, not the result that is achieved.[284] All that should be expected of military justice litigators—government or defense—is their absolute best effort, from the very beginning of the case all the way through to the end of trial.[285] At the end of every case, each TC and DC should be able to say, "I gave

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[281] *See* Coupe & Trant, *supra* note 80, at 11 (emphasizing that an experienced practitioner can "raise pretrial and post-trial issues and offer suggestions on trial preparation that simply would not occur to new counsel"); McDonald, *supra* note 16, at 39 ("Counsel should not hesitate to seek the advice of more experienced practitioners and bounce ideas off more experienced litigators.").

[282] *See* Captain Elizabeth Cameron Hernandez & Captain Jason M. Ferguson, *The Brady Bunch: An Examination of Disclosure Obligations in the Civilian Federal and Military Justice Systems*, 67 A.F. L. REV. 187, 237 (2011) (suggesting that counsel should "seek supervisory intervention" when appropriate). Of course, for certain disagreements among defense counsel, the tiebreaker could be the client as opposed to the RDC.

[283] In the event that the RDC is unable to offer support, the DCs would seek guidance and support either from DCAP or another RDC designated by DCAP.

[284] *See, e.g.*, Morris, *supra* note 4, at 31 ("A scorecard filled with convictions is not necessarily a measure of success.").

[285] *See* Gilberg Survey, *supra* note 6, TC42 (recalling one case in which the victim was satisfied even though there was an acquittal "because of the great efforts" made by the prosecution team "to get justice for her").

everything I had to this case."[286] When that statement is true for both sides, justice has been done—regardless of the result.[287]

C. Suggested Changes to the Current Military Justice ASI System

The JAG Corps must accurately identify experienced litigators to fill the positions that call for higher levels of mentorship in the courtroom. Amending the current ASI system is critical to accomplishing this goal. The present ASI system provides a solid foundation in quantifying an individual's military justice experience, assisting in the assignments process, and encouraging junior judge advocates to seek military justice training and experience.[288] However, the system has some flaws that must be addressed to maximize the value that it can bring to the JAG Corps in terms of identifying and tracking litigation experience.[289]

1. The Current Military Justice ASI System

On 21 July 2008, then Army TJAG Major General Scott C. Black implemented the ASIs in military justice.[290] The policy, updated on 9 June 2011, "encourages Judge Advocates (JAs) to set goals to achieve greater skill in litigation and expertise in military justice."[291] It

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[286] The criminal justice system works best when opposing sides are both competently represented. *See id.* SDC4 (admitting that he would "much rather deal [with] somebody on the other side who is competent").

[287] *See* Colonel Jeffery R. Nance, *A View from the Bench: So, You want to Be a Litigator?*, ARMY LAW., Nov. 2009, at 48, 56 ("The better we are at what we do, the more likely justice will be achieved in every case. That should be what we are all about."); Kennedy, *supra* note 276, at 6 (suggesting that "[a] truly effective justice program requires all organizations involved, not just the legal office, to be fully proficient at their part in the process").

[288] Grace, *supra* note 2, at 31 (stating that the ASI is a "great start" in placing qualified practitioners in appropriate positions).

[289] Proposing changes to the current ASI system is not a new idea. *See id*. at 31–32 (suggesting that certain changes should be made to the current ASI system so that its utility as an assignment tool would not be "useless").

[290] Policy Memorandum 08-2, Office of the Judge Advocate General, subject: Military Justice Additional Skill Identifiers (21 July 2008) [hereinafter TJAG Policy Memo 08-2]; Major General Scott C. Black, *Additional Skill Identifiers in Military Justice*, 37-17, TJAG SENDS, July 2008 [hereinafter TJAG SENDS 37-17]. Major General Black retired as a lieutenant general.

[291] Policy Memorandum 11-7, Office of the Judge Advocate General, subject: Military Justice Skill Identifiers, para. 2a (9 June 2011) [hereinafter TJAG Policy Memo 11-7].

establishes four levels of military justice proficiency and is "designed to encourage counsel to seek out litigation-related assignments to deepen their level of military justice training and expertise."[292]

One of the objectives of the ASI initiative is to identify those individuals in the JAG Corps with extensive military justice experience.[293] For purposes of ASI determination, military justice experience is defined as "time spent in attorney positions substantially devoted to the investigation, prosecution, or defense of potential violations of the UCMJ, or the management supervision, or appellate review thereof."[294] The four ASI levels are Basic, Senior, Expert, and Master.[295] Each of the four ASI levels requires varying amounts of "schooling and either courtroom or justice management experience."[296]

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[292] *Id*. para. 2b. *See also* Pede, *supra* note 4, at 35 (suggesting that the ASI system is meant to "incentivize and motivate [judge advocates] to train and to seek jobs in [military justice]").

[293] JAGCNET, *Frequently Asked Questions on the Military Justice ASI Program*, https://www.jagcnet.army.mil/ (last visited Mar. 26, 2014) [hereinafter ASI FAQ].

[294] TJAG Policy Memo 11-7, *supra* note 291, para. 3; JAGCNET, *Implementing Guidance Military Justice Additional Skill Identifier Program* para. 5b, https://www.jagcnet.army.mil/ (last visited Mar. 26, 2014) [hereinafter ASI Guidance].

[295] TJAG Policy Memo 11-7, *supra* note 291, para. 2b; TJAG Sends 37-17, *supra* note 290.

[296] TJAG Policy Memo 11-7, *supra* note 291, para. 4; TJAG Sends 37-17, *supra* note 290. The Basic (ASI 1) requires 18 months as a trial or defense counsel or the litigation of 15 courts-martial, three of which must have been contested; the Senior (ASI 2) requires 30 months of military justice experience or the litigation of at least 36 courts-martial, seven of which must have been contested; the Expert (ASI 3) requires at least 48 months of military justice experience or the litigation of at least 45 courts-martial, 12 of which must have been contested; and, the Master (ASI 4) requires 96 months of military justice experience or the litigation of at least 80 courts-martial, 18 of which must have been contested. *Id.* paras. 4a-d. Each ASI level also imposes educational requirements as well. For example, while the Basic (ASI 1) requires completion of the Judge Advocate Officer Basic Course, the Criminal Law Advocacy Course (CLAC), and a qualifying TCAP or DCAP training, the Senior (ASI 2) requires completion of two advanced military justice or litigation courses and a written recommendation from a qualifying military justice practitioner. *Id.* Further, the Expert (ASI 3) requires completion of the Judge Advocate Officer Graduate Course and a written recommendation from a qualifying military justice practitioner. *Id.* para. 4c. Although the Master does not require any additional schooling, it does impose the additional requirements of working in a qualifying supervisory position and a written recommendation from a qualifying military justice practitioner. *Id.* para. 4d. *See* Appendix D (Current and Proposed ASI Prerequisites).

Every judge advocate is expected, although not required, to certify their eligibility for the appropriate skill identifier.[297] In order to be awarded a particular ASI, judge advocates must apply through the Office of the Judge Advocate General—Criminal Law Division (OTJAG-CLD).[298] To apply, applicants must indicate the ASI level for which they are applying and submit supporting documentation, such as results of trial, award citations, or officer evaluation reports (OERs), to verify the purported level of experience.[299] The application is located on JAGCNet and should be submitted by uploading all necessary documentation electronically.[300]

Once submitted, the Chief, OTJAG-CLD, forwards recommendations to the Chief, Personnel, Plans & Training Office (PPTO), who approves the recommendation for the particular ASI and subsequently adds that designation to the applicant's officer record brief (ORB).[301] The Chief of PPTO has the authority to waive any of the requirements within each ASI.[302] Although the ASIs are not prerequisites for any particular assignment, they were envisioned to assist in the assignment process.[303]

2. Proposed Changes to the Current Military Justice ASI System

There are three changes that should be made to the current ASI system in order to maximize the value it can bring to the JAG Corps' military justice practice. First, the metrics required for each military justice ASI level should be adjusted. Second, the application process should be simplified. Third, applying for a military justice ASI should be a mandatory annual requirement. Each of these changes, if implemented together, would substantially increase the ASI system's overall value to the JAG Corps in terms of identifying experienced military justice practitioners.

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[297] TJAG Policy Memo 11-7, *supra* note 291, para. 5a.
[298] *Id*. paras. 3, 5c.
[299] *Id*. para. 5a.
[300] ASI Guidance, *supra* note 294, para. 5d.
[301] ASI FAQ, *supra* note 293.
[302] TJAG Policy Memo 11-7, *supra* note 291, para. 5b.
[303] *Id*. para. 2c. *See also* ASI Guidance, *supra* note 294 ("ASIs will assist the Personnel, Plans, and Training Office (PPTO) in recommending qualified officers for certain jobs."); Pede, *supra* note 4, at 35 ("As an added benefit, SIs aid in the assignment process by helping identify [a] DC or TC for a particular case or the next potential SDC, SVP, or COJ.").

a. Adjust the ASI Metrics

As then Colonel Charles N. Pede stated while serving as Chief of the Criminal Law and Policy Division, the ASI utilizes "commonly understood measures and metrics of experience in military justice."[304] However, the current "measures and metrics" are skewed, resulting in the award of a higher ASI level to many judge advocates than is appropriate.[305] In particular, the amount of time that one must serve in a military justice position to qualify for a specific ASI level should be higher if an applicant is to qualify for an ASI based solely upon that metric.

Currently, there are two ways that one can achieve a particular ASI level—the number of cases litigated or the number of months served in a military justice position. As should be the case with any quantifiable metric that allows for the achievement of a certain level in two alternative ways, the required criteria for each method should be equivalent to one another. For example, if one has qualified for an ASI 3 based upon the number of months served in a military justice position, he should—in most cases—also qualify for an ASI 3 based on the number of cases he has litigated. The same should also be true of the reverse. Of course, there may be occasions where one qualifies for a higher ASI level under one of the methods than the level he would otherwise achieve under the other method. But, if the criteria for each method of ASI achievement are equivalent, these occasions would be few and far between. And, to the extent that it does happen, there should be an equal number of counsel that qualify for a higher ASI under the number of months in military justice method as there would be counsel that qualify for a higher ASI based on the number of cases litigated method.

This is not the case under the current ASI system. As mentioned above, Part One of this article's survey successfully obtained the litigation experience of all 445 active duty Army judge advocates currently serving in military justice litigation positions.[306] It did so by asking all of them to provide the total number of courts-martial they have litigated, how many of those cases were contested, how many of them

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[304] Pede, *supra* note 4, at 35. Colonel Pede remains on active duty and has since been promoted to brigadier general.

[305] In his 2010 article, Major Grace also criticized the ASI program, suggesting that as currently set up, it does not accurately capture the military justice expertise of Army attorneys. Grace, *supra* note 2, at 24.

[306] *See generally* Gilberg Survey, *supra* note 6.

were in front of a panel, and how many total months of their JAG Corps careers they have spent serving in military justice positions.[307] Additionally, the survey also received responses from five RDCs, thereby providing data for a total of 450 active duty judge advocates.[308] From this data, this author was able to determine which ASI each of the 450 survey participants would qualify for under each method of ASI achievement (i.e., time in military justice vs. number of cases litigated).[309]

The results reveal that under the current ASI model, there are far too many judge advocates who qualify for a higher ASI under the time spent in military justice method than they would otherwise qualify for under the number of cases litigated method.[310] Specifically, of the 450 survey respondents, 160 (35.6%) of them fall into this category.[311] In contrast, only 26 (5.8%) qualify for a higher ASI based upon the number of cases they have litigated.[312] The remaining 264 (58.7%) would qualify for the same ASI regardless of which metric is used (i.e., time in military justice vs. number of cases litigated).[313]

Even more troubling, there are 40 (8.9%) survey respondents who would actually qualify for an ASI *two* levels higher based upon the amount of time spent in military justice than the ASI level they would otherwise qualify for based upon the number of cases litigated.[314] On the flip side, only two (0.4%) would qualify for an ASI level two levels higher based upon the number of cases litigated than the ASI level they would otherwise qualify for based on the amount of time spent in military justice. (See Table 6, Current ASI System Analysis.)[315]

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[307] *See* Appendix A (Distributed Surveys).
[308] Gilberg Survey, *supra* note 6.
[309] Of course, this exercise assumes that the applicants have met the training and other requirements of the applicable ASI.
[310] *See generally*, Gilberg Survey, *supra* note 6. *See also id.* TC15 ("Although I occupied the TC billet for a fairly lengthy time, due to deployment and a subsequent slow jurisdiction I did not have a lot of trial experience."), COJ10 (emphasizing that "[d]oing something for years does not necessarily make one good at it").
[311] *Id.*
[312] *Id*.
[313] *Id.*
[314] *Id.* The results revealed that under the current ASI system, 15 would qualify for ASI 4, 57 would qualify for ASI 3, 78 would qualify for ASI 2, 106 would qualify for ASI 1, and 194 would not yet qualify for an ASI. *Id.*
[315] *Id*.

Position	# of counsel achieving a higher ASI under the # of months in military justice method	# of counsel achieving an ASI *two* levels higher under the # of months in military justice method	# of counsel achieving a higher ASI under the # of cases litigated method	# of counsel achieving an ASI *two* levels higher under the # of cases litigated method	# of counsel that would qualify for the same ASI under either method
SDCs / DCs (144)	67 (46.5%)	16 (11.1%)	12 (8.3%)	0 (0%)	65 (45.1%)
COJs / TCs (278)	80 (28.8%)	20 (7.2%)	9 (3.2%)	2 (0.7%)	189 (68.0%)
SVPs (23)	8 (34.8%)	4 (17.4%)	5 (21.7%)	0 (0%)	10 (43.5%)
RDCs (5)	5 (100%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)
Total (450)	160	40	26	2	264
Percentage	35.6%	8.9%	5.8%	0.4%	58.7%

Table 6. Current ASI System Analysis

This is problematic as junior judge advocates often look to these individuals for advice as litigation experts simply because of the inflated ASI level they hold. To correct this problem, the requisite amount of time that one must serve in a military justice position to qualify for a particular ASI level should be higher to minimize the risk of inexperienced counsel achieving a higher ASI level than is appropriate.[316] Specifically, the amount of time in military justice required to qualify for a particular ASI should be increased from 18 to 24 months for ASI 1; from 30 to 48 months for ASI 2; and, from 48 to 72 months for ASI 3.[317] The requirements for ASI 4 should remain at 96 months (this would separate each ASI by 24-month increments).[318]

Additionally, if an applicant is to be awarded an ASI based on the number of cases litigated, it should matter how many of those cases were tried before a military panel. Perhaps the current ASI model assumes that most contested cases are tried before a military panel. However, there is a growing trend of litigating a contested court-martial before a

[316] *See* Appendix D (Current and Proposed ASI Prerequisites).
[317] *Id.*
[318] *Id.*

military judge alone. In fact, the survey revealed that 201 (44.7%) of the 450 survey respondents have tried *multiple* contested cases before a military judge alone.[319] This number is remarkably large considering that 245 (54.4%) of the 450 respondents have tried five or fewer contested courts-martial in their entire career.[320] Moreover, 178 (45.41%) of the 392 contested courts-martial that were tried in 2013 were tried before a military judge alone (as opposed to before a military panel).[321]

As such, the ASI criteria should be expanded to include not only the total number of cases and total number of contested cases, but also the total number of *panel* cases litigated.[322] Specifically, ASI 1 should require 2 panel cases; ASI 2 should require four panel cases; ASI 3 should require 8 panel cases; and, ASI 4 should require 12 panel cases.[323] As the logistical complexity of trying a case before a military panel cannot be overstated, those who understand those dynamics must be identified in the Army's ASI initiative. Interestingly, the Navy's Military Justice Litigation Qualification (MJLQ), which is their version of the Army's ASI, already accounts for the number of cases tried before a military panel.[324] The Army should follow suit.

Finally, the ASI scale as a whole should be altered to ensure that the increased requirements for each ASI level are consistently gradual. For example, the total number of cases required for each ASI should be in 15-case increments (15 cases required for ASI 1, 30 cases for ASI 2, 45 cases for ASI 3, and 60 cases for ASI 4).[325] Similarly, the total number of contested cases required for each ASI should be in 4-case increments (4 contests for ASI 1, 8 contests for ASI 2, 12 contests for ASI 3, and 16 contests for ASI 4).[326] And, the total number of panel cases should be set

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[319] Gilberg Survey, *supra* note 6.
[320] *Id*.
[321] E-mail from Tony Pottinger, to Major Jeffrey A. Gilberg (Feb. 4, 2014, 15:14 EST) (on file with author) (hereinafter Pottinger e-mail].
[322] *See* Appendix D (Current and Proposed ASI Prerequisites).
[323] *Id.*
[324] U.S. DEP'T OF NAVY, JAGINST 1150.2C, OFFICE OF THE JUDGE ADVOCATE GENERAL, enclosure 2 (10 Sept. 2013) [hereinafter NAVY QUALIFICATION].
[325] *See* Appendix D (Current and Proposed ASI Prerequisites). This changes the ASI 2 total case requirement from 36 to 30 cases and the ASI 4 total case requirement from 80 to 60.
[326] This changes the contested case requirements of ASI 1, ASI 2, and ASI 4 from 3 to 4, 7 to 8, and 18 to 16, respectively.

at 2 for ASI 1, 4 for ASI 2, 8 for ASI 3, and 12 for ASI 4.[327] This gradual model makes more sense and is easier for applicants to understand what is required to qualify for the next ASI level.

In order to test whether these proposed changes would *actually* address the problems identified above, this author examined the data provided by the 450 survey respondents and determined which ASI each of them would qualify for under the amended ASI system outlined above.[328] The results of this analysis revealed that only 69 (15.3%)—compared to 160 (35.6%) under the current ASI system—would qualify for a higher ASI based upon the amount of time they have spent in military justice than the ASI they otherwise would qualify for based upon the number of cases they have litigated.[329] In contrast, 70 (15.6%) counsel—compared to 26 (5.8%) under the current ASI system—would qualify for a higher ASI based upon the number of cases they have litigated.[330] The number of counsel that would qualify for the same ASI level under either model would increase from 264 (58.7%) under the current ASI system to 310 (68.9%) under the proposed ASI system.[331] Finally, only 8 (1.8%) survey respondents—compared to 40 (8.9%) under the current ASI system—would qualify for an ASI level *two* levels higher based upon the amount of time spent in military justice than the ASI level they would otherwise qualify for based upon the number of cases litigated. (See Table 7, Proposed ASI System Analysis.)[332]

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[327] *See* Appendix D (Current and Proposed ASI Prerequisites).

[328] Again, this exercise assumes that the applicants have met the training and other requirements of the applicable ASI.

[329] *See* Gilberg Survey, *supra* note 6.

[330] *Id*.

[331] *Id.*

[332] *Id*. The results revealed that under the proposed ASI system, 22 would qualify for ASI 4, 17 would qualify for ASI 3, 60 would qualify for ASI 2, 118 would qualify for ASI 1, and 233 would not yet qualify for an ASI. *Id*.

Position	# of counsel achieving a higher ASI under the # of months in military justice method	# of counsel achieving an ASI *two* levels higher under the # of months in military justice method	# of counsel achieving a higher ASI under the # of cases litigated method	# of counsel achieving an ASI *two* levels higher under the # of cases litigated method	# of counsel that would qualify for the same ASI under either method
SDCs/DCs (144)	31 (21.5%)	5 (3.5%)	34 (23.6%)	1 (0.7%)	79 (54.9%)
COJs / TCs (278)	31 (11.2%)	2 (0.7%)	25 (9.0%)	3 (1.1%)	222 (79.9%)
SVPs (23)	5 (21.7%)	1 (4.3%)	11 (47.8%)	3 (13.0%)	7 (30.4%)
RDCs (5)	3 (60%)	0 (0%)	0 (0%)	0 (0%)	2 (40%)
Total (450)	69	8	70	7	310
Percentage	15.3%	1.8%	15.6%	1.6%	68.9%

Table 7. Proposed ASI System Analysis

As these numbers illustrate, the amended ASI system proposed above goes a long way in minimizing the risk of a judge advocate being awarded a higher ASI level than is appropriate by establishing metrics of experience that are equivalent to one another. Once again, if the metrics established under either method are equivalent, a vast majority of counsel should qualify for the same ASI level under either method of achievement. Further, the number of counsel who qualify for a higher level under one of the methods should be about the same number of counsel who qualify for a higher level under the alternative method. With 310 (68.9%) of the 450 respondents qualifying for the same ASI level under either method, 69 (15.3%) of them qualifying for a higher ASI level under the time in military justice method, and 70 (15.6%) of them qualifying for a higher ASI level under the number of cases litigated, this goal is accomplished.[333]

[333] *Id.*

b. Simplify the ASI Application Process

The second improvement to the ASI system, simplifying the application process, allows a judge advocate to more easily communicate his experience to OTJAG. Under the current ASI system, the application process is too burdensome and takes too long. Rather than requiring counsel to hunt down and upload supporting documentation that verifies their participation in every single case, the applicant should be permitted to write a memorandum that specifically details his experience. Applicants would write it themselves and sign it, thereby certifying that its contents are true and accurate to the best of their knowledge and belief.

The memorandum would specify—by name—the cases that the applicant has litigated, a brief factual summary of the charges, which of those cases were guilty pleas, which were contests, which were tried before a military panel, a brief description of the role that he played in that case, and the result that was achieved. The memorandum would also specify the military justice positions that the applicant has held and the dates during which he served in those positions. Finally, the memorandum would detail the training events that the applicant attended, to include a sufficient description of the substance and length of the training as well as the extent of the applicant's participation. Additionally, for applicants with civilian litigation experience, such experience should also be included in the memorandum.[334] In many ways, this memorandum would represent the military justice litigation résumé of its author.

Every judge advocate is an attorney, admitted to practice law by a particular state, and therefore bound by the rules of professional responsibility and legal ethics. As such, judge advocates ought to be trusted to tell the truth when documenting and certifying their experience. Nonetheless, to be vigilant in ensuring that accurate and complete information is presented in the self-certifying memorandum of experience, an applicant must obtain a supervisory endorsement. In order to obtain such an endorsement, the applicant must submit the memorandum to his rater, who would then review it and subsequently discuss it with the applicant (either in person or over the phone). The applicant's rater would not endorse the memorandum until he was

[334] *See, e.g.*, *id.* TC115 (suggesting that his previous civilian experience as an assistant district attorney helped make him a better Army litigator).

satisfied that the memorandum was accurate, complete, and in compliance with the required format.[335] In the event that the applicant's rater was not satisfied, he would return it to the applicant to correct.

Additionally, the current online program should be modified so that applicants could self-certify by simply uploading their memorandum of experience and supervisory endorsement. Once an ASI candidate is able to do so, he should be able to self-certify that he has met the specific requirements for the ASI level for which he has applied. The OTJAG-CLD would then review and ratify those self-certifications, ensuring that the appropriate ASI level is reflected on that applicant's ORB. However, the ratification process would amount to nothing more than ensuring that the applicant's memorandum and endorsement were completed and uploaded—it would not entail any substantive review and would instead rely upon applicant and supervisory integrity.

Currently, the processing time for ASI 1 and ASI 2 applications is 30 to 60 days.[336] For ASI 3 and ASI 4 applications, the processing time is 90 to 180 days.[337] Because it takes so long to process these applications, the awarded ASI may no longer be an accurate indication of the applicant's experience by the time the application is approved. Putting the onus on the applicant to include all of their experience and on their supervisor to ensure that it is accurate, complete, and in compliance with the required format would substantially reduce the processing time for applications.[338]

c. Require Annual ASI Certification

Although highly encouraged and perhaps even expected, applying for an ASI is not currently required of all judge advocates. Under the current ASI system, as of 21 March 2014, there are 1,024 active duty

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[335] A sample memorandum would be available for all judge advocates to review in order to assist them.

[336] E-mail from Master Sergeant Angela Jenkins, to Major Jeffrey A. Gilberg (Mar. 21, 2014, 15:30 EST) [hereinafter Jenkins e-mail] (on file with author).

[337] *Id.*

[338] Under the proposed simplified application process, letters of recommendation would no longer be required and waivers of any of the ASI level prerequisites would no longer be granted. Whether one achieves a particular ASI or not would be a simple question: either the applicant meets the experience and training requirements or not. With such a straightforward approach, it would no longer be necessary for such an involved and intricate approval process to exist.

Army judge advocates (51.2% of the JAG Corps) who have been awarded a military justice ASI.[339] While this is a great start, it merely scratches the surface of what could be inventoried. Instead, ASI self-certification should be an annual requirement for *every* active duty Army attorney—much like the requirement for all judge advocates to self-certify that they are a member of a specific bar and in good standing to practice law in that state. This way, on an annual basis, JAG Corps leadership would have access to a current snapshot of the Corps' proficiency in military justice; as a Corps, we would know exactly how many of our attorneys are certified at each ASI level, *each year*. Furthermore, JAG Corps leadership would have the ability to review the specific military justice litigation experience of *any* single judge advocate simply by looking at the memorandum of experience for that particular individual.

Admittedly, implementing this requirement could be difficult. Many applicants—particularly those who have been serving in the JAG Corps for many years and perhaps not kept the best records—may have difficulty including all of their training and litigation experience in their memorandum. Perhaps the required format of the memorandum could be relaxed for those judge advocates who have been in the JAG Corps for more than four years.[340]

For example, rather than requiring these judge advocates to list *every* case they have ever litigated, they would be permitted to only list their top 5 to 10 most significant cases and estimate how many total cases they have litigated, how many of them were contested, and how many of them were before a military panel. However, for these individuals, an ASI would be awarded strictly based upon the amount of time the applicant has spent in military justice positions and not the number of cases that they have litigated (since those figures are merely estimates that are unverifiable).

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[339] Jenkins e-mail, *supra* note 336. There are 2000 active duty judge advocates in the U.S. Army JAG Corps. PowerPoint Presentation of Lieutenant Colonel Laura J. Calese, Field Grade Assignments Officer, Office of the Judge Advocate General, Personnel, Plans & Training Office, on 62nd Graduate Course Presentation slide 25 (Sept. 9, 2013) (on file with author) [hereinafter Calese Presentation].

[340] The four-year threshold is suggested because that ordinarily would coincide with the length of time of one's first tour. Simply stated, with a little focus and effort, every first-tour judge advocate should be able to sit down and reconstruct the names and number of cases that he has litigated during that time.

Others might complain that completing this memorandum would be extremely time-consuming, especially for senior judge advocates doing so for the first time. However, the memorandum would be a working document that would be updated throughout one's career. Each year, all one has to do is add the experience they have gained and any military justice training they have attended in the past 12 months. In all likelihood, the applicant has probably already compiled this information when completing his evaluation support form. Long term, particularly for attorneys just now coming into the JAG Corps, the time that applicants must spend on the memorandum of experience would be marginal and far outweighed by the value that these memoranda would provide to JAG Corps leadership in the many years to come.

As then Colonel Pede once wrote, the ASI program helps JAG Corps leaders "make informed decisions."[341] Just imagine how much more informed those decisions could be if a detailed memorandum of litigation experience was available for leaders to review for *every* active duty judge advocate.

D. Code Certain Positions and Implement a Military Justice Career Track

The proposed military justice re-organization outlined above would be ineffective in detailing experienced judge advocates to contested cases unless specific measures are also put in place *guaranteeing* that those selected to serve as DCs, SDCs, RDCs, STCs, SVPs, CPs, MJs, and TCAP/DCAP personnel are *actually* experienced military justice practitioners.[342] The best way to do so would be to code these positions with a prerequisite level of military justice experience, as established by the *amended* military justice ASI, and implement a military justice career track.[343] The Navy has already injected such a measure into its military justice practice and the Army should follow its lead.

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[341] Pede, *supra* note 4, at 35.

[342] Grace, *supra* note 2, at 31 (stressing the importance of assigning the right personnel to STC, SDC, and COJ positions).

[343] The ideas of coding certain military justice positions with the ASI and implementing a military justice career track have been proposed before. *See, e.g.*, *id.* at 26, 31 (suggesting that the Army implement a MJ career track similar to the Navy and use the ASI system to ensure that certain military justice practitioners have the necessary experience required of them); Cooke, *supra* note 4, at 29 ("One alternative may be specialization."); Ku, *supra* note 4, at 81 (arguing that military justice specialization

In recognition that the delivery of military justice is "both a core competency and primary mission of the JAG Corps,"[344] the Navy created a Military Justice Litigation Career Track (MJLCT) to recruit, identify, select, and retain qualified military justice practitioners in the JAG Corps.[345] To aid in this endeavor, the Navy also established the MJLQ, which is their method of quantifying and qualifying an individual's litigation expertise.[346] There are three MJLQs: Specialist I, Specialist II, and Expert.[347]

As a part of the MJLCT, the Navy JAG designated 53 billets as MJLQ-required.[348] These positions are MJLQ-coded because they have been identified as positions that "necessitate a certain amount of military justice litigation experience."[349] In addition to the litigation expertise that each MJLQ judge advocate is expected to bring to these coded positions, they are also expected to mentor and train junior judge advocates with whom they work.[350] In fact, the Navy has instructed that "training programs shall be an integral part of the MJLCT professional development along with the mentoring by senior MJLQ judge advocates in the courtroom."[351]

Similar to the Navy, the Army should designate certain billets as ASI-required.[352] Specifically, DCs should possess an ASI 1; STCs, TCAP/DCAP Training Officers, and 23 of the SDCs an ASI 2; SVPs and

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would be "one huge step in the right direction"); Stimson, *supra* note 4 (arguing that establishing a military justice career track is "the best way to strengthen the military criminal justice system over the long term").

[344] NAVY QUALIFICATION, *supra* note 324, para. 3a(1).

[345] *Id*. para. 1.

[346] *Id*. paras. 1, 3a(4).

[347] *Id*. paras. 3b, 3c, 3d. The Specialist I MJLQ requires four years in service and participation in ten panel cases, of which at least five must be as lead counsel; the Specialist II MJLQ requires ten years in service, of which at least three years must be in a MJLQ billet, and participation in 20 members cases, of which at least ten must be as lead counsel; the Expert MJLQ requires 16 years in service, of which at least eight years must be in a MJLQ billet, and participation in 40 members cases, of which at least 20 must be as lead counsel. *Id*.

[348] *Id*. para. 3g(1), enclosure 7.

[349] *Id*. para. 3g(1).

[350] *Id*. para. 3i(2).

[351] *Id*.

[352] *See* Gilberg Survey, *supra* note 6, SDC7 (suggesting that "[a]n SVP candidate should satisfy baseline criteria for [numbers] of contested / panel cases before [being] admitted to the program").

23 of the SDCs an ASI 3;[353] and, CPs, RDCs, MJs, and TCAP/DCAP leadership an ASI 4.[354] Neither the TCs nor the COJs would be coded positions.[355] In total, 266 positions would be ASI-coded, with 102 of them at the ASI 3 or 4 levels. (See Table 8, Proposed Military Justice Position Coding.)[356]

ASI Prerequisite	Position and Quantity	Total
None	230 TCs, 48 COJs	278
ASI 1	110 DCs	110
ASI 2	23 SDCs, 23 STCs, 4 TCAP Training Officers, 4 DCAP Training Officers	54
ASI 3	23 SDCs, 23 SVPs	46
ASI 4	11 RDCs, 11 CPs, 27 MJs, 2 TCAP, 5 DCAP	56
Total Coded Positions	11 CPs, 23 SVPs, 23 STCs, 11 RDCs, 46 SDCs, 110 DCs 6 TCAP (Chief, Deputy, 4 Training Officers) 6 DCAP (Chief, Deputy, 4 Training Officers) 3 TDS (Chief, Deputy, Ops) 27 MJs	266

Table 8. Proposed Military Justice Position Coding

[353] While the ASI prerequisite for half of the SDCs would be ASI 2, the ASI prerequisite for the other half would be ASI 3. This would provide DCAP with a comparable level of litigation experience to what the SVPs and STCs would collectively provide TCAP.

[354] *See* Ku, *supra* note 4, at 75 (commenting that the trial experience requirement for military judges "is not high, and is in fact rather modest").

[355] The TCs would not be coded positions for obvious reasons—most are junior attorneys just starting their JAG Corps careers. However, the COJs would not be coded to allow those senior captains and junior majors, who have not yet had the opportunity to practice military justice, do so for purposes of following the traditional broadly skilled career path.

[356] There would be 56 positions coded as ASI 4. Those 56 positions would be comprised of the 27 active duty MJs, Chief of TCAP, Deputy of TCAP, Chief of TDS, Deputy of TDS, Operations Officer for TDS, Chief of DCAP, Deputy of DCAP, the 11 CPs, and the 11 RDCs. There would be 46 positions coded as ASI 3 (the 23 SVPs and 23 of the SDCs). There would be 54 positions coded as ASI 2 (the remaining 23 SDCs, all 23 STCs, and the 8 TCAP/DCAP Training Officers). Finally, the 110 DCs would be coded as ASI 1 positions.

These pre-requisites should be enforced whenever possible and only in extraordinary circumstances should an exception ever be made.[357] The Chief of PPTO would be the exception authority and would only be able to make such an exception with Chief, TCAP or Chief, DCAP concurrence.[358] To assist these individuals in deciding whether to make an exception or not, the self-certifying memorandum of experience filed with the applicant's most recent ASI application would be accessible for review.

One possible concern associated with coding so many positions might be whether the JAG Corps has enough ASI-qualified judge advocates to fill these slots. If PPTO continues filling positions as it does now, this concern would be valid and *many* exceptions would have to be made.[359] Currently, only 69 of the 110 DCs would qualify for at least an ASI 1 under the proposed ASI system.[360] Of the 34 SDCs, only 20 of them would qualify for at least an ASI 2.[361] Of the 23 SVPs, only 17 would qualify for at least an ASI 3.[362] Therefore, it is true that the JAG Corps' current criminal litigation practice lacks the experience that the proposed plan would require. However, that does not mean that this military justice experience does not exist *outside* of the JAG Corps' current criminal litigation practice; to the contrary, it does.

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[357] Grace, *supra* note 2, at 32 (cautioning that the placement of inexperienced practitioners in senior litigation positions would harm the junior judge advocates under their supervision and the "[military justice] system as a whole"). One example of when an exception might be appropriate would be in the case of a judge advocate who has previous civilian litigation experience. This is why including such civilian experience in one's memorandum of experience would be important.

[358] For example, if the prospective attorney being considered for a TCAP position does not meet the established prerequisite, both the Chief of PPTO and the Chief of TCAP must agree to waive that prerequisite before that attorney may be assigned to that position. Similarly, if the prospective attorney being considered for a DCAP position does not meet the established prerequisite, both the Chief of PPTO and the Chief of DCAP must agree to waive that prerequisite before that attorney may be assigned to that position.

[359] Hayden, Hunter & Williams, *supra* note 4, at 21 (observing that "the first-level supervisory positions in the Army's criminal justice system are currently being filled by attorneys who have considerably less trial experience than their predecessors").

[360] Gilberg Survey, *supra* note 6. More specifically, 3 would qualify for an ASI 4, 0 would qualify for an ASI 3, 18 would qualify for an ASI 2, 48 would qualify for an ASI 1, and 41 would not yet qualify for any ASI. *Id.*

[361] *Id*. In particular, 2 would qualify for an ASI 4, 3 would qualify for an ASI 3, 15 would qualify for an ASI 2, 12 would qualify for an ASI 1, and 2 would not yet qualify for any ASI. *Id*.

[362] *Id*. More specifically, 11 would qualify for an ASI 4, 6 would qualify for an ASI 3, 5 would qualify for an ASI 2, and 1 would qualify for an ASI 1. *Id*.

As mentioned above, there are currently 1,024 judge advocates who have been awarded a military justice ASI under the current ASI system.[363] More specifically, 569 hold an ASI 1; 238 hold an ASI 2; 145 hold an ASI 3; and, 72 hold an ASI 4.[364] Additionally, there are many judge advocates in non-coded positions who would be qualified to fill a coded position in the future. For example, there are currently 49 TCs and 39 COJs who would qualify for at least an ASI 1 (under the proposed ASI system).[365] Moreover, there are 26 current COJs qualifying for at least an ASI 2 (also under the proposed ASI system).[366]

All of these judge advocates represent a pool of attorneys who could fill these newly coded positions. The problem is that many of them are motivated to leave military justice and pursue other areas of the law because of the broadly skilled career model, motivated out of fear of being passed over for promotion.[367] If these judge advocates were told that it is okay for them to remain in military justice, perhaps many of them would choose to do so.

In order to establish the capability to fill all of these positions with the appropriate ASI-coded personnel, a military justice career track should be implemented that both preserves the broadly skilled judge advocate model while also recognizing the need to maximize the Corps' military justice experience.[368] On one hand, it is important to develop broadly skilled judge advocates who are equipped with the institutional knowledge necessary to succeed in the JAG Corps' most important leadership positions.[369] Yet, on the other hand, military justice remains the JAG Corps' statutory mission—one that is completed with greater success when specialized expertise is utilized.[370] While some may argue that these two concepts (broadly skilled versus specialization) cannot co-

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[363] Jenkins e-mail, *supra* note 336.
[364] *Id.*
[365] Gilberg Survey, *supra* note 6.
[366] *Id*.
[367] Ku, *supra* note 4, at 86 (acknowledging that there is "no systemic effort. . . to convince young [j]udge [a]dvocates that they can and should remain in military justice for a sufficient period of time with positive career implications").
[368] *See* Gilberg Survey, *supra* note 6, CR24 (suggesting that there should be a military justice specialty in the JAG Corps).
[369] *See* Calese Presentation, *supra* note 339, slide 25 (identifying the need to develop "broadly skilled judge advocates" as a goal of the JAG Corps).
[370] Kennedy, *supra* note 276, at 6 ("Military justice is job #1 for the JAG Corps."); Coupe & Trant, *supra* note 80, at 5 (asserting that trial work is the "heart of our profession").

exist, such a position ignores the evolving needs of the Army. A system that draws upon the benefits of both is required in order to maximize the overall legal proficiency of the Army's law firm.[371] The plan proposed in this article accomplishes this very goal.

Specifically, at any given time, there would be approximately 125 active duty judge advocates serving in the Army's Military Justice Career Track (AMJCT).[372] Any post-graduate course judge advocate may apply for selection into the AMJCT. An annual board would convene to determine which judge advocates are selected. From this pool of approximately 125 AMJCT personnel, PPTO would fill the 102 ASI 3 and 4 coded positions described above (i.e., MJs, TCAP/DCAP leadership, CPs, RDCs, SVPs, and half of the SDCs). The remaining 23 would be assigned to non-military justice assignments for what the Navy calls a "disassociated tour."[373] All personnel on the AMJCT would, at some point in their respective careers, complete at least one disassociated tour.[374] This will keep these judge advocates current on the overall mission of the JAG Corps, while adding to the institutional Army knowledge that they must draw upon when they inevitably return to a litigation position.[375] Allowing judge advocates to serve a disassociated tour would also address the problem of "military justice burnout"—something that many Army litigators have experienced.

In order to encourage the Army's most highly qualified military justice practitioners to apply for the career track, some measure must be taken to ensure that those that are selected are not punished at promotion time for deviating from the broadly skilled judge advocate model.[376] The Navy's career track includes language for inclusion in promotion board precepts so that board members might understand the importance of a

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[371] *See* Gilberg Survey, *supra* note 6, CR6 (commenting that some attorneys are not cut out for the courtroom and "belong in legal assistance forever").

[372] *See* Grace, *supra* note 2, at 34 (stating that the JAG Corps "must maintain a core of seasoned [military justice] practitioners").

[373] *See* Stimson, *supra* note 4, at 22.

[374] No judge advocate should ever serve in more than three consecutive military justice billets.

[375] Stimson, *supra* note 4, at 22 (advocating that the Navy's requirement of serving in a disassociated tour provides many benefits both to the individual involved and the JAG Corps as a whole).

[376] *See* Gilberg Survey, *supra* note 6, COJ35 (suggesting that the JAG Corps must "make sure [SVPs] are taken care of as they exit the program").

judge advocate specializing in military justice practice.[377] As Major Grace observes, "[i]t is hard to imagine a stronger vote of confidence."[378] The Army should follow suit.

The 125 judge advocates serving in the AMJCT would amount to a very small percentage (6.25%) of the active duty JAG Corps.[379] Moreover, it is comparable to the 7.8% of the Navy's active duty JAG Corps that are currently serving in its military justice career track.[380] Designating such a small portion of the Army JAG Corps' workforce as career military justice practitioners would hardly disrupt the overarching broadly skilled career model. However, it would do just enough to improve the quality of the Corps' litigation while also better developing military justice expertise in *all* judge advocates.

With respect to the overwhelming majority of judge advocates who do follow the broadly skilled career model, it is especially important that the small amount of time they do spend in a military justice position is

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[377] Memorandum, Sec'y of the Navy, to Presidents, FY–15 Active-Duty Navy Captain Staff Corps Officers Promotion Selection Board para. 7c (24 Jan. 2014).

> Military Justice Litigation Specialty. Military justice plays a critical role in the maintenance of good order and discipline and accountability in the Navy. The JAG Corps must maintain a cadre of specialized officers whose primary responsibility is to prosecute, defend, and judge criminal cases and military commissions. The officers who form this cadre are formally selected by a board and designated as being a member of the Military Justice Litigation Career Track. Once designated, officers within this career track normally spend significant portions of their careers within designated litigation billets. Developing and maintaining military justice litigation skills, which are perishable by nature, require progressive assignment to military justice litigation billets. These assignments may limit variety in billet history and the opportunity for assignment to sea duty, but are vitally important to the Navy's mission. Currently, the needs of the Navy reflect a shortage of officers for senior leadership assignment in this area of expertise. In determining the best and fully qualified officers, you shall favorably consider valuable contributions made through superior performance in this specialty area.

Id.

[378] Grace, *supra* note 2, at 28.

[379] *See* Calese Presentation, *supra* note 339, slide 25 (stating that there are 2000 active duty judge advocates in the U.S. Army JAG Corps).

[380] Of the 830 active duty Navy judge advocates, 65 of them are in the Navy's military justice career track. Stimson, *supra* note 4, at 21.

meaningful. Ensuring that an experienced litigator is available to mentor them while they "do their justice time" would go a long way to *actually* contributing to a broadly skilled knowledge base within that particular attorney.

During a time when the military justice system is seemingly under attack by Congress and the public, it is important to examine the current system to ensure that the JAG Corps is truly doing the best that it can do.[381] As Major Ku has argued, "cultivating seasoned military justice practitioners in turn populates the military justice system with people who understand how the system operates and what it is designed to do."[382] Although the current ASI system was not intended to "create a specialization in military justice,"[383] perhaps it is time to revisit that position, but in a very limited manner.

VI. The Primary Benefits of the Proposed Plan

Above all else, the proposed plan would improve the Army's military justice practice in four primary ways. First, it would enhance the military justice professional development provided to junior litigators in the Corps without compromising case quality. Second, it would provide a systemic capability to prosecute and defend high-profile cases. Third, the proposed plan would build upon the success of the SVP program by maximizing its strengths and addressing its weaknesses. Finally, it would continue to emphasize the importance of training, both locally and globally.

A. Simultaneously Improving Professional Development and Case Quality

The JAG Corps is confronted with competing interests in every case. On one hand, the professional development of junior judge advocates is crucial to the long-term success of our organization. And, as many have

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[381] *See* Pede, *supra* note 4, at 32 ("News coverage is invariably followed by calls for action.").
[382] Ku, *supra* note 4, at 81.
[383] TJAG SENDS 37-17, *supra* note 290 ("These ASIs do not guarantee the right to remain in military justice throughout an officer's career."); ASI FAQ, *supra* note 293 ("Officers should and are expected to balance their experience in all of our core competencies.").

said over the years, the best way for an inexperienced litigator to learn is by trying real cases.[384] But, on the other hand, there is simply too much at stake to send brand new counsel into the courtroom by themselves.[385] The proposed plan reconciles these two competing interests by allowing brand-new litigators to gain valuable litigation experience so long as they are accompanied into the courtroom by an experienced practitioner as their co-counsel. It also guarantees that this will happen in *every* contested case, thereby providing quality mentorship and supervision during an actual case while also maintaining the integrity of that case. Major Grace wrote that "[t]here is no substitute for time in the courtroom."[386] Yet, in reality, there is—it is time in the courtroom *with an experienced litigator*.[387]

Until the SVP program was implemented, there was no formal Army initiative that provided every new counsel local access to an experienced military justice practitioner.[388] Although there have been COJs, SDCs, and RDCs for quite some time, it was simply the luck of the draw as to whether experienced litigators actually occupied those positions. As Part One of the survey illustrates, those positions are often filled with judge advocates that simply do not have enough experience to provide meaningful mentorship.[389]

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[384] Hayden, Hunter & Williams, *supra* note 4, at 28 ("The best way for inexperienced counsel to learn advocacy skills is to try cases."); Grace, *supra* note 2, at 25 ("There is no substitute for experience when it comes to litigating cases."); Holland, *supra* note 4, at 16 ("Undoubtedly, an attorney should gain experience in the courtroom."); Stimson, *supra* note 4, at 13 ("There is no substitute for actual experience."); Coupe & Trant, *supra* note 80, at 9 (arguing that "counsel probably receive their most significant training while actually preparing and trying real cases").

[385] *See* Holland, *supra* note 4, at 16 (maintaining that the military justice system "cannot afford to allow counsel to perform alone without ensuring that they are trained properly").

[386] Grace, *supra* note 2, at 26.

[387] *See* Morris, *supra* note 4, at 15 (asserting that counsel learn even more from their mistakes "when those mistakes are filtered and interpreted by someone who not only can diagnose the error but also can talk them through solutions and alternative approaches to future cases"). *See also* Gilberg Survey, *supra* note 6, SVP12 (stressing that "[i]t's the note-passing and whispering at the table that help spur-of-the-moment decisions happen and change the course of trials").

[388] *See* Pede, *supra* note 4, at 33 (discussing the benefit afforded to TCs that are able to "learn from and consult with their more experienced colleagues").

[389] *See generally* Gilberg Survey, *supra* note 6.

Although the SVP model has begun to correct this problem, it is not sufficiently staffed to do so in every case.[390] Due to the number of special victim cases and the impossibility of an SVP being in two places at one time, there remain far too many cases where new counsel are sent into the courtroom without an experienced practitioner by their side.[391] By expanding the SVP program, creating a CP, and redefining what it means to be an RDC, SDC, and STC, the Corps would be able to guarantee every TC and DC local access to quality mentorship and litigation expertise in every single contested case, regardless of where in the world they are assigned. No longer would such access be luck of the draw.

Moreover, the concept of the experienced litigator stepping aside once a case changes from a contested court-martial to a guilty plea cannot be understated. Not only does it allow the junior practitioner to assume more responsibility in a lower threat environment, but it also allows a *second* junior practitioner to sit at counsel table in the experienced litigator's place to gain valuable courtroom experience. Even though the case is no longer contested, it nonetheless offers the attorneys involved an excellent opportunity to improve their advocacy skills in a real case. As then Lieutenant Colonel Edye U. Moran, who served as a military judge in the 2d Judicial Circuit, once wrote, learning how to properly prepare for a guilty plea "should speed the transition from inexperienced counsel to polished litigator."[392]

B. Providing a Systemic Capability to Prosecute and Defend High-Profile Cases

High-profile cases are generally those cases that are likely to receive substantial media attention and significant public interest.[393] One of the problems with the Army's current litigation framework is that there is no

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[390] *See, e.g.*, *id.* COJ7 (stressing that there are not enough SVPs), RDC5 (concluding that "[s]ome jurisdictions need more SVPs to cover the case load").

[391] *See, e.g.*, *id.* TC14 (stating that the SVP "was not available to sit for the trial"), TC39 (noting that his SVP was "way too busy to assist on every 120 case"), COJ11 (observing that due to the SVP's busy workload, "it's hard for them to keep a hand in everything").

[392] Moran, *supra* note 4, at 66. Lieutenant Colonel Moran has since been promoted to colonel and currently serves as an Army Reserve military judge with the 150th Legal Operations Detachment (LOD). ARMY KNOWLEDGE ONLINE, https://www.us.army.mil/suite/designer (last visited Mar. 13, 2014).

[393] Bankson, *supra* note 4, at 5 (defining high-profile cases as "those cases receiving significant and persistent media attention").

systemic capability to handle high-profile cases.[394] As Major Bankson wrote, there is a "gap in the Army's military justice practice in the field of high-profile cases."[395] Whenever a high-profile case emerges, it is incumbent upon the office that owns that case to deal with it.[396] In some cases, SJAs ask for help.[397] In other cases, the "our problem, our case, our work" mentality prevails.[398] Either way, the Army suffers.[399]

If an Office of the Staff Judge Advocate (OSJA) does ask for help, the quality of that case usually benefits as an experienced litigator is brought in to prosecute it. However, that benefit is often achieved at the expense of other offices and other missions. For example, in the case against Major Malik N. Hasan at Fort Hood, Texas, the assignments of at least two officers were amended so that they could assist with the case and at least three offices were affected.[400] Moreover, in the case against Brigadier General Jeffrey A. Sinclair at Fort Bragg, North Carolina, one officer's PCS was delayed by almost a year and another officer was taken off a scheduled deployment.[401]

In contrast, when an OSJA does not ask for help, it is often one of the local TCs who is detailed to prosecute the case as either lead or co-counsel. When this happens, other assignments may be preserved and other offices left intact, but the quality of the case often suffers. As Major Grace wrote, "the average trial counsel does not have the skill level, resources, and experience to adequately approach and prosecute more complex cases."[402]

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[394] *Id*. at 7 (arguing that "the Army needs to address systematic shortcomings in managing high-profile cases").
[395] *Id*. at 4.
[396] *Id*. at 6 (stressing that "[t]he decisions on how to manage high-profile cases are largely left to each [Office of the Staff Judge Advocate] (OSJA)").
[397] *See id*. at 11, 12, 19 (stating that in many cases OSJAs have turned to outside resources, leveraged "outside talent," and put together specialized teams to try high-profile cases).
[398] *Id*. at 6 (recognizing that because there is no plan, the various OSJA approaches vary).
[399] *Id*. (concluding that because the various OSJA approaches differ, the results that are achieved in these cases also vary).
[400] Grace, *supra* note 2, at 33.
[401] E-mail from Lieutenant Colonel Will Helixon, to Major Jeffrey A. Gilberg (Jan. 30, 2014, 10:18 EST) (on file with author).
[402] Grace, *supra* note 2, at 30.

The proposed model would provide both the government and the defense with the systemic capability to litigate complex, high-profile cases—wherever they may arise—without having to disrupt other offices and other personnel assignments. One of the responsibilities of the CPs would be to identify those cases that arise within their respective AORs that may generate media attention or significant public interest. When those cases are identified, CPs would report them to the Chief of TCAP. At that point, the Chief of TCAP would examine the case and decide whether it warrants inclusion on the government's list of pending high-profile cases. If it does, the Chief of TCAP would ordinarily detail one of the 11 CPs to handle the case along with another experienced practitioner (either a second CP, SVP, STC, or TCAP Training Officer).

Similarly, whenever an RDC identifies a high-profile case that arises within his AOR, he must report that case to the Chief of DCAP, who would then examine the case and decide whether it warrants inclusion on the defense's list of pending high-profile cases. If it does, the Chief of DCAP would ordinarily detail one of the 11 RDCs to handle the case along with another experienced practitioner (either a second RDC, SDC, or a DCAP Training Officer).

In essence, the proposed litigation model would provide the Chiefs of TCAP and DCAP a pool of experienced practitioners to choose from to handle high-profile cases, whenever and wherever they may arise. Specifically, with 11 CPs and 11 RDCs to consider, the Chiefs of TCAP and DCAP would have systemic expertise to draw upon to assign a litigation expert to serve as lead counsel in these cases. And, based upon the degree of public interest that the case may receive, the Chiefs of TCAP and DCAP would each be empowered to detail a second CP or RDC to the case in the event that he feels it is warranted. With 61 experienced litigators to choose from, the Chiefs of TCAP and DCAP would never again have to ask for help outside of their allocated resources to prosecute or defend high-profile cases.[403] Similar to the Navy's MJLCT, which enables "the highest quality of representation in complex criminal litigation,"[404] this proposed plan would provide the Army with a mechanism to do the same.

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[403] The government would have 11 CPs, 23 SVPs, 23 STCs, and 4 TCAP Training Officers to choose from. Similarly, the defense would have 11 RDCs, 46 SDCs, and 4 DCAP Training Officers to choose from.

[404] NAVY QUALIFICATION, *supra* note 324, para. 3a(1).

C. Building upon the Current Systemic Special Victim Case Capability

As already discussed above, the SVP program is an excellent start to providing the Army with a systemic special victim case capability. It assists in mentoring the next generation of Army litigators while also preserving the integrity of those cases. Moreover, the program also improves the quality of care provided to the victims of these crimes.

Of the 269 (Part Two) survey participants, 198 were asked whether SVPs positively contribute to the quality of victim care.[405] While 166 (83.8%) of them answered "yes," only 32 (16.2%) answered "no."[406] Interestingly, positive responses were common not only among SVPs, but also among COJs and TCs. (See Table 9, Whether SVPs Positively Contribute to Victim Care.)[407]

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[405] Gilberg Survey, *supra* note 6. Of the 198, 42 of them were COJs, 35 of them were SVPs, and 121 were TCs (past and present) who prosecuted a contested case with an SVP as co-counsel. *Id*.

[406] *Id*. It is important to acknowledge that of those 166 survey respondents answering "yes," 28 of them noted that they have also observed cases where the SVP's contribution to the quality of victim care was less than what it could have been. *Id*. Of the 32 survey respondents that answered "no" to the question of whether SVPs contributed to the quality of victim care, most of them explained that it did not have anything to do with the SVP's ability. *Id*. For example, 15 explained that it was the TC who served as the primary contact for the victim; 12 clarified that the SVP's remote geographic location interfered with the quality of care provided; and, 19 reported that the SVP was either too busy or too late to become involved in the case. *Id*. In fact, only 7 of the 32 answering "no" to this question complained of the SVP's competency in one way or another. *Id*.

[407] *See, e.g.*, *id.* SVP6 (relating that in one case, the victim e-mailed the prosecutors "I don't know how I can ever thank you for everything you've done for me"), SVP11 (describing positive feedback that he received from numerous victims indicating that they were "very pleased" with the way they were guided through the legal process by the prosecution), SVP30 (indicating that due to the inexperience of TCs, SVPs assume the role of educating TCs just how important it is to keep victims informed on a regular basis).

Position (Number of Responses)	Responded Yes	Responded Yes/No	Total of Yes and Yes/No Responses	Responded No
TC Responses (121)	81 (66.9%)	15 (12.4)	96 (79.3%)	25 (20.7%)
COJ Responses (42)	28 (66.7%)	10 (23.8%)	38 (90.5%)	4 (9.5%)
SVP Responses (35)	29 (82.9%)	3 (8.6%)	32 (91.4%)	3 (8.6%)
Total (198)	138	28	166	32
Percentage	69.7%	14.1%	83.8%	16.2%

Table 9. Whether SVPs Positively Contribute to Victim Care

For example, one COJ remarked that "SVPs are good at 'sheltering' victims in tough cases . . . and building rapport with those victims who are hostile to the [g]overnment."[408] Another COJ noted that their SVP guides the TC in keeping victims "informed about and engaged in the court-martial process."[409] As one COJ concluded, it is "unequivocal" that SVPs contribute to better victim care.[410]

Perhaps more indicative of whether SVPs positively contribute to victim care are the responses of the TCs who actually sat with them during a contested case. For example, one TC noted that "the SVP's participation . . . gave the victim a greater level of comfort and confidence in the process."[411] Another TC acknowledged that the SVP's "ability to relate to victims allowed our office to connect to [them] in a way that I do not believe would have been possible without [him]."[412] While some TCs have described their co-counsel SVP as "compassionate,"[413] "invested,"[414] and "comforting,"[415] others have

[408] *Id.* COJ37. *See also id.* COJ1 (stating that "[t]he SVP made it a point to act as a protector and advocate for the victim").
[409] *Id.* COJ34.
[410] *Id.* COJ31. *See also id.* COJ47 (relating that the SVP in his jurisdiction is so effective in dealing with victims that he is known as the "victim whisperer").
[411] *Id.* TC94.
[412] *Id.* TC63.
[413] *Id.* TC8.
[414] *Id.* TC15.
[415] *Id.* TC26.

qualified the SVPs' contributions to victim care as "top notch,"[416] instrumental,[417] and "essential."[418] As one TC put it, "I have definitely modeled my behavior off of the SVPs who looked and felt like they were taking the time to care about victims."[419]

However, as Part Two of this article's survey also demonstrates, the SVP program is not without flaws. First, as discussed above, many of the SVPs' workloads are too great, causing them to pick and choose which cases deserve more of their time, or worse yet, neglect some of their cases altogether, thereby leaving a junior practitioner to prosecute the case alone.[420] In fact, of the 234 (non-SVP) survey respondents who provided their impressions of the SVP program, 53 of them (22.7%) remarked that SVPs were too busy and 55 (23.5%) commented that SVPs were not available to work on cases from the beginning of the case all the way through to the end of trial—as a co-counsel should.[421] Similarly, 19 respondents (8.1%) believe that there are not enough SVPs to cover the busy workload.[422] As one SDC commented, "from what I saw of our SVP's travel schedule, it was like he was deployed while living at home."[423]

Under the current system, each SVP attempts to handle as many cases as their professional capacity will allow. This forces each SVP to make a difficult decision. Either he can pick and choose which cases to work on wholeheartedly and which cases to pass along to the local OSJA, or he can work on *every* special victim case in his AOR, contributing a little to each of those cases but never really becoming

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[416] *Id.* TC35.
[417] *Id.* TC45, TC47, TC77.
[418] *Id.* TC109.
[419] *Id.* TC37. *See also id.* TC53 ("At times, I would become frustrated with the victim . . . I couldn't understand her decisions or her comments about the case. . . . The SVP consistently put me back on the tracks and helped me understand her state of mind and helped me encourage her to testify, which she did, resulting in a conviction to an Art[icle] 120 offense. A non-SVP co-counsel doesn't do that.").
[420] *See generally id.* Although circumstances often require an inexperienced counsel to go into court alone, it is something that the Army should try its best to avoid. *See id.* SDC5 (stating that putting justice in the hands of a novice TC when an SVP is available "would be like the Miami Heat sitting LeBron James on the bench in the playoffs just so that Larry Drew can get experience").
[421] *See, e.g.*, *id.* COJ 40 (reporting that their SVP only sits on cases about half the time because he "has to take care of other jurisdictions"). *See also id.* COJ6 (asserting that SVPs "are at their best as trainers working informally with local counsel on cases").
[422] *Id.*
[423] *Id.* SDC20.

completely engaged in any of them.[424] Whatever decision the SVP makes, the Army suffers. If the former approach is taken, many contested cases will go to trial without having the benefit of an SVP detailed to the case. If the latter approach is taken, TCs are deprived of meaningful mentorship that an SVP could provide by walking them through every step of the case.

The proposed plan addresses this flaw by creating a larger pool of experienced litigators to handle important cases and also directing that these experienced litigators generally only sit on contested cases. Last year, there were 252 contested special victim cases.[425] Instead of 23 SVPs attempting to handle all 252 of these cases (in addition to reviewing and consulting on *all* other special victim cases within their respective AORs), the Chief of TCAP would have 11 CPs, 23 STCs, and four TCAP Training Officers at his disposal to bridge the gap. This way, an experienced litigator would be available to assist the local TC wholeheartedly, from the very beginning of the case, all the way through to the end of trial, *in every case*. No longer would triaging cases be necessary.[426]

Second, while the survey illustrates that by and large the right people are chosen for this important job,[427] anecdotal evidence suggests that this does not happen all the time. For example, 30 (12.8%) out of the 234 non-SVP survey respondents commented that the right people are not always selected to serve as an SVP.[428] While one TC described his SVP as "lazy and uninformed,"[429] another TC reported that the SVP's contributions at trial "were embarrassing."[430] On a similar note, 28

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[424] *See id.* TC65 (describing his experience of litigating a case with an SVP as "what I imagine playing with Kobe Bryant would be like. We had greater successes than we would have had otherwise, but he was not interested in sharing the ball.").

[425] Pottinger e-mail, *supra* note 321.

[426] Last year there were 392 contested courts-martial, which, if split proportionately among all SVPs and STCs, would average 8.5 contested cases each year per counsel. *Id.* Although this is a healthy case load—particularly in light of all the other SVP/STC responsibilities such as reviewing every case in their AOR, providing local training, assisting with TCAP training while TDY, etc.—it is manageable and realistic.

[427] Gilberg Survey, *supra* note 6, SDC2 (writing that "[f]rom what I have seen, the SVP program is staffed by the JAGC's most skilled and experienced litigators"), COJ22 (describing SVP selection as one of the program's strengths), CR8 (noting that the selection is focused "on finding the best litigators possible").

[428] *Id.*

[429] *Id.* TC57.

[430] *Id.* TC90. *See also id.* CR2 (describing an SVP's performance at trial as "horrible").

(12.0%) specifically commented that a given SVP's contributions depend on the SVP.[431] Additionally, 28 (12.0%) commented that some SVPs are losing sight of their primary purpose—to do what they can to ensure that justice is done.[432] Regardless, there are many who believe—as one COJ put it—that "the selection process for SVPs seems to have some bugs in it."[433] An RDC agreed, suggesting that the program "needs a better vetting process."[434]

The proposed plan addresses this by altering the manner in which SVPs are selected and adjusting the criteria used in the selection process. All 23 of the SVP billets would be coded as ASI 3 positions—meaning that nobody would be selected to serve as an SVP unless they have achieved an ASI 3. Moreover, since the 23 SVP billets would be filled from the newly established AMJCT, only those officers that have been previously selected by the annual board for inclusion in the AMJCT would even be eligible to serve as an SVP. Combining the experiential requirements imposed by the ASI 3 prerequisites, the human discretion exercised by the AMJCT annual board, and the specific personnel judgment provided by PPTO when filling these assignments, only the best and brightest would pass through. The proposed plan would also ensure that similar care is applied to the selection of all military justice litigation positions—especially those that are a part of the AMJCT.

Third, some of the survey respondents expressed concern about the unfair advantage that the SVP program may provide to the government over the defense.[435] In fact, 10 (8.9%) of the 113 survey respondents that were asked to identify weaknesses of the SVP program remarked that the program is unfair to the defense because it provides a specially trained

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[431] *See, e.g.*, *id.* TC41 (distinguishing the quality of two SVPs by describing one as setting him up for failure and crediting another with making him the litigator that he is today), CR6 (characterizing the two SVPs that he has observed as "polar opposites"), RDC5 (declaring that "not all SVPs are created equal").

[432] *See, e.g.*, *id.* COJ4 (stating that some SVPs were "overzealous and seemed to just seek convictions"), SDC1 (suggesting that SVPs sometimes become so invested in getting a conviction that "they lose sight of whether justice is really being done"), CR16 (finding that some SVPs become too personally involved with the victims and "lose sight of what is important in the case").

[433] *Id.* COJ11. *See also id.* COJ27 (asserting that many SVPs are not as experienced as they should be).

[434] *Id.* RDC5.

[435] *See generally id.*

expert to litigate special victim cases without doing the same for the defense.[436]

First, it is questionable whether the SVP program does anything more than provide a balance that previously did not exist. Overall, the litigation experience of DCs is more than double that possessed by TCs.[437] More specifically, the average DC has litigated 18.3 total courts-martial, with 7.7 of them contested and 4.6 of them in front of a military panel.[438] In contrast, the average TC has only litigated 7.4 total courts-martial, with 3.2 of them being contested and 2.0 of them being in front of a military panel.[439] Of course, this makes sense as most TCs are brand new and most DCs have previously served in a military justice position.[440] Moreover, after factoring in the experience of SDCs, the discrepancy in experience between those who try cases for the defense and those who do so for the government (prior to the SVP program) was even greater—the averages for the defense jump to 21.5 total courts-martial, 8.6 contests, and 5.2 panel cases per DC.[441] Adding an experienced SVP to the prosecution merely minimizes the significant advantage that the defense previously enjoyed over the government.

Nonetheless, to the extent that the SVP program does provide the government with an unfair advantage over the defense, the proposed plan addresses this concern by redefining what it means to be an SDC. Similar to how the government would utilize its 23 SVPs and 23 STCs, the defense would utilize its 46 SDCs in the same way—by detailing them to *all* contested cases. Just as SVPs and STCs would use real cases as training opportunities to teach and mentor junior TCs, SDCs would do the same for DCs. Furthermore, just as the STCs and SVPs would be coded as ASI 2 and ASI 3 positions respectively, the SDC billets would be coded similarly, with half of them as ASI 2 positions and the other half as ASI 3 positions. Finally, just as the SVP positions would be filled by judge advocates in the AMJCT, the 23 SDC positions coded as ASI 3

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[436] *Id. See, e.g.*, *id.* COJ14 (complaining that it is "fundamentally unfair to provide specialized, experienced prosecutors to the government, but nothing analogous to the defense"), SDC5 (arguing that "adding the SVP only stacks the deck further against the accused"), CR9 (suggesting that TDS "should have somewhat of a parallel organization").
[437] *Id.*
[438] *Id.*
[439] *Id.*
[440] *See generally id.*
[441] *Id.*

billets would be as well. Thus, the proposed plan would provide the defense with a framework that mirrors that of the government, providing it with a comparable and equivalent level of expertise to draw upon when detailing counsel to cases.[442]

D. Enhancing Military Justice Training

As then Colonel Pede once wrote, "establishing a culture of training is essential to developing competent and capable [judge advocates]."[443] Lieutenant Colonel Holland adds, "counsel cannot be expected to learn everything they need to know from law school classes or the Judge Advocate General's Officer Basic Course."[444] While it is true—as much of this article emphasizes—that the best way for counsel to learn is to spend time in court litigating real cases,[445] it is undeniable just how big a role regular military justice training can play in the development of junior judge advocates.[446] As AF Lieutenant Colonel James H. Kennedy, III, has analogized, "we can best improve our skills by demonstrating the same dedication to training and practice [that is] displayed by professional athletes."[447]

Fortunately, TCAP and DCAP have long recognized the importance of training in the context of military justice. For example, four times each year, TCAP offers a New Prosecutor Course (NPC), which junior litigators attend during the same week as Effective Strategies for Sexual Assault Prosecution (ESSAP).[448] Together, both of these conferences provide new TCs with a six-day interactive training event to aid their transition into the demanding world of military justice.[449] Similarly,

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[442] *See id*. SDC33 (suggesting that the government and the defense should each have regional litigators to consult on difficult cases and "be detailed to cases that require specialized expertise").
[443] Pede, *supra* note 4, at 32.
[444] Holland, *supra* note 4, at 16.
[445] Grace, *supra* note 2, at 31 ("Trial work offers the best training and development opportunity in military justice; there is no substitute for real work in real cases.").
[446] Major Jay Thoman, *Advancing Advocacy*, ARMY LAW., Sept. 2011, at 35 (emphasizing that "teaching trial advocacy is one of the most critical duties of a supervising attorney in the trial arena").
[447] Kennedy, *supra* note 276, at 6; Hayden, Hunter & Williams, *supra* note 4, at 31 (asserting that "advocacy skills only improve through practice and dedication").
[448] E-mail from Lieutenant Colonel Alex Pickands, to Major Jeffrey A. Gilberg (Mar. 21, 2014, 12:41 EST) (on file with author).
[449] *Id.*

DCAP conducts regular regional training to improve the quality of representation that Army DCs provide for their clients worldwide.[450] Moreover, while the Judge Advocate General's Legal Center and School (TJAGLCS) provides advocacy training to both new and intermediate litigators,[451] TCAP and DCAP co-sponsor the Sexual Assault Training Advocacy Course (SATAC), which is designed to improve the advocacy skills of more experienced litigators in sexual assault cases.[452] As Charles D. Stimson, who currently serves as Deputy Chief Trial Judge of the Navy-Marine Corps Trial Judiciary (Reserves), has recently recognized, "the services have committed themselves to litigation training."[453]

The proposed plan would continue this commitment by providing both sides of the aisle with an experienced litigator (i.e., the Deputies of TCAP and DCAP), who would be responsible for scheduling, developing, and executing regular military justice training for TCs and DCs alike. Additionally, both TCAP and DCAP would have four Training Officers to assist their respective Deputies with this important endeavor. Since the TCAP/DCAP Training Officers would be coded as ASI 2 positions, both TCAP and DCAP would have appropriately qualified instructors at its disposal.

As AF Major Stephen J. McManus, then serving as the SJA at Grissom Air Reserve Base, noted, "the common denominators for all instructors include a love of litigation and an ability to teach important litigation skills to less experienced [judge advocates]."[454] While the proposed plan sets TCAP/DCAP up for training success, it nonetheless remains crucial for PPTO to fill these important positions with individuals possessing this "love of litigation" and "ability to teach." After all, the TCAP/DCAP Deputies and Training Officers have the

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[450] E-mail from Lieutenant Colonel Fansu Ku, to Major Jeffrey A. Gilberg (Mar. 21, 2014, 12:39 EST) (on file with author) [hereinafter Ku e-mail]. Specifically, DCAP offers DC 101, a course designed to assist newly assigned TDS counsel, approximately five times each year. *Id.* DCAP also offers DC 201, which is a course designed to assist all TDS counsel, multiple times each year. *Id.*

[451] While the Judge Advocate Officer Basic Course provides advocacy training to brand new judge advocates, the Intermediate Trial Advocacy Course (ITAC) is targeted towards those litigators that have assumed TC/DC responsibilities within the past six months. E-mail from Major Jeremy Stephens, to Major Jeffrey A. Gilberg (Mar. 24, 2014, 11:07 EST) (on file with author).

[452] Ku e-mail, *supra* note 450.

[453] Stimson, *supra* note 4, at 5.

[454] McManus, *supra* note 4, at 17.

opportunity to impact the professional development of more junior judge advocates per year than perhaps any other Army attorney.

VII. Conclusion

H.F. "Sparky" Gierke, former Chief Judge of the United States Court of Appeals for the Armed Forces, noted that "a strength of our military justice system has been its capacity to change with the times."[455] And, the times have changed—the number of cases each year has dwindled, mission requirements are expanding, and the global and political landscape is constantly evolving.[456] Moreover, today's cases "are more complicated to prosecute and defend than in years past."[457] Meanwhile, the OTJAG Criminal Law Division "continues to look for ways to improve [judge advocate] practice."[458] The best way to "change with the times" and "improve judge advocate practice" would be to implement the systemic changes advocated in this article.

By realigning the Army's geographical jurisdiction, creating new supervisory positions while redefining those that already exist, altering the current military justice ASI system, and coding certain positions as a part of a newly established military justice career track, the JAG Corps would set itself up for military justice success. Together, all of these changes provide better legal services to the Army and its Soldiers. It is time for the JAG Corps to once again demonstrate its "capacity to change with the times" by recognizing and addressing the lack of litigation experience within its military justice practice. As Colonel Nance, a military judge at the trial level, observed, "trial advocacy is not easy."[459] However, by implementing the proposed plan and maximizing the litigation experience of our law firm, we could make it *easier*. Why wouldn't we? Anything else would be "insane."[460]

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[455] H.F. "Sparky" Gierke, *The Thirty-Fifth Kenneth J. Hodson Lecture on Criminal Law*, 193 MIL. L. REV. 178, 181 (2007). Gierke also served as a judge advocate from 1967 to 1971, which included a year as a military judge. *Id.* S*ee also* Ku, *supra* note 4, at 87 (suggesting that "we need to continually examine how we carry out our statutory mission").

[456] *See* James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185 (2002) (concluding that "the American military justice system is not static or outdated; it is dynamic and evolving").

[457] Stimson, *supra* note 4, at 22.

[458] Pede, *supra* note 4, at 36.

[459] Nance, *supra* note 287, at 56.

[460] *See* Narcotics Anonymous, *supra* note 1.

Appendix A

Survey—Special Victim Prosecutors

Please take a few minutes to fill out the survey below. This survey is to gather data regarding the experiences of our Special Victim Prosecutors (SVP), both past and present. Information provided, including any comments, will not be linked to any particular individual. You may type your responses directly on this survey, save as a new document, and email it to me at jeffrey.gilberg@us.army.mil.

1. When and where did you serve as an SVP?

2. Approximately how many total court-martial have you litigated (as either government or defense)?

   a. Approximately how many of that total were contested cases?

   b. Approximately how many of that total were panel cases?

3. Approximately how many total months of your JAG Corps career have you served in a military justice position (e.g., TC, COJ, SVP, DC, SDC, TCAP, DCAP, etc)?

4. For purposes of this question, please think about all of the <u>contested</u> cases that you have prosecuted as an SVP in which you sat at counsel table with a Trial Counsel (TC).

   a. How many <u>contested</u> cases have you sat at counsel table as an SVP with a TC.

   b. Please list the names of all TCs with whom you have sat at counsel table with in a <u>contested</u> case as an SVP.

   c. Do you believe that your participation in the <u>contested</u> case contributed to that TC's military justice professional development more so or less so than if you were not detailed to the case? Please explain your answer by providing specific examples, if possible.

d. Do you believe that your participation in the contested case contributed to the quality of care that was provided to the victim(s) in that case? Please explain your answer by providing specific examples, if possible.

e. Do you believe that your participation in the contested case contributed to the quality of the case that was presented at trial? Please explain by providing specific examples, if possible.

Survey—Chiefs of Military Justice

Please take a few minutes to fill out the survey below. This survey is to gather data regarding the experiences of Chiefs of Military Justice (COJ) and Trial Counsel (TC). Information provided, including any comments, will not be linked to any particular individual. You may type your responses directly on this survey, save as a new document, and email it to jeffrey.gilberg@us.army.mil.

1. When and where have you served as a COJ?

2. Approximately how many total court-martial have you litigated (as either gov or defense)?

a. Approximately how many of that total were contested cases?

b. Approximately how many of that total were panel cases?

3. Approximately how many total months of your JAG Corps career have you served in a military justice position (e.g., TC, COJ, SVP, DC, SDC, TCAP, DCAP, etc)?

4. How many TCs do you supervise?

5. Please answer Questions #2, 2a, 2b, and 3 for each TC that you supervise. For purposes of this question, it is not necessary to include names. For example, if you supervise three (3) TCs, your answer might look like this:

TC #1: 22 cases; 6 contested; 5 panel; 26 months

TC #2: 8 cases; 2 contested; 1 panel; 8 months
TC #3: 5 cases; 2 contested; 1 panel; 6 months

6. For purposes of this question, please think about all of the contested cases that you have seen an SVP sit at counsel table with a Trial Counsel (TC).

a. Do you believe that the SVP's participation in the contested case contributed to that TC's military justice professional development more so or less so than if that SVP was not detailed to the case? Explain your answer by providing specific examples, if possible.

b. Do you believe that the SVP's participation in the contested case contributed to the quality of care that was provided to the victim(s) in that case? Please explain your answer by providing specific examples, if possible.

c. Do you believe that the SVP's participation in the contested case contributed to the quality of the case that was presented at trial? Please explain by providing specific examples, if possible.

7. What do you view as the strengths of the SVP Program?

8. What do you view as the biggest weaknesses or problems with the SVP program?

Survey—Regional Defense Counsel

Please take a few minutes to fill out the survey below. This survey is to gather data regarding the litigation experience of Regional Defense Counsel and their observations of the SVP Program. Information provided, including any comments, will be anonymous meaning that they will not be linked to any particular individual. Please type your responses directly on this survey, save as a new document, and email it to jeffrey.gilberg@us.army.mil.

1. Approximately how many total court-martial have you litigated (as either government or defense) during your JAG Corps career? Wild "Ballpark Guesses" are perfectly fine!

   a. Approximately how many of that total were contested cases?

   b. Approximately how many of that total were panel cases?

2. Approximately how many total months of your JAG Corps career have they served in a military justice position (e.g., TC, COJ, SVP, DC, SDC, TCAP, DCAP, MJ, RDC, etc)?

3. What do you view as the biggest strength of the SVP program?

4. What do you view as the biggest weakness of the SVP program?

Survey—Senior Defense Counsel

Please take a few minutes to fill out the survey below. This survey is to gather data regarding the experiences of Senior Defense Counsel (SDC) and Defense Counsel (DC). Information provided, including any comments, will not be linked to any particular individual. You may type your responses directly on this survey, save as a new document, and email it to jeffrey.gilberg@us.army.mil.

1. When and where have you served as a SDC?

2. Approximately how many total courts-martial have you litigated (as either government or defense)?

   a. Approximately how many of that total were contested cases?

   b. Approximately how many of that total were panel cases?

3. Approximately how many total months of your JAG Corps career have you served in a military justice position (e.g., TC, COJ, SVP, DC, SDC, TCAP, DCAP, etc)?

4. How many DCs do you supervise?

5. Please answer Questions #2, 2a, 2b, and 3 for each DC that you supervise. For purposes of this question, it is not necessary to include names. For example, if you supervise three (3) DCs, your answer might look like this:

DC #1: 22 cases; 6 contested; 5 panel; 26 months
DC #2: 8 cases; 2 contested; 1 panel; 8 months
DC #3: 5 cases; 2 contested; 1 panel; 6 months

6. For purposes of this question, please think about all of the contested cases that you have seen where an SVP sat at counsel table with a Trial Counsel (TC).

a. Do you believe that the SVP's participation in the contested case contributed to that TC's military justice professional development more so or less so than if that SVP was not detailed to the case? Please explain your answer by providing specific examples, if possible.

b. Do you believe that the SVP's participation in the contested case contributed to the quality of the case that was presented at trial? Please explain by providing specific examples, if possible.

7. For purposes of this question, please think about all of the contested cases that you have seen where an SVP did not sit at counsel table with a TC. These do not have to just be sex cases.

a. What are the worst mistakes that you have seen a TC make in a case in which he/she did not have the benefit of an experienced litigator sitting with him/her?

b. Do you believe that if that TC had an experienced litigator sitting with him/her at counsel table in those cases that he/she would have been less likely to make those mistakes? Why or why not?

8. What do you view as the strengths of the SVP Program?

9. What do you view as the biggest weaknesses or problems with the SVP program?

Survey—Trial Counsel

Please take a few minutes to fill out the survey below. This survey is to gather data regarding the experiences of Trial Counsel (TC) in contested cases in which a Special Victim Prosecutor (SVP) sat at counsel table. Information provided, including any comments, will not be linked to any particular individual. You may type your responses directly on this survey, save as a new document, and email it to jeffrey.gilberg@us.army.mil.

1. How many contested cases have you prosecuted with an SVP sitting with you at counsel table as your co-counsel?

2. At the time of each of each of the contested cases referenced in your response to Question #1, approximately how many contested cases had you litigated (either as government or defense) at that point in time? For example, let's say that you have prosecuted (3) three contested cases with an SVP. Your answer might look something like this:

> "At the time of case #1, I had never litigated a contested court-martial before – that was my first one. At the time of case #2, I had previously litigated 3 other contested courts-martial – that was my fourth one. At the time of case #3, I had previously litigated 6 other contested courts-martial – that was my seventh one."

3. For purposes of this question, please think only about the contested cases that you have prosecuted as a TC in which an SVP sat with you at counsel table.

   a. Do you believe that the SVP's participation with you in these contested cases contributed to your military justice professional development more so or less so than if the SVP was not detailed to these cases? Please explain your answer by providing specific examples, if possible.

   b. Do you believe that the SVP's participation with you in these contested cases contributed to the quality of care that was provided to the victim(s) in these cases? Please explain your answer by providing specific examples, if possible.

c. Do you believe that the SVP's participation with you in these contested cases contributed to the quality of the case that was presented at trial? Please explain by providing specific examples, if possible.

Survey—Court Reporters

Please take a few minutes to fill out the survey below. This survey is to gather data regarding the observations of Court Reporters (CR) during contested cases. Information provided, including any comments, will be anonymous meaning that they will not be linked to any particular individual. You may type your responses directly on this survey, save as a new document, and email it to jeffrey.gilberg@us.army.mil.

1. How many total years have you served as a court reporter in the military?

2. Approximately how many total contested courts-martial have you reported?

a. Approximately how many of that total were panel cases?

b. Approximately how many of that total were cases on which an SVP sat at counsel table?

c. How many different SVPs have seen try a contested court-martial?

3. For purposes of this question, please think about all of the contested cases that you have seen where an SVP sat at counsel table with a Trial Counsel (TC).

a. Do you believe that the SVP's participation in the contested case contributed to that TC's military justice professional development more so or less so than if that SVP was not detailed to the case? Please explain your answer by providing specific examples, if possible.

b. Do you believe that the SVP's participation in the contested case contributed to the quality of the case that

was presented at trial? Please explain by providing specific examples, if possible.

4. For purposes of this question, please think about all of the contested cases that you have seen where an SVP did not sit at counsel table with a TC. **These do not have to just be sex cases.**

   a. What are the worst mistakes that you have seen a TC make in a case in which he/she did not have the benefit of an experienced litigator sitting with him/her? Please list as many examples as you are willing.

   b. Do you believe that if that TC had an experienced litigator sitting with him/her at counsel table in those cases that he/she would have been less likely to make those mistakes? Why or why not?

5. What do you view as the strengths of the SVP Program?

6. What do you view as the biggest weaknesses or problems with the SVP program?

Survey—Military Judges

Please take a few minutes to fill out the survey below. This survey is to gather data regarding the observations of Military Judges (MJ) during contested special victim cases. Information provided, including any comments, will be anonymous meaning that they will not be linked to any particular individual. Please type your responses directly on this survey, save as a new document, and email it to jeffrey.gilberg@us.army.mil.

1. Approximately how many months have you served as a Military Judge (MJ)?

Prior to becoming a MJ, approximately how many total courts-martial had you litigated (as either government or defense)? "Ballpark Guesses" are perfectly fine!

a. Approximately how many of that total were contested cases?

b. Approximately how many of that total were panel cases?

2. Approximately how many total months of your JAG Corps career have you served in a military justice position (e.g., TC, COJ, SVP, DC, SDC, TCAP, DCAP, MJ, etc.)?

3. For purposes of this question, please think about all of the contested cases that you have presided over in which an SVP sat at counsel table with a Trial Counsel (TC).

a. Approximately how many contested cases have you presided over in which an SVP sat at counsel table with a TC?

b. Do you believe that the SVP's participation in these contested cases contributed to the military justice professional development of those TCs more so or less so than if the SVP was not detailed to the case? Please explain your answer by providing specific examples, if possible.

c. Do you believe that the SVP's participation in these contested cases contributed to the quality of the case that was presented at trial? Please explain by providing specific examples, if possible.

4. What do you view as the biggest strength of the SVP program?

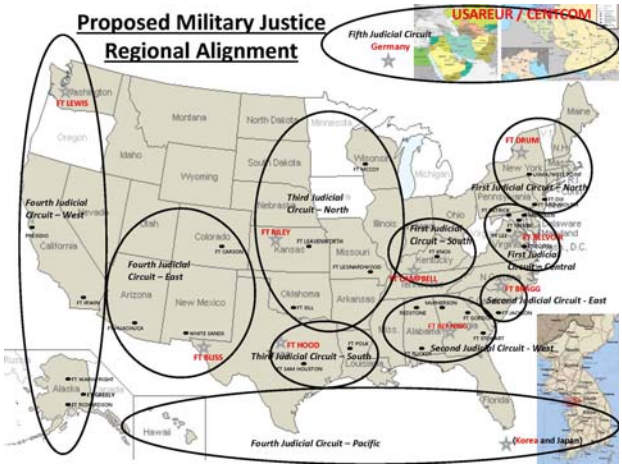
5. What do you view as the biggest weakness of the SVP program?

Appendix B

Proposed Military Justice Regional Alignment—Installations by Circuit

Proposed Military Justice Regional Alignment – Installations by Circuit

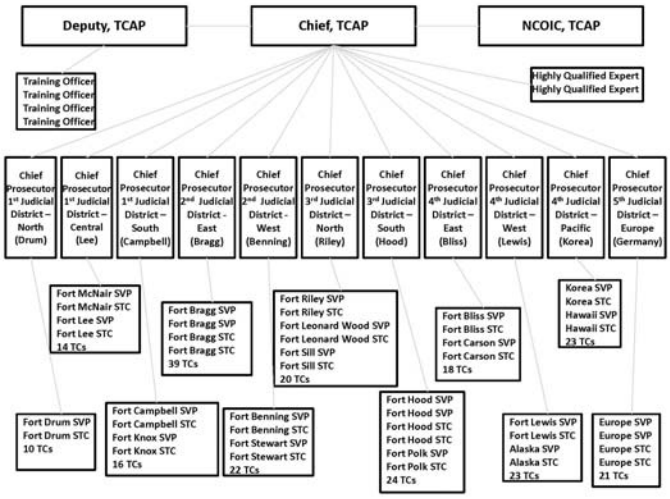
First Judicial Circuit– North (Fort Drum, West Point, Fort Dix)
First Judicial Circuit– Central (Aberdeen Proving Ground, Fort Detrick, Fort Meade, Fort McNair, Fort Myer, Fort Belvoir, Fort Lee, Fort Eustis, Military District of Washington)
First Judicial Circuit– South (Fort Knox, Fort Campbell)
Second Judicial Circuit– East (Fort Bragg, Fort Jackson)
Second Judicial Circuit– West (Fort Gordon, Fort Stewart, Fort Benning, Fort McPherson, Fort Rucker, Redstone Arsenal
Third Judicial Circuit– North (Fort Riley, Fort Leavenworth, Fort Leonard Wood, Fort Sill, Fort McCoy)
Third Judicial Circuit– South (Fort Hood, Fort Sam Houston, Fort Polk)
Fourth Judicial Circuit– East (Fort Bliss, Fort Carson, Fort Huachuca, White Sands)
Fourth Judicial Circuit– West (Fort Lewis, Presidio, Fort Irwin, Fort Wainwright, Fort Richardson, Fort Greely)
Fourth Judicial Circuit– Pacific (Hawaii, Korea, Japan)
Fifth Judicial Circuit– Europe (Germany, Italy)



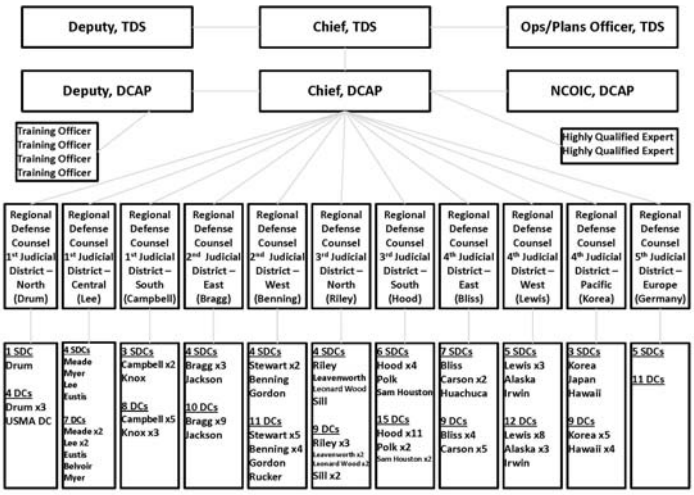
Appendix C

Propose Government and Defense Litigation Models

Proposed Government Litigation Model



Proposed Defense Litigation Model



Appendix D

Current ASI Prerequisites

ASI 1 BASIC MILITARY JUSTICE PRACTITIONER	ASI 2 SENIOR MILITARY JUSTICE PRACTITIONER	ASI 3 EXPERT MILITARY JUSTICE PRACTITIONER	ASI 4 MASTER MILITARY JUSTICE PRACTITIONER
- Requirements: **1.** Basic Course Completion. **2.** 18 months as a trial or defense counsel; **OR** 15 courts-martial (including 3 contests). **3.** CLAC within 6 months of assuming duty as a trial or defense counsel.[a] **4.** New Developments; **OR** TCAP/DCAP training within 12 months of assuming duty as a trial or defense counsel.[a] **Military Justice Experience is time spent in attorney positions substantially devoted to the investigation, prosecution, or defense of potential violations of the UCMJ, or the management, supervision, or appellate review thereof. Time spent as a SJA DSJA, BJA, CJA, OIC, or SAUSA may qualify upon application through Chief, CLD to Chief, PPTO.* [a] Chief, CLD may approve alternative training programs. Extensions for training requirements and waiver requests must be sent through Chief, CLD to Chief, PPTO.	**- Requirements:** **1.** ASI 1. **2.** Two post-CLAC military justice advocacy courses.[a] **3.** 30 (total) months military justice experience (preferably serving as both a DC and TC); **OR** 36 (total) courts-martial (including 7 contests); **OR** 18 months military justice experience *and* 24 months experience as a litigation attorney in LITDIV, ELD, or KFLD. **4.** Letter of recommendation.[b] [b] Recommendation from an RDC, SJA, Appellate Military Judge, Military Judge, or the Chief DAD, GAD, TCAP, TDS-HQ, CLD, LITDIV, ELD, or KFLD.	**- Requirements:** **1.** ASI 2. **2.** Graduate Course Completion.[c] **3.** 48 (total) months military justice experience (preferably serving as both a DC and TC); **OR** 45 (total) courts-martial (including 12 contests); **OR** 36 (total) months military justice experience *and* 30 (total) months experience as a litigation attorney in LITDIV, ELD, or KFLD. **4.** Letter of recommendation.[b] [c] Requires 3 Graduate Course elective credit hours in Criminal Law. Exceptions to policy may be granted on a case-by-case basis by the Chief of Criminal Law, Office of The Judge Advocate General. Reservists with an LL.M. in Criminal Law can apply for an exception to policy through Chief, CLD.	**- Requirements:** **1.** ASI 3. **2.** 96 (total) months military justice experience (preferably serving as both a DC and TC); **OR** 80 (total) courts-martial (including 18 contested cases); **3.** Served as RDC, Chief of Military Justice (Corps), Deputy Chief DAD/GAD, Chief DCAP/TCAP, Deputy Chief CLD/TDS-HQ, SJA,[d] Military Judge, or TJAGLCS Criminal Law Professor.[e] **4.** Letter of recommendation.[b] [d] Requires written verification that time spent in this position required a substantial amount of military justice involvement. [e] Other military justice positions may qualify upon application through Chief, CLD to Chief, PPTO.

Proposed ASI Prerequisites

ASI 1 BASIC MILITARY JUSTICE PRACTITIONERS	ASI 2 SENIOR MILITARY JUSTICE PRACTITIONERS	ASI 3 EXPERT MILITARY JUSTICE PRACTITIONERS	ASI 4 MASTER MILITARY JUSTICE PRACTITIONERS
- Requirements	- Requirements	- Requirements	- Requirements
1. Judge Advocate Officer Basic Course;	1. Satisfaction of all ASI 1 Requirements	1. Satisfaction of all ASI 1 and 2 Requirements;	1. Satisfaction of all ASI 1, 2, and 3 Requirements;
2. 24 months in a military justice position*; OR 15 courts-martial (including 4 contests and 2 panel cases);	2. Two Trial Advocacy Courses (in addition to the course that was completed to satisfy the ASI 1 requirement	2. 72 months in a military justice position*; OR 45 courts-martial (including 12 contests and 8 panel cases)	2. 96 months in a military justice position*; OR 60 courts-martial (including 16 contests and 12 panel cases)
3. Memorandum, signed by the applicant and endorsed by his/her rater, detailing how the experience pre-requisites are met.	3. 48 months in a military justice position*; OR 30 courts-martial (including 8 contests and 4 panel cases	3. Memorandum, signed by the applicant and endorsed by his/her rater, detailing how the experience pre-requisites are met.	3. Memorandum, signed by the applicant and endorsed by his/her rater, detailing how the experience pre-requisites are met.
4. Trial Advocacy Course; and,	4. Memorandum, signed by the applicant and endorsed by his/her rater, detailing how the experience pre-requisites are met.	4. Graduate Course Completion	*Jobs that count towards any of the time in a military justice position requirement include TC, STC, DC, SDC, COJ, TCAP, DCAP, TDS, SVP, CP, GAD, DAD, RDC, MJ.
5. TCAP or DCAP Training			

MIGS AND MONKS IN CRIMEA: RUSSIA FLEXES CULTURAL AND MILITARY MUSCLES, REVEALING DIRE NEED FOR BALANCE OF *UTI POSSIDETIS* AND INTERNATIONALLY RECOGNIZED SELF-DETERMINATION

MAJOR JUSTIN A. EVISON*

Tens of millions of our fellow citizens and countrymen found themselves beyond the fringes of Russian territory.

—President Vladimir Putin, April 25, 2005[1]

Putin, surely, is the main guarantor of the security of the Russian world," the president's spokesman, Dmitry Peskov, said on state television last month. "And Putin has rather unambiguously stated that.

—Dmitry Peskov, March 7, 2014[2]

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[1] Ott Ummelas, *Putin's 21-Year Quest to Be Russian Guardian Began in Estonia*, BLOOMBERG NEWS (Apr. 14, 2014), http://www.bloomberg.com/news/2014-04-13/putin-21-year-quest-to-be-guardian-of-russians-began-in-estonia.html. *See also* Valery Sharifulin, *Peskov: Putin Is Guarantor of Russian World's Security*, ITAR-TASS NEWS AGENCY (Mar. 7, 2014), http://en.itar-tass.com/russia/722667.

[2] *Id.* In 2005, after winning a second presidential term, Putin told the nation that the Soviet collapse in 1991 was a "genuine tragedy" for the Russian people. *Id.*

I. Introduction

Flights to Sochi's beachside airport arrive from all points north in Russia as August brings a flood of sun-starved tourists to the warm beaches of the Black Sea. Approaching planes fly south over the resort city and out across the water before turning in a low "U" to land just meters beyond the sun-glinting waves. Near the beach, onion domes rise up against the sky, their golden surfaces glistening in the sun. Worshipers file into a cathedral for the Russian Orthodox liturgy on Sunday morning, pressing close in the crowded sanctuary, lighting candles, and venerating icons in the shadow of sweeping flower-adorned walls. The rhythmic hum of a Znamenny Chant evokes Byzantine visions of the Middle Ages as the wafting incense completes the celestial transcendence. An intrepid American, visiting the church, steps outside to break the reverie and notices a constant stream of flights taking off from the airport into the clear, blue sky. The lumbering passenger jets hang over the swimming throngs on the beach as they gain altitude. But, the quieter, higher-pitched whine of the Mikoyan-i-Gurevich or "MiG" fighters really grab his attention. Two, four, six, eight . . . it is easy to lose count. The fighters bank right, engage afterburners and head with belligerent resolve toward the closest landmass to the west: Ukraine.

This fictional account of conflict between Ukraine and Russia demonstrates current Russian cultural trends and ambitions. Russia violated *uti possidetis*[3] by sponsoring Crimea's secession vote from Ukraine and subsequently annexing Crimea in March of 2014.[4] Russia's action demonstrated a warped view of self-determination[5] and a

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[3] *Uti possidetis* is "the doctrine that colonial administrative boundaries will become international boundaries when a political subdivision or colony achieves independence." BLACK'S LAW DICTIONARY (8th ed. 2004). *See also* Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Border of New States* 90 AM. J. INT'L L. 590, 590 (1996). "[*U*]*ti possidetis* provides that states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence." *Id.*

[4] David M. Herszenhorn, *Crimea Votes to Secede from Ukraine as Russian Troops Keep Watch*, N.Y. TIMES (Mar. 16, 2014), http://www.nytimes.com/2014/03/17/world/europe/crimea-ukraine-secession-vote-referendum.html?_r=1. *See also* Matt Smith & Alla Eshchenko, *Ukraine Cries 'Robbery' as Russia Annexes Crimea*, CNN (Mar. 18, 2014), http://www.cnn.com/2014/03/18/world/europe/ukraine-crisis/index.html.

[5] "Self-determination implies the right of an identity group to self-governance, meaning sovereignty over themselves-limited or complete." Michael J. Kelly, *Political Downsizing: The Re-emergence of Self-determination, and the Movement Toward Smaller, Ethnically Homogenous States*, 47 DRAKE L. REV. 209, 220 (1999).

dangerous lack of respect for *uti possidetis*. Crimea's undeniable historical and cultural connection to Russia is not a unique circumstance; however, as dozens of groups and regions across the globe agitate for their own self-determination or sovereignty and provide at least as compelling a case to justify it. By one count, there have been over 78 "self-determination conflicts since World War II."[6] Had the world consistently applied *uti possidetis* over the past 20 years, Russia may have been deterred from sponsoring Crimea's secession and subsequently annexing it.

This article examines the important concept of *uti possidetis* and how it can be strengthened through consistent state practice and harmonized with the preemptory norm of self-determination. Self-determination movements, tempered with *uti possidetis*, can develop peacefully, focusing on four essential elements: international recognition, compliance with domestic law, fair elections, and no outside interference. History shows how the implementation of *uti possidetis* had some success in preserving peace since World War II. Selective application of *uti possidetis* in Kosovo weakened the principle and created a perception in Russia that it could seize Crimea in March 2014. A stronger *uti possidetis* balanced with self-determination requires Crimea remain part of Ukraine, but still allows the Crimean population to work towards self-determination—without Russian interference. Increased, consistent state practice of *uti possidetis* balanced with an internationally recognized process of self-determination featuring the four above-mentioned, essential elements may have deterred Russia from sponsoring the secession of Crimea and annexing it; in the future it may prevent violence, economic hardship, and outright war in Eastern Europe and beyond.

II. Balancing *Uti Possidetis* and Self-Determination

Uti possidetis is a legal principle holding that the frontiers of newly independent states remain fixed following independence.[7] *Uti possidetis* emerged in medieval times as a theory governing land ownership.[8] It

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[6] Marc Weller, *Settling Self-Determination Conflicts: Recent Developments*, 20 EUR. J. INT'L L. 111, 114 (2009).
[7] Ratner, *supra* note 3, 590–91.
[8] Enver Hasani, *International Law under Fire Uti Possidetis Juris: From Rome to Kosovo*, 27 FLETCHER FORUM OF WORLD AFF. 85, 85 (2003).

developed into a theory determining state borders after armed conflict.[9] It has been credited with being the precursor of the modern territorial integrity norm.[10] *Uti possidetis* has evolved to become a doctrine designed to aid territory emerging from colonialism.[11] In this way it incorporates both self-determination and "non-interference in internal affairs" of other countries.[12] Modern *uti possidetis* mandates that colonial era "administrative borders" become the newly independent states' borders upon de-colonization.[13] It was applied in South America and Africa as their countries threw off colonial shackles, but needed a commonly agreed upon construct to determine borders.[14]

In modern times, it is taken for granted that the world is mostly divided into nation-states and these nations have fixed borders. This notion of states respecting the fixed borders of neighboring countries, though, is a relatively modern concept. Universal respect for fixed borders and the principle of "territorial integrity" began after World War II.[15] The United Nations (UN) charter affirms the validity of territorial integrity.[16] However, territorial integrity is not absolute. Human nature drives groups of people to seek self-determination for a variety of reasons including ethnic homogeneity.[17] *Uti possidetis* evolved to address the specific circumstance of new countries emerging from colonialism or occupation. Thus, *uti possidetis* best represents a slow paradigm shift of thought from the ethno-centric preference of territorial division to a post-colonial "photograph of territory" scheme.[18] Just as a photograph represents a moment in time, *uti possidetis* prefers a practical

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[9] *Uti possidetis*, INT'L L. BLOG (Jan. 22, 2012), http://rsb-internationallawblog.blogspot.com/2012/01/term-status-quo-ante-bellum-is-latin.html.

[10] Paul R. Hensel, Michael E. Allison & Ahmed Khanani, Territorial Integrity Treaties, Uti Possidetis, and Armed Conflict over Territory, Shambaugh Conference "Building Synergies: Institutions and Cooperation in World Politics," at the University of Iowa7 (Oct. 13, 2006).

[11] Hasani *supra* note 8, at 86–87. *See also* Joshua Dilk, *Reevaluating Self-Determination in a Post-Colonial World*, 16 BUFF. HUM. RTS. L. REV. 289, 298–99 (2010).

[12] Hasani, *supra* note 8, at 87.

[13] Hensel, Allison & Khanani, *supra* note 10, at 1. *See also* C. Lloyd Brown-John, *Self-Determination and Separation*, POL'Y OPTIONS, Sept. 1997, at 40, 42, *available at* http://archive.irpp.org/po/archive/sep97/brown.pdf. *Uti possidetis* is a tool to aide newly-born states as they struggle with their identities, definitions, and boundaries. *Id. See also* Dilk, *supra* note 11, at 298–99.

[14] Brown-John, *supra* note 13.

[15] Hensel, Allison & Khanani, *supra* note 10, at 4.

[16] U.N. Charter art. 2, para 4.

[17] Kelly, *supra* note 4, at 213.

[18] Ratner, *supra* note 9, at 591.

preservation of previously delineated administrative or internal republic boundaries and looks at the moment of independence to assign the new, fixed, international boundaries. In cases of major geopolitical transformation, such as the newly independent socialist republics of the Union of Soviet Socialist Republics[19] (USSR) faced in the early 1990s, a border delineation process such as *uti possidetis* provides an unbiased, proven method to achieve peaceful independence.

In an opinion issued in response to a frontier dispute between Burkina Faso and the Republic of Mali [20] the International Court of Justice (ICJ) delivered a forceful and practical justification for *uti possidetis*.

> [*Uti possidetis*] is a general principle, which is logically connected with the phenomenon of the obtaining of independence wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.[21]

Succinctly put, "frontiers inherited from colonial times are deemed permanent where states have made the transition from colonial to independent status."[22] The ICJ's analysis of *uti possidetis* provides the best rationale for dealing with persistent and otherwise unsolvable ethnic conflicts.[23] Elegantly simple, the concept is an accepted legal principle and has been applied in Africa, South America, and other places since World War II.[24]

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[19] Union of Soviet Socialist Republics was founded in 1921 and dissolved in 1991. It consisted of fifteen republics: Armenia, Azerbaijan, Belorussia, Georgia, Kazakhstan, Kirghizia, Latvia, Lithuania, Moldavia, Russia, Tadzhikistan, Turkmenistan, Ukraine, and Uzbekistan. ENCYCLOPÆDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/614785/Union-of-Soviet-Socialist-Republics (last visited June 10, 2014).

[20] Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. 554 (Dec. 22).

[21] *Id*. ¶ 20, at 565).

[22] Brown-John, *supra* note 13, at 42.

[23] In dicta, the ICJ in *Frontier Dispute* affirms the "exceptional importance [of *uti possidetis*] for the African continent" and highlights the employment of *uti possidetis* in "Spanish America." *Frontier Dispute*, *supra* note 20, ¶¶ 20–21, at 565.

[24] Brown-John, *supra* note 13, at 42.

> The concept of *uti possidetis* as a basis for determining boundaries has been affirmed in several international documents including

Most scholars note that *uti possidetis* has been relevant only three times after the de-colonization of Africa: during the dissolutions of the USSR, Czechoslovakia, and Yugoslavia in the early 1990s.[25] Faced with an explosion of new states in Europe when the Soviet Union dissolved, the European Commission (precursor to the European Union[26]) used the power of diplomatic recognition to influence the reorganization of borders in the early '90s.[27] New members of the Commonwealth of Independent States (CIS)[28] agreed to the application of the *Frontier Disputes* version of *uti possidetis*.[29] Of the fifteen former Soviet Republics became independent countries, twelve of them constituted the CIS while the Baltic States of Lithuania, Latvia and Estonia did not join.[30] Regions contained within those new states such as Crimea inside

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> interpretations by the ICJ. In addition it has been explicitly affirmed or implicitly reiterated in: Principle 3 of the Final Act of Helsinki (1975); the Vienna Diplomatic Convention (1966); Article 62 of the Vienna Convention on the Law of Treaties (1969); and, the Vienna Convention on Succession of States (1978); Article 3 of the Charter of the Organization of African Unity; Article 20 (implied) of the African Charter of Human and Peoples' Rights (1981); Paragraph 6 of the UNGA Resolution 1514 (XV) expressly states that self-determination cannot be interpreted to impair the territorial integrity of a sovereign country.

Id.

[25] Hasani, *supra* note 8, at 85.

[26] The European Union is a political and economic union of twenty-eight European countries. EUROPEAN UNION, http://europa.eu/index_en.htm (last visited May 31, 2014).

[27] Hasani, *supra* note 8, at 91.

[28] Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine comprise the Commonwealth of Independent States. *About Commonwealth of Independent States*, INTERSTATE STATISTICAL COMM. OF THE COMMONWEALTH OF INDEP. STATES, http://www.cisstat.com/eng/cis.htm (last visited May 31, 2014).

[29] Hasani, *supra* note 8, at 91. A variety of agreements struck in the early 1990s evidence Ukraine and Russia's, as well as the rest of the CIS countries', reliance on the principles of *uti possidetis* to create the borders of the newly independent states emerging from the ashes of the former Soviet Union. In particular, "Article 3 of the Charter of the Commonwealth of Independent States (June 22, 1993) affirms the 'inviolability of States' boundaries, recognition of existing borders and rejection of unlawful territorial acquisitions.' The Alma-Ata Agreement establishing the Commonwealth of Independent States (December 1991) includes similar provisions." *Id.*

[30] *Constitutional (Fundamental Law) of the Union of Soviet Socialist Republics*, BUCKNELL UNIV., http://www.departments.bucknell.edu/russian/const/1977toc.html (last visited May 31, 2014). *See also About Commonwealth of Independent States*, *supra* note 28.

of Ukraine, Chechnya[31] inside of Russia, and South Ossetia and Abkhazia inside of Georgia[32] seceded (or attempted to) in violation of *uti possidetis*. Otherwise, the application of *uti possidetis* proved successful across the fifteen new statelets formed from the ruins of the Soviet Union. Pundits could argue other factors such as ethnic homogeneity and optimistic exuberance, resulting from new-found freedom, suppressed conflict. Although, this failed to prevent violence in the former Yugoslavia.

The application of *uti possidetis* to the dissolving situation in Yugoslavia occurred through the Arbitration commission also known Badinter Commission.[33] The commission used a conservative approach, relying heavily on the *Frontier Disputes* case, with only the federal republics of Yugoslavia, such as Croatia and Serbia, "granted" the right of self-determination.[34] The commission recognized as newly independent states those that have "features of a federal republic" such as "possess[ing] territory, population, and a government in control of its territory and population."[35] The result was smaller enclaves of homogenous peoples such as the Republic of Serbian Krajina and Kosovo receiving no such recognition as they did not possess those features in the eyes of the commission.[36] Tragically, war ensued. A balance of *uti possidetis* and self-determination featuring respect for domestic law, international recognition, fair referendum and no outside interference could have provided a path for stability and successful self-determination movements in the former Yugoslavia and USSR. This process discourages states from resorting to war when they disagree with it.

The right of self-determination and *uti possidetis* may appear mutually exclusive at first blush. However, *uti possidetis* does not prohibit all future self-determination movements and can co-exist with

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[31] *A Sham Referendum in Chechnya*, N.Y. TIMES (Jan. 14, 2003), http://www.nytimes.com/2003/01/14/opinion/a-sham-referendum-in-chechnya.html. *See also The Warlord and the Spook*, ECONOMIST (May 31, 2007), http://www.economist.com/node/9254176.

[32] William R. Slomanson, *Legitimacy of the Kosovo, South Ossetia, and Abkhazia Secessions: Violations in Search of a Rule*, 6 MIKOLC J. INT'L L. 1 (2009), http://www.tjsl.edu/slomansonb/2.4_Secession_Legitimacy_MiskKiev.pdf.

[33] Hasani, *supra* note 8, at 91.

[34] *Id.* at 92.

[35] *Id.*

[36] *Id.* The commission applied the criteria of "democracy, the rule of law, and respect for human and minority rights" to Kosovo's application and denied it. *Id.*

self-determination in cases featuring four essential elements: international recognition, compliance with domestic law, fair elections, and no outside interference. While international law does not require compliance with domestic law for secession to be legal,[37] although some scholars disagree,[38] others say the right is limited and restricted to cases without outside interference.[39] In reality, seeking compliance with domestic law will reduce the likelihood of violent struggles over secession. The current Scottish movement for secession demonstrates how compliance with domestic law, an apparently fair referendum with no outside interference, can facilitate a peaceful secession.[40] Legal scholars and state practice affirm the necessity of international recognition for new states[41] as recognizing a new state tends to confer legitimacy on it.[42] Thus, state practice confirms the necessity of international recognition, the first essential factor. State practice

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[37] *Crimea's Referendum and Secession: Why It Resembles Northern Cyprus More than Kosovo*, BLOG OF THE EUR. J. OF INT'L L. (Mar. 20, 2014), http://www.ejiltalk.org/crimeas-referendum-and-secession-why-it-resembles-northern-cyprus-more-than-kosovo/.

[38] Ron Synovitz, *Crimea: Annexation And Recognition—The Legal Battles Ahead*, RADIO FREE EUROPE, RADIO LIBERTY (March 16, 2014), http://fb.rferl.org/content/law-arguments-crimea-annexation-referendum-ukraine-russia/25299060.html.

[39] Anna Stepanowa, *International Law and the Legality of Secession in Crimea*, CAMBRIDGE J. INT'L & COMP. L. (Apr. 20, 2014), http://cjicl.org.uk/2014/04/20/international-law-legality-secession-crimea/.

[40] Laura Smith-Spark, *After Crimea, Will Scotland Be Next to Vote on Independence?* CNN (Mar. 18, 2014), http://www.cnn.com/2014/03/18/world/europe/scotland-independence-referendum-explainer/index.html.

[41] Chris Borgen, *From Intervention to Recognition: Russia, Crimea, and Arguments over Recognizing Secessionist Entities*, OPINO JURIS (Mar. 18, 2014), http://opiniojuris.org/2014/03/18/intervention-recognition-russia-crimea-arguments-recognizing-secessionist-entities/.

> States tend to view the decision to recognize or not recognize an entity as a state as a political decision, albeit one that exists within an international legal framework. That legal framework is in part the rules of statehood. The standard view in international law is that a state must have (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter relations with other states . . . . These criteria are meant to reflect the nuts and bolts of sovereignty: an ability to stand on your own feet, make decisions for yourself, and undertake international relations. Crimea seems less like a sovereign than a hothouse flower: alive due to extraordinary intervention, surviving due to conditions carefully controlled by others, and with little real say in its destiny.

Id.

[42] *Id.*

combined with a peaceful process in Scotland, compliance with British law, a fair referendum in 2014 with no outside interference confirms the necessity of the last three essential factors in a balanced self-determination movement concerning territory first secured in earlier times under the principle of *uti possidetis.*

Self determination emanated from the enlightenment and undergirds the right of people to choose their own government.[43] President Wilson's Fourteen Points from the Versailles conference in 1919 provided support for minority rights and aimed to form countries along ethnically homogenous lines.[44] Self-determination remains a critical determinant of the collective freedom of a people and is a vital building block for any democratic system. The belief in the right of self-determination provides motivation for countless revolutions and fights for independence. Article I of the UN Charter lists "respect for the principles of equal rights and self-determination of peoples" among the purposes of that organization.[45] In fact, the right of self-determination can be considered *jus cogens*.[46]

The world cannot entertain all uprisings of independence, regardless of how many groups across the world promote self-determination as their aspiration toward democracy. Former UN Secretary General Boutros-Boutros Ghali recognized the danger of unbridled self-determination when he stated, "if every ethnic, religious or linguistic group claimed statehood, there be no limit to fragmentation, and peace, security and

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[43] Dilk, *supra* note 11, at 291.
[44] *Id.* at 290–92.
[45] U.N. Charter art. 1, para. 2.
[46] *Jus cogens* is "[a] mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted. BLACK'S LAW DICTIONARY (9th ed. 2009). See also Article 53 of the Vienna Convention on the Law of Treaties, which states,

> a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Vienna Convention on the Law of Treaties art. 35, May 23, 1969, 1155 U.N.T.S. 331. *See also* HENRY STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAWS, POLITICS, MORALS 78 (3d ed. 2008) ("A rule cannot become a peremptory norm unless it is 'accepted and recognized [as such] by the international community of states as a whole.").

economic well-being for all would become ever more difficult to achieve."[47] Practical implementation of Wilson's altruistic vision has been difficult to achieve. "Unfortunately, the problems that plagued Wilson's interpretation of self-determination: definitional ambiguity, legislative obstinacy, haphazard application and geopolitics continue to do so today."[48] It remains vital to distinguish situations featuring annexations or coercion of neighboring states from those ensconced in the selfless pursuit of equal status, suffrage, and opportunity for a deserving group. Self-determination must be limited to meritorious situations and administered through a process that unites the world. While not a panacea, *uti possidetis* provides a healthy limit during a time of great geopolitical transition while allowing for future self-determination with the four essential elements. Strengthening *uti possidetis* through consistent state practice may inhibit unending re-alignments of sovereignty and borders, and thus future violence and war. The Maidan protests, which began over Thanksgiving weekend of 2013, and subsequent ouster of Ukrainian President Yanukovych in 2014, and Russia's reaction to both, has again brought the need for the application of *uti possidetis* to the forefront.[49]

III. Prelude to a Feud: Crimean Connection to Russia and Why *Uti Possidetis* Matters to Crimea

The history of Crimea and its evolution of ethnicities, alliances, and loyalties have led to the current tension between Ukraine and Russia. Ethnic Russians comprise the majority of the peninsula providing a

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[47] U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking, and Peace-Keeping: Rep. of the Secretary-General*, ¶ 17, U.N. Doc. A/47/277-S/24111 (June 17, 1992), *as cited in* Dilk, *supra* note 11, at 290. Dilk also states, "While every ethnic group should not be able to carve out a microstate for themselves, a right for ethnic minorities to possess alternative state options ranging from regional autonomy, federation, and only in limited situations, the ability to secede and create a new country should be systematically recognized." *Id.* While correct, Dilk does not define the "limited situations" prescribe a process for self-determination or what allowance, (if any) should be made for domestic law.

[48] President Woodrow Wilson, Fourteen Points Address (Jan. 18, 1918), *in* PUBLIC PAPERS OF WOODROW WILSON 155, 155–62 (Ray Stannard Baker & William E. Dodd eds., 1927), *as cited in* Dilk, *supra* note 11, at 292.

[49] *From a Sea of Flags to Rivers of Blood: How Kiev's Peaceful Protests Turned into Maidan Mayhem*, RT (Feb. 22, 2014, 5:32 AM), http://rt.com/news/ukraine-maidan-protest-developments-982/; *see also* Responding to Mr Putin, ECONOMIST, Mar. 22 2014, *available at* http://www.economist.com/news/briefing/21599413-russia-wants-divided-ukraine-and-despite-promise-revolution-it-may-well-get.

strong bond with Russia. Ukrainians and Tatars are significant minorities. The Black Sea Fleet headquarters city of Sevastopol takes on mythical status in the Russian psyche and binds the Russian heart to Crimea through epic battles and stalwart defensive struggles.[50] All factors combine to form a compelling bond between Crimea and Russia.

A. History of Crimea

The Tatars settled Crimea in the Middle Ages but Asian and European contenders fought over the territory for most of its history.[51] Although Ukrainians and Russians share a common ethnic background, Crimea includes a mix of other nationalities and cultures, reflecting its long stretches of time as the homeland for the Tatar people as well as other Turkic and European peoples.[52] The Ottomans ruled Crimea for 300 years.[53] Although the predecessor state (Kiev-Rus) of both Ukraine and Russia first established a foothold on Crimea by conquering an area near the present-day city of Sevastopol, no permanent Russian presence was sustained until 1783.[54] Premier Kruschev, in conjunction with the Soviet Presidium of the Central Committee (Presidium),[55] then

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[50] Joshua Kucera, *Can a Russian Naval Base Remain in a Ukrainian City?*, SLATE (Feb. 26, 2009), http://www.slate.com/articles/news_and_politics/ dispatches/ features/2009/ crimea_scene_investigation/can_a_russian_naval_base_remain_in_a_ukrainian_city. html.

[51] Doris Wydra, *The Crimea Conundrum: The Tug of War Between Russian Ukraine on the Questions of Autonomy and Self-Determination*, 10 INT'L J. ON MINORITY & GROUP RTS. 111, 112 (2003).

[52] *Id.*

[53] *Id. See also* Juan Valdés & Rosemary Wardley, *300 Years of Embattled Crimea History in 6 Maps*, NAT'L GEOGRAPHIC (Mar. 5, 2014), http://news.national geographic.com/news/2014/03/140305-maps-crimea-history-russia-ukraine/.

[54] *Id.*

[55] The Presidium of the Central Committee was the successor to the Politburo, which was established in 1917 and utilized by Stalin for many years as a means of controlling the government. "The Politburo until July 1990 exercised supreme control over the Soviet government." *Politburo*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com /EBchecked/topic/467548/Politburo (last visited 31 May 2014). In 1952,

> [m]ore stress was laid on "collective leadership" within this body after the tyrannical excesses of Stalin (d. 1953), and the Presidium was actually strong enough to remove Nikita Kruschev from the party's leadership in 1964. The old name of Politburo was revived for the body in 1966. The Politburo's membership was nominally elected by the Central Committee of the Communist Party, but in truth the Politburo was a self-perpetuating body that itself decided

transferred or "gifted" the territory to the Ukrainian Soviet Socialist Republic (UkrSSR) in 1954.[56] Russian culture now pervades the peninsula with former palaces of the Czars scattered throughout.[57]

Prior to its vote for independence and annexation by Russia in March 2014—a vote many found unlawful—Crimea was a semi-autonomous, parliamentary republic with its own legislative body, the Verkhovna Rada.[58] The Verkhovna Rada operated under the authority of the president and constitution of Ukraine; however, the central government of Ukraine recognized Crimea as an autonomous republic within Ukraine, like Tatarstan within Russia.[59] This unique arrangement allowed Crimea to exercise some independence in the passage of its own laws, as well as a limited amount of self-regulation and self-determination.[60] This arrangement led to a productive co-existence with mainland Ukraine, increasing tourism and a seamless sense of a united Ukraine state from the beaches of Yalta to the northern border with Belarus.

B. Culturally Russian Crimea

One of the facts Russia cites as justification for its annexation of Crimea is the majority Russian population and Russian cultural identity throughout Crimea.[61] This justification is a well-worn argument for those promoting unbridled self-determination in contravention of *uti possidetis*. However, it is important to examine how culturally "Russian" Crimea is in order to understand the Russian thought process in this matter.

> which new members would be admitted and which members expelled.

Id.

[56] Krishnadev Calamur, *Crimea: A Gift to Ukraine Becomes a Political Flash Point*, NPR (Feb. 27, 2014), http://www.npr.org/blogs/parallels/2014/02/27/283481587/crimea-a-gift-to-ukraine-becomes-a-political-flash-point.

[57] *Crimea—Welcome to Visit Palaces of the Czars*, MY UKRAINE, http://myukraine.info/en/tourism/crimea/Russian-czars/ (last visited May 31, 2014).

[58] Wydra, *supra* note 51, at 116.

[59] *Id.* at 128. *See also* Tatarstan, *The Survivor, A Better Way to Skin the Kremlin's Cat*, ECONOMIST (May 31, 2007), *available at* http://www.economist.com/node/9254187.

[60] Wydra, *supra* note 51, at 127–29.

[61] Calamur, *supra* note 56.

In rough terms, ethnic Russians make up 58.5 percent of the population of Crimea, Ukrainians make up nearly 25 percent, and Crimean Tatars make up just over 12 percent.[62] Although, under Ukrainian control, the mandated, official language of Crimea was Ukrainian, Russian remained the language used in most business, personal, and government transactions.[63] Many Russian pensioners, especially military retirees, live on the peninsula, where Russian Orthodoxy is strong.[64] Even before the annexation, Orthodox Christians were aligned to the Patriarch in Moscow instead of the one in Kiev by a large margin.[65] The population consistently followed Russian media, current events, and trends.[66] When Ukraine gained independence in 1991, Crimean politicians maintained strong connections with Moscow, with Russian politicians visiting and fomenting unrest to further their own ideal of Crimea as part of Russia.[67] For many years, some of the ethnic Russian population pressed for Crimea's return to Russian control.[68] However, many citizens across all three main ethnic groups desire to be free of both Russian and Ukrainian control.[69] It is obvious that many Crimeans have an affinity for Russia. The Russian affinity for and desire to own Crimea runs even deeper. One city in Crimea is so revered in Russia, it defines the Russian soul.[70]

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[62] *All-Ukrainian Population Census 2001*, STATE STATISTICS COMM. OF UKRAINE http://2001.ukrcensus.gov.ua/eng/results/general/nationality/Crimea (last visited May 31, 2014) [hereinafter *Census*].

[63] Joshua Kucera, *Crime Scene Investigation, Language Wars*, SLATE (Feb. 27, 2009) http://www.slate.com/articles/news_and_politics/dispatches/features/2009/crimea_scene_investigation/language_wars.html.

[64] *Id.*; *see also* Gabriela Baczynska & Alessandra Prentice, *Kiev—Loyal Orthodox Church Doubtful of Its Future in Crimea*, REUTERS (Mar. 31, 2014), http://www.reuters.com/article/2014/03/31/us-ukraine-crisis-crimea-orthodox-idUSBREA2U1A120140331.

[65] Kucera, *supra* note 63. *See also* Baczynska & Prentice, *supra* note 64.

[66] Joshua Kucera, *Crime Scene Investigation, Crimea Is the Conspiracy—Theory Capitol of Ukraine*, SLATE (Feb. 24, 2009), http://www.slate.com/articles/news_and_politics/dispatches/features/2009/crimea_scene_investigation/simferopol_is_the_conspiracytheory_capital_of_crimea.html.

[67] Kucera, *supra* at note 50.

[68] Wydra, *supra* note 51, at 115.

[69] *Crimean Population Opposed to Becoming Part of Russia*, UNIAN (Feb. 16, 2009), http://www.unian.net/eng/news/news-301059.html; *see also* Clifford J. Levy, *Russia and Ukraine in Intensifying Standoff*, N.Y. TIMES, Aug. 28, 2009, at A4, *available at* http://www.nytimes.com/2009/08/28/world/europe/28crimea.html.

[70] *What Does Crimea Mean to Russia*?, ORIENTAL REV. (Mar. 26, 2014), http://orientalreview.org/2014/03/26/what-does-crimea-mean-to-russia/

C. Battles of Sevastopol

Sevastopol has a sacred place in the Russian heart. The intense, sustained struggle by Russian and Ukrainian soldiers in the Crimean War in the 1850s first romanticized the city in the Russian consciousness and appears throughout Russian literature. In particular, Leo Tolstoy wrote about the Siege of Sevastopol during the Crimean War in *Sevastopol Stories*.[71] His words describing the stubbornness, hardiness, and dogged survival of the Sevastopol defenders lend a mythic aura to the city. He depicts Russian troops as "joyfully prepared to die . . . for their native land . . . [l]ong will Russia bear the imposing traces of the epic of Sevastopol, the hero of which was the Russian people."[72] Though Tolstoy's pacifist views may be more familiar to Western audiences, his writings about Sevastopol have contributed to his legendary status as a Russian nationalist.[73] Following Hitler's attack of the Soviet Union, the Soviet government printed 150,000 copies of *Sevastopol Stories* in an effort to raise national morale and determination.[74] Stalin awarded Sevastopol the title of Hero City for its heroic stand against German invaders in 1942–43.[75] More than merely mystical, Sevastopol also has strategic significance.

The Russian military founded Sevastopol in 1783 as a naval base.[76] Built by Russian and Ukrainian soldiers and defended during several wars, including World War II, hundreds of thousands of Ukrainian and Russian soldiers and civilians fought and died defending the city from invasion.[77] Catherine the Great established a Russian naval presence there that has lasted until the present time.[78] In 1948 Moscow designated it as a separate Soviet city, not under the rule of the Crimean Oblast in

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[71] LEO TOLSTOY, THE COSSACKS AND OTHER STORIES 221 (Paul Foote & David McDuff, trans., 2007).
[72] *Id.*
[73] Walter G. Moss, *Classics Revisited: Leo Tolstoy's Sevastopol Stories*, MICH. WAR STUD. REV. (July 2, 2008), http://www.miwsr.com/tab-2008.asp.
[74] *Id.* at 5.
[75] *Sevastopol: The Hero City Turns 225*, RIA NOVOSTI (Feb. 20, 2009), http://en.ria.ru/analysis/20090220/120240104.html.
[76] *Black Sea Fleet (BSF)*, FED'N OF AM. SCIENTISTS, http://www.fas.org/nuke/guide/russia/agency/mf-black.htm, (last updated Sept. 7, 2000 7:00:00 AM).
[77] Patrick Murphy, *The Effect of Industrialization and Technology on Warfare: 1854–1878*, MILITARY HISTORY ONLINE, http://www.militaryhistoryonline.com/general/articles/effectofindustrialization.aspx (last visited May 31, 2014).
[78] *Black Sea Fleet*, *supra* note 76.

which it resided nor under the UkrSSR.[79] This special status recognized the strategic importance of the city as the home port of the Soviet Black Sea Fleet. Until annexation by Russia in 2014, Sevastopol also served as the headquarters for the smaller, Ukrainian Black Sea fleet and continues to serve as a commercial port and as the headquarters for large companies.[80] Ukrainian independence in 1991 revealed this pressing ownership issue of the Crimean peninsula to the world.

In the mid-1990s, the newly-independent state of Ukraine and Russia squabbled over the ownership of Crimea and whether Sevastopol was a Ukrainian city.[81] These disagreements faded somewhat with the signing of the Treaty of Friendship, Cooperation, and Partnership,[82] along with the lease of the Sevastopol port facilities and division of the Black Sea Fleet in May, 1997.[83] However, even that treaty failed to sever the Russian connection due to the large Russian naval presence remaining in Sevastopol. Solidifying the Russian hold, thousands of Russian sailors, their dependents and retirees call it home.[84] Sevastopol's population includes over 70 percent ethnic Russians with ethnic Ukrainians and others making up the remainder.[85] Up until the annexation of Crimea by Russia, some Russian politicians never accepted a non-Russian Sevastopol.[86] Russian designs on Crimea were so intense and sustained from the 1990s that they were suspected of supplying passports to Ukrainian citizens in Crimea.[87] It is clear the Russians have considered

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[79] Wydra, *supra* note 51, at 113. *See also History Confirms Itself: Sevastopol Is a Hero-City*, YOUTH RES. GROUP, NOTA BENE, http://nbenegroup.com/history/sevastopol_en.html.

[80] *Ukrainian Warships Voluntarily Leave Sevastopol: Sources*, RT (Mar. 2, 2014), http://rt.com/news/ukrainian-warships-leave-sevastopol-476/.

[81] Kataryna Wolczuk, *Catching Up with 'Europe'? Constitutional Debates on the Territorial-Administrative Model in Independent Ukraine*, 12 REGIONAL & FED. STUD. 65, 71 (2002). *See also* Anka Feldhusen, *Geography and the Boundaries of Confidence: The "Russia Factor" in Ukrainian Foreign Policy*, 23 FLETCHER F. WORLD AFF. 199, 121–22 (1999).

[82] Spencer Kimball, *Bound by Treaty, Russia, Ukraine, Crimea*, DW (March 3, 2014), http://www.dw.de/bound-by-treaty-russia-ukraine-and-crimea/a-17487632. "Under Article 2 [of the Treaty], the neighbors agreed to 'respect each other's territorial integrity, and confirm the inviolability of the borders existing between them.'" *Id.*

[83] Feldhusen, *supra* note 81, at 123.

[84] *Black Sea Fleet*, *supra* note 76.

[85] *Census*, *supra* note 62.

[86] Kucera, *supra* note 50.

[87] Adrian Blomfield, *Russia Distributing Passports in the Crimea*, TELEGRAPH (Aug. 17, 2008), http://www.telegraph.co.uk/news/worldnews/europe/ukraine/2575421/Russia-distributing-passports-in-the-Crimea.html.

the Crimea question since the dissolution of the USSR. The unique nature of Sevastopol remained a rallying cry for those agitating for Crimea's return to Russia until its annexation in 2014.

Close cultural connections bound Crimea, Sevastopol, and Russia together for centuries. However, in the long view of history and territorial horse-trading, such a connection is not exceptional. Deep, unique, human connections, won in blood, sweat and tears, overlap most parts of Europe and elsewhere in the world. Weighing one group's claim against another's based on wars, number of lost souls, and broken destinies is impossible and leads to intractable disputes. The depth of the Russian attachment to Crimea best illustrates the need for a stronger principle of *uti possidetis* to discourage outside interference by Russia in Ukrainian affairs. Ukraine and Russia both have strong connections to Crimea. However, under the legal principle of *uti possidetis*, Crimea belongs to Ukraine.

IV. Legal Basis for Crimea as Part of Ukraine

Ukraine can claim under *uti possidetis* that Crimea is part of its sovereign territory. For this assertion to be valid, Ukraine must demonstrate that Crimea was part of Ukraine before the dissolution of the Soviet Union. In 1954, Crimea was transferred by Kruschev from the Russian Soviet Federative Socialist Republic (RSFSR)[88] to the UkrSSR.[89] Thus, Crimea was a part of Ukraine when the USSR dissolved. To lawfully secede in 2014, Crimea should have sought international recognition for its independence, complied with Ukrainian law, held fair elections, and resisted outside influence from Russia. Instead, Crimea's secession violated Ukrainian law,[90] and was only recognized by Russia, Afghanistan, Syria, and Venezuela.[91] Russia's troop presence and support of the snap referendum on secession make

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[88] *Constitutional (Fundamental Law) of the Union of Soviet Socialist Republics*, *supra* note 30.
[89] Wydra, *supra* note 51, at 113.
[90] *Id.*
[91] *Putin Signs Order to Recognize Crimea as a Sovereign Independent State*, RT (Mar. 17, 2014), http://rt.com/news/russia-recognize-crimea-independence-410/. *See also* Matthew Rosenberg, *Breaking with the West, Afghan Leader Supports Russia's Annexation of Crimea*, N.Y. TIMES (Mar. 23, 2014), http://www.nytimes.com/2014/03/24/world/asia/breaking-with-the-west-afghan-leader-supports-russias-annexation-of-crimea.html?ref=asia&_r=0.

the results questionable.[92] A stronger rule of *uti possidetis* may have discouraged Russia from sponsoring Crimea's secession in 2014. An examination of Kruschev's gift of Crimea to Ukraine, Ukrainian statehood, and domestic law all demonstrate the applicability of *uti possidetis* to Crimea.

A. The Gift

Ukraine is a recognized, constitutional state that exercised control and dominion over Crimea until its secession in March 2014.[93] From the time of its independence until the present, Ukraine and its boundaries (including Crimea) have comported with the legal definition of a sovereign state.[94] While Crimea enjoyed more autonomy than other regions within Ukraine, Ukrainian law limited that autonomy, subordinating it to the supremacy of the Ukrainian government.[95] Ukrainian law places the Ukrainian president and court system over semi-autonomous Crimea.[96] Dependence on funding supplied by the government of Ukraine solidified that hierarchy.[97] This structure again supports the classic notion of Ukraine being one state, encompassing all of its Oblasts and semi-autonomous regions.[98]

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[92] Borgen, *supra* note 41.

[93] Wydra, *supra* note 51, at 111, 113.

[94] *Black's Law Dictionary* defines "state" as "the political system of a body of people who are politically organized; the system of rules by which jurisdiction and authority are exercised over such a body of people. BLACK'S LAW DICTIONARY (8th ed. 2004). The Montevideo Convention offers four characteristics of statehood generally accepted in international law. Article 1 of the convention defines the state as possessing the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states**.** Int'l Conference of Am. States, Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 U.N.T.S. 3802.

[95] *Id.* at 118–20.

[96] Wydra, *supra* note 51, at 124–26.

[97] David M. Herszenhorn, *Dependence on Russia Is Likely to Leave Region's Economy in a Precarious State*, N.Y. TIMES (Mar. 18, 2014), http://www.nytimes.com/2014/03/19/world/europe/crimea-economy.html.

[98] Wolczuk, *supra* note 81, at 84. An Oblast is an administrative region. Oblasts have little self-rule authority and are ruled by the central government. They have a status lower than that of a "semi-autonomous region."

> Soviet *oblasti* were purely territorial-administrative units and did not correspond to historical regions . . . between 1954 and 1991, the UkrSSR comprised 25 *oblasti* and two cities of 'republican subordination' (Kiev and Sevastopol). *Oblasti* were further divided

The transfer of Crimea from the RSFSR to the UkrSSR was not a random, spontaneous act. Prior to 1954, Crimea was an Oblast within the RSFSR.[99] The transfer of Crimea to Ukraine moved the Oblast from one Soviet Republic to the other. While symbolic at the time, it inserted Crimea in Ukraine, where it found itself upon Ukraine's independence in 1991. While Crimea enjoyed a brief period of semi-autonomous status while part of the RSFSR, it had been relegated back to Oblast status well before the transfer.[100] This particular fact weakens any argument that the transfer was an effort to give Crimea independence or broader recognition of autonomy.

A popular view is that Kruschev, acting alone, gave Crimea to Ukraine in 1954.[101] Russian politicians and historians attempting to invalidate the transfer largely ignore the fact that the Presidium gave unanimous consent to Kruschev's transfer decree.[102] The Presidium

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> into districts (*raion*), cities (which were further divided into *raiony*), and rural settlements. Each unit was represented by a council of people's deputies.

Id. at 66, 68.

[99] The hierarchy of the Soviet Union consisted of four levels. At the first level were the different Soviet Socialist Republics or "SSRs." These "republics" had the right to secede, according to the 1977 constitution. Within that group, Russia was the first among equals and added the word "federated" into its designation. Ukraine was a soviet republic throughout its entire stint in the USSR. Below the Soviet Republics were Autonomous Republics, which were "constituent" parts of the Republic. *Constitutional (Fundamental Law) of the Union of Soviet Socialist Republics*, *supra* note 30.

[100] Gwendolyn Sasse, *Die Krim—Regionale Autonomie in der Ukraine I* [Crimea—Regional Autonomy of the Ukraine], 31 BERICHTE DES BUNDESINSTITUT FÜR OSTWISSENSCHAFTLICHE UND INTERNATIONALE STUDIEN, 1998 [REPORTS OF THE FEDERAL INSTITUTE FOR EAST EUROPEAN AND INTERNATIONAL STUDIES], at 8, *available at* http://nbn-resolving.de/urn:nbn:de:0168-ssoar-43615.

[101] Wydra, *supra* note 51, at 115.

[102] Volodymyr G. Butkevych, *Who Has a Right to Crimea*, INFOUKES (1992), http://www.infoukes.com/history/crimea/page-03.html (last visited May 31, 2014). Butkevych examined the relevant documents, speeches and materials in Russian in his research on the Russian-Crimean-Ukrainian relationship. His analysis of Crimea from the revolution to 1954 is from a Ukrainian perspective, with occasional negative views of Bolshevik policy. Nonetheless, his examinations of the various rulings of the relevant parliamentary bodies in 1954 are detailed and reveal a painstaking chronology of the events up through the transfer.

> The territory of the Crimean Peninsula was transferred to Ukraine in accordance with the USSR Constitution of 1936. Article 49 of that document outlined the powers of the USSR Supreme Soviet, among which no mention was made regarding the transfer of

formally passed an act ordering the transfer of Crimea, detailing separate reasons and justifications for the transfer.[103] It is important to note that the Presidium is a separate institution from the office of the president.[104] The transfer is misunderstood as a solitary act by Kruschev.[105] In reality, the Soviet leadership collectively transferred Crimea to Ukraine as Ukraine and Crimea had developed cultural, economic, and political ties from the turn of the 20th century through World War II. These ties continued to strengthen until it became apparent that a Ukrainian Crimea made practical sense.[106]

In justifying the transfer, legislative history cites such examples as the close linkage with the economy of the UkrSSR and the basic geographic fact that Crimea is "a natural extension of the southern Ukrainian steppes."[107] Historians note that the transfer also commemorated the 300th anniversary of the Pereyaslav Treaty.[108] This

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> territory. However, Article 14, subsection "(d)" stated that "ratification of any border changes between Union republics" is a prerogative of the Union of Soviet Socialist Republics. Furthermore, Article 31 included the following clause: "*The Supreme Soviet of the USSR cedes the implementation of all rights granted the Union of Soviet Socialist Republics, in accordance with Article 14 of the Constitution. insofar as they are not explicitly included in the powers granted by the Constitution, to the responsibility of the subordinate organs of the USSR Supreme Soviet, the USSR Supreme Soviet Presidium, the USSR Council of Ministers and all USSR ministries.* . . . Therefore, such an act could only have been legally carried out by the USSR Supreme Soviet . . . . Noteworthy is the fact that since the Presidia of both the Russian and Ukrainian Supreme Soviets adopted these resolutions, this created a certain "agreement in principle" between the two republics. In terms of international law, this in turn made the resolutions a legally binding set of documents, since they were adopted by authoritative organs mandated to enact them.

Id. (emphasis added).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] The transfer was made by a "decree issued February 19, 1954 of the Presidium of the Supreme Soviet of the USSR." Additionally, the Soviet government gave multiple addresses to the people to explain the transfer. *The Transfer of the Crimea to the Ukraine*, INT'L COMMITTEE FOR CRIMEA (2005), http://iccrimea.org/historical/crimeatransfer.html (citing Unsigned Article, 1 BULL. INST. FOR STUDY OF HIST. & CULTURE OF USSR (Munich), Apr. 1954, at 30–33).

treaty marked an important point in Ukrainian and Russian cultural and political unification.[109] The treaty's long-term effects included exchanging the then Polish cultural, political, and military domination of Ukraine for Russian domination and creating sustained cultural and linguistic ties between much of Ukraine and Russia, which have lasted to this day.[110] It is possible the Kremlin made the transfer for political purposes including even beyond the Pereyaslav Treaty commemoration.[111] The transfer, while culturally significant, was legally inconsequential at the time. It amounted to little more than an internal, administrative restructuring, with no impact on international relations or state-to-state recognition. When the USSR dissolved in 1991, complications from the Russian perspective arose as Crimea found itself firmly within Ukrainian territory. Crimea's status was clear under *uti possidetis*: it was part of Ukraine. However, Crimeans voted in 2014 to secede.[112] This illegal secession and the resulting unrest and harm to Ukraine illustrates the type of unbridled self-determination characterized by UN General Secretary Ghali as dangerous and risky to world security. As a self-determination movement arose in Crimea, a region where *uti possidetis* applies, the movement should respect domestic law.

B. Ukraine Constitution

The secession of Ukraine violated the Ukrainian constitution and should be considered a violation of the principle of *uti possidetis*. Critical to the discussion is the fundamental fact that Ukraine is an independent, sovereign state, exhibiting characteristics of sovereignty to include "popular legitimacy . . . discernible territory and population, and . . . international recognition."[113] Although a republic within the Soviet Union,[114] Ukraine voted to become independent in 1991[115] and was accepted as a member of the United Nations shortly thereafter.[116] The

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[109] Sasse, *supra* note 100, at 8.
[110] Treaty of Pereyaslav, ENGLISHINFO, http://english.turkcebilgi.com/Treaty+of+Pereyaslav (last visited May 31, 2014).
[111] Sasse, *supra* note 100, at 8.
[112] Herszenhorn, *supra* note 4.
[113] Kelly, *supra* note 4, at 245.
[114] ENCYLOPAEDIA BRITANNICA, *supra* note 20.
[115] *Declaration of State Sovereignty of Ukraine*, VERKHOVNA RADA OF UKRAINE, http://static.rada.gov.ua:/site/postanova_eng/Declaration_of_State_Sovereignty_of_Ukraine_rev1.htm (last visited May 31, 2014).
[116] *UN Member States: On the Record*, U.N., http://www.un.org/depts/dhl/unms/cms.shtml#uMemStates (last visited June 15, 2014).

USSR recognized its own dissolution on 25 December 1991.[117] After years of internal debate and outside meddling from Russia, Ukraine ratified a constitution in 1996.[118] Article 133 of the constitution affirms that the "Autonomous Republic of Crimea is an inseparable constituent part of Ukraine."[119] Article 2 states that the "sovereignty of Ukraine extends throughout its entire territory."[120] Ukrainian law allows secession of individual regions if the remaining regions affirmatively vote to allow it.[121] These provisions intertwine Crimea into Ukraine with enough latitude for Crimea to exercise heightened control over its own destiny.

Domestic law must be respected at this juncture as no right to or prohibition of secession exists in international law.[122] This gap in international law, combined with inconsistent state practice of *uti possidetis*, empowered Russia to manufacture a "self-determination" referendum in Crimea in 2014 that on its face appeared legitimate.[123] However, it was little more than a step to conjure legitimacy for the future annexation of Crimea by Russia. The ability for regions to violate domestic law in pursuit of self-determination facilitates destabilizing conflicts such as the current Ukraine-Russia conflict. An in-depth discussion of the applicability of *uti possidetis* to Crimea is necessary to complete the discussion.

C. *Uti Possidetis* Applied to Crimea

Applying *uti possidetis* analysis to the Ukraine's borders upon independence in 1991 provides a compelling case for Crimea belonging to Ukraine. Under the "photograph of territory" theory, on the date of Ukraine's independence, 25 December 1991,[124] the territory of the

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[117] *1991: End of the Soviet Union*, SEVENTEEN MOMENTS IN SOVIET HISTORY, http://www.soviethistory.org/index.php?page=subject&SubjectID=1991end&Year=1991 (last visited May 31, 2014).
[118] Wydra, *supra* note 51, at 124.
[119] *Id.*
[120] *Id.*
[121] Noah Feldman, *Crimea's Democracy Trampled Its Constitution*, BLOOMBERGVIEW (Mar. 20, 2014), http://www.bloombergview.com/articles/2014-03-20/crimea-s-democracy-trampled-its-constitution.
[122] Stepanowa, *supra* note 39.
[123] Herszenhorn, *supra* note 4.
[124] *1991: End of the Soviet Union*, *supra* note 115. Ukraine voted for independence from the Soviet Union on December 1, 1991. A week later, Ukraine, Russia, and Belarus agreed to terminate the Soviet Union and replace it with the Commonwealth of

UkrSSR, which included Crimea, converted to the present-day country of Ukraine. While the dissolution of the USSR resulted not from de-colonialization, but from a major geopolitical transition, it would still be envisaged by the ICJ as qualifying for *uti possidetis* applicability.[125] Both de-colonization in Africa and the USSR-breakup featured larger political entities fragmenting into multiple smaller statelets. The resulting statelets were based on previously delineated, internal, administrative borders which were adhered to upon independence.

In this sense, a balance between *uti possidetis* and self-determination, strengthened by state practice, could discourage the sprouting of innumerable, unending territorial disputes provoked by unbridled self-determination. Moreover, *uti possidetis* does not restrict carefully scripted self-determination movements featuring international recognition, compliance with domestic law, fair elections, and freedom from outside interference (e.g., the movement in Scotland).[126] An unbalanced world with one concept dominating the other in the world consciousness risks continuing conflict as groups attempt to pattern their struggle for self-determination against previous secession movements based on "unique" factors in an effort to avoid working through a process featuring the four essential factors. A world practicing inconsistent application of *uti possidetis* has a reduced ability to encourage countries to this peaceful (but usually lengthy) process when self-determination movements arise.

V. Kosovo Secession Precedent

Selective application of *uti possidetis* by the international community creates a perception of bias and favoritism, promotes self-interest, and weakens this critical principle. Selective application would allow self-determination movements of ethnic Tatars of Western Russia to form a sovereign Tatarstan or the ethnic Albanians to form a sovereign Kosovo. It could support ethnicities in the restive Caucuses to secede from Russia—or equally be used to deny their secession. The case of Kosovo

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Independent States. On December 21, the presidents of all the other republics with the exception of Georgia (already embroiled in civil war) and the three Baltic states declared their willingness to enter the Commonwealth. Finally, on December 25, Gorbachev announced his acceptance of the dissolution of the Soviet Union and his resignation as its president. *Id.*

[125] Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. ¶ 11, at 565 (Dec. 22).

[126] Smith-Spark, *supra* note 40.

stands out as example of selective application that turned out to be particularly galling to the Russians.

The U.S. and Western allies encouraged, provided for, and recognized Kosovo's independence in 2008.[127] The decision went against the decisions of the Badinter commission, the ICJ in *Frontier Disputes*, the European Union's precedent with the former USSR and Yugoslavia, and many other cases. The Kosovo recognition[128] demonstrated to Russia, China, and other observers that the countries espousing "Rule of Law" morality and philosophy will violate their own philosophy when it suits their policy self-interest. The West attempted to dissuade others from using Kosovo as precedent, claiming it was a unique case.[129] However, that did not hinder Russia's negative reaction to Kosovo's secession in 2007, when it implied that there would be repercussions.[130] Several months later, war erupted between Georgian and Russian forces over the secession of the provinces of Abkhazia and South Ossetia from Georgia.[131] The West's stance on Kosovo weakened the West's objection to Russia's actions in Georgia and Crimea and demonstrates the consequences of selective application of *uti possidetis.*

The ICJ issued a non-binding advisory opinion that Kosovo's secession did not violate international law.[132] The court's advisory opinion noted the various declarations of independence and secessions issued in the years after World War II and could not identify a rule either prohibiting secession or granting it.[133] While significant, this ruling

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[127] Jeff Israely, *Why Kosovo Divides Europe*, TIME (Feb. 19, 2008), http://content.time.com/time/world/article/0,8599,1714413,00.html.

[128] Kosovo has been recognized by 108 countries as of February 12, 2014. *Who Recognized Kosova as an Independent State?*, KOSOVO THANKS YOU, http://www.kosovothanksyou.com/ (last visited May 30, 2014).

[129] Kosovo declared independence on February 17, 2008, based on assurances from the United States and other Western European nations that it would be recognized and defended. The United States and European Union (EU) felt that "Kosovo constituted a *sui generis* case that does not call into question the territorial integrity principles of the UN Charter." Elitsa Vucheva, *EU Fudges Kosovo Independence Recognition*, EUOBSERVER (Feb. 2, 2008), http://euobserver.com/9/25684.

[130] Jacques Martin, *Russia Threatens to Use Force Over Kosovo*, EUROPEAN UNION TIMES (Feb. 24, 2008), http://www.eutimes.net/2008/02/russia-threatens-to-use-force-over-kosovo.

[131] Slomanson, *supra* note 32, at 5.

[132] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22).

[133] *Id.* at 436.

offers no prescription for a peaceful independence process once independence is declared. Some scholars supported the Kosovo intervention based on the "responsibility to protect" theory, preventing further massacre,[134] though the West still debates standards of if, when, and how this responsibility attaches.[135] Conversely, some legal scholars objected to the intervention (leading to secession) based on a lack of UN approval.[136] Do competing standards of international law exist? On one

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> In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation . . . . A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.

Id.

[134] W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT'L L. 57, 68 (2008).

> Secretary General Kofi Annan created a High Level Panel (HLP) in 2004 to prepare a report on 'our State Responsibility.' The report stated: We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.

Id. at 68 (citing U.N. Secretary-General, Note dated Dec. 2, 2004 from the Secretary-General addressed to General Assembly, U.N. Doc. No. A/59/565, ¶ 203 (requesting a High-level Panel on Threats, Challenges and Change titled "A More Secure World: Our Shared Responsibility"). *See also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43.

[135] Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect, Revisiting Humanitarian Intervention*, FOREIGN AFF. (2002), *available at* http://www.foreignaffairs.com/articles/58437/gareth-evans-and-mohamed-sahnoun/the-responsibility-to-protect.

[136] Reisman, *supra* note 134, at 68–69.

hand, UN Security Council action and/or self-defense is imperative before military action but on the other hand, member states may have a duty to act without either.[137] In some cases, failure to act might be construed as complicity.[138] This uncertainty allows Russia to wrap favorable pieces of law around its policy decisions as justification for its actions in Chechnya, Georgia, and, especially, Crimea.

Those who support the West's decision to intervene and sponsor Kosovo's secession argue that the conflict was intractable with no other solutions available. UN Special Envoy Martti Ahtisaari proposed a

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> As strange as it may seem, many international lawyers take issue with the lawfulness of the few effective efforts to stop ongoing mass murders. Consider the reaction to NATO's action to stop the mass killing that occurred in Kosovo in 1999. NATO bombed Serbia into submission without the authorization of the Security Council prescribed by the U.N. Charter. Kosovo is currently under United Nations supervision. What is fascinating about this one case of relatively rapid international action to stop mass killing is that it aroused great disquiet and even criticism of many of the international legal custodians of the world community . . . The Kosovo Report, which was prepared on the initiative of the Prime Minister of Sweden in 2000, also stated that NATO's intervention was illegal because of the lack of prior approval by the Security Council but, in a way comically disrespectful of international law, conceded that "the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.

Major Jeremy A. Haugh, *Beyond R2P: A Proposed Test for Legalizing Unilateral Armed Humanitarian* Invervention, 221 MIL. L. REV. (forthcoming Fall 2014). *Id. See also* CONOR FOLEY, THE THIN BLUE LINE: HOW HUMANITARIANISM WENT TO WAR 150–59 (Verso 2008).

[137] Reisman, *supra* note 134, at 69.

> The failure to prevent is a violation of the obligation on parties to the Genocide Convention, but it does not necessarily constitute a crime of complicity, which "always requires that positive action has been taken to furnish aid or assistance to the perpetrators of the genocide while a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed." Yet in some circumstances, a failure to prevent *can* be construed as complicity.

Id. (citation omitted). Haugh, *supra* note 136.

[138] *Id.*

settlement in an attempt to resolve the conflict.[139] The proposal acknowledged several unique ethnic aspects of the Kosovars and that no other solution for Serbs and Kosovars seemed possible.[140] Serbia rejected the settlement[141] creating a frozen state of affairs similar to dozens of frozen conflicts world-wide. Kosovo enjoyed the luxury of heavy NATO and EU involvement,[142] a privilege few other conflicts have had in the past 20 years. Because of NATO and EU protection, Kosovo's parliament—its own legitimacy questionable—voted for independence.[143] That independence continues to be secured by outsiders in an ongoing, artificial stasis. Such ad hoc solutions create precedent despite the uniqueness of the Kosovo situation claimed by the

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[139] *Summary of the Comprehensive Proposal for the Kosovo Status Settlement*, BUREAU OF EUROPEAN & ASIAN AFF., U.S. DEP'T OF STATE (Jan. 20, 2009), http://www.state.gov/p/eur/rls/fs/101244.htm.

> In April 2007, UN Special Envoy Martti Ahtisaari submitted to the UN Security Council his Comprehensive Proposal for the Kosovo Status Settlement (the "Ahtisaari Plan"). The Ahtisaari Plan includes a main text with15 articles that set forth its general principles, as well as 12 annexes that elaborate upon them. The Ahtisaari Plan is primarily focused on protecting the rights, identity and culture of Kosovo's non-Albanian communities, including establishing a framework for their active participation in public life. Special Envoy Ahtisaari also proposed that Kosovo become independent, subject to a period of international supervision. On February 17, 2008, the Kosovo Assembly declared the independence of Kosovo in line with the Ahtisaari recommendations. In its declaration of independence, Kosovo made a binding commitment to implement fully the Ahtisaari Plan and welcomed a period of international supervision. Kosovo has already begun to approve new legislation as envisioned in the Ahtisaari Plan, develop a constitution that enshrines the Ahtisaari principles and take other measures to implement fully the Ahtisaari Plan's provisions.

Id. The full text of the Ahtisaari Plan can be found at http://www.unosek.org/unosek/en/statusproposal.html.

[140] *Id.*

[141] *Belgrade Rejects Ahtisaari's Plan for Kosovo*, RT (Feb. 15, 2007), http://rt.com/news/belgrade-rejects-ahtisaaris-plan-for-kosovo/.

[142] Israely, *supra* note 127.

[143] *Kosovo Parliament Declares Independence from Serbia*, DW (Feb. 2, 2008), http://www.dw.de/kosovo-parliament-declares-independence-from-serbia/a-3131964-1.

West.[144] The Russians noted this precedent and asserted protection of ethnic Russians as a pretext for their initial incursion into Crimea.[145]

Uti possidetis has been applied world-wide and can only be ignored with consequences. Comparing the merits of one country's claim over a strip of land confronts powerful walls of emotion. As an example, Russia's strong connections to Crimea pale in comparison to those of Jewish and Palestinian peoples to ancient Palestine. The Kosovo secession ignored the Badinter Commission's plan for the division of Yugoslavia in accordance with principles of *uti possidetis.* The Kosovo solution avoided further near-term bloodshed in Kosovo but spawned Russia's seizures of Georgian and Ukrainian territory. Within months of Kosovo's independence declaration and subsequent diplomatic recognition by much of Europe and the United States, Russia and Georgia fought a brief but costly war over the separatist province of South Ossetia.[146] Those arguing Kosovo's claim to secession was *sui generis* fail to realize that each case is compelling in its own, unique, historical way, and each group agitating for self-determination can cite historical wrongs in need of resolution. To claim one group has a greater need, a unique need, or right to self-determination without regard for *uti possidetis* displays a dangerous shortsightedness and lack of historical awareness.

VI. Russian Ambition Beyond Crimea

In the years since the break-up of the USSR, Ukraine's historical westward leanings coupled with a centuries-old quagmire of cultural, linguistic, ethnic, and historical influences combined with NATO's[147] eastward expansion to result in a tug-of-war between the West and Russia. In the dynamic 1990s, the West invested in the region but put more energy into expanding NATO and EU borders eastward up to the

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[144] Vucheva, *supra* note 129.

[145] Roman Kupchinsky, *Sub-Rosa Warfare in the Crimea*, EURASIA DAILY MONITOR, (July 24, 2008), http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=33833.

[146] Slomanson, *supra* note 32, at 7.

[147] The North Atlantic Treaty Organization (NATO) is a "political and military alliance" established in 1949 that consists of 28 independent member countries. *What Is NATO?*, NATO, http://www.nato.int/nato-welcome/ (last visited May 31, 2014).

border of Russia than drawing Russia into a strong, lasting partnership. The West's influence on Ukraine's destiny has irked Russia.[148]

Russia views NATO expansion as a threat.[149] As NATO inches eastward, the Russians react to what they perceive to be a movement to gain and maintain key leverage against them by pushing back in rhetoric against U.S. actions in Kosovo, Iran, and Syria and with military incursions into Georgia and Ukraine.

Russia's revanchist tendencies have risen apace with its economic clout since the dawn of the millennium.[150] Russia characterizes this effort as influencing its near-abroad, encompassing the entire, former Soviet Union—Crimea constitutes just part of this effort.[151] It is worth noting that no right to "control spheres of influence over other sovereign states" exists in international law.[152] The reasons for this revanchism are murky and shifting at times. Discussions of Russian revanchism are in vogue, focusing on the recovery of the former Soviet empire. A closer look reveals a more complex reality involving a reinvented neo-nationalism increasingly dominating Russian culture. The result: a more outward-focused Russia that sees itself as exceptional and serving as a moral beacon for the world.

A. Russian Revanchism

Part of Russia's re-emergence on the world stage includes a healthy strain of revanchism.[153] Russia continues to exercise more influence and

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[148] *Ukraine Fears It May Be the Next Target for Russia*, REUTERS (Aug. 21, 2008), http://www.reuters.com/article/2008/08/21/us-georgia-ossetia-ukraine-idUSLL4020080821.

[149] Edward Walker, Commentary: *NATO Expansion Stoked Russian Paranoia*, FREE LANCE-STAR (Mar. 6, 2014), http://www.freelancestar.com/2014-03-06/articles/30865/commentary-nato-expansion-stoked-russian-paranoia/.

[150] *Russia Could Claim Crimea If Ukraine Joins NATO—MP*, RIA NOVOSTI (Apr. 9, 2008), http://en.rian.ru/world/20080409/104227945.html.

[151] Ken Aldred & Martin A. Smith, *Imperial Ambition or Humanitarian Concern? Russia and Its 'Near Abroad'*, J. HUMANITARIAN ASSISTANCE (July 4, 1997), http://sites.tufts.edu/jha/archives/115.

[152] Chris Borgen, *Kosovo, South Ossetia, and Crimea: The Legal Rhetoric of Intervention, Recognition, and Annexation*, OPINIO JURIS (Apr. 2, 2014), http://opiniojuris.org/2014/04/02/kosovo-south-ossetia-crimea-legal-rhetoric-intervention-recognition-annexation/.

[153] Revanchism: "a usually political policy designed to recover lost territory or status." MERRIAM-WEBSTERS ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/

control in the former Soviet Republics.[154] Though many Russian citizens live in the former Republics, culture and language tie many of them back to Russia.[155] A few former Republics share historic trade and political relationships.[156] Ties and relationships are one thing but control and heavy influence on another country's destiny better describes Russia's style. It is important to understand Russia's historic obsession with its "near abroad." This fixation stems not from arrogance or desire from Empire so much as it is a paranoia left over from successive invasions by various enemies-at-the-gate such as the Vikings, Mongols, Tatars, and Huns. The Tatar invasion probably had the most lasting effect on the Russian view of the world.

Before the Tatar invasion in 1237, Russia maintained close ties to Europe.[157] When a new Muscovy finally overthrew the Tartars 250 years later, Russia had drifted away from European culture.[158] "It [Russia] historically protected itself with its depth."[159] Ukraine provided that depth and a "buffer to the West."[160] Russia still stings from its loss of empire, including Ukraine, in the early '90s, leading to a heightened Russian obsession with its "near abroad."[161] This obsession stems from centuries of invasion and near annihilation from both Europeans and Asians alike. Russia was ringed with non-Russian, yet still-Soviet

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revanchism (last visited May 22, 2014).

[154] *Russian Leaders Talk Big, But Army and Economy Are Weak*. MCCLATCHY NEWSPAPERS (Sept. 11, 2008), http://www.mcclatchydc.com/world/v-print/story/52313.html.

[155] Andrei Kortunov, *RUSSIA and the "NEAR ABROAD": Looking for a Model Relationship*, NAT'L DEF. UNIV. PRESS (Jan. 24, 2003), http://www.ndu.edu/inss/books/books-1999/USRussian Partnership July 99/usrp7.html.

[156] *Id.*

[157] Anil Çicek, *The Rise of Russian Nationalism-Footsteps of the Slavophiles?: Understanding the Dynamics of Nationalism as a State Policy in Russia*, INT'L J. RUSSIAN STUD. 3 (2012), *available at* http://www.ijors.net/issue5_2_2012/articles/cicek.html.

[158] *Id.*

[159] James Traub, *Burning Bridges and the Smell of Fresh Blood*, FOREIGN POL'Y (Mar. 21, 2014), http://www.foreignpolicy.com/articles/2014/03/21/burning_bridges_fresh_blood_ukraine_putin.

[160] *Id.*

[161] Aldred & Smith, *supra* note 149. Russia defines its "near abroad" as the fourteen countries around it which constituted the former Soviet Union. The term "near abroad" has a geographic meaning, describing the surrounding countries, but has a starker "political" meaning. The term evokes Russian "rights" to interfere in internal affairs of the former Soviet republics and to justify influencing the former republics regarding the treatment of "ethnic Russian brethren civilians." William Safire, *ON LANGUAGE; The Near Abroad*, N.Y. TIMES (May 22, 1994), http://www.nytimes.com/1994/05/22/magazine/on-language-the-near-abroad.html.

republics on its outskirts such as the Baltics on the western flank and Kazakhstan and other republics on the Asian Steppe in the east. This buffer zone offered some protection from hostile neighbors until the Iron Curtain's demise in the early 1990s.

Russia has viewed the disintegration of the Soviet Union as a humiliating injury.[162] Not only were "buffers" such as Ukraine detached, the expansion of NATO to the Russian border poured salt into this wound. This stung for two reasons: One, the historic fear of enemies-at-the-gates has been rekindled; second, the humiliation has been reinforced, especially rankling current Russian leadership who emerged from the USSR and still espouse many of its values.[163] Former republics such as Kazakhstan and Belarus declared independence but remained part of the looser Commonwealth of Independent States. The former republics of Latvia, Lithuania, and Estonia joined NATO and became openly hostile toward Russia.[164] The Warsaw Pact[165]—Russia's previous counterbalance to NATO—dissolved with the USSR. Then NATO moved into the vacuum created by the Warsaw Pact's absence, even rebuffing Russian overtures to join it.[166] Prestige declined not only outside Russia's borders but internally as well.

The Russian population wavered due to declining health, a high accident rate, and alcoholism.[167] Living standards dropped from previous Soviet levels.[168] Russia fought two financially and

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[162] David J. Kramer, *Resetting U.S.-Russian Relations: It Takes Two*, 31 WASH. Q. 61 (2010), *available at* http://csis.org/files/publication/twq10januarykramer.pdf.

[163] Alexei Bayer, *Putin Fails Big as a Strategist*, MOSCOW TIMES (May 11, 2014), http://www.themoscowtimes.com/opinion/article/putin-fails-big-as-a-strategist/499911.html.

[164] Rick Rozoff, *Baltic Sea: Flash Point for NATO-Russia Conflict*, MEDIA MONITORS NETWORK (Feb. 27, 2009), http://usa.mediamonitors.net/content/view/full/60200.

[165] The Warsaw Pact is the common term for the Treaty of Friendship, Co-operation and Mutual Assistance between Albania, Bulgaria, Hungary, East Germany, Poland, Romania, the Union of Soviet Socialist Republics, and Czechoslovakia, signed on May 1, 1955. *Modern History Sourcebook: The Warsaw Pact, 1955*, MODERN HISTORY SOURCEBOOK, http://www.fordham.edu/halsall/mod/1955warsawpact.html (last visited June 10, 2014).

[166] Marc Bennetts, *Russia's Vladimir Putin Keeps Westerners Guessing on His Strategies, Intentions*, WASH. TIMES (Apr. 13, 2014), http://www.washingtontimes.com/news/2014/apr/13/russias-vladimir-putin-keeps-westerners-guessing-o/?page=3.

[167] *The Incredible Shrinking People*, ECONOMIST (Nov. 27, 2008), http://www.economist.com/node/12627956.

[168] Mark Adomanis, *The Intelligence Squared Debate: Masha Gessen Has Some Really Strange Ideas About the 1990's*, FORBES (May 24, 2013), http://www.forbes.com/

psychologically draining wars over a decade to pacify the Caucuses.[169] But things in Russia began to improve at the turn of the millennium.

Russia's economy is resurging.[170] Growth is high[171] and personal incomes are rising.[172] Gone are the "wild west" early years of Russian capitalism. While open markets, private ownership of business, and accumulation of wealth are still allowed, Russia's authoritarian government strictly controls businesses, national and local politics and—indirectly—the whole economy.[173] Given Russia's renewed weight in the world, the government is trying to re-assert itself, as evidenced by its August 2008 war with Georgia, push-back on Iran sanctions, opposition to the missile shield in Poland, and manipulation of oil supplies for Ukraine and Europe. Economic growth may explain Russia's new-found confidence and ability to invade Georgia in 2008, push back at the West over policy issues, and annex Crimea; however, two other factors have propelled Russia's motivation to accomplish these actions: revanchism and a weak principle of *uti possidetis*.

Crimea was first on the list of Russian desires. Russia was never keen on Crimea belonging to Ukraine after the dissolution of the USSR.[174] Referring to the eastern provinces of Ukraine, President Vladimir Putin has lamented the loss of "historically Russian territory" to Ukraine.[175] Many Russians long imagined Crimea would be reunited with Russia one day.[176] After all, Crimea represented the jewel of Ukraine containing the beloved Sevastopol and a warm water port. All that was needed was an opportunity.

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sites/markadomanis/2013/05/24/the-intelligence-squared-debate-masha-gessen-has-some-really-strange-ideas-about-the-1990s/.

[169] *The Warlord and the Spook*, *supra* note 31.

[170] Kim Iskyan, *On a Roll*, BAY LEDGER (Sept. 30, 2005), http://www.blnz.com/news/2008/04/23/Roll_7721.html.

[171] *Russia's Economy*, ECONOMIST (Dec. 22, 2011), http://www.economist.com/blogs/graphicdetail/2011/12/focus-1.

[172] *Richer Russians*, ECONOMIST (Mar. 12, 2012), http://www.economist.com/blogs/graphicdetail/2012/03/daily-chart-0.

[173] *Sochi or Bust: The Conspicuous Dazzle of the Games Masks a Country, and a President, in Deepening Trouble*, ECONOMIST (Feb. 1, 2014), http://www.economist.com/news/briefing/21595428-conspicuous-dazzle-games-masks-country-and-president-deepening-trouble-sochi.

[174] Wydra, *supra* note 51, at 115.

[175] Traub, *supra* note 159.

[176] Wydra, *supra* note 51, at 115.

The West was caught off guard by the fast-paced events of 2014 that resulted in Russia's annexation of Crimea. It might appear obvious that Russia annexed Crimea in March of 2014 due to instability in Ukraine after the overthrow of Yanukovich. In retrospect, plenty of warning signs existed that Russia was biding its time until an opportunity for annexation arose. The Russian government appeared to be "passport stuffing" by issuing thousands of Russian passports to ethnic Russian inhabitants of Crimea.[177] Russia's "passport imperialism" has been going on since the late 1990s.[178] Prominent figures within a Russian nationalist movement have agitated for years for the return of Crimea to Russia[179] and there were reports of Russian spy activity in Crimea in the mid 2000s by Russians suspected of initiating efforts toward Crimean secession.[180] Russian agents used similar practices in South Ossetia before Russia's invasion in 2008 as a pretext to defend the Russian "citizens in the breakaway province."[181] Russia had set the stage for a takeover. Several years ago, the looming trigger for annexation seemed to be over natural gas shipments and payments. Ukraine and Russia have butted heads over oil and gas payments and shipments through Ukraine to Europe since 2005.[182] Russia halted or reduced gas shipments through Ukraine over the course of several winters, threatening the energy supplies of Western European countries as well as Ukraine.[183] Before one of these crises could mushroom again and lead to a fight over Crimea, the 2014 instability in Ukraine erupted, and Russia sent Special Forces into Ukraine under the guise of protecting ethnic Russians,[184] sponsored secession,[185] and annexed Crimea.[186]

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[177] Peter Fedynsky, *Crimea—Potential Russian-Ukrainian Flashpoint*, VOA (Nov. 7, 2008), http://www.wwenglish.com/en/voa/stan/2008/11/2008110928434.htm.

[178] *Russia's Passport Imperialism*, SOUFAN GROUP (Mar. 25, 2014), http://soufangroup.com/tsg-intelbrief-russias-passport-imperialism/.

[179] Leon Aron, *Russia's Next Target Could Be Ukraine*, WALL ST. J. (Sept. 10, 2008), http://online.wsj.com/article/SB122100831438617621.html?mod=opinion_main_commentaries.

[180] Kupchinsky, *supra* note 145.

[181] *Id.*

[182] *Ukraine Wants Change in Russia Oil Transit Deal*, EU BUS. (Dec. 28, 2009), http://www.eubusiness.com/news-eu/energy-oil-ukraine.23l; *see also Ukraine Takes Extra Russian Gas*, BBC (Jan. 24, 2006), http://news.bbc.co.uk/2/hi/europe/4642684.stm; *Russia-Ukraine Gas Dispute Remains Unsettled*, RIA NOVOSTI (Dec. 20, 2005), http://en.rian.ru/russia/20051220/42586383.html.

[183] *Id.*

[184] Nick Cumming-Bruce, *At U.N., Russia Points to Ultranationalist Threats in Ukraine*, N.Y. TIMES (Mar. 3, 2014), http://www.nytimes.com/2014/03/04/world/europe/ukraine-united-nations.html?_r=0.

[185] Herszenhorn, *supra* note 4.

While it is natural for governments to protect their nationals[187] at home and abroad, the Russian government uses their nationals as a pretext for action in foreign lands. In Georgia in 2008, the Russians cited protection of their nationals as justification for their incursion into South Ossetia.[188] The same pretext was used in Crimea.[189] Scant evidence existed in either location that their nationals were threatened.[190] Russia has issued similar warnings about ethnic Russians (who are not Russian nationals) in the Baltics as well.[191] Russia seeks to regain influence over its neighbors under the guise of protecting whom they call ethnic Russians to promote its own world vision.

B. Neo-Nationalism and Russian Ambition

Russia's actions can be best understood as a uniquely Russian strain of neo-nationalism with distinct anti-Westernism. Some Russians view the West as "spiritually and culturally bankrupt."[192] Also troublesome for U.S.-Russian relations, "Putin . . . perceives the West . . . as a decadent, anti-religious and ignorant society."[193] Skewed perspectives of the West cross the governmental spectrum. One Russian children's rights official recently stated, "The West is a terrible garbage dump, even though it smells of various delicious things."[194] These thoughts are not new or original in Russia. Famous writers such as Pushkin and

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[186] Smith & Eshchenko, *supra* note 4.

[187] "A member of a nation . . . [a] person owing permanent allegiance to and under the protection of a state." BLACK'S LAW DICTIONARY (9th ed. 2009).

[188] Calamur, *supra* note 56.

[189] Cumming-Bruce, *supra* note 184.

[190] Mark Kersten, *Does Russia Have a 'Responsibility to Protect' Ukraine? Don't Buy It*, GLOBE & MAIL (Mar. 4, 2014), http://www.theglobeandmail.com/globe-debate/does-russia-have-a-responsibility-to-protect-ukraine-dont-buy-it/article17271450/. *See also* Editorial, *Russian Aggression*, WASH. TIMES (Aug. 11, 2008), http://www.washingtontimes.com/news/2008/aug/11/russian-aggression/. *See* Slomanson, *supra* note 32, at 5 (asserting that Georgia fired the first shots of the war in South Ossetia and Russia may have been justified in asserting humanitarian intervention).

[191] Molly K. McKew & Gregory A. Maniatis, *Putin's Global Ambitions Could Destabilize Europe*, WASH. POST (Mar. 18, 2014), http://www.washingtonpost.com/opinions/putins-global-ambitions-could-destabilize-europe/2014/03/18/69abb2a2-aec5-11e3-9627-c65021d6d572_story.html. *See also* Ummelas, *supra* note 1.

[192] *Pan-Slavism*, ENCYCLOPÆDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/440678/Pan-Slavism (last visited May 31, 2014).

[193] Vladislav Inozemtsev, *Russia Pivoted East Centuries Ago*, MOSCOW TIMES (May 27, 2014), http://www.themoscowtimes.com/article/500990.html.

[194] Anna Dolgov, *Russian Children's Rights Official Calls for Iron Curtain*, MOSCOW TIMES (May 16, 2014), http://www.themoscowtimes.com/article/500283.htm.

Dostoevsky described the West as "morally corrupt," even "decadent . . . materialist, egotistical.[195] Russia partially defines itself by being different than the West, forging its own way in culture and international law.

Due to geopolitical realities in Eurasia, Russia detached from Europe at times throughout its history, developing a different world-view that has impacted its understanding of international law.[196] Russia desired to be considered "a normal, European, 'civilized' country" and followed European law not for the law's intrinsic value, rather, to achieve European acceptance.[197] While drawing closer to the West, Russia fought several wars against Catholic Lithuania-Poland and cultivated "mistrust" toward the West in legal relationships as well as moral and religious values.[198] In the middle ages, Western Europe developed the theory of division between the "divine and secular power."[199] Inheriting Byzantine traits through Orthodoxy, Russia did not match the West's division theory, instead maintaining a divine sense and respect of their rulers, which continues to exist today.[200] Thus, the law could be subjugated to the ruler or to the concept of "Kyvian Rus" itself.[201]

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[195] Çicek, *supra* note 157, at 3.

[196] Lauri Mälksoo, *The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe*, 19 EUR. J. INT'L L. 211, 214–15 (2008).

> The Russian theory of international law has moved from proving that "we too are civilized" in the early 18th century via the admiration of and aspiration towards Western European civilization in the 18th and 19th centuries to the break with the West and the affirmation of Russia's own civilizational primacy in the 20th century.

Id. at 216.

[197] *Id.* at 217.

[198] *Id.* at 218–19.

[199] *Id.*

[200] *Id.*

[201] *Id. See also The 1,025th Anniversary of the Baptism of Kyivan Rus*, ECONOMIST (Jul. 30, 2013), http://www.economist.com/blogs/easternapproaches/2013/07/ukraine-and-russia [hereinafter *Kyvian Rus*]. "Kyvian Rus" denotes the "mythical birthplace of the Russian nation," the cradle of Russian civilization. Both Russians and Ukrainians look to Kyiv or Kiev as the source of their common, Orthodox faith. *Id. See also* Philip Wythe, *Crisis in Ukraine Affects Communities in America*, DAILY TARGUM (Apr. 22, 2014), http://www.dailytargum.com/opinion/columnists/philip_wythe/crisis-in-ukraine-affects-communities-in-america/article_f0bc3ac2-c9bf-11e3-9e1e-001a4bcf6878.html. "The Russian Orthodox patriarch of Moscow, Patriarch Kirill, buffered messages of Christian spirituality with calls for, 'an end to the designs of those who want to destroy holy Russia' during Moscow's Resurrection Matins services." *Id.* (citation omitted).

Modern Russian nationalism promotes centralization of power and the preeminence of the Church and State as one united entity to protect Russia.[202]

It is no surprise that the law can place second to the needs of the state. Thus, Russian society is more apt to accept or even celebrate the government's decision to annex Crimea. Ultimately, the government and the populace prioritize the historical connection between Russia and Crimea much more than adhering to *uti possidetis* or international law. While a sense of a gulf between Western and Russian legal theories may exist, international law is persuasive to the Russians and has been cited throughout the Crimean conflict in 2014.[203] Additionally, it is worth noting Putin also desires a "pragmatic" working relationship with the West.[204] Thus, it is not inconceivable that a stronger (through state practice), consistently-applied *uti possidetis* could have influenced the Russian government to seek a more peaceful, internationally supported self-determination process in Crimea than it did.

Across the Russian vastness, there is a revival of a sense of a unique Russian destiny in the world. "Russian exceptionalism" revived in the last two decades, coinciding with a perceived cultural and moral weakness in the West.[205] The first part of this destiny is protection of Russian people. One of Putin's stated goals is the protection of Russian people outside of Russia.[206] This protection is both physical and spiritual as he "protects" Russians by calling for an "Orthodox morality" opposing western values.[207] Furthermore, Russian people instinctively view the Russian Orthodox Church as a bulwark and protector of "Russian values."[208] The Church protects "Russian values against foreign and domestic threats."[209] While the closeness of Russians to the Orthodox Church may seem surprising, in spite of the atheistic nature of communism, the Russian Orthodox Church has been a part of Russian heritage for a thousand years.[210]

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[202] *Id.*
[203] Borgen, *supra* note 152.
[204] Çicek, *supra* note 157, at 9.
[205] McKew & Maniatis, *supra* note 191.
[206] *Id.*
[207] *Id.*
[208] Çicek, *supra* note 157, at 2.
[209] *Id.*
[210] *Kyivan Rus*, *supra* note 199.

In difficult times, Russian people have turned to a few key characteristics of the Russian heritage to rally their people. Typically, these have been Orthodox Christianity and peasant life at their heart.[211] Influential Russian writers intertwine Orthodox Christianity into Russian history and view it as the worldwide protectorate.[212] Some view the Russian Orthodox Church as favoring the Putin Regime in the Ukraine Crisis although both Russia and Ukraine are both Eastern Orthodox.[213] Putin shrewdly capitalizes on this linkage and has used it throughout his presidency. The difficulty lies in knowing how he will behave next in his quest to protect ethnic Russians outside Russia.

This protectorate will not take a fortress or empire form. It is an ideological protection, supported by surgical military and economic force. Putin certainly takes the long view of world affairs.[214] Putin waited fifteen years after the initial U.S. action in Serbia to take Crimea. However, this seizure was opportunistic rather than part of a larger scheme. "Putin has no overall strategy. He has a mission: to save Russia and the Russians."[215] Russia will use its heightened economic clout as leverage to pursue its interests abroad. The interests are varied but involve several themes: promotion of Russian values and protection of Russian speakers, traditions, values, and morality. Whether the Russian government will simply issue official statements from spokesmen, initiate covert actions, or engage in outright armed conflict is dependent on several factors. Specific Russian activity in promoting its interests is impossible to predict. It depends on uncontrollable factors, one of which seems to be the internal activities of countries on its borders containing large amounts of ethnic Russians and Russian speakers.[216] Russia's actions in Crimea and eastern Ukraine have demonstrated that Ukraine is critical to Russian interests. Russia will unquestionably use the leverage it now has to influence Ukraine.

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[211] Robert Steuckers, *Foundations of Russian Nationalism*, EURO-RUS (July 20, 2010), http://www.eurorus.org/index.php?option=com_content&view=article&id=6604%3Afoundations-of-russian-nationalism&catid=3%3Aanalysis&Itemid=92&lang=en.

[212] *Id.*

[213] Tom Heneghan, *In Ukraine, Religious Tensions Contribute to Worsening Political Divide, Russian Orthodox Official Says*, HUFFINGTON POST (May 19, 2014), http://www.huffingtonpost.com/2014/05/19/ukraine-religious-tension_n_5352267.html.

[214] McKew & Maniatis, *supra* note 189.

[215] Bennetts, *supra* note 166.

[216] Christian Caryl, *Rescue Me! Vladimir Putin Is Justifying His Grab for Crimea with the Need to Protect the "Russian-Speaking Population" in Ukraine. But Why Stop There?* FOREIGN POL'Y (Mar. 2, 2014), http://www.foreignpolicy.com/articles/2014/03/02/ rescue_me.

Natural gas can still be used as a weapon for Russia to dominate Ukraine. Once new pipelines bypassing Ukraine are built, Ukraine could be put completely under the energy mercy of Russia. Russia could then manipulate the Ukrainian government, influencing laws, business, contracts, and language. Russia, though, has interests beyond Ukraine.

The Estonian city of Narva presents a vignette for a potential future conflict. Some have speculated a potential Russian action could involve this city,[217] as nearly all of the city's population is ethnic Russian.[218] Estonia and Russia have clashed in the past over discrimination against the Russian minority in the country.[219] The Russian population in Narva could request support or protection from Russia against perceived wrongs inflicted on it by the Estonian government. Russia could insert unmarked forces into the town to isolate it from the rest of Estonia. Such interference inside another country's borders degrades respect for national sovereignty, creating instability and a propensity for violent confrontation. The world suffers as a result. Aside from outright war, a strong principle of *uti possidetis* balanced with self-determination featuring the four essential elements of international recognition, compliance with domestic law, fair elections, and no outside interference can influence Russia's international policy. While not a panacea, this formula promises more success than the fragmented state of *uti possidetis* and self-determination at present.

VII. Conclusion

As the Russian MiGs approached the southeastern part of the Crimean peninsula, several Ukrainian MiGs from Kirovs'ke Air Base in Eastern Crimea flew out to intercept them. The two formations joined forces and flew together south over the Black Sea to participate in Trident-Sickle 2014—a joint Russian/Ukraine/NATO exercise. This fictitious ending to the ominous beginning of this article shows an ideal, peaceful outcome of a seemingly tense situation.

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[217] Michael Ben-Gad, *The Tiny Estonian Town That Could Spell the End of NATO*, THE WEEK (Mar. 27, 2014), http://theweek.com/article/index/258840/the-tiny-estonian-town-that-could-spell-the-end-of-nato.

[218] *Id.*

[219] Scott Shackelford, *From Nuclear War to Net War: Analogizing Cyber Attacks in International Law*, 27 BERKELEY J. INT'L L. 192, 193 (2009).

The principle of *uti possidetis*, in spite of the Kosovo precedent as well as the Crimean connection to Russia, provides a solid legal case for a Ukrainian Crimea. A resurgent and revanchist Russia may elevate its interests over the law as it interacts with its neighbors and the West. A neo-nationalist Russia may not directly attack when it deems its interests are threatened. It may employ more sophisticated, less obvious interference in neighboring countries' affairs. This interference could affect others' sovereignty, internal affairs, oil, gas, transport embargoes, and even involve conventional attacks.

The West should embrace opportunities to draw Russia into a closer partnership and emphasize commonalities. The Crimea issue must be a part of the dialogue between the West and Russia. The U.S. must publicly support this issue in dialogue with Russia about Crimea given the history of Crimea and its complex relationship with its neighbors. The transfer to Ukraine and the intricacies of the case must be mastered by the West as they engage Russia so Russia perceives the West's solid legal case for Crimea belonging to Ukraine.

The United States and NATO should ensure proper planning takes place and policy is implemented to deal with a potential attack on NATO allies. The Russian government interprets dithering and equivocations as weakness. Additionally, Russia will take and pocket any unilateral concessions from the United States. If reciprocation is desired, it should be guaranteed when concessions are made. The United States and NATO must engage Russia from a position of strength but also cooperation; NATO dithered over the extension of membership action plans to Georgia and Ukraine in the spring of 2008. This lack of support gave Russia the signal that their push into Georgia would not be met with Western military resistance. The West cannot afford to let this happen in Ukraine.

The starkest lesson learned as Russia removed Crimea from Ukraine's grasp is the impunity with which Russia took it. Short of war, nothing would have stopped Russia's involvement in the secession and annexation into Russia. Had *uti possidetis*, balanced with self-determination featuring the four essential elements, existed as international state practice, Russia may have been dissuaded from supporting Crimea's secession and instead may have worked through the international community to achieve international recognition, compliance with domestic law, a fair referendum, and no outside interference. Through state practice and support from international institutions, a

vision of a stronger *uti possidetis* balanced with self-determination can become reality.

THE MILITARY JUSTICE DIVIDE: WHY ONLY CRIMES AND LAWYERS BELONG IN THE COURT-MARTIAL PROCESS

MAJOR ELIZABETH MURPHY*

I don't want just more speeches or awareness programs or training, but ultimately, folks look the other way. If we find out somebody is engaging in this stuff, they've got to be held accountable—prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period. It's not acceptable.[1]

I. Introduction

Public outcry over sexual assault and the decisions of senior military leaders with authority under the Uniform Code of Military Justice (UCMJ) has cast a shadow over military justice. In November 2012, then-Lieutenant Colonel (Lt Col) James Wilkerson, a former inspector general at Aviano Air Base, was convicted of sexual assault; three months later the convening authority, Lieutenant General Craig Franklin,

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[1] President Barack Obama, Address at the Naval Academy Graduation (May 24, 2013); *see also* Michael D. Shear, *Obama Calls for 'Moral Courage' at Naval Academy Graduation*, N.Y. TIMES, May 24, 2013, http://www.nytimes.com/2013/05/25/us/politics/obama-naval-academy-commencement.html.

overturned his conviction.[2] Lieutenant General Franklin may retire as a Major General after possibly losing a star following "scrutiny of his handling of sexual assault cases."[3] Congress blocked former convening authority Lieutenant General (Retired) Susan Helms's promotion due to the clemency she granted when she overturned Captain Matthew Herrera's 2010 sexual assault conviction.[4] She retired from the Air Force on April 1, 2014.[5] These cases have called into question whether commanders should have the authority to decide the path and ultimate fate of sexual assault cases. Even if command authority remains intact, potential loss of a star or the lack of promotion to the next rank in these aforementioned cases sends the message to senior leaders that severe professional consequences will result if commanders take what they think Congress believes to be the incorrect action in sexual assault cases.

The alleged or actual misconduct of senior leaders in the military also has been an attention-generating topic in the media. On June 14, 2012, then-Colonel James Johnson received what many perceived to be a light punishment of a $300,000 fine and a reprimand for 15 offenses, ranging from bigamy to fraud.[6] Colonel Johnson's case was followed by the investigation of then-General William "Kip" Ward, who was administratively reduced from a four-star general to a three-star general

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[2] Letter from Lieutenant General Craig A. Franklin, former Commander, Third Air Force, to Secretary Michael B. Donley, Secretary of the Air Force (Mar. 12, 2013) (on file with author) (detailing his reasons for dismissing the charges against Lieutenant Colonel James H. Wilkerson III); Kristin Davis, *Lt. Col. Whose Overturned Sex Assault Case Sparked Outrage Will Retire*, ARMY TIMES, Oct. 2, 2013, http://www.airforcetimes.com/article/20131002/CAREERS03/310020019/Lt-col-whose-overturned-sex-assault-case-sparked-outrage-will-retire.

[3] Kristin Davis, *Lt. Gen. Franklin Will Retire as a 2-star*, AIR FORCE TIMES, January 9, 2014, http://www.airforcetimes.com/apps/pbcs.dll/article?AID=/201401091322/ NEWS/ 301090021. As of publication of this article, the retirement grade decision had not yet been determined.

[4] Memorandum for Record from Lieutenant General Susan Helms, subject: Disapproval of Findings in U.S. v. Herrera (24 Feb. 2012); Craig Whitlock, *General's Promotion Blocked Over Her Dismissal of Sex-Assault Verdict*, WASH. POST, May 6, 2013, http://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07- b6e0e6152528_story_1.html; Jeff Schogol, *With Nomination Blocked, 3-star Applies for Retirement*, MIL. TIMES, Nov. 8, 2013, http://www.militarytimes.com/article/20131108/CAREERS03/311080013/Helms-set-retire.

[5] Telephone Interview with Lieutenant General (Retired) Susan Helms, former commander, 14th Air Force Space Command (Mar. 12, 2014).

[6] Nancy Montgomery, *Former 173rd Commander Handed Reprimand, $300,000 Fine*, STARS & STRIPES, June 14, 2012, http://www.stripes.com/news/former-173rd-commander-handed-reprimand-300-000-fine-1.180356.

and retired after it was determined he engaged in widespread suspicious spending of government funds amounting to more than $80,000.[7] In November 2012, news broke about an adulterous affair between General David Petraeus and then-Lieutenant Colonel Paula Broadwell; the affair also led to an investigation into the personal life of Marine General John Allen.[8] Shortly thereafter, Secretary of Defense Leon Panetta ordered a Department of Defense (DoD)-wide review of ethics among the senior officer corps.[9] Originally charged with forcible sodomy, on March 20, 2014, Brigadier General Jeffrey Sinclair was sentenced by a military judge to receive a reprimand and a $20,000 fine after pleading guilty to charges, including adultery, inappropriate relationships, conduct unbecoming an officer, and misuse of a government travel card.[10] These stories describing actual or alleged misconduct by senior military leaders preceded a flurry of proposed legislation calling for changes to the military justice system.[11]

The 2012 documentary "The Invisible War" has had an impact on military justice. The film provides detailed accounts of women of all services who had been sexually assaulted in the military, and most of their attackers were not prosecuted.[12] In April 2012, then-Secretary of Defense Leon Panetta mandated that all sexual assault cases be withheld to officers with, at a minimum, special court-martial convening authority and in the pay grade of O-6.[13] Several of the victims in the film met with

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[7] Lolita C. Baldor, *William Ward, Four-Star General Demoted for Lavish Spending, Ordered to Repay $82,000*, HUFF. POST, Nov. 13, 2012, http://www.huffingtonpost.com/2012/11/13/william-ward_n_2122379.html.

[8] Robert Burns, *Petraeus-Broadwell Probe Spreads to Gen. Allen*, ASSOCIATED PRESS, Nov. 13, 2012, http://www.military. com/daily-news/2012/11/13/ petraeus-broadwell-probe-spreads-to-gen-allen.html.

[9] Elisabeth Bumiller, *Panetta Orders Review of Ethics Training for Military Officers*, N.Y. TIMES, Nov. 15, 2012, http://www.nytimes.com/2012/11/16/us/panetta-orders-review-of-ethics-training-for-officers.html.

[10] Jeffrey Collins, *Army General Fined, Reprimanded in Sex Case*, ASSOCIATED PRESS, Mar. 20, 2014, http://news.msn.com/crime-justice/army-general-fined-reprimanded-in-sex-case?ocid=ansnews11.

[11] *See, e.g.*, Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013); Better Enforcement for Sexual Assault Free Environments Act of 2013, S. 1032, 113th Cong. (2013); Combating Military Sexual Assault Act of 2013, H.R. 2002, 113th Cong. (2013); Military Sexual Assault Prevention Act of 2013, S. 548, 113 Cong. (2013); STOP Act, H.R. 1593 113th Cong. (2013).

[12] THE INVISIBLE WAR (Chain Camera Pictures 2012).

[13] *Id.*; Memorandum from Sec'y of Def., to Secretaries of the Mil. Dept's et al., subject: Withholding Initial Disposition Authority Under the UCMJ in Certain Sexual Assault Cases (20 Apr. 2012).

Senators Jackie Speier and Claire McCaskill;[14] these women have apparently spurred Congress to action. At least one of the victims, former Marine Captain Ariana Klay, appeared with Senator Kirsten Gillibrand during a press conference before the debates over amendments to the fiscal year (FY) 2014 National Defense Authorization Act (NDAA) involving the UCMJ.[15]

Whether a truly legitimate problem or an issue exaggerated by propaganda, sexual assault cases are changing military justice. Recent public interest and congressional response to perceived problems in the military justice system have resulted in both proposed legislation and actual modifications to the UCMJ. Congress revised Article 120 of the UCMJ twice in less than ten years to address perceived problems with the litigation of sexual assault offenses.[16] Senator Gillibrand's Military Justice Improvement Act (MJIA), proposed on May 16, 2013, called for the removal of certain offenses from command authority, the elimination of a commander's power to overturn or downgrade convictions in clemency, and abolishment of a commander's consideration of the

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[14] THE INVISIBLE WAR, *supra* note 12.

[15] J. Taylor Rushing, *Group of Senators Begin Push to Remove Sex Assault Cases from the Chain of Command*, STARS & STRIPES, Nov. 6, 2013, http://www.stripes.com/news/group-of-senators-begin-push-to-remove-sex-assault-cases-from-chain-of-command-1.251408.

[16] UCMJ art. 120 (2008); UCMJ art. 120 (2012); MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012) [hereinafter 2012 MCM]. Offenses committed before October 1, 2007, under Article 120 included rape and carnal knowledge. Rape and carnal knowledge of a spouse were not recognized as crimes, and the prosecution had to prove that sexual intercourse was done by force and without consent. The legislation for crimes committed between October 1, 2007, and June 27, 2012, expanded Article 120 to include crimes of rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, abusive sexual contact, abusive sexual contact with a child, indecent liberty with a child, indecent act, forcible pandering, wrongful sexual contact, and indecent exposure. The rape and aggravated sexual assault statutes allowed prosecutors to charge the accused for more than force, such as bodily harm, threats, rendering someone unconscious, and substantial incapacitation. Also, marriage became an affirmative defense to seven of the offenses. The current Article 120 includes the offenses of rape, sexual assault, aggravated sexual contact, and abusive sexual contact. Article 120a (stalking), Article 120b (rape and sexual assault of a child), and Article 120c (other sexual misconduct) are separate offenses under the current UCMJ. *See also* Major Mark D. Sameit, *When a Convicted Rape Is Not Really a Rape: The Past, Present, and Future Ability of Article 120 Convictions to Withstand Legal and Factual Sufficiency Reviews*, 216 MIL. L. REV. 77 (2013) (describing the changes to sexual assault and Article 120 from 1950 through 2012).

character of the accused in decisions about initial disposition of a case.[17] Senator Barbara Boxer's bill proposed significant changes to the Article 32 process to the detriment of the accused by limiting the scope of the hearing to a determination of only probable cause and giving the victim the option to be excused from participating.[18] Senator Claire McCaskill proposed the Victims Protection Act of 2013 on November 21, 2013; the bill's 33 sections proposed both improvements to the military's current program to prevent and respond to sexual assault and specific changes to the UCMJ.[19] Several of these bills resulted in legislation under the NDAA, which included over 30 sections related to the UCMJ that substantially change the *Manual for Courts-Martial* (*MCM*).[20] On March 6, 2014, the MJIA failed in the Senate by a vote of 55-45.[21] Senator McCaskill's additional legislation, the Victims Protection Act of 2014, passed the Senate on March 10, 2014, by a vote of 97-0.[22] Although both senators have proposed legislation to address the military's handling of sexual assault cases, the key difference between the two is that Senator McCaskill believes commanders should continue to have prosecutorial discretion over UCMJ cases, while Senator Gillibrand does not.[23]

These recent changes to the law will require even greater change to the military justice system in order for the court-martial process and the

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[17] Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013).

[18] Article 32 Reform Act, S. 1644, 113th Cong. (2013). Previously, an Article 32 investigation required a "thorough and impartial investigation of all the matters set forth" and an "inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline." UCMJ art. 32 (2012).

[19] Victims Protection Act of 2013, S.1775, 113th Cong. (2013).

[20] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1701–1753 (2013).

[21] Robert Herriman, *Sen. Gillibrand's 'Military Justice Improvement Act' Falls Short in the Senate*, GLOBAL DISPATCH, Mar. 8, 2014, http://www.theglobaldispatch.com/sen-gillibrands-military-justice-improvement-act-falls-short-in-the-senate-67226/.

[22] Victims Protection Act of 2014, S. 1917, 113th Cong. (as passed by Senate, Mar. 10, 2014); Donna Cassata, *Senators Rally behind Military Sexual Assault Bill*, ASSOCIATED PRESS, Mar. 11, 2014, http://news.yahoo.com/senators-rally-behind-military-sexual-assault-bill-071253179--politics.html.

[23] *See* Charles J. Dunlap, Jr., Abstract, *Top Ten Reasons Sen. Gillibrand's Bill Is the Wrong Solution to Sexual Assault*, SOC. SERV. RESOURCE NETWORK 1, 3 (21 Nov., 2013), *available at* http://papers.ssrn. com/sol3/papers.cfm?abstract_id=2358044. Senator McCaskill believes that commanders are giving victims their day in court, that increased reporting shows the current system with commanders involved is working, and that foreign jurisdictions removed their commanders to protect the accused rather than the victim. *Id.* at 4, 13.

rights of the accused to remain intact. Because military justice has become so politicized, this article proposes that military lawyers in prosecutorial roles, rather than commanders, should have decision-making authority for preferral and referral of certain cases to special and general courts-martial. The proposed offenses eligible for preferral and referral to special and general courts-martial should be limited to those offenses that authorize more than one year of confinement as a maximum punishment and have a companion statute under either Title 18 or Title 21 of the United States Code in order to ensure military accused are only prosecuted for offenses recognized as criminal in nature by civilian federal courts. Commanders should retain authority to issue non-judicial punishment and administrative action for any and all offenses under the UCMJ. This proposal ensures: (1) that the subject matter experts in military justice make charging decisions; (2) that commanders can maintain good order and discipline by issuing quick and binding disciplinary actions through non-judicial and administrative action; and (3) that servicemembers are not prejudiced by federal convictions for minor or military-specific offenses. Without a substantial change to prosecutorial authority and types of offenses that can be tried at court-martial, the military accused unjustly stands to lose protections afforded to the criminal defendant tried in civilian court.

This article explores the process and concerns with commanders' UCMJ authority, analyzes recent legislation, and proposes a new military justice model by incorporating the spirit of the MJIA. First, part II outlines the historical background of the UCMJ and command authority in military justice. Second, parts III and IV explore some of the legal conundrums, such as command discretion and unlawful command influence (UCI), which uniquely affect military justice cases. Third, part V critiques both the changes to the UCMJ in the FY 14 NDAA and the previously proposed MJIA. Lastly, the article presents a model that allows military lawyers to obtain prosecutorial discretion over crimes, bolsters command authority to instill good order and discipline, and attempts to provide the means for a military accused to receive a fair trial.

II. History of the UCMJ

The UCMJ functions as a living, breathing document that reflects the changing times. Initially governed by the Articles of War of 1775 and the Articles for the Government of the Navy, in 1950 the armed forces became subject to the UCMJ, a code that provided the same military justice system for all uniformed services.[24] As David Schlueter points out, there is a great deal of literature "on the history and background of the UCMJ."[25] In short, the original intent for the UCMJ, other than uniformity for the services, was to provide: (1) rights to the accused without interfering with the military mission; and (2) an adjudicative process that was not a civilian criminal justice system, yet not completely controlled by military commanders.[26] While Congress debates the effectiveness of the UCMJ, scholars and practitioners argue that the present-day court-martial structure reflects this originally intended balance of criminal justice and command control because the accused is afforded most of—if not all or more—the rights of any criminal defendant in the United States,[27] and the commander investigates alleged offenses, decides which charges will be preferred and referred, selects the panel, and considers clemency requests.[28] Perhaps the difficult question is not whether the original intent of the UCMJ is being met, but rather, whether the UCMJ still sufficiently protects the rights of the accused.

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[24] David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline*, 215 MIL. L. REV. 1, 4 (2013); THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE 10 (20 May 1970) [hereinafter BACKGROUND]; Sameit, *supra* note 16, at 82.

[25] Schlueter, *supra* note 24 (citing ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES (1956); BRIGADIER GENERAL JAMES SNEDEKER, A BRIEF HISTORY OF COURTS-MARTIAL (1954); Walter T. Cox, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987); Major Gerald F. Crump, *Part II: A History of the Structure of Military Justice in the United States, 1921–1966*, 17 A.F. L. REV. 55 (Fall 1975); Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953); David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129 (1980).

[26] BACKGROUND, *supra* note 24.

[27] *See generally* Schlueter, *supra* note 24 (describing and applying the due process and crime control models to the military justice system); Fred L. Borch III, Regimental Historian & Archivist, The Judge Advocate General's Legal Center and School, Evolution of the Military Criminal Legal System before the Response Systems to Adult Sexual Assault Crimes Panel (June 27, 2013), http://www.c-spanvideo.org/program/AdultSe.

[28] Schlueter, *supra* note 24, at 56–58.

Change is not unheard of in the military justice system; the Articles of War and the *MCM*, which includes the UCMJ, have been amended multiple times since their inception.[29] Albeit flexible and adaptive, this separate system for military offenses governed by command authority has survived over 200 years of American jurisprudence. One constant that has remained from the Articles of War to the present-day *MCM* is that military commanders have full disposition authority, or ultimate prosecutorial discretion, for offenses committed by those subject to the UCMJ.[30] Military justice is considered the "commander's tool for discipline," and the "commander is at the root of the system."[31] However, this is not the first time in history that command discretion over military justice has been called into question.[32] The perception of how the military prosecutes alleged sex crimes has given new life to the debate; in 2014, commanders will begin to lose some authority over clemency requests for sexual assault offenses.[33] It remains to be seen whether Congress will continue to whittle away commanders' authority, or remove it altogether.

III. The Competing and Conflicting Responsibilities of Commanders

Commanders have a caretakers' responsibility when it comes to servicemembers subject to their command. Commanders are responsible for the health, welfare, and morale of all of their troops.[34] The

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[29] *See generally* BACKGROUND, *supra* note 24. There were seven versions of the Articles of War from 1775 to 1948. Amendments include but are not limited to changes in types of punishment, maximum sentences, statutes of limitation, jurisdiction, and appointment of counsel. *Id*. at 3–5. The MCM has been updated five times since 1970, most recently in 2012. *See* MCM, *supra* note 16.

[30] BACKGROUND, *supra* note 24.

[31] Borch, *supra* note 27.

[32] *Id.*; *see also* Edward F. Sherman, "*Military Justice Without Military Control*," 82 YALE L.J. 1398 (1973) (describing abolishment of foreign military justice systems and advocating for civilianization of the military justice system in the United States in order to "provide American servicemen with a greater system of justice"). *Id*. at 1425.

[33] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702 (2013) (removing commanders' ability to disapprove convictions or lesser included offenses for most offenses under the UCMJ); *id.* § 1705 (requiring a punitive discharge for rape, sexual assault, rape and sexual assault of a child, and forcible sodomy for offenses committed after June 24, 2014).

[34] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY paras. 1-5, 3-1, 3-2 (18 Mar. 2008) (RAR 20 Sept. 2012) [hereinafter AR 600-20]; U.S. DEP'T OF AIR FORCE INSTR. 1-1, AIR FORCE STANDARDS para. 1.7.1 (7 Aug. 2012); U.S. DEP'T OF NAVY, U.S.

responsibility is broad; commanders must focus on the physical, material, mental, and spiritual state of their servicemembers, civilian employees, and their families.[35] The duty to take care of servicemembers is the cornerstone of command; commanders are evaluated on their duty to take care of servicemembers directly through command climate surveys[36] and individual evaluation reports.[37] Commanders' responsibilities for their servicemembers' morale and welfare must be executed at all times. Major General Anthony Cucolo, former Commandant of the War College and former general court-martial convening authority (GCMCA) for the 3d Infantry Division, described the commander as "responsible for everything that happens to every individual Soldier and every single thing on his installation."[38] He further maintained that the families of servicemembers trust that the commander will take care of every aspect of that servicemember's life both at home and abroad.[39] This huge undertaking of responsibility is inherent and fundamental to serving as a commander; in terms of military justice, the commander's major duties fall under the broad categories of reporting, evaluations, military justice, and duties owed to opposing parties.

NAVY REGULATIONS, 1990, art. 0802 (14 Sept. 1990); MARINE CORPS MANUAL app. A, paras. 2000, 2817, 1011 (21 Mar. 1980).

[35] AR 600-20, *supra* note 34, para. 3-2.

[36] *Id.* para. 6-3.

[37] *See generally* U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM para. 1-8 (5 June 2012) [hereinafter AR 623-3]. In the Army, commanders distribute command climate surveys to their Soldiers, and the Soldiers anonymously respond to questions regarding the climate of the unit. Officer evaluation reports are completed by officers senior to the rated individual and comment on the officer's duty performance and promotion potential.

[38] Interview with Major General Anthony Cucolo III, former Commandant, U.S. Army War Coll., in Carlisle, Pa. (Jan. 22, 2014). As the commandant of the U.S. Army War College for two years (after relinquishing command in June 2014) he was directly responsible for the education and leader development of senior military and civilian leaders in the rank of Lieutenant Colonel, Colonel, and GS-15. His experience as a Division Commander and War College Commandant uniquely positions him to explain what is expected of commanders and senior leaders in the armed forces. *See also* Borch, *supra* note 27 (describing how the commander is the individual responsible for everything that happens to his servicemembers and his unit).

[39] *Id.*

A. Reporting

One obligation that a commander has is to report certain incidents or alleged offenses to designated personnel or agencies. In general, commanders use the established chain of command to inform the higher headquarters at each level of UCMJ actions.[40] Depending on the offense, a commander must send a serious incident report (SIR) to the higher headquarters.[41] Sexual harassment cases involving a commander in the rank of O-6 or higher or sexual harassment/assault response and prevention (SHARP) personnel, "curious cases," or cases likely to receive media attention, must be reported to Headquarters, Department of the Army.[42] Unrestricted reports of sexual assault cases where the victim is a servicemember must be reported to the installation commander, first officer in the grade of O-6, and first general officer in the chain of command, within eight days of receipt.[43] The report must include the victim's progress, care, and support, referral to investigators, details of the incident, and post-incident actions.[44] Reporting obligations ensure that appropriate personnel are informed of incidents that could affect members of an installation or deployed area, draw media attention, or that will require further action from those higher in the chain of command.[45]

B. Evaluations

Congress has required greater accountability of leaders' actions taken with regard to sexual assault. The secretaries of the military departments, and thus their subordinate commanders, must ensure that all

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[40] In practice, informing a senior commander of UCMJ actions can occur by informal means, such as an e-mail or "telephone call," or by more formal means, such as a briefing or memorandum.

[41] U.S. DEP'T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING para. 1-1 (30 Mar. 2007).

[42] Memorandum from Deputy Chief of Staff, G-1, to Principal Officials of Headquarters, Dep't of Army et al., subject: Guidelines and Process for Critical Command Information Requirements (CCIR) regarding Sexual Harassment and Assault Incidents (11 Oct. 2013) [hereinafter G-1 memo].

[43] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1743, 127 Stat. 672 (2013).

[44] *Id*.

[45] *See generally* G-1 memo, *supra* note 42.

servicemembers have received extensive training on sexual assault.[46] Accountability for actions taken in furtherance of eradicating sexual assault has spread to every leader in the military as efforts made in support of the SHARP program must be reflected in every Army non-commissioned officer evaluation report (NCOER) and officer evaluation report (OER).[47] The Secretary of Defense is required to direct the military secretaries to "verify and track" their commanders' compliance in conducting climate assessments in an effort to prevent and report sexual assault.[48] Accountability is required to be evaluated by senior leaders in terms of their command climate regarding sexual assault.[49] Commanders must ensure that "sexual assault allegations are properly managed and fairly evaluated" and that "a victim can report criminal activity, including sexual assault, without fear of retaliation, including ostracism and group pressure from other members of the command"; if a commander fails in these tasks, he can be relieved of command.[50]

C. Military Justice

Military discipline is one component of a commander's responsibility.[51] In the armed forces, the UCMJ is an important part of command authority. The Army views military justice and good order and discipline as intertwined, and preserving the integrity of the system is of utmost importance.[52] Major General Cucolo underscored this point when he noted that command authority and the UCMJ go hand-in-hand:

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[46] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 577, 118 Stat. 1812 (2004); *see generally* U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT (18 Dec. 2009) (RAR 4 Aug. 2011) (outlining all mandatory Army training).

[47] U.S. DEP'T OF ARMY, DIR. 2013-20, ASSESSING OFFICERS AND NON-COMMISSIONED OFFICERS ON FOSTERING CLIMATES OF DIGNITY AND RESPECT AND ON ADHERING TO THE SEXUAL HARASSMENT/ASSAULT RESPONSE AND PREVENTION PROGRAM (27 Sept. 2013) [hereinafter ARMY DIR. 2013-20].

[48] National Defense Authorization Act for Fiscal Year 2014 § 1721.

[49] *Id*. § 1751.

[50] *Id*.

[51] AR 600-20, *supra* note 34, para. 4-1; *see also* Borch, *supra* note 27 (stating that discipline is one piece of everything the commander is responsible for, and the "commander is at the root of the system").

[52] *See generally* Memorandum from Sec'y of Def., to Sec'ys of the Military Dep'ts, et al., subject: Integrity of the Military Justice Process (6 Aug. 2013).

> Good order and discipline is the fabric of the armed forces, and to remove the UCMJ is to tear at the very fabric of the institution. The commander has the responsibility to take people from all walks of society, normalize them, and make them obedient to orders. A commander's responsibility becomes meaningless when his authority is removed. The UCMJ is a system of checks and balances on the people in the system to ensure they behave properly, and there is no way to parse command authority out of it. The commander is best situated to understand the Soldier and receive information from his subordinates about a case.[53]

Commanders have always been expected to instill good order and discipline in their units; UCMJ authority, including preferring and referring cases to court-martial, has been a tool to assist in that institutional responsibility.

First and foremost, the individual commander is charged with treating all of his personnel fairly and equally.[54] When an offense is alleged to have occurred, the commander of that servicemember has several obligations. The first category of obligation is investigation. A commander must make a preliminary inquiry into all suspected offenses.[55] A commander can then direct a member of his command to conduct an investigation[56] or contact the criminal investigative units, such as Criminal Investigative Division (CID), Naval Criminal Investigative Service (NCIS), or the Air Force Office of Special Investigations (AFOSI) for an investigation into alleged offenses within their purview.[57] In the military justice realm, the commander makes disposition decisions after appointed officers, military police, or criminal investigators have completed their respective investigations into alleged offenses.[58]

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[53] Interview with Major General Anthony Cucolo III, *supra* note 38.
[54] AR 600-20, *supra* note 34, para. 1-5.
[55] MCM, *supra* note 16, R.C.M. 303.
[56] U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2 Oct. 2006) [hereinafter AR 15-6].
[57] U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES app. B (15 May 2009) (RAR 6 Sept. 2011) [hereinafter AR 195-2]; U.S. DEP'T OF NAVY, SEC'Y. OF NAVY INSTR. 5430.107, MISSION AND FUNCTIONS OF THE NAVAL CRIMINAL INVESTIGATIVE SERVICE para. 6b(1) (28 Dec. 2005).U.S. DEP'T OF AIR FORCE, INSTR. 71-101, CRIMINAL INVESTIGATIONS PROGRAM paras. 1.5, 2.1.2 (8 Apr. 2011).
[58] MCM, *supra* note 16, R.C.M. 306.

Commanders have many options available when presented with evidence that a servicemember under their command has allegedly committed an offense under the UCMJ. Under certain circumstances, a commander can impose pretrial restraint on an accused, including "conditions on liberty, restriction in lieu of arrest, arrest, or confinement."[59] A commander has the option of taking no action against a servicemember, issuing an administrative action, imposing non-judicial punishment, or preferring charges.[60] Currently, only commanders have the ability to make decisions regarding alleged offenses under the UCMJ.[61] Although a commander can seek legal advice, he is only required to do so before referral of charges to a court-martial, and it is the commander's decision as to whether or not to follow that advice.[62] Although anyone subject to the UCMJ can prefer charges, in Army practice, a commander is the individual who signs the charge sheet against an accused. The commander has full prosecutorial discretion, and only a commander can refer a case to a court-martial.[63]

D. Duties Owed to Opposing Parties

The commander's multitude of military justice responsibilities can conflict. For example, in a case that involves both a victim and an accused, such as a sexual assault, a commander owes a duty to both individuals. The commander owes any accused several protections during and after the court-martial process.[64] In a sexual assault case, the commander may temporarily reassign or remove an accused for the purpose of good order and discipline as soon as the commander receives

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[59] *Id.* R.C.M. 304.
[60] *Id*. R.C.M. 306.
[61] *Id.*
[62] *See* UCMJ art. 34 (2012) (Before referring a case to trial, the convening authority must receive written advice from his Staff Judge Advocate (SJA) addressing jurisdiction, whether a specification alleges an offense, and whether the Article 32 report of investigation shows that the "specification is warranted by the evidence.").
[63] Borch, *supra* note 27.
[64] *See* MCM, *supra* note 16, R.C.M. 302, 304–05, 308, 705, 707, 1101, 1105, 1107–09, 1113–14, and ch. XIII. The commander is bound by the Rules for Courts-Martial in terms of apprehension, arrest, pretrial confinement, restriction, notification of charges, pretrial agreements, speedy trial, post-trial procedures, and summary courts-martial. *See also id.* MIL. R. EVID. 301, 305, 311–13, 315–16. The commander is bound by the military rules of evidence prohibiting compulsory confessions, illegal searches and seizures, and inspections.

an unrestricted report of sexual assault.[65] The commander has a duty to consider a victim's preferences and avoid re-victimization; he may also transfer the victim to a different unit.[66] Commanders issue military protective orders to either or both the accused and the victim to ensure the parties do not have contact with each other.[67] Commanders must appoint and train unit victim advocates, sexual assault response coordinators, victim witness liaisons, and special victim counsel, all of whom he must make available, to victims.[68] The commander has a responsibility to, "when appropriate, consult with the victim on pretrial and charging decisions"[69] and must also consider the victim's input when submitted during the post-trial process.[70] Additional protection and support for the victim is a positive step in the right direction,[71] as it is good for command responsibility, soldier care, morale of the unit, and encouraging reporting of sexual assault and justice for the victim. However, the enhanced focus on the victim could directly or indirectly impact the due process rights of the accused.[72]

It is the role as decision-maker in the military justice realm that creates the complex and untenable situation for commanders. Commanders are required to handle a multitude of tasks simultaneously.[73] They have been required to balance servicemembers' due process rights with serving military justice and maintaining good order and discipline in their units for decades.[74] As Major General Cucolo noted in praise of commanders, they "can handle vast quantities of diverse information, all of which is hitting them at the same time. They are trained and educated to do that."[75] The question then is not whether commanders can continue to have authority over complex cases,

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[65] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1713, 127 Stat. 672 (2013).
[66] AR 600-20, *supra* note 34, para. 8-5.
[67] *Id.*
[68] *Id.* para. 8-3; National Defense Authorization Act for Fiscal Year 2014 § 1716.
[69] AR 600-20, *supra* note 34, para. 8-5; U.S. DEP'T OF ARMY, REG. AR 27-10 MILITARY JUSTICE para. 18-15 (3 Oct. 2011) [hereinafter AR 27-10].
[70] National Defense Authorization Act for Fiscal Year 2014 § 1706.
[71] Interview with Major General Anthony Cucolo III, *supra* note 38.
[72] Borch, *supra* note 27; *see also* discussion *infra* Part V.B.
[73] *See generally* AR 600-20, *supra* note 34. Commanders at all levels are responsible and accountable for all personnel, equipment, missions, daily operational requirements, and military justice.
[74] *See* BACKGROUND, *supra* note 24.
[75] Interview with Major General Anthony Cucolo III, *supra* note 38.

but whether they should, especially as the pressure to protect victims and adjudicate every case grows.

The additional military justice requirements, by virtue of a change in law and policy, are on their face positive steps toward addressing sexual assault in the military. However, those being evaluated on how they address sexual assault allegations are also the decision-makers for military justice. Several retired senior officers testified during the January 30, 2014, Response Systems to Adult Sexual Assault Crimes Panel. In support of Senator Gillibrand's MJIA removing UCMJ authority from commanders, Major General (Retired) Martha Rainville, former Adjutant General of the Vermont National Guard (both Army and Air), stated,

> I think that the decisions to prosecute or not should be based on evidence, independent of preexisting command relationships and that really our men and women deserve that fair treatment and due process that would come with that. I strongly believe in holding commanders responsible. That is a given. But we should not confuse command responsibility with leadership. Commanders should always be responsible for command climate. And this change, if made, would allow those commanders to focus their efforts on command business, improving the command climate, and on the warfighting abilities of their units.[76]

In advocating for military lawyers to make prosecutorial decisions rather than commanders, she further noted this would "let commanders lead, to free them to focus on mission-readiness and warfighting in their command climate and inspiring and leading."[77]

Clearly, commanders have a responsibility to prevent and respond to sexual assault, command their units, accomplish their missions, and take care of all of their servicemembers. However, commanders cannot properly evaluate cases without their loyalties and duties to the accused

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[76] *See* Transcript of Response Systems to Adult Sexual Assault Crimes Panel: The Role of the Commander in the Military Justice System: Perspectives of Retired Senior Commanders and Former Officers 11–12 (Jan. 30, 2014) [hereinafter RSP Transcript], *available at* http://responsesystemspanel.whs.mil/.

[77] *Id.* at 13–14.

and victim conflicting. Colonel (Retired) Paul McHale, former Congressman and Assistant Division Commander of the Fourth Marine Division**,** made this point when he explained the difficulty for a commander to remain "truly impartial" when adjudicating "an adversarial relationship" between "accused and accuser"[78] and discussed a commander's concerns about scrutiny of command climate, the unit, the war fighting mission, and his own career.[79] A commander's conflicting interests can jeopardize the individual due process rights of the accused when he is acting as the decision-making authority.

IV. The Present Concern about Unlawful Command Influence

Commanders may receive criticism for taking too little action in military justice cases. A victim of any crime could experience trepidation when she enters the criminal justice system. Victims of sexual assault might experience fear of retaliation, damage to reputation, harassment or violence to her or her family, and anxiety that no one will do anything on her behalf.[80] In the military justice system, victims might suspect that their superiors will not take their complaints seriously, and ultimately, the concern might be that the commander of the accused would not only take no action against the assailant, but would take action against the victim herself.[81] This theme is prevalent in "The Invisible War," as several women describe being raped or otherwise sexually assaulted, and the command taking little to no action in their cases or even punishing the victims.[82] The Commandant of the Marine Corps shared his experience with learning of the prevalence of sexual assault in the military upon speaking with a female captain and master sergeant who told him that they had been "sexually assaulted at every rank [they] held."[83] Statistics have been advertised to show that thousands of rapes

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[78] *Id*. at 44.
[79] *Id.* at 45, 86–87.
[80] Charles D. Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, HERITAGE REP., Nov. 6, 2013, http://report.heritage.org/sr149.
[81] For example, a victim might have engaged in misconduct that is punitive under Article 92 of the UCMJ, such as underaged drinking or engaging in a prohibited relationship, which could lead to her reluctance to report.
[82] *See generally* THE INVISIBLE WAR, *supra* note 12.
[83] General James F. Amos, Commandant of the U.S. Marine Corps, Heritage Brief at Marine Corps Recruit Depot in Parris Island, S.C. 12 (Apr. 19, 2012) [hereinafter Amos Brief] (transcript on file with the author).

or sexual assaults are unreported in the military.[84] The question is whether victims do not report sexual assaults in the military because of lack of command action against the accused, fear of retaliation, prosecution for their own collateral misconduct, a resigned acceptance of the male-dominated climate and culture, a combination of the aforementioned factors, or another reason entirely. Regardless of the reason, a victim's reluctance or failure to report a crime of this nature is a problem in any circumstance.

When the commander has any influence over a court-martial involving victims, the military justice practitioner must be concerned with the opposite problem that can occur—that the commander will overreach in his power to influence or prosecute the case. A commander could engage in unlawful command influence by exercising too much authority and thus taking unlawful action in a case.[85] Unlawful command influence has been identified as the "mortal enemy of military justice" for decades because it "tends to deprive [s]ervicemembers of their constitutional rights."[86] In general, the integrity of the system is compromised by a finding of UCI, and for a specific case, a founded claim of UCI could result in the severe consequence of dismissal of those charges[87] or reversal of a conviction.[88] The prosecutor and victim in the military justice system have a unique concern that is not present in civilian criminal cases; the intentional or unintentional exercise of unlawful influence by a commander can result in dismissal of the charges for which that victim has suffered great harm.

The Rules for Courts-Martial (RCM) contain prohibitions for commanders who have authority over court-martial proceedings to minimize the possibility of UCI. First, absent a few exceptions, commanders and convening authorities are prohibited from reprimanding, censuring, admonishing, coercing, or influencing court-martial members, military judges, or tribunals in their roles of

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[84] THE INVISIBLE WAR, *supra* note 12; Lolita Baldor & Donna Cassata, "*Most Military Sexual Assault Cases Go Unreported*," ASSOCIATED PRESS, May 8, 2013, http://news.yahoo.com/most-military-sexual-assault-cases-unreported-071009797.html.

[85] DAVID A.SCHLUETER, MILITARY CRIMINAL JUSTICE PRACTICE AND PROCEDURE 365–67 (LexisNexis, 7th ed. 2008).

[86] United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).

[87] Lieutenant James D. Harty, *Unlawful Command Influence and Modern Military Justice*, 36 NAV. L. REV. 231, 242 (1986).

[88] SCHLUETER, *supra* note 85, at 380 (citing United States v. Levite, 25 M.J. 334 (C.M.A. 1987)).

determining appropriate findings or sentences for an accused.[89] Second, neither those who have served as court-martial members nor defense counsel may receive negative evaluation reports due to the performance of their professional duty in a court-martial.[90] Third, neither general nor special court-martial convening authorities may prepare fitness or efficiency reports relating to duty performance for a military judge detailed to that convening authority's respective court-martial.[91] Fourth, commanders and judge advocates are prohibited from unlawfully influencing witnesses.[92] These prohibitions protect panel members, defense counsel, military judges, and witnesses in any and all court-martial proceedings.

Rule for Courts-Martial 104 merely scratches the surface of what can constitute UCI. It can occur at any point in the court-martial process, even before preferral of charges.[93] To allege UCI, defense counsel must present facts[94] showing that some evidence of UCI is present.[95] Once the defense has met this burden, the government must, beyond a reasonable doubt: (1) disprove the facts proferred as evidence of UCI; (2) persuade the military judge that the facts do not amount to UCI; or (3) prove that UCI will not affect the proceedings at trial.[96] If the defense is successful in its UCI claim, then several remedies are available to the accused,

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[89] MCM, *supra* note 16, R.C.M. 104(a)(1) –(3). The exceptions include: (1) commanders can receive military justice education; (2) the military judge and counsel may give statements and instructions "in open session;" (3) the Judge Advocate General may professionally supervise and discipline counsel; and (4) counsel, the military judge, or court-martial member can be prosecuted for a UCMJ offense.

[90] *Id*. R.C.M. 104(b)(1).

[91] *Id*. R.C.M. 104(b)(2).

[92] SCHLUETER, *supra* note 85, at 378 (citing United States v. Drayton, 45 M.J. 180 (1996); United States v. Thomas, 22 M.J. 388 (C.M.A. 1986); United States v. Harris, 65 M.J. 594 (N.M. Ct. Crim. App. 2007); United States v. Gleason, 39 M.J. 776 (A.C.M.R. 1994)).

[93] *Id.* at 365–92. Professor Schlueter's book includes an extensive explanation of unlawful command influence (UCI), to include the definitions and examples of actual, apparent, and perceived UCI, cases that show how UCI was raised at different stages of the court-martial and against both commanders and other military members, and how to avoid UCI.

[94] United States v. Simpson, 58 M.J. 368, 373 (C.A.A.F. July 1, 2003) (citing United States v. Biagese, 50 M.J. 143, 150 (C.A.A.F. Apr. 13, 1999)).

[95] *Id.* at 373 (quoting United States v. Ayala, 43 M.J. 296, 300 (C.A.A.F. Sept. 29, 1995)).

[96] *Id.* at 373 (citing *Biagese*, 50 M.J. at 151 and United States v. Stoneman, 57 M.J. 35, 41 (C.A.A.F. July 5, 2002)).

including the most advantageous to the accused—dismissal of a case or the overturning of a conviction.[97]

Notably, UCI has affected and continues to affect cases due to the outcry over sexual assault. Recent legislation suggests that Congress is trying to strike the right balance of influence the commander should have over a court-martial.[98] The amount of proposed legislation itself shows that Congress is displeased with the way the services have handled sexual assault.[99] However, some of the senior military leadership's efforts to address the alleged problem with sexual assault have backfired. One of the most high-profile examples occurred when defense attorneys successfully filed UCI motions based on President Obama's Naval Academy Graduation address.[100] In the past year, defense counsel have alleged UCI in various forms based on the leadership's response to the purported sexual assault crisis, and several have resulted in significant remedies for the accused.[101] Perhaps most significant was *United States*

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[97] SCHLUETER, *supra* note 85, at 371 (citing United States v. Lewis, 63 M.J. 405 (C.A.A.F. Aug. 9, 2006) (government failed to prove beyond a reasonable doubt that the court-martial was unaffected by UCI); *Simpson*, 58 M.J. at 373–74 (citing *Biagese*, 50 M.J. at 152 and United States v. Rivers, 49 M.J. 434, 443 (C.A.A.F. Oct. 1, 1998) (possible remedies include: transfer of case to a different general court-martial convening authority (GCMCA), orders prohibiting retaliation, "changes of venue, liberal grants of challenge for cause" during voir dire, "and the use of discovery and pretrial hearings to delineate the scope and impact of alleged unlawful command influence")).

[98] National Defense Authorization Act for Fiscal Year 2014**,** Pub. L. No. 113-66 (2013), 127 Stat. 672. Sections 1701, 1715, 1716, 1723–26, 1733–34, 1742–45, and 1751 require more action from the commander with regard to sexual assault, while sections 1702, 1705, 1806, 1708, 1741, 1751, and 1753 limit the commander's discretion in sexual assault allegations and cases.

[99] *See, e.g.*, Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013); Better Enforcement for Sexual Assault Free Environments Act of 2013, S. 1032, 113th Cong. (2013); Combating Military Sexual Assault Act of 2013, H.R. 2002, 113th Cong. (2013); Military Sexual Assault Prevention Act of 2013, S. 548, 113 Cong. (2013); STOP Act, H.R. 1593 113th Cong. (2013).

[100] Jennifer Steinhauer, *Remark by Obama Complicates Military Sexual Assault Trials*, N.Y. TIMES, July 13, 2013, http://www.nytimes.com/2013/07/14/us/obama-remark-is-complicating-military-trials.html?pagewanted=2&_r=1 (as quoted in the introduction to this article).

[101] Erik Slavin, *Judge: Obama Sex Assault Comments "Unlawful Command Influence*," STARS & STRIPES, June 14, 2013, http://www.stripes.com/judge-obama-sex-assault-comments-unlawful-command-influence-1.225974. In both cases the option for the panel to punitively discharge the accused Navy seaman was removed from the options for punishment due to President Obama's comments. Also, in *United States v. Betts*, 12–188, at 40 (2d Marine Division, Camp Lejeune, N.C., Oct. 2, 2012) and *United States v. Maza*, 73 M.J. 507 (N-M. Ct. Crim. App. 2014) (appealed on other grounds), the military judge ruled that extensive *voir dire* would be allowed to determine whether and to what

v. Kaufman, an Army case in which the sexual assault offenses were dismissed when the GCMCA received a promotion after referring a case where the recommendation from the chain of command and investigating officer was to not send the case forward.[102] Additionally, in *United States v. Sinclair*, the military judge halted the trial and allowed the defense to submit another offer to plead guilty after finding that the convening authority had been unlawfully influenced.[103] Congress has attempted to address the problem of sexual assault by ensuring more cases are prosecuted, but the potential effect is that commanders may be sending cases forward when they should not. When a commander receives a career benefit, such as a promotion, after referring a sexual assault case, the benefit could be construed as an endorsement of his so-called independent authority being exercised exactly as Congress sees fit. Because of the nature of the commander's role in military justice, the result of the professional benefit to that commander could be the exact opposite of what Congress intended—a finding of UCI and the dismissal of a sexual assault case.

Even publicly discussing discipline and accountability in terms of military justice problems, such as sexual assault allegations, can create a UCI problem. It is understandable for senior leaders, such as the commander-in-chief of the armed forces and the Commandant of the Marine Corps, to address the problem of sexual assault in the ranks. However, the way in which statements are made and the audience to whom they are made could make a difference. For example, the commander-in-chief is speaking to all servicemembers when he makes a policy statement and calls for firing or a dishonorable discharge in all sexual assault cases; this could logically be construed as UCI.[104] General Amos made comments about his personal knowledge of Congress's lack of trust in the military's ability to handle sexual assault cases, demanded that his leaders fix the problem, and advocated that the health and future of the Marine Corps depended upon solving the problem of sexual

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extent UCI had infected the panel, and the accused was provided two additional preemptory challenges during *voir dire* after the Commandant of the Marine Corps, General James Amos, made several comments at his Heritage Bridge speech at Parris Island, South Carolina, on April 19, 2012.

[102] Transcript of Article 39(a) session, United States v. Kaufman, at 71–72 (Shaw Air Force Base, June 15, 2013) (investigating officer found that no reasonable grounds existed for any of the sexual assault charges).

[103] David Zucchino, *Judge Rules Army Command Interfered in Sinclair Sexual Assault Case*, L.A. TIMES, Mar. 10, 2014, http://www.latimes.com/nation/nationnow/la-na-nn-sinclair-judge-rules-military-interfered-20140310,0,1682787.story#axzz2w9ROt3UP .

[104] Shear, *supra* note 1.

assault.[105] In the current system, no leader with command authority can take a public stance against sexual assault without concern that the comments could be intentional or unintentional UCI.

The potential for UCI to taint any military case is palpable. Professor Elizabeth Hillman, who testified at the Response Systems to Adult Sexual Assault Crimes Panel in January 2014, noted the need to obtain "high prosecution and conviction rates has never been higher for a convening authority" and that UCI occurs because convening authorities have "pressure to demonstrate progress on all the metrics."[106] In an interview regarding UCI with two army brigade commanders who requested to remain anonymous, one stated that if a sexual assault or sexual harassment case comes across his desk, even if he thinks it is not a good case, he feels he should send it forward, err on the side of the victim, and hope that justice is served in the end.[107] He stated that there is "indirect UCI from the top right now."[108] The second brigade commander contended that the hard part is when he is told by someone that there is no case, but everyone looks to him to make the decision, and he will be scrutinized for not seeming to take the matter seriously enough if he does not opt for a court-martial.[109] He stated that there is a lot of indirect pressure, and his concern is that a statistic will show that he did not send enough cases forward, that his name will be out there as "someone who doesn't get it," and that if he does not believe the victim, then he is further victimizing her.[110] These commanders' comments and their request to remain anonymous show that UCI is a problem at ranks below the GCMCA, as commanders are fearful to make the unpopular decision to not refer a sexual assault case when they truly believe referral is not appropriate.

Commanders are not the only offenders of UCI. Any servicemember could influence a commander with military justice decision making authority to take action that amounts to UCI. For example, judge advocates can commit UCI, which ultimately occurs by virtue of their duty to advise commanders.[111] In *United States v. Sinclair*, the evidence

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[105] Amos Brief, *supra* note 83, at 12, 16.
[106] RSP Transcript, *supra* note 76, at 315–16.
[107] Interview with an Anonymous Person, Charlottesville, Va. (Nov. 7, 2013).
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] SCHLUETER, *supra* note 85, at 365–66 (citing United States v. Kitts, 23 M.J. 105, 107-8 (C.M.A. 1987) (case remanded to determine whether staff judge advocate (SJA)

that led to a finding of UCI by the military judge was a letter submitted by a judge advocate, the victim's special victim counsel, to the convening authority; she claimed that if the convening authority accepted the plea offer submitted by the defense, it "would have an adverse effect on my client and the Army's fight against sexual assault"[112] and "allowing the accused to characterize this relationship as a consensual affair would only strengthen the arguments of those individuals that believe the prosecution of sexual assault should be taken away from the Army."[113] Military lawyers, by virtue of their close advisory relationship with commanders or as advocates for individuals involved in the system, are positioned to unlawfully influence the process.

Even if commanders no longer had authority in prosecuting courts-martial, UCI could occur through panel or Article 32 investigating officer (IO) selection. A GCMCA selects panel members in accordance with Article 25 of the UCMJ.[114] He also selects IOs for Article 32 hearings.[115] The military judge and counsel must explore any scintilla of UCI or bias due to command relationships in *voir dire*.[116] Although the potential for UCI diminishes when the commander is not involved in the charging decisions and post-trial, IOs and panel members might be concerned with how their evaluation reports or promotions will be affected if they decide a case a certain way.[117] Because commanders still

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committed unlawful command influence (UCI) by contacting witnesses, discussing the case on videotape, speaking with prospective court members, and obtaining defense counsel's pretrial motions prior to execution of the pretrial agreement); United States v. Hamilton, 41 M.J. 32, 37 (C.M.A. 1994) (an SJA could commit UCI because he "generally acts with the mantle of command authority") (citing *Kitts*, 23 M.J. 108).

[112] Zucchino, *supra* note 103.

[113] Alan Blinder & Richard A. Oppel, Jr, "*Plea Deal Talks Begin After Sexual Assault Trial Against Army General is Halted*," N.Y. TIMES, Mar. 11, 2014, http://www.nytimes.com/2014/03/12/us/general-sinclair-sex-abuse-court-martial.html.

[114] UCMJ art. 25 (2012).

[115] *Id*. art. 32; *see generally* SCHLEUTER, *supra* note 85, 371–72. The FY 14 NDAA mandates that an "impartial judge advocate" shall serve as the Article 32 hearing officer "whenever practicable, or in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer that is not a judge advocate." National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013). If a judge advocate is not available to serve as a hearing officer, then a judge advocate must provide legal advice to the hearing officer. *Id*.

[116] *See generally* SCHLUETER, *supra* note 85, at 371 and 373.

[117] Perhaps the most challenging concern is that panel members might not understand how they have been unlawfully influenced by congressional legislation, the current climate of sexual assault, and their leadership's expectations. Furthermore, they might not be forthcoming with their answers on this subject in a public setting or may conform their answers to those of the group. *See* RICHARD WAITES, COURTROOM PSYCHOLOGY

have the authority to make procedural and substantive decisions in all phases of a court-martial, there is the potential for unlawful command influence to forever plague the military justice system.[118]

One goal of sweeping changes to the military justice system should be to minimize UCI. Under the current MJIA, UCI could still occur in prosecution of the minor, military-specific offenses by either commanders or judge advocates advising commanders because commanders would still make those charging decisions under the UCMJ.[119] Presumably, for the serious, non-military offenses as delineated by the MJIA, there would be fewer, if any, claims of UCI in the court-martial decision making process because commanders would not make those charging decisions. Unless commanders were required to make and forward recommendations on disposition to the prosecuting judge advocate, then judge advocate UCI in the charging process would be minimized because military lawyers would make all charging decisions without command approval or authority.[120] Although types of UCI, such as influencing investigations, witnesses, or court members, could occur, UCI by commanders could be minimized in the charging phase if commanders no longer had prosecutorial discretion.

AND TRIAL ADVOCACY 292 (A.L.M. Media LLC 2002); Lieutenant Colonel Eric R. Carpenter, *An Overview of the Capital Jury Project for Military Justice Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility*, ARMY LAW., May 2011, at 6, 7 (citing S.E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, *in* GROUPS, LEADERSHIP, AND MEN: RESEARCH IN HUMAN RELATIONS 177 (Harold Guetzkow ed. 1951); SOLOMON E. ASCH, SOCIAL PSYCHOLOGY (1952); Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS: GEN. & APPLIED 1 (1956); *see also* GREGORY BURNS, ICONOCLAST: A NEUROSCIENTIST REVEALS HOW TO THINK DIFFERENTLY 88–92 (2008) (parenthetical omitted); SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 81–84 (2005)).

[118] *See* Victor Hansen, *The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences*, 21 MICH. ST. INT'L L. REV. 229 (2013) (providing an overview of the changes to several foreign military justice systems to address the problems with military commander influence over the different actors and stages of the process).

[119] Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013).

[120] It is important to note that military lawyers and other servicemembers could still be influenced by Congress, senior military or civilian leadership, or their superiors during any phase of the process, which likely would be considered unlawful command influence even though the commander is no longer the decision making authority. However, the amount of UCI claims would likely decrease if commanders are not preferring or referring cases. Defense counsel also could consider motions for selective or malicious prosecution or prosecutorial misconduct if facts arise that support a claim of improper or unlawful influence by senior officials or superiors on the prosecution.

Currently, military leaders are in a catch-22 situation when it comes to sexual assault policy and UCMJ authority. Strong leadership and demands for culture change and accountability may be construed as UCI because commanders are the decision-makers for all UCMJ actions.[121] Unlawful command influence is an evil that must be uncovered and destroyed in any military justice case in order to protect the due process rights of the accused. A commander's congressionally mandated requirement of effectively addressing the problem of sexual assault is potentially in direct conflict with his need to exercise independent discretion in military justice. A commander has the ability to possibly taint every sexual assault case because a commander's message or actions to deter sexual assault could amount to UCI. Furthermore, when the government loses a case or the accused receives relief at trial due to UCI, then the senior leadership subsequently attempts to repair the statements construed as UCI[122] or Congress changes the law in an effort to avoid losing sentencing options for the panel.[123] The vicious cycle will only repeat itself when commanders' leadership responsibilities and military justice authority clash. Cases will be affected by UCI, only to lead to senior leaders' cleansing statements, additional proposed legislation, more efforts by commanders to address the problem, and thus new cases of UCI. Only a system that does not involve the commander in the most serious cases can effectively minimize UCI in the military justice system.

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[121] Obama Address, *supra* note 1; Amos Brief, *supra* note 83. By contrast, Lieutenant General David Morrison, Chief of the Australian Army, in response to an investigation into sexually inappropriate conduct, stated that those who engage in this behavior "have no place in this Army," should "get out," and that they did not belong "amongst this band of brothers and sisters." *Chief of Army Message Regarding Unacceptable Behaviour* (June 12, 2013), *available at* http://www.youtube.com/watch?v=QaqpoeVgr8U. He further promised he would "be ruthless in ridding the Army of people who cannot live up to its values" and stated he "need[s] every one of you to support [me] in achieving this." *Id.* In the United States military comments like these by a senior leader easily could be construed as UCI. However, the Australian military no longer has a convening authority. Hansen, *supra* note 118.

[122] Memorandum from Sec'y of Def., to Sec'ys of the Military Dep'ts, et al., subject: Integrity of the Military Justice Process (6 Aug. 2013).

[123] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1705, 127 Stat. 672 (2013). Congress "cured" any further potential UCI problems caused by the President's comments by making a dishonorable discharge mandatory in all rape, sexual assault, rape and sexual assault of a child, and forcible sodomy cases six months after the President's comments. *Id*.

V. The FY 14 NDAA Affects Actors in the Military Justice System

The FY 14 NDAA substantially changed several provisions under the UCMJ that affect the accused, victim, and commander—both pre- and post-trial. Just as claims of UCI have emerged as a result of the military's increased response to sexual assault, the changes in the law show a heightened focus on the responsibility of commanders to recommend prosecution of sexual assault allegations and protect alleged victims. President Obama signed the NDAA on December 26, 2013.[124] It was composed of H.R. 1960 and S. 1197, both of which passed on June 14, 2013.[125] Although additional legislation could be passed to further amend the UCMJ, the NDAA already greatly affects the process of courts-martial and the roles of many of the major players in the system—the accused, the victim, and the commander.

A. The Accused

When sexual assault allegations must be investigated by the appropriate service-specific criminal investigative team, an investigation into the accused's alleged actions will no longer be left to the discretion of the recipient of the complaint. Although Army Regulation (AR) 195-2 dictated that rape and sexual assault cases are within the purview of CID, and the general practice was that CID would investigate sexual assault cases, commanders were not necessarily required to send every allegation of sexual misconduct to CID.[126] Currently, when a commander receives a report of a "sex-related offense," he must immediately refer the case to the appropriate criminal investigative division.[127] The case cannot be investigated at the local level through a commander's inquiry or 15-6 investigation.[128] When any case investigated by CID is determined to be founded against a subject, then the accused will be titled with the offense.[129] A founded case is one that

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[124] *Obama-Signed Bill Provides Military Pay, Bonuses*, U.S. DEP'T OF DEF., Dec. 26, 2013, http://www.defense.gov/news/newsarticle.aspx?id=1214504.

[125] ARMED SERV. COMM., *FY 14 NDAA House-Senate Bill Text*, http://armedservices.house.gov/index.cfm/ndaa-home?p=ndaa (last visited Jan. 29, 2014).

[126] AR 195-2, *supra* note 57, app. B. For example, if the case involved a minor offensive touching, then the case, at least initially, might not have been referred to an investigative division, such as the criminal investigative division (CID).

[127] National Defense Authorization Act for Fiscal Year 2014 § 1742.

[128] MCM, *supra* note 16, R.C.M. 303; AR 15-6, *supra* note 56.

[129] AR 195-2, *supra* note 57, para. 1-4. Because this is a CID procedure, an accused is not titled for an offense as a result of an RCM 303 commander's inquiry or investigation

is "adequately substantiated by police investigation."[130] When an accused has been titled, then any law enforcement agency can presumably find that fact in a person's background.[131] If the accused is acquitted at trial or the charges are dismissed, the title will still remain, and the fact that the case was initially founded by CID results in a likely permanent stain on an accused's background.[132] All sexual assault allegations will be treated with the appropriate time, attention, and resources as they are thoroughly investigated by professionals trained in criminal laws and procedure. However, a low threshold for evidence will result in nearly every investigation being founded, which results in substantial consequences for the lifetime of each accused.

The accused is losing substantial due process rights under the FY 14 NDAA. Before the passage of the NDAA, an Article 32 hearing was a "thorough and impartial investigation of all the matters set forth therein" and an "inquiry as to the truth of the matter set forth into the charges."[133] The NDAA amends Article 32 of the UCMJ to a limited preliminary hearing where there must be a determination of jurisdiction, form of charges, probable cause that a crime has been committed, and recommended disposition.[134] The NDAA further limits the former thorough, impartial, and truth-seeking function of the Article 32 hearing by specifically providing that a victim is not required to testify and will be considered unavailable if she elects not to do so.[135] In contrast, at the Article 32 hearing, before the passage of the FY 14 NDAA, the accused was to be given a full opportunity to cross-examine witnesses, present a defense or matters in mitigation, and have the IO examine his available witnesses.[136] The Article 32 was also to "serve as a means of

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under AR 15-6. According to the glossary, a "subject" is "a person about whom probable cause exists to believe that the person committed a particular criminal offense." *Id*.

[130] *Id*.

[131] *Id*. para. 1-4.

[132] *Id.* para. 4-4. It is unlikely that a subject will be successful in removing a title. If the subject, upon request to the Director, U.S. Army Crime Records Center, can prove that "credible information did not exist to believe that the individual committed the offense for which titled as a subject at the time the investigation was initiated, or the wrong person's name has been entered as a result of mistaken identity," then the title will be removed. *See also* Major Patricia Ham, *The CID Titling Process—Founded or Unfounded?*, ARMY LAW. , Aug. 1998, at 1, 6, 12–15.

[133] UCMJ art. 32 (2012).

[134] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013).

[135] *Id.*

[136] UCMJ art. 32 (2012).

discovery."[137] Moreover, all relevant and non-cumulative evidence was admissible.[138] Thus, the Article 32 hearing was a forum where the accused could fully attack the credibility of his accusers and present a defense to all charges. The NDAA limits these provisions by requiring that cross-examination and evidence "relevant to the limited purposes of the hearing" be considered.[139] These changes might have been prompted by Congress's view that victims have been subject to "hostile" and graphic questioning at Article 32s.[140] That subjective determination as to what specific cross-examination might have been inappropriately included in previous Article 32s has substantially whittled away pre-trial protections afforded the accused.[141]

The prosecution benefits from the recent change in the law to Article 32 hearings to the detriment of the accused. The changes made by the NDAA transform the Article 32 hearing to a proceeding similar to a civilian grand jury because it is now limited to questions of jurisdiction, probable cause, and disposition.[142] The benefit to the trial counsel is that less evidence presumably will be necessary for a finding of probable cause; with such a low burden on the government and the loss of the previous thorough and impartial investigation standard, defense counsel will have fewer opportunities to demand that charges be dismissed. The government will also benefit at this stage of the proceeding because

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[137] MCM, *supra* note 16, R.C.M. 405(a) discussion.

[138] *Id.* R.C.M. 405(g)(1)(B).

[139] National Defense Authorization Act for Fiscal Year 2014 § 1702.

[140] Adele M. Stan, *Gillibrand's Sexual Assault Measure Slated for Stand-Alone Vote*, RH REALITY CHECK, Dec. 17, 2013, http://rhrealtity check.org/article/2013/12/17/gillibrands-sexual-assault-measure-slated-for-stand-alone-vote/; Annys Shin, *Judge Finds Midshipman Not Guilty in Naval Academy Sex Assault Case*, WASH. POST, Mar. 20, 2014, http://www.washingtonpost.com/local/judge-to-rule-in-naval-academy-sexual-assault-case-after-hearing-closing-arguments/2014/03/20/d9211394-b040-11e3-b8b3-44b1d1cd4c1f_story.html.

[141] Specific rules of evidence that protect the victim, such as military rule of evidence (MRE) 412 and MRE 303, apply at an Article 32 proceeding. Except in "exceptional circumstances," judge advocates are the IOs for all Article 32 investigations and presumably understand how to apply these rules. National Defense Authorization Act for Fiscal Year 2014 § 1702.

[142] Lieutenant Homer E. Moyer, Jr., *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 51 MIL. L.REV. 1, 10 (1971). The difference between the Article 32 and a civilian grand jury is that the investigating officer makes a disposition recommendation to the convening authority while a civilian grand jury's decision is determinative of whether or not a case is indicted. *Id.*

fewer resources will be needed for an Article 32 hearing.[143] Less testimony will be admissible due to the limitations on admissibility, and hearings presumably will be shorter in length. Because the accused is losing the opportunity to present a full defense to the charges, it is likely that fewer cases will be dismissed after Article 32 hearings when the admissibility of evidence is so limited for the defense.

The number of prosecutions will likely increase as a result of the FY 14 NDAA. Under RCM 306, commanders could consider 11 factors when determining how to dispose of an offense, including the character and military service of the accused.[144] The FY 14 NDAA strikes that factor from RCM 306; the accused's character and military service can no longer be considered when the commander is initially determining how he wants to dispose of a case.[145] This provision applies to all offenses under the UCMJ. In circumstances where a commander might have been inclined to give an Article 15, issue a reprimand, or allow resignation or discharge in lieu of court-martial for a servicemember with a stellar character and military service,[146] that accused might be prosecuted for even a minor violation of the UCMJ without consideration of his personal and professional record. Also, all crimes had a statute of limitations of five years other than "absence without leave or missing movement in time of war," "murder, rape, rape of a child," and "offenses punishable by death."[147] The FY 14 NDAA amended "rape" and "rape of a child" under Article 43 to "rape or sexual assault" and "rape or sexual assault of a child."[148] Servicemembers can now be prosecuted, tried, and punished for sexual assaults and sexual assaults of a child without regard to time limitations, which could lead to more prosecutions.

There are fewer options for the accused in terms of what sentence he receives for a sexual assault conviction. First, the maximum punishment

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[143] However, more cases will likely go forward. Initial savings on resources at the Article 32 will be eliminated if more cases with weak evidence are referred to courts-martial.

[144] MCM, *supra* note 16, R.C.M. 306 discussion (b)(J).

[145] National Defense Authorization Act for Fiscal Year 2014 § 1708.

[146] *See generally* UCMJ art. 15 (2012); U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS ch. 10 (6 June 2005) (RAR 6 Sept. 2011) [hereinafter AR 635-200]; U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES ch. 3 (12 Apr. 2006) (RAR 13 Sept. 2011) [hereinafter AR 600-8-24].

[147] UCMJ art. 43 (2012).

[148] National Defense Authorization Act for Fiscal Year 2014 § 1703(a).

for rape has increased since the *MCM* was amended in 2012.[149] The FY 14 NDAA further limits the sentencing options for a panel or military judge for an accused convicted of sexual assault because the finder of fact is now required to give a dismissal or dishonorable discharge for a conviction, actual or attempted, for rape, sexual assault, rape or sexual assault of a child, and forcible sodomy.[150] The accused and convening authority cannot bargain for a lesser sentence in a pre-trial agreement than what is required by law when there is a mandatory minimum sentence for an offense; however, the parties can negotiate a bad-conduct discharge rather than a dishonorable discharge.[151] The sentence the accused will receive in specific cases under Article 120 will ensure that servicemembers convicted of these offenses will no longer serve in the military regardless of any characteristics or factors that could have once been in their favor and produced the result of continued service despite their crime.

As a result of the FY 14 NDAA, the accused is suffering an additional loss with regard to what he can petition for in his clemency request. Before the passage of the FY 14 NDAA, commanders could dismiss charges and specifications or change findings of guilty on charges and specifications to findings of guilty to lesser included offenses. Now an accused's conviction can only be set aside or reduced to that of a lesser included offense if his conviction is: (1) not for rape or sexual assault, forcible sodomy, or rape or sexual assault of a minor; and (2) for an offense for which the maximum sentence is no more than two years and does not include a punitive discharge.[152] If the commander grants the clemency request, he must state in writing his reasons for doing so.[153] For the remainder of offenses under the UCMJ, the commander can only set aside a conviction or change it to a finding of guilty to a lesser included offense if the maximum sentence that can be adjudged is two years or less, and the actual sentence adjudged does not include confinement for more than six months or a bad-conduct or dishonorable discharge.[154] These provisions substantially limit the

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[149] UCMJ art. 120 (2012); 2013 Amendments to the Manual for Courts-Martial, United States, Exec Order No. 13,543, 78 Fed. Reg. 29,559 (May 15, 2013). The maximum punishment for rape increased from life with or without eligibility for parole to life without eligibility for parole. *Id.*

[150] National Defense Authorization Act for Fiscal Year 2014 § 1705.

[151] *Id*. § 1702.

[152] *Id*.

[153] *Id.*

[154] *Id.*

accused's ability to request the convening authority to undo the gravest of consequences of a court-martial for serious offenses; namely, the conviction, term of confinement, and level of discharge.[155] If the accused is convicted of an offense that may not be dismissed by the convening authority in clemency, he might be limited to either a post-trial Article 39(a) session with the military judge to move for reconsideration of the findings or an appeal.[156] This limitation on the accused and the convening authority does place the military justice system on par with civilian criminal justice systems where the decision of a jury is final, absent a judge granting a motion for a new trial or an appellant winning on appeal.[157]

Article 60 of the UCMJ served both commanders and the accused by giving the convening authority the final say in a court-martial and providing an additional chance for the accused to essentially be found not guilty.[158] This provision of clemency allowed the military judicial process to become a nullity. Other than increasing the sentence an accused received, the convening authority had complete control over any court-martial because he could dismiss or alter findings of guilty for charges and specifications after a case had gone through the judicial process.[159] Regardless of the evidence presented and the verdict reached, the commander could undo a finding he determined to be incorrect without explanation or justification.[160] It is unclear whether the

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[155] *Cf.* Military Justice Improvement Act of 2013, S. 967, 113th Cong. § 6 (2013). In terms of limiting command authority, section 6 is even more restrictive to the accused and commander because it removes the convening authority's power to reverse or alter the findings of a verdict reached by a military panel. Section 6 strikes the provisions allowing for dismissal of charges and specifically states that convening authorities may not dismiss charges or change findings of guilty on charges or specifications to guilty to lesser included offenses.

[156] MCM, *supra* note 16, R.C.M. 1102. Rule for Courts-Martial (RCM) 1102 allows for post-trial Article 39(a) sessions for inquiries into a matter that "arises after trial and that substantially affects the legal sufficiency of any findings of guilty or the sentence." Rule for Courts-Martial 1102 also allows for a motion for reconsideration of a "trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence." *Id.*

[157] *Id.*; UCMJ art. 66 (2012); Sameit, *supra* note 16, at 93. If the accused receives more than one year of confinement or a punitive discharge, he can still appeal on the basis that there is no legal or factual sufficiency for the charges of which he was found guilty. *Id.*

[158] UCMJ art. 60 (2012).

[159] MCM, *supra* note 16, R.C.M. 1107(d)(1).

[160] Section 1702 of the FY 2014 NDAA also requires the convening authority to provide a written explanation for eligible cases of a sentence adjudged of less than six months and without a bad-conduct or dishonorable discharge, in which he disapproves, commutes, or suspends the sentence.

convening authority's power to grant any clemency will be removed entirely in the future.

Although the clemency provisions in the FY 2014 NDAA severely limit the accused and commander in post-trial, they add legitimacy to the military justice system. When a conviction is overturned by a commander, the perception is that the court-martial is a useless waste of time and resources. This is evidenced by the congressional discontent with Lieutenant General (Retired) Helms's and Lieutenant General Franklin's dismissal of findings of guilt in sexual assault cases when unconvinced beyond a reasonable doubt that the servicemembers were guilty even though the panel of military officers who heard all the evidence were in fact so convinced.[161] Removing the power to dismiss or alter convictions from the convening authority ensures that a panel's decision is final, and if there is legal error or other grounds for an appeal, the accused will use the well-established appellate process to request relief.[162] The FY 14 NDAA aligns the rights of a convicted servicemember with the rights of a convicted civilian, and it demands that the judicial process in the military be equally credited and respected.[163] Although civilianization adds legitimacy to the military justice system the question is whether and which of the FY 14 NDAA provisions have in effect created a system with fewer rights for the military accused.

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[161] Davis, *supra* note 2; Whitlock, *supra* note 4. Lieutenant General (Retired) Helms and Lieutenant General Franklin were the same GCMCAs who found sufficient evidence of a crime to send the case forward to court-martial. However, the evidence available at the Article 32 hearing is not as substantial as that in a complete record of trial, which the convening authority reviews post-trial. Section 6 of the MJIA, which called for an absolute prohibition on the commander's authority to set aside findings of guilty or amend findings of guilty to lesser included offenses regardless of the type of offense, was in part motivated by the outrage expressed over the clemency granted to Lieutenant Colonel Wilkerson. Interview with Major Bridget Byrnes, former advisor to Senator Kirsten Gillibrand, in Washington, D.C. (Dec. 4, 2013).

[162] MCM, *supra* note 16, R.C.M. 201(e)(5), 1203, 1204, 1205. servicemembers have the right to appeal their convictions to their respective service court of appeals, the Court of Appeals for the Armed Forces, and ultimately the Supreme Court of the United States. *Id*.

[163] *See infra* p. 134 and note 27.

B. The Victim

Defense counsel will have less access to victims as a result of the UCMJ provisions in the FY 14 NDAA. For example, a victim is not required to testify at the Article 32 hearing.[164] If the victim elects not to testify, she will be deemed "not available."[165] This clear mandate would likely preclude defense counsel from requesting that the IO indicate that the victim refused to testify on the Department of Defense (DD) Form 457, IO's Report, thereby eliminating the opportunity for the convening authority to draw a negative inference from her lack of participation. If the victim chooses not to participate, then the defense is unable to cross-examine the victim before trial and thus loses the ability to observe the victim's appearance, voice, and mannerisms, assess her credibility, and obtain recorded sworn testimony about the offense.[166] It appears that this change in the law was prompted by the perception that victims have been subject to mistreatment at Article 32 hearings.[167] Although Congress has ensured that victims are not subjected to perceived mistreatment, this provision of the FY 14 NDAA will substantially limit the scope of what the accused was originally entitled to—including discovery, an opportunity for substantial cross-examination, and presentation of evidence—at the Article 32 hearing.[168]

Defense counsel could be precluded from or substantially limited in their ability to talk to the victim before an Article 32 hearing or trial. Under the *MCM*, counsel and the court-martial had "equal opportunity to obtain witnesses and other evidence."[169] Now, when the trial counsel notifies the defense counsel of a sexual assault victim in a case involving a charge under Article 120, 120a, 120b, 120c, or 125, the defense counsel must request an interview of that victim through the trial counsel.[170] Furthermore, the trial counsel, special victim's counsel, or sexual assault victim advocate must be present during any interview by the defense counsel if the victim so chooses.[171] This substantially

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[164] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702 (2013).
[165] *Id*.
[166] LARRY S. POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES 1-2, 1-9 (LexisNexis, 2d ed. 2004).
[167] Stan, *supra* note 140.
[168] *See* UCMJ art. 32 (2012).
[169] *Id*. art. 46.
[170] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1704.
[171] *Id*.

changes the battlefield for defense counsel because in the past, counsel could contact a victim directly or through her chain of command without government counsel knowing about or impacting the interview. Also, during the interview, defense counsel could now be forced to show their trial strategy and work product to the government counsel. Defense counsel will likely want to speak to victims, but might choose not to under the new law, so as not to "show their hand" before trial. Whether or not counsel decide to interview the victim, they lose a previously held advantage that ultimately affects the accused's chances at trial.

Victims are gaining substantial rights in the military justice system under the FY 14 NDAA. Victims are now entitled to a special victim counsel who will represent their interests from the initial report of the crime through the post-trial process and can even argue motions on a victim's behalf at court-martial.[172] In a sexual assault case, the victim will have the following resources: a trial counsel and special victim prosecutor handling the case, a special victim counsel, a unit victim advocate, a victim witness liaison, and any other potential services that she needs, such as a behavioral health physician.[173] The victim's opinion now must be considered by the convening authority who is considering granting an accused's request for discharge in lieu of court-martial.[174] Additionally, the victim of a case may submit matters to the convening authority when the convicted servicemember has submitted a petition for clemency, and her waiver of the right to do so must be in writing.[175] During clemency, the convening authority can only consider the victim's character as it was introduced at trial.[176] These provisions of the FY 14 NDAA have ensured that the victim's voice will be heard, that her rights will be protected, and that any evidence of bad character is not introduced to the convening authority if not properly admitted at trial.

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[172] *Id.* § 1702; LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. July 18, 2013).

[173] By contrast, the accused is only entitled to be represented by one counsel, which can be civilian counsel at the accused's expense, one detailed military defense counsel, or an individual military counsel as selected by the accused if that counsel is reasonably available. MCM, *supra* note 16, R.C.M. 506. It is also important to note that all of the individuals providing services to the victim work for the Staff Judge Advocate, who advises the GCMCA.

[174] National Defense Authorization Act for Fiscal Year 2014 § 1753.

[175] *Id.* § 1706.

[176] *Id.*

C. The Commander

The commander is losing independent discretion in the military justice realm as a result of the FY 14 NDAA. The sentencing, clemency, initial disposition considerations, and pretrial agreement changes that affect the accused and victim also affect the commander, as he is the party who makes the final decision in a case. Military justice decisions ultimately belong to the commander, and judge advocates advise commanders on those decisions.[177] Prior to the passage of the FY 14 NDAA, there was no explanation required for UCMJ decisions; commanders could claim that they merely followed the advice of their lawyers upon issuing an unpopular decision, and judge advocates could claim that they were only advisors.[178] Now, if both the staff judge advocate (SJA) and convening authority agree that a case should not be referred, and the convening authority does not refer the case, then the case will go to the next level in the chain of command for review.[179]

Additionally, when the SJA advises a GCMCA to refer a case to court-martial, and the GCMCA does not refer, the case will be submitted to the Secretary of the military department for review.[180] The change in the law does create more accountability in the system by ensuring that the SJA's advice and GCMCA's action are being documented and reported when a case does not go forward. However, unless there are special circumstances, an accused will have little to no ability to determine whether anyone influenced a commander to refer a case.[181]

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[177] MCM, *supra* note 16, R.C.M. 105.

[178] *But see* Opening Statement of Jack B. Zimmerman at 3, Meeting of the Response Systems Panel on Sexual Assault (Nov. 8, 2013), *available at* http://responsesystemspanel.whs.mil/public/docs/meetings/20131107/20131108/09_Persp_Mil_Def_Bar/Statement_Zimmermann_20131107.pdf (stating that commanders rely on their SJAs and "rarely" do not follow their advice).

[179] National Defense Authorization Act for Fiscal Year 2014 § 1744. This provision was amended to allow either the SJA or senior trial counsel to serve in this role. Victims Protection Act of 2014, S. 1917, 113th Cong. (as passed by Senate, Mar. 10, 2014).

[180] *Id.*

[181] *See, e.g.*, Zucchino, *supra* note 103 (explaining that the military judge found the letter submitted by the special victim counsel improperly influenced the convening authority in *United States v. Sinclair*).

Both of the reporting scenarios create a climate in which a commander should refer every case to avoid having his superior officer or the Secretary of the military department question his decisions. Furthermore, it creates friction between the SJA and convening authority if they do not agree on every case because that fact will now be disclosed to the appropriate Secretary of the Army. As Major General Cucolo pointed out, this change in the law has the potential to breed moral cowardice in the ranks because commanders will be afraid to make the unpopular and difficult, albeit correct, decision in not referring a weak case.[182] During the Response Systems Panel, in discussing the issue of commanders referring weak cases to trial against the advice of their lawyers, Mr. Harvey Bryant, a former Virginia prosecutor,[183] stated that it is an "abuse of the process" to "teach somebody a lesson when you know you're not going to win" and that losing weak cases teaches servicemembers that people can get away with crimes.[184] These perspectives show that Section 1744 will likely impact the rights of the accused, create weak leadership, and adversely affect the public's perception of the court-martial process.

Although Congress did not explicitly require convening authorities to make the same, specific decision in sexual assault cases regardless of the facts, one section of the FY 14 NDAA is problematic in terms of eroding commanders' discretion. It is Congress's "sense" that commanders should court-martial rape, sexual assault, and forcible sodomy cases or an attempt to commit those offenses, and if they decide not to do so, a written justification for their decision should be placed in the file.[185] Congress also stated that discharge in lieu of court-martial requests should be granted "exceedingly sparingly" and that an other-than-honorable discharge should be issued when separating the servicemember.[186] Congress's message is clear: a commander's prosecutorial discretion should be exercised by deciding to prosecute every alleged sexual assault at court-martial, regardless of the facts or weight of the evidence.

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[182] Interview with Major General Anthony Cucolo III, *supra* note 38.
[183] *Harvey Bryant Biography*, Response Systems to Adult Sexual Assault Crimes Panel, http://responsesystemspanel.whs.mil/index.php/about/panel/Bryant 9 (last visited June 9, 2014).
[184] RSP Transcript, *supra* note 76, at 287.
[185] National Defense Authorization Act for Fiscal Year 2014 § 1753.
[186] *Id*.

D. Additional Changes Post-FY 14 NDAA

The sweeping changes contained in the FY 14 NDAA already were amended to remove additional rights from the accused and provide further protection to the victim. As of September 6, 2014, the accused may no longer assert the "Good Soldier" defense at trial; he may no longer profess his innocence to a charge on the basis of his character.[187] Although the decision to prosecute a case in military or civilian court traditionally belonged to counsel or the convening authority, the commander must now give the victim's preference "great weight" in this decision.[188] As Lieutenant General (Retired) Helms pointed out in her critique of the recent changes to the UCMJ:

> Politics have become law because Congress is using law to fix a social problem. All cases are different; there cannot be one answer that solves a general problem. Congress wants the "right" outcome of every trial. There are very distinct phases of the sexual assault problem. Awareness, education, and accountability have created phenomenal change, but the military is not getting credit for it. Sexual assault has become a politically useful tool to attack the UCMJ process without understanding it and analyzing how structural changes will impact the victim and accused. Congress influencing the justice system is short-sighted and too damaging to the accused because influencing the process negatively influences his rights.[189]

The FY 14 NDAA and its follow-on legislation have tipped the scale in favor of the victim (and therefore the government) without any additional due process protections for the accused to ensure the scales of justice are in balance.[190]

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[187] Victims Protection Act of 2014, S. 1917, 113th Cong. § 3(g) (as passed by Senate, Mar. 10, 2014).
[188] *Id*.
[189] Interview with Lieutenant General Susan (Retired) Helms, *supra* note 5.
[190] Borch, *supra* note 27.

VI. The MJIA: Lost But Not Forgotten

A. The Great Debate over the MJIA

Several foreign jurisdictions, such as Canada, the United Kingdom, and Australia, have civilianized their military justice systems.[191] The MJIA proposed to civilianize the U.S. military justice system by entrusting lawyers with prosecutorial discretion over all felony-level UCMJ offenses.[192] Military leaders expressed opposition to the MJIA before the bill failed in the Senate.[193] General Raymond Odierno, in his testimony before the Senate Armed Services Committee opposing the MJIA, predicted a worsening of the problem with sexual assault and the enormous monetary cost of implementing the changes proposed under the MJIA.[194] The judge advocates of all of the military services stated the bill created "parallel systems of justice" with jurisdictional, non-judicial punishment, plea bargaining and manning problems.[195] Additionally, many retired judge advocates argued that commanders had both sufficient legal training and working relationships with their legal counsel to make UCMJ decisions and that the U.S. military justice system was distinguishable from the justice systems of U.S. Allies.[196] Several retired military officers asserted that the bill would reduce confidence in the chain of command, adversely affecting good order and

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[191] Hansen, *supra* note 118. Canada limited the role of commanders in the court-martial process; the Director of Military Prosecutors now determines the level of court-martial and panel members for a case, and the military police can request that a case go forward if the commander does not. *Id.* at 238. In the United Kingdom, the "prosecuting authority" now determines which cases will be referred to court-martial rather than the convening officer, and a court administrator establishes the logistics of the trial. *Id.* at 241. Australia abolished the convening authority, and the Director of Military Prosecutors and Registrar of Military Justice make court-martial decisions. *Id.* at 243. *See generally* Major General Michael D. Conway, *Thirty-Ninth Kenneth J. Hodson Lecture in Criminal Law*, 213 MIL. L. REV. (2012).

[192] Military Justice Improvement Act, S. 967, 113th Cong. (2013).

[193] *See* Jim Garamone, *Leaders Urge Care in Changing Commanders' UCMJ Responsibilities*, U.S. DOD AM. FORCES PRESS SERV., June 4, 2013, http://www.defense.gov/news/newsarticle.aspx?id=120209.

[194] Julian E. Barnes, *Gen. Odierno Opposes Gillibrand Measure on Sexual Assaults*, WALL ST. J., November 13, 2013, http://blogs.wsj.com/washwire/2013/11/13/gen-odierno-opposes-gillibrand-measure-on-sexual-assaults/.

[195] Letter from Lieutenant General Flora Darpino et al., to Senator James Inhofe (Oct. 28, 2013) (on file with author).

[196] Letter from Lieutenant General (Retired) Jack L. Rives et al., to Senators Carl Levin and James Inhofe (Aug. 30, 2013) (on file with author).

discipline, and impacting mission readiness.[197] Although it did not pass the Senate, the bill's strengths and weaknesses deserve evaluation because commanders' continued UCMJ authority will likely be questioned until Congress is satisfied with the military's handling of sexual assault.

B. Subject Matter Experts Should Practice Their Craft

In terms of congressional action in the military justice arena, section two of the MJIA proposed the most substantial change thus far. On May 16, 2013, Senator Gillibrand introduced the MJIA, and the act was debated in the Senate on November 20, 2013.[198] Section two of the MJIA divided UCMJ offenses by their respective maximum punishments and required judge advocate advice on the disposition of certain UCMJ offenses.[199] Under the current UCMJ, commanders have authority to dispose of all offenses, regardless of the seriousness of the crime or possible sentence.[200] Under the MJIA, commanders would have maintained disposition authority, including the power to prefer and refer charges to special or general courts-martial, for all offenses with either a maximum sentence of less than one year of confinement or that are uniquely military in nature.[201] Of the fifty-eight punitive articles with potential punishment, commanders would have retained authority for approximately twenty-five of those punitive articles.[202]

Former convening authorities and commanders expressed their concern with military lawyers making prosecutorial decisions. Lieutenant General (Retired) Helms stated that lawyers must consider the evidence, legal sufficiency, and risk of losing a case, rather than the overall human concept implicated by a case.[203] Commanders, on the other hand, consider the human beings affected and whether the accused

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[197] RSP Transcript, *supra* note 76; Letter from Lieutenant General (Retired) Robert K. Muellner et.al., to Senator Carl Levin (Nov. 13, 2013) (on file with author).

[198] Ramsey Cox, *Gillibrand: Military Has "Zero Accountability" for Assaults*, THE HILL, Nov. 20, 2013, http://thehill.com/blogs/floor-action/senate/190918-gillibrand-military-has-zero-accountability-for-assaults.

[199] Military Justice Improvement Act of 2013, S. 967, 113th Cong. § 2 (2013).

[200] MCM, *supra* note 16, R.C.M. 306.

[201] S. 967.

[202] *See generally* MCM, *supra* note 16, pt. IV. The author performed this calculation by counting the punitive articles that include offenses with a maximum punishment of up to and including one year and adding the excluded offenses under the MJIA.

[203] Interview with Lieutenant General (Retired) Susan Helms, *supra* note 5.

is guilty and being held accountable.[204] Similarly, Major General Cucolo noted that commanders are concerned about everyone involved in the process, including the accused, victim, and witnesses, and the family members of those individuals entrust commanders and the military in general to see that justice is served.[205] Brigadier General (Retired) Malinda Dunn, both a former Chief Judge of the Army Court of Criminal Appeals and Staff Judge Advocate,[206] commented that commanders have told their lawyers that some cases need to go to trial regardless of the outcome because "it is a critical case and it has a critical impact on good order and discipline."[207] These perspectives show that commanders have a greater stake in the outcomes of individual courts-martial than the actual result for the accused. The process is inherently unfair to an accused when the individual with prosecutorial discretion must consider anything other than the facts and the evidence in reaching a disposition decision in a criminal case.

Military justice attorneys are the best equipped to make all decisions regarding a criminal case because they are the subject matter experts personally and professionally invested in each part of the case. As Rear Admiral (Retired) Marsha Evans[208] pointed out in support of the MJIA:

> I think I would have accepted and even welcomed a senior JAG officer with prosecuting experience weighing the evidence and making a fact-based decision about whether to move forward with a court-martial. That would be in the best interest of the victim and accused. I cannot see how a commander's authority would be undermined and that she or he would somehow not be able to set the proper command climate to support

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[204] *Id.* Lieutenant General (Retired) Helms's position is that commanders are charged with the ability to cut through political questions and the emotions of politics. However, if commanders no longer have UCMJ authority over felony offenses, then civilian courts should have jurisdiction over these offenses. Her opinion is based on many factors, including Congress's scrutiny of the system based on politically unpopular decisions and the recent changes to the UCMJ as a result of the FY 14 NDAA that severely impacts the rights of the accused. *Id*.

[205] Interview with Major General Anthony Cucolo III, *supra* note 38.

[206] Brigadier General (Retired) Malinda Dunn, Response Systems to Adult Sexual Assault Crimes Panel, http://responsesystemspanel.whs.mil/index.php/about/panel/dunn.

[207] RSP Transcript, *supra* note 76, at 72.

[208] Rear Admiral (Retired) Evans served as a commander in the Navy for eight years with six years as a GCMCA. In 1992 she also served as the Director of the Navy's Standing Committee on Military and Civilian Women after *Tailhook*. *Id.*, at 22–23.

> the unit's mission, if cases proceeded to trial based on the strength[s] and weaknesses of evidence.[209]

Colonel McHale echoed this sentiment in his support of the MJIA:

> [A]n effective commander needs to focus his or her attention on the warfighting responsibilities of the command. Our commanders are superbly trained and carefully chosen to fulfill this warfighting duty. By contrast, commanders are rarely trained or prepared to exercise informed judgment regarding the weight of evidence in pending criminal matters.[210]

In his opinion, the judge advocate would give "an objective and professional assessment of the evidence."[211]

Commanders should not dispose of criminal offenses in today's military because commanders do not and cannot be expected to have the legal training necessary to make charging decisions. Throughout their careers, commanders receive legal advice about charging decisions but are not bound to follow it because they are the sole decision-making authority.[212] Most commanders attend a one-week Senior Leaders' Legal Orientation Course (SOLO) when they are selected for or serving in Brigade Command at the rank of lieutenant colonel or colonel.[213] Although they may receive some legal training in various courses throughout their career, such as a career course or intermediate level education, they receive little to no legal training during the first 15 to 20 years of their careers and only a short course during the SOLO.[214] During that gap between serving as commanders and receiving some legal training, all commanders have the ability to prefer charges, forward charges, or issue company grade or field grade Article 15s, which could lead to court-martial.[215] The MJIA addressed the problem with the

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[209] *Id.* at 26–27.
[210] *Id.* at 43.
[211] *Id.* at 86.
[212] MCM, *supra* note 16, R.C.M. 306, 105.
[213] Each year the dates for the SOLO courses and the SOLO curriculum are posted on http://www.JAGCnet.army. mil. COURSE CATALOG: FISCAL YEAR 2014 (The Judge Advocate Gen.'s Legal Ctr. & Sch., 2014), *available at* https://www.jagcnet2.army.mil/ Portals/Files/ jaglcsfiles.nsf/ Index/d5835b60be18c5cc85257bcd0074cc6b/$FILE/FY14 %20TJAGLCS%20Course%20Catalog%20-%20Approved.pdf (login required).
[214] *Id.*
[215] *See* MCM, *supra* note 16, R.C.M. 306.

current system; untrained individuals should not make decisions that forever impact the lives of all accused servicemembers and others affected by the case, such as victims and witnesses.

Military lawyers are better suited to make charging decisions and determine which cases should go to trial because they have the necessary legal training and background. All military lawyers must earn a degree from an American Bar Association-accredited law school, gain admission to and maintain good standing in their state bar,[216] graduate from an Officer Basic Course with mock trial experience for a typical sexual assault case,[217] and may attend short courses with additional sexual assault litigation training.[218] Judge advocates from all services with several years of experience also attend a graduate course at The Judge Advocate General's Legal Center and School. The MJIA allows for the subject matter experts to perform their legal duties directly, without having to advise commanders and rely on their ultimate judgment in cases.

Lawyers are the gatekeepers for keeping weak cases from going to trial. Judge advocates serving as trial counsel are the attorneys who know the case intimately and are best suited to make the decision as to which cases should go forward based on the evidence.[219] Courts-martial are a drain on resources for which the taxpayers bear the burden. A military lawyer's independent, professional, and trained analysis of which felony cases should be court-martialed is necessary to ensure that the accused receives a fair trial, victims are not re-victimized, and government resources are not wasted in order to serve a political agenda.

The use of one-year maximum confinement as a dividing line for disposition authority is a sound legal concept. The one-year cutoff in the

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[216] HOW TO BECOME A JAG LAWYER: 6 STEPS, http://www.wikihow.com/Become-a-JAG-Lawyer (last visited Mar. 20, 2014).

[217] Officer Basic Course Student Guide provided by Major (Professor) Meghan Wakefield, Instructor, The Judge Advocate Gen.'s Legal Ctr. & Sch., to author (Nov. 26, 2013, 10:15 A.M. EST) (on file with author).

[218] Intermediate Trial Advocacy Course Student Guide provided by Major (Professor) Jeremy Steward, Instructor, The Judge Advocate Gen.'s Legal Ctr. & Sch., to author (Nov. 26, 2013, 10:20 A.M. EST) (on file with author).

[219] *See* RSP Transcript, *supra* note 76, at 311–13. The Honorable Barbara Jones stated that prosecutors consider facts, law, and risk of defeat at trial. Mr. Bryant stated that lawyers consider credibility of the victim, probable cause, resources, problems that exist in a case, and whether or not there should be a conviction.

MJIA delineated which offenses are more serious than others.[220] Generally, felony offenses are punishable by more than one year of imprisonment.[221] Felony convictions have more serious consequences in society, such as the loss of the right to vote,[222] loss of the right to serve as a juror,[223] and employment, housing, and education consequences.[224] The message that the MJIA sent is that military lawyers should handle crimes that carry more serious consequences to the accused, while commanders may continue to dispose of cases that are less serious or purely military in nature.[225] When considering the fact that lawyers are better trained and equipped to handle more serious offenses, this one-year cutoff is a sensible way to ensure that the most serious crimes receive due attention from the subject matter experts. The MJIA's proposed sweeping change of removing serious offenses from commanders ensures that traditional crimes are treated as such by lawyers practicing criminal law and that commanders influence good order and discipline by handling minor, military-specific offenses. However, there are inconsistencies within the legislation that detract from the success of that feat.

VII. Improvements to the Military Justice Improvement Act

A. Exclusion of All Crimes

Senator Gillibrand's SA 2099 was an amendment to the original MJIA that gave additional disposition authority to commanders initially

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[220] Interview with Major Bridget Byrnes, *supra* note 161. Major Byrnes confirmed that the one-year cutoff is the bright-line rule that is defined by what constitutes a felony-level offense. Those offenses deserve the fairest, blindest justice. *Id*.

[221] BLACK'S LAW DICTIONARY 694 (9th ed. 2009).

[222] Marc Mauer, *Felon Disenfranchisement: A Policy Whose Time Has Passed?*, 31 HUM. RTS. 16 (2004); *see also* Andrew S. Williams, *Safeguarding the Commander's Authority to Review the Findings of a Court-Martial*, 28 BYU J. PUB. L. (forthcoming Summer 2014).

[223] Gabriel J. Chin, "*Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*," 54 HOW. L.J. 675, 687 (2011).

[224] *Id*. at 689.

[225] Military Justice Improvement Act of 2013, S. 967, 113th Cong. § 2(a)(4) (2013). The MJIA specifically excludes several offenses from the mandatory removal from command authority that carry more than one year of punishment but are military in nature. One example of this is desertion. UCMJ art. 85 (2012). *See also* Interview with Major Bridget Byrnes, *supra* note 161. Lawyers should decide the disposition on serious offenses. The offenses that are excluded to remain with commanders are uniquely military in nature and address disciplinary problems.

removed by her bill. Thus, SA 2099 struck the MJIA's original section 552 and replaced it with an amended version of section 552.[226] The initial version of the MJIA failed to exclude some offenses that are minor, purely military offenses from the list of those proposed for removal from command authority, such as Article 92 and many offenses under Article 134. [227] Article 92 has a maximum sentence of confinement of two years, and the three possible violations of the article are: violation of a general order or regulation, violation of a superior order, and dereliction of duty.[228] All three of these offenses are considered minor and purely military in nature. Several offenses under Article 134 that are purely military in nature were not excluded due to their greater than one year of maximum punishment.[229] The most recent version of the MJIA allowed punitive articles 83–117, 133, and 134 to remain within command disposition authority.[230]

In general, the problem with the MJIA is that some excluded offenses carry the most severe of maximum punishments, such as death, and it is unclear why a commander should not have disposition authority over a "bad checks" offense under Article 123a but can still dispose of desertion charges under Article 85.[231] It is also unclear why certain offenses under Article 134 were excluded from removal. Article 134 is comprised of 55 offenses, including the general article that allows the government to allege any conduct is illegal if the terminal element, "that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces."[232] Approximately 27 of the Article 134 offenses carry a maximum punishment of greater than one year of confinement, and of those 27, only five do not have a companion

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[226] *Id*. (amended by SA 2099 (2013)).
[227] *See generally* S.967 § 2.
[228] UCMJ art. 92 (2012).
[229] The Article 134 offenses previously not excluded by the original MJIA are: disloyal statements, impersonation of a commissioned, warrant, noncommissioned or petty officer, or an agent or official with intent to defraud, self-injury without intent to avoid service in time of war, or in a hostile fire pay zone, intentional self-inflicted injury, intentional self-inflicted injury in a time of war or in a hostile fire pay zone, loitering or wrongfully sitting on post in time of war or while receiving special pay under 37 U.S.C. § 310.
[230] S. 967 (amended by SA 2099 (2013)).
[231] *Id*.
[232] *See generally* UCMJ art. 134 (2012). Within those fifty-five offenses are additional offenses that are named and described as "lesser included offenses" or "other cases" of the title article.

offense under Title 18 or 21 of the United States Code.[233] If the bill excluded all Article 134 offenses from removal for being purely military in nature, then it is unclear why several offenses that have a criminal component or comparable federal criminal statute were excluded as well.[234] If commanders cannot be entrusted with the authority to handle serious, non-military offenses, then the MJIA should not have excluded the serious, non-military offenses contained within Article 134. The UCMJ could be amended to carve specific offenses, such as child pornography and kidnapping, out of Article 134.[235] Otherwise, the notion that commanders cannot have authority over sexual assault and murder cases but can maintain disposition authority over a violent crime, such as kidnapping, or child pornography, a crime with potentially thousands of victims in one case, defies logic.

B. Prosecution of Criminal Acts

The MJIA should have eliminated prosecution of minor offenses. The MJIA allowed for courts-martial for offenses that would not carry the possibility of a criminal conviction in civilian court. Under the MJIA, commanders could still prefer and refer charges that carry a maximum sentence of confinement of one year and below for approximately 23 punitive articles.[236] Some examples of this are Article 134 (adultery), Article 134 (fraternization), and Article 133 (conduct unbecoming an officer and gentleman).[237] Each of these offenses is minor and would not be prosecuted in civilian criminal court.[238] Under

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[233] *See* Appendix. These offenses include bigamy, disloyal statements, fraternization, self-injury, and loitering in a time of war.

[234] Examples include but are not limited to: possession and/or distribution of child pornography, kidnapping, assault with intent to commit murder, voluntary manslaughter, rape, robbery, arson, burglary, or housebreaking, negligent homicide, child endangerment, and communicating a threat.

[235] As the MJIA is currently written, this could only be accomplished by Congress subsequently enacting new punitive articles for these offenses because all offenses under Article 134 are excluded from removal.

[236] Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013).

[237] *See* MCM, *supra* note 16, app. 12.

[238] Fraternization and conduct unbecoming an officer and gentleman are military offenses. *Id.* part IV. Adultery is a misdemeanor crime under Section 255.17 of New York Penal Law but generally not prosecuted. Sewell Chan, *Is Adultery a Crime in New York?*, N.Y. TIMES CITY ROOM (Mar. 21, 2008, 1:51 PM), http://cityroom.blogs.nytimes.com/2008/03/21/is-adultery-a-crime-in-new-york/?_r=0.

the MJIA, the military accused would still be prosecuted for misdemeanor offenses for which he can receive a federal conviction.

The potential for convictions for misdemeanor-level and military-specific offenses is a reality in military justice. Minor offenses are regularly prosecuted, and convictions result. In the Army alone, from 2011 to 2013, there were 127 convictions for Article 134 (adultery), 13 for Article 134 (fraternization), and 41 for Article 133 (conduct unbecoming an officer and gentleman).[239] From 2011 to 2013, there were 509 convictions for Article 92 violations alone.[240] Thus, the MJIA's failure to exclude prosecution for these minor offenses would not be without consequences to the accused because commanders could still refer these offenses to court-martial. The MJIA proposed a radical change to the system that did not consider alternatives to prosecution for minor, military-specific offenses, but it should have.

A servicemember should not face the possibility of a federal conviction for minor offenses, especially those that are military in nature. Minor offenses that would not otherwise carry a criminal conviction in civilian court should not be adjudicated in a court-martial because the consequences of a federal conviction are too severe for minor, military-specific offenses. Servicemembers will not serve in the military for the duration of their lifetimes; they will retire or be discharged at some point in their careers. They should be afforded the same protections that a civilian court would provide, such as a differentiation between major and minor offenses and resulting consequences, depending on the nature of the offense. The military justice system fails to provide this protection because regardless of the seriousness of the offense or the maximum punishment, all offenses can be tried at a general court-martial.[241] Also, any conviction could be considered a federal conviction because military

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[239] E-mail from Malcolm Squires, Clerk of the Court, Office of the Clerk of Court, Army Court of Criminal Appeals, to author (Nov. 21, 2013, 16:04 P.M. EST) [hereinafter Squires e-mail] (on file with author). These figures represent convictions at court-martial solely for these specific individual offenses; these numbers are not indicative of convictions where the servicemember was convicted for additional offenses. Additionally, there were 631 convictions for Article 86 (Absence Without Leave), for which there is a maximum punishment of less than one year for all offenses with the exception of being absent without leave for more than thirty days and terminated by apprehension, which carries a maximum punishment of eighteen months. *Id*.

[240] *Id.* This does not include convictions for the offense where the servicemember was convicted of additional offenses.

[241] MCM, *supra* note 16, R.C.M. 201(f)(1)(A)(i).

courts are federal courts.[242] Servicemembers might be able to explain that a special court-martial conviction should be treated as a misdemeanor conviction due to the jurisdictional one-year confinement maximum that can result from that proceeding, but the argument is complicated due to their differences in federal and state laws and their potential interpretations of a servicemember's conviction.[243] The military accused experiences a greater consequence at court-martial than a criminal defendant in civilian courts because the military accused can be prosecuted for offenses unlikely to have been prosecuted in civilian court.

The MJIA would not have solved the problem of unlawful command influence or the pressure on commanders to prosecute all cases in order to retain UCMJ authority. It is an understood practice, whether civilian or military, that the prosecution will include all possible charges or advise the commander to prefer all charges, even those minor in nature, in the hopes of securing a conviction for at least one offense.[244] Furthermore, when commanders must report the outcome of cases, it benefits the command to report that the accused was convicted of some offense, even if acquitted of the greater offense of rape or sexual assault.[245] Thus, one can predict that if given the authority, the commander would continue to refer even minor offenses for prosecution at court-martial.

The MJIA attempted to differentiate serious from less serious offenses by using the one-year maximum punishment as a line of demarcation. However, because it allowed for prosecution of minor and military-specific offenses and does not limit the type of conviction that can result, it did not address the remaining inherent unfairness to the military accused who will receive all of the burdens of a criminal conviction through a court-martial.[246] If legislation extinguished the possibility for prosecution at court-martial for minor, military-specific offenses, then the military accused only could be prosecuted for criminal

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[242] *Id*. R.C.M. 907(b)(2)(C).

[243] *Id*. R.C.M. 201(f)(2)(B)(i) *see* Williams, *supra* note 222 (citing Matthew S. Freedus & Eugene R. Fidell, *Conviction by Special Courts-Martial: A Felony Conviction?*, 15 FED. SENT. R. 220 (2003)).

[244] This assertion is based on the author's professional experiences as a Trial Defense Counsel and Trial Counsel from 2009 to 2013.

[245] *See* RSP transcript, *supra* note 76, at 315–16.

[246] *See* Williams, *supra* note 222.

offenses recognized by civilian courts.[247] The spirit of the MJIA was to civilianize the military justice system by requiring that lawyers rather than non-lawyers have prosecutorial discretion.[248] A system that mirrors modern civilian criminal law will meet the intent of the bill and makes the revised UCMJ process as proposed more practical.[249]

C. One System of Prosecution

The MJIA does not address the practical or ethical considerations that result from granting commanders prosecutorial discretion for some offenses and judge advocates for others. Under military law, the commander should prefer all known charges at the same time.[250] Serious and minor offenses are included on one charge sheet. Under the system proposed by the MJIA, the judge advocate would have authority over the serious felony-level offenses, and the commander would have authority over the misdemeanor-level, military-specific offenses.[251] This division of authority will result in two charge sheets for the accused: one prepared by a judge advocate and one by a commander. Questions then arise, such as whether the same judge advocate that prepared the felony-level charge sheet should advise the convening authority on the "misdemeanor" charge sheet and whether there should be two different courts-martial for the accused, especially if a commander decides charges should be referred to a summary or special court-martial. The system should be one in which the judge advocate exercises prosecutorial discretion regarding felony-level offenses to avoid practical problems and injustice to the accused.

If the MJIA or similar bill were enacted, then judge advocates would be the disposition authority for offenses with a maximum sentence of more than one year of confinement and offenses specifically excluded in

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[247] Perhaps the modern court-martial for an all-volunteer military no longer needs to prosecute individuals for offenses that were enumerated in the Articles of War of 1775. *See id.* at 7–9.

[248] *See generally* Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013).

[249] Interview with Major General Anthony Cucolo III, *supra* at note 38. Although Major General Cucolo believes that commanders should retain UCMJ authority, he agrees that minor offenses should not be prosecuted at court-martial. Some offenses, such as adultery, allow for extreme viewpoints to impact justice. The military justice system should be one that sets the example and reflects the best of society in the 21st century. *Id*.

[250] MCM, *supra* note 16, R.C.M. 307.

[251] S. 967**;** *see* Letter from Lieutenant General Flora Darpino et.al., *supra* note 195.

the Act. The MJIA required an O-6 or higher, able to be detailed as a trial counsel, to be the disposition authority for these offenses.[252] However, this provision of the MJIA was too limited. Any individual in a prosecutorial role, regardless of rank, is qualified to make the decision of whether or not to charge and which charges to prefer due to their legal training.[253] The prosecutor for the government, or trial counsel, works closely with criminal investigators during the investigative process. They provide an opinion as to whether there is a founded offense case that leads to CID titling the subject for those offenses. Trial counsel draft charge sheets, prepare witnesses and other evidence for trial, and present the case at the court-martial. Even if captains in the position of trial counsel are the individuals making charging decisions, they are supervised by senior trial counsel, chiefs of military justice, deputy SJAs, and SJAs.

D. Questions Regarding Scope and Purpose

Another problem with the MJIA is the lack of clarity in its purpose for the breadth of change to the military justice system. During the NDAA debates, Senator Gillibrand stated that she would consider changing the removal of offenses from those carrying more than one year of maximum confinement to only sexual assault offenses.[254] If the bill was intended to only address perceived problems with the prosecution of sexual assault offenses, then there is little rationale as to why the one-year maximum sentence of confinement was ever the qualifier for removal of offenses from command authority. The bill appears to be a reaction to a few victims' stories about their beliefs, founded or

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[252] *Id.* § 2(a)(4); Interview with Major Bridget Byrnes, *supra* note 159. Major Byrnes noted that the intent of this decision was to ensure that officers were of a rank where they could make decisions without fear of reprisal or concern about promotions because they might be promoted only one or more times in their career, if that. Judge advocates in the grade of O-6 have the requisite education and experience to make these decisions. *Id.*

[253] *But see* Stimson, *supra* note 80, at 16–23 (describing civilian prosecutor and public defender training and practices and advocating for a military career litigation track).

[254] Jeremy Herb, "*Gillibrand Supporters Wary of Her Changes to Sexual Assault Bill*, THE HILL BLOG (Nov. 14, 2013, 5:26 PM), http://thehill.com/blogs/defcon-hill/policy-strategy/190344-gillibrand-supporters-wary-of-sex-assault-bill-changes. *Cf.* Interview with Major Bridget Byrnes, *supra* note 159. Senator Gillibrand would not limit the bill to removal of sexual assault charges in this Congress because separating sexual assault cases might do more harm than good by highlighting those cases and garnering media attention for them.

unfounded, that their cases were not handled well by commanders.[255] Any concession or major change to the bill exposes it to greater scrutiny and criticism because limiting the removal to one type of offense indicates that the entire bill was not thoroughly researched. If the bill is amended to only remove sexual assault, then the proponents must explain what makes commanders capable of handling all serious offenses except sexual assault and why lawyers will be in a better position to evaluate those cases.

VIII. Proposed Solution for Crimes and Disciplinary Infractions

Congress could remove UCMJ authority from commanders in the future; meanwhile, the services are taking action now that cuts against the longstanding tradition of independent discretion enjoyed by their own commanders. Lieutenant General Franklin, the convening authority who overturned Lieutenant Colonel Wilkerson's sexual assault conviction, dismissed another sexual assault case after the Article 32 hearing was complete.[256] Rather than Lieutenant General Franklin's decision being final, the accused Airman was administratively reassigned to another GCMCA, and a new Article 32 hearing was scheduled.[257] This is an example of the Air Force communicating to its GCMCAs that sexual assault allegations will go forward to a court-martial, and if Congress is unable to remove commanders' prosecutorial discretion, then the service will do so when displeased with the result. The impact of this message on the accused is severe because no matter how weak the case or how little evidence is present, a case will go forward to court-martial.

The FY 14 NDAA and Victims Protection Act of 2014 have created a framework for military justice for, at the very least, the near future. As

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[255] Interview with Major Bridget Byrnes, *supra* note 161. The genesis of Senator Gillibrand's bill was that she was listening to victims' stories, including that horrific things were happening to them, their chains of command were not acting on their complaints, and they had nowhere else to go. Senator Gillibrand wanted a bill that took these cases out of the chain of command, and the bill represents her reaction to what she heard in those victims' voices. Although Congress is focused on sexual assault, Senator Gillibrand is concerned with a fairer justice system in general that includes sexual assault under that umbrella. However, limiting the bill to sexual assault is simply reactionary, as her stated goal is to create an overall better and fairer justice system. *Id*.

[256] Staff Report, *General Who Overturned Sexual Assault Conviction Loses Authority over New Sex Assault case*, A.F. TIMES, December 8, 2013, http://www.airforcetimes.com/article/20131218/NEWS/312180013.

[257] *Id*.

explored in this article, the revisions to the UCMJ and the current climate for sexual assault and command authority in general have created a no-win situation for commanders. If commanders prefer and refer cases, especially those involving sexual assault, they will be subject to allegations of unlawful command influence. If they do not prefer and refer cases, these actions could result in negative evaluations, lack of promotions, demotions, or uncomfortable scrutiny from their superior commander or the Secretary of the military department.[258] In terms of protecting their careers and the integrity of the military, commanders should send every case to court-martial in order to deflect scrutiny from Congress and special interest groups that have little confidence in their ability to handle crime.[259] It is difficult to imagine how the military justice system would be viewed as one that actually administers justice. Major General Cucolo discussed the potential second- and third-order effects of great change to the system and asked how the military would be able to continue to recruit bright, educated, talented people to join its ranks if it becomes a system that the civilian populace lack confidence in and do not perceive as being just.[260]

The military justice system has greatly changed over the last year with its new focus on the rights of the victim.[261] Criminal cases have traditionally had only two parties: the government or prosecution and the accused or defendant. Arguably, the recent congressional legislation has created another party to the system: the victim.[262] Due process in a

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[258] *See generally* ARMY DIR. 2013-20, *supra* note 47; Davis, *supra* note 2; Whitlock *supra* note 4; National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1744, 127 Stat. 672 (2013).

[259] Interview with Anonymous Person, *supra* note 107.

[260] Interview with Major General Anthony Cucolo III, *supra* note 38. Major General Cucolo believes that the retention of UCMJ authority over commanders is of utmost importance, even after considering the changes to the law under the NDAA. He could envision a system where commanders do not have authority over the most heinous of crimes, but it was difficult for him to imagine a scenario where it would benefit the accused, accused's family members, and the military as a whole to relinquish command authority over the UCMJ. *Id*.

[261] *See, e.g.*, UCMJ art. 6b (2013); 10 U.S.C. § 806b (2013).

[262] A recent example of an alleged victim impacting a pending case occurred in April 2014 when military defense counsel for Lieutenant Colonel Jay Morse requested the United States Army Court of Criminal Appeals prohibit the accused's chain of command from enforcing its order for the accused's counsel to cease interviewing witnesses or potential witnesses as part of their pretrial investigation for his case. The chain of command ordered the accused to cease and desist his investigation because the alleged victim was displeased with defense counsel's efforts on behalf of their client. Petitioner's Petition for Extraordinary Writ in the Nature of Writ of Prohibition (Apr. 15, 2014).

criminal case protects the accused from overreaching by the government.[263] Although a victim might not be vindicated by the process or may feel embarrassed by the proceedings,[264] she will never lose basic rights, such as life, liberty, or property. The accused, on the other hand, has everything to lose. The problem with the recently passed and proposed legislation is that the focus of the bill is on serving victims of sexual assault without considering the consequences that the court-martial of certain offenses has on the accused. The military justice system needs additional change to regain its balance and focus on ensuring the due process rights of the accused over the concerns of the victim.

UCMJ authority should be removed from commanders as the MJIA suggested. Over sixty years ago, the UCMJ was originally instituted to ensure the accused was protected from a commander with "virtually unlimited control over military justice."[265] However, politically unpopular cases and the inevitable unlawful command influence in sexual assault cases necessitates the overhaul of our military justice system. The system is no longer a balance of command authority and the rights of the accused because it no longer sufficiently protects the process or the individual servicemember. The MJIA provided a remedy for the present conundrum by removing serious offenses from commanders. If UCMJ court-martial convening authority is removed from commanders, then commanders will have less ability to exercise unlawful command influence or exert pressure personally on cases by sending every case forward. Lawyers in a prosecutorial role should exercise the same discretion that civilian prosecutors enjoy without command involvement in the adjudication of crimes.

When offenses are removed from both command authority and the possibility of trial by court-martial, federal law should assist in the division of punitive articles. Military law is federal law.[266] If all offenses that had a maximum punishment of greater than one year and a companion statute under Title 18 or Title 21 of the United States Code were exclusively available for court-martial, then serious crimes—

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[263] U.S. CONST. amend. V, XIV.
[264] Stimson, *supra* note 80.
[265] Hansen, *supra* note 118, at 244.
[266] *See generally* MCM, *supra* note 16, pt. I.

whether military in nature or not—would be adjudicated.[267] Under this system, companion federal law would support the prosecution of offenses at court-martial that are acts traditionally recognized as criminal in nature, rather than minor disciplinary infractions. This adds legitimacy to the military system by prosecuting conduct analogous to civilian criminal conduct and creates a dividing line between serious crime and minor behavior that affects the good order and discipline of military units.

Commanders should retain non-judicial and administrative authority for every offense under the UCMJ. Commanders need the punitive articles for the exercise of good order and discipline in the ranks; counseling statements, Article 15s, and reprimands that refer to misconduct under those articles serve that purpose. Counseling statements, Article 15s, and reprimands are sufficient to address minor disciplinary offenses because these actions allow a commander to make on-the-spot corrections and affect good order and discipline. Article 15s serve as a disciplinary tool for a commander.[268] An Article 15 allows a commander many options, such as demoting servicemembers, reprimanding them, forfeiting their pay, imposing extra duty, and restricting them.[269] Non-judicial and administrative actions affect the servicemember's status in the unit; thus, avoiding discipline imposed by the commander is enough of an incentive to deter minor misconduct.[270] Good order and discipline can remain intact when a servicemember receives swift, binding punishment.

The military justice system should use Article 15s as a disciplinary tool only, whereby a servicemember could not refuse the Article 15 and demand court-martial. Other jurisdictions have implemented a system where servicemembers cannot refuse Article 15s.[271] Due process

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[267] Title 18 and Title 21 include all serious offenses, such as murder, rape, and kidnapping, but also include drug offenses and desertion. *See* Appendix (comparing punitive articles in the MCM to federal criminal statutes).

[268] *See generally* Schlueter, *supra* note 24, at 59.

[269] AR 27-10, *supra* note 69.

[270] Note, *The Unconstitutional Burden of Article 15*, 82 YALE L.J. 1481, 1485–86 (1973).

[271] The concept of disallowing servicemembers to turn down non-judicial punishment is not new. States that do not allow their Soldiers to reject non-judicial punishment while in a Title 32 status under their respective state UCMJs include: Oklahoma, Maine, North Dakota, Oregon, New Hampshire, Mississippi, Alabama (unless restriction is imposed), North Carolina, Illinois, Minnesota, Missouri, Georgia (unless serving on State Active Duty), and Kentucky. Also, a servicemember "attached to or embarked on a vessel" may

concerns may be lessened when the action taken by the commander is limited to affecting the servicemember's military conditions of employment.[272] Commanders could issue Article 15s for any offense, even murder, and that would not preclude the prosecuting judge advocate from preferring court-martial-eligible cases carrying more than one year maximum confinement and a companion statute under Title 18 or Title 21 of the United States Code. This would allow the commander to exercise immediate good order and discipline but still allow for the government to prosecute serious offenses. Practically, the commander might not issue an Article 15 for a serious offense; yet, it would give him the option to do so and also discipline the servicemember for any minor misconduct that is part of the case but will not be part of the court-martial. The balance exists for the accused because although conditions of his employment and pay would be at stake, he would no longer be subjected to court-martial for minor offenses. This component of the system allows for crimes to be adjudicated in a criminal prosecution without the possibility of the accused receiving a federal conviction for minor violations of the UCMJ, while improving a commander's disciplinary authority over minor and military-specific infractions by showing that servicemembers will be held accountable for behavior that impacts mission readiness.

IX. Conclusion

Recent changes to the UCMJ and the perceived culture of sexual assault in the military have created a minefield for the military justice practitioner and commanders. The FY 14 NDAA increased the rights of victims but removed several protections from the accused. The MJIA took the greatest leap in proposing the removal of some offenses from commanders, but the division of offenses will not solve the perceived problem of sexual assault without substantially affecting the rights of the

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receive non-judicial punishment without the right to demand trial by court-martial. MCM, *supra* note 16, pt. V, para. 3.

[272] Commanders could be limited to imposing rank reduction, forfeiture of pay, restriction, and extra duty as conditions of employment adversely affected by an individual's misconduct under paragraph 5 punishments. During their respective interviews, both Major General Cucolo and Lieutenant General (Retired) Helms agreed with a no-turn-down Article 15 policy. Lieutenant General (Retired) Helms stressed the need for continued ability of individuals to appeal any Article 15s imposed to ensure they receive fair and equal treatment and that commanders do not abuse their authority. Interview with Major General Anthony Cucolo III, *supra* note 38; Interview with Lieutenant General (Retired) Susan Helms, *supra* note 5.

accused. Regardless of whether the MJIA is passed, the problem of UCI, overemphasis on victim concerns to the detriment of the accused, and further amendments to the UCMJ will not end in this current climate of constant effort to eradicate sexual assault.

In order for the accused to be served justice and for the military justice system to be the most fair system possible, judge advocates should have prosecutorial discretion for allegations of serious, felony-level offenses under the UCMJ that are analogous to federal law under the United States Code. Commanders should be able to take administrative or non-judicial action that servicemembers cannot refuse, especially for minor, misdemeanor-level, and military-specific offenses, in order to instill good order and discipline. This model ensures that the right offenses are being tried at court-martial because the system is supported by companion federal law. Individuals who are trained and experienced in criminal law are making the decisions to effect that result, and commanders can maintain good order and discipline by addressing and punishing minor, military-specific disciplinary infractions. Crimes will be prosecuted in the proper forum by the appropriate personnel, and minor, military-specific offenses will be handled in an administrative or non-judicial proceeding by the individual responsible for good order and discipline. Only then will the military justice system protect the rights of the accused and operate in a cost-efficient and respectable manner that ensures justice for all.

Appendix

UCMJ Punitive Articles Authorizing Greater Than One Year of Confinement and Companion Statutes Under Title 18 or Title 21, United States Code[273]

UCMJ	U.S.C.
82 Solicitation to desert	18 U.S.C. § 1381 Enticing desertion and harboring deserters
82 Solicitation to mutiny	18 U.S.C. § 2192 Incitation of seamen to revolt or mutiny;18 U.S.C. § 373 Solicitation to commit a crime of violence
82 Solicitation to commit act of misbehavior before enemy	18 U.S.C. § 757 Prisoners of war or enemy aliens
82 Solicitation to commit act of sedition	18 U.S.C. § 2192 Incitation of seamen to revolt or mutiny; 18 U.S.C. § 373 Solicitation to commit a crime of violence
83 Fraudulent enlistment, appointment	18 U.S.C. § 35 Imparting or conveying false information
83 Fraudulent separation	18 U.S.C. § 35 Imparting or conveying false information
84 Effecting unlawful enlistment, appointment, separation	18 U.S.C. § 498 Military or naval discharge certificate; 18 U.S.C. § 35 Imparting or conveying false information; 18 U.S.C. § 495 Contracts, deeds, and powers of attorney
85 Desertion	18 U.S.C. § 1381 Enticing desertion and harboring deserters
86 AWOL more than 30 days and terminated by apprehension	No companion statute
87 Missing movement through design	No companion statute
90 Assaulting, willfully disobeying superior commissioned officer (all)	18 U.S.C. § 111 Assault

[273] *Comparison of Title 18 Sexual Offenses and UCMJ Sexual Offenses* tbl., DOD.GOV, *available at* http://www.dod.mil/dodgc/php/docs/comparison_with_Title18_3-2-05.pdf.

91 Striking or assaulting warrant officer	18 U.S.C. § 111 Assault
91 Striking or assaulting superior NCO or petty officer	18 U.S.C. § 111 Assault
91 Willfully disobeying warrant officer	18 U.S.C. § 111 Assault
92 Violation of or failure to obey general order or regulation	No companion statute
94 Mutiny & sedition	18 U.S.C. § 2193 Revolt or mutiny of seamen; 18 U.S.C. § 2192 Incitation of seamen to revolt or mutiny
95 Escape from post-trial confinement	18 U.S.C. § 751 Prisoners in custody of institution or officer; 18 U.S.C. § 752 Instigating or assisting escape;
96 Releasing a prisoner without proper authority; suffering a prisoner to escape through design	18 U.S.C. § 752 Instigating or assisting escape; 18 U.S.C. § 757 Prisoners of war or enemy aliens
97 Unlawful detention	18 U.S.C. § 913 Impersonator making arrest or search
98 Knowingly, intentionally failing to enforce or comply with provisions of the code	18 U.S.C. § 4 Misprision of felony
99 Misbehavior before enemy	18 U.S.C. § 757 Prisoners of war or enemy aliens
100 Subordinate compelling surrender	No companion statute
101 Improper use of countersign	18 U.S.C. § 757 Prisoners of war or enemy aliens
102 Forcing safeguard	No companion statute
103 Captured, abandoned property, failure to secure of value of $500 or more or any firearm or explosive	18 U.S.C. § 922 Unlawful acts
103 Looting or pillaging	18 U.S.C. § 654 Officer or employee of United States converting property of another; Accounting generally for public money; 18 U.S.C. § 648 Custodians, generally, misusing

	public funds
104 Aiding the enemy	18 U.S.C. § 757 Prisoners of war or enemy aliens; 18 U.S.C. § 756 Internee of belligerent nation
105 Misconduct as prisoner	18 U.S.C. § 757 Prisoners of war or enemy aliens
106 Spying	18 U.S.C. § 793 Gathering, transmitting or losing defense information; 18 U.S.C. § 794 Gathering or delivering defense information to aid foreign government
106a Espionage	18 U.S.C. § 793 Gathering, transmitting or losing defense information; 18 U.S.C. § 794 Gathering or delivering defense information to aid foreign government
107 False official statements	18 U.S.C. § 1001 Fraud and False Statements; 18 U.S.C. § 35 Imparting or conveying false information
108 Military property; loss, damage, destruction, disposition selling or otherwise disposing of a value of more than $500, firearms or explosive	18 U.S.C. § 32 Destruction of aircraft or aircraft facilities; 18 U.S.C. § 33 Destruction of motor vehicles or motor vehicle facilities
108 Military property; damaging, destroying, losing or suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of a value or damage of more than $500 or any firearm or explosive	18 U.S.C. § 32 Destruction of aircraft or aircraft facilities; 18 U.S.C. § 33 Destruction of motor vehicles or motor vehicle facilities
109 Property other than military property of U.S.: waste, spoilage, or destruction of more than $500	No companion statute
110 Wilfully and wrongfully or negligently improper hazarding of vessel	18 U.S.C. § 342 Operation of a common carrier under the influence of alcohol or drugs
111 Drunk or reckless operation	18 U.S.C. § 342 Operation of a

of vehicle, aircraft, or vessel resulting in personal injury	common carrier under the influence of alcohol or drugs
112 All drug offenses	21 U.S.C. § 841 Prohibited acts A – 21 U.S.C. § 865 Smuggling methamphetamine or methamphetamine precursor chemicals into the U.S. while using facilitated entry programs
113 Misbehavior of sentinel or lookout in time of war or while receiving special pay under 37 U.S.C. 310	No companion statute
115 Malingering, feigning illness, physical disablement, mental lapse, or derangement in time of war, or in a hostile fire pay zone	No companion statute
115 Intentional self-inflicted injury (all)	No companion statute
116 Riot	18 U.S.C. § 2101 Riots
118 Murder	18 U.S.C. § 1111 Murder
119 Manslaughter	18 U.S.C. § 1112 Manslaughter
119a Death or injury of an unborn child	18 U.S.C. § 1841 Protection of unborn children
120 Rape, sexual assault, aggravated sexual contact, abusive sexual contact	18 U.S.C. § 2241 Aggravated sexual abuse, 18 U.S.C. § 2242 Sexual abuse; 18 U.S.C. § 2244 abusive sexual contact
120a Stalking	18 U.S.C. § 2261A Stalking
120b Rape and sexual assault of a child	18 U.S.C. § 2243 Sexual abuse of a minor or ward
120c Indecent viewing, visual recording, or broadcasting, forcible pandering, indecent exposure.	18 U.S.C. § 1460 Possession with intent to sell, and sale, of obscene matter on Federal property; 18 U.S.C. § 2257A Record keeping requirements for simulated sexual conduct; 18 U.S.C. § 1461 Mailing obscene or crime-inciting matter; 18 U.S.C. § 1462 Importation or transportation of obscene matters
121 Larceny of military property	18 U.S.C. § 641 Public money,

of a value of more than $500 or of any military motor vehicle, aircraft, vessel, firearm, or explosive	property or records; 18 U.S.C. § 643 Accounting generally for public money;18 U.S.C. § 654 Officer or employee of United States converting property of another
121 Larceny of property other than military property of a value of more than $500 or any motor vehicle, aircraft, vessel, firearm, or explosive	18 U.S.C. § 641 Public money, property or records; 18 U.S.C. § 654 Officer or employee of United States converting property of another
121 Wrongful appropriation of MV, aircraft, vessel, firearm, or explosive	18 U.S.C. § 38 Fraud involving aircraft or space vehicle parts in interstate or foreign commerce
122 Robbery, with a firearm or otherwise	18 U.S.C. § 2111 Special maritime and territorial jurisdiction; 18 U.S.C. § 2112 Personal property of United States
123 Forgery	18 U.S.C. § 470 Counterfeiting and Forgery
123a Bad Checks more than $500	18 U.S.C. § 641 Public Money, property or records; 18 U.S.C. 335 Circulation of obligations of expired corporations; 18 U.S.C. § 651 Disbursing officer falsely certifying full payment
124 Maiming	18 U.S.C. § 114 Maiming within maritime and territorial jurisdiction
125 Sodomy (repealed by § 1707 of FY 14 NDAA)	No companion statute
126 Aggravated arson; arson with more than $500 damage	18 U.S.C. § 81 Arson
127 Extortion	18 U.S.C. § 872 Extortion by officers or employees of the United States; 18 U.S.C. § 873 Blackmail
128 Assaults: simple assault with unloaded firearm, assault upon commissioned officer of U.S. or friendly power not in execution of office, assault upon warrant officer, not in execution	18 U.S.C. § 111 Assault; 18 U.S.C. § 111 Assaulting, resisting, or impeding certain officers or employees; 18 U.S.C. § 113 Protection of foreign officials, official guests, and internationally

of office, upon, in execution of office, person serving as sentinel, lookout, security policeman, etc.,; consummated by battery upon child under 16 years; assault with a dangerous weapon (all)	protected persons; 18 U.S.C. § 113 Assaults within maritime and territorial jurisdiction
129 Burglary	18 U.S.C. § 2117 Breaking or entering carrier facilities; 18 U.S.C. § 2118 Robberies and burglaries involving controlled substances
130 Housebreaking	18 U.S.C. § 2117 Breaking or entering carrier facilities
131 Perjury	18 U.S.C. § 1621 Perjury
132 Frauds against US – more than $500 or under article 132 (1) or (2)	18 U.S.C. § 1002 Possession of false papers to defraud United States; 18 U.S.C. § 1003 Demands against the United States;18 U.S.C. § 35 Imparting or conveying false information
134 Assaults with intent to commit murder or rape, with intent to commit voluntary manslaughter, robbery, sodomy, arson, or burglary, with intent to commit housebreaking	18 U.S.C. § 111 Assault
134 Bigamy	No companion statute
134 Bribery and graft	18 U.S.C. § 201 Bribery, graft, and conflicts of interest
134 Burning with intent to defraud	18 U.S.C. § 1519 Destruction, alteration, or falsification of records in Federal Investigations and Bankruptcy
134 Child endangerment (other than by culpable negligence)	18 U.S.C. § 2251 Sexual exploitation of children; 18 U.S.C. § 2251A Selling or buying of children
134 Child pornography	18 U.S.C. § 2251 Sexual exploitation of children; 18 U.S.C. § 2252 Certain activities relating to material involving the sexual

	exploitation of minors
134 Disloyal statements	No companion statute
134 False pass with intent to defraud	18 U.S.C. § 499 Military, naval, or official passes
134 Services under false pretenses of more than $500	18 U.S.C. § 35 Imparting or conveying false information; 18 U.S.C. § 287 False, fictitious or fraudulent claims
134 False swearing	18 U.S.C. § 35 Imparting or conveying false information
134 Fraternization	No companion statute
134 Negligent homicide	18 U.S.C. § 1112 Manslaughter (Involuntary)
134 Impersonation with intent to defraud	18 U.S.C. § 912 Officer or employee of the United States; 18 U.S.C. § 701 Official badges, identification cards, other insignia; 18 U.S.C. § 702 Uniform of armed forces and Public Health Service
134 Indecent language communicated to child under 16 years of age	18 U.S.C. § 1464 Broadcasting obscene language; 18 U.S.C. § 1470 Transfer of obscene material to minors
134 Kidnapping	18 U.S.C. § 1201 Kidnapping
134 Mail taking, opening, secreting, destroying, or stealing, depositing or causing to be deposited obscene matters in	18 U.S.C. § 1700 Desertion of Mails
134 Obstructing justice	18 U.S.C. § 1501 Obstruction of Justice
134 Wrongful interference with administrative proceeding	18 U.S.C. § 115 Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member; 18 U.S.C. § 201 Bribery, graft, and conflicts of interest
134 Pandering	18 U.S.C. § 1384 Prostitution near military and naval establishments[274]

[274] Table, *Comparison of Title 18 Sexual Offenses and UCMJ Sexual Offenses, available at* http://www.dod.mil/ dodgc/ php/docs/comparison_with_Title18_3-2-05.pdf.

134 Perjury	18 U.S.C. § 1621 Perjury
134 Destroying public record	18 U.S.C. § 1519 Destruction, alteration, or falsification of records in federal investigations and bankruptcy
134 Self-injury	No companion statute
134 Loitering in time of war	No companion statute
134 Soliciting more than $500	18 U.S.C. § 201 Bribery of public officials and witnesses
134 Wrongful refusal to testify	18 U.S.C. § 1509 Obstruction of court orders
134 Threat, bomb, or hoax	18 U.S.C. § 115 Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member; 18 U.S.C. § 119 Protection of individuals performing certain official duties; 18 U.S.C. § 175 Prohibitions with respect to biological weapons
134 Communicating a threat	18 U.S.C. § 115 Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member; 18 U.S.C. § 119 Protection of individuals performing certain official duties

TRANSGENDER SERVICE: THE NEXT SOCIAL DOMINO FOR THE ARMY

MAJOR MARK R. MILHISER*

The point is that if the Army completely wasted me over 40 years ago, how many more career caliber, and otherwise high caliber officers, *NCO (Non-Commissioned Officer) and enlisted personnel has it wasted and does it continue to waste over its stupid anti-trans regulations?*[1]

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[1] E-mail from Phyllis Randolph Frye, Senior Partner, Frye & Assocs., PLLC Law Firm & Assoc. Mun. Judge in Houston, Tex., to author (Sept. 27, 2013, 05:18 PM EST) (on file with author). Phyllis Frye was born Phillip Randolph Frye on February 10, 1948, and grew up in San Antonio, Texas. Phillip was an Eagle Scout, varsity letter winner and Cadet Colonel for his high school's Corps of Cadets. Phillip went to Texas A&M on a four-year ROTC scholarship in 1966. He completed his Civil Engineering degree in three-and-a-half years. He immediately pursued his Masters Degree in Mechanical Engineering and completed the program after being commissioned as a Second Lieutenant (2LT) in the Regular Army in January 1970. While in the Army, Phillip served at Fort Sam Houston, Texas, and Landstuhl, Germany. In 1972, as his wife was leaving him, Phillip was accused of crossdressing. The Army initiated separation procedures against then–First Lieutenant (1LT) Frye because of the alleged crossdressing. First Lieutenant Frye was ultimately separated with an Honorable discharge in August 1972. In 1976 Phillip transitioned to Phyllis. While presenting as a female, Phyllis was blackballed by engineering firms and was unable to find work in Houston. With the G.I. Bill, Phyllis enrolled in the University of Houston and earned an M.B.A. and J.D. Phyllis has been a lawyer since 1981. In the intervening years, she has become the senior named partner in a law firm, has been appointed a municipal court judge and has an annual Advocacy Award named after her that is presented during Texas A&M diversity celebrations. Phyllis Randolph Frye is the self-proclaimed "Grandmother of the National TG (Transgender) Legal and Political Movement." ALLY WINDSOR HOWELL, TRANSGENDER PERSONS AND THE LAW, at xiv (2013).

I. Introduction

The U.S. military has a track record of adapting to societal shifts.[2] Sometimes the military is the impetus for change and at other times it is the last to adapt. Women were once relegated to non-uniformed and non-combat support positions. Today, women are allowed to serve, attend military academies, and participate in ground combat hostilities.[3] African-Americans encountered segregation, lack of opportunity for advancement, and targeted hatred while serving in uniform, and today an African-American is Commander in Chief of the armed forces. Currently, the Army celebrates its diversity by recognizing the heritage and history of its minority personnel,[4] yet gender, race, and ethnicities are not the only societal issues that the U.S. military has addressed. Recent reform of sexual assault laws[5] and the Department of Defense's (DoD's) initiative to eradicate hazing and bullying[6] in the service academies and in the ranks shows a continually adapting military that reflects the U.S. military and society as a whole.

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[2] Women's Armed Services Integration Act of 1948, Pub. L. No. 625, ch 449, 62 Stat. 356 (authorizing enlistment and appointment of women in the active duty and reserve armed forces).

[3] U.S. Dep't of Def. Appropriation Authorization Act, Pub. L. No. 94-106, tit. VIII, 89 Stat. 531 (1975) (authorizing women to attend the U.S. service academies). *See* U.S. DEP'T OF DEF., REPORT TO CONGRESS ON THE REVIEW OF LAWS, POLICIES AND REGULATIONS RESTRICTING THE SERVICE OF FEMALE MEMBERS IN THE U.S. ARMED FORCES (2012). *See also* U.S. DEP'T OF ARMY, DIR. 2012-16, CHANGES TO ARMY POLICY FOR THE ASSIGNMENT OF FEMALE SOLDIERS (27 June 2012).

[4] Memoranda from Sec'y of Army, Chief of Staff of the Army, and Sergeant Major of the Army, announcing African American Black History Month (Feb. 2013), Asian Pacific American Heritage Month (May 2013), National Hispanic Heritage Month (15 Sept.–15 Oct. 2013), and National American Indian Heritage Month (Nov. 2013) (on file with author). *See also* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY ch. 6 (18 Mar. 2008) [hereinafter AR 600-20] (RAR 20 Sept. 2012).

[5] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701–1753.

[6] U.S. DEP'T OF DEF., DIR. 1322.22, SERVICE ACADEMIES para. 4.5.3 (24 Aug. 1994). *See also* AR 600-20, *supra* note 4, para. 4-20. *See also On Quality of Life in the United States Army*, 112th Cong. 2d Sess. (2012) (statement of Sergeant Major of the Army). *See also* Army Sergeant First Class Tyron C. Marshall, Jr., *Pentagon Official Underscores Zero Tolerance Policy for Bullying*, AM. FORCES PRESS SERV., Dec. 21, 2011, *available at* http://www.defense.gov/news/newsarticle.aspx?id=66573. *See also* defense.gov/news/newsarticle.aspx?id=66573. *See also* Donna Miles & Army Sergeant First Class Tyrone C. Marshall, Jr., *Dempsey: Hazing, Bullying 'Intolerable' in Military*, AM. FORCES PRESS SERV., Dec. 23, 2011, *available at* http://www.defense.gov/news/newsarticle.aspx?id=66590.

"Don't Ask, Don't Tell" (DADT) was repealed on September 20, 2011.[7] As a result, lesbian, gay, and bisexual servicemembers can now serve openly and are no longer subject to administrative separation based on homosexual acts, homosexual statements, marriage, or attempts to marry a person of the same biological sex.[8] The lesbian, gay, bisexual, and transgender (LGBT) community championed this historic change.[9] However, a growing, well-funded, organized minority argues that the repeal of DADT was not enough.[10]

The repeal of DADT did not change the prohibition of service for transgender personnel; their service is currently prevented by regulation.[11] In the Army, Army Regulation (AR) 40-501, *Standards of Medical Fitness*, prohibits servicemembers from serving in the military if they have "a history of, or current manifestations . . . of transsexualism, gender identity disorder to include major abnormalities or defects of the

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[7] 10 U.S.C. § 654 (2010) (originally enacted as Don't Ask, Don't Tell Repeal of Act of 2010, Pub. L. No. 111-321, 124 Stat. 3516, (2010)) (codified as Repeal 10 U.S.C. § 654) Act of 2010, triggered review by the military. The review took place and certification was signed by President Obama, Secretary of Def. Gates, and Chairman, Joint Chiefs of Staff Mullen. Implementation of the repeal took place sixty days later. That repeal was formalized by an Under Sec'y of Def. memorandum. *See infra* note 8.

[8] Memorandum from Under Secretary of Def. (Personnel and Readiness), to Secretaries of the Military Departments et al., subject: Repeal of "Don't Ask, Don't Tell" (20 Sept. 2011).

[9] Lieutenant Colonel Steve Loomis, *A Difficult Fight Pays Off*, OUTSERVE MAG., Nov. 2011, at 20. *See also* Aaron McQuade, *GLAAD Applauds Passage of DADT Repeal in House* (Dec. 15, 2010), http://www.glaad.org/2010/12/15/glaad-applauds-passage-of-dadt-repeal-in-house. The Gay & Lesbian Alliance Against Defamation (GLAAD) was founded in 1985. Its stated mission rewrites the script for Lesbian Gay Bisexual Transgender (LGBT) equality in addition to acting as dynamic media force and provoking dialogue that leads to positive change. Gay & Lesbian Alliance Against Defamation (GLAAD), http://www.glaad.org/about#mission. *See also* Sheryl Gay Stolberg, *Obama Signs Away 'Don't Ask, Don't Tell'*, N.Y. TIMES, Dec. 23, 2010.

[10] Tom Vanden Brook, *Transgender Troops Serve in Silence*, USA TODAY, July 23, 2013. *See also* Press Release, Palm Center, Blueprints for Sound Public Policy, New Multi-Year Research Project to Address Transgender Military Service (July 30, 2013) (on file with author). *See also Tawani Foundation, Wells Fargo Award $1.35 Million for Research on Transgender Military Service*, PHILANTHROPY NEWS DIG. (Aug. 1, 2013), http://www.philanthropynewsdigest.org/news/tawani-foundation-wells-fargo-award-1.35-million-for-research-on-transgender-military-service.

[11] U.S. DEP'T OF DEF., INSTR. 6130.03, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION IN THE MILITARY SERVICES para. 29r (28 Apr. 2010) [hereinafter DoDI 6130.03] (C1, 13 Sept. 2011). The following conditions listed are those that do *not* meet the medical standards for appointment, enlistment, or induction into the military services; current or history of psychosexual conditions, including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias.

genitalia such as change of sex or a current attempt to change sex . . . ."[12] The medical diagnoses that prevent transgender servicemembers from serving in the military have a close relationship to the diagnosis criteria found in the Diagnostic and Statistical Manual of Mental Disorders (DSM).[13] The most recent edition, the DSM-5, contains revisions to the diagnoses of those who are not content with their assigned gender or who identify with the opposite gender.[14] These changes more accurately define the diagnosis, reduce the stigma associated with transgender terminology, and remove the diagnosis from being grouped with sexual dysfunctions.[15] In part, based on these changes, the military's perception of transgender individuals is also changing.

The transgender community is slowly gaining acceptance throughout U.S. society, but that acceptance has yet to reach the U.S. armed forces. However, the militaries of U.S. allies accept transgender personnel into their ranks.[16] Australia allows transgender servicemembers to serve openly and advises its defense force, supervisors, and commanders to create a more inclusive workplace and culture for transitioning these

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[12] U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS para. 3-35*a* (14 Dec. 2007) [hereinafter AR 40-501] (RAR 4 Aug. 2011). This regulation covers medical fitness standards for enlistment, induction, and appointment, as well as retention and separation, including retirement. *Id.* para. 1-1.

[13] AM. PSYCHIATRIC ASSOC.: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 535 (4th ed., text rev. 2000) [hereinafter DSM-IV-TR]. *See also* AM. PSYCHIATRIC ASSOC.: DSM-5 DEVELOPMENT, *Frequently Asked Questions*, http://www.dsm5.org/about/Pages/faq.aspx#1 (last visited Mar. 14, 2014). The DSM is an official publication from the American Psychiatric Association (APA). It is the handbook that health care professionals in the United States use as a guide to diagnose patients. Moreover, behavioral health care providers around the world consider it the "authoritative guide" in their profession. *Id.*

[14] AM. PSYCHIATRIC ASSOC.: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 822 (5th ed. 2013) [hereinafter DSM-5]. The Roman numeral was dropped from this edition of the DSM, DSM-5, so incremental updates, i.e., *DSM-5.1*, *DSM-5.2*, etc., can be facilitated until a new edition is required. AM. PSYCHIATRIC ASSOC., *Frequently Asked Questions*, *available at* http://www.dsm5.org/about/Pages/faq.aspx#8.

[15] AM. PSYCHIATRIC ASSOC., GENDER DYSPHORIA (2013) [hereinafter GENDER DYSPHORIA FACT SHEET], *available at* http://www.dsm5.org/Documents/ Gender%20Dysphoria% 20Fact%20Sheet.pdf.

[16] DEP'T OF DEF. (2011) UNDERSTANDING TRANSITIONING GENDER IN THE WORKPLACE (Austl.) (Nov. 10, 2011) [hereinafter UNDERSTANDING TRANSITIONING GENDER IN THE WORKPLACE (Austl.)], *available at* http://www.defglis.com.au/resources/Understanding Transition.pdf. *See also* U.K. MINISTRY OF DEFENCE, DEFENCE INSTR. AND NOTICES (DIN) 2009DIN01-007, POLICY FOR THE RECRUITMENT AND MANAGEMENT OF TRANSSEXUAL PERSONNEL IN THE ARMED FORCES (Jan. 2009) [hereinafter DIN 01-007].

members.[17] Likewise, the United Kingdom (UK) issued statutory protections resulting in transgender troops being held to the same standards as their colleagues.[18] Although the U.S. military still prohibits transgender service, changes within U.S. society, as discussed later in this article, indicate legislators may need to reevaluate the current prohibition.

This article contains five sections. First, it identifies the terminology associated with being transgender as well as the changes included in the most recent publication of the DSM. Then, a discussion follows on the current procedures in place that prevent transgender recruits and servicemembers from serving in the U.S. armed forces, specifically in the U.S. Army.[19] Third, this article examines the policy and legislative changes that U.S. allies have taken to include transgender servicemembers in their defense force. Fourth, a survey of grassroots campaigns to overturn the military's prohibition against transgender service assists the reader in understanding how the current service of civilian transgender personnel in the DoD will benefit the military as it creates and fosters an atmosphere of tolerance and acceptance. The fifth section of this article reviews recent court decisions, legislative action, and Veterans Affairs (VA) policy that indicate an increased level of acceptance in society for transgender individuals. The U.S. military rarely makes policy changes in a vacuum. Before delving into transgender evolution in foreign services and in U.S. courts, it is helpful to review the history of transgender issues in both the medical and the military communities.

II. The Evolution of Transgender in the Diagnostic and Statistical Manual of Mental Disorders

The DSM is an official publication of the American Psychiatric

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[17] AIR FORCE DIVERSITY HANDBOOK: TRANSITIONING GENDER IN AIR FORCE 5 (Austl.) (Apr. 2013), *available at* http://defglis.com.au/guides/GenderTransition.pdf. *See also* UNDERSTANDING TRANSITIONING GENDER IN IHE WORKPLACE (Austl.), *supra* note 16.

[18] The Sex Discrimination Act 1975 (U.K.), Sex Discrimination (Gender Reassignment) Regulations 1999 (U.K.), Gender Recognition Act 2004 (U.K.). *See also* DIN 01-007, *supra* note 16.

[19] This article does not address potential impacts on the military health system or on TRICARE, the health care program serving uniformed servicemembers, retirees, and their families worldwide. This article evaluates the current prohibition of transgender servicemembers as it relates to the Army and policy implications.

Association (APA) that is used by clinicians, physicians, researchers, and mental health professionals to diagnose and classify mental disorders.[20] Historically, U.S. mental health statistics were gathered by census in order to determine mental illness frequency in the population.[21] After World War II, with the assistance of the U.S. Army, a broader set of diagnoses were developed to address the mental health of returning servicemen and veterans.[22] Since that time, the APA has published numerous editions of the DSM, beginning with the DSM-I in 1952, and most recently, the DSM-5 in May 2013.[23]

Transgender is an inclusive term referring to the broad spectrum of individuals who transiently or persistently identify with the gender that is the opposite of their natal gender.[24] The term transgender can also include transsexuals and cross-dressers.[25] A transsexual is an individual who lives full-time in a gender role consistent with his or her inner gender identity, and not his or her natal gender, with or without surgery.[26] Sex reassignment surgery is not a requirement to be identified specifically as a transsexual or in the broader category of transgender. Gender Dysphoria (GD) replaced Gender Identity Disorder (GID) as a diagnosis in the most recent DSM publication that falls within the category of transgender, as explained below.

Before the DSM-5, the version of the DSM was the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR), published in 2000. The DSM-IV-TR diagnosis of GID was based upon two components. The first component required that a person demonstrate evidence of a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of

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[20] GENDER DYSPHORIA FACT SHEET, *supra* note 15.

[21] AM. PSYCHIATRIC ASSOC., *DSM: History of the Manual*, *available at* http://www.www.psychiatry.org/practice/dsm/dsm-history-of-the-manual (last visited Feb. 28, 2014).

[22] *Id*.

[23] *Id*.

[24] GENDER IDENTITY RESEARCH AND EDUCATION SOCIETY (GIRES), GENDER VARIANCE (DYSPHORIA), vers. 2.0 (rev. Aug. 31, 2008), *available at* http://www.gires.org.uk/assets/gdev/gender-dysphoria.pdf. *See also* DSM-5, *supra* note 14 at 451, 822. Gender Assignment is defined as "[t]he initial assignment as male or female, which usually occurs at birth and is subsequently referred to as the 'natal gender.'"

[25] HOWELL, *supra* note 1, at 194. *See also* GLAAD MEDIA REFERENCE GUIDE TRANSGENDER GLOSSARY OF TERMS, *available at* http://www.glaad.org/reference/transgender (last visited Feb. 28, 2014).

[26] HOWELL, *supra* note 1, at 194.

the opposite sex.[27] The second component encompassed an individual showing evidence of persistent discomfort about one's assigned birth sex or a sense of inappropriateness in the gender role of that sex.[28] The DSM-IV-TR groups the GID diagnosis in a chapter with Sexual Desire Disorders, Orgasmic Disorders, Sexual Pain Disorders, other Sexual Dysfunctions and Paraphilias.[29] The diagnosis and alignment, however, was short-lived, as the DSM-5, recently published in 2013, does not list GID as a diagnosis. Further, the DSM-5 removes the new diagnosis, which is now classified as GD from the chapter of Sexual Desire Disorders, Sexual Dysfunctions, and Paraphilias and places it in its own independent chapter.[30] This is significant because the grouping of GID with the other diagnoses in the DSM-IV-TR matches the grouping in the Army regulation. Now that GD is in its own chapter, separate from the other diagnoses, it will be a challenge to keep GD with the other diagnoses in any update or revision to AR 40-501.[31]

As with the diagnosis of GID, the diagnosis of GD has two components. The first component requires that an individual has a marked incongruence between his gender expression and his assigned gender at birth or natal gender.[32] The second component is that the incongruence results in distress for the individual.[33] The change in diagnosis aspires to better characterize the experiences of affected children, adolescents, and adults.[34] The DSM-5 diagnosis of GD is an effort to "emphasize the phenomenon of 'gender incongruence' rather than cross-gender identification."[35] The chapter change removes the

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[27] DSM-IV-TR, *supra* note 13, at 576.

[28] *Id*.

[29] *Id*. at 535. Paraphilias are characterized by recurrent, intense sexual urges, fantasies, or behaviors that involve unusual objects, activities, or situations and cause clinically significant distress or impairment in social, occupational, or other important areas of functioning. Paraphilias include Exhibitionism, Fetishism, Pedophilia, Sexual Masochism, and Sexual Sadism. *Id*.

[30] DSM-5, *supra* note 14, at 451.

[31] For the Army, the challenge in keeping GD with the previous groupings is that the Army would be ignoring a significant shift in the DSM-5, which is considered the "bible" of American psychiatry.

[32] *Id.* at 453.

[33] *Id*.

[34] GENDER DYSPHORIA FACT SHEET, *supra* note 15. The new diagnostic name is more applicable to the symptoms and behaviors of the patient yet does not jeopardize access to treatment options.

[35] DSM-5, *supra* note 14, at 814. Gender Dysphoria (GD) takes into account the wide variation of gender-incongruent conditions that an individual can experience, whereas Gender Identity Disorder (GID) only addressed the identification with the opposite sex,

diagnosis from being considered a sexual dysfunction and treats it as a mental health issue. Additionally, the changes in the new edition avoid stigmatizing GD individuals by offering a diagnostic name that is more appropriate, without jeopardizing access to effective treatment options.[36] These changes are expected to allow insured clinical care for individuals who express themselves differently from their birth gender.[37]

Despite being considered the "bible of psychology," [38] not all mental health professionals agree that DSM-5, or its development process, is perfect. Gary Greenberg, a practicing psychotherapist who participated in the development of the DSM-5, is critical of its revision process and is largely skeptical of the DSM-5.[39] In *The Book of Woe* he details what he observes as flaws in the DSM-5 research and revision process by questioning the politics and business of psychiatry and the APA.[40] Similarly frustrated with the DSM-5 is Dr. Allen Frances, who led the DSM-IV edition.[41] As a leader in the psychiatric community, Dr. Frances was privy to the proposed changes to the DSM-5 before its publication.[42] In his book, *Saving Normal*, he cautions the public and his colleagues that using the new DSM-5 may lead to mislabeling normal people, promoting diagnostic inflation, and encouraging medical

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male or female. *DSM-V Self-Exam: Gender Dysphoria*, PSYCHIATRY ONLINE (Oct. 30, 2013), http://psychnews.psychiatryonline.org/newsArticle.aspx?articleid=1764484&RelatedWid.

[36] GENDER DYSPHORIA FACT SHEET, *supra* note 15.

[37] *Id*. *See also* Kelly Winters, *Gender Dysphoria Diagnosis to be Moved Out of Sexual Disorders Chapter of DSM-5* (The Bilerico Project), Dec. 9, 2012, *available at* http://www.bilerico.com/2012/12/gender_dysphoria_diagnosis_to_be_moved_out_of_sexu.php (last visited Mar. 2, 2014).

[38] Sharon Begley, *Psychiatrists Unveil Their Long-Awaited Diagnostic "Bible,"* REUTERS, May 17, 2013, *available at* http://www.reuters.com/article/2013/05/17/us-science-psychiatry-dsm-idUSBRE94G04420130517 (last visited Mar. 2, 2014).

[39] GARY GREENBERG, THE BOOK OF WOE 287 (2013). Gary Greenberg is the author of four books, a contributing writer for *Mother Jones*, and a contributing editor for *Harper's*. Gary Greenberg, *Biography*, http://www.garygreenbergonline.com/pages/bio.php.

[40] *Id*.

[41] ALLEN FRANCES, SAVING NORMAL: AN INSIDER'S REVOLT AGAINST OUT OF CONTROL PSYCHIATRIC DIAGNOSIS, DSM-5, BIG PHARMA, AND THE MEDICALIZATION OF ORDINARY LIFE, at xiii (2013). Allen Frances, M.D., was the chairman of the DSM-IV Task Force and part of the leadership group for DSM-III and DSM-III-R. He is Professor Emeritus and Chair of the Department of Psychiatry and Behavioral Science at Duke University School of Medicine. The following websites provide further details on the Duke faculty and Allen Frances: http://psychiatry.duke.edu/faculty/details/0098224, http://www.psychiatrictimes.com/authors/allen-frances-md.

[42] FRANCES, *supra* note 41, at 172–76.

providers to prescribe medication inappropriately.[43] Moreover, he argues that the danger of increased prescription medications in the mental health world will impede a patient's ability to heal himself.[44]

While both authors take issue with numerous parts of the DSM-5, such as the research validity or certain diagnoses, neither challenges the removal of GID or its replacement of GD. With the absence of GID from the DSM-5 and the addition of GD in a different chapter from Sexual Disorders, Sexual Dysfunctions, and Paraphillias, the military must evaluate and reform its policies and regulations addressing transgender servicemembers because the current Army regulation still reflects GID, not the more modern and medically accurate GD diagnosis.[45]

III. Current State of Transgender in the Military

Department of Defense Instruction (DoDI) 6130.03, last updated in 2011, contains the DoD's policy and guidance on medical standards for the assessment and retention of military personnel.[46] These standards are subject to periodic review by the DoD and are based on the needs of the military.[47] By operation of DoDI 6130.03, the Secretary of Defense (SecDef) directs the Secretaries of the Military Departments to develop and enforce those medical standards.[48] If a recruit or servicemember is unable to meet medical standards to assess or remain in the armed forces, DoDI 6130.03 permits each branch of service to exclude or discharge that individual from the military.[49] Each service has the ability to waive

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[43] *Id*. at 3–34.
[44] *Id*. at xx, 209–11.
[45] DSM-5, *supra* note 14.
[46] DoDI 6130.03, *supra* note 11, enclosure 4, para. 29r.
[47] U.S. DEP'T OF DEF., INSTR. 5025.01, DOD DIRECTIVES PROGRAM para. 3c (26 Sept. 2012) (C1, 20 Aug. 2013). The Secretary of Defense (SecDef) derives his power to exercise authority, direction, and control of the Department of Defense (DoD) from 10 U.S.C. § 113. To establish and implement his policies, delegate authorities, and to lead the DoD, the SecDef uses a number of DoD Issuances to communicate his message. These official issuances include DoD Directives (DoDD), DoD Instructions (DoDI), DoD Manuals (DoDM), and other similar documents.
[48] DoDI 6130.03, *supra* note 11, enclosure 2, para. 3.
[49] *Id*. A recruit can enter the military and not disclose his desire to express himself in a different gender. After becoming a member of the armed forces, that individual may express himself as a transgender individual. Once that happens, the military may initiate proceedings to separate the individual from the service. *Id*.

accession standards found in the DoDI based on individual service needs.[50] Accession standards outline the minimum medical standard required for any and all service positions while retention standards are specific to each service.[51]

In the Army, Army Regulation 40-501, Standards of Medical Fitness addresses retention standards. The regulation was last revised in 2011.[52] In this regulation, a person diagnosed with GID is administratively unfit for service.[53] Such a declaration in the Army is significant. An "administratively unfit" finding prohibits the individual from being medically evaluated for continued service.[54] The approach is different from most other diagnoses enumerated in AR 40-501. Other diagnoses allow unfit soldiers to be reconsidered for service through the Army's Medical Evaluation Board (MEB) and Physical Evaluation Board (PEB) system.[55] These boards are the Army's mechanism for evaluating whether a soldier with an ailment or diagnosis, such as a mental health diagnosis, can continue his military service.[56] A Soldier who is diagnosed who can continue performing his responsibilities in the Army will continue serving. Notably, individuals with GID or GD cannot even be evaluated for further military service in the U.S. Army. The GID or GD diagnosis removes the ability for their cases to be treated individually. They may, however, be able to continue to serve in the military of our allies.[57]

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[50] *Id*. enclosure 2, para. 3b.

[51] *Id*. para. 1b. Being free from a contagious disease that will probably endanger the health of other personnel and being medically capable of completing required training are two examples of accession standards. *See id*. para. 4c(1) & (3). Soldiers incapable of performing their duties with a hearing aid or soldiers that have challenges with range of motion for one of their joints are examples of retention standards that would require medical review for continued service. *See* AR 40-501, *supra* note 12, paras. 3-10*a* and 3-12*b*.

[52] AR 40-501, *supra* note 12, at Summary of Change. The revisions in 2011 implemented the Don't Ask, Don't Tell Repeal Act of 2010 by deleting references to separation for homosexual conduct. *Id.*

[53] *Id.* para. 3-35*b*. *See also* U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS chs. 3–5 (6 June 2005) (RAR 6 Sept. 2011). A soldier who is administratively unfit for service and is separated may lose continued benefits, health care, and retirement.

[54] *Id*. para. 3-3.

[55] *Id*.

[56] U.S. DEP'T OF DEF., INSTR. 1332.38, PHYSICAL DISABILITY EVALUATION enclosure 3 (14 Nov. 1996) (C2, 10 Apr. 2013).

[57] DR. JOYCELYN ELDERS & REAR ADMIRAL ALAN M. STEINMAN (RET.), REPORT OF THE TRANSGENDER MILITARY SERVICE COMMISSION 21 (Mar. 2014) [hereinafter REPORT OF THE TRANSGENDER MILITARY SERVICE COMMISSION], *available at* http://www.

IV. Foreign Services Allowing Transgender Servicemembers

A. Australia

The Australian Defence Force (ADF) allows transgender military members to serve openly.[58] The ADF's acceptance of transgender servicemembers results from parliamentary action and regulatory implementation.[59] The ADF regulations state, "Defence is committed to fostering a diverse, inclusive, equitable, fair and safe work environment."[60] The Australian military is dedicated to fostering an environment of trust and openness where people are comfortable and can demonstrate initiative, efficiency, and effectiveness.[61]

Historically, the Australian government and the leadership of the ADF have sought to expand the diversity of its military. In November 1992, the Australian government ended its ban on homosexuals serving in the military,[62] nineteen years before the United States repealed DADT. Today, the ADF shows public support of its homosexual and transgender servicemembers in a variety of ways.

On March 2, 2013, in celebration of the twentieth anniversary since lifting its ban on gays and lesbians serving in the military,[63] the ADF authorized attendance for ADF members to march in formation and in

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palmcenter.org/files/Transgender%20Military%20Service%20Report.pdf. The report focuses on the current regulatory rationale that prevents transgender service as well as the medical aspects of transgender service—mental health, cross-sex hormone therapy, gender confirming surgery, deployability, and adaptability and continuity of care. This report is part of the Transgender Military Initiative that is being funded by the Tawani foundation and Wells Fargo. The Tawani Foundation, *infra* note 79. This report states that at least twelve countries allow transgender personnel to serve; Australia, Belgium, Canada, the Czech Republic, Denmark, Israel, the Netherlands, New Zealand, Norway, Spain, Sweden, and the UK.

[58] The Australian Defence Force (ADF) is comprised of the Royal Australian Air Force, the Royal Australian Navy, and the Australian Army. *See* DEFENCEJOBS.GOV, http://www.defencejobs.gov.au/.

[59] *Sex Discrimination Act 1984* (Cth) pts. 5A and 5B (Austl.). DEP. PERSONNEL INSTR. 1/2001 EQUITY AND DIVERSITY IN THE DEP. OF DEFENCE (Austl.) (22 Jan. 2001).

[60] UNDERSTANDING TRANSITIONING GENDER IN THE WORKPLACE (Austl.), *supra* note 16, at 3.

[61] *Id*.

[62] *Sex Discrimination Act 1984* (Cth) pt. 5A (Austl.).

[63] *Australia Ends a Prohibition on Homosexuals in Military*, N.Y. TIMES, Nov. 24, 1992, http://www.nytimes.com/1992/11/24/world/australia-ends-a-prohibition-on-homo sexuals-in-military.html.

uniform at the Sydney Mardi Gras Parade.[64] An additional purpose of this display was to generate positive media coverage of the Defence's respect for and inclusion of transgender individuals.[65] In another example, the Australian Chief of the Air Force, Air Marshal Geoff Brown, published a handbook to assist transgender servicemembers and their supervisors in creating a more inclusive workplace and culture for transitioning members.[66] This handbook covers outreach sources, as well as a roadmap outlining all expectations for affected personnel during the transition.[67] Further, the ADF has publicly supported the transition of a senior officer.[68] In addition, another strong ally of the United States has

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[64] THE AUSTRALIAN DEFENCE LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX INFORMATION SERV. (DEFGLIS), ADMIN. INSTR. NO. 01/2012, amend. 1 (Feb. 21, 2013). The Sydney Mardi Gras parade is the largest event of the annual Sydney Gay and Lesbian Mardi Gras. The organizing group, Sydney Gay and Lesbian Mardi Gras (SGLMG) holds the event in order to raise the visibility of the lesbian, gay, bisexual, transgender, queer, and intersex communities. *About*, MARDIGRAS.ORG, http://www.mardigras.org.au/homepage/about/ (last visited Mar. 2, 2014).

[65] *Id*.

[66] AIR FORCE DIVERSITY HANDBOOK: TRANSITIONING GENDER IN AIR FORCE 5 (Austl.) (Apr. 2013), *available at* http://defglis.com.au/guides/GenderTransition.pdf. Air Marshal Geoff Brown is the current Chief of Air Force for the Royal Australian Air Force (RAAF). He joined the RAAF in 1980. Since that time he has more than five thousand hours in military aircraft and has held multiple leadership positions. AIRFORCE.GOV.AU, http://www.airforce.gov.au/Our_People/Our_Leaders/Chief_of_Air_Force/?RAAF-cIPygzYc/Fwxxi5dCKVD3g8SFEpfUGXS.

[67] *Id*.

[68] Recently, the ADF publicly showed its support of transgender personnel in its treatment of Australian Army Lieutenant Colonel (Lt Col) Cate McGregor. Lieutenant Colonel Cate McGregor, before she changed her name, was known as Lt Col Malcolm McGregor. Ian McPhedran, *Transgender Lieutenant Colonel Cate McGregor Speaks Out About Abuse and Support*, NEWS.COM.AU, July 5, 2013, http://www.news.com.au/national/transgender-lieutenant-colonel-cate-mcgregor-speaks-out-about-abuse-and-support/story-fncynjr2-1226674523255. Lieutenant Colonel McGregor is the highest-ranking transgender person in the ADF. She is a published author, MALCOLM MCGREGOR, AN INDIAN SUMMER OF CRICKET: REFLECTIONS ON AUSTRALIA'S SUMMER GAME (2012), and former reporter on the sport of cricket. Cate McGregor, *Pointing to the End of a Legendary Generation*, AUSTRALIAN FIN. REV., Dec. 1, 2012; *Clark Wins Struggle for Acceptance*, AUSTRALIAN FIN. REV., Nov. 24, 2012; *Australia Questions Cricket*, AUSTRALIAN FIN. REV., Nov. 17, 2012; *Too Early to Tell*, AUSTRALIAN FIN. REV., Nov. 13, 2012. She is also a speechwriter for the senior Australian Army Officer, Army Chief, Lieutenant General (Lt Gen) David Morrison. McPhedran, *supra*. In the summer of 2013, Lt Gen Morrison gained international attention for his speech that addressed the behavior of Australian military officers and non-commissioned officers who, without consent, produced and distributed, on defence computers, videos, and pictures of themselves having sex with women who were members of the ADF. *Id*. *See also* Australian Associated Press, *ADF Officers Allegedly Emailed Sex Films*, HERALD SUN (Austl.), June 14, 2013 *available at* http://www.heraldsun.com.au/news/breaking-

opened its military to transgender servicemembers in an attempt to advance tolerance and acceptance within its ranks.

B. United Kingdom

The United Kingdom enacted laws over the past four decades eliminating discrimination, including transgender discrimination. This legal position is reflected in military policy and practice. In 1975, the Sex Discrimination Act (SDA) guaranteed a servicemember would not be subject to discrimination based on individual sex.[69] In 1999, the SDA expanded anti-discrimination rights to those undergoing gender reassignment. The expansion is known as the Sex Discrimination Regulations of 1999 and covers "persons who intend to undergo, are undergoing or have undergone gender reassignment."[70] In addition to the SDA and the Sex Discrimination Regulations of 1999, the UK continued to legislate to ensure equality. In the last decade, the UK enacted the Gender Recognition Act of 2004, which governs the legal rights related to changing gender; the Equality Act of 2006, establishing a Commission of Equality and Human Rights; and the Equality Act of 2010, which replaced the SDA and other anti-discrimination acts.[71]

Despite the legislation, the Ministry of Defence (MoD) was still challenged with enhancing tolerance, opportunity, and equality. The Armed Forces Act of 2006 created the Services Complaints Commissioner.[72] The position was created to help combat improper

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news/adf-officers-allegedly-emailed-sex-films/story-fni0xqi4-1226663588676. His tone and speech emphasized the ADF's intolerance for the denigrating behavior. *Chief of Army Message Regarding Unacceptable Behavior* (June 12, 2013), http://www.youtube.com/watch?v=QaqpoeVgr8U&list=UUSXqARiuZFpFaRDE_056y3w&feature=c4-overoverview. Lieutenant General Morrison's speech was authored by Lt Col Cate McGregor. McPhedran, *supra*. Lieutenant Colonel McGregor recently took part in an interview about her transition and the professional relationship she shares with Lt Gen Morrison, both currently as a woman, and formerly as a man. Interview by Jane Hutcheon, Australian Broadcasting Corp. (ABC) journalist and host of One Plus One, with Lieutenant Colonel Cate McGregor, Speechwriter to Australian Chief of Army Lt Gen David Morrison, http://www.abc.net.au/news/2013-07-05/one-plus-one-lieutenant-colonel-cate-mcgregor/4802564. Despite the attention her transition has brought to Lt Gen Morrison, Lt Col McGregor retains his support. *Id.*

[69] Sex Discrimination Act 1975, ch. 65, §§ 6, 7, 85 (U.K.).

[70] Sex Discrimination (Gender Reassignment) Regulations 1999, § 7(1) (U.K.).

[71] Gender Recognition Act 2004, ch. 7 (U.K.), Equality Act 2006, ch. 3 (UK), Equality Act 2010, ch. 15 (U.K.).

[72] Armed Forces Act 2006, ch. 52 § 334–39, 366 (U.K.).

behavior in the armed forces, including bullying, harassment, and unlawful discrimination.[73] In addition to the legislation and creation of an office to monitor and address soldier complaints, the MoD implemented regulatory guidance detailing expectations of transgender recruits, transgender personnel and their managers.[74] These policies and regulations provide guidelines on how to address issues involving transgender servicemembers, including accession, gender reassignment surgeries, physical fitness standards, housing, law enforcement, and detention by the military police.[75] Although the transition has taken decades, the UK has made great strides in achieving its stated goal of gender equality throughout its government.

C. Other U.S. Allies

It is important to recognize that deployed U.S. troops may serve with transgender personnel from other militaries in a joint environment. In addition to Australia and the UK, other U.S. allies also support transgender servicemembers. Since 1998, the Canadian military affords its soldiers the right to have government-funded gender reassignment surgery.[76] Canada also requires those servicemembers who emotionally and psychologically feel they belong to the opposite sex to wear the uniform of their target gender.[77] Israel has also reportedly started to accept transgender recruits; in August of 2013, the press reported that a female-to-male transgender soldier was accepted for conscription into the Israeli military.[78] Not all U.S. allies allow transgender servicemembers, but the Pentagon should take note that its closest allies do allow

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[73] Press Release, Service Complaints Commissioner for the Armed Forces, After 5 Years the Armed Forces Complaints System is Still Inefficient and Undermines Confidence in the Chain of Command. Service Complaints Commissioner Urges Ombudsman as Way Ahead (U.K.) (Mar. 21, 2013) (on file with author).

[74] DIN 01-007, *supra* note 16. *See also* Equality and Diversity of Schemes 2008–2011, Ministry of Defence (U.K.).

[75] DIN 01-007, *supra* note 16.

[76] Thaddeus Baklinski, *Canadian Military Established Dress Rules for Transsexuals*, LIFESITENEWS.COM. (Dec. 8, 2010, 16:59 EST), http://www.lifesitenews.com/news/canadian-military-establishes-dress-rules-for-transsexuals?utm_tm_source=LifeSiteNews.com+Daily+Newsletter&utm_campaign=7cf5fdde7e-LifeSiteNews_com_US_Headlines12_08_2010&utm_medium=email.

[77] *Id*.

[78] Cheryl K. Chumley, *Israel Drafts First Transgender Female Soldier*, WASH. TIMES, Aug. 15, 2013, *available at* http://www.washingtontimes.com/news/2013/aug/15/israel-drafts-first-transgender-female-soldier/.

transgender service.

V. Grassroots Movement to Change the U.S. Military Ban

Organizational change is not always generated by high-level leadership. Outside forces and individual ideas from within can sometimes play a significant role leading to change. The push to allow transgender servicemembers is a hybrid of interior and exterior forces attempting to effect change. As stated earlier, current regulations do not allow a transgender individual to serve in the military. To explore the possibility of transgender service in the U.S. military, the Tawani Foundation[79] and Wells Fargo donated more than $1.35 million to the Palm Center to fund the Transgender Military Service Initiative in July 2013.[80] The grant is being used to conduct eleven studies on whether and how the U.S. armed forces could include transgender troops without undermining readiness.[81]

In addition to the research at the Palm Center, other parties are also advocating for transgender service. In July 2013, Kristen Beck, formerly Chris Beck, a retired U.S. Navy Senior Chief–Sea, Air, and Land (SEAL), published a book detailing the struggles she faced growing up and serving in the Navy.[82] Although Kristen had to conceal her true self,

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[79] The Tawani Foundation was founded by Colonel Jennifer N. Pritzker (IL) ARNG (Retired). Formerly known as James Pritzker, Jennifer Pritzker announced on August 16, 2013, that she identifies as a woman (Tawani Foundation). *See also* Press Release, Palm Ctr., New Multi-Year Research Project to Address Transgender Military Service (July 30, 2013), http://www.palmcenter.org/files/July-30-13-release.pdf.

[80] The Palm Center, founded in 1998, originally was known as the Center for the Study of Sexual Minorities in the Military (CSSMM) and was housed at the University of California, Santa Barbara. In 2006, in recognition of a $1 million dollar endowment gift from the Michael D. Palm Foundation, the Center was renamed. From 1998 to 2012 the Palm Center's "don't ask, don't tell" project sponsored state-of-the-art scholarships on the impact of the DADT policy on military effectiveness. Palm Center research has been cited on the floor of Congress and covered by newspapers and radio and television stations throughout the world. Palm scholars have delivered briefings and lectures at the British Ministry of Defence, the U.S. Military Acad. at West Point, the U.S. Naval Acad., the U.S. Air Force Acad., the Army War Coll. and the Nat'l Def. Univ., *available at* http://www.palmcenter.org/dadt_project (last visited June 16, 2014).

[81] Press Release, Ind. Univ. Bloomington, Kinsey Institute Receives Grant to Study Transgender Issues in the U.S. Military (Aug. 22, 2013), http://newsinfo.iu.edu/news/page/normal/24519.html.

[82] KRISTEN BECK & ANNE SPECKHARD, WARRIOR PRINCESS: A U.S. NAVY SEAL'S JOURNEY TO COMING OUT TRANSGENDER (2013). Chris Beck grew up as a boy. He joined the Navy and became part of the Navy Sea, Air, Land Team (SEAL). He served

her struggle to live with the internal conflict did not detract from her or her unit's missions and responsibilities.[83] While it is an individual account, her story illustrates how transgender service is possible. Groups such as the Transgender American Veterans Association (TAVA), the Servicemembers Legal Defense Network, SPART*A (an LGBT military community), and the National Center for Transgender Equality are also advocating that transgender men and women should be allowed to serve.[84]

While outside influences calling for change in transgender service are encouraging, real change will still require support from senior leadership. In June 2013, Secretary of Defense Chuck Hagel portrayed strong optimism at an LGBT Pride Month event at the Pentagon Auditorium.[85] Secretary Hagel recognized the contributions that gay and lesbian servicemembers make and the struggles that they may endure.[86] Further, Secretary Hagel remarked how integral LGBT civilians are to the United States.[87] Although his words were not an endorsement of transgender service in the military, he was the first Secretary of Defense to ever speak at a Pride event. The former executive director of the LGBT military organization, OutServe-SLDN,[88] thought that Secretary

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for twenty years and went on thirteen deployments. While in the Navy, he earned a Purple Heart and a Bronze Medal with "V" device in addition to many other awards. Since 2013, Kristen has lived her life as a woman and is a speaker and activist in the transgender community. *Id*.

[83] *Id*. at 85–94.

[84] TAVA (Transgender American Veterans Association), http://tavausa.org/ (last visited Mar. 2, 2014). *See also* OutServe-Servicemembers Legal Defense Network, http://www.sldn.org/ (last visited Mar. 2, 2014); SPART*A, Service Members [sic], Partners, Allies for Respect and Tolerance for All. SPART*A is a group of LGBT people who currently serve or have served in the military http://www.spartapride.org/ (last visited June 15, 2014). Nat'l Ctr. for Transgender Equal., http://transequality.org/ (last visited Mar. 2, 2014).

[85] Proclamation 8989 Lesbian, Gay, Bisexual, and Transgender Pride Month, 2013 DAILY COMP. PRES. DOC. (May 31, 2013). President Obama proclaimed June 2013 as LGBT Pride month. In his proclamation he stated that his administration has extended hate crime protections to include attacks on gender identity, has prohibited discrimination based on gender identity in federal housing, and has implemented the Affordable Care Act, which prohibits insurers from denying coverage to consumers based on their gender identity.

[86] Chuck Hagel, U.S. Sec'y of Def., Remarks by Secretary Hagel at the Lesbian, Gay, Bisexual, Transgender Pride Month Event in the Pentagon Auditorium (June 25, 2013).

[87] *Id*.

[88] Outserve-SLDN is an organization that empowers, supports, and defends the DoD and military service LGBT community. Their mission is to "educate the community, provide legal services, advocate for authentic transgender service, provide developmental

Hagel's attendance and speech served as a nod to transgender civilians and was a big step in the long road toward transgender equality for servicemembers.[89] Senior leaders might consider looking to cultural shifts in the United States, as well as judicial and legislative changes, as reasons for policy changes regarding transgender service in the military.

VI. Culture Shift and Judicial and Legislative Changes

The U.S. Office of Personnel Management (OPM), which oversees all policy created to support federal human resources departments, ensures that its employees are treated with dignity and respect, including transgender employees.[90] The OPM policy addresses how it accommodates employees during their transition process, the responsibilities of transgender employees, and the expectations of managers.[91] The policy protections offered by the OPM are grounded in legal precedent and administrative rulings. A review of key cases in the area of gender equality is helpful to understand why the military should consider allowing transgender servicemembers to serve in the U.S. military.

A. *Price Waterhouse v. Hopkins*

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin.[92] In 1989, the U.S. Supreme Court, in *Price Waterhouse v. Hopkins*, found that "sex" does include gender, and when gender stereotyping is used to make employment decisions, those decisions are viewed as sex-based discrimination.[93] As a result, lower courts rely on *Price Waterhouse* for

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opportunities, support members and local chapters, communicate effectively, and work towards equality for all." *See* http://www.sldn.org/pages/about-sldn-vision-mission-and-goals**.**

[89] Chris Johnson, *Hagel Addresses LGBT Service Members at Pride Event*, WASH. BLADE (June 25, 2013), http://www.washingtonblade.com/2013/06/25/hagel-says-gay-troops-integral-to-u-s-military/.

[90] *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, OPM.GOV, http://www. www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/ (last visited Feb. 10, 2014).

[91] *Id*.

[92] Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000 (LexisNexis 2014).

[93] Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989). *Price Waterhouse v. Hopkins* is a non-transgender case that involved Hopkins, an employee at a large

Title VII purposes and expand the gender stereotyping laws to apply to transgender individuals. In 2011, following the precedent set in *Price Waterhouse*, the U.S. Court of Appeals for the Eleventh Circuit decided *Glenn v. Brumby*,[94] the case of a transgender employee who lost her job when she began to transition from male to female and did not fit within the gender stereotype expected by her boss.

B. *Glenn v. Brumby*

In *Glenn*, a former U.S. Naval officer was employed as an editor in the Georgia General Assembly's Office of Legislative Counsel (OLC).[95] Her employment was terminated when she informed her boss of her intent to transition.[96] Glenn sought relief from the courts under the Equal Protection Clause of the Fourteenth Amendment for being discriminated against based on her sex and her failure to conform to the gender roles that Brumby, head of the Georgia General Assembly's OLC and responsible for personnel decisions, perceived were appropriate.[97] After citing *Price Waterhouse* and a number of other circuit decisions that followed, the court found that Brumby, the defendant, did not provide a sufficient purpose for terminating an employee other than "gender non-conformity."[98] As a result, the court held that Brumby violated Glenn's Fourteenth Amendment rights.[99] This decision illustrates the absence of federal law prohibiting discrimination against transgender employees is an impediment to employment-free from discrimination. *Price Waterhouse v. Hopkins* and *Glenn v. Brumby* are cases that provide a legal foundation for future legislation; however, those cases had limited effect on the widespread expansion of the implementation of transgender rights. The Equal Employment Opportunity Commission (EEOC) increased the impact of those decisions by expanding transgender rights

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accounting firm, who was nominated for partnership. She was ultimately denied that partnership because the firm determined that her behavior was not in line with her gender. The court found that gender-stereotyping by the accounting firm was in violation of Title VII's anti-discrimination sex statute. Hopkins was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" in order to be more competitive for a partnership position. *Id.* at 235 (citing 618 F. Supp. 1109, 117 (D.D.C. 1985)).

[94] Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

[95] *Id*. at 1314.

[96] *Id.*

[97] *Id*.

[98] *Id*. at 1321.

[99] *Id*.

in its seminal case involving transgender employees.

C. *Macy v. Holder*

On April 20, 2012, the EEOC issued a decision that transgender employees are protected from discrimination under Title VII of the Civil Rights Act of 1964.[100] The impact of this decision is far-reaching, as the EEOC is the independent federal agency in charge of investigating allegations of discrimination against employers.[101] This ruling issued a legal remedy for transgender employees in the public and private sector claiming sex and gender nonconforming-based employment discrimination.[102] As a result of the EEOC decision in *Macy*, transgender individuals who experiences employment discrimination because of their transgender status will now have access to legal protection through the EEOC under a sex discrimination claim.

The EEOC decision, as well as the *Price Waterhouse* precedent, places the transgender community on equal footing with other protected classes. Despite the expansive interpretation of Title VII by the courts and the EEOC, federal law does not support employment rights of those in the transgender community. To fill the legislative void, U.S. Senator Jeff Merkley (D-Or.) introduced the Employment Non-Discrimination

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[100] Macy v. Holder, EEOC No. 0120120821 (Apr. 20, 2012). Mia Macy was a military veteran and police detective when she applied for a position as a ballistics technician with the Bureau of Alcohol, Tobacco, Firearms and Explosives. During the interview process she presented herself as a man and was in the early stages of transitioning. She had not legally changed her name or presented herself as a woman. She was notified that she had earned the job pending a background check. During the background check process, Macy informed the party responsible for filling the position that she was in transition. Five days later, Macy was informed the position was no longer hers due to federal budget reduction eliminating the position. In reality, the agency had hired someone else for the position. Shortly thereafter, Macy filed an Equal Employment Opportunity (EEO) complaint citing discrimination based on sex, gender identity, and sex stereotyping. *Id.* While a decision from the EEOC is not binding on courts because it is an Executive Branch agency, it can be influential in the judicial and legislative process. A dissatisfied party to an EEOC decision may file a civil action in U.S. District Court. *Frequently Asked Questions About the Federal Sector Hearing Process*, http://eeoc.gov/federal/fed_employees/faq_hearing.cfm#q38 (last visited Mar. 13, 2014). *See also* DANA BEYER & JILLIAN T. WEISS WITH RIKI WILCHINS, NEW TITLE VII AND EEOC RULINGS PROTECT TRANSGENDER EMPLOYEES 3 (2014), http://transgenderlawcenter.org/wp-content/uploads/2014/01/TitleVII-Report-Final012414.pdf.

[101] EQUAL EMP'T OPPORTUNITY COMMISSION, *Overview, Authority and Role*, *available at* http://www.eeoc.gov/eeoc/index.cfm.

[102] Macy v. Holder, EEOC No. 0120120821.

Act (ENDA), which seeks to protect the employment rights not only of the transgender community, but also of the lesbian, gay, and bisexual community.[103]

D. Employment Non-Discrimination Act

In November 2013, the U.S. Senate passed the ENDA,[104] which the LGBT community viewed as "historic."[105] Some form or variation of the ENDA was introduced in every Congress for twenty years,[106] but November 2013 was the first time it successfully passed in either chamber of Congress. Passage of the ENDA in the current U.S. House of Representatives will likely be challenging,[107] however President Obama has already indicated his support.[108] If signed into law by the President, ENDA will prohibit discrimination based on an individual's actual or perceived sexual orientation, or gender identity, by public and private employers in hiring, discharge, compensation, and other terms and conditions of employment.[109] Passage of the ENDA will result in better workplace protection for the entire LGBT community.

If passed, the ENDA's impact on the armed forces will not be determinative, as there is a military exception.[110] However, ENDA does

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[103] Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (as passed by Senate, Nov. 7, 2013).

[104] *Id*.

[105] Press Release, Transgender Law Ctr., Historic! ENDA Passes in Senate (Nov. 7, 2013), *available at* http://transgenderlawcenter.org/archives/9396. *See also* Press Release, Human Rights Campaign, ENDA Passes Senate 64-32 (Nov. 7, 2013), *available at* http://www.hrc.org/press-releases/entry/enda-passes-senate-64-32. *See also* The Journey to Passing ENDA in the Senate, Human Rights Campaign, *available at* http://www.hrc.org/files/assets/resources/ENDA_Accomplishments-HRC.pdf.

[106] JODY FEDER & CYNTHIA BROUGHER, CONG. RESEARCH SERV., R40934, SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN EMPLOYMENT: A LEGAL ANALYSIS OF THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) 1 (2013).

[107] Chris Johnson, *Boehner Tells LGBT Caucus 'No Way' ENDA Will Pass*, WASH. BLADE (Jan. 29, 2014), http://www.washingtonblade.com/2014/01/29/boehner-tells-lgbt-caucus-way-enda-will-pass/ (reporting on a closed-door meeting between U.S. House of Representatives Speaker John Boehner (R-Ohio) and the LGBT Equality Caucus).

[108] Presidential Statement on Senate Passage of Legislation to Prevent Employment Discrimination Against Lesbian, Gay, Bisexual, and Transgender Persons, DAILY COMP. PRES. DOC. (Nov. 8. 2013).

[109] FEDER & BROUGHER, *supra* note 106.

[110] Employment Non-Discrimination Act (ENDA) of 2013, S. 815, 113th Cong. § 7 (as passed by Senate, Nov. 7, 2013). The ENDA has an exception written into it that it will

symbolize a new level of tolerance and acceptance in U.S. society that may prompt a move toward similar changes in the military.

E. *Kosilek v. Spencer*

In January 2014, the Massachusetts Department of Corrections (MDOC) found that it too had to recognize the rights of transgender individuals when the Commonwealth of Massachusetts was told it had to fund gender reassignment surgery for a convicted murderer. Michelle Kosilek, formerly known as Robert Kosilek, is still anatomically male but presents as a female and has done so most of her life.[111] She was convicted of killing her wife in 1992 and during her incarceration was diagnosed with GID.[112] She sued the MDOC, seeking gender reassignment surgery.[113] The court found that the state's decision to withhold her treatment was cruel and unusual punishment in violation of the Eighth Amendment.[114] Despite the initial ruling in favor of Kosilek, Massachusetts withheld providing sex reassignment surgery, claiming security concerns, and Kosilek subsequently prevailed on appeal.[115] The MDOC appealed the three-member panel decision and the First Circuit Court of Appeals voted to rehear the case en banc.[116] While Kosilek's case is on the fringe of elevating transgender rights, the decision recognizes that withholding a prisoner's treatment for GID may be a violation of a constitutional right and providing treatment for GID or GD, to include gender reassignment surgery, can be made the responsibility of a state government. Whether the appellant wins or loses, the *Kosilek* decision and appeal has increased awareness of treatment rights of transgender prisoners not only in state facilities, but

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not apply to the relationship between the United States and uniformed members of the Armed Forces.

[111] Kosilek v. Spencer, No. 12-1294, at 5 (1st Cir. Jan. 17, 2014).

[112] *Id*. at 12.

[113] *Id*. at 7.

[114] Kosilek v. Spencer, 889 F. Supp. 2d 190 (D. Mass. 2012).

[115] *Kosilek*, No. 12-2194, at 90. *But see* Press Release, Mass. Dep't. of Correction(MDOC), Department of Correction Statement on Kosilek Appeal, (Jan. 31, 2014) (on file with author). The MDOC filed a petition for rehearing the Jan. 17, 2014, decision and requested a hearing by the full bench of the First Circuit Court of Appeals. The original decision was made by a three-judge panel.

[116] Kosilek v. Spencer, No. 12-2194 (1st Cir. Feb. 12, 2014) (granting rehearing of the case en banc on May 8, 2014). At the date of publication of this article, the opinion was not published.

also in federal prisons.[117]

F. Inmate Manning

At the federal level, the DoD is attempting to balance the medical needs of Inmate Chelsea Manning with the obligation it has to keep Inmate Manning incarcerated.[118] In May 2014, while traveling with the SecDef in Saudi Arabia, Rear Admiral John F. Kirby, the Pentagon spokesman, stated that SecDef Hagel approved a request from the Army to "evaluate potential treatment options for inmates diagnosed with gender dysphoria."[119] This review may lead to Inmate Manning, who is currently incarcerated at the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas, being transferred to a federal prison to serve out her sentence and receive treatment from the federal prison system. However, Manning's attorney, David E. Coombs, argues that this is an attempt to force Manning to drop the request for hormone replacement therapy (HRT) so that she can remain at the Disciplinary Barracks.[120]

Coombs alleges that the military's refusal to treat Manning is "flatout transphobia" since the U.S. military must provide medical treatment to its soldiers and that a transfer to a federal prison would jeopardize Manning's personal safety.[121] Coombs believes the military

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[117] Steve Contorno, *Army Won't Pay for Bradley Manning's Sex Change Therapy*, WASH. EXAM. (Aug. 22, 2013), http://washingtonexaminer.com/army-wont-pay-for-bradley-mannings-sex-change-therapy/article/2534581#null. It is unknown whether the *Kosilek* decision will clear the way for the transgender treatment requested by former Army Soldier Chelsea Manning. Private First Class Bradley Edward Manning, a U.S. Soldier, was convicted in July 2013 of violating the Espionage Act, as well as copying and disseminating classified information. Julie Tate, *Judge Sentences Bradley Manning to 35 Years*, WASH. POST, Aug. 21, 2013, http://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html. Shortly after sentencing, he publicly identified as a female and wanted to be addressed as Chelsea Manning. *Today: Bradley Manning: I Want to Live as a Woman* (NBC television broadcast Aug. 22, 2013).

[118] Missy Ryan, *Pentagon Considers Options for Chelsea Manning Detention*, REUTERS, May 14, 2014, http://www.reuters.com/article/2014/05/14/us-usa-military-idUSBREA4D09220140514.

[119] Helene Cooper, *Pentagon Weighs Transfer of Chelsea Manning to Civilian Facility*, N.Y. TIMES, May 14, 2014, http://nyti.ms/1qC9a5A.

[120] Press Release, Statement Re: Chelsea Manning's Potential Transfer to Federal Prison from David E. Coombs (May 14, 2014) (on file with author).

[121] *Id*.

policy prohibiting transgender service is archaic and unsupported.[122] He cites the March 2014 Transgender Service study by the Palm Center that concluded there is no compelling medical rationale for prohibiting transgender service and that Fort Leavenworth does have the ability to provide HRT.[123]

G. U.S. Department of Veterans Affairs, States, and Cost of Care

Judicial and administrative decisions are not the only reasons for transgender rights advancement. The Veterans Affairs (VA) and individual states are unilaterally promoting transgender rights. Veterans Affairs policy allows transgender U.S. military veterans to receive government-supported healthcare.[124] The health care includes hormonal therapy, mental health care, preoperative evaluation, and medically necessary post-operative and long-term care following sex reassignment surgery.[125] While the VA does not provide sex reassignment surgery or plastic reconstructive surgery for strictly cosmetic purposes, it does provide transgender-related care for veterans.[126]

Not only has there been more than an indicia of acceptance at the federal level for transgender rights, actions at the state level have also begun to elevate the health care rights, employment, and equality of transgender individuals. In 2011, Connecticut passed Public Act 11-55, which added gender identity and expression to Connecticut's anti-discrimination laws and later expanded that protection to include Connecticut insurance providers.[127] Seventeen states and the District of

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[122] *Id.*
[123] *Id*.
[124] U.S. DEP'T OF VETERANS AFFAIRS, DIR. 2013-003, PROVIDING HEALTH CARE FOR TRANSGENDER AND INTERSEX VETERANS para. 1 (Feb. 8, 2013).
[125] *Id*. para. 4b(1).
[126] *Id*. para. 2b.
[127] 2011 Conn. Acts 55. (Reg. Sess.). *See also* CONN. INS. COMM'R. BULL., GENDER IDENTITY NONDISCRIMINATION REQUIREMENTS (Dec. 19, 2013) [hereinafter CONN. GENDER IDENTITY NONDISCRIMINATION REQ'S], *available at* http://www.ct.gov/cid/lib/cid/Bulletin_IC-37_Gender_Identity_Nondiscrimination_Requirements.pdf. Also, any medically necessary services to include gender reassignment surgery cannot be handled any differently from other medical or mental health conditions. *See also* MD. INS. COMM'R BULL. 14-02, CLARIFICATION OF COVERAGE FOR TRANSGENDER INDIVIDUALS (Jan. 27, 2014), *available at* http://www.mdinsurance.state.md.us/sa/docs/documents/insurer/bulletins/bulletin-1402-transgender.pdf. Maryland does not allow insurance providers to discriminate based on gender identity or being transgender. *Id*.

Columbia have codified anti-discrimination statutes in their state constitutions.[128] In Virginia, Governor Terry McCauliffe signed his first Executive Order calling for equal opportunity for all by prohibiting discrimination based on gender identity.[129] In Maine, after litigation revealed a conflict between the Maine Human Rights Act and a Maine statute regarding sanitary facilities in schools, the state supreme court held that an elementary school student diagnosed with GD has the right to use the bathroom of her expressed gender.[130] All of these decisions and actions are promising movement toward the U.S. military allowing transgenders to join the service. In making those policy changes, the DoD should continue to study the issue and work toward the goal of gender equality in the military to keep in step with changing social values and trends in the United States.

Recently, a commission co-led by former U.S. Surgeon General Dr. Joycelyn Elders, argued the cost of health care for transgender servicemembers would be minimal,[131] complications from gender-confirming surgeries would have limited impact,[132] and the number of soldiers requiring medication would likely not impact readiness.[133] However, there are recruits with medical conditions that the military does not enlist, such as those diagnosed with certain learning, psychiatric, and behavioral disorders,[134] hearing defects,[135] and vision loss.[136] The military may, on its own accord, determine what medical conditions are not compatible with service and what costs it does or does not want to incur; however, other branches of the government may also initiate change. The report co-led by Dr. Elders, and cited by the attorney for Inmate Manning, does provide a health care cost estimate,[137] but the military should examine the expected number of individuals who would need that care and the long-term cost associated with their care.

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[128] HOWELL, *supra* note 1, at 39, 137–38.
[129] Exec. Order No. 1 (2014), *available at* https://governor.virginia.gov/policy/executive-orders/eo-1-equal-opportunity/.
[130] John Doe et al. v. Reg'l. Sch. Unit 26 (Me. S. Ct., Jan. 30, 2014).
[131] REPORT OF THE TRANSGENDER MILITARY SERVICE COMMISSION, *supra* note 57, at 14–15.
[132] *Id*. at 15.
[133] *Id*. at 11.
[134] DoDI 6130.03, *supra* note 11, enclosure 4, para. 29.
[135] *Id*. enclosure 4, para. 7.
[136] *Id*. enclosure 4, para. 5.
[137] REPORT OF THE TRANSGENDER MILITARY SERVICE COMMISSION, *supra* note 57, at 15 (citing a report that the average cost of transition-related health care is $29,929 per person, not including any related follow-on medical issues).

Regardless, health care cost concerns should not be determinative. The costs alone will not be a valid justification to limit recruits who can fulfill and excel in DoD personnel requirements.

VII. Recommended Changes

The new diagnosis of GD is not currently in the military's regulatory lexicon, nor are the most recent changes from the DSM-5 reflected in the military's regulatory materials. The current governing DoD instruction, DoDI 6031.03, and Army regulations, specifically, AR 40-501, need to be updated.

First, the DoD must note and adhere to SecDef Hagel's recent statement that the prohibition of transgender service, more specifically its medical component, should be reviewed so that every qualified American has the opportunity to serve.[138] Second, if a diagnosis of GD is compatible with military service, a determination should be made as to what, if any, evaluation boards will be required. In making these determinations, the DoD should announce its willingness to accept transgender personnel for military service. Third, the DoD and the military services must begin the evaluation process of the DSM-5 to determine how to apply the publication and its changes. Fourth, existing regulations must be updated to include the new diagnosis of GD and other changes published in the DSM-5.

Before the Pentagon makes a decision, it should examine the state of the transgender movement and transgender acceptance in the United States and around the world in both military and non-military settings. Allowing gays to openly serve in the military was thought at one time to be insurmountable.[139] Years of grassroots lobbying, congressional pressure, and senior leadership attitudes reflected a seismic shift in

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[138] Interview by Martha Raddatz, American Broadcasting Co. (ABC) News, Host of This Week, with SecDef Hagel (May 11, 2014), http://abcnews.go.com/ThisWeek/week-transcript-defense-secretary-chuck-hagel-sen-marco/story?id=23667691.

[139] The Flag & General Officers for the Military, *Statement to President Barack Obama and Members of Congress* (Mar. 31, 2009) *available at* http://www.flagandgeneralofficersforthemilitary.com/. *See also* http://cmrlink.org/data/sites/85/CMRDocuments/FGOM-SigList(1087)-033109.pdf (an open letter to President Obama and Congress signed by more than 1,050 retired military leaders from all branches urging the continued support for "Don't Ask, Don't Tell" arguing that the repeal would break the all-volunteer force).

tolerance, leading to the repeal of DADT. The challenges facing transgenders are similar to those previously faced by women, minorities, and homosexuals in terms of acceptance. The DoD should follow its own approach to the repeal of DADT by examining the current reasons for not allowing transgender service and determining if any changes should be made. By conducting research on the feasibility of service and seeking input from servicemembers, Congress, and the public, and by looking to the militaries of U.S. allies, the DoD will be able to decide what is and what is not possible.

In the near term, the Palm Center will continue to publish reports from its Transgender Military Service Initiative, the DoD will review the DSM-5, and the idea of military service by transgenders will continue to grow. The DoD should be open to the findings of the Transgender Military Service Initiative and be proactive in addressing the expanding recruitment and retention pools. In the long term, it is likely the current prohibition against transgender service will end. The "administratively unfit" classification that leads to an automatic separation from the Army will cease and those diagnosed with GD and other similar diagnoses will receive the same physical and medical review that is afforded to all servicemembers.

VIII. Conclusion

The DoD is currently in the position to make changes to allow transgender recruits and transgender servicemembers in the military. While the option of doing nothing is a potential course of action, that is not the most viable way forward, in light of trends in foreign militaries, and the ever-growing acceptance of transgender culture, both in the medical community and in U.S. society as a whole.

Any inclusion of transgender service will likely raise concerns—cost of health care, recruitment, benefits, retention, unit cohesion, and unit readiness are always at issue just as they were factors in the decision to repeal DADT. The provision of health care for transgender personnel should be evaluated to ensure the same standard of care currently provided to all servicemembers will be available for transgender. The medical corps of the military will require time and resources to implement training and care protocols. Any issues addressing transgender deployment and hormone therapy must also be examined. But federal courts are starting to address these concerns in the civilian

sector and states are beginning to mandate insurance providers cover those surgeries.[140] The military would be wise to follow their lead. The concerns of recruitment, retention, benefits, unit cohesion, and unit readiness are all legitimate concerns, and were the same concerns echoed before the repeal of DADT. However, since the repeal of DADT, those concerns have proven to be of little merit.[141]

The United States is deliberately moving toward acceptance of transgender individuals in the workplace and our communities. The recent repeal of "Don't Ask, Don't Tell"; changes in the DSM; and the cultural shift in the United States and overseas should lead the DoD to carefully review its current policies prohibiting service by transgender personnel. Acceptance and tolerance will always ultimately be a force multiplier in any workplace and the U.S. Army would do well to foster an atmosphere of inclusion within its ranks.

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[140] CONN. GENDER IDENTITY NONDISCRIMINATION REQ'S, *supra* note 127, para. 2.

[141] AARON BELKIN ET AL., ONE YEAR OUT: AN ASSESSMENT OF DADT REPEAL'S IMPACT ON MILITARY READINESS 4 (Sept. 20, 2012), *available at* http://www.palmcenter.org/files/One%20Year%20Out_0.pdf.

BALANCING THE SCALES: APPLYING THE FAIR COMPENSATION PRINCIPLE TO DETERMINE RECOVERY FOR COMMERCIAL ITEM CONTRACTS TERMINATED FOR THE GOVERNMENT'S CONVENIENCE

MAJOR PHILLIP T. KORMAN*

I. Introduction

One lovely Monday morning, you return from physical training to find a voice-mail message from the contracting squadron requesting advice about a commercial items[1] contract terminated for the Air Force's convenience. Following up with the contracting officer, you learn that although the contract provided flight simulators for twelve months, the Air Force terminated it for convenience[2] after three months due to budget cuts. The contractor and contracting officer are at loggerheads over the entitled recovery under the Federal Acquisition Regulation (FAR).[3]

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[1] For purposes of this illustration, the flight simulators are "commercial items" as defined in FAR 2.101(b).

[2] Reference to terminations of commercial item contracts will always refer to the convenience of the government unless otherwise stated.

[3] The Federal Acquisition Regulation (FAR), issued as Chapter 1 of Title 48 C.F.R., serves as the primary regulation for all federal executive agencies in their acquisition of supplies and services with appropriated funds. It became effective on April 1, 1984. FAR 1.105-1(b) foreword (Mar. 2005).

The contractor claims that the Air Force owes him a percentage of the contract price reflecting three months of performance, unamortized costs[4] incurred in manufacturing the simulators in anticipation of the year-long contract, post-termination settlement costs, and lost anticipated profit for the remaining nine months of the terminated contract. The contractor claims that, despite diligent efforts, he has been unable to contract out the simulators elsewhere. The contracting officer wants your advice before rejecting the contractor's settlement offer.

Hanging up the phone, you scramble to find FAR 52.212-4(l), the Termination for the Government's Convenience Clause,[5] included in the contract. You stare at its two-part recovery formula, which reads, "Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate . . . have resulted from the termination."[6] You are unsure about what encompasses "reasonable charges" but are encouraged to find detailed recovery guidelines for terminated traditional government contracts in FAR part 49.[7] However, FAR 12.403(a) states that the "requirements of Part 49 do not apply" but that "[c]ontracting officers may continue to use part 49 as guidance to the extent that part 49 does not conflict with this section and the language of the termination paragraphs in § 52.212-4,"[8] leaving you a bit puzzled. You vaguely

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[4] Here, "unamortized costs" refers to costs incurred by the contractor in providing the simulators in anticipation of the full twelve months of performance but uncompensated for due to early termination.

[5] 48 C.F.R. § 52.212-4(l) (2014).

[6] *Id.* A judge advocate facing a novel or unfamiliar contracting issue would be wise to consult more senior legal advisors, including AFLOA/JAQK (Contract Law Field Support Center). Contracting officers should be aware that the Defense Contracting Management Agency (DCMA) offers support through Termination Contracting Officers, whose sole purpose is to settle delegated contracts terminated for the convenience of the government. DEF. CONTRACT MGMT. AGENCY (DCMA) TERMINATIONS CTR., guidebook.dcma.mil/25/Terminations_Customer_Pamplet.doc (last visited June 10, 2014).

[7] The FAR pt. 49.113 provides that "[t]he cost principles and procedures in the applicable subpart of Part 31 shall, subject to the general principles in 49.201-(a) [b]e used in asserting, negotiating, or determining costs relevant to termination settlements under contracts with other than educational institutions . . . ." 48 C.F.R. § 49.113(a) (2014). Section 31.205-42 lists numerous cost principles peculiar to termination situations, including initial costs and costs continuing after termination, among others. *Id.* § 31.205-42.

[8] 48 C.F.R. § 12.403(a). Neither the mandated § 52.212-4(l) clause nor § 12.403 expressly recognizes the fair compensation principle or loss adjustment principle as applicable to commercial item contract terminations. *Id.* § 52.212-4(l); *id.* § 12.403.

recall from the Contracts course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia, that a dissatisfied contractor may appeal a contracting officer's final decision to either the Armed Services Board of Contract Appeals (ASBCA) or to the U.S. Court of Federal Claims (COFC) and wonder what you will tell the contracting officer.[9]

Given scant regulatory guidance and few board and court decisions, determining a contractor's entitled recovery can be daunting. Federal Acquisition Regulation 52.212-4(l)'s two-pronged recovery formula[10] for terminated commercial item contracts is short on details, leading to uncertainty over what is recoverable. Further, FAR 12.403(a) fails to define precisely which portions of FAR Part 49 can guide recovery determinations.

A logical, uniform approach to determining recovery for terminated commercial item contracts is especially necessary given the statutory preference for commercial item contracting.[11] With draw-downs in Afghanistan, automatic spending cuts,[12] and budget reductions[13]

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[9] Under the Contract Disputes Act, a contractor may appeal a contracting officer's final decision to the Armed Services Board of Contract Appeals (ASBCA) or bring an action directly on the claim to the United States Court of Federal Claims. 41 U.S.C. § 7101, § 7104(a),(b)(1), § 7105(e)(1)(A) (2014) (granting the ASBCA jurisdiction to decide any appeal from a decision from a contract officer of the Department of Defense (DoD), the Department of the Army, the Department of the Navy, the Air Force, and the National Aeronautics and Space Administration regarding a contract administered by that agency). A contractor may appeal the decision of the ASBCA to the United States Court of Appeals for the Federal Circuit, which also has exclusive jurisdiction to hear an appeal from a final decision of the United States Court of Federal Claims. *Id.* § 7107(a)(1)(A). In maritime claims, United States district courts may also hear appeals from the ASBCA. *Id.* § 7102(d).

[10] 48 C.F.R. § 52.212-4(l) (2014).

[11] 41 U.S.C. § 3307 (2011) (statutory subheading reads "Preference for commercial items").

[12] The Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 (requiring total defense spending to decline by $487 billion from FY 2012 through 2021). According to the DoD's Defense Budget Priorities and Choices-Fiscal Year 2014, if sequestration were allowed to continue, between 2010 and 2014, there would be an 18% decline in the inflation-adjusted defense base budget. Sequestration would further reduce average annual defense spending by more than $50 billion each year through 2021. DEF. BUDGET PRIORITIES AND CHOICES-FISCAL YEAR 2014, http://www.defense.gov/pubs/Defense BudgetPrioritiesChoicesFiscalYear2014.pdf. The National Defense Authorization Act for fiscal year 2014, which authorizes a DoD base budget of $526 billion, however, offers a temporary reprieve from the full effect of sequestration for fiscal years 2014 and 2015. Ros Krasny, *Obama Signs Bipartisan Budget Deal, Annual Defense Bill*, REUTERS (Dec.

projected well into the future, more commercial item contract terminations and recovery disputes are foreseeable.

To help resolve this uncertainty over recovery, fair compensation should apply to FAR 52.212-4(l)'s recovery formula[14] and inform what constitutes "reasonable charges" resulting from the termination in a given case. Moreover, FAR Part 49 and, by extension, FAR Part 31 principles[15] consistent with FAR 12.403 and FAR 52.212-4(l) should guide recovery determinations if implicated by factual circumstances and necessary to achieve fair compensation.

This article begins with a background on terminations of traditional government contracts for the government's convenience, examines provisions to calculate recovery for terminated commercial items contracts, and surveys four views on determining contractor recovery. It next demonstrates from the history of fair compensation, FAR Part 12 itself, and sound public policy that contracting officers should adhere to the principle of fair compensation when determining recovery. This article asserts that contracting officers can and should rely on FAR Part 49 and FAR Part 31 principles consistent with FAR 52.212-4(l)'s recovery formula[16] as circumstances dictate to achieve fair compensation. Lastly, the article discusses potential problems with this approach and poses possible solutions.

26, 2013), http://www.reuters.com/ article/2013/12/26/us-usa-obama- idUSBRE9BP0HK 20131226.

[13] The DoD's baseline budget funding in fiscal year 2015 is currently constrained by law to $496 billion. Daniel Wasserbly, *Pentagon Budget 2015: DoD Seeking Added Readiness Funding and Brac*, IHS JANE'S DEFENCE WKLY. (Feb. 23, 2014), http://www.janes.com/article/34523/pentagon-budget-2015-dod-seeking-added-readiness-funding-and-BRAC-IHS Jane's 360. By way of comparison, the Pentagon's base-line budget for the 2013 National Defense Authorization Act was $527.5 billion. Jim Garamone, *Obama Signs $633 Billion Defense Authorization Act*, AM. FORCES PRESS SERV. (Jan. 3, 2013), http://www.defense.gov/news/newsarticle.aspx?id=118913.

[14] 48 C.F.R. § 52.212-4(l) (2014).

[15] *Id.* § 31.205-42 (2014).

[16] *See supra* note 14.

II. Background

A. Termination for the Government's Convenience

The government has enjoyed a long-standing ability to terminate a contract based upon changes in the expectations in the parties, as happened at the conclusion of the Civil War.[17] The concept of termination for the government's convenience where there has been no fault or breach by the non-government party developed in military war-time procurement[18] during World War I, extended to peacetime military procurement in 1950, and ultimately expanded to peacetime civilian procurement today.[19]

The U.S. Court of Appeals for the Federal Circuit[20] has noted that the government's right to terminate a contract for its convenience is an exception to the common law's required mutuality of contract.[21] A cardinal change in the circumstances is not a prerequisite for a valid termination for the government's convenience.[22] Termination for the government's convenience reduces the government's liability by limiting recovery in comparison with damages for breaching a contract.[23]

Termination of a traditional government contract for the government's convenience transforms it into a cost-reimbursable contract under FAR 52.249-2's non-commercial item termination for convenience clause.[24] Federal Acquisition Regulation Part 49 regulates recovery for non-commercial item contracts, more often referred to as "traditional government contracts," terminated for the government's convenience.[25] A contractor whose traditional government fixed-price contract is terminated for the government's convenience is entitled to recover the following: (1) allowable costs incurred in the performance of the work; (2) costs allowable under a special termination cost principle

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[17] United States v. Corliss-Steam Eng. Co., 91 U.S. 321 (1876).
[18] Torncello v. United States, 681 F.2d 756, 764–65 (Ct. Cl. 1982).
[19] *Id.* (citing NASH & CIBINIC, FEDERAL PROCUREMENT LAW 1106-07 (3d ed. 1980)).
[20] The United States Court of Appeals for the Federal Circuit has jurisdiction over an appeal from final decisions of the United States Court of Federal Claims and of an agency board of contract appeals. 28 U.S.C. § 1295(a)(3), (10) (2014).
[21] Maxima Corp. v. United States, 847 F.2d 1549, 1552 (Fed. Cir. 1988) (noting that termination for convenience serves only the government).
[22] T & M Distributors, Inc., v. United States, 185 F.3d 1279, 1284 (Fed. Cir. 1999).
[23] *Maxima Corp.*, 847 F.2d at 1552.
[24] 48 C.F.R. § 52.249-2 (2014).
[25] *Id.* § 49.002 (2014).

set forth at FAR 31.205-42, including unamortized costs incurred prior to the termination, costs continuing after termination, and settlement expense; and (3) a reasonable profit on the above costs with the exception of settlement expense.[26] Recovery in such cases is subject to the fair compensation principle[27] and to the loss adjustment principle.[28]

B. The Recovery Formula for Terminated Commercial Items Contracts[29]

1. FAR 52.212-4(l) and FAR 12.403(d)

In 1994, Congress passed the Federal Acquisition Streamlining Act (FASA, also known as FASA I)[30] to streamline the "acquisition laws of the federal government . . . [to] facilitate the acquisition of *commercial* products, . . . and increase the efficiency and effectiveness of the laws governing the manner in which the government obtains goods and services."[31] The government then promulgated FAR 12.403 and FAR 52.212-4(l) to govern terminations of commercial item contracts for the government's convenience.[32]

The regulatory guidance for determining recovery for terminated commercial item[33] contracts is far less detailed than similar guidance for

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[26] Paul Seidman, *Termination for Convenience of FAR Part 12 Commercial Item Contracts: Is Fair Compensation Required*, *in* 24 NASH & CIBINIC REP. no. 8, ¶ 37 (2010) (citing 48 C.F.R. § 52.249-2, paras. (f), (g), (i); *id.* §§ 49.113, 49.201, 49.202, and 31.205-42).

[27] The fair compensation principle, as stated in 48 C.F.R. § 49.201(a), provides, "A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit." 48 C.F.R. § 49.201(a) (2014).

[28] The loss adjustment principle disallows recovery for profit if it appears that the contractor would have incurred a loss, had the entire contract been completed. *Id.* § 49.203.

[29] For the remainder of this article, terminated commercial item contracts will refer to commercial item contracts terminated for the government's convenience.

[30] The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10 U.S.C. and 41 U.S.C.).

[31] S. REP. NO. 103-258, at 1–2 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 2561, 2562 (emphasis added).

[32] 48 C.F.R § 12.403; *id.* § 52.212-4(l). Federal Acquisition Regulation Part 12 makes no reference to the fair compensation principle or the loss adjustment principle for commercial item contracts. *Id.* § 12.

[33] As an introduction, 48 C.F.R. § 2.101(b) defines "commercial items" to include, among other things, items of a type customarily used by the general public and sold,

traditional government contracts.[34] Recovery is determined by a simple, two-pronged formula consisting of "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate . . . have resulted from the termination."[35] Unlike FAR Part 49, neither FAR 52.212-4(l) nor FAR 12.403 expressly mentions incurred costs, continuing costs, or reasonable profit.[36]

2. The First Prong: Percentage Contract Price

A cursory examination of two board decisions addressing the first prong of the commercial recovery formula suggests that the percentage of the contract price reflecting the percentage of work performed generally refers to actual physical work performed.[37] For example, in *Red River Holdings*, the government terminated a commercial item contract requiring a U.S. flag vessel to perform charter services with just two months remaining on the fifty-nine month charter period.[38] The ASBCA stated that the "work" consisted of providing a suitable U.S. flag vessel for inspection, acceptance, and performance of the fifty-nine-month charter.[39] The ASBCA indicated that the contractor would be entitled to 57 out of 59 months of the contract price under the first prong of the commercial item recovery formula.[40]

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leased, or licensed to the general public as well as certain services. For the complete definition of "commercial items," see *id.* § 2.101(b).

[34] Generally, the termination for convenience provision in FAR Part 12 is approximately 90 percent shorter than comparable termination for convenience provisions governing traditional government contracts. FEDERAL PUBLICATIONS LLC, COMMERCIAL ITEM ACQUISITION 9-37 (2007).

[35] 48 C.F.R. § 52.212-4(l).

[36] *Id.* § 52.212-4(l) (2014); *id.* § 12.403; *id.* § 49. Commercial item contracts are exempted from the Truth in Negotiations Act, thereby relieving contractors of the obligation to submit cost and pricing data to the government. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186. Similarly, a commercial items contractor is not required to comply with the cost accounting standards or with the contract cost principles of FAR Part 31 applicable to traditional government contracts. 48 C.F.R. § 12.403(d)(ii) (2014).

[37] PowerPoint Presentation of Paul J. Seidman, Seidman & Associates, P.C., ABA Section on Public Contract Law Committee on Commercial Items, "FAR Pt 12 Commercial Item Terminations for Convenience: Is Fair Compensation Required?" slide 6 (Oct 19, 2011), *available at* www.seidmanlaw.com/Events/Far-PT-12-Commercial-Item-Terminations-for-Convenience.pdf.

[38] Red River Holdings, LLC, No. 56316, 2009 WL 3838891, at *3–4 (Nov. 4, 2009).

[39] *Id.* at *7.

[40] *Id.*

Similarly, the Civilian Board of Contract Appeals (CBCA) in *Corners & Edges* found that payment of the contract price for the months of actual courier service performed on a terminated commercial service contract reflected the percentage work physically completed prior to notice of termination.[41]

While these two cases are not intended to encompass all possible factual scenarios, they do illustrate an emerging understanding that "percentage of work performed" under the first prong of the commercial item recovery formula[42] frequently translates into the percentage of the contract physically completed.

3. The Second Prong: Reasonable Charges Resulting from Termination

Focusing on the second prong of FAR 52.212-(4)(l)'s recovery formula,[43] this article reviews four differing perspectives of what constitutes "reasonable charges" resulting from termination and potential categories of recoverable costs. The ASBCA's initial *Red River* ruling, the first view, limits the "reasonable charges" prong to settlement expenses.[44] In the opinion of the U.S. District Court, District of Maryland, the second view, the "reasonable charges" prong expands to include costs or costs reasonably incurred in anticipation of contract performance, provided such costs are not adequately reflected as a percentage of the work performed, and provided such costs could not have been reasonably avoided.[45] In its *Russell Sand & Gravel* decision, the CBCA applied the cost-reimbursement construct in FAR Parts 49 and 31 and determined that "reasonable charges" included continuing costs and profits on such costs that could not be discontinued following

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[41] Corners & Edges, Inc. v. Dept. of Health & Human Servs., CBCA No. 693, 08-2 BCA ¶ 33,961.

[42] 48 C.F.R. § 52.212-4(l). What constitutes "work performed" under the first prong, with all the potential factual circumstances and complexities, exceeds the scope of this article. The author intends merely to familiarize the reader with the simplest of prong one circumstances and notes, for example, that neither of the two board cases mentioned concerned contract terminations for common, off-the-shelf stock items that could easily be placed back on the shelf for resale.

[43] *Id.* § 52.212-4(l).

[44] *Red River Holdings, LLC*, 2009 WL 3838891, at *7–8.

[45] Red River Holdings, LLC v. United States, 802 F. Supp. 2d 648, 662 (D.Md. 2011).

termination, the third view.[46] Lastly, a noted legal commentator suggests that "reasonable charges" could even include lost anticipatory profit.[47]

a. ASBCA's Initial Red River Holdings *Ruling*

First, in the *Red River Holdings* decision, the ASBCA found that the "reasonable charges" prong consisted of mere settlement expenses.[48] There, the U.S. Navy had terminated a contract involving a chartered vessel two months prior to its completion date.[49] The contractor, who had taken out a loan to acquire and outfit the vessel, sought a portion of the loan costs and insurance premiums allocable to the final two months of the contract. Although he had been paid the portion of the contract price reflecting the period of performance on the contract, the contractor asserted that the unamortized loan and insurance premium costs allocable to the final two months of the contract were reasonably incurred in anticipation of full contract performance and resulted from the termination.[50]

In its analysis, the ASBCA emphasized the conceptual differences between the commercial item clause in FAR 52.212-4(l), with its two-pronged recovery formula,[51] and FAR 52.249-2's traditional termination for convenience clause,[52] which converts fixed price contracts to cost-reimbursable contracts. In denying the contractor's appeal, the ASBCA concluded that the loan costs and costs incurred in reflagging and modifying the vessel for contract performance were not recoverable under FAR 52.212-4(l)'s "percentage of work performed" prong and did not "result from" the termination of the commercial item contract.[53] While never expressly raising FAR Part 49's fair compensation principle, the ASBCA effectively rejected its applicability to terminated commercial item contracts.

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[46] Russell Sand & Gravel Co., Inc., No. 2235, 2013 WL 6144153, at *5–10 (Nov. 6, 2013).
[47] Ralph C. Nash & Paul J. Seidman, Postscript: Termination for Convenience of Part 12 Commercial Item Contracts, *in* 25 NASH & CIBINIC REP. NO. 8, ¶ 37 add (2011).
[48] *Red River Holdings, LLC*, 2009 WL 3838891, at *7.
[49] *Id.* at *3–4.
[50] *Id.* at *6–7.
[51] 48 C.F.R. § 52.212-4(l) (2014).
[52] *Red River Holdings, LLC*, 2009 WL 3838891, at *6–7; 48 C.F.R. § 52.249-2 (2014).
[53] *Red River Holdings, LLC*, 2009 WL 3838891, at *6–7.

b. The United States District Court's Red River Holdings *Decision*

Next, the U.S. District Court, District of Maryland, in reversing and remanding the ASBCA's decision, referenced "principles of fairness in the administration of government contracts"[54] as applicable to FAR 52.212-4(l)'s recovery formula. The court reasoned that if "reasonable charges" were construed to include only settlement expenses from a termination, "monumental unfairness" could result if a contractor had incurred major preparatory costs in anticipation of full contract performance and the "percentage of the work performed prior to the notice of termination" failed to fully compensate the contractor's expenses.[55]

In the district court's view, recovery under FAR 52.212-4(l)'s second prong entitles a contractor to "payment as compensation for settlement costs or costs *reasonably* incurred in anticipation of contract performance, *provided such costs are not adequately reflected as a percentage of the work performed*, and *provided such costs could not have been reasonably avoided*."[56] The court stated that the second prong "generally does not contemplate *additional* allowances for profit," preventing recovery of profit on incurred costs.[57]

c. The CBCA's Decision in Russell Sand & Gravel

More recently, the CBCA relied upon FAR Part 49 and FAR Part 31 principles when determining "reasonable costs" where the International Boundary and Water Commission (IBWC) had terminated two delivery orders on a firm fixed price requirements contract, incorporating by reference FAR 52.212-4.[58]

In its analysis, the CBCA cited the fair compensation principle and reverted to the cost-reimbursement construct in FAR Parts 49 and 31

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[54] Red River Holdings, LLC v. United States, 802 F. Supp. 2d 648, 660 (D.Md. 2011).
[55] *Id.* at 659.
[56] *Id.* at 662. The court asserts that a contractor may not recover additional amounts, however reasonable or necessary, if already reflected in the percentage-of-work performed payment. *Id.* at 662 n.17.
[57] *Id.* at 662 n.18.
[58] Russell Sand & Gravel Co., Inc., No. 2235, 2013 WL 6144153, at *2–3 (Nov. 6, 2013).

used for traditional government contracts to determine "reasonable charges" that resulted from the termination. Applying the cost principles in FAR 31.205-42(b), for example, the CBCA allowed recovery for continuing costs and profits on such costs that could not be discontinued following termination.[59] This CBCA decision exceeds the *Red River Holdings* ruling for its wholesale adoption of FAR Part 49's recovery scheme for traditional government contracts.

d. Recovery of Anticipated Profit Viewpoint

Lastly, a noted legal commentator suggests that recovery of anticipated profit fulfills FASA I's mandate that the federal acquisition regulation be consistent with standard commercial practice.[60] Section 8002(b)(1) of FASA I requires that the FAR include to the maximum extent practicable only clauses "(A) that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items . . . .; or *that are determined to be consistent with standard commercial practice*."[61] Section 2-708(2) of the Uniform Commercial Code (UCC),[62] which allows recovery of anticipatory profit, has been adopted by forty-nine states[63] and reflects standard commercial practice. Under this rationale, recognizing anticipatory profit as a

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[59] *Id.* at *5–10.

[60] Seidman, *supra* note 47, ¶ 37 add. Mr. Paul Seidman's impressive legal career includes service as Assistant Counsel for Contract Claims at Naval Sea Systems Command and as Assistant Chief Counsel for Procurement in the Office of the Chief Counsel for Advocacy at the SBA. Additionally, he has over three decades of experience as a private practitioner in government contract law. He has appeared as an expert witness on procurement-related issues at congressional hearings and drafted procurement-related legislation and regulations. A prolific writer, Mr. Seidman's works have been published in *The Briefing Papers*, *The Nash & Cibinic Report*, and *The Government Contractor*, among others. Elected a Fellow by the National Contract Management Association, Mr. Seidman has served on the Advisory Board of The Government Contractor and on the Data and Patent Rights Committee of the American Bar Association. www.seidmanlaw.com/Attorneys/Paul-J-Seidman.shtml (last visited May 30, 2014).

[61] The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 8002(b)(1), 108 Stat. 3243 (codified 41 U.S.C. § 3307 (2014)) (emphasis added).

[62] U.C.C. § 2-708(2) (2002) provides that "the measure of damages [for cancellation by the buyer includes] . . . the profit (including reasonable overhead) which the seller would have made from full performance by the buyer . . . ." *Id.* § 2-708(2).

[63] Seidman, *supra* note 47, ¶ 37 add.

"reasonable charge" under FAR 52.212-4(l) satisfies FASA I's mandate.[64]

III. Fair Compensation and Terminated Commercial Item Contracts

Having discussed the history of contract terminations, the two-pronged recovery formula for commercial items contracts, and competing perspectives on determining contractor recovery, this article next addresses the applicability of the fair compensation principle to commercial item contract terminations and analyzes FAR 52.212-4(l) and FAR 12.403. Lastly, the article presents a framework for determining recovery in such circumstances.

A. Historically, Fair Compensation Applied to Such Terminations

1. Statutory and Regulatory History

The fair compensation principle, currently manifested in FAR 49.201(a), asserts that a "settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit."[65] The fair compensation principle applied to terminated government contracts enjoys a rich statutory and regulatory history. During WWI, the Sixty-Fifth Congress passed legislation signed by the President that stated, "Whenever the United States shall cancel, modify, suspend or requisition any contract . . . it shall make *just compensation* therefor . . . ."[66] The Contract Settlement Act of 1944 decreed, "It is the policy of the Government . . . to provide war contractors with speedy and *fair compensation* for the termination of any war contract . . . ."[67] Later that year, the War and Navy Departments issued the Joint Termination

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[64] *Id.*

[65] 48 C.F.R. § 49.201 (2014). Federal Acquisition Regulation 49.201 provides that "[f]air compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement." *Id.*

[66] The Urgency Deficiency Appropriation Act, Pub. L. No. 65-23, 40 Stat. 182, 183 (1917) (emphasis added).

[67] Contract Settlement Act of 1944, Pub. L. No. 78-395, 58 Stat 649, 652 (emphasis added).

Regulation, which authorized "fair compensation" for terminated contracts.[68]

Moreover, FAR 49.201 echoes prior regulations, including the Defense Acquisition Regulation (DAR) 8-301[69] and the Federal Procurement Regulation (FPR) 1-8.301(a),[70] which provided fair compensation for the preparations made and the work completed.

2. Case Law Supports the Fair Compensation Principle

A persuasive line of case law buttresses applying the fair compensation principle to terminated commercial item contracts. For example, when considering the recoverability of unabsorbed overhead in a traditional government contract, the Federal Circuit asserted that "the overall purpose of a termination for convenience settlement is to fairly compensate the contractor and to make the contractor whole for the costs incurred in connection with the terminated work."[71] In a case involving a terminated development and construction contract, the Federal Circuit noted the following:

> A contractor is not supposed to suffer as the result of a termination for convenience of the Government, nor to underwrite the Government's decision to terminate. If

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[68] Joint Termination Regulation, 9 Fed. Reg. 13,324 (Nov. 10, 1944).

[69] Defense Acquisition Regulations, 32 C.F.R. § 8-301(a) (1984) ("A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including an allowance for profit thereon which is reasonable under the circumstances."); *see* Williams Alaska Petr., Inc. v. United States, 57 Fed. Cl. 789 n.7 (2003) (observing that the FAR resulted from an effort that culminated in 1983 to consolidate three separate systems of procurement regulations: the Federal Procurement Regulations, the Defense Acquisition Regulations, and the National Aeronautics and Space Administration Regulations).

[70] Federal Procurement Regulations, 27 Fed. Reg. 11,583, 11,591 (Nov. 27, 1962) (later codified at 41 C.F.R. pt. 1-8.301 but now obsolete) ("A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including an allowance for profit thereon which is reasonable under the circumstances.").

[71] Nicon, Inc., v. United States, 331 F.3d 878, 885 (Fed. Cir. 2003) (citing Freedom Elevator Corp., GSBCA No. 7259, 85-2 BCA ¶ 17,964). The Federal Circuit ruled that although FAR's "Termination for Convenience of the Government (Fixed-Price)" clause did not specifically mention unabsorbed overhead as one that would be paid under the settlement, as a matter of law, it could be recovered if properly allowed and allocable. *Id.* at 885.

> he has actually incurred costs . . . , it is proper that he be reimbursed those costs when the Government terminates for convenience . . . .[72]

Both a U.S. district court and the CBCA have acknowledged this long-standing fair compensation principle when determining recovery for terminated commercial item contracts.[73] While the fair compensation principle is not expressly mandated for terminated commercial item contracts by statute or regulation, out of respect for the long-standing practice and precedent, contracting officers should adhere to this venerable principle as a matter of course when deciding recovery for terminated commercial item contracts.

B. FAR 12.403(a) Allows Application of the Fair Compensation Principle

1. Fair Compensation Is Consistent with FAR 12.403(a) and FAR 52.212-4(l)

Notably, FAR 12.403 supports imposing the fair compensation principle currently embodied in FAR Part 49.201 onto commercial item contracts terminated for the government's convenience. Federal Acquisition Regulation 12.403(a) states that "[c]ontracting officers may continue to use part 49 as guidance to the extent that part 49 does not conflict with this section and language of the termination paragraphs in 52.212-4."[74] Further, FAR 49.201(b)'s directive that settlement proposals compensate the contractor fairly for the work done and for preparations made for the terminated portions of the contract is consistent with both FAR 12.403 and FAR 52.212-4(l).[75]

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[72] Jacobs Eng'g Group, Inc., v. United States, 434 F.3d 1378, 1381 (Fed. Cir. 2006) (citing *In re* Kasler Elec. Co., DOTCAB No. 1425, 84-2 BCA ¶ 17374).

[73] Red River Holdings, LLC v. United States, 802 F. Supp. 2d 648, 660 (D.Md. 2011); Russell Sand & Gravel Co., Inc., No. 2235, 2013 WL 6144153, at *6 (Nov. 6, 2013).

[74] 48 C.F.R. 12.403(a) (2014).

[75] *Id.* § 49.201(b) notes that the primary objective of the fair compensation principle is "to negotiate a settlement by agreement." The regulation does not require rigid cost and accounting data but recognizes that "[o]ther types of data, criteria, or standards may furnish equally reliable guides to fair compensation." *Id.* § 49.201(c). Similarly, FAR Part 49.201(c) provides that "[t]he amount of recordkeeping, reporting, and accounting related to the settlement of terminated contracts should be kept to a minimum compatible with the reasonable protection of the public interest." *Id.*

One might object that since FAR 12.403 and FAR 52.212-4(l) do not expressly mention the term "fair compensation," the principle does not apply to terminations of commercial item contracts. The FASA I,[76] FAR 12.403, and FAR 52.212-4(l), however, make no mention of abolishing the long-established fair compensation principle.[77] The statutory and regulatory silence on fair compensation should not be interpreted as intent to abolish the principle. Fair compensation does not conflict with either FAR 52.212-4(l) or FASA I. Indeed, the district court in *Red River Holdings* declined to find that the drafters of FAR 52.212-4(l) intended to modify longstanding fairness principles and stated "that such a modification could well fail as an unreasonable interpretation of the statutory mandate set forth in the FASA . . . ."[78] Federal Acquisition Regulation 12.403(a) empowers contracting officers to incorporate FAR 49.202's fair compensation principle into FAR 52.212-4(l).

2. Recovery Formula of FAR 52.212-4(l) Enables Fair Compensation

When commercial item contracts are terminated, FAR 52.212-4(l)'s recovery formula provides the means to achieve fair compensation. By mandating payment of "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination" and "reasonable charges the Contractor can demonstrate . . . have resulted from the termination," FAR 52.212-4(l) provides a versatile formula capable of delivering a just settlement under a variety of factual circumstances.[79]

The formula's second prong, FAR 52.212-4(l)'s "reasonable charges" resulting from termination, serves as a vehicle to provide compensation extending beyond mere settlement costs. A proposed earlier version of the second prong did not use the phrase "reasonable charges," but, instead, referenced "actual direct costs that . . . have resulted from the termination."[80] One commentator has observed that the language of the final rule, "*charges* [that] have resulted from

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[76] The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 8002(b)(1), 108 Stat. 3243 (codified 41 U.S.C. § 3307 (2014)).
[77] 48 C.F.R. § 12.403; *id.* § 52.212-4(l).
[78] *Red River Holdings*, LLC, 802 F. Supp. 2d at 660 n.15.
[79] 48 C.F.R. 52.212-4(l) (2014).
[80] Federal Acquisition Regulations for the Acquisition of Commercial Items (Proposed Rule), 60 Fed. Reg. 11,198, 11,215–16 (Mar. 1, 1995).

termination," envisions amounts that would not have been billed but for the termination, whereas the earlier "costs that . . . have resulted from the termination" would have contemplated covering only amounts that would not have been incurred except for termination.[81] The distinction between "charges" and "costs" matters. The final rule, with its broader "charges" language, might cover costs incurred pre-termination but billed post-termination, while the earlier "cost" version could be construed to encompass only costs incurred post-termination, such as settlement costs.[82] Since payment of such "reasonable charges" is mandatory under FAR 52.212-4(l), what constitutes "reasonable charges" under the second prong determines the government's liability.[83]

The U.S. district court concluded that the drafters of FAR 52.212-4(l) likely chose the "charges" terminology over "costs" to allow recovery of reasonable preparation costs and the like.[84] This court is not alone in concluding that "reasonable charges" could refer to more than just post-termination settlement costs incurred after termination. The General Services Board of Contract Appeals (GSBCA) awarded several pre-termination incurred costs in a terminated commercial item contract.[85] Moreover, the Agriculture Board of Contract Appeals noted that the termination clause's "reasonable charges" language in a commercial item contract could encompass the costs reasonably incurred in anticipation of performing the contract but not fully reflected as a percentage of the work performed.[86]

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[81] *Red River Holdings, LLC*, 802 F. Supp. 2d at 661 n.16 (citing Seidman, *supra* note 26, ¶ 37) (emphasis added).

[82] *Id.*

[83] 48 C.F.R. 52.212-4(l) (2014).

[84] *Red River Holdings, LLC*, 802 F. Supp. 2d, at 661 n.16. The district court in *Red River* concluded that the "reasonable charges" prong serves as a "safety valve" component to allow compensation for any reasonable, unavoidable costs not reflected in the first component. *Id.* at 662 n.18.

[85] Divecon Servs., LP v. Dep't of Commerce, GSBCA No. 15997-COM, 04-2 BCA ¶ 32,656.

[86] Jon Winter & Assocs., No. 2005-129-2, 2005 WL 1423636, at *4 (June 20, 2005); *see also* Dehdari Gen. Trading & Contract'g, ASBCA No. 53987, 2003-1 BCA ¶ 32,249 (in a commercial items case, the ASBCA implied that a contractor would be entitled to pre-termination payments made to a supplier in anticipation of full contract performance if it had submitted evidence to support the alleged payments and proved that such costs could not have reasonably been avoided).

3. Fair Compensation Is Sound Policy

In addition to complying with long-standing practice, case law, and statutory and regulatory intent, fair compensation promotes sound policy. Why would a contractor expend resources competing for a commercial items contract just to face an unacceptable risk of being stuck with uncompensated costs should the government decide to terminate the contract for its convenience? Allocating a disproportionate share of the risk and financial burden onto the contractor's shoulders defeats FASA I's intent, thwarting competition rather than enhancing it. Further, small contractors, particularly sensitive to the current constrained fiscal environment, might be compelled to shutter their doors if forced to absorb unamortized costs reasonably incurred in anticipation of contract performance or other costs resulting from a contract termination.

Fair compensation, on the other hand, offers relief, lessening the disruption of termination, and ultimately promotes greater competition by creating a more secure contracting environment for companies. Fair compensation could preserve businesses in certain circumstances from closure following contract terminations and thereby sustain sources of goods or services the Department of Defense may need to tap for conflicts in the future. Further, fair compensation satisfies the government's obligation to manage limited public funds responsibly, prevents potential injustice, and follows the rule of law. Adhering to the time-tested fair compensation principle for terminated commercial item contracts promotes the national interest and serves as sound policy.

IV. FAR Part 49 and Recovery for Commercial Item Contracts

A. Consistent FAR Part 49 and FAR Part 31 Principles Are Advisory

Although FAR Part 49 was not promulgated to govern FAR Part 12 commercial item contract terminations, contracting officers may rely upon FAR Part 49, and, by extension, FAR Part 31 principles when consistent with FAR 12.403 and FAR 52.212-4(l) to determine "reasonable charges" resulting from termination. At the outset, FAR 49.002(a)(2)[87] asserts as a disclaimer that "[t]his part [FAR Part 49] does not apply to commercial item contracts awarded using part 12 procedures" and cites §12.403 for direction on termination policies for

[87] 48 C.F.R. § 49.002(a)(2) (2014).

commercial item contract. Federal Acquisitions Regulation 49.002(a)(2) declares "for contracts for the acquisition of commercial items, this part provides administrative guidance which may be followed unless it is inconsistent with the requirements and procedures in 12.403 . . . ."[88] Federal Acquisition Regulation 12.403(a) also states, "Contracting officers may continue to use part 49 as *guidance* to the extent that part 49 does not conflict with this section and the language of the termination paragraphs in 52.212-4."[89]

The portions of FAR Part 49 consistent with FAR 12.403 and FAR 52.212-4(l) can,[90] and should, inform FAR 52.212-4(l)'s two-pronged recovery formula. Under the recovery formula's second prong, contracting officers must pay "reasonable charges the Contractor can demonstrate . . . have resulted from the termination."[91] In the absence of any express mention of incurred cost, continuing cost, or reasonable profit in either FAR 12.403 or FAR 52.212-4(l), the salient question becomes which provisions of FAR Part 49 are considered consistent—and relevant—to a contracting officer's determination of "reasonable charges" resulting from termination.

Boards of review have frequently resorted to FAR Part 49 and to related FAR Part 31 principles for guidance when determining recovery of terminated commercial item contracts to the benefit of either contractors or the government. For example, the CBCA relied upon FAR 31.205-42(b)'s specific cost principle in awarding costs continuing after termination despite all reasonable efforts by the contractor to eliminate them.[92] The GSBCA referenced FAR 49.203(a)[93] and declined to award any profit claimed on termination costs where a loss would have been incurred, had the contract not been terminated.[94] Similarly, the ASBCA noted that the termination for convenience clause does not state whether or not profit is payable as a "reasonable charge" and, "[i]n

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[88] *Id.*
[89] *Id.* § 12.403(a) (2014) (emphasis added).
[90] *Id.*
[91] *Id.* § 52.212-4(l) (2014).
[92] Russell Sand & Gravel Co., Inc., No. 2235, 2013 WL 6144153, at *8 (Nov. 6, 2013).
[93] 48 C.F.R. § 49.203 (a) (2014) states, "In the negotiation or determination of any settlement, the [termination contracting officer] (TCO) shall not allow profit if it appears that the contractor would have incurred a loss had the entire contract been completed." *Id.* § 49.203 (a).
[94] Divecon Servs., LP v. Dep't of Commerce, GSBCA No. 15997-COM, 04-2 BCA ¶ 32,656. Relying upon FAR Part 49.202(a), the GSBCA disallowed recovery for anticipated but unearned profit on work not performed. *Id.*

the absence of other guidance," decided to follow FAR 49.202(a)'s[95] language disallowing recovery of profit on settlement expenses.[96]

Bearing in mind the overarching principle of fair compensation, contracting officers should analyze FAR Part 49, and, by extension, the relevant FAR Part 31 provisions, and decide which principles are consistent with FAR 12.403 and FAR 52.212-4(l) and reasonably applicable to the particular facts of the case at hand. Elaborating on all the possible categories for recovery exceeds the scope of this article, but, as a boundary, a strong argument can be made that contractors cannot recover for lost anticipated profit for unperformed work on a terminated commercial item contract.[97] There may be instances where fair compensation implicates recovery based on FAR 31.205-42(b)'s costs continuing after termination principle.[98]

B. Potential Pitfalls and Possible Solutions

While contracting officers and boards have incorporated FAR Part 49 principles into their recovery calculations on occasion, potential pitfalls include uneven application of FAR Part 49 principles by contracting officers and a lack of consensus among reviewing authorities on what categories of expenses are recoverable as "reasonable charges"[99] under FAR 52.212-4(l)'s second prong.[100] Also, FAR 12.403(a)'s[101] discretionary grant to contracting officers on whether to follow

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[95] 48 C.F.R. § 49.202(a) (2014) precludes recovery of profit on settlement expenses, lost profit, and consequential damages. *Id.* § 49.202(a).

[96] Appeals of Alkai Consult., LLC, ASBCA No. 56792, 10-2 BCA ¶ 34,493.

[97] *See* Appendix.

[98] 48 C.F.R. § 31.205-42(b) (2014) provides in part, "Despite all reasonable efforts by the contractor, costs which cannot be discontinued immediately after the effective date of termination are generally allowable." *Id.* § 31.205-42(b).

[99] Red River Holdings, LLC, No. 56316, 2009 WL 56316 at *7–8 (Nov. 4, 2009) (limiting recovery under FAR 52.212-4(l)'s "reasonable charges" prong to settlement expenses); Red River Holdings, LLC v. United States, 802 F. Supp. 2d 648, 662 (D.Md. 2011) (allowing recovery for settlement costs reasonably incurred in anticipation of contract performance if such costs are not adequately reflected as a percentage of the work performed and could not be reasonably avoided); Russell Sand & Gravel Co., Inc., No. 2235, 2013 WL 6144153 at *8–11 (Nov. 6, 2013) (recovery for "reasonable charges" under FAR 52.212-4(l) included costs incurred, profits on cost incurred, costs continuing after termination, and profit on such continuing costs).

[100] 48 C.F.R. § 52.212-4(l) (2014).

[101] *Id.* § 12.403(a) (2014).

consistent FAR Part 49 principles for recovery determinations could lead to their uneven application and to disparate outcomes.

A similar difficulty in this still-evolving area also occurs when boards and courts differ as to which FAR Part 49 provision and Part 31 cost principles apply to terminated commercial item contracts. For example, one commentator believes the district court's decision in *Red River Holdings* might preclude recovery of continuing costs and profits on incurred costs.[102] The CBCA, however, has allowed recovery for continuing costs and profits on such costs.[103] In the future, the Court of Federal Claims and ASBCA could potentially disagree on what costs are recoverable, inviting forum shopping.

While specific facts of a particular case are decisive in determining recovery, the Federal Circuit may ultimately resolve which FAR Part 49 and FAR Part 31 principles apply to terminated commercial item contracts. Congress could also pass legislation, or, more likely, the FAR Council could amend the FAR and specify which provisions of FAR Part 49 and FAR Part 31 apply to terminated commercial item contracts for recovery purposes. Other potential reforms include narrowing the definition of "commercial items" to exclude complex items more appropriate for FAR Part 49 governance.[104] Given this dynamic legal terrain, contracting officers should consult their contracting attorney before conducting settlement negotiations.

V. Conclusion

Having advocated for an approach to determining recovery that fuses the fair compensation principle with FAR 52.212-4(l)'s two-part recovery formula and consistent FAR Part 49 principles when reasonably applicable, it is now appropriate to apply it. Returning to the article's opening scenario, the contracting attorney should advise the contracting officer that pursuant to FAR 52.212-4(l), the contractor is entitled to payment of the contract price reflecting three months of contract performance as well as settlement costs.[105] While the *Red River*

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[102] Seidman, *supra* note 47, ¶ 37 add.

[103] *Russell Sand & Gravel Co., Inc.*, 2013 WL 6144153, at *8–11.

[104] Parties could consider tailoring termination clauses specifying which costs are recoverable.

[105] 48 C.F.R. § 52.212-4(l) (2014). This vignette presupposes consultation with higher headquarters.

Holdings case is pending on remand with the ASBCA,[106] in light of the district court's decision and the CBCA's *Russell Sand & Gravel* opinion, other costs beyond mere settlement costs not compensated for by a percentage of the contract price may be recoverable under FAR 52.212-4(l)'s "reasonable charges" prong[107] if the contractor can demonstrate they resulted from termination and could not be reasonably avoided. Additionally, FAR Part 49 and Part 31 principles deemed consistent with FAR 12.403(a) and FAR 52.212-4(l) should be considered if relevant and necessary for fair compensation.

While fair compensation is a matter of judgment,[108] the contractor will have to provide satisfactory evidence to obtain recovery of costs incurred in anticipation of contract performance, and this proof requirement will undo an unsubstantiated claim. Following existing case law, the contracting attorney should advise the contracting officer to disallow recovery for lost anticipated profit.

This illustration is not merely an intellectual exercise but could prove useful in the future. Faced with historic fiscal pressure to reduce spending and a pending withdrawal from Afghanistan, the Department of Defense will inevitably resort to terminating commercial item contracts to comply with the Budget Control Act of 2011.[109] In all likelihood, recovery disputes will continue to arise over FAR 52.212-4(l)'s general two-pronged recovery formula.[110] In these fiscally challenging times, the long-established fair compensation principle should serve as a guidepost for determining recovery for terminated commercial item contracts.

Under the current regulatory scheme, FAR 52.212-4(l)'s two-pronged recovery formula[111] can accommodate a range of factual circumstances. While both prongs of the formula play important roles, the "reasonable charges" prong provides a flexible mechanism to incorporate consistent FAR Part 49 and FAR Part 31 principles,

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[106] The ASBCA has yet to publish a response to the district court's reversal. Red River Holdings, LLC v. United States, 802 F. Supp. 2d 648, 662 (D.Md. 2011). Although the Federal Circuit has not ruled on this issue, the CBCA found that more than settlement expenses can be recovered where the government terminates a commercial item contract for its convenience under FAR 52.212-4(l). *Russell Sand & Gravel Co., Inc.*, 2013 WL 6144153, at *8–11.

[107] 48 C.F.R. § 52.212-4(l).

[108] *Id.* § 49.201(a) (2014).

[109] The Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240.

[110] 48 C.F.R. § 52.212-4(l) (2014).

[111] *Id.*

depending on the facts. Contracting officers must continue to use their judgment in looking to FAR Parts 49 and 31 for guidance and pursue fair compensation in their individual cases within the current matrix of board of review cases and court decisions.

Appendix

Recovery for Anticipated Profits Is Disallowed

While identifying all the FAR Part 49 and FAR Part 31 provisions relevant to terminated commercial item contracts exceeds the scope of this paper, a strong case can be made that anticipated profits should be disallowed. Federal Acquisition Regulation 49.202(a) states that "[a]nticipatory profits and consequential damages shall not be allowed."[112] The appropriate analysis asks whether this limiting provision is consistent with FAR 12.403 and FAR 52.212-4(l), and, therefore, able to guide contracting officers in determining recovery.[113]

In the analysis of FAR 52.212-4(l)'s clause, a basic principle of contract interpretation requires construing the "plain language" of the contract.[114] This involves "giving the words of the agreement their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning."[115] The paragraph entitled "Termination for the Government's convenience" contained within FAR 52.212-4(l)'s Contract Terms and Conditions—Commercial Items[116] makes no express mention of recovery for lost anticipated profit or any hint of such recovery. On the contrary, if anything, FAR 52.212-4(l) affirms the traditional bar on recovery for lost anticipated profit. The clause's very title, "Termination for the Government's convenience," conveys meaning. The clause is not entitled "Breach of Contract for the Government's Convenience," which suggests intent to permit recovery of lost anticipated profit or consequential damages. Instead, the clause's opening words hearken to the government's long-held ability to terminate a contract for its convenience without incurring liability for lost anticipated profit.

Historically, termination of a contract for the government's convenience has disallowed recovery for lost anticipated profit on unperformed work as a unique sovereign benefit.[117] Within this context

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[112] 48 C.F.R. § 49.202(a) (2014).
[113] *Id.* § 12.403(a) (2014).
[114] McAbee Const., Inc. v. United States, 97 F.3d 1431, 1435 (Fed. Cir. 1996).
[115] Harris v. Dep't of Veterans Affairs, 142 F.3d 1463, 1467 (Fed. Cir. 1996).
[116] 48 C.F.R. § 52.212-4(l) (2014).
[117] Marc Pederson, *Rethinking the Termination for Convenience Clause in Federal Contracts*, 31 CONT. L.J. 83, 86–87 (2001) (reviewing the historical development of the

and in the absence of express statutory or regulatory language expressing intent to allow recovery for anticipated profits, the most logical conclusion is that the drafters did not intend the "reasonable charges" language of FAR 52.212-4(l) to include lost anticipated profits. Notwithstanding FASA I, Section 8002(b)(1)'s language favoring standard commercial practices,[118] there is no specific indication in FASA I or FAR 52.212-4(l) that Congress or the DAR Council intended to cede the government's long-standing civil immunity from lost anticipated profits during terminations for the government's convenience and bestow on contractors a gratuitous windfall. Surely Congress and the DAR Council would have more clearly provided for the recovery of anticipatory profits for terminated commercial item contracts had such a policy shift with its vast financial consequences been intended.

In addition to the long-established association of the title "Termination for the Government's Convenience" with excluding recovery of anticipated profits and the complete absence of language allowing recovery of anticipated profit, § 49.202(a)'s restriction[119] on recovering anticipated profits is consistent with § 12.403 and § 52.212-4(l) and reasonably applicable under FAR 12.403(a).[120] Moreover, the Court of Federal Claims has found in *Praecomm* that anticipatory profits are not recoverable for such terminations of commercial item contracts.[121] Based upon practice, regulation, and case law, anticipatory profits are not recoverable under FAR 52.212-4(l)'s "Termination for the Government's Convenience" clause.[122]

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government's sovereign ability to terminate contracts without facing common law breach damages).

[118] The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 8002(b)(1), 108 Stat. 3243 (codified 41 U.S.C. § 3307 (2014)).

[119] 48 C.F.R. § 49.202 (2014) precludes a terminated contractor from recovering anticipatory profit.

[120] *Id.* § 12.403(a) (2014).

[121] Praecomm, Inc. v. United States, 78 Fed. Cl. 5, 12 (2007) (citing Int'l Data Prods. Corp. v. United States, 492 F.3d 1317, 1323–24 (Fed. Cir. 2007)).

[122] 48 C.F.R. 52.212-4(l) (2014).

IF I HAVE TO FIGHT FOR MY LIFE—SHOULDN'T I GET TO CHOOSE MY OWN STRATEGY? AN ARGUMENT TO OVERTURN THE UNIFORM CODE OF MILITARY JUSTICE'S BAN ON GUILTY PLEAS IN CAPITAL CASES

MAJOR FRANK E. KOSTIK JR.[*]

You have built up a good piece of legislation here. It may not be completely free of the need for further revision in the future, but, knowing the personnel of the Committee on Armed Services, I have tremendous confidence . . . [that] you will continue your study and observation and develop further legislation of this kind when needed. . . . It is also important that Congress be ever ready to revise and improve the system in the way best illustrated by the bill H.R. 4080 now before us.[1]

I. Introduction

In late 2009, the military charged then–Major (MAJ) Nidal Hasan of killing thirteen and wounding thirty-two unarmed soldiers as they prepared to deploy at Fort Hood, Texas.[2] On August 15, 2012, Inmate

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[1] Uniform Code of Military Justice, 95 CONG. REC. 5718 (1949) [hereinafter H.R. 4080 Debate], *reprinted in* Dep't. of Navy, Uniform Code of Military Justice, Congressional Floor Debate on Uniform Code of Military Justice 31–32, *available at* http://www.loc.gov/ rr/frd/Military_Law/pdf/congr-floor-debate.pdf (statement of Congressman Thomas E. Martin in support of H.R. 4080, a bill to enact and establish the Uniform Code of Military Justice (UCMJ)).

[2] *See* Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012); TIMES TOPICS, *Nidal Malik Hasan*, http://topics.nytimes.com/top/reference/timestopics/people/h/nidal_malik_hasan/index.html (last visited June 15, 2014).

Hasan attempted to plead guilty at his court-martial[3] in contravention of Article 45(b)'s prohibition on receiving pleas "to any charge or specification alleging an offense for which the death penalty may be adjudged."[4] The military judge denied his request, which forced the case to trial on the merits.[5] Inmate Hasan was later convicted of the charged offenses and sentenced to death.[6] In his attempt to plead guilty to the offenses charged, Inmate Hasan joined numerous other military capital defendants who have either attempted to plead guilty at trial or reserved the inability to plead guilty at trial as an appellate issue warranting reversal of the conviction.[7] This example raises the question: Why does the military justice system prohibit guilty pleas in capital cases, when a large majority of death penalty states and the federal system permit them?

In *United States v. Matthews*, the Court of Military Appeals (now the Court of Appeals for the Armed Forces (CAAF)) ruled that the prohibition in Article 45(b) is constitutional.[8] Constitutionality of a statute, however, should not end the analysis of whether a statute is the best law for a particular system of justice. The military justice system is no different and requires "continue[d] . . . study and observation" to develop legislation as needed.[9] Article 45(b)'s prohibition on guilty pleas in capital cases presents an issue that deserves further analysis.

The statute, as drafted, rose out of frustration by convening authorities that records of trial contained little to no information for them to review. The lack of information made it nearly impossible for them to

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[3] *See* Kari Huus, *Nidal Hasan Barred from Pleading Guilty to Murder in 2009 Fort Hood Shooting*, NBC News (Aug. 15, 2012), http://usnews.nbcnews.com/_news/2012/08/15/13299644-nidal-hasan-barred-from-pleading-guilty-to-murder-in-2009-fort-hood-shooting (last visited June 15, 2014).

[4] UCMJ art. 45(b) (2012); *see* Appendix A (Article 45. Pleas of the Accused) (providing complete text of UCMJ art. 45 (2012)).

[5] *See* Huus, *supra* note 3.

[6] *See* Billy Kenber, *Nidal Hasan Sentenced to Death for Fort Hood Shooting Rampage*, WASH. Post (Aug. 28, 2013), http://www.washingtonpost.com/world/national-security/nidal-hasan-sentenced-to-death-for-fort-hood-shooting-rampage/2013/08/28/aad28de2-0ffa-11e3-bdf6-e4fc677d94a1_story.html (last visited June 15, 2014).

[7] *See generally* United States v. Matthews, 16 M.J 354, 362–63 (C.M.A. 1983) (accused attempting to plead guilty to premeditated murder at trial, then raising inability to plead as an appellate issue); *see also* Brief for Appellant at 433, 466, United States v. Akbar, No. 20050514, 2012 WL 2887230 (A. Ct. Crim. App. July 13, 2012) (on file with author).

[8] 16 M.J. 354, 362-63 (C.M.A. 1983).

[9] *See* H.R. 4080 Debate, *supra* note 1.

determine what happened at trial and assess the degree of criminality of the accused or if the accused was actually guilty. This review was particularly important to the accused because it represented the only appellate process available. Even when Congress passed the Uniform Code of Military Justice (UCMJ), many of the protections provided to the accused today, like a detailed providence inquiry, increased requirements for mitigation evidence, and additional evidentiary requirements in capital cases did not exist. Thus, a rule like Article 45(b) that protected the accused by forcing information into the record through a contested case made sense.

This article argues that in light of a detailed providency inquiry,[10] an increased requirement for mitigation investigations,[11] and the President's addition of Rule for Courts-Martial (RCM) 1004,[12] Article 45(b)'s prohibition on guilty pleas in capital-eligible cases no longer serve—nor needs to serve—as the robust protection that it once did. Therefore, Congress should amend Article 45(b) to permit a military accused to plead guilty in a capital-eligible offense.[13] Such a change in the law would bring the UCMJ in line with the federal code and the large majority of states who permit guilty pleas in capital cases. In addition, the change would provide greater latitude to military accused to focus their efforts and strategy on simply avoiding death. A decision to plead guilty by the accused also provides ancillary benefits to the government, such as increased judicial economy, economic savings, and quicker and assured closure for military units and victims' families. This article does not argue that Article 45(b) is unconstitutional as it exists or was an irrational rule when enacted, only that Article 45(b) is an antiquated rule that has been overcome by other protections for the accused and creates needless litigation. When such situations occur in the law, common sense and logic dictate change.

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[10] *See* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

[11] *See* Major David D. Velloney, *Balancing the Scales of Justice: Expanding Access to Mitigation Specialists in Military Death Penalty Cases*, 170 MIL. L. REV. 1, 17–26 (2001) (arguing that United States v. Loving, 41 M.J. 213 (C.A.A.F. 1994) and United States v. Gray, 51 M.J. 1 (C.A.A.F. 1999) are out of step with United States v. Curtis, 46 M.J. 129 (C.A.A.F. 1997), United States v. Simoy, 50 M.J. 1 (C.A.A.F. 1998), and United States v. Murphy, 50 M.J. 4 (C.A.A.F 1998) and the legal community writ large, which tends to support a more lenient standard in granting mitigation specialists for presentencing ostensibly because of an increased requirement to ensure the panel hears all relevant mitigation evidence in capital cases).

[12] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004 (2012) [hereinafter MCM].

[13] UCMJ art. 45(b) (2012).

II. Historical Purpose of Article 45(b)

Article 45(b)'s prohibition against guilty pleas in capital cases is the direct result of the convening authorities' need to review court-martial results. Prior to the passage of the UCMJ, no formal appellate courts existed to protect military accused.[14] Rather, as early as 1775 with the passage of the earliest version of the Articles of War for the United States,[15] only the convening authority reviewed court-martial proceedings to determine whether the process and sentence were just.[16] In doing so, they reviewed the records of the proceedings and determined whether the court-martial was procedurally and substantively fair.[17] If not satisfactory, they could order a new trial or grant other meaningful relief.[18] As such, an accused convicted of a capital crime often went from the courtroom to the hanging post at lightning speed in comparison with today's lengthy appellate process.[19]

At this early period in U.S. history, courts-martial involving a plea of guilty by the accused likely took even less time, as it was common practice not to accept any evidence.[20] The accused, often without counsel, would simply plead guilty to the offense charged. Upon

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[14] *See* JONATHAN LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775–1980, at 13 (Univ. Press of Kan. rev. and abr. ed. 2001) (1992).

[15] *See* 1775 Articles of War, *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 953 (2d ed. 1920 reprint), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/ML_precedents.pdf (The 1775 Articles of War were enacted in 1775 and revised in 1776 by the Continental Congress.).

[16] *See* LURIE, *supra* note14, at 2; M. Mauer, *Military Justice Under General Washington*, 28 MIL. AFFS., no. 1, Spring 1964, at 13 (discussing General Washington's detailed review of court-martial proceeding in capital cases).

[17] *See* Mauer, *supra* note 16, at 13.

[18] *See* 1775 Articles of War, *supra* note 15, art. LXVII (providing "[t]hat the general, or commander in chief for the time being, shall have full power of pardoning, or mitigating any of the punishments ordered to be inflicted, for any of the offences mentioned in the foregoing articles; and every offender, convicted as aforesaid, by any regimental court-martial, may be pardoned, or have his punishment mitigated by the Colonel or officer commanding the regiment").

[19] *See* Mauer, *supra* note 16 (detailing that Thomas Hickey, the first soldier ordered executed by General George Washington under the Articles of War, was executed the day following his trial. Hickey was convicted for attempting to enlist soldiers from the Continental Army into British service); United States v. Akbar, No. 20050514, 2012 WL 2887230 (A. Ct. Crim. App. July 13, 2012) (affirming the adjudged death sentence for Hassan Akbar, who killed two military officers and wounded fourteen others while deployed, over nine years after his crimes).

[20] *See* WINTHROP, *supra* note 15, at 278–79.

acceptance of the plea, the case was complete because the court took no evidence and there was no presentencing procedure.[21] Without taking evidence, the review by the convening authority was not an effective tool in the process.

A common example of this involved cases of desertion.[22] Desertion then required, as it does today, a specific intent to remain away from one's unit permanently; the lesser offense of absence without leave did not contain this element.[23] Thus, a soldier who intended to return to his unit after a few days of debauchery was only guilty of being absent without leave and not deserting. Desertion in a time of war was, as it is today, a capital offense.[24]

Unfortunately, many soldiers who pled guilty to desertion did not understand this legal nuance and, without representation, pled to the more serious offense of desertion without ever explaining what they did or why they did it.[25] Because the court-martial did not take testimony, it was impossible for the reviewing authority to determine if the soldier was actually guilty of desertion or if the sentence was appropriate.[26] This practice created problems early on with the reviewing authority's ability to review the findings and sentence.[27] With no formal appellate process and a lack of formal rules concerning a record of trial, little incentive existed for the government to prepare a record of trial detailing the evidence and testimony.

In 1829, the commanding general of the Army and lawyer Major

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[21] *See generally* BRIGADIER GENERAL GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES TOGETHER WITH THE PRACTICE AND PROCEDURE OF COURTS-MARTIAL TRIBUNALS 117 n.1 (John Wiley & Sons 1906) (noting "[i]n a majority of these cases [concerning deserters] in which the plea is 'guilty' the record is found to contain no testimony whatever").

[22] *See* WILLIAM WINTHROP, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 376–77 (1880), *available at* http://archive.org/stream/digestofopinions0000unitrich#page/n7/mode/2up; WINTHROP, *supra* note 15, at 277 n.89.

[23] *See, e.g.*, 1874 Articles of War art. 32 (finding violation occurs simply by absenting oneself from a unit), and art. 47 (providing violation requires intent to remain away permanently), *reprinted in* WINTHROP, *supra* note 15, at 988–89; UCMJ art. 85 (noting violation requires intent to remain away permanently), and *id.* art. 86 (providing violation occurs simply by absenting oneself from a unit).

[24] *See* UCMJ art. 85 (2012); 1775 Articles of War, *supra* note 15, at Additional Articles (possible punishment for desertion in time of war was death).

[25] *See* WINTHROP, *supra* note 15, at 277 n.89.

[26] *See* DAVIS, *supra* note 21, at 116.

[27] *See id*. at 117 n.1.

General Alexander Macomb[28] attempted to remedy the lack of evidence in guilty plea cases by issuing General Order from Army Headquarters, No. 60, directing that:

> courts-martial in capital cases, and especially cases of desertion, not to receive the plea of guilty, but, entering for the prisoner the plea of not guilty, to, "determine the grade of the offence and quantum of guilt by the character of the evidence produced to them."[29]

This absolute prohibition did not last long, and Major General Macomb issued another order aimed at resolving the issue. In General Order from Army Headquarters, No. 23 in 1830, he replaced the absolute prohibition with a less stringent rule. The new order allowed guilty pleas but mandated courts-martial must receive and report evidence, as it is "essential that the facts and particulars should be known to those whose duty it is to report on the case, or who have discretion in carrying the sentence into effect."[30] The 1830 order both preserved the ability to plead guilty, even to capital offenses, and ensured a record for review.

Major General Macomb never memorialized why he altered the prohibition in 1830. However, a review of law in the United States during the nineteenth century indicates states disfavored a prohibition on pleas.[31] Macomb's prohibition was therefore at odds with the majority rule. The 1830 order brought the military's practice in line with that of the states. Moreover, the absolute prohibition was also inconsistent with

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[28] *See generally* WILLIAM GARDNER BELL, COMMANDING GENERALS AND CHIEFS OF STAFF 1775–2010: PORTRAITS & BIOGRAPHICAL SKETCHES OF THE UNITED STATES ARMY'S SENIOR OFFICER 76–78 (Center of Military History, U.S. Army, 2010) (Major General Macomb was the Commanding General of the Army from May 29, 1828, to June 25, 1841.).

[29] WINTHROP, *supra* note 15, at 278–79 (citation omitted) (quoting Headquarters, U.S. Dep't of Army Gen. Order No. 60 (1829)) (emphasis added).

[30] *Id*. at 279 (quoting Headquarters, U.S. Dep't of Army Gen. Order No. 23 (1830)).

[31] *See* FRANKLIN FISKE HEARD, THE PRINCIPLES OF CRIMINAL PLEADING 263 (1879) (explaining that a guilty plea is to be accepted in a capital case if accused "comprehends the effects of his plea"); WM. L. CLARK, JR., HAND-BOOK OF CRIMINAL PROCEDURE 373 (1895) ("[T]he defendant may plead guilty in a capital case as well as any other. . . . It cannot compel him to plead not guilty, and submit to a trial, but it may and generally will, advise him to withdraw his plea and plead not guilty."); *see also* Barry J. Fisher, *Judicial Suicide of Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty*, 65 ALB. L. REV. 181 (2001) (arguing that the right to plead guilty in capital cases is a fundamental right rooted in the history of our country and that prohibitions violate due process).

the authority of convening authorities, who could not properly order such a prohibition.[32] After the 1830 order went into effect, Major General Macomb began disapproving courts-martial that did not follow the requirements. In doing so, he specifically referenced the needs of the reviewing officer and the "President as the pardoning power" to understand the facts and circumstances of the offense.[33] In 1840, a year before Major General Macomb died in office, he published a manual that included similar direction to the 1830 order on taking evidence in guilty pleas.[34] As time progressed, Congress continued amending the Articles of War, adding additional protections for the accused and various procedural obligations for the government.[35] However, the Articles never implemented either of Major General Macomb's orders.[36] The 1830 order continued in force through the Opinions of the Judge Advocate General of the Army.[37] Then in 1890, the Army included the mandate to take evidence in guilty plea cases in the *Instructions for*

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[32] *See* WINTHROP, *supra* note 22, at 375–76.

[33] WINTHROP, *supra* note 15, at 279 (quoting Headquarters, U.S. Dep't of Army Gen. Order No. 23 (1830)).

[34] *See* ALEXANDER MACOMB, THE PRACTICE OF COURTS MARTIAL 38–39 (Coleman, 1840). General Macomb wrote that

> if the prisoner plead guilty, the Court will proceed to determine what punishment shall be awarded, and to pronounce sentence thereon. Preparatory to this, in all cases where the punishment of the offence charged is discretionary, and especially where the discretion includes a wide range and great variety of punishment, and the specifications do not show all the circumstances attending the offence, the Court should receive and report, in its proceedings, any evidence the Judge Advocate may offer, for the purpose of illustrating the actual character of the offence . . . such evidence being necessary to enlightened exercise of the discretion of the Court, in measuring the punishment, and also to those whose duty it may be to report on the case, or to carry the sentence into effect.

Id.

[35] *See generally* LURIE, *supra* note 14, at 2, 74 (explaining that the original Articles of War had little concern for due process over military discipline, then later describing additional rights, albeit not as robust as possible, such as a pretrial investigations, counsel for the accused, and a form of court-martial review vested in the Judge Advocate General's Office).

[36] This information is based on a review of various versions and amendments of the United States Articles of War from 1775 through 1948.

[37] See, for example, cases referred to in WINTHROP, *supra* note 22, at 375–76, WILLIAM WINTHROP, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 587–88 (1885), and WILLIAM WINTHROP, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 552–53 (1901).

Courts-Martial and Judge Advocates (*1890 Instructions*).[38] The *1890 Instructions*, citing William Winthrop's *Digest of Opinions of the Judge Advocate General of the Army (1880)* (*Winthrop's Digest 1880*), provided that it is "proper for the court to take evidence after a plea of guilty in any case, except when the specification is so descriptive as to disclose all the circumstances of mitigation or aggravation that accompany the offense."[39]

The *1890 Instructions* also included a specific warning concerning capital cases, stating that, "it is most important that all the facts of the case be exhibited in evidence."[40] However, they never incorporated the outright prohibition previously ordered by Major General Macomb. Yet, it cites to *Winthrop's Digest 1880* that mandated the taking of evidence and makes particular note of the importance of this rule in capital cases. The purpose in the *1890 Instructions*, to provide "full knowledge of the circumstances attending the offense" so that the reviewing authority may exercise enlightened discretion when "measuring punishment," remained consistent with the intent behind both of Major General Macomb's previous orders.[41]

A review of each *Instruction for Courts-Martial* and the *Manual for Courts-Martial* (*MCM*) from 1890 thru 1949, the last year prior to passage of the UCMJ, reveals little variation or change in the rule or its purpose, as originally outlined by Major General Macomb.[42] However,

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[38] CAPTAIN P. HENRY RAY, INSTRUCTIONS FOR COURTS-MARTIAL AND JUDGE ADVOCATES 24 (1890) [hereinafter 1890 INSTRUCTIONS]. The *Instructions for Courts-Martial and Judge Advocates* was the precursor to the *Manual for Courts-Martial*.

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] *See generally* LIEUTENANT ARTHUR MURRAY, INSTRUCTIONS FOR COURTS-MARTIAL INCLUDING SUMMARY COURTS 25 (1891) [hereinafter 1891 INSTRUCTIONS] ("In *capital* cases, particularly, it is most important that all the facts of the case be exhibited in evidence."); MANUAL FOR COURTS-MARTIAL, UNITED STATES 38–39 (1893) (remaining similar to the *1891 Instructions*); MANUAL FOR COURTS-MARTIAL, UNITED STATES 29 (1898) (dropping the specific reference to capital cases, but retaining a provision requiring the record to contain "full knowledge of the circumstances" of the offense); MANUAL FOR COURTS-MARTIAL, UNITED STATES 31 (1902); MANUAL FOR COURTS-MARTIAL, UNITED STATES 31 (rev. ed. 1901) (remaining similar to the 1898 *MCM*); MANUAL FOR COURTS-MARTIAL, UNITED STATES 33 (1908) (remaining similar to the 1901 *MCM*); MANUAL FOR COURTS-MARTIAL, UNITED STATES 33 (1910) (remaining similar to both the 1901 *MCM* and the 1908 *MCM*); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IX, ¶ 154 (1917) [hereinafter 1917 MCM] (remaining similar to the 1902 *MCM*, the 1908 *MCM* and the 1910 *MCM*); MANUAL FOR COURTS-MARTIAL,

between the *1893 MCM* and *1898 MCM*, the drafters dropped the specific reference to accepting evidence in capital cases from the text. Even with this omission, acceptance of pleas in capital cases remained unfavorable and the prosecution was still required to present evidence.[43] Regardless of the rule's consistency, courts often ignored it in the field. One can find evidence of this in the numerous cases and orders that repeat the rule and in a 1919 inquiry from the Secretary of War on this subject, among others.[44]

The 1919 inquiry from the Secretary of War to the Judge Advocate General after World War I serves as a good example of the scrutiny that faced the military from civilian leadership with regard to pleas in capital cases. With large-scale military operations came more courts-martial under the Articles of War. The additional courts-martial led to greater scrutiny from the public and concerns that soldiers were railroaded by the command into pleading guilty to capital offenses, without evidence, without an understanding of the charges, and without attorney representation.[45]

General Crowder responded to the criticism by arguing the percentage of pleas in capital cases was small.[46] Additionally he noted that when a court-martial accepts a plea, the accused must admit the elements and the government must present evidence of the crime.[47]

UNITED STATES pt. IX, ¶ 154 (1918) (remaining similar to the 1902 *MCM*, the 1908 *MCM*, the 1910 *MCM* and the 1917 *MCM*); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IX, ¶ 154 (1921) (remaining unchanged from 1918 MCM); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. XIII, ¶ 70 (1927) (maintaining provision but removing reasoning for the requirement); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. XIII, ¶ 70 (1936) (remaining unchanged from the 1927 *MCM*); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. XIII, ¶ 70 (1943) (remaining unchanged from the 1936 *MCM*); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. XIII, ¶ 71 (1949) [hereinafter 1949 MCM] (remaining substantially the same as the 1943 *MCM*). All historical *Manuals for Courts-Martial* are available on the internet at http://www.loc.gov/rr/frd/Military_Law/CM-manuals.html.

[43] *See* WINTHROP, *supra* note 15, at 279.

[44] *See id.* at 280; War Dep't, Military Justice During the War, A Letter from the Judge Advocate General of the Army to the Secretary of War 31 (1919) [hereinafter Crowder Letter], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/letter.pdf (Major General Enoch Crowder responding to criticism that during World War I, the Army allowed accused to plead guilty to cases in which death was a possible sentence without the taking of evidence).

[45] *See* Crowder Letter, *supra* note 44, at 2–3, 23, & 28–31.

[46] *See id.* at 31.

[47] *See id.*

Lastly, he argued that when this did not occur, reviewing authorities usually "disapproved the record for such legal error."[48] General Crowder's response makes it clear that while there was no absolute prohibition, the convening authority would not approve a finding and sentence if the record contained no information.

Post-World War II, another call for large-scale revisions to the Articles of War and the Articles for the Government of the Navy was made by returning veterans and their supporters.[49] This was, again in part, due to the large number of military men court-martialed during World War II.[50] In response, Congress and military departments formed various committees to review both the Articles of War and the Articles for the Government of the Navy.[51] Commonly referenced are the committees chaired by Arthur T. Vanderbilt, the committee chaired by Arthur J. Keeffe (Keeffe Report), and the committee chaired by Edmund Morgan (Morgan Report).[52] Findings from these reports, among others, combined to form the basis for an initial draft of the UCMJ.[53] Each of the committees expressed a need to prohibit guilty pleas in death-eligible cases.[54]

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[48] *Id.*

[49] *See* LURIE, *supra* note 14, at 76–80.

[50] *See* H.R. 4080 Debate, *supra* note 1, at 14 (indicating that 80,000 men were convicted by general courts-martial during World War II); Lurie, *supra* note 14, at 77 (stating over 1.7 million trials were held during World War II, resulting in 100 executions and some 45,000 service members imprisoned).

[51] *See, e.g.*, LURIE, *supra* note 14, at 80–100 (giving a brief summary of the various reports).

[52] *See id.*

[53] *See* H.R. 4080 Debate, *supra* note 1, at 4–5; *Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 599–600 (1949) [hereinafter *H.R. 2498*], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/hearings_01.pdf.

[54] *See* Committee on a Uniform Code of Military Justice, Uniform Code of Military Justice, Text, References, and Commentary Based on the Report of the Committee on a Uniform Code of Military Justice to the Secretary of Defense 64 (1949) [hereinafter The Morgan Draft], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/morgan.pdf ("A plea of guilty by the accused shall not be accepted in a capital case."); Report and Recommendations of the General Court Martial Review Board 10–11, 139–46 (1947) [hereinafter The Keeffe Report], *available at* http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-III_general-court-martial-sentences-review-board.pdf; The Administration of Military Justice: A summary of Constructive Criticisms Received by the War Department's Advisory Committee on Military Justice 16–17 (1946), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Vanderbilt-A_Summary.pdf (providing that a trial should take place even when a there is a guilty plea in a capital case).

Only the Keeffe Report, which studied the Navy military justice system, detailed the reasoning for prohibiting guilty pleas in death-eligible cases.[55] The Keeffe Report's recommendations acknowledged that the Army did not contain an outright prohibition. However, the committee pointed out that the Navy did have the prohibition in its regulations for desertion cases and that New York did not allow guilty pleas in capital cases.[56] In commenting on those prohibitions, the committee found that the "rule is sound" and "would preclude the possibility of an unjust conviction of a serious offense on a plea of guilty by an accused who was inadequately represented by counsel, or who had no counsel, and who did not full [sic] understand the nature of the charges against him."[57] The dangers the committee listed would lead to unjust convictions because the accused might not understand what he is pleading to.

The Keeffe Report's arguments for the prohibition appear to be new, but the spirit of its reasoning remains the same as General Macomb's. That is, in cases where death is a possible sentence, both the trial court and convening authority must know all the facts and circumstances of the conduct; adequate counsel and understanding the charges help achieve that ultimate goal. Macomb's original order concerning the review of desertion cases is evidence of his concern about whether the accused entered a knowing plea. Without evidence on the record, the reviewing authority could not determine whether the accused understood the elements of desertion or whether he committed the offense of desertion or the lesser included offense of absent without leave. Thus, the Keeffe Report's recommendation of an absolute prohibition centered on avoiding the same problems that General Macomb was presumably trying to avoid.

In the 1949 debates on this provision, Mr. Overton Brooks and Mr. Felix Larkin responded to questions concerning the need for a prohibition on guilty pleas in capital cases.[58] During the testimony, Mr. Brooks and Mr. Larkin offered the following:

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[55] *See* The Keeffe Report, *supra* note 54, at 10–11, 139–46.
[56] *See id*. at 140.
[57] *Id*.
[58] *See H.R. 2498*, *supra* note 53, at 1056–57. Mr. Felix Larkin was the Assistant General Counsel of the Office of the Secretary of Defense and Mr. Overton Brooks was the chairman of the congressional subcommittee responsible for the Uniform Code of Military Justice. *See* Dwight H. Sullivan, *Killing Time: Two Decades of Capital Litigation*, 189 MIL. L. REV. 1, 40, 40 n.168 (2006).

> Mr. Brooks: This as originally written was intended to cover a case like we had in Chicago, the Loeb case, where the defendants pleaded guilty and threw themselves on the mercy of the court.
>
> Mr. Larkin: This is new in statute, but it has been regulations of the services for years. The intention is that you do not permit a man in a case in which the death penalty is possible to plead guilty, which is uniform practice in civil courts. You just do not let a man plead himself into the death penalty.[59]

Neither response directly addressed the concerns about the inability of the convening authority to review the facts and circumstances of the case that caused Major General Macomb to issue General Orders No. 60 and 23. While Mr. Larkin could have been more detailed in his response, he appeared to simply be stating that the rule is the status quo in the majority of death penalty jurisdictions. Mr. Brooks's response was not as clear from the text.

Mr. Brook's response presumably referenced the trial of Nathan Leopold, Jr, and Richard Loeb for the murder of minor Robert Franks in 1924.[60] Leopold and Loeb, sons of wealthy Chicago businessmen, planned and executed the murder for thrill.[61] They both later confessed to the crime and the state prosecutor, after having secured a substantial amount of evidence, sought the death penalty.[62] The parents of the two accused hired Clarence Darrow to defend them.[63] With virtually no options, the accused pled guilty, allowing Darrow to focus the court on his presentencing case.[64] The plea did not preclude any evidence because at the time, Illinois state law required the prosecution to prove their case notwithstanding the plea.[65] Darrow then focused his presentencing case on the defendants' mental infirmity that did not reach

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[59] *See H.R. 2498*, *supra* note 53, at 1056–57.
[60] *See generally* IRVING STONE, CLARENCE DARROW FOR THE DEFENSE 380–421 (1941) (providing a detailed account of the Leopold and Loeb case).
[61] *See* Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb*, 79 IOWA L. REV. 989–90 (1994) (citations omitted).
[62] *See id.* at 997.
[63] *See* STONE, *supra* note 60, at 380–81.
[64] *See* Howe, *supra* note 61, at 999–1001.
[65] *See id.* at 1000–01.

the level required to succeed on a plea of insanity.[66] The strategy worked and the two avoided the death sentence.[67]

It is unclear exactly what Mr. Brooks meant by referencing the Loeb case. The case, aside from accepting the plea, was consistent with the practice of taking evidence for the convening authority to review, except that the military lacked a true presentencing proceeding. Darrow's presentencing case was much more than throwing the defendants on the mercy of the Court. Darrow presented a strong individualized presentencing case, focusing on the mental infirmities of the defendants.[68] In 1949, such a tactic was procedurally unworkable because of the lack of a robust presentencing procedure in the military, which likely led to Mr. Brooks's rejection of the Illinois practice in favor of the clear-cut prohibition.[69]

Tracing the history of the present prohibition in Article 45(b) from 1776 through the proposal of the UCMJ, illustrates that review of courts-martial, particularly in capital cases, has always been important to commanders. At its base, the goal of the various orders was to ensure a plea contained enough information for the convening authority to review the record in order for him to determine the degree of the offense and if the accused understood the crime. The various orders and regulations used prior to the UCMJ operated to place information into a record for review in order to protect the accused from issues like unknowing pleas and inexperienced counsel referenced in the Keeffe Report. When Congress drafted the UCMJ, the prohibition in Article 45(b) operated as a blunt rule to eliminate those concerns in capital cases and to ensure that a record would always exists in the most serious cases.

III. The Historical Need for Article 45(b) No Longer Exists

Without the prohibition or a mandate to include evidence, there was little for the reviewing authority and later the Judge Advocate General to review in terms of facts and circumstances, including aggravation and mitigation evidence, surrounding the offense. This information for

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[66] *See id.* at 1001.
[67] *See* STONE, *supra* note 60, at 418–19.
[68] *See generally* Howe, *supra* note 61, at 1001–12 (describing in detail the evidence and theory presented by Darrow during his pre-sentencing case).
[69] *See infra* Part III.B (discussing evolution of extenuation and mitigation evidence permitted in courts-martial).

review was crucial when life hung in the balance. While life still hangs in the balance on review today, the previous concerns for which Article 45(b) was implemented have been overcome by case law, statute, and the President's rule-making authority. As such, Article 45(b) remains a vestige of another time. Specifically, a mandate for a detailed providency inquiry, requirements for increased mitigation investigations, and RCM 1004 eliminate the issues underlying the creation of Article 45(b).

A. Mandate for a Detailed Providency Inquiry

The modern guilty plea requirement to question the accused in detail concerning the elements of the offense during a guilty plea[70] eliminates the concern that reviewing authorities will be unable to understand the seriousness of the offense.[71] In 1951, nothing in the UCMJ, the President's instructions, or the Trial Procedure Guide called for the detailed inquiry that exists today.[72] Article 45(a) of the UCMJ, enacted at the same time as Article 45(b), created the requirement for the court to accept only knowing and voluntary pleas.[73] The original purposes of Article 45(a) and (b) are inextricably related. As such, they operate in tandem to ensure an accused enters a knowing and voluntary plea, while at the same time prohibiting pleas in capital cases.[74] Yet, even in non-capital cases, the conversation during the plea was more of a one-way conversation from the military judge[75] to the accused rather than a colloquy where the accused explains the crimes in his own words. Thus, in 1951, the prohibition played an important role in protecting the

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[70] *See* United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969); MCM *supra* note 12, R.C.M. 910(d) (2012).

[71] *See generally* WINTHROP, *supra* note 15, at 279 (quoting Headquarters, U.S. Dep't of Army Gen. Order No. 23 (1830) and referencing the need of the reviewing authority and the President as the pardoning authority to understand all of the facts).

[72] *The Trial Procedure Guide* was a script used in courts-martial and was published in the 1951 *Manual for Courts-Martial*. MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 8a (1951) [hereinafter 1951 MCM].

[73] *See* UCMJ art. 45(a), 45(b) (1951).

[74] *See supra* pp. 250–51 (explaining the relationship between recommendations in the *Keeffe Report* and the Morgan Committee in drafting the 1951 Code).

[75] Courts-martial did not have independent military judges until Congress passed the Military Justice Act of 1968. Prior to 1968, courts-martial were presided over by a law officer. Law officers were lawyers, but their authority and independence as judges was limited. *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, 638–40 (1994).

accused from a factually deficient record being reviewed in the most serious cases. This is because neither the UCMJ provisions nor the implementing language explicitly required a detailed providence inquiry.[76]

Over time, requirements imposed by the courts diminished the importance of the prohibition. For example, nearly fifteen years later, the relatively new Court of Military Appeals (CMA) decided *United States v. Chancelor*.[77] The *Chancelor* court used the legislative history of Article 45(a) and (b) to conclude that the drafters intended the military judge to complete a detailed providency inquiry in guilty plea cases, something not expressly stated in the UCMJ.[78]

In that case, Airman Second Class Chancelor pled guilty to wrongful cohabitation and issuing worthless checks in violation of Article 134. At trial, the president's inquiry was "limited to the formula advice suggested by the Manual for Courts-Martial, United States, 1951, Appendix 8a, page 509, including the statement of the maximum punishment which might be imposed."[79] However, the pro forma advice did not contain an explanation of the elements of the offenses or a statement by the accused detailing his conduct. During Chancelor's post-trial clemency interview, he stated that he believed that he had sufficient funds to cover the check.[80] This revealed a matter inconsistent with his plea, which led the CMA to set aside the finding of guilty to that specification of the charge.[81]

The key to the *Chancelor* decision is the court's interpretation of the President's regulation that "the accused plea 'admits every act or omission alleged and every element of the offense charged.'"[82] Prior to *Chancelor*, trial judges only asked if the accused admitted every element of the offense and if he understood the meaning and effect of the plea.[83] The CMA interpreted Article 45(a) using the congressional floor debates

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[76] *See* UCMJ arts. 45(a) and (b) (1951); *see* 1951 MCM, *supra* note 72, pt. XII, ¶ 70.a and b; *but see* United States v. Chancelor, 36 C.M.R. 453, 455–56 (C.M.A. 1966) (holding that the legislative intent of the provision called for a detailed inquiry with the accused of the elements on the record).
[77] *Chancelor*, 36 C.M.R. at 455.
[78] *See id.*
[79] *See id.* at 454.
[80] *See id.*
[81] *See id.* at 457.
[82] *See* 1951 MCM, *supra* note 72, pt. XII, ¶ 70b.
[83] *See id.* app. 8a.

concerning the UCMJ. In doing so they interpreted the above quoted provision much more broadly than the drafters of the *Trial Procedure Guide* did in the *1951 MCM*.[84] The court held that the law officer must now establish guilt-in-fact by explaining the elements of the offense and having the accused explain in his own words why he violated them.[85] While this is certainly a logical opinion, the broader rule is not as clear in the legislative history as the court opined.[86] A reading of the quoted congressional testimony in *Chancelor* leaves the reader guessing if there really was a desire for a discussion between the court and the accused concerning elements and facts or simply a verbatim record of the accused affirming that he committed the elements.[87]

The failure of the trial judiciary to follow the seemingly clear guidance in *Chancelor* and the court's need to readdress the issue in *United States v. Care* is further evidence of this dissonance.[88] In *Care*, the accused pled guilty to desertion. The law officer examined the accused perfunctorily in that he "did not personally inform him of the elements constituting the offense and he did not establish the factual components of the guilty plea."[89] *Care* alleged in a post-trial affidavit that his counsel never informed him of the elements of the crime and that he never intended to remain away permanently.[90] The court ultimately found that "on the basis of the whole record"[91] the plea was voluntary even though the trial judge did not personally address the accused.[92] The court then expressed its displeasure in the failure of the armed services to follow the recommendation that it provided in *Chancelor*.[93]

Out of frustration at the armed services' unsatisfactory attempt to implement its recommendation in *Chancelor*, the court outlined its own

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[84] *See Chancelor*, 36 C.M.R. at 455–56 (The *Trial Procedure Guide* only required pro forma questions without a detailed colloquy between the law officer and the accused.)
[85] *See id.* at 456.
[86] *See id.* (articulating that the procedure for taking a plea is "so cogently outlined in House Report. No. 491").
[87] *See id.* at 455–56; The author has no quarrel with the interpretation of the provisions in *Chancelor*. The discussion is relevant to show the evolution of the providency inquiry from an undeveloped procedure in 1951 to a robust, codified, and institutionalized procedure today.
[88] *See* United States v. Care, 40 C.M.R. 247, 250 (C.M.A. 1969).
[89] *Id.* at 252.
[90] *See id.* at 249.
[91] *See id.* at 251.
[92] *See id.* at 253.
[93] *See id.* at 252.

rule.[94] Specifically, the court imposed a requirement on the military judge both to explain the elements of the crime to the accused and to ask the "accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for the determination" that the accused committed the offense.[95] The court further explained that the military judge could not meet the requirement by simply asking the accused if he understood the elements. Rather, the rule required the military judge to personally address the accused and "to question him about his actions and omissions."[96] It is fitting that the seminal case establishing the black-letter rule for a providency inquiry would include the charge of desertion, as it was the charge of desertion that started the problem with pleas in the first place.[97]

In light of the court's view in *Chancelor* that Congress always intended a robust colloquy, Congress arguably considered and determined a need for both provisions. Such a determination suggests that even with that robust colloquy, Congress believed capital cases to be too serious for a soldier to plead. The Keeffe Report, which Professor Morgan used in creating the *Morgan Draft*,[98] strengthens this argument.[99] The Keeffe Report maintained that

> [t]he board was handicapped in its review by the brevity of the record in cases with a plea of guilty. . . . To remedy this the Board recommends that the Advisory Council consider including in the record of guilty cases, first, the complainant's testimony taken under oath before sentence, and second, the pre-trial report of

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[94] *See generally id.* at 253 (expressing displeasure at the change in language in the 1969 *Manual for Courts-Martial*, seemingly making the explanation of the elements by the law officer discretionary and that no update was made to the "new Manual's Trial Procedure Guide (Appendix 8a)").

[95] *Id.*

[96] *Id.*

[97] *See supra* note 22 and accompanying text.

[98] *See* LURIE, *supra* note 14, at 80–100 (noting the *Morgan Draft* is a document produced as a result of the Morgan Committee and is the basis of the modern-day UCMJ).

[99] *See generally* MORGAN PAPERS COMPARATIVE STUDIES NOTEBOOK A.W. 21, at 2 (Jan. 6, 1949), *available at* http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-II.pdf (citing recommendations of the the Keeffe Report, *supra* note 54); The Morgan Draft, *supra* note 54, at 64–65 (citing the recommendations of The Keeffe Report, *supra* note 53, to be included in the President's instructions to Article 45(a)).

investigation.[100]

If Congress considered and intended a more robust inquiry, the argument that the *Care* inquiry obviates the prohibition is less persuasive, because it shows a desire by Congress to have both the robust colloquy and the prohibition, regardless of overlapping purposes.

Nevertheless, Congress failed to articulate that intent in the UCMJ and the President failed to provide that requirement in his instructions, therefore weakening the robust colloquy position.[101] Moreover, it took the courts eighteen years to ferret out a black letter rule establishing a requirement for a guilt-in-fact inquiry.[102] The latter leaves the impression that while some type of colloquy was intended, it was in no way as robust as the one that existed post-*Care*. Now that the rule is firmly established, the original tandem purpose of Article 45(a) and (b) is of no value because the courts regularly guard the requirement for guilt-in-fact pleas, thus maintaining an appropriate record for review.[103]

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[100] The Keeffe Report, *supra* note 54, at 14. The specific recommendations of report were:

> (1) That the plea of guilty shall not be received in capital cases;
> (2) That the accused in every case be represented by counsel appointed for or selected by him, and that the plea of guilty be received only after an accused has had the opportunity to consult with counsel;
> (3) That in every case the judge advocate explain to the accused the meaning and effect of a plea of guilty, such explanation to include the following:
> (a) That the plea admits the offense, as charged (or in a lesser degree, if so pleaded), and make a conviction mandatory.
> (b) The sentence which may be imposed.
> (c) Unless the accused admits doing the acts charged, or if he claims a defense, a plea of guilty will not be accepted.
> (4) That the judge advocate determine whether a plea of guilty be accepted, and rule on all special pleas.

Id.

[101] *See* Loving v. United States, 62 M.J. 235, 241 (C.A.A.F. 2005) (stating "[i]t is a fundamental tenet of statutory construction to construe a statute in accordance with its plain meaning") (citations omitted).

[102] *See* United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969).

[103] Even if Congress did desire the robust inquiry in conjunction with prohibition, the practice did not bear out that desire. Congress made no attempt to change the rule, and the President made no attempt to update the implementing instruction until post-*Care*. *See id.* at 253.

An examination of just a few cases illustrates that military appellate courts routinely address whether the military judge sufficiently explained the elements of the offense to the accused during a plea, whether the military judge established a factual basis for pleas, and whether the military judge resolved conflicts to the plea. For instance, in *United States v. Negron*, the military judge used the wrong definition of indecent when explaining the elements to the accused.[104] The wrong definition fundamentally changed the offense. The court set aside the findings and sentence because with the wrong definition, the plea could not be knowing.[105]

The courts have also ensured that the accused's explanation of the offense factually establishes the elements. In *United States v. Weeks*, the Court found that while the military judge explained the elements to the accused, the accused's responses did not factually meet the elements of forgery, which caused the appellate court to set aside the finding.[106]

Lastly, courts regularly address when the accused makes a statement inconsistent with his plea or raises a defense. Although the military judge is required to address inconsistency during the providency inquiry, on appeal, the courts require a substantial conflict in testimony or more than a mere possibility of a defense before they find the plea improvident.[107] In *United States v. Phillippe*, the accused, after pleading to absence without leave, stated that he attempted to return during the charged period during his presentencing unsworn statement.[108] The court held that the military judge abused his discretion for failing to reopen the providency inquiry and only approved the plea up to the date of return.[109] The accused's unsworn statement that conflicted with his statement

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[104] *See* United States v. Negron, 60 M.J. 136 (C.A.A.F. 2004) (The military judge used the definition of "indecent" from indecent acts rather than the from the correct offense of indecent language.); *see also, e.g.*, United States v. Redlinski, 58 M.J. 117 (C.A.A.F. 2003) (setting aside the finding of guilt to a specification of attempted distribution of marijuana because the military judge failed to explain the elements of attempt on the record).

[105] *See Negron*, 60 M.J. at 142.

[106] *See* United States v. Weeks, 71 M.J. 44, 48–49 (C.A.A.F. 2011); *see also, e.g.*, United States v. Thomas, 65 M.J. 132, 135 (C.A.A.F. 2007) (holding accused's plea improvident because accused and government stipulated that he did not enter or know he was entering a military installation, a required fact to establish a violation introducing marijuana onto a military installation (Article 112a, UCMJ)).

[107] *See* United States v. Phillippe, 63 M.J. 307, 309–10 (C.A.A.F. 2006).

[108] *See id.* at 308.

[109] *See id.*

during the providency inquiry amounted to a substantial conflict with his plea. This conflict required the military judge to reopen the inquiry to resolve the conflict.[110]

In sum, the interpretation of Article 45(a) presented by *United States v. Chancelor*[111] and *United States v. Care*[112] ensures that the accused has knowledge of the offense, understands the plea, and builds a record. In combination, the construction eliminates the original need for Article 45(b). "The military justice system takes particular care to test the validity of guilty pleas because the facts and the law are not tested in the crucible of the adversarial system."[113] With this in mind, removal of Article 45(b)'s absolute prohibition on a plea would not affect the particular care taken and would be tempered by the military judge's obligation to refuse the plea, if any of the requirements set forth in Article 45(a) and RCM 910 are not met.[114] Even after acceptance of the plea, the military judge has an obligation to reopen providency if the accused later raises matters that are inconsistent with the plea.[115] These protections prevent military accused from erroneously pleading guilty to a death-eligible offense and make Article 45(b)'s prohibition unnecessary.

B. Requirement for Mitigation Evidence

The military's current death penalty jurisprudence also obviates the need for Article 45(b) by requiring defense counsel to submit all relevant mitigation evidence.[116] Often, a defense attorney's sole goal in a capital case is to avoid a death sentence. In doing so, attorneys must competently present a comprehensive presentencing case, from having all the right witnesses to reviewing all the possible evidence that they might later use. It is no surprise then that one of greatest burdens for defense counsel in a capital case is overcoming ineffective assistance of

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[110] *See id.* at 311. Because the court approved a shorter period of absent without leave, they returned the record to the Court of Criminal Appeals to perform a sentence reassessment *Id*.
[111] 36 C.M.R. 453 (C.M.A. 1966).
[112] *See* 40 C.M.R. 247, 253 (C.M.A. 1969).
[113] United States v. Pinero, 60 M.J. 31, 33 (C.A.A.F. 2004).
[114] *See generally* MCM, *supra* note 12, R.C.M. 910 (outlining the requirements to receive a plea).
[115] *See Phillippe*, 63 M.J. at 308.
[116] *See* Velloney, *supra* note 11, at 2 (citing Locket v. Ohio, 438 U.S. 586, 604 (1976)).

counsel by presenting a robust individualized presentencing case.[117]

The rule enunciated in *Strickland v. Washington*[118] remains the standard for ineffective assistance of counsel in capital cases, but it has arguably evolved in military capital cases, lowering appellant's burden on appeal.[119] Even the American Bar Association recognized the difficulty that faces capital defenders by outlining increased qualifications for attorneys representing accused facing the death penalty.[120] To ensure effective representation under an individualized sentencing model, mitigation specialists have become an essential part of counsel making a "broad inquiry into all relevant mitigating evidence."[121] Thus, the evolving law and increased requirements for mitigation evidence ensures a robust record for review and limits Article 45(b)'s original purpose in the death penalty scheme.

An analysis of the historical view toward sentencing is helpful in understanding why Article 45(b) served an important purpose when drafted, but is now no longer necessary. The historical procedure for sentencing in the military is starkly different from what it is today. The military has shifted from a retribution model focused on uniformity to an individualized sentencing philosophy.[122] During the Civil War, Army trials were not bifurcated into merits and sentencing. Colonel Winthrop points out:

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[117] *See* Honorable Helen G. Barrigan, *The Indispensible Role of Mitigation Specialist In A Capital Case: A View From The Federal Bench*, 36 HOFSTRA L. REV. 819, 830 (2008) (citing Wiggins v. Smith, 539 U.S. 510, 537–38 (2003) and Williams v. Taylor, 529 U.S. 362, 395–96 (2000); *see also, e.g.*, United States v. Loving, 517 U.S. 748 (C.A.A.F. 1996); United States v. Curtis (*Curtis II*), 46 M.J. 129 (C.A.A.F. 1997); United States v. Murphy, 50 M.J. 4 (C.A.A.F. 1998); United States v. Gray, 51 M.J. 1 (C.A.A.F. 1999) (all addressing ineffective assistance of counsel in the context of the presentation of mitigation evidence).

[118] *See* Strickland v. Washington, 466 U.S. 688 (1984) (setting forth a two-pronged test for ineffective assistance of counsel: (1.) that counsel performance was deficient, and (2.) that the deficiency resulted in prejudice to the appellant).

[119] *See* Mary M. Foreman, *Military Capital Litigation: Meeting the Heightened Standards of* United States v. Curtis, 174 MIL. L. REV. 1, 19–21 (2002).

[120] *See* AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 961–62 (rev. ed. 2003), *in* 31 HOFSTRA. L. REV. 913 [hereinafter ABA GUIDELINES] (providing criteria for counsel to provide "high quality legal representation" in capital cases). The *ABA Guidelines* are also available online at http://ambar.org/2003Guidelines.

[121] *See* Velloney, *supra* note 11, at 9 (quoting Buchanan v. Angelone, 522 U.S. 269 (1998)).

[122] *See* Captain Denise K. Vowell, *To Determine an Appropriate Sentence. Sentencing in the Military Justice System*, 114 MIL. L. REV. 87, 113–14 (1986).

> Basing then the sentence upon the facts as established by the evidence and ascertained by the finding, the punishment will regularly and properly be measured by the peculiar circumstances preceding and accompanying it, the intent manifested by the offender, his animus toward the aggrieved person if any, the consequences of his act, its effect upon military discipline, and etc.[123]

The lack of a formal procedure for introducing mitigation evidence kept the focus on retribution.[124] This focus certainly limited the amount and type of information presented at trial.

The military treated guilty pleas differently, and early courts-martial contained something that at first glance appears to be a presentencing proceeding.[125] They were procedurally different, in part, because records often made it to the reviewing authority with little information to actually review.[126] As a result, it was "proper for the court to take evidence after a plea of guilty in any case, except when the specification is so descriptive as to disclose all circumstances of mitigation or aggravation that accompany the offense."[127] However, the procedure was more of an extension of the merits than a true presentencing proceeding, as it was still improper for the sentencing authority to consider mitigation evidence.[128] Discretion to consider any evidence in extenuation and

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[123] *See id.* at 108–09 (quoting WINTHROP, *supra* note 15, at 397).
[124] *See id.* at 109.
[125] *See id.* (citing 1890 INSTRUCTIONS, *supra* note 38, at 24); *see also* WINTHROP, *supra* note 15, at 279. Winthrop noted that

> a court-martial was authorized, notwithstanding the plea of guilty, and even where the sentence was not discretionary, to receive evidence on the merits, with a view to determining the actual criminality of the offender and the measure of punishment which should properly be executed, in any case in which such evidence was deemed to be essential to the due administration of military justice.

Id.
[126] *See supra* Part II.
[127] *See* Vowell, *supra* note 122, at 109–10 (quoting WINTHROP, *supra* note 15, at 376) (emphasis added).
[128] *See* WINTHROP, *supra* note 15, at 396 (Evidence "of valuable service, general good character, or other extraneous circumstances favorable to the accused but foreign to the merits of the case, (although sometimes properly considered upon the Finding as material especially to question of *intent*) cannot—*strictly*—be allowed to affect the discretion of the court in imposing sentence."); *but see* Vowell, *supra* note 122, at 109–10 (analyzing

mitigation remained with the reviewing authority.[129]

In a guilty plea context, the lack of an adversarial process may have excluded mitigation evidence, leaving the reviewing authority with only the facts as presented by the government.[130] The procedure of taking evidence after a guilty plea attempted to ensure the reviewing authority had enough information to determine if the accused was guilty and if the sentence should remain. However, because the focus remained on the offense and not on the individual, it was unlikely that all mitigation made it into the record of trial.

Slowly, the military justice system began changing the way it viewed punishment at courts-martial to a more individualized approach. The *1917 MCM* was the first to articulate how the sentencing authority might exercise their discretion.[131] The manual instructed court members to consider "individual characteristics of the accused . . . as the individual factor[s] in one case may be such that the punishment of one kind would serve the ends of discipline, while in another case punishment of a different kind would be required."[132] The various *MCM*s from 1928–1949 continued this trend, but again failed by not providing for a robust presentence proceeding.[133] In part to remedy these issues, a presentencing procedure was included in the *1951 MCM*.[134]

The shift in presentencing procedures from the pre-UCMJ *1949 MCM* to the post-UCMJ *1951 MCM* began a substantial sea change in the type and amount of evidence received by the court during presentencing proceedings. A comparison of a pre-UCMJ capital case with a recent capital case serves to illustrate the enormity of this change. On April 12, 1951, Private Hunter shot and killed two Korean civilians,

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this procedure and concluding it was closer to the presentencing procedure held today, rather than an extension of the merits).

[129] *See* WINTHROP, *supra* note 15, at 396.

[130] *See id.* (Explaining that some mitigation evidence was entered properly on the merits, primarily to reduce an accused's intent. Logically, it is this mitigation evidence that the convening authority would lose in a guilty plea).

[131] *See* James K. Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1, 14–15 (1998) (citing 1917 MCM, *supra* note 40, pt. XII, ¶ 342).

[132] *See* Vowell, *supra* note 122, at 113–14 (quoting 1917 MCM, *supra* note 42, pt. XII, ¶ 342).

[133] *See id.* at 115 (stating that the "sentencing practices in the military did not undergo any major revisions from 1921 to 1950).

[134] *See id.* at 118.

wounded three others, and violently raped a ten-year-old girl.[135] Counsel met with the accused at least twice before trial, "the first time at least one month in advance of the hearing."[136] The record of trial indicated that counsel for the accused was present during trial, kept hearsay out, and disclosed a good working knowledge of the law. However, the "[t]he record [was] barren of any extenuating or mitigating circumstances."[137] Not surprisingly, the panel convicted Hunter of the charges and sentenced him to death.[138] Evidence in both extenuation and mitigation were permissible forms of evidence under the *1949 MCM*.[139]

Just eighteen months later, on appeal at the military's highest court, Hunter complained that he did not receive effective assistance of counsel.[140] He substantiated his allegation with an unsworn statement that lacked specificity.[141] The court disagreed and upheld the sentence. Shockingly, the court failed to address how meeting with a client only twice might have a negative impact on investigating extenuating and mitigating evidence.[142] Not only did they fail to address the issue, but the court used the lack of such evidence to uphold a death sentence.[143] This is striking considering the *1949 MCM* required unanimous concurrence of the members to adjudge death and a single mitigating factor might have swayed just one.[144] The holding illustrates that the court did not place a high value on the importance of individualized sentencing that the *MCM* appeared to be adopting. If they had placed

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[135] *See* United States v. Hunter, 6 C.M.R. 37, 40 (C.M.A. 1952) (Hunter's conduct occurred prior to the effective date of the Uniform Code of Military Justice (May 31, 1951), so the Court adjudged the sentence on June 27, 1951. Because Hunter's conduct occurred prior to the effective date of the UCMJ, the command charged him under the Articles of War, and completed the trial pursuant to the 1949 *MCM*, but the Court of Military Appeals heard his case pursuant to procedures for appellate review outlined in the new UCMJ.

[136] *Id.* at 41.

[137] *See id.* at 45.

[138] *See id.*

[139] *See* 1949 MCM, *supra* note 42, pts. XV, ¶ 79, XXV, ¶ 113 (mandating evidence in extenuation and mitigation be introduced under certain circumstances); *see* 1951 MCM, *supra* note 72, pt. XIII, ¶ 76 (providing for evidence in extenuation and mitigating evidence post-UCMJ).

[140] *See Hunter*, 6 C.M.R. at 40.

[141] *See id.*

[142] *See id.* at 41.

[143] *See id.* at 45 (The court articulated that in order to prevail, appellant must show "that the proceedings by which he was convicted were so erroneous as to constitute a ridiculous and empty gesture, or were so tainted with negligence or wrongful motives on the part of his counsel as to manifest a complete absence of judicial character.").

[144] *See* 1949 MCM, *supra* note 42, pt. XV, ¶ 80b.

value on individualized sentencing they likely would have recognized the impossibility of presenting that type of evidence after only meeting with the client twice.

By contrast, in 2012, in *United States v. Akbar*, the Army Court of Criminal Appeals (ACCA) addressed the investigation and presentation of mitigation evidence in detail.[145] Akbar threw grenades into several brigade staff tents at Camp Pennsylvania, Kuwait, on the eve of the Iraq war.[146] After throwing a grenade into the second tent, he shot and severely wounded Major KR when he ran out.[147] As a result, Akbar killed two officers and wounded fourteen others.[148] The panel convicted Akbar of two specifications of premeditated murder and three specifications of unpremeditated murder and sentenced him to death.[149] On appeal, the Army court addressed numerous issues, including ineffective assistance of counsel, for failing to conduct a complete investigation into the background of the appellant.[150]

Specifically, Akbar argued "that . . . his trial defense counsel failed to adequately investigate [his] social history, ignored voluminous information collected by mitigation experts and ceased using mitigation experts, resulting in an inadequate mental health diagnosis."[151] On the contrary, trial defense counsel used five mitigation specialists at different times during their pre-trial preparation.[152] The mitigation specialists collected life history information, including at least four boxes of documents, identified witnesses, regularly gave reports, and provided information that led to use of additional mental health assets. The defense used some of the documentary evidence and witnesses at trial.[153] The court, relying on *Loving v. United States* (*Loving III*), disagreed with appellant and drew a distinction between cases "where no life history or mitigating evidence was presented and an allegation that additional life

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[145] *See* United States v. Akbar, No. 20050514, 2012 WL 2887230, at *14–17 (A. Ct. Crim. App. July 13, 2012).
[146] *See id.* at *2.
[147] *See id.*
[148] *See id.*
[149] *See id.* at *3.
[150] *See id.* at *8. Appellate defense counsel raised 61 assignments of error and a petition for a new trial; the court found that five of those issues merited discussion. *See id.* at *1.
[151] *Id.* at *14.
[152] *See id.* at *15.
[153] *See id.* at *15–16.

history or mitigation evidence was available."[154]

The distinction illustrates that the court might have come to a different result had appellant raised information missed by the defense during the investigation.[155] In analyzing the issue in this way, the court sent a clear message to practitioners to investigate thoroughly. While the court ultimately ruled against appellant, the fact that they addressed this issue in light of the extensive investigation completed by trial defense counsel illustrates the court's concern and the vast shift from *Hunter*.

Logically, defense counsel are likely to present a more robust mitigation case if they are armed with mitigating evidence. The shift from *Hunter* to *Akbar* did not occur overnight. The shift resulted primarily from a judicial recognition of an individualized sentencing mandate analyzed through the rubric of ineffective assistance of counsel.[156] A driving factor, then, in forcing a more robust sentencing case is the court's willingness to overturn a case when a defense counsel fails to present a complete picture of the accused.[157] *United States v. Loving* affirms that the standard for ineffective assistance of counsel remains *Strickland v. Washington* and does not create a bright line rule requiring mitigation specialist.[158] However, *United States v. Curtis* held that the performance prong of Strickland should be viewed in context of a capital case, thereby lowering appellant's burden when death is on the table.[159] The lower burden for an appellant on appeal translates to a higher burden on the defense counsel to produce mitigation evidence at

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[154] *Id.* at *16 (citing Loving v. United States (*Loving III*), 68 M.J. 1, 15–16 (C.A.A.F. 2009)) (emphasis added).

[155] *See id.* (explaining that documents relied on by the appellate defense counsel mitigation specialist are the same as those relied on by trial defense counsel).

[156] *See* Vowell, *supra* note 122, at 141–42 (citing United States v, Burfield, 22 C.M.R. 321 (C.M.A. 1973), United States v. Lacey, 49 C.M.R. 738 (C.M.A. 1975), and United States v. Hill, 44 C.M.R. 257 (C.M.A. 1972)); *see generally* United States v. Curtis (*Curtis II*), 46 M.J. 129, 130 (C.A.A.F. 1997) (citing Strickland v. Washington, 466 U.S. 668, 694 (1984), and holding the trial defense counsel was ineffective for failing to exploit all available mitigation evidence).

[157] *See, e.g.*, United States v. Murphy, 50 M.J. 4, 9, 12–13 (C.A.AF. 1998) (finding ineffective assistance of counsel in part due to failure of counsel to conduct complete investigation into appellant's life); United States v. Kreutzer, 61 M.J. 293 (C.A.A.F. 2005) (holding that the trial court erred in denying a mitigation specialist to the defense team); *Curtis II*, 46 M.J. at 130 (holding defense counsel ineffective for failing to exploit all available mitigation evidence).

[158] *See* United States v. Loving, 41 M.J. 213, 242, 250 (C.A.A.F. 1994).

[159] *See* Foreman, *supra* note 119, at 20–21 (citing United States v. Curtis, 48 M.J. 331, 332 (C.A.A.F. 1997) (Cox, C.J., concurring)).

trial.[160] Higher risk of reversal has led a variety of commentators to conclude granting a defense mitigation specialist request can avoid this pitfall.[161]

The trend to include a mitigation specialist as part of the defense team increases the likelihood that trial defense counsel will present more information to the panel in hopes of persuading one juror to vote for life imprisonment in a death-eligible case.[162] Counsel still maintain discretion concerning the amount and type of information to present. However, military courts now require that counsel have that information to make the decision. It is extremely unlikely that the drafters of Article 45(b) anticipated the large amount of information offered during presentencing today. The sharp distinction between the two pre-trial meetings in *Hunter* and five mitigation specialists and two years of preparation in *Akbar* further illustrates how far capital litigation is from the drafter's temporal experience with presentencing procedures. Thus, the increased requirements for mitigation evidence eliminates the original need for Article 45(b).

C. Rule for Courts-Martial 1004's Aggravating Factor Scheme

The prohibition on guilty pleas in death-eligible cases articulated in Article 45(b) is no longer required because RCM 1004 creates additional protections for a military accused between merits and voting on the sentence.[163] The provision requires the prosecution to prove at least one

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[160] *See* Major Edyle U. Moran, *New Developments in the Sixth Amendment Right to Counsel and Mental Responsibility*, ARMY LAW., Apr. 1999, at 65, 71–72.

[161] *See, e.g.*, Foreman, *supra* note 119, at 28–29 (arguing that "[w]hile employment of a mitigation specialist is not legally required in a capital court-martial, it is a sound means of adding capital experience to an otherwise inexperienced trial defense team); Velloney, *supra* note 11, at 26 (arguing that "[l]iberally granting requests for expert assistance [trained mitigation specialist] in death cases will help solve the unavoidable problem of inexperienced military counsel"); Dwight Sullivan et al., *Raising the Bar: Mitigation Specialist in Military Capital Litigation*, 12 GEO. MASON U. CIV. RTS. L.J. 199, 228 (2002) ([T]he military should provide service members charged in capital cases a regulatory right to the assistance of a mitigation specialist.").

[162] *See generally* Robin M. Maher, *The ABA and the Supplementary Guidelines for the Mitigation Function of the Defense Teams in Death Penalty Cases*, 36 HOFSTRA. L. REV. 763 (2008) (explaining the American Bar Association guidelines on mitigation and the use of mitigation evidence).

[163] *See* MCM, *supra* note 12, R.C.M. 1004 cmt. ("That the rule was drafted in recognition that, as a matter of policy, procedures for the sentence determination in

listed aggravating factor beyond a reasonable doubt to a military panel of at least twelve members.[164] Presentation of evidence by the government during this phase would easily fill any gaps in the record left from the detailed providency inquiry discussed above and create a more informed record for review. The drafters of Article 45(b) certainly did not consider such advanced protections for an accused, because RCM 1004 results from a fundamental shift in death penalty jurisprudence in the United States.[165]

Generally, RCM 1004 requires four gates[166] that the government must pass through in order to secure a sentence of death.[167] The first gate requires the government to secure a unanimous conviction in a death-eligible offense.[168] Under the proposal in this article, the President must amend this provision to allow a military judge to accept a plea of guilty to a capital offense.[169] The second gate requires the government to prove beyond a reasonable doubt that one of the aggravating factors is present in the case.[170] This gate offers the greatest opportunity for the facts and circumstances of the case to become part of the record. The third gate calls for a "unanimous concurrence that the aggravating factors outweigh the mitigating factors."[171] The fourth gate mandates a unanimous vote for the sentence of death.[172] The members are required to announce on the record the aggravating factors on which they relied in choosing death as a sentence.

The shift in capital jurisprudence that led to RCM 1004 began with *Furman v. Georgia*.[173] In a short per curiam opinion, the Supreme Court (in a 5–4 vote) invalidated the death sentences of three separate cases.

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capital cases should be revised, regardless of the outcome of such litigation, in order to better protect the rights of servicemembers.").

[164] *See id.*; *see generally* UCMJ art. 25a (2012) (requiring twelve panel members under ordinary circumstances).

[165] *See* Sullivan, *supra* note 58, at 4 (providing an excellent summary of the shift in death penalty jurisprudence and particularly its application to military death cases through 2006).

[166] *See* Loving v. Hart, 47 M.J. 438, 442 (C.A.A.F. 1998) (describing the requirements in RCM 1004 as gates).

[167] *See* United States v. Simoy, 50 M.J. 1, 2 (C.A.A.F. 1998) (citing *Loving*, 47 M.J. at 442 and listing the requirements sequentially).

[168] *See id.* at 2 (citing RCM 1004(a)(2)).

[169] *See* Appendix C (Recommended Changes to the Rules for Courts-Martial).

[170] *See Simoy*, 50 M.J. at 2 (citing RCM 1004(b)(7)).

[171] *Id.* (citing RCM 1004(b)(4)(C)).

[172] *See id.* (citing RCM 1006(d)(4)(A) which is referenced by RCM 1004(b)(7)).

[173] 408 U.S. 238 (1972) (per curium).

Each of the justices wrote separate opinions.[174] However, "Furman generally has been interpreted as holding that the Eighth Amendment requires that the death penalty procedures 'channel the discretion of sentencing juries in order to avoid a system in which the death penalty would be imposed in a 'wanton' and 'freakish' manner.'"[175] This ruling caused thirty-five states and the federal government to alter their death penalty statutes either by adding aggravating factors to presentencing analysis or through mandating the death penalty for some offenses.[176] The Supreme Court ultimately deemed some of the changes resulting from *Furman* that called for mandatory death, in certain crimes, unconstitutional.[177]

Although Article 36 of the UCMJ gives the President authority to adopt "principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district court"[178] the military was slow to follow the lead of the states to change the capital punishment scheme.[179] President Reagan added RCM 1004 in 1984, after the Court of Military Appeals in *United States v. Matthews*[180] held a portion of the military death penalty scheme unconstitutional.[181]

In *Matthews*, the Court of Military Appeals determined that the military death penalty scheme did not meet the requirements set forth by the Supreme Court.[182] The court reasoned, that "the lack of identified circumstances make meaningful appellate review, at any level, impossible, and we cannot be sure that the sentence was correctly imposed."[183] The Court identified that both Congress and the President

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[174] *See id.* at 239; *see also* United States v. Matthews, 16 M.J. 354, 370 (C.M.A. 1983) (the "nature of the diverse opinions makes brief summary impossible").
[175] Sullivan, *supra* note 58, at 4 (quoting Johnson v. Texas, 509 U.S. 350, 359 (1993)); *see also* Locket v. Ohio, 438 U.S. 586, 599 (1978).
[176] *See id.* at 4 (citing Gregg v. Georgia, 428 U.S. 153, 179–80 (1976)).
[177] *See id.* at 4 n.12 (citing Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976)).
[178] UCMJ art. 36(a) (2012); *see also* Loving v. United States, 517 U.S. 748, 770 (1996); *Matthews*, 16 M.J. at 380–81.
[179] *See* MCM, *supra* note 12, app. 21, at A21–76 (indicating that the rule was undergoing public comment in 1983, 10 years after the decision in Furman v, Georgia, 408 U.S. 238, 239 (1972)).
[180] 16 M.J. 354, 379–80 (C.M.A. 1983).
[181] *See* 49 Fed. Reg. 3169 (Jan. 26, 1984) (containing Executive Order 12,460 adding RCM 1004).
[182] *See Matthews*, 16 M.J. at 379–80 (analyzing Supreme Court precedent that interpreted capital sentencing schemes in various states).
[183] *Id.* at 380.

have the ability to remedy this defect.[184] Within ninety days of the *Matthews* decision, the President issued Executive Order 12,460 containing the new provision.[185] Seven years later the CAAF upheld the new death penalty scheme in *United States v. Curtis* (*Curtis I*).[186] The court provided "[i]n sum, as we construe RCM 1004, it not only complies with due process requirements but also probably goes further than most state statutes in providing safeguards for the accused."[187] The CAAF reaffirmed its ruling in *United States v. Loving*,[188] which the Supreme Court approved in *Loving v. United States*.[189]

The approval of RCM 1004 did more than simply ensure the military death penalty scheme is constitutional; it created a more robust record for review. In that sense, RCM 1004 helps to eliminate the original need for the Article 45(b) prohibition. Arguably, when Congress passed the UCMJ, it created the largest court-martial jurisdiction to adjudge capital punishment in the country.[190] Although the UCMJ is widely heralded as increasing service member protections, it was only as advanced as the time allowed. At the time, Article 45(b) served as one of the few checks on a sentence of death. As articulated above, RCM 1004 resulted from a new era in death penalty jurisprudence in which the drafters of the UCMJ could have had no knowledge.

That said, Congress has not opted to change Article 45(b) in light of the President's promulgation of RCM 1004.[191] This is less likely from a specific intent of Congress to retain both provisions than it is from a lack of consideration of the interplay between the statute and the President's

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[184] *Id.* at 380–81.

[185] *See* United States v. Curtis (*Curtis I*), 32 M.J. 252, 257 (C.M.A. 1991) *cert. denied*, 502 U.S. 952 (1991).

[186] *Id.* The Court in *Curtis I* split the appellate litigation into two cases. The first dealt with issues common to all capital cases tried in military courts and a second dealt with issues specific to the case. The second case ultimately led to a finding of ineffective assistance of counsel during the sentencing phase and a reduced sentence of confinement for life. These decisions have no effect on *Curtis I* as precedential value. *See generally* United States v. Curtis (*Curtis II*), 44 M.J. 106 (C.A.A.F. 1996); United States v. Curtis (*Curtis III*), 46 M.J. 129 (C.A.A.F. 1997).

[187] *Curtis I*, 32 M.J. at 269 (emphasis added).

[188] 41 M.J. 213 (C.A.A.F. 1994).

[189] 517 U.S. 748 (1996).

[190] *See id.* at 752–53 (providing a detailed history of the expansion of court-martial jurisdiction in capital cases from 1775 through adoption of the Uniform Code of Military Justice in 1950).

[191] *See* UCMJ art. 45(b) (2012).

rule.[192] Aside from affecting capital litigation, the statute and the rule address different underlying concerns. One ensures a record for review (Article 45(b)) and the other narrows the class of person eligible for the death penalty as required by the Eighth Amendment (RCM 1004).[193] If Congress created Article 45(b) to ensure a record for review, then a new rule like RCM 1004, which requires presentation of evidence by the prosecution, certainly diminishes the necessity of Article 45(b). The amount of evidence presented is dependent on the case, but nonetheless will increase the amount of material for the reviewing authority.

Prior to promulgation of RCM 1004, the prosecution may have voluntarily presented much of what is now required. However, with the requirement there is now a guarantee that evidence will be presented for the record and thus for the convening authority who reviews it. So while the real purpose of RCM 1004 is to narrow the class of persons eligible for death, the resulting evidence and testimony eliminate much of the concern that brought about Article 45.

IV. Article 45(b) Should Be Repealed in Part

In addition to greater protection now given to military accused,[194] there are several practical and tactical reasons that Congress should remove Article 45(b)'s prohibitions on guilty pleas in capital cases. This section will outline the most important of these reasons from both a defense and government perspective. This section is not an all-inclusive list of benefits, nor does it suggest that all capital litigants should plead guilty. Rather, it shows possible benefits to the accused and government if Congress granted the accused the choice to plead guilty. The benefits to both sides tip the scale in favor of repealing to Article 45(b), which has already outlived its use under the UCMJ.

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[192] The President does have the ability to change the requirements of RCM 1004, possibly giving Congress pause in changing Article 45(b). However, without RCM 1004, the military death penalty scheme would not pass constitutional muster, making Article 45(b) irrelevant. *See Loving*, 517 U.S. at 756, 770.

[193] *See id.* at 755 (citing Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

[194] *See supra* Part III.

A. Defense Benefits[195]

There are numerous benefits in allowing an accused to plead guilty at a capital trial. Currently, defense counsel can operate to achieve some of the benefits below only to a limited extent. However, the military appellate courts are cautious in how far they will let accused and counsel go in conceding elements on the merits[196] because the court forbids violating even the spirit of Article 45(b).[197] With a repeal of the prohibition in Article 45(b) the rules would permit the accused to accept the goodwill benefits of accepting responsibility; avoid any animosity from the panel by litigating a meritless case; be able to focus on the presentencing phase; and potentially limit what evidence the prosecution admits.

1. Benefits of the Accused Showing Remorse and Accepting Responsibility

Simply accepting responsibility and showing true remorse for a death-eligible offense may convince one member of the panel that an accused does not deserve death.[198] As Justice Scalia explained in *Minnick v. Mississippi*, "[w]hile every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself, 'admission[n] of guilt . . . , if not coerced, [is] inherently desirable.'"[199] Justice Scalia further explains that an admission shows

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[195] All argument made in this section assumes that the accused is actually guilty of a capital offense and makes it through a providency inquiry.

[196] *See* Captain Joseph A. Russelburg, *Defense Concessions as a Trial Tactic*, ARMY LAW., Sept. 1983, at 22, 23 (noting the reversal of numerous military cases and arguing that there are legal limits to a concession defense, particularly when concessions appear to clash with the interest of the appellant); *see also* United States v. Dock, 28 M.J. 117, 119 (C.M.A. 1989) (citing United States v. McFarlane, 23 C.M.R. 320 (C.M.A. 1957) and providing "[I]t is not just the pleas that are looked to but the 'four corners' of the record to see if, 'for all practical purposes,' the accused pled to a capital offense").

[197] *See McFarlane*, 23 C.M.R. at 324 (McFarlane pled not guilty to the capital offense but presented no defense and a minimal mitigation case; the court reversed the decision of the board of review and returned the case for a rehearing on the specifications.).

[198] *See* Fisher, *supra* note 31, at 201 & n.99, 202 & n.101.

[199] Minnick v. Mississippi, 498 U.S. 146, 167 (1990) (Scalia, J., and Rehnquist, C.J., dissenting) (quoting United States v. Washington 431 U.S. 181, 187 (1977)) (*Minnick* is a capital case dealing with the admission of a confession rather than a guilty plea; however, confessions and guilty pleas are sufficiently analogous to offer insight into how society views admissions of guilt.).

rehabilitative potential and "demonstrates a recognition and affirmative acceptance of personal responsibility."[200] Moreover, admissions serve to ingratiate the accused not only to the panel but also to reviewing authorities who have the power to reduce a sentence.[201] These two factors make pleading guilty to a military panel a viable option in the right case.

First, panels place remorse in high regard.[202] While few statistics exist, this is perhaps an even greater influence on military panels that hold integrity, honor, and personal courage to be at the core of service.[203] Generally, panels are more likely to vote for life, if they can identify remorse or acceptance of responsibility prior to the accused opting to take the stand during presentencing.[204] Thus, it is especially damaging to the accused's chances of a life vote if he first puts on a denial defense, prior to attempting to accept responsibility.[205] A denial defense is a strategy in which the accused proclaims his innocence during the merits portion of the trial.[206] Of course, if the jury convicts him, then he is in the precarious position of remaining recalcitrant and appearing as though he accepts no responsibility. Alternatively, if he now accepts responsibility, then he appears disingenuous.[207]

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[200] *Id.* at 167 (Scalia, J., and Rehnquist, C.J., dissenting) (quoting Michigan v. Tucker, 417 U.S. 433, 448 (1974)).

[201] *See* Fisher, *supra* note 31, 201–02 & n.100 (providing "even in the English common law period of the mandatory death penalty, some defendant's plead guilty to capital offenses in hope 'that benefit-of-clergy'—a precursor of executive commutation—'would nullify the otherwise applicable sanction.'") (citation omitted).

[202] *See* Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1560 (noting that 65 percent of death case jurors cited lack of remorse as a reason for voting for death).

[203] *See* U.S. DEPT'T OF ARMY, REG. 600-100, ARMY LEADERSHIP para. 1-5, fig.1-1 (8 Mar. 2007) [hereinafter AR 600-100], *available at* http://www.apd.army.mil/pdffiles/r600_100.pdf (providing the seven core Army values: loyalty, duty, respect, selfless service, honor, integrity, and personal courage).

[204] *See* Lieutenant Colonel Eric Carpenter, *An Overview of the Capital Jury Project for Military Justice Practitioners: Aggravation, Mitigation, and Admission Defenses*, ARMY LAW., July 2011, at 17; *see also* Sundby, *supra* note 202, at 1587–88 (showing juries are more receptive to showing the accused accepted responsibility early).

[205] *See* Carpenter, *supra* note 204, at 18 (citing Sundby, *supra* note 202, at 1586, 1573–74 and SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 33–35 (2005)).

[206] *See* Sundby, *supra* note 202, at 1574 (citing Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 330 (1983)).

[207] *See* Sundby, *supra* note 202, at 1587.

An alternative to the denial defense is the admission defense.[208] The admission defense is a strategy in which the accused admits a portion of the offense that does not amount to the capital offense.[209] He then defends the remaining element with a theory like "provocation, self-defense, diminished capacity, lack of specific intent, accident, or mistake."[210] Juries are more likely to vote for life over death when the accused shows remorse or personal responsibility, even just for the lesser offense, throughout the trial process.[211]

An admission defense allows a capital defendant to accept responsibility and appear remorseful.[212] This works even better if the accused admits to some of the events prior to trial, thus making them less self-serving.[213] It follows that if an admission defense is likely to produce a life vote due in part to the panel believing that the accused is accepting responsibility, then a sentencing panel will hold a plea to a capital offense in similar regard. Article 45(b) takes away the former but not the latter from a military accused, forcing him to walk a tightrope of admitting some but not all of his conduct. In some cases, the plea may not appear remorseful, just the only course of action in the face of overwhelming evidence. Even if the tactic of pleading as a form of remorse is not always successful, the law should give the accused and counsel the choice.

To illustrate, imagine a military accused who confessed to a murder in a properly advised sworn statement prior to trial. Suppose, as is often the case, that the accused's statement is unclear on the issue of premeditation. Article 45(b) prevents the accused from telling the panel that he premeditated. Therefore, while he can attempt an admission defense, if the panel disagrees with the defense on the issue of premeditation, he is stuck with only accepting responsibility for the lesser form of murder.[214] Without Article 45(b), he could plead and then use the statement to show that he accepted responsibility and showed

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[208] *See id.*
[209] *See* Carpenter, *supra* note 204, at 18 (citing Goodpaster, *supra* note 206).
[210] *Id.* at 22.
[211] *See* Sundby, *supra* note 202, at 1565 (stating that in "thirteen of nineteen cases, at least *one* juror explicitly insisted that he would have voted for life rather than death had the defendant shown remorse" (emphasis added)).
[212] *See* Carpenter, *supra* note 204, at 18.
[213] *See* Sundby, *supra* note 202, at 1584.
[214] *But see id.* at 1584–85 (providing that a traditional admission defense can be highly successful in receiving a vote for life in pre-trial confession cases).

remorse from investigation through presentencing.[215] Clearly, there are no magic strategies in a capital case, but this example is consistent with the principles that make the admission defense successful and one that Article 45(b) prohibits.[216]

Second, military accused have two statutory protections prior to approval of the death sentence by the President—the convening authority and mandatory appellate review.[217] The accused's best opportunity at clemency is the convening authority.[218] By pleading guilty, the accused sends a clear message to the convening authority that he accepts responsibility. Importantly, the convening authority does not observe the trial.[219] As such, he is unlikely to draw the same possible negative impressions from appearance and demeanor of the accused that a death panel member might draw.[220] Lastly, the accused has the right to present additional extenuation and mitigation evidence to the convening authority in order to assist in his decision to grant clemency.[221] A plea saving the government resources and reducing the impact on the unit and families in protracted ligation may be just enough for a grant of clemency from the convening authority.

The military courts of criminal appeals also have the awesome plenary authority to disapprove a portion of a sentence.[222] Article 66 of the UCMJ provides that the court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds

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[215] *See infra* Part IV.B.2 (outlining that even considering the success rate of an admission defense an accused and counsel may opt to limit face time with the panel on the merits).

[216] Each capital case must be independently evaluated taking into consideration the accused, the extenuation and mitigation evidence available, and the circumstances of the crime. This article does not argue that pleading guilty is the best option in all or a majority of cases, merely that when death is on the table, all possible strategies to avoid death should be available to the defense team.

[217] *See* UCMJ arts. 60 and 66 (2012).

[218] *See* United States v. Wheelus, 49 M.J. 283, 287 (C.A.A.F. 1998) (citing United States v. Wilson, 26 C.M.R. 3, 6 (C.M.A. 1958)); *see* Sullivan, *supra* note 58, at 16–19 (noting that between 1984 and 2006, the convening authority commuted two of the fifteen cases with an adjudged death sentence).

[219] *See* United States v. Harvey, 64 M.J. 13, 20–21 (C.A.A.F. 2006) (questioning the prudence of the convening authority attending a court-martial and holding his presence amounted to unlawful command influence).

[220] *See* Sundby, *supra* note 202, at 1561–62 (noting that juries consider the accused's demeanor during trial above all else).

[221] *See* UCMJ art. 60(b)(1).

[222] *See* United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990); *see also* United States v, Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999).

correct in law and fact and determines, on the basis of the entire record, should be approved."[223] Determining sentence appropriateness is a function of the court to assure that justice is done and the accused "gets the punishment he deserves."[224] Justice is distinguished from clemency, which "involves bestowing mercy."[225] The court judges sentence appropriateness "by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'"[226] In doing so, the court may disapprove a death sentence under circumstances it finds compelling. A case in which the appellant has taken responsibility and shown remorse might convince the court to exercise that authority.

2. Animosity Toward the Accused

Forcing the accused to litigate a meritless case is likely to foster a panel's frustration or even animosity toward the accused. Two examples stand out as evidence of this premise: panel reactions to the reasonable doubt defense and panel reaction to in-court demeanor of the accused.[227]

"[A] death penalty trial is no ordinary criminal trial and invoking one's presumption of innocence can prove deadly."[228] This statement is striking because it assumes that the panel will not follow the military judge's instructions.[229] Specifically, the panel is to draw no adverse inference from an accused exercising his right to plead not guilty and forcing the government to prove the elements of the offense.[230] Yet, studies show that juries react poorly to a defense that argues the government did not meet their burden and then after conviction attempt

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[223] UCMJ art. 66 (2012).
[224] *See* United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988).
[225] *See id.*
[226] United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982) (quoting United States v. Mamaluy, 27 C.M.R. 176, 180–81 (C.M.A. 1959)).
[227] It is not the intent of this section to outline all possible reasons an accused may choose to plead guilty to a capital offense without a plea agreement with the convening authority. It serves only to highlight tactical options removed by Article 45(b) and how the claim appears to be supported by empirical data.
[228] *See* Carpenter, *supra* note 204, 18 (quoting Sundby, *supra* note 205, at 33).
[229] *See* United States v. Loving, 41 U.S. 213, 235 (C.A.A.F. 1994) (stating "Court members 'are presumed to follow the military judge's instruction'" (citation omitted)).
[230] *See* United States v. Paxton, 64 M.J. 484, 487 (C.A.A.F. 2007) (panel may not draw an inference that accused is not remorseful from his plea of not guilty).

to express regret.[231] This is an interesting dynamic because juries indicated they felt manipulated by the tactic; in essence, they felt manipulated by an exercise of the accused's constitutional rights.[232] Permitting a guilty plea would give the defense another option; this is especially appealing if the admission defense is lacking or the prosecution case is especially strong.[233]

Panels also look to the accused's demeanor.[234] Limiting the accused's exposure to the panel during the merits phase might be critical, especially if he lacks self-control and will appear agitated, amused, or angry during the prosecution case. "What struck jurors again and again was the defendant's lack of emotion during the trial, even as the prosecution introduced into evidence horrific depictions of his crimes."[235] An accused who laughs during the presentation of the evidence, appears emotionless, fidgets, appears arrogant, or portrays defiance could affect his chances at a life sentence before presentencing proceedings ever begin.[236] A multi-week merits phase gives the panel members hours and hours of time to observe the accused's every move, while at the same time assessing guilt. Limiting this exposure might prove a good defense tactical approach. This approach is especially appealing when one considers that the panel's first impression of the accused would then be through the lens of acceptance of responsibility rather than legal culpability.[237]

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[231] *See* Sundby, *supra* note 202, at 1587–88.
[232] *See id.*
[233] *See id.* at 1587 n.68 (citing Goodpaster, *supra* note 206, at 332 and stating that "Professor Goodpaster has suggested that if the prosecution's case-in-chief turns out to be very strong, then it might be strategically prudent for the defendant to admit guilt instead of allowing the reasonable doubt defense to go to the jury").
[234] *See id.* at 1561–62.
[235] *Id.* at 1563.
[236] *See id.* at 1563–65.
[237] *See generally* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 37 (1997) (stating an accused's "moral culpability for murder may be greater or lesser, depending on aggravating and mitigating circumstances, even though his legal culpability remains the same"); *see also* L. TIMOTHY PERRIN, H. MITCHELL CALDWELL & CAROL A. CHASE, THE ART & SCIENCE OF TRIAL ADVOCACY 22–23, 26 (1st ed. 2003) (describing that panel members remember what they hear first, last, and often).

3. Tactical Benefit for the Defense to Focus on Presentencing

Counsel who do not have to prepare for a merits case can focus the entire defense team's collective skills on the mitigation case and on limiting the panel's exposure to the prosecution theory and perhaps some evidence. "[D]efense team[s] must be creative and, to an extent visionary."[238] The mitigation presented "must be comprehensive, consistent, coherent, and credible."[239] The tightrope that counsel must walk in pleading guilty to only non-capital offenses may put off the panel, cause counsel to lose focus, or, worse, cause reversal on appeal.[240] Avoiding slipping off that tightrope consumes a large amount of time, focus, and defense team energy. With the ability to plead, a defense team can focus its energy on the presentencing phase, while using the mitigating effect of accepting responsibility as a theme for the sentencing case. This is not possible under the current scheme, which is why Article 45(b) should be repealed in part.

One theory of presenting mitigation evidence is to frontload it during the merits phase so that the panel begins to understand why the accused committed a crime.[241] This makes sense, because without the information from the accused, the panel only hears that the accused is a cold, calculating killer until the presentencing portion of the case.[242] The fact remains that they still hear the prosecution theory and witnesses proving the case, sometimes for days or weeks, even when mitigation evidence is frontloaded. Even if the defense chooses an admission defense, the panel is going to hear the prosecution theory and theme often. A guilty plea would limit the exposure to the prosecution mantra

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[238] John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1042 (2008).

[239] *Id.* at 1039.

[240] *See, e.g.*, United States v. Murphy, 50 M.J. 4, 12 (C.A.A.F. 1998) (Faced with Article 45(b)'s prohibition counsel "attempted to mount a defense to the capital murder charges. In light of numerous confessions, some with inconsistencies, the defense tried to create the belief that perhaps the confessions were untrue and the killings were actually committed by appellant's second wife . . . ." The defense strategy did not work.). *Id. See also* United States v. Dock. 28 M.J. 117, 119 (C.M.A. 1989) (holding that appellant's pleas amounted to a plea to a capital offense in violation of Article 45(b)); United States v. McFarlane, 23 C.M.R. 320 (C.M.A. 1957) ("[I]t is not just the pleas that are looked to but the 'four corners' of the record to see if, 'for all practical purposes,' the accused pled guilty to a capital offense.").

[241] *See* Carpenter, *supra* note 204, at 17 (arguing that frontloading is a feature of the admission defense).

[242] *See* Sundby, *supra* note 202, at 1594.

to some extent and thus would limit the effects of primacy, frequency, and recency on the panel.[243]

Lastly, the defense may be able to limit some of the most graphic evidence by pleading guilty in a capital case. Often, the prosecution argues that autopsy photos and photos showing different angles of the victim's wounds are circumstantial evidence of premeditation or lack of self-defense. For example, a bullet wound showing a path from back to front is evidence an accused shot the victim in the back and thus limits the effects of a self-defense argument. Defense counsel generally objects to the gruesome nature of these photos pursuant to Military Rule of Evidence (MRE) 403 because the unfair prejudice to the accused substantially outweighs the probative value.[244] Nevertheless, because the photos go to the element of premeditation, the military judge permits the evidence as relevant and the panel may view and consider them during deliberation. If permitted to plead guilty, an accused admits the elements, and possibly limits the probative value of such evidence, tilting the MRE 403 balancing test in the accused's favor.[245]

B. Government Benefits

Benefits to the government are more difficult to quantify because less empirical data is available. This is particularly true when the data set needed is very specific—like comparing contested capital cases to capital guilty pleas without a plea bargain.[246] Even with a lack of empirical data, one can make general observations about the cost and government interest in permitting a military accused to plead guilty in any case, capital or non-capital. As such, this section outlines possible benefits to the government if Congress chooses to repeal Article 45(b)'s prohibition on pleas in death cases. Specifically, this section analyzes

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[243] *See* PERRIN ET AL., *supra* note 237, at 26 (describing that panel members remember what they hear first, last, and often).

[244] *See, e.g.*, United States v. Burks, 36 M.J. 447, 453 (C.M.A. 1993) (discussing the probative value of photographs in a murder trial offered to show violent nature of the attack versus unfair prejudice to the accused); *see also* MCM, *supra* note 12, MIL. R. EVID. 401–03.

[245] Admittedly, these photos may be presented to the jury for another purpose, such as proving an aggravating factor pursuant to RCM 1004(c).

[246] *See generally* JOHN ROMAN ET AL., THE COST OF THE DEATH PENALTY IN MARYLAND 5 (2008), *available at* http://www.urban.org/UploadedPDF/411625_md_death_penalty.pdf (describing as of 2008 only thirteen previous studies analyzed the cost of capital litigation and that they "varied widely in their scope").

how a change in the law has the potential to reduce the cost of capital litigation, reduce the impact of protracted litigation on victims' families, and increase the effectiveness of the process on good order and discipline.

1. Significant Effects on Judicial Economy and Reduced Cost

Allowing an accused to plead guilty would likely reduce the overall cost of the trial process and ease the trial and appellate burden on the judiciary. In a 2010 report analyzing median cost of authorized[247] capital trials, researchers found the cost for a guilty plea was half that of a case that went to trial.[248] The report included the cost of all pleas including those that ultimately resulted in a plea for life.[249] This does not drastically affect the premise in this article because every case that starts as death-eligible will begin in the same manner. That is to say, even military death cases that result in a plea agreement for a sentence less than death will require the parties to prepare as if it were a contested case.[250] However, once the defense opts to plead, they will no longer need the services of numerous experts.

For example, in a murder case involving a firearm, the defense might require a forensic pathologist, a firearm, tool mark, and ballistic expert, a crime scene reconstructionist, a trace evidence expert, blood spatter expert, and a fingerprint expert.[251] The reduction in assistance applies equally to plea bargains, reducing the maximum sentence and pleas in which death remains a possibility. As it is likely that the defense front-

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[247] *See* JOHN B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES 6 (2010), *available at* http://www.deathpenaltyinfo.org/documents/FederalDPCost2010.pdf (explaining that an authorized case is one that the Attorney General of the United States approves the local prosecutor to seek the death penalty); *see also* Memorandum from Eric H. Holder, Jr. Attorney Gen. of the United States, to All Federal Prosecutors (July 27, 2012), *available at* http://www.deathpenaltyinfo.org/documents/FedDPRules2011.pdf (explaining amended procedures for local prosecutors to seek the death penalty).

[248] *See* GOULD & GREENMAN, *supra* note 247, at 2, 6, & 24 (finding that from 1998 to 2004, the median cost of a capital trial was $465,000, and the mean cost for a plea in an authorized capital plea was $200,933).

[249] *See id.* at 18 n.22.

[250] *See id.* at 25 (finding that even in a plea, attorneys must thoroughly investigate).

[251] *See* ABA GUIDELINES, *supra* note 120, at 952–60 (outlining the defense team approach to capital litigating including the use of numerous experts).

loaded its mitigation-investigation to determine if a plea was appropriate, additional presentencing cost should be minimal because expert's services would be needed for a much shorter period of time.

A plea of guilty would result in shorter trials, which would ease the burden on the trial judiciary. Capital cases are extremely time-consuming for all of the parties involved.[252] Judges in federal practice indicate that presiding over a capital trial is all-consuming, causing extensive independent study and prolonged high stress.[253] A federal judge noted that one case involved over "250 pre-trial motions, some requiring many hours of hearings and three interlocutory appeals."[254] A guilty plea would reduce preparation and in-court time on the merits, and likely reduce the number of motions filed. This, in turn, would ease the burden on the judiciary at the trial level. Of course, tactically, a defense team may choose to file all their pre-trial merits motions prior to making the decision to plead guilty, but that guilty plea would still lessen the potential future burden on the appellate judiciary.

Lack of a contested merits phase would thus also limit involvement at the appellate level. Presumably, a trial that lacks a contested merits portion would contain a shorter record for review because an unconditional plea waives most issues for appeal.[255] A shorter record would reduce processing time as counsel and the court would spend less time examining the shorter record.[256] Additionally, the court would consider fewer issues involving the merits portion of the trial. For example, in *United States v. Murphy*, a capital case, counsel briefed and the court considered twelve separate assignments of error dealing exclusively with the merits portion of the trial.[257] An increase in

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[252] *See, e.g.*, Hasan v. Gross, 71 M.J. 416, 417 (C.A.A.F. 2012) (illustrating that over three years after the Fort Hood shooting, the trial on the merits had not started).

[253] *See* GOULD & GREENMAN, *supra* note 248, at 80.

[254] *See id.* (another judge disagreed, indicating the real stress was on the lawyers).

[255] *See* Patricia A. Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections—The Why and How*, ARMY LAW., Mar. 2003, at 10, 22 (citing RCM 910(j) for the proposition that many of the motions outlined in RCM 905 are waived by an unconditional plea); *but see* MCM *supra* note 12, R.C.M. 910(a)(1) discussion (providing that the government may admit evidence in support of the factual basis of the pleas prior to its acceptance by the court).

[256] *See generally* UCMJ art. 66 (2012) (requiring the Court of Criminal Appeals to approve only the findings and sentence that it finds correct in law and fact, which necessarily includes a review of the entire record).

[257] *See* United States v. Murphy, 50 M.J. 4, 16–24 (C.A.A.F. 1998) (listing all assignments of error alleged).

assignments of error dealing with the plea may limit benefits to the burden on the appellate courts. However, contrary to the innumerable potential issues arising out of a contested merits case, the law of pleas is well developed.[258]

Congress would need to modify the RCM and/or the UCMJ if it repealed the prohibition. The UCMJ contains no standard to apply for the military judge to grant a request by the accused to withdraw a plea.[259] Under the current plea system, an accused may withdraw his plea at any time before acceptance by the military judge with permission.[260] After the military judge accepts his plea, the accused may only withdraw that plea at the discretion of the military judge[261] At the outset, the possibility of withdrawal of a plea limits any potential financial benefits on the government, as the prosecution must still prepare their merits case thoroughly.

While a detailed argument for a new standard for this issue is beyond the scope of this article, *Federal Rule of Procedure 11* presents a workable standard. Simply stated, the rule allows withdrawal for "a fair and just reason" after acceptance of the plea, but before imposing a sentence.[262] While not perfect, this at least provides factors for the judge to consider. To grant a motion to withdraw the plea, a judge must balance a series of factors, such as the time between plea and motion, whether *Rule 11* was complied with, whether the accused is claiming innocence, and whether accused had competent counsel at the plea.[263] The courts review the judge's ruling for an abuse of discretion.[264] With the repeal of Article 45(b), the government will most likely benefit from judicial efficiency and reduced cost in litigation.

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[258] *See supra* Part III.A.
[259] *See* UCMJ art. 45 (2012).
[260] MCM, *supra* note 12, app., at A21-62.
[261] *See* United States v. Silver, 35 M.J. 834, 836 (C.M.A. 1992) (providing "[a]n accused does not have an absolute right to withdraw a guilty plea, and granting such a request is in the discretion of the military judge (citations omitted)).
[262] FED. R. CRIM. P. 11(d)(1)-(2); *see also* United States v. Hyde, 520 U.S. 670, 679–60 (1997).
[263] *See* 1A FED. PRAC. & PROC. CRIM. § 181 (4th ed. 2012) (citing numerous cases from various circuits applying different balancing tests).
[264] *See* United States v. Peleti, 576 F.3d. 377, 382 (7th Cir. 2009).

2. Public Policy Concerns of Protracted Litigation and Impact on the Families of Victims

Lengthy delays between a crime and trial have an adverse effect on perceptions of the justice system.[265] The public has an interest in seeing a case go to trial in an expeditious and just manner. In addition, there is no doubt that a trial adversely affects families of victims. Recently, a series of motions and interlocutory appeals concerning the growth of a beard by the accused delayed the capital prosecution of Major Nidal Hasan.[266] Victims expressed outrage, lamenting that the court-martial itself is part of their healing process and the delays were adversely affecting them personally.[267] While *United States v. Hasan* is an unusually complex case because it involves multiple victims, it still serves as a good example of public discontent over protracted litigation. As victims seek finality in the process, they see the lengthy litigation as evidence that the justice system is not working well. This is especially true when the UCMJ prevents a plea even in the face of the accused's attempt to plead. Permitting guilty pleas in death-eligible cases would lessen or possibly even eliminate this perception.

3. Speed and Justice Help Maintain Good Order and Discipline

The military justice system must move at a pace that ensures commanders receive the benefit of the discipline it produces.[268] Over

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[265] *See generally* Joe Goldeen, *Family Frustrated by Murder Trial Delay*, RECORDNET (Jan. 24, 2012), *available at* http://www.recordnet.com/apps/pbcs.dll/article?AID=/20120124/A_NEWS/201240318 (illustrating that discontent over trial delays, even at defense request are often held against the government) (last visited June 15, 2014).

[266] *See* Megan McCloskey, *Hood Survivors Find Hasan's Beard a Mockery*, MILITARY TIMES (Oct. 29, 2012), *available at* http://www.military.com/daily-news/2012/10/29/hood-survivors-find-hasans-beard-a-mockery.html (last visited June 15, 2014); *see also* Jim Forsyth, *Trial Delays Vex Fort Hood Survivors Three Years After Rampage*, REUTERS (Nov. 5, 2012), *available at* http://www.reuters.com/article/2012/11/05/us-usa-crime-fort-hood-idUSBRE8A403Y20121105 (last visited June 15, 2014).

[267] *See* McCloskey, *supra* note 266.

[268] *See* Chapell v. Wallace, 462 U.S. 296, 300 (1983) (citing Parker v. Levy, 417 U.S. 733, 743–44 (1974)) (stating, "[t]he need for special regulations in relation to military discipline, and the justification for a special and exclusive system of justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting."); *see also* Hon. Robinson O. Everett, *The First 50 Years of the Uniform Code of Military Justice: A Personal Perspective*, 47-DEC. FED. LAW. 28, 30 (2000) (citing United States Senator

time, the adage of swift, harsh punishment for even minor infractions has given way to modern concepts of justice.[269] However, at its core, the UCMJ remains a commander's tool to maintain good order and discipline in the military community.[270] Unnecessary delays in the court-martial process lead to a perception that the command is not disciplining soldiers for infractions. This perception can prove detrimental in a specialized society that requires "compliance with military procedures and orders . . . with no time for debate or reflection."[271] Even with an increase in a soldier's rights in the modern military, delaying a case merely for an outdated rule runs counter to the UCMJ's purpose and ultimately adversely affects the commander's ability to maintain good order and discipline. As Judge Wiss noted in *United States v. Loving*, "[j]ustice delayed is not justice—not to the accused and not to society."[272] Permitting an accused to plead guilty, if he so desires, helps ensure the UCMJ remains relevant for its intended purpose.

C. Bring Military Law in Line with Majority Law in Death Penalty Jurisdictions

Permitting guilty pleas in capital cases would bring the UCMJ in line with the laws of federal government and the large majority of states that permit the death penalty. Congress, currently, specifically forbids pleas in cases that are referred capital.[273] However, Congress has also expressed a desire for the UCMJ to look like the criminal law practiced before the U.S. district courts. Article 36 of the UCMJ permits the President to make "regulations which shall, so far as practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the *U.S. district court*, but which may not be

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Sam Ervin and stating "[t]here is no discipline in the Armed Forces without justice and no justice without discipline").

[269] *See* Nicole E. Jaeger, *Maybe Soldiers Have Rights After All!*, 87 J. CRIM. L. & CRIMINOLOGY 895, 896–904 (1996) (discussing the evolution of military justice).

[270] *See* MCM, *supra* note 12, pt. I, ¶ 3; *see also* Reid v. Covert, 354 U.S. 1, 34–35 (1957); United States v. Loving, 41 M.J. 213, 269 (C.A.A.F. 1994) (holding that "protection of society and preservation of good order and discipline" were permissible sentencing considerations in a capital case); *see generally* David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1 (2013) (outlining the various purposes for military law).

[271] *Wallace*, 462 U.S. at 300.

[272] *Loving*, 41 M.J. at 329 (Wiss, J., dissenting).

[273] *See* UCMJ art. 45(b) (2012).

contrary to or inconsistent with this chapter."[274]

The language in the statute suggests that a review of civilian law is appropriate when the President desires to make a rule pursuant to Article 36. It follows then that such a review is also useful, although not required, when arguing for a substantive change to the UCMJ. In part, this is exactly what Congress did when it considered and passed Article 45(b). As evidenced by the Morgan Report and congressional hearings, Congress considered the special needs of the military and current civilian practice.[275] In addition to other protections overcoming Article 45(b)'s prohibition, it is not consistent with the majority view concerning guilty pleas.

Currently, the federal government and thirty of the thirty-two states that allow the death penalty permit the accused to plead guilty to the charged offense.[276] In light of these numbers, a change in the law would be consistent with current law in the U.S. district courts and the state courts. Because Article 45(b) is no longer needed to serve its intended purpose, little reason exists for the UCMJ to be inconsistent with federal law and that of the majority of states.

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[274] *Id.* art. 36 (emphasis added).

[275] *See H.R. 2498*, *supra* note 53, at 1056–57 (noting that the prohibition was nearly uniform in civilian courts); *see* The Keeffe Report, *supra* note 54, at 140 (citing military basis for the prohibition on pleas in capital cases).

[276] *See* 18 U.S.C. § 3593 (2002); ALA. CODE § 13A-5-42 (2012); ARIZ. R. CRIM. P. 17.1 (2012); CAL. PENAL CODE § 190.4 (West 2012); COLO. REV. STAT. § 18-1.3-1201 (2012); DEL. CODE ANN. tit. 11, § 4209 (2012); FLA. STAT. ANN. § 921.141 (West 2010); GA. CODE ANN. § 17-10-32 (West 2012); IDAHO CODE ANN. § 19-2515 (West 2012); IND. CODE ANN. § 35-50-2-9(d) (West 2007); KAN. STAT. ANN. § 22-3210 (2009); KY. REV. STAT. ANN. § 532.025(1)(a) (West 2012). *See also* Chapman v. Commonwealth, 265 S.W.3d 156, 175 (2007); MISS. CODE ANN. § 99-19-101 (West 2012); MO. ANN. STAT. § 565.006 (West 2012); MONT. CODE ANN. § 46-18-301 (West 2013); NEB. REV. STAT. § 29-2520 (2012); NEV. REV. STAT. ANN § 175.552 (West 2011); N.H. REV. STAT. ANN. § 630:5 (2013); N.C. GEN. STAT. ANN. § 15A-2000(a)(2) (West 2013); OHIO REV. CODE ANN. § 2929.02 (West 2012); OKLA. STAT. ANN. tit. 21, § 701.10 (West 2012); OR. REV. STAT ANN. § 163.150 (West 2012); 42 PA. CONS. STAT. ANN. § 9711(b) (West 2012); S.C. CODE ANN. § 16-3-20 (2012); S.D. CODIFIED LAWS § 23A-27A-4 (2012); TENN. CODE ANN. § 39-13-205 (2012); TEX. CRIM. PROC. CODE ANN. §§ 1.13-1.15, 37.071 (Vernon 2011). *See also* Fuller v. State, 253 S.W.3d 220, 226–27 (Tex. Crim. App. 2008) (clarifying statute and holding plea in capital cases permissible); Utah CODE ANN. § 76-3-207 (West 2012); VA. CODE ANN. §§ 19.2-257, 19.2-264.4 (West 2012); WASH. REV. CODE ANN. § 10.95.050 (West 2012); WYO. STAT. ANN. § 6-2-102 (West 2012). The two states that allow the death penalty but do not allow a guilty plea are Arkansas and Louisiana. *See* ARK. CODE ANN. 5-10-101 (2013); ARK. CODE ANN., 5-4-608 (2014); LA. R.S. 14:30 & 14:113 (2012); LA. CODE CRIM. PROC. ANN. art. 557.

V. Conclusion

The UCMJ must march on with time to remain a relevant system of justice in the United States.[277] Just as Congressman Martin said in the congressional floor debates after World War II, "You have built up a good piece of legislation here. . . . It is also important that Congress be ever ready to revise and improve the system in the way best illustrated by H.R. 4080."[278] This statement is more than an observational pleasantry during a hearing, but rather a warning to future generations to continue to analyze and improve the UCMJ. In fact, not just improve, but improve "in the way best illustrated by [the UCMJ]." Modifying the UCMJ in this way requires Congress to continue to balance service member rights with the requirements of discipline in the modern military. As military law advances, Congress and the services must identify protections of the past that have become hindrances for the future.

The prohibition on guilty pleas in capital cases is a glaring example of a protection that has outlived its historical purpose and has become a hindrance. The original intent ensured that the reviewing authority received enough information in a record to determine if the accused was in fact guilty and to decide if he should mitigate the sentence. However, the passage of the UCMJ, in combination with advances in military criminal law like the detailed providency inquiry, increased requirements for presentation of mitigation evidence in capital trials, and the promulgation of RCM 1004, eliminates those historical concerns.

Not only have additional rights rendered 45(b)'s original intent obsolete, but also evolving practice and complexity of capital litigation favor its change. A repeal of the prohibition will allow defense teams to focus their cases on mitigation, highlight the remorsefulness of their clients, and avoid litigating meritless cases. Even today, with Article 45(b) firmly held constitutional—capital issues like Inmate Nidal

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[277] *See* UCMJ art. 146 (2012) (establishing an annual Code committee to report, among other items, recommended changes to the UCMJ); *see* Major General William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to Be Changed?*, 48 A.F. L. REV. 185, 186 (2000) ("Our system, like all other legal systems, is subject to the dynamics of change. No legal system can remain static, each must change to reflect the needs and demands of society or risk becoming an anachronistic relic of a dead or dying society. For the reason, we are always looking for and evaluating ways to improve military justice activities."); *see also* Everett, *supra* note 268 (calling for continued study to improve the UCMJ).

[278] H.R. Debate, *supra* note 1.

Hasan's attempt to plead guilty at trial and capital appellants like Inmate Hassan Akbar raise the issue on appeal.[279] Admittedly, this may be a defense tactic to insert an issue at trial to seek reversal of a conviction later on appeal. However, the fact that litigants continue to raise the issue is evidence that Congress should at least now examine the prohibition.

The benefits of a change in the law do not solely benefit the accused. A guilty plea in a capital case would reduce the cost to the government and create less of a burden on the judiciary. Perhaps, more importantly, a plea is likely to reduce processing time of a capital case. Such a reduction would help the UCMJ meet the commander's requirement to maintain discipline by illustrating prompt and fair justice. Moreover, prompt adjudication of capital cases would increase public confidence in the military justice system and reduce the impact of protracted litigation on victims.

The aforementioned benefits, in addition to advanced rights for service members under the UCMJ, establish a strong argument that Congress should repeal Article 45(b)'s prohibition and allow an accused fighting for his life to choose his own defense strategy.[280]

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[279] *See* United States v. Matthews, 16 M.J 354, 362–63 (C.M.A. 1983).

[280] Additional required changes to the UCMJ and the RCM as a result of the repeal of Article 45(b)'s prohibition are contained in Appendix B and C.

Appendix A

Article 45. Pleas of the Accused

(a) If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any ~~other~~ charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

Appendix B

Recommended Changes to the Uniform Code of Military Justice

§ 818. Art. 18. Jurisdiction of general courts-martial

Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. However, a general court-martial of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to ~~try~~ (sentence) any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

§ 845. Art. 45. Pleas of the accused

(a) If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

(b) ~~A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged.~~ With respect to any ~~other~~ charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

Appendix C

Recommended Changes to the Rules for Courts-Martial 201(f)(1)(C)

(C) Limitations in judge alone cases. A general court-martial composed only of a military judge does not have the jurisdiction to act as the sentencing authority in any case in which a finding of guilty has been entered to any offense for which the death penalty may be adjudged unless the case has been referred to trial as non-capital. A general court-martial composed only of a military judge ~~does not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been referred to trial as noncapital.~~ (**has jurisdiction to accept a plea to any charge or specification alleging an offense for which the death penalty may be adjudged**).

R.C.M. 910(a)(1)

(a) Alternatives.
(1) In general. An accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or, not guilty. ~~A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial.~~

R.C.M. 1004(a)(2):

(a) In general. Death may be adjudged only when:
(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty, or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and
(2) The accused was (**either**) convicted of such an offense by the concurrence of all the members of the court-martial present at the time the vote was taken (**or a military judge accepts a knowing and voluntary plea to a death eligible offense**); and
(3) The requirements of subsections (b) and (c) of this rule have been met.

STEWARDSHIP AND THE RETIRED SENIOR LEADER: TOWARD A NEW PROFESSIONAL ETHIC

COLONEL GEORGE R. SMAWLEY*

In the interest of winning this war we all must defer judgments about the efficacy of our wartime leaders to the wisdom of the American voters and the 20-20 hindsight of historians like me . . . after our Soldiers and Marines come home.

—Major General Robert H. Scales (Retired)
Former Commandant, U.S. Army War College[1]

I. Introduction

When the nation's senior military leader, the Chairman of the Joint Chiefs of Staff, feels compelled to publicly render as "disappointing" the criticisms by former military officers toward the President's management of national security information, it is a remarkable thing indeed. The August 2012 comments by General Martin Dempsey, describing the policy criticisms as "eroding that bond of trust that we have with the American people,"[2] is the most recent illustration of an enduring question

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[1] Robert H. Scales, Op Ed, *The Generals' Ill-timed Revolt*, WASH. TIMES, May 2, 2006, at A19.

[2] General Martin Dempsey, *in* Victor Davis Hanson, *Should Retired Military Officers Speak Out: Always, Never—or It Sort of Depends?*, NAT'L REV. ONLINE, Aug. 23, 2012, *available at* http://www.nationalreview.com/corner/314795/should-retired-military-officers-speak-out-always-never-or-it-sort-of-depends/ (last visited June 4, 2014). *See also* Jim Garamone, *Public Trust Requires Apolitical Military, Dempsey Says*, U.S. A.F.

about the proper relationship of former military leaders to civilian leadership and active military. It also begs the more nuanced question of appropriate professional ethics for retired military leaders and its consequences for the military profession.

The underlying tension between former military leaders and the executive branch is hardly new. The annals of military and civilian relations are replete with examples of retired flag and general officers openly criticizing military strategic planning, organization, and operations in peace and war. In the mid-1950s, President Dwight Eisenhower was confronted by active and uniformed Army leaders' vociferous opposition to his strategic approach, which relied heavily upon nuclear weapons at the expense of a large standing Army.[3] This opposition endured well into the retirements of General Matthew B. Ridgway, General James M. Gavin, and General Maxwell Taylor, who in the 1950s each wrote and advocated against what they perceived to be a poorly conceived policy compromising national security in the face of a rising Soviet threat.[4]

In the modern era, policy advocacy by retired military leaders has taken on a new political character that could hardly be imagined a half century ago. The contemporary nature of instant and enduring information via the Internet and print and cable news has fundamentally altered how the voices of former senior leaders are received and utilized. Association with the active force affords retired senior leaders important

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ONLINE, Sept. 17, 2006, *available at* http:www.af.mil/news/story.asp?id=123318227 (last visited June 4, 2014); Larry Thornberry, *Political General Complains of Politics: Time for First Amendment Training for Flag Officers*, AM. SPECTATOR, Aug. 23, 2012, *available at* http://spectator.org/archives/2012/08/23/political-general-complains-of/ (last visited June 4, 2014).

[3] Donald Alan Carter, *Eisenhower Versus the Generals*, 71 J. MIL. HISTORY no. 4, Oct. 2007, at 1169–71; *see also* ANDREW J. BACEVICH & LAWRENCE F. KAPLAN, GENERALS VERSUS THE PRESIDENT: EISENHOWER AND THE ARMY, 1953–1955 (Syracuse University and Johns Hopkins University, 1997), *available at* http://www.maxwell.syr.edu/exed/Sites/nss/NSS_Case_Study_Listing_Descriptions/#CS0697-02 (last visited June 4, 2014) (a case study describing senior Army leader opposition to Eisenhower's strategy of massive retaliation, and the means by which military leaders advanced their opposition).

[4] *Id.* at 1195. General Ridgway vented his frustration through a series of magazine articles published by the *Saturday Evening Post* and later condensed into a book, *Soldier: The Memoirs of Matthew B. Ridgway*. A year after his 1858 retirement, General Gavin published *War and Peace in the Space Age*, condemning the Eisenhower Administration's strategic emphasis on nuclear weapons. In the same year, 1959, General Maxwell Taylor published *The Uncertain Trumpet*, which took a highly critical look at Eisenhower's reorganization of the military. *Id.* at 1185–95.

credibility and responsibility in matters affecting the national security dialogue, but it requires renewed vigilance and attention.

An essential issue is whether, given the partisanship and proliferation of public information, retired military leaders are bound by a professional ethical standard subjugating their right of public participation to an ethical code of political stoicism and restraint. The following discussion attempts to answer this question by first examining the associative nature of the military profession and the juxtaposition of legitimate policy dissent versus an apolitical professional ethic.

Perhaps most importantly, this article considers whether retired military leaders have a responsibility to the military profession that endures beyond active service. Additionally, this article analyzes the idea of stewardship of the military profession by its retired cohorts in the context of its consequences for the profession of arms, its relationship to the American public, as well as whether retired leaders' enduring association with the armed forces obligates them to an ethical code of nonpartisan restraint in light of their elevated place within military society.

II. The Military as a Profession

Samuel Huntington, through his 1957 book *The Soldier and the State*, remains among the most widely studied and influential commentators on the nature of military professionalism.[5] In describing the military as a profession much different from its civilian counterparts,

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[5] SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE (The Belknap Press of the Harvard University Press 1957). For compressive discussions on the nature of the military profession, see also ANTHONY E. HARTLE, MORAL ISSUES IN MILITARY DECISION MAKING (University Press of Kansas, 2d ed. 2004); RICHARD H. KOHN, ED., THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989 (New York University Press 1991); WILLIAM B. SKELTON, AN AMERICAN PROFESSION OF ARMS: THE ARMY OFFICER CORPS, 1784–1861 (The University Press of Kansas 1992); DON M. SNIDER & GAYLE L. WATKINS, PROJECT DIRS., & LLOYD J. MATTHEWS, ED., THE FUTURE OF THE ARMY PROFESSION (McGraw Hill 2002); MICHAEL ELIOT HOWARD, SOLDIERS AND GOVERNMENTS (Indiana University Press 1959); MORRIS JANOWITZ, THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT (Free Press 1960); SAMUEL E. FINER, THE MAN ON HORSEBACK. THE ROLE OF THE MILITARY IN POLITICS (Westview Press, F. Pinter, 2d enlarged ed., rev. & updated vers. 1988); CHARLES A. STEVENSON, WARRIORS AND POLITICIANS: U.S. CIVIL-MILITARY RELATIONS UNDER STRESS case studies (Routledge Press 2006).

Huntington concluded that "the vocation of officership meets the principal criteria of professionalism," and that "a distinct sphere of military competence exists which is common to all, or almost all, officers and which distinguishes them from . . . civilians."[6] Importantly, Huntington's foremost observation was that apolitical military professionalism, particularly within the officer corps, is essential to the military ideal "in which the behavior of men is governed by a code, the product of generations."[7]

Anthony Hartle viewed the nature of the military profession similarly, considering the "complexity of the American military ethic."[8] Hartle implied there is a military profession by referencing and refining Huntington's analysis and went on to employ the concept of "*role-differentiated behavior* which calls upon members of a profession to act differently than general members of society."[9] He suggested, in broad terms, "that the American professional military ethic is a synthesis of the functional requirements of the profession of arms, the principles underlying the prescriptions of the laws of war, and the moral implications generated by the enduring values of American society."[10] Citing Huntington, Hartle concluded, "The role of the American military professional is a morally coherent, partially differentiated role that is rationally justified within the context of American society."[11]

Hartle cites the lawyer-client privilege and confidentiality as an example of ethical rules governing the conduct of professionals, in this case promotion of the adversarial legal system. "From this view," Hartle observed, "lawyers are said to have a differentiated role in society."[12] Hartle argued further, that the position and status of the military affords its profession a similarly differentiated role,[13] concluding that in many circumstances "society can realize the desired benefits only if the profession operates under special norms," defined as "an idea that a

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[6] HUNTINGTON, *supra* note 5, at 11.
[7] *Id*. at 465.
[8] HARTLE, *supra* note 5, at 7
[9] *Id.* (emphasis added).
[10] *Id.* at 229.
[11] *Id.* at 150.
[12] *Id.* at 8.
[13] *Id.* at 9.

given behavior is expected because it is right, proper, moral, wise, efficient, technically correct or otherwise defined as desirable."[14]

More generally, the distinguished British officer, academic, and author General Sir John Hackett has written of the military profession:

> Service under arms has been seen at some times and in some places as a calling resembling that of a priesthood in its dedication. . . . a more or less exclusive group coherence, a complex of institutions peculiar to itself, and educational pattern adapted to its own specific needs, a career structure of its own and a distinct place in the society which has brought it forth. In all these respects it has strong points of resemblance to medicine and the law, as well as the holy orders.[15]

Whether as a function of Huntington's "role differentiated behavior," Hartle's lawyer-client analogy, or Hackett's almost romantic allusion to the military as a "holy order," it is clear that there exists a distinctive military profession with its own particular function, character, and ethics. Among its unique characteristics are the differentiated roles and relationships of its two principal cohorts—the active military and the retired military—as essential parts of the same fraternal order.

III. Retired Leaders as Stewards of the Profession

As a function of professional responsibility and association, the retired cohort are those senior members of the profession who dedicated the better part of their working life to military service, were educated in its schools and war colleges, were steeped in its culture, and led its organizations. Their association with the military endures in the mind of the active force and the American public. Even in retirement, a former military member is part of two worlds, both civilian and military. While the profession's retired cohort does not lay aside the citizen, it is never entirely separate from the soldier, either. With that role of retired soldier comes a certain moral and ethical responsibility as a representative and

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[14] *Id.* at 240–41 n.10 (citing FREDERICK L. BATES & CLYDE C. HARVEY, THE STRUCTURE OF SOCIAL SYSTEMS 77 (Gardner Press 1975)).

[15] GENERAL SIR JOHN HACKETT, THE PROFESSION OF ARMS 9 (MacMillan Publishing Company 1983).

generational steward of the profession itself and as a responsible defender and guarantor for its future.

From a policy and legal perspective, retired members of the military remain tied to the profession through their association with the military via retired pay, benefits including medical care and access to military facilities and installations, and the fact that they are generally subject to involuntary recall to active duty by an order of the Secretary of Defense.[16] Subject to certain conflict of interest prohibitions, federal regulations also allow retired members of the military to retain their military ranks and titles and to wear their uniforms, afford them unique death benefits, and laud them for their service to the nation.[17]

Dr. Richard Swain, the former Professor of Officership at the William E. Simon Center for the Professional Military Ethic at the U.S. Military Academy at West Point (2002–2007), has considered the application of codified ethical standards for the military's active cohort. He found public participation of retired officers in certain national policy debates troubling, noting the "famous remark by General George Marshall to a newspaper correspondent that 'I have never voted, my father was a Democrat, my mother a Republican, and I am an Episcopalian.'"[18] Swain concluded that the retired cohort of senior leaders is bound by at least the spirit of Marshall's commitment and abstention from partisan involvement. Swain observed,

> It is at least a false proposition that upon retirement officers revert to full civilian status in so far as the obligations they undertook at their commissioning. Retirement is not resignation. It is a matter of fact, not interpretation, that retired officers remain members of the armed forces by law and regulation. . . . Unless, like George Washington, they lay down their commissions by resignation, it is reasonable to assume that they

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[16] *See* 10 U.S.C. § 688 (LexisNexis 2014) (Retired members: authority to order to active duty).

[17] *See generally id.* § 371 (Retirement for Length of Service), *id.* §75 (subch. II, Death Benefits).

[18] Richard Swain, *Reflection on an Ethics of Officership*, PARAMETERS, Spring, 2007, at 4, 18 (citing Letter from George C. Marshall, to Charles J. Graham (Sept. 23, 1943), *in* THE PAPERS OF GEORGE CATLETT MARSHALL: VOLUME 2, "WE CANNOT DELAY," JULY 1, 1939–DECEMBER 6, 1941, at 616 (Larry I Bland, Sharon R. Ritenour & Clarence E. Wunderlin, Jr., eds. (Johns Hopkins Univ. Press 1986)).

> remain at least ethically obliged to observe the limitations imposed by commissioned service, accepted by the oath they made and commission they still hold. These limitations are imposed by obligations of loyalty to the Constitution, the virtues of patriotism, valor, fidelity, and abilities, and certainly, as officers, include public respect to the office of the President and other Department of Defense civil authorities.[19]

Accordingly, for better or worse, retired leaders are inescapably associated with the active cohort and have a powerful professional imperative to abide by a code of conduct consistent with the standards underlying the active military's high esteem among the American people. The public easily and inescapably associates one with the other, often without distinction, and clearly deems retired officers as members of Sir Hackett's military "priesthood."[20] Although they are retired, the retired cohort is still perceived as part of the profession, and it naturally follows that they are ethically bound by a certain code of conduct consistent with the character of the profession's relationship to the American people, civilian authority, the active cohort, and their own individual legacy.

Colonel Bernard Horn and Dr. Robert Valker, who write on behalf of military leadership within the Royal Canadian armed forces, support this idea by recognizing the comparative obligation of senior military leaders to the health and efficacy of the military profession. In an analysis easily applicable to the United States, they observed: "Stewardship is therefore formally defined as the special obligation of officers and non-commissioned members who by virtue of their rank or appointment, are directly concerned with ensuring that the profession of arms . . . fulfills its organizational and professional responsibilities. . . ."[21]

These responsibilities are often informed by common standards and a trust relationship with a particular client, something that Huntington

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[19] *Id.* at 19. *See also* Martin L. Cook, *Revolt of the Generals: A Case Study in Professional Ethics*, PARAMETERS, Spring, 2008, at 4, 9. Cook considers the ethical balance between retired officers who engage in public debate on military issues at a cost to the profession, and the benefit such participation brings to important national security dialogue.

[20] HACKETT, *supra* note 15, at 9.

[21] BERNARD HORN & ROBERT WALKER, EDS., THE MILITARY LEADERSHIP HANDBOOK 458 (2008) (Dundurn Press and Canadian Defense Academy Press in cooperation with the Department of National Defense, and Public Works and Government Services Canada).

noted, adding, "The client of every profession is society, individually or collectively . . . . This social responsibility distinguishes the professional man from other experts."[22] Importantly, Huntington's basic elemental characterization of what constitutes a profession—expertise, responsibility, and corporateness—supports the notion that retired military leaders are stewards of the relationship between the military and its civilian host.[23]

Huntington's idea of corporateness, in particular, has a special resonance in describing the active and retired cohorts together under a corresponding professional ethic, and their shared membership within the broader military profession. He describes both "associational" professions (law, medicine) and "bureaucratic" professions (diplomatic corps)[24] and notes they are not mutually exclusive. The first has an express code of conduct, while the latter operates under a "collective professional responsibility" toward society.[25] The military profession shares elements of both, and the unique characteristic of what Huntington describes as "a sense of organic unity and consciousness of themselves as a group apart from laymen. This collective sense has its origins in the lengthy discipline and training necessary for professional competence, the common bond of work, and the sharing of a unique social responsibility."[26]

In much the same way, senior military leaders share a unique responsibility toward the military profession and its interests, place, and role in society.[27] As its most experienced members and institutional ballast, they are proprietors of the profession's relationship with civilian authority and serve as a key conduit between the Armed Services and the American people. Retired officers share special trust in facilitating the reputation, influence, credibility, and understanding between the military and the American people. Their status is predicated on credibility, they are trusted for their loyalty and are highly regarded precisely for what the

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[22] HUNTINGTON, *supra* note 5, at 9.
[23] *Id.* at 10.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *See* 2012 ARMY POSTURE STATEMENT add. L (2012) (The Army Profession), *available at* https://secureweb2.hqda.pentagon.mil/vdas_armyposturestatement/2012/addenda/addenda_l.aspx (last visited June 4, 2014). The *2012 Army Posture Statement* includes among its four key concepts the importance of "Stewardship of the Army Profession over time by its leaders, particularly strategic level leaders as they see to the continual generation of new military expertise." *Id*.

military profession is—a reflection of the country's highest ideals—and what it is not—a self-interested constituency.

Stewardship of the military profession by past and present leaders who share mutual responsibility and commitment fits easily into this definitional construct. The question, then, is whether this responsibility to the profession extends to members of the retired cohort. The objection by General Dempsey, and others, appears to be that retired officers cross an important association boundary when they exploit their status and professional standing to become political actors.

IV. Stewardship, Stoicism, and Restraint

The nature of retired military professionals, integral as they are to the national security culture, may require in retirement the same kind of Stoic discipline that served them so well amid the trials of active duty. An important aspect of the Stoic character is the measured restraint by former leaders in their critiques of national military policy and operations. This is essential to the profession and its relationship to civilian leaders, their decision-making processes, and the profession's place in national security and policy dialogue. There is no question retired leaders have the same civic rights to say and participate in the public domain as any other citizen, but the question is, should they? Or, more specifically, should they do so without being bound by a set of ethics to guide that participation?

Huntington makes perhaps the most detailed and passionate argument for an apolitical military profession as a central tenet of American civil-military relations. His military ideal calls for a conservative profession balanced between functional imperatives and social values, in selfless subjugation to civilian authority despite individual misgivings over policy.[28] In his view, "[t]he essence of objective civilian control is the recognition of autonomous military professionalism."[29] He considered the active involvement of individuals in the military profession in politics as a threat to both the military and the nation, noting that "the participation of military officers in politics undermines their professionalism, curtailing their professional competence, dividing the profession against itself, and substituting

[28] HUNTINGTON, *supra* note 5, at 2.
[29] *Id.* at 83.

extraneous values for professional values."[30] Arguing for partial differentiation of ethics for the military profession as it concerns an inherent right, such as political participation, Hartle acknowledged the need for military leaders to "weigh their special obligation as professionals and their functional requirements" against the exercise of certain individual rights.[31]

In the case of the military profession, ethical differentiation and its associated relevance for retired officers is the idea that the profession's place in public life is truly distinct. It is defined by its servitude to the elected civilian leadership and the fact that it is fundamentally representative of the nation as a whole, rather than a separate constituency with political interests. The profession's nonpartisan character is part of what distinguishes the military, and it is a functional requirement derived from a civil-military relationship free of political distractions and debate and all that comes from it.[32] General Dempsey's predecessor as the Chairman of the Joint Chiefs of Staff, Admiral Michael G. Mullen, echoed the same sentiment: "[A] professional armed force that stays out of the politics that drive the policies it is sworn to enforce is vital to the preservation of the union and to our way of life."[33]

The principal point of reference for both Mullen, Huntington, and Hartle was the active duty force, but an important analogy for the whole military profession is easily drawn. The associative nature of the retired cohort to the active force should drive former senior leaders to abstain from criticism of current civilian leadership, defense policy, or operations.

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[30] *Id.* at 71.

[31] HARTLE, *supra* note 5, at 168.

[32] For an excellent and unique study of the conservative political alignment of the Army's officer corps, and its implications for civil-military relations, see JASON K. DEMPSEY, OUR ARMY, SOLDIERS, POLITICS, AND AMERICAN CIVIL-MILITARY RELATIONS (Princeton Univ. Press 2010).

[33] Admiral Michael G. Mullen, *Military Must Stay Apolitical*, JOINT FORCE Q., July 1, 2008, at 2. Retired Air Force General Richard Myers, also a former Chairman of the Joint Chiefs, has similarly commented that retired generals who allow themselves to be "used as a potted palm at political conventions really do a disservice" to the military. Thomas E. Ricks, *Get Retired Generals Out of Politics Now; "Shut Up and Go Home to Your Farm,"* FOREIGN POL'Y (Online ed.), Apr. 12, 2010, *available at* http://ricks.foreignpolicy.com/posts/2010/04/12/get_retired_generals_out_of_politics_now_shut_up_and_go_home_to_your_farm (last visited June 12, 2014). *Id.*

There is a balance between political non-participation and advocacy. No one would suggest members of the military profession abdicate their right to vote, contribute, join, or discuss policy in appropriate settings. But active criticism of a particular policy or civilian leader by retired general officers, like in the 2006 "revolt of the generals" calling for the resignation of Secretary of Defense Rumsfeld, was a stunning example of the profession being drawn into a public discourse implicating specific executive prerogatives of civilian leadership, especially the President.[34] It forced the active military cohort into the untenable position of defending or decrying claims by retired general officers and thus suggested a discord between the military and the Secretary of Defense. In the end, the incident diminished both, including the officers involved. And for good reason.

Military leaders are individually and collectively representative of the profession and are an expression of its unique character that is properly apolitical. The potential cost to political activism paid by the credibility of the military profession and institution is far greater than the cost of restraint. What distinguishes the military profession from the other professions is precisely what is lost when retired leaders enter the public domain to criticize current policy and operations not as selfless servants, but as critics.

So how should retired leaders act? What model within the military profession should inform their approach to political activism? One possibility is the sort of professional stoicism described as far back as Marcus Aurelius, recognizing the value and acceptance of political realities that are beyond the span of immediate control. The lesson of stoicism is a lesson, in part, of restraint and tacit understanding of the soldier's relationship to civilian governance.

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[34] *See generally* Perry Bacon Jr., *The Revolt of the Generals*, TIME, Apr. 16, 2006, *available at* http://www.time.com/time/printout/0,8816,1184048,00.html (last visited June 4, 2014); David S. Cloud & Eric Schmitt, *More Retired Generals Call for Rumsfeld's Resignation*, N.Y. TIMES, Apr. 13, 2006, *available at* http://www.nytimes.com/ 2006/04/14/washington/14military.html?pagewanted=all&_r=0 (last visited June 4, 2014); Richard J. Whalen, *Revolt of the Generals: Military Officers Speak out Against a Failed War*, NATION, Oct. 16, 2006; *A News Hour with Jim Lehrer* (Online ed.), PBS, Apr. 18, 2006, *available at* http://www.pbs.org/newshour/bb/military/jan-june06/ rumsfeld_4-18.html (last visited June 4, 2014).

Dr. Michael Evans, of the Australian Defense College in Canberra, has made the case for an application of Stoic traditions in western military professions based on a system of four cardinal virtues of courage, justice, temperance, and wisdom.[35] In doing so, he suggests, in part, that military leaders learn from the Stoic conviction "that virtue consists in knowing what is in one's control and what is not," [36] and the associated obedience to one's professional calling.[37]

> It is not for nothing that Epictetus compares the Stoic's life to that of the discharge of military service. . . . Each man's life is a campaign, and a long and varied one. It is for you to play the soldier's part—do everything at the General's bidding, divining his wishes, if it be possible.[38]
>
> At every stage of his military career, no matter what the personal discomfort, the professional officer must seek to behave correctly. As Epictetus puts it, life is like a play, and "it is your duty to act well the part that is given you; but to select the part belongs to another."[39]

Stoicism might therefore be useful as a system for informing the conduct of former military leaders in their approach to policy dialogue and dissent. By "playing the soldier's part" they are satisfying the higher virtue of temperance and wisdom so crucial to service in arms, in deference to the professional ethic of non-partisanship and recognition of its importance to the military, now and for the future.

Just as importantly, a Stoic approach to post-retirement partisanship demonstrates loyalty to the Active cohort by mitigating public challenges to the credibility of the active military leadership when they speak, act, or advocate on behalf of the President or other civilian leaders. Echoing

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[35] Michael Evans, *Captains of the Soul, Stoic Philosophy and the Western Profession of Arms in the Twenty-first Century*, 64 NAVAL WAR C. REV., Winter 2011, no 1, at 35 (citing JOHN SELLERS, STOICISM 1–31 (Univ. of California Press 2007)).

[36] *Id.* at 37.

[37] *Id.* (citing JOSEPH GERARD BRENNAN, FOUNDATIONS OF MORAL OBLIGATION: THE STOCKDALE COURSE 2 (Presidio 1994)).

[38] *Id.* at 38 (citing Epictetus, *Discourses*, *in* KEITH SEDDON, EPICTETUS' HANDBOOK AND TABLET OF CEBES: GUIDE TO STOIC LIVING 27 (Routledge 2005)).

[39] *Id.* at 45 (citing Epictetus, *Enchiridion* (trans. George Long 21–22, Prometheus Books 1991)).

Huntington's concern that partisanship could "divide the profession against itself" when retired leaders enter the public domain to criticize civilian or active military authorities, they risk compromising the legitimacy of current leaders whose express duty it is to execute orders that are given.[40] Policy criticism by respected voices within the military profession carry with it a challenge to the profession itself, particularly the active cohort; as a result, their tempered restraint in such matters helps sustain the military's much-earned trust among the public at large and within the ranks of the military.

V. Professional Stewardship and Civil Society

There exists an inescapable ethical component to a career officer's relationship to the military profession in its relationship to civil society. If it is appropriate for military leaders in a democracy to be apolitical during active service (and that such is in the best interest of the nation), then it is reasonable to expect that officers respect the same standard upon transition to a retired status. There is an ethical trust, and perhaps even a moral virtue, in the separation of a nation's professional military from the public domain. Professional ethics help bind the active and retired cohorts together as members of one very special fraternity, and remain a defining characteristic of the profession's relationship to American society.[41]

Americans ascribe a certain trust to their military leaders because, in part, they represent an institution considered a national asset and an essential instrument of civilian authority.[42] There is, accordingly, a noble concordance of ethical imperatives and institutional priorities in military-civilian relations that endures despite the transition to retired status and return to civilian life. When career military leaders enter the domain of

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[40] HUNTINGTON, *supra* note 5, at 71.

[41] *See* General Martin Dempsey, *in* Jim Garamone, *Public Trust Requires Apolitical Military, Dempsey Says*, ARMED FORCES PRESS SERV., Sept. 17, 2012, *available at* http://www.af.mil/news/story.asp?id=123318227 (last visited June 4, 2014). Dempsey is quoted as saying, "Former service members who continue to use their military title should just think about what impact their actions will have on our standing as a profession with the American people if they engage in partisan political activity." *Id.*

[42] Jeffery M. Jones, *Americans Most Confident in Military, Least in Congress*, GALLUP, June 23, 2011, *available at* http://www.gallup.com/poll/148163/americans-confident-military-least-congress.aspx/ (last visited June 4, 2014) (The survey by the Gallup organization found the U.S. military had highest level of institutional confidence of any organization in America, followed by small business, the police, and organized religion.).

policy advocacy and partisanship, they risk betraying the very attribute that distinguishes them in the first place. If former leaders appear to leverage their active service as the fulcrum by which they enter the public space to criticize policy, or even worse, to profit from it, they may lose the halo of selflessness so strongly engendered by a successful military career, and the profession they represent.

What is at risk when retired senior leaders question the decision-making process of the active cohort and civilian leadership? For many, it is nothing less than the credibility of the military profession itself. Costs to the profession, large and small, occur when former military officers openly criticize the current military and civilian leadership, appear to gain personally from such criticism, or perpetuate the idea of a monolithic military establishment as an interest group or vague political constituency. When this happens, public trust in the military as a whole risks compromise. The public will naturally infer that retired senior officers are channeling a prevailing view within the military potentially at odds with the current civilian or military leadership, putting active members of the profession in the position of having to defend civilian policy or military advice.

For example, if a president thinks a senior leader will turn against him publicly upon retirement, write tell-all books, or enter the public domain of discourse and punditry, then why trust him today—or any military leader, for that matter? Dissent by retired officers in controversial or politicized matters can attach to the active service and inform Congress and the administration about the sort of military they are dealing with, correctly or not. This dissent can result in a false perception by the public and Congress that the views expressed by the retired cohort are the views of the organization as a whole. What happens to the public's perception of the profession when the public domain is occupied by discordant military voices and disquisitions regarding strategy (especially, when they create a cacophony of contradictory expert assessments among various constituencies involved in a particular issue or approach)?

In answering this question, Army Lieutenant Colonel Jason Dempsey, who holds a Ph.D in Political Science from Columbia University, considered the impact on the active force of political involvement by recently retired general officers and its relationship with civilian authority, and found that there is indeed a cost.

> If retired generals continue to leave the force and enter the partisan political fray as a means to settle unresolved grievances, they are likely to inspire elected leaders to further vet the political affiliations of those officers considered for promotion. Furthermore, when officers endorse parties or candidates as a means of resolving conflicts with their former bosses, they may lead other elected officials to question the motivation of military advice in other contexts.[43]

Writing of the role and impact of military veterans participating in competing conservative and liberal media campaigns during the 2008 presidential election, Lieutenant Colonel Dempsey further observed, "The armed forces risk being torn apart by internal political conflicts in addition to squandering the military's reputation for unwavering subservience to the democratic process."[44]

Military professionals who engage in this kind of partisan public dialogue also invite suspicion by opposing sides of important national security and defense issues. Further, they risk criticism of self-interest for profit or position that may taint the military as a whole. This, then, risks mistrust by the executive and legislative branches, which in turn may call into question the honest and essential advice of active military leaders in their role as advisors on national strategy.

During the 2012 political campaign, Dr. James Golby of West Point, Dr. Peter Feaver of Duke University, and Kyle Dropp of Stanford University, writing for the Center for a New American Security (CNAS), took a critical view of the role of military endorsements and the intercourse between retired general officers and politics in the context of presidential elections. They note the prized status of retired flag officers as advisors and participants in national campaigns, where "[t]he message of such endorsements is clear and unmistakable: 'I am a distinguished military voice speaking on behalf of the military. Because "we, the military" trust this person to be commander in chief, you can, too.'"[45]

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[43] DEMPSEY, *supra* note 32, at 192.
[44] *Id.* at 193.
[45] JAMES GOLBY, KYLE DROPP & PETER FEAVER, MILITARY CAMPAIGNS, VETERANS' ENDORSEMENTS AND PRESIDENTIAL ELECTIONS 6 (Oct. 2012) (Center for a New American Security).

Indeed, during the recent 2012 election, numerous retired military officers endorsed presidential candidates including dozens of retired three- and four-star generals.[46] Such high-profile involvement, presumably designed to bolster a candidate's national security credentials and foreign policy agenda, creates undue risk to the objective character so integral to the military profession and its relationship to civil society.[47] The Golby, Feaver, and Dropp study detailed the potentially adverse consequences resulting from political activity by retired senior leaders on the military profession's standing within civil society.

> [The survey suggests that] such endorsements do affect the way the public views the military and that endorsements may undermine trust and confidence in the military over the long term. . . . This perception also might undermine military recruiting efforts and hinder effective civil-military relations.[48]

While acknowledging the controversial nature of Secretary Rumsfeld's perceived politicization of the officer corps, West Point Professor Colonel Matthew Moten has nonetheless observed, "While those are matters of concern, as policy choices by civilian leaders they lie outside the scope of the professional military ethic."[49] In condemning the conduct of retired general officers associated with the "revolt of the generals" and their call for Rumsfeld's resignation, Moten accurately captured the implications for their entry into the public policy domain, most specifically their adverse effect upon the nonpartisan ethic of military service.[50] He noted:

> This dissent and the widespread perception that the retired generals "spoke for" their former colleagues still on active duty threatened the public trust in the

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[46] Andrew Tilghman, *Retired Officers Endorse Romeny, but Report Says Effect May Be Negligible*, ARMY TIMES, Oct. 29, 2012, at 12.

[47] Given the fact that over 300 retired general officers endorsed Mr. Romney, who lost the election to President Obama, they evidently do very little good for their intended beneficiary.

[48] GOLBY ET AL., *supra* note 45, at 18.

[49] Matthew Moten, *The Army Officer's Professional Ethic—Past, Present, and Future*, STRATEGIC STUD. INST., U.S. ARMY WAR C., Feb. 2010, at vi.

[50] *Id.*

> military's apolitical and nonpartisan ethic of service as well as the principle of civilian control.[51]

Others have similarly observed the detrimental effect on civil-military relations whenever retired senior leaders enter the political domain. In studying the political activity of retired general officers during the mid-1990s, Boston University professor Andrew Bacevich, a West Point graduate and career Army officer, concluded that all they accomplished was a regrettable degradation of the profession, and themselves.[52]

At its core, the concern arising when retired senior leaders enter public policy debates has its roots in the relationship of the military profession to civil society, national leadership, and the active military itself. Accurately or not, and fairly or not, retired senior leaders represent something bigger than themselves whenever they enter the public domain and with that comes a certain responsibility. The representation is nearly always implicit, but as Golby, Feaver, and Dropp observe, that is enough. "When veterans of any rank explicitly or implicitly suggest that they are speaking on behalf of the military as an institution, they have crossed the line and are risking considerable damage to the norm of a non-partisan military."[53]

VI. Stewardship, the Individual, and *Noblesse Oblige*

Finally, as part of a differentiated ethic for former military leaders, there is a nuanced argument for nonpartisanship in the social idea of a differentiated moral obligation, known as *noblesse oblige*. The term describes a commitment by those with social status to conduct that is noble, or deserving of received honors. Generally stated, the application of *noblesse oblige* to the military profession and its retired senior leaders

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[51] *Id.* at 17–18. ("Equally troubling was a 2008 report that numerous retired officer-commentators on television news programs had parroted without attribution 'talking points' provided by the Department of Defense. Some of these former officers, most of them former generals, also had fiduciary ties to defense industries with contracts in support of the war effort. Those ties had also gone undisclosed. . . . The palpable sense that those retired officer had sold their professionalism to the highest bidder cast an ethical shadow over all the military services.")

[52] ANDREW J. BACEVICH, THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR 61–62 (Oxford Univ. Press 2005).

[53] GOLBY ET AL., *supra* note 45, at 19.

suggests an unwritten code of principles derived from service to the nation. Its origins are social and professional norms and the conditions under which the military profession functions within the American system. It informs the conduct of individuals and is adopted and enforced by members of the military profession and society.[54]

At its definitional core, *noblesse oblige* concerns aspiration toward a higher ethical ideal, informed by conduct that is entirely consistent with the military professional ethic and character. In the case of retired senior leaders, most especially general officers, they carry with them much deserved status as elite leaders of the country's most venerated and essential national security institution. Consequently, their standing within society and its attendant responsibilities endure; their position and responsibility in retired status should be considered an extension of their active service.

The idea originates from the notion that the apolitical professional ethic associated with the military profession risks betrayal when career officers surrender to an appetite for political participation wholly inconsistent with the profession's relationship to civil society. Retired leaders who engage in public criticism of military policy often take refuge in the notion that their partisanship is consistent with their commitment to the military and the nation, generally relying on the idea that their participation in the issue is in the best interest of both. But they misunderstand both the potential consequences, and the cost. In a world with large and imposing challenges, the sideline sniping by those no longer vested with personal responsibility for leadership threatens the credibility of the military profession and achieves little for servicemembers in the field.

Out of a sense of *noblesse oblige*, therefore, retired military leaders should refrain from exercising certain civic rights to comment on and critique the civilian and active military leadership. Such restraint should arise from a genuine commitment to stewardship of the military profession, and concern for its highly reputable place within the American system. Their conduct with regard to the nonpartisan military profession should originate from an individual sense of social obligation, with a commitment to the profession's unique place and function in society.

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[54] Jon Elster, *Rationality, Morality, and Collective Action*, 96 ETHICS, Oct. 1985, no. 1, at 136–55.

A good analogy for this proposal is the U.S. judiciary. There is an unwritten professional code that generally restrains members of the judiciary from public criticism of judicial decisions by others out of a personal and professional commitment to the rule of law.[55] If judicial decisions were commonly prey to popular criticism outside formal appellate processes, citizens and institutions would begin to question the competency and legitimacy of the judiciary as an essential social and political institution. In this way, the military is no different. When retired senior officers question the validity of military policy or the civilian leadership they call into question the expertise and competence of the profession itself, and those active members participating in the decision-making.[56]

As the military develops its senior leaders, the profession must continually affirm its apolitical character if it is to achieve consensus of the ethic's fundamental value, and the alternative's genuine professional risks. A good start to this habituation would be a straight-forward approach to a new professional ethic regarding nonpartisanship by members of the profession's retired cohort.

VII. Toward a New Professional Ethic

The relationship of the military profession to society has long been influenced by a code of ethical conduct that is both expressed in the *Joint Ethics Regulation* and implied through standards of conduct developed over many generations.[57] Huntington described this ethical behavior as

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[55] While public criticism among and between members of the federal judiciary is rare, it does occasionally happen, as has recently been the case in the running contest on judicial interpretation between conservative U.S. Supreme Court Justice Anthony Scalia and liberal Judge Richard Posner, Seventh Circuit Court of Appeals. *See* Garrett Epps, *How Two of the Nation's Leading Conservative Jurists Locked Horns Over a Two-Word Phrase*, ATLANTIC MAG., Sept. 22, 2012, *available at* http://www.theatlantic.com/national/archive/2012/09/how-two-of-the-nations-leading-conservative-jurists-locked-horns-over-a-two-word-phrase/262700/ (accessed February 10, 2013).

[56] In the case of the 2006 "Revolt of the Generals," Jason Dempsey notes the affect the criticism may have had on the active military leadership's credibility, "That John Batiste and Paul Easton felt military advice on Iraq had been ignored could reasonably lead one to wonder if the remaining generals on active duty were competently engaging civilian leadership. It also injected the views of senior military leaders in a political arena over which officers have little control." DEMPSEY, *supra* note 32, at 192.

[57] U.S. DEP'T OF DEF., DIR. 5500.07, JOINT ETHICS REGULATION (29 Nov. 2007), *available at* http://www.dod.mil/dodgc/defense_ethics/ethics_regulation/ (accessed June 20, 2014)/.

"comparable to the canons of a professional ethics of the physician and lawyer . . . the officer's code expressed in custom, tradition, and the continuing spirit of the profession."[58]

Voicing the need for a coherent statement of Army ethics, Colonel Moten astutely argued that "the Army officer corps has both a need and an opportunity to better define itself as a profession, forthrightly to articulate its professional ethic, and clearly to codify what it means to be a military professional."[59] In view of the connection between the two military professional cohorts, any future professional ethic must include the recognition of unintended adverse consequences of retired officers entering the public domain for policy or partisan advocacy.

Retired general officers, in particular, merit a special accounting because of their unique status both within the military profession and American society. The CNAS study of the role of general officers in the 2012 presidential election specifically distinguished this small but crucial population for special consideration, and noted:

> Once an officer achieves flag rank, it seems likely that the broader public would view his statements as "official" even if he tried to claim they were his own private, personal views. . . . Consequently, an effective taboo must focus on flag officers at a minimum.[60]

Nearly all professions have ethical standards that codify rules and issue guidance offering clarity, certainty, and concordance to an often discordant constellation of rules governing personal and professional behavior, particularly those like the military where trust and accountability are considered essential. Golby, Feaver, and Dropp described the nature of an ethical standard for military professionals in relation to policy and politics, noting "the prudent course is to adopt norms of behavior that create the brightest possible line between the sphere of partisan politics that picks the American commander in chief and the sphere of military professionals who must serve unreservedly regardless of what the other sphere produces."[61]

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[58] HUNTINGTON, *supra* note 5, at 16.
[59] Moten, *supra* note 49, at vi.
[60] GOLBY ET AL., *supra* note 45, at 19.
[61] *Id.* at 20.

Lieutenant Colonel Jason Dempsey, in turn, having considered in depth the political attitudes of the U.S. Army, believed that the military needs to internalize these norms of nonpartisan behavior within the profession and ensure its neutrality during often partisan national debates over national defense and foreign policy as a way of preserving its reputation with civil society. "It is therefore crucial," he wrote, "for the military to educate its members on appropriate norms of behavior at a time when military leaders must carefully navigate a contentious domestic political environment that is sharply divided on issues of national security."[62]

A professional ethic addressing the conduct of retired leaders is easily reconciled with the norms of behavior currently incumbent on military leaders though the existing paradigm of federal government ethics designed to mitigate financial conflicts of interest.[63] These rules

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[62] Moten, *supra* note 49, at 188.

[63] 18 U.S.C. § 207(a)(1) (LexisNexis 2014).

> Former Government officers and employees may not knowingly make a communication or appearance on behalf of any other person, with the intent to influence, before any officer or employee of any Federal agency or court in connection with a *particular matter* in which the officer or employee *personally and substantially* participated, which involved a *specific party* at the time of the participation and representation, and in which the U.S. is a party or has a direct and substantial interest.

Id. § 207(a)(2).

> For a period of 2 years after termination of Government service, former Government officers and employees may not knowingly make a communication or appearance on behalf of any other person, with the intent to influence, before any officer or employee of any Federal agency or court, in connection with a particular matter which the employee reasonably should have known was actually pending under his or her *official responsibility* within 1 year before the employee left Government service, which involved a specific party at that time, and in which the U.S. is a party or has a direct and substantial interest.

Id. § 207(b).

> For a period of 1 year after leaving Government service, former employees or officers may not knowingly represent, aid, or advise someone else on the basis of *covered information*, concerning any ongoing *trade or treaty negotiation* in which the employee

are in place because they serve the best interests of the public. A reasonable set of sanctions for retiring senior leaders is entirely consistent with this.

So what can be done? First, there needs to be an acknowledgement that the non-partisan nature of the military profession extends to its retired cohort. This article makes the argument why. Second, this new professional ethic must become part of the dialogue at Army and joint ethics events like the annual Command and General Staff College Ethics Symposium, held at Fort Leavenworth, Kansas and the Annual Army Profession Forum/Symposium held at West Point. It is a topic that should be integrated into the senior leader narrative for the profession, and considered and advocated by military institutions like the Center for the Army Profession and Ethic (CAPE). Furthermore, non-partisanship should be added to the instruction and formal education of general officers at the joint and Service level, such as the Chief of Staff's Army Senior Leader Development Program (ASLDP) and the Senior Official Personal/Support Staff Collective Training Package (addressing travel, gifts, relations with contractors, official/unofficial functions, etc.)

Institutionally, and not unlike what many bar associations and attorney credentialing authorities do within the legal profession, the Chairman of the Joint Chiefs or the Service Chiefs of Staff could establish a Committee for Military Professional Ethics, with a subcommittee empowered to receive, consider, and make findings and recommendations regarding the professional conduct of retired senior leaders: whether cited actions were consistent with the military

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> participated personally and substantially in his last year of Government service.

Id. § 203.

> After you leave Government service, you may not accept compensation for representational services, which were provided by anyone while you were a Government employee, before a Federal agency or court regarding particular matters in which the Government was a party or had a substantial interest. This prohibition may affect personnel who leave the Government and share in the proceeds of the partnership or business for representational services that occurred before the employee terminated Federal service. (Examples: Lobbying, consulting, and law firms).

Id.

professional ethic. These can be published, distributed among the Services, and forwarded to military-oriented organizations and associations, akin to what the Army Judge Advocate General may do with judge advocates found to have violated the rules of professional responsibility and conduct.[64] There is, for example, nothing in law or policy expressly prohibiting Army leadership from issuing a memorandum of concern or reprimand to retired officers for conduct that would merit the same were they still on active duty.

This formal approach might codify a two-year "cooling off" period following retirement, prohibiting any public statement advocating for or against a particular policy, political candidate, or operational matter implicating the Department of Defense or its subordinate military services. Lieutenant Colonel Dempsey also suggests consequences for recently retired general officers who "use the military's prestige for partisan purposes."[65] Measures include removing the title of general from official correspondence, denial of speaking rights before active military audiences, and exclusion from various mentoring programs.[66] He concludes that, at a minimum, "more professional opprobrium should be meted out to those who step in front of national political conventions and have the temerity to claim to be 'simple soldiers.'"[67]

Regardless of what form any penalties take, the achievement would be the professional recognition of a new ethic of nonpartisanship incumbent upon retired senior leaders. The normative values for the profession would help define a standard recognizing the important role that retired senior leaders play as stewards and, as Huntington concluded, "remain true to themselves, to serve with silence and courage in the military way."[68] It would also clearly articulate the risks and potential adverse consequences to the profession and the civil-military relationship that come from retired officers who, as Lieutenant Colonel Dempsey described, implicitly deal in "a commodity they should realize is not theirs to trade."[69]

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[64] *See* U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES (30 Sept. 1996) (revised by RAR, 13 Sept. 2011) (revising Chapter 7 (Professional Conduct Inquiries)).
[65] DEMPSEY, *supra* note 32, at 191.
[66] *Id.*
[67] *Id.*
[68] HUNTINGTON, *supra* note 5, at 466.
[69] DEMPSEY, *supra* note 32, at 191.

VIII. Conclusion

Taken together, the changes suggested in this article would help to protect and perpetuate the American public's perception of the military as an honorable, ethical institution and profession free of partisan bias. There is no question that the active duty servicemember is bound by the profession's nonpartisan standard. The retired cohort's close and continued association with the military profession demands that they, too, abide by those same ethical imperatives. The profession of arms should take nothing for granted in the realm of military and civilian relations, and cannot afford to risk "eroding that bond of trust we have with the American people."[70]

[70] Dempsey, *supra* note 2.

IF A TREE FALLS IN THE WOODS AND THE GOVERNMENT DID NOTHING TO CAUSE IT, DOES IT STILL INVOKE THE ENDANGERED SPECIES ACT? EVALUATING *KARUK TRIBE V. U.S. FOREST SERVICE* AND ITS IMPACT ON AGENCY ACTION UNDER THE ESA

COMMANDER DAVID M. SHERRY*

There is no reality except in action.[1]

I. Introduction

If one reflects on environmental law, existential philosophy is probably not the first thought that comes to mind. Yet, with the Endangered Species Act (ESA) as a backdrop, the 9th Circuit's 2012 *Karuk Tribe of California v. U.S. Forest Service (Karuk III)*[2] decision raises exactly that subject. Similar to existentialism, where one's acts define the extent of their existence,[3] the extent of federal agency obligation under Section 7 of the ESA is determined by the level of activity conducted by that agency.[4] This is known as agency action, and, when present, it requires the federal government to follow special procedures, (including regulatory consultation), to ensure the protection

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[1] JEAN-PAUL SARTRE, EXISTENTIALISM IS A HUMANISM 37 (2007).

[2] Karuk Tribe of California v. U.S. Forest Serv. (*Karuk III*), 681 F.3d 1006 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579 (2013).

[3] *See generally* SARTRE, *supra* note 1.

[4] *See Karuk III*, 681 F.3d at 1021–22.

of certain species.[5] *Karuk III* troublingly lowered the threshold of federal activity required to trigger this ESA consultation requirement in the 9th Circuit. The *Karuk III* decision begs the question: What *won't* trigger ESA consultation?

This article explores *Karuk III*'s impact on the meaning of "agency action" under the ESA. The majority opinion, which declared that the use of the U.S. Forest Service's mining Notice of Intent (NOI)[6] system was agency action, was overbroad and therefore incorrect. The majority opinion gave the wrong interpretation to the specific interactions between the U.S. Forest Service (Forest Service) and miners, treating these interactions as evidence of agency action. It failed to properly interpret the mining regulations involved. Finally, it failed to reconcile its decision with contrary case law, both in and beyond the 9th Circuit, that supports a finding in favor of the Forest Service. As a result, it created an unwarranted expansion of ESA applicability by requiring ESA consultation during the use of this NOI process.[7] The decision will lead to regulatory confusion, not only in the mining realm, but also with respect to what other agency actions might trigger ESA consultation, and it could facilitate unwarranted court challenges to other federal activity.[8] This, in turn, will increase burdens on public activity via unnecessary entanglement in the over-application of the ESA.[9] The government should look for opportunities to challenge this precedent in the future and look to other avenues, such as regulatory clarifications, to minimize the effects of the decision.

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[5] 16 U.S.C. § 1536(a)(2) (LexisNexis 2014).

[6] As explained in detail below, the Notice of Intent (NOI) regulations require miners to provide notice to the Forest Service prior to commencing certain types of mining. *See* 36 C.F.R. § 228 (LexisNexis 2014).

[7] *See Karuk III*, 681 F.3d at 1030 (Smith, J., dissenting).

[8] *See Ninth Circuit Expands "Agency Action" for Endangered Species Act Consultation*, PERKINS COIE (July 12, 2012), http://www.perkinscoie.com/ninth-circuit-expands-agency-action-for-endangered-species-act-consultation-07-12-2012/. As discussed further infra, these issues are not conjecture. The legal community has already recognized the case will create distinct problems. *See id.*

[9] *See id.*

II. ESA Background and Statutory and Regulatory Scheme

A. Brief Background

1. Legislative History

To fully recognize the flaws in the *Karuk III* decision and how it led to misapplication of the ESA, one must first understand the scope of the act and how it is triggered. As with many environmental statutes, the ESA is relatively new.[10] The modern ESA passed in 1973; Congress intended a broad scope for the law, which was enacted during a period of great environmental regulatory expansion in the 1960s and 1970s.[11] It repealed the majority of prior endangered species laws and implemented much more substantive protections in their place.[12] The ESA is now recognized as one of the most robust and important environmental laws in the United States.[13]

2. Statutory Provisions

The ESA mandated the federal government to identify threatened and endangered species and designate their critical habitats (Section 4), authorized land acquisition for habitat protection (Section 5), called for state and international cooperation in species protection (Sections 6 and 8), and prohibited the taking of endangered or threatened species by public and private parties (Section 9), among other directives.[14] Section 7 (the section at issue in *Karuk III*) created the requirement for agencies

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[10] *See* BRIAN CZECH & PAUL R. KRAUSMAN, THE ENDANGERED SPECIES ACT: HISTORY, CONSERVATION BIOLOGY, AND PUBLIC POLICY 1, 24 (2001).

[11] *See id.* at 23–24 (noting that between 1970 and 1972 alone the Federal Water Pollution Control Act, Clean Air Act, Marine Mammal Protection Act, and Coastal Zone Management Act were enacted); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 188 (1978).

[12] *See* CZECH & KRAUSMAN, *supra* note 10, at 21–26.

[13] *See* SHANNON PETERSEN, ACTING FOR ENDANGERED SPECIES: THE STATUTORY ARK, at ix, 119 (2002). Data shows the Endangered Species Act (ESA) has had a positive impact on species protection. For example, the U.S. Fish and Wildlife Service (USFWS) has delisted eleven species due to their recoveries. However, there is debate over the exact reach of its benefits. *Id.*

[14] *See* CZECH & KRAUSMAN, *supra* note 10, at 25; *U.S. Fish and Wildlife Service Endangered Species Program*, FWS.GOV, http://www.fws.gov/endangered/law-policies/section-4.html (last visited Apr. 22, 2014). Taking has a broad meaning. Take means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (LexisNexis 2014).

to consult with federal fish and wildlife agencies when a federal action (defined below) may affect protected species.[15]

3. ESA Agency Action and Implementation of the Requirement

The agency action concept at the heart of *Karuk III* is derived from 16 U.S.C. § 1536(a)(2) (Section 7).[16] Under implementing regulations, Section 7 agency action is defined very broadly to include permits, contracts, licenses, or other activities authorized or funded by a federal agency (hence, *agency* action).[17] Other conditions must be present to invoke ESA consultation. For example, the action must be discretionary,[18] and it must have the potential to affect species covered

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[15] DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS 1164–65 (Robert C. Clark et al. 2002). *See Section 7 Consultation: A Brief Explanation*, FWS.GOV (Mar. 29, 2011), http://www.fws.gov/midWest/endangered/section7/section7.html (finding that action "may affect" a listed species is a requirement to finding agency action with respect to invoking consultation; without it, consultation is not required). Although discussed in the *Karuk* decisions, this article focuses on the agency action requirement, as that is the heart of the controversy in the case. *See* Karuk Tribe of California v. U.S. Forest Serv. (*Karuk III*), 681 F.3d 1006, 1011 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579 (2013).

[16] *See* 16 U.S.C. § 1536(a)(2) (LexisNexis 2014). Section 7 states that

> each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . .

Id.

[17] 50 C.F.R. § 402.02 (LexisNexis 2014). Agency action includes

> all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.

Id.

[18] 50 C.F.R. § 402 notes that "Section 7 and the requirements of this part apply to all actions in which there is *discretionary* Federal involvement or control." *Id.* § 402.03 (emphasis added). Thus, even if the agency conducts an action under the ESA, if it was

by the ESA (the "may affect" requirement).[19] Although discussed by the majority in *Karuk III*, both the discretionary aspect and "may affect" standards are not at issue,[20] and the essential debate is whether the actual activity of the Forest Service amounted to agency action under the law.

The ESA is implemented and enforced by the U.S. Fish and Wildlife Service (USFWS), which falls under the Department of the Interior, and the National Marine Fisheries Service (NMFS), which falls under the National Oceanic and Atmospheric Administration in the Department of Commerce).[21] Once federal agency action by definition under the statute and Code of Federal Regulations (CFR) is involved, the law requires, at a minimum, informal consultation with either the USFWS, NMFS, or both, depending on the location of the action.[22] The agency seeking to take the action at issue must request informal consultation in the early stages of planning with USFWS/NMFS. After these discussions, if the agency determines that the proposed action is not likely to adversely affect any listed species in the project area, and if the USFWS/NMFS concur, informal consultation is complete and the proposed project can proceed. If, after informal consultation, it still appears the agency's action may

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compelled to do so by law, ESA consultation is not required. *See generally* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007).

[19] 50 C.F.R. § 402.14(a). *See Section 7 Consultation: A Brief Explanation*, FWS.GOV, http://www.fws.gov/midWest/endangered/section7/section7.html (Mar. 29, 2011) (finding that the action "may affect" a listed species is an equal requirement to finding agency action with respect to invoking consultation; without this finding, consultation is not required). Note that implementing agencies have determined that any possible affect, whether beneficial, benign, adverse, or of an undetermined nature, triggers the requirement for formal consultation; unless through informal consultation agencies determine it is not needed. Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19926, 19949 (June 3, 1986) (codified at 50 C.F.R. § 402).

[20] *See Karuk III*, 681 F.3d at 1031–39 (Smith, J., dissenting). Neither discretion nor the "may affect" requirement are contested in Judge Smith's dissent. *Id*. The issue of agency action was the only substantive issue put to the Supreme Court. *See* Petition for Writ of Certiorari at 2, The New 49'ers, Inc., et al., v. Karuk Tribe of California (9th Cir. 2012) (No. 12-289).

[21] *Endangered Species Act (ESA)*, NOAA FISHERIES, http://www.nmfs.noaa.gov/pr/laws/esa/ (last visited Apr. 22, 2014). Generally, USFWS manages land and freshwater species and the National Marine Fisheries Service (NMFS) manages marine species. *Id*.

[22] *See Consulting with Federal Agencies (ESA Section 7)*, NOAA.GOV (Sept. 24, 2012), http://www.nmfs.noaa.gov/pr/consultation; *Section 7 Consultation: A Brief Explanation*, FWS.GOV (last updated Apr. 1, 2014), http://www.fws.gov/midWest/endangered/section7/section7.html (informal consultation can be as simple as discussions with USFWS or NMFS to determine if a project is likely to affect any listed species in the project area).

affect a listed species, formal consultation must take place.[23] Formal consultation could lead to project modification, a halt to the project, or continuance without further issue.[24]

B. Supreme Court Interpretation of Agency Action

Only one Supreme Court case has directly evaluated the extent of Section 7 and what constitutes agency action under the ESA. *Tennessee Valley Authority v. Hill*[25] involved a project found to threaten the survival of a small species of fish known as the snail darter. The agency action at issue was the construction of the Tellico Dam, to be carried out by the Tennessee Valley Authority, a U.S. public corporation. Despite the fact that dam construction began before the passage of the ESA, and the fact that the dam was 75% complete by the time the snail darter was listed as an endangered species, the Court noted that under Section 7 it was required to permanently enjoin the operation of any federal project that threatened endangered species or their habitat. In describing the broad intent of Section 7, the Court noted that the ESA's language affirmatively commands all federal agencies "'to *insure* that actions *authorized, funded,* or *carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species . . . .'"[26] The Court further noted that "[t]his language admits of no exception."[27] Although *Tennessee Valley Authority* gave Section 7 a very broad scope,[28] the 9th

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[23] 50 C.F.R. §§ 402.13, 402.14(a) (Lexis Nexis 2014).

[24] *Id.* (formal consultation may last up to 90 days, after which NMFS or USFWS will prepare a biological opinion stating whether the proposed action will jeopardize the continued existence of a listed species). The federal approval and construction of a dam on a river that is home to endangered fish is a good example of agency action that would require formal consultation prior to execution. *See generally* Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (discussed below).

[25] Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

[26] *Id.* at 173 (quoting 15 U.S.C. § 1536 (2014)).

[27] *Id.*

[28] *Id.* at 153–57, 173, 194, 196–204. Another Supreme Court case, *National Association of Home Builders v. Defenders of Wildlife* (2007), addressed agency action in the context of discretion. The Court found the Clean Water Act required the EPA to transfer pollution discharge permitting power to the State of Arizona, which was a non-discretionary action that by regulation and definition did not qualify as agency action. *See generally* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007). Again, although discussed in *Karuk III*, discretion is not at issue in that case. *See generally* Karuk Tribe of California v. U.S. Forest Serv. (*Karuk III*), 681 F.3d 1006 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579 (2013).

Circuit expanded this scope and the apparent applicability of the ESA further than precedent and the facts warranted in *Karuk III*.[29]

III. Analysis of the *Karuk III* Controversy

A. Basic Background

The case involves public citizens mining on federal lands overseen by the Forest Service.[30] An overview of the mining laws, regulations, and the specific facts involved is critical to understanding how the 9th Circuit went awry in finding agency action present and stating the Forest Service should have completed ESA consultation when using the NOI process.

1. The Mining Laws and Regulations at Issue in Karuk III

The mining regulations involved in *Karuk III* fall under the Organic Administration Act of 1897 and the General Mining Law of 1872.[31] Forest Service implementing regulations for these laws create a three-level approach to mining in federal forests based on the potential for environmental disturbance.[32] First, certain *de minimus* mining acts (panning for gold, for example) require no notice to or interaction with the Forest Service.[33] Second, miners who might cause a significant disturbance of surface resources must give notice to the Forest Service District Ranger overseeing the area of mining in the form of an NOI.[34]

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[29] *See generally Karuk III*, 681 F.3d at 1031–39.

[30] *See id*. at 1012.

[31] *See id*. Under the General Mining Law of 1872, minerals on U.S. lands are open to exploration by the public. The Organic Act states that federal forests are governed by U.S. mining laws, and that those entering national forests for "proper and lawful purposes" (such as those allowed by the General Mining Law of 1872) must comply with regulations governing such forests. *Id*.

[32] *See* 36 C.F.R. § 228.1, § 228.4 (West 2013); *Karuk III*, 681 F.3d at 1012.

[33] *Karuk III*, 681 F.3d at 1012 (noting that 36 C.F.R. § 228.4(a)(1) lists the specific activities that do not require advance notice to the Forest Service).

[34] *See* 36 C.F.R. § 228.4(a) (LexisNexis 2014), which states,

> A notice of intent to operate is required from any person proposing to conduct operations which might cause significant disturbance of surface resources. Such notice of intent to operate shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted. Each notice of intent to operate shall

Finally, if the mining activity will likely cause a significant disturbance of surface resources, an approved Operations Plan (Ops Plan) is required prior to the start of mining.[35] An Ops Plan could result from the miners identifying the need themselves, or because it is directed by the Forest Service after review of an NOI.[36]

The Forest Service does not review the first level of activity, so agency action is not involved with that type of mining.[37] On the other end of the spectrum, review and approval of an Ops Plan is agency action.[38] The second tier is what is at issue in *Karuk III*. Since NOIs involve some interaction with the Forest Service, they may appear to constitute an authorization (or agency action). However, to label them as such (as the *Karuk III* decision did) reached too far in light of prior case law, ignored the agency's clear intent for the NOI regulations, and set a dangerous precedent that could impact how a court interprets other federal notice processes.[39]

2. The Karuk III *Facts*

The *Karuk* dispute concerns four NOIs submitted to the Forest Service for mining in and along the Klamath River, in the Happy Camp District of the Klamath National Forest in Northern California.[40] The plaintiff, Karuk Tribe of California (the Tribe), is a federally recognized Indian Tribe located in Happy Camp, California, that depends on native fish for cultural uses. Coho Salmon in the Klamath River were listed as threatened under the ESA in 1997, and the Klamath River system was

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> provide information sufficient to identify the area involved, the nature of the proposed operations, the route of access to the area of operations, and the method of transport.

Id.

[35] *See id.* § 228.4(a), which states, "An operator shall submit a proposed plan of operations to the District Ranger having jurisdiction over the area in which operations will be conducted in lieu of a notice of intent to operate if the proposed operations will likely cause a significant disturbance of surface resources." *Id.* § 228.4(a).

[36] *Karuk III*, 681 F.3d 1006, 1021 (noting that when an NOI is filed, under 36 C.F.R. § 228(a)(2)(iii), the Forest Service will notify a sender within fifteen days as to whether an Ops Plan is required for the proposed activity).

[37] *See id.* at 1021.

[38] Baker v. U.S. Dept. of Agric., 928 F. Supp. 1513, 1518 (D. Idaho 1996).

[39] *See* Petition for Writ of Certiorari at 31–32, The New 49'ers, Inc., et al., v. Karuk Tribe of California (2012) (No. 12-289).

[40] *Karuk III*, 681 F.3d at 1011–16.

listed as critical habitat in 1999. The four NOIs involve mining by suction dredging and were submitted by: (1) The New 49'ers (a mining corporation), (2) Nida Johnson, (3) Robert Hamilton, and (4) Ralph Easley.[41]

All four NOI filers were eventually notified their activities would not require Ops Plans.[42] However, there were various degrees of interaction between the filers and Forest Service before and during the NOI filing process. After the Tribe expressed concerns about the environmental effects of suction dredge mining, the Happy Camp District Ranger (Ranger Vandiver) organized meetings between the Tribe, Forest Service, and unspecified miners to discuss the issue. Ranger Vandiver then developed criteria for the Klamath River and its tributaries that he considered important to the review of mining operations. On May 17, 2004, Ranger Vandiver then met with the New 49'ers and advised them of these criteria, which included areas to avoid, methods for tailings pile disposal, and the maximum number of dredges per mile he felt were appropriate. On May 24, 2004, the New 49'ers submitted an NOI for suction dredge mining in the Happy Camp District, which conformed to the criteria outlined by Ranger Vandiver. In a Forest Service response, the New 49'ers were told they could mine after obtaining all relevant state and federal permits and that the "authorization expires December 31, 2004."[43]

Johnson submitted her NOI on May 29, 2004, and noted it was the result of a meeting with the Forest Service on May 25, 2004.[44] Her NOI also conformed to criteria regarding tailings piles and locations to avoid, and was approved on June 14, 2004. Hamilton submitted his NOI on June 2, 2004. The record does not discuss a meeting between him and the Forest Service, but his NOI conformed to dredge spacing criteria the District Ranger gave to the New 49'ers. It was approved by the District Ranger on June 15, 2004. Lastly, Easley submitted his NOI to mine one claim on June 14, 2004. The record does not discuss a meeting between him and the Forest Service either, but his NOI also conformed with tailings pile disposal criteria given to the New 49'ers and was approved

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[41] *Id*. Suction dredge mining uses an apparatus that sucks up stream bed material and directs it to a floating sluice box. Excess material is deposited into a "tailings pile" in the stream or on the stream bank. *Id*.
[42] *Id*. at 1013–15.
[43] *Id*.
[44] *Id*.

on June 15, 2004.[45]

B. Case History

1. District Court and 9th Circuit Panel Decisions

The Karuk Tribe brought suit against the miners and the Forest Service in the Northern District of California in 2005 to challenge the four NOIs under the ESA.[46] The Tribe specifically alleged the Forest Service violated Section 7 of the ESA by failing to consult with USFWS during the NOI review process. It argued that the Forest Service NOI reviews were a federal authorization of mining operations, and thus were agency action that triggered Section 7 of the ESA. The district court found the NOI reviews did not constitute agency action.[47] On appeal (in *Karuk II*) a three-judge 9th Circuit panel upheld the decision.[48]

2. Analysis of the Karuk III *Decision*

a. Judge Fletcher's Majority Opinion

In June 2012 the 9th Circuit published its *en banc* rehearing on the Tribe's challenge to the NOIs under the ESA.[49] Judge William A. Fletcher wrote for a seven-judge majority, and Judge Milan D. Smith wrote for a four-judge dissent.[50] Judge Fletcher's opinion was based on his interpretation of the regulations and the conduct of the Forest Service, both evaluated in light of general case law statements regarding the

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[45] *See id*.

[46] *See id*. at 1016. The Tribe also alleged failures to follow the National Environmental Policy Act (NEPA) and the National Forest Management Act. Both allegations were unsuccessful and not discussed in *Karuk III*. *Id*.

[47] *See id*. at 1011, 1016.

[48] *See* Karuk Tribe of California v. U.S. Forest Serv. (*Karuk II*), 640 F.3d 979, 993 (9th Cir. 2011) *reh'g en banc granted*, 658 F.3d 953 (9th Cir. 2011) and *on reh'g en banc*, 681 F.3d 1006 (9th Cir. 2012). The *Karuk II* majority opinion finding the NOI process did not invoke agency action was the basis for Judge Smith's dissent in *Karuk III*; he authored both opinions. *See generally Karuk II*, 640 F.3d 979; and *Karuk III*, 681 F.3d 1006.

[49] *Karuk III*, 681 F.3d at 1006.

[50] *Id*. at 1007. Two judges did not join with Judge Smith's final commentary on the state of 9th Circuit environmental case law and the impact of the *Karuk III* decision on mining. *Id*.

overarching principles of Section 7.[51]

He started his analysis by setting forth a two-part test for agency action: whether a federal agency affirmatively[52] authorized, funded, or carried out an activity; and whether the agency had some discretion to influence the activity to benefit protected species.[53] He declared the issue must be analyzed in the context of the broad scope of Section 7.[54] He felt the facts describing meetings and criteria set by the Forest Service favored finding agency action, and he found it highly persuasive that both sides appeared to use language indicating they were in an approval process.[55] Judge Fletcher believed that the miners had to meet the criteria set by Vandiver prior to proceeding, and that this was further evidence that the Forest Service affirmatively approved their mining.[56] He noted that under the regulations the Forest Service had to notify miners whether they could proceed or if an Ops Plan would be required, and found this also supported finding an affirmative authorization.[57] In arriving at the overbroad conclusion that the NOI process amounted to agency action, he ignored the Forest Service's intent for its own regulations,[58] misapplied precedents to support his expanded view of Section 7, and failed to refute key case law that cut against his holding.[59]

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[51] *Id*. at 1021–24.

[52] *See id*. The word affirmative appears often in 9th Circuit analysis of agency action. The 9th Circuit has stated that Congress's intent was that agencies must refrain from jeopardizing listed species when acting affirmatively. *See* Defenders of Wildlife v. U.S. Envtl. Prot. Agency, 420 F.3d 946, 967 (9th Cir. 2005), *rev'd* and *remanded sub nom*. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007).

[53] *Karuk III*, 681 F.3d at 1024–27. Judge Fletcher discussed discretion at length and why it was present. However, discretion is not truly at issue, and the dissent conceded this. *Id.* at 1036 (Smith, J., dissenting).

[54] *Id.* at 1020.

[55] *Id*. at 1021–25. For example, the District Ranger told the New 49'ers, "This authorization expires December 31, 2004." On another occasion the Ranger told the New 49'ers, "I am unable to allow your proposed mining operations" regarding separate mining not challenged in the case. *Id*. at 1022.

[56] *Id.* at 1013–16, 1022–23. The facts (1) that the record does not show all of the four NOI submitters met with the Forest Service and (2) that it indicates at least one (Hamilton) may not have been able to meet the specific criteria set by Vandiver, but was still able to mine, are not addressed by the majority. *Id*.

[57] *Id*. at 1021.

[58] *See infra* Part III.C.1.b. *See infra* notes 83–86 and accompanying text.

[59] *Karuk III*, 681 F.3d at 1020–24. The majority also makes a comparison to the Administrative Procedure Act (APA) based on *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545 (9th Cir. 2009), where an NOI review was labeled final agency action for the purposes of the APA and cited as an act from which legal consequences flow. This raises the specter that the entire controversy is already decided.

b. An Overbroad Holding

There are two issues that should have been addressed in *Karuk III*: (1) Did the review of the specific NOIs at issue constitute agency action and invoke the ESA; and (2) Do the NOI regulations on their face invoke the consultation requirement in all cases? It is possible that use of the NOI process in every circumstance is not agency action, but under these facts, the manner in which it was executed did amount to agency action (the conduct and communications at issue make this argument possible, as shown by Judge Fletcher's opinion).[60] Along this line, the court could have specifically limited its holding to the NOIs at issue. This is not to say this would have been the correct holding, but it would be more supportable than the one given. It would have recognized the intent of the regulations and not ignored appropriate precedent. Regardless of the decision on the specific NOIs at issue, it would have correctly decided the more important issue of the NOI regulations overall, and avoided exposing a host of other activities to baseless challenge.

Judge Fletcher did indicate an attempt to limit his opinion solely to the four NOIs at issue.[61] However, he used unclear language throughout the opinion that left plenty of room to argue the NOI regulations require ESA consultation *every time* they are applied.[62] The parties themselves

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One might argue if NOI review is final agency action under the APA, it must be agency action under the ESA. Judge Fletcher implied as much. However, the reasoning that declares ESA agency action is not the equivalent of major federal action under NEPA applies. *See infra* note 92 and accompanying text (directly equating APA final agency action with ESA agency action raises problems). For example, it is possible that what is declared agency inaction by the court could still be considered final agency action under the APA, thus making the APA applicable, but not the ESA. *Karuk III*, 681 F.3d at 1023.

[60] *See Karuk III*, 681 F.3d at 1021–24. Judge Fletcher supported his opinion heavily with facts surrounding the Forest Service and miner meetings. *Id*. It would be interesting to see how he would have decided had there been little to no interaction between the Forest Service and miners, aside from the required responses under the Code of Federal Regulations.

[61] *See id*. at 1021–30. For example, Judge Fletcher uses the phrase "in approving the NOIs challenged" in his conclusion, possibly implying an attempt to limit the decision to the four NOIs challenged. *Id.*

[62] *See id*. at 1021, 1024, 1030. Judge Fletcher uses phrases such as "[b]y regulation, the Forest Service must authorize mining activities before they may proceed under a NOI" and "the Forest Service controls mining activities through the NOI process. . . ." *Id*. These statements clearly indicate he believes the NOI process itself is at issue. In their briefs surrounding the petition for certiorari discussed below, the parties believed the same. *See also Endangered Species Act to Trump Mining Claims: Supreme Court Lets Stand Ninth Circuit Ruling in* Karuk Tribe of California v. U.S. Forest Serv., CALIFORNIA LAND USE BLOG (Mar. 22, 2013) (averring that low-level mining that could have

agree *Karuk III* determined the NOI process itself, and not just the four NOIs, invoke Section 7 consultation.[63] Because of the failure to limit the decision, its impact might be felt outside the context of the Forest Service mining NOI regulations. Although the holding does not discuss impacts on other regulatory schemes, the arguments used in the decision provide a glimpse into how parties could challenge similar notice processes used by other agencies.[64] As discussed below, such challenges could have a huge negative impact on agency regulation and business endeavors.[65]

c. Judge Smith's Correct Dissenting Opinion

Judge Smith began with an assessment of 36 C.F.R. § 228.[66] He emphasized the Forest Service's interpretation of those regulations; specifically, that they were intended to be a simple notification procedure to assist in identifying whether an Ops Plan is needed. He refuted the notion that the rangers turned the NOI reviews into approvals due to the meetings, criteria established, and approval language used during the process. In his view the meetings and criteria merely involved advice regarding how the miners could avoid regulation by the Forest Service,

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proceeded under an NOI must now undergo ESA consultation in the 9th Circuit). At least one National Forest has issued guidance discussing the effects of *Karuk III* on mining. *See Frontliner Questions and Answers, Minerals and Geology*, NEZ PERCE NAT'L FOREST, *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5426179.pdf (last visited Apr. 23, 2014). Conflicting with this is the fact that in October 2012 the Forest Service was recently sued by groups alleging the Forest Service, based on *Karuk III*, had to complete Section 7 consultation when it approved suction dredge mining in Oregon under NOIs (demonstrating that the Forest Service continued to utilize the same regulatory process after *Karuk III*). *See* Brian Hennes, *Ninth Circuit Endorses Functional Approach to Determining Agency Action Under Section 7(a)(2) of the Endangered Species Act:* Karuk Tribe of California v. United States Forest Service, 28 J. ENVTL. L. & LITIG. 545, 591 (2013). At a minimum, the decision has generated regulatory confusion in the short-term.

[63] *See* Petition for Writ of Certiorari at 21, The New 49'ers, Inc., et al., v. Karuk Tribe of California (9th Cir. 2012) (No. 12-289).

[64] *See id.* at 32. The New 49'ers briefly recognized this possibility, averring that the 9th Circuit in *Karuk III* effectively held that each time a federal agency requires information from a citizen about activity in areas where listed species may be present, that activity is subject to approval by the federal agency and triggers consultation under the ESA. *Id*.

[65] *See Karuk III*, 681 F.3d at 1039 (Smith, J., dissenting) (noting in the mining realm alone in 2008, California issued about 3,500 permits to low-impact miners such as those involved in *Karuk III*, and 18 percent of those miners earned a significant portion of their income from dredge mining).

[66] *Id*. at 1034.

and it was well established that such activities did not equal agency action.[67] He noted precedent similar to *Karuk III* establishing that inaction is not agency action. Most significantly, he showed Judge Fletcher did not identify any case where activity similar to that engaged in by the Forest Service was found to equal agency action.[68]

C. Why Judge Fletcher and the *Karuk III* Majority Are Incorrect

Judge Smith held the correct position in declaring the Forest Service NOI process should not be considered agency action for three main reasons. First, the majority overstated the significance of the interactions between the Forest Service and miners. Second, the NOI regulatory structure and intent, largely ignored by Judge Fletcher, weigh in favor of finding the NOI process is a simple notice procedure.[69] Third, a finding of no agency action under these facts is well supported by analogous case law that was not adequately addressed by Judge Fletcher.[70]

1. Interpreting the Forest Service Actions and Their Regulations

a. The Forest Service and Miners' Interactions

Judge Fletcher neglected to adequately consider precedent in holding the meetings between the miners and Forest Service, and the criteria developed by Vandiver, were proof of an approval process. The case of *Marbled Murrelet v. Babbitt*[71] offers a close analogy supporting Judge Smith's dissenting argument that this type of conduct is not proof of an approval process or agency action. In *Babbitt*, the USFWS, during a voluntary consultation, wrote a letter to a lumber company describing specific conditions to follow to avoid a taking (in violation of ESA Section 9) of protected species during operations.[72] The plaintiffs argued the letter showed control over the lumber operations amounting to

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[67] *Id*. at 1038–39.
[68] *Id*. at 1034–39.
[69] *See id*. at 1034–35.
[70] *See id*. at 1036.
[71] Marbled Murrelet v. Babbitt, 83 F.3d 1068 (9th Cir. 1996).
[72] *Id*. at 1074 (noting the letter required lumber companies to provide a description of procedures to be followed, and required a "no-take" determination by the USFWS in order to avoid a taking of northern spotted owls; and directing that site consultation with USFWS was required prior to timber harvest operations).

agency action.[73] Despite mandatory-type language in the letter, the 9th Circuit held the USFWS did nothing more than provide advice on how to avoid Section 9 enforcement by the USFWS.[74] The court noted holding otherwise would discourage necessary dialogue between the agency and public that assists in ensuring environmental compliance.[75] Likewise, the Forest Service interactions and criteria detailed in *Karuk III* were only forms of advice regarding how miners could avoid triggering the need for an Ops Plan.[76] By holding otherwise in *Karuk III*, the 9th Circuit produced the exact opposite result of what the Forest Service intended for the NOI process, and put a considerable chilling effect on vital public-agency interaction.[77]

Additionally, although the Forest Service used language in their interactions and correspondence that presented a tone of approval, these words should not decide the issue.[78] Use of a term like "approve" with the public does not convert a communication or interaction into an approval amounting to agency action if the activity cannot otherwise legally be called an approval or agency action under the ESA.[79] Agency representatives can call activity what they want, but if a legal analysis does not bear that label out, then such words should not matter as much as they did to Judge Fletcher in *Karuk III*.[80]

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[73] *Id*.
[74] *Id.* at 1074–75.
[75] *Id*.
[76] *See* Karuk Tribe of California v. U.S. Forest Serv. (*Karuk II)*, 640 F.3d 979, 993 (9th Cir. 2011), *reh'g en banc granted*, 658 F.3d 953 (9th Cir. 2011) and *on reh'g en banc*, 681 F.3d 1006 (9th Cir. 2012) (explaining that the NOI process merely facilitates whether an Ops Plan is needed, it is not a regulatory action itself, and communications between miners and the Forest Service at the NOI stage occur for the limited purpose of categorizing the private activity, not for the purpose of obtaining the agency's affirmative permission to act).
[77] *See* Karuk Tribe of California v. U.S. Forest Serv. (*Karuk III*), 681 F.3d 1006, 1038–39 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579 (2013).
[78] *Id*. at 1037–38 (Smith, J., dissenting).
[79] *See id*. at 1038 (noting in Sierra Club v. Babbitt, 65 F.3d 1502, 1511 (9th Cir.1995), the court held that an agency's letter purporting to approve a construction project could not be construed as an authorization for ESA purposes because the letter did not otherwise satisfy the statutory criteria of an ESA authorization).
[80] *See id*.

b. The Interpretation of the Forest Service Regulations

Judge Fletcher's interpretation of the regulations reveals two flaws. First, he failed to adequately consider key regulatory interpretations provided.[81] Second, he failed to give deference in general to the Forest Service's interpretation of its own regulations.[82]

There are several items that show Judge Fletcher glossed over or ignored key matters. He did not adequately address the Forest Service Federal Register clarification indicating the NOI process was only meant to gather information.[83] He assumed the mere fact that miners had to provide information to the Forest Service prior to starting work was strong evidence of an approval.[84] He misinterpreted the meaning of the regulatory requirement for a response to NOI filers.[85] Judge Fletcher failed to address the difference in regulatory treatment between mining under an Ops Plan and an NOI, a difference which favored Judge Smith's position.[86] Lastly, he used a generally conclusory tone that

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[81] *See id.* at 1034–35.

[82] *See* Auer v. Robbins, 519 U.S. 452, 461–62 (1997) (deference to an agency's interpretation of its own regulation is warranted unless that interpretation is clearly erroneous, inconsistent with the regulation, or does not reflect the agency's fair and considered judgment on the issue).

[83] *See Karuk III*, 681 F.3d at 1023. Judge Fletcher does not give full context to a statement in the Federal Register clarifying NOI regulatory intent. He quotes "a notice of intent to operate was not intended to be a regulatory instrument" and then criticizes the Forest Service by stating the question of agency action is not answered by whether something is intended to be a regulatory instrument or not. While technically correct, his statement misses the point of the Forest Service clarification. Judge Smith gives the full context by quoting, "[A] notice of intent to operate was not intended to be a regulatory instrument; it was simply meant to be a notice given to the Forest Service . . . facilitating resolution of the question, 'Is submission and approval of a plan of operations required . . . ?'" *See id.* at 1034 (Smith, J. dissenting). Judge Fletcher never adequately addresses these Forest Service interpretations. *See id.* at 1021–24.

[84] *See id.* at 1021–22. Here, the extent of Judge Fletcher's argument is, because the miners have to submit NOIs before mining, NOI reviews are approvals. He repeats the NOI regulations with this assertion as if they obviously support this contention, but offers little to no analysis as to why this is so.

[85] *See id.* at 1034 (Smith, J., dissenting). It is an overgeneralization to equate a response to the public as an approval. Judge Smith accurately characterizes the fifteen-day response requirement in the NOI regulations by analogizing it to the NOI itself, stating that it merely provides notice of the agency's review. *Id*.

[86] *See id*. at 1021–24 (majority opinion). The Forest Service specifically states that if mining will likely cause a significant disturbance to surface resources, an approved Ops Plan is required prior to the start of work. No such requirement is listed for mining under the NOI provision. *See* 36 C.F.R. § 228 (LexisNexis 2014). One would think the Forest Service would use similar language if the NOI process was meant to be an approval.

presupposed the decision he reached.[87]

Regarding deference in general, Judge Fletcher noted it was not warranted because the ESA regulations were not administered by the Forest Service.[88] It is true that because the Forest Service does not oversee the ESA regulations (i.e., 50 C.F.R. § 402), it is not entitled to deference in any interpretation of what is considered agency action under those regulations.[89] However, the majority should have distinguished this rule from deference owed to the Forest Service regarding the interpretation of its *own* regulations at 36 C.F.R. § 228.[90] This could raise a conflict; granting deference to the Forest Service for its regulations is difficult without appearing to grant deference to it regarding the ESA regulations. However, the conflict can be resolved. Judge Fletcher should have applied deference to the Forest Service interpretations of its NOI regulations, appropriately finding that on their face, their use did not amount to agency action. Then, in a separate interpretation, he could have analyzed the Forest Service activity in *Karuk III* to see if the execution of the NOI process under the facts of the case amounted to agency action under the ESA (which, again, may have led to a more appropriate limited holding regarding only the four NOIs and not the whole NOI process).[91]

This is further evidence of intent to use the NOI process only as an information-gathering tool, not an approval process.

[87] *See Karuk III*, 681 F.3d at 1011. The language Judge Fletcher uses shows he appears to have the case decided before conducting any analysis. He frames the question as "whether the Forest Service's *approval* of four NOIs . . . ." is agency action (emphasis added). Prior to attempting an analysis of the NOI regulations, he states, "By regulation, the Forest Service *must authorize* mining activities before they may proceed under a NOI." *Id*. at 1011, 1021 (emphasis added).

[88] *Id*. at 1017.

[89] *See id*.

[90] *See* Auer v. Robbins, 519 U.S. 452, 461–62 (1997). There are several reasons for not giving deference to an agency's interpretation of its own regulations. They include: (1) the agency's interpretation conflicts with a prior interpretation; (2) the agency interpretation is merely a convenient litigating position; and (3) accepting the interpretation would impose new regulatory requirements without fair notice. *See* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 159 (2007). None of these concerns are present in *Karuk III*. The Forest Service maintained a consistent position, treating the NOI system as a notice process and maintaining an interpretation not asserted merely to win the *Karuk* case. *See Karuk III*, 681 F.3d, at 1031–34 (Smith, J., dissenting).

[91] *See infra* Part III.B.2.b.

Thus, Judge Fletcher not only should have given more consideration to key facts and interpretations surrounding the Forest Service regulations, he should have granted some deference to Forest Service explanations regarding the NOI process. His failure to do so significantly contributed to his overly broad interpretation of agency action.

2. Agency Action Case Law Supports Judge Smith

The NOI regulations and their application are also more analogous to previous situations where agency action was not found.[92] There are clear examples of agency action involving permits, contracts, and similar actions that can easily be labeled affirmative approvals—yet Judge Fletcher fails to analogize any of them to the facts in *Karuk III*.[93] Judge Smith, however, compares the *Karuk III* facts to prior cases holding that agency inaction does not equal action, and in the process provides a much more compelling and legally sound argument.[94]

The key case raised by Judge Smith is *Western Watersheds Project v. Matejko*, a 2006 9th Circuit opinion.[95] It involved Bureau of Land

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[92] *See Karuk III*, 681 F.3d at 1035–37 (Smith, J., dissenting). One case used by Judge Smith, *Sierra Club v. Penfold*, 857 F.2d 1307 (9th Cir. 1988), warrants mention for an incorrect analogy. In that case, the 9th Circuit held Forest Service NOIs were not major federal action triggering NEPA requirements, and Judge Smith felt this supported finding the NOI process did not amount to ESA agency action in *Karuk III*. Judge Fletcher correctly points out NEPA and the ESA have two different standards for action, and thus the analogy does not work. *Id*. at 1024 (majority opinion). This is of no moment—for the reasons stated in this article, Judge Smith's opinion should have carried the day without any mention of *Penfold*.

[93] *Karuk III*, 681 F.3d at 1036 (Smith, J., dissenting); Baker v. U.S. Dept. of Agric., 928 F. Supp. 1513, 1515 (D. Idaho 1996) (approval of mining plan of operations under 36 C.F.R. § 228 is agency action); Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969, 970 (9th Cir. 2003) (NMFS had a duty to consult under Section 7 with respect to high seas fishing permits it issued); Sierra Club v. United States, 255 F. Supp. 2d 1177, 1179 (D. Colo. 2002) (road easement granted by the Federal Regulatory Energy Commission to gravel miners was agency action); Washington Toxics Coal. v. Envtl. Prot. Agency, 413 F.3d 1024, 1030 (9th Cir. 2005) (EPA's registration of fifty-four pesticide active ingredients, allowing them for public use, was an agency action).

[94] *See Karuk III*, 681 F.3d at 1035–36 (Smith, J., dissenting) (discussing W. Watersheds Project v. Matejko, 468 F.3d 1099 (9th Cir. 2006); California Sportfishing v. F.E.R.C., 472 F.3d 593 (9th Cir. 2006)).

[95] *See id. at* 1021–24 (majority opinion). It is notable that Judge Fletcher does not refute the analogy to *Western Watersheds* anywhere in his opinion. He does not even mention

Management (BLM) oversight of private water diversions.[96] The BLM determined it would not regulate water diversions established under certain historical grants unless there were substantial deviations from those original grants.[97] Citizens' groups alleged the BLM's continued adherence to its decision not to apply its regulatory authority to these water diversions was affirmative agency action.[98] The court disagreed, noting the BLM watercourse policy was agency inaction that did not trigger ESA consultation; BLM had simply decided not to regulate.[99] The BLM adherence to its policy was not a mere failure to regulate, it was a deliberate decision not to act after a review of the facts.[100] This is analogous and very similar to the NOI process in *Karuk III*, where the Forest Service reviewed information and decided not to require an Ops Plan.[101] Just as the BLM's refusal to require permits for the water diversions was not an affirmative approval of their use, a Forest Service refusal to require an Ops Plan for a miner filing an NOI is not an affirmative approval of that mining.[102]

A case from the D.C. Circuit (not discussed in *Karuk III*) offers another direct comparison to the activity in *Karuk III*.[103] In *International Center for Technology Assessment v. Thompson*,[104] the plaintiffs challenged the Food and Drug Administration's (FDA) decision not to regulate a company's genetically engineered pet fish, stating the FDA should have conducted ESA Section 7 consultation prior to deciding not to regulate. As with the Forest Service NOI process, information was reviewed by the FDA, and it decided no further action was needed. The court held that the FDA's decision was appropriately characterized as an election not to engage in enforcement, and it was not agency action.[105]

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the case, other than to use it for general statements about ESA Section 7. *See Karuk III*, 681 F.3d at 1035–36 (Smith, J. dissenting).

[96] *See generally* Western Watersheds Project v. Matejko, 468 F.3d 1099 (9th Cir. 2006).

[97] *See id*. at 1105–08.

[98] *Id*. at 1109. The Bureau of Land Management (BLM) previously issued policy and relevant regulations, 43 C.F.R. § 2803, well before this case that promulgated the decision to exclude the referenced water diversions from further regulation. *Id*. at 1105–06.

[99] *Id*.

[100] *See id*.

[101] Karuk Tribe of California v. U.S. Forest Service (*Karuk III*), 681 F.3d 1006, 1035–37 (9th Cir. 2012) (Smith, J., dissenting), *cert. denied*, 133 S. Ct. 1579 (2013).

[102] *See id*.

[103] *See generally id.* at 1006.

[104] Int'l Ctr. for Tech. Assessment v. Thompson, 421 F. Supp. 2d 1, 5, 11 (D.D.C. 2006).

[105] *Id*. at 11. The court also concluded that even if the company had submitted a New Animal Drug Application (NADA) to the FDA, and even if it approved the NADA, the

A 7th Circuit case, *Texas Independent Producers & Royalty Owners Association v. EPA*,[106] presents another excellent analogy to the facts of *Karuk III*. In that case, the EPA granted a national general permit to allow certain wastewater discharges under the Clean Water Act.[107] Facility operators that wanted to use the permit provisions filed NOIs with the EPA, and, absent a negative ruling from the agency, could proceed with their wastewater discharges. The court specifically held these reviews were not agency action, and that the EPA did not have to complete ESA consultation for NOIs filed under the general permit.[108] Advocates for the *Karuk III* majority note that *Texas Independent Producers & Royalty Owners Association v. EPA* may not be on point because the EPA did in fact conduct ESA consultation when it issued the general permit.[109] The case remains persuasive nonetheless because the court focused on action and who was taking action, if any—the court clearly held that the filing of an NOI was a private action, and there was no federal action involved.[110]

Western Watersheds provides specific 9th Circuit precedent that Judge Fletcher fails to contend with, and *International Center for Technology Assessment* and *Texas Independent Producers* offer diverse support for Judge Smith's position.[111] Judge Smith gives appropriate

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court would still consider this a decision not to enforce. *Id*. at 8. Again, this is similar to the review of a Forest Service NOI with no objections. *See generally Karuk III*, 681 F.3d 1006.

[106] Texas Indep. Producers & Royalty Owners Ass'n v. E.P.A., 410 F.3d 964 (7th Cir. 2005). The case is not used as a direct analogy by Judge Smith, and only briefly mentioned in *Karuk III* in a footnote. *See Karuk III* at 1041 (Smith, J., dissenting).

[107] *Texas Indep. Producers & Royalty Owners Ass'n*, 410 F.3d at 968. The EPA met ESA consultation requirements at the time it promulgated the general permit requirements. *Id*. at 979.

[108] *See id*. Although the EPA is not required to respond to each NOI filer under this process, and the Forest Service is required to respond under its NOI process, that issue should not matter. By regulation the EPA states a timely NOI filer meeting their requirements can proceed automatically. The Forest Service's fifteen-day response requirement (where a miner would learn the Forest Service has no objections) has the same effect, the Forest Service just chose to respond individually, whereas the EPA chose to give blanket notice via the C.F.R. to filers regarding how they would know if there were objections to their NOI. *See* 40 C.F.R. 122.28(b)(2)(i) (LexisNexis 2014). If the EPA's method of communicating with NOI filers did not transform their process into an approval, the Forest Service's method should not either.

[109] Respondent Karuk Tribe of California's Brief in Opposition at 20–21, The New 49'ers, Inc., et al., v. Karuk Tribe of California, *et. al*. (9th Cir. 2012) (No. 12-289) (Feb. 2013).

[110] *See Texas Indep. Producers & Royalty Owners Ass'n*, 410 F.3d at 979.

[111] *See Karuk III*, 681 F.3d at 1020–24.

recognition to the agency's intent under the regulations and has precedent and direct analogy for support—all of which are weakly addressed or missing in the majority opinion.[112] Unfortunately, Judge Fletcher's overbroad analysis can potentially be applied to impede other government notice activities that should not invoke the ESA.

D. What Happened to *Karuk III*

The New 49'ers filed a petition for writ of *certiorari* in August 2012, and the federal government filed a brief in opposition in November 2012.[113] In its response, the government stated that the 9th Circuit incorrectly found the Forest Service review of the NOIs required ESA consultation.[114] However, the government felt *certiorari* was unwarranted because the decision did not conflict with any U.S. Supreme Court or Court of Appeals decisions,[115] and the practical effect of the decision on future mining operations would be limited because California recently enacted a permanent moratorium on suction dredging.[116] The U.S. position seemed to ignore the fact that the *Karuk III* decision creates a confusing state of the law and potentially opens the door to unwarranted ESA challenges to a wide range of low-level government activity similar to the Forest Service NOI process.[117] *Certiorari* was denied on March 18, 2013.[118]

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[112] *See id*. at 1035–39 (Smith, J., dissenting).

[113] *See* SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/the-new-49ers-inc-v-karuk-tribe-of-california/ (last visited Apr. 22, 2014).

[114] Brief for the United States in Opposition to Petition for Certiorari at 11, The New 49'ers, Inc., et al., v. Karuk Tribe of California (9th Cir. 2012) (No. 12-289).

[115] *See id*. at 14. With a narrow view toward *Karuk III* and the NOI process, the statement about a lack of a split in the circuits may be true. With a broader view of notice activities in general there is a split, demonstrated by juxtaposing *International Center for Technology* and *Texas Independent Producers* with the *Karuk III* decision. *See id*.

[116] *Id*. at 11, 14. The government's brief did not discuss any possible impact (or perceived lack thereof) of the 9th Circuit's decision on mining in the other states within the circuit. *Id*. at 11–16.

[117] *See* PERKINS COIE, *supra* note 8.

[118] *See* SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/the-new-49ers-inc-v-karuk-tribe-of-california/ (last visited Apr. 22, 2014).

IV. The Potential For Broader Negative Impacts

A. Why We Should Care

As mentioned above, the ESA has an incredibly expansive reach.[119] If its scope is improperly pushed too far, the ESA will stymie government and private efforts that should not be covered by the statute.[120] An immediate concern is the decision will lead to inconsistent application of Forest Service regulations from circuit to circuit.[121] On a larger scale, *Karuk III* created uncertainty as to whether consultation might be required by other agencies conducting similar activities, which could lead to confusion and inconsistent regulation application in other areas of U.S. governmental regulation.

Most significantly, the *Karuk III* decision provided an unseemly conduit for further baseless opposition to minor government activity (i.e., similar notice procedures) that should not fall under Section 7.[122] Federal agencies conduct many other low-level activities that might carry some appearance of an authorization on the surface, but in reality are nothing more than notice and information-collecting activities that can be analogized to cases discussed above that found inaction for the purposes of the ESA. As stated by Judge Smith, such activities are "at most a preliminary step prior to agency action being taken."[123] This is likely not the type of activity that Congress contemplated invoking ESA Section 7. The arguments that successfully challenged the NOI process could be applied to other notice activities, causing drastic economic impacts and seriously hampering the government's ability to carry out its missions.[124] Enterprising Non-Governmental Organizations have always sought to expand ESA applicability through suits, and the *Karuk III* case now provides them a potential new template to utilize in challenging government activity.[125] Below is an example of how the *Karuk III*

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[119] *See generally* Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).
[120] *See* PERKINS COIE, *supra* note 8.
[121] *See* Karuk Tribe of California v. U.S. Forest Serv. (*Karuk III*), 681 F.3d 1006, 1038 (Smith, J., dissenting) (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579 (2013).
[122] *See* PERKINS COIE, *supra* note 8.
[123] *Karuk III*, 681 F.3d at 1035 (Smith, J., dissenting).
[124] *See* PERKINS COIE, *supra* note 8.
[125] *See* PETERSEN, *supra* note 13, at ix, 119 (commenting on the ESA citizen suit provision serving as a powerful tool for environmental groups to expand the powers of the law, and that litigation has played a significant role in broadening the scope of the act).

arguments could be applied to challenge other important government activity.[126]

B. How Could Unwarranted Challenges Happen?

U.S. Coast Guard advance notice of transfer (ANOT) regulations provide one example for examination of the problem. Oil and chemical transfers involving vessels, tanker trucks, and bulk liquid facilities occur in marine port areas throughout the United States on a daily basis and are regulated by numerous provisions throughout 33 C.F.R. Notice provisions for these transfers fall under 33 C.F.R. § 156.118.[127] The regulations indicate that an ANOT must be provided to the Coast Guard if required by the Captain of the Port (COTP) prior to commencing a

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[126] This is but one example. There are likely dozens more, spanning multiple federal agencies; the government uses NOIs and similar processes across the board to lessen regulatory burdens on the public in numerous spheres. The EPA NOI process at issue in *Texas Independent Producers & Royalty Owners Association v. EPA* is another example. Another is the U.S. Customs NOI process for drawbacks (refunds) involving unused merchandise. Regulations provide that individuals seeking to use this process must submit an NOI to the Customs Service, which will make a determination as to whether or not the merchandise must be inspected, or inspection will be waived. *See* 19 C.F.R. § 191.35 (LexisNexis 2014). The feasibility of challenges to these NOI processes is debatable (especially since the "may affect" standard must still be met), these examples and the one discussed in detail herein are merely provided to show that there are numerous "notice" activities utilized by the federal government.

[127] The regulation states,

> (a) The COTP may require a facility operator to notify the COTP of the time and place of each transfer operation at least 4 hours before it begins for facilities that: (1) Are mobile; (2) Are in a remote location; (3) Have a prior history of oil or hazardous material spills; or (4) Conduct infrequent transfer operations. (b) In the case of a vessel to vessel transfer, the COTP may require a vessel operator of a lightering or fueling vessel to notify the COTP of the time and place of each transfer operation, as specified by the COTP, at least 4 hours before it begins. (c) No person may conduct such transfer operations until advance notice has been given as specified by the COTP.

See 33 C.F.R. § 156.118 (LexisNexis 2014). The COTP refers to the Coast Guard Captain of the Port, and "means the U.S. Coast Guard officer commanding a Captain of the Port Zone described in part 3 of this chapter, or that person's authorized representative." *Id.* § 154.105. The COTP administers marine safety, security, and environmental protection programs throughout his or her area of responsibility. *See* U.S. COAST GUARD, MARINE SAFETY MANUAL VOL. VI, PORTS AND WATERWAYS ACTIVITIES para. 1.A.2 (11 Oct. 1996) [hereinafter USCG MARINE SAFETY MANUAL].

liquid transfer.[128] Descriptions of the intent behind this requirement at 33 C.F.R. § 156.118 are not as extensive as those for the NOI process published by the Forest Service, but the purpose is nonetheless clear—the process is designed to provide the Coast Guard with awareness of oil and chemical transfers.[129] The Coast Guard does not describe the process as an authorization of oil or chemical transfer operations.[130] Once received, ANOTs are reviewed (similar to the Forest Service NOIs) and used as one of many sources of information to determine whether any further monitoring or enforcement action is needed.[131] One difference in the process is, the Coast Guard does not respond to the ANOT unless some form of enforcement is needed.[132]

Other Coast Guard regulations add to the scenario. 33 C.F.R. § 154 contains dozens of requirements (or criteria) governing the actual transfer process.[133] Additionally, 33 C.F.R. Section 160.109 gives the Captain of the Port the authority to halt bulk liquid transfers if they pose a risk to navigable waters.[134] One can see how an entity could apply Judge Fletcher's two-part test and the same arguments made in *Karuk III* and use them to raise a possible challenge to an ANOT, claiming it involves agency action.[135]

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[128] *See* 33 C.F.R. § 156.118.

[129] *See* Pollution Prevention: Vessel and Oil Transfer Facilities, 42 Fed. Reg. 32,670, 32673 (June 1977) (codified at 33 C.F.R. § 154) (explaining the requirement to notify the Coast Guard of oil transfers was implemented simply because the Coast Guard was unaware of numerous transfers that occur).

[130] *See, e.g.*, *Advance Notice of Transfer*, MARINE SAFETY UNIT CHI., http://www.uscg.mil/d9/msuchicago/AdvanceNoticeForm.asp (last visited Apr. 22, 2014) (showing the form simply asks for the particulars surrounding when and where the transfer will occur).

[131] This statement is based upon the author's experience as a Division Officer in charge of bulk oil and chemical facility compliance and pollution response.

[132] *Id*. The lack of an actual response to each ANOT would not stop a challenge to this notice activity. Challengers could argue an implied approval was created when the regulations governing bulk liquid transfers were promulgated. More importantly, key arguments used in the *Karuk III* case are still available. Namely, the facts that an ANOT must be filed prior to commencing a transfer, the Coast Guard has established criteria governing bulk liquid transfers, and the Coast Guard has the ability to monitor or stop the transfers. *Cf.* Karuk Tribe of California v. U.S. Forest Service (*Karuk III*), 681 F.3d 1006, 1021–24 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579 (2013).

[133] 33 C.F.R. § 154.530 (LexisNexis 2014). For example, 33 C.F.R. §154.530 requires small discharge containment equipment in the event a spill occurs during transfer. *Id*.

[134] 33 C.F.R. § 160.109 (LexisNexis 2014).

[135] *See Karuk III*, 681 F.3d at 1021. Again, this test asks whether a federal agency affirmatively authorized, funded, or carried out an activity; and whether the agency had discretion to influence the activity to benefit protected species. *Id*. One can easily show the discretion portion is met, as with the NOIs in *Karuk III*, discretion is present in the

In applying the arguments used by Judge Fletcher to the Coast Guard ANOT process, the strongest potential argument a party could use for finding agency action would be the fact that, as stated in 33 CFR § 156.118, the ANOT must be filed prior to commencing a transfer. A reviewing court could equate this to a condition precedent to operating that in reality meant agency approval was required.[136] Judge Fletcher considered the fact that miners who might disturb surface resources had to submit an NOI prior to commencing operations as strong evidence in support of finding agency action, and a challenger could argue the review of required ANOTs is an analogous action.[137] One could also argue the facility transfer requirements at 33 C.F.R. § 154 (such as small discharge containment) are similar to the dredge distance and tailings pile replacement criteria set by the Forest Service in *Karuk III*, and assert the filing of an ANOT is effectively a member of the public stating to the Coast Guard that they have met pre-established criteria.[138] Additionally, the Coast Guard has the authority to (and often does) monitor transfers for compliance; one could argue this is similar to when Judge Fletcher found the Forest Service monitoring of mining was evidence of an approval process.[139] Lastly, the fact that the filer knows the purpose of an ANOT is to make the Coast Guard aware of the transfer and allow it the opportunity to intervene for safety reasons (if needed) gives an additional ground for a challenger to argue that the submitter seeks approval through an ANOT.

Thus, one could make an argument that the Coast Guard ANOT process is actually agency action requiring ESA consultation. This is not to say the argument would have much chance of success in this particular example; however even unsuccessful, misguided challenges such as this place significant unnecessary logistical burdens on the government. It is but one example of how *Karuk III* could be used, and there are countless other government notice activities it could be applied against. Some federal government activities may have more of a tenor of agency action than the example discussed above, and thus may be more at risk in a

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case of the ANOT review. The Coast Guard, like the Forest Service, has discretion in deciding to act on information. Such actions could include increased safety measures or a halt to the oil or chemical transfer altogether, so it has discretion to influence the liquid transfer to benefit protected species.

[136] *Id.* at 1021–22 (Smith, J., dissenting).

[137] *See id.*

[138] *See id*. at 1013–16, 1022–23 (noting Forest Service criteria for mining were evidence of agency action).

[139] *Id*. at 1023.

challenge. The ultimate problem is that a successful court challenge to what should clearly be considered a notice activity (such as the ANOT process) may then require that Section 7 consultation occur for that activity. Consultation takes time and funds, and should only be used when truly necessary; during consultation, agencies must gather information from the public, hold interagency discussions, and possibly produce formal biological opinions before proceeding.[140] In the meantime, if the activity involves construction or business operations, a negative economic impact due to delays will occur.[141]

C. What Can Be Done?

There are three avenues to combat this problem. First, the USFWS and NMFS could issue a clarification in the form of a rulemaking regarding the definition of agency action.[142] Such a clarification could set guidelines excluding low-level notice activities that meet certain criteria from the definition of agency action. The USFWS and NMFS could even list specific exempted activities. This would significantly assist federal agencies whose notice activities may be challenged in the future. There is risk in this method—such a regulation could be challenged as an unacceptable interpretation of the ESA.[143] However, this may prove to be the most economical approach. From a practical standpoint, it is better to have an overarching solution instead of leaving federal agencies to defend their notice activities one by one.

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[140] *See id*. at 1039 (Smith, J. dissenting) (noting that ESA consultations can sometimes take years, and private entities often have to hire their own experts to assist in the process due to agency shortfalls).

[141] *See Comparison of U.S. and Foreign-Flag Operating Costs*, U.S. MARITIME ADMINISTRATION (Sept. 2011) http://www.marad.dot.gov/ documents/Comparison_of_US_and_Foreign_Flag_Operating_Costs.pdf. It notes in 2010 the average daily operating cost of a U.S.-flagged vessel was about $20,053. In the Coast Guard example, this would be the cost to a vessel operator for every day a fuel transfer was delayed due to an ANOT challenge. *See id*.

[142] *See* Interagency Cooperation—Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19926, 19930 (June 3, 1986) (codified at 50 C.F.R. § 402). This was the last time the USFWS and NMFS clarified the definition of action under the ESA regulations. *See id*.

[143] *Cf.* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (where citizens challenged EPA regulations implementing the Clean Air Act as an unreasonable interpretation of the law).

Second, agencies should be aware of the increased potential for challenge to their notice activities after *Karuk III*, and may want to promulgate clarifications for their own notice processes they feel may be vulnerable to challenge. The Forest Service created a significant amount of fodder for the *Karuk III* majority through its interactions with the miners that required explanation; some agency guidance may help avoid this issue. Otherwise, agency counsel should simply be aware that their regulators in the field can conduct notice-related activities that might give rise to ESA challenges, and they should be prepared to defend these notice processes and regulations.

Lastly, the government should challenge the decision at its next opportunity. It is unclear why the government did not desire to fight the case in the Supreme Court. One can only surmise it feared that the Court would find against the government, which would fully cement the expansion of agency action put forth in *Karuk III*. However, until overturned, the decision remains a significant issue, and not just for the Forest Service NOI process.[144] It increases the potential for overbroad application of the agency action concept across the circuits, leaving similar activities exposed to court challenges.[145] It also has created the potential for increased confusion over the state of ESA Section 7.[146] The federal government would be better served by challenging the decision at the next opportunity to ensure it does not become an unreasonable impediment to agency notice activities.

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[144] *See* PERKINS COIE, *supra* note 8.

[145] *See id.*

[146] The case has already generated disagreement in the 9th Circuit over the status of a previous 9th Circuit ESA case, *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994), which addressed ESA consultation in the context of ongoing (continuous) agency action. A Northern Distict of California case found *Karuk III* overruled the *Pacific Rivers* stance on ongoing agency action. *See* Ctr. for Biological Diversity v. E.P.A., 2013 WL 1729573, at 10 (N.D. Cal. Apr. 22, 2013). A District of Montana case decided less than a month later held *Pacific Rivers* remained good law in the 9th Circuit. *See* Salix v. U.S. Forest Serv., 944 F. Supp. 2d 984, 986 (D. Mont. 2013). *See also* Brian Hennes, *Ninth Circuit Endorses Functional Approach to Determining Agency Action Under Section 7(a)(2) of the Endangered Species Act:* Karuk Tribe of California v. United States Forest Service, 28 J. ENVTL. L. & LITIG. 545, 591–92 (2013) (discussing the conflict between the Montana and Northern District of California cases).

V. Conclusion

It is evident from *Karuk III* that this area of the law can turn on the finest distinctions in federal regulations and actions. Nonetheless, on balance precedent, regulations, and the law are on the side of Judge Smith and the *Karuk III* dissent. Judge Fletcher was overly focused on the activity and language used by the Forest Service, he ignored precedent, and he could not identify case law specifically analogous to his position. The focus on activity and labeling is understandable, but not at the exclusion of precedent and valid regulatory interpretation.

There is no doubt Section 7 is meant to be broad. However, *Karuk III* pushed the law's reach too far. One could take the *Karuk III* result to its furthest extent and argue any time an agency does anything, it acts affirmatively, and apply that concept across the board to invoke the ESA for virtually any federal activity. Given the amount of notice activity in the federal realm, *Karuk III* creates a huge potential for frivolous suits, and will ultimately cause great confusion and inconsistency in regulatory efforts.[147] The federal government should investigate issuing clarifying regulations to lessen the chance that similar notice activities will be interpreted as agency action in future court challenges. It should also look for future opportunities to aid in overruling *Karuk III* to ensure it cannot be used to further confuse the regulatory landscape and burden the public.

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[147] *See* Petition for Writ of Certiorari at 31–32, The New 49'ers, Inc., et al., v. Karuk Tribe of California (9th Cir. 2012) (No. 12-289).

THE FIFTEENTH ANNUAL SOMMERFELD LECTURE[1]

THE STRUCTURE OF THE CYBER MILITARY REVOLUTION

PAUL ROSENZWEIG[*]

Thank you. Thank you, thank you very much for the introduction and thank you for the invitation. I must say, I am deeply, deeply honored

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[*] This is an edited transcript of a lecture delivered by Mr. Paul Rosenzweig to members of the staff and faculty, and their distinguished guests, on September 3, 2013.

Paul Rosenzweig is the founder of Red Branch Consulting PLLC, a homeland security consulting company, and a Senior Advisor to The Chertoff Group. Mr. Rosenzweig formerly served as Deputy Assistant Secretary for Policy in the Department of Homeland Security. He is a Distinguished Visiting Fellow at the Homeland Security Studies and Analysis Institute. He also serves as a Professorial Lecturer in Law at George Washington University, as a Senior Editor of the Journal of National Security Law & Policy, and as a Visiting Fellow at The Heritage Foundation. In 2011 he was a Carnegie Fellow in National Security Journalism at the Medill School of Journalism, Northwestern University, where he now serves as an Adjunct Lecturer.

Mr. Rosenzweig is a *cum laude* graduate of the University of Chicago Law School. He has an M.S. in Chemical Oceanography from the Scripps Institution of Oceanography, University of California at San Diego, and a B.A from Haverford College. Following graduation from law school, he served as a law clerk to the Honorable R. Lanier Anderson, III of the United States Court of Appeals for the Eleventh Circuit.

He is the author of *Cyber Warfare: How Conflicts in Cyberspace Are Challenging America and Changing the World* and of the video lecture series, *Thinking About Cybersecurity: From Cyber Crime to Cyber Warfare* from The Great Courses. He is the coauthor (with James Jay Carafano) of *Winning the Long War: Lessons from the Cold War for Defeating Terrorism and Preserving Freedom* and co-editor (with Timothy McNulty and Ellen Shearer) of *National Security Law in the News: A Guide for Journalists, Scholars, and Policymakers.*

[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 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.

to have been invited to give you the Fifteenth Annual Sommerfeld Lecture.

I am particularly honored because, of course, I am not a military lawyer. Indeed I am not a military man much at all. I practice in the national security sphere, but mostly from the civilian side. So it's quite an honor for me to be invited to speak with you, many of whom know far more about military law than I do.

I assume that the reason I was invited was to bring to this meeting a bit of an outside-of-the-box perspective on issues of cyber law and policy. I hope to honor that spirit by being at least a little provocative if not iconoclastic. My goal at the end of this discussion will be to have given you some things to think about, even if you don't agree with everything I say over the next couple of hours. If you walk away thinking, "Oh, yeah, he has a point there," then that will be a successful event, I think. My plan of attack is to talk for about forty-five or fifty minutes—we have more than that—and then have Q&A for as long as you guys like. If I say anything at all during this talk that is unclear, feel free to interrupt. I am not like an automaton or anything. So please, by all means, if you want to dispute something in the midst of this, you don't have to wait for the Q&A.

As I said, I am not a military man, but I have been to enough military briefings to know that the time-honored way to begin them is to give your audience the bottom line up front so that you all know exactly where I am going. So I have written this one down because I want it to come out exactly right. Here is my bottom line: Much of what the U.S. military is doing to prepare for conflict in cyberspace is misguided. We are, in effect, preparing to fight the last war against the last enemy. We conceive of the conflict as involving a contest against a peer nation states—China, for example. What we are systematically missing is something I would call the democratization of conflict in cyberspace. The capability of nonstate actors, ad hoc groups, and even individuals to compete on an almost level playing field with nation states and to do significant damage to our national security interests. If we do not reconceptualize how we are thinking about cyber security, policy, and conflict, we are going to miss the boat.

To illustrate the point, let me begin by asking you a question. I want you to think about the last ten years, and I want you to confine yourself to the cyber domain, broadly speaking, and ask yourself what has been

the worst U.S. national security failure in cyberspace in the last ten years? I would submit to you that there are really only two possible answers to that question. One possibility, one that fits the nation state model, is the systematic efforts by the Chinese government to conduct espionage against American national security and economic security interests. We have lost a boatload of intellectual property. The Commission on the Theft of American Intellectual Property says that it is on the order of $300 billion in value per year, which is really not chump change, even in the United States.

Meanwhile, the Defense Science Board has issued a classified report—and by classified, I mean it is only on the front page of the *Washington Post*—but a classified report on all of the systems that have been compromised in one way or another by ongoing Chinese espionage. They range from the F-35 fighter to something called nano armor, which I don't even know what that is, but it sounds really cool and I hope we have it, and I am upset that the Chinese are getting it as well.

So that is one area where we have systematically suffered a national security failure, and that is kind of paradigmatically what we have been talking about. If you have listened to President Obama and the Secretary of Defense, that is what they talk about when they talk about the conflict in cyberspace.

But the other answer, the answer that I think is actually more in your minds today, at least in my mind, would be Edward Snowden, right? A single individual who, through his own individual activities, or perhaps with a cadre of a few fellow travelers, has done immense damage to the American national security interests. Think of what has happened just by virtue of Edward Snowden's activities. We have suffered major diplomatic difficulties. There is a significant amount of anger at the United States amongst our allies and friends in Europe about what they perceive to be American spying on their national security interests. They sort of knew that we did it, but now it is out in the open, they can no longer deny it, and they are annoyed.

Even worse, the disclosures have given China and Russia the opportunity to create a false equivalence, if you will, between the nature of what they are doing, which is widespread rampant economic espionage, and what the United States has been engaged in, which by and large has been more traditional national security intelligence activities.

Edward Snowden's actions have disclosed our sources and methods to the great detriment of the United States. As result of this, we have already seen terrorist and other governments change their communication activities so that we are no longer as readily able to intercept their communications and understand their plans. That is major damage to the United States' national security interests. And then, of course, if you have been, oh, say, reading the newspapers you know that there has been a massive domestic political uproar. An amendment to defund completely portions of the NSA's intelligence activity programs, failed by only twelve votes in the House of Representatives just before the August recess; 217 to 205. When in the course of American history has a vote to essentially close down a portion of our national security apparatus come that close to success?

And if you think of that, you understand the scope of the damage that Snowden has done. Think of his contacts, though he is a lone wolf. He acted alone or perhaps with a few others. He had a lot of support from journalists like Lauren Poitras and Glenn Greenwald, and it appears as though he may have had some post-activity support from Russia or China. He is now, obviously, in Russia, and he is reported to have gone to the Russian Consulate in Hong Kong. But the bottom line is that he undertook this level of activity independent, essentially, of anyone else.

The latest report—one report that I saw—said that in a rather unguarded moment, Snowden admitted that he actually took the job at Booz Allen Hamilton for the purpose of collecting classified information with an eye towards eventually disclosing it. So that demonstrates the damage to national security interests that a single individual, or a small group of actors, like Snowden, can do. They are not affiliated with any nation state except perhaps after the fact. They have no sovereign interest that we can address or talk to. They are in essence a combination of political activism, ideology, criminality, and an adherence to some form of anarcho-libertarianism, if you will, and a great deal of narcissism.

So when I speak of the democratization of conflict, what I mean is simply that the tools and weapons of attack are now widely available throughout the globe and the use of force (and, if you'll permit me to say, information is a tool of force that we call information operations)—the use of information force, information power in this domain, is no longer the exclusive province of nation states. That, I think, is the reality of the

conflict in cyberspace, and that is the reality that I do not think our cyber strategy is coming to grips with.

My lecture today is titled *The Structure of the Cyber Military Revolution*. For those who do not know, it is a deliberate evocation of Thomas Kuhn's famous sociological book *The Structure of Scientific Revolutions*.[2] And for those who have not read that, here is a really short and necessarily incomplete summary of what Kuhn said.

Kuhn was asking, "How do we do science? How does something like science develop?" And he said that there are really two forms of science development out there. One form is what we would call normal science. Normal science is the kind of step-by-step accretion of new information. All of a sudden, we can measure something to .001 instead of .1. All of a sudden, we begin to know how much carbon dioxide there is in the atmosphere, and we can measure it as it increases. We have developed theories about what that might mean for global warming. And they can be right or they can be wrong, but normal science kind of starts from a basic set of premises and builds on that one step at a time in a slow accumulation of human knowledge.

The other type of science development that Kuhn talks about is what he calls paradigm shifts. Paradigm shifts are these avulsive yet discontinuous changes in thinking where all of a sudden everything you knew beforehand was wrong—what you thought was right is wrong, and everything that you know now or that you have just learned is a new reality.

The example he gives, the classic example of this, is from astronomy. Ptolemy thought that everything went around the Earth, and he had this whole idea of astronomy that was Earth-centric. Then all of a sudden, along came Copernicus, who made some new measurements and came to the conclusion that the Earth was not the center of the universe. That, in fact, the Earth went around the sun. The sun ran around the center of some universe elsewhere in the world. This was a huge disruption of the astronomy status quo. Nothing is less useful than a Ptolemaic astronomer after this sort of change, right? And that's why people resist them—they are too disruptive.

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[2] THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996 Univ. Chicago Press) (1st ed. 1962).

Paradigm shifts are not limited to science. We see them in all sorts of human endeavors, including military endeavors. Take an example, Naval warfare. There are some Navy men in the room, right?

For 400 years, the entire scope of British strategy was based upon their view that naval supremacy was all that was necessary to rule the world. From the Spanish Armada in 1588 to 1940 in World War II, Britain ruled the waves. Many thought that this was an eternal truth that the Navy would always be the queen of combat and that nothing would ever change that. Then along came the Japanese. There is a very famous video taken by the Japanese after the British had sent the *Prince of Wales* and the *Repulse* out to Singapore as a response to growing Japanese power. The British Admiralty thought that this was enough to deter Japanese aggression in Southeast Asia. The Japanese, with a few very small torpedo planes, more or less, demonstrated that they were wrong. Aviation power was the new paradigm, and those who didn't make the change from a naval-centric power to aviation power were left with nothing but sunken ships on the bottom of the South China Sea.

We are in the middle, I think, of that same sort of paradigm shift in cyberspace. And the shift is the empowering of individuals to act with force in ways that were beyond our conception beforehand.

I would like to introduce you to Max Cornelisse.[3] Max is what I would call a happy hacker. He is a white hat, a Dutch hacker, who sees as his goal, using nothing but his iPhone, exposing flaws in Dutch cyber systems. Here we are in Amsterdam. All of a sudden, Max can turn out the lights. And just to show that he is not working alone—well, we will get to that in a second. I have seen him open drawbridges. I have seen him send mass text messages to everybody in a room hacking a cell tower. Here he is, proving that it is not a buddy in the basement: he does it in another building. So Max, as I said, is a happy hacker. He is a

[3] Since giving this lecture, I've come across some evidence that Max himself may be a fraud. *E.g.* http://ucnim.wordpress.com/2009/01/14/max-cornelisse-amazing-computer-hacker/. On the other hand, most of the capabilities he has exhibited on video have been achieved by real-world security researchers. They can hack into traffic control systems, *e.g.*, *Flaws Let Hackers Control Electronic Highway Billboards*, NEXTGOV.COM, http://www.nextgov.com/cybersecurity/2014/06/flaw-lets-hackers-control-electronic-highway-billboards/85849/, and medical devices, *e.g.*, Jerome Radcliffe, *Hacking Medical Devices for Fun and Insulin*, BLACKHAT.COM, http://media.blackhat.com/bh-us-11/Radcliffe/BH_US_11_Radcliffe_Hacking_Medical_Devices_WP.pdf. Thus, though Max is, perhaps, a flawed symbol personally, what he represents is the reality of the future.

good guy, a white hat. He does not mean to do any damage. Although, if I were working in the building on a last-minute assignment for my Judge Advocate Course, that would be kind of annoying. But he is not trying to do damage.

But what if he were bad Max or mad Max from Thunder Dome and this was not a random building in Amsterdam, but a hospital, or the New York Stock Exchange, or the Pentagon, or some other critical command and control node? Just as the video of Japanese attacks on the *Prince of Wales* signaled the paradigm shift in Naval warfare, this, I think, is a sign of the paradigm shift that we are in the midst of. Our military strategy, I think, is still fighting naval battles. Max, and other security researchers like him, are torpedo planes.

So let me step back a bit and kind of give you a little architecture of who these types of actors are. And for this I want to give some thanks—this is the product of a bunch of discussions I have had with a very brilliant fellow named Josh Corman who works for Sonatype and spends a lot of his time studying the hacktivist community.[4] So some of what I am about to tell you is the product of discussions he and I have had. So citation is the most sincere form of flattery, and I do not want to claim his ideas as my own.

Who are the combatants in cyberspace? They are not just nation states. They are not Russia and China. From Russia and China, we can expect some form of rationality. We can understand their motivations. We know why the Chinese are stealing intellectual property to jumpstart their economy. We can make some judgments about what would annoy them, what would not annoy them.

In the end they are rational actors just as the Russians were in the Cold War. But in this domain, the motivations of the actors are as diverse as the number of people who are there. And the closer you look, the more unclear it is. There are indeed many actors with many different motivations. I drop them into two different groups. Ones who are chaotic actors, and perhaps it is a little unfair to call them chaotic actors,

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[4] Mr. Corman is the Chief Technology Officer for Sonatype. Previously, Corman served as a security researcher and strategist at Akamai Technologies, The 451 Group, and IBM Internet Security Systems. He co-founded Rugged Software and IamTheCavalry to encourage new security approaches in response to the world's increasing dependence on digital infrastructure. *See* www.rsaconference.com/speakers/joshua-corman. He writes a useful blog called Cognitive Dissidents, http://blog.cognitivedissidents.com/.

but what seems to unify them is a disrespect for authority, for hierarchy, for structure, a dislike of it and an effort to work outside of it. And then there are those on the second level, who are more interested in creating terror and war, who are closer to something we would be familiar with and are more like nation states, though not quite.

I say that there are essentially three flavors in the top row of chaotic actors. Hacktivists or anarchist in the purest sense; vandals or criminals, who are spending most of their time breaking things or stealing things; and then most troubling of all for law and policy, people who are in that space for collective action, for free speech reasons, for protecting the freedom of the Internet. The challenge for lawyers and people it that it is really hard to tell the difference among all three of these.

Let's talk about the first group: Hacktivists. To my mind, they are cyber insurgents with a bit of an ideological twist. If you don't believe me—these are just some of the names of some of the people who are from some of the groups. If you don't believe me, here is Barrett Brown. Barrett Brown is the self-described cyber strategist for Anonymous, which is an ad hoc collection of generally anonymous cyber activists. Here is what he said: "It's a guerrilla cyber war, that is what I call it. It is sort of an unconventional asymmetric act of warfare that we are involved in."[5] If that is not enough, Anonymous has posted a manifesto online. You can Google it and pull it down and listen to it. This is what they say: "I declare the global space we are building together to be naturally independent of the tyrannies and injustices that you—that's governments—that you seek to impose on us. You have no moral right to rule others, nor do you possess any real methods of enforcement we have true reason to fear."[6]

This is tantamount to an insurgent's declaration of war. And if you kind of doubt that, you probably didn't know this, but we're at war. Anonymous has declared war on the United States. They did that in a manifesto published in February 2012, and they called on all of the citizens of the United States, that is all of us in the room, to rise up in rebellion. You didn't get that message did you? But that is what they

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[5] Michael Isikoff, *Hacker Group Vows 'Cyberwar' on U.S. Government*, *Business*, Mar. 8, 2011, http://www.msnbc.msn.com/id/41972190/ns/technology_and_science-security.

[6] *Anonymous to the Governments of the World—Web Censorship*, YOUTUBE.COM (Apr. 25, 2010), http://www.youtube.com/watch?v=gbqC8BnvVHQ. Anonymous refers to itself in the singular, even though it is a collective group of people.

see as the struggle. It is eerily, to my mind, eerily similar to Osama bin Laden's declaration of war against the United States in 1998, or 1999, three years before 2001. So this is an insurgency group, and they use insurgency tactics. For example, they intercept communications.

LulzSec famously intercepted a conference call between the FBI and Scotland Yard, the topic of which was the prosecution of LulzSec and Anonymous members and then disclosed that capability as a means of sowing confusion and doubt amongst the FBI and Scotland Yard as to the security of their communications.

In recent months, the conflict between ordered liberty governments, like the United States, and cyber hacktivists has just ramped up in more ways than we can possibly imagine. Here are a few. Consider The Onion Router. The Onion Router (TOR) is an Anonymous browsing mechanism. The NSA tried to hack it. Why? Because that was how groups like Anonymous and LulzSec were communicating without being subjected to surveillance and tracing by government authorities. It was recently reported that the NSA hacked one end of a chain of that type of anonymous communication, enabling them to countersurveil anonymous groups like Anonymous and LulzSec.

The effort is not just limited to the United States—in Belarus it is a crime to own a map of the country. It is an authoritarian communist country, and they want to keep secret all of their government facilities. The social activists in Belarus opposed to this went on social media, pulled together all of the things that they could get from Google Maps, Instagram, Facebook, Twitter, and built a map of Belarus that is now publicly available outside of Belarus. How did Belarus respond? By making it a crime to access any website that is not a .be, that is the Belarus country code, .be website. That's punishable by life imprisonment, if not death. So this is the contest space between social activist in Belarus and the Belarusian government.

And if you think we are immune, I read a recent report that there are members of Anonymous in the military. A bunch of NCOs at Fort—I am going to say this wrong—Fort Huachuca. Huachuca in Arizona, which is one of our cyber bases where we do a lot of this. Apparently, several of the NCOs said that they are also participants in Anonymous. I don't know whether they are double agents on our side, or triple agents on Anonymous's side, but this has all the makings of an insurgency conflict between us, the United States, or Western governments

supporting ordered liberty, and this crypto-anarchistic kind of libertarian group over here.

But it's not a monolith, sometimes they'd trend over into criminality. We have seen a lot of criminal activity on the network, much of it is not ideologically motivated at all. Purely criminal groups like the Russian Business Network, RBN, and Ukrainian criminal groups are into nothing more than stealing money for their own private gain. But at the same time, groups like Anonymous and LulzSec, they tend to drift over into that realm when they get into vandalism, I would call it.

Recently, just basically as a joke, LulzSec started writing graffiti on the CIA's website. Not a significant or existential threat, didn't really do any damage, but it's like tagging it: "We were here. LulzSec was here." They did the same thing to the Church of Scientology. Apparently, the Church of Scientology is something that the anarchists really dislike, and so you can imagine why. But at the same time, they are also about Internet freedom, the idea that this new space is a place where political freedom, speech, new ideas, innovation—this is the good side, if you will, of the revolution.

For example, Anonymous gave some tools to the people who were behind the Arab Spring in Egypt, so that they could avoid the shutdown of the Internet by the Egyptian government. That actually sounds like something we would do, we would be in favor of as well. They, likewise, have given tools to the Falun Gong in China, which is a dissident group in China that is opposing Chinese authoritarianism. So we can't tell exactly where they are coming from. And some of the actors in this space are actually independent wild west sheriffs on the network who are trying to defend the network against people that they see, like Anonymous and LulzSec, who want to take it down.

One of my favorites is the Jester. The Jester is a former Army or Air Force Special Ops guy; nobody's quite sure. He is ex-military for sure. He has at least disclosed that. And what he does is he counterattacks the command and control centers of groups like Anonymous and LulzSec when they get too far out of line. He doesn't do it on orders. He does it as a hobby, if you will, or as his independent retirement activity. Some people retire from the JAG Corps and go back home and do county law; he retired from special ops and became the Jester, which is quite something. The Happy Ninjas is another such group that runs around the Internet wacking the bad guys—at least their perception of the bad guys.

And then, of course, some of the actors are kind of pseudo-state actors like Al Qaeda, the Russian Patriotic Hackers, and if you have been reading the news, units of the People's Liberation Army, PLA. Unit 61398 in China is essentially a top secret unit of the Chinese, and they sometimes look like Anonymous, and we can't tell the difference amongst all of the various actors in this space.

I did this slide three days ago, four days ago; if I had to redo it today, I would put the Syrian Electronic Army (SEA) up there somewhere. I am not sure where—probably down in the political motives group, but maybe up in the anarchistic group, in the middle; I do not know for sure. But the SEA have recently acted against American interests—and we aren't sure if Assad is behind them or not.

So now that we know who these actors are, what does that mean? So far, I have just been kind of descriptive. What does that mean for our policy? Well, first let me talk a little law because, after all, we are at a law school, and this is a conflict space, and you have just finished the section on operations law. You know a lot more about this than I do, guaranteed. You live, sleep, breathe *jus in bello* and *jus ad bellum*. Necessity and proportionality are by now, after how many weeks, four, three, coming out of your ears. The good news is that there is an emerging consensus that those laws, the international humanitarian laws, the laws of armed conflict, apply just as readily in cyberspace as they do in the physical, kinetic world.

Recently, a group of experts convened in Tallinn, Estonia and wrote something we call the Tallinn Manual,[7] which was an explication of how traditional laws of armed conflict, traditional rules from the Geneva Convention, would be applicable to nation states conflict in cyberspace. This is good. This is a wonderful achievement, and if you wind up being assigned after this to U.S. Cyber Command in the Staff Judge Advocate office there, you will imbibe the Tallinn Manual every day. We also saw, quite luckily, after four or five years at the UN, the Chinese government just made an announcement that they agreed that International Humanitarian Law (IHL) and the laws of armed conflict applied to cyber conflict.

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[7] TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Cambridge Univ. Press 2013), https: www.ccdcoe.org/249.html.

I don't know what would have applied if that hadn't applied, but at least we have an agreement amongst the nation states that that's the set of rules we are going to apply to cyber war.

But if you bought anything that I have said so far about the paradigm shift that's happening in cyberspace, you know that is barely the start of the story. What about conflicts with nonstate actors? International humanitarian law is reduced is defined by state-to-state conflict. There is a limited amount of international law that applies in non-international armed conflicts. Again, stuff you all know better than I do. Things like Common Article 3 of the Geneva Convention and things like that. But the fundamental question for operational lawyers in the cyber domain for the next five years—fair warning, this is great thesis topic area—is what sort of law applies to, say, our conflict with Russian Patriotic Hackers, or the Syrian Electronic Army. We have read—I have read—the *San Remo Manual*,[8] which is the equivalent for international law that applies to all non-international armed conflict. And I have to tell you, I have absolutely no idea, no idea whatsoever, how military lawyers are going to apply that law, which applies to non-international armed conflicts in the kinetic, in the physical world with boots on the ground—how that's going to be applied next year to a conflict in the cyber domain against a nonstate actor.

In that one space, there are literally five dozen subtopics that you can ask. What do the rules—what's a protected person? What is an appropriate weapon? What is a good targeting decision? How do you do that when the other guy is not a nation state actor? He is not wearing a uniform, and you are not even sure of his motivations. That is the fundamental question, and it is going to be a great specialty for somebody in this room. You write that paper now and two years from now, when we actually have to answer that question, the Army is going to look around and say who knows this stuff? And they are going to pull out your paper from the files here at the JAG School, and you will be the pocket expert. I highly recommend it.

Let me turn from that to give you some sense of what some of those questions would be; some of the policy issues that are going to drive the counterinsurgency in cyberspace conflict. Some of this I have said

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[8] SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (12 June 1994).

before in an article I wrote for the Heritage Foundation.[9] And if citation is the most sincere form of flattery, then self-citation is an even more sincere form of flattery. I think that there are three factors that have to guide our cyber strategy that we are not necessarily paying as much attention to as we would like. The first is that asymmetric conflict is here to stay. Nonstate actors with near equal power to governmental actors are going to be the rule, not the exception, going forward. They can serve time as proxies as the Russian Patriotic Hackers do for nation states, but they aren't nation states themselves.

Second, currently, nonstate actor capabilities are limited. They can't take down the electric grid in the United States, but that's not a situation that's going to be around for very long. Five, maybe ten years at the outside before nonstate actor capabilities become almost equivalent to nation state actor capabilities. Max Cornelisse and people like him say that the time where our nonstate actor opponents are nothing more than kids running around playing war games—you know that old movie, right?—that's not going to last for very long. We have a window of opportunity to get our strategy right now, and we need to take it.

Third, attribution is the hardest part of the game. Knowing who the other side is and what their motivations are is the most difficult challenge of all. I saw an interview with the Syrian Electronic Army just the other day, in which they said they have got nothing to do with Bashar al-Assad: "We don't even like that guy. But we are on the side of the Syrian people, and if the United States launches weapons against the Syrian people, we are going to act on behalf of the Syrian people."

How do we deal with that? Who are these people? What are their true motivations? That's not something that we can fix technologically. In the end, we can get better at it, but it's not something where you are going to have the same confidence in identifying the enemy, or the opponents, as you do in the kinetic world where it's very clear that the tank was right over there, and you can shoot right back at him.

So my conclusion is that instead of technical fixes, what we need to do is to develop cyber counterinsurgency law and policy that uses all of the techniques in our arsenal to fight this kind of new opponent. This is

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[9] Paul Rosenzweig, *Lessons of WikiLeaks: The U.S. Needs a Counterinsurgency Strategy for Cyberspace*, HERITAGE FOUNDATION, Backgrounder No. 2560 (May 2011).

going to be similar to the lessons we just relearned in Iraq, in a kinetic conflict. It's going to require not big disruptive military activity, but things like integrating the military and civilian activities, collecting intelligence, building host nations security, things like that. It's going to be military, intelligence, diplomatic, law enforcement, information, financial, and economic power, all of them will come into play.

Let me talk a little bit more about some of these elements in detail and try to identify some of the policy and legal challenges that are going to come about. If you accept my view that this is a counterinsurgency, the first thing we are going to need is to collect intelligence on our adversaries. And because of the technical difficulties, that's probably going to be human intelligence. That's probably going to be activities to try to infiltrate their organization so that we understand their motivations: so that we can learn who they are, foster a diplomatic campaign against them by naming them, and shaming them if we want to, so that we create divisions amongst them through misinformation if we have the opportunity.

I trust you can see immediately that that creates a lot of legal problems, not the least of which is that I do not even know whether any of the members of Syrian Electronic Army are Syrian Americans, residents here in the United States who have a political viewpoint that they are trying to activate through this action. I do not know if they are in the anarcho group, the political motive group, or if some of them might be in the Internet Freedom Group, and may be exercising protected First Amendment speech rights, or acting here in the United States in a domain where different sets of rules control military and intelligence activities. Nonetheless, in the absence of actual intelligence, we are not going to be in a position to be able to really understand what they want.

Second, we are going to have to build host nation cyber capabilities. In 2007, Russia attacked—Russian hacktivists attacked Estonia. Basically, they took the entire country off-line for a number of weeks. In response, the United States has provided a great deal of technical assistance to Estonia, where Tallinn is, and now they are one of the most cyber-capable nations in the world. Our network of Western actors—ordered liberty western actors, and that includes states like Japan and Australia who aren't in the West—is only as strong as its weakest link. The network is globalized and an attack that comes in through a server in France, before it hops over to a Department of Defense (DoD) server in

Germany, is just as dangerous as a direct attack against the German server itself. So we need to build that capability.

Likewise, we need to build public/private sector capabilities. Because 95 percent of the network is owned and operated by the private sector. Ninety percent of U.S. government military unclassified communications go over a civilian network right now. When you send an e-mail in the unclassified network, it goes through AT&T, or Verizon, or whoever the military server is. That's a problem for us. In addition, the civilian network is something we are critically dependent upon for everything else that supports the military function, like the lights in this room. Even though we are dependent upon these lights, the military has no real formal role, domestically, in protecting—what's the name of the local energy company—Virginia Electric Co.? Dominion? in protecting Dominion against cyber attack.

We need to deny the cyber insurgents safe haven. Max Boot just wrote a wonderful book on insurgency in general called *Invisible Armies*.[10] One of the things that he said was a key to the success of an insurgency was its physical safe havens. Vietnam, think Laos and Cambodia for the Vietcong. The Taliban had the Federally Administered Tribal Areas (FATA) in Pakistan. There are cyber-safe havens out there right now in China, and in Russia, and in the Ukraine. And we need to exercise either military, diplomatic, legal, economic, financial tactics to convince those countries to cease being cyber-safe havens where cyber insurgents can stay.

We need to recognize that some of this, the Internet freedom part of this, is actually a legitimate political viewpoint. I mean, it's quite simple. We need to think about how to win the hearts and minds of that group of people. We need to know how to break off the Internet freedom people on the left from the anarchists and the criminals on the right. The U.S. government is, unfortunately, seen in that space as an exceedingly authoritarian institution that wants to restrict the freedom of information and free speech.

Aaron Swartz is a quite famous case who was involved in what's called the Freedom of Information Movement. He wanted all of the journals, scientific journals, to be freely available to everybody. He was

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[10] MAX BOOT, INVISIBLE ARMIES: AN EPIC HISTORY OF GUERILLA WARFARE FROM ANCIENT TIMES TO THE PRESENT (Liveright 2013).

charged with a crime for stealing them, and he committed suicide. His name is a *cause celebre* in the Internet and information freedom space, amongst the people who should be our natural allies. I am not going to argue the merits of his criminal prosecution, but through a very underhanded sort of set of activities, we essentially drove a number of people who might be like-minded to us in general away from the United States' point of view, at least for little bit of time.

We need to build resiliency. When you build—when you have an insurgency in Iraq, one of the first rules that I learned was rebuild the road so that the insurgents can't claim a success in disrupting the economy of the area. We need to have the cyber equivalent to that. And you will read every strategy in the U.S. government, military or civilian, and you will not find a single mention of resiliency as an important factor in the cyber domain. But we should be striving for a world in which the Syrian Electronic Army, who recently took down the *New York Times* for two or three days, can only take it down for an hour, or 30 minutes, where we can bring it back up as quickly as possible.

And then, finally, I could go on, but we need a theory of offensive of action. The general theory of kinetic offensive action against nation states is one of maximum destruction of the enemy's forces. You want to eliminate its factors of military production. In insurgency warfare in the kinetic world, the physical world, that's very different. You want to find key havens, capture and kill key leaders, and isolate the enemy in domains away from where the civilian population is. We need to build the same sort of targeted cyber tool capability in the cyber domain. Again, another classified leak in the *Washington Post* suggests we are trying to do that, but we are doing it on the intelligence side, not at U.S. Cyber Command.

Finally, we need to do all of this consistent with our own values, the rule of law, and appreciation of dissent in the First Amendment. By contrast, we don't want to be like Belarus, where the response to social media innovation is a lifetime imprisonment or the death sentence.

One more critical point I'll make, and this is one not of strategy but of structure. Five years ago, I wrote an article about the organization of American government in cyberspace calling for more centralized federal

government control.[11] I wanted a really strong cyber czar who had a budgetary authority and directive authority over as much of the government as we could to centralize a response.

I was wrong. I repent and regret those words. This is the most distributive dynamic domain that I know of. There are more than two-and-a-half billion people and more than a trillion things connected to the network across the globe. It changes on a, literally, hourly or daily basis. The advanced, persistent threats that are intruding on the DoD's .mil computers today did not exist six months or a year ago. They are newly built, purpose-built for that thing. The last thing we need is a centralized hierarchy that is going to go into conflict with a diverse, multifaceted, morphing opponent in a battle space that changes every day. If I am right, that the cyber conflict is a paradigmatic shift, the last thing we need to do is build a hierarchy with a top-down structure.

Now, we are here at the Judge Advocate General's School, it is part of the big Army. The big Army does a lot of things great, but one of the things it doesn't do well is turn quickly. The Army's turning radius is the same as that of an aircraft carrier, not of a Corvette. We are in the process of building, at cyber command, big cyber. It's a sub-unified command that reports to STRATCOM, and there's already proposals to turn it into an independent command of its own. And you know exactly what that means in Pentagon structure. We are going to have a big hierarchy with lots of rules, reporting to the top, acquisition rules, staff judge advocate who drives rules all the way down. In this battle space, I think we need a cyber force that's much more akin to special operations. Something that's lean, quick to react, flexible, with flat administrative structure and, essentially, the equivalent of an "A" detachment in the special ops branch.

Think about where we are right now. President Obama is in the midst of thinking about a physical attack on Syria. What's going to be Syria's cyber response? The Syrian Electronic Army has already told us they are going to counterattack. What do we know about their capabilities? Nothing. We don't have anybody on the inside. What are

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[11] Paul Rosenzweig, *The Organization of the United States Government and Private Sector for Achieving Cyber Deterrence*, *in* NATIONAL RESEARCH COUNCIL, PROCEEDINGS OF A WORKSHOP ON DETERRING CYBER ATTACKS: INFORMING STRATEGIES AND DEVELOPING OPTIONS FOR U.S. POLICY (National Academies Press 2010).

their likely targets? We don't know, because we don't have any sense of what their capabilities or any intelligence on their targeting methodologies or what they think are our soft points. Do we have targeted weapons that can find the Syrian Electronic Army's command-and-control servers and take them out without taking offline the entire Syrian electric grid? I don't know, but I suspect not. Do we want to take down the entire Syrian electric grid? No, because that's what the rebels are also using for their command and control and that's what the civilians are using to ameliorate the horrible effects of the chemical warfare that they are undergoing.

What response and resiliency measures do we have in place here in case the Syrian Electronic Army does attack? I don't know, but very little I suspect. In short, the entire paradigm of the cyber aspect of our anticipating kinetic attack on Syria is really a counterinsurgency response to what we see as potential counter activity by the Syrians.

Let me make two final points very quickly. The first is I have left out of this discussion completely one other set of important actors out there, corporations or the private sector. If you don't think that Facebook, Google, Microsoft are big players in this space, think back to January 2012. I don't know if you remember, but the entire Internet was blacked out for a day by these companies in protest of a bill that they didn't like that was being considered in Congress.

If an Iranian had done that to us, we'd call that a cyber intrusion or possibly even a cyber attack. But when Google does it to itself, what do we call it? And imagine if they decide tomorrow that even if Congress authorizes an attack against Syria, they don't like that idea, so they say they are going to blackout the network anyway? Because the means of our communication are in their hands, they have an important role here.

The other final point I would end with is an admonition to humility. Nobody who works in this environment has any real certainty. Oliver Cromwell is reported to have said back during the War of the Roses to churchmen in Scotland: "I beseech you in the bowels of Christ, think it possible you may be mistaken."[12]

Now, I have got to think about that. Perhaps China really is the main threat and my worry about Anonymous and LulzSec is wrong. Perhaps

[12] Letter to the General Assembly of the Church of Scotland (Aug. 3, 1650).

nation states will, *ala* Belarus, crush Anonymous and LulzSec. But as long as the United States and the West are limited by our respect for the rule of law, I do not think we are going to undertake the types of activity against those groups that would be successful in crushing them. The Russians might, but we would never do that.

So what I see is that the change is real. Max Cornelisse and his ilk are a harbinger—power and force are being democratized, and we are not ready for it. So that is my bottom line. In my judgment, we are in the midst of a Kuhnian paradigm shift from a time when nation states have a monopoly on the use of significant force to a time when destructive potential in cyberspace is being increasingly democratized. If I am right, then our current military strategy in cyberspace is focused on the wrong enemy at the wrong time, using the wrong tools and with, I think, the wrong hierarchy. And that almost certainly means we are setting ourselves up for a failure of a sort that I cannot even imagine.

Again, I have overstated the conclusion somewhat for rhetorical effect, but the outlines of the problem are there for anyone to see. I think it is just that we are not looking.

So with that, I thank you for the honor of being invited to give you this lecture. I very deeply appreciate it, and I will look forward to speaking with you and answering your questions.

FIVE LIEUTENANTS: THE HEARTBREAKING STORY OF FIVE HARVARD MEN WHO LED AMERICA TO VICTORY IN WORLD WAR I[1]

REVIEWED BY MAJOR CHRISTOPHER A. LACOUR[*]

He had done all that the Army had required and expected of him, and more: despite all his self-doubts and fumbling, he had learned to lead men, and those same men had willingly followed him into the trenches and lastly into battle, where their safety, not his own, had been paramount, and where his courage had not faltered. "They can't kill me," he had said, and one gets the sense that by that morning, his men believed it.[2]

I. Introduction

In *Five Lieutenants*, James Nelson explores the private thoughts of five Harvard-educated lieutenants during World War I—from their recruitment, training, and suffering during battle to either their untimely death or disillusionment at the hands of a terrible war machine. Meticulously researched from private letters and journals, an especially impressive achievement given the heavy censorship during the war, the book succeeds at two things: giving insight into a war almost forgotten in the American literary narrative and showing that great leaders are not born from education or privilege, but rather from good mentorship and training. Despite being peculiarly organized and, at times, burdened with cumbersome prose, *Five Lieutenants* is worth reading by any junior officer or fan of military history, because it offers a distinct perspective of the challenges faced by our forefathers and of leadership and leadership development that is still relevant today.

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[1] JAMES CARL NELSON, FIVE LIEUTENANTS: THE HEARTBREAKING STORY OF FIVE HARVARD MEN WHO LED AMERICA TO VICTORY IN WORLD WAR I (2012).

[2] *Id.* at 266.

II. Nelson's Personal Research Made Public

James Carl Nelson, a journalist by trade, has written two books on World War I: *The Remains of Company D*[3] and the follow-on of that story, *Five Lieutenants*. Nelson was inspired to research and write these two books by the exploits and stories of his grandfather, John Nelson, who was a member of the 28th Infantry Regiment during the Great War.[4] He was enthralled at a young age by his grandfather's story of being wounded and left for dead near Soissons, France, in 1918.[5] The story told to a young Nelson was vague in details, described as, "my grandfather had been shot in the left side by a machine gun bullet, laid out on the field overnight, and then was 'saved' by two stretcher-bearers from some exotic French Colonial unit."[6]

After his grandfather's death in 1993, Nelson became interested in researching more about him and received his grandfather's medical records, indicating wounds much more grievous than the childhood stories he was told. Nelson also found a muster roll from his grandfather's unit, Company D, 28th Infantry Regiment, U.S. 1st Division.[7] Nelson's search for the story of his grandfather inevitably led him to explore the stories of his grandfather's unit; resulting in seven years of research into the lives and deaths of the men of Company D and the publication of his first novel, *The Remains of Company D*.[8]

While researching the men of Company D, Nelson observed that the letters from enlisted men were often "terse and devoid of any descriptions of actions, emotions, hopes, and fears and any accounting of where Soldiers had been."[9] Noting that the letters of officers were less censored and more detailed, Nelson began a "concerted push" to find letters and writings of the young officers in the unit.[10] During this push, Nelson discovered a large number of letters and writings from the men who would eventually take center stage in his next book, *Five*

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[3] JAMES CARL NELSON, THE REMAINS OF COMPANY D: THE STORY OF THE GREAT WAR (2009).
[4] JAMES CARL NELSON, *About the Author*, http://theremainsofcompanyd.com/about.html (last visited Sept. 9, 2013).
[5] *Id.*
[6] *Biography*, JAMES CARL NELSON, http://www.amazon.xom/JamesCarlNelson/e/B00294I39A/ref=ntt_dp_epwbk_01 (last visited Sept. 9, 2013) [hereinafter *Biography*].
[7] *Id.*
[8] NELSON, *supra* note 4.
[9] NELSON, *supra* note 1, at ix.
[10] *Id.*

Lieutenants, resulting in "a natural bookend" to *The Remains of Company D*.[11] The fact these lieutenants happened to all be Harvard-educated and, more importantly, kept meticulous journals and volumes of letters led to the creation of this book.[12] Nelson, educated at the University of Minnesota,[13] does not appear to have set out to research the exploits of Ivy League graduates in the Great War, but seems instead to have arranged the stories he had already researched. This becomes evident in the disjointed organization of the book and tenuous relationship of the overall narrative to the Harvard education of these five lieutenants.

III. Overcoming Censorship

Nelson intended to uncover what drove these privileged young Harvard men to enlist, how they interacted with those from a lower social class, and if they were superior leaders due to their privileged education and upbringing.[14] He generally succeeds in this endeavor and, truly, his greatest achievement in *Five Lieutenants* is his research. Gathering material for the book was a Herculean task, considering diaries and journals were forbidden during World War I, lest the enemy recover them. Further increasing the difficulty of finding source material was the "Draconian censorship" of the enlisted letters to home and the fact that many enlisted soldiers simply could not write for a variety of reasons: some were recent immigrants, others were barely literate, and many had almost no education.[15] Nelson found exception to these obstacles in the copious writings from the five lieutenants of the book's title: Richard Newhall, George Redwood, George McKinlock, George Haydock, and William O.P. Morgan.[16] In addition to the scarcity of source material, given the relatively little time Americans spent in the Great War, critical writing on the subject is virtually non-existent and personal accounts written after the war tended to be overly patriotic and lacked detailed descriptions of life on the front line.[17] A quick glimpse

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[11] *Biography*, *supra* note 6.
[12] NELSON, *supra* note 1, at ix.
[13] NELSON, *supra* note 4.
[14] *Biography*, *supra* note 6.
[15] NELSON, *supra* note 1, at ix.
[16] *See id*. at ix–xi.
[17] *See* David Lundberg, *The American Literature of War: The Civil War, World War I, and World War II*, AM. Q., vol. 36, no. 3, 1984, at 373, 378.

of the bibliography[18] in *Five Lieutenants* demonstrates that Nelson is a capable and determined researcher, synthesizing numerous personal accounts, newspaper articles, and official records into a compelling, mostly coherent narrative.

While Nelson does a magnificent job of combining the various diaries and letters of his protagonists[19], there is a sense that, in order to focus primarily on Harvard-educated lieutenants, more interesting officers' stories were either bypassed or glossed over. Perhaps the five lieutenants in Nelson's book stand out not due to their actions in the Great War, but only because they were such prolific writers. That we are denied understanding other junior officers, who might be in many ways much more interesting and inspiring, simply because Harvard lieutenants wrote more than their counterparts leaves the reader feeling a bit cheated. It leaves the impression that Nelson made the choice to focus on Ivy League officers simply because it made a nice theme and catchy title.

One notable example of this omission is that of Second Lieutenant Mort Stromberg, easily the most fascinating person in the book. Stromberg grew up in New York but, preferring to be transient, became the travelling companion of an invalid for a number of years, was left destitute when his ward passes, and somehow joined the rebels during the Cuban Revolution in 1895.[20] There he was injured and rescued by two women on a donkey.[21] Shortly after, he changed his name on a whim, enlisted in the U.S. Army, fought in the Philippines, was cited for distinguished action, patrolled the Mexican border in 1917 with the 28th Infantry Regiment.[22] When the Great War started, he was offered a battlefield commission, shipped off to France, helped train Harvard-educated Lieutenant George Haydock, fought in the Great War, and ultimately was killed by sniper fire in July 1918.[23] Even his death is dramatic, as he died with his pipe in one hand and tobacco in the other; foreshadowing his death by telling his men, "When you see me on the

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[18] NELSON, *supra* note 1, at 347.
[19] *See id*. at 33–46.
[20] *Id.* at 116.
[21] *Id.* "Two girls 'whose brothers were in the rebel army found me lying unconscious, and dragged me to their home on sort of a sled drawn by a jackass. I don't know anything about it but what they told me afterwards.'" *Id.*
[22] *Id.* at 117.
[23] NELSON, *supra* note 1, at 117.

battlefield, I will be smoking my pipe just like this."[24] He is relegated to less than two pages in the novel.[25]

While Nelson's ability to research is impeccable, his writing is, sadly, less so. The book is laid out in a jarring manner, often jumping among protagonists, locations, and time with little warning or transition. For example, George Redwood, one of the protagonists, is not introduced until page 130, a third of the way into the book.[26] By the time he is introduced, every other character has had their background discussed at length and were all training in France before the narrative is interrupted. This introduction is both a disservice to the reader and to George Redwood, whose exploits and heroism deserve better.[27] To compound this difficulty, Nelson often uses flowery prose, usually at the beginning of a chapter, which is unnatural and clumsy, as when Nelson describes the German front-lines from Richard Newhall's perspective

> They were so close now they felt as they could reach out and touch them, and through a cold, sputtering rain and heavy mist they squinted intently past the detritus of no-man's-land, past the craters and curling and rustling bands of barbed wire to where the dark forms seemed to lull without a care in the world, hanging wash and cooking their bread and sausages under think plumes of white smoke.[28]

It is unclear whether this was paraphrased writing of one of the lieutenants or if Nelson felt he needed to wax eloquently to make the book better literature. Either way, it is unnecessary. Nelson's writing is best when he communicates in his natural, no-frills journalistic style, as he does for the best parts of the story. The protagonists and material are engaging enough without clumsy prose distracting from what is

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[24] *Id*.
[25] *Id.* at 115–17.
[26] *Id.* at 130.
[27] George Redwood was a scout, mapping machine gun posts and German strong points. He first achieved fame on March 29, 1918 when he led four Americans to capture prisoners of war. *See id.* at 188. On May 29, 1918, he was wounded in the shoulder by machinegun fire but refused to go to the aid station. Later that day, he was again wounded, this time in the jaw. He was ordered to go to the hospital, but refused and left the aid station to return to his men. He was again shot in the chest by machinegun fire, refused any aid, rescued a wounded Soldier, and was killed by artillery while trying to lead a counterattack against the German lines. *See id.* at 270–73.
[28] *Id.* at 53.

otherwise a great book.[29] Despite these shortcomings, Nelson manages to craft an engaging narrative while illuminating common threads of the war experience, creating a work that is informative for junior leaders in today's military.

IV. From the "Great War" to the "Long War"

Nelson's work brings forth an interesting comparison between the doughboys[30] of World War I and junior officers fighting the Long War.[31] The frustrations of lieutenants of the 28th Infantry Regiment in 1918 would be familiar to any junior officer serving in the early stages of Iraq circa 2004;[32] supplies were inadequate and the training was driven by higher commanders, mostly out-of-touch officers who were fighting the previous war. As Shipley Thomas, a junior officer with the 26th Infantry Regiment, lamented about "the incompetence of generals who taught open warfare and attack, 'when any fool could see that it was the Germans, and not us, who were going to attack.'"[33] Richard Newhall describes the frustrations of conducting unnecessary drill and ceremony in a combat zone when he lambasts a marching review for a general officer; requiring an earlier-than usual wake up for his troops, a long march, and standing in a field for an hour only to have the ceremony last no longer than ten minutes.[34] Newhall would likely speak for any lieutenant who has been forced to attend a formal ceremony in Iraq or Afghanistan, describing the ordeal as "of one those stupid, unnecessary, very military things."[35]

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[29] The narrative suffers also from a lack of editing, as the book contains grammatical and editing errors, occasionally leaving out quotation marks, to cite one example. With a better editor to keep Nelson from wandering into an unnatural writing style, this book could have been much more digestible and enjoyable.

[30] Slang term for an American Soldier in WWI, although its origins are unknown. *The Origins of Doughboy*, http://www.worldwar1.com/dbc/origindb.htm (last visited Sept. 9, 2013).

[31] A term for the Global War on Terrorism, as coined by General John P. Abizaid in 2004, see Bradley Graham & Josh White, *Abizaid Credited With Popularizing the Term 'Long War,'* WASH. POST, Feb. 3, 2006.

[32] This reviewer deployed to Baqubah, Iraq, in February 2004 until November 2005 as a Platoon Leader for C Battery, 1st Battalion, 6th Field Artillery Regiment, 1st Infantry Division. The transition from a field artillery battery to a maneuver combat company was filled with the same frustrations.

[33] NELSON, *supra* note 1, at 86.

[34] *See id.* at 166.

[35] *Id.*

Nelson's research provides numerous examples of the experiences and frustrations suffered by the doughboys that are still relevant today, be they: the disparity of living conditions for front line combat troops versus the support troops,[36] a Christmas meal sent from the United States and served in a warzone,[37] losing track of days and weeks, as each is the same,[38] the sheer amount of gear that a soldier was expected to carry into combat,[39] and even paying out claims to locals with destroyed property.[40] Nelson's portrayal of the challenges and frustrations facing junior officers in World War I is important, because they keep a reader engaged and make the book relevant to not just war historians, but to officers in today's Army. A junior officer can gain personal insight from the lessons learned by George Haydock and Richard Newhall, who were in their shoes almost a century ago.

Ultimately, Nelson answers his question of whether these five lieutenants were better leaders simply because they attended Harvard—they were not. The timeless truth that Nelson uncovers, using the exploits of primarily Haydock and Newhall,[41] is that great leaders are made, not born. Privilege and education alone do not make a leader.

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[36] *Id.* at 211. Haydock describes eating at a hotel after coming off two weeks in the trenches. He enters the hotel, "looking like a tramp . . . covered in mud of a month's collection, no belt, and in need of a haircut." *Id.* Upon entering the hotel, he encounters "two staff 2nd lieutenants all shined up within an inch of their lives." *Id.* "They thought we had the plague (as a matter of fact we were only unclean) in a way that made me smile. It is a funny war." *Id.*

[37] *Id.* at 126. Haydock describes eating turkey dinner and the lieutenants giving each other stockings full of cigarettes, chewing gum, and an orange.

[38] *Id.* at 205. "Like many other doughboys in France that spring, Morgan often lost track of the time, his duties, the sameness of the days, and the changing French weather conspiring to leave him unsure if it was Monday or Sunday." *Id.* at 205.

[39] *Id.* at 123. George Haydock describes his kit in great detail. "Starting at the bottom I wear the heaviest underclothes I own, flannel shirt sweater, and uniform, either my big boots or heavy shoes and spiral putties. Over this I wear my sheepskin coat, carry a pack with two days rations, blanket poncho, shelter tent, and an extra pair of shoes and mess kit. On my belt I wear a canteen, first aid packet, automatic and two extra clips, a Veri pistol, which is a modified form of a shotgun to fire rockets with, around my neck I wear an English small box respirator which is a gas mask to take air in and is about a foot square. On the other side I wear a French gas mask . . . dispatch case, and am supposed to have field glasses to crown the whole business." This is in addition to his helmet, which he describes as a "tin hat." *Id.*

[40] *Id.* at 168. Newhall describes sending Soldiers to guard rabbits during a fire drill to "protect the Government from exorbitant claims for lost property." *Id.*

[41] *See generally id.* at 232–38. While the other Harvard lieutenants make appearances through the book, the focus is certainly on Haydock and Newhall. Most of the second half of the book in the story focuses on their friendship and growth as leaders.

Using the private thoughts and exploits of Haydock and Newhall, Nelson demonstrates that mentorship, humility, and introspection are more determinative of a person's leadership ability than education and upbringing.[42] One example of a positive mentor Lieutenant Colonel Jesse Cullison, who taught Newhall effective communication under stress by "know[ing] exactly what he wants and [being able to] tell his subordinates what he expects of them briefly and clearly, without scolding, lecturing, or threatening them."[43]

As an important counter-point, a lieutenant can learn just as much by watching a poor leader.[44] Nelson shows that great leaders are humble and rely on the knowledge of others. Haydock, originally timid and unsure, learned to rely on his noncommissioned officers, writing, "If they will help me, all will be well."[45] He eventually becomes assertive and confident, winning the respect of his men. Through Haydock, Nelson illustrates that with mentorship and training, a lieutenant can find the balance between having a sense of humor and strictly enforcing standards.[46] Most importantly, Nelson shows a great leader places the needs of his men before his own. This is exemplified again in Haydock, who died running up and down the line telling his men to "keep lower for your own sakes."[47] Ultimately, it was not Harvard that made Haydock and Newhall great; it was their humility, their desire to learn, and their mentors.

V. Conclusion

> '*Waal*, now,' said an old soldier once to a young lieutenant, '*soldiers is queer bein's* [sic]. *Yer have to get so yer understand 'em'*[sic]. *Getting so you understand em' may, of course, come to an officer by the gift of God, without the necessity of having to live with soldiers; but generally it does not.*[48]

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[42] *Id.*
[43] *Id.* at 232.
[44] *Id.* at 213, 232 (describing how Newhall observed traits he despised in his Company Commander, Captain Francis Van Natter).
[45] *Id*. at 115.
[46] *See. id.* at 229–30.
[47] *Id.* at 266.
[48] *Id.* at 229. This quotation is from Robert Bullard, the 1st Division's Commander. Haydock, "who struggled to understand' em [sic] the previous winter, had come to know

Despite the jarring organization and occasional clumsy prose, Nelson crafted a book that is worthy of the time and effort to read it. Given the sheer magnitude of the effort required to synthesize the various stories of these five Harvard men, Nelson's less-than-perfect writing can be forgiven. The stories of these five lieutenants, and those of the supporting characters, from the 28th Infantry Regiment during World War I are timeless; their experiences and suffering are relatable to those serving in the military today. Every leader should read about the exploits of our forefathers in World War I with a critical eye toward the lessons they learned, paid for in blood on the battlefield.

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the men in his platoon individually and earned their respect . . . ." *Id.* Through the course of the second half of the novel, Nelson uses the diaries of Haydock and Newhall to show the progression of these young lieutenants from clumsy and clueless lieutenants to competent leaders, as fine as any that America has ever produced.

THE SAVIOR GENERALS: HOW FIVE GREAT COMMANDERS SAVED WARS THAT WERE LOST—FROM ANCIENT GREECE TO IRAQ[1]

REVIEWED BY MAJOR DAVID TRAINOR[*]

I. A Classicist's Take on Military Turnaround Specialists

When Apple Computers, Inc. was on the brink of bankruptcy in the mid-1990s, Steve Jobs was called back in to turn the company around.[2] When the Internal Revenue Service stood accused of targeting political opponents in 2012, the President called in a turnaround specialist to clean up its image.[3] When townspeople in Hollywood's version of the Wild West need to be saved, they call on gun-slinging outsiders to turn the tide.[4] From business to government to popular western films,[5] Americans are familiar with the phenomenon of the outsider called in to save a seemingly desperate cause. In *The Savior Generals*, author Victor Davis Hanson argues that armies in conflict sometimes need such a turnaround specialist to ride in and save a war. Using a broad range of historical sources he then attempts to profile the type of general who fits that mold.[6] Part historical survey, part leadership essay, and occasional polemic against politics and bureaucracy in military circles, *The Savior Generals* is an easy read for the casual reader of military history. While it makes a thought-provoking addition to a growing body of literature teaching leadership principles by historical biography,[7] it is likely not a comprehensive answer to the question of who or what exactly saves lost wars.

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[1] VICTOR DAVIS HANSON, THE SAVIOR GENERALS: HOW FIVE GREAT COMMANDERS SAVED WARS THAT WERE LOST—FROM ANCIENT GREECE TO IRAQ (2013).

[2] *Apple Inc.: The Greatest Turnaround in Corporate History?*, OXYGEN, THE TURNAROUND MAG., No. 6, Autumn 2011, http://www.endlessllp.com/oxygen/apple-inc-issue6.aspx; *see also* WALTER ISAACSON, STEVE JOBS, 359–65 (2012).

[3] Josh Hicks, *Obama Picks Restructuring Expert John Koskinnen to Head IRS*, WASH. POST, http://www.washingtonpost.com/politics/federal_government/obama-picks-restructuring-expert-john-koskinen-to-head-irs/2013/08/01/bf4a3e30-fada-11e2-9bde-7ddaa186b751_story.html (last visited Aug. 27, 2013).

[4] DAVIS, *supra* note 1, at 240.

[5] *Id.* at 238–41.

[6] *Id.* at 2–7, 253–95.

[7] *Id.* at 3–4.

Victor Davis Hanson is educated in the classics and has written extensively in that area.[8] He has been a visiting professor of classics or history at various institutions including Stanford University and the U.S. Naval Academy.[9] Currently a writer for the *National Review Online*, Hanson has been a contributor of weekly articles for the past decade.[10] In 2007 he wrote at length on the Iraq War and generated a series of articles introducing many of the personalities and concepts found in *The Savior Generals*.[11]

II. Of What Stuff a Savior General Is Made

In *The Savior Generals* Hanson skillfully interweaves history to provide a glimpse into some common characteristics of generals who proved themselves qualified to fill the important but limited leadership role required of wartime turnaround specialists.[12] Following this theme, Hanson offers an easily understood historical text containing biographical sketches of five generals, ranging from Themistocles of ancient Athens, Flavius Belisarius of Byzantium, William Tecumseh Sherman, Mathew Ridgeway of Korean War note, to present day David Petraeus.[13] Using succinct and engaging narrative, to the point that the reader can easily visualize battles without the need for much illustration, Hanson details wars deemed to have been "lost" over the course of two millennia. He then sets out what he considers the primary factors in saving these wars—the unique characteristics of Savior Generals who came in at critical moments to turn the effort, the participants, and public opinion around.[14] Despite taking a bit of literary license in attempting to

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[8] Hoover Inst. of Stanford Univ., http://www.hoover.org/fellows/10529/short-bio (last visited Sept. 10, 2013).
[9] *Id.*
[10] THE NAT'L REV. ONLINE, http://www.nationalreview.com/author/victor-davis-hanson/page/20/0?splash= (last visited Sept. 10, 2013).
[11] Victor Davis Hanson, *Iraq's Savage Ironies*, NAT'L REV. ONLINE (November 21, 2007, 12:00 PM), http://www.nationalreview.com/articles/222892/iraqs-savage-ironies/victor-davis-hanson.
[12] HANSON, *supra* note 1, at 7.
[13] *Id.* at 8–237. Based on the author's theme, David Petraeus is a logical contemporary choice for this study. However, the paucity of protracted wars fought by consensual societies in the last half-century where victory could be said to have been snatched from the jaws of defeat leaves little choice of other examples. Without belittling Petraeus's accomplishments or character, a reader of this book who is also familiar with the recent war in Iraq, might be forgiven for thinking that Hanson's treatment of Petraeus's value and virtues is a bit more stylized than historically complete.
[14] *Id.* at 1–7.

correlate his generals' professional success with their personal and moral traits,[15] Hanson generally succeeds in providing a useful historical profile of the strategic and tactical capabilities of these Savior Generals.[16]

At the outset Hanson limits his biographical pool to generals from "consensual societies."[17] Although done at the expense of a more robust empirical analysis, his restrictive data pool makes his thesis more useful to readers from those societies.

While he offers a moralistic basis for picking consensual societies, this restriction ultimately allows him to neatly frame a definition of wars as lost when a free nation's people lose interest in them or see no way to achieve a desirable end.[18] Hanson then argues that these lost wars can be saved by military leaders who find ways to reverse public opinion with short-term battle wins, while simultaneously implementing new strategies allowing others to achieve the nation's overall war aims.[19]

These Savior Generals often come into a theater facing civilian disillusionment[20] or despair[21] and generally following a string of recently lost battles or men.[22] They quickly generate battle victories by flexibly adopting new tactical methods and using a combination of charisma and leadership to boost Soldier morale.[23] For this theme of tactic adoption and morale building, Hanson's most persuasive and logically consistent example is the Athenian general, Themistocles. In the Athenian-Persian wars of the early 5th century B.C., years of infantry tradition and a recent ground victory at Marathon convinced Greek strategists to prepare solely for infantry engagements with Persia.[24] Against the Persian navy and the huge numbers of soldiers it was capable of bringing to Greek shores, that strategy soon proved to be a miserable failure.[25] Following the Greek defeat at Thermopylae, the Athenian national defense strategy devolved into one of simply surviving as a people on a piece of land.[26] Using a

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[15] *Id.* at 238–41, 249.
[16] *Id.* at 241–49.
[17] *Id.* at 76.
[18] *Id.* at 4, 7, 247–48.
[19] *Id.* at 246.
[20] *Id.* at 192.
[21] *Id.* at 148–49.
[22] *Id.* at 26–29, 108–11.
[23] *Id.* at 40, 91, 247–49.
[24] *Id.* at 16–17.
[25] *Id.* at 24–25.
[26] *Id.* at 12, 26.

broad slate of references,[27] Hanson adeptly describes Themistocles's tactical prowess at Salamis in the naval victory that saved the Athenian state from annihilation.[28] Hanson then persuasively argues that Themistocles's strategic foresight in building a peacetime navy to counter a return of the Persian navy,[29] his personal charisma in convincing Athenians to abandon their city to Persian attack,[30] and his ability to understand enemy weaknesses[31] explains why he was the pivotal factor in saving the war for Athens.

Hanson next introduces his readers to Flavius Belisarius, a 6th century A.D. Byzantine general.[32] Campaigning far from Constantinople and outnumbered by his enemies on their own territory, Belisarius successfully reclaimed for Constantinople vast North African and Italian lands from Vandal and Goth control.[33] Using accounts from Belisarius's personal biographer and later historians, Hanson paints a persuasive picture of a soldiers' general able to rally his men by dint of personal charisma, willing to adopt successful battle tactics such as archery, and having the foresight to create relations with indigenous people by coopting rather than subjugating them.[34]

Hanson convincingly casts William Tecumseh Sherman in the same light, explaining how his ability to connect with his soldiers on a personal level, willingness to avoid large battles, and understanding of the utility of property destruction in the Deep South allowed his soldiers to break the back of the Confederacy when many of his countrymen had given up hope of winning the war.[35] Finally, and equally as adroitly, Hanson explains how Mathew Ridgeway's and David Petraeus's ability to personally connect with scared and sometimes disaffected soldiers and their willingness to use contrarian tactics turned the Korean War in 1950 and the Iraq War in 2007–2008 away from seeming imminent loss.[36]

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[27] Though Hanson draws liberally from Herodotus, Thucydides, and Diodorus, there are understandably few contemporary sources to draw from.
[28] HANSON, *supra* note 1, at 29–34.
[29] *Id.* at 19.
[30] *Id.* at 40–41.
[31] *Id.* at 14.
[32] *Id.* at 49.
[33] *Id.* at 66–79.
[34] *Id.* at 90–93.
[35] *Id.* at 136–39.
[36] *Id.* at 140–237.

After detailing the tactical miracles wrought by his Savior Generals, Hanson nests their battlefield successes in a broader explanation of the value their strategic vision gave to their respective nations. This, he argues, is how they saved their respective wars. Themistocles's use of close quarters and heavy ships at Salamis certainly saved Athens on that fateful September day in 480 B.C., but the existence of an effective Athenian Navy was from then on a deterrent to Persian kings seeking to repeat imperial advances into Greek territory.

It was also a springboard from which Athenians could exercise their own imperial ambitions.[37] Belisarius's positive treatment of indigenous populations in his various theaters saved Byzantine lives and won battles during his campaigns.[38] Strategically, this practice also heightened the chances for a lasting achievement of Byzantium's ultimate goal, acceptance of Byzantine rule over the conquered lands.[39] Sherman's execution of total war in Atlanta tactically broke Lee's supply line, but more importantly, it finally brought the war home to the Deep South, convincing its citizens to "cease the production of war material and contribution of men to the cause."[40] In the darkest hours of the 1950–51 Korean winter, Ridgeway's singular understanding of Chinese supply constraints and American capabilities allowed American troops to push Chinese soldiers out of South Korea and over the 38th parallel which likely acted as a strategic deterrent to Russia and China from further Asian or European expansion.[41] In the same way, putting more American soldiers on Iraqi streets during the 2007–2008 surge was tactically successful when it physically took thousands more insurgents off the battlefield and reduced fighting.[42] From a strategic perspective, though, the surge secured breathing room so nation-building efforts could sow seeds for a viable democratic nation in the heart of the Middle East, the ostensible American endgame.[43]

Hanson also successfully argues that his Savior Generals are willing to steer clear of outdated tactics and aggressively pick battles while avoiding significant casualties.[44] This instills loyalty and confidence in

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[37] *Id.* at 47.
[38] *Id.* at 68, 81–82.
[39] *Id.* at 82, 91.
[40] *Id.* at 131, 134.
[41] *Id.* at 165–66.
[42] *Id.* at 221.
[43] *Id.* at 217–21.
[44] *Id.* at 136–37, 247.

troops and generates civilian support at home.[45] Hanson also makes a compelling point when he argues that his generals are effective because they understand the crucial role played by civilians on both sides of the conflict.[46] At home, his generals cultivate relationships with civilians, either the civilian leadership or the populace as a whole. This allows them to move forward with innovative tactics even though military peers or superiors disapprove of them.[47] Themistocles used the Athenian assembly to build a navy when his fellow generals saw no need for it.[48] Ridgeway remained loyal to Truman's war aims despite being subordinate to General MacArthur who was often opposed to Truman.[49] Petraeus worked in a bipartisan fashion with Congress and the President's office to maintain support for a surge that his peers and superiors believed doomed to fail.[50] In theater, these generals recognize that sustaining a strategic win requires acceptance of the winner's strategic aims by the losing civilian populations. Belisarius and Petraeus defused civilian populations by coopting them using counterinsurgency techniques,[51] while Sherman used property destruction to convince southerners to accept the reality of northern military superiority.[52]

III. A Thesis Perhaps a Bit Overplayed?

Though Hanson's themes are supported by his sources and his thesis is generally analytically sound, he sometimes moves away from his role as military historian and attempts to illuminate personal or psychological characteristics he considers common to Savior Generals.[53] Unfortunately, as he attempts to correlate social, psychological, and moral makeup with saving lost wars, his data sometimes moves from the reasonably empirical to the anecdotal, and occasionally ends up in the realm of somewhat fanciful.[54] While writers of social science self-

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[45] *Id.*
[46] *Id.* at 244–46.
[47] *Id.*
[48] *Id.* at 20–21.
[49] *Id.* at 168–69.
[50] *Id.* at 226–27.
[51] *Id.* at 59, 227–28.
[52] *Id.* at 133.
[53] *Id.* at 238–41.
[54] Neither Ridgeway, Petraeus, nor Sherman took their leading roles in the face of widespread approval for their predecessor's tactics or lack of previous contact with their particular conflicts. Rather than consensus that past practice was working, all arrived at a time when it was recognized that something different needed to be done. *Id.* at 242.

realization tomes are due some factual latitude, Hanson's credentials as a historian and the book's professed purpose of identifying Savior Generals of the future[55] demand a bit more rigor in choosing the facts underpinning his conclusions. At some points, Hanson's evidence even hints of romantic musing or social moralizing. This is particularly true when he describes the "retreat into the shadows"[56] of his "mavericks and loners."[57] Themistocles's possible desertion to Persia and rumored suicide after being ostracized by class conscious conservatives angered by expanding Athenian citizenship to common sailors,[58] Belisarius's fabled retirement mendicancy[59] and equally real political drama with Theodora,[60] and Petraeus's CIA career brought short by infidelity,[61] lend little to understanding how these men saved wars, even though they make for a more interesting story.

Similarly distracting is Hanson's preoccupation with painting his heroes as iconoclastic class warriors.[62] He spends a bit too much of the reader's time eulogizing Themistocles as a mixed-race, low-born

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Hanson's argument that Petraeus resigned from the Central Intelligence Agency, rather than being the result of political backstabbing by bureaucrats, is probably attributable to a more pedestrian cause like the difficulty of holding a high security clearance in light of both his personal and electronic indiscretions. *Id.* at 249. In this same vein is Hanson's argument that Belisarius was singled out for Theodora's wrath because of his morality and good character. *Id.* at 87–89, 93. One might read that with a grain of salt. Theodora's mistreatment of her subjects was sufficiently widespread and egregious to merit an entire sixteenth chapter in Procopius's Secret History. *See* PROCOPIUS: SECRET HISTORY, *translated by* Richard Atwater (1927), *available at* http://www.fordham.edu/halsall/basis/procop-anec.asp.

[55] *Id.* at 250.

[56] *Id.* at 249–50.

[57] *Id.* at 238, 250. Excepting Sherman's brief break from the Army in the 1850s, each general was a lifelong officer. To advance as far as they did in their respective careers, one must question whether they were truly iconoclastic Cassandras in waiting, or were simply good officers who had the right ideas at the right time and the fortune to be in a position to implement them. Likewise, Hanson's portrayal of Petraeus as being fortuitously summoned from the obscurity of the Fort Leavenworth schoolhouse to save the day in Iraq ignores the fact that in the preceding four years he held two and threestar posts in Iraq. As a former division and multi-national forces commander in the middle of the fight, he had not exactly been previously incapable of exercising his strategic vision.

[58] *Id.* at 34–40. Hanson acknowledges the flimsy historical basis for his contentions as well as the idea that Greek generals often met with similar fates. *Id.* at 257–58, endnotes 33–39.

[59] *Id.* at 259–60, endnotes 1 and 2.

[60] *Id.* at 87–89, 93.

[61] *Id.* at 236.

[62] *Id.* at 248–49.

democrat unjustly punished by landed Greek conservatives,[63] Belisarius as an apolitical moral champion tragically whipped about by a weak-kneed emperor and Byzantine court intrigue,[64] Sherman as an unjustly maligned down-to-earth westerner riding in to save the day from incompetent east coast soldiering,[65] and Petraeus as the victim of establishment politicians blocking a future presidential run.[66] Ranging from the purely anecdotal to the admittedly unsubstantiated,[67] these types of colorful interjections paint a tragic hero in the classical tradition, but they detract from the book's historical credentials and do not help the reader profile future Savior Generals.[68]

Finally, while Hanson consistently argues that Savior Generals are the primary driving force in "saving" lost wars, some of his earlier writings on the Iraqi surge indicate otherwise. In a December 27, 2007, article, Hanson painted a much more diminished picture of General Petraeus's role in the Iraq turnaround, calling the surge simply a "tip" of "the strategic balance" in a war where "[t]ens of thousands of now mostly unknown American soldiers took a frightful toll on insurgents and terrorists between 2003–2007, to such an extent that many enemy groups were increasingly incapable of continuing."[69] Given these issues, one can and certainly should weigh Hanson's choice of examples and his impartiality in rendering history to support his thesis.

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[63] *Id.* at 38–39, 13.
[64] *Id.* at 49–51, 83.
[65] *Id.* at 113, 131, 269, endnotes 23–25.
[66] *Id.* at 235.
[67] *Id.* at 49, 87, 89, 94, 249, at 259–60, endnotes 1 and 2. Hanson bookends Belisarius's story by alluding to his mythical downfall, a story belied by Hanson's own admission that this rendition is likely little more than a romantic tale. Even if true, an inordinate number of Byzantium's highest political officials regularly took leave of their respective jobs by being crippled, forcibly tonsured, blinded, exiled, or murdered in myriad gruesome ways. Falling on hard times at the end of a high political life in the East Roman Empire, like biblical rain, was a fate which fell equally on the just and the unjust. *See* JOHN JULIUS NORWICH, A BRIEF HISTORY OF BYZANTIUM (1997) for an engaging treatment of a millennium of murder and dismemberment at the top of the Byzantine political heap.
[68] *Id.* at 42, 248.
[69] Victor Davis Hanson, *A Long War in a Nutshell, A Look Back*, NAT'L REV. ONLINE, (Dec. 27, 2007, 12:00 PM), http://www.nationalreview.com/node/223168/print.

IV. Conclusion

When focusing on the tactical and strategic minds of his subjects, Hanson successfully profiles soldiers' generals who understand strategy, adopt new tactics, change public opinion, and set their nations on a path to achieving strategic end aims. His historical vignettes are quick, pleasurable reads, grounded in a wide selection of primary, secondary, and tertiary sources. If read as interesting historical snapshots, *The Savior Generals* is informative, delightful, and well worth the reader's time. However, the author's limited choice of biographies, failure to discuss other factors that possibly saved his lost wars, and focus on the heroic and tragic personal aspects of his subjects make his effort to construct a model of future Savior Generals more thought-provoking than practically useful.

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