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CONTENTS

Articles

Human Rights Convergence and Future Detention Operations in the Indo-Pacific
Colonel Ryan B. Dowdy *321*

Other Security Forces Too: Traditional Combatant Commander Activities Between U.S. Special Operations Forces and Foreign Non-Military Forces
Major Jason A. Quinn *336*

Paying for Their Deaths: How the "Widow Tax" Targets and Penalizes Surviving Spouses of Fallen Soldiers and Retirees
Major Jenna C. Ferrell *381*

The First Thomas J. Romig Lecture in Principled Legal Practice
Mr. Alberto Mora *433*

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Volume 227
Issue 4

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HUMAN RIGHTS CONVERGENCE AND FUTURE DETENTION OPERATIONS IN THE INDO-PACIFIC

COLONEL RYAN B. DOWDY*

I. Introduction

The Indo-Pacific Command (USINDOPACOM) Area of Responsibility (AOR) is comprised of thirty-six nations and over half of the world population, some of the world's largest militaries, and a significant portion of the world's maritime commerce.[1] Much of the international community is inextricably tied to this region through commerce, politics, and security interests. These activities are governed by international law, primarily developed through treaties established as

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[1] *USINDOPACOM Area of Responsibility*, U.S. INDO-PACIFIC COMMAND HOME PAGE, www.pacom.mil/About-USINDOPACOM/USPACOM-Area-of-Responsibility/ (last visited Jan. 15, 2019).

part of the post-World War II international order under the United Nations (U.N.).[2]

The complexity of the USINDOPACOM AOR makes armed conflict likely in the near future.[3] While international law governs armed conflict, the debate as to which bodies of international law apply in armed conflict is not settled.

The U.S. view is that the Law of War (LOW) is *lex specialis*, displacing laws that normally apply in peace.[4] Many other states, to include several U.S. allies and key partners in the USINDOPACOM AOR, either expressly reject this view, or, through their own official statements and jurisprudence, indicate a propensity to reject this view.

Generally, the opposing view asserts that states' legal obligations during peace, specifically those pertaining to human rights, continue during armed conflict without being wholly displaced by the LOW. This opposing view is commonly referred to as the legal concept of convergence, and the body of law is generally referred to as International Human Rights Law (IHRL).[5] The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), among other key human rights treaties, instruments, and customary international law (CIL), make up IHRL[6]

The complexities of this debate are myriad, and arguments for and against convergence have been litigated and made the subject of numerous publications. The purpose of this article is not to argue the virtues of the

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[2] U.N. Charter (1945).

[3] *Statement of Admiral Harry B. Harris Jr., U.S. Navy Commander, U.S. Pacific Command Before the House Armed Services Committee on U.S. Pacific Command Posture*, 115th Cong. (2018).

[4] DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL 7-10 (2016) (noting that the DoD Law of War Manual, paragraph 1.6.3.1, provides that during armed conflict human rights treaties continue to apply to matters that are within their scope of application and that are not addressed by the law of war).

[5] *E.g.*, Geoffrey Corn, *Mixing Apples and Hand Grenades – The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 INT'L HUMAN. LEGAL STUD. 52 (2010); Naz Modirzadeh, *The Dark Sides of Convergence: A Pro-civilian Critic of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 U.S. NAV. WAR C. INT'L L. STUD. SERIES 349 (2010).

[6] UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_en (last visited Jan. 15, 2019).

LOW vis-à-vis IHRL, or re-hash this well documented discourse. The purpose of this article is to survey our Indo-Pacific region allies' legal obligations in detention operations and identify areas of divergence with the U.S. Department of Defense (DoD) view. Specifically, this article focuses on the likely friction that will arise regarding the detention of individuals that the United States classifies as "unprivileged belligerents."[7] This issue, if not addressed now between the United States and its allies and partners in the Indo-Pacific AOR, will create legal vulnerabilities caused by lawfare or lack of inter-operability.

For example, Russia's use of "irregulars" in Ukraine, China's militarization of their civilian fishing vessels, and the activities of rogue states and Violent Extremist Organizations (VEOs) indicate their proclivity to operate in legal grey zones during competition activities and low intensity armed conflict.[8] This practice has become known as conducting "lawfare."[9] Identifying and addressing areas of divergence now is essential to reducing the risk of disruption through lawfare.

The operational impact of convergence is not theoretical. United States Central Command (USCENTCOM) encountered hurdles in conducting coalition detention operations in Iraq and Afghanistan.[10] Lawsuits brought against U.S. ally the United Kingdom (U.K.) compounded these hurdles. Specifically, human rights lawsuits brought before the European Court of Human Rights (ECtHR) and within the U.K. against the British Armed Forces severely disrupted the U.K.'s ability to conduct detention operations.[11]

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[7] LAW OF WAR MANUAL, *supra* note 4, at 102-03 and 160-62.

[8] HARRIS STATEMENT, *supra* note 3; *Statement of General Curtis M. Scaparrotti, Untied States Army Commander, United States European Command to the United States Senate Committee on Armed Services in the EUCOM's 2018 Posture Statement,* 115th Cong. (2018).

[9] *See* John Carlson & Neville Yeomans, *Whither Goeth the Law - Humanity or Barbarity,* THE WAY OUT - RADICAL ALTERNATIVES IN AUSTRALIA (M. Smith & D. Crossley, eds., Melbourne: Lansdowne Press 1975); Colonel Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts* (Nov. 29, 2001) (unpublished paper presented at Harvard University, Carr Center, Humanitarian Challenges in Military Intervention Conference), http://www.duke.edu/-pfeaver/dunlap.pdf (last visited Nov. 15, 2019).

[10] *See generally*, INVASION-INSURGENCY-CIVIL WAR, 2003-2006: THE U.S. ARMY IN THE IRAQ WAR 228-29, 428 (Joel D. Rayburn & Frank K. Sobchak, eds., 2019).

[11] Richard Norton-Taylor, "Military chiefs lead charge against Human Rights Act," *The Guardian Online* (April 8, 2015), https://www.theguardian.com/news/defence-and-security-blog/2015/apr/08/military-chiefs-lead-charge-against-human-rights-act (last visited February 10, 2019); *Al-Skeini and Others v. The United Kingdom*, App. No.

Furthermore, it is important to note that unlike the USCENTCOM AOR, the maritime nature of the USINDOPACOM AOR will present our competitors and adversaries an opportunity to manipulate IHRL as a form of lawfare beyond land domain operations. For example, the United Nations Convention on the Law of the Sea (UNCLOS), which addresses, among other things, rights of those detained at sea, may potentially serve as a new legal platform to challenge future coalition detention operations in the USINDOPACOM AOR.[12]

In order to frame the discussion on potential areas of divergence between the United States and its allies, this article first briefly reviews the European line of cases against the U.K. These cases will likely serve as persuasive authority for our allies and partners in the USINDOPACOM AOR. Then, this article considers the current legal posture of those allies in the Indo-Pacific region who appear to take a convergent approach by reviewing the official government statements, applicable laws, and open source military regulations and policies of Australia, Japan, the Philippines, and the Republic of Korea.

Worth particular analysis is New Zealand's legal posture. The U.S. military and the New Zealand Defense Forces (NZDF) continue to participate in coalition operations despite the suspension of the U.S.'s collective security obligations to New Zealand under the Australian-New Zealand-United States (ANZUS) security agreement.[13] Furthermore, the United States and New Zealand are "Five Eye" partners, and technically remain parties to the Southeast Asia Treaty, a multi-lateral collective defense agreement still in effect despite the dissolution of the treaty's

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55721/07 Eur. Ct. H.R. (2011), http://hudoc.echr.coe.int/eng?i=001-105606 (last visited Jan. 15, 2019); *Al-Jedda v. The United Kingdom*, App. No. 27021/08 Eur. Ct. H.R. (2011), http://hudoc.echr.coe.int/eng?i=001-105612 (last visited Jan. 15, 2019); *Hassan v. The United Kingdom*, App. No. 29750.09 Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-146501 (last visitedJan. 30, 2019); *Serdar Mohammed v. Ministry of Defence* (2017) UKSC 2 https://www.supremecourt.uk/cases/docs/uksc-2014-0219-judgment.pdf (last visited Jan. 15, 2019).

[12] United Nations Convention on the High Seas arts. 10, 11, 19, Apr. 29, 1958, 450 U.N.T.S. 11; United Nations Convention on the Law of the Sea arts. 94, 97, 101, 107, Dec. 10, 1982, 1833 U.N.T.S. 397.

[13] U.S. Dep't of State, Bureau of East Asian and Pacific Aff., U.S. Relations With New Zealand (2018); HARRIS STATEMENT, *supra* note, 3 at 37, 45.

North Atlantic Treaty Organization (NATO)-like enforcement organization, Southeast Asia Treaty Organization (SEATO).[14]

II. The European Model

Convergence is real, the significance of which is best illustrated through what our ally, the United Kingdom, endured in over a decade of litigation on these issues. Several cases from Europe stemming from British operations in Afghanistan and Iraq highlight the legal complexity of coalition detention operations: *Al-Skeini v. The United Kingdom*; *Al-Jedda v. The United Kingdom*; *Hassan v. The United Kingdom*; and *Serdar Mohammad v. The Ministry of Defence*.

This litigation occured in both the European Court of Human Rights (ECtHRs) and the U.K.'s domestic judicial system.[15] In aggregate, these cases stand for the extra-territorial application of human rights obligations, and although states must accommodate the LOW, they must also complement it with IHRL. Of particular note, the ECtHR rather explicitly disregarded Common Article 3 (CA3) as providing independent authority to detain or constituting relevant law under any modern armed conflict scenario.[16]

Our allies in the Indo-Pacific AOR are not members of a regional human rights convention like the European Convention on Human Rights (ECHR). However, the European model will likely serve as persuasive authority in Indo-Pacific regional domestic courts considering their countries' human rights obligations during armed conflict.

III. Allies and Partners in the Indo-Pacific

A. Australia

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[14] U.S. Dept' of State, Bureau of East Asian and Pacific Aff., U.S. Relations With Thailand (2018); HARRIS STATEMENT, *supra* note, 3 at 37-8.

[15] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

[16] Hassan v. The United Kingdom, App. No. 29750/09, Eur. Ct. H.R. (2014) 33, 96-107 http://hudoc.echr.coe.int/eng?i=001-146501 (last visited Jan. 19, 2019); Diane Webber, *Hassan v. United Kingdom: A New Approach to Security Detention ion Armed Conflict?*, 19 AM. SOC'Y OF INT'L L. 7 (2015).

Australia signed the ICCPR in 1972 and incorporated it into the law of the commonwealth in 1980.[17] The Australian delegation did not express any reservations at that time with respect to application of the ICCPR in armed conflict. However, in a 2009 response in the U.N.'s Universal Periodic Review process by the U.N. Human Rights Council, Australia's representatives stated that the LOW is the *lex specialis* in armed conflict. The Australian officials then described what is actually a complementary approach to the interplay of the LOW and IHRL. Specifically, the Australian officials acknowledged that certain aspects of Australia's obligations under the ICCPR extended to its activities in armed conflict when the two laws were not in conflict.[18] This view mirrors the accommodation approach applied by the U.K. Supreme Court in *Serdar*.

Under domestic law, Australia's treaty obligations do not constitute a direct source of individual rights or government obligations absent incorporation into its legislature. However, the High Court of Australia (High Court) made clear in its 1995 decision in *Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh* that treaties signed by Australia's executive are highly persuasive and shall apply when consistent with domestic law.[19] The High Court emphasized that treaty obligations serve as a "positive statement . . . to the world" that Australia's "executive government and its agencies will act in accordance" with its treaty obligations.[20]

The High Court's opinion established what is now referred to as the "legitimate expectation" principle, a principle followed by its courts and by Australia's Human Rights Commission.[21] The Australian Human Rights Commission interprets this principle to mean that Australia has

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[17] *Status of Treaties*, UNITED NATIONS TREATY COLLECTION HOME PAGE, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (last visited Dec. 20, 2018),

[18] Bruce Oswald, *Interplay as Regards Dealing with Detainees in International Military Operations*, CONVERGENCE AND CONFLICTS OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW IN MILITARY OPERATIONS 81 (Erika De Wet & Jann Kleffner eds., 2014).

[19] Laitai Tamata, *Application of the Human Rights Conventions in the Pacific Islands Courts*, 4 J. OF S. PACIFIC L.2000 (2017).

[20] Human Rights and Equal Opportunity Commission, *Australia's Human Rights Obligations*, A LAST RESORT? NATIONAL INQUIRY INTO CHILDREN IN IMMIGRATION DETENTION 90, (2004), https://www.humanrights.gov.au/sites/default/files/document/publication/alr_complete.pdf.

[21] *Id.* at 90, 92, 100-1.

agreed to adhere to the international system of law created through its treaty obligations, to include its ratification of the ICCPR.[22]

Australia's 2009 expression of the interplay of the LOW and the ICCPR invites extraterritorial application of IHRL obligations to Australian detention operations in instances of handling unprivileged belligerents. Furthermore, under the "legitimate expectation" principle, Australia's judiciary would likely grant standing for consideration of relief under the ICCPR to any detainee held by Australian Defense Forces under the auspices of CA3 and Additional Protocol I (API) or Additional Protocol II (APII).

B. Japan

Japan is a party to ten U.N. human rights-based instruments including the ICCPR, which it ratified in 1979. Japan ratified the ICCPR without reservations regarding the treaty's application in armed conflict.[23] Japan's Constitution provides that Japan's treaties constitute domestic law.[24] Furthermore, Japan's criminal code generally prohibits warrantless detention, and its Habeas Corpus Act allows any individual detained to sue for release for due process violations.[25] Specifically, authorities may detain individuals for up to seventy-two hours without indictment, but then a judge must review the case.[26]

Japan's Self Defense Force (JSDF) is an armed force but structured primarily to defend Japan's air, sea, and land.[27] Under a self-

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[22] *Id.*

[23] *Ratification Status of Japan*, UNITED NATIONS HUMAN RIGHTS COMMISSION, https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=87&Lang=EN (last visited Feb. 10, 2019).

[24] Replies of Japan to the List of issues in relation to the sixth periodic report of Japan 1, U.N. Human Rights Committee, CCPR/C/JPN/Q/6/Add.1 (July 2014), https://www.mofa.go.jp/files/000449793.pdf

[25] International Committee of the Red Cross, *Japan - Practice Relating to Rule 99, Deprivation of Liberty*, Customary IHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_jp_rule99 (last visited Feb. 10, 2019).

[26] U.S. Dept' of State, Bureau of Democracy, H.R. and Lab., Japan 2015 Human Rights Report, 7 (2015).

[27] Cent. Intelligence Agency, East Asia/Southeast Asia: Japan: The World Fact Book, https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html (last visited Feb. 10, 2019); YOSHIKAZU WATANABE, ET AL., THE U.S.-JAPAN ALLIANCE AND ROLES OF THE JAPAN SELF-DEFENSE FORCES 1-8 (2016).

defense construct, Japan's domestic law strictly governs the JSDF and Japan's Ministry of Defense (MOD).[28] Japan's MOD utilizes a "national response framework" designed under Japan's laws for responding to "armed attack."[29] These laws place a number of requirements on the MOD, including implementation of fundamental principles of International Humanitarian Law (IHL), also referred to as the LOW, in an armed attack.[30]

With respect to detention operations, Japan's "Prisoner of War Law" applicable in armed attack is designed to guarantee adherence to IHL.[31] It establishes the scope and application of the law, defines categories of those captured, and provides the process for handling detainees. Interestingly, with respect to IHL, the Prisoner of War Law draws entirely from the Third Geneva Convention and API and defines the categories of those that may be interned as spies, saboteurs, and members of enemy armed forces that fail to adhere to their obligations under API.[32] Except for making a reference to "enemy armed forces" including "other similar organizations," the Japanese Prisoner of War Law is silent as to instances of Non-International Armed Conflicts (NIACs) and does not mention CA3 or APII.[33]

The relevance of Japan's self-defense legal framework is that it is primarily constructed to address international armed conflict and does not address the legal rights of members of organized armed groups or civilians directly participating in hostilities. Therefore, Japan will likely extend their IHRL and domestic human rights obligations in instances of detaining those categories of unprivileged belligerents.

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[28] *Id.* at 8.
[29] Ministry of Defense of Japan, Framework for Activities of the SDF and others after the Enforcement of the Legislation for Peace and Security: Defense of Japan (2018), http://www.mod.go.jp/e/publ/w_paper/pdf/2018/DOJ2018_2-3-2_web.pdf.
[30] Ministry of Defense of Japan, Framework for Responses to Armed Attack Situations: The Basics of Japan's Defense Policy 130 (2006) http://www.mod.go.jp/e/publ/w_paper/pdf/2006/2-3-1.pdf
[31] Ministry of Defense of Japan, *supra* note 29 at 240.
[32] Act on the Treatment of Prisoners of War and Other Detainees, Act No. 117 of 2004, art. 3 (Japan) *translated in* www.japaneselawtranslation.go.jp/law/detail_download/?ff=09&id=1866.
[33] *Id.*

C. The Philippines

The Philippines ratified the ICCPR in 1986.[34] The Philippines delegation did not register any interpretive limitations with respect to the scope and application of the ICCPR and has incorporated the ICCPR into its domestic laws.[35]

The Human Rights Commission (HRC) of the U.N., throughout periodic reviews, has raised a number of concerns regarding the Philippines' perceived lack of adherence to their human rights obligations in counter-terrorism operations.[36] Despite these concerns of actual compliance, the Philippines' official position in its response is that it applies a convergent approach to the military detention activities. Specifically, in the Philippines' 2012 response to the HRC, the Philippine Government reaffirmed that its obligations under the ICCPR constituted the "law of the land" and applied to all aspects of its government activities.[37]

With respect to military governance, the Armed Forces of the Philippines (AFP) are authorized to conduct counter-terrorism operations pursuant to the Republic Act No. 9372, entitled *An Act to Secure the State and Protect Our People from Terrorism* and referred to as the *Human Security Act of 2007*.[38] Pursuant to Section 3 of this Act, terrorism includes piracy, insurrection, and coups, and therefore would likely apply to NIACs. Additionally, the Act is not limited by geography and therefore applies to domestic and extraterritorial operations as written.

Furthermore, in Section 2, Declaration of Policy, the Act mandates that government activities, to include that of its military, "shall not prejudice respect for human rights which shall be absolute."[39]

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[34] *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS COMMISSION OFFICE OF THE HIGH COMMISSIONER, http://indicators.ohchr.org (last visited Mar. 11, 2019). .

[35] *Id.*

[36] *Human Rights by Country*, UNITED NATIONS HUMAN RIGHTS COMMISSION OFFICE OF THE HIGH COMMISSIONER HOME PAGE, https://www.ohchr.org/en/countries/asiaregion/pages/phindex.aspx (last visited Mar. 11, 2019).

[37] Republic of the Philippines, Reply to List of Issues, Reporting Status for the Philippines, U.N. Human Rights Committee (2012).

[38] An Act to Secure the State and Protect Our People from Terrorism, Rep. Act No. 9372, (2007) (Phil.).

[39] *Id.*

Specifically, the Act proscribes rigorous compliance with law enforcement and judicial processes associated with principles of human rights. Sections 7 through 18 of the Act establish additional protections pertaining to surveillance, searches and seizures, and the requirement for judicial review within three days of apprehension.[40]

D. The Republic of Korea

The Republic of Korea (ROK) is a state party to ten international human rights instruments including the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[41] The U.N. HRC has expressed concerns about the ROK's domestic laws and, in application, its conformity with IHRL with respect to "arrests and detentions."[42]

In its official responses to the U.N. HRC, however, ROK officials reassured the HRC of its intent to comply with its international human rights obligations. First, the ROK argued that its Constitutional Court protects against arbitrary application and violations of due process within its domestic criminal system.[43] Second, the ROK pointed out that its National Assembly incorporated the Rome Statutes into its domestic law, criminalizing, among other grave breaches of international law, crimes against humanity.[44]

The ROK's domestic criminal laws criminalize armed aggression against the ROK. Specifically, the *Criminal Act* and the *National Security Act* criminalize taking part in insurrection or providing material assistance to foreign aggression against the Republic.[45] Jurisdiction under these acts

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[40] *Id.*

[41] *Ratification Status for the Republic of Korea,* UNITED NATIONS HUMAN RIGHTS COMMISSION OFFICE OF THE HIGH COMMISSIONER HOME PAGE, https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=141&Lang=EN (last viewed Feb. 11, 2019).

[42] Comm. Against Torture, *List of issues prior to the submission of the combined third to fifth periodic reports of the Republic of Korea,* CAT/C/KOR/Q/3-5, 45th session (Nov. 1-19, 2010) 1-2.

[43] Republic of Korea, Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure – Republic of Korea, at the U.N. Comm. against Torture (Feb. 29, 2016) *in* the Fourth Periodic Report at 3).

[44] *Id.*

[45] Criminal Act, Act No. 11731, Part II, Chapters I-II, National Assembly of the Republic of Korea (2013), *translated in* Criminal Act, Korean Law Translation Center ,

applies within the territory of the ROK and on any ROK sea or air vessel.[46] Furthermore, the *Criminal Act* extends jurisdiction extraterritorially over Korean nationals and aliens that commit certain acts of aggression or insurrection abroad against the ROK.[47]

The key to understanding the ROK's approach under its domestic criminal law is to see that individuals considered unprivileged belligerents by the U.S. under the LOW would likely fall under the purview of the ROK's *Criminal Procedure Act*.[48] The *Criminal Procedure Act* is comprehensive and details the investigative and judicial procedures including the rights of the accused from arrest through the judicial appeal process. Of note, the Act extends a number of protections that align with fundamental principles of human rights with respect to judicial guarantees and protections against arbitrary detention.

Specifically, the Act places a time limit on detention prior to the initiation of formal prosecution, a ten-day period of which may only be extended once by a district judge.[49] Furthermore, the suspect must be immediately informed of the basis of detention, and be provided access to an attorney.[50] The *National Security Act*, *Criminal Act*, and *Criminal Procedure Act* do not align with the U.S. view that the LOW permits indefinite detention of unprivileged belligerents for imperative security reasons.

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https://elaw.klri.re.kr/eng_service/lawView.do?hseq=28627&lang=ENG (last visited Jan. 14, 2019); National Security Act, Act No. 11042, National Assembly of the Republic of Korea (2011), *translated in* National Security Act, Korea Law Translation Center, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=26692&lang=ENG (last visited Jan. 14, 2019).

[46] Criminal Act, Act No. 11731, Part I, Chapter I, National Assembly of the Republic of Korea (2013), *translated in* Criminal Act, Korean Law Translation Center, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=28627&lang=ENG (last visited Jan. 14, 2019); Criminal Procedure Act, Act No. 14179, Art. 4, National Assembly of the Republic of Korea (2009) *translated in* Criminal Procedure Act, Korean Law Translation Center, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=22535&lang=ENG (last visited Jan. 14, 2019).

[47] Criminal Act, Act No. 11731, Part I, Chapter I, Art. 3-5, National Assembly of the Republic of Korea (2013), *translated in* Korea Law Translation Center, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=28627&lang=ENG (last visited Jan. 14, 2019).

[48] Criminal Procedure Act, Act No. 14179, National Assembly of the Republic of Korea (2009) *translated in* Korea Law Translation Center, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=22535&lang=ENG (last visited Jan. 14, 2019).

[49] *Id.* at arts. 202, 203, 205.

[50] *Id.* at arts. 88, 90.

E. New Zealand

In 1948, New Zealand's Prime Minster Peter Fraser took a lead role in the creation of the UDHR.[51] Today, New Zealand is a signatory to seven U.N. human rights treaties, and has incorporated much of its international obligations in its domestic law.[52] Specifically, with respect to the ICCPR, New Zealand's Bill of Rights Act of 1993 incorporates many of the enumerated rights of the ICCPR and requires its government agencies to abide by these obligations.[53] During the process for making reservations to the ICCPR, New Zealand did not express any limitations as to the application of the ICCPR with respect to armed conflict.[54]

The NZDF is obligated to comply with New Zealand's international and domestic legal obligations.[55] The NZDF's recently updated 2019 Manual of the Armed Forces Law reinforces this point. The Manual provides that the LOW is the *lex specialis* in the conduct of war and applies specifically to those issues it was intended to address, for example POWs.[56] However, the Manual also applies a complementary approach. It emphasizes that NZDF's legal obligations "include[] aspects" of IHRL, and in cases of "overlapping provisions," the NZDF must comply with all binding provisions.[57]

Chapter 12 of the Manual, titled "Persons Deprived of Their Liberty," covers NZDF detention operations. This chapter categorizes persons deprived of their liberty as prisoners of war, retained personnel, internees, and detainees.[58] New Zealand's category for "detainees" mirrors what the U.S. DoD considers unprivileged belligerents.[59] Specifically, in section

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[51] *Human Rights*, NEW ZEALAND HUMAN RIGHTS COMMISSION HOME PAGE, https://www.hrc.co.nz/your-rights/ (last visited Mar. 21, 2019).
[52] *International Human Rights - Constitutional Issues and Human Rights*, NEW ZEALAND MINISTRY OF JUSTICE HOME PAGE, https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/human-rights/international-human-rights/ (last visited Jan. 15, 2019).
[53] HUMAN RIGHTS COMMISSION, *supra* note 50.
[54] MINISTRY OF JUSTICE, *supra* note 51.
[55] New Zealand Defence Force, *Legitimacy and Force*, NEW ZEALAND DEFENCE DOCTRINE NZDDP-D, 39-40 (4th ed. 2017).
[56] Directorate of Legal Services, *Section 2 – The Nature of the Law of Armed Conflict*, *in* DEFENCE MANUAL 69 – MANUAL OF ARMED FORCES LAW – LAW OF ARMED CONFLICT 3-5 (4th ed. 2019).
[57] *Id.* at 2-4, 3-5, 3-6.
[58] *Id.* at 12-1.
[59] *Id.* at 12-1.

12.2.3, the Manual classifies a detainee as a person not entitled to POW, retained personnel, or internee status, and who is detained for any reason in an International Armed Conflict (IAC) or a NIAC.[60]

Like the U.S., the NZDF derives its authority to capture a detainee from the LOW.[61] However, the U.S. DoD and the NZDF positions diverge as to the legal basis, or at least the scrutiny associated with the legal basis, for continued detention. Specifically, the NZDF Manual provides that a "more specific legal basis is necessary" for continued detention other than the fact that hostilities are on-going.[62] The difference in approaches is substantive in that the NZDF Manual cites to the "ICRC Customary IHL rule 99 – Arbitrary deprivation of liberty prohibited" as its source, a rule that draws heavily from IHRL and the ICCPR.[63]

F. Rome Statute of the International Criminal Court

On a related matter, it is also important to note that our security agreement allies discussed in this paper, except for the Philippines and Thailand, are parties to the Rome Statute.[64] The Philippines was a signatory of the Rome Statute but gave notice of withdrawal on March 17, 2018, a decision that became effective one year later.[65] Therefore, except for the Philippines and Thailand, U.S. allies in the region have given legal effect to the Rome Statute within their domestic law and have ceded a portion of their judicial sovereignty to the International Criminal Court (ICC).[66]

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[60] *Id.* at 12-6.
[61] *Id.* at 12-8.
[62] *Id.* at 12-36.
[63] *Id.* at 12-36; CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I: RULES, Int'l Comm. of the Red Cross (Jean-Marie Henckaerts & Louise Doswald-Beck eds., Cambridge University Press 3d ed. 2009) (2005).
[64] *State Parties to the Rome Statute*, THE HAGUE INTERNATIONAL CRIMINAL COURT HOME PAGE, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Feb. 12, 2019).
[65] *ICC Statement on The Philippines' notice of withdrawal*, INTERNATIONAL CRIMINAL COURT HOME PAGE, https://www.icc-cpi.int/Pages/item.aspx?name=pr1371 (last visited Mar. 22, 2019).
[66] Rome Statute of the International Criminal Court, Preamble art. 1, 4, July 17, 1998, 2187 U.N.T.S. 90); Preliminary *Examination – Republic of Korea*, OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT HOME PAGE, https://www.icc-cpi.int/korea (last visited Feb. 12, 2019).

The ICC is a court of complementary jurisdiction to a state party's court and is charged with investigating and trying cases of alleged grave breaches of international law, to include crimes against humanity.[67] The Rome Statute provides that deprivation of liberty in "violation of fundamental rules of international law" is a crime against humanity.[68] Therefore, the ICC would have complementary purview over detention operations conducted by our allies, except for Thailand and the Philippines, and would apply IHRL norms if granted jurisdiction over a complaint.

IV. Conclusion

Conducting coalition detention operations in the USINDOPACOM AOR will be legally complex. Without a plan, the interplay of the LOW and IHRL will be disruptive to the operations. Proper planning is imperative because the joint force has a responsibility to account for "special considerations" that will impact detention operations.[69] While the Army is the DoD-designated Executive Agent for the detainee operations program, the future of coalition detention operations in the Indo-Pacific AOR is a joint force problem, especially considering the maritime nature of the theater.

Consensus between the U.S. and our allies will be essential to conducting effective, interoperable coalition detention operations. A potential starting point for planning for and achieving consensus would be to use "The Copenhagen Process on the Handling of Detainees in International Military Operations" (Copenhagen Process) as a starting point.[70]

The Copenhagen Process provides principles and guidelines for the handling of detainees that the U.S. considers unprivileged. However, the

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[67] *How the Court Works*, INTERNATIONAL CRIMINAL COURT HOME PAGE, COMMENT Rule 18.2.2.b.ii, https://www.icc-cpi.int/about/how-the-court-works (last visited Feb. 12, 2019).

[68] Rome Statute, *supra* note 64, at art. 7.

[69] JOINT STAFF, JOINT PUBLICATION 3-63, III-1, para. 2, (2014)

[70] Denmark Ministry of Foreign Affairs, *The Copenhagen Process: Principles and Guidelines*, (2012),); Bruce Oswald and Thomas Winkler, *Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations*, 16 ASIL INSIGHTS ONLINE 39 (2012), https://www.asil.org/insights/volume/16/issue/39/copenhagen-process-principles-and-guidelines-handling-detainees (last visited Feb. 10, 2019); DOD LAW OF WAR MANUAL, *supra note 4, at* 513-4.

Copenhagen Process has its limitations and really is just a potential starting point. First, of the U.S.' security agreement allies in the Indo-Pacific, only Australia is a party to this process. Second, the Copenhagen Process was only intended to apply to a NIAC and not an IAC. An IAC, especially with respect to asymmetric threats, does not preclude the inevitability that states will detain belligerents that fall within the grey area between the LOW and IHRL. Finally, the parties to the process did not reach consensus as to the application of IHRL to detention operations in armed conflict.[71]

Despite these limitations, without planning and consensus, interoperable coalition detention operations will not be feasible. Furthermore, absent proper planning, key challengers in this region, specifically Russia, China, the Democratic People's Republic of Korea, and VEOs will exploit vulnerabilities and leverage IHRL to conduct lawfare through fraudulent lawsuits.

[71] Bruce Oswald and Thomas Winkler, *Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations*, 16 ASIL INSIGHTS ONLINE 39 (2012), https://www.asil.org/insights/volume/16/issue/39/copenhagen-process-principles-and-guidelines-handling-detainees (last visited Feb. 10, 2019).

OTHER SECURITY FORCES TOO: TRADITIONAL COMBATANT COMMANDER ACTIVITIES BETWEEN U.S. SPECIAL OPERATIONS FORCES AND FOREIGN NON-MILITARY FORCES

MAJOR JASON A. QUINN*

I. Introduction

On the night of September 11 and morning of 12 September 2012, more than sixty terrorists conducted three different armed attacks against two U.S. facilities in Benghazi, Libya.[1] Over the course of eight hours, the attacking forces overwhelmed the facilities' on-ground security teams with small arms and mortar fire, killing four Americans, including the U.S. Ambassador to Libya.[2]

During the attacks, the U.S. Department of Defense repositioned aerial assets,[3] teams of Marines,[4] and two teams of special operations forces: the European Command (EUCOM) Commander's In-Extremis Force (CIF), which was on a training mission in Croatia when the attacks began, and a separate Special Operations Forces (SOF) team based in the United States.[5] To the detriment of the besieged U.S. personnel, only unmanned, unarmed aerial surveillance assets arrived on-scene by the time the

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[1] S. REP. NO. 113-134, at 3–9 (2014).

[2] *Id.*

[3] *Id.* at 28.

[4] Two Marine Fleet Antiterrorism Security Teams ("FAST platoons") based in Rota, Spain. *Id.* at 30.

[5] *Id.* at 28. *See also* H. REP. NO. 114–848, at 58 (2016).

survivors and deceased were en route from Benghazi.[6] Given more time, both U.S. SOF teams would have deployed to the crisis scene.[7] As it was, they made it no farther than a staging base in Sigonella, Italy before the evacuation was complete.[8]

Of the two teams, the regionally-aligned CIF is generally more responsive and offers emergency action capabilities for missions such as hostage rescue and noncombatant evacuation, including the capability to immediately assault targets as required.[9] Typically arriving on-scene later, the SOF team based in the United States complements the CIF with more robust capabilities.[10] As a consolidated crisis response force, both teams must coordinate and be prepared to operate in combination with on-scene security forces to eliminate a threat.[11] In Benghazi, had the SOF teams arrived in Libya, this would have meant coordination and operations with overwhelmed security teams comprising of personnel from the U.S. Department of State Bureau of Diplomatic Security, the U.S. Central Intelligence Agency, the Libyan National Police, a local militia, and a local security contractor.[12]

Interagency and international coordination are difficult tasks under the best of circumstances, and become near superhuman in the midst of defending against a multi-pronged attack. At that point, any pre-existing familiarity between an inbound U.S. SOF teams and the on-scene security forces is critical to quickly and effectively eliminating the threat. Unfortunately, the legal framework for building familiarity with foreign security forces rests on an uncertain foundation and U.S. SOF teams entering crises like the Benghazi attacks, may find themselves fighting alongside strangers.

A. Purpose

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[6] S. REP., *supra* note 1, at 28.
[7] *Id.* at 30-31.
[8] *Id.*
[9] H. REP., *supra* note 5, at 58–59.
[10] *Id.* at 59.
[11] *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-26, COUNTERTERRORISM II-3 (24 Dec. 2014) [hereinafter JOINT PUB. 3-26].
[12] *Id.*

Through the cloud of political controversy[13] surrounding the Benghazi attacks at least one clear question emerged: What can the United States and its agencies do better next time? The multiple investigations into the Benghazi attacks probed this question from multiple avenues of approach[14] and this article does not rehash or critique the investigations or their findings. Instead, this article focuses on a relatively narrow avenue not previously considered: clarifying and refining the legal and policy frameworks affecting U.S. SOF's ability to enhance interoperability with security forces of friendly foreign countries before a crisis occurs or before a planned operation. With an understanding of legally permissible pre-operational activities with foreign forces, legal advisors can provide the type of accurate and nuanced advice that enables U.S. forces to build key relationships with foreign forces, enhancing readiness through information sharing, combined planning and preparation, and combined safety and familiarization activities.

For this narrow issue, it is important to detail where the law ends and policy begins. As touched on throughout this article,[15] existing restraints on pre-operational activities that hinder U.S. SOF's ability to build relationships with foreign non-military forces, such as the Libyan National police and local militia that responded to the Benghazi attacks, are largely policy based, but often take on the color of law because the policy is long-standing and not widely understood.

To be clear, terrorist attacks like the ones in Benghazi are not the only reason pre-operational activities between U.S. SOF and other security forces of friendly foreign countries are important. The example of the Benghazi attacks is salient, but U.S. SOF's congressionally mandated responsibilities extend beyond counterterrorism and include other activities, such as civil affairs and foreign internal defense,[16] that

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[13] *See generally* Kurt Eichenwald, *Benghazi Biopsy: A Comprehensive Guide to One of America's Worst Political Outrages*, NEWSWEEK (Oct. 21, 2015, 4:18 PM), https://www.newsweek.com/benghazi-biopsy-comprehensive-guide-one-americas-worst-political-outrages-385853.

[14] S. REP, *supra* note 1 (highlighting recommendations for improvement throughout the report); H. REP., *supra* note 5, at 409–414.

[15] *See, e.g.*, discussion *infra* Parts II.D, IV.A.

[16] Foreign internal defense (FID) is the "[p]articipation by civilian and military agencies of a government or international organization in any of the programs or activities taken by a host nation (HN) government to free and protect its society from subversion, lawlessness, insurgency, violent extremism, terrorism, and other threats to its security." JOINT CHIEFS OF STAFF, JOINT PUB. 3-22, FOREIGN INTERNAL DEFENSE ix (17 Aug. 2018) [hereinafter JOINT PUB. 3-22].

necessarily entail working side-by-side with other security forces of friendly foreign countries.[17] This article argues that, when applied to U.S. SOF, the legal framework governing pre-operational activities with foreign forces *does* permit engagements with other security forces of friendly foreign countries, even in the absence of express statutory authority, and that the policy framework should follow suit in order to enhance U.S. SOF readiness for future combined exercises and operations.

B. Defining "Other Security Forces"

Consistent with Chapter 16, Title 10 United States Code, which details the statutory authorities available to the Department of Defense (DoD) for security cooperation with foreign forces, this article distinguishes between "military forces of friendly foreign countries" and "other security forces of friendly foreign countries."[18] Although used throughout Chapter 16, neither term is formally defined. Instead, Chapter 16 defines the related term "national security forces," which, for most purposes, encompasses only government forces at the national level, and not subnational or non-governmental forces. [19] This leaves open the question of whether the defined term subsumes "military forces" and "other security forces" or whether the latter terms, as used in Chapter 16, are also intended to include subnational and non-governmental forces. This article uses "military forces" to refer to national-level military forces and "other security forces" to refer to non-military national, subnational, and non-governmental forces. This is consistent with the DoD's definition of "security forces," which distinguishes between "military forces" and a wide range of other forces, including governmental forces (at all levels of government) and non-governmental forces.[20]

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[17] Special operations activities includes the following: (1) direct action; (2) strategic reconnaissance; (3) unconventional warfare; (4) foreign internal defense; (5) civil affairs; (6) military information support operations; (7) counterterrorism; (8) humanitarian assistance; (9) theater search and rescue; and (10) such other activities as may be specified by the President or the Secretary of Defense. 10 U.S.C. § 167 (2018).

[18] *See, e.g.*, 10 U.S.C. § 321(a)(1) (Supp. IV 2016).

[19] 10 U.S.C. § 301(6) (Supp. IV 2016).

[20] JOINT PUB. 3-22, *supra* note 16, at VI-24, GL-6 (scoping "security forces" to include "military forces; police forces and gendarmeries; border police, coast guard, and customs officials; paramilitary forces; forces peculiar to specific nations, states, tribes, or ethnic groups; prison, correctional, and penal services forces; infrastructure protection forces; [and] governmental ministries or departments responsible for the above forces.").

C. Roadmap

Part II of this article lays the fiscal law groundwork for the U.S. SOF focused discussion to follow, first reminding readers of the three pillars of fiscal law analysis—purpose, time, and amount—focusing on the three-pronged necessary expense rule underpinning any analysis of whether appropriated funds are being used for a valid purpose. From there, Part II progresses to a discussion of *The Honorable Bill Alexander*; the GAO opinion emphasizing the DoD's circumscribed role in security sector assistance activities and articulating the DoD's authority to undertake pre-operational combined-forces activities for "safety and familiarization . . . in order to ensure 'interoperability.'"[21] Part II then introduces the concept of Traditional Combatant Commander Activities (TCA) as an expanded set of pre-operational combined-forces activities based on a Combatant Commander's inherent authority to promote regional security in their areas of responsibility and otherwise carry out their statutory duties. Part II concludes by highlighting existing policy that constrains TCA to military-to-military activities. Part III illustrates how this constraint has a particular impact on special operations activities, increasing the probability that U.S. SOF will be called upon to conduct combined operations with unfamiliar other security force partners in response to emerging events. Part IV argues that the military-to-military constraint is policy based and advocates for removing the constraint so that U.S. SOF may efficiently interact with the foreign security forces they will foreseeably be called to fight alongside. Part IV also seeks to align TCA, including activities with other security forces, with the Department of Defense's security cooperation authorities in Chapter 16, Title 10 United States Code. Finally, Part IV proposes codification of TCA to cement U.S. SOF's legal authority to engage with other security forces and to round out Chapter 16, 10 United States Code, so that it explicitly provides for the full spectrum of DoD security cooperation activities.

II. A Fiscal Law Question

The question of whether U.S. SOF may, without express statutory authority, engage in pre-operational activities with other security forces of friendly foreign countries is ultimately a fiscal law one, centered on whether such activities are within the purpose of the Operations and Maintenance (O&M) and military personnel appropriations. The

[21] Hon. Bill Alexander, 63 Comp. Gen. 422, 44 (1984) [hereinafter HBA Opinion].

applicable fiscal law principles are well-established and expounded upon in great detail elsewhere.[22] Accordingly, this Part restates the applicable principles only to the extent necessary to lay the foundation for the discussion that follows.

A. Exercising the Congressional Power of the Purse

The fundamental rule of U.S. fiscal law is that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[23] This "power of the purse" is vested with the U.S. Congress and is regarded as "the most important single curb in the Constitution on Presidential power,"[24] requiring an affirmative act by Congress to authorize an expenditure, not merely the absence of a Congressional prohibition.[25] Congress exercises the power of the purse through statutory framework governing the collection and use of public funds[26] and through annual appropriations and authorizations establishing funding levels and the purposes to which public funds may be put.[27]

The statutory framework incorporates the key fiscal law principle that appropriated funds are only available for obligation or expenditure for authorized purposes, within authorized timeframes, and up to authorized amounts. In other words, all obligations and expenditures must be proper

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[22] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-463SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (4th ed. 2016) [hereinafter GAO RED BOOK]; CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR & SCH., U.S. ARMY, FISCAL LAW DESKBOOK 10-7 (2018).

[23] U.S. CONST., art. I, § 9, cl. 7; *see also* Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) (reaffirming that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress").

[24] GAO RED BOOK, *supra* note 22, at 1-5 (citing Edward S. Corwin, *The Constitution and What it Means Today*, 134 (14th ed. 1978)).

[25] United States v. MacCollom, 426 U.S. 317, 321 (1976) (stating "the established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress").

[26] *See generally* GAO RED BOOK, *supra* note 22, at 1-8.

[27] *Id.* at 1-6. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1237, 130 Stat. 2494-96 (2016) [hereinafter FY17 NDAA] (extending the "Ukraine Security Assistance Initiative," which authorizes the use of appropriated funds for purposes such as training for Ukrainian staff officers and senior military leadership); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 9014, 131 Stat. 291 (appropriating $150,000,000 for the Ukraine Security Assistance Initiative for fiscal year 2017).

as to purpose, time, and amount.[28] The requirement to use funds only for authorized purposes is codified at 31 U.S.C. § 1301 (the "purpose statute"), which states that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."[29] The time[30] and amount[31] requirements are similarly codified.

B. Conducting a Purpose Analysis—The Necessary Expense Rule

Although violations of any of the purpose, time, and amount requirements can trigger reporting requirements [32] and possible administrative[33] and criminal penalties,[34] the central question of whether O&M funds may be used for U.S. SOF to engage in TCA with other security forces of friendly foreign countries is focused on the purpose requirement. Conducting a purpose analysis begins with the purpose statute. The purpose statute's prohibition is clear and unambiguous,[35] such that the difficulty in applying the statute comes from the near impossibility of spelling out all "objects for which the appropriations were

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[28] *See generally* GAO RED BOOK, *supra* note 22, at 1-23; discussion *infra* Part II.B.

[29] 31 U.S.C. § 1301(a) (2018).

[30] 31 U.S.C. § 1341(a)(1)(B) (2018) (stating a federal officer or employee may not incur obligations "for the payment of money before an appropriation is made unless authorized by law"); 31 U.S.C. § 1502(a) (2018) (stating appropriations are "available only for payment of expenses properly incurred during the period of availability").

[31] 31 U.S.C. § 1341(a)(1)(A) (stating a federal officer or employee may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation"); 31 U.S.C. § 1517(a) (2018) (stating a federal officer or employee "may not make or authorize an expenditure or obligation exceeding: (1) an apportionment; or (2) the amount permitted by regulations prescribed under section 1514(a) of this title").

[32] 31 U.S.C. §§ 1351, 1517(b) (2018) (requiring agency heads to "report immediately to the President and Congress all relevant facts and a statement of actions take" when there has been a violation of 31 U.S.C. §§ 1341(a), 1342, or 1517).

[33] 31 U.S.C. § 1349 (2018) (subjecting federal officers and employees violating 31 U.S.C. § 1341(a) or 1342 to "appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office").

[34] 31 U.S.C. § 1350 (2018) (imposing, for knowing and willful violations of 31 U.S.C. § 1341(a) or 1342, criminal penalties up to a "fine[] not more than $5,000, imprison[ment] for not more than 2 years, or both").

[35] 4 Comp. Dec. 569, 570 (1898) (stating "[i]t is difficult to see how a legislative prohibition could be expressed in stronger terms. The law is plain, and any disbursing officer disregards it at his peril.").

made."[36] Accordingly, when applying the purpose statute, one must turn to the necessary expense rule,[37] which entails a three-step analysis for determining whether an obligation or expenditure is indeed "necessary or proper or incident to the proper execution of the object" the appropriation from which it is drawn.[38]

C. Safety and Familiarization Activities

In 1984, the Comptroller General applied the necessary expense rule when examining (among other issues) the use of O&M funds to interact with Honduran military forces under the justification that the U.S. was not providing "formal training," but was merely providing "familiarization and safety orientation at no additional cost to the U.S."[39] The facts of the case and the resulting opinion have been discussed ad nauseum,[40] but are

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[36] 31 U.S.C. § 1301(a) (2018).

[37] 6 Comp. Gen. 619 (1927).

> It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law, or unless it is manifestly evident from various precedent appropriation acts that Congress has specifically legislated for certain expenses of the Government creating the implication that such expenditures should not be incurred except by its express authority.

Id. at 621.

[38] GAO RED BOOK, *supra* note 22, at 3-16–3-17.

> The necessary expense rule embodies a three-step analysis:
>
> 1. The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available.
> 2. The expenditure must not be prohibited by law.
> 3. The expenditure must not be otherwise provided for, that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.

Id.

[39] HBA Opinion, *supra* note 21, at 41–49.

[40] A LexisNexis search returns 127 secondary and administrative materials results for the search term "63 Comp. Gen. 422." *See, e.g.*, Major Timothy A. Furin, *Legally Funding*

worth reiterating to clearly identify what constraints were and were not laid out in the opinion.

The decision centered on "Ahuas Tara II," a six-month combined exercise with Honduran military forces, which began in 1983 and ended on 8 February 1984.[41] The exercise entailed the participation of 12,000 U.S troops; the United States funded construction of four–3,000-8,000 foot airstrips, 300 wooden huts to serve as various life support and administrative facilities, and a school; the deployment of two radar systems; medical assistance to 50,000 Honduran civilians; veterinary assistance to 40,000 animals; and artillery, infantry, and medical training to hundreds of Honduran military personnel.[42] Obviously large in scale, Ahuas Tara II prompted the eponymous Honorable Bill Alexander, U.S. House of Representatives, to request that the Comptroller General provide a formal legal opinion on the exercise's fiscal propriety.[43]

Concluding that the DoD had indeed misspent its O&M funds, the Comptroller General's response addressed in detail the variety of fiscal law concerns raised by Ahuas Tara II, including the use of O&M funds for military construction projects, the authority (or lack thereof) to conduct O&M funded civic and humanitarian assistance, and the use of O&M funds to conduct "familiarization and safety orientation" with Honduran military forces.[44] Examining U.S interactions with Honduran military forces, the Comptroller General highlighted their relatively limited pre-exercise capabilities and the substantial training they required before they could adequately participate in Ahuas Tara II.[45] The Comptroller General acknowledged that "some degree of familiarization and safety instruction is necessary before combined-forces activities are undertaken, in order to ensure 'interoperability' of the two forces."[46] But:

Military Support to Stability, Security, Transition, and Reconstruction Operations, ARMY LAW., Oct. 2008, at 2–7.

[41] HBA Opinion, *supra* note 21, at 8

[42] *Id.*

[43] *Id.* at 1.

[44] *Id.*

[45] *Id.* at 48 (stating it "should [] have been apparent to [the Department of Defense] at the time the exercises were planned that substantial training would be required for adequate Honduran participation: for example, [the Department of Defense] scheduled combined field artillery exercises using 105mm guns with Honduran soldiers who had never been trained on such weapons").

[46] *Id.* at 44.

> [W]here familiarization and safety instruction prior to combined exercises rise to a level of formal training comparable to that normally provided by security assistance projects, it is our view that those activities fall within the scope of security assistance, for which comprehensive legislative programs (and specific appropriation categories) have been established by the Congress.[47]

In other words, training of the Honduran military forces was otherwise provided for under specific security assistance appropriations and, even if it cleared the first two steps, the use of O&M for that purpose failed the third step of the necessary expense rule, violating the purpose statute and, if not correctable, the Anti-Deficiency Act.[48]

Still, the decision explicitly acknowledged the necessity of some level of O&M funded safety and familiarization interaction before combined-force activities. In doing so, it alluded to at least two factors for determining whether safety and familiarization activities with other security forces of friendly foreign countries are within the purpose of the relevant O&M appropriation.

One factor is cost. If proposed safety and familiarization orientation before combined-forces activities are at no additional cost to the United States, then that is an initial indication that the activities may appropriately be funded with O&M.[49] But for safety and familiarization activities to have anything other than the barest viability, some additional costs must be acceptable. Presumably, this would include at least a modicum of pay and allowances, travel expenses, and supply expenses for U.S. forces necessary for minimal safety and familiarization activities.

Depth of training is the other factor. Safety and familiarization activities may include some transfer of information and skills, even if the "transfer is principally in one direction" because one of the participating

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[47] *Id.*

[48] *Id.* at 2–5.

[49] *Id.* at 42 (accepting the principal that O&M funded "familiarization and safety orientation at no additional cost to the U.S." could be permissible, but finding that safety and familiarization orientation before Ahuas Tara II in fact resulted in significant additional cost to the United States).

forces is more developed than other participating forces.[50] At some point, however, a transfer of information and skills is security sector assistance that is otherwise provided for and cannot be funded with O&M.[51] Providing a partner force with a new combat capability is an example of the type of activity that crosses that threshold.[52]

Crucially, the opinion is also notable for what it did not do: constrain authority to conduct O&M funded safety and familiarization activities to military forces of friendly foreign countries. The issues raised were in the context of activities conducted with Honduran military forces. Accordingly, the Comptroller General did not address whether the allowance for O&M funded safety and familiarization activities could also apply to other security forces. This point can be lost when applying the holdings of the *Honorable Bill Alexander (HBA) Opinion*, such that subsequent policy decisions, discussed in the Part II.D, *infra*, are sometimes presumed to have legal force.

D. Traditional Combatant Commander Activities

After the *HBA Opinion*, TCA emerged as an expanded set of permissible pre-operational O&M and military personnel funded activities with the security forces of friendly foreign countries. Originally enunciated in a statutory authorization for which appropriations were never provided,[53] TCA have a somewhat confused history[54] and are now described primarily in a series of orders from the Joint Chiefs of Staff

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[50] *Id.* at 44.

[51] *Id.* (holding that safety and familiarization activities do not include instruction that rises to the level of training normally provided under statutory programs for security assistance).

[52] *Id.* at 48 (noting that Honduran forces required substantial training before executing the combined exercise, including training on 105mm field artillery that the Honduran forces had never previously used).

[53] 10 U.S.C. § 168 (2012), *repealed by* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1253, 130 Stat. 2000, 2532.

[54] MAJ Anthony V. Lenze, *Traditional Combatant Commander Activities: Acknowledging and Analyzing Combatant Commanders' Authority to Interact with Foreign Militaries*, 225 MIL. L. REV. 641, 657–62 (2018) (describing the 1994 enactment of 10 U.S.C. § 168 authorizing "military-to-military contacts and comparable activities," Congress's subsequent failure to appropriate funds for the implementation of the authorization, the zombie revival of military-to-military contacts through Joint Chiefs of Staff orders issued in 1995 and 1996, and the ultimate repeal of the never used statutory authorization in 2016).

(*TCA Orders*)[55] and in guidance published by the implementing geographic combatant commands.[56]

Under the Joint Chiefs of Staff guidance, TCA include at least: military liaison teams; traveling contact teams; state partnership programs; regional conferences and seminars; information exchanges;[57] unit exchanges; staff assistance/assessment visits; training program review and assessments; ship rider programs; joint/combined exercise observers; limited humanitarian and civic assistance (HCA);[58] bilateral staff talks; and medical and dental support planning.[59] At least one combatant command has expanded on this non-exhaustive list to include familiarization events.[60]

This set of "traditional" activities is based in large part on the combatant commanders' authority to conduct activities necessary to carry out their statutory responsibilities. For instance, 10 U.S.C. § 164 states that combatant commanders are "directly responsible to the Secretary for the preparedness of the command to carry out missions assigned to the command."[61] The *TCA Orders* further identify the "long-standing requirement to interact with the militaries of nations within their area of responsibility/area of interest in order to promote regional security and other national security goals" as one of those missions assigned to the combatant commanders.[62] In carrying out that mission, the combatant

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[55] VICE CHAIRMAN, JOINT CHIEFS OF STAFF MESSAGES, TRADITIONAL CINC ACTIVITIES FUNDING (2 May 1995) [hereinafter TCA ORDER 1]; VICE CHAIRMAN, JOINT CHIEFS OF STAFF MESSAGES, TRADITIONAL CINC ACTIVITIES FUNDING paras. 2-3 (18 Oct. 1995) [hereinafter TCA ORDER 2]; VICE CHAIRMAN, JOINT CHIEFS OF STAFF MESSAGES, TRADITIONAL CINC ACTIVITIES FUNDING UPDATE (19 Aug. 1996) [hereinafter TCA ORDER 3].

[56] *See, e.g.*, UNITED STATES SOUTHERN COMMAND, TCA SMART BOOK (14 Oct 2016) [hereinafter SOUTHCOM TCA SMART BOOK]; UNITED STATES EUROPEAN COMMAND, THEATER SECURITY COOPERATION RESOURCES HANDBOOK 161 (22 Jun. 2018) [hereinafter EUCOM TSC HANDBOOK].

[57] This activity is stated as "personnel and information exchanges" in TCA ORDER 2, *supra* note 55, but Congress has since provided separate statutory authority for personnel exchanges that likely precludes their continued inclusion in TCA. *See* 10 U.S.C. § 311 (Supp. IV 2016).

[58] Many humanitarian and civic assistance (HCA) activities are provided for in or prohibited by statute. 10 U.S.C. § 401 (2018). If an HCA activity is otherwise provided for or is prohibited, then it may not be conducted under TCA authority. *See* discussion *supra* Part II.B.

[59] TCA ORDER 2, *supra* note 55, para. 3.

[60] EUCOM TSC HANDBOOK, *supra* note 56, at 161.

[61] 10 U.S.C. § 164(b)(2)(B) (2018).

[62] TCA ORDER 1, *supra* note 55, para. 5.

commanders have statutory authority to direct, organize, train, and employ subordinate commands and forces,[63] while the *TCA Orders* direct O&M and military personnel funding for that purpose, subject to the requirements of the necessary expense rule.[64] Expanding slightly beyond the *TCA Orders*, the combatant commands have themselves referred back to their responsibilities and duties under 10 U.S.C. § 164 to identify additional TCA that may be funded by O&M.[65]

Aside from the requirements of the necessary expense rule, a key restraint on the implementation of TCA is that the *TCA Orders* are primarily focused on interactions with the military forces of friendly foreign countries, with no clear allowance for interactions with the other security forces of friendly foreign countries.[66] The *TCA Orders* do not enunciate a legal requirement for this military-to-military restriction and the executing combatant commands have applied the restriction in different ways. Some have maintained a strict adherence,[67] while at least one combatant command does make a limited exception for "civilians with direct nexus or support to militaries *or security forces*" (emphasis added).[68] In addition, although not addressing the issue head-on, the Secretary of Defense has separately implied that not all TCA need be military-to-military.[69] Nevertheless, until the *TCA Orders* are explicitly

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[63] 10 U.S.C. § 164(c)(1).

[64] *See* TCA ORDER 2, *supra* note 55, paras. 2-3 (authorizing O&M and military personnel funding for TCA except for activities specifically prohibited or otherwise provided for by Congress).

[65] *See* SOUTHCOM TCA SMART BOOK, *supra* note 56, at 10 (identifying invitational travel in support of the powers and duties assigned to the Combatant Commanders in 10 U.S.C. § 164 as permissible O&M funded TCA).

[66] *See* TCA ORDER 1, *supra* note 55, para. 5 ("[TCA] funding fulfills the [Combatant Commands'] long-standing requirement to interact with the militaries of nations within their area of responsibility/area of interest"); TCA Order 2, *supra* note 55, para. 4 ("[t]hese funds fulfill the [Combatant Commands] need for flexible resources to interact with the militaries in their AORs"); TCA ORDER 3, *supra* note 55, para. 1 ("[TCA] is one of the pillars of our foreign military interaction (FMI) initiatives.").

[67] *See* EUCOM TSC HANDBOOK, *supra* note 56, at 161 (reiterating that TCA is "a flexible resource to interact with the militaries in [a combatant command's] area[] of responsibility"); JENNIFER D. P. MORONEY ET AL., RAND CORPORATION, REVIEW OF SECURITY COOPERATION MECHANISMS COMBATANT COMMANDS UTILIZE TO BUILD PARTNER CAPACITY 177 (2013) (noting that the AFRICOM TCA program is "used for mil-mil events").

[68] SOUTHCOM TCA SMART BOOK, *supra* note 56, at 8.

[69] Memorandum from Sec'y of Defense to Secretaries of the Military Department et al., subject: Implementation of Section 8057, DoD Appropriations Act, 2014 (division C of Public Law 113-76) ("the DoD Leahy Law") Tab A (18 Aug. 2014) (distinguishing between "military-to-military contacts" and other types of "individual and collective

updated to allow for TCA between U.S. SOF and other security forces of friendly foreign countries, the commanders that decide when, where, and with whom to conduct TCA are at risk and their legal advisors are appropriately conservative when advising on the scope of TCA.

Ultimately, though, TCA between U.S. SOF and other security forces of friendly foreign countries bear a logical relationship to the O&M and military personnel appropriations, are not prohibited, are not otherwise provided for, and thus do not violate the purpose statute (i.e., it would not in fact be an Anti-Deficiency Act violation to use those appropriations for such TCA).[70] Accordingly, the primary risks are procedural and administrative, rather than legal in nature. The procedural risk stems from the tight timeline for reporting suspected Anti-Deficiency Act violations. A "flash report" must be submitted through command channels to the Office of the Assistant Secretary for Financial Management for the applicable military department within two weeks of discovery.[71] For any individual unaware that the restriction on TCA with other security forces is based on obscure, decades-old policy, rather than any clear legal requirement, submitting the flash report is the safe bet. The flash report, though, triggers an extensive investigatory process that can include both a preliminary review[72] and a formal investigation,[73] exposing the unit that conducted the TCA with other security forces to months of scrutiny.[74] Then, even if the preliminary review or formal investigation concludes that there was no Anti-Deficiency Act violation, the approving commander may still be subject to administrative action for contravening the *TCA Orders*.

As discussed in Part III of this article, the cautiousness that the procedural and administrative risks breed has practical implications for U.S. SOF readiness. Accordingly, Parts III and IV of this article make the argument that, when executed by U.S. SOF, TCA can and should include interactions with other security forces of friendly foreign countries.[75]

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interface activities . . . *where the primary focus is interoperability or mutually beneficial exchanges and not training of foreign security forces*").

[70] *See* discussion *supra* Part II.B and *infra* Parts III–IV.

[71] U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION vol. 14, ch. 03, para. 030101 (Nov. 2010).

[72] *Id.* at para. 030202.

[73] *Id.* at para. 030205.

[74] The preliminary review alone entails a roughly fourteen week timeline. *Id.* at para. 030202.

[75] There is some disagreement about whether TCA and safety and familiarization activities as described in the HBA Opinion are categorically the same, with TCA

III. With Operational Impacts

Even if the baseline issue is one of fiscal law and policy, its resolution has clear operational impacts for U.S. SOF. The commander of United States Special Operations Command (USSOCOM) must train, equip, and employ U.S. SOF to execute ten statutorily specified activities: (1) direct action; (2) strategic reconnaissance; (3) unconventional warfare; (4) foreign internal defense; (5) civil affairs; (6) military information support operations; (7) counterterrorism; (8) humanitarian assistance; (9) theater search and rescue; and (10) such other activities as may be specified by the President or the Secretary of Defense.[76] By their nature and by military doctrine, many of these special operations activities are necessarily or routinely conducted in combination with foreign other security forces. As a result, restricting TCA to military-to-military interactions has a particular impact on U.S. SOF readiness to execute its statutory missions.

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encompassing safety and familiarization activities, or whether they are wholly separate bases for engaging with security forces of friendly foreign countries. At least one commenter takes the latter position, describing the HBA Opinion as only "tangentially related to the proper legal analysis for military-to-military contacts" conducted as TCA. *See* Lenze, *supra* note 54, at 670. Under this view, activities under the HBA Opinion have the aim of enhancing interoperability, while TCA's purpose is to "interact with [foreign] forces for national and theater strategic goals," with no training permitted. *Id.* at 670-72. This article takes the alternate position that safety and familiarization activities and TCA fall into the same category—pre-operational or pre-exercise activities with security forces of friendly foreign countries that are necessary expenses of the O&M appropriations (i.e., do not require separate statutory authority). Under this view, the HBA Opinion recognized safety and familiarization activities with security forces of friendly foreign countries in order to prepare for and execute missions assigned to the Combatant Commanders as one aspect of the Combatant Commanders' inherent authority. TCA are based on the same inherent authority and are also intended to enhance readiness for future combined forces missions, but incorporate and expand beyond safety and familiarization activities to include other interactions that do not rise to the level of security sector assistance, such as interactions at a regional conference. This view is partially based on the fact that the Geographic Combatant Commands have themselves incorporated familiarization activities into their TCA guidance. *See, e.g.*, EUCOM TSC HANDBOOK, *supra* note 56, at 161. It is also based on Joint Chiefs of Staff guidance that TCA funding from the O&M appropriations cannot be used for events prohibited by Congress or for which Congress has provided other funding sources,, but "can be used to fund any other O and M . . . activity for which the [Combatant Commander] currently has authority." TCA ORDER 2, *supra* note 55. Safety and familiarization activities would seem to be "any other O and M . . . activity for which the [Combatant Commander] currently has authority." As used in this article, the term TCA includes safety and familiarization activities.

[76] 10 U.S.C. § 167(k) (2018). This is in addition to the authorities and responsibilities common to all combatant commanders under 10 U.S.C. § 164.

Although any of the specified SOF activities may be conducted in combination with other security forces of friendly foreign countries, the following sections focus on the four U.S. SOF activities most frequently conducted in combination with other security forces: unconventional warfare, foreign internal defense, civil affairs, and counterterrorism. Each section begins by highlighting the doctrine applicable to a particular activity, focusing on the aspects of each activity that would typically be conducted with other security forces. Each section then provides an illustrative example of the importance of pre-operational activities between U.S. SOF and other security forces of friendly foreign countries. The discussion and examples ultimately demonstrate that, in the absence of a legal prohibition[77] or other statutory funding scheme,[78] U.S. SOF TCA with other security forces is critical for U.S. SOF readiness. Thus, it is "necessary or proper or incident to the proper execution"[79] of the O&M appropriations (or the military personnel appropriations, for certain expenses) and may be funded from those appropriations.[80]

A. Unconventional Warfare

Unconventional warfare (UW), when conducted by the United States, consists of support to indigenous insurgencies or resistance movements to "coerce, disrupt or overthrow a government or occupying power."[81] The best known examples of United States' UW operations are the

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[77] *See* discussion *supra* Part II.D and *infra* Part IV.B (highlighting that existing restrictions on TCA with non-military forces are policy based, not law based).

[78] *See* discussion *infra* Part IV.C (discussing how TCA is not explicitly provided for by statute and can be viewed as a stepping stone to the statutory authorities for that do otherwise provide for security cooperation activities).

[79] 6 Comp. Gen. 619 621 (1927).

[80] *See* discussion *supra* Part II.B

[81] JOINT CHIEFS OF STAFF, JOINT PUB. 3-05, SPECIAL OPERATIONS xi (16 July 2014).

> [Unconventional warfare (UW)] consists of operations and activities that are conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or occupying power by operating through or with an underground, auxiliary, and guerrilla force in a denied area.

Id. In the National Defense Authorization Act for 2016, Congress adopted this definition, with one modest change, defining unconventional warfare as "activities conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or occupying power by operating through or with an underground, auxiliary, *or* guerrilla force in a denied area." National Defense Authorization Act for Fiscal Year 2016, Pub. L.114-92, § 1097, 129 Stat. 726, 1020 (2015) (emphasis added).

multinational "Jedburgh" teams deployed during World War II in support of the French Resistance against occupying German forces.[82] The Jedburgh teams worked alongside the resistance forces, providing training and equipment, maintaining communications between the French Resistance and Allied high command, and liaising between the various factions of the resistance.[83] After World War II, the United States conducted UW operations during the Cold War in locations around the world, including Eastern Europe, Southeast Asia, and Latin America, and in the early days of post-9/11 operations in Afghanistan and Iraq.[84]

Under modern doctrine, effective UW begins well before a crisis, through "long-term preparation, thorough assessments, and relationships with key players."[85] In its UW Pocket Guide, USSOCOM details the importance of Phase 0: Steady State and Phase I: Preparation activities, including activities "to assure or solidify relationships with friends and allies" and "Gain Access to and Identify Resistance Assets."[86] Importantly, Phase 0 and Phase I activities do not necessarily take place under the authority of an approved UW campaign plan or operation.[87] Instead, the planning, preparation, and relationship building in Phase 0 "can include the full menu of theater cooperation engagement activities,"[88] presumably including TCA. Similarly, Phase I relationship building and resistance force analysis takes place before actual contact with resistance forces, which is reserved for Phase II: Initial Contact.[89]

Instead of through direct engagement with resistance forces, early phase preparation, assessments, and relationship building can take place through engagements with the foreign national-level agencies and security forces that have responsibility for developing and overseeing resistance forces. In many cases, the responsible agency will be the foreign Ministry of Defense. This is true, for example, in the Baltic countries. The Estonian

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[82] Joseph L. Votel et al., *Unconventional Warfare in the Grey Zone*, JOINT FORCE Q., 1st Q. 2016, at 106.
[83] *Id.*
[84] *Id.*
[85] David S. Maxwell, *Do We Really Understand Unconventional Warfare?*, SMALL WARS J., http://smallwarsjournal.com/jrnl/art/do-we-really-understand-unconventional-warfare (last visited June 14, 2019).
[86] U.S. SPECIAL OPERATIONS COMMAND, UNCONVENTIONAL WARFARE POCKET GUIDE 11–12 (Apr. 2016).
[87] *See id.* (identifying "Identify Threats, and Design and Plan UW Options" as a Phase 0 activity and "Design, Plan, and Update the UW Campaign" as a Phase I activity).
[88] *Id* at 11.
[89] *Id* at 12.

Defence League,[90] Lithuanian National Defence Volunteer Forces (KASP),[91] and Latvian National Guard (Zemessardze)[92] are volunteer paramilitary forces that will act as resistance forces during foreign invasions and that are formally incorporated into national defense plans and the structure of the national armed forces.[93] As a result, the responsible United States geographic combatant commander is fully empowered under existing U.S. law and policy to conduct relationship-building TCA with the Baltic military forces that can share information about and provide access to the paramilitary resistance forces that U.S. SOF may be called upon to support during future UW operations.

If, however, a volunteer force is organized under a foreign ministry other than the Ministry of Defense, such that other security forces have development and oversight responsibility, TCA policy would constrain the ability of the geographic combatant commander's U.S. SOF assets to prepare for UW. This is true even if the volunteer force is nearly identical to the Baltic paramilitaries in all other respects. A good example is the Ukrainian Donbas Battalion, a group formed in 2014 to resist separatists in the eastern region of Ukraine, including in territory controlled by the separatists.[94] Initially constituted as a private militia, the Donbas Battalion was quickly incorporated into the Ukrainian National Guard.[95] In Ukraine, unlike in the Baltic countries, the Ministry of Internal Affairs, not the Ministry of Defense, oversees the National Guard.[96] As a result of this

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[90] EST. MINISTRY OF DEF., ESTONIAN MILITARY DEFENCE 2026 (2017), http://www.kaitseministeerium.ee/sites/default/files/sisulehed/eesmargid_tegevused/rkak2026-a6-spreads_eng-v6.pdf; *see also* Andrew E. Cramer, *Wary of Russia's Ambitions, Estonia Prepares a Nation of Insurgents*, N.Y. TIMES, Nov. 1, 2016, at A4.

[91] *National Defence Volunteer Forces*, LITH. ARMED FORCES, https://kariuomene.kam.lt/en/structure_1469/national_defence_volunteer_forces_1357.html (last visited June 14, 2019).

[92] *Latvian National Guard – Zemessardze*, GLOBALSECURITY.ORG, https://www.globalsecurity.org/military/world/europe/lv-zemessardze.htm (last visited June 14, 2019).

[93] James K. Wither, "*Modern Guerrillas and the Defense of the Baltic States*, SMALL WARS J., http://smallwarsjournal.com/jrnl/art/modern-guerrillas-and-defense-baltic-states (last visited June 14, 2019).

[94] Sabra Ayres, *The Donbass Battalion Prepares to Save Ukraine from Separatists*, AL JAZEERA AM. (Jun. 29, 2014, 5:00 AM), http://america.aljazeera.com/articles/2014/6/28/the-donbas-battalionpreparestosaveukrainefromseparatists.html.

[95] *Id.*

[96] *Id. See also* The Government Approved the Strategy for the Development of the Ministry of Internal Affairs until 2020, MINISTRY OF INTERIOR OF UKR., https://mvs.gov.ua/en/news/10872_The_Government_approved_the_Strategy_fo

quirk in the organization of Ukraine's national security apparatus, interactions between U.S. SOF and the other security forces that have direct ties to the Donbas Battalion could not be conducted as O&M funded TCA. In other words, there would be a critical constraint on U.S. SOF's ability to conduct the UW Phase 0 and Phase I planning, preparation, and relationship building that can lead to a successful UW campaign; a constraint primarily based on Ukraine's unique organization of its security forces and not on the nature or mission of the Donbas Battalion itself.

B. Foreign Internal Defense

In many ways the inverse of UW, foreign internal defense (FID) is the activity through which a government such as the United States or an international organization participates in a host nation government's efforts to counter and insulate its populace from internal threats such as violent extremism, insurgency, and other forms of subversion.[97] Foreign Internal Defense often requires a whole of U.S. government approach (i.e., a coordinated effort between executive agencies), with the DoD supporting other agencies' FID activities with routine security cooperation by both SOF and conventional forces, conducted in accordance with a geographic combatant commander's theater campaign plan.[98]

Even though FID is a whole of government activity, U.S. SOF play a unique role and are "forces of choice for FID, due to their extensive language capability, cultural training, advising skills, and regional expertise."[99] In some circumstances, such as in remote areas with a limited U.S. conventional force presence, U.S. SOF may in fact be the sole military FID effort, training host nation forces and conducting information operations with a goal of precluding the need for greater U.S. military participation.[100] Importantly, U.S. SOF's role in a FID operation is not limited to interactions with military forces and may include engagements with other security forces of friendly foreign forces.[101]

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r_the_Development_of_the_Ministry_of_Internal_Affairs_until_2020_PHOTOS_VIDEO_PRESENTATION.htm (last visited Sept. 5 2019).

[97] JOINT PUB. 3-22, *supra* note 16, at ix

[98] *Id.*at ix, I-2.

[99] *Id.* at IV-15.

[100] *Id.* at IV-17.

[101] *Id.* at I-22.

In 2003, after the invasion of Iraq by U.S. SOF and conventional forces and the collapse of the incumbent Iraqi government, U.S. SOF FID activities played an important role in rebuilding the Iraqi Security Forces.[102] In doing so, they engaged with military forces, developing Iraqi SOF. They also engaged with other security forces, working directly with the Iraqi Ministry of Interior Emergency Response Unit.[103] As a direct result of U.S. SOF efforts, the military forces and other security forces developed into "fully capable urban-trained CT force[s]" providing the reformed Government of Iraq a critical capability that was the key to success during the liberation of Mosul from ISIS fourteen years later, in 2017.[104]

Although U.S. SOF development of Iraqi CT forces included training, equipping, and construction that went beyond TCA and required express statutory authority,[105] the example makes clear the importance of U.S. SOF interactions with other security forces of friendly foreign countries. Under slightly different circumstances, such as where the United States is seeking to stabilize a host nation government rather than to install a new government, pre-operational efforts to identify and build relationships with the full range of potential partner forces would, as intended by the *TCA Orders* "promote regional security and other national security goals."[106] This could include readiness to conduct FID if and when directed. Or, by demonstrating U.S. resolve and enhancing host nation situational awareness and capabilities, pre-operational efforts with appropriate partners could even preempt the foreign internal instability that gives rise to FID missions in the first place. But if potential partners include other security forces like the Iraqi Ministry of Interior Emergency Response Unit, the responsible geographic combatant commander and executing U.S. SOF unit cannot rely on the *TCA Orders* and must instead turn to a statutory authority, accept procedural and administrative risk,[107] or forego engagements with the unit all together.

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[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *See, e.g.*, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L.109-13, 119 Stat. 231, 236 (2005) (establishing the Iraq Security Forces Fund (ISFF) "to provide assistance . . . to the security forces of Iraq, including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction, and funding").
[106] TCA ORDER 1, *supra* note 55, para. 5.
[107] *See* discussion *supra* Part II.D.

C. Civil Affairs

Civil affairs operations, and the broader category of civil-military operations (CMO),[108] enable military commanders to fulfill their responsibility to coordinate and integrate with the host nation civil component during the conduct of military operations.[109] By definition, civil affairs operations require interactions with foreign non-military forces and organizations.[110]

Importantly, civil affairs are not conducted only in the context of combat operations. They are conducted "where [U.S.] military forces are present"[111] and have an ongoing mission to "[c]oordinate military activities with other U.S. Government departments and agencies, civilian agencies of other governments, host-nation military or paramilitary elements, and nongovernmental organizations."[112] Indeed, civil affairs can take place outside any military operation, whether combat or non-combat; military commanders are also responsible for integrating them into "programs[] and activities."[113] In fulfilling their responsibility to coordinate with civil organizations during military operations, programs, and activities, it is almost axiomatic that civil affairs forces should seek interactions that, if conducted with military forces of friendly foreign

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[108] "CMO are the activities performed by military forces to establish, maintain, influence, or exploit relationships between military forces and indigenous populations and institutions (IPI). CMO support US objectives for host nation (HN) and regional stability." JOINT CHIEFS OF STAFF, JOINT PUB 3-57, CIVIL-MILITARY OPERATIONS I-1 (9 Jul. 2018) [hereinafter JOINT PUB. 3-57]. CMO are conducted at "[a]t the strategic, operational, and tactical levels of warfare, during all military operations [in order to] facilitate unified action *between military forces and nonmilitary entities*" (emphasis added). *Id.* at I-3.

[109] *Id.* at I-6.

[110] U.S. DEP'T OF DEF., DIR. 2000.13, CIVIL AFFAIRS Definitions (11 Mar. 2014).

> [Civil affairs operations are] military operations conducted by civil affairs forces that enhance the relationship between military forces and civil authorities in localities where military forces are present; require interaction and consultation with other interagency organizations, intergovernmental organizations, non-governmental organizations, indigenous populations and institutions, and the private sector; and involve application of functional specialty skills that normally are the responsibility of civil government to enhance the conduct of civil-military operations.

Id.

[111] *Id.*

[112] *Id.* at 1.

[113] *Id.* at 2.

forces, would be considered TCA and funded as a necessary expense of O&M.

For example, consider a civil affairs team planning for possible U.S. military operations in an allied foreign country. One risk they identify is that an electronic warfare attack or cyber attack could disable the foreign ally's emergency alert and reporting system. Such an attack would severely restrict the U.S.'s and the ally's ability to communicate with and receive critical information from the civilian population, with potentially devastating effects if the degradation were a precursor to kinetic attacks.[114]

To mitigate that risk and in accordance with the strategic goals of the responsible geographic combatant command, the civil affairs team seeks to interact with the allied foreign country to enhance the team's understanding of the ally's emergency alert and reporting system, identify alternate means of communication with the civilian population, and share information regarding possible defenses against the anticipated electronic warfare attack or cyber attack. The team identifies several means of doing so, including sending a two-person liaison team to the national headquarters of the agency responsible for the emergency alert and response.

During their discussion with their command's legal advisor, the civil affairs team is encouraged that the activity seems to fall within the scope of TCA and sense that they are well on their way to executing a low-cost, high-impact event that will truly enhance regional security. But the civil affairs team is stymied as the discussion progresses when the legal advisor

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[114] This is not an attenuated scenario. In September 2017, Russia reportedly disabled Latvia's emergency services hotline using a mobile communications jammer. Gederts Gelzis and Robin Emmott, *Russia May Have Tested Cyber Warfare on Latvia, Western Officials Say*, REUTERS (Oct. 5, 2017, 6:52 AM), https://www.reuters.com/article/us-russia-nato/russia-may-have-tested-cyber-warfare-on-latvia-western-officials-say-idUSKBN1CA142. This real-world jamming took place during Russia's Zapad 2017 war games, which included approximately 100,000 Russian troops exercising along the borders of the Baltic countries, live fire bombings near the Lithuanian border of Russia's Kaliningrad Oblast, and ballistic missile launches from hard to detect mobile platforms. *Id*. The Lithuanian Defence Minister described Zapad 2017 as a "simulated [] attack on all Baltic countries." *Id.* Presumably, if such an attack were real and not simulated, the U.S. would come to the defense of the Baltic countries in accordance with it North Atlantic Treaty obligations. *See* North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. It would do so with greater readiness if its civil affairs forces were permitted to engage in pre-crisis preparations with the other security forces of vulnerable allies.

asks the fateful question: "does the emergency alert and reporting system fall under the ally's Ministry of Defense?" The answer, unfortunately, is no. The system is the responsibility of the national police, falling under the Ministry of the Interior. The legal advisor dutifully advises the civil affairs team that, since the event is not a military-to-military interaction, it cannot, by policy, be conducted as O&M funded TCA. Instead, the civil affairs team must seek an applicable security sector assistance authority,[115] which requires significantly longer lead-time for planning and approval, or incorporate the event into an existing operation, program, or activity, if one with the necessary scope even exists.

D. Counterterrorism

United States Special Operations Forces counterterrorism (CT) teams, such as the CIF that responded to the Benghazi attacks, must be ready to immediately execute Chairman of the Joint Chiefs of Staff or geographic combatant command crisis response plans in complex operational environments.[116] This requires significant coordination and support from the U.S. agencies, as well as from "[partner nations] for basing and/or forces and [host nation] government and security forces."[117] Joint doctrine acknowledges the valuable deterrence and readiness effects of U.S. CT forces routinely interacting with other security forces of friendly foreign countries pre-crisis.

Pre-crisis, pre-conflict CT shaping activities are deliberately broken into two categories: (1) security cooperation and (2) military engagement.[118] Security cooperation is focused on building partner capacity and capabilities[119] and typically requires express statutory authority, regardless of whether the security cooperation activity is being conducted with a military or non-military force.[120] Military engagement,

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[115] *See, e.g.*, 10 U.S.C. § 321 (Supp. IV 2016) (authorizing U.S. SOF to train with the other security forces of a friendly foreign country).

[116] JOINT PUB. 3-26, *supra* note 11 (noting that "CT crisis response operations are rapid, relatively small scale, of limited duration, and may involve multiple threat locations").

[117] *Id.* at II-3.

[118] *Id.* at II-2.

[119] *Id.*

[120] The term "security cooperation" as used in JOINT PUB. 3-26 predates the definition of "security cooperation programs and activities of the Department of Defense" in 10 U.S.C. § 301(7) (Supp. IV 2016) and the consolidation of security cooperation authorities into Chapter 16, 10 United States Code. As a result, the JOINT PUB. 3-26 use of the term differs in some respects from the statutory use. Still, the similarities are extensive enough

on the other hand, is a "routine" activity "to build trust and confidence, share information, coordinate mutual activities, maintain influence, build defense relationships, and develop allied and friendly military capabilities for self-defense and multinational operations."[121] Critically, as part of overall military engagement efforts, joint doctrine calls for CT forces to engage with military and with other security forces.[122]

The particular importance of routine pre-crisis engagements with other security forces is exemplified in the Benghazi scenario. Recall that the U.S. SOF CT teams responding to the attacks would have, if they had arrived in Libya before U.S. personnel were en route from Benghazi, conducted operations alongside a loosely integrated mix of U.S. interagency, foreign, and private security forces, none of which were military forces.[123] Any pre-crisis U.S. SOF military engagement with those security forces undoubtedly would have improved mid-crisis interoperability through increased familiarization with partner force communications systems and tactics, techniques, and procedures.

Similar attacks on U.S. Embassies and their personnel could realistically unfold in any number of friendly foreign countries, including those to which U.S. SOF has more immediate access. Aside from the generalized threat of terrorists striking any place at any time,[124] potential geographic flashpoints and potential foreign non-military CT force partners can be identified before a crisis occurs. With appropriate leeway to conduct TCA, U.S. SOF could build interoperability with those local CT forces before a crisis occurs.

Bosnia and Herzegovina (BiH) is one of those potential flashpoints with a ready non-military CT force. It is a "cooperative counterterrorism

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that most security cooperation activities under JOINT PUB. 3-26 would fall within the scope of a statutory security cooperation authority. *Compare id.* ("Security cooperation that involves interaction with [partner nation] or host nation [] counterterrorism defense forces builds relationships that promote US [counterterrorism] interests and develops indigenous and [partner nation counterterrorism] capabilities and capacities.") *with* 10 U.S.C § 333 (Supp. IV 2016) (providing statutory authority to build the capacity of foreign national security forces for counterterrorism and other operations).

[121] JOINT PUB. 3-26, *supra* note 11 at II-2.

[122] *Id.*

[123] *See supra* note 12 and accompanying text.

[124] *See* NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM, GLOBAL TERRORISM IN 2017: BACKGROUND REPORT (Aug. 2018) (identifying 10,900 total terrorist attacks worldwide in 2017).

partner" that faces extremist threats within its borders.[125] At times, groups opposed to U.S. policies have staged protests in Sarajevo, prompting U.S. Embassy Sarajevo to warn U.S. citizens that "[e]ven demonstrations intended to be peaceful can turn confrontational and escalate into violence."[126] If such a demonstration were to escalate into (or serve as cover for) an attack on the U.S. Embassy or U.S. personnel, U.S. SOF would likely be called upon to respond, as they were in Libya.

When responding, U.S. SOF would likely be working alongside the BiH Ministry of Security's State Investigation and Protection Agency (SIPA), the lead BiH law enforcement unit for counterterrorism.[127] But even though the responsible U.S. SOF unit could identify a terrorist threat to U.S. persons and a cooperative CT partner in BiH with whom it would be valuable to build a relationship in order to counter that threat, pre-crises TCA with the SIPA would not be feasible because the SIPA is an other security force. fo

IV. Aligning TCA with Other Security Sector Assistance Authorities

In Part II, this article made the initial case that the foundational fiscal law principles for pre-operational activities with foreign security forces do not prohibit O&M funded activities with other security forces, highlighting that the only express impediment to such activities with other security forces is the military-to-military focus of the *TCA Orders*.[128] Part III of this article demonstrated the necessity of enabling U.S. SOF to conduct TCA with other security forces of friendly foreign countries. This part returns to the legal analysis, examining more specific possible legal objections to pre-operational activities between U.S. SOF and other security forces of friendly foreign countries, concluding that there is legal leeway for U.S. SOF to conduct O&M and military personnel funded TCA with other security forces; room to maneuver that could be a boon if the *TCA Orders*' policy restrictions are relaxed.

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[125] U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 76 (2018) [hereinafter DoS TERRORISM REPORT].

[126] U.S. DEP'T OF STATE, SECURITY MESSAGE FOR U.S. CITIZENS: DEMONSTRATION IN SARAJEVO ON SUNDAY 12/17 (Dec. 2017) (advising U.S. citizens to avoid the location of demonstrations in Sarajevo protesting the relocation of the U.S. Embassy in Israel from Tel Aviv to Jerusalem).

[127] DoS TERRORISM REPORT, *supra* note 125, at 77.

[128] *See* discussion *supra* Part II.D.

Reticence to apply safety and familiarization or TCA authority to interactions between U.S. military forces and other security forces stems from two places: (1) the Department of State's (DoS) traditional primacy in the realm of security sector assistance, especially with respect to engagements with other security forces of friendly foreign countries; and (2) the potential overlap between safety and familiarization activities or TCA and the security sector assistance programs through which Congress has authorized the funding, training, and equipping of the security forces of friendly foreign countries for a wide range of purposes.

This part examines the DoS's traditional primacy in security sector assistance to demonstrate that the DoS's role is not absolute and does not supersede the DoD's authority to conduct TCA that are necessary for U.S. SOF to fulfill its statutory responsibilities. This part also provides an overview of the express statutory authorities for security cooperation. In doing so, this part shows in the language of the necessary expense rule, those authorities do not "otherwise provide for" TCA with other security forces of friendly foreign countries, such that those activities may be legally funded with O&M. Finally, this part argues for a revived statutory TCA authority in order to cement U.S. SOF's ability to conduct TCA with other security forces of friendly foreign forces and to complete the authoritative legal framework for security cooperation found in Chapter 16, 10 United States Code.

A. "Security Sector Assistance" as an Umbrella Term

The foundational and initial task of defining "security sector assistance" and the related terms "security assistance" and "security cooperation" is not simple, with different branches and agencies of the U.S. government defining and applying the terms differently. This can make it difficult to coherently discuss the respective responsibilities of the various executive agencies or identify where TCA ends and statutory authorities begin.

As a starting point, presidential policy, defined "security sector assistance" as any U.S. Government "policy, program, [or] activity" used to:

- Engage with foreign partners and help shape their policies and actions in the security sector;

- Help foreign partners build and sustain the capacity and effectiveness of legitimate institutions to provide security, safety, and justice for their people; [or],
- Enable foreign partners to contribute to efforts that address common security challenges.[129]

Under this definition, "security sector assistance" includes the relevant policies, programs, or activities of any executive agency. Complicating matters, though, Congress has considered a proposed definition for "security sector assistance" that, in contrast to the presidential policy definition,[130] encompasses DoS programs, but not DoD or other executive agency programs.[131] In addition, Congress has defined "security cooperation" as DoD specific,[132] but it has not defined "security assistance."

The DoD adheres to the presidential policy definition and further defines "security cooperation" as all its relationship building and foreign partner development activities, including "security assistance," which the DoD defines as a subset of security cooperation that is funded and authorized by the DoS and administered by the Defense Security Cooperation Agency.[133] The DoS, on the other hand, uses the term "security assistance" in a manner that contradicts the DoD's definition, employing it to describe *any* DoS or DoD assistance to foreign military or other security forces.[134]

To synthesize these definitions, and consistent with presidential policy, this article uses the term "security sector assistance" to mean: (1) DoS approved, funded, and administered "security assistance;" (2) DoD approved, funded, and administered "security cooperation;" and (3) hybrid

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[129] Press Release, The White House, Office of the Press Secretary, Fact Sheet: U.S. Security Sector Assistance Policy (Apr. 5, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/04/05/fact-sheet-us-security-sector-assistance-policy.

[130] *Id.*

[131] Dep't of State Authorization Act of 2018, H.R. 5592, 115th Cong. (2018).

[132] 10 U.S.C. § 301(7) (Supp. IV 2016).

[133] *See* U.S. DEP'T OF DEF., DIR. 5132.03, DOD POLICY AND RESPONSIBILITIES RELATING TO SECURITY COOPERATION 17 (Dec. 29, 2016).

[134] *See* U.S. DEP'T OF STATE, Off. of Sec. Assistance., https://www.state.gov/t/pm/sa/ (last visited Oct. 18, 2018); U.S. DEP'T OF STATE, Title 10 Team, https://www.state.gov/t/pm/sa/c78161.htm (last visited Oct. 18, 2018) (describing programs such as 10 U.S.C. § 333, which the DoD terms a security cooperation programs, as "DoD security assistance programs").

security assistance/cooperation, approved and funded by the DoS, but administered by the DoD.[135]

B. Department of State Primacy in Security Sector Assistance

At the outset of security sector assistance programs in the 1940s and 1950s,[136] the Secretary of State was given responsibility for program direction and oversight based on a "principle of civilian leadership, influence, and oversight."[137] At first, it was the President, through Executive Orders, who placed this responsibility in the hands of the Secretary of State.[138] Then, with the Foreign Assistance Act of 1961, the Congress solidified the Secretary of State's oversight responsibility, stating that "[u]nder the direction of the President, the Secretary of State shall be responsible for the continuous supervision and general direction of economic assistance, military assistance, and military education and training programs,"[139] with the Secretary of Defense having much more circumscribed responsibilities focused solely on military assistance.[140]

Although the precise division of responsibilities between the DoS and DoD gradually shifted and became more complex, the DoS retained its overarching responsibility for supervision and direction of security sector

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[135] This also appears to be the approach adopted by the DoD in practice. *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-20, SECURITY COOPERATION I-6–I-8 (23 May 2017) (incorporating Department of State (DoS) and Department of Defense (DoD) funded programs into the definition of "security sector assistance").

[136] *See, e.g.*, Greek-Turkish Aid Act, Pub. L. No. 80-75 (1947); Mutual Defense Assistance Act, Pub. L. 81-329 (1949); Mutual Security Act, Pub. L. No. 82-165 (1951); Mutual Security Act, Pub. L. 83-665 (1954).

[137] NINA M. SERAFINO, CONG. RESEARCH SERV., R44444, SECURITY ASSISTANCE AND COOPERATION: SHARED RESPONSIBILITY OF THE DEPARTMENTS OF STATE AND DEFENSE 5–6 (2016) [hereinafter CRS-R44444].

[138] *Id.*

[139] Foreign Assistance Act of 1961, Pub. L. 87-195, § 622(c), 75 Stat. 424 (1961). *See also* CRS-R44444, *supra* note 137, at 37-39.

[140] Foreign Assistance Act of 1961, Pub. L. 87-195, § 623, 75 Stat. 424 (1961). Under the Foreign Assistance Act, the Secretary of Defense has primary responsibility for—

> (1) the determination of military end-item requirements;
> (2) the procurement of military equipment in a manner which permits its integration with service programs;
> (3) the supervision of end-item use by the recipient countries;
> (4) the supervision of the training of foreign military and related civilian personnel;
> (5) the movement and delivery of military end-items; and
> (6) within the Department of Defense, the performance of any other functions with respect to the furnishing of military assistance, education and training.

Id.

assistance programs until the 1980s.[141] Starting in 1981, the Congress began to expand the DoD's role by *ad hoc* "authorizing DOD to directly train, equip, and otherwise assist foreign military and other security forces through new provisions in annual National Defense Authorization Acts (NDAA)."[142] This eventually resulted in a "complex and confusing 'patchwork'" of authorities scattered across Title 10 and NDAAs,[143] recently cleaned up in the Congress's overhaul of DoD security cooperation authorities in the National Defense Authorization Act for Fiscal Year 2017 (FY17 NDAA). The FY17 NDAA, along with providing new authorities, amended and consolidated existing DoD authorities into a newly enacted Chapter 16, Title 10 United States Code.[144]

Today, the DoS clearly retains security sector assistance primacy, but its authority is not absolute. The DoD does have independent authority under Chapter 16, including the authority to engage with other security forces of friendly foreign countries under some circumstances. The basis for this enhancement of DoD authorities is detailed in the Senate Armed Services Committee (SASC) conference report accompanying the FY17 NDAA.

In the conference report, the SASC initially emphasized that "[t]he Department of State is the lead agency responsible for the policy, supervision, and general management of the United States' [security sector assistance] programs and activities."[145] But in almost the same breath, the SASC also recognized that "the Department of Defense . . . plays a critical role,"[146] and justified its recommendation for the consolidation of DoD security cooperation authorities in Chapter 16 by noting that "over the last 15 years, the Department's engagement with national security forces of friendly foreign countries has expanded substantially in response to changing strategic requirements."[147] The consolidation, although "not intended to create a Department of Defense mission that competes with security assistance overseen by the State Department, . . . [is intended to]

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[141] CRS-R44444, *supra* note 137, at 39–40 (describing the supplementation and expansion of the Foreign Assistance Act through legislation under Title 22, United States Code, executed through the DoS).
[142] *Id.* at 40–41.
[143] CRS-R44444, *supra* note137, at 1.
[144] *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L.114-328, § 1241, 130 Stat. 2000, 2497 (2016).
[145] S. REP. NO. 114-255, at 315 (2016) (Conf. Rep.).
[146] *Id.*
[147] *Id.* at 316.

enable the Department [of Defense] to meet its own defense-specific objectives in support of broader defense strategy and plans."[148]

This interplay between DoS and Department of Defense, with the balance of authority in the DoS's hands, carries through to the procedural aspects of the Chapter 16 security cooperation authorities. For many of the security cooperation authorities, the Secretary of Defense is the designated approval authority, but reliant on the Secretary of State for consultation, concurrence, coordination, joint development and planning, or implementation.[149]

At least two patterns emerge when examining the Secretary of State's precise role in security cooperation under Chapter 16. First, the more closely a security cooperation authority resembles traditional security sector assistance, with the primary benefit accruing to the foreign partner, the more in-depth the Secretary of State's involvement.[150] Similarly, Secretary of State involvement can be triggered if the partner security force is another security force of a friendly foreign country.[151] But both those coins have flip sides. First, when there is a clear benefit to U.S. forces from training with the military forces of a friendly foreign country, the DoD has unilateral approval authority, not subject to Secretary of State input.[152] Furthermore, when conducted by U.S. SOF the DoD's unilateral

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[148] *Id.*

[149] *See* 10 U.S.C. § 311(a)(3) (Supp. IV 2016); 10 U.S.C. § 312(b)(1)(B) Supp. IV 2016); 10 U.S.C. § 331(e) (Supp. IV 2016); 10 U.S.C. § 332(b)(1) (Supp. IV 2016); 10 U.S.C. § 333(b) (Supp. IV 2016); 10 U.S.C. § 341(a)(1) (Supp. IV 2016); 10 U.S.C. § 342(f)(3)(B)(i) and (h)(1) (Supp. IV 2016); 10 U.S.C. § 343(c)(2) (Supp. IV 2016); 10 U.S.C. § 344(a)–(b) (Supp. IV 2016); 10 U.S.C. § 346(a) (Supp. IV 2016); 10 U.S.C. § 349(b)(1) (Supp. IV 2016); 10 U.S.C. § 350(c)(1) (Supp. IV 2016).

[150] *See, e.g.*, 10 U.S.C. § 332(b)(1) (requiring Secretary of State concurrence, joint development and planning, and coordination on implementation for programs to provide training and equipment to foreign national security forces).

[151] *See, e.g.*, 10 U.S.C. § 311 (authorizing the Secretary of Defense to enter defense personnel exchange agreements and requiring Secretary of State coordination only to the extent an exchange is with "a non-defense security ministry of a foreign government" or "an international or regional security organization"); 10 U.S.C. § 312 (authorizing the Secretary of Defense to pay expenses necessary for theater security cooperation, including payment of expenses for defense personnel of friendly foreign countries, but requiring Secretary of State concurrence to pay expenses of "other personnel of friendly foreign governments and non-governmental personnel").

[152] 10 U.S.C. § 321 (authorizing the Secretary of Defense to approve training with foreign forces and payment of the foreign forces' incremental expenses, so long as the training supports, to the maximum extent practicable, the mission essential tasks of the participating U.S. unit).

approval authority extends to training with other security forces of friendly foreign countries.[153]

Between U.S. SOF and other security forces of friendly foreign countries is on the flip side of both those coins, where the DoD has the widest latitude. It meets "defense-specific objectives" [154] and does not normally include conventional U.S. forces. In addition, TCA are generally less intensive, executed with fewer resources and for shorter durations than security cooperation activities executed under statutory authority.[155] As a result, without a clear legal prohibition and for so long as the DoD, by Congressional design, retains some unilateral security cooperation authority, the DoS's general security sector assistance primacy should not preclude necessary TCA between U.S. SOF and other security forces of friendly foreign countries.

C. Traditional Combatant Commander Activities as a Stepping Stone to Combined-Forces Activities or to More Intensive Security Cooperation

Congress consolidated the DoD's security cooperation authorities under Chapter 16, Title 10 United States Code, into four overarching categories: (1) military-to-military engagements;[156] (2) training with foreign forces;[157] (3) support for operations and capacity building;[158] and (4) educational and training activities.[159] Within those four categories, there are eighteen specified security cooperation programs and activities. This article does not individually address the scope of each specified program or activity, but it does make the case that the codified security cooperation authorities do not otherwise provide for TCA with other

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[153] *Id.* at (a)(2) (restricting U.S. general purpose forces, but not U.S. SOF, to training only with the military forces of a friendly foreign country); 10 U.S.C. § 322 (authorizing combatant commanders to approve U.S. SOF training with the "armed forces and other security forces of a friendly foreign country," so long as the primary purpose of the training is to train the SOF belonging to that combatant command).

[154] S. REP., *supra* note 145, at 316.

[155] *See* TCA Order 2, *supra* note 55, para. 3; TCA Order 2, *supra* note 55, para. 5–6 (authorizing TCA funding for naturally limited activities, such as "traveling contact teams" and "staff assistance visits," while prohibiting such funding for resource-intensive activities, such as training, construction, research and development, and activities for which Congress has provided a specific authority or funding source).

[156] 10 U.S.C. §§ 311–313 (Supp. IV 2016).

[157] 10 U.S.C. §§ 321–322 (Supp. IV 2016).

[158] 10 U.S.C. §§ 331–336 (Supp. IV 2016).

[159] 10 U.S.C. §§ 341–351 (Supp. IV 2016).

security forces of friendly foreign countries and that O&M funded TCA with other security forces are a legally permissible stepping stone to the more vigorous statutory authorities.

The best way to make that case is by analogizing between TCA with military forces of friendly foreign countries and the same activities with other security forces of friendly foreign countries. As made clear in the *HBA Opinion*, safety and familiarization activities with foreign military forces end where express statutory authority for formal training begins.[160] Similarly, and consistent with the thrust of the *HBA Opinion*, O&M funds provided for TCA with foreign military forces are "not intended to replace or duplicate any other specifically authorized or appropriated funds sources"[161] and are intended to "promote regional security and other U.S. national security goals" [162] up to the point where express statutory authority begins.[163] Thus, O&M funded TCA with the military forces of friendly foreign countries are a means of building familiarity and relationships with potential partner forces that can be a critical first step toward conducting combined exercises or training and equipping under statutory authorities for security cooperation, with an ultimate eye toward readiness for potential combined operations. The table at Appendix A highlights this point, showing how TCA underlie the statutory security cooperation authorities that permit more intensive activities with foreign military forces.[164]

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[160] HBA Opinion, *supra* note 21, at 44 (stating that an activity falls within the scope of legislative authorities for security assistance when it "rise[s] to level of formal training comparable to that normally provided by security assistance projects).

[161] TCA Order 2, *supra* note 55, para. 4.

[162] *Id.*, para. 1.

[163] The limited scope of the examples of TCA provided by the Joint Chiefs is also an indication that TCA are necessarily less intensive than statutory security sector assistance and are not simply a gap filler that can be employed to conduct robust engagements simply because there is no express authority authorizing the activity. *Id.* at para. 3.

[164] The security assistance and hybrid authorities under the purview of the Secretary of State are generally more intensive still. While security cooperation authorities are intended to meet a relatively narrow range of DoD objectives, security assistance and hybrid authorities are intended to achieve a wide range of foreign policy ends. *Compare, e.g.,* 10 U.S.C. § 301(7) (describing the purpose of security cooperation as "build[ing[and develop[ing] allied and friendly security capabilities or self-defense and multinational operations," "provid[ing] the [U.S.] armed forces with access to the foreign country," and "build[ing] relationships that promote specific United States security interests") *with* 22 U.S.C. §2752 (2018) (requiring the Secretary of State to coordinate programs executed under the Arms Export Control Act with broader foreign policy objectives, such as economic assistance) *and* 22 U.S.C. § 2754 (2018) (providing a laundry list of purposes for which military sales or leases may be authorized, including enabling foreign forces to "construct public works and to engage in other activities

With the arguable exception of certain authorities for educational and training activities,[165] each of the statutory authorities for security cooperation also permits activities with other security forces.[166] Like TCA with foreign military forces, TCA between U.S. SOF and other security forces of friendly foreign countries are a critical first step in building the necessary relationships and familiarity to conduct successful combined-forces activities or make effective use of the statutory security cooperation authorities. But, as discussed in Part III, *supra*, and highlighted in Appendix A, the *TCA Orders*' military-to-military policy often removes that first step, creating a gap that would not exist if the anticipated partner force were a military force. This gap persists notwithstanding the fact that, in its 2017 revamping of the DoD's security cooperation authorities, the Congress repeatedly recognized the Department's role, and U.S. SOF's role in particular, in conducting a wide range of security cooperation activities with the other security forces of friendly foreign countries.

To close this gap, Part IV.D, *infra*, proposes policy updates and codification to cement U.S. SOF authority to conduct TCA with other security forces, but those need not be the first steps. The necessary expense rule that forms the basis for O&M funded TCA with the military forces of friendly foreign countries is an adaptive rule; one that reflects "changes in societal expectations regarding what constitutes a necessary expense."[167] Application of the rule already permits O&M funded TCA

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helpful to the economic and social development of such friendly countries"). In addition, security assistance and hybrid authorities are generally focused on providing a level of military training, equipment, and services similar to or beyond what is provided for by security cooperation authorities. *See* CRS-R44444, *supra* note137, at 43–47 (summarizing Title 22 DoS security sector assistance authorities). As a legal matter, if a security assistance or hybrid authority provides for an activity, then it may not be conducted as a TCA. As a practical matter, if a proposed activity meets the definition of TCA, is aimed at achieving a specific DoD objective, and is not provided for by a security cooperation authority, then it almost certainly is not provided for by a security assistance or hybrid authority.

[165] *See, e.g.*, 10 U.S.C. § 346 (Supp. IV 2016) (authorizing distribution of educational and training materials and information technology "to enhance interoperability between the armed forces and military forces of friendly foreign countries," while also authorizing distribution to "military and civilian personnel of a friendly foreign government"); 10 U.S.C. § 347 (Supp. IV 2016) (authorizing personnel from foreign countries to attend U.S. service academies, without making clear whether foreign non-military personnel may attend).

[166] Although there may be differences in how the activities are planned and conducted. *See supra* Part IV.A.

[167] GAO RED BOOK, *supra* note 22, at 3-15–3-16 (stating that the GAO "act[s] to maintain a vigorous body of case law [applying the necessary expense rule] responsive to the changing needs of government").

between U.S. SOF and foreign military forces. Applying the rule when the proposed partner force is another security force invokes no additional strict legal prohibitions or restrictions. To the extent there ever was a bona fide rationale for restricting U.S. SOF ability to conduct O&M funded TCA with other security forces, that rationale should be adapted to account for the DoD's generally enhanced authority to engage with other security forces and for U.S. SOF's statutory responsibility to prepare for combined operations with other security forces of friendly foreign countries.

D. Circumscribing and Codifying TCA Authority

The persistent gap in U.S. SOF's ability to conduct TCA with other security forces is largely a result of the tortured history of those activities.[168] It is also based, however, in the lack of comprehensive, up-to-date guidance, reflecting contemporary realities. The legal and policy touchstones, the *HBA Opinion*[169] and the *TCA Orders*[170] were published in 1984 and 1995–1996, respectively, and are limited in their relevance to the question of whether U.S. SOF may legally engage with other security forces of friendly foreign countries through TCA.

Though highly persuasive and widely followed, the *HBA Opinion* is not strictly authoritative[171] and its reach is limited by the facts presented in the case. It does not address other activities, outside safety, and familiarization, that are within a commander's traditional authority, nor does it address U.S. military interactions, SOF or otherwise, with other security forces of friendly foreign countries. For their part, the *TCA Orders*, although binding on the combatant commands, are policy documents that do not fully account for the fact that U.S. SOF must, by statute, be ready to conduct special operations activities that require working alongside other security forces of friendly foreign countries.

As suggested by other commentators, updated DoD policy guidance would go a long way toward resolving wide-ranging uncertainty regarding

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[168] *See supra* notes 53–56 and accompanying text.
[169] HBA Opinion, *supra* note 21.
[170] TCA ORDERS, *supra* note 55.
[171] Authority of the Environmental Protection Agency to Hold Employees Liable for Negligent Loss, Damage, or Destruction of Government Personal Property, 32 Op. O.L.C. 79, 85 (2008) (finding "[t]he opinions of the Comptroller General are not binding on the Executive Branch").

the scope of TCA.[172] It would also help curtail the extra-legal restraints on U.S. SOF interactions with other security forces of friendly foreign countries that hinder U.S. SOF's ability to prepare to execute its statutorily assigned activities. If done at the DoD level in accordance with the DoD Issuances Program[173] a policy update would benefit from a comprehensive internal review and approval process [174] and wide dissemination, especially if published on the public portal for DoD issuances.[175]

In addition to a policy update, this article proposes that the Congress enact a statutory authority for O&M funded TCA under Chapter 16, Title 10 United States Code, in order to achieve several important ends. First, it would place TCA on the strongest possible fiscal law footing. As an express statutory authority, there would be little doubt that the DoD could expend its O&M funds to conduct low-level, but critical, security cooperation activities with appropriate foreign partners in order to prepare for combined-forces activities or build toward more extensive security cooperation under other statutory authorities. In other words, there would be no need to resort to an extensive analysis and the application of the necessary expense rule to confirm the DoD's authority to engage in such activities. Second, it would clarify Congress's full intent concerning the DoD's authority to engage in TCA.[176] In an express statutory authority, the Congress could resolve questions of the DoS's appropriate involvement with TCA, TCA's relationship to the other security cooperation authorities of Chapter 16, the scope of permissible TCA, and, critically for the purposes of this article, U.S. SOF's authority to engage in TCA with the other security forces of friendly foreign countries in order to ensure the effective conduct of the special operations activities specified by the Congress in 10 U.S.C. § 167. Finally, an express authority could

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[172] *See* Lenze, *supra* note 54, at 680 (stating that "[f]or the DoD to more effectively interact with foreign militaries within the limits of the law (and provide a proper long-term understanding), the DoD should publish guidance that clearly articulates that combatant commanders have discretion to conduct such activities under TCA as they see fit").

[173] U.S. DEP'T OF DEF. INSTR. 5025.01, DOD ISSUANCES PROGRAM (1 Aug. 2016) (C2, 22 Dec. 2017).

[174] *Id.* at 18.

[175] *DoD Issuances*, DEP'T DEF. EXECUTIVE SERVICES DIRECTORATE, https://www.esd.whs.mil/DD/DoD-Issuances/ (last visited June 17, 2019).

[176] In this regard, a statutory TCA authority would further the purpose of consolidating security cooperation authorities under Chapter 16, which was to "provide greater clarity about the nature of scope of the Department [of Defense's] security cooperation programs and activities to those who plan, manage, implement, and conduct oversight of these programs." S. REP., *supra* note 145, at 316–317.

improve Congressional oversight of DoD activities, mitigating concerns that the DoD may encroach on the DoS's primacy in security sector assistance or that the combatant commands will turn to TCA, which are relatively easy to execute, when other security cooperation authorities that require higher level coordination and approval are more applicable.

Although an express statutory authority for TCA could take any number of forms, this article proposes several key provisions to ensure the continued effectiveness of TCA as an easily executable security cooperation authority,[177] to implement the apparent intent of the Congress for security cooperation generally, and to ensure appropriate levels of Congressional oversight and DoS involvement. The remainder of this Part argues that an express statutory authority for TCA should: (1) authorize U.S. SOF to engage in TCA with other security forces of friendly foreign countries and (2), with respect to the DoS's involvement, default to the general statutory requirement that the respective chief of mission be kept fully informed of executive agency operations and activities of a foreign country.[178] The remainder of this Part also suggests that, as reasonable restraints on TCA, an express statutory authority could: (1) limit TCA activities to engagements with the national-level military and other security forces of friendly foreign countries and (2) authorize the use of appropriated funds only for the expenses of U.S. forces. Then, using the

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[177] As an inherent authority of the Combatant Commanders, the routine execution of TCA is not subject to the higher level approval or bureaucratic processes applied to the security cooperation authorities currently codified in Chapter 16, Title 10 United States Code. Funds provided for TCA are intended to be "flexible resources," that for "day-to-day operations . . . will not be centrally managed," with the Combatant Commands responsible for "direct oversight and execution . . . within established policy/legal guidelines." TCA Order 2, *supra* note 55, paras. 1 & 4.

[178] 22 U.S.C. § 3927(b) (2018):

> Any executive branch agency having employees in a foreign country shall keep the chief of mission to that country fully and currently informed with respect to all activities and operations of its employees in that country, and shall insure that all of its employees in that country (except for Voice of America correspondents on official assignment and employees under the command of a United States area military commander) comply fully with all applicable directives of the chief of mission.

language of the repealed 10 U.S.C. § 168[179] and the *TCA Orders*[180] as a foundation, Appendix B provides language that could be adopted to codify TCA, including U.S. SOF's authority to engage with the other security forces of friendly foreign countries.

1. Engagement with National Security Forces Only

Congress is clearly concerned with the types of foreign security forces (i.e., the foreign force's mission set and level of government) U.S. military forces engage with. In its conference report accompanying the FY17 NDAA, the SASC justified, in part, the creation of Chapter 16, Title 10 United States Code, by noting the DoD's increased engagements with the "national security forces of friendly foreign countries."[181] Then, in the legislative act, the Congress carefully defined "national security forces"[182] to include only those forces with missions that generally align with the U.S. DoD's national security role[183] and to exclude almost all sub-national

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[179] 10 U.S.C. § 168 (2012), *repealed by* National Defense Authorization Act (NDAA) for Fiscal Year 2017, Pub. L. No. 114-328, § 1253. 10 U.S.C. § 168 authorized military-to-military contacts and comparable activities. The authorization included a list of permissible activities that, when Congress failed to appropriate funds to implement 10 U.S.C. § 168, were largely incorporated into the TCA ORDERS, *supra* note 55. *See also* Lenze, *supra* note 54, at 657–658.

[180] *See* TCA ORDERS, *supra* note 55.

[181] S. REP., *supra* note 145, at 316.

[182] 10 U.S.C. § 301(6) (Supp. IV 2016):

> The term "national security forces", in the case of a foreign country, means the following:
> (A) National military and national-level security forces of the foreign country that have the functional responsibilities for which training is authorized in section 333(a) of this title.
> (B) With respect to operations referred to in section 333(a)(2) of this title, military and civilian first responders of the foreign country at the national or local level that have such operations among their functional responsibilities.

[183] "National security forces" includes only those forces with functional responsibility for:

> (1) Counterterrorism operations.
> (2) Counter-weapons of mass destruction operations.
> (3) Counter-illicit drug trafficking operations.
> (4) Counter-transnational organized crime operations.
> (5) Maritime and border security operations.
> (6) Military intelligence operations.

security forces.[184] It then limited the most robust security cooperation authority, the authority to build partner capacity under 10 U.S.C. § 333 to training and equipping those defined "national security forces."[185] That limitation appears to be a means of limiting the risk of Department of Defense encroachment upon the DoSs' security sector assistance primacy.[186]

For the same reason, limiting TCA to engagement with "national security forces" as defined in 10 U.S.C. § 301(6), would be appropriate. Although not all security cooperation authorities are limited to engagements with "national security forces,"[187] especially for those authorities with a direct benefit to U.S. forces,[188] a tradeoff for TCA's ease of execution is a heightened risk of encroachment on DoS primacy. A "national security forces" limitation for TCA would provide some assurance that the approving combatant command is not exceeding its international affairs expertise and, for example, interacting with a local security force unit that may have limited national or international recognition or that may raise U.S. legal concerns, especially if the local security force unit may have committed human rights violations.[189] Tying

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> (7) Operations or activities that contribute to an international coalition operation that is determined by the Secretary to be in the national interest of the United States.

10 U.S.C. § 301(6)(A); 10 U.S.C. § 333(a) (Supp. IV 2016).

[184] Only local first responders with responsibility for counter-weapons of mass destruction operations meet the definition of "national security forces." 10 U.S.C. § 301(6)(B).

[185] 10 U.S.C. § 333.

[186] The SASC expressed concern that the "train and equip" authority does not "create a Department of Defense mission that competes with security assistance overseen by the State Department." S. REP., *supra* note 145 at 316. Instead, security assistance should, in general, still be conducted through DoS programs such as Foreign Military Financing and Foreign Military Sales, through which the United States provides financing (including non-repayable grants) to select countries so that they may purchase U.S. defense articles, services, and training. *See Foreign Military Financing*, DEFENSE SECURITY COOPERATION AGENCY, http://www.dsca.mil/programs/foreign-military-financing-fmf (last visited June 17, 2019).

[187] Indeed, 10 U.S.C. § 333 is the only one.

[188] *See, e.g.*, 10 U.S.C. § 321(a)(1) (Supp. IV 2016) (authorizing training with (as opposed to providing training to) "the military forces or other security forces of a friendly foreign country," which is not defined and presumably could include sub-national forces).

[189] The DoD Leahy Law, which prohibits the use of funds appropriated for assistance to a foreign security force unit if the selected unit has committed a gross violation of human rights, would not apply because TCA does not constitute "training," but the issue may

a statutory TCA authority to the definition of "national security forces" would also provide some assurance that the selected foreign security force units have operational responsibilities that correlate to the DoD's mission.[190]

2. Only U.S. SOF May Engage with Other Security Forces

Permitting only U.S. SOF to conduct TCA with other security forces of friendly foreign countries would be another reasonable restraint on a statutory TCA authority; one that is consistent with other security cooperation authorities and appropriately limits the possibility of encroachment on DoS primacy in security sector assistance. Chapter 16, 10 United State Code addresses security cooperation activities with other security forces in two ways. For example, 10 U.S.C. § 311 authorizes the exchange of defense personnel[191] between the United States and friendly foreign countries, but requires Secretary of State concurrence if the exchange is with a non-military ministry or organization.[192] On the other hand, 10 U.S.C. § 321 authorizes training with friendly foreign countries

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still cause Congressional or international concern. *See* 22 U.S.C. § 2378d (2012); 10 U.S.C. § 362 (Supp. IV 2016); Memorandum from Sec'y of Defense to Secretaries of the Military Department et al., subject: Implementation of Section 8057, DoD Appropriations Act, 2014 (division C of Public Law 113-76) ("the DoD Leahy Law") Tab A (18 Aug. 2014) (stating training requiring DoD Leahy Law vetting does not include typical TCA, such as: incidental familiarization, safety, and interoperability training; subject matter expert exchanges; military-to-military contacts; seminars; conferences; partnerships; pre deployment site surveys; planning and coordination visits; and other small unit exchanges).

[190] *See supra* note 183 and accompanying text. One potential difficulty with adopting the 10 U.S.C. § 301(6) definition of "national security forces" in a codified TCA authority is that the such forces must have "functional responsbilit[y]" for at least one of the types of operations identified in 10 U.S.C. § 333, which does not explicitly include the SOF activities of unconventional warfare, internal defense, or civil affairs. In most cases, though, the foreign national security forces responsible for those activities are likely also responsible for one of the types of operations explicitly identified in 10 U.S.C. § 333. For instance, a foreign force responsible for developing and overseeing potential resistance forces would likely also have border security responsibilities, while a foreign force responsible for protection against internal threats would also have counterterrorism responsibilities, and a foreign force responsible for civil affairs could also have responsibility for any one or more of the operations identified in 10 U.S.C. § 333.

[191] Including personnel of a defense ministry, security ministry, or international or regional security organization. 10 U.S.C. § 311(a)(2)(B) (Supp. IV 2016).

[192] 10 U.S.C. § 311(a)(3) (requiring Secretary of State concurrence for personnel exchanges with "[a] non-defense security ministry of a foreign government" or "[a]n international or regional security organization").

without requiring Secretary of State input, but permits only U.S. SOF to train with the other security forces of friendly foreign countries.[193] For TCA, the latter restraint would be more appropriate because U.S. SOF have the primary need to interact with other security forces and it would maintain ease of execution for events that may arise on short notice and should not be time or resource intensive.

3. Expenses of United States Forces Only

A statutory TCA authority should permit the expenditure of appropriated funds only for the expenses of United States forces. As a general matter, the O&M appropriations available for most TCA are for the "operation and maintenance of the [military departments or activities and agencies of the Department of Defense],"[194] such that the use of such funds for the benefit of foreign forces are not necessary expenses of the O&M appropriations. Instead, the use of O&M funds to pay expenses for the benefit of foreign forces requires a separate express statutory authority.[195] In many cases, a requirement to pay the expenses of participating foreign forces is an indication that an event has progressed beyond TCA[196] and should be executed, in whole or in part, under another security cooperation authority.[197] In addition, limiting authorized expenditures to only those necessary for U.S. forces is another means of ensuring that TCA can be executed efficiently, but do not become a

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[193] 10 U.S.C. § 321(a)(2) (restricting U.S. general purpose forces, but not U.S. SOF, to training only with the military forces of a friendly foreign country).

[194] Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 130 Stat. 232 (2016).

[195] *See, e.g.*, 10 U.S.C. § 312(b) (2018) (authorizing, when necessary for theater security cooperation, the payment of travel, subsistence, and similar personnel expenses for non-governmental personnel and the defense and other personnel of friendly foreign governments).

[196] *See* discussion *supra* Part II.C (identifying cost and level of assistance provided to foreign forces as factors for determining whether an activity may be funded with O&M).

[197] For example, if a foreign force requires assistance with travel expenses to attend a conference hosted by a combatant command, the costs of hosting the conference could be funded under TCA authority, but the travel expenses of the foreign force should be funded in accordance with 10 U.S.C. § 312 which, in the language of the necessary expense rule, "otherwise provides for" the payment of personnel expenses necessary for theater security cooperation. As another example, if a proposed U.S. "traveling contact team" will require a foreign force to incur substantial incremental expenses, then that is a good indication that the proposal is not in fact for a traveling contact team, but is for a more intensive security cooperation event, such as an event to train with foreign forces that should be funded under 10 U.S.C. § 321.

substitute for other security cooperation activities for which higher approval levels or greater DoS involvement is warranted.

4. Keeping the Department of State Informed

As currently implemented, combatant commanders must obtain the concurrence of the appropriate United States Embassy before conducting TCA,[198] but are not required, as they would be for most security cooperation authorities under Chapter 16, Title 10 United States Code, to involve the Secretary of State.[199] In a codified TCA authority, the Congress *could* insert a requirement for concurrence for the relevant United States Embassy, but doing so would deviate from Congressional practice for the other Chapter 16 authorities which, when DoS involvement is warranted, place responsibility at the Secretary level and not at the subordinate Embassy level.[200] On the other hand, consistent with its practice for the other Chapter 16 authorities, Congress *could* require Secretary of State involvement (concurrence or otherwise) and leave it to the Secretary to delegate that authority.[201] Either of those alternatives, though, would defeat the necessary efficiency of TCA, creating legal hurdles where none currently exist and impairing the purpose of TCA as a stepping stone. Instead, a statutory TCA authority should remain silent on DoS involvement, defaulting to the general statutory requirement that the executing combatant command keep the responsible chief of mission "fully and currently informed" of all TCA in a given country.[202] This would preserve a role for the DoS in the TCA process while maintaining the vital efficiency of TCA.

V. Conclusion

The United States' strategic approach to national defense, outlined in the *Summary of the 2018 National Defense Strategy*, is built on three

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[198] TCA ORDER 2, *supra* note 55, at para. 1.
[199] *See* sources cited *supra* note 149 and accompanying text.
[200] *Id.*
[201] *See* CRS-R44444, *supra* note137, at 8 (stating "[a]ctivities requiring concurrence are generally reviewed at the highest levels of the State Department").
[202] 22 U.S.C. § 3927(b) (2018) (requiring that "[a]ny executive branch agency having employees in a foreign country shall keep the chief of mission to that country fully and currently informed with respect to all activities and operations of its employees in that country").

pillars.[203] One of those three is "Strengthen[ing] Alliances and Attract[ing] New Partners,"[204] recognizing that "[o]ur allies and partners provide complementary capabilities and forces along with unique perspectives, regional relationships, and information that improve our understanding of the environment and expand our options."[205] Maintaining this pillar requires "[e]xpanding regional consultative mechanisms and collaborative planning"[206] and "[d]eepen[ing] interoperability."[207]

Traditional Combatant Commander Activities are tools almost tailor-made for furthering these strategically important initiatives. "Expanding consultative mechanisms and collaborative planning" at the national level becomes "bilateral staff talks" and "regional conferences and seminars" at the combatant command level, while "[d]eepen[ing] interoperability" becomes "information exchanges," "unit exchanges," and "safety and familiarization events."[208] When conducted with foreign military forces, TCA do not require statutory authority and are efficient and cost-effective, answering the *National Defense Strategy*'s call to extend the United States' network of alliances and partnerships in order to deter and decisively act against shared challenges.[209]

But when it comes to executing the *National Defense Strategy* through TCA with the other security forces that are natural partners for U.S. SOF, the DoD is self-defeating. Internal TCA policy that focuses on military-to-military interactions fails to account for the fact that by statute and doctrine, U.S. special operations are frequently conducted by, with, and through foreign non-military forces. For future operations like the Benghazi attacks or like the scenarios described in Part III, *supra*, this increases this risk that U.S. SOF will not know the forces they are operating alongside or how they fight and communicate.

This self-inflicted hamstringing is unwarranted. Properly scoped TCA between U.S. SOF and other security forces of friendly foreign forces are necessary, not prohibited, and not provided for in any statutory security

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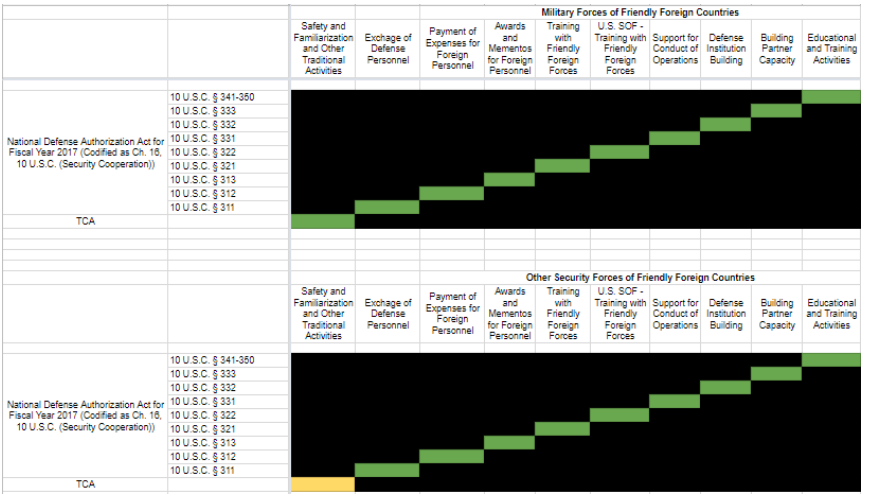
[203] U.S. DEP'T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 4–11 (2018) [hereinafter NATIONAL DEFENSE STRATEGY].
[204] *Id.* at 8.
[205] *Id.*
[206] *Id.* at 9.
[207] *Id.*
[208] *See supra* notes 57–60 and accompanying text.
[209] *See* NATIONAL DEFENSE STRATEGY, *supra* note 203, at 8.

sector assistance authority. Thus, with minor revisions to the *TCA Orders* that are the source of the military-to-military restriction, TCA between U.S. SOF and other security forces could immediately be conducted as necessary expenses of the O&M and military personnel appropriations. To the extent that departmental oversight and standardization of TCA remains a concern, a new, formal DoD TCA policy could address those issues, as formal policy does for so many other DoD activities. Then, if the Congress chooses to conclusively lay the issue to rest, a statutory authority could be comfortably integrated into the recently reformed statutory frame work for security cooperation.

Appendix A. A Comparison of Authorities to Engage with Military Forces of Friendly Foreign Countries and Other Security Forces of Friendly Foreign Countries



This appendix highlights the disparate treatment of TCA with military forces of friendly foreign countries and TCA with other security forces of friendly foreign countries. This policy-based disparate treatment persists despite the fact that in the FY17 NDAA Congress provided authority for U.S. forces to interact with both military forces and other security forces for all statutory security cooperation activities. The block for TCA with other security forces of friendly foreign countries is yellow instead of red only because at least one combatant command makes a limited allowance for TCA with "civilians with direct nexus or support to militaries *or security forces*" (emphasis added). UNITED STATES SOUTHERN COMMAND, TCA SMART BOOK 8 (14 Oct 2016).

Appendix B. Proposed Statutory Authority for TCA Traditional Combatant Commander Activities

(a) PROGRAM AUTHORITY.—The commander of any unified or specified combatant command may approve traditional combatant commander activities with the national security forces of friendly foreign countries that are designed to promote regional security and other national security goals.

(b) AUTHORIZED ACTIVITIES.—Activities that may be approved under subsection (a) include the following:

(1) The activities of traveling contact teams.

(2) The activities of military liaison teams.

(3) Safety and familiarization activities.

(4) Seminars and conferences held primarily in a theater of operations.

(5) Distribution of publications primarily in a theater of operations.

(6) Other engagement activities within the traditional authority of a combatant commander.

(c) LIMITATIONS.—Activities conducted pursuant to subsection (a) are subject to the following limitations:

(1) Activities conducted by the general purpose forces of the United States must be primarily with the national military forces of a friendly foreign country.

(2) Payment of expenses is limited to expenses necessary for the participation of the U.S. armed forces and no expenses may be paid for the incremental or other costs of other countries.

(d) REGULATIONS.—The Secretary of Defense shall prescribe regulations for the administration of this section. The regulations shall establish accounting procedures to ensure that the expenditures pursuant to this section are appropriate.

PAYING FOR THEIR DEATHS: HOW THE "WIDOW TAX" TARGETS AND PENALIZES SURVIVING SPOUSES OF FALLEN SOLDIERS AND RETIREES

MAJOR JENNA C. FERRELL*

> *This country owes them all a debt of gratitude. The down payment on that debt is making sure that we live up to Lincoln's charge: to care for him who shall have borne the battle, and for his widow, and his orphan.*[1]

I. Introduction

"We regret to inform you . . . ."

Much like "I do," these five simple words take only moments to say but carry with them a life-changing, infinite permanence. Every military spouse knows about the dreaded "knock at the door"[2] but, as matter of

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[1] Former Rep. David R. Obey, QUOTETAB (quoting Abraham Lincoln, Second Inaugural Address (Mar 4., 1865)), https://www.quotetab.com/quotes/by-dave-obey#AFT3gVxesKmXcXFK.97 (last visited June 11, 2019).

[2] *See* Hugh Lessig, *A Death in the Military, a Knock on the Door*, DAILY PRESS (May 28, 2016, 8:27 PM), https://www.dailypress.com/news/military/dp-nws-evg-casualty-notification-officer-20160528-story.html; Neal Conan, *A Grim Task: Military-Death Notification*, NPR (May 27, 2013, 2:00 PM),

survival and sanity, clings to the belief that she or he will never be the recipient of that nightmarish message. Sadly, as a result of concurrent wars in Iraq and Afghanistan, more than 7,000 service members have lost their lives due to combat-related incidents alone, thereby creating over 3,600 young, wartime widows.[3] The Department of Defense (DoD) has come a long way since the days of impersonal telegram notifications during the World War II, Korean War, and Vietnam War eras.[4] However, where the DoD still fails these family members—in addition to the widows of service-disabled retirees—is in the imposition of a "tax" applicable only to the growing population of surviving spouses.[5]

Surviving spouses of retirees who pass away from a service-connected condition and of active duty service members who die in the line of duty are generally eligible for two monthly benefits: Survivor Benefit Plan payments (SBP) and Dependent and Indemnity Compensation (DIC).[6] Under current law,[7] family members who qualify for both benefits are subject to an offset, meaning that for every dollar paid out in DIC, payouts

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https://www.npr.org/2013/05/27/186452175/a-grim-task-military-death-notification; Christian Burkin, *Casualty Officers Bear Heavy Burden One Door at a Time*, RECORDNET.COM (July 8, 2007, 12:01 AM), https://www.recordnet.com/article/20070708/A_NEWS/707080320.

[3] *Our Mission*, AM. WIDOW PROJECT, http://americanwidowproject.org/meet-us/mission/ (last visited June 11, 2019). *See also Fatalities by Country and Year*, IRAQ COALITION CASUALTY COUNT, http://www.icasualties.org (last visited June 11, 2019).

[4] *See* Renita Foster, *For the Families*, U.S. ARMY (May 5, 2008), https://www.army.mil/article/8966/for_the_families; Megan Harris, *Beyond "I Regret to Inform You,"* FOLKLIFE TODAY (Feb. 23, 2015), https://blogs.loc.gov/folklife/2015/02/beyond-i-regret-to-inform-you/; Alex Johnson, *Breaking the Bad News*, NBCNEWS.COM (Mar. 21, 2003), http://www.nbcnews.com/id/3340619/#.W9ZXtkxFxxd. *See also* DEP'T OF DEF., INSTR. 1300.18, PERSONNEL CASUALTY MATTERS, POLICIES, AND PROCEDURES (8 Jan. 2008) (C1, 14 Aug. 2009).

[5] *See generally* Lieutenant General Dana T. Atkins, USAF Retired, *The Indignity of Our Military's 'Widow's Tax,'* THE HILL (Sept. 19, 2017, 6:20 PM), https://thehill.com/opinion/finance/351438-the-indignity-of-our-militarys-widows-tax; Collin Breaux, *'Widows' Tax' Denies Some Military Survivors Full Payments*, MILITARY.COM (Nov. 14, 2017), https://www.military.com/daily-news/2017/11/14/widows-tax-denies-some-military-survivors-full-payments.html; Laurie Caruso, *'Widow's Tax' an Unjust Law for Surviving Spouses*, ELK VALLEY TIMES (July 31, 2018), https://www.elkvalleytimes.com/news/widow-s-tax-an-unjust-law-for-surviving-spouses/article_239bd9ec-9438-11e8-9e19-dfa1e269887f.html; *The Widow's Tax*, MIL. OFFICERS ASS'N OF AM. (on file with author) (explaining that the loss of any portion of SBP annuity is often referred to as a "widows tax").

[6] *See generally* Lindsay I. McCarl, *The Case for Concurrent Veterans Benefits: Duplicative but Not Duplicitous*, 20 FED. CIR. B.J. 409, 418 (2011).

[7] 10 U.S.C.S. § 1450 (LexisNexis 2019).

under the SBP are reduced by one dollar.[8] In other words, a survivor "may not receive the [combined] amount of both SBP and DIC. In order to receive DIC, the survivor must waive the same amount of SBP."[9] While the SBP is a DoD-managed and employee-earned benefit intended to function as the equivalent of a life insurance annuity,[10] DIC is a Veterans Affairs (VA)-managed indemnity payment intended to replace lost family income and serve as reparation for service-connected deaths.[11] Despite these distinct purposes,[12] the offset continues to penalize surviving spouses who, due to a widespread lack of knowledge and understanding,

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[8] JAMES HOSEK ET AL., AN ASSESSMENT OF THE MILITARY SURVIVOR BENEFIT PLAN 10 (2018), https://www.rand.org/content/dam/rand/pubs/research_reports/RR2200/RR2236/RAND_RR2236.pdf. *See also* DAVID F. BURRELLI & JENNIFER R. CORWELL, CONG. RESEARCH SERV., RL32769, MILITARY DEATH BENEFITS: STATUS AND PROPOSALS 6 (2006) (explaining that "[i]f the DIC benefit is larger than the SBP benefit, then the survivor receives only the DIC benefit" but "[if] the SBP benefit is larger . . . , the surviving spouse receives the full DIC benefit and any SBP benefits less an amount equivalent to the DIC benefit").

[9] Kate Horrell, *Understanding the SBP-DIC Offset*, KATE HORRELL (Feb. 25, 2018), https://www.katehorrell.com/understanding-sbp-dic-offset/.

[10] HOSEK ET AL., *supra* note 8, at 4 (explaining that SBP is "administered by DoD, and the subsidy is funded as part of DoD's retirement accrual charge"); *see also* ERIC CHRISTENSEN ET AL., FINAL REPORT FOR THE VETERANS' DISABILITY BENEFITS COMMISSION: COMPENSATION, SURVEY RESULTS, AND SELECTED TOPICS 105 (2007), https://www.cna.org/CNA_files/PDF/D0016570.A4.pdf; U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-837R, ACTUARIAL SOUNDNESS OF THE DOD SURVIVOR BENEFIT PLAN PROGRAM 1 (2006); Forrest Baumhover, *Survivor Benefit Plan Resources: Everything You Need in One Blog Post*, MILITARYPAY.ORG (Dec. 7, 2017), https://www.militarypay.org/survivor-benefit-plan-resources/; *Eliminating the Widows' Tax*, MIL. OFFICERS ASS'N OF AM. (Mar. 11, 2016) (on file with author); *Understanding the Survivor Benefit Plan*, MIL. ONE SOURCE (Mar. 15, 2018, 10:10 AM), https://www.militaryonesource.mil/-/understanding-the-survivor-benefit-plan.

[11] *See* CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 12 (2011); HOSEK ET AL., *supra* note 8, at 9 (quoting U.S. DEP'T OF DEF., OFFICE OF THE SEC'Y OF DEF. FOR PERSONNEL AND READINESS, MILITARY COMPENSATION BACKGROUND PAPERS 693 (7th ed., 2011), www.loc.gov/rr/frd/pdf-files/Military_Comp-2011.pdf). *See also* Bale Dalton, Office of Sen. Bill Nelson, S. 339, SBP-DIC Offset Repeal Fact Sheet, 115th Cong. (2017) (on file with author); Patricia Berguist, *Surviving Spouse Corner: The SBP-DIC Offset—A Military Problem*, MIL. OFFICERS ASS'N OF AM., https://www.moaa.org/content/chapters-and-councils/council-and-chapter-enewsletters/council-and-chapter-news/past-editions/the-affiliate/2017-affiliate/september/surviving-spouse-corner-the-sbpdic-offset--a-military-problem/ (last visited June 19, 2019).

[12] Caruso, *supra* note 5; *see also* Mike Baron, *MOAA's Expectations for 2019 Federal Budget*, MIL. OFFICERS ASS'N OF AM. (Apr. 10, 2018), http://www.moaa.org/Content/Take-Action/Top-Issues/Currently-Serving/MOAA-s-Expectations-for-2019-Federal-Budget.aspx.

expected to receive both benefits.[13] Although similar bans on receipt of concurrent benefits have been eliminated for other populations, surviving spouses comprise the only subset of federal beneficiaries who continue to bear the burden of this kind of "tax."[14] In this sense, the offset creates an incompatible incongruence with the incessant emphasis on "supporting our troops" that has pervaded the last two decades of conflict.[15]

Because Congress recently implemented a permanent offset to the already-existing DIC offset, the road to more meaningful change appears bleak.[16] This "stop gap measure,"[17] known as the Special Survivors Indemnity Allowance (SSIA), originated in 2009 as a monthly payment of $50 and increased incrementally to $310 until December 2018, after which the amount will be adjusted based on percentage increases in retired pay.[18]

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[13] To provide some anecdotal examples, every surviving spouse this author interviewed while compiling research for this article stated she was unaware of the SBP-DIC offset or its practical implications until the death of her husband. This author had a similar experience when her first husband, Captain Jonathan Grassbaugh, was killed on 7 April 2007 while serving with the 82d Airborne Division in support of Operation Iraqi Freedom. At the time of his death, this author was almost twenty-three years old, a commissioned officer with Bachelor's and Master's degrees, and a law student on an educational delay preparing to serve in the Judge Advocate General Corps (JAGC). Despite her educational background, prior Army Reserve Officer Training Corps (ROTC) training, and supportive family, the SBP-DIC offset remained a topic of much confusion until many years after her late husband's death. Furthermore, a brief and very informal poll of 67th Graduate Course students revealed that none were aware of the post-September 11th extension of SBP benefits to active duty service members, much less the existence of the SBP-DIC offset.

[14] *See, e.g.*, U.S. DEP'T OF DEF., OFFICE OF THE SEC'Y OF DEF. FOR PERSONNEL AND READINESS, MILITARY COMPENSATION BACKGROUND PAPERS 608 (8th ed., 2018), https://www.loc.gov/rr/frd/pdf-files/Military_Comp.pdf (describing the phase-out of the ban on concurrent receipt of disability and retirement pay for veterans with a disability rating of 50 percent of more).

[15] *See, e.g.*, *We Support Our Troops*, FACEBOOK, https://www.facebook.com/wesupportthetroops (last visited Feb. 7, 2019). *Cf.* Steven Salaita, *No Thanks: Stop Saying "Support the Troops,"* SALON (Aug. 25, 2013, 3:00 PM), https://www.salon.com/2013/08/25/no_thanks_i_wont_support_the_troops/.

[16] *See* HOSEK ET AL., *supra* note 8, at 11, 14.

[17] H.R. REP. NO. 115-200, pt. 1, at 145 (2017). *See also Survivor Advocacy Issues*, MIL. OFFICERS ASS'N OF AM., http://www.moaa.org/Content/About-MOAA/Meet-our-Leaders/Surviving-Spouse-Advisory-Committee/Survivor-Advocacy-Issues.aspx (last visited June 12, 2019).

[18] CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 15 (2011). *See also* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 644, 122 Stat. 3, 158 (2008); National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 621, 131 Stat. 1289, 1427–28 (2017).

Although intended to address the inequities in the current law,[19] the SSIA has the unfortunate consequence of allowing Congress to "get around the offset regulations without fully funding a repeal."[20]

Overall cost is the primary reason cited for failure to repeal the SBP-DIC offset; most estimates range between $7 and $10 billion over ten years.[21] Although the current DoD budget is as large as it has ever been in decades, future budget prospects remain less certain.[22] Thus, if there were ever a time for Congress to make good on its promise to repeal the SBP-DIC offset, that time may already have passed. If lawmakers are unable—or simply unwilling—to make room in future budgets for a complete repeal, Congressional leaders should consider two alternate options in need of further exploration: (1) establish income-based cut-offs for the concurrent receipt of SBP and DIC payments; or (2) use a private commercial provider to better manage and administer the SBP. Either alternative would provide a superior solution to the current situation. No matter what the solution, Judge Advocates must be prepared to assume a larger role in bridging the offset knowledge gap for active duty families in need of long-term estate planning guidance. Inserting Judge Advocates into the retirement transition process would also ensure greater transparency for soon-to-be retirees and increase awareness of the risks associated with *not* opting out of the SBP.[23]

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[19] *Survivor Advocacy Issues*, *supra* note 17; *Eliminating the Widows' Tax*, *supra* note 10.

[20] Leo Shane III, *Defense Lawmakers Take Aim at Fixing the 'Widow's Tax,'* MIL. TIMES (Mar. 12, 2017), https://www.militarytimes.com/news/pentagon-congress/2017/03/12/defense-lawmakers-take-aim-at-fixing-the-widow-s-tax/.

[21] Breaux, *supra* note 5. Ted Painter, national legislative director for the American Military Retirees Association, noted that "we are consistently met with the same answer from members of Congress—a repeal is impossible . . . due to the cost." *Id*. *See also* Memorandum from Deputy Assistant Sec'y of Navy to Co-Chairmen, Sec'y of the Navy's Retiree Council, subject: Secretariat Response to the 2015 Sec'y of the Navy's' Retiree Council Report (12 Aug. 2016); Lisa Hammersly, *Widows say Military-Benefits 'Offset' Law Adds Insult to Injury*, ARK. DEMOCRAT GAZETTE, Apr. 1, 2018, at 10A; Tom Philpott, *Survivor Benefit Plan Still Irks Some Military Widows*, DAILY PRESS (May 3, 2018, 11:35 AM), http://www.dailypress.com/news/military/dp-nws-military-update-0507-story.html; Lieutenant Colonel Shane Ostrom, USA Retired, *SBP-DIC Offset After Sharp Lawsuit*, MIL. OFFICERS ASS'N OF AM. (June 2, 2010) (on file with author).

[22] *See* Greg Myre, *How the Pentagon Plans to Spend That Extra $61 Billion*, NPR (Mar. 26, 2018, 5:23 PM), https://www.npr.org/sections/parallels/2018/03/26/596129462/how-the-pentagon-plans-to-spend-that-extra-61-billion.

[23] *See, e.g.*, *SFL-TAP Program*, U.S. ARMY SOLDIER FOR LIFE - TRANSITION ASSISTANCE PROGRAM, https://www.sfl-tap.army.mil/pages/program.aspx (last visited June 12, 2019).

Ultimately, after almost twenty years of the ongoing Global War on Terror, the SBP-DIC offset represents an archaic, outdated, and bizarre legal limitation that Congressional leaders acknowledge is unjust.[24] Despite over three decades of attempts at repeal,[25] the offset continues to this day. With the permanent implementation of the SSIA, some lawmakers consider the issue moot,[26] hence the need to reexamine complete overhaul of the benefits system within budgetary parameters and consider potential alternatives.

II. History and Development of the Survivor Benefit Plan, Dependency Indemnity Compensation, and the SBP-DIC Offset

The SBP and DIC are two entirely different survivor benefits managed by different organizations for different purposes.[27] Despite these distinctions, the statutorily-mandated SBP-DIC offset results in thousands of lost dollars each year in potential benefits, thereby eliminating the value of one benefit in its entirety for many surviving spouses.[28] As Mary

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[24] *See* H.R. REP. NO. 111-89, at 72 (2009) (Conf. Rep.) ("The Senate resolution also recognizes the serious inequity in how the military death benefits system treats widows and orphans whom our servicemembers and veterans leave behind."); ROBERT TOMKIN, FACT SHEET NO. 112-6, DEFENSE AUTHORIZATION FOR FY 2012 50 (2011), LEXISNEXIS (noting that the committee acknowledged the widow's tax "has long denied surviving family members the payment of their SBP benefits earned by the service of their spouse and paid for through premium reductions to retired pay"). *See also* Caruso, *supra* note 5 (explaining that "[w]idow's tax is a nickname for an unjust federal law"); Hammersly, *supra* note 21, at 10A ("'This is an injustice!' [surviving spouse Elly Gibbons told Congress] about the law."); *Survivor Advocacy Issues*, *supra* note 17 ("In multiple Congresses, a majority of House and Senate members acknowledged the inequity and cosponsored corrective legislation to recognize SBP and DIC are paid for different reasons.").

[25] *See* Hammersly, *supra* note 21, at 10A; Breaux, *supra* note 5; Caruso, *supra* note 5; Philpott, *supra* note 21; Shane III, *supra* note 20.

[26] Philpott, *supra* note 21.

[27] *Hearing on S. 1990 Before the S. Comm. on Veterans' Affairs*, 115th Cong. 2 (2018) (statement of Dr. Vivianne Cisneros Wersel, Surviving Spouse); Breaux, *supra* note 5; Caruso, *supra* note 5.

[28] Colonel Steve Strobridge, USAF Retired, & Colonel Phil Odom, USAF Retired, *Vow of Honor: Protecting Today's Survivors*, MIL. OFFICERS ASS'N OF AM. (on file with author) (explaining that for service members in the grade of E-6 and below, the offset "virtually wipes out any SBP payment, leaving most survivors with just DIC"). *See also* Berquist, *supra* note 11; Shane III, *supra* note 20.

Craven, whose husband retired from the Air Force after being wounded in Vietnam, asked, "[w]hy have two programs if one wipes out the other?"[29]

A. History and Development of the SBP

The SBP originated during the post-World War II era as the Uniformed Contingencies Option Act of 1953,[30] intended solely to benefit the surviving spouses of deceased retirees.[31] On 4 October 1961, Congress revised the Contingencies option plan and renamed it the Retired Serviceman's Family Protection Plan (RSFFP).[32] Finally, on 21 September 1972, another legislative act further amended the RSFFP to create what is now known as the SBP.[33] As enacted, the purpose of the SBP was to "insure that the surviving dependents of military personnel who die in retirement or after becoming eligible for retirement will continue to have a reasonable level of income."[34] In addition to providing

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[29] Strobridge et al., *supra* note 28. *See also Eliminate the Widows Tax (SBP-DIC Offset)*, HAMPTON ROADS CHAPTER MIL. OFFICERS ASS'N OF AM., http://bcsthome.net/hrcmoaa/hotnews/sbp_dic_offset.shtml (last visited June 19, 2019) (explaining that "the offset wipes out most or all of the SBP check for the vast majority of survivors").

[30] James N. Higdon, *The Survivor Benefit Plan: Its History, Idiosyncrasies, Coverages, Cost, and Applications*, 43 FAM. L.Q. 439, 439 (2009).

[31] HOSEK ET AL., *supra* note 8, at 11.

[32] Higdon, *supra* note 30, at 439.

[33] Armed Forces Survivor Benefit Plan, Pub L. No. 92-425, 86 Stat. 706, 706–13 (1972) (codified as amended at 10 U.S.C.S. §§ 1447–1455 (LexisNexis 2019)); *see also Hearing on S. 979 Before the S. Subcomm. on Pers. of the Comm. of Armed Servs.'*, 115th Cong. 4 (2016) (statement of Edith G. Smith, Surviving Spouse) (emphasizing Congress' recognition of the fact that surviving military spouses should be treated the same as civil service surviving spouses for benefits purposes); HOSEK ET AL., *supra* note 8, at 3 (referencing the *Inquiry into Survivor Benefits: Hearing Before the Special Subcomm. on Survivor Benefits of the H. Armed Serv.'s Comm.*, 91st Cong. (1970), in explaining that the "creation of a military benefit would bring military compensation in line with the compensation packages of public and private employers"); Higdon, *supra* note 30, at 439; Caruso, *supra* note 5 (noting that Congress intended for SBP to closely parallel the Civil Service Retirement System).

[34] U.S. DEP'T OF DEF., OFFICE OF THE SEC'Y OF DEF. FOR PERSONNEL AND READINESS, MILITARY COMPENSATION BACKGROUND PAPERS 727 (8th ed., 2018), http://loc.gov/rr/frd/pdf-files/Military_Comp-2018.pdf; *see also* CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 1 (2011); CHRISTENSEN, *supra* note 10, at 105 (explaining that "SBP acts somewhat like an insurance plan"); HOSEK ET AL., *supra* note 8, at 3 (noting that despite eligibility for other government assistance programs, "SBP is the *only* means by which a servicemember can ensure that his or her immediate family will be provided with continued government income under any and all circumstances . . . after the member's death" (emphasis added)

a form of survivor protection, the House Armed Services Committee recognized that "retired pay [is] an earned entitlement, and the government ha[s] a 'moral obligation' to provide it to retirees and their survivors."[35] Thus, the SBP became part of the DoD's Military Retirement Fund,[36] which the Defense Finance and Accounting Service (DFAS) manages.[37] Although originally offset by Social Security payments, the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2005 mandated elimination of this offset over the next three fiscal years.[38]

For retirees, the cost of SBP protection is "shared by the retiree (in the form of reductions from monthly military retired pay at the time of the retiree's death), the government, and possibly the beneficiary (under certain types of coverage)."[39] Although service members technically have the "option" of participating in the SBP at the onset of retirement,[40] retirees are, by default, automatically enrolled and must proactively opt out of enrollment within a specified time period.[41] Enrollees pay a percentage of their retired paycheck—capped at 6.5%—in exchange for the right of their dependents to receive a monthly SBP annuity following their death.[42] This SBP annuity represents "55 percent of the base amount

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(quoting U.S. DEP'T OF DEF., OFFICE OF THE SEC'Y OF DEF. FOR PERSONNEL AND READINESS, MILITARY COMPENSATION BACKGROUND PAPERS 735 (7th ed., 2011), www.loc.gov/rr/frd/pdf-files/Military_Comp-2011.pdf).

[35] HOSEK ET AL., *supra* note 8, at 3 (quoting the *Inquiry into Survivor Benefits: Hearing Before the Special Subcomm. on Survivor Benefits of the H. Armed Services Comm.*, 91st Cong. (1970)).

[36] U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-837R, ACTUARIAL SOUNDNESS OF THE DOD SURVIVOR BENEFIT PLAN PROGRAM 1 (2006).

[37] KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 1 (2018).

[38] HOSEK ET AL., *supra* note 8, at 12; *see also* National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 644, 118 Stat. 1817, 1960–62 (2005); Higdon, *supra* note 30, at 447.

[39] CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 1 (2011).

[40] 10 U.S.C.S. § 1448 (LexisNexis 2019) (describing the requirements for opting out of SBP); *Survivor Benefit Plan*, MIL. OFFICERS ASS'N OF AM., http://www.moaa.org/sbp/ (last visited June 12, 2019).

[41] HOSEK ET AL., *supra* note 8, at 5. *See also Changing Your SBP Coverage*, DEF. FIN. AND ACCT. SERV., https://www.dfas.mil/retiredmilitary/provide/sbp/change.html (last visited June 12, 2019) (describing the limited options for changing SBP coverage and cancelling SBP coverage after three years of payments).

[42] CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 4 (2011); Higdon, *supra* note 30, at 445; *Survivor Benefit Plan – What Does it Mean to Me?*, MILITARY MONEY MANUAL,

of [their] retired pay."[43] Once a retiree makes a total of 360 monthly payments over thirty years and reaches the age of seventy, the individual is considered "paid up" and no longer makes monthly payments.[44] In FY 2016, retirees paid $1.41 billion in SBP premiums, which represented approximately fifty-five percent of the total $2.56 billion SBP "liability."[45]

Following September 11, 2001, Congress amended the original SBP statute to allow "servicemembers' survivors to receive SBP even if the member was not retirement eligible," thereby providing "some measure of financial relief and support to the survivors of servicemembers who died in the line of duty . . . ."[46] Thus, in its current form, the SBP provides for the survivors of both retirees and "active duty and reserve-component military personnel upon the death of a servicemember."[47] Annuity coverage is calculated "as if the servicemember was medically retired at

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https://militarymoneymanual.com/survivor-benefit-plan/. *See also Survivor Benefit Plan*, *supra* note 40 (explaining that because retired pay stops with the death of the service member, SBP is "one way to ensure a continued financial benefit for . . . a . . . survivor").

[43] HOSEK ET AL., *supra* note 8, at 5 (quoting U.S. DEP'T OF DEF., OFFICE OF THE SEC'Y OF DEF. FOR PERSONNEL AND READINESS, MILITARY COMPENSATION BACKGROUND PAPERS 738 (7th ed., 2011), www.loc.gov/rr/frd/pdf-files/Military_Comp-2011.pdf); *see also* 10 U.S.C.S. § 1451(a) (LexisNexis 2019); CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 2 (2011); McCarl, *supra* note 6, at 417.

[44] *Survivor Benefit Plan*, *supra* note 40; *see also* CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 5 (2011); HOSEK ET AL., *supra* note 8, at 13.

[45] HOSEK ET AL., *supra* note 8, at 4 (quoting DEP'T OF DEF., OFFICE OF THE ACTUARY, STATISTICAL REPORT ON THE MILITARY RETIREMENT SYSTEM, FISCAL YEAR 2016 at 237 (2018), https://actuary.defense.gov/Portals/15/Documents/MRS_StatRpt_2017%20v4.pdf?ver=2018-07-30-094920-907) (further explaining that the "government subsidy in the previous fiscal year was 64.6 percent of the SBP cost"); see also CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 16 (2011) (noting that from 1973 through 2005, "the cumulative cost [of SBP] to retirees was $22,595,064,000 while cumulative payments to families was $30,923,249,000," a delta of almost $8.5 billion).

[46] Higdon, *supra* note 30, at 446–47; *see also* National Defense Authorization Act for Fiscal Year 2002, Pub. L. 107-107, § 642, 115 Stat. 1012, 1151 (2001); *Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 31 (2005) (statement of Edith G. Smith, Member, Gold Star Wives of America) ("[SBP] was expanded in the 108th Congress to include all line of duty deaths without the requirement of 20 years of active duty service after September 10, 2011."); Berquist, *supra* note 11.

[47] Higdon, *supra* note 30, at 445.

100 percent disability,"[48] and, due to the nature of this "implied coverage,"[49] active duty members do not pay premiums.[50] In other words, because an individual who dies in the line of duty cannot fulfill either of the traditional requirements to earn retirement benefits,[51] the benefit is "essentially free."[52] For these members, the base amount of retired pay for SBP annuity purposes is "computed as seventy-five percent of their high-thirty-six basic pay."[53] High-thirty-six earnings constitute the "average basic pay for the 36-month period . . . the member earned the highest rate of basic pay."[54] Put a different way, annuities equal fifty-five percent of the service member's theoretical retired pay.[55]

The current version of the SBP recognizes six classes of beneficiaries: (1) spouse; (2) spouse and children; (3) children; (4) former spouse; (5) former spouse and children; and (6) persons with an insurable interest.[56] For surviving spouse recipients of the SBP, benefits are paid until the surviving spouse dies but terminate upon the spouse's remarriage before the age of fifty-five, assuming the marriage took place on or after 14

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[48] *Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 35 (2005) (statement of Kathleen B. Moakler, Deputy Director of Government Relations, National Military Family Association). *See also* CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 11, 12 (2011) (explaining that "the legislation assumes the level of disability is 100").

[49] Higdon, *supra* note 30, at 447; *see also* 10 U.S.C. § 1448(d) (LexisNexis 2019).

[50] HOSEK ET AL., *supra* note 8, at x, 5, 7; *see also* Major Heidi M. Steele, *Making the Most Out of Your Pay and Allowances: Military Income and Tax-Free Benefits*, ARMY LAW., Oct. 2016, at 45; *Survivor Advocacy Issues*, *supra* note 17.

[51] McCarl, *supra* note 6, at 418. *See also Hearing on S. 979 Before the S. Subcomm. on Pers. of the Comm. of Armed Servs.'*, 115th Cong. 4 (2016) (statement of Edith G. Smith, Surviving Spouse) (quoting former Sen. Kay Bailey Hutchison).

[52] CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 15 (2011); *see also Hearing on S. 979 Before the S. Subcomm. on Pers. of the Comm. of Armed Servs.'*, 115th Cong. 4 (2016) (statement of Edith G. Smith, Surviving Spouse); HOSEK ET AL., *supra* note 8, at x; McCarl, *supra* note 6, at 418.

[53] HOSEK ET AL., *supra* note 8, at 7 (quoting DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION vol. 7B, ch. 46 (Mar. 2018), https://comptroller.defense.gov/Portals/45/documents/fmr/Volume_07b.pdf); *see also* Steele, *supra* note 50, at 45 (noting that "[t]his is effectively equal to seventy-five percent of full retired pay").

[54] CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 12 (2011).

[55] *See* 10 U.S.C.S. § 1451(a) (LexisNexis 2019).

[56] CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 2 (2011); Higdon, *supra* note 30, at 447.

November 1986.[57] If the surviving spouse's second marriage "ends by death, divorce, or annulment, DFAS will reinstate the SBP[] annuity . . . ."[58]

In FY 2016, the SBP had 1.1 million enrollees and 321,476 annuitants, of which 10,442 represented annuitants of active duty deaths.[59] Most of the survivors of active duty members were categorized as "young survivors" (under the age of forty), though this group typically accounts for only three percent of the total survivor population in any given year.[60] Thus, despite the concurrent wars in Iraq and Afghanistan, the majority of the surviving spouse population remains over the age of sixty-five.[61]

B. History and Development of DIC

In 1956, the Servicemen's and Veteran's Survivor Benefit Act established the VA Dependency Indemnity Compensation.[62] Dependency

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[57] *Guide to Survivor Benefits*, DEF. FIN. AND ACCT. SERV. 6 (Aug. 2014), https://www.dfas.mil/dam/jcr:fbbe66f5-e3c2-4e17-90d2-7681e1de3ddc/Draft_SBP%20Guide%20Book%20Aug%202014_20150323.pdf; *see also* 10 U.S.C.S. § 1450(b) (LexisNexis 2019); CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 5 (2011); HOSEK ET AL., *supra* note 8, at 8; *Survivor Benefit Plan*, *supra* note 40.

[58] *Guide to Survivor Benefits*, *supra* note 57, at 6.

[59] HOSEK ET AL., *supra* note 8, at xi, 3. *See also* KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 1 (2018). According to the slightly more recent Kamarck study, the FY 2017 figures were as follows: 276,820 survivors received SBP annuity payments, which translated to $3.7 billion in DoD expenditures. Of this group, 10,295 represent survivors of active duty service members, including 3,377 spouses and 6,918 children. *Id.*

[60] *See* CHRISTENSEN, *supra* note 10, at 99. Note that these statistics are associated with "survivors" as defined by those surviving spouses receiving DIC. Because, however, SBP annuitants of members who died on active duty are, in the vast majority of cases, almost always also entitled to DIC, the available data associated with this particular category of surviving spouses is practically identical for both SBP and DIC purposes. *See, e.g.*, *Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 31 (2005) (statement of Edith G. Smith, Member, Gold Star Wives of America) (explaining that "practically all active duty deaths result in the survivor receiving only a DIC payment" due to the effect of the offset on line-of-duty deaths).

[61] *See* CHRISTENSEN, *supra* note 10, at 100.

[62] The Servicemen's and Veterans' Survivor Benefits Act, Pub. L. No. 84-881, 70 Stat. 857, 862–67 (1956) (codified as amended at 38 U.S.C. §§ 1310–1318 (2012)). *See also*

Indemnity Compensation "provid[es] a modest annuity for survivors whose death is determined to have been caused by military service."[63] As amended, DIC is paid to three categories of survivors of service members or veterans who died on or after 1 January 1957 from: "(1) a disease or injury incurred or aggravated in the line of duty while on active duty or active duty training; or (2) an injury incurred or aggravated in the line of duty while on inactive duty training; or (3) a disability compensable under laws administered by the VA."[64] Unlike the SBP, DIC has always been available to non-retirees.[65] In addition, between the SBP and DIC, the latter "tends to be [the] better benefit" because it is nontaxable and need not be reported in gross income.[66] The SBP, on the other hand, is taxable.[67]

Eligible DIC beneficiaries include the service member's surviving spouse, children, and parents.[68] For surviving spouse annuitants, DIC is

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CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 12 (2011).

[63] *SBP Offset for Survivors*, MIL. OFFICERS ASS'N OF AM., http://takeaction.moaa.org/survivors (last visited June 12, 2019); *see also* HOSEK ET AL., *supra* note 8, at 9 ("The purpose of DIC is 'to authorize a payment to the surviving dependents of a deceased military member partially in order to replace family income lost due to the member's death and partially to serve as reparation for death.'") (quoting U.S. DEP'T OF DEF., OFFICE OF THE SEC'Y OF DEF. FOR PERSONNEL AND READINESS, MILITARY COMPENSATION BACKGROUND PAPERS 693 (7th ed., 2011), www.loc.gov/rr/frd/pdf-files/Military_Comp-2011.pdf); Gina Harkins, *'Widow's Tax' Costs Families of Fallen Servicemembers $15,000 Each Year*, MIL. OFFICERS ASS'N OF AM. (Mar. 21, 2017) (on file with author) (noting that DIC is intended to compensate for "economic losses . . . suffered as a result of a veteran's death").

[64] CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 12–13 (2011); *see also* 38 U.S.C. § 1310 (2012) (defining those service member and retiree deaths that entitle survivors to dependency and indemnity compensation).

[65] McCarl, *supra* note 6, at 418.

[66] *Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 31 (2005) (statement of Edith G. Smith, Member, Gold Star Wives of America); McCarl, *supra* note 6, at 418; Steele, *supra* note 50, at 46; *Survivor Benefit Plan*, *supra* note 40.

[67] *Survivor Benefit Plan*, *supra* note 40 (noting, however, that SBP [p]remiums are tax-deductible and subsidized by the federal government."); *see also* HOSEK ET AL., *supra* note 8, at 10; McCarl, *supra* note 6, at 418.

[68] 38 U.S.C. § 1310(a) (2012). Note that DIC will only be paid to a parent if he or she was financially dependent on the deceased service member or veteran, subject to income limitations. *See Parents Dependency and Indemnity Compensation*, U.S. DEP'T OF VETERANS AFFS., http://benefits.va.gov/Pension/current_rates_Parents_DIC_pen.asp (last visited June 12, 2019).

awarded at a flat rate of $1319.04—or just over $15,000 per year—regardless of the rank or time-in-service of the service member at time of death.[69] In addition, spousal beneficiaries are eligible to receive $311.64 per dependent child and a "two-year flat-rate monthly transition allowance of $270 . . . [for] any dependent children."[70] Spousal DIC ceases upon remarriage before age fifty-seven, though the termination of the remarriage by death or divorce restores the surviving spouse's eligibility to receive DIC.[71]

As of FY 2017, a total of 411,390 survivors received service-connected death benefits for an estimated $6.53 billion in annual payments.[72] Of the total number of survivors, 394,028 represented surviving spouses.[73] Approximately 1.13% of these spouses were under the age of thirty-five, 7.15% were between the ages of thirty-six and fifty-six, 50.93% were fifty-seven to seventy-five years old, and 40.29% were over the age of seventy-five.[74]

C. Effects of the SBP-DIC Offset

As the genesis and development of each benefit suggests, the SBP and DIC are far from one in the same. While the SBP is a "voluntary, member-purchased annuity provided by DoD, allowing a continuation of a portion

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[69] *Dependency and Indemnity Compensation – Effective 12/1/18*, U.S. DEP'T OF VETERANS AFFS., https://benefits.va.gov/Compensation/current_rates_dic.asp (last visited June 12, 2019); *see also* CHRISTENSEN, *supra* note 10, at 107 (noting that "because the goal of DIC . . . is not well defined, we cannot determine definitively whether DIC is about at the right level"). For sources citing previous DIC rates, *see also* 38 U.S.C. § 1311(a) (2012) (specifying that DIC will be paid to a surviving spouse at the monthly rate of $1,154); *Survivor Advocacy Issues*, *supra* note 17 (referencing DIC payments of $1,258 per month); *The Widow's Tax*, *supra* note 5 (also referencing DIC payments of $1,258 per month).

[70] HOSEK ET AL., *supra* note 8, at 10; *see also* 38 U.S.C. § 1311 (2012) (specifying that surviving spouses will receive $286 for each dependent each child under the age of eighteen, plus an additional $250 monthly payment, subject to inflation adjustments, for two years following the service member's death).

[71] 38 U.S.C. § 103(d) (2012); *see also* HOSEK ET AL., *supra* note 8, at 10; *Dependency and Indemnity Compensation – Effective 12/1/18*, *supra* note 69 (noting that "a surviving spouse who remarries on or after December 16, 2003, and on or after attaining age 57, is entitled to continue to receive DIC").

[72] U.S. DEP'T OF VETERANS AFFS., VETERANS BENEFITS ADMINISTRATION ANNUAL BENEFITS REPORT FISCAL YEAR 2017 at 70 (2017), https://www.benefits.va.gov/REPORTS/abr/docs/2017_abr.pdf.

[73] *Id.* at 114.

[74] *Id.* at 115.

of military retired pay upon the death of the service member," DIC is a "VA-paid monetary benefit for eligible survivors whose sponsors died of a service-connected injury or disease."[75] Families of active duty members are often entirely unaware of their post-9/11 eligibility for the SBP, in part because they pay no premiums. As a result, the loss of this benefit is inconsistent with public policy but potentially less financially onerous than the penalties paid by retirees.[76] For these family members, the loss of decades of monthly payments is devastating, especially when they have no idea at the time of electing to retain SBP coverage that the retiree might eventually pass away from a latent, service-connected ailment. One can imagine the public outrage if, for instance, "a private life insurance company refused to pay the beneficiary of a life insurance policy, simply because the policy holder had other coverage."[77] However, in simplified terms, that is the reality of the SBP-DIC offset.

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[75] Lieutenant General Dana T. Atkins, USA Retired, *Eliminate the "Widows Tax" (SBP-DIC Offset)*, MIL. OFFICERS ASS'N OF AM., (on file with author); *see also* Breaux, *supra* note 5 (noting that the two benefits serve two different populations, which, in a small percentage of cases, happen to overlap). *Cf.* PATRICK MACKIN, RICHARD PARODI, & MARK DYE, REVIEW OF MILITARY DEATH BENEFITS FINAL REPORT 45 (2004) (on file with author) ("[B]oth SBP and DIC replace income lost to the family because of a service-connected disability resulting in the death of the member [for active duty deaths]. We found no evidence that other employers provide overlapping benefits in such a manner."). Notably, however, the Mackin report did not consider the effect of the SBP-DIC offset on survivors of retirees and "offer[ed] no recommendations in this area." *Id.*

[76] On the other hand, expanding eligibility for what was previously a retirement benefit (SBP) and combining it with the receipt of a contingency-based annuity payment (DIC) has arguably caused more confusion and contentious backlash than it was worth. These two types of benefits are as different as apples and oranges; they are intended for differently situated populations and serve different purposes. Unfortunately, in electing to extend SBP to active duty survivors in the aftermath of September 11th, lawmakers inadvertently created false expectations for these individuals without anticipating the problems inherent in funding and managing a benefit originally created for a very different survivor scenario. Instead, perhaps lawmakers should have created a separate, long-term compensation program for active duty survivors to ensure financial stability, particularly in the years following the unexpected death of a young service member. Alternatively, Congress could also have revamped and increased DIC to make it a more generous form of income replacement for active duty deaths. Either way, what was originally a well-intentioned policy decision has now mushroomed into a public relations fiasco. At this point, it has become increasingly difficult, if not impossible, to turn back the clock on the extension of SBP to the active duty survivor population. Instead of taking ownership of the ongoing conundrum, lawmakers tend to avoid the issue entirely or attempt to make minor amends year after year without addressing the root of the problem. *See* discussion *infra* Section IV.B.

[77] Caruso, *supra* note 5.

Understanding the legal basis for the offset is somewhat complicated and requires the concurrent reading of several different statutes. The DIC eligibility statute pertaining to surviving spouses of veterans states that, "notwithstanding any other provision of law . . . , no reduction of benefits under such provision of law shall be made by reason of such individual's eligibility for benefits under this section."[78] Enter then the highly controversial "other provision of law," namely the SBP annuity payment structure:

> If . . . the surviving spouse or former spouse of [the eligible service member] is also entitled to dependency and indemnity compensation . . . , the surviving spouse or former spouse may be paid an annuity under this section, but only in the amount that the annuity otherwise payable under this section would exceed that compensation.[79]

In other words, read together, these statutes require that "money paid from SBP . . . be reduced dollar-for-dollar by the amount paid by the VA's DIC."[80]

As defenders of the offset correctly assert, "the DIC-SBP offset is not a new rule; it's been part of the SBP program since it was created in its current form. It was part of the program when each retiring military family decided to elect SBP."[81] That being said, institutional knowledge of the offset is incredibly limited;[82] most surviving spouses only learn of its existence once already subject to its penalties, and the reality of its

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[78] 38 U.S.C. § 1311(e) (2012).

[79] 10 U.S.C.S. § 1450(c) (LexisNexis 2019); *see also* 10 U.S.C.S. § 1448 (LexisNexis 2019) (outlining the requirements for opting out of SBP, possible elections, and rules associated with changing beneficiaries).

[80] Baron, *supra* note 12. *See also* KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 15–16 (2018) (explaining that SBP, when first enacted in 1972 was intended to serve as a substitute or supplement for existing federal benefits, like Social Security and VA payments, rather than providing an *additional* financial benefit that did not previously exist).

[81] Horrell, *supra* note 9, comment to Don Berry (July 25, 2018); *see also* Hammersly, *supra* note 21, at 10A (noting that a spokesman for the DoD claimed "information about the VA's payment's impact is provided to service families in meetings and in printed materials").

[82] Hammersly, *supra* note 21, at 10A. According to a former Veterans Affairs benefits counselor, despite the DoD attempts at sharing information about the offset through pamphlets, "many new widows [are still] blindsided by it." *Id.*

financial impact is, for many of them, debilitating.[83] Often forced to visit numerous administrative agencies to sign a mountain of paperwork within days of their husbands' death, surviving spouses in a "Widow's Fog"[84] are unable to comprehend the convoluted SBP-DIC offset until months or even years later.[85] John Tilford, a retired Army Reserve Colonel and part-time VA counselor, described the offset notification process to new widows as follows:

> You start out speaking to a lady who's in horrible shape because she's just lost her husband . . . . When you fully describe [the offset], the widows raise their eyes and look at you like 'You've got to be kidding.' If the widows aren't already crying, they start. They suddenly realize they will be punished for the remainder of their lives because their spouse gave his life for their country.[86]

As a result, the majority of surviving spouses find themselves blindsided by the long-term consequences of the offset, and, for those who have no plans to remarry, these consequences are palpable.[87] For example,

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[83] *See* Hammersly, *supra* note 21, at 10A (explaining that "too many widows . . . don't know the law's impact, or even its existence until their spouses die"). Tarona Stanfield, whose husband died in 2009 from injuries related to military service, said she was in "'total shock . . . . Those [SBP] premiums were paid in good faith. Not once in the meeting selling us the [SBP] annuity did anyone mention an 'offset' or 'Widow's Tax.'" *Id.* *See also* Berquist, *supra* note 11 (noting that most military retirees and active duty service members "have never heard of SBP, DIC, the offset, or how it financially could affect their own spouses").

[84] Janine Boldrin, *Their Forever War: Milspouses Continue to Carry the Burden of the Widow's Tax*, MIL. SPOUSE (Dec. 18, 2018), https://militaryspouse.com/spouse-101/widows-tax/. *See also* Telephone Interview with Dawn Wilson, surviving spouse of Captain Patrick Wilson (Nov. 3, 2018) ("I was in a fog at the time and I didn't care. I didn't want to talk about money and how I was benefiting from my husband's death.").

[85] *See, e.g.*, Questionnaire Answers of Theresa Morehead, surviving spouse of Master Sergeant Kevin Morehead (Oct. 24, 2018) (on file with author) (noting that no one explained the SBP-DIC offset when she filled out paperwork with DFAS and VA representatives following her husband's death). When Theresa Morehead finally learned of its existence and experienced its impact, she felt "ANGRY, so unfair and should be illegal. They would not do that to any other government employee or anyone in congress." *Id.*

[86] Hammersly, *supra* note 21, at 10A.

[87] *See, e.g.*, Telephone Interview with Teresa Priestner, surviving spouse of Chief Warrant Officer 4 John Priestner (Oct. 28, 2018) ("John sat me down and went through exactly what he thought I'd receive in benefits if anything ever happened to him. He believed I would receive SBP plus DIC, and we had no reason to think otherwise."). *See also* Hammersly, *supra* note 21, at 11A. To provide another example, Kathy Prout, who

Susie Brodeur, whose children were three and seven at the time of her husband's death in Afghanistan, has been alone for over six years and "does the job of two people and then some. It's not easy. When the government takes away the money from the lone survivor—the spouse—it really hurts."[88] Dan Merry, the vice present of the Military Officers Association of America (MOAA), characterized the SBP-DIC offset as "grossly unfair" and argued it "should be repealed. When military service causes the death of the servicemember, VA indemnity pay should be paid in addition to the SBP annuity—not subtracted from it."[89] Expressing stronger sentiments, Ted Painter, the national legislative director for the American Military Retirees Association (AMRA), referred to the offset as "arguably the most egregious and unfair theft of military related benefits currently in existence."[90]

Approximately 67,000 surviving spouses are impacted by the offset,[91] which represents approximately seventeen percent of all survivors.[92] Of those affected, "65 percent receive zero in SBP and only $15,095 a year in [total] income."[93] In other words, due to the offset, most surviving spouses lose out on approximately $15,000 annually in expected government benefits, hence the moniker of the 'widow's tax.'[94] Those

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had three children when her husband was killed an aviation crash in 1995, suffered a 75 percent drop in household income due in large part to the offset; in her words, "[h]ow do you live on this?" *Id.*

[88] Harkins, *supra* note 63. Susie Brodeur described the loss of her husband's income as a "big adjustment," noting that "[t]he fact that the government is withholding from us is really sad . . . It really surprises me that they're not taking care of all families as well as they possibly can." *Id.*

[89] Harkins, *supra* note 63.

[90] Breaux, *supra* note 5. In addition, Rep. Dean Dunn, a cosponsor of H.R. 846, the Military Surviving Spouses Equity Act, called the offset an "appalling injustice" that punishes families who dutifully paid for SBP. *Id.*

[91] Atkins, *supra* note 75.

[92] CHRISTENSEN, *supra* note 10, at 100; *see also* Boldrin, *supra* note 84 (noting that the total number of affected survivors is a "relatively small group, and that makes solving the offset harder because it can be easily dismissed").

[93] Berquist, *supra* note 11. *See also* Hammersly, *supra* note 21, at 10A ("More than three of five affected widows and widowers lose every dollar of their expected survivor annuities according to Defense Department data."); Shane III, *supra* note 20 (noting that the loss of thousands of dollars of dollars a year in benefits "creates significant financial problems for families who are already dealing with the death of a loved one").

[94] Boldrin, *supra* note 84; Harkins, *supra* note 63; Leo Shane III, *'Widow's Tax' Fix in Defense Budget Compromise Would Raise Some Tricare Co-pays*, MIL. TIMES (Nov. 8, 2017), https://www.militarytimes.com/news/pentagon-congress/2017/11/08/widows-tax-fix-in-defense-budget-compromise-would-raise-some-tricare-co-pays/. *See also* Hammersly, *supra* note 21, at 10A (noting that the DoD defends the offset by pointing

spouses of "lower-rank and long-retired service members" tend to be hit hardest by this "reduction in expected income."[95] In theory, "the total of DIC and offset SBP payments combined is, at least, equal to the full SBP benefit."[96] That is of little comfort, however, to retiree survivors, for most of whom the offset wipes out the annuity the military retiree paid for over several decades.[97] To add insult to injury, although retiree survivors receive a proportional refund of SBP premiums, this refund includes no interest,[98] thereby amounting to the equivalent of a "tax-free" loan for the government.[99] Furthermore, many service-disabled retirees have "limited

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out that widows "receive the higher of the two annuities," which generally allows them to benefit from DIC's tax-exempt status); Strobridge et al., *supra* note 28. In speaking of her late husband, surviving spouse Mary Craven asserted that "[t]he service caused his death. The service should pay extra for that, rather than cancelling part of the insurance he bought for me. It's as if they're saying that it was his own fault he died." *Id.* Similarly, for Sarah Castile, whose husband died in 2011 due to service-related illness, she and her husband paid a total of twenty-six years for the SBP annuity, totaling approximately $90,000. *Id*. She has now lost approximately $100,000 in expected benefits since her husband's death: "We're paying for their death." *Id.* Caruso, *supra* note 5.

[95] Hammersly, *supra* note 21, at 10A. *See also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-HEHS-95-30, VETERANS' BENEFITS—BASING SURVIVORS' COMPENSATION ON VETERANS' DISABILITY IS A VIABLE OPTION 10 (1995) (noting that SBP benefits for the surviving spouses of higher ranking service members "are less likely than the payments of survivors of enlisted personnel to be totally offset by DIC benefits").

[96] CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 13 (2011).

[97] *SBP Offset for Survivors*, *supra* note 63; *see also* Breaux, *supra* note 5. In the case of Debra Tainsh, whose husband died of an illness caused by Agent Orange exposure during his service in Vietnam, she receives a monthly income of $2,000 instead of the $3,525 she expected: "It's a matter of the Department of Defense . . . not being fair by any means to the widows of retired military personnel who died of service-connected issues." *Id*. For additional examples of the financial impact on retirees, see *Legislative Presentations of NASDVA, FRA, GSW, BVA, JWV, MOPH, MOAA: Hearing Before the S. Comm. on Veterans' Affairs*, 116th Cong. (2019), https://www.veterans.senate.gov/imo/media/doc/3%20-%20GSW%20Testimony%2003.12.19.pdf (statement of Crystal Wenum, National President, Gold Star Wives of America).

[98] Hammersly, *supra* note 21, at 10A ("[T]hat refund [in premiums] doesn't include interest on premiums paid, often for decades."). *See also* Horrell, *supra* note 9; Strobridge et al., *supra* note 28; *Survivor Advocacy Issues*, *supra* note 17.

[99] *Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 31 (2005) (statement of Edith G. Smith, Member, Gold Star Wives of America); *see also* Breaux, *supra* note 5. According to Kathy Prout, whose late husband died in the line of duty after serving in the Navy for twenty-nine years, the DoD "is not honoring the contract the deceased purchased . . . . People are paying premiums for a benefit they may not get." *Id.*

opportunities to purchase additional life insurance, and [private] policies . . . impose exorbitant premiums,"[100] which makes the decision *not* to opt out of SBP look more like a contract of adhesion. For others, the lost opportunity to benefit from private life insurance represents an added source of frustration. Take, for example, retired Chief Master Sergeant John Gibbons and his wife, Elly Gibbons, who were entirely unaware of the offset until John passed away from a service-connected illness.[101] At this point, Mrs. Gibbons wished they had invested in a private insurance plan not subject to the federal offset; however, she and her late husband both believed "until too late that the military's plan was 'a guaranteed source of income.'"[102]

Between retiree surviving spouses and active duty surviving spouses, the offset arguably penalizes the former to the greatest extent of the law; for years, retiree families elect to forfeit a portion of their monthly retirement check in exchange for a benefit they expect to receive. On the other hand, Congress extended the SBP benefit to active duty surviving spouses in response to the challenges of a sudden, unexpected loss for which a family cannot adequately prepare; thus, the loss of this relatively new entitlement ultimately does little to help those Congress intended for

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[100] *Eliminating the Widows' Tax*, *supra* note 10.

[101] Some might argue that the Gibbons family could have researched the offset and asked more questions about its potential effect on receipt of SBP before subjecting themselves to its provisions. The problem, in large part, is the uncertainty of DIC payments. Unless a retiree knows at the time of retirement that he or she will succumb to a service-related illness at some point in the future, choosing to remain invested in SBP often seems like the safest and securest financial option available at the time; SBP ensures that whether the survivor dies from a service-connected condition or passes away from unrelated causes, the surviving spouse will receive *some* financial benefit, though perhaps not as much as the retiree anticipated. Furthermore, despite a persistent lack of knowledge regarding the existence of the offset in the military community, some of the tools now available to families to assist them in planning for the future did not exist at the time retirees chose not to opt out of SBP. *See, e.g.*, *SBP Financial Analysis Tools*, OFF., OF THE ACTUARY, https://actuary.defense.gov/Survivor-Benefit-Plans/ (last visited June 12, 2019); MY ARMY BENEFITS, https://myarmybenefits.us.army.mil/ (last visited June 12, 2019).

[102] Hammersly, *supra* note 21, at 11A. See also *Legislative Presentations of NASDVA, FRA, GSW, BVA, JWV, MOPH, MOAA: Hearing Before the S. Comm. on Veterans' Affairs*, 116th Cong. (2019), https://www.veterans.senate.gov/imo/media/doc/3%20-%20GSW%20Testimony%2003.12.19.pdf (statement of Douglas Greenlaw, National Commander, Military Order of the Purple Heart) (referring to SBP as a "personal decision by each retiree to sacrifice a portion they receive over their lifetime in order to provide some financial stability to their survivors . . . similar to the decision to purchase a life insurance policy").

it to benefit.[103] In theory at least, SBP has the potential to provide an invaluable "income supplement" to active duty surviving spouses, many of whom "are on the move, and . . . don't have steady careers."[104] As the last two decades of patriotic fervor suggest, supporting the sacrifices of active duty family members who "have to put down roots every few years in a new place, make new friends, [and] learn new school systems . . . alone"[105] is the equivalent of supporting the troops themselves. Due to the interplay of SBP and DIC, however, most surviving spouses never see a dime of what Congress authorized them to receive in recognition of the exigencies of military life after September 11th.[106] Surviving spouse Traci Voelke, whose husband was killed in Afghanistan, summarized the human cost for those families who have already sacrificed more than most: "I lost my husband in the middle of his career, along with his income and earning potential. Without the additional SBP, my monthly payments aren't even half of what he was earning."[107]

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[103] *Hearing on S. 979 Before the S. Subcomm. on Pers. of the Comm. of Armed Servs.'*, 115th Cong. 4 (2016) (statement of Edith G. Smith, Surviving Spouse) (quoting former Sen. Kay Bailey Hutchison) (noting that Congress "recognized that those active duty service members who died the youngest paid the 'highest price' and made the 'greatest sacrifice'").

[104] Harkins, *supra* note 63 (quoting surviving spouse Traci Voelke).

[105] *Id.*

[106] *See Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 31 (2005) (statement of Edith G. Smith, Member, Gold Star Wives of America) (noting that "this expanded SBP eligibility [is] a hollow benefit to the younger widows" because practically all active duty deaths result in the survivor receiving the equivalent of a DIC payment due to the mandatory SBP reduction); *see also* Questionnaire Answers of Theresa Morehead, surviving spouse of Master Sergeant Kevin Morehead (Oct. 24, 2018) (on file with author) ("I feel cheated in more ways than you can imagine."). Put another way, because most active duty deaths are considered to be "in the line of duty," active duty surviving spouses qualify for DIC and, therefore, are subject to the SBP-DIC offset. For a more detailed discussion on line-of-duty determinations and their effect on the receipt of benefits, see Major Aaron Lancaster, *Line of Duty Investigations: Battered, Broken, and in Need of Reform*, 225 MIL. LAW REV. 597 (2017); Major Melvin L. Williams, *In the Line of Duty? A Primer on Line of Duty Determinations and the Impact on Benefits for Soldiers and Families*, ARMY LAW., Nov. 2014, at 20.

[107] Harkins, *supra* note 63; *Cf. Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 77 (2005) (statement of Hon. Charles S. Abell, Principal Deputy Under Secretary of Defense) (asserting that "taken together, the surviving spouse with minor children will typically qualify for monthly benefits that are equal to or even exceed the former income of the member"). *See supra* note 76, discussing the problems inherent in attempting to extend SBP, a retirement benefit, to the active duty survivor population. Again, perhaps lawmakers should have considered

Although personal anecdotes provide powerful examples of the human consequences of the offset, the numbers also speak volumes. Consider, for instance, a retired Lieutenant Colonel (O-5) who served on active duty for twenty-two years. Theoretically, his retiree-purchased SBP annuities would total $26,974 annually at the time of his death. For service-connected deaths, however, DIC totals approximately $14,580 per year. As a result, his surviving spouse loses the difference of $12,394 and keeps only the total amount of DIC, which although the higher of the two amounts, still results in an almost fifty percent reduction in potential benefits. Similarly, on the active duty side, for a Staff Sergeant (E-6) with fourteen years of active duty service, annual SBP annuities would equate to $15,271, but DIC payments total $14,580 annually. Thus, the Staff Sergeant's surviving spouse receives $15,271, the higher of the two amounts, but he will still pay taxes on the $691 difference between the two benefits.[108]

A key point of contention among surviving military spouses is the fact that other service members, survivors, and surviving spouses of federal employees are not "penalized" for receipt of two separate benefits.[109] Former Senator Bill Nelson, who was once an insurance commissioner, stated that he knows of "no purchased annuity [like SBP] that would deny payment based on receipt of a different payment."[110] Framed this way, the SBP-DIC is a blatant inequity. Notably, "no other federal surviving spouse is required to forfeit his or her federal annuity because military service caused his or her sponsor's death."[111] Although recipients of other concurrent federal benefits previously faced similar limitations, Congress has since eliminated comparable offsets. For example, before 2004, the "VA offset" prevented veterans from collecting both retirement pay and

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increasing DIC payments in accordance with spousal income to cover the unanticipated costs of losing a young service member and his or her future earning potential. Instead, however, conflating the circumstances of retiree Families with those of active duty surviving spouses has only created more confusion and frustration among these two populations regarding what they are entitled to receive and why.

[108] Examples are adapted from the SBP and DIC figures provided in Strobridge et al., *supra* note 28. Note that these figures are based on prior calendar year rates for retirement pay purposes and DIC. Current DIC rates total $1,319.04 per month and $15,828.48 per year. *See Dependency and Indemnity Compensation – Effective 12/1/18*, *supra* note 69. For a similar example using current retirement, SBP, and DIC rates, see *infra* Appendix A.

[109] *See* Hammersly, *supra* note 21, at 10A.

[110] Philpott, *supra* note 21.

[111] Boldrin, *supra* note 84.

VA disability pay; however, veterans who are at least fifty percent disabled and retired after twenty years can now collect both benefits.[112]

Similarly, when a disabled former service members retires from the Federal Civil Service, "the survivor [is] entitled to both the Civil Service survivor benefit and DIC, with no offset."[113] Kayce Lee, the surviving spouse of an active duty service member who died during physical training in 2011, finds this discrepancy particularly galling; she noted that "[t]he widows of federal civil service employees do not have [an] offset, nor would your wife if you died while a Congressman."[114] In addition, if surviving children are designated as SBP beneficiaries, "the surviving

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[112] *See Concurrent Retirement and Disability Pay (CRDP)*, DEF. FIN. AND ACCT. SERV., https://www.dfas.mil/retiredmilitary/disability/crdp.html (last visited June 12, 2019). *See also* CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 14 (2011) ("[S]ome have claimed that if concurrent receipt or "special pays" for military retirees is allowed, such should also be afforded their survivors."); McCarl, *supra* note 6, at 417 ("Concurrent Retirement and Disability Pay replaced Special Compensation Pay for Severely Disabled Military Retirees and is a ten-year phase-in program, designed for military retirees with 50% to 100% disability ratings to receive full concurrent benefits by 2014."); Hammersly, *supra* note 21, at 10A. ("Congress changed the VA offset law in 2004 to allow veterans who were at least 50 percent disabled and retired after 20 years to collect both benefits without penalty."); Philpott, *supra* note 21 (pointing out that the same military retirees advising lawmakers on the SBP-DIC offset "have themselves gotten legislative relief from dual compensation laws and the lifting of bans on concurrent receipt of both military retired pay and VA disability compensation"). *See generally Findings of the President's Commission on Care for America's Returning Wounded Warriors: Hearing Before the H.R. Comm. on Veterans' Affairs*, 110th Cong. (2007).

[113] *Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 31 (2005) (statement of Edith G. Smith, Member, Gold Star Wives of America); see also *Legislative Presentations of NASDVA, FRA, GSW, BVA, JWV, MOPH, MOAA: Hearing Before the S. Comm. on Veterans' Affairs*, 116th Cong. (2019), https://www.veterans.senate.gov/imo/media/doc/3%20-%20GSW%20Testimony%2003.12.19.pdf (statement of Crystal Wenum, National President, Gold Star Wives of America) ("Cost of Living Adjustment (COLA) increases have been the only change in DIC since the flat rate was implemented in 1993. When DIC is compared to payments to surviving spouses of other federal employees, DIC lags behind by almost 12%."); Atkins, *supra* note 75 ("No other federal annuity is structured with this offset; DIC is not deducted from federal survivor annuities for military veterans in civil service jobs."); Strobridge et al., *supra* note 28 ("No survivors of civilian retirees who also are disabled military veterans and die of a service-connected cause must forfeit any of their purchased survivor benefits to receive DIC."); *The Widow's Tax*, *supra* note 5 (emphasizing that "no other federal annuity [is] structured with this offset").

[114] Breaux, *supra* note 5. Kayce Lee also noted that her drastic change in financial circumstances has been an incredibly difficult adjustment: "We went from my husband making close to $4,000 a month, to no husband or daddy period." *Id.*

spouse avoids any offsets from the receipt of [DIC],"[115] subject to age and disability cut-offs associated with minor SBP recipients.[116] In this scenario, the surviving spouse has the option of collecting DIC while designating a child as the SBP beneficiary until the child reaches the age of eighteen.[117] Even in this configuration, however, the surviving spouse is eventually limited to DIC as their sole source of income because the SBP benefit terminates when the child reaches the age of majority.[118] Thus, in the case of a child who is already fourteen years old at the time of the service member's death, the family collectively receives four years of "concurrent" SBP and DIC payments, followed by a lifetime of less than $1,500 in monthly income for the surviving spouse.[119] For surviving spouses without children at the time of the active duty service member's death, there is no equivalent option for temporary relief; the offset takes effect immediately.[120] Thus, despite the prevalence of "support our

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[115] CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 12 (2011); *see also* Hammersly, *supra* note 21, at 10A (noting that children and parents of armed forces members are also exempt from any equivalent of the offset, as are "survivors of other federal workers who die in connection with their service"); *Eliminating the Widows' Tax*, *supra* note 10 (emphasizing the offset does not apply to surviving military children, only to the spouse); *Survivor Advocacy Issues*, *supra* note 17 (explaining the exception for military children).

[116] Due to these age cut-offs, designating a child as the recipient of the SBP benefit is not, in most cases, a viable option for the majority of retiree surviving spouses. *See* CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 6 (2011) ("A child becomes ineligible for an SBP benefit upon reaching age 18 (or 22, if a full-time student). A child who marries becomes ineligible to receive SBP benefits regardless of age.").

[117] *See Understanding SBP, DIC, and SSIA*, DEF. FIN. AND ACCT. SERV., https://www.dfas.mil/retiredmilitary/survivors/Understanding-SBP-DIC-SSIA.html (last visited Feb. 7, 2019).

[118] *See Survivor Benefit Plan Overview*, MIL. COMPENSATION, https://militarypay.defense.gov/Benefits/Survivor-Benefit-Program/Overview/ (last visited June 12, 2019).

[119] *See SBP Costs and Benefits Spouse Coverage*, MIL. COMPENSATION, https://militarypay.defense.gov/Benefits/Survivor-Benefit-Program/Costs-and-Benefits/Spouse-Coverage/ (last visited June 12, 2019) (noting that SBP is "designed to provide a *lifetime* monthly income for your surviving spouse after you die") (emphasis added)).

[120] *See Office of Survivors Assistance FAQs*, U.S. DEP'T OF VETERANS AFF., https://www.va.gov/SURVIVORS/FAQs.asp#FAQ8 (last visited June 12, 2019).

troops" rhetoric,[121] in perhaps the ultimate irony, "[m]ilitary spouses are the only ones subject to this offset in the entire government."[122]

As if these discrepancies weren't enough, a federal appeals holding delivered another "slap in the face" to the already beleaguered widow community and, in doing so, created yet another inequity.[123] Though worded somewhat unartfully, the DIC statute, as amended in 2003, states:

> [I]n the case of an individual who is eligible for dependency and indemnity compensation under this

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[121] *See, e.g.*, *Show Your Support for America's Troops and Their Families*, USO, https://secure.uso.org/OM_RGR/?sc=WF18SRCH68&utm_source=bing&utm_medium=cpc&utm_campaign=Search_Nonbrand_Donate&utm_term=military%20%2Btroops&utm_content=Donate-Troops (last visited June 12, 2019); SUPPORT OUR TROOPS, https://supportourtroops.org/ (last visited June 12, 2019). *See also* Lisa Hammersly, *Military Widows, Including Those in Arkansas, Still Fighting to Get Annuity with New Congress, Work Starts Anew*, ARK. DEMOCRAT GAZETTE (Dec. 30, 2018, 4:30 AM), https://www.arkansasonline.com/news/2018/dec/30/military-widows-still-fighting-to-get-a/?news-national&fbclid=IwAR07iEJyPDn0-YCBY_JkjKwevb7QgVNRDUtU9_0tIrZDNUnyBHhVUAM0nU0 (describing how some surviving spouses "cringe[] to hear congressional members and president speak glowingly of their support for military members and families").

[122] Berquist, *supra* note 11. For a detailed explanation of how SBP and DIC benefits compare generally to those available in the civilian sector, see CHRISTENSEN, *supra* note 10, at 27 (comparing benefits by salary level and employer type, including federal, military, large private employers, and small private employers); HOSEK ET AL., *supra* note 8, at 45 (concluding that cumulative SBP benefits tend to be comparable or greater than those benefits offered to survivors of federal civilian employees under FERS and those offered to survivors of private industry employees); MACKIN ET AL., *supra* note 75, at 66 (comparing death benefits across employers, to include military service members, federal civilian employees, contractors, and county police officers); U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-62, ANALYSIS OF VA COMPENSATION LEVELS FOR SURVIVORS OF VETERANS AND SERVICEMEMBERS 6 (2009) (finding that DIC generally provides higher payments than the Civil Service Retirement System (CSRS) and the Federal Employees' Retirement System (FERS) but that DIC payments are typically lower than "payments to comparably paid federal employees under the federal workers' compensation program known as [the Federal Employees' Retirement System (FERS)]"); U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-814, SURVIVOR BENEFITS FOR SERVICEMEMBERS AND FEDERAL, STATE, AND CITY GOVERNMENT EMPLOYEES 4–5 (2004) (concluding that military survivor benefits compare in type but not amount to benefits offered by federal, state, and city government entities who die in the line of duty and noting specifically that supplemental benefits paid to survivors of deceased government employees in high-risk occupations "can result in lump sum and recurring payments . . . being generally higher than those for survivors of servicemembers").

[123] *See* Hammersly, *supra* note 21, at 10A. *See also* Boldrin, *supra* note 84; *Survivor Advocacy Issues*, *supra* note 17 (noting that "no other federal survivor is required to remarry to avoid a reduction in his or her survivor annuity eligibility").

> section by reason of [remarriage after the age of 57] who is also eligible for benefits under another provision of law by reason of such individual's status as the surviving spouse of a veteran, then . . . no reduction in benefits under such other provision of law shall be made by reason of such individuals' eligibility under this section.[124]

Thus, as of 1 January 2004, surviving spouses who remarry after attaining the age of fifty-seven are technically no longer subject to the SBP-DIC offset and can collect full SBP and DIC payments simultaneously.[125] This "bizarre" technicality[126] is the combined result of the Veterans Benefit Act of 2003, federal law, and *Sharp v. United States*, a 2009 federal appeals case that reiterated what the plain language of the law already stated.[127] Although the government in *Sharp* argued that Congress could not have possibly intended to implement this "ridiculous remarriage rule,"[128] the court found otherwise, citing the lower court's opinion: "The 2003 legislation in all likelihood reflected Congress's intent to repeal the DIC-SBP offset for a small group of surviving spouses as a first step, until such time as Congress could be persuaded to repeal the offset altogether."[129] Not surprisingly, the appellees won. Not only did the court hold that the law is written to allow for receipt of both benefits for surviving spouses who remarry after age fifty-seven, but the government also had to pay thousands of dollars in back pay to the appellees for years of denied benefits.[130]

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[124] The Veterans Benefit Act of 2003, Pub. L. No. 108-183, § 101, 117 Stat. 2651, 2652–53 (2003) (codified as amended at 38 U.S.C. §§ 1310–1318 (2012)).

[125] *See* CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 13 (2011); Boldrin, *supra* note 84.

[126] Caruso, *supra* note 5; *see also* Boldrin, *supra* note 84 (calling the remarriage offset elimination rule "odd"); *Survivor Advocacy Issues*, *supra* note 17 (referring to the *Sharp* holding as the "ultimate irony").

[127] The Veterans Benefit Act of 2003, Pub. L. No. 108-183, § 101, 117 Stat. 2651, 2652–53 (2003); 38 U.S.C. §§ 1311(e) (2012); Sharp v. United States, 580 F.3d 1234 (Fed. Cir. 2009) [hereinafter *Sharp II*].

[128] Horrell, *supra* note 9 (calling the remarriage offset elimination rule a "strangely-written law").

[129] Sharp v. United States, 82 Fed. Cl. 222, 227, n. 1 (2008) [hereinafter *Sharp I*]. The *Sharp II* court noted that the statutory provision allowing for the receipt of both benefits upon remarriage after age fifty-seven, may "represent[] a first step in an effort to eventually enact full repeal. After all, the servicemember paid for both benefits: SBP with premiums; DIC with his life." *Sharp II*, 580 F.3d at 1239.

[130] *Sharp II*, 580 F.3d at 1235; *Sharp I*, 82 Fed. Cl. at 23.

Although an apparent victory for a small subset of surviving spouses, many others feel that current law, as clarified by *Sharp*, "punishes" those who remarry before age fifty-five by ending their SBP and DIC eligibility and punishes those age fifty-seven or older who do not remarry by continuing to impose the offset.[131] Optimistic advocates continue to hope that the *Sharp* holding "at least opened the door to the possibility of receiving both annuities,"[132] but, after ten years, that possibility has yet to come to fruition.

Ultimately, the uncomfortable and frequently-avoided questions shrouding the offset boil down as follows: what is it about a remarried surviving spouse's situation that makes her or him so different from every other potential beneficiary, including children and parents? The offset cannot be premised solely on presumed financial security at the time of remarriage or else the *Sharp* remarriage exception would be meaningless. Furthermore, why is a remarried widow severed from all financial connections to her first spouse while a divorced spouse, in contrast, continues to retain an interest in her former husband's retirement income? Consider, for instance, a former spouse whose marriage overlapped for any period of time with her ex-husband's active duty service. Under these circumstances, the former spouse may still receive up to fifty percent of the member's retired pay.[133] Thus, "a discrepancy exists between that of a widow and that of a divorcee. Upon remarriage, that divorcee is still entitled to half of her husband's retired pay. Upon remarriage, a widow is not entitled to anything . . . ."[134] If divorcees can seek SBP benefits during divorce proceedings without offsetting any other sources of income, one has to wonder why legally married spouses are made to feel as if they are

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[131] *SBP Offset for Survivors*, *supra* note 63; Telephone Interview with Laura Monk, surviving spouse of Specialist Austin Monk (Nov. 4, 2018) (noting that although she is in a committed relationship with another service member with whom she has a daughter, the loss of all benefits deters her from considering remarriage before the age of fifty-seven).

[131] McCarl, *supra* note 6, at 419.

[133] *See* 10 U.S.C.S. § 1408 (LexisNexis 2019) (authorizing, though not requiring, state courts to award a portion of military retired pay to former spouses in divorce proceedings); *Former Spouses' Protection Act Frequently Asked Questions*, DEF. FIN. AND ACCT. SERV., https://www.dfas.mil/garnishment/usfspa/faqs.html (last visited June 12, 2019).

[134] *Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 15 (2005) (statement of Jennifer McCollum, Surviving Spouse).

asking for more than they have earned.[135] Given the government's adamant pledge to care for the families of the fallen,[136] the persistence of the offset also leaves one wondering whether this disparate treatment of surviving spouses has—or will have—negative effects on recruiting future generations of service members. Due to the alarming lack of knowledge of the offset, the answer, for now, is still to be determined.[137] On its face, however, the SBP-DIC offset raises questions about the military's commitment to "taking care of its own" when the families of those who die in connection with service are treated as second-class citizens for benefits purposes.[138] The DoD—and the Government generally—cannot

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[135] *See, e.g.*, *Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 31 (2005) (statement of Edith G. Smith, Member, Gold Star Wives of America).

[136] *See, e.g.*, *Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 79 (2005) (statement of Hon. Charles S. Abell, Principal Deputy Under Secretary of Defense) ("Our objective is to ensure that we fully support our servicemembers when we send them in harm's way, and that we properly support the family's needs if the servicemember dies on active duty.").

[137] *See, e.g.*, MACKIN ET AL., *supra* note 75, at 30 ("There is no available evidence linking the level of survivor benefits to recruiting and retention behavior."). *But see id.* at 39 (noting that certain additional benefits recognizing the risks of service "could conceivably improve recruiting and retention into the military's most hazardous front-line jobs").

[138] *See Hearing on S. 979 Before the S. Subcomm. on Pers. of the Comm. of Armed Servs.'*, 115th Cong. 5 (2016) (statement of Edith G. Smith, Surviving Spouse) (describing the loss of SBP compensation as a "disservice," both to the service member who makes the ultimate sacrifice and to the family members for whom this service member "may not now be able to provide"). This discrepancy raises other troubling questions about the persistence of the offset: is it a sign that society still views widows, particularly those over the age of fifty-seven, as being reliant on their husbands for financial support? Alternatively, does it mean that lawmakers consider remarriage an "invalidation" of the widow's first marriage? In theory, the very existence of the widow's first marriage entitled her to long-term financial benefits like SBP and DIC. Why then does the continued receipt of any earned benefits after remarriage appear to be premised on what is essentially a lifestyle choice? Is the point of the law to disincentive remarriage or, at the very least, force widows to wait until after turning fifty-seven to take this step? For many surviving spouses, both young and old, that certainly seems to be the message. *See, e.g.*, Telephone Interview with Dawn Wilson, surviving spouse of Captain Patrick Wilson (Nov. 3, 2018) (stating that the remarriage and offset rules are particularly harsh for young widows, who stand to lose over $1 million if they choose to remarry before the age of fifty-seven). Interestingly, other countries have "recognized the remarriage concern" and "have taken steps to alleviate the remarriage issues." *Legislative Presentations of NASDVA, FRA, GSW, BVA, JWV, MOPH, MOAA: Hearing Before the S. Comm. on Veterans' Affairs*, 116th Cong. (2019), https://www.veterans.senate.gov/imo/media/doc/3%20-

have it both ways: either they are committed to providing in full for these families or they are not, in which case survivors deserve to hear the truth so that they might divert their relief efforts elsewhere.

Whether couched in the dire financial challenges faced by many surviving families or general principles of equity, the consequences of the SBP-DIC offset for surviving families are palpable. Affected spouses insist they are not seeking a "handout," but, rather, recognition of a sacrifice that is unique to military service.[139] Despite successful efforts at reform for other concurrent federal beneficiaries, the SBP-DIC offset remains unique in its unforgiving application to retiree and active duty surviving spouses alike; as advocates often point out,"[w]hile retired members pa[y] SBP premiums, earlier active duty deaths often cause[] more family disruption and financial penalties. In each case, military service extract[s] the ultimate premium from member and spouse—the very life of the servicemember."[140]

III. Implementation of the Special Survivors Indemnity Allowance (SSIA)

A. The Genesis of the SSIA

To further complicate matters, those surviving spouses whose DIC payments are reduced by SBP are also eligible for another related benefit: the Special Survivor Indemnity Allowance (SSIA).[141] Special Survivor Indemnity Allowance is "an additional taxable benefit meant to partially make up for the compensation lost due to the offset."[142] Congress

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%20GSW%20Testimony%2003.12.19.pdf (statement of Crystal Wenum, National President, Gold Star Wives of America) (explaining that, for example, the United Kingdom "changed a similar law recognizing unfair treatment of surviving spouses" and emphasizing that "current [U.S.] law . . . binds young surviving spouses to widowhood" by imposing restrictions on those who remarry by the "arbitrary age" of fifty-seven).

[139] Caruso, *supra* note 5. As surviving spouse Sarah Castile emphasized, "[w]e are not asking for welfare . . . . We have paid both in the loss of military spouse due to serving our country and in premiums paid for many years." *Id.*

[140] *Eliminate the Widows Tax (SBP-DIC Offset)*, *supra* note 29.

[141] Steele, *supra* note 50, at 45; *see also Guide to Survivor Benefits*, *supra* note 57, at 9.

[142] *Survivor Benefit Plan*, *supra* note 40. *See also* KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 18 (2018) (noting that SBP and SSIA are both taxable benefits, unlike DIC, which is non-taxable).

introduced SSIA in the NDAA for FY 2008.[143] Although the original authorization contained a sunset provision, the NDAA for FY 2018 implemented SSIA as a permanent benefit.[144] Because SSIA technically offsets the DIC offset, some refer to it as the offset to the offset[145] or a "stop gap measure."[146] At the outset, SSIA was intended only as a temporary solution "in hopes of eliminating the SBP-DIC offset."[147] Given its permanent implementation, however, the future of full repeal now appears as uncertain as ever.

B. Dollar Value of SSIA

In its infancy, the SSIA annuity totaled only $50 a month with payments set to increase to $100 by 2014.[148] Lawmakers then extended the benefit and again increased SSIA payments in staggered increments from 2014 through 2017, at which point the SSIA reached a high of $310 per month.[149] In any given month, the amount of SSIA may not exceed the annuity amount subject to the DIC offset.[150] For those spouses who elect to transfer SBP to their children, there is no SBP-DIC offset; thus, these survivors do not receive SSIA.[151]

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[143] *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 644, 122 Stat. 3, 158 (2008) (implementing the original version of the SSIA); National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 631, 122 Stat. 4356, 4492–93 (2008) (extending the SSIA to survivors of active duty members).

[144] *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 621, 131 Stat. 1289, 1427–28 (2017) (permanently implementing the SSIA with variance for COLA at the beginning of each calendar year beginning in 2019); *see also* KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 17–18 (2018).

[145] HOSEK ET AL., *supra* note 8, at 11, 14.

[146] *Survivor Advocacy Issues*, *supra* note 17.

[147] *Id*.

[148] *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 644, 122 Stat. 3, 158 (2008).

[149] Family Smoking Prevention and Tobacco Control and Federal Retirement Reform, Pub. L. No. 111-31, § 201, 123 Stat. 1776, 1857–58; *2019 Cost of Living Adjustment*, DEF. FIN. AND ACCT. SERV. (Dec. 12, 2018), https://www.dfas.mil/retiredmilitary/newsevents/newsletter/2019-Cost-of-Living-Adjustment.html (noting that the current SSIA monthly payment rate, with adjustments for COLA, is $318). *See also* KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 18 (2018).

[150] *Guide to Survivor Benefits*, *supra* note 57, at 10.

[151] *Understanding SBP, DIC, and SSIA*, *supra* note 117; *see also Survivor Advocacy Issues*, *supra* note 17.

At its core, SSIA serves as a "rebate, giving spouses about 25 percent of what they lose from the SBP/DIC offset."[152] For eligible beneficiaries, this translates roughly to an additional $3,700 each year.[153] Compared with what the majority of these spouses would receive without the offset, however, this "modest rebate" is viewed as somewhat insulting.[154] Thus, despite the best intentions of the lawmakers who originally crafted this "special" financial benefit, the current $318 "rebate" is generally considered "a poor effort at restitution."[155]

C. Practical Consequences and Long-Term Prognosis

Some long-time advocates of offset repeal are optimistic that the SSIA represents "one foot in the door."[156] Although a 2008 House Armed Services Committee press release referred to SSIA as the "latest step" in the quest to eliminate the widow's tax offset,[157] other advocates fear Congressional leaders—and even some widows—consider the issue moot.[158] The press release promised that the House Committee "will continue to explore every opportunity to pursue legislation that brings us closer to eliminating the 'widow's tax.'"[159] Ten years after the initial

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[152] Harkins, *supra* note 63. The DoD estimates that "about 3,000 of 64,000 survivors impacted—those who are older and saw sponsors opt for minimal SBP coverage—have been made whole by the SSIA." Philpott, *supra* note 21 Note that critics consider SSIA a form of "triple-dipping" in that surviving spouses receive three benefits—SBP, DIC, and SSIA—for the same period of service. CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 15 (2011).

[153] Hammersly, *supra* note 21, at 10A; *see also* Shane III, *supra* note 93 (pointing out that $3,700 is still "only a fraction of their offset losses").

[154] *Eliminate the Widows Tax (SBP-DIC Offset)*, *supra* note 29.

[155] *The Widow's Tax*, *supra* note 5; Questionnaire Answers of Katie Utley, surviving spouse of Captain Daniel Utley (Oct. 23, 2018) (on file with author) ("I feel like the "stop gap' is a joke. [Congress] recognize[s] it is wrong and validate[s] the issue by paying the small amount of money owed, but will not end it completely or take steps to end it."); Telephone Interview with Laura Monk, surviving spouse of Specialist Austin Monk (Nov. 4, 2018) (describing how SSIA feels like a "band aid on a really big wound, like Congress is saying 'here's this—we're very sorry'"). *See also* Strobridge et al., *supra* note 28 (describing the outrage of those who qualify for the offset). As surviving spouse Mary Craven pointed out,"[i]t's almost an insult to take away $1,215 and then expect us to be grateful to get back $90 in FY 2013." *Id.*

[156] Ostrom, *supra* note 21 (noting that the *Sharp* case is "another foot in the door").

[157] *SBP Offset for Survivors*, *supra* note 63.

[158] Ostrom, *supra* note 21 (explaining that the permanent implementation of SSIA may "leav[e] full repeal of the offset forever out of reach"); Philpott, *supra* note 21.

[159] *SBP Offset for Survivors*, *supra* note 63.

implementation of SSIA, however, repeal of the offset remains out of reach;[160] in fact, with the permanent implementation of SSIA, the issue is, in the minds of some Congressional leaders, resolved.[161] Given recent budget crises, SSIA, both in its temporary and permanent forms, may represent the extent of Congress' willingness to address the issue.[162] Tellingly, the House of Representatives failed to offer a solution to the pending expiration of SSIA in its version of the FY 2018 NDAA,[163] calling into question lawmakers' genuine commitment to further reform.[164]

Although the House version of the FY 2018 NDAA noted that Congress must work to eliminate the widows' tax entirely, this language simply parroted the promises of previous Congressional committees.[165] The practical concern, as always, is cost: the permanent implementation of SSIA is estimated to require approximately $2.8 billion in funding over

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[160] *See* Caruso, *supra* note 5 (noting that "SSIA was initiated . . . with the expectation that the total offset would be settled within the 10-year period, but Congress has failed to do that").

[161] Philpott, *supra* note 21. Congressional leaders expressed confusion when The Military Coalition—one of many advocacy groups—continued to list resolving the SBP-DIC offset as a legislative priority because lawmakers mistakenly believed the offset had already been eliminated with the implementation of SSIA. *Id. See also* Ostrom, *supra* note 21.

[162] Ostrom, *supra* note 21 (noting that despite acknowledging the offset is "wrong," Congress authorized SSIA as a supplemental payment and "compromise" in order to avoid eliminating the offset due to prohibitive costs); *see also* Shane, *supra* note 93 (calling SSIA a "partial fix to an ongoing benefits problem that has frustrated military advocates for decades").

[163] H.R. REP. NO. 114-404, at 838–39 (2017) (Conf. Rep.) (noting that the House version of the NDAA included only an "express[ion] of the sense of Congress that the [SSIA] was created as a stop gap measure" while "[t]he Senate amendment contained a provision . . . that would amend section 1450 of title 10, United States Code, to permanently extend the authority to pay the [SSIA] . . . ."). *See also* Berquist, *supra* note 11.

[164] *See* Shane, *supra* note 93 ("House lawmakers had made finding a solution to the SSIA issue a priority in negotiations this year, given the pending May 2018 expiration of the program.").

[165] H.R. REP. NO. 115-200, pt. 1, at 145 ("This section would also state that the dollar-for-dollar reduction in payments to surviving spouses should be fully repealed at the first opportunity."). *See also, e.g.*, H.R. REP. NO. 111-89, at 72 (2009) (Conf. Rep.) ("Congress recognized the injustice of the SBP-DIC offset in the National Defense Authorization Act for Fiscal Year 2008 when it authorized a special payment to SBP-DIC-affected survivors, but this payment is far below the full amount that is offset."); DAVID F. BURRELLI & JENNIFER R. CORWELL, CONG. RESEARCH SERV., RL32769, MILITARY DEATH BENEFITS: STATUS AND PROPOSALS 6 (2006) (pointing out that the "[l]anguage . . . in the Senate version of the National Defense Authorization Act for Fiscal Year 2006 to repeal this offset . . . was dropped by the Conference Committee"); ROBERT TOMKIN, FACT SHEET NO. 112-6, DEFENSE AUTHORIZATION FOR FY 2012 50 (2011), LEXISNEXIS.

the next decade.[166] The fact that lawmakers have already struggled to fund this minimal benefit, much less full repeal, is further proof that meaningful reform remains a distant goal.[167]

IV. Current Status of the Offset and Potential Solutions

As surviving spouses have long pointed out, why have both the SBP and DIC if one benefit wipes out the other?[168] Advocates and lawmakers alike have offered possible alternatives to the offset, though many advocates understandably hesitate to push for anything less than full repeal.[169] Critics maintain that repeal will allow survivors to "double" or even "triple-dip" into federal benefits,[170] while surviving spouses continue

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[166] Shane, *supra* note 93.

[167] *Survivor Advocacy Issues*, *supra* note 17. Rep. Susan Davis introduced and later withdrew an amendment to increase TRICARE pharmacy fees for all beneficiaries in an effort to fund SSIA, which drew sharp criticism from various advocates. *Id. See also* Shane, *supra* note 93 (describing the disappointment of MOAA President, Dana Atkins, at the idea that the funding solution for SSIA "[may] require[] military beneficiaries, not the government, to bear the costs"). Under Rep. Davis' proposal, co-pays for name-brand drugs would almost double, and co-pays for generic drugs would increase from $10 to $14, thereby creating nearly $3 billion in revenue over the next eight years. *Id.*

[168] *See* Harkins, *supra* note 63 (quoting Mary Craven, the surviving spouse of an Air Force officer who died from a service-connected illness in 1978).

[169] *See, e.g.*, Atkins, *supra* note 5. Other proposed alternatives to repeal of the offset include the following: (1) instituting a single death benefit for all active duty deaths, *Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 27 (2005) (statement of Edith G. Smith, Member, Gold Star Wives of America); (2) eliminating the offset for surviving spouses of retirees who paid SBP premiums while maintaining the offset for survivors of active duty service members, Tom Philpott, *Widows Left Out of 'Concurrent Receipt' Reforms*, MONTGOMERY ADVERTISER (Mar. 4, 2007); (3) adding a new SBP option under which members would fully fund SBP costs in exchange for elimination of the offset, FINAL REPORT OF THE MILITARY COMPENSATION AND RETIREMENT MODERNIZATION COMMISSION 44–45 (2015), https://docs.house.gov/meetings/AS/AS00/20150204/102859/HHRG-114-AS00-20150204-SD001.pdf; *see also* KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 19 (2018).

[170] CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 14 (2011). The authors of this report describe the concept of double-dipping as follows:

> Critics contend that concurrent receipt was originally barred because Congress viewed it as "double dipping" or paying someone twice for the same period of service. These critics reason that allowing concurrent receipt to the retiree or the retiree's survivor are forms of

to stress the inequity of the offset in comparison with other concurrent benefit recipients, a tactic which, to date, has gained little headway.[171]

> "double dipping" that are inherently unfair to the taxpayer . . . . Eliminating the SBP-DIC offset, they contend, would lead to "triple dipping" in that survivor(s) would be eligible to receive three overlapping government benefits [SBP, DIC, and Social Security] based on the same military career.

Id. See also Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs, 109th Cong. 87 (2005) (statement of Thomas R. Tower, Assistant Director of Compensation, Office of the Deputy Under Secretary of Defense) (noting that because "[b]oth SBP and [DIC] for active duty deaths are fully funded by the Government . . . the offset of DIC from SBP avoids the duplication of Government benefits"); KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 19 (2018) (describing how critics argue that "because the federal government pays the full DIC cost and subsidizes the SBP coverage, allowing survivors to receive both SBP and DIC is inherently unfair to the taxpayer"); MACKIN ET AL., *supra* note 75, at iv (noting that the key argument against elimination of the offset is "that both DIC and SBP provide a disability annuity to survivors and would therefore constitute dual compensation"); Memorandum from Deputy Assistant Sec'y of Navy to Co-Chairmen, Sec'y of the Navy's Retiree Council, subject: Secretariat Response to the 2015 Sec'y of the Navy's' Retiree Council Report (12 Aug. 2016) (arguing that eliminating the offset "would create inequity compared to beneficiaries who are not eligible for both by creating a group of survivors receiving two government-subsidized survivor annuities"); Hammersly, *supra* note 21, at 10A (noting that "Department of Defense spokesmen have argued that it wouldn't be fair for these widows and widowers to collect both benefits when other survivor usually are entitled to one or the other"). *But see* MACKIN ET AL., *supra* note 75, at 6 (listing Servicemember Group Life Insurance (SGLI) as one of several "income replacement military benefits). Although SGLI is not a traditional annuity but, rather, a one-time lump sum payment, one has to wonder why opponents of repeal do not argue that receipt of SGLI for active-duty surviving spouses is also a form of "double," "triple," or even "quadruple" dipping.

[171] *See* Tom Philpott, *Military Update: House Eyes Giving Widows More Relief from 'SBP-DIC Offset,'* STARS AND STRIPES (Dec. 30, 2015), https://www.stripes.com/news/us/military-update-house-eyes-giving-widows-more-relief-from-sbp-dic-offset-1.386519. Mr. Philpott explained this lack of progress as follows:

> The creaky logic behind the offset is that widows, though rightly compensated for loss of a spouse from service-related injury or ailment, shouldn't also get a government-subsidized annuity. That logic collapsed a decade ago when Congress ended a similar ban on "concurrent receipt" for military retirees who qualify both for longevity retirement and VA compensation for serious service-connected disabilities or combat-related injuries or ailments . . . . Most members of Congress agree but so far leaders refuse to remove the offset, citing costs.

Despite recognition of the risks inherent in military service and the emphasis on honoring the sacrifices of survivors, the SBP-DIC offset persists with no clear end in sight.[172] The vicious cycle of promises and inaction over the last few decades raises some troubling questions: do lawmakers simply not care about this population? Are there too few vocal opponents who are willing to bang on Congress' doors until their demands are met? Do lawmakers require more raw data to be convinced to take action? Or perhaps the simplest of explanations is ultimately the only one that matters: lawmakers remain unwilling to divert funds from another project or population, nor will they impose new taxes to generate additional revenue, thereby leaving repeal of the offset forever beyond reach.[173]

Id.

[172] *See, e.g.*, MACKIN ET AL., *supra* note 75, at 39 (explaining that "none of the benefits available to survivors of members who die on active duty recognize deaths directly related to the hazardous nature of military service). As the authors note, "survivors of a member who dies of an illness are eligible for the same benefits as the survivors of a member who is killed in action," nor does the equivalent of a workers' compensation death benefit exist. *Id.*

[173] Despites advocacy efforts urging lawmakers to "do the right thing," arguments premised on "moral obligation" or "equity and justice" have proven ineffective to date. *See, e.g.*, *Hearing on S. 979 Before the S. Subcomm. on Pers. of the Comm. of Armed Servs.'*, 115th Cong. 10 (2016) (statement of Edith G. Smith, Surviving Spouse) (noting that "[c]orrecting this offset . . . is a moral obligation that now stands before Congress and the President"); Lisa Hammersly, *Issues with Law, Congress' Lack of Action*, ARK. DEMOCRAT GAZETTE (Dec. 30, 2018, 3:20 AM), https://www.arkansasonline.com/news/2018/dec/30/widow-s-tax-issues-in-congress-20181230/?news-arkansas (quoting Kathy Prout, founder of the SBP-DIC Offset Facebook group, who asserts that "'[t]he moral compass has gone askew . . . [Congress] could fix this.'"). For example, financial analyst Kate Horrell points out that those who claim that surviving spouses lose money due to the offset are incorrect: "You just don't get MORE money due to the offset." *See* Horrell, *supra* note 9. In responding to user comments, Horrell also makes the following assertions regarding the "losing money" argument:

> [It is] factually incorrect, and it hurts the cause of repealing the offset to continue [to repeat] it . . . Survivors and lobbying group have been trying for years to repeal the offset using emotionally charged testimony and claiming that they're "losing" money. It's been unsuccessful so far, and I believe that is in part because of the tactics being used. Congress, and its staffers, are interested in factually accurate information. It weakens the case to repeal the offset to present math that just doesn't add up.

Id.

A. The Fiscal Year (FY) 2019 Department of Defense Budget

Not surprisingly, money is almost always the reason for doing—or not doing—anything to effectuate change. Notwithstanding the Army's prediction that the military be prepared to do "more with less,"[174] the FY 2019 DoD budget was one of the "biggest defense budgets in modern American history,"[175] if not "*the* largest."[176] With $686 billion of the FY 2019 $716 billion defense funding budget dedicated to the DoD,[177] the armed forces enjoyed an $82 billion increase in spending compared with FY 2018.[178] Despite a dramatic slowdown in recent combat deployments, this defense budget rivals spending surges used to fund troop buildups in 2003 and 2008 during the height of Global War on Terror.[179] Interestingly, the budget is also approximately $60 billion *more* than what was originally requested for 2018,[180] though some lawmakers feel it is still "not enough to fix the problems."[181] Whether it proves to be "enough" is yet to be determined; regardless, the fact remains that since President Trump took office, "the defense budget will have grown by $133 billion, or 23 percent."[182]

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[174] *The Army Vision*, U.S. ARMY (June 7, 2018), https://www.army.mil/e2/downloads/rv7/vision/the_army_vision.pdf?_st.

[175] Jeff Stein, *U.S. Military Budget Inches Closer to $1 Trillion Mark, as Concerns Over Federal Deficit Grow*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/06/19/u-s-military-budget-inches-closer-to-1-trillion-mark-as-concerns-over-federal-deficit-grow/?utm_term=.fb40b7f83056.

[176] Myre, *supra* note 22.

[177] Press Release, Dep't of Def., DoD Begins Fiscal Year with Funding for First Time in 10 Years, (Sept. 28, 2018), https://dod.defense.gov/News/News-Releases/News-Release-View/Article/1648774/dod-begins-fiscal-year-with-funding-for-first-time-in-10-years/.

[178] Stein, *supra* note 175.

[179] Myre, *supra* note 22; *see also* Lawrence J. Korb, *Trump's Defense Budget*, CENTER FOR AMERICAN PROGRESS (Feb. 28, 2018, 9:02 AM), https://www.americanprogress.org/issues/security/news/2018/02/28/447248/trumps-defense-budget/ (comparing the current budget to FY 2010 when the United States still had more than 200,000 troops deployed to Iraq and Afghanistan).

[180] Daniel Goure, *Can Trump Rebuild the Military as Deficits Balloon?*, BREAKING DEF. (Oct. 18, 2018, 3:53 PM), https://breakingdefense.com/2018/10/can-trump-rebuild-the-military-as-deficits-balloon/. *See also* Myre, *supra* note 22 (noting that the budget increase is "more than the Trump administration originally requested").

[181] Myre, *supra* note 22 (quoting Rep. Mac Thornberry, the head of the House Armed Services Committee).

[182] Korb, *supra* note 179. *Cf.* Stein, *supra* note 175 (noting that the "increase in military spending is one of the largest in modern U.S. history, jumping by *9.3 percent* from 2017 to 2019") (emphasis added).

Less than one month after President Trump approved the FY 2019 budget, however, he announced that the FY 2020 defense budget will likely drop to approximately $700 billion due to exorbitant increases in the national deficit.[183] Furthermore, because spending caps implemented pursuant to the Budget Control Act of 2011 will resume in 2020, additional funds for new or previously unfunded projects will likely be limited.[184] Theoretically, funding the repeal of the SBP-DIC offset would be simple if military budgets continue to increase or, at the very least, remain at current levels.[185] Given predictions for the future state of the DoD budget, however, repeal seems unlikely in the short term. Thus, despite continued calls for elimination of the SBP-DIC offset, advocates may find that their opportunity to capitalize on the all-time high in defense spending has passed, which raises questions about the alternatives to full repeal.

B. Prognosis for Repeal and Reform

1. Option 1: Repeal the Current Law

Despite expected budgetary constraints, dedicated advocates will almost certainly continue to push for nothing less than full repeal of the SBP-DIC offset. These hardened survivors already have plenty of experience with arguing to myriad audiences that surviving spouses should receive their full SBP annuity in addition to DIC.[186] Multiple

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[183] Goure, *supra* note 180 (describing how the national debt "ballooned 17 percent to $779 billion this year"); *see also* Aaron Mehta, *It's Official: DoD Told to Take Cut with FY20 Budget*, DEF. NEWS (Oct. 26, 2018), https://www.defensenews.com/pentagon/2018/10/26/its-official-dod-told-to-take-cut-with-fy20-budget/ (noting that the $700 billion defense budget estimate represents a 4.5% cut below the projected $733 billion for FY 2020, but "still exceeds the $576 billion budget caps for discretionary defense spending, set under the Budget Control act").

[184] Claudia Grisales, *Trump Says 2020 Defense Budget will Drop to $700 Billion*, STARS AND STRIPES (Oct. 17, 2018), https://www.stripes.com/news/us/trump-says-2020-defense-budget-will-drop-to-700-billion-1.552276 (describing how although Congress lifted Budget Control Act spending limits for 2018 and 2019, those limits are slated to return for FY 2020, which will decrease the defense budget to $576 billion if no action is taken).

[185] *See* Shane III, *supra* note 20 ("Fixing [the offset] would cost about $1 billion a year, a small fraction of the country's $600 billion-plus in annual defense funding.").

[186] *See, e.g.*, *Repeal of the Survivor Benefit Plan/Dependency Indemnity Compensation Offset*, H. COMM. ON THE BUDGET (June 20, 2018, 9:45 AM), https://budget.house.gov/sites/democrats.budget.house.gov/files/documents/15%20-%20Repeal%20SBP%20DIC%20Offset.pdf ("The survivors of military servicemembers who gave their lives for the nation deserve fair treatment and full receipt of their SBP

advocacy groups have poured many years and thousands of dollars into the fight to repeal the current law;[187] individuals affected by the offset's provisions have petitioned to raise awareness of the issue;[188] and a Facebook group designed to promote awareness and encourage lobbying efforts currently has over 1,800 members.[189] Of note, a majority of House and Senate members in multiple sessions of Congress have "acknowledged the inequity and cosponsored corrective legislation to recognize SBP and DIC are paid for different reasons."[190]

Undoubtedly, advocacy efforts garner attention from lawmakers,[191] but these voices continue to take a back seat to the demands of larger populations. Optimistic advocates believe the SBP-DIC offset is an oversight, "that it's not what Congress intended for the families of fallen military personnel."[192] After years of passionate advocacy by surviving

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benefits. When military service causes a servicemember's death, DIC should be paid in addition to the SBP benefits."). *See also The Widow's Tax*, *supra* note 5.

[187] *See, e.g.*, *Legislative Action Center*, MIL. OFFICERS ASS'N OF AM., http://takeaction.moaa.org/?4 (last visited Mar. 10, 2018); *SBP-DIC Offset*, AIR FORCE SERGEANTS ASS'N, http://www.hqafsa.org/sbp---dic-offset.html (last visited Dec. 20. 2018).

[188] *See, e.g.*, Kathy Prout, *Stop denying earned survivor benefits to military surviving spouses*, CHANGE.ORG, https://www.change.org/p/stop-denying-earned-survivor-benefits-to-military-surviving-spouses (last visited June 12, 2019); The MOAA Channel, *Repeal SBP DIC Offset, End Sequestration MOAA "Storms" 535 Congressional Offices in 6 Hrs.*, YOUTUBE (June 8, 2017), https://www.youtube.com/watch?v=CnZ0AvPup5M.

[189] *Military Widows: SBP-DIC Offset*, FACEBOOK, https://www.facebook.com/groups/MilitarySurvivingSpouses/ (last visited June 12, 2019). *See also* Hammersly, *supra* note 21, at 11A; Breaux, *supra* note 5; Caruso, *supra* note 5.

[190] Caruso, *supra* note 5; *Eliminating the Widows' Tax*, *supra* note 10; *SBP Offset for Survivors*, *supra* note 63. *See also* Bale Dalton, Office of Sen. Bill Nelson, S. 339, SBP-DIC Offset Repeal Fact Sheet, 115th Cong. (2017) (on file with author) (noting that since September 2001, "the Senate has generally supported repealing the SBP-DIC offset [but] [t]he repeal has yet to make it into public law despite being included in many years' Senate passed NDAA," to include FYs 2001, 2006, 2007, 2008, 2009, 2010, 2012, and 2013); CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 14 (2011) (describing how the Senate versions of the NDAA for FYs 2006, 2008, 2008, and 2010 all included language to eliminate the offset that was later dropped by the conferees); Atkins, *supra* note 5 (emphasizing that "Congress knows this inequity needs to be fixed").

[191] Philpott, *supra* note 21; *see also* Ostrom, *supra* note 21. Kelly Hruska, a survivor issues representative for the National Military Family Association and The Military Coalition, referred to the offset as criminal: "This is a benefit that service members paid for, either through monthly premiums or . . . with their lives. If any company were doing this, they would tie [its executives] up in the square and members of Congress would be the first ones lining up to throw stones." *Id.*

[192] Harkins, *supra* note 63.

spouses and their supporters, however, lawmakers continue to pay lip service to the repeal[193] without taking meaningful action.[194] Thus, ironically, despite increased efforts to repeal the widow's tax over the last few decades, "no efforts have been successful."[195]

Not surprisingly, the impediment has always been—and continues to be—cost,[196] or, more specifically, "the last minute consensus on how to pay for the offset elimination."[197] To call the problem last-minute is, at this point, however, disingenuous; lawmakers have been aware of the offset for decades but continue to delay their commitment to finding a permanent solution.[198] As advocates aptly note, the only apparent purpose

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[193] H.R. REP. NO. 111-89, at 72 (2009) (Conf. Rep.) ("Repeal of the offset would allow the widows and orphans whom our servicemembers and veterans leave behind to receive the full SBP amount due to them."); ROBERT TOMKIN, FACT SHEET NO. 112-6, DEFENSE AUTHORIZATION FOR FY 2012 50 (2011), LEXISNEXIS.

[194] Boldrin, *supra* note 84 ("No one has solved the problem beyond slapping band-aids on it.").

[195] McCarl, *supra* note 6, at 419.

[196] Estimates regarding the total cost of repealing the offset range considerably, including, but not limited to: $12.9 billion, U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-837R, ACTUARIAL SOUNDNESS OF THE DOD SURVIVOR BENEFIT PLAN PROGRAM 11 (2006); $8 billion over ten years, Philpott, *supra* note 21 (referencing the latest Congressional Budget Office's calculations); $7 billion from 2010 to 2019, CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 14 (2011); and as low as $4.5 billion, Hammersly, *supra* note 21, at 10A. Note, however, that according to the GAO, adjustments to DoD and Treasury payments to offset increased costs associated with expanded benefits, "should not negatively affect the actuarial soundness of the [DoD Military Retirement] Fund." U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-837R, ACTUARIAL SOUNDNESS OF THE DOD SURVIVOR BENEFIT PLAN PROGRAM 5 (2006). *See also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-HEHS-95-30, VETERANS' BENEFITS—BASING SURVIVORS' COMPENSATION ON VETERANS' DISABILITY IS A VIABLE OPTION 18 (1995) ("If the SBP offset were eliminated, federal savings would be reduced because of increased DOD SBP payments. Additionally, including in the program the surviving spouses of all disabled veterans would increase the number of surviving spouses who become eligible for the program each year.").

[197] Ostrom, *supra* note 21 ("[T]he barricade to ending the offset is finding budget dollars to cover the cost . . . The cost of full repeal is estimated by the Congressional Budget Office at $8 billion over 10 years."). Due to mandatory allocations of funds for the national defense, Congress has little flexibility to generate these funds independently, hence the need to work with House Budget Committee members to increase direct spending to resolve the issue. *Id. See also* Berquist, *supra* note 11 (explaining that "the sense in Congress is that the offset should be eliminated but the costs are high"); Philpott, *supra* note 21. *Cf.* MACKIN ET AL., *supra* note 75, at 42 (estimating a total cost of $35 million for "each year's new cohort of surviving spouses").

[198] Shane III, *supra* note 93 (noting that "lawmakers on the committee have repeatedly said they cannot find [enough funding] in ever tightening military budgets").

of the offset is to save the government money.[199] Year after year, Congress' go-to justifications for failing to effectuate full repeal are rooted in "defense spending caps and House budgeting rules."[200] Until recently, opponents of the offset argued that Congress should, at the very least, extend and increase SSIA.[201] Now that SSIA is a permanent benefit, however, repeal is the logical next step that lawmakers continue to claim remains far out of reach.[202]

Undaunted by these obstacles, members of MOAA—one of several active advocacy groups—continue to urge surviving spouses to call their Congressional representatives to express support for the latest in a series of bills to eliminate the offset.[203] MOAA advocates acknowledge that budget uncertainty will make funding total repeal "difficult,"[204] but they remain committed to prioritizing the issue.[205] Due to political turnover, however, the reeducation and advocacy process begins anew every election cycle, forcing offset opponents to return to the drawing board in seeking out additional cosponsors. For example, in the 2018 midterm election, Senator Bill Nelson, the proponent of the Military Widow's Tax

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[199] Philpott, *supra* note 169. Joe Davis, the public affairs director for Veterans of Foreign Wars calls this penny-pinching justification the "'ultimate insult our government can inflict on' surviving spouses." *Id.*

[200] Shane III, *supra* note 93.

[201] *Eliminating the Widows' Tax*, *supra* note 10; *see also* Berquist, *supra* note 11 (noting that those impacted would lose $3720 a year in survivor benefits if SSIA was not extended or made a permanent benefit); *Survivor Advocacy Issues*, *supra* note 17; *The Widow's Tax*, *supra* note 5 (pointing out that SSIA "will terminate in May 2018 if Congress does not extend the allowance").

[202] Hammersly, *supra* note 21, at 10A (noting that DoD views the "cost in billions as "another issue" and estimates that the total cost of repeal will require $7 billion to $10 billion over ten years, despite widows and others believing the number is closer to $4.5 billion to $5 billion).

[203] Berquist, *supra* note 11 (arguing that without enough cosponsors, the issue will go unfunded).

[204] *Eliminating the Widows' Tax*, *supra* note 10 (estimating the total cost of repeal at approximately $6.5 billion).

[205] *See Legislative Action Center*, *supra* note 187.

Elimination Act of 2017[206] and a long-time advocate of repeal[207] was defeated by his opponent.[208] To make matters worse, the total number of

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[206] S. 339, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/senate-bill/339/text?format=txt; *see also* H.R. 846, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-bill/846/text?q=%7B%22search%22%3A%5B%22h846%22%5D%7D&r=1. With the recent political turnover in the Congress, including the defeat of former Sen. Bill Nelson, a new bill has now replaced the previously pending offset repeal legislation. *See* H.R. 553, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/553/text?q=%7B%22search%22%3A%5B%22Hr+553%22%5D%7D&r=1&s=1; *see also* Press Release, Tammy Duckworth U.S. Senator for Illinois, Duckworth Helps Reintroduce Bipartisan Legislation to Eliminate the Military "Widow's Tax," (Mar. 8, 2019), https://www.duckworth.senate.gov/news/press-releases/duckworth-helps-reintroduce-bipartisan-legislation-to-eliminate-the-military-widows-tax (noting that, in addition to Sen. Duckworth, thirty-two other Senators from both parties have cosponsored the newest bill); Brittany De Lea, *Military 'Widow's Tax' Under Fire on Capitol Hill*, FOX BUSINESS (May 24, 2019), https://www.foxbusiness.com/economy/military-widows-tax-capitol-hill; Misty Inglet, *'I Feel Betrayed': Boise Veteran Fighting Terminal Cancer Aims to End 'Military Widow's Tax,'* KTVB.COM (Apr. 23, 2019, 11:02 PM), https://www.ktvb.com/article/news/local/i-feel-betrayed-boise-veteran-fighting-terminal-cancer-aims-to-end-military-widows-tax/277-8357cfe2-2c74-4b45-82a5-64e5dda415f6; Kevin Lilley, *Bipartisan House Bill Would End 'Widows Tax,'* MIL. OFFICERS OF AM. (Jan. 16, 2019), https://www.moaa.org/Content/Publications-and-Media/News-Articles/2019-News-Articles/Bipartisan-House-Bill-Would-End--Widows-Tax-; Ed O'Keefe, *Military Spouses Seek to Repeal "Widow's Tax,"* CBS NEWS (May 27, 2019), https://www.cbsnews.com/video/military-spouses-fight-to-repeal-archaic-rule-known-as-widows-tax/; Leo Shane, *Will the Military 'Widows Tax' Disappear This Year?*, MIL. TIMES (May 21, 2019), https://www.militarytimes.com/news/pentagon-congress/2019/05/21/will-the-military-widows-tax-disappear-this-year/; Annie Yu & Stephanie Wilson, *'We've Seen Historic Numbers': Surviving Military Spouses Fight for Benefits Reaches Milestone*, WUSA90 (May 21, 2019, 11:17 PM), https://www.wusa9.com/article/news/national/military-news/weve-seen-historic-numbers-surviving-military-spouses-fight-for-benefits-reaches-milestone/65-6e7be06d-cc4d-49df-961f-406cc1afbba6. Notably, a tax code update (often referred to as the "kiddie tax") that adversely impacted the children of Gold Star families during the 2018 tax season has also refocused Congressional attention on the repeal of the SBP-DIC offset. *See generally* James Clark, *Trump's Tax Cut was a Disaster for Some Gold Star Families, but it's a Symptom of a Larger Problem*, TASK & PURPOSE (Apr. 23, 2019, 11:26 AM), https://www.cnn.com/2019/05/24/politics/gold-star-families-tax-fix/index.html?ofs=fbia; Sean Higgins, *Provision of GOP Overhaul is Creating Big Tax Hikes for Gold Star Families*, WASH. EXAMINER (Apr. 29, 2019, 7:20 PM), https://www.washingtonexaminer.com/policy/economy/provision-of-gop-overhaul-is-creating-big-tax-hikes-for-gold-star-families; Laura Saunders, *The Surprising Tax Bill for Sons and Daughters of Gold-Star Families*, THE WALL STREET J. (May 10, 2019, 5:30 AM), https://www.wsj.com/articles/the-surprising-tax-bill-for-sons-and-daughters-of-gold-star-families-11557480602. *See also* Haley Byrd, *Congress Fails to Reach Pre-Memorial Day Tax Fix for Gold Star Families*, CNN POLITICS (May 24, 2019, 4:05 PM), https://www.cnn.com/2019/05/24/politics/gold-star-families-tax-fix/index.html?ofs=fbia.

bill cosponsors does not necessarily translate into repeal legislation success; previous bills garnered more support than S. 339 and H.R. 846, but they still failed to progress beyond the Senate and House subcommittees.[209] Thus, despite bipartisan "support" for repeal, until lawmakers do more than say they want to allocate the funding, 67,000 surviving spouses will continue to face disappointment at the government's unwillingness to honor its commitment to those who sacrificed everything.[210]

2. Option 2: Reform the Current Law to Base Payments on Income

As surviving spouses often note, the sudden financial strain associated with the offset is, in a word, "scary."[211] Full repeal would undoubtedly

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[207] Breaux, *supra* note 5 (noting that now-former Sen. Nelson "introduced legislation to repeal this dollar-for-dollar offset in every Congress since 2001 . . . [and] most recently introduced S. 339").

[208] Patricia Mazzei et al., *Rick Scott Wins Florida Recount as Bill Nelson Concedes*, N.Y. TIMES (Nov. 18, 2018), https://www.nytimes.com/2018/11/18/us/florida-recount-senate-rick-scott-bill-nelson.html?pgtype=Homepage.

[209] *See* Hammersly, *supra* note 21, at 10A. As Sen. John Boozman pointed out, "[t]here's a lot of sympathy. Congress is on record saying they want to fix it. The disagreement is where you cut costs to pay for that." *Id.* Notably, neither the former House Speaker, Paul Ryan, nor Senate Majority Leader Mitch McConnell co-sponsored repeal bills. *Id.*

[210] *See* Hammersly, *supra* note 21, at 11A (Elly Gibbon, surviving spouse of Chief Master Sergeant John Lee Gibbons, USAF Retired, emphasized that "[o]ur husbands honored their commitment to their country [and] [n]ow it is high time for the government to honor its commitment."). Realistically, however, the ongoing border wall debate and recent partial government shutdown crisis make the likelihood of Congress allocating the necessary funds to repeal the offset even less likely than before. *See, e.g.*, Andrew Taylor, *The Pentagon May Tap Military Pay and Pension Funds to Build Trump's US-Mexico Border Wall*, BUS. INSIDER (Mar. 8, 2019, 9:46 AM), https://www.businessinsider.com/pentagon-may-tap-military-pay-pensions-for-border-wall-2019-3. *See also* Jill Colvin, *Trump Suggests Paying for Border Wall with Pentagon Funds*, WASH. TIMES (Mar. 28, 2018), https://www.washingtontimes.com/news/2018/mar/28/trump-suggests-paying-for-us-border-wall-with-pent/; Kate Davidson, *CBO: Shutdown Will Cost Government $3 Billion of Projected 2019 GDP*, WALL ST. J. (Jan. 28, 2019, 5:16 PM), https://www.wsj.com/articles/cbo-shutdown-will-cost-government-3-billion-of-projected-2019-gdp-11548688574; Patricia Kime, *CBO Suggests Raising Tricare Fees, Cutting Veteran Benefits to Slash Deficit*, MILITARY.COM (Jan. 14, 2019), https://www.military.com/daily-news/2019/01/14/cbo-suggests-raising-tricare-fees-cutting-veteran-benefits-slash-deficit.html?fbclid=IwAR3uy-jxawiPdEURsw6c0s-bBANd2iMIYw3XeSYq6kLJlnXTumA3aCwIKC0.

[211] Harkins, *supra* note 63 (quoting surviving spouse Susie Brodeur, who emphasized the challenges inherent in "not knowing where that next dollar [is] going to come from").

alleviate this stress; until then, basing survivor benefits on an established income cut-off, particularly in the years immediately following a service member's death, would provide some temporary respite for those who need it most. Many surviving spouses struggle to retain their homes and pay monthly bills, barely subsisting above the poverty line in some cases.[212] In a recent Rand Corporation study conducted at the behest of Congress, researchers found that "nearly 16 percent of widows whose main source of survivor benefits is the military are below the poverty line," and 7.7% of this same subset of the survivor population participate in food stamps.[213] The study's authors are quick to note that these findings "do[] not necessarily mean that military survivor benefits are ineffective" but, rather, that "further analysis is . . . needed to better understand" the data.[214] However, references to a "lack of data" pervade the authors' analysis of surviving spouses' income,[215] thereby calling into question the extent to which SBP widows truly do "compare well [with other widows]."[216]

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[212] *See* Hammersly, *supra* note 21, at 10A; *see also* Telephone Interview with Teresa Priestner, surviving spouse of Chief Warrant Officer 4 John Priestner (Oct. 28, 2018) (describing her financial difficulties in making ends meet now that her daughters have both reached the age of twenty-two and no longer qualify for receipt of SBP); Questionnaire Answers of Theresa Morehead, surviving spouse of Master Sergeant Kevin Morehead (Oct. 24, 2018) (on file with author) ("I almost lost my home and had to sell possessions just to get by.").

[213] HOSEK ET AL., *supra* note 8, at 69.

[214] *Id.*

[215] *See, e.g.*, HOSEK ET AL., *supra* note 8, at 47, 48 (noting that the average income data on which the authors relied on in reaching their conclusions excludes widows under age 40, which represent less than two percent of all widows); *id.* at 54 (explaining that the data for "the characteristics of decedent spouses . . . were not available"); *id.* at 49–50 (discussing various limitations associated with the Annual Social and Economic Supplement (ASEC) of the Current Population Survey (CPS) used to analyze income data); *id.* at 58 (attempting to explain differences in data between military survivor benefits and VA benefits); *id.* at 60 (acknowledging that "the data do not allow us to investigate whether the larger benefits are explained by higher earnings of the deceased spouse"); *id.* at 69 (referencing "data limitations"); *id.* at 72 (noting "we recognize that more-detailed analysis is needed to better understand the differences in outcomes we observe and determine whether remedies to the SBP program are warranted").

[216] *Id.* at 47. The study's authors acknowledge that *nonmilitary* widows receiving benefits from other federal, state, or local government pension plans typically "had higher average total income, lower poverty rates, and lower participation in public assistance programs." KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 3 (2018). *See also* HOSEK ET AL., *supra* note 8, at xiv–v, 67–68.

For surviving spouses living with the real consequences of lost spousal income, the conclusions of the Rand study provide little comfort.[217] If these survivors had additional time to adjust to their new reality, however, the sudden financial blow might be an easier pill to swallow. In a 2007 report, the Veterans' Disability Benefits Commission (VDBC) found that regardless of the time elapsed since the veterans' death, young survivors in their twenties and thirties "with an SBP offset had lower employment than those without the offset," and, as a result, also earned less on average.[218] More to the point, however, the study found that "the average income of survivors within 5 years of the veteran's death is lower than for those whose veteran spouse died 5 or more years ago."[219] Similarly, for all age groups, available data indicated that surviving spouses of veterans who "died within the last 5 years have employment rates that are consistently below those [whose] spouse died 5 or more years ago."[220]

Collectively, data from the Rand study and VDBC report suggests that the first five years following a veteran's death are among the most financially challenging for the surviving spouse, particularly when the spouse is young, inexperienced, and requires additional qualifications to secure employment.[221] The VA already offers income-based benefits to other groups of beneficiaries, such as DIC payments to surviving parents[222] and the Survivors Pension[223] to eligible low-income surviving spouses or unmarried children. Establishing a similar income-based payment system for *all* surviving spouses would eliminate the confusion currently associated with the offset while guaranteeing a sufficient and reliable level of income. Arguably, setting a minimum income threshold for receipt of benefits might disincentivize some surviving spouses from

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[217] *See, e.g.*, Tom Philpott, *Military SBP 'Compares Well,' Irking Widows Still Hit by Offset*, MILITARY.COM (May 3, 2018), https://www.military.com/militaryadvantage/2018/05/03/military-sbp-compares-well-irking-widows-still-hit-offset.html.

[218] Christensen, *supra* note 10, at 105–06.

[219] *Id.* at 104.

[220] *Id.* at 103.

[221] See also AMALIA MILLER ET AL., ANALYSIS OF FINANCIAL SUPPORT TO THE SURVIVING SPOUSES AND CHILDREN OF CASUALTIES IN THE IRAQ AND AFGHANISTAN WARS 33 (2012), https://www.rand.org/content/dam/rand/pubs/technical_reports/2012/RAND_TR1281.pdf (finding "substantial household earnings losses following the deaths of active duty service members" that tend to "increase over the first four years following the deaths," due to in part to the loss of service member earnings and in part to the "decline in the earnings of the spouses of fallen service members").

[222] *Parents Dependency and Indemnity Compensation*, *supra* note 68.

[223] *Survivors Pension*, U.S. DEP'T OF VETERANS AFFS., https://www.benefits.va.gov/pension/spousepen.asp (last visited June 12, 2019).

seeking employment or other sources or income; however, the importance of providing financial support to this population during an emotionally fraught time outweighs the dangers of potential abuse in the short term. If abuse were to become a problem, Congress could further revise the income-based benefits structure to taper payment percentages over time or simply add a time limit to the receipt of further payments.

3. Option 3: Switch to a Commercial Provider for the Administration and Management of Survivor Benefits

Much in the same way Servicemembers' Group Life Insurance (SGLI) is managed by Prudential,[224] Congress should also consider administering survivor benefits through a commercial provider. As the Rand study noted, eliminating the DIC offset would have no negative financial impact on a private insurer "because premiums would have been paid on the SBP policy, thereby providing the funds needed to pay SBP benefits upon the death of the insured."[225] Furthermore, providing SBP commercially would fundamentally alter the nature of the DoD's subsidy from SBP, making it "a government outlay and not an intergovernmental subsidy as it is today."[226] As a result, the contracting accrual charge and outlays for a provider with the ability to operate SBP at a lower total cost than the DoD "would be smaller than they would have been under continued DoD

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[224] *See Office of Servicemembers' Group Life Insurance*, PRUDENTIAL, https://ssologin.prudential.com/app/giosgli/Login.fcc?TYPE=33554433&REALMOID=06-000eb2bc-e833-1efc-9d9b-348e307ff004&GUID=&SMAUTHREASON=0&METHOD=GET&SMAGENTNAME=giosgli&TARGET=-SM-HTTPS%3a%2f%2fgiosgli%2eprudential%2ecom%2fosgli%2fController%2flogin%3faction%3dreturn (last visited June 12, 2019); *Servicemembers' Group Life Insurance*, U.S. DEP'T OF VETERANS AFFS., https://www.benefits.va.gov/insurance/sgli.asp (last visited June 12, 2019). *See also* HOSEK ET AL., *supra* note 8, at 80 (emphasizing the high quality of service Prudential Insurance provides). Compare, however, the success of the privatization of SGLI with the recent military housing crisis. *See, e.g.*, Matthew Cox, *Army Under Secretary on Housing Crisis: 'It's Embarrassing,'* MILITARY.COM (Feb. 27, 2019), https://www.military.com/daily-news/2019/02/27/army-under-secretary-housing-crisis-its-embarrassing.html; Claudia Grisales, *Lawmakers Ramp Up Hearings in Face of Military Housing Crisis*, STARS AND STRIPES (Mar. 5, 2019), https://www.stripes.com/lawmakers-ramp-up-hearings-in-face-of-military-housing-crisis-1.571478; Karen Jowers, *Black Mold, Rodents, Lead Paint in Privatized Housing: No Rent Until It's Fixed, Military Spouses Say*, MIL. TIMES (Feb. 13, 2019), https://www.militarytimes.com/pay-benefits/2019/02/14/black-mold-rodents-lead-paint-in-privatized-housing-no-rent-until-its-fixed-military-spouses-say/.

[225] HOSEK ET AL., *supra* note 8, at 76.

[226] *Id.* at 78.

management of SBP."[227] Although there are currently no "readily available commercial versions of SBP," the technological capacity to create such a product exists.[228] Thus, "if the commercial price, the cost of contracting, and the subsidy DoD would deliver to the commercial provider sum to an amount less than the in-house costs of administering, managing, and subsidizing the SBP fund, then outsourcing SBP is more likely to be advisable."[229]

Providing SBP through a commercial insurance company is not, however, without potential pitfalls, to include "rising premiums with age and the possibility of no policies being offered to older individuals."[230] As a result, the Rand study authors note that "commercially provided term life policies are less likely to feasibly replace the current SBP, since SBP has neither feature."[231] A commercial provider would also have to determine how to fund SBP payments for active duty beneficiaries because, unlike retirees, these individuals do not pay SBP premiums; rather, retiree premiums, DoD SBP accrual charges, interest earned on the fund, and the subsidy currently cover minimal SBP payments to active duty survivors.[232] Thus, in order to overcome these hurdles, a commercial provider would have to design a product with "construction of inflation-adjusted, flat-rate, single-rate whole life policies that pay an amount sufficient to fund an inflation-adjusted whole life annuity for the life of a surviving spouse and fund the payouts for the other categories of SBP beneficiaries."[233]

Despite frequent references to a lack of data,[234] the Rand study authors ultimately concluded that a contracted commercial insurance company may be able to administer SBP at a lower cost than the DoD while

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[227] *Id.* at 78–79.
[228] *Id.* at 79.
[229] *Id.* at 80.
[230] *Id.* at 75.
[231] *Id*.
[232] *Id.* at 76.
[233] *Id.* at 83.
[234] *See*, *e.g.*, *id.* at 73 (2018) (stating that data regarding quality and cost of service under the DoD compared to potential commercial providers is lacking); *id.* at 80 (noting that the cost information to assess the feasibility of outsourcing SBP is not currently available); *id.* at 82 (emphasizing that "further data and analysis would be required to determine whether commercial providers could perform the insurance function more cheaply than the public sector does"); *id.* at 83 ("[A]dvisability depends on whether, combined, the commercial price, the cost of DoD's SBP subsidy to the commercial provider, and DoD's cost of contracting are less than the in-house costs of administering, managing, and subsidizing the SBP," for which "data are lacking to assess whether this is the case . . . .").

increasing overall efficiency and providing a higher overall quality of service.[235] Given these cautiously optimistic findings, Congress should, at the very least, take note of the study's multiple references to the need for more information[236] and invest resources into analyzing the costs associated with the commercialization of SBP.

V. Conclusion

Then-Senator Barack Obama was one of several Congressmen who heard the testimony of surviving spouses at a special veterans' benefits hearing on 3 February 2005. He listened to their words, acknowledged their frustrations at the inequities of the SBP-DIC offset, and ultimately urged his colleagues "not to pinch pennies on this . . . We can do better. I know there is a bipartisan commitment to do better. I am looking forward to being a part of doing better."[237]

After over a decade and three White House administrations, however, the SBP-DIC offset persists. The plight of approximately 67,000 surviving spouses, many of whom are elderly, is hardly the kind of sensational, attention-grabbing headline that ruffles the feathers of public indignation. Perhaps it should be, but after years of attempts at legislative reform, repeal of the offset continues to take a backseat to other issues. Survivors of both retirees and active duty members have ample cause for concern: retirees forfeit a percentage of their earned retirement pay to participate in SBP, and, in theory, active duty service members should benefit from the post-9/11 expansion of the program. The difference in dollars between the receipt of SBP *plus* DIC and SBP *minus* DIC may not seem like much, but for most surviving family members, $15,000 represents a significant loss in annual income. By the time they learn these additional benefits will never come to fruition, it is almost always too late for contingencies, such as pursuing private life insurance coverage. To make matters worse, some spouses forfeit their own professional

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[235] *See id.* at 82.

[236] *See, e.g., id.* at 73 (noting that "[f]urther research into DoD's internal costs, at a minimum, is indicated, as well as research into contract mechanisms that could induce insurers to provide a sufficiently high-end product to service members at a reduced cost to the government").

[237] *Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 50 (2005) (statement of former Sen. Barack H. Obama, S. Comm. On Veterans' Affairs).

opportunities to keep their families intact while moving from assignment to assignment. Generally, survivors do not regret the decision to make these kinds of personal sacrifices. However, to say that they now feel slighted at the government's lack of urgency in response to their efforts to change the status quo would be an understatement. Default SBP enrollment for retirees, a lack of knowledge about the offset, and, perhaps most galling, what amounts to a post-9/11 publicity stunt purporting to expand SBP to active duty survivors are all factors that aggravate the impact of the current law on those subject to it. Fortunately, in these areas, judge advocates have the opportunity to provide an invaluable resource; in translating obscure statutes and legislation into digestible, clear guidance for active duty and retiree families, military lawyers can bridge the persistent knowledge gap that shrouds the SBP-DIC offset.[238]

Full repeal of the offset—an admittedly costly endeavor—is by no means the only avenue to providing some relief for surviving spouses. Congressional leaders should also consider other options to effectuate meaningful change for those impacted by the sudden emotional and financial strain of lost earnings. First, Congress could amend the statutory offset to establish income cut-offs for surviving spouses in dire need of both benefits. Second, Congress could dedicate additional resources to exploring the commercial privatization of SBP, thereby potentially reducing the costs of funding and managing the program. The reality, however, is that although lawmakers *could* spend money to resolve the inequities of the offset, they have not and, due to competing demands, likely will not. After almost two decades of war on more than two fronts, the offset remains an ugly, unpleasant stain on the nation's conscience. It challenges the patriotic solidarity of the "support our troops" rhetoric, and it calls into question President Lincoln's age-old pledge to provide for those hit hardest by years of war: until and unless something gives, who *will* care for him who shall have borne the battle, and for his widow, and his orphan?

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[238] For suggested guidance on how judge advocates might advise potential clients on estate-planning issues related to the SBP-DIC offset, see *infra* Appendix A.

Appendix A. Quick Guide to the SBP-DIC Offset for Judge Advocates

- Introduction

In advising service members, retirees, and surviving family members on estate planning matters, judge advocates must be equipped with knowledge of the interaction between the Survivor Benefit Plan (SBP) and Dependency Indemnity Compensation (DIC). Understanding how current law impacts the concurrent receipt of these two benefits may significantly affect the decisions service members and their family members make in preparing for the future.

- What is SBP?

SBP is a Department of Defense (DoD)-funded benefit that acts somewhat like a life insurance plan. Unlike private insurance policies, however, the SBP provides flat-rate, inflation adjusted monthly annuity payments that are not contingent on the policy holder's age or pre-existing medical conditions. Retirees are automatically enrolled in SBP while transitioning out of the military and must proactively opt out to avoid monthly payments. SBP monthly payments comprise up to 6.5% of the individual's monthly retirement pay. After September 11th, 2001, Congress expanded SBP eligibility to include surviving family members of active duty service members who die in the line of duty. Unlike retirees, active duty service members are not required to make monthly SBP payments.

Eligible SBP beneficiaries include the retiree or active duty member's spouse; spouse and children (with age limitations for children); children; former spouse; former spouse and children; and other persons with an insurable interest. Surviving spouse beneficiaries who remarry before the age of fifty-five lose SBP eligibility. SBP is a taxable benefit for all categories of beneficiaries. For survivors of retirees, annuity payments are calculated as fifty-five percent of the member's monthly retirement pay. For survivors of active duty service members, annuity payments are calculated as fifty-five percent of the member's theoretical monthly retirement pay if he/she had been 100% medically retired at the time of his/her death.

- What is DIC?

DIC is a Veterans Affairs (VA)-funded benefit payable to the family members of active duty and retired service members who die from service-connected injuries or illnesses (e.g. health issues associated with Agent Orange exposure during the Vietnam War). Unlike the SBP, DIC is a tax-free benefit awarded at a flat rate to all eligible recipients, regardless of rank or time in service. As of 1 December 2018, the basic monthly rate for DIC payments was $1319.04. Dependency Indemnity Compensation beneficiaries include surviving spouses, children, and, in some cases, parents, depending on the parents' income and marital status. Surviving spouse beneficiaries who remarry before the age of fifty-seven lose DIC eligibility.

- What is the SBP-DIC offset and why does it matter?

The SBP-DIC offset is a statutory requirement that offsets the SBP payments dollar-for-dollar by DIC payments. If the DIC benefit is larger than the SBP benefit, then the survivor receives only the DIC benefit. On the other hand, if the SBP benefit is larger than the DIC benefit, the survivor receives the full DIC benefit and any SBP benefits less an amount equivalent to the DIC benefit. Put another way, the survivor retains the higher of the two payments rather than the combined amount of both benefits. The offset is, in essence, a limitation on the concurrent receipt of SBP and DIC. Unfortunately, knowledge of the SBP-DIC offset is generally quite limited, and many surviving family members are unaware of its existence until confronted with the realities of its unexpected impact on their financial circumstances.

Survivors subject to the offset are also eligible for an additional monthly payment known as the Special Survivors Indemnity Allowance (SSIA). Special Survivors Indemnity Allowance is intended to partially make up for the SBP-DIC offset. Like DIC, SSIA is awarded at a flat rate (adjusted for COLA) and, like SBP, is a form of taxable income.

- Bottom Line

Although judge advocates may not bear direct responsibility for managing or overseeing personnel matters, we can thoroughly research the kinds of complex survivor benefit issues that impact the lives of surviving family members. In this area of law, responding to client questions often requires parsing through multiple statutory and regulatory authorities,

many of which are obscure or difficult to understand in a vacuum. Distilling this information into simplified, easily digestible terms can make a very emotional subject far less daunting for service members and their families.

As a result, service members and retirees can make more informed decisions based on their families' needs while still in a position to do so. For all clients, this might mean pursuing an additional, privatized life insurance policy to make up for the potential effects of the SBP-DIC offset. For retiree clients, this may translate to proactively opting out of SBP rather than forfeiting years of premium payments, especially when the retiree knows that his/her spouse may be eligible for DIC based on his/her disability ratings at retirement. Ultimately, equipping clients with this invaluable information manages expectations for family members following the sudden death of a service member or retiree, which, for most survivors, is likely among the most challenging life events they will ever experience.

- Helpful Resources

SBP Financial Analysis Tools, OFF., OF THE ACTUARY, https://actuary.defense.gov/Survivor-Benefit-Plans/.

MY ARMY BENEFITS, https://myarmybenefits.us.army.mil/.

Benefits and Programs, MILITARYSURVIVOR.COM, https://www.militarysurvivor.com/benefits.

FORREST D. BAUMHOVER, MILITARY IN TRANSITION'S GUIDE TO THE SURVIVOR BENEFIT PLAN: NAVIGATING THE SBP (2016).

Understanding SBP, DIC, and SSIA, DEF. FIN. AND ACCT. SERV., https://www.dfas.mil/retiredmilitary/survivors/Understanding-SBP-DIC-SSIA.html.

Office of Survivors Assistance FAQs, U.S. DEP'T OF VETERANS AFF., https://www.va.gov/SURVIVORS/FAQs.asp#FAQ8.

HYPOTHETICAL SBP-DIC OFFSET COMPARISON		
	O-5 Retiree Death (Spouse Only)	**E-6 Active Duty Death (Spouse Only)**
Years in Service (YIS)	20 years	14 years
Monthly Retirement Pay (as of Jan. 1, 2019) ➢ **Retirees = 2.5% x YIS x Monthly Base Pay** ➢ **AD = 75% x High-36 Basic Pay (i.e. medically retired at 100% disability rating)**	$4621.80 (= .025 x 20 x $9243.60)	$2922.75 (= .75 x $3897)
Monthly SBP Deduction Payment ➢ **Retirees = Up to 6.5% x Monthly Retirement Pay** ➢ **AD = Free**	$300.42 (= .065 x $4621.80)	None
Theoretical Timing of Death (note that the numbers used here are provided for the limited purpose of this hypothetical example)	10 years <u>AFTER</u> retirement (this could be any number of months or years following retirement).	6 years <u>PRIOR TO</u> retirement eligibility (this could be any number up to and in excess of 20 years, the cut-off for traditional retirement eligibility).
Total SBP Payments at Time of Theoretical Death (not adjusted for inflation)	$36,050.40 (= $300.42 x 12 months/year x 10 years)	None

Monthly SBP Payment to Beneficiary (= 55% x Monthly Retirement Pay)	$2541.99 (= .55 x $4621.80)	$1607.51 (= .55 x 2922.75)
Monthly DIC Payment to Beneficiary (as of Dec. 1, 2018)	$1319.04	$1319.04
Monthly Amount Received by Beneficiary Without SBP-DIC Offset (= SBP + DIC)	$3861.03 (= $2541.99 + $1319.04)	$2,926.55 (= $1607.51 + $1319.04)
Monthly Amount Received by Beneficiary After SBP-DIC Offset (= Higher of SBP/DIC Payments)	$2541.99	$1607.51
Monthly SSIA Payment to Beneficiary (as of Dec. 1, 2018)	$318	$318
Total Monthly Amount Received by Beneficiaryf (= Monthly Amount Received After SBP-DIC Offset + SSIA) ***not including Social Security Payments***	$2859.99 (= $2541.99 + $318)	$1925.51 (= $1607.51 + $318)

THE FIRST THOMAS J. ROMIG LECTURE IN PRINCIPLED LEGAL PRACTICE*

ALBERTO MORA[1]

Thank you, Colonel (COL) [Randolph] Swansiger, for your gracious introduction. Before I get started, let me add my thanks to you, Brigadier General [Patrick] Huston, for your very welcome invitation to visit the School and present this lecture, and to you, Lieutenant General [Charles] Pede, for your presence today. I also want to recognize Mr. Moe Lescault, for all his help and patience with me as we coordinated all the logistical details of this visit.

Most of all, let me acknowledge my admiration, friendship, and gratitude to Major General Tom Romig, the 36th Judge Advocate General of the Army in whose honor this lecture series is named. Tom and I got to work closely together at the Pentagon after 9/11 until his retirement from the Army in 2005. We formed part of what I came to view as a band of brothers – the band being composed of Tom, the other service Judge Advocate Generals, and I – who came to work as a unit, shoulder-to-shoulder, back-to-back, on detainee, Geneva Conventions, and other complex legal issues that arose in the immediate aftermath of 9/11. These are issues, we all recognized, that were foundational to the rule of law, to the ethos of the military, and to the character of our nation. Like everyone who has worked with Tom, I, too, have come to recognize that his name is synonymous with the term "principled," which is why the establishment of this series is so fitting.

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* This is an edited transcript of a lecture as delivered on May 13, 2019 by Mr. Alberto Mora to members of the staff and faculty, distinguished guests, and officers attending the 67th Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. The lecture is in honor of the 36th Judge Advocate General of the Army, Major General Thomas J. Romig.

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Tom and Mrs. Romig, I regard this invitation to present the inaugural Thomas J. Romig Lecture in the Principled Practice of Law as a signal of honor, and I'm doubly honored and touched to learn that you had a hand in selecting me as the first speaker.

I propose to explore with you this evening the Bush administration's use torture as a weapon of war, starting with my own involvement in the matter as Navy General Counsel. Although I was not part of the initial decision to adopt torture, I learned about it – or, as they euphemistically called it, "Enhanced Interrogation Techniques" – relatively early and became deeply engaged in the opposition to it. And, though the Bush administration largely abandoned the use of torture before the end of the administration and President Obama formally outlawed it in his second day in office, the allure of torture is still with us. Like a low-grade fever that threatens to flare up, whether to use of torture is an issue that has been the subject of discussion and debate almost continuously since the terrorist attacks on 9/11. As many of you may know, it is very much a matter of controversy in the Trump administration. President Trump has repeatedly declared himself to be a supporter of torture both during the electoral campaign and after his inauguration. Sadly, he is not an American outlier or oddity: recent polling indicates that more than sixty-two percent of the American public supports the use of torture. Also, every one of the recent Republican candidates for president, with the exception of Sen. Lindsay Graham, either openly supported torture or refused to condemn it. Same thing. My sense is that if President Trump serves out his entire term – now a very big if – he will openly or secretly attempt to reinstate torture, most likely after the next terrorist attack.

Most of us when we think of torture probably view it through a moral and cinematic frame. We tend to think of it episodically: We recall the scene of torture that we have seen in movies or television and apply our moral judgment to it. But the Bush administration's decision to use torture had implications that went well beyond these two factors and any government's decision to use torture has policy and systemic implications that go well beyond what happens in a single torture chamber. Note that the US norm against torture originated with George Washington even before the triumph of the American Revolution and the legal prohibition traces its roots to the British prohibition of torture of around 1640. By 2002, these norms and laws had been deeply and broadly imbedded in U.S. policy and practices. Thus, when the United States adopted and implemented its torture policy, that decision came to have implications – adverse implications – not only for morality and law, but also U.S. values

and the American character, the rule of law, our constitutional order, the architecture of human rights and international human rights law, U.S. foreign policy, U.S. national security and our security strategy, our military alliance structure, combat operations, intelligence relationships, and the War on Terror. Torture damaged the professional norms of doctors, psychologists, and lawyers; distorted congressional oversight of the executive branch; and compromised judicial independence. As an example of how it affected U.S. foreign policy, in one way or another torture harmed our relationship with probably every democratic country, including Canada.

In his work, *Algerian Chronicles*, Albert Camus – reflecting in part on French torture in Algeria -- noted that countries at war need to take care that they not use weapons that would destroy what they are trying to protect. Torture is such a weapon and the U.S. experience with it demonstrates the wisdom of Camus's insight.

I'll touch on some of these factors in a few moments, but let me take you back to how I first got involved with the torture issue.

In the U.S., the Navy General Counsel is the chief legal officer of the Department of the Navy, which includes both the Navy and Marine Corps, and reports directly to the Secretary of the Navy. The two of us, along with the Under Secretary and four Assistant Secretaries constitute the senior civilian leadership team of the Department and embody the constitutional principle of civilian leadership of the military. Each of us was appointed by the President, confirmed by the Senate, and carries the equivalent military rank of four stars. On the legal side, I worked very closely with the Judge Advocate General of the Navy and the Staff Judge Advocate of the Marine Corps. My direct reports included the more than 640 civilian attorneys in the Navy Office of General Counsel and the Naval Criminal Investigative Service, or NCIS. Before 9/11, NCIS was already deeply involved in the fight against Al Qaeda due to their involvement in the response to the USS Cole bombing in 2000; after 9/11 NCIS moved the front lines in the fight against terrorism and, as a consequence, so did I, to a larger extent than most Pentagon civilians.

In November of 2002, then-NCIS director David Brant took me aside after a meeting on an unrelated issue and said to me, in a low voice: "We [meaning NCIS] are hearing rumors that detainees are being abused in Guantanamo. Do you want to hear more?" The question was cryptic, but

my response to him was instantaneous: Of course I did. He nodded and said he'd be back the following day with his team to give me a brief.

Now, there are a couple of contextual things to bear in mind. The first is that in 2002 neither the Department of the Navy nor I had any official responsibility for detention operations in Guantanamo or anywhere else. The mission of each military department is to train, organize, and equip combat ready forces and to furnish them to the combatant commands. With the exception of the Army Department, detention operations and interrogation tactics were operational matters within the purview of the operational chain of command, not the military departments. Although Guantanamo was a Navy base, the detention facilities on the base reported to Southern Command, not to the Navy.

At the moment that Director Brant asked me his question, I had had zero involvement in detention matters – not a single conversation or meeting and no knowledge of any aspect of detainee treatment. Dave's question was subtly phrased. He was offering me the opportunity to get involved, but also the opportunity to not get involved before hearing details that would give me actual knowledge of the problem. It was, in a way, a courtesy. But for me not getting involved simply never crossed my mind.

Director Brant came back the following day with a number of his NCIS agents assigned to Guantanamo. At Guantanamo, the NCIS agents explained, there were two interrogation task forces operating at the time, an intelligence task force and a criminal investigation task force. NCIS was assigned to the second. The agents had not personally witnessed any abuse, but Guantanamo was a small place and they had heard from personnel assigned to the intelligence task force that coercive interrogation tactics were being used.

Then NCIS went snooping. Without authorization, they tapped into the intelligence task force's computers and extracted interrogation transcripts, one of which they pushed across the conference table to me. The transcript detailed the sexual taunting of an unidentified detainee (whom years later I would learn was Mohammed Al-Qahtani, the so-called "Twentieth Hijacker") by female Army personnel, who were straddling him and placing women's underwear on his head. While this did not constitute cruel treatment, much less torture, it was evidence of abusive and degrading treatment and helped substantiate the NCIS concerns.

Director Brant and his NCIS colleagues were worried that the phenomenon known as "force creep" was already at play in Guantanamo. This is the situation common in the history of interrogation that occurs when the use of cruelty is authorized. In this setting, the interrogators tend to ratchet up the level of cruelty because, they figure, if cruelty is an effective tool, then twice the level of cruelty is twice as effective, and so on. Abuse inevitably segues into cruelty, and cruelty into torture. Brant closed the brief by saying that NCIS did not know how many of the detainees were being abusively interrogated, but thought it was a few of them. Also, they had heard that the use of abusive interrogation techniques had been approved "at the highest levels" of the Pentagon, but had not seen any documents to corroborate that.

I was appalled by the NCIS account because any abuse of detainees in Guantanamo was presumptively unlawful. However, the degree of abuse I had been shown, while unacceptable, was still relatively mild; the number of prisoners being abused appeared to be low; and this had to be rogue activity – no American service member, I thought, would purposefully authorize the abuse of any enemy prisoner. Still, my duty was clear: if there was any prisoner abuse in Guantanamo, my duty as Navy General Counsel, as a lawyer, as a member of the Bush Administration, and as a citizen was to uncover it and stop it. I was confident in my ability to do that. I promised my colleagues that I would investigate.

The next day after Director Brant's briefing I called the Army General Counsel, Steve Morello. To my shock, he acknowledged that he had information about the detainee abuse in Guantanamo and offered to share it. This was day two.

The following day, day three, I met with the Steve. He handed me a copy of a memorandum signed by Secretary of Defense Donald Rumsfeld authorizing the use of "Counter-Resistance Interrogation Techniques" against the detainees in Guantanamo. Among these techniques were the use of sensory deprivation, detainee-specific phobia techniques, stress positions, and the use of some force. To the memo, which had been authored by the DOD General Counsel, Jim Haynes, there was also attached the initial memo from the Guantanamo base commander requesting the authority to use the techniques and a legal memo from his SJA, an Army lawyer, concluding that their use would be legal. Other parts of the composite memo indicated that the commander of SOUTHCOM had endorsed the request, and that the Chairman and Vice-

Chairman of the JCS, GEN Richard Myers and GEN Peter Pace, had given verbal approval.

When I reviewed the composite memorandum, it was clear that its effect, even if nowhere stated, was to authorize torture. The legal memo itself was an incompetent treatment of the law, particularly given that some of the proposed techniques could easily rise to the level of torture whether applied singly or in combination, depending on severity. Also, nowhere in the memorandum could one find words of limitation, that is, an instruction that the techniques could be applied, but only to the point that their effect did not reach the level of "cruel, inhuman, or degrading treatment". Had abuse at and beyond that limit had been prohibited, the memo would have arguably complied with all legal standards. But it didn't, and thus the memo authorized unlawful conduct. Despite this fatal deficiency in the memo, it did not occur to me at that moment that anyone in the chain of approval, including Secretary Rumsfeld, had acted knowingly or in bad faith. This was, I felt, a case of simple error, no more: the lawyers had made a mistake and the principals had predictably relied on the poor advice. All parties had failed to think through the full implications of their decisions. This would be a simple matter to correct once it was pointed out.

The next day, day three, I was in Jim Haynes' office, memo in hand. I told him that his memo authorized torture. "No it doesn't," he responded. I then spent the next hour walking him through its language and explaining to him why it did. Although Jim was almost completely silent during the rest of the meeting, I was confident that he saw the problem and that the interrogation authorization would be rescinded within a few hours. Problem solved, I thought.

But it wasn't. About ten days later I was at my Mother's home in Miami on Christmas vacation with my family when I was called to the phone. It was Dave Brant, calling from the Pentagon to tell me that the detainee abuse at Guantanamo was still going on. This was a shocking and even bizarre moment. People I liked and trusted, fellow colleagues, had been cautioned about potentially unlawful activity involving the abuse of human beings but had not changed their behavior. The abuse was no longer a matter of simple error or inadvertent -- it was clearly deliberate. This matter had just become much more serious.

I returned to the Pentagon and broadened my effort to overturn the interrogation policy. Over the next two weeks, I met with the Secretary of

the Navy and senior members of the Commandant and CNO's staffs. All were completely supportive. I met with the senior JAGs and the GCs of all the services and the Chairman's Legal Adviser. From that point forward until the end of my tenure at Navy, the JAGs of the Navy, Marine Corps, Army, and Air Force and I always acted as a team on this issue. I also met with a number of Rumsfeld's senior advisors and met with Haynes again.

Despite all this activity, I was not making any progress in getting the authorization rescinded, so after about ten days I decided to put my concerns in writing. I wrote a memo to Haynes analyzing the flawed Guantanamo legal memo and characterizing it as an incompetent piece of legal analysis that authorized the unlawful use of torture. I predicted that any abuse of prisoners would not only produce legal fallout, but also significant adverse policy and political consequences, including damage to any person authorizing or involved in the abuse, damage to the effective prosecution of the war on terror, and potentially damage to the Presidency itself. It was the first time I had written anything on the issue. I had the memo delivered to Haynes in draft form early one morning and indicated to him that I would sign it out by close of business that day unless there was a reason not to.

By 3:00 o'clock that afternoon and after another meeting with him, Haynes called me to say that Secretary Rumsfeld had rescinded the authorization to use counter-resistance techniques. All of us opposed to the use of cruelty were elated. It had taken longer than we had wished, but in the end reason had prevailed and we had conformed back to our values and laws. About ten days later, Dave Brant called to say that NCIS could then confirm that the abuse of detainees in Guantanamo had stopped.

Or so we thought. On April 28, 2004, or about a year-and-a-half later, the CBS news program "60 Minutes II" broadcast the revolting and now iconic photographs of the sexual and physical abuse of Iraqi prisoners by American soldiers at the Abu Ghraib prison in Iraq. The ensuing investigations, reporting, and hearing revealed that Abu Ghraib and Guantanamo were not isolated events, but the metastasis of a conscious and deliberate US policy to use torture in the interrogation of so-called "unlawful combatants" captured in the war on terror.

As we now know, the CIA initially conceived the torture program in the summer of 2002. The Agency advised the White House and the Justice Department that, because of legal limits, the standard interrogation

techniques then commonly in use would be inadequate to extract from prisoners the intelligence that could be vital in helping save lives from future terrorist attacks. The Agency – which at the time had zero institutional experience or capability in the field of interrogation -- proposed that it be authorized to employ what it termed "Enhanced Interrogation Techniques". These were, in the main, reverse-engineered from North Korean torture techniques used against Americans during the Korean War. Despite the opposition of Secretary of State Colin Powell, who opposed the suspension of the Geneva Conventions for legal, foreign policy, and practical reasons, and, later, the FBI, which regarded torture not only as unlawful but as an inferior interrogation method as compared to time-tested, non-coercive interrogation techniques, the President approved the use of the Enhanced Interrogation Techniques. He was strongly supported in this by the Vice President, Dick Cheney, by the Attorney General, John Ashcroft, and by White House Counsel, Alberto Gonzalez. At Ashcroft's direction, the DOJ Office of Legal Counsel prepared legal memos – all of which have since been discredited and withdrawn – that disregarded and distorted the clear body of law prohibiting torture for the purpose of providing both legal clearance for the use of torture and the foundation for a legal shield that would immunize those who authorized and executed the program from future legal accountability for the commission of war crimes.

With this authority in hand and CIA Director George Tenet as the lead manager, the CIA established a program that became known as the Rendition, Detention, and Interrogation (RDI) Program. Dozens of victims – some completely innocent of any combatant activity – were tortured in this program either directly by CIA officers or contractors at "black sites" established in half-a-dozen or so countries around the world or by cooperative third countries (including Syria and Egypt) that applied the torture at our request. And the U.S. military, too, as we have seen, also participated in the abuse. At Guantanamo, Abu Ghraib, and multiple other locations in Afghanistan, Iraq, and in the field, U.S. soldiers -- acting either under orders or on the widespread belief that the "gloves had comes off" and that abuse could be applied with impunity – inflicted cruelty on hundreds of prisoners.

And what happened to Al-Qahtani, the prisoner held in Guantanamo? Here is how journalist Jane Mayer described his treatment:

> Qahtani had been subjected to a hundred and sixty days of isolation in a pen perpetually flooded with artificial light. He was interrogated on forty-eight of fifty-

> four days, for eighteen to twenty hours at a stretch. He had been stripped naked; straddled by taunting female guards; …forced to wear women's underwear on his head and to put on a bra; threatened by dogs; placed on a leash; and told that his mother was a whore. [He] had been subjected to a phony kidnapping, deprived of heat, given large quantities of intravenous liquids without access to a toilet, and deprived of sleep for three days. [At one point,] Qahtani's heart rate had dropped so precipitately, to thirty-five beats a minute, that he required cardiac monitoring.[2]

Make no mistake – this was torture, and it was acknowledged as such by the Department of Defense in 2009. Three years ago, Qahtani's civilian lawyer told me that it was her belief that had Secretary Rumsfeld not rescinded his interrogation authorization when he did, Qahtani would have died after another one or two weeks of such abuse. He has, she added, suffered permanent physical and psychological damage.

How did the U.S. come to use torture in this war? Clearly, the fear and fury we all felt after 9/11 was the critical factors, as was the belief that those who belonged to Al Qaeda had self-selected to opt out of the human race through their savagery. But the authorization to apply torture rested on six implicit policy assumptions. The first five assumptions are clearly false but the sixth is, so far, still quite correct. I'll list and discuss them:

First, torture is uniquely effective in producing information and its use was necessary if our nation was to be protected against further loss of life. This is assumption is categorically false and, in fact, the clear failure record of torture during the Bush administration proves this. Despite the folklore that torture is effective in eliciting truthful information rapidly, this was not only not the case, but also the use of torture was both counter-productive and distracted from the use of non-brutal interrogation techniques that were more effective. In December 2008, the Senate Committee on the Armed Services concluded in a report entitled "Inquiry into the Treatment of Detainees in U.S. Custody," which was issued without dissent, that brutal interrogation techniques "damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemy, and compromised our moral authority." Similarly, in 2015 the Senate Select Committee on Intelligence examined the CIA's 20 major claims of success in the RDI Program after reviewing the totality of the Agency's internal records and documents and concluded, in its final report, that 1) The CIA's use of its enhanced interrogation techniques was

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[2] Jane Mayer, *The Memo: How an internal effort to ban the abuse and torture of detainees was thwarted*, THE NEW YORKER, February 19, 2006, https://www.newyorker.com/magazine/2006/02/27/the-memo.

not an effective means of acquiring intelligence or gaining cooperation from detainees; and 2) The CIA's justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness.

I should note that in 2005 General Stanley McChrystal, when he was commanding U.S. troops in Iraq, turned down an offer by President Bush in 2005 to confer upon him authority to use "EITs in theater. By then, General McChrystal had seen data indicating that units that did not use brutality obtained better intelligence and had better relations with the local communities, and thus as a rule had better combat records.

Second, no law prohibited the application of cruelty. Thus, the government could direct the use of cruelty as a matter of policy depending on the dictates of perceived military necessity. This, too, was false. United States law in 2002 and before – including the Constitution and constitutional jurisprudence, statutes, and treaties -- categorically prohibited the use of cruelty on captives. The proof of this extensive, but the Supreme Court held as such when it proclaimed in its 2006 *Hamdan* decision that the Geneva Conventions applied in the war on terror, thus declaring President Bush's 2001 declaration that Geneva did not apply invalid.

Third, even if such a law were to exist, the President's constitutional commander-in-chief authorities included the unabridged discretion to order torture and other forms of abuse. Any existing or proposed law or treaty that would purport to limit this discretion would be an unconstitutional limitation of his powers. This was utterly false as well. No person, including the President, is above the law. The constitutional limitations on the commander-in-chief authorities are well established, as evidenced, for example, in the Supreme Court's 1952 *Youngstown Sheet & Tube* decision, which invalidated President Truman's assertion of that authority to seize steel mills during the Korean War.

Fourth, the use of cruelty in the interrogation of unlawful detainees held abroad would not implicate or adversely affect our values, our domestic legal order, our international relations, or our security strategy. This constituted a major miscalculation by the Bush administration, but the truth is that the administration appears never to have conducted a full policy analysis of the second-order policy consequences of the use of torture. In fact, the adverse consequences were massive, as I'll describe in a moment.

Fifth, if this abuse were disclosed or discovered, virtually no one would care. While in truth some citizens don't care, actually many did. This is why the controversy continues and the issue will not go away.

Sixth and last, if the abuse were discovered, no one responsible would be held accountable. This could be true, and it would be tragic because accountability should be central to our law and government, but it's still too early to tell. The gravitational pull of the law towards accountability is powerful and it is difficult to envisage that our system of justice would completely fail to respond to a crime such as torture. But so far it hasn't.

I wish to do two more things. First, I've mentioned the adverse policy consequences of our use of torture, and I wish to expand on that. And, second, let's turn to the issue of policy. Many Americans are less concerned by law and morality than by what could make them safer. If torture can make them safer, these people ask, why should the law prohibit torture? Why should we not disregard the law? They've heard the repeated claims of President Cheney and some of the other architects of the Bush-era torture policy – and now the similar claims of President Trump – that torture is effective and helps keep the country safe. They now ask – as they have a right to – why not torture? They are entitled to an answer.

And here it is: we don't torture on moral, legal, and policy grounds. We don't torture because we are Americans and torture is antithetical to our commitment to human dignity and is illegal. Beyond that, we don't torture because the evidence shows that torture is not effective; because it makes us weaker, not stronger, and less safe; and because it is contrary to our strategic interest. The application of cruelty and torture harmed and continues to harm our nation's legal, foreign policy, and national security interests in multiple ways. I'll discuss each of these harms.

A. The Legal Harm

The first harm was to our laws. The acceptance of cruelty is contrary to and damages our values and legal system by discarding the basic principle that the highest purpose of law is to protect human dignity. As Professor Lou Henkin wrote: "Every man and woman between birth and death counts, and has a claim to an irreducible core of integrity and dignity."[3]

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[3] LOUIS HENKIN, THE AGE OF RIGHTS 193 (1990).

Cruelty damages and ultimately would transform our constitutional structure because cruelty is incompatible with the philosophical premises upon which the Constitution is based. Our Founders drafted the Constitution inspired by the belief that law could not create, but only recognize, certain inalienable rights – rights vested in every person, not just citizens, and not just here, but everywhere. These rights are the shields that protect core human dignity.

To have adopted and applied a policy of cruelty anywhere within this world was to say that our Founders and the successor generations were wrong about their belief in the rights of the individual, because there is no right more fundamental than the right to be safe from cruel and inhumane treatment.

If we can lawfully abuse Qahtani and others the way they were abused – however reprehensible their acts may have been – it is because they did not have the inalienable right to be free from cruelty. And if that is the case, then the foundation upon which our own rights are based starts to crumble, because it would then ultimately be left to the discretion of the state whether and how much cruelty may be applied to each of us or to any person.

The infliction of cruelty damages not only the victims, but also the fabric of the law itself in two ways. It does so, first, because if cruelty is taken out of the law's ambit and placed within the realm of policy, the scope of the law is then by definition diminished. Also, cruelty violates the important principle of law that Professor Jeremy Waldron terms the "principle of non-brutality." He writes:

> Law is not savage. Law does not rule through abject fear and terror, or by breaking the will of those whom it confronts…. [There is] an enduring connection between the spirit of the law and respect for human dignity – respect for human dignity even in extremis, where law is at its most forceful and its subjects at their most vulnerable. [T]he rule against torture … is vividly emblematic of our determination to sever the link between the law and brutality, between the law and terror, and between law and the enterprise of breaking a person's will.[4]

[4] JEREMY WALDRON, TORTURE, TERROR AND TRADE OFFS: PHILOSOPHY FOR THE WHITE HOUSE 232-33 (2010).

B. The Harm to U.S. Foreign Policy Interests

The second category of the harm from torture is to our foreign policy interests. In sum, the effects and consequences of cruelty were contrary to our long-term and over-arching strategic foreign policy interests, including many of the principal institutions, alliances, and rules that we have nurtured and fought for over the past sixty years.

America's international standing and influence stems in no small measure from the effectiveness of a foreign policy that harmonized our policy ends and means with our national values. The employment of cruelty not only betrayed our values, thus diminishing the strength of our example and our appeal to others, it impaired our foreign policy by adopting means inimical to our traditional national objective of enhancing our security through the spread of human rights protected by the rule of law.

From World War II until today, American foreign policy has been grounded in strong measure on a human rights strategy. We have fought tyranny and promoted democracy not only, or even primarily, because it was the right thing to do, but because the spread of democracy made us safer and protected our freedoms. In ways that echoed the development of our own domestic legal system, we successfully promoted the development of a rules-based international order based on the rule of law. Across the world, human rights principles, international treaties and laws (particularly humanitarian and international criminal law) and many domestic constitutions and legal systems owe their character, acceptance, and relevance to our inspiration, efforts, or support.

Let's look at three examples, out of many, of these foreign policy achievements:

1) The Geneva Conventions, as do most of the major human rights treaties adopted and ratified by our country during the last century, forbid the application of cruel, inhuman, and degrading treatment to all captives. Thousands of American soldiers have benefited from these conventions;

2) The Nuremberg Trials, a triumph of American justice and statesmanship that launched the modern era of human rights and international criminal law, treated prisoner abuse as an indictable crime,

helped cement the principle of command responsibility, and started the process whereby national sovereignty no longer served as a potential shield to protect the perpetrator of crimes against humanity from the long arm of justice; and

3) The German Constitution has helped transform a country that helped launch two of the most destructive wars in history into the responsible society it is today. Its Article one, Section one, states: "The dignity of man is inviolable. To respect and protect it is the duty of all state authority." That this should be an element of the German Constitution today reflects credit only on the German nation and its citizens. However, that it should have been adopted by Germany in 1949, the year the constitution was first ratified, also reflects credit on an American foreign policy that had integrated our national focus on human dignity as an operational objective.

Each of these three achievements has returned massive dividends to the U.S. We are all the better for them. However imperfectly these precedents, rules, or laws may be observed or enforced, they have helped shape public opinion worldwide, created global standards of conduct, and influenced the conduct of foreign individuals, groups, and nations in ways that are overwhelmingly supportive of our national interest and objectives.

When we adopted our policy of cruelty we sabotaged these policies and achievements. Consider the following. When we tortured, We rendered incoherent a core element of our foreign policy -- the protection of human dignity through the rule of law; we violated the letter and spirit of the Geneva Conventions; we weakened the Nuremberg principle of command responsibility; we damaged he very fabric of human rights and international law and fostered a spirit of non-compliance with both; we fostered the incidence of prisoner abuse around the world; we created a deep legal and political fissure between ourselves and our traditional allies; and we fueled public disrespect for and opposition to our country around the world, thus hampering the achievement of our foreign policy objectives and compromising our ability to provide human rights leadership;

None of this has been to our benefit, yet all of these harms were among the costs we suffered when we adopted the policy of cruelty and transformed our foreign policy into incoherency.

C. The Harm to U.S. National Security

Let me now turn to the third category of harm, the harm to U.S. national security. Simply stated, the use of torture is a quintessential example of allowing tactical considerations to override strategic objectives. Our nation's defenses were materially and demonstrably weakened, not strengthened, by the practice of torture. Cruelty made the U.S. weaker, not stronger. Not only did it blunt our moral authority, it sabotaged our ability to build and maintain the broad alliances needed to prosecute the war effectively, it diminished our military's operational effectiveness, it had adverse consequences on the battlefield, and it presented our enemies with a strategic gift.

In the fight against terror, U.S. national security is achieved not solely through military action, but also through the simultaneous use of ideas and communications, political persuasion, intelligence and law enforcement, and diplomacy. The attacks on the World Trade Center, the Madrid railway station, and Charlie Hebdo, among many others, evidence a terrorist ideology that would obliterate human dignity. Our defense to this assault cannot be solely military. These terrorist acts emanated from specific ideas that fostered and propagated this cycle of hate -- ideas that must be combated by our own ideas and ideals. Our defense must also consist of rallying to our mutual defense those who share our values and our vision of a humane civilization.

The fight against terror is not a war the U.S. can fight alone. Our political and military strategy must be geared to building and sustaining a large, unified alliance that cooperates across the spectrum of the conflict. Yet we will not be able to build this alliance unless we are able to articulate a clear set of political objectives and prosecute the war using methods consistent with those objectives; we will not be able to build this alliance unless we construct with our leading allies a common legal architecture that is true to our shared values; and we will not be able to establish that common legal architecture if were to insist, as we once did, on the discretionary right to apply cruel treatment to detainees.

When the U.S. adopted our policy of cruelty we compromised our ability to accomplish these national security objectives. Here are four examples of the strategic damage to our national security that we suffered:

First, because the cruel treatment of prisoners constitutes a criminal act in every European jurisdiction, European cooperation with the United States across the spectrum of activity -- including military, intelligence,

and law enforcement – diminished once this practice became apparent;

Second, almost every European politician who sought to fully ally his country with the U.S. effort in the fight on terror incurred a political penalty as a consequence, as the political difficulties of former Prime Ministers Tony Blair and Jose Maria Aznar demonstrated;

Third, our abuses at Abu Ghraib, Guantanamo, and elsewhere perversely generated sympathy for the terrorists and eroded the international good will and political support that we had enjoyed after September 11; and

Fourth, we lost the ability to draw the sharpest possible distinction between our adversaries and ourselves and to contrast our two antithetical ideals. By doing so, we compromised our ability to prosecute this aspect of the war – the war of ideas – from the position of full moral authority.

All of these factors contributed to the difficulties the U.S. has experienced in forging the strongest possible coalition in the fight on terror. But the damage to our national security also occurred not only at the strategic, but also at the operational and tactical military levels. Consider these following four points: 1) Senior U.S. officers maintain that the first and second identifiable causes of U.S. combat deaths in Iraq were, respectively, Abu Ghraib and Guantanamo, because of the effectiveness of these symbols in helping attract and field insurgent fighters into combat; 2) At various different points, some allied nations – including New Zealand -- refused to participate in combat operations with us out of fear that, in the process, enemy combatants captured by their forces could be abused by U.S. or other forces; 3) At other times, allied nations refused to train with us in joint detainee capture and handling operations, also because of concerns about U.S. detainee policies; and 4) Our policy of treating detainees harshly could have stiffened our adversaries' resolve on the battlefield by inducing them to fight harder rather than surrender, and this too could have led to loss of American lives.

Whatever intelligence obtained through our use of harsh interrogation tactics may have been, on the whole the military costs of these policies and practices greatly damaged our overall efforts and impaired our effectiveness in the war.

Let me say a word about the role of Canada and how the U.S. torture policy affected the Canada-U.S. relationship. This is an issue that my

colleagues and I intend to research more deeply.

Obviously, the relationship is one of the strongest bilateral relationships for either country. The two countries are economically integrated and have the closest possible relationship in many realms of activities, including in the military, intelligence, and law enforcement realms. When the U.S. was attacked on 9/11, Canada stood by the U.S. in Afghanistan.

But U.S. decisions in the war on terror strained that relationship. Guantanamo, military commissions, interrogation policies, indefinite detention, and the invasion of Iraq all caused strains. And here are some more specific aspects of the relationship in these areas: the U.S. detention of Omar Khadr, a 15-year-old Canadian citizen, at Guantanamo was a point of conflict; the U.S. abduction of Maher Arar, another Canadian citizen, and his rendition to Syria, where he was tortured, was another; because of Canadian legal concerns with U.S. detention policies, it has been reported that Canada refused to turn detainees over to U.S. forces in Afghanistan during a period of time out of concern that Canada might be accused of complicity with the commission of war crimes; and but more significantly, I was the subject of a demarche by the Canadian military in 2005.

Let's give the last word to Senator John McCain, who took to the floor of the Senate on December 9, 2014, to reflect on torture and what it means to be an American. He said:

> In the end, torture's failure to serve its intended purpose isn't the main reason to oppose its use. I have often said, and will always maintain, that this question isn't about our enemies; it's about us. It's about who we were, who we are and who we aspire to be. It's about how we represent ourselves to the world.
>
> We have made our way in this often dangerous and cruel world, not by just strictly pursuing our geopolitical interests, but by exemplifying our political values, and influencing other nations to embrace them. When we fight to defend our security we fight also for an idea, not for a tribe or a twisted interpretation of an ancient religion or for a king, but for an idea that all men are endowed by the Creator with inalienable rights. How much safer the world would be if all nations believed the same. How much more dangerous it can become when we forget it ourselves even momentarily.
>
> Our enemies act without conscience. We must not…. [A]cting without

> conscience isn't necessary, it isn't even helpful, in winning this strange and long war we're fighting.

And McCain continues:

> Now, let us reassert the contrary proposition: that is it essential to our success in this war that we ask those who fight it for us to remember at all times that they are defending a sacred ideal of how nations should be governed and conduct their relations with others – even our enemies.
>
> Those of us who give them this duty are obliged by history, by our nation's highest ideals and the many terrible sacrifices made to protect them, by our respect for human dignity to make clear we need not risk our national honor to prevail in this or any war. We need only remember in the worst of times, through the chaos and terror of war, when facing cruelty, suffering and loss, that we are always Americans, and different, stronger, and better than those who would destroy us.[5]

By defending the accused, you on the defense team are defending the beating moral heart of our nation – the concept that every single person matters, without exception, and that consequently the dignity of every single individual is to be protected through the agency of justice under law. As Professor Lou Henkin wrote: "Every man and woman between birth and death counts, and has a claim to an irreducible core of integrity and dignity."[6] By defending that claim to dignity that everyone possesses, including those detained at Guantanamo, you help protect us all.

On January 21, 1961 – Inauguration Day – John F. Kennedy stood on the Capitol steps less than two miles from here and gave one of the greatest speeches in American history, great because it constituted one of the purest expressions of American character, purpose, and idealism. In paragraph two of his address, almost his first words, he set his theme by associating himself and his new presidency with the guiding belief of the American Revolution, that "the rights of man come not from the generosity of the state, but from the hand of God." Note that he did not refer to the rights of only "citizens." In the very next paragraph, he spoke about how a torch had passed to a new generation of Americans "tempered by war,

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[5] Senator John McCain, Floor Statement on Senate Intelligence Committee Report on CIA Interrogation Methods (Dec. 9, 2014), https://www.justsecurity.org/wp-content/uploads/2014/12/STATEMENT-BY-SENATOR-JOHN-McCAIN-ON-SENATE-INTELLIGENCE-COMMITTEE-REPORT-ON-CIA-INTERROGATION-METHODS.pdf.

[6] LOUIS HENKINS, THE AGE OF RIGHTS 193 (1990).

disciplined by a hard and bitter peace, proud of our ancient heritage…." And those Americans, he then confidently pledged, are "unwilling to witness or permit the slow undoing of those human rights to which this nation has always been committed, and to which we are committed today at home and around the world."

Let's dwell on this for a moment: "unwilling to witness or permit the slow undoing of those human rights to which this nation has always been committed, and to which we are committed today at home and around the world."[7] Today, fifty-six years later, we are led by an unapologetic, pro-torture president who does not subscribe to a single word of this sentence. Indeed, it would not be unfair or an exaggeration to say that by words and acts he has already put in place policies to distance our nation from our historic commitment to human rights at home and abroad and to do so not slowly, but rapidly. Acting in conformity with presidential guidance, the secretary of state has already declared that the United States is abandoning our human rights leadership, reducing our advocacy efforts, and is stripping the department of much of its capability in the area. In all of this, the president and his cabinet are supported by millions of Americans and yet acts with scant opposition or dissent from Congress.

Which president has the better grasp of the real national interest, John Kennedy or Donald Trump? And what happened between Kennedy and Trump to have brought us to this state of events, this sea change in our national purpose? My vote is with JFK, but to attempt to answer these questions, let's turn back the clock a few years.

Four days ago our nation remembered and reflected on the anniversary of 9/11. It seems incredible that it has been 16 years since that day. For me – as I suspect is the case with most of us here – 9/11 could have occurred yesterday. I was in my Navy office in the Pentagon that day, and I remember vividly the momentary shudder that went through the building at 9:37 a.m. when American Airlines flight 77 struck it. Of course, I did not know at first that this is what had occurred; it felt as if a large, heavy safe had been dropped on the floor above me. But in the impact that had caused that shudder, as we would all learn later, 64 passengers and crew died, as did 125 other Americans who were working in the Pentagon that day.

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[7] John F. Kennedy, U.S. President, Inaugural Address (January 20, 1961).

Of all those deaths in the Pentagon, the one that stays with me most was that of LCDR Otis Tolbert, a Navy intelligence officer. Before 9/11, LCDR Tolbert would leave the Pentagon and go home to his wife and three infant children. One of his children was a daughter, Brittany, who was severely afflicted with cerebral palsy. As a victim of that disease, she did not have the strength to hold her head up, but Otis would help her with that when he would care and play with her after he came home from the day's duty. That Brittany would lose her father – whom she would never really come to know – and that he did not come home that day, or any other day ever after, to help her hold her head up has always struck me as one of the most tragic and cruel events of a day filled with tragedy and cruelty.

That is where it started. Otis, the murdered Navy father, is representative of the almost 3,000 deaths that day and Brittany, his disabled daughter, is one of the tens of thousands who directly experienced loss and grief as a result. Having been attacked and wounded, our nation went to war. We did so out of fury – to avenge the dead – and out of fear, to protect the living. Sixteen years later, the fear and fury are still coursing through the national bloodstream. These emotions partially help explain the emergence of Trump. And they largely explain, I think, why our nation – mistakenly and I hope temporarily – seems prepared at this point to permit the unwinding of those human rights at home and abroad to which we have been committed our entire history. The fear has distorted our judgment and our values.

We are now sixteen years after 9/11, and we are still at war – the longest in American history. More precisely, we are engaged in various wars: the incursion into Afghanistan to destroy Al-Qaeda and the Taliban, its host and protector, segued into the invasion of Iraq, what military historian Thomas Ricks correctly has called one of the "most profligate actions in the history of American foreign policy."[8] And these, in turn, led to military or paramilitary engagements in scores of other countries, all under the badly conceived and ill-defined rubric of the "War on Terror." What started and should have remained as a tightly focused political and military effort against Al-Qaeda and its direct supporters metastasized into something quite different, diffuse, undisciplined, and vague. At the moment that we called out our enemy to be "terror", which is a tactic, not a tangible entity like Al-Qaeda, we lost the clear understanding of who the enemy is, a cardinal sin in any military undertaking. As a consequence, we inevitably lost our strategic objective, grasp, and direction for, as the

[8] THOMAS RICKS, FIASCO (2006).

saying goes, "If you don't know where you're going, any road will take you there"[9] These mistakes were compounded by a series of other interrelated mistakes: forgetting that all military action should be guided by and subordinated to overarching, clearly defined political objectives; over-militarizing our efforts in the fight against terrorism; and losing sight in the advantages of coalition warfare in this type of conflict as we fell prey to the temptation to go-it-alone militarily. And all of this was in part fueled, we can now recognize, by what was at the time a toxic dose of military hubris created by the collapse of the Soviet Union, the absence of a peer military competitor, the easy victory over Iraq in Gulf War I, the success of the all-volunteer military, and the so-called Revolution in Military Affairs brought about by precision guided munitions.

Given this matchless military power, perhaps it is understandable that our nation's real military objective after the initial invasion of Afghanistan, although one never openly articulated to the American public by the Bush administration, came to be not primarily to crush Al-Qaeda – an organization, as has been noted somewhere, whose membership in 2001 would not have filled a good-sized basketball gym in an average small town – but to figuratively "drain the swamp" of the Middle East and transform the region politically, a much more ambitious but, it was felt, a worthier and attainable objective given the perceived invincibility of American power. This breathtaking logic was a major contributor to the decision to invade Iraq, which has proven to be an exercise in strategic overreach of staggering dimensions with disastrous human, economic, foreign policy, and military consequences.

But these were not the only mistakes of American post-9/11 statecraft and military strategy. Perhaps an even greater mistake was this: We failed to give proper weight to our values and ideals and to recognize the role that law and human rights should play and must play in the defense of our nation and in the projection of our military strength. We knew all too well what we were against – that would be Al-Qaeda and everything, however nebulous, having to do with "terror" – but we started forgetting what we stood for. Outraged by Al-Qaeda's suicidal savagery, fearful of its declared intent to kill again if given the chance, and uncertain of its residual capability to do so, the Bush administration adopted a basket of measures that Mark Danner has termed a "state of exception."[10] They may

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[9] GEORGE HARRISON, ANY ROAD (2002), almost certainly inspired by a comment by Cheshire Cat in LEWIS CAROLL'S ALICE IN WONDERLAND.

[10] MARK DANNER, SPIRAL (2016).

have been adopted mainly out of the sincere belief that they were required by military and security necessities, but they departed from our legal order. These measures included the use of Guantanamo as a detention center exempt from judicial oversight and jurisdiction; the establishment of military commissions lacking fundamental due process protections; the implementation of indefinite detention; the disregard of the Geneva Conventions as governing laws of war; the extensive use of domestic wiretap and communications intercepts in violation of clear legal restraints; the adoption of torture as a weapon of war; the outsourcing of torture through use of extraordinary rendition; and the exclusion of the public and even Congress from meaningful participation in the adoption and oversight of many of these measures. Each of these measures violated our values, existing law, the structure and principles of the rule of law, and the norms of democratic governance. At the time, however, the Bush administration chose to regard the legal constraints that applied as inconvenient barriers to be brushed aside and gave little or no attention to the broader domestic or international policy consequences of adopting these measures. Our blood was up, and the gloves were off.

Almost all of the former senior members of the administration continue to defend the security measures. Referring to President Obama's opposition to the Bush-era torture policies, Vice President Dick Cheney, the most energetic apostle of the administration's security policies, said in 2009 that to abandon "enhanced interrogation" (as he puckishly insists in calling torture) would be "recklessness cloaked in righteousness, and would make the American people less safe". If asked today, he would probably extend that statement to any opposition to the other policies as well.

Was he right? No, demonstrably not. If there is "recklessness cloaked in righteousness" (a wonderfully crafted phrase, by the way), the original recklessness was on the part of the Bush administration in first departing from the law and our values, not on the part of its critics in calling them out and demanding that our nation revert to what the law required. The Bush administration not only was wrong in adopting these measures, it was wrong in misleading the nation in its description of them, in making false claims of their necessity, legality, and effectiveness, and by failing to disclose or even examine their adverse policy consequences.

Let's take the example of the use of torture or, to use the administration's euphemism, "enhanced interrogation"; it helps illustrate the larger issues.

During their tenures, the principal architects of the enhanced interrogation program – President Bush, Vice President Cheney, Attorneys General Ashcroft and Gonzalez, Defense Secretary Rumsfeld, and CIA Director Tenet – emphatically and frequently denied that the program had resulted in torture. And, in an eloquent and passionate speech in 2009, Vice President Cheney went further: he charged that those who dared asserted that the U.S. had tortured were casting libel.[11]

Today, the facts prove otherwise. We now know, from the Senate Intelligence Committee's Torture Report[12] and many other sources that the administration's claim that "enhanced interrogation" was grounded on some sort of scientific basis and constituted a uniquely effective method of gaining access to terrorist confessions was completely bogus. We know that there was no scientific basis at all behind the techniques; we know that the only thing "enhanced" about them was their level of brutality; and we know that their effectiveness in yielding actual intelligence, to judge from the CIA's own internal records on their 20 principal claims of success, was close to nil.

Even more importantly, we now also know that the administration's vehement claims of legal innocence – i.e., that the level of brutality never crossed the legal threshold of "severe physical and mental pain or suffering," the legal definition of torture –are verifiably false and constitute no more than empty posturing. Such claims were always suspect because they would have required something that doesn't exist, which is a method to precisely calculate the level of pain and suffering inflicted. Now we don't have to guess or accept the administration's self-serving representations as accurate. Even a cursory read of the accounts of detainee treatment in the Senate Torture Report demonstrates that each of the thirty-nine individuals subjected to the CIA's "enhanced interrogation" program were tortured over extensive periods of time. And, although the Report did not cover CIA rendition, it would now be naïve to presume anything other than that many and perhaps all of the estimated 136 individuals rendered by the CIA[13] to third countries were also tortured. No wonder that a unanimous European Court of Human Rights

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[11] Richard Cheney, Speech at the American Enterprise Institute (May 21, 2009), http://www.politico.com/story/2009/05/full-transcript-dick-cheneys-speech-022823?o=2.

[12] Senate Select Committee on Intelligence, *Study of the CIA's Detention and Interrogation Program – Foreword, Findings, and Conclusions, and Executive Summary* (released Dec. 10, 2014).

[13] *See* AMRIT SINGH, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 6 (Open Society Foundations, 2013).

in the two cases in which it considered the treatment of detainees in European CIA black sites held in 2014 that the abuse amounted to torture.[14] And no wonder why President Obama acknowledged on August 1, 2014, that our treatment of some detainees constituted torture.

The plain fact, simply stated, is that the U.S. tortured and that we did so despite and in violation of our laws, values, and traditions, with specific intent, and as a desired result of express state policy. That question is now settled and is no longer a matter of reasonable debate, dispute, or opinion. Our nation is responsible for the torture of certainly dozens and more likely hundreds of individuals at CIA black sites around the world; at Abu Ghraib, Guantanamo, and dozens of other military locations; and at multiple foreign government locations where prisoners were subjected to outsourced brutality as a result of the CIA's extraordinary rendition program. And, lest we forget, many more victims were subjected to lesser forms of brutality that constituted cruel, inhuman, and degrading treatment that could be as destructive of human dignity as torture.

But we also know more than this. We know that the damage from the torture extended well beyond that inflicted on the individual victims – there was damage to our country as well. Torture damaged and the legacy of torture continues to cause damage in three principal areas: domestically, to our values, societal norms, laws and legal system, and to our governmental integrity; internationally, to our standing abroad, to the architecture of international law and human rights, to many bilateral relationships, to the support for U.S. goals and policies in the fight against terrorism, and to the coherency of our foreign policy and our ability to achieve our foreign policy objectives; and lastly, to our national security, by weakening our alliance structure, disrupting and reducing military and intelligence cooperation, producing adverse military impacts at the tactical, operational, and strategic levels, degrading U.S. military integrity and ethos, enhancing enemy propaganda, recruiting, and combat effectiveness, and contributing to U.S. combat deaths.

Let's look into each of these three areas of damage in a bit more detail. First, at home, the damage was massive. As Sen. John McCain has said, "In the end, torture's failure to serve its intended purpose isn't the main reason to oppose its use…. [T]his question isn't about our enemies; it's

[14] Al Nashiri v. Poland, App. No. 28761/11, Eur. Ct. H. R. (2014), Husayn (Abu Zubaydah) v. Poland, App. No. 7511/13, Eur. Ct. H. R. (2014).

about us. It's about who we were, who we are and who we aspire to be."[15] The norm against torture has been shattered, causing major damage to the foundational belief that cruelty is incompatible with the American ideal. Now, almost half of all Americans are of the view that the use of torture is permissible under "some circumstances"[16]; almost all of the Republican candidates for president in the last election cycle, most notably Donald Trump, pledged to restore "enhanced interrogations" if elected; the corrupt Bush-era Office of Legal Counsel memoranda on torture will continue to plague legal discourse and judicial deliberations for years to come; and we have chosen to disregard a critical requirement for any legal system, which is accountability for crimes. The net result, among others, is that the zone of individual protection from cruelty has shrunk, personal rights and liberty have been diminished, and the United States has established the strongest and most formidable precedent among democratic nations for the proposition that immunity from accountability from torture is acceptable and that impunity for crimes committed in the pursuit of security is a viable option. The damage to fundamental values, individual liberty, and the rule of law is severe.

When we as a nation adopted and implemented our torture program in 2002, we simultaneously and necessarily discarded the belief that every individual is vested with the inalienable right to be free from cruelty. When we tortured Abu Zubaydah and Mohammed Al-Qahtani and Khalid Sheik Mohammed (and many others) the way we did, it was only because they did not have the right to be free from cruelty. And, if that's true, then neither you nor I have that right, either, because we took the right to be free from torture out of the basket of protected and inviolable personal rights – where it had previously been under American laws and values and international law – and put it into the realm of state discretion. Thus, no longer would our decision or any state's decision to use cruelty be constrained by the victim's assertion of his or her judicially cognizable individual rights; now it would be left to the discretion of state policy. The United States might be more restrained in its use of cruelty, but if Syria, North Korea, or Cuba decided to be completely unconstrained, who could object? The answer is, of course, no one.

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[15] Senator John McCain, "Floor Statement on Senate Intelligence Committee Report on CIA Interrogation Methods," (Dec. 9, 2014).

[16] PEW RESEARCH CENTER, *2016 Pew Research Center's American Trends Panel Wave 22 October Final Topline*, https://assets.pewresearch.org/wp-content/uploads/sites/12/2017/01/26122359/Torture-topline-for-release-CHECKED.pdf. In this poll, 48% responded that torture may be used and 49% responded that it may never be used.

The second category of the harm from torture is to our foreign policy interests. By torturing, the United States acted contrary to our long-term and over-arching strategic foreign policy interests, including many of the principal institutions, alliances, and rules that we have nurtured and fought for over the past sixty years. Let us look at three examples, out of thousands, of these foreign policy achievements. First, the Geneva Conventions. As do most of the major human rights treaties adopted and ratified by our country during the last century forbid the application of cruel, inhuman, and degrading treatment to all captives, thousands of American soldiers have benefited from these conventions. Second, the Nuremberg Trials, a triumph of American justice and statesmanship that launched the modern era of human rights and international criminal law, treated prisoner abuse as an indictable crime, helped cement the principle of command responsibility, and started the process whereby national sovereignty no longer served as a potential shield to protect the perpetrator of crimes against humanity from the long arm of justice; and third, the German Basic Law, which is the name for the German constitution, has helped transform a country that was instrumental in launching two of the most destructive wars in history into the responsible society it is today. Article one, Section one, states: "The dignity of man is inviolable. To respect and protect it is the duty of all state authority." That this should be an element of the German Basic Law today reflects credit only on the German nation and its citizens. However, that it should have been adopted by Germany in 1949, the year the constitution was first ratified, also reflects credit on an American foreign policy that had integrated our national focus on human dignity as an operational objective.

Each of these three achievements has returned massive dividends to our nation. We are all the better for them. However imperfectly these precedents, rules, or laws may be observed or enforced, they have helped shape public opinion worldwide, created global standards of conduct, and influenced the conduct of foreign individuals, groups, and nations in ways that are overwhelmingly supportive of our national interest and objectives. And yet, when we adopted our policy of cruelty we sabotaged these policies and achievements. When we tortured, we rendered incoherent a core element of our foreign policy: the protection of human dignity through the rule of law; we violated the letter and spirit of the Geneva Conventions; we weakened the Nuremberg principle of command responsibility; we damaged the very fabric of human rights and international law and fostered a spirit of non-compliance with both; we fostered the incidence of prisoner abuse around the world; we created a deep legal and political fissure between ourselves and our traditional

allies; and we fueled public disrespect for and opposition to our country around the world, thus hampering the achievement of our foreign policy objectives and compromising our ability to provide human rights leadership.

Let me now turn to the third category of harm, that to our national security. Simply stated, the use of torture is a quintessential example of allowing tactical considerations to override vastly more important strategic objectives. Our nation's defenses were materially and demonstrably weakened, not strengthened, by the practice of torture. Not only did it blunt our moral authority, it sabotaged our ability to build and to maintain the broad alliances needed to prosecute the war effectively, it diminished our military's operational effectiveness, it had adverse consequences on the battlefield, and it presented our enemies with a strategic gift.

This is why in 2005 General Stanley McChrystal, when he was commanding U.S. troops in Iraq, turned down an offer by President Bush to confer upon him authority to use "Enhanced Interrogation Techniques" in theater. By then, General McChrystal had seen data indicating that units that did not use brutality obtained better intelligence and had better relations with the local communities, and thus as a rule had better combat records. And this is why on November 20, 2008, the Senate Committee on the Armed Services concluded in a report entitled "Inquiry into the Treatment of Detainees in U.S. Custody," which was issued without dissent, that brutal interrogation techniques "damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemy, and compromised our moral authority."[17]

When our nation adopted our policy of cruelty, we compromised our ability to accomplish critical national security objectives in the fight against terror. Here are a few examples:

1) Because the cruel treatment of prisoners constitutes a criminal act in every European jurisdiction, European cooperation with the United States across the spectrum of activity -- including military, intelligence, and law enforcement – diminished once this practice became apparent;

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[17] INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, S.REP. NO. 110-2 at xii (2008), https://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf.

2) Almost every European politician who sought to fully ally his country with the U.S. effort in the fight on terror incurred a political penalty as a consequence, as the political difficulties of Prime Ministers Tony Blair and Jose Maria Aznar demonstrated;

3) Our abuses at Abu Ghraib, Guantanamo, and elsewhere perversely generated sympathy for the terrorists and eroded the international good will and political support that we had enjoyed after September 11; and

4) We lost the ability to draw the sharpest possible distinction between our adversaries and ourselves and to contrast our two antithetical ideals. By doing so, we compromised our ability to prosecute this aspect of the war – the war of ideas – from the position of full moral authority.

All of these factors contributed to the difficulties our nation has experienced in forging the strongest possible coalition in the fight on terror. But the damage to our national security also occurred not only at the strategic, but also at the operational and tactical military levels. Consider these following five points:

1) Senior U.S. officers have stated that the first and second identifiable causes of U.S. combat deaths in Iraq were, respectively, Abu Ghraib and Guantanamo, because of the effectiveness of these symbols in helping attract and field insurgent fighters into combat;

2) Some allied nations – including New Zealand -- refused to participate in combat operations with us out of fear that, in the process, they enemy combatants captured by their forces, but transferred to U.S. custody and abused by the U.S. could create war crime liability for New Zealand;

3) The U.K. limited intelligence sharing with the U.S. in instances when it was feared that the intelligence could prompt or be used in U.S. torture of detainees, thus potentially creating accomplice liability for the UK in the commission of war crimes;

4) Some allied nations (reportedly Australia) refused to train with us in joint detainee capture and handling operations, also because of concerns about U.S. detainee policies; and

5) Our policy of treating detainees harshly could

have stiffened our adversaries' resolve on the battlefield by inducing them to fight harder rather than surrender, and this too could have led to loss of American lives.

Looking back at our nation's adoption of the use of torture as a weapon of war, we can now see the Bush administration made five fundamental errors in attempting to fight terrorism without conforming to human rights values.

The first error consisted in failing to recognize that torture and other human rights violations were inimical to our national character, identity, and purpose, as John Kennedy and John McCain warned.

The second error lay in failing to adequately define what the core national interest was in the defense of our nation after 9/11. Throughout its tenure, the Bush administration identified that core national interest as that of "saving lives," with the prevention of further terrorist attacks being accorded the highest priority. This was not wrong, of course, and the administration cannot be faulted for this; the protection of lives is always a core responsibility of our state and all states. The mistake lay in not recognizing that the United States has two core national interests in the defense of the nation, not just one: We protect lives and we protect those values and individual rights that define our nation and ensure individual human dignity. These two objectives are of equal weight and importance and are pursued simultaneously. In practical terms, what this means is that the nation is prepared to risk lives, if need be, to protect our liberties. This is not new or novel. It has always been thus, as the War of Independence, the Civil War, World War II, and the Cold War demonstrates. What Vice President Cheney and his colleagues failed to recognize when they authorized torture and other illegalities is that they were damaging our nation in a fundamental way. American courage is meant to be deployed not only in protecting lives, but also in protecting our liberties.

The third Bush administration error consisted in not recognizing the truth in Albert Camus's observation (to paraphrase) that when fighting a war it is important not to employ weapons whose use would destroy what you're trying to protect.[18] This error is closely related to the second, the

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[18] ALBERT CAMUS, ALGERIAN CHRONICLES (1958). In the book's preface, Camus states that while it is sometimes necessary to fight a war, the war must be justified in terms of values. "One must fight for one's truth while making sure not to kill that truth with the very arms employed to defend it…."

distinction being in that one can profess to be attempting to defend one's values and still unwittingly adopt methods that will be destructive of the very values one is trying to protect. The specific example of the weapon that Camus warns us of is torture.

The fourth mistake made by the Bush administration was to fail to recognize that U.S. did not have the power to unilaterally abrogate the settled international architecture of human rights, regardless of any claim of necessity, and that any attempt to do so would yield adverse consequences. Thus, it was illusory in the international context for the administration's to pretend that torture wasn't torture, or that the use of torture could be justified this time under allegedly exigent circumstances, or that other nations would not look to their own laws, not U.S. legal interpretations, in governing their relationship with American torture practices, or that these same nations would not conclude that they were precluded, as a matter of law and policy, from aiding and abetting what were transparently American war crimes. Other nations did not follow American leadership into the swamp of torture because they could not and, more importantly, would not.

And the fifth mistake is in failing to recognize the fundamental truth that the our long-term national strategic interest lies in helping foster a world that is less cruel, not more cruel, and that shares our vision of the importance of human dignity and of individual rights protected by the rule of law. Needless to say, the use and normalization of torture, a policy adopted by the Bush administration, would always be counterproductive from this standpoint.

The Trump administration, which stands on the shoulders of the Bush administration's security policies, is repeating the same mistakes, but in a more extensive, radical, and possibly damaging fashion. At home, the president threatens our liberties by attacking the freedom of the press, seeming to condone police brutality, disparaging our judges and judiciary, casting suspicion on refugees and immigrants, adopting policies that appear to target ethnic and religious minorities, and fostering a climate of fear, policies never countenanced by the Bush administration. These Trump actions and statements reveal, at best, a lack of understanding in the nature and value of our fundamental rights and for the law and, at worst, a dangerous lack of respect for them. They seem to have been motivated, in part, by the belief that they demonstrate toughness and help make us safer. In fact, they demonstrate a lack of understanding as to what

makes America great, what we should protect when we defend our country, and how we go about doing that.

Abroad, in addition to other aberrant actions, the president has communicated his disdain for human rights and has signaled that the U.S. would no longer seek to lead in this area or conduct our foreign policy consonant with foreign policy interest. He is not torturing, but has exhibited his support for torture and has suggested that international law and the laws of war should not bind U.S. military operations. He has signaled his preference for autocrats, such as Vladimir Putin, and a disdain for committed democrats, like Angela Merkel. He has disparaged NATO, the leading alliance of democratic states. He prioritizes a military approach to international problems while discounting diplomacy and, consistent with this tendency, is dismantling the State Department and AID. And he is pursuing a strategy he calls "America First", but which has been described as "America Only" or "America Alone" and has fostered widespread distrust of U.S. intentions, values, objectives, reliability, and credibility.

These are not the correct policies, either domestically or internationally. They don't represent who we are or who we wish to be. They will not make the U.S. a better country or the world a safer place. We should, instead, to heed the counsel of Senator McCain, who said: "We have made our way in this often dangerous and cruel world, not by just strictly pursuing our geopolitical interests, but by exemplifying our political values, and influencing other nations to embrace them."[19] And as to what those guiding values are, we can do not better than to turn to, again, President Kennedy, whose credo we should adopt as our own. He said, "I believe in human dignity as the source of national purpose, in human liberty as the source of national action, in the human heart as the source of national compassion…."[20]

Thank you all again for helping defend our country and our values.

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[19] McCain, *supra* note 5.

[20] President John F. Kennedy, Address accepting the Liberal Party's Nomination for President (Sept. 14, 1960), https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/liberal-party-nomination-nyc-19600914.