



THE ARMY LAWYER

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Lore of the Corps

An Army Lawyer Tried and Convicted by Court-Martial: *United States v. Joseph I. McMullen*

By Fred L. Borch

Regimental Historian & Archivist

While there have been a handful of courts-martial in which an Army lawyer was the accused, including one involving a former Judge Advocate General,¹ the high-profile trial of Colonel Joseph I. McMullen in February 1936 has long been forgotten. But the case is worth remembering for two reasons: First, McMullen was well-known as one of the prosecutors in the court-martial of Colonel William “Billy” Mitchell in the 1920s, and so the story of his trial was carried in the newspaper of the day.² Second, the misconduct for which McMullen was convicted was a classic violation of professional ethics: engaging in the private practice of law and accepting money and other gratuities from civilian corporations that were doing business with the government. What follows is the story of Joseph I. McMullen’s place in military legal history.

Joseph Irving McMullen began his military career in April 1896, when he enlisted in the 6th Cavalry at the age of 22.³ Five years later, he obtained a commission as a Second Lieutenant (2LT).⁴ McMullen then remained on active duty until 1906, when he “was retired on account of physical disability in line of duty.”⁵

Ten years later, 2LT McMullen was recalled to active duty, and after America’s entry into World War I, he was quickly promoted to first lieutenant, captain, then major.⁶ In August 1921, now Lieutenant Colonel McMullen transferred to the Judge Advocate General’s Department; he apparently had been admitted to the bar in Idaho and California sometime prior to World War I and so was well-qualified to serve as an Army lawyer.⁷ Additionally, McMullen seems to have been an expert in patent law, which would explain why he was the Chief of the Patents Section, Judge Advocate General’s Office, from 1921 until 1935.⁸

In this important legal assignment, McMullen had much contact with businessmen and corporations doing business with the Army. By all accounts, he was a superb attorney “who discharged his duties in an excellent manner and did nothing . . . to impair . . . the rights of the War Department in patent matters.”⁹ But, perhaps believing that his good work entitled him to more than his military pay and allowances, McMullen engaged in “gravely unethical conduct.”¹⁰



Judge Advocate Colonel Joseph I. McMullen (center) stands with his son, Bruce McMullen (left), and defense counsel, William Leahy (right), after his conviction by general court-martial for dishonorable conduct on February 20, 1936.

A 1935 investigation conducted by the Army Inspector General (IG) revealed that in 1932, newly-promoted Colonel (COL) McMullen had received \$3,000 from the Cuban-

¹ In 1884, Brigadier General David D. Swaim, who had been serving as Judge Advocate General since 1881, was tried for “improprieties” arising out of “his conduct of a business transaction,” including fraud and conduct unbecoming an officer. U.S. ARMY JUDGE ADVOCATE GENERAL’S CORPS, THE ARMY LAWYER 79-82 (1975). After an unprecedented fifty-two days of trial time, Swaim was found guilty and sentenced to be suspended from rank, duty, and pay for three years. *Id.* Unhappy with this result, however, President Chester A. Arthur returned the case to the court for “revision,” which was permitted under the Articles of War at that time. *Id.* As a result, the members “adjusted” Swaim’s sentence to suspension from rank for twelve years and to forfeiture of one half of his monthly pay for every month for twelve years. *Id.*

² *Colonel McMullen on Trial before Court Martial, Charged with Accepting Railroad Tickets as Reward for Advice*, LEWISTON DAILY SUN, Feb. 15, 1936, at 12; DOUGLAS WALLER, A QUESTION OF LOYALTY 51 (2004). For more on the legal aspects of the Mitchell court-martial, see Fred L. Borch, *The Trial by Court-Martial of Colonel William “Billy” Mitchell*, ARMY LAW., Jan. 2012, at 1.

³ *McMullen v. United States*, 100 Ct. Cl. 323, 324 (1943).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 325. See also WALLER, *supra* note 2, at 51.

⁸ JUDGE ADVOCATE GENERAL’S DEPARTMENT, BOARD OF REVIEW CM 204639, UNITED STATES V. MCMULLEN 26 (1936) [hereinafter OPINION, BOARD OF REVIEW].

⁹ Memorandum from Major General J. F. Preston, Inspector Gen., for Sec’y of War, subject: Investigation of Colonel Joseph I. McMullen, JAGD, Judge Advocate General’s Office, at 1 (13 April 1935).

¹⁰ *Id.*

American Manganese Corporation. At the time, Congress was considering legislation that would impose a one-cent tax on manganese imports from Cuba, and such a tax would have a substantial and adverse impact on the company's profits given that manganese ore coming from Cuba was free of duty at the time.¹¹

The Cuban-American Manganese Corporation approached McMullen and asked him to help the company stop this import tax, and in May 1932, Congress in fact rejected the proposed one-cent tax. This was a victory for the company, and because McMullen had "led the company to believe that he had favorably influenced high government officials" to prevent the tax from being imposed, the Cuban-American Manganese Corporation wanted to reward McMullen for his good work.¹² According to the IG, McMullen had in fact "accomplished no such . . . results" for the company, but he collected \$3,000 from the Cuban-American Manganese Corporation because the company's officers believed that he had successfully lobbied for them.¹³ At that time, \$3,000 was nearly twice the income of the average American family, and considering that the United States was in the middle of the Great Depression, this was a sizeable gratuity.¹⁴

This same IG investigation also disclosed that in January 1934, while acting as a legal advisor to the Assistant Secretary of War, COL McMullen had accepted two round-trip railroad tickets from Joseph Silverman Jr.¹⁵ Silverman was a second-hand clothing dealer in New York City who operated "under a number of different firm names" and who sought to buy "surplus [clothing] goods" from the War Department.¹⁶ In any event, Silverman had "continuing business dealings with the War Department," and at the time McMullen took the tickets from Silverman, he had been giving legal advice on the latter's clothing contracts with the War Department.¹⁷

As a result of his ethical lapses, McMullen was tried by general court-martial at Walter Reed General Hospital in January and February 1936. He was charged with violating the 96th Article of War, which was the equivalent of today's

Article 134 of Uniform Code of Military Justice.¹⁸ As it was concerned that much of McMullen's criminal behavior was outside the statute of limitations, the War Department decided only to court-martial McMullen for having "wrongfully and dishonorably" accepted the two round-trip railroad tickets from Mr. Silverman given "with the intent to have [McMullen's] decision and action on [Silverman's] contract . . . influenced thereby."¹⁹

Colonel McMullen pleaded not guilty but was convicted. He was sentenced "to be reduced in rank to the foot of the list of officers of his grade," to be reprimanded, and to forfeit \$150 per month for twenty-four months.²⁰

When McMullen's record of trial was reviewed by the Board of Review, the forerunner of today's Army Court of Criminal Appeals, he got lucky: The three-judge appellate body determined there was "reasonable doubt" in McMullen's case.²¹ According to the Board members, there was "a doubt as to whether the [train] tickets were a gift" from Mr. Silverman. Consequently, the Board recommended to The Judge Advocate General that he advise the convening authority that the evidence was "legally insufficient" and that the findings of guilty and the sentence be set aside.²²

Based on this recommendation, Major General Arthur W. Brown, then serving as The Judge Advocate General, advised the convening authority to take no action in McMullen's case, and so his court-martial—as a practical matter—had no legal effect.²³ But this was not the end of the story because McMullen had been indicted in U.S. District Court for the District of Columbia for his unethical dealings with the Cuban-American Manganese Company in 1932. This was because the three-year statute of limitations applicable to courts-martial did not apply to Title 18 offenses prosecuted in Federal civilian court, and so McMullen could be indicted for taking \$3,000 from the Cuban-American Manganese Corporation.²⁴

¹¹ McMullen v. United States, 96 F.2d 574 (D.C. Cir. 1938).

¹² Memorandum from Major General J. F. Preston, *supra* note 10, at 5.

¹³ *Id.*

¹⁴ The average U.S. family income between 1934 and 1936 was \$1,574. *100 Years of U.S. Consumer Spending*, U.S. BUREAU OF LAB. STAT. 35 (2006), <http://www.bls.gov/opub/usc/1934-36.pdf>.

¹⁵ Memorandum from Major General J. F. Preston, *supra* note 9.

¹⁶ GEORGE P. PERROS, RECORDS OF THE MILITARY AFFAIRS COMMITTEE OF THE HOUSE OF REPRESENTATIVES RELATING TO AN INVESTIGATION OF THE WAR DEPARTMENT (1934-1936), at 4 (1955).

¹⁷ Memorandum from Major General J. F. Preston, *supra* note 9, at 5.

¹⁸ OPINION, BOARD OF REVIEW, *supra* note 8, at 1.

¹⁹ *Id.* at 2.

²⁰ *Id.* at 4. In the Army of the 1930s, a loss of seniority by date-of-rank was a lawful punishment at a court-martial, and for McMullen, this meant he would be the junior ranking colonel in the Regular Army. MANUAL FOR COURTS-MARTIAL, U.S. ARMY ch. XXIII, para. 103h. (1928) ("Loss of rank is accomplished by a sentence directing that the accused . . . be reduced in rank to the foot of the list of officers of his grade."). As for the \$3,600 forfeiture of pay, this was significant: In the 1930s, an Army colonel with twenty-four years of service earned \$408.00 a month; a colonel with thirty years of service earned \$500 a month. Military Pay Chart 1922-1942, NAVY CYBER SPACE, <https://www.navycs.com/charts/1922-officer-pay-chart.html> (last visited Feb. 18, 2016).

²¹ OPINION, BOARD OF REVIEW, *supra* note 8, at 26.

²² *Id.*

²³ McMullen v. United States, 100 Ct. Cl. 323, 332 (1943).

²⁴ ARTICLES OF WAR, 41 stat. 787 art. 39 (1920); letter from George H. Dern, Secretary of War, to John J. McSwain, Chairman, Military Affairs Division, April 16, 1935 (on file with author).

On April 26, 1936, a civilian jury convicted him of receiving (in violation of a Federal statute²⁵) “compensation for services rendered by him while still an officer of the United States in behalf of one of his clients in relation to a proceeding in which the United States was interested,” i.e. lobbying against the proposed tax on manganese imported into the United States by the Cuban-American Manganese Company.²⁶ McMullen was sentenced to six months in jail and fined \$1,000.²⁷

McMullen appealed his conviction. He argued that it should be set aside because the trial court denied his motion for a bill of particulars in the case.²⁸ According to McMullen, the indictment was legally insufficient to support his conviction because it did not clearly state whether McMullen had received “a thing of value” or “money.” As a result, he had been deprived of a fair trial because in denying his motion for a bill of particulars, the jury had been “in doubt” as to what McMullen had actually received from the Cuban-American Manganese Corporation.²⁹

On March 21, 1938, the U.S. Court of Appeals for the District of Columbia agreed. It reversed McMullen’s conviction and “remanded for a new trial.”³⁰ Lest any lawyer reading its opinion be mistaken, the court wrote that “forms and procedure still have their place and purpose in the administration of the law; without them we would have chaos.”³¹ The court continued: “Much impatience is being shown with the technicalities of the law . . . [but] the requirement that an indictment . . . must state the crime with which a defendant is charged, and the particular act constituting the crime is more than a mere technicality; it is a fundamental, a basic principle of justice”³²

So what happened next? Despite the fact that the Court of Appeals had set aside McMullen’s conviction in the U.S. District Court, the Army “[a]s a result of the conviction” and relying on “an opinion from the Attorney General of the United States,” notified McMullen that he “was dropped from the rolls of the Army and . . . that he ceased to be an officer of the Army as of May 8, 1938.”³³ The Attorney General’s rationale was that, having been convicted of a crime involving

the acceptance of a gratuity, McMullen “became immediately incapable of holding any office of honor, trust, or profit under the Government of the United States,”³⁴ and so must be separated from the Army.

Shortly thereafter, the Department of Justice (DOJ) decided that it had had enough of the “McMullen affair”;³⁵ on June 30, 1939, DOJ declined to take any further criminal action against him.³⁶

But while the Army and the Justice Department may have believed they were finished with COL Joseph I. McMullen, he was not finished with them. On September 11, 1940, McMullen filed a complaint in the U.S. Court of Claims. In his suit for money, he maintained that because his Federal conviction had been reversed (and the case *nolle prosequi* by DOJ), he “never was legally separated from the service” and consequently was entitled to recover as much as \$25,000 in back pay.³⁷

What happened to McMullen’s suit in the U.S. Court of Claims? On December 6, 1943, that court ruled that the War Department had acted lawfully in permanently separating McMullen from the Regular Army after his 1935 conviction in U.S. District Court.³⁸ In their opinion, the three judges deciding McMullen’s claim acknowledged that his conviction at trial had been reversed.³⁹ They conceded that it might seem unfair that he was being penalized after this conviction was overturned. But, said the court, the Army had correctly dismissed McMullen because of the immediate “harm to the public service” resulting from his conviction, and his subsequent “vindication” was insufficient reason to award him any back pay.⁴⁰

The Court of Claims expressly rejected McMullen’s argument that once the Court of Appeals had set aside his conviction in U.S. District Court, he should be treated as if he had never been convicted of any crime, and “be paid the salary and allowances” of an Army colonel.⁴¹ The Court of Claims dismissed McMullen’s petition; he recovered nothing.⁴²

²⁵ 18 U.S.C. § 203 (2015).

²⁶ McMullen v. United States, 96 F.2d 574, 575 (D.C. Cir. 1938).

²⁷ *Id.*

²⁸ *Id.* at 576.

²⁹ *Id.* at 575.

³⁰ *Id.* at 579.

³¹ *Id.*

³² *Id.*

³³ Memorandum from Colonel James E. Morrisette, Chief, Military Justice Division, Office of The Judge Advocate General, to General Malin Craig, no subject, (8 Nov. 8 1942) (on file with author).

³⁴ Status of Army Officer Removed Because of Conviction, 39 Op. Att’y Gen. 437, 438 (1941).

³⁵ McMullen v. United States, 96 F.2d 574, 575 (D.C. Cir. 1938).

³⁶ Memorandum: Re: Colonel Joseph I. McMullen v. United States; Court of Claims No. 45242. Suit filed September 11, 1940; amount involved around \$25,000 counting interest, undated, at 1, (on file with author).

³⁷ *Id.*

³⁸ McMullen v. United States, 100 Ct. Cl. 323, 343 (1943).

³⁹ *Id.* at 323, 324.

⁴⁰ *Id.* at 343.

⁴¹ *Id.* at 338.

⁴² *Id.* at 343.

So ended the “McMullen affair”—a largely forgotten but fascinating piece of our military legal history.

More historical information can be found at

The Judge Advocate General’s Corps
Regimental History Website
<https://www.jagcnet.army.mil/8525736A005BE1BE>

*Dedicated to the brave men and women who have served our
Corps with honor, dedication, and distinction.*

Restoring Balance to the Scales: Higher Panel Quorums and Voting Requirement in Light of Article 60 Restrictions

Major Jeremy D. Broussard*

I. Introduction

The charges Staff Sergeant (SSG) Jones faced were very serious. If convicted, he could spend decades behind bars and receive a Dishonorable Discharge. The decision the panel made could impact the rest of his life. Now, after several days of testimony and argument, the case was in the hands of that panel. The bailiff barked, “All rise!” SSG Jones and his defense counsel, Captain (CPT) Standard, stood at their table, rising with the rest of the courtroom as the general court-martial panel strode in and took their seats. However, there were not the twelve jurors SSG Jones had grown up watching in courtroom dramas.¹ Instead, only six panel members—four officers and two senior NCOs— took their seats in the panel box. As the court-martial progressed, a sinking feeling hit SSG Jones as he remembered his attorney’s advisement that only two-thirds of this panel, or four out of the six members, needed to find him guilty in order to convict him.² Those same four panel members could then sentence him to up to ten years behind bars.³ It required more panel members to sentence SSG Jones to more than ten years confinement. Some members who had voted to acquit him could then vote to give SSG Jones a lengthier sentence.⁴

Regarding the sentence, until 2014, SSG Jones could have submitted matters to the commanding general (CG) who had convened the court-martial, asking that he consider SSG Jones’s years of military service, his combat deployments, his awards, and his injuries in service to his country.⁵ However, due to changes in the Uniform Code of Military Justice

(UCMJ) implemented by the 2014 National Defense Authorization Act (NDAA), that was no longer the case.⁶ While SSG Jones could still submit clemency matters to the CG through his attorney,⁷ the general could not set aside any of the charges and specifications SSG Jones was convicted of, nor could the general reduce the sentence adjudged by the panel.⁸

SSG Jones’s thoughts were interrupted when he saw the president of the panel stand up, findings form folded in his hands, and bellow, “Yes we have, your honor.” The bailiff retrieved the verdict from the panel president and delivered it to the military judge, Colonel (COL) Stern. This was it: SSG Jones’s entire future rested in the hands of just six individuals— and only four of them needed to agree.

Despite dramatic changes to fundamental aspects of the UCMJ over the past two years,⁹ military courts-martial still only require three members for a special court-martial and five for a general court-martial.¹⁰ These panels only need two-thirds of the members to vote guilty to convict the accused.¹¹ Three-quarters of the members must agree in order to sentence the accused to a period of confinement of more than ten years.¹² However, under Article 60, the court-martial’s convening authority (CMCA) was able to unilaterally reduce the sentence adjudged or set aside some or all of the findings of guilt when he took final action regarding the outcome of the court-martial.¹³ This Article 60 ability to actually overturn a conviction, although rarely used, was a type of “safety valve” for the less-than-unanimous conviction

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¹ See *Perry Mason* (CBS television broadcast 1957–1966); *Matlock* (NBC television broadcast 1986–1992); *Law & Order* (NBC television broadcast 1990–2010); *MY COUSIN VINNY* (20th Century Fox Pictures 1992); *A FEW GOOD MEN* (Columbia Pictures 1992); *RULES OF ENGAGEMENT* (Paramount Pictures 2000).

² 10 U.S.C.A. § 852 (2015).

³ 10 U.S.C.A. § 852(b)(2) (2015).

⁴ *Id.*

⁵ Manual for Courts-Martial, United States, R.C.M. 1105 (2012) [hereinafter 2012 MCM].

⁶ See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1702(b), 127 Stat. 672, 954 (2014) [hereinafter NDAA FY 14]. Effective June 24, 2014, court-martial convening authorities (CMCAs) are prohibited from disapproving convictions, partly or entirely, or reducing sentences except in very limited circumstances. See *infra* Section III.

⁷ 2012 MCM, *supra* note 5, R.C.M. 1105.

⁸ *Id.* R.C.M. 1107.

⁹ See NDAA FY 14, *supra* note 6. Some of the changes to the Uniform Code of Military Justice (UCMJ) made by the NDAA FY 14 include a narrowing of scope in the Article 32 process from being in part a tool of discovery for the accused to a probable cause hearing for the government. *Id.* § 1702(a). Mandating that sex offenses under Article 120 be tried at a general court-martial. *Id.* § 1705(a)(1)(B). And the codifying of the Special Victim Counsel (SVP) program. *Id.* § 1702(b).

¹⁰ 10 U.S.C.A. § 816 (2015).

¹¹ 10 U.S.C.A. § 852 (2015).

¹² *Id.*

¹³ 10 U.S.C.A. § 860 (2015).

requirement.¹⁴ It provided the ability for the convening authority to act as “outside eyes”: reviewing the facts and evidence independently and, in some extreme cases, setting aside what he believed to be an erroneous conviction.¹⁵

In light of the new restrictions on post-trial action by the convening authority, there should be a higher requirement on the front end of the court-martial process, namely, more panel members and a higher voting requirement in order to garner a conviction. To get there, this paper will provide a brief history of Article 16, which designates the minimum number of members needed for a court-martial panel, and Article 52, which codifies the voting requirement for convictions and sentences. It will then discuss why Congress implemented significant restrictions to the general court-martial convening authority’s (GCMCA’s) Article 60 powers. This authority served as a safety net for questionable convictions or excessive sentences.

This article will compare and contrast military courts-martial and civilian state and federal jury requirements for felony criminal trials. This article proposes increasing the Article 16 panel member requirements for a special court-martial from its current three to seven members and general court-martial’s current five to twelve. It will explain why the Article 52 voting requirement to enter a finding of guilty should be the same requirement that currently exists to sentence an accused to over ten years confinement, that is three-quarters of members. Finally, this article will discuss how these proposed changes to the UCMJ would be implemented.

II. Evolution of the Court-Martial Panel Composition and Voting Requirement

A. Summary of Changes to Court-Martial Panels from 1786 - 1920

The military court-martial process in the United States has slowly developed since the days of the Revolutionary

War. Prior to the UCMJ, military justice was carried out through the Articles of War, which were first enacted by the Continental Congress in 1775 and were occasionally updated by Congress.¹⁶ These early courts-martial required thirteen panel members, and the Articles of War were silent regarding the number of votes required for a conviction.¹⁷

1. *A Desertion Case and the Lowering of the Bar for Panel Cases*

In the years following the end of the Revolutionary War, the Continental Army shrank to a force of less than one thousand Soldiers.¹⁸ Because some units were unable to provide the sufficient number of officers to convene thirteen-member panels,¹⁹ Congress authorized court-martial panels reduced to as few as five members. However, in 1786 when two Soldiers were court-martialed by a five-member panel for desertion and sentenced to death, the Secretary of War, Henry Knox, found the five-member general court-martial panel to be illegal and ordered the Soldiers released.²⁰ Secretary Knox, writing to the Continental Congress, described the impact the reduced force had on following the procedures for military justice:

[T]he small number of troops at present in the service of the United States, and their dispersed situation, render it difficult, and almost impossible to form a general court-martial, of the numbers required by the Articles of War; therefore desertion and other capital crimes may be committed without its being practicable to inflict legally the highest degree of punishment provided by the laws.²¹

At Secretary Knox’s request, the Continental Congress passed a resolution voiding the two convictions.²² Despite voiding the convictions, Congress authorized all future general courts-martial to consist of between five and thirteen

¹⁴ John B. Wells, *A Safety Valve for the Court-Martial System*, VIRGINIAN-PILOT (May 19, 2013), <http://hamptonroads.com/2013/05/safety-valve-court-martial-system>; Andrew S. Williams, *Safeguarding the Commander’s Authority to Review the Findings of a Court-Martial*, 28 BYU J. PUB. LAW 471, 473 (2014) (“The incorrectness of the [court-martial] verdicts will not always be apparent and may not be discoverable at all. Because the panel’s factual determinations will not always be as accurate as those of a [civilian] jury, commanders need the authority to review those determination.”).

¹⁵ Williams, *supra* note 14.

¹⁶ LAWRENCE J. MORRIS, *MILITARY JUSTICE: A GUIDE TO THE ISSUES* 14-15, 17-19 (2010).

¹⁷ Articles of War of June 30, 1775, 2 J. CONT. CONG. 111, 117 (1775). The tradition of thirteen panel members dates back to 1666, predating the founding of the United States. Howard C. Cohen, *The Two-Thirds-Verdict: A Surviving Anachronism in an Age of Court-Martial Evolution*, 20 CAL. W.L. REV. 9, 30 (1983).

¹⁸ In 1789, the U.S. Army numbered only 672 Soldiers. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* I, 72

HARV. L. REV. 1, 9 (1958). By 1794, the Army’s size had been increased to 3,692. *Id.*

¹⁹ Colonel Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 6 n.18 (1998).

²⁰ *Id.* While Congress had allowed courts-martial to be tried with as few as five members, the preference was still thirteen. *Id.* The issue came to Secretary Knox’s attention when the garrison commander, Major John Palsgrave Wyllys, wrote the War Department seeking its permission to carry out the executions. *Id.* The Continental Congress initially ordered the arrest of Major Wyllys because it also concluded that trying the deserters in a capital case with only five panel members was illegal. *Id.* Secretary Knox recommended Major Wyllys’s release, stating that his actions arose from a need to stop desertions and were “justifiable on military and political principles.” *Id.* Congress agreed and released Major Wyllys. *Id.*

²¹ *Id.*

²² *Id.*

members.²³ As a result, courts-martial in the eighteenth and nineteenth centuries required a simple majority from a panel of as few as five and as many as thirteen members.²⁴ Those facing capital crimes, however, required conviction by two-thirds vote.²⁵

The Army in the 1780s was a force of only hundreds of Soldiers, so the policy regarding panel size made sense. However, in the intervening 230 years, the military services have grown exponentially. Even with budget cuts, the Army is projected to be comprised of 475,000 Soldiers and officers in Fiscal Year 2016.²⁶ The underlining personnel crisis of the 1780s simply does not exist anymore, and the requirement for only five panel members is as antiquated as muskets and wooden battleships.

2. Race Riots, Extraordinary Sentences, and Early Reform Efforts

The next major change to court-martial panels occurred in 1920 when Congress updated the Articles of War.²⁷ The motivation to update the Articles came mainly from the millions of Americans who had fought in the First World War and the need to correct perceived deficiencies in military justice that had essentially remained the same since the start of the nineteenth century.²⁸ Gone was the preference for thirteen-member panels. The 1920 changes simply stated that a general court-martial could consist of “any number of members not less than five.”²⁹ For the first time, a two-thirds majority vote was needed in Army courts-martial to convict for all offenses except those mandating the death penalty,

which now required a unanimous vote.³⁰ Sentencing requirements also mandated three-fourths vote for sentences in excess of ten years.³¹

At the time, there had been an effort to increase the voting requirement for a conviction to be the same as the one for sentencing. Brigadier General (BG) Samuel T. Ansell, the then-acting Judge Advocate General of the Army,³² proposed a bill³³ in 1919 that would require three-fourth vote in order to convict in all non-capital courts-martial.³⁴ Reforming the court-martial system became a passion for BG Ansell.³⁵ His concerns were greater than simply the panel’s voting requirement. Brigadier General Ansell “strongly condemned the existing system of courts-martial in vogue in the army,” arguing that “the death penalty and heavy terms in prison had been inflicted for what he characterized as relatively trivial offenses.”³⁶ He gave an example of a Soldier court-martialed for refusing to give an officer a cigarette when asked, telling the officer, “Go to hell.”³⁷ The Soldier was convicted and sentenced to forty years confinement and a Dishonorable Discharge.³⁸

There was also a post-First World War racial aspect to BG Ansell’s proposed changes. In the summer and fall of 1917, there was tremendous controversy regarding the mass general courts-martial of 63 African-American Soldiers following a race riot in Houston, Texas.³⁹ Of the 63 Soldiers tried, the general court-martial panel convicted 58 of them, sentencing thirteen to death and most of the rest to life

²³ *Id.*

²⁴ Sullivan, *supra* note 19, at 7.

²⁵ *Id.*

²⁶ Andrew Tilghman, *Pentagon Budget Reveals Next Pay Raise, Military Retirement Changes*, MILITARY TIMES, Feb. 19, 2016, <http://www.militarytimes.com/story/military/2016/02/09/dods-2017-budget-reveals-16-percent-pay-raise-and-new-changes-military-retirement/80055802/> (“The Army’s current long-term plans call for bringing the size of its force down to 450,000.”).

²⁷ Articles of War of June 4, 1920, ch. 227, 41 Stat. 759 (1920).

²⁸ MORRIS, *supra* note 16, at 25-31. Similar to the 1919-1920 reforms following the First World War, Congress addressed problems with military justice and its implementation following the Second World War a generation later. With eight million servicemembers in uniform during the Second World War, there were over 1.8 million courts-martial. *Id.* at 122. Instead of simply amending the Articles of War as it had done in 1920, Congress replaced the Articles of War with the Uniform Code of Military Justice in 1950. *Id.* at 125-30.

²⁹ Articles of War of June 4, 1920, ch. 227, 41 Stat. 787, 788 (1920).

³⁰ Murl A. Larkin, *Should the Military Less-Than-Unanimous Verdict of Guilt Be Retained?*, 22 HASTINGS L.J. 237, 239 (1971).

³¹ Articles of War of June 4, 1920, ch. 227, 41 Stat., 795-96 (1920).

³² President Wilson appointed the actual Judge Advocate General of the Army, Major General Enoch Crowder, to the position of Provost Marshall

for the Army in 1917. Major Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1, 2 (1967). Seeing the inherent conflict of interest in having the Army’s chief lawyer also serve as the chief military policeman, Wilson appointed Brigadier General (BG) Ansell as the “acting” Judge Advocate General that same year. *Id.*

³³ *Courts-Martial Called Atrocious*, N.Y. TIMES (Feb. 14, 1919), <http://timesmachine.nytimes.com/timesmachine/1919/02/14/issue.html>.

³⁴ *Id.*

³⁵ Brown, *supra* note 32, at 2 (detailing the prosecution at a general court-martial for a group of enlisted Soldiers who refused to attend drill formation and were convicted and sentenced to Dishonorable Discharge and periods of confinement ranging from ten to twenty-five years).

³⁶ *Courts-Martial Called Atrocious*, *supra* note 33.

³⁷ *Id.*

³⁸ *Id.* Had that Soldier been court-martialed today for disrespect towards a superior commissioned officer, a violation of Article 89, UCMJ, the maximum punishment would be a reduction to the grade of E-1, total forfeiture of all pay and allowances, confinement for one year, and a Bad Conduct Discharge. See 2012 MCM, *supra* note 5, Appendix 12.

³⁹ Fred L. Borch, “The Largest Murder Trial in the History of the United States”: *The Houston Riots Courts-Martial of 1917*, ARMY LAW., Feb. 2011, at 2. The sixty-three Soldiers on trial were represented by the same defense counsel, who himself was not an attorney. *Id.*

imprisonment.⁴⁰ The condemned men's executions were carried out a mere two days later.⁴¹ Horrified by the manner in which the Soldiers received a mass court-martial and mass execution, BG Ansell argued for change to the courts-martial.⁴²

Assisting BG Ansell's efforts in reforming the court-martial composition and voting requirements was U.S. Senator George E. Chamberlain, who sponsored the reform bill in the Senate.⁴³ The Secretary of War, Newton D. Baker, opposed BG Ansell's efforts and helped to ultimately defeat Chamberlain's proposed reforms in the Senate. Senator Chamberlain and BG Ansell's efforts were unsuccessful nearly a century ago.⁴⁴ However, in light of Congress's recent desire to update the UCMJ, perhaps their efforts should be taken up again.

B. The Military Court-Martial: A Sixth Amendment-ish Right to Trial by Panel

There is no Sixth Amendment right to a trial by jury in the military system.⁴⁵ Unlike civilian Article III courts, military courts-martial are convened under Congress's powers under Article I, Section 8 of the U.S. Constitution to "make rules for the government and regulation of the land and naval forces."⁴⁶ Military courts are seen as instrumentalities of the executive branch to allow the President, as Commander-in-Chief of the Armed Forces, to properly command the force by enforcing discipline therein.⁴⁷ As a consequence, the United States Supreme Court has held that military servicemembers being tried in military courts are not entitled to a jury trial under the Fifth and Sixth Amendments,

and courts-martial are not jury trials as understood under Article III.⁴⁸ In *O'Callahan v. Parker*, the Supreme Court held, in part,

The Constitution gives Congress power to "make Rules for the Government and Regulation of the land and naval Forces," and it recognizes that the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply. The Fifth Amendment specifically exempts "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" from the requirement of prosecution by indictment and from the right to trial by jury. The result has been the establishment and development of a system of military justice with fundamental differences from the practices in the civilian courts.⁴⁹

However, military case law has evolved to provide the right to a court-martial panel, which is different from a civilian jury, to try cases at a general or special court-martial.⁵⁰ Military appellate courts have held that so long as the minimum number of panel members is maintained

⁴⁰ *Id.* Only four of the fifty-eight Soldiers convicted received a sentence less than death or life imprisonment. *Id.* Those sentenced to life imprisonment were pardoned in the 1920s. *Id.* at 3 n.14.

⁴¹ *Id.* at 2. The Army executed the thirteen Soldiers by hanging on the morning of December 11, 1917. *Id.* It was the first mass execution since 1847. *Id.*

⁴² *Id.* Of particular concern to BG Ansell was the fact that there was no review of the death sentences by a Judge Advocate prior to them being carried out:

The men were executed immediately upon the termination of the trial and before their records could be forwarded to Washington or examined by anybody, and without, so far as I can see, any one of them having had time or opportunity to seek clemency from the source of clemency, if he had been so advised.

Id. at 2-3. This court-martial and mass execution was the basis for BG Ansell creating General Orders No. 7, promulgated by the War Department on January 17, 1918, and prohibited the execution of the sentence in any case involving death before the Judge Advocate General conducted a legal review and determination. *Id.* at 3. This Board of Review was the precursor to today's Army Court of Criminal Appeals. *Id.*

⁴³ Larkin, *supra* note 30, at 251 n.68, citing S. 64, 66th Cong., 1st Sess (1919).

⁴⁴ Larkin, *supra* note 30, at 251 n.68.

⁴⁵ *Ex Parte Quirin*, 317 U.S. 1, 39-40 (1942) ("The fact that 'cases arising in the land or naval forces' are . . . expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth [Amendment]."). Some have argued that the Framers simply forgot to address military justice in the Sixth Amendment. Eugene M. Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 CORNELL L. REV. 363, 411 (1972) (stating that the military exception was "merely an oversight" brought on by an exhausted Congress); Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 305 ("The most logical explanation for the failure to mention courts-martial in [the Article III jury] clause is that it was the result of oversight or poor draftsmanship."). Others have stated that the Framers never intended the Sixth Amendment to apply to a court-martial. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 280-84 (1958).

⁴⁶ U.S. CONST. art. I, § 8, cl 14.

⁴⁷ WILLIAM WINTHROP, *WINTHROP'S MILITARY LAW AND PRECEDENTS* 48-49 (2d ed. 1920).

⁴⁸ *O'Callahan v. Parker*, 395 U.S. 258 (1969).

⁴⁹ *Id.* at 261-62.

⁵⁰ *United States v. Witham*, 47 M.J. 297 (C.A.A.F. 1997); *see also United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (The accused "has a constitutional right, as well as a regulatory right, to a fair and impartial panel."). *Id.*

throughout the trial,⁵¹ there are no violations of due process rights if a panel starts with a certain number of members and concludes with a different number due to excusals.⁵²

The procedures for these courts-martial have likewise evolved over time. In 1950, Congress introduced Articles 16 and 52 of the UCMJ when President Truman signed it into law. Specifically, Article 16 lays out the panel composition for general and special court-martial panels. A general court-martial will consist of “a military judge and not less than five members.”⁵³ For a special court-martial, where the maximum punishment is no more than one year confinement and a Bad Conduct Discharge, the panel must consist of “a military judge and not less than three members.”⁵⁴ In those cases where the accused may be sentenced to death, there must be at least twelve members on the general court-martial panel.⁵⁵ Both the UCMJ and the Rules for Courts-Martial are silent regarding a maximum number of court-martial members.

Once the number of court-martial members is addressed, there is the question of the voting requirement for a conviction. Article 52 sets the requirements of panel votes needed in order to enter a finding of guilty at a court-martial.⁵⁶ It takes “a concurrence of two-thirds of the members present at the time the vote is taken” to convict the accused at trial.⁵⁷ The exception to this is a capital case, which requires all twelve panel members to vote unanimously.⁵⁸ Curiously, the UCMJ requires three-fourths of the panel to sentence a convicted servicemember to life imprisonment or confinement more than ten years, a higher burden than actually convicting someone beyond a reasonable doubt.⁵⁹ Despite significant changes to other aspects of the UCMJ, Articles 16 and 52 have remained unchanged since the UCMJ was implemented in 1951. The need to address these articles

is timely, considering the recent changes Congress has made to the convening authority’s abilities under Article 60.

III. Article 60 Under Attack: Taking Away the Safety Valve

A. Previous Law

Prior to 2014, the convening authority had broad authority regarding the disposition of a general or special court-martial he had convened. Under Article 60, the convening authority could “modify the findings and sentence of a court-martial.”⁶⁰ This was considered “a matter of command prerogative involving the sole discretion of the convening authority.”⁶¹ This authority dates back to the early 1800s, when senior commanding officers were entrusted with the authority to convene courts-martial and were vested with the responsibility to ensure justice was served.⁶² The Articles of War gave the commanding general the plenary authority to both convene courts-martial and to approve the outcome of the tribunal.⁶³ This tradition was continued with the UCMJ’s enactment in 1950.⁶⁴ Although the UCMJ was revised in 1969 and 1983, Congress kept this power in the hands of the convening authority.⁶⁵ The United States Court of Appeals for the Armed Forces (CAAF) upheld this plenary power as being lawful as recently as 2003.⁶⁶ It would take an otherwise unremarkable court-martial to gain national attention and mark the beginning of the end of this authority.

B. 2014 NDAA: “Commanders, You Have Gone Too Far”

The term “strategic corporal” is often used to describe how the actions of one Soldier on the battlefield can have policy impacts that ripple across the entire strategic

⁵¹ See 10 U.S.C.A. § 829(a)(2015) (“No member of a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.”); 10 U.S.C.A. § 829(b), (c)(2015). General and special courts-martial cannot proceed if the number of panel members falls below the quorum until the convening authority details a sufficient number of new members. *Id.* See also *United States v. Brown*, 206 U.S. 240 (1907) (holding that when court-martial panel was of the minimum number of members, the incompetency of one member voided the proceedings).

⁵² *United States v. Montgomery*, 5 M.J. 832, 834 (C.M.R. 1978).

⁵³ 10 U.S.C.A. § 816 (2015).

⁵⁴ *Id.*

⁵⁵ 10 U.S.C.A. § 825a (2015).

⁵⁶ 10 U.S.C.A. § 852 (2015).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 10 U.S.C.A. § 852 (2015).

⁶⁰ 10 U.S.C. § 860(c)(1) (2012).

⁶¹ *Id.*

⁶² Major Brent A. Goodwin, *Congress Offends Eisenhower and Cicero by Annihilating Article 60, UCMJ*, ARMY LAW., July 2014, at 23-24.

⁶³ Articles of War, 2 Stat. 359 (1806):

Any general officer commanding an army, or Colonel commanding a separate department, may appoint general courts-martial whenever necessary. But no sentence of the courts-martial shall be carried into execution until after the whole proceedings shall have been laid before the same officer ordering the same.

Id.

⁶⁴ Goodwin, *supra* note 61, at 24.

⁶⁵ *Id.*

⁶⁶ *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003) (citing 10 U.S.C. § 860(c)(1)-(2)(2002)) (“As a matter of ‘command prerogative[.]’ a convening authority ‘in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part.’”).

spectrum.⁶⁷ Similarly, there has been the emergence of the “strategic court-martial”: a military trial where the outcome, regardless of the merits, has political and policy ramifications well outside of its jurisdiction. Examples include the court-martial of First Lieutenant William Calley after the My Lai Massacre during the Vietnam War⁶⁸ and the courts-martial of several military guards for prisoner abuse in the Abu Ghraib detention facility during the Iraq War.⁶⁹ The most consequential strategic court-martial of the modern era is the U.S. Air Force general court-martial of Lieutenant Colonel (LTC) James H. Wilkerson.⁷⁰

At his trial, a panel consisting of five colonels convicted LTC Wilkerson in November 2012 of several specifications of aggravated sexual assault, in violation of Article 120 of the UCMJ,⁷¹ and conduct unbecoming an officer and a gentleman, in violation of Article 133 of the UCMJ.⁷² The general court-martial convening authority (GCMCA) in the case, Lieutenant General (LTG) Craig A. Franklin, reviewed the case and, using his authority under Article 60 as the GCMCA, disapproved the panel’s finding of guilt and dismissed the case.⁷³

The public uproar as a result of LTG Franklin’s actions was immediate and intense.⁷⁴ Sexual assault victim

advocates argued that LTG Franklin’s decision was a “reckless disregard for the safety of those who work and serve at Aviano” and that LTG Franklin’s action was “just one example of an extremely biased and broken military justice system.”⁷⁵ Soon after news broke of LTC Wilkerson’s conviction being overturned, LTG Susan Helms, the commanding general of 14th Air Force, similarly overturned the verdict of an officer convicted of sexual assault at a general court-martial.⁷⁶ When President Obama nominated LTG Helms for promotion to four-star general, U.S. Senator Claire McCaskill placed a hold on LTG Helms’s promotion, using the matter as a vehicle to discuss her concern regarding convening authorities overturning Article 120 convictions.⁷⁷ Advocacy groups strongly lobbied Congress to make sweeping changes to the UCMJ regarding the authorities of the CMCA. The overriding theme of those arguing for Article 60 repeal or restrictions was that it was abused by those GCMCAs taking care of subordinates they knew.⁷⁸ The actions of these GCMCAs under Article 60,⁷⁹ although rare,⁸⁰ were sufficient to end both LTG Franklin’s and Helms’s career⁸¹ and began a passionate debate in Congress about more fundamental changes to the UCMJ.

⁶⁷ General Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, MARINES (Jan. 1999), http://www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm.

⁶⁸ MICHAEL R. BELKNAP, *THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY* (2013).

⁶⁹ STJEPAN GABRIEL MESTROVIC, *THE TRIALS OF ABU GHRAIB* (2005).

⁷⁰ *United States v. Lieutenant Colonel James H. Wilkerson* (3d Air Force, Aviano Air Base, Italy, 3 Nov. 2012).

⁷¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 45 (2008) [hereinafter 2008 MCM]. The date of the alleged offenses was March 24, 2012. *Id.* Therefore, the misconduct was prosecuted using the offenses prescribed in the 2008 Manual for Courts-Martial.

⁷² *Id.* pt. IV, ¶59.

⁷³ *United States v. Lieutenant Colonel James H. Wilkerson* (3d Air Force, Aviano Air Base, Italy, 3 Nov. 2012).

⁷⁴ Nancy Montgomery, *Case Dismissed Against Aviano IG Convicted of Sexual Assault*, STARS AND STRIPES (Feb. 27, 2013), <http://www.stripes.com/news/air-force/case-dismissed-against-aviano-ig-convicted-of-sexual-assault-1.209797>; Karen McVeigh, *Victim of US Sexual Assault ‘Scared’ After Conviction Overturned*, THE GUARDIAN (Mar. 12, 2013), <http://www.theguardian.com/world/2013/mar/12/us-military-assault-overturned-victim>; James Risen, *Hagel to Open Review of Sexual Assault Case*, N.Y. TIMES (Mar. 11, 2013), <http://www.nytimes.com/2013/03/12/us/politics/hagel-to-open-review-of-sexual-assault-case.html>.

⁷⁵ Brian Purchia, *Victim in Aviano Scandal Calls on Air Force to Remove Commander Who Overturned Both Her Attacker’s Conviction and Decided Against the Recommendation of the Base Commander Not to Court-Martial Another Airman Accused of Rape*, PROTECT OUR DEFENDERS (Dec. 19, 2013), <http://www.protectourdefenders.com/statement-aviano-victim-calls-on-air-force-to-remove-commander-following-new-scandal/>.

⁷⁶ Craig Whitlock, *General’s Promotion Blocked Over Her Dismissal of Sexual Assault Verdict*, WASH. POST (May 6, 2013),

http://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07-b6e0e6152528_story.html.

⁷⁷ *Id.*

⁷⁸ Kristin Davis, *Lawmakers Lambaste ‘Old Boy’s Network’ In Email Exchange*, THE MIL. TIMES (Sept. 10, 2013), <http://www.militarytimes.com/article/20130910/NEWS05/309100011/Law-makers-lambaste-old-boy-s-network-email-exchange> (“Newly released emails show the lengths to which [Lieutenant General Franklin] went to help a fellow fighter pilot [Lieutenant Colonel Wilkerson] get a new assignment and advance in his career after overturning the pilot’s sex assault conviction.”). *Id.*

⁷⁹ Lieutenant General (LTG) Franklin initially tried to defend his actions in light of the public criticism. See Letter from LTG Franklin to the Sec’y of Air Force (Mar. 12, 2013). In his letter, LTG Franklin stated that he conducted an exhaustive review of the record of trial. He wrote that he “reviewed the Article 32 investigation report again[,] . . . the entire court transcript[,] and all the other evidence the jury reviewed,” and that he “looked at some evidence a second and third time” and “re-read particular portions of the court transcripts.” LTG Franklin wrote that he “reviewed affidavits provided after trial by the prosecuting attorneys” and that he “also read a personal letter to [him] from the alleged victim.” LTG Franklin concluded, “The more evidence that I considered, the more concerned I became about the court martial findings in this case.” *Id.*

⁸⁰ The Air Force reported that between 2008 and 2013, there had been 327 convictions for sexual assault, rape, and similar crimes, but only five verdicts (1%) had been overturned at the clemency stage. See Craig Whitlock, *Air Force General’s Reversal of Pilot’s Sexual-Assault Conviction Angers Lawmakers*, WASH. POST (Mar. 8, 2013), http://www.washingtonpost.com/world/national-security/air-force-generals-reversal-of-pilots-sexual-assault-conviction-angers-lawmakers/2013/03/08/f84b49c2-8816-11e2-8646-d574216d3c8c_story.html.

⁸¹ Nancy Montgomery, *Franklin Will Retire as a Two-Star, Officials Say*, STARS AND STRIPES (Jan. 9, 2014), <http://www.stripes.com/news/franklin-will-retire-as-a-two-star-officials-say-1.261202>; Jeff Schogol, *With*

In the wake of the controversy that would ultimately lead to LTG Franklin's and Helms's retirement, the Obama administration sided with advocacy groups and those in Congress arguing for changes to the UCMJ.⁸² The Secretary of Defense called for the removal of commanders' ability to overturn convictions under Article 60, stating, "These changes [to Article 60], if enacted by Congress, would help ensure that the military justice system works fairly, ensures due process, and is accountable," and that the changes would "increase the confidence of servicemembers and the public that the military justice system will do justice in every case."⁸³ The *Wilkerson* controversy had stoked anger from both political parties, from the White House to Capitol Hill.⁸⁴

Sensing political momentum for a major overhaul of the UCMJ,⁸⁵ Senator Kristen Gillibrand of New York proposed legislation that would completely remove military commanders from the court-martial process, replacing them with "independent prosecutors."⁸⁶ While popular among many activists, the service chiefs and their supporting judge advocates general resisted.⁸⁷ Opponents defeated the bill in a procedural maneuver,⁸⁸ although Senator Gillibrand has indicated that she intends to reintroduce her legislation

removing commanders from the UCMJ process.⁸⁹ This pressure to completely remove military commanders as convening authorities, however, helped result in the compromise legislation regarding limits to the convening authorities.⁹⁰ The final bill allowed the UCMJ to stay within the purview of the chain of command, but placed severe limits on commanders' discretion regarding the outcome of the cases they referred.⁹¹

Specifically, the convening authority can no longer set aside a finding of guilt or only find the accused guilty of a lesser included offense.⁹² The only exceptions to this blanket prohibition are so-called "qualifying offenses": those offenses that carry a punishment no greater than two years confinement and where the sentence adjudged at trial was six months or less without a punitive discharge.⁹³ Sexual assault crimes under Articles 120 and 125 were specifically exempted as "qualifying offenses."⁹⁴ This change became effective in June 2014.⁹⁵

This change by Congress, in its efforts to increase convictions for sexual assault in courts-martial,⁹⁶ was within its authority. However, changing panel quorums and voting requirements are also within Congress's authority.

Nomination Blocked, 3-Star Applies for Retirement, AIR FORCE TIMES (Nov. 8, 2013), <http://archive.airforcetimes.com/article/20131108/CAREERS03/311080013/With-nomination-blocked-3-star-applies-retirement> (noting LTG Helms's retirement from the Air Force).

⁸² President Obama stated in May 2013 that those accused of sexual assault in the military would "be held accountable, prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged—period." Craig Whitlock, *Obama Delivers Blunt Message on Sexual Assaults in the Military*, WASH. POST (May 7, 2013), http://www.washingtonpost.com/world/national-security/possible-military-sexual-assaults-up-by-33-percent-in-last-2-years/2013/05/07/8e33be68-b72b-11e2-bd07-b6e0e6152528_story.html. Those comments were the basis for at least one successful unlawful command influence (UCI) motion in a pending sexual assault case. Erik Slavin, *Judge: Obama Sexual Assault Comments "Unlawful Command Influence"*, STARS AND STRIPES (June 14, 2013), <http://www.stripes.com/judge-obama-sex-assault-comments-unlawful-command-influence-1.225974>.

⁸³ Chris Carroll, *Hagel: Change UCMJ to Deny Commanders Ability to Overturn Verdicts*, STARS AND STRIPES (Apr. 8, 2013), <http://www.stripes.com/hagel-change-ucmj-to-deny-commanders-ability-to-overturn-verdicts-1.215629>.

⁸⁴ Donna Cassata, *Outraged Lawmakers Look to Change Military Justice*, ASSOCIATED PRESS (Apr. 30, 2013), <http://bigstory.ap.org/article/outraged-lawmakers-look-change-military-justice>.

⁸⁵ The President ordered a review of the military services' response to sexual assaults in units, vowing, "If I do not see the kind of progress I expect, then we will consider additional reforms that may be required to eliminate this crime from our military ranks." Scott Neuman, *President Orders Review of Sexual Assault in Military*, NAT'L PUB. RADIO (Dec. 20, 2013), <http://www.npr.org/blogs/thetwo-way/2013/12/20/255826837/president-orders-review-of-sexual-assault-in-military>.

⁸⁶ Military Justice Improvement Act, S. 1752, 113th Congress (2013).

⁸⁷ Elliott C. McLaughlin, *Military Chiefs Oppose Removing Commanders from Sexual Assault Probes*, CNN (June 5, 2013), <http://www.cnn.com/2013/06/04/politics/senate-hearing-military-sexual-assault/>.

⁸⁸ Arlette Saenz & Jeff Zeleny, *Military Assault Bill Months in the Making Fails in Senate*, ABC NEWS (Mar. 6, 2014), <http://abcnews.go.com/blogs/politics/2014/03/gillibrand-military-sexual-assault-bill-fails-in-senate/>.

⁸⁹ Anna Palmer & Daniel Samuelsohn, *Kirsten Gillibrand Gears Up for Another Round*, POLITICO (Jan. 7, 2015), <http://www.politico.com/story/2015/01/kirsten-gillibrand-military-sexual-assault-114018.html> (Senator Gillibrand: "I think [sexual assault in the military] is a major issue, and I think the next commander in chief will have to look at this very seriously, particularly if our current one doesn't embrace this final reform as necessary . . .").

⁹⁰ Jonathan Weisman and Jennifer Steinhauer, *Negotiators Reach Compromise on Defense Bill*, N.Y. TIMES (Dec. 9, 2013), http://www.nytimes.com/2013/12/10/us/politics/house-and-senate-reach-compromise-on-pentagon-bill.html?pagewanted=all&_r=0.

⁹¹ *Id.*

⁹² NDAA FY 14, *supra* note 6, at § 1702(b).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See transcript of Honorable Judge Barbara Jones testimony, Department of Defense Response Systems to Adult Sexual Assault Crimes Panel (June 16, 2014), at 73-74. The panel was commissioned by Congress. Judge Jones stated in part:

I think the way you began this . . . was to say we need to – that a lot of our assessment with respect to this narrow issue, not about all commanders but of convening authority within the UCMJ, our, at least the majority's decision at this point not to do anything was because we did not believe we had enough evidence to convince us that it was going to increase reporting or increase convictions or what have you.

Id.

Consequently, Congress missed an opportunity to rebalance the court-martial process by exploring ways to address the composition and voting requirement.

IV. Following the State and Federal Lead for Panel Size and Voting Requirements

The Fifth Amendment of the Constitution ensures that no one will lose life, liberty, or property without due process of law.⁹⁷ The Sixth Amendment states in part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]”⁹⁸ These amendments apply to the states under the Fourteenth Amendment.⁹⁹ In considering how to reform the UCMJ regarding court-martial panels, Congress need only look at the practices of the federal and state courts, practices which have withstood appellate scrutiny at the United States Supreme Court.

A. Federal Criminal Jury Requirements

While in many ways the military court-martial system is modeled after federal courts, there are key differences. The military system adopted the Federal Rules of Evidence, made minor military-specific adjustments to it, and named it the Military Rules of Evidence.¹⁰⁰ Under Article 134, certain federal criminal statutes can be prosecuted in military court.¹⁰¹ However, a key difference is in the standards for civilian juries versus court-martial panels for criminal trials. Under the federal rules, unless a defendant agrees to a lower number, there must be twelve jurors in every federal criminal trial.¹⁰² These jurors must return a verdict to a judge in open court and the verdict must be unanimous.¹⁰³ There are no exceptions to this requirement for unanimity; anything less

will result in a mistrial.¹⁰⁴ With the military justice system mirroring the federal system, there should be a higher standard for panel quorums and conviction burdens. While a unanimous verdict by twelve panel members may be considered to be too much change to the UCMJ, state courts provide a pathway for more moderate reform to the court-martial panel size and voting requirements which are not as onerous as the federal criminal courts but provide more protections for the accused than the current system.

B. State Criminal Jury Requirements

Except for Florida, all states and the District of Columbia require twelve jurors for felony trials.¹⁰⁵ Florida only requires six jurors who must vote unanimously to convict.¹⁰⁶ In 1978, the United States Supreme Court held in *Ballew v. Georgia* that a trial consisting of a jury of less than six persons deprived a defendant of the right to trial by jury as contemplated in the Sixth Amendment.¹⁰⁷ The Court reached its conclusion based largely on empirical studies showing that “the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members.”¹⁰⁸ Six jurors were enough to meet constitutionality under the Sixth Amendment.¹⁰⁹ The following year, in *Burch v. Louisiana*,¹¹⁰ the Court held that any guilty verdict by a six-member jury must be by unanimous vote.¹¹¹

However, in 2014 the CAAF summarily affirmed a ruling from the Air Force Court of Criminal Appeals, holding that that the Supreme Court’s decision in *Burch* did not apply to military courts-martial where there were fewer than six panel members convicting without a requirement to vote unanimously.¹¹² Because of the military appellate courts’

⁹⁷ U.S. CONST. amend. V.

⁹⁸ U.S. CONST. amend. VI. The Seventh Amendment also ensured the right of trial by jury in civil cases.

⁹⁹ U.S. CONST. amend XIV.

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

¹⁰¹ 2012 MCM, *supra* note 5, pt. IV, ¶ 60b(4)(b) (2012)(discussing use of Article 134 to prosecute federal crimes not covered elsewhere by the punitive articles of the UCMJ).

¹⁰² FED. R. CRIM. P. 23.

¹⁰³ FED. R. CRIM. P. 31(a).

¹⁰⁴ FED. R. CRIM. P. 31(b)(3).

¹⁰⁵ DAVID B. ROTTMAN AND SHAUNA M. STRICKLAND, STATE COURT ORGANIZATION, table 42 (Washington, DC: Bureau of Justice Statistics, 2004) (providing complete state-by-state information on jury composition and voting requirements for criminal and civil trials).

¹⁰⁶ *Id.*

¹⁰⁷ *Ballew v. Georgia*, 435 U.S. 223, 239-40 (1978).

¹⁰⁸ *Id.* at 239. Studies of jury verdicts in several civil lawsuits in the 1960s demonstrated significant differences in finding for either the plaintiff or defendant based on the size of the jury, with six-member juries awarding larger damages than twelve-member juries. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Burch v. Louisiana*, 441 U.S. 130 (1979).

¹¹¹ *Id.* at 131.

[M]uch the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude now that conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous.

Id. at 138.

¹¹² *United States v. Daniel*, 2014 CCA LEXIS 224 (A.F. Ct. Crim. App. 2014), *aff'd*, 2014 CAAF LEXIS (C.A.A.F. 2014), *cert. denied*, No. 14-621 (2014) (Appellant, relying on *Ballew v. Georgia* and *Burch v. Louisiana*, challenged the constitutionality of his conviction at a general court-martial by a panel of only six members who were not required to unanimously vote to convict. The Air Force Court of Criminal Appeals held that because courts-martial were not subject to the same jury requirements as other

holdings regarding the non-applicability of the Sixth Amendment right to a larger panel size and voting requirement,¹¹³ it is clear that only congressional action updating Articles 16 and 52 will result in a higher panel quorum and voting requirement for conviction.

While some may argue that the current two-thirds voting requirement to convict is “enough” due process for courts-martial,¹¹⁴ not requiring a higher voting requirement undermines the concept of “proof beyond a reasonable doubt.” The reasonable doubt is, in effect, the one-third of those panel members who voted to acquit.¹¹⁵ In practice, the total effect of our current system is that a simple majority of members favoring conviction may be able to force reballoting until a conviction results, hardly “proof beyond reasonable doubt.”¹¹⁶

While most states and the federal government require unanimous verdicts by twelve-member juries, this is not universal. In a 1972 plurality opinion, the Supreme Court held that while the Sixth Amendment guaranteed a unanimous verdict in federal criminal trials, this right was not extended to the states under the Fourteenth Amendment. Therefore, states could convict individuals with a 9-3 verdict.¹¹⁷ Louisiana and Oregon are the only states that allow convictions based on juries that are not unanimous in reaching verdicts.¹¹⁸ Oregon requires eleven jurors to be in favor of conviction for murder and only ten for all other offenses.¹¹⁹ Louisiana only requires nine out of twelve jurors to vote to convict for all non-capital felony cases.¹²⁰ These states provide excellent examples for increased panel size with a larger, non-unanimous voting requirement.

criminal trials, there was no merit to appellant’s claim that his due process rights were violated when he was prosecuted by a court-martial panel consisting of only six members whose verdict did not have to be unanimous.)

¹¹³ *Id.*

¹¹⁴ See Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CONST. L. Q. 141 (2005) (arguing that a focus on criminal juries being unanimous in their verdicts is misplaced and that a supermajority of jurors is not only sufficient due process, but also a better indicator of “society’s will” in jury decisions).

¹¹⁵ *Billeci v. United States*, 184 F.2d 394, 403 (D.C. Cir. 1950).

An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only a verdict of guilty cannot be returned. These principles are not pious platitudes recited to placate the shares of venerated legal ancients. They are working rules of law bidding upon the court. Startling though the concept is when fully appreciated, those rules mean that the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement.

Id.

V. Proposed Solution: More Members and More Votes Equals More Military Justice

A. A Higher Court-Martial Quorum

The practice of using only five panel members in general courts-martial is a relic of the 1780s and reflects a time when the military was simply too small to field a larger panel.¹²¹ That is no longer the case. As punitive articles and procedures have evolved with the times, so too should the court-martial panel reflect current practices by state and federal courts in terms of panel size. An increased quorum for courts-martial promotes a greater sense of fairness and justice for the accused and for the public at large.

Mandating a panel of twelve members for a general court-martial and seven for a special court-martial would also remove the gamesmanship¹²² of having the “right” number of panel members to reach the conviction requirement.¹²³ Knowing the size of the panel depending on the type of court-martial, the “magic number” of three-fourths members to convict would be known by all: six members for a special court-martial and nine for a general court-martial. Additionally, while appellate courts have upheld the current quorum requirements, this was always with the presumption that the convening authority had the ability to unilaterally take corrective action after the trial under Article 60. This is no longer the case. The Supreme Court has previously stated that it could review the UCMJ in the future and determine that it no longer meets basic due process requirements.¹²⁴ Congress should complete its work with UCMJ reform and increase the court-martial quorum before the issue is reviewed by appellate courts. Not only should the panel size be increased, but the voting requirement to convict should be increased also.

¹¹⁶ Larkin, *supra* note 30, at 247.

¹¹⁷ *Apodaca v. Oregon*, 406 U.S. 404, 412-13 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

¹¹⁸ ROTTMAN AND STRICKLAND, *supra* note 104.

¹¹⁹ OR. REV. STAT. § 136.450 (2013).

¹²⁰ LA. CONST., art. VII, § 41.

¹²¹ Sullivan, *supra* note 19.

¹²² MAJOR S.A. LAMB, THE COURT-MARTIAL PANEL MEMBER SELECTION PROCESS: A CRITICAL ANALYSIS, at 95 (“A specified number of members would remove any incentive on the part of either defense counsel or trial counsel to play the numbers game with peremptory challenges.”) (1992).

¹²³ U.S. Dep’t of Army, Reg. 27-9, Military Judge’s Benchbook table 2-1 (10 Sep. 2014) [hereinafter AR 27-9].

¹²⁴ *Weiss v. United States*, 510 U.S. 163, 177-78 (1994) (“We do not mean to say that any practice in military courts which might have been accepted at some time in history automatically satisfies due process of law today”; however, history “is a factor that must be weighed” in considering the constitutionality of a challenged military justice practice.); see also *Ballew v. Georgia*, 435 U.S. 223, 239-40 (1978).

B. Two Out of Three Ain't Bad, Unless One's Liberty Is At Stake

Florida, Oregon, and Louisiana demonstrate that it is possible to have courts that have fewer than twelve jurors and non-unanimous convictions, but perhaps not both. The proposed changes to court-martial panels are incremental and seek in part to prevent possible appellate due process challenges to Articles 16 and 52 under the Sixth Amendment now that the "safety valve," or Article 60, has effectively been shut off. The states mentioned demonstrate that it is possible to increase our quorum to twelve for general courts-martial, have three-fourths voting requirement for conviction (effectively what Louisiana requires), and have the conviction withstand any future constitutional scrutiny. Special courts-martial have a maximum punishment of one year confinement and a Bad Conduct Discharge, which is roughly the equivalent of a misdemeanor conviction in civilian courts. Having a non-unanimous conviction by seven panel members will most likely not draw the appellate challenges that a felony-level conviction at a general court-martial would.

The current military justice system can create a form of "conviction peer pressure"¹²⁵ that can affect court-martial panel deliberations. For example, consider a court-martial panel consisting of nine members. Under the current two-thirds rule, six votes are needed in order to convict.¹²⁶ If upon the first ballot on the question of guilt or innocence the vote is five to four for acquittal, the four members who would convict probably could not force a reballoting because they do not constitute a majority. The accused would be acquitted. However, if the vote were five to four for conviction, the five who would convict may force reballoting repeatedly until one member agrees to change his vote and convict.¹²⁷ It is much easier to get this one vote under the two-thirds system than the two if a conviction required three-fourths vote. More to the point, with a standard panel size and three-fourths voting requirement, every trial counsel, accused, military judge, and general court-martial panel would know at the start of trial that it requires nine of the twelve panel members to convict. Because there are no "deadlocked juries" resulting in a mistrial in the military justice system, the risk of this "conviction peer pressure" is real and taints a verdict that relies on only two-thirds support.¹²⁸ The current 230 year-old paradigm of small majorities from even smaller panels

¹²⁵ JEFFREY ABRAMSON, *WE, THE JURY* 197 (paperback ed. 2000) (discussing data showing the widespread occurrence of splits among jurors that were eventually overcome by intimidation, as opposed to persuasion, of would-be holdouts); Tom Jackman, *Prieto Juror's Reversal Could Lead to Mistrial*, WASH. POST, July 3, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/02/AR2007070201828.html> ("A juror in Fairfax County's double murder trial of Alfredo R. Prieto wrote a letter to the judge yesterday saying he should not have voted for conviction two weeks ago, calling his fellow jurors 'a pack of lions protecting their kill.'"); *California Case Puts Spotlight on Jury Coercion and Peer Pressure*, N.Y. TIMES, July 17, 1992, <http://www.nytimes.com/1992/07/17/news/california-case-puts-spotlight-on-jury-coercion-and-peer-pressure.html> ("Invariably, two to five assertive people, often the most articulate in the group, take the lead in jury deliberations, while four to six others say very little, jury analysts say. And when assertive

should be updated to provide better due process for our Soldiers.

C. In Pursuit of a More Perfect Military Justice System

Some will undoubtedly ask why one would propose this greater emphasis on due process and heightening the burden on military court-martial panels, especially at a time when Congress appears to be seeking a higher conviction rate in sexual assault prosecutions. The answer is best given by the former Judge Advocate General of the Air Force, Lieutenant General Richard C. Harding, who said,

Due process enhances discipline. America's mothers and fathers send their sons and daughters to us to join our all-volunteer force because they believe their children will be fairly treated. They believe and expect that we will adhere to due process in judging their children, should they violate our code; otherwise, they would not have sent them to us. As a result, when we adhere to due process, we send a message to those parents, parents of other prospective [servicemembers] and all [servicemembers] everywhere that they can trust the [armed forces] to treat its [servicemembers] fairly and protect and promote justice within our service[s]. By protecting our recruiting and retention pipelines, due process safeguards our combat effectiveness. Conversely, when we permit due process to suffer, we discourage enlistment of America's best and brightest; we demoralize and discourage the retention of currently-serving [servicemembers], who worry they will likewise be treated unfairly, and as a consequence, we degrade military discipline and combat effectiveness.¹²⁹

Due process is a component of the good order and discipline our UCMJ system was created to protect. It goes hand-and-hand with the justice our commanders, Congress, and the public seek. Addressing court-martial panel composition and voting requirements, therefore, is fundamental to UCMJ reform.

jurors agree with each other, the others will often follow, even if they disagree.").

¹²⁶ AR 27-9, *supra* note 119.

¹²⁷ Larkin, *supra* note 30, at 247.

¹²⁸ *Id.*

¹²⁹ Lieutenant General Richard C. Harding, *A Revival in Military Justice: An Introduction by the Judge Advocate General*, THE REPORTER, Summer 2010, at 4, available at www.afjag.af.mil/shared/media/document/AFD-101105-056.pdf (emphasis added).

The fact that our courts require twelve panel members to vote unanimously in order to convict an accused of a capital offense and sentence him to death shows that there is less than the beyond-reasonable-doubt standard for all other charges only requiring two-thirds of panel members in order to convict.¹³⁰ An increase in our voting requirement—implementing BG Ansell’s proposed reforms nearly a century later—helps ensure that procedural due process is afforded for the accused. Ultimately, it is the accused’s presumption of innocence and right to a fair trial that must be protected, and recent changes to the UCMJ made in political haste threaten to undermine this right.¹³¹ With the extensive experience of CMCA’s and their supporting judge advocates, the practical implementation of this policy is very achievable.

VI. Implementation at Your Local Installation

How would these proposals play out in actual practice? For starters, Staff Judge Advocates and their Chiefs of Justice would draw a greater pool of potential panel members through their Court-Martial Convening Orders (CMCOs). Instead of ten to twelve officers and enlisted panel members per CMCO, a greater number, perhaps twenty-four or thirty-six, would be required. As a practicable matter, this is not a great challenge to OSJAs, and the practice of selecting mainly senior officers and NCOs is more of a custom than a requirement under the UCMJ.¹³²

At the convening of the general court-martial, a larger number of potential panel members from the CMCO, perhaps twenty, would report to court for voir dire. Their questionnaires and officer or enlisted Soldiers record briefs would already have been provided to the accused through his defense counsel days or weeks earlier. The “primary” panel would be made of the twelve most senior officers and enlisted, and if there are no challenges they would be seated. Once twelve members are seated and the court-martial assembled, the remainder of those summoned would be excused. Although the proposed changes are arguably more onerous on

commands, the court-martial process is one of the most important responsibilities of commanders and their judge advocates in order to maintain a disciplined fighting force and ensure justice to the military, society, victims, and the accused.¹³³ These proposed policy changes are important to give the commanders, Soldiers, those accused of crimes, and the public at large greater trust and confidence in the military justice system.

VII. Conclusion

The current court-martial panel quorum and voting requirements are vestiges of a much smaller, isolated military.¹³⁴ Back then, commanders, not legally-trained attorneys and judges, arbitrarily meted out justice against the accused, often with the horrific results which necessitated the formation of the UCMJ over sixty-five years ago.¹³⁵ The current standard of three to five panel members determining the fate of an accused, who faces federal conviction at trial, has outlived its usefulness and is insufficient due process. This is especially true in light of the severe restrictions on the CMCA’s authority under Article 60. Congress should complete its work and bring the military court-martial into the twenty-first century by raising panel seating and voting requirements for special and general courts-martial. Doing so will provide Soldiers like SSG Jones with an increased sense of fairness in the court-martial process, regardless of the verdict.

¹³⁰ Larkin, *supra* note 30, at 251.

¹³¹ Congressman Loretta Sanchez, *The Forty-First Kenneth J. Hodson Lecture in Criminal Law*, 218 MIL. L. REV. 265, 275 (2013).

We need to do justice and deter crime. Notice that I did not simply say “punish the guilty.” We must always preserve the rights of the accused. Americans are innocent until proven guilty. Doing justice means thoroughly and fairly investigating and trying these cases so that the guilty can be punished according to the offense and their individual culpability. False accusations, overcharging, or the rush to judgment can do tremendous harm to those accused of sexual assault.

Id.

¹³² 10 U.S.C.A. § 825 (2015) (Any commissioned or warrant officer can serve on a court-martial panel and any enlisted member “who is not a member of the same unit as the accused” may serve. Panel members should not be junior in rank to the accused “[w]hen it can be avoided.”).

¹³³ MORRIS, *supra* note 16, at 5.

A military justice system in a free society is only truly effective when it commands the broad respect of those whom it governs. The concern for justice, then, is grounded partly in the concern that good order and discipline are so important that they must be rooted in a system that soldiers essentially trust. If soldiers perceive that the system—popular or not—essentially produced just results, then it would be an effective tool for leaders to enforce discipline and produce a fighting force that is more cohesive and effective.

Id.

¹³⁴ Wiener, *supra* note 18.

¹³⁵ Brigadier General John S. Cooke (Retired), *Military Justice and the Uniform Code of Military Justice*, ARMY LAW., Mar. 2000, at 2.

Advising Military Clients on Lump Sum Income

Major Cesar B. Casal*

*I bought myself a yacht, a mansion, a couple of cars. That ain't a million dollars. That's seven million dollars. I pretty much gave it away.*¹

I. Introduction

A large man sits on a stool in front of a background that mimics the appearance of a hundred dollar bill.² His movements are jerky and nervous.³ His shoulders are hunched, as if defeated, tired, or both.⁴ His body has grown soft, but like the ruins of Pompeii,⁵ what the viewer perceives is the remnant of something once great and powerful—something once beheld—and something that once instilled fear in the opposition. The man is Keith McCants, a former player in the National Football League (NFL).⁶ He is explaining how he lost the millions he earned as a football player, and is now broke.⁷ He is not alone. An article in *Sports Illustrated* claims that as soon as two years after retirement, a staggering 78% of NFL retirees are broke or having “financial difficulties.”⁸

In another story, a sixteen-year-old girl in the United Kingdom wins nearly three million dollars in a lottery jackpot.⁹ She collects the money while making public statements that she would “not spend loads,” “take some advice and see an accountant,” and merely wanted a “normal home” and “normal car.”¹⁰ Eight years, two breast augmentations, \$380,000 in cocaine, and four suicide

attempts later, she is broke.¹¹ She, too, is not alone; the National Endowment for Financial Education estimates that 70% of large lump sum recipients will lose it all within a few short years.¹²

What could professional athletes and teenage lottery winners have in common with servicemembers? All three groups face the challenge of managing lump sum income. While NFL athletes and lottery winners are extreme examples, they illustrate the potentially perilous nature of receiving large amounts of money in a short period of time. Servicemembers receive far smaller (and therefore more manageable) sums, but they are at risk of sharing the same outcomes as the other groups: Years after receiving the money, they are no better off than they were before.¹³

This article guides judge advocates advising their military clients on managing their lump sum income. Although financial investment advice is not within the scope of the Army's legal assistance program,¹⁴ financial planning matters frequently arise ancillary to the areas where Army lawyers do advise Soldiers, such as with wills and basic estate planning, separations and divorces, dependent support obligations,¹⁵ separations, non-judicial punishment, and

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¹ *30 for 30: Broke* (ESPN television broadcast Oct. 2, 2012). In *30 for 30: Broke*, Keith McCants describes how he lost the money he earned as a player in the National Football League. *Id.*

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Archival Photographs*, POMPEII FORUM PROJECT, <http://pompeii.virginia.edu> (last visited Feb. 10, 2016) (showing archaeological photographs of Pompeii).

⁶ *Keith McCants*, NFL.COM, <http://www.nfl.com/player/keithmccants>

/2501941/profile (last visited Feb. 10, 2016). Keith McCants played in the National Football League for six seasons as a member of three different teams from 1990 to 1995. *Id.*

⁷ See *supra* note 1 and accompanying text.

⁸ Pablo S. Torre, *How (and Why) Athletes Go Broke*, SPORTS ILLUSTRATED, Mar. 23, 2009, at 90. *But see* Kyle Carlson, Joshua Kim, Annamaria Lusardi & Colin F. Camerer, *Bankruptcy Rates Among NFL Players with Short-Lived Income Spikes* (National Bureau of Economic Research, Working Paper No. 21085, 2015), <http://www.nber.org/papers/w21085> (claiming much lower, but still significant rates of bankruptcy among NFL players after retirement).

⁹ Callie Rogers, *Lottery Winner Who Spent Fortune On Drugs And Parties, Now Poorer But Happy*, HUFFINGTONPOST.COM (July 17, 2013), http://www.huffingtonpost.com/2013/07/17/callie-rogers-lottery-drugs-happy_n_3612836.html.

¹⁰ *Id.*

¹¹ *Id.*

¹² NAT'L ENDOWMENT FOR FIN. EDUC., FINANCIAL WINDFALL (2004).

¹³ *30 for 30: Broke*, *supra* note 1; Torre, *supra* note 8. See also FINANCIAL INDUSTRY REGULATORY AUTHORITY INVESTOR EDUCATION FOUND., FINANCIAL CAPABILITY IN THE U. S. 2012 REPORT OF MILITARY FINDINGS (2013) (showing 41% of military survey respondents report “somewhat or very difficult” time covering expenses and paying bills).

¹⁴ See U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (RAR 13 Sept. 2011).

¹⁵ *Id.*

courts-martial.¹⁶ The financial tools and instruction the military provides to servicemembers focus largely on basic budgeting of monthly pay and expense management.¹⁷ But these tools tend to be silent on how to manage relatively large sums of money such as lump sum payments servicemembers receive or accumulate fairly regularly but are unaccustomed to handling.¹⁸ These payments include re-enlistment and continuation pay and bonuses, separation pay (including Thrift Savings Plan distributions at separation or retirement), deployment savings, and lump sums from the sale of the primary home during a Permanent Change of Station (PCS) move.¹⁹

Servicemembers who lack a plan to manage lump sum payments over the course of their careers will limit the potential of those payments to contribute to long term financial health. The intent of this article is to assist Army attorneys in providing realistic goals and azimuth checks to their clients as opposed to financial advice. Part II discusses the behavioral and psychological aspects that may affect an individual's perspective on lump sum income as opposed to a salary paid over time. Part III discusses sources and amounts of lump sums payments in the military. Part IV proposes a systematic approach to managing lump sum income within an overall financial plan and introduce two laws that serve to protect servicemembers and their assets.

II. The Behavioral Aspects that Affect the Perception of Lump Sum Income

Do individuals see lump sum income differently than other income? After all, the well-known saying "easy come, easy go" generally refers to monetary gains.²⁰ Do individuals behave differently when they receive these large income gains than they do with their regular salaries? Studies conducted by academic psychologists and economists support the theory that individuals do indeed view lump sums differently and

therefore treat them differently than smaller periodic payments.

A. Same Sums, Different Mindset

1. *Kahneman and Tversky*

In 1979, two psychologists, Daniel Kahneman and Amos Tversky, co-authored a paper titled *Choices, Values, and Frames*.²¹ The paper introduced—or rather built upon—the concept of risk aversion that Daniel Bernoulli discussed in an essay he wrote in 1738.²² While the idea that individuals are averse to loss and risk is intuitive and universally understood, Kahneman and Tversky sought to discuss why individuals make decisions that seem to contradict purely rational outcomes.²³ For example, they discussed the observation that individuals tend to see losses of a certain amount as far worse than a gain of the same exact amount.²⁴ In other words, an individual would find a loss of \$100 as less attractive than a \$100 gain would be attractive.²⁵ One particularly illustrative example Kahneman and Tversky highlight is the situation where study participants make one of two choices: A gamble, where he or she would have an 85% chance of losing \$1000 and a 15% chance of losing nothing, or an automatic loss of \$800.²⁶ A pure mathematical analysis states that the latter choice should clearly be more attractive, as the value of the first choice is an expected loss of \$850 versus the sure loss of \$800.²⁷ Kahneman and Tversky, however, cite to several studies that indicate individuals far preferred the gamble to the sure loss, indicating a preference for inferior sums based on emotion or circumstance.²⁸

2. *Richard Thaler*

Richard Thaler, in his article *Anomalies: Saving, Fungibility, and Mental Accounts* advances the principle that

¹⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1101 (2012) (discussing process for deferral of court-martial related forfeitures); U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 3-19b(7) (3 Oct. 2011) (discussing forfeitures as an option for punishment under non-judicial punishment procedures).

¹⁷ See generally *Money Management*, MILITARYONESOURCE.COM, <http://militaryonesource.com/pfm> (last visited Feb. 10, 2016); *Military Financial Readiness*, SAVEANDINVEST.ORG, <http://www.saveandinvest.org/MilitaryCenter/> (last visited May 18, 2015). These are two websites directed at members of the military. Both sites provide instruction on budgeting, spending plans, general investing, and debt management; however, neither site discusses lump sum management.

¹⁸ *Id.*

¹⁹ See generally U.S. DEP'T OF DEF., MILITARY COMPENSATION BACKGROUND PAPERS (Nov. 2011) [hereinafter COMPENSATION PAPERS] (explaining background and rationale for separation pays, enlistment and continuation bonuses, and combat zone tax exclusions).

²⁰ See generally *Easy Come, Easy Go*, MERRIAM-WEBSTER LEARNER'S DICTIONARY, <http://www.learnersdictionary.com/definition/easy> (last visited Feb. 10, 2016) (The contextual explanation for the entry is, "His attitude toward money has always been, easy come, easy go.").

²¹ Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341 (1984).

²² *Id.* Bernoulli "attempted to explain why people are generally averse to risk and why risk aversion decreases with increasing wealth." *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 342.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* ("Risk seeking in the domain of losses has been confirmed by several investigators (Fishburn & Kochenberger, 1979; Hershey & Schoemaker, 1980; Payne, Laughhunn, & Crum, 1980; Slovic, Fischhoff, & Lichtenstein, 1982). It has also been observed with nonmonetary outcomes, such as hours of pain (Eraker & Sox, 1981) and loss of human lives (Fischhoff, 1983; Tversky, 1977; Tversky & Kahneman, 1981).")

individuals classify income into certain “mental accounts”—or classifications of what money is for or how it is spent—purely in one’s own mind.²⁹ Thaler’s study established that individuals spend funds in these “mental accounts” in different ways, depending on how they classified the income.³⁰ In another article, Thaler introduces the “house money” effect, where “under some circumstances, a prior gain can increase subjects’ willingness to accept gambles.”³¹ This is the very principle that highlights the danger of lump sums, particularly for members of the military: Recipients may view the money received in such sums differently than they do their periodic pay and act in ways they would otherwise find imprudent.³²

B. House Money

Other studies support Thaler’s “house money” mentality. Nicholas Souleles, a professor at the Wharton School at the University of Pennsylvania, conducted a study to determine the effect on spending upon a household’s receipt of their yearly income tax refund.³³ Souleles sought to answer the question of whether the additional income would cause additional spending.³⁴ He found that within a quarter of a year, households had spent from 35% to over 60% of the income tax refund.³⁵ A second study Souleles contributed to in 2007 attempted to draw conclusions from a similar set of data: the 2001 federal income tax rebates.³⁶ The second study had similar results: While recipients saved some of the money initially (by paying down debt and increasing amounts in savings), participants had increased their spending equivalent to 40% of the rebate within nine months of receipt.³⁷ Instead of engaging in risk-reducing behavior (saving), participants opted to spend.³⁸

A Vanderbilt University Law School paper indicates similar and possibly counter-intuitive results.³⁹ The authors analyzed data pertaining to different sets of lottery winners:

²⁹ Richard H. Thaler, *Saving, Fungibility, and Mental Accounts*, 4 J. OF ECON. PERSPECTIVES 193, 194 (1990).

³⁰ *Id.*

³¹ Richard H. Thaler & Richard J. Johnson, *Gambling with the House Money and Trying to Break Even: The Effects of Prior Outcomes on Risky Choice*, 36 MGMT. SCI. 643, 644 (1990).

³² *Id.*

³³ Nicholas S. Souleles, *The Response of Household Consumption to Income Tax Refunds*, 89 AM. ECON. REV. 947 (1999).

³⁴ *Id.*

³⁵ *Id.* at 955-56.

³⁶ Sumit Agrawal, Chunlin Liu, & Nicholas S. Souleles, *The Reaction of Consumer Spending and Debt to Tax Rebates—Evidence from Consumer Credit Data*, 115 J. OF POLITICAL ECON. 986 (2007).

³⁷ *Id.* at 989.

³⁸ *Id.*

those that won less than \$10,000, those that won \$10,000 to \$50,000, and those that won \$50,000 to \$150,000.⁴⁰ They found that, with minimal variations, the amount the individuals won did not significantly affect their financial well-being three to five years from winning the prize; the groups filed bankruptcy at the same rates and with largely the same level of assets.⁴¹ The researchers noted that even though some winners received enough money to pay off all of their debts, the funds merely postponed their bankruptcy instead of preventing it.⁴²

Academics and economists continue to study this area because the findings can have wide-ranging economics policy implications and be the “key for the formulation of effective stabilization policies.”⁴³ But this area is not just important to academics and economists; individual savers should be acutely aware that when they receive their lump sum payments, they are fighting a battle with their own perspectives, biases, and emotions when it comes to their desire to spend. Following a discussion of ways military members may face these challenges, Part IV of this article proposes a plan that can help mitigate their effects.

III. Sources of Lump Sum Payments in the Military

Soldiers receive lump sums from a variety of sources and at different points in their career—from the start of their career in the form of enlistment bonuses up to the very end of their career in the form of separation pay.⁴⁴ These lump sums can vary from the low thousands to the hundreds of thousands depending on the Army’s operational requirements and the need to “provide monetary incentive[s] to induce persons to enlist for and serve in military skill specialties experiencing critical personnel shortages.”⁴⁵ For example, the Army has, at times, offered \$20,000 “quick ship” bonuses for new enlistees who agree to depart for basic training within thirty days.⁴⁶ In 2009, the Army offered \$150,000 bonuses to

³⁹ Scott Hankins, Mark Hoekstra, & Paige Marta Skiba, *The Ticket to Easy Street? The Financial Consequences of Winning the Lottery* (Vanderbilt University Law School Law and Economics, Working Paper No. 10-12, 2010), <http://ssrn.com/abstract=1324845>.

⁴⁰ *Id.* at 3-4.

⁴¹ *Id.* at 17-18.

⁴² *Id.*

⁴³ See Tullio Japelli & Luigi Pistaferri, *The Consumption Response to Income Changes*, 2 ANNUAL REV. ECON. 479 (2010) (“Understanding how household consumption responds to changes in income is an important topic of research, in particular for understanding how consumers would respond to tax or welfare reforms, which is key for the formulation of effective stabilization policies.”).

⁴⁴ See COMPENSATION PAPERS, *supra* note 19.

⁴⁵ *Id.* at 493.

⁴⁶ Josh White, *Many Take Army’s ‘Quick Ship’ Bonus*, WASHINGTON POST (Aug. 27, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/26/AR2007082601266.html>. This article discusses the popularity of the bonus during 2007, the same year as the Iraq

Special Forces Soldiers who reenlisted for six years and bonuses of \$75,000 for five-year enlistments.⁴⁷ The bonuses remained fairly constant in 2014 with the Army offering \$72,000 for five-year enlistments for the same skill sets and military occupational specialties.⁴⁸ Army wide, the average enlistment bonus fluctuated from \$18,300 in fiscal year 2008 to \$3,500 in fiscal year 2011.⁴⁹

In stark contrast to the bonuses during the height of the wars in Iraq and Afghanistan, in 2013 the Army initiated selection boards to separate a number of officers in the grades of O-3 and O-4 in response to decreasing personnel requirements.⁵⁰ These officer separation boards had authority to separate up to 2,000 officers from the active duty force, many of whom would have been entitled to involuntary separation pay if selected.⁵¹ In 2014, for example, a captain with eight years of service would have been entitled to \$54,595, while a major with ten years of service would have been entitled to \$56,367.⁵²

Deployment savings can also qualify as a lump sum payment of sorts, particularly for single Soldiers.⁵³ A deployed Soldier receives not only his normal salary but also other pay and allowances such as hostile fire and imminent danger pay,⁵⁴ hardship duty pay,⁵⁵ and family separation pay if the Soldier is married.⁵⁶ Moreover, the Soldier is not subject to federal or state income tax during the year he is serving in the hostile fire area, and the Army provides meals and housing, greatly minimizing the Soldier's expenses.⁵⁷ When the Soldier returns from deployment, he may have a

sizable amount of money saved from accumulated deployment earnings.⁵⁸

A final, commonly encountered type of lump sum is the income tax refund. Most income tax filings result in refunds to the taxpayer. For the 2014 tax year, over 83% of returns processed by the Internal Revenue Service through March 6, 2015 were refund returns.⁵⁹ The average amount of these refunds was \$2,988.⁶⁰ Although tax refunds are merely the individual's money being returned to them, they are particularly susceptible to the "house money" effect described above. One study showed that after filing a tax return (and presumably discovering how large their refund would be), recipients increased their retail spending by as much as 11%.⁶¹

IV. Proposed Plan for Lump Sum Payment Management

A holistic plan for the management of lump sums incorporates not only the behavioral research in Part II, but also the specifics of the individual's financial situation, his age or stage in life, and his long term goals. A sound plan also considers the legal aspects of the lump sum, from income tax obligations to laws in place to protect consumers. While these circumstances vary by individual, the framework discussed below should provide flexibility regardless of the situation.

A. First, Do Nothing

"surge." The article indicates that 90% of new enlistees over the previous month accepted the bonus. *Id.*

⁴⁷ Military Personnel Message, 09-039, U.S. Army Human Res. Command, subject: Critical Skills Retention Bonus (CSRB) Program (2 Mar. 2009).

⁴⁸ Military Personnel Message, 14-303, U.S. Army Human Res. Command, subject: Selective Reenlistment Bonus (15 Oct. 2014).

⁴⁹ *Frequently Asked Questions About Recruiting*, U.S. ARMY RECRUITING COMMAND, <http://www.usarec.army.mil/support/faqs.htm> (last visited Feb. 10, 2016); see also U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-11-631, MILITARY CASH INCENTIVES (2011).

⁵⁰ Military Personnel Message, 13-356, U.S. Army Human Res. Command, subject: FY14 Officer Separation Boards (OSB) and (Enhanced) Selective Early Retirement Boards (E-SERB), Captain (CPT), Army Competitive Category (ACC) (6 Dec. 2013); Military Personnel Message, 13-357, U.S. Army Human Res. Command, subject: FY14 Officer Separation Boards (OSB) and (Enhanced) Selective Early Retirement Boards (E-SERB), Major (MAJ), Army Competitive Category (ACC) (6 Dec. 2013).

⁵¹ C. Todd Lopez, *Thousands of Officers to Face Boards for Early Separation*, UNITED STATES ARMY (Dec. 12, 2013), <http://www.army.mil/article/116900>.

⁵² 10 U.S.C. § 1174 (2012); *DOPMA/ROPMA Reference Tool: Separation Pay*, RAND CORPORATION, <http://dopma-ropma.rand.org/separation-pay.html> (last visited Feb. 20, 2016).

⁵³ Ryan Guina, *How to Save Money While Deployed*, THE MILITARY WALLET (Aug. 11, 2010), <http://themilitarywallet.com/how-to-save-money-while-deployed/>; Rob Berger, *Saving and Investing on Your Military Deployment*, DOUGROLLER (Sept. 9, 2013),

<http://www.doughroller.net/personal-finance/saving-investing-military-deployment/>.

⁵⁴ U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol.7A, ch. 10 (Jun. 2014) [hereinafter DoD FMR]. Servicemembers are entitled to \$7.50 per day, up to \$225 monthly, for service in areas the DoD FMR designates as imminent danger areas. *Id.*

⁵⁵ *Id.* ch. 17. Servicemembers are entitled to additional payments of up to \$150 per month depending on duty location or mission. *Id.* The total amount of hardship duty and hostile fire/imminent danger pay a servicemember may receive in one month may not exceed \$325. *Id.*

⁵⁶ *Id.* ch. 27. Servicemembers that are separated from their dependents are entitled to family separation allowance in the amount of \$250 per month. *Id.*

⁵⁷ 26 U.S.C. § 112 (2012).

⁵⁸ See Guina, *supra* note 53; Berger, *supra* note 53.

⁵⁹ Internal Revenue Serv., *Visits to IRS Website Increase as Taxpayers Turn to IRS.gov for Answers During Filing Season*, INTERNAL REVENUE SERV. (Mar. 12, 2015), <http://www.irs.gov/uac/Newsroom/Visits-to-IRS-Website-Increase-as-Taxpayers-Turn-to-IRS.gov-for-Answers-During-Filing-Season>.

⁶⁰ *Id.*

⁶¹ Brian Baugh, Itzhak Ben-David, & Hoonsuk Park, *Disentangling Financial Constraints, Precautionary Savings, and Myopia: Household Behavior Surrounding Federal Tax Returns* (Charles A Dice Ctr. for Res. in Fin. Econ., Working Paper No. 2013-20), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2370507.

In her book, *Sudden Money*, Susan Bradley, a financial advisor, refers to the first stage after receipt of a lump sum as the “decision free zone.”⁶² She argues that when receiving a lump sum, the recipient should strive to “create an environment that is free from emotion-based decisions and free from the influence of others.”⁶³ She advocates this approach regardless of the amount received or how experienced or savvy an individual is with managing his finances.⁶⁴ Don McNay, a financial consultant and author of instructional guides for lottery winners espouses a similar view: His first rule is, “Never tell anyone you’ve won.”⁶⁵ His second rule is, “Don’t make any quick decisions.”⁶⁶ These steps make sense in the context of the research in Part II; a certain perspective may sway an individual when deciding how to use a lump sum, and fighting the tide of emotions from oneself and others is a challenging ordeal. To successfully battle these emotions and biases, a lump sum recipient must make a conscious and deliberate effort to refrain from making immediate decisions, at least for a period of time when emotions and impulses have subsided.⁶⁷ That time is unique to every individual; it could be days, all the way to months. McNay even advises prize recipients that they choose a stream of payments rather than a lump sum to avoid dealing with the problem of lump sums entirely.⁶⁸

While a Soldier may not be able to elect the method of payment for his bonus, he can simulate a stream of payments by depositing the bonus in a separate account or a sub-account. If “doing nothing” is not an option, he can instead limit himself to withdrawing the money in equal amounts over a period of time such as a year or six months, which should dissipate the initial rush of emotion that tends to accompany lump sums.⁶⁹ To simplify this process, some online banks permit creation of secondary accounts or sub-accounts with a few clicks that have all the features of a standard account including periodic withdrawals to the account holder’s primary account.⁷⁰

⁶² SUSAN BRADLEY, *Sudden Money: Managing a Financial Windfall* 19 (2000).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Don McNay, *Why do People Run Through Large Sums of Money Quickly?*, HUFFINGTON POST (Dec. 6, 2012), http://www.huffingtonpost.com/don-mcnay/why-do-people-run-through_b_1945118.html.

⁶⁶ *Id.*

⁶⁷ BRADLEY, *supra* note 62.

⁶⁸ McNay, *supra* note 65.

⁶⁹ BRADLEY, *supra* note 62.

⁷⁰ See, e.g., *360 Savings Guide*, CAPITAL ONE BANK, <https://home.capitalone360.com/savings-guide-multiple-accounts> (last visited Feb. 10, 2016) (explaining the ability to create unlimited subaccounts, either checking or savings, with customizable names that can be tied to specific goals, e.g. “Car Fund” or “College Fund”).

B. Second, Assess Duties and Obligations

The next phase of a sound plan—after emotions have subsided at least somewhat—is a thorough assessment of any obligations a lump sum recipient may assume as a result of the income he receives. These obligations may include tax consequences, current or outstanding debts, and expenses.

1. Tax Consequences

The first concern when it comes to lump sums is the effect on the recipient’s taxable income. That is, not only will taxes have to be paid on the lump sum, but because the U.S. tax system is progressive, the amount may push the recipient’s household into a higher tax bracket which will result in a greater tax burden than he may have expected.⁷¹ A single filer with over \$37,450 in taxable income for 2015 will move from the 15% to the 25% tax bracket on income over that amount; that is, any income over \$37,450 will be taxed at 25%.⁷² This change is sufficient to turn a tax refund into a tax payment.

One additional benefit of acting methodically, as discussed in Part IV, is that individuals will not underestimate their tax burden and spend more than they actually had available after taxes are due.⁷³ While the Defense Finance and Accounting Service (DFAS) typically withholds federal and state income taxes from bonuses, the change in income may still cause lump sum recipients to understate or even overstate their final tax bill.⁷⁴ An understatement will be more likely if the recipient also receives income from other sources that he is not accustomed to withholding or paying estimated taxes on, such as interest income, capital gains, or rental income from a second home.⁷⁵ To accurately forecast any changes in his tax bracket, a lump sum recipient should tally all taxable sources of income, including the bonus or other lump sum, for the calendar year and compare it with the

⁷¹ See Progressive, MERRIAM-WEBSTER’S DICTIONARY, <http://www.merriam-webster.com/dictionary/progressive> (last visited Feb. 10, 2016) (defining progressive in the context of a tax that is “increasing in rate as the base increases”); see also INTERNAL REVENUE SERV., PUBLICATION 15: EMPLOYER’S TAX GUIDE 2015 (2014) [hereinafter EMPLOYER’S TAX GUIDE] (outlining tax brackets for the 2015 tax year).

⁷² EMPLOYER’S TAX GUIDE, *supra* note 71.

⁷³ BRADLEY, *supra* note 62, at 27 (advocating careful assessment and projection of one’s tax burden to avoid the risk of being surprised by its size when the filing season begins the following year).

⁷⁴ EMPLOYER’S TAX GUIDE, *supra* note 71. Typically, Defense Finance and Accounting Service (DFAS) exercises the standard federal supplemental withholding rate imposed by the Internal Revenue Service, currently a flat 25%. *Id.* If the servicemember is subject to state income taxes, DFAS will also withhold bonus and special pays based on the state’s supplemental rate. See *Roth TSP: One Time Tax Rates for Reserve & Guard*, DEF. FIN. & ACCT. SERV., <http://www.dfas.mil/militarymembers/tsppformilitary/rothtsprctaxinfo.html> (last visited Feb. 10, 2016).

⁷⁵ INTERNAL REVENUE SERV., PUBLICATION 505: TAX WITHHOLDING AND ESTIMATED TAX 23 (2014).

IRS's tax bracket chart.⁷⁶ The recipient should then calculate the amount withheld and then compare that with his overall estimated tax liability.⁷⁷ Appendix A illustrates an example of this calculation.

2. Debt Analysis and the Fair Debt Collection Practices Act

A servicemember may have had outstanding debts before receiving the lump sum, and repayment of existing debts is one method of using the lump sum in a potentially constructive manner. Legal assistance attorneys should ensure their clients are aware of the Fair Debt Collection Practices Act (FDCPA) and its protections. The FDCPA is an act Congress established in 1977 to protect consumers from debt collectors—particularly in the means they use to contact and convince the consumers to repay the debt.⁷⁸ The FDCPA prohibits a host of abusive practices employed by debt collectors.⁷⁹ For example, the FDCPA limits debt collectors to calling during reasonable hours,⁸⁰ prohibits “obscene or profane” language used in the course of communication regarding the debt,⁸¹ and prevents debt collectors from making false or exaggerated legal claims if the debt is not paid.⁸²

How does this apply to servicemembers receiving lump sum payments? At a minimum, awareness of the FDCPA will ensure servicemembers do not simply agree to pay a debt collector out of fear. Under the FDCPA, a debt collector must “validate” the debt they are seeking repayment on by

providing specific information about a loan they are seeking to collect.⁸³ Under that same section, a debt collector that has not provided this notice within five days of the initial communication with the consumer has violated the FDCPA and would be liable for actual damages or statutory damages of \$1,000.⁸⁴

If the servicemember recognizes the debt after validation, he may still not be legally compelled to pay the debt. A debt collector cannot sue to compel payment of a debt on which the statute of limitations has run.⁸⁵ In fact, the FDCPA requires that a debt collector answer truthfully if an individual asks if the debt is “time-barred.”⁸⁶ The statute of limitations on debts varies by state and type of debt.⁸⁷ And, in some circumstances, paying on an old debt on which the statute of limitations has already run can restart the statute of limitations period in a process referred to as “debt re-aging.”⁸⁸

3. The Fair Credit Reporting Act

Congress enacted the Fair Credit Reporting Act (FCRA) in 1970 in the face of a credit reporting system of growing complexity and with the knowledge that “lenders can use the information advantage over their existing clients to extract monopoly rents.”⁸⁹ In other words, companies can profit from the information that consumers do not know or understand.⁹⁰ Congress sought to create a framework that distributes credit information “in a manner that is fair and equitable to the consumer with regard to confidentiality, accuracy, and the proper use of such information.”⁹¹

⁷⁶ *Id.* at 25-26.

⁷⁷ *Id.*

⁷⁸ See Pub. L. No. 95-109, 91 Stat. 874 (codified as amended at 15 U.S.C. §1692 (2012)). From Congress' perspective, “[t]here is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.” *Id.* On the other hand, they also sought to “insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.” *Id.*

⁷⁹ *Id.*

⁸⁰ 15 U.S.C. § 1692c (2012).

⁸¹ 15 U.S.C. § 1692d (2012).

⁸² 15 U.S.C. § 1692e(5) (2012).

⁸³ 15 U.S.C. § 1692g (2012). Within five days, the debt collector must provide notice of the following: (1) the amount of the debt; (2) the name of the creditor to whom the debt is owed; (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and (5) a statement that, upon the consumer's written request within the thirty-day

period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor. *Id.*

⁸⁴ *Id.*; 15 U.S.C. § 1692k (2012).

⁸⁵ See *Time-Barred Debts*, FED. TRADE COMM'N, <https://www.consumer.ftc.gov/articles/0117-time-barred-debts> (last visited Feb. 10, 2016).

⁸⁶ 15 U.S.C. § 1692e(2)(A) (2012) (prohibiting the “false representation of the character, amount, or legal status of any debt”); 15 U.S.C. § 1692f(1) (2012) (prohibiting the “collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law”).

⁸⁷ See FED. TRADE COMM'N, *supra* note 85.

⁸⁸ *Id.*

⁸⁹ WORLD BANK, GLOBAL FINANCIAL DEVELOPMENT REPORT: RETHINKING THE ROLE OF THE STATE IN FINANCE 131 (2012); see also Pub. L. No. 91-508, 82 Stat. 146 (codified as amended at 15 U.S.C. §1681 (2012)) (“An elaborate mechanism has been developed for investigating and evaluating [consumers' credit].”).

⁹⁰ *Id.*

⁹¹ Commentary on the Fair Credit Reporting Act, 16 C.F.R. § 600 app. (2011). See also WORLD BANK, GLOBAL FINANCIAL DEVELOPMENT REPORT: RETHINKING THE ROLE OF THE STATE IN FINANCE 131 (2012) (“The state therefore plays an important role in promoting the exchange of

The FCRA overlaps with the FDCPA in its protections in a situation where a debt collector ties a servicemember to a debt that may have been charged off by the original lender.⁹² While the FDCPA protects consumers from practices involved in the collection of the debt itself, the FCRA protects consumers from the effects of the debt on the consumer's financial reputation, i.e. his credit report.⁹³ Section 1681c(a)(4) of the FCRA imposes a credit reporting statute of limitations of seven years on accounts that lenders have already sent to collections or "charged off their profit and loss."⁹⁴ Thus, an old, unpaid debt may not necessarily appear on an individual's credit report or affect his corresponding credit score.⁹⁵ Consequently, repayment of a debt under collections may not have any effect on a borrower's credit score if it has already been removed from the credit report as the FCRA requires.⁹⁶ A debt's credit reporting status is independent from its legal enforceability; a servicemember seeking to repay old debts should ascertain both the FDCPA status and the FCRA status of that debt, as they may vary.⁹⁷ A typical consumer credit report would provide most information on a debt's FCRA status, but a debt's FDCPA status would have to take into account the laws of the state in which the debt is recorded and would require additional legal research.⁹⁸

4. Current Expense Analysis

In addition to other financial advisors, Bradley also advocates an expense analysis step.⁹⁹ This is a prudent exercise regardless of whether one expects to receive a lump sum or not. This analysis involves a breakdown of all recurring household expenses from the most significant to the most mundane, then classifying them into two categories: necessities and "discretionary spending."¹⁰⁰ The purpose of this is to develop a sense of the cash flow within the household, and then use this information to control spending,

mostly by limiting the discretionary outflows.¹⁰¹ One way to preserve a lump sum, for example, is to attempt to maintain current spending patterns for as long as possible even after the lump sum.¹⁰² The servicemember must recognize that the typical military lump sum payment (of \$5,000 to \$150,000, for example) is not sufficient to allow a permanent, immediate lifestyle change.

One way to increase awareness of increasing discretionary spending is to manage the phenomenon called "lifestyle creep."¹⁰³ This term refers to minor expenses that spenders treat as lifestyle enhancements that accumulate to large expenditures over time.¹⁰⁴ For example, in a post lump-sum spending spree, a family may decide to join a gym (\$50 monthly), upgrade their cable package (\$60 monthly), upgrade their phone plan (\$20 monthly), eat out once more per week (\$200 monthly), and upgrade to a new television and computer (\$3000) after receiving a lump sum payment. In isolation, each expense seems minor, but over the course of one year, these minor lifestyle enhancements will cost nearly \$7,000. Even a seemingly minor expense like a \$4.00 cup of coffee before work can add up to nearly \$1,000 over a year. The fact that a household incurs these additional expenses in different areas, varying amounts, and dispersed time periods makes the cumulative effect of the spending more difficult to perceive unless its members are consciously monitoring it.

While curtailing all discretionary spending is not a realistic, or even desirable, goal, servicemembers should carefully track and assess new household expenses after receipt of a lump sum. Careful tracking will assist the servicemember in determining whether he is living beyond his means or underestimating the opportunity cost of those additional expenses. Assuming a yearly return of 11.5%, that \$7,000 invested in a broad market index fund that holds shares

credit information and in protecting open and equal access to the market for credit information.").

⁹² 15 U.S.C. § 1681c(a)(4) (2012); *see also* U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-09-748, CREDIT CARDS (2009) (defining "charge off" as a declaration from a credit card company as a debt that is unlikely to be collected). *Id.* This assists the credit card company in obtaining a tax deduction for the bad debt, but does not forgive the debt to the consumer. *Id.* This creates the market for debt collection firms who purchase these debts for a fraction of their original value. *Id.*

⁹³ 15 U.S.C. § 1681c(a)(4) (2012); *see also* WORLD BANK, GLOBAL FINANCIAL DEVELOPMENT REPORT: RETHINKING THE ROLE OF THE STATE IN FINANCE 131 (2012) (discussing the concept of "reputational collateral").

⁹⁴ *Id.*

⁹⁵ *It is Possible to Owe Debts Not on Your Credit Report*, EXPERIAN (Aug. 1, 2012), <http://www.experian.com/blogs/ask-experian/2012/08/01/it-is-possible-to-owe-debts-not-on-report/>.

⁹⁶ *Id.*

⁹⁷ *Id.*; *see also* FED. TRADE COMM'N, *supra* note 85.

⁹⁸ *Id.*

⁹⁹ BRADLEY, *supra* note 62, at 30; *see also* *The Budget Breakdown*, DAVERAMSEY.COM (Jul. 30, 2012), http://www.daveramsey.com/article/the-budget-breakdown/lifeandmoney_budgeting/; *Your 2015 Financial Road Map*, SUZEORMAN.COM (Jan. 3, 2015), <http://www.suzeorman.com/blog/your-2015-financial-road-map/> (discussing approaches to creating household budgets).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 31.

¹⁰² *Id.*

¹⁰³ *See generally* Hank Coleman, *Avoiding Lifestyle Creep*, FIVE CENT NICKEL (Oct. 8, 2012), <http://www.fivecentnickel.com/2012/10/02/avoiding-lifestyle-creep/>; April Dykman, *Detecting and Preventing Lifestyle Creep*, GET RICH SLOWLY (Dec. 21, 2011), <http://www.getrichslowly.org/blog/2011/12/21/detecting-and-preventing-lifestyle-creep/>; Matthew Amster-Burton, *Lifestyle Creep: Are You Living Beyond Your Means?*, MINT LIFE (Mar. 30, 2010), <https://www.mint.com/blog/how-to/living-beyond-your-means/>.

¹⁰⁴ *Id.*

in the largest American companies could be worth over \$60,000, non-inflation adjusted, in twenty years.¹⁰⁵

5. The Emergency Fund

Lump sum recipients should prioritize creation of an emergency fund or “rainy day” fund.¹⁰⁶ This is an easily accessible fund from which a household can draw in the event of an unexpected expense or life situation.¹⁰⁷ Despite the utility of such a fund, the participation rate among the general population is likely low. The Federal Reserve’s personal savings rate statistics show a savings rate of 4.4% as of November 2014 (compared to 10-15% during the 1960s to the mid-1980s) and consumer debt statistics show an average of debt of approximately \$10,300 per household.¹⁰⁸ These figures indicate a low likely participation rate for emergency funds of any amount and a similarly low rate for emergency funds that contain at least six full months of household expenses.¹⁰⁹

The fund should have certain characteristics.¹¹⁰ First, the funds should be easily accessible.¹¹¹ A standard checking or savings deposit at a nearby bank would meet these requirements. While a certificate of deposit may yield a higher interest rate, the money within may not be accessible for a few days, defeating its purpose if a household needs to access the funds immediately.¹¹² Second, the money should be in a liquid and stable form, i.e. cash, and not in possibly volatile and unpredictable investments such as stocks or bonds.¹¹³ And third, the fund should be large enough to cover

at least three to six months of full household living expenses including rent or mortgage payments.¹¹⁴

C. Assess Priorities and Deploy Funds

Once the lump sum recipient addresses the immediate financial priorities of taxes, debts, credit, and emergency funds, he can begin looking towards his short and long-term goals. As stated in Part I, this article and the Army legal assistance program do not aim to provide specific financial and investment advice. But informing the client of his options may encourage the client to use the money for purposes other than consumption of material goods.

For example, if a military client wants to increase his retirement savings, he has access to the Thrift Savings Plan (TSP), a 401(k)-like tax-deferred investment account.¹¹⁵ Financial writers and advisers (at least those who do not work on commission) consider the TSP to be one of the best, if not the best, investment vehicles in existence, primarily due to its incomparably low expense fees.¹¹⁶ With a simple adjustment on the My Pay website, a servicemember can allocate up to \$18,000 of his base pay or lump sum bonus into the TSP per year.¹¹⁷ This allocation not only invests the Soldier’s hard-earned savings in a low expense investment vehicle, but it reduces his taxable income and, accordingly, his tax liability.¹¹⁸

Finally, a Soldier and his Family should not hesitate to spend part of the lump sum on fun and leisure purchases.¹¹⁹

¹⁰⁵ Aswath Damodaran, *Annual Returns on Stock, T.Bonds and T.Bills: 1928–Current*, NEW YORK UNIV. SCH. OF BUS., http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html (last visited Feb. 10, 2016) (showing average nominal return of the S&P 500 index from 1928-2014 at 11.53%).

¹⁰⁶ See generally Vibha Bhargava & Jean M. Lown, *Preparedness for Financial Emergencies: Evidence from the Survey of Consumer Finances*, J. OF FIN. COUNSELING & PLANNING 17 (2006).

¹⁰⁷ *Id.* A household should not necessarily consider their emergency fund as “savings.” The term implies a growth-oriented goal and perhaps the ability to be tapped for various non-emergent expenses. *Id.* This purpose runs contrary to the purpose of an emergency fund, and such a “mental account” may lead a household to spend the fund rather than preserve it.

¹⁰⁸ *Personal Saving Rate*, FED. RES. BANK OF ST. LOUIS, <http://research.stlouisfed.org/fred2/series/PSAVERT/> (last visited Feb. 10, 2016); *Federal Reserve Statistical Release*, BD. OF GOVERNORS OF THE FED. RES. SYS., <http://www.federalreserve.gov/releases/g19/current/> (last visited May 18, 2015); see also Y. Regina Chang, Sherman Hanna, & Jessie X. Fan, *Emergency Fund Levels: Is Household Behavior Rational?*, J. OF FIN. COUNSELING & PLANNING 1, 2 (1997) (“[M]ajority of families had insufficient funds to cover normal total household income for the average time a household could expect to be out of work.”).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*; see also *High-Yield CDs—Protect Your Money by Checking the Fine Print*, SEC. & EXCH. COMM’N, <http://www.sec.gov/investor/pubs/certific.htm> (last visited Feb. 10, 2016).

¹¹³ Bhargava and Lown, *supra* note 106, at 17.

¹¹⁴ *Id.* at 18.

¹¹⁵ 5 U.S.C. § 8440(e) (2012). This statute implements the Thrift Savings Plan for uniformed service members.

¹¹⁶ See Elliot Raphaelson, *Think Twice Before Rollover from the Federal Thrift Savings Plan*, CHICAGO TRIBUNE (Sept. 2, 2014), <http://www.chicagotribune.com/business/sns-201409021900--tms--savingsgctnzy-a20140902-20140902-story.html> (discouraging rollovers from the Thrift Savings Plan (TSP) because its low fees are nearly unmatched in the industry); John Hechinger, *Brokers Lure Soldiers Out of Low-Fee Federal Retirement Plan*, BLOOMBERG BUSINESS (Aug. 12, 2014), <http://www.bloomberg.com/news/articles/2014-08-12/brokers-lure-soldiers-out-of-low-fee-federal-retirement-plan> (describing aggressive efforts by financial firms to entice TSP participants into transferring their accounts to more expensive options).

¹¹⁷ 26 U.S.C. § 402(g) (2012); Internal Revenue Serv., *COLA Increases for Dollar Limitations on Benefits and Contributions*, RETIREMENT PLANS (Jan. 13, 2015), <http://www.irs.gov/Retirement-Plans/COLA-Increases-for-Dollar-Limitations-on-Benefits-and-Contributions>.

¹¹⁸ *Id.* (Elective deferrals are not included in income up to the statutory limit, \$18,000 for 2015.).

¹¹⁹ Amit Kumar, Matthew Killingsworth, & Thomas Gilovich, *Waiting for Merlot: Anticipatory Consumption of Experiential and Material Purchases*, PSYCHOL. SCI., Oct. 2014, at 1929 (supporting the idea that money spent on experiences provides an individual with longer lasting happiness than does

If the Soldier seeks to spend, he may be better off spending on “doing” rather than “having” and avoiding the “lifestyle creep” purchases discussed in Part IV above.¹²⁰

V. Conclusion

While judge advocates are not financial advisers and should not act as such, the broad scope of client practice, from legal assistance to trial defense, makes financial discussions a likely occurrence.¹²¹ Whether it is the OSB-selected Captain with a \$90,000 separation payment at Legal Assistance for a will or the recently-retired Sergeant First Class with \$60,000 in deployment savings seeking tax assistance, judge advocates can add value by encouraging their clients to plan for the constructive use of their lump sums and by helping them to avoid emotionally driven, hasty decisions. The sizes of lump sums in the military are not sufficient to provide a permanent change to an individual’s standard of living, but they can significantly increase savings or emergency funds and add to the servicemember’s peace of mind and financial stability over the long term if employed wisely. The key is to offer a basic framework to the client that is both aspirational and attainable. While it would be laudable for a young Soldier to put his entire \$15,000 re-enlistment bonus into an emergency fund, it is unrealistic—so much so that the client might disregard all of the practitioner’s advice. The attorney should understand the client’s perspective and life circumstances and adjust the proposed framework accordingly. Ultimately, if a lump sum recipient does not make any rash decisions and has outlined at least some broad goal for the money, that is a victory in itself.

money spent on material objects, based on a social psychology and behavioral economics study); see also James Hamblin, *Buy Experiences, Not Things*, THE ATLANTIC (Oct. 7 2014), <http://www.theatlantic.com/business/archive/2014/10/buy-experiences/381132/>.

¹²⁰ *Id.*

¹²¹ See U.S. DEP’T OF ARMY, LEGAL ASSISTANCE, *supra* note 14.

Appendix A: Comparison of Tax Liability After Lump Sum

The two scenarios below outline the differing tax liability between two Soldiers.

<p>E-6 (over 8 years of service) with no dependents, assuming exemption from state tax:</p> <p>Basic Pay¹²²: \$3,261</p> <p>BAH (Fort Drum)¹²³: \$1,305 (non-taxable)</p> <p>BAS: \$367.92¹²⁴ (non-taxable)</p> <p>2015 Gross Income: \$39,132</p> <p>Total taxable income less standard deduction (\$6,300) and personal exemption (\$4,000)¹²⁵: \$28,832</p> <p>Tax Bracket: 15%</p> <p>Amount withheld (1 allowance)¹²⁶: \$4463.55</p> <p>2015 tax due¹²⁷: \$3863.55</p> <p>Result: \$600 tax refund</p>	<p>E-6 (over 8) with no dependents, assuming exempt from state tax, with lump bonus income and other additional income</p> <p>Basic Pay: \$3,261</p> <p>BAH (Fort Drum): \$1,305 (non-taxable)</p> <p>BAS: \$367.92 (non-taxable)</p> <p>Re-enlistment bonus: \$20,000</p> <p>Capital Gains & Interest Income: \$6,200</p> <p>2015 Gross Income: \$65,332</p> <p>Total taxable income less standard deduction (\$6,300) and personal exemption (\$4,000): \$55,032</p> <p>Tax Bracket: 25%</p> <p>Amount withheld (1 allowance and standard 25% DFAS lump sum withholding): \$9463.55</p> <p>2015 tax due: \$9551.75</p> <p>Result: \$88.20 tax due</p>
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¹²² 2015 Military Pay Chart, DEF. FIN. & ACCT. SERV., http://www.dfas.mil/dam/jcr:b6ef41d4-f071-45f9-b863-70b202be05a6/2015MilitaryPayChart_2.pdf (last visited Feb. 10, 2016).

¹²³ 2015 Without Dependents BAH Rates, DEF. TRAVEL & MGMT. OFF., <http://www.defensetravel.dod.mil/Docs/perdiem/browse/Allowances/BAH/PDF/2015/2015-Without-Dependents-BAH-Rates.pdf> (last visited Feb. 10, 2016).

¹²⁴ DEF. FIN. & ACCT. SERV., *supra* note 121.

¹²⁵ INTERNAL REVENUE SERV., *supra* note 72.

¹²⁶ *Id.*; Calculation of “Take Home” Pay, PAYCHECK CITY, <http://www.paycheckcity.com/calculator/salary/> (enter yearly gross base pay in “Gross Pay” box, select Texas in “state for withholding” drop down box, “Annually” for “Gross Pay Type” drop down box and “Annual” for “Pay Frequency” drop down box to simplify, enter 1 for # of Federal Allowances; then follow “Calculate” hyperlink).

¹²⁷ *Id.* (calculation based on 2015 tax brackets).

INFORMATION PAPER

SUBJECT: Preserving and Maximizing Your Lump Sum Payment

1. Purpose: To provide Soldiers with a framework for preserving and maximizing the benefit of their lump sum payment.
2. If you have received a large cash bonus as part of your military service, you should be careful how you spend it. The money may seem like plenty at first, but careless spending will consume it quickly.
3. Go through the following steps before you spend your lump sum:
 - a. Do Nothing. Choose an amount of time during which you will not spend any part of the bonus. Unless you are in the midst of a financial emergency, you should not need the money right away. Whether for a week or a month, take this time to let the emotions that come with receiving large sums of money subside.
 - b. Determine Tax Impact. DFAS will typically withhold 25% of any bonus you receive from the Army, but the bonus may still push you into a higher tax bracket. If you receive any other type of income, such as interest, capital gains, or rental income, you may owe more in taxes than you anticipated when you file the next year. Visit your local Tax Center for advice on your situation.
 - c. Assess Your Debts and Obligations. Do you have existing credit card debt? Do you have a mortgage that you want to pay off early? Create a list of all your current debts and decide whether you want to put your bonus towards any of them. For example, if you have an existing auto loan with a high interest rate, it may be advantageous to use your bonus to pay off the loan. The same applies to any high interest credit card balances you may have.
 - d. Figure Out Your Household Expenses. Receiving a bonus is a great way to get an azimuth check on your financial well-being. Start with a list of your monthly income from all sources. Then, list all your monthly expenses and compare the two. Are you spending more than you are earning? Find areas where you can apply your bonus to reduce some of your monthly expenses. Paying off an auto loan or credit card puts that monthly payment right back in your pocket.
 - e. Create a Rainy Day Fund. Finance experts recommend an emergency fund of 3-6 months of total household expenses to cover any unexpected expenses. If you don't have an emergency fund, getting a bonus is a great way to start one. Set up a checking or savings account separate from the ones you normally use and forget about it until you need it.
4. Finally, make a short list of your long and short-term goals and spend accordingly. These goals can include long term financial goals like college funds, but they can also include fun purchases like vacations. Whatever you decide, ensure that you spend in a systematic and purposeful way, and stick to the priorities you laid out in your plan.

Knowing is Half the Battle: The Case for Investigative Subpoena Power in the Military Justice System

Major Alexander G. Douvas*

[T]here are known knowns: There are things we know we know. We also know there are known unknowns: That is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know.¹

I. Introduction

You are the trial counsel for a Marine helicopter squadron. As you peruse the police blotter after a long weekend, you hear a knock at your door. A Naval Criminal Investigative Service (NCIS) agent informs you that he is opening a proactive investigation into a possible drug ring involving multiple Marines. The evidence implicating the Marines consists of the word of one Sailor who, after testing positive for cocaine, provided NCIS with a list of “bigger fish” on base. The Sailor also has a recent nonjudicial punishment for fraud and lying to superiors. The agent wants to obtain a search warrant for the Marines’ off-base residences, and tells you the squadron commander wants to apprehend and charge the Marines as soon as possible. “All of this requires probable cause,” you explain to the agent, “and we have none.” The agent suggests that you should issue subpoenas for the Marines’ telephone and bank records, “just like the U.S. Attorney’s Office does.” You remind him that military prosecutors have no subpoena power until charges are referred² or an Article 32, Uniform Code of Military Justice (UCMJ) preliminary hearing is ordered.³ Just then,

your phone rings. It is the squadron commander, wanting to know what your plan is to deal with the suspected drug dealers who are currently turning wrenches on his aircraft.

For federal prosecutors, investigative subpoenas⁴ (in the form of grand jury subpoenas) are an indispensable tool for gathering key evidence early in the life of a criminal investigation.⁵ Unfortunately, no similar tool is currently available to military trial counsel. The result is frustrating and paradoxical. Evidence requiring a subpoena remains essentially off-limits to military investigators and trial counsel until after the initial investigation is complete and charges have been filed. As a consequence, trial counsel are forced to charge and go to trial with the evidence they have, not the evidence that is out there.⁶

Concern over these impediments and their impact on military criminal investigations resulted in several calls to expand military subpoena power.⁷ In response, Congress recently changed Article 47 to allow issuing *subpoenas duces tecum* at Article 32 preliminary hearings.⁸ While this is an improvement, military subpoena power remains ineffective to

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¹ DONALD RUMSFELD, KNOWN AND UNKNOWN: A MEMOIR xiii (2011).

² Referral is an order directing that charges against an accused be tried by a specific court-martial, but first these charges must be “preferred,” or sworn, against an accused. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307 (2012) [hereinafter MCM] (discussing preferal); see also *id.* R.C.M. 601(a) (discussing referral).

³ See MCM, *supra* note 2, R.C.M. 703(e)(2)(C); 2014 Amendments to the Manual for Courts-Martial, Exec. Order No. 13,669, 75 Fed. Reg. 34,999, 35,003 (June 18, 2014) (amending R.C.M. 703(e)(2)(C) to allow the issuance of *subpoena duces tecum* by an Article 32 investigating officer or by trial counsel after referral of charges); National Defense Authorization

Act for Fiscal Year 2014, Pub. L. 133-66, 127 Stat. 672, 954 (2013) [hereinafter NDAA FY 2014] (amending Article 32 by replacing the terms “pretrial investigation” and “investigating officer” with “preliminary hearing” and “preliminary hearing officer”).

⁴ For the purposes of this article, the term “subpoena” refers to a subpoena to produce documents or similar evidence (*subpoena duces tecum*), not a subpoena to compel testimony. Similarly, the term “investigative subpoena” refers to a *subpoena duces tecum* that is used in the investigation of a suspected criminal offense prior to the initiation of charges. “*Duces tecum*” is a Latin phrase that means “bring with you.” BLACK’S LAW DICTIONARY 538 (8th ed. 2004).

⁵ E-mail from Mark Pletcher, Assistant U.S. Att’y, S. Dist. of Cal., to author (Mar. 11, 2015) (on file with the author) [hereinafter Pletcher E-mail]. Mr. Pletcher stated that the grand jury (with its attendant powers) is the single most important tool federal prosecutors use in complex investigations. *Id.* Federal prosecutors routinely use grand jury subpoenas to obtain documentary evidence (including bank records, telephone records, and email subscriber information), evaluate it (both to inculcate and exculpate), and understand the nature of the crimes being investigated. *Id.*

⁶ See Major Joseph B. Topinka, *Expanding Subpoena Power in the Military*, ARMY LAW., Sept. 2003, at 21 (describing how the lack of “critical subpoena authority during the principal and formative parts of investigations” results in “impediments to timeliness, evidence gathering, case integrity, and case perfection”); OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF DEF., CRIMINAL INVESTIGATIVE POLICY & OVERSIGHT, EVALUATION OF SUFFICIENCY OF SUBPOENA AUTHORITY WITHIN THE DEPARTMENT OF DEFENSE IN SUPPORT OF GENERAL CRIMES INVESTIGATIONS 4, 10 (May 15, 2001) [hereinafter CIPO STUDY].

⁷ See discussion *infra* Parts II.B.1–3.

⁸ See UCMJ art. 47 (2012); see also *supra* note 3 and accompanying text.

acquire evidence when it is needed most: during the initial investigation and before the initiation of charges. To remedy this, Congress should amend the UCMJ to provide investigative subpoena power prior to the referral of charges.

This article will propose changes to the UCMJ and Rules for Courts-Martial (RCM) that would expand military subpoena power and conform it more closely to federal criminal procedure. Part II explores military subpoena power in its current form and surveys the various proposals to expand it. Part III discusses the problems created by current military subpoena power and the lack of viable alternatives to subpoena evidence prior to referral. Part IV examines subpoena power in the federal criminal justice system as a model for expanded military subpoena power, and discusses the changes required to implement it. The appendices contain proposed language which, if enacted, would create investigative subpoena power in the military justice system and enable more timely, thorough, and just investigations and prosecutions.

II. Subpoena Power in the Military Justice System

A. Articles 46 thru 48 and RCM 703

The power of compulsory process in the military justice system is found in Articles 46 thru 48. Article 46 provides that trial counsel, defense counsel, and the court-martial “shall have equal opportunity to obtain witnesses and other evidence . . .”⁹ Notably, it also requires that process “issued in court-martial cases to . . . compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue . . .”¹⁰ Articles 47 and 48 outline the enforcement mechanisms by which a military court can compel the production of subpoenaed evidence and punish noncompliance.¹¹

⁹ See UCMJ art. 46 (2012).

¹⁰ See *id.*; cf. UCMJ art. 36 (2012) (stating pretrial procedures shall “apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts” to the extent the President “considers practicable”).

¹¹ See UCMJ arts. 47-48 (2012). For a primer on military subpoena enforcement mechanisms, see Major Brett Miner, A Military Practitioner’s Guide to the Compulsory Process (Subpoenas and Warrants of Attachment) of Civilian Persons, Civilian Businesses, and Non-Military Governmental Agencies (May 16, 2015) (unpublished primer, The Judge Advocate General’s Legal Center and School) (draft on file with author).

¹² See MCM, *supra* note 2, R.C.M. 703(e)(2)(c); 2014 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,669, 75 Fed. Reg. 34,999, 35,003 (June 18, 2014); see also Major Chris W. Pehrson, *The Subpoena Duces Tecum and the Article 32 Investigation: A Military Practitioner’s Guide to Navigating the Uncharted Waters of Pre-Referral Compulsory Process*, ARMY LAW., Feb. 2014, at 10.

¹³ See UCMJ art. 27 (2002); Topinka, *supra* note 6, at 21 (“There is no trial counsel or court-martial within the meaning of Rule for Courts-Martial 703(e)(2)(C) until a convening authority has referred a case to trial and counsel is detailed to the court-martial. By implication, there is no trial

Rule for Courts-Martial 703(e)(2) contains the President’s implementation of Articles 46 thru 48 in the form of procedures for issuing and enforcing subpoenas.¹² Historically, RCM 703(e)(2)(C) provided that a subpoena to obtain evidence could only be issued by trial counsel “of a special or general court-martial.”¹³ Thus, the authority of a trial counsel to issue a subpoena did not vest until after charges had been referred by the convening authority to a specific court-martial. Though recent changes to Article 47 and RCM 703 grant trial counsel the ability to issue subpoenas for an Article 32 preliminary hearing, subpoena power remains unavailable during the formative stages of a military investigation.¹⁴

B. Proposals to Expand Military Subpoena Power

Neither the restrictive nature of military subpoena power nor its impact on the efficiency of military criminal investigations are new controversies to the military justice system. On the contrary, Congress and the executive branch have ordered several studies into the limitations of military subpoena power resulting in numerous calls for a change to the status quo.

1. National Academy of Public Administration (NAPA) Report

In 1999, Congress directed the National Academy of Public Administration (NAPA)¹⁵ to assess military criminal investigative organization (MCIO) investigations of sexual misconduct.¹⁶ Among other findings, the NAPA report highlighted the lack of MCIO access to investigative subpoena power and resulting negative impact on investigating military sex crimes.¹⁷ The NAPA report observed a “growing potential for use of subpoenas in investigations involving Internet computer crime, including pornography and child solicitation,” and recommended that

counsel subpoena authority in a military case until after referral of the charges.”).

¹⁴ See *supra* notes 2-3 and accompanying text.

¹⁵ The National Academy of Public Administration (NAPA) is an independent, congressionally chartered organization comprised of former legislators, jurists, government executives and scholars and tasked with assisting Government agencies and organizations in research and problem solving. See Pub. L. No. 98-257, 98 Stat. 127 (1984); see also CIPO STUDY, *supra* note 6, at 1. In this regard, NAPA’s composition and mandate closely resemble recently created organizations tasked with studying the efficacy of the military justice system, such as the Military Justice Review Group, Judicial Proceedings Panel, and Response Systems to Adult Sexual Assault Crimes Panel. See discussion *infra* Part II.B.4.

¹⁶ See NAT. ACAD. OF PUB. ADMIN., ADAPTING MILITARY SEX CRIME INVESTIGATIONS TO CHANGING TIMES 4-5 (June 1999) [hereinafter NAPA REPORT].

¹⁷ See *id.*; CIPO STUDY, *supra* note 6, at 1.

the military services be provided with subpoena approval authority.¹⁸

2. DOD IG Criminal Investigative Policy & Oversight (CIPO) Study

Following the NAPA report, in 2001, the Office of the Department of Defense (DoD) Deputy Assistant Inspector General (IG) for Criminal Investigative Policy and Oversight (CIPO) conducted a study to determine whether the limitations on military subpoena power adversely impacted the military services' ability to conduct general crimes investigations.¹⁹ As part of the study, CIPO surveyed 2,023 MCIO investigators and 753 judge advocates with current or prior military justice experience.²⁰ From the survey responses, the study concluded that existing military subpoena authority was inadequate to compel the production of evidence in general crimes investigations.²¹ Specifically, the report identified "a significant number of situations in which a certain mechanism [to subpoena evidence] was needed but was not available."²² The CIPO study concluded that "as a result of this lack of a fully effective mechanism to compel production of evidence, some investigations are incomplete, and some prosecutions may be precluded."²³ The DoD General Counsel and military services' judge advocate leadership concurred with CIPO's findings and conclusion, and forwarded the matter to the Joint Services Committee (JSC) on Military Justice for further action.²⁴

3. DOD Office of Legislative Counsel (OLC) Legislative Proposal

In 2011, the JSC persuaded the DoD Office of Legislative Counsel (OLC) to propose an amendment to the UCMJ that would allow issuing subpoenas prior to the referral of charges.²⁵ The OLC legislative proposal highlighted the problems caused by the absence of pre-referral subpoena

power: "In many cases involving telephone, Internet Service Provider, bank records, and similar records. . . [the] investigation is often delayed or obstructed."²⁶ The OLC proposal also emphasized the requirement of Article 36 for "military practice . . . to conform to Federal criminal procedure" to the extent practicable, before contrasting military subpoena power with federal practice where "prosecutors and grand juries have subpoena powers even before charges are filed."²⁷ While the "DoD's legislative proposal envisioned expanding 10 U.S.C. § 847 [Article 47] to provide broad authority to issue *subpoenas duces tecum* after pre-referral of charges . . . Congress ultimately opted for a more subdued version of the amendment" which limits the expansion of subpoena power to Article 32 investigations.²⁸ This compromise was borne of concern "over how recipients could challenge a pre-referral subpoena . . . where the convening authority would have cognizance over the case and the power to quash or modify the subpoena."²⁹

4. Response Systems to Adult Sexual Assault Crimes Panel (RSP) Report

Despite Congress' effort in 2012 to provide limited expansion of military subpoena power, recent scrutiny of military sexual assault investigations once again brought the issue of the adequacy of military subpoena power to the fore. The 2013 National Defense Authorization Act (NDAA) directed the Secretary of Defense (SECDEF) to establish the Response Systems to Adult Sexual Assault Crimes Panel (RSP) to review and assess "the systems used to investigate, prosecute, and adjudicate" military sex assault crimes and develop recommendations for improving their effectiveness.³⁰ The SECDEF also established the Comparative Systems Subcommittee (CSS) to "compare the investigation, prosecution, defense, and adjudication of sexual assault cases in the military and civilian systems" and make appropriate recommendations to the RSP.³¹ The CSS

¹⁸ See NAPA REPORT, *supra* note 16, at 8; CIPO STUDY, *supra* note 6, at 9.

¹⁹ See CIPO STUDY, *supra* note 6, at i. The CIPO defined "general crimes" as felony-type offenses under the UCMJ punishable by a dishonorable discharge and one year or more years of confinement, not including fraud crimes or purely military offenses (e.g. drug and sexual assault offenses). *See id.*

²⁰ *See id.* at 5-9.

²¹ *See id.* at 3; *see also* Pehrson, *supra* note 12, at 9.

²² *See* CIPO STUDY, *supra* note 6, at i.

²³ *See id.* at ii.

²⁴ *See id.* at 10-11, 15-24; *see also* Pehrson, *supra* note 12, at 9. ("[T]he JSC is responsible for reviewing [the MCM] and proposing amendments to it and, as necessary, to [the UCMJ].") *See* U.S. DEP'T OF DEF., DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE para. 3 (3 May 2003); Pehrson, *supra* note 12, at 9 n.14.

²⁵ *See* OFFICE OF LEGISLATIVE COUNSEL, U.S. DEP'T OF DEF., SIXTH PACKAGE OF LEGISLATIVE PROPOSALS SENT TO CONGRESS FOR FISCAL

YEAR 2012 § 532 (2011) [hereinafter OLC LEG. PROPOSAL], <http://www.dod.gov/dodgc/olc/docs/15April2011LP.pdf>; ANNUAL REPORT SUBMITTED TO COMMITTEE ON ARMED SERVICES OF THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES AND TO THE SECRETARY OF DEFENSE, SECRETARY OF HOMELAND SECURITY, AND THE SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD OCTOBER 1, 2010 TO SEPTEMBER 30, 2011 § 1 (2011), <http://www.armfor.uscourts.gov/newcaaf/annual/FY11AnnualReport.pdf> (summarizing testimony of Colonel Charles Pede, U.S. Army, Exec. Sec. of the JSC); Pehrson, *supra* note 12, at 9.

²⁶ *See* OLC LEG. PROPOSAL, *supra* note 25, § 532, at 2.

²⁷ *See id.*

²⁸ *See* Pehrson, *supra* note 12, at 10.

²⁹ *See id.*

³⁰ *See* BARBARA S. JONES ET. AL., REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 1 (2014).

³¹ *See* ELIZABETH L. HILLMAN ET. AL., REPORT OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL

was specifically tasked with identifying “best practices from civilian jurisdictions that may be incorporated into any phase of the military system,” and recommending numerous systemic changes to the military justice system as a result.³² These recommendations included expanding the military judge’s role in the pretrial process to begin at preferral or the imposition of pretrial confinement.³³ To this end, the CSS recommended authorizing “the military judge to issue subpoenas to secure witnesses, documents, evidence, or other assistance . . . with *ex parte* procedures as appropriate that will allow the defense the opportunity to subpoena witnesses through the military judge.”³⁴

III. Problems with Military Subpoena Power and the Lack of Viable Alternatives

A. Difficulties Caused by Current Military Subpoena Power

While the recent changes to military subpoena power were intended to “increase the availability of documentary evidence during the criminal investigation and [Article 32] investigation stages of a case,” the formative stages of a criminal investigation do not occur during the Article 32 preliminary hearing, but prior to the preferral of charges.³⁵ The absence of investigative subpoena power during this period creates numerous problems impacting the efficient administration of justice.³⁶

1. Blind Spots in Investigation and Charging Decision

Several critical steps in the investigation and charging process occur before the Article 32 preliminary hearing, any of which could be substantially impacted by the discovery of

subpoenaed evidence. Upon suspicion that a UCMJ violation has been committed, an investigative entity (e.g. an MCIO, IG, or the accused’s command) is tasked with gathering relevant evidence in order to determine the nature and scope of the misconduct, identifies suspects, and gathers relevant evidence.³⁷ Based on this investigation, the suspect’s commander, in his role as the court-martial convening authority, decides on an appropriate course of action, and if the convening authority determines that the offenses should be adjudicated at a court-martial, the investigation is typically presented to trial counsel for charges to be preferred.³⁸ At no point up to this stage in the process does an investigative entity have the power to issue subpoenas. Yet evidence that can only be obtained by subpoena is critical to the successful development and outcome of many investigations. This is especially true in complex investigations (e.g. fraud or conspiracy) and proactive investigations (e.g. investigations into drug distribution networks) where telephone and financial records are frequently used.³⁹

The absence of investigative subpoena power increases the potential for blind spots in investigations. For example, evidence of suspicious financial transactions or phone calls may cause investigators to pursue new leads that uncover a suspect’s involvement in a larger (or different) criminal enterprise with more serious charges. Without this information, these leads may be missed altogether. Conversely, subpoenaed records may help investigators refute an uncorroborated allegation, confirm an alibi, or close an investigation as unfounded, conserving scarce resources that would otherwise be wasted on a case that should never have proceeded to trial. Furthermore, subpoenaed evidence is frequently used to develop probable cause necessary to utilize other more robust investigative tools, such as search warrants⁴⁰ and specialized court orders.⁴¹ These investigative

ASSAULT CRIMES PANEL 2 (2014) [hereinafter CSS REPORT]. The Comparative Systems Subcommittee was comprised of “four members of the [Response System Panel (RSP)] as well as six experts with extensive knowledge of military or civilian criminal justice,” with “more than 188 years of military service and 326 years of criminal justice experience . . . supported by a staff with current knowledge of military justice and experience in investigation, training, prosecution, and defense.” *Id.* at 1.

³² *See id.* at 2.

³³ *See id.* at 8, 28, 181.

³⁴ *See id.* at 30, 185-86.

³⁵ *See* OLC LEG. PROPOSAL, *supra* note 25, § 532, at 2.

³⁶ *See* Topinka, *supra* note 6, at 21.

³⁷ *See* MCM, *supra* note 2, R.C.M. 303.

³⁸ *See id.* R.C.M. 307 and discussion. In many investigations, military commanders or law enforcement agencies will consult with trial counsel early in the investigation process, before a decision on adjudication is made. *See, e.g.,* UNDERSEC’Y OF DEF. FOR PERSONNEL AND READINESS, ESTABLISHMENT OF SPECIAL VICTIM CAPABILITIES WITHIN THE MILITARY DEP’TS TO RESPOND TO ALLEGATIONS OF CERTAIN SPECIAL VICTIM OFFENSES, 2 (2013) (“For the initial investigative response, the [Military Criminal Investigative Organization] will notify the [Special Victim

Capabilities] legal representative within twenty-four hours of determining that an allegation meets the criteria of a special victim offense.”).

³⁹ *See* CIPO STUDY, *supra* note 6, at 6; Pletcher E-Mail, *supra* note 5.

⁴⁰ *See* FED. R. CRIM. P. 16(c); Pletcher E-mail, *supra* note 5. There is also a fair amount of confusion regarding the differences between subpoenas and search warrants.

A subpoena is generally considered less intrusive than a warrant. The warrant authorizes an officer to enter, search for and seize, forcibly if necessary at a reasonable time of the officer’s choosing, that property to which the officer understands the warrant refers; the *subpoena duces tecum* instructs the individual to gather up the items described at his relative convenience and bring them before the tribunal at some designated time in the future. The validity of a warrant may only be contested after the fact; a motion to quash a subpoena can ordinarily be filed and heard before compliance is required.

CHARLES DOLE, CONG. RESEARCH SERV., RL33321, ADMINISTRATIVE SUBPOENAS IN CRIMINAL INVESTIGATIONS: A BRIEF LEGAL ANALYSIS 12 (2006) [hereinafter CRS REPORT].

⁴¹ Examples include court orders to obtain historical cell site information pursuant to 18 U.S.C. § 2703(d) and orders to compel Internal Revenue

tools can help determine the location of a suspect's cell phone on a given date and time, uncover evidence of fraud based on a suspect's tax filings, and discover evidence of a crime in the suspect's possession or effects. The inability to subpoena evidence early in the investigation diminishes an investigator's ability to obtain and utilize these valuable tools.

The absence of pre-referral subpoena power also makes it difficult for trial counsel to investigate, identify, and prefer accurate charges during the early stages of his involvement in a criminal case. It is ultimately the trial counsel's responsibility to analyze the available evidence, identify legally appropriate charges, and ensure those charges can be proven at trial. To aid in this responsibility, trial counsel often conduct additional investigation to confirm the viability of charges under consideration, close evidentiary gaps, and evaluate other possible charging strategies. Once satisfied, trial counsel draft the charges and specifications and prefer them against the accused. However, lack of subpoena power during the charging process often results in trial counsel being forced to charge imprecisely and instead substitute "unknown" for dates, locations, co-conspirators, quantities, dollar amounts, and values.⁴²

2. Effect on timing and outcome of plea negotiations

The lack of investigative subpoena power can also impair plea negotiations and timely disposition of cases. Staff Judge Advocates (SJAs) and convening authorities often set deadlines to submit proposed pretrial agreements in order for them to be given favorable consideration. This usually coincides with early trial milestones such as prior to initiating an Article 32 pretrial investigation or referral to special court-martial. Late submissions by the defense are rejected outright or accepted with an increase in the accused's punitive exposure, in order to minimize delay, conserve prosecution resources, and promote judicial economy.⁴³ Meanwhile, the defense's evaluation of plea offers is typically based on the strength of the government's evidence and the government's concessions in exchange for a guilty plea; if the former is

lacking, the latter must increase (and vice versa). Because knowledge drives negotiations, gaps in the government's evidence for want of timely subpoena power can mean the difference between a quick plea and a contested trial. Investigative subpoena power would give both sides a better sense of the state of the evidence facilitating more informed plea negotiations and earlier plea offers.

3. Effect of delays on speedy trial

The current timing of subpoena power coupled with delays in compliance by subpoena recipients can complicate government efforts to mitigate speedy trial concerns.⁴⁴ Rule for Courts-Martial 707's 120-day speedy trial clock is of vital concern to the government after the prefferal of charges.⁴⁵ This concern is magnified in cases involving an accused who is in pretrial confinement where Article 10 requires the government to exercise "reasonable diligence" in taking the accused to trial.⁴⁶ For example, if critical evidence is not received by the conclusion of the Article 32 preliminary hearing, should the government request that the hearing be kept open? Should the government request that delay be excluded from speedy trial computations?⁴⁷ If so, how is this delay accounted for on the speedy trial clock? Does it matter who requested the subpoenaed evidence?⁴⁸ While there has been no case law on the speedy trial consequences of subpoena-related delay on an Article 32 preliminary hearing, previous case law suggests that it will be difficult for the government to justify requests for excludable delay caused solely by a subpoena recipient's delays in compliance.⁴⁹

4. Impact of newly discovered evidence on judicial economy

While speedy trial concerns require diligence by the government in moving a case to trial, haste can also create serious problems if new evidence requires additional charges or major changes to the charge sheet. Late-subpoenaed evidence may lead to new charges which require the Article

Service disclosure of confidential tax information pursuant to 18 U.S.C. § 6103(i).

⁴² See MCM, *supra* note 2, R.C.M. 307 discussion. Precise charging is even more critical in light of the U.S. Supreme Court's recent holding that "[f]acts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 133 S. Ct. 2151, 2152 (2013).

⁴³ This assertion is based on the author's professional experiences as Defense Counsel assigned to Marine Corps Air Ground Combat Center from 2008–2009 and Trial Counsel assigned to Marine Corps Air Station Miramar from 2010–2012.

⁴⁴ Depending on the size of the business or entity being subpoenaed, the scope of the subpoena's request, and requests or litigation to modify or quash the subpoena, the timeframe for compliance can range from anywhere from days to months. Based on the author's recent professional experience as Special Assistant U.S. Attorney, Southern District of California, the average timeframe for subpoena compliance is usually between fifteen to forty-five days.

⁴⁵ See MCM, *supra* note 2, R.C.M. 707.

⁴⁶ See UCMJ art. 10 (2012); Pehrson, *supra* note 12, at 19 n.140; *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010) (requiring "immediate steps" be taken to bring an accused who is in pretrial confinement to trial).

⁴⁷ See MCM, *supra* note 2, R.C.M. 707(c)(1) and discussion.

⁴⁸ At an Article 32 preliminary hearing, it may be possible for the trial counsel, defense counsel, and preliminary hearing officer to each seek the issuance of subpoenas. See Manual for Courts-Martial; Proposed Amendments, 79 Fed. Reg. 59,938, 59,941 (proposed Oct. 3, 2014).

⁴⁹ See *U.S. v. Byard*, 29 M.J. 803 (A.C.M.R. 1989) (finding that fifty-eight days of delay while pending receipt of subpoenaed financial records was chargeable to the government where trial counsel did not first exhaust subpoena alternatives). "*Byard* exemplifies the difficulty of trying to subpoena records quickly and efficiently before trial." Topinka, *supra* note 6, at 24-25.

32 preliminary hearing to be re-opened.⁵⁰ If charges have been forwarded and SJA's advice provided to the general court-martial convening authority, new evidence or charges would also require these procedural steps to be repeated as well.⁵¹ A worst-case scenario occurs if late-subpoenaed evidence requires additional charges or major changes to the charge sheet after arraignment, neither of which can happen without the accused's consent.⁵² The likely outcome of this scenario is two separate courts-martial for the same underlying conduct.

For these reasons, military investigative subpoena power is essential to ensure a thorough investigation prior to initiating charges and to improve the efficiency of the military justice process.

B. Problems with Subpoena Alternatives

There are several alternatives to traditional subpoenas that may allow the government to obtain documentary evidence earlier in a military investigation. Unfortunately, these alternatives are limited in scope and practicality of use.

One alternative is the administrative subpoena. "Administrative subpoena authority is the power vested in various administrative agencies to compel testimony or the production of documents or both in aid of the agencies' performance of their duties."⁵³ Administrative subpoenas are "not a traditional tool of criminal law investigation, but neither are they unknown."⁵⁴ Several statutes authorize the use of administrative subpoenas in conjunction with criminal investigations, one of which is the Inspector General Act of 1978.⁵⁵ This statute confers the DoD Inspector General (IG) with administrative subpoena power to obtain a wide variety of documentary evidence "necessary in the performance of the [IG] functions assigned."⁵⁶ As a result, the DoD IG subpoena is "limited in scope, because its focus is fulfilling the [DoD] IG's functions . . . relating to the detection, prevention, and investigation of fraud, waste, and abuse" in

DoD "programs and operations"⁵⁷ So, while DoD IG subpoenas may be available in certain fraud cases where the DoD is the victim,⁵⁸ they "are of little use to most investigations of general crimes specified in the UCMJ."⁵⁹ Furthermore, even in investigations for which DoD IG subpoenas are permissible, the procedural requirements necessary to obtain one are notoriously "lengthy, cumbersome, and difficult to handle."⁶⁰ Finally, while some⁶¹ have proposed making DoD IG subpoenas more accessible by delegating IG subpoena authority to a lower level (e.g. designated officials within each service), no provision in the Inspector General Act permits delegation "outside the Office of the Inspector General or [use] for purposes outside the scope of the Act."⁶²

Another alternative is RCM 703(e)(2)(C) which allows subpoenas to be issued by "an officer detailed to take a deposition."⁶³ However, a deposition may only be ordered by the convening authority prior to the referral of charges and upon a showing that "due to exceptional circumstances, it is in the interest of justice that the testimony of the prospective witness be taken and preserved for use at [an Article 32] preliminary hearing or a court-martial."⁶⁴ The military deposition's limited application⁶⁵ makes it unavailable for use as a tool to subpoena documentary evidence in most cases.⁶⁶ Finally, similar to the rules for obtaining administrative subpoenas, the rules governing military depositions "are procedurally complex,"⁶⁷ further limiting the deposition's utility as a means for issuing subpoenas.

While administrative subpoenas and depositions can serve as a potential workaround to the current limitations on military subpoena power, their inherent complexities and restrictions make them of no value in a majority of military criminal investigations. Creating investigative subpoena power would eliminate the need for such workarounds while harmonizing the UCMJ with federal practice.

⁵⁰ See UCMJ art. 32 (2012); National Defense Authorization Act for Fiscal Year 2014, Pub. L. 133-66, 127 Stat. 672, 954 (2013) ("No charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing.").

⁵¹ See UCMJ arts. 33-34 (2012).

⁵² See MCM, *supra* note 2, R.C.M. 601(e)(2), 603.

⁵³ CRS REPORT, *supra* note 40, at 1.

⁵⁴ *Id.*

⁵⁵ See 5 U.S.C. app. § 6(a)(4).

⁵⁶ See *id.*

⁵⁷ See Topinka, *supra* note 6, at 22 n. 93; CIPO STUDY, *supra* note 6, at 4.

⁵⁸ See CIPO STUDY, *supra* note 6, at 1 (During a three-year period, 95% of DoD IG subpoena requests were in support of fraud investigations.).

⁵⁹ *Id.* at 4.

⁶⁰ See Topinka, *supra* note 6, at 22.

⁶¹ See *id.* at 9.

⁶² CIPO STUDY, *supra* note 6, at 9.

⁶³ MCM, *supra* note 2, R.C.M. 703(e)(2)(C).

⁶⁴ See UCMJ art. 49 (2012); Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 532 (2014).

⁶⁵ As a practical matter, the deposition's purpose of preserving testimony for trial makes it generally inapplicable to corporate custodians of records or compliance officers, who simply maintain the business records being sought.

⁶⁶ See Topinka, *supra* note 6, at 21.

⁶⁷ FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 11-60.00 (3d ed. 2013) [hereinafter COURT-MARTIAL PROCEDURE].

IV. Proposal: Federal Subpoena Power as a Model for Military Subpoena Power

Article 36 requires military practice to conform to Federal criminal procedure to the extent practicable.⁶⁸ Yet “[f]ederal prosecutors and grand juries have subpoena powers even before charges are filed”—a power that remains unavailable in military practice.⁶⁹ In an era where military crimes are becoming increasingly complex and efforts to reform the military justice system are ubiquitous, conforming military subpoena power to federal practice is an uncontroversial way to increase the effectiveness of military investigations.

A. Subpoena Power in the Federal Criminal Justice System

Federal Rule of Criminal Procedure 17(c) governs the issuance of *subpoenas duces tecum*, generally, and states,

A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence.⁷⁰

Under federal criminal procedure, there are two types of subpoenas: trial subpoenas and grand jury subpoenas.⁷¹ A trial subpoena may be issued for the purpose of securing evidence to prepare for trial.⁷² A trial subpoena is “not intended to provide a means of discovery for criminal cases.”⁷³ However, either party may use a trial subpoena to “obtain evidence that either party knows about, and to obtain it before the trial begins.”⁷⁴ The party seeking to use a trial subpoena must demonstrate:

(1) that the documents [sought] are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and

inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general “fishing expedition.”⁷⁵

In contrast, “[a] grand jury subpoena is . . . much different from a [trial subpoena], where a specific offense has been identified and a particular defendant charged.”⁷⁶ “The purpose of a federal grand jury subpoena is to obtain evidence for presentation to a grand jury that may show that a person has committed a federal crime.”⁷⁷ Though the grand jury’s function is limited toward the possible return of an indictment,⁷⁸ “given a proper purpose . . . grand jury subpoenas can cast a wide net.”⁷⁹ Federal criminal procedure permits prosecutors to “obtain a blank subpoena from the clerk of court and use it to order the production of any books, papers, documents, data or other objects designated by the prosecutor” before charges are even filed.⁸⁰ The Supreme Court explains,

The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.⁸¹

B. Similarities Between Grand Jury and Military Investigations

Though there are no grand juries in the military,⁸² the purpose of a grand jury investigation is fundamentally no different from the purpose of a military criminal investigation: to gather all evidence necessary to determine whether or not a person has committed a crime and present

⁶⁸ UCMJ art. 36 (2012).

⁶⁹ See OLC LEG. PROPOSAL, *supra* note 25, § 532, at 2.

⁷⁰ FED. R. CRIM. P. 17(c); *cf.* MCM, *supra* note 2, R.C.M. 703(e)(2)(b) (“A subpoena may also command the person to whom it is directed to produce books, papers, documents or other objects designated therein at the proceeding or at an earlier time for inspection by the parties.”).

⁷¹ FED. GRAND JURY PRACTICE, OFFICE OF LEGAL EDUC., U.S. DEP’T OF JUSTICE 5 (2008) [hereinafter GRAND JURY MANUAL].

⁷² *Id.* at 5.39.

⁷³ *Id.*; *United States v. Nixon*, 418 U.S. 683, 698 (1974) (citing *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951)).

⁷⁴ See GRAND JURY MANUAL, *supra* note 71, at 5.39.

⁷⁵ See *Nixon*, 418 U.S. at 699-700.

⁷⁶ *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991).

⁷⁷ GRAND JURY MANUAL, *supra* note 71, at 5.1.

⁷⁸ U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-11.120 (1999), http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

⁷⁹ GRAND JURY MANUAL, *supra* note 71, at 5.1.

⁸⁰ See FED. R. CRIM. P. 17(a); OLC LEG. PROPOSAL, *supra* note 25, § 532, at 2.

⁸¹ *R. Enterprises, Inc.*, 498 U.S. at 297 (internal quotations and citations omitted).

⁸² See U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . .”).

that evidence to an authority vested with the power to charge.⁸³

In the federal criminal justice system, evidence collected during an investigation is presented to the grand jury, which is constitutionally “charged with the responsibility of determining whether or not a crime has been committed”⁸⁴ and is “empowered to indict and to refuse to indict.”⁸⁵ “To make that decision, the grand jury must determine whether there is probable cause . . . to believe that a crime has been committed, and if the individual charged in the indictment committed it.”⁸⁶ As the Supreme Court has stated, because the grand jury’s “task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad.”⁸⁷ These broad powers include the ability to compel the production of evidence prior to the initiation of charges.⁸⁸

In the military justice system, convening authorities exercise many quasi-judicial functions that resemble the powers of the grand jury.⁸⁹ Like the grand jury, convening authorities are uniquely empowered to direct charges or refuse to charge.⁹⁰ Subpoenaed evidence assists convening authorities in exercising this responsibility. One distinction between the grand jury and convening authority is that “the grand jury is regarded primarily as a protection for the individual,”⁹¹ “a kind of buffer or referee between the government and the people.”⁹² The convening authority has no similar function, but is instead charged with maintaining good order and discipline within his command.⁹³ In practice, however, “the grand jury’s role [in routine investigations] is only accusatory, not investigatory.”⁹⁴ Instead, investigators gather evidence using the grand jury’s subpoena power, but not necessarily with their foreknowledge or approval.⁹⁵ The

prosecutor then presents the evidence to the grand jury, often through the summarized testimony of a single law enforcement agent.⁹⁶ Similarly, a convening authority often decides whether or not to charge a suspect based on a summary of the evidence obtained by investigators. Investigative subpoena power would increase the convening authority’s situational awareness at this decisional stage, further protecting servicemembers from the risk of unfounded charges.

C. Changes Necessary to Expand Military Subpoena Power

1. Judicial Oversight

As part of its broader proposal to increase the pretrial involvement of military judges in the military justice process, the CSS recommended that military judges serve as the subpoena issuing authority.⁹⁷ However, the federal district court’s oversight of the grand jury subpoena process offers a better model for military judge involvement in issuing subpoenas. To carry out its investigative and accusatory functions, the grand jury relies on the district court’s subpoena and enforcement powers under the Federal Rules of Criminal Procedure.⁹⁸ However, neither the grand jury nor the prosecutor must request or obtain the court’s approval before issuing a grand jury subpoena.⁹⁹ Instead, on motion by a subpoenaed party, the district court may quash or modify a subpoena that is unreasonable, oppressive, or violates the law.¹⁰⁰

Giving military judges a similar role in the subpoena process would offer several advantages over the CSS proposal. It would provide a check on the government’s use

⁸³ See MCM, *supra* note 2, R.C.M. 303.

⁸⁴ *R. Enterprises, Inc.*, 498 U.S. at 297.

⁸⁵ CRS REPORT, *supra* note 40, at 11.

⁸⁶ GRAND JURY MANUAL, *supra* note 71, at 2.1.

⁸⁷ *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

⁸⁸ See *supra* note 77.

⁸⁹ See *United States v. Nealy*, 71 M.J. 73, 78 (C.A.A.F. 2012) (Baker, C.J., concurring) (“[T]he convening authority plays a central role as both quasi-judicial decision maker and as commander, the custodian of good order and discipline.”).

⁹⁰ See MCM, *supra* note 2, R.C.M. 306, 401. It is worth noting that the Article 32 investigation (now preliminary hearing) has been frequently and improperly analogized to the grand jury. There are significant differences between a grand jury’s plenary power to investigate and dispose of a case and the Article 32 preliminary hearing’s limited, non-binding authority to determine if probable cause exists and make recommendations on the disposition of a case. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. 133-66, 127 Stat. 672, 954 (2013) (explaining the limited purpose of an Article 32 preliminary hearing).

⁹¹ GRAND JURY MANUAL, *supra* note 69, at 2.2.

⁹² *United States v. Williams*, 504 U.S. 36, 47 (1992).

⁹³ See COURT-MARTIAL PROCEDURE, *supra* note 66, at § 11-20.00.

⁹⁴ GRAND JURY MANUAL, *supra* note 69, at 2.1.

⁹⁵ See *Lopez v. Department of Justice*, 393 F.3d 1345, 1349 (D.C. Cir. 2005) (“[T]he term ‘grand jury subpoena’ is in some respects a misnomer, because the grand jury itself does not decide whether to issue the subpoena; the prosecuting attorney does.”); see also 1 SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 6:2, at 6-12 (rev. 2d ed. 2001) (“[T]he federal courts have universally rejected the claim that the [federal] prosecutor must secure the prior authorization of the grand jury before he can issue a subpoena.”).

⁹⁶ See GRAND JURY MANUAL, *supra* note 69, at 7.1.

⁹⁷ See CSS REPORT, *supra* note 31, at 186.

⁹⁸ See CRS REPORT, *supra* note 40, at 11-12 (noting that, though the grand jury itself “belongs to no branch of the institutional government[,] . . . [t]he subpoena power upon which the grand jury relies . . . is the process of the court and may be enforced only through the good offices of the court.”); see also FED. R. CRIM. P. 17.

⁹⁹ Prior court approval for grand jury subpoenas is unnecessary because “the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury’s labors, not at the beginning.” *Blair v. United States*, 250 U.S. 273, 282 (1919).

¹⁰⁰ See FED. R. CRIM. P. 17(c)(2).

of investigative subpoena power without overburdening the judiciary with routine requests for commonly subpoenaed evidence.¹⁰¹ It would provide an improved means of redress for those seeking relief from compliance with unreasonable or oppressive subpoenas prior to referral.¹⁰² Finally, it would allay earlier congressional concerns with proposals to extend subpoena prior to the Article 32 stage.¹⁰³

The CSS proposal for earlier military judge involvement would also improve defense access to compulsory process.¹⁰⁴ Unlike many civilian public defenders, military defense counsel lack independent subpoena power.¹⁰⁵ Instead, the defense must submit its requests for compulsory process to the convening authority, via trial counsel, for review and approval.¹⁰⁶ This forces defense counsel to prematurely disclose confidential aspects of defense case theory and strategy to trial counsel and leads to a perception that military compulsory process is “imbalanced in favor of the government.”¹⁰⁷ The CSS proposal would remedy this by giving the defense “access to *ex parte* procedures . . . [such as issuing a] subpoena [to] witnesses through the military judge[] without disclosing information to the trial counsel or convening authority”¹⁰⁸ In addition to providing the defense with equal access to evidence via compulsory process, this would promote judicial economy by reducing the amount of pretrial litigation over defense discovery requests.

However, the scope and timing of subpoena power must logically differ depending on which party is seeking to utilize it. Unlike trial counsel—whose investigative subpoena power is used to investigate and charge suspected offenses—defense counsel’s need to subpoena evidence does not arise until pretrial, when “a specific offense has been identified and a particular defendant charged.”¹⁰⁹ For this reason, a defense subpoena is necessarily a trial subpoena and should require a higher threshold showing for issuance.¹¹⁰ While these distinctions may seem to resemble the same “imbalance” the proposed changes were intended to correct, they offer improved subpoena access to both parties that is commensurate with their intended uses.

2. Changes to UCMJ and RCM

Enhanced subpoena power would necessarily require changes to several provisions of the UCMJ and the *Manual for Courts-Martial (MCM)*.¹¹¹ Article 47 would need to be amended to allow for the issuance of *subpoenas duces tecum* prior to the Article 32 preliminary investigation for a military criminal investigation. Rule for Courts-Martial 703 would require several changes: (1) adding “designated military judge” to the list of who may issue subpoenas, (2) adding instructions for the defense use of compulsory process, (3) deleting references to the Article 32 pretrial investigation and referral as prerequisites for investigative subpoena power, and (4) deleting language granting the convening authority the ability to quash or modify an unreasonable or oppressive subpoena.

V. Conclusion: Military Investigative Subpoena Power is Long Overdue

In an era of increased congressional focus on the perceived shortcomings of the military justice system, Congress can and should amend the UCMJ to provide investigative subpoena power to aid military investigations and prosecutions. Yet despite Article 36’s requirements of conformity to federal practice, numerous calls to expand military subpoena power, and the utility of investigative subpoenas to federal prosecutors, subpoena power remains unavailable to military investigators and prosecutors prior to the charging decision. This can create a ripple effect that impacts every aspect of the investigation and court-martial process.

While there are several potential alternatives to subpoena evidence earlier in the military justice process, each has significant restrictions. Department of Defense IG subpoenas are limited in scope and must serve the IG purpose of combating fraud-related crimes where the DoD is the victim.¹¹² Depositions, while providing the deposition officer with subpoena power, do not generally apply to routine *subpoenas duces tecum* issued to corporate custodians.¹¹³

¹⁰¹ See CSS REPORT, *supra* note 31, at 186 n.847.

¹⁰² See MCM, *supra* note 2, R.C.M. 703(f)(4)(C) (“If the person having custody of evidence requests relief on grounds that compliance with the subpoena or order of production is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena or order of production be withdrawn or modified.”).

¹⁰³ See OLC LEG. PROPOSAL, *supra* note 25, § 532, at 2.

¹⁰⁴ See CSS REPORT, *supra* note 31, at 28-29.

¹⁰⁵ See *id.* at 30.

¹⁰⁶ See *id.* at 33; MCM *supra* note 2, R.C.M. 703(f)(3).

¹⁰⁷ See CSS REPORT, *supra* note 31, at 29.

¹⁰⁸ See *id.* at 30.

¹⁰⁹ See *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991).

¹¹⁰ Compare *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (“The Government is obligated to produce by compulsory process evidence requested by the defense that is ‘relevant and necessary.’”), with *United States v. Nixon*, 418 U.S. 683, 699–700 (1974) (“[I]n order to require production prior to trial, the moving party must show . . . that the documents are evidentiary and relevant . . .”). Because a post-arraignment subpoena by trial counsel is also necessarily used in preparation for trial, issuance should also be restricted to the military judge and conditioned on a demonstration of relevance and necessity by trial counsel.

¹¹¹ See *infra* App. A-B.

¹¹² See Topinka, *supra* note 6, at 22 n. 93; CIPO STUDY, *supra* note 6, at 4.

¹¹³ See Topinka, *supra* note 6, at 21.

Current proposals to expand subpoena power by increasing the military judge's role in the pretrial process are promising but go too far by requiring military judge approval for all subpoena requests.¹¹⁴ This level of judicial involvement is unnecessary for military subpoena power that is modeled after federal grand jury subpoena power—where courts have oversight but intervene only as circumstances require. Such a model would improve both sides' access to evidence at all stages of the military justice process and provide subpoena recipients with an improved means of redress before a military judge. Accomplishing this would require changes to the UCMJ and MCM. However, these changes are long overdue in light of Article 36's mandate and the many problems caused by current limitations on military subpoena power.

¹¹⁴ See *supra* Part B.

(a) Any person not subject to this chapter who—

(1) has been duly subpoenaed to appear as a witness before a court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission, or board, or has been duly issued a *subpoena duces tecum* ~~for a preliminary hearing pursuant to section 832 of this title (article 32);~~ for a military criminal investigation;

(2) has been provided a means for reimbursement from the Government for fees and mileage at the rates allowed to witnesses attending the courts of the United States or, in the case of extraordinary hardship, is advanced such fees and mileage; and

(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce; is guilty of an offense against the United States.

(e)(2)(C) *Who may issue.*

(1) A subpoena to secure evidence may be issued by:

(a) The summary court-martial;

(b) At any time prior to arraignment, detailed trial counsel supporting a military criminal investigation; ~~At an Article 32 hearing, detailed counsel for the government;~~

(c) After preferral of charges, a designated military judge upon application by detailed defense counsel; ~~After referral to a court martial, detailed trial counsel;~~

(d) After arraignment, a designated military judge upon application by detailed trial counsel or detailed defense counsel;

~~(d)~~(e) The president of a court of inquiry; or

~~(e)~~(f) An officer detailed to take a deposition.

(f)(4)(B) *Evidence not under the control of the government.* Evidence not under the control of the government may be obtained by a subpoena issued in accordance with subsection (e)(2) of this rule. A *subpoena duces tecum* to produce books, papers, documents, data, or other objects or electronically stored information ~~for a preliminary hearing pursuant to Article 32~~ may be issued, ~~following the convening authority's order directing such preliminary hearing~~ by counsel for the government or a designated military judge, in accordance with subsection (e)(2)(C) of this rule. A person in receipt of a *subpoena duces tecum* for an Article 32 hearing need not personally appear in order to comply with the subpoena.

(f)(4)(C) *Relief.* If the person having custody of evidence requests relief on grounds that compliance with the subpoena or order of production is unreasonable or oppressive, ~~the convening authority or, after referral, the,~~ a designated military judge may direct that the subpoena or order of production be withdrawn or modified.

Where the Interests of Justice and Humanitarianism Collide: The International Committee of the Red Cross's "Right" to Non-Disclosure and Evidentiary Privilege

Major Brett A. Warcholak*

*What are the ICRC's views on detainees at GTMO these days? Colin said there are problems. What is up? Thanks.*¹

I. Introduction

On November 6, 2013, a military commission at Guantanamo Bay, Cuba, hearing the case against four alleged 9/11 plotters, including Khalid Shaikh Mohammad, the so-called "mastermind" of the attacks, ruled that the International Committee of the Red Cross (ICRC) did not have a legal right to prevent disclosure of confidential ICRC records in the possession of the U.S. government.² Instead, the commission ordered the prosecution to turn over all correspondence between the ICRC and the U.S. government pertaining to ICRC inspections of Guantanamo Bay detention facilities.³ Observers described the ruling as "extraordinary."⁴ For its part, the ICRC was "disappointed by the ruling" and "dismayed and concerned" that the commission had rejected its argument that confidential ICRC materials are privileged as a matter of customary international law (CIL).⁵

The military commission's ruling is noteworthy, because it runs counter to the international-level recognition that the ICRC has the right not to provide witness testimony or permit the disclosure of confidential ICRC information, even if held by another party, during legal proceedings. This recognition is reflected in several international criminal tribunal decisions, their rules of evidence, and the writings of international legal scholars.⁶ The ICRC has itself

acknowledged, however, that this right is "not carved in stone."⁷ Perhaps the greatest threat to this right is a growing precedent of unfavorable national-level judicial decisions such as in the 9/11 case, *United States v. Mohammad (KSM)*.

Such decisions could have far-reaching effects. The ICRC argues that, without this right, courts would decide when to disclose confidential ICRC information, and if this were the case, the ICRC would not be able to assure its dialogue partners, which include state and non-state authorities and private individuals, that their communications would be confidential.⁸ If the ICRC were unable to maintain the confidentiality of its communications and parties could use confidential ICRC information during legal proceedings, others would be less likely to cooperate with the ICRC, and authorities could restrict ICRC access to otherwise denied areas, especially detention facilities, or so the ICRC's argument goes.⁹ This would certainly impair the ICRC's humanitarian mission, and additional human suffering could be the result, especially among detainee populations.¹⁰ By contrast, the defense bar has expressed keen interest in obtaining confidential ICRC information on conditions of detention, since it may contain mitigating evidence for defendants.¹¹

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¹ Memorandum from Sec'y of Def. Donald Rumsfeld to Dep't of Def. Gen. Council William J. Haynes II, subject: ICRC and GTMO (16 Sept. 2003), <http://library.rumsfeld.com/doclib/sp/1910/2003-09-16%20to%20Jim%20Haynes%20re%20ICRC%20and%20GTMO.pdf>.

² Order on Defense Motion to Compel Discovery in Support of Defense Motion for Appropriate Relief to Compel Defense Examination of Accused's Conditions of Confinement at 12, *United States v. Mohammad* (Nov. 6, 2013) [hereinafter *KSM*, Order on Defense Motion to Compel Discovery]. All military commissions case documents cited in this article are available at <http://www.mc.mil/CASES.aspx>.

³ *Id.* at 13.

⁴ Spencer Ackerman, *US Ordered to Hand over Red Cross Files on Conditions at Guantánamo Bay*, THE GUARDIAN (Nov. 6, 2013, 17:26 EST), <http://www.theguardian.com/world/2013/nov/06/us-red-cross-files-conditions-guantanamo>; Steven Ratner, *Should ICRC Reports on Detainee Visits be Turned Over to Military Commission Defense Counsel?* JUST SECURITY (Nov. 12, 2013, 10:26 AM), <http://justsecurity.org/3116/icrc-reports-military-commission/>.

⁵ Anna Nelson, *Why Confidentiality Matters*, INTERCROSS (Nov. 19, 2013), <http://intercrossblog.icrc.org/blog/why-confidentiality-matters>.

⁶ Most of whom, it bears mentioning, have served as ICRC legal advisors. Cf. Emily Ann Berman, Note, *In Pursuit of Accountability: The Red Cross, War Correspondents, and Evidentiary Privileges in International Criminal Tribunals*, 80 N.Y.U. L. REV. 241 (2005); Joshua McDowell, Note, *The International Committee of the Red Cross as a Witness before International Criminal Tribunals*, 1 CHINESE J. INT'L L. 158 (2002).

⁷ Gabor Rona, *The ICRC Privilege Not to Testify: Confidentiality in Action*, ICRC (Feb. 2, 2004), <https://www.icrc.org/eng/resources/documents/misc/5wsd9q.htm>.

⁸ *Id.*

⁹ Stéphane Jeannot, *Recognition of the ICRC's Long-Standing Rule of Confidentiality: An Important Decision by the International Criminal Tribunal for the Former Yugoslavia*, 82 INT'L REV. RED CROSS 403, 406 (2000).

¹⁰ *See id.*

¹¹ *See, e.g.*, Defense Motion to Compel Discovery in Support of Defense Motion for Appropriate Relief to Compel Defense Examination of

Despite clear international-level recognition of the ICRC's absolute right to the non-disclosure of evidence, the degree of legal protection for ICRC information varies from state to state. Two key common-law jurisdictions, the United States and the United Kingdom (U.K.), do not recognize a separate evidentiary privilege for ICRC communications, which would provide such protection.¹² Although U.S. law provides considerable privileges and immunities for the ICRC,¹³ U.S. law should also recognize a separate evidentiary privilege for confidential ICRC communications. Such an evidentiary privilege would be consistent with the law of privileges. This law holds that, although privileges may inhibit litigation by excluding information that would otherwise be discoverable to another party or admissible as evidence,¹⁴ they are nonetheless justified on the grounds that they protect "extrinsic policy,"¹⁵ i.e. interests and relationships that society has deemed "more important and overpowering,"¹⁶ than the disclosure of relevant information in litigation. The public interest in ICRC confidentiality is such an interest.

This article will proceed first by providing background on the ICRC's confidential approach and its "testimony policy." It will then review the international-level treatment of the ICRC's purported right to the non-disclosure of evidence. Next, this article will analyze national-level protections for ICRC information with a focus on U.S. law. Last, it will provide compelling reasons why U.S. law should recognize a separate evidentiary privilege for confidential ICRC communications.

II. The ICRC's Confidential Approach and Testimony Policy

For the ICRC, the confidential approach is "at the core of its identity."¹⁷ It uses the confidential approach during persuasion, a mode of action that consists of attempting to persuade a state or non-state authority, through bilateral

confidential dialogue with the ICRC, to do something that falls within an authority's area of responsibility.¹⁸ The idea behind confidential dialogue is that "by discussing serious issues, such as abuse or ill-treatment, away from the glare of public attention, governments and non-state actors are often more likely to acknowledge problems and commit to taking action."¹⁹ The ICRC also uses the confidential approach to help obtain access from authorities to people under their control.²⁰ It has been described as "the key that enables the ICRC to open doors that would otherwise remain shut, giving [the ICRC] access to people in need and places that many other organizations cannot reach."²¹ Confidentiality gives the ICRC a comparative advantage over human rights organizations that are more public advocacy oriented. Based on their field experiences, ICRC representatives have stated that the confidential approach works,²² although its efficacy is impossible to measure.²³

Due to the ICRC's unique humanitarian mission, information obtained or produced by the ICRC, which it considers confidential, may later become relevant in proceedings to examine the legality of actions of parties to a conflict.²⁴ As the example of *KSM* shows, litigants may seek to obtain confidential information from the ICRC or its dialogue partners to use as documentary evidence, or to call upon ICRC personnel to testify as witnesses regarding their observations during a conflict or interactions with parties to the conflict.²⁵

However, ICRC policy guidelines state that the ICRC "does not provide testimony or confidential documents in connection with investigations or legal proceedings relating to specific violations."²⁶ Remarkably, the ICRC has even sought to prevent two states, Ethiopia and Eritrea, from providing ICRC information to an impartial body during an

Accused's Conditions of Confinement at 4, *United States v. Mohammad* (Jan. 8, 2013) [hereinafter *KSM*, Defense Motion to Compel Discovery].

¹² See *infra* Part IV.

¹³ See *infra* Part V.

¹⁴ See EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 1.1 (2d ed. 2009).

¹⁵ JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW*, vol. 8 at § 2175 (McNaughton rev. 1961).

¹⁶ *Id.*

¹⁷ ICRC, *The International Committee of the Red Cross's (ICRC's) Confidential Approach*, 94 INT'L REV. OF THE RED CROSS 1135, 1136 (2012) [hereinafter *The ICRC's Confidential Approach*].

¹⁸ *Id.* at 1135.

¹⁹ ICRC, *Confidentiality: Key to the ICRC's Work but Not Unconditional*, INTERNATIONAL COMMITTEE OF THE RED CROSS (Sept. 20, 2010), <https://www.icrc.org/eng/resources/documents/interview/confidentiality-interview-010608.htm> (interviewing Dominik Stillhart, ICRC Deputy

Director of Operations) [hereinafter *Confidentiality: Key to the ICRC's Work but Not Unconditional*].

²⁰ *The ICRC's Confidential Approach*, *supra* note 17, at 1138-39.

²¹ *Confidentiality: Key to the ICRC's Work but Not Unconditional*, *supra* note 19.

²² *E.g. id.*

²³ Steven A. Ratner, *Behind the Flag of Dunant: Secrecy and the Compliance Mission of the International Committee of the Red Cross*, in *TRANSPARENCY IN INTERNATIONAL LAW* 297, 313 (Andrea Bianchi & Anne Peters eds., 2013).

²⁴ See *Confidentiality: Key to the ICRC's Work but Not Unconditional*, *supra* note 19.

²⁵ See *id.*

²⁶ ICRC, *Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or of Other Fundamental Rules Protecting Persons in Situations of Violence*, 87 INT'L REV. OF THE RED CROSS 393, 398 (2005).

international arbitration, even though both sides had supported disclosure.²⁷

III. The Right to Non-Disclosure of Evidence at the International Level

Although the International Criminal Tribunal for the Former Yugoslavia (ICTY) 1999 case *Prosecutor v. Simic* arguably provided a poor foundation for international-level recognition of the ICRC's right to non-disclosure, subsequent decisions and international court rules have clearly established the ICRC's right to non-disclosure of evidence.

A. Judicial Decisions

1. International Criminal Tribunal for the Former Yugoslavia

In *Prosecutor v. Simic*, the prosecution, in an *ex parte* and confidential motion, sought a determination from the Trial Chamber as to whether the prosecution could call a former ICRC employee to testify as to information obtained during the course of his employment.²⁸ The Trial Chamber framed the issue as an evidentiary matter: "whether the ICRC has a relevant and genuine confidentiality interest such that the testimony of a former employee, who obtained the Information while performing official duties, should not be admitted."²⁹ The Trial Chamber stated that the primary considerations in resolving the issue were: one, whether treaty law or CIL recognize that the ICRC has a confidentiality interest that gives it the right to prevent ICRC information from disclosure; two, if the ICRC has such a right, whether it must be balanced against the interests of justice; and, three, whether protective measure can adequately protect the ICRC's confidentiality interest.³⁰

On the first question, the Trial Chamber made its crucial finding, namely, that the ICRC has an absolute right under CIL to prevent the disclosure of the information that would be

provided by the former ICRC employee.³¹ In the Trial Chamber's view, the state practice component of this CIL rule was satisfied by the "general practice of States in relation to the ICRC."³² More specifically, the Trial Chamber looked at the acceptance of states of the ICRC's special role and mandate under the Geneva Conventions,³³ and their recognition of the ICRC's fundamental principles, especially, neutrality and impartiality, from which the practice of confidentiality flows.³⁴ The Trial Chamber was convinced that allowing ICRC employees to testify would dissuade authorities from granting the ICRC access to victims and thereby prevent the ICRC from discharging its mandate under the Geneva Conventions.³⁵ Finally, the Trial Chamber concluded that the universal ratification of the Geneva Conventions satisfied the *opinio juris* component of the CIL rule, and dismissed the remaining questions.³⁶

Judge David Hunt authored a separate concurring opinion³⁷ that has taken on new importance since the military commission's ruling in *KSM*. Judge Hunt agreed that the ICRC had a serious interest in the matter, but that there was another "powerful public interest that all relevant evidence must be available to the courts who are to try persons charged with serious violations of international humanitarian law, so that a just result might be obtained in such trials in accordance with law."³⁸ For Judge Hunt, there were just two issues to consider: one, whether the protections against the disclosure of ICRC information were absolute, requiring no balancing of these interests; or, two, if balancing is required, what is the result in this case.³⁹ Judge Hunt was not convinced that CIL provides an absolute right to non-disclosure at the international level,⁴⁰ so he argued instead for a balancing of the interests.⁴¹ The balancing test proposed by Judge Hunt was "whether the evidence to be given by the witness in breach of the obligations of confidentiality owed by the ICRC is so essential to the case of the relevant party (here the prosecution) as to outweigh the risk of serious consequences of the breach of confidence."⁴² In his opinion, the balance in this case was clearly in favor of the ICRC due to the potential damages that could result from the testimony and the

²⁷ Partial Award on Prisoners of War (Ethiopia's Claim 4), 42 I.L.M. 1056, 1064 (Eri.-Eth. Claims Comm'n 2003); Partial Award on Prisoners of War (Eritrea's Claim 17), 42 I.L.M. 1083, 1093 (Eri.-Eth. Claims Comm'n 2003).

²⁸ *Prosecutor v. Simic*, Case No. IT-95-9-PT (Int'l Crim. Trib. for the Former Yugoslavia July 27, 1999) (decision on the prosecution motion under Rule 73 for a ruling concerning the testimony of a witness at 2) [hereinafter *Simic*, Decision on the Prosecution Motion]. All International Criminal Tribunal Former for the Former Yugoslavia (ICTY) case documents cited in this article are available at <http://icr.icty.org/default.aspx>.

²⁹ *Id.* ¶ 39.

³⁰ *Id.* ¶ 44.

³¹ *Id.* ¶ 74.

³² *Id.*

³³ *Id.* ¶ 48.

³⁴ *Id.* ¶¶ 54-55.

³⁵ *Id.* ¶¶ 65-70.

³⁶ *Id.* ¶ 74.

³⁷ *Prosecutor v. Simic*, Case No. IT-95-9-PT (Int'l Crim. Trib. for the Former Yugoslavia July 27, 1999) (separate opinion of Judge David Hunt on prosecutor's motion for a ruling concerning the testimony of a Witness) [hereinafter *Simic*, Separate Opinion of Judge Hunt].

³⁸ *Id.* ¶ 17.

³⁹ *Id.* ¶ 18.

⁴⁰ *See id.* ¶ 23.

⁴¹ *Id.* ¶ 27.

⁴² *Id.* ¶ 35.

prosecution's failure to demonstrate sufficiently the importance of the witness testimony.⁴³ Accordingly, Judge Hunt agreed with the Trial Chamber's ruling to exclude the testimony but on other grounds.⁴⁴

2. International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) has had three occasions⁴⁵ to rule on ICRC witness testimony in light of the *Simic* decision and other developments at the international level. These ICTR decisions have largely confirmed the ICTY Trial Chamber's prediction that finding a right of non-disclosure for the ICRC would not "open the floodgates" in respect of other organizations,⁴⁶ due to the unique role of the ICRC under the Geneva Conventions.

B. Rules of Procedure and Evidence

Even before the ICTY publicized the *Simic* decision in October 1999, the ICRC sought a rule before the International Criminal Court (ICC) that would protect its confidentiality interest.⁴⁷ Eventually, the Preparatory Commission for the ICC adopted by consensus the ICC's Rules of Procedure and Evidence, including Rule 73, "Privileged communications and information," which gives the ICRC a privilege against the disclosure of ICRC information.⁴⁸ Crucial for the ICRC, only it can waive the privilege, but it must first consult with the ICC to try to resolve the issue.⁴⁹ Under Rule 73, the ICRC's privilege is thus functionally absolute. Similar rules were later adopted in 2009 for the Special Tribunal for Lebanon,⁵⁰ and in 2012 for the United Nations Mechanism for International Criminal Tribunals.⁵¹

IV. National-Level Protections for ICRC Information

In contrast to the clear picture of the ICRC's right to non-disclosure that has emerged at the international level, the degree of legal protections for ICRC information at the national level varies greatly from state to state. In many states, headquarters agreements with the ICRC and national legislation provide such protections.⁵² The common-law jurisdictions of the U.K. and the United States have not recognized a separate evidentiary privilege for confidential ICRC information in the few judicial decisions on the subject.

A. Headquarters Agreements

The ICRC seeks to conclude "headquarters" or "status" agreements to provide a legal framework for its humanitarian activities,⁵³ including an international law basis for the domestic application of the right to the non-disclosure of evidence.⁵⁴ These agreements typically "contain provisions regarding the seat, status, privileges, and immunities of the international organization or institution, and its activities in the territory of the host State."⁵⁵ According to ICRC information, the number of headquarters agreements has more than doubled in the past twenty years from fifty-one in 1994⁵⁶ to as many as 100 (with thirteen more in negotiation) in 2012.⁵⁷ Unfortunately, very few of these agreements are publicly accessible, which hampers academic research in this area.

Most headquarters agreements appear to contain provisions which grant immunity from process for ICRC delegates and prevent national-level courts from calling them to appear as witnesses or requiring the ICRC to produce other

⁴³ *Id.* ¶¶ 36-40.

⁴⁴ *See id.* ¶¶ 42-43.

⁴⁵ *See* Prosecutor v. Nizeyimana, Case No. ICTR-00-55C-PT, Decision on Nizeyimana's Extremely Urgent and Confidential Motion Challenging the Admissibility of Witness TQ's Testimony (July 26, 2011); Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Reasons for the Chamber's Decision on the Accused's Motion to Exclude Witness TQ (July 15, 2005); Prosecutor v. Nyiramasuhuko and Ntahobali, Trial Chamber, Case No. ICTR-97-21-T, Decision on Ntahobali's Extremely Urgent Motion for Inadmissibility of Witness TQ's Testimony (July 15, 2004).

⁴⁶ *Simic*, Decision on the Prosecution Motion, *supra* note 28, at 26 n.56.

⁴⁷ Stéphane Jeannot, *Non-Disclosure of Evidence before International Criminal Tribunals: Recent Developments regarding the International Committee of the Red Cross*, 50 INT'L & COMP. L. Q. 643, 651-53 (2001).

⁴⁸ *Id.* at 653.

⁴⁹ Rules of Procedure and Evidence 73.4(a), 73.6, ICC-ASP/1/3/Part-II-A (2002). Rules 73.4-.6 is reprinted at Appendix A.

⁵⁰ Rules of Procedure and Evidence 164, STL/BD/2009/01/Rev. 1 (June 10, 2009).

⁵¹ Rules of Procedure and Evidence 10, MICT/1 (June 8, 2012).

⁵² *See infra* Part IV.A.

⁵³ Giovanni Distefano, *Le CICR et l'immunité de juridiction en droit international contemporain: fragments d'investigation autour d'une notion centrale de l'organisation internationale* [The ICRC and Immunity from Jurisdiction in Contemporary International Law: Fragments of Investigation on an Important Topic in International Organization], 3 Swiss Rev. of Int'l and Eur. L. 355, 368 (2000).

⁵⁴ Rona, *supra* note 7.

⁵⁵ Jochen Herbst, *International Organizations or Institutions, Headquarters*, para. 1, in Max Planck Encyclopedia of Public International Law (Oxford Pub. Int'l L., 2009), <http://opil.ouplaw.com/home/EPIL>.

⁵⁶ Cornelio Sommaruga, President of the International Committee of the Red Cross, Improving Respect for International Humanitarian Law: A Major Challenge for the ICRC, Fourth George Seward Lecture, International Bar Association (June 3, 1994), <https://www.icrc.org/eng/resources/documents/misc/57jm99.htm>.

⁵⁷ Motion of the International Committee of the Red Cross for Leave to Intervene in Opposition to Defense Motion to Compel Production of Confidential ICRC Communications (AE108C) and for Protective Order Denying Request for Production of Confidential ICRC Materials at Attachment B, p. 8, United States v. Mohammad (Apr. 4, 2013) [hereinafter *KSM*, ICRC Motion for Leave to Intervene].

evidence.⁵⁸ Other standard provisions grant broad immunity to the ICRC and refer to the inviolability of ICRC property, assets, and archives.⁵⁹ Since 2002, the ICRC has apparently modified its standard proposed headquarters agreement to include a specific provision on ICRC confidentiality, which clearly exempts ICRC communications from use in judicial proceedings.⁶⁰ The ICRC has claimed that recent agreements include this provision,⁶¹ and two of the few publicly available headquarters agreements confirm this.⁶²

B. Legislation

Several states have instead chosen to grant protections to the ICRC by way of national legislation. In some states, general statutes allow the executive branch to determine a level of privileges, immunities, and other rights to confer upon an international organization and its personnel.⁶³ Examples of such states include Australia,⁶⁴ the U.K.,⁶⁵ and the United States.⁶⁶ Of these states, the executive branch in Australia and the United States has given the ICRC legal protections within this legislative framework.⁶⁷ By contrast, France has adopted a brief law giving the ICRC and its personnel the same privileges and immunities of the United Nations and its personnel.⁶⁸

C. Judicial Decisions

Several post-9/11 detainee cases in the U.K. and the United States have confronted national-level courts with the question of how much protection to give ICRC information in the possession of the government. While these courts have recognized the sensitivity of ICRC information and have employed various protective measures, e.g. special advocates,

closed sessions, closed judgments, in camera review, and protective orders, these cases nonetheless made it known that ICRC information was before the court.⁶⁹ These courts have declined to follow the example of the international level and have not recognized a separate privilege for confidential ICRC information.

1. The U.K. Detainee Cases

In two cases, the U.K. courts had to determine how to best protect sensitive evidence, including ICRC information, in the possession of the Ministry of Defence. In both cases, the government claimed public interest immunity (PII), previously known as “Crown privilege,”⁷⁰ for certain categories of information, including the ICRC information.

In a 2010 case, *The Queen (on the application of Maya Evans) v. Secretary of State for Defence*, a High Court reviewed the lawfulness of the detention and subsequent transfer of suspected insurgents captured by the U.K. forces to Afghan detention facilities.⁷¹ In its open judgment, the court explained that it had used certain protective measures, specifically, closed and semi-closed sessions, and special advocates for the claimant, so that it could consider material covered by PII.⁷² The judgment makes plain, however, that the court had considered information on the ICRC’s detainee-related activities in Afghanistan.⁷³ In 2013, the claimant’s counsel and special advocates asked the court in a post-judgment hearing to release into the public domain some of the evidence that the court had previously kept from disclosure in 2010.⁷⁴ In asserting PII, the Foreign Secretary had certified to the court that the disclosure of sensitive information in twelve categories, including materials from the

⁵⁸ See *Simic*, Decision on the Prosecution Motion, *supra* note 28, at 21 n.34; *Rona*, *supra* note 7.

⁵⁹ *Rona*, *supra* note 7.

⁶⁰ *KSM*, ICRC Motion for Leave to Intervene, *supra* note 57, attachment B, p. 8.

⁶¹ *Id.*

⁶² *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013* (Cth) sched. 1, para. 11 (Austl.); Acuerdo sede entre el Gobierno de la República de Guinea Ecuatorial y el Comité Internacional de la Cruz Roja [Headquarters Agreement Between the Government of the Republic of Equatorial Guinea and the International Committee of the Red Cross] subpara. 5.1 (May 25, 2011).

⁶³ Chanaka Wickremasinghe, *International Organizations or Institutions, Immunities before National Courts*, para. 186, in Max Planck Encyclopedia of Public International Law (Oxford Pub. Intl. L., 2009), <http://opil.ouplaw.com/home/EPIL>.

⁶⁴ *International Organisations (Privileges and Immunities) Act 1963* (Cth).

⁶⁵ *International Organisations Act*, 1968 c. 48.

⁶⁶ *International Organizations Immunities Act*, 22 U.S.C. § 288-2881 (2014).

⁶⁷ *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013* (Cth); 22 U.S.C. § 288f-3 (2014); Exec. Order No. 12,643, 53 Fed. Reg. 24,247 (June 23, 1988). See *infra* Part V.A.

⁶⁸ Loi 2003-475 du 4 juin 2003 relative aux privilèges et immunités de la délégation du Comité international de la Croix-Rouge en France (1) [Law 2003-475 of June 4, 2003 Relative to the Privileges and Immunities of the Delegation of the International Committee of the Red Cross in France (1)], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 5, 2003, p. 9581; see also Convention on the Privileges and Immunities of the United Nations arts. II and V, Feb. 13, 1946, 1 U.N.T.S. 15.

⁶⁹ See *infra* Parts IV.C.1.-2.

⁷⁰ James Richardson, Archbold: Criminal Pleading Evidence and Practice § 12-26 (2014 ed.).

⁷¹ *Regina (Evans) v. Sec’y of State for Def.*, [2010] EWHC (Admin) 1445, at [1].

⁷² *Id.* at [8].

⁷³ See *id.* at [43]-[47], [98], [105], [115], [140].

⁷⁴ *Regina (Evans) v. Sec’y of State for Def.*, [2013] EWHC 3068 (Admin), [5], [13].

ICRC, “would cause a real risk of serious harm.”⁷⁵ The court agreed that disclosure of those parts of the closed judgment “would even now [in 2013] be damaging to the public interest,”⁷⁶ and that balancing continued to favor non-disclosure, since the materials were no longer needed in current litigation, and the public interest in open justice, while “a weighty factor . . . [was] not sufficient to outweigh the public interest in non-disclosure.”⁷⁷

In 2012, another High Court adopted a different approach in *Regina (Mohammed) v Secretary of State for Defence*.⁷⁸ In this case, the claimant requested that the court review his detention by the U.K. and transfer to Afghan authorities.⁷⁹ The Defence Secretary claimed PII over 121 documents to protect various public interests, including “the confidentiality of communications with various international bodies, including the International Committee of the Red Cross.”⁸⁰ During a pre-trial hearing, the court ruled that, in principle, when it could not uphold a claim of PII, it could still limit disclosure within a “confidentiality ring,” which would include counsel but not the claimant, to mitigate the damage that would result from an invalid PII claim.⁸¹

2. U.S. Military Commissions: *United States v. Mohammad*

The issue concerning ICRC information first came before the military commission in *KSM* as the result of litigation over a joint defense motion to examine the defendant’s conditions of detention at Guantanamo for the purposes of discovery, to develop mitigation evidence, and to mount a possible legal challenge to the current conditions.⁸² Exchanges between the prosecution and defense led to another defense motion on similar grounds, requesting the Commission to compel discovery of ICRC inspection reports on conditions of detention at Guantanamo.⁸³ The prosecution initially opposed the motion on the grounds that the ICRC documents

and communications were “irrelevant and immaterial”⁸⁴ to the original motion and that “disclosure of confidential ICRC communications would be detrimental to national security and the public interest.”⁸⁵

The ICRC sought leave to intervene in the proceedings, requesting a protective order denying the defense motion and guarding against future disclosure of confidential ICRC information.⁸⁶ The ICRC advanced three arguments for the requested relief. First, it claimed that confidential ICRC materials were privileged as a matter of CIL.⁸⁷ Second, the ICRC argued that the military commissions had to apply the privilege, since CIL is a part of federal common law, which is one of the sources of privileges.⁸⁸ Third, the ICRC argued that the Commission could use its discretionary authority under Rule for Military Commissions (RMC) 703(l)(2) to issue a protective order denying discovery of the requested ICRC materials.⁸⁹

The Commission granted the ICRC’s motion for leave to intervene but did not accept any of its arguments.⁹⁰ The Commission first noted a lack of national-level judicial precedent on the subject.⁹¹ The Commission then briefly turned to federal statute, finding no privilege against the disclosure of ICRC generated materials.⁹² Most of the Commission’s remaining discussion looked at the international-level treatment of the issue. It greatly downplayed the Trial Chamber’s decision in *Simic*, merely stating that it “provided an evidentiary privilege for ICRC work,”⁹³ and instead highlighted the balancing approach adopted by Judge Hunt,⁹⁴ analogizing it to the Supreme Court’s jurisprudence regarding privilege.⁹⁵ The Commission narrowly interpreted the ICTR cases, writing that the cases “provided little support for a common law privilege for the ICRC,”⁹⁶ and even interpreted ICC Rule

⁷⁵ *Id.* at [31].

⁷⁶ *Id.* at [34].

⁷⁷ *Id.* at [2].

⁷⁸ *Regina (Mohammed) v Sec’y of State for Def.*, [2012] EWHC 3454 (Admin), [2014] 1 W.L.R. 1071.

⁷⁹ *Id.*

⁸⁰ *Id.* at [29].

⁸¹ *Id.* at [1], [16], [19], [20].

⁸² Defense Motion for Appropriate Relief to Compel Defense Examination of Accused’s Conditions of Confinement at 4, *United States v. Mohammad* (Dec. 5, 2012).

⁸³ *KSM*, Defense Motion to Compel Discovery, *supra* note 11, at 4.

⁸⁴ Government Response to AE 108C (MAH, AAA, RBS, WBA) Defense Motion to Compel Discovery in Support of Defense Motion for Appropriate Relief to Compel Examination of Conditions of Confinement AE 108 (MAH,AAA,RBS,WBA) at 4, *United States v. Mohammad* (Jan. 22, 2013).

⁸⁵ *Id.* at 6.

⁸⁶ *KSM*, ICRC Motion for Leave to Intervene, *supra* note 57, at 1.

⁸⁷ *Id.* at 3.

⁸⁸ *Id.* at 10-14.

⁸⁹ *Id.* at 15.

⁹⁰ *KSM*, Order on Defense Motion to Compel Discovery, *supra* note 2, at 4.

⁹¹ *Id.* at 6.

⁹² *Id.* at 6-7.

⁹³ *Id.* at 7.

⁹⁴ *Id.*

⁹⁵ *Id.* at 10.

⁹⁶ *Id.* at 8.

73.6, which requires consultation between the ICRC and the court, as supporting balancing.⁹⁷

The Commission then applied the four conditions proposed by the jurist John Wigmore, which U.S. courts commonly accept as a test for determining whether to recognize a new privilege for confidential communications.⁹⁸ Those conditions are:

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.⁹⁹

While granting that conditions (1) through (3) “weigh heavily on the side of finding a privilege” for the ICRC materials, the commission claimed, without much discussion, that an ICRC privilege failed condition (4), because the defendants face the death penalty.¹⁰⁰ This analysis led to the Commission’s harshly worded finding that “there is a lack of meaningful or longstanding international common law to service as precedent”¹⁰¹ for determining that the ICRC had a privilege over the materials in question.

⁹⁷ *Id.* at 9-10. One of the important aspects of the Rule, however, is that it actually codifies the requirement of ICRC consent, making the ICRC’s privilege functionally absolute. *See supra* Part III.B.

⁹⁸ IMWINKELRIED, *supra* note 14, § 3.2.3.

⁹⁹ WIGMORE, *supra* note 15, at § 2285.

¹⁰⁰ *KSM*, Order on Defense Motion to Compel Discovery, *supra* note 2, at 10.

¹⁰¹ *Id.* at 12.

¹⁰² *Id.* at 13.

¹⁰³ *Id.*

¹⁰⁴ Order on Defense Motion to Compel Discovery in Support of Defense Motion for Appropriate Relief to Compel Defense Examination of Accused’s Conditions of Confinement at 2-3, *United States v. Mohammad* (Jan. 15, 2014). The Military Judge later determined that (1) one of the reports did not meet the criteria for discovery and (2) authorized the release of two additional ICRC reports. Order on Defense Motion to Compel Discovery In Support of Defense Motion For Appropriate Relief to Compel Defense Examination of Accused’s Conditions of Confinement at 2, *United States v. Mohammad* (Jan. 31, 2014); *corrected by* Order (Corrected Copy) on Defense Motion to Compel Discovery In Support of Defense Motion For Appropriate Relief to Compel Defense Examination of Accused’s Conditions of Confinement, *United States v. Mohammad* (Mar. 24, 2014); *corrected by* Order (2d Corrected Copy) on Defense Motion to Compel

The Commission then ordered the prosecution to turn over all communications between the ICRC and the U.S. government “concerning ICRC inspections of the detention facilities at Guantanamo.”¹⁰² The Commission deferred the defense motion to compel discovery until it could conduct an in camera review to determine the relevance of the materials,¹⁰³ but on January 15, 2014, the commission authorized the release, under seal, of sixteen ICRC working papers and reports concerning visits to Guantanamo from October 2006 to October 2013 to the defense.¹⁰⁴

The release of these materials has opened new litigation paths. The commission granted a defense motion to use ICRC reports as a basis for other pleadings, including witness requests,¹⁰⁵ which could signal another, even more dramatic showdown with the ICRC over the appearance of ICRC personnel as witnesses before the commission.¹⁰⁶ Also, two co-defendants have requested that the commission compel discovery of ICRC reports regarding U.S. detention facilities in Afghanistan.¹⁰⁷ At the time of this writing, litigation on these defense requests continues.

V. Existing Protections for ICRC Information in the United States

Although the commission rejected the ICRC’s claim of privilege, the ICRC actually enjoys substantial privileges and immunities under U.S. statutory law, while additional protections are available under rules of evidence and procedure.¹⁰⁸

A. Statutory Law

Discovery In Support of Defense Motion For Appropriate Relief to Compel Defense Examination of Accused’s Conditions of Confinement, *United States v. Mohammad* (Mar. 25, 2014).

¹⁰⁵ Order on Defense Motion for Leave to Use ICRC Documents in Litigation and DOD Advocacy at 1, 3, *United States v. Mohammad* (July 21, 2014).

¹⁰⁶ Although a civilian may not be compelled to testify in-person before a military commission at Guantanamo Bay, a civilian may be subpoenaed and, if necessary, compelled by law enforcement to testify from the United States by video-teleconference or deposition. DEP’T OF DEF., REGULATION FOR TRIAL BY MILITARY COMMISSION, ch. 13-5(b)-(d) (2011), <http://www.mc.mil/Portals/0/2011%20Regulation.pdf>. As the author later shows, U.S. law may nonetheless give ICRC employees testimonial immunity in such cases. *See infra* Part V.A.

¹⁰⁷ Defense Motion to Compel Discovery of ICRC Records from Afghanistan, *United States v. Mohammad* (July 18, 2014); Mr. al Baluchi’s Notice of Joinder, Factual Supplement & Argument to Defense Motion to Compel Discovery of ICRC Records from Afghanistan, *United States v. Mohammad* (July 24, 2014).

¹⁰⁸ Remaining sources of law, i.e. the Constitution and federal common law, do not provide clear pathways for an ICRC privilege or other protections. Whether the ICRC’s right to non-disclosure, as a rule of international law, is incorporated into these sources of law is beyond the scope of this article.

The ICRC derives certain privileges, exemptions, and immunities under the International Organizations Immunities Act (IOIA).¹⁰⁹ In particular, ICRC employees are “immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions.”¹¹⁰ In a case concerning a different organization, the Ninth Circuit deferred to an interpretation of a similar provision by the Department of State as conferring “testimonial immunity for all information that a covered individual possesses solely by virtue of his official position.”¹¹¹ The court used this interpretation in determining that a court could not compel a covered employee to testify about “information he possesses solely by virtue of his official position.”¹¹² Consistent with this ruling, ICRC employees should possess testimonial immunity and, if so, courts may not compel them to testify pursuant to *subpoenae ad testificandum*, at least as to ICRC official business. Other IOIA provisions indicate that the ICRC should also be able to withstand compulsory process for ICRC information in its possession, i.e. *subpoena duces tecum*.¹¹³ It is, however, unclear whether such protection would extend to demands for ICRC communications (working papers, reports, etc.) provided to a state authority and no longer under exclusive ICRC control.

Under IOIA, the ICRC’s official communications are entitled to the same “privileges, exemptions, and immunities . . . accorded under similar circumstances to foreign governments.”¹¹⁴ Consistent with the law of foreign relations,¹¹⁵ this section can be interpreted as providing for unfettered communications between or among offices of an international organization covered by IOIA; however, it is unclear, at best, whether this provision would allow the ICRC to prevent the disclosure of confidential ICRC communications in the possession of a state authority. This article also leaves open the question whether Congress intended these privileges and immunities under IOIA as also providing for evidentiary privileges under military rules.¹¹⁶

¹⁰⁹ International Organizations Immunities Act, 22 U.S.C. § 288-2881 (2014); Exec. Order No. 12,643, 53 Fed. Reg. 24,247 (June 23, 1988).

¹¹⁰ 22 U.S.C. § 288d(b) (2014).

¹¹¹ *Taiwan v. U.S. Dist. Ct. for the N.D. of Cal.*, 128 F.3d 712, 718 (9th Cir. 1997) (citing Brief for the United States as Amicus Curiae at 16).

¹¹² *Id.* at 719.

¹¹³ *See* 22 U.S.C. § 288a(b)-(c) (2015).

¹¹⁴ 22 U.S.C. § 288a(d) (2015).

¹¹⁵ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 466 cmt. f. (1987).

¹¹⁶ A determination would also have to be made that the International Organizations Immunities Act (IOIA) is “applicable to trial by courts-martial [or military commissions].” MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 501(a)(2) (Supp. 2014) [hereinafter MCM]; MANUAL FOR MILITARY COMMISSIONS, UNITED STATES, MIL. COMM’N R. EVID. 501(a)(2) (2012) (reprinted at Appendix B) [hereinafter MMC].

B. Rules of Evidence and Procedure

Although there is no separate privilege for ICRC information under rules of evidence or procedure, *KSM* has validated that ICRC information in the government’s possession can be privileged under Military Commission Rules of Evidence (MCRE) 506 and, therefore, MRE 506, as other-than-classified government information, the disclosure of which “would be detrimental to the public interest.”¹¹⁷ Such information is nonetheless subject to disclosure to the defense, when a “request demonstrates a specific need for information containing evidence that is relevant to the guilt or innocence or to punishment of the accused, and is otherwise admissible.”¹¹⁸ Even before the commission had ruled on the defense motion to compel discovery, the prosecution reserved the right to exercise MCRE 506(g) to allow for limited disclosure of the ICRC materials to the defense, subject to the terms of a protective order, and use of such materials at trial after *in camera* review by the Military Judge.¹¹⁹ Moreover, at the time of the commission’s first ruling on the subject, it stated that the ICRC materials, if disclosed to the defense, would be protected according to an existing protective order for unclassified discovery materials.¹²⁰

A military judge also has discretionary authority under RCM 701(g)(2) and RMC 701(l)(2) to deny or restrict discovery upon “sufficient showing.”¹²¹ In *KSM*, the ICRC requested that the commission exercise this authority to deny discovery of the ICRC materials;¹²² however, the commission did not address this request.¹²³

VI. Toward a Privilege for Confidential ICRC Communication

As the previous section shows, U.S. law does not provide a separate evidentiary privilege for confidential ICRC communications; however, such a privilege is desirable for the following reasons: one, judicial balancing is ill-suited for weighing the extraordinary public interest in ICRC

¹¹⁷ MMC, *supra* note 116, MIL. COM’N R. EVID. 506(a); MCM, *supra* note 116, MIL. R. EVID. 506(a).

¹¹⁸ MMC, *supra* note 116, MIL. COM’N R. EVID. 506(i)(4)(C); MCM, *supra* note 116, MIL. R. EVID. 506(j)(1)(D);

¹¹⁹ Government Response to AE013GG(AAA) Defense Motion to Amend AE013AA Protective Order #1 to Protect Confidential ICRC Materials at 8-12, *United States v. Mohammad* (May 2, 2013).

¹²⁰ *KSM*, Order on Defense Motion to Compel Discovery, *supra* note 2, at 11; *see also* Protective Order #2 To Protect Unclassified Discovery Material Where Disclosure is Detrimental to the Public Interest, *United States v. Mohammad* (Dec. 20, 2012).

¹²¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(g)(2) (2012); MMC, *supra* note 116, R.M. COM’NS R. EVID 701(l)(2).

¹²² *KSM*, ICRC Motion for Leave to Intervene, *supra* note 57, at 15.

¹²³ *See KSM*, Order on Defense Motion to Compel Discovery, *supra* note 2.

confidentiality; two, the interests of the U.S. government in litigation are not necessarily aligned with ICRC confidentiality; three, protective measures have failed to adequately protect ICRC confidentiality; and, four, an ICRC privilege is consistent with the U.S. law of privilege.

A. The Problem of Judicial Balancing

For at least two reasons, judicial balancing is a poor construct for determining whether to disclose confidential ICRC information. First, there is a danger that courts will misidentify the public interest in non-disclosure as the ICRC's own interest in maintaining confidentiality. Judge Hunt, for example, referred to the "obligation of confidentiality that the ICRC has to the warring parties"¹²⁴ and "the interest of the ICRC in protecting itself against the disclosure."¹²⁵ Clearly, the ICRC has certain organizational interests in maintaining confidentiality. For example, confidentiality helps to safeguard the presence of ICRC employees¹²⁶ and protect ICRC communications from unwanted politicization.¹²⁷ But the public interest in ICRC confidentiality extends far beyond these limited organizational interests. If the ICRC is correct that the confidential approach achieves humanitarian results that would not be possible without it, then the public interest lies in the instrumental value of ICRC confidentiality. Viewed as a humanitarian instrument, the public interest in ICRC confidentiality is similar to the public interest in a particular medical treatment. It is hard to imagine a weightier public interest in any legal proceeding than preserving the efficacy of such methods for the alleviation of human suffering. Second, although a court will be able to readily determine the effects of non-disclosure of confidential ICRC communications, a court will have difficulty in ascertaining the risk of harm caused by the disclosure of confidential ICRC information, even after hearing the advocacy of the parties. Faced with a lack of proof as to the risks of disclosure, a court may feel judicially obligated to rule in favor of it. Such decisions could, however, produce a "butterfly effect," leading to unpredictable but devastating consequences for the ICRC's brand of impartial humanitarianism. Similarly, the cumulative effect of multiple decisions in favor of disclosure could produce a "death by a thousand cuts" for the confidential approach.

B. The Failure of Protective Measures

¹²⁴ *Simic*, Separate Opinion of Judge Hunt, *supra* note 37, ¶ 15.

¹²⁵ *Id.* ¶ 17.

¹²⁶ *The ICRC's Confidential Approach*, *supra* note 17, at 1139.

¹²⁷ *Confidentiality: Key to the ICRC's Work but Not Unconditional*, *supra* note 19.

¹²⁸ See *Simic*, Decision on the Prosecution Motion, *supra* note 28, ¶ 20; *Simic*, Separate Opinion of Judge Hunt, *supra* note 37, ¶ 17.

Unfortunately, the use of protective measures has not adequately protected the public interest in ICRC confidentiality. As the ICRC had argued and Judge Hunt had agreed in *Simic*, the issue with protective measures was not whether they would protect the form or even, for that matter, the content of the ICRC information, but if they would protect the fact that ICRC information was before the court.¹²⁸ In the ICRC's view, even the "mere suggestion" that confidential ICRC information is the subject of judicial proceedings acts as a disincentive to future cooperation with the ICRC.¹²⁹ Courts have done a poor job of preventing outside knowledge that litigation has involved confidential ICRC information, even when protective measures were deployed. Before the Trial Chamber lifted the confidentiality of the *Simic* decision, counsel for one of the co-defendants apparently learned of the matter and filed a motion seeking essentially the same ICRC information the prosecution wished to enter.¹³⁰ The detainee cases in the U.K. and the *KSM* case before the military commissions also show that national-level courts are not guarding against outside knowledge that confidential ICRC information is the subject of legal proceedings. In both jurisdictions, the protective measures employed have only protected the content of confidential ICRC information from public disclosure but not the fact that litigants were presenting such information to the bench.

C. The Government's Interests

A government's immediate interest in securing a "successful" outcome in legal proceedings may be inimical to the ICRC's confidentiality interest. While the U.K. detainee cases show that a government may claim some legal protections for confidential ICRC information, the Ethiopia-Eritrea arbitration of claims¹³¹ and *KSM* demonstrate that a government may in fact support some degree of disclosure. A government may be in favor of disclosure for several reasons: the confidential ICRC information may actually support the government's position; disclosure would eliminate one possible ground for defense appeal; or the government may wish to promote the fairness of the litigation. For a government involved in legal proceedings, these interests are likely to predominate over, and could conflict with, the public interest in ICRC confidentiality.

D. The Law of Privileges

¹²⁹ *Simic*, Decision on the Prosecution Motion, *supra* note 28, ¶ 20.

¹³⁰ See *Prosecutor v. Simic*, Case No. IT-95-9-PT, Accused Stevan Todorovic's Motion for an Order Requesting Assistance in Securing Documents and Witnesses from the International Committee of the Red Cross (Int'l Crim. Trib. for the Former Yugoslavia Sept. 22, 1999).

¹³¹ See *supra* p. 5 and note 26.

Wigmore's four conditions largely remain "the litmus test for determining the propriety of recognizing a privilege."¹³² The commission in *KSM* accepted that a privilege for confidential ICRC communications met the first three conditions of the Wigmore test but not the fourth.¹³³ This section argues that the commission was mistaken in this respect.

From the outset, it is important to note that the "injury," as contemplated by the fourth criterion, is not, as the commission identified, the punishment faced by the accused. The "injury" is the damage caused by disclosure to the "the relation," or better said, the relationship "between the parties" at issue, as the second criterion indicates. Correctly identifying the parties to the relationship is key. In this case, the best view is that the ICRC stands alone on one side of the relationship, because the ICRC is truly in a class by itself, apart from other humanitarian organizations, due to its special role and mandate under the Geneva Conventions. On the other side of the relationship stands not just the United States, but the many dialogue partners with whom the ICRC communicates on a confidential basis.

The remaining task is to weigh the "injury" to the ICRC's relationship with its dialogue partners against the "benefit" of the evidence that would be gained by disclosure. As described previously, such balancing tests are ill-suited to determining whether to disclose ICRC information, but, due to the overwhelming public interest in the instrumental value of ICRC confidentiality, balancing should easily break in favor of the ICRC.

VII. Conclusion

Courts in the United States are not likely to create a new evidentiary privilege for confidential ICRC communications. Such protections will have to come from outside the courtroom. This could take the form of a headquarters agreement between the United States and the ICRC, which includes a confidentiality provision. The next Geneva law or other international humanitarian law treaty could expressly state obligations with regard to the confidentiality of ICRC information. Military rules of evidence could be changed.¹³⁴ This is the most accessible point of entry for an ICRC privilege. Although military courts-martial and commissions occupy but a small part of the U.S. judicial landscape, additional protections for ICRC information are clearly needed there first, as the ongoing litigation in *KSM* shows.

The military commissions are making decisions as to the disclosure of confidential ICRC communications that could very well affect the sentencing of defendants, if convicted, and setting precedent for courts-martial, federal criminal prosecutions under the anti-torture statute,¹³⁵ and federal civil litigation under the Alien Tort Statute¹³⁶ and Torture Victim Protection Act.¹³⁷ This article urges greater public awareness of these decisions, because they are not just technical, legal decisions but moral choices as well: choices between administering fair justice and preserving a capability to mitigate human suffering. The public should not leave such choices to judges alone.

¹³² IMWINKELRIED, *supra* note 14, § 3.2.3 (original emphasis).

¹³³ "The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation." WIGMORE, *supra* note 15, § 2285.

¹³⁴ See UCMJ art. 36(a) (2014) (requiring Presidential approval to change the Military Rules of Evidence); Military Commissions Act of 2009, 10 U.S.C. § 949a(a) (2014) (allowing the Secretary of Defense, in consultation

with the Attorney General, to make changes to the Military Commission Rules of Evidence).

¹³⁵ 18 U.S.C. § 2340-2340b (2015).

¹³⁶ 24 U.S.C. § 1350 (2015).

¹³⁷ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

Rule 73

Privileged communications and information

4. The Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past official or employee of the International Committee of the Red Cross (ICRC), any information, documents or other evidence which it came into the possession of in the course, or as a consequence, of the performance by ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement, unless:

(a) After consultations undertaken pursuant to sub-rule 6, ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or

(b) Such information, documents or other evidence is contained in public statements and documents of ICRC.

5. Nothing in sub-rule 4 shall affect the admissibility of the same evidence obtained from a source other than ICRC and its officials or employees when such evidence has also been acquired by this source independently of ICRC and its officials or employees.

6. If the Court determines that ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than ICRC, the interests of justice and of victims, and the performance of the Court's and ICRC's functions.

Rule 501. General rule

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

- (1) The Constitution of the United States, as applicable;
- (2) An Act of Congress applicable to trials by military commissions;
- (3) These rules or this Manual; or

(4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence, insofar as the application of such principles in trials by military commissions is practicable and not contrary to or inconsistent with chapter 47A of title 10, United States Code, these rules, or this Manual.

(b) A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to:

- (1) Refuse to be a witness;
- (2) Refuse to disclose any matter;
- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

(c) The term “person” includes an appropriate representative of the Federal Government, a State, or political subsection thereof, or any other entity claiming to be the holder of a privilege.

(d) Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.

Book Reviews

The Wright Brothers¹

Reviewed by *Captain Nicholas C. Frommelt**

*It had taken four years. They had endured violent storms, accidents, one disappointment after another, public indifference or ridicule, and clouds of demon mosquitos . . . all to fly a little more than half a mile. No matter. They had done it.*²

I. Introduction

The Wright Brothers sit prominently in the American pantheon of historical figures.³ Two states' automobile license plates (perhaps somewhat ironically) lay claim to their invention, and three states quarrel over bragging rights for conceiving modern aviation.⁴ Indeed, it is difficult to overstate their importance. David McCullough's biopic has given life to these pioneers, coloring rich accounts of leadership, resiliency, grit, and collaboration. While these themes are well-tread for military leaders, McCullough's *The Wright Brothers* is a compelling case study in an important subject: innovation.⁵

Not only does a study of Orville and Wilbur Wright offer a valuable look at how innovation occurs organically, it also serves as an example of how innovation may fail without the conditions to foster its development. McCullough's biopic is a superb read for anyone, but it holds critical lessons in innovation for military leaders and judge advocates.

II. The "1000 Year Problem"⁶

McCullough begins his development of the Wrights as products of a liberal arts education, detailing a well-rounded, immersive approach to problem solving. The Wrights' parents steeped their childhood in everything from the classics of antiquity to contemporary scientific treatises.⁷ Reflecting on their accomplishments, Orville would remark that the Wrights "had no special advantages [T]he greatest thing in our favor was growing up in a family where there was always much encouragement to intellectual curiosity."⁸ Moreover, the Wrights had an incredible knack for mechanical problem solving. From printing presses to bicycles, the Wrights were "[e]ver enterprising, incapable of remaining idle"⁹

Captivated by the works of German glider enthusiast Otto Lilienthal, the Wrights studied aeronautics "as a physician would read his books."¹⁰ In his 1899 letter to the Smithsonian Institution, Wilbur began to orient himself to the problem of flight with a bold request: "I wish to avail myself of all that is already known"¹¹ Having no formal education in engineering and limited practical experience, such a request must have reeked of delusional grandeur. Sensing as much,

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¹ DAVID MCCULLOUGH, *THE WRIGHT BROTHERS* (2015).

² *Id.* at 106.

³ Ross Douthat, *The 100 Most Influential Figures in American History*, *THE ATLANTIC* (Dec. 2006), <http://www.theatlantic.com/magazine/archive/2006/12/the-100-most-influential-figures-in-american-history/305384/>. Based on a survey of ten "eminent historians," *The Atlantic* named Orville and Wilbur Wright as number twenty-three on its list of the 100 most influential figures in American history. *Id.*

⁴ Jim Siegel, *Ohio in First Flight Fight with Connecticut*, *THE COLUMBUS DISPATCH* (May 13, 2015, 6:18 AM), <http://www.dispatch.com/content/stories/local/2015/05/12/ohio-connecticut-first-flight.html> (discussing North Carolina's and Ohio's claims to the Wrights' innovation, memorializing their states connections on license plates, espousing the mottos "Birthplace of Aviation" and "First in Flight" respectively). Recently, Connecticut's legislature entered the fray, claiming that Gustave Whitehead made the first flight in 1901, two years before the Wright flight. *Id.* As noted by *The Dispatch* and McCullough, Whitehead's claims are dubious. MCCULLOUGH, *supra* note 1, at 260. McCullough concluded: "Strangely, the story still draws attention, despite the fact that there is still no proof." *Id.*

⁵ See, e.g., General Martin Dempsey, *18th Chairman's 2nd Term Strategic Direction to the Joint Force*, JOINT CHIEFS OF STAFF 6 (Jan. 2014), http://www.jcs.mil/portals/36/Documents/CJCS_2nd_Term

_Strategic_Direction.pdf (General Dempsey called "innovation and leader development" the cornerstone of the Nation's military advantage in his 2nd Term Strategic Objective.). Moreover, innovation figures prominently in the Air Force priorities. General Mark Welsh, Chief of Staff, U.S. Air Force, has said of innovation: "We were born from it." General Mark Welsh, *Remarks at Air Force Association Symposium*, U.S. AIR FORCE 10 (Feb 12, 2015), <http://www.af.mil/Portals/1/documents/af%20events/Speeches/af-150212-Welsh-AFA%20Remarks.pdf>. General Welsh continued, noting that "[e]very airman should be, can be, I believe must be innovative if we're to succeed in the future." *Id.* at 10-11.

⁶ After one failure with the Wrights' glider, Wilbur Wright remarked that "not in a thousand years would man ever fly." MCCULLOUGH, *supra* note 1, at 63. The Wrights had incredible resiliency in the face of repeated and overwhelming obstacles. See, e.g., *id.*

⁷ *Id.* at 17 (describing the Wrights' studies).

⁸ *Id.* at 18.

⁹ *Id.* at 23. The Wrights began selling and repairing bicycles in 1893, but the enterprise would not sustain their interest for long. *Id.* at 22. In 1896, Orville contracted typhoid, and Wilbur began reading works on aviation to Orville while bedridden. *Id.* at 28. The prospect of building a flying machine "infected" the brothers with "unquenchable enthusiasm and transformed idle curiosity into the active zeal of workers." *Id.* at 37.

¹⁰ *Id.* at 30.

¹¹ *Id.* at 27.

Wright defended: “I am an enthusiast, but not a crank in the sense that I have some pet theories as to the proper construction of a flying machine.”¹² So began the Wrights’ work—a journey from tinkerers to pioneers.

As the Wrights immersed themselves in the problem of flight from 1899–1903, they began to distill the critical issues associated with manned flight. They exhaustively studied the flights and wing shapes of different species of birds.¹³ Orville would write, “Learning the secret of flight from a bird . . . was a good deal like learning the secret of magic from a magician.”¹⁴ They made a major stride in focusing themselves on one major hurdle, stability in flight, as chronically neglected in the enterprises of their forbearers.¹⁵ The Wrights’ understanding of the mechanics of designing and riding bicycles naturally complemented their studies of aeronautics:¹⁶ “Equilibrium was the all-important factor, the brothers understood.”¹⁷

From thorough observation and continuous trial and error, the Wrights began work on their glider.¹⁸ Faced with repeated failures, the Wrights had to rethink the underpinnings of their design:

It was not just that their machine had performed so poorly, or that so much still remained to be solved, but that so many of the long-established, supposedly reliable calculations and tables prepared by the likes of Lilienthal, Langley, and Chanute—data the brothers had taken as gospel—had proven to be wrong and could no longer be trusted. Clearly those esteemed authorities had

been guessing, “groping in the dark.” The accepted tables were, in a word, “worthless.”¹⁹

The Wrights’ setbacks with the glider were only the beginning. They had several crashes,²⁰ injuries, and a brush with death.²¹ Indeed, their undertaking was so perilous that they would not fly together until well after refining their third Wright Flyer out of fear that the work could not continue if one of the brothers would die.²² They worked on a shoestring budget.²³ They conducted tests in an incredibly austere environment: The Outer Banks of Kitty Hawk, NC, were windswept and rugged.²⁴ They sustained life-threatening injuries, in one instance landing Orville in the hospital for weeks.²⁵ Following their work on stabilizing a glider in flight, the Wrights took on the task of building an engine, but they had no practical experience in combustion engines.²⁶ The Wrights leveraged the talents of Charlie Taylor, a “brilliant” local mechanic—a “godsend.”²⁷ Moreover, the Wrights faced a “still bigger challenge” in the design of the propellers.²⁸

Like any of the other problems they faced, the brothers immersed themselves in the problem, collaborated, and devised solutions—they innovated.²⁹ They learned from the successes and failures of others, like Langley and Chanute, as well as their own.³⁰ After several trials at Kitty Hawk, they devised a wind tunnel to test their rudders,³¹ enabling ongoing experimentation at their shop in Dayton.³² Moreover, they devised a way to stabilize their flyer with flexible wing surfaces.³³ They leveraged the talents of those around them,

¹² *Id.* at 32-33. McCullough notes that “strange or childish flying machines” served as a continuous source of comic relief in the press. *Id.* at 33.

¹³ *Id.* at 51-53.

¹⁴ *Id.* at 53.

¹⁵ The Wrights observed that “[e]quilibrium was the all-important factor . . . The difficulty was not to get into the air but to stay there. . . .” *Id.* at 38.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 56-63.

¹⁹ *Id.* at 63.

²⁰ *Id.*

²¹ *See, e.g., id.* at 106 (the “first ever airplane accident” caused from a gust of wind while not in flight); *id.* at 115 (Orville’s crash in the Flyer II); *id.* at 175-76 (Wilbur’s crash of the Flyer III in front of a large crowd at Le Mans, France); *id.* at 191-92 (Orville’s crash of the Flyer III that caused the death of Lt. Selfridge and Orville’s own life-threatening injuries at Fort Myer, VA). McCullough quotes Orville, stating that he said he “plunged straight down, ‘like a bird shot dead in full flight.’” *Id.*

²² *Id.* at 253. In all the years they had worked together, they never flew together, “so that if something were to go wrong and one of them should be killed, the other would live to carry on with the work.” *Id.*

²³ *Id.* at 108. The Wrights invested approximately \$1,000 into their first flyer design. *Id.*

²⁴ *Id.* at 40-41. The Wrights’ choice of Kitty Hawk was itself incredibly novel. They studied records of average wind velocities at over 100 locations. *Id.* at 40. Kitty Hawk provided not only high wind speeds but also remote isolation, affording the Wrights privacy. *Id.* at 41.

²⁵ *Id.* at 192.

²⁶ *Id.* at 87.

²⁷ *Id.* at 86.

²⁸ *Id.* at 88 (The Wrights drew on “several months of study and discussion” in understanding the mechanics of propellers.).

²⁹ *See, e.g., id.* at 88-90 (discussing their collaboration to solve the propeller problem).

³⁰ *See, e.g., id.* at 63 (The Wrights learned that they had to re-examine the data sets of Lilienthal, Langley, and Chanute.); *id.* at 101 (discussing lessons learned from Langley’s work).

³¹ *Id.* at 69-70.

³² *Id.* at 70. The Wrights tested “some thirty-eight wing surfaces, setting the ‘balances’ or ‘airfoils’—the different-shaped hacksaw blades—at angles from 0 to 45 degrees in winds up to 27 miles per hour.” *Id.*

³³ *Id.* at 63-64, 90.

like Charlie Taylor.³⁴ Where Samuel Langley failed with a \$70,000 budget,³⁵ the Wrights succeeded with \$1,000.³⁶ Even after their first flight, they continued to learn from mishaps and persevered after crashes.³⁷ They constantly refined and re-designed to increase distance and speed.³⁸

Upon successfully making their first flight at Kitty Hawk in 1903,³⁹ there was little traction for an event that would become a defining moment in the 20th century. They faced widespread incredulity, even from the Smithsonian Institution that provided the background materials for their undertaking.⁴⁰ It was not until May 1909 that President Taft recognized the accomplishment.⁴¹ Though several news outlets reported the first flight, “little happened as a consequence.”⁴² The French dismissed the accomplishment outright as a fraud,⁴³ though the French later showered effusive praise on the Wrights.⁴⁴ Years passed, with repeated signals of disinterest from the U.S. Government and the War Department, without any recognition of the significance of the event.⁴⁵ Following several successful demonstrations in France, the Wrights would receive broad recognition for their accomplishments in the United States.⁴⁶ In 1909, following a demonstration at Fort Myer, VA, the Wrights finally executed a contract with the War Department.⁴⁷

Readers will know the outcome before they begin reading: The Wrights would persevere and go down as pioneers of modern aviation. The rub, which McCullough masterfully depicts, is how their innovation took them from a bicycle shop to world-famous flyers.

III. Innovation in Action

Civilian and military audiences alike will find McCullough’s *The Wright Brothers* as a smoothly written, edifying historical account. However, there are some vital lessons that are pertinent for a military audience. McCullough provides a case study in the organics of innovation. Moreover, this book contains a subtle lesson in how leaders and institutions respond to the innovators around them.

The Air Force’s Vision Statement focuses on “Airmen, Mission, and Innovation.”⁴⁸ General Mark Welsh, the Air Force Chief of Staff, emphasized the critical nature of empowering Airmen to innovate:

This spirit of innovation, of seeing problems from an alternative perspective, is in our culture, in our heritage, and in every Airman Airmen characteristically view security challenges differently—globally, without boundaries The Air Force’s competitive advantage begins with its ability to recruit, develop, and retain innovative warriors with strong character Even though the Air Force has become significantly smaller since 1947, our Nation has maintained an asymmetric airpower advantage because Airmen continue to lead the way in integrating military capabilities across air, space, and cyberspace. In the face of an unknown and unpredictable future, the American military’s

³⁴ *Id.* at 86-88, 92.

³⁵ *Id.* at 93. Langley received \$50,000 from the publicly-funded Smithsonian Institute. *Id.* Private contributions to Langley totaled an additional \$20,000. *Id.* Langley would fail for a third time in late 1903 (a couple weeks prior to the Wrights’ first flight), and the Washington Post would call for defunding Langley’s enterprise. *Id.* at 100.

³⁶ *Id.* at 108.

³⁷ See, e.g., *supra* note 21 and accompanying text (describing Wilbur’s crash of the Flyer III at Le Mans, France and Orville’s crash of the Flyer III that caused the death of Lt. Selfridge and Orville’s own life-threatening injuries at Fort Myer, VA).

³⁸ The Wrights continued to set records for distance flown. Their first flight flew 852 feet in 59 seconds. MCCULLOUGH, *supra* note 1, at 106. While demonstrating the Flyer III at Fort Myer, VA, Orville would set “a new world record” by remaining in the air for an hour and six minutes. *Id.* at 185. Wilbur made another record-breaking flight in France, flying over one and a half hours at Camp d’Auvours. *Id.* at 197. Wilbur would later win the newly established “Michelin Cup” by flying 2 hours and 0 minutes, a distance of 77 miles. *Id.* at 210.

³⁹ *Id.* at 107.

⁴⁰ *Id.* at 32-33.

⁴¹ *Id.* at 229.

⁴² *Id.* at 110, 128.

⁴³ *Id.* at 132 (recounting the *Paris Herald* mocking the Wrights in an editorial “Flier or Liars”). The French Government was particularly dismissive prior to witnessing the flyer firsthand: McCullough writes, “At the war ministry it was being said the Wrights were ‘bluffers like all Americans’ . . . [and were] ‘worthless people’ trying to sell to France ‘an object of no value’ that even the Americans did not believe in.” *Id.* at 142.

⁴⁴ *Id.* at 203 (discussing how “[n]ot since Benjamin Franklin had any American been so overwhelmingly popular in France.”). The French would later hail the brothers as exhibiting “the grit and indomitable perseverance that characterize American efforts in every department of activity.” *Id.*

⁴⁵ *Id.* at 111, 123, 128. Shortly after flights in Dayton, the Wrights received a “standard reply sent irrespective of the fact that the Wrights had made no appeal for financial support.” *Id.* at 123. McCullough hypothesizes that such a response may be a function of “extreme wariness” after Langley’s failures, “plain bureaucratic ineptitude,” or even that the claims made by the Wrights “seemed too preposterous to be taken seriously.” *Id.*

⁴⁶ *Id.* at 230. The Wrights received praise from President Taft and visited the White House in 1909. *Id.*

⁴⁷ *Id.* at 238. The War Department paid \$30,000 for a flyer after it demonstrated a successful flight from Fort Myer, VA, to Alexandria, VA (approximately 10 miles). *Id.*

⁴⁸ General Mark Welsh, *The Power of Airmen*, U.S. AIR FORCE (Aug. 15, 2013), <http://www.af.mil/News/ArticleDisplay/tabid/223/Article/466873/the-power-of-airmen.aspx>.

ability to conduct successful joint operations is enhanced by the power of Airmen.⁴⁹

Innovation is at the core of U.S. military power, and few have embodied innovation quite like the Wrights. They demonstrated resiliency, grit, and collaboration in their efforts to innovate. They showed an acute knack for working analytically, where hard work alone would not be enough. Through exhaustive observation and testing, they pinpointed where others had erred in developing flying machines.⁵⁰ They shortened their learning curve by developing testing mechanisms like a rudimentary wind tunnel.⁵¹ Simply put, their success was a function of recognizing the need to innovate in order to succeed.

Perhaps more importantly, McCullough's work provides a case study for harnessing the innovation of others. *The Wright Brothers* offers a cautionary tale of bureaucracy obfuscating truly groundbreaking work. As noted, the U.S. Government took nearly six years to realize the significance of the 1903 Kitty Hawk flight.⁵² The failures to recognize the importance of the Wrights' innovation ought to serve as a note of caution to all leaders. It is critical to harness the vision and innovative spirit of the proverbial bicycle shop tinkerers in every organization.

In Colin Clark's recent editorial, *Can the Air Force Innovate? Snake Clark And Buzz Moseley*, Clark notes, "One of the standard comments you'll hear about smart colonels is that they were pushed out before they could win a star, precisely because they had a really good idea or two and were thus far too disruptive to the status quo."⁵³ Military members are charged with the imperative to innovate. Similarly, leaders must recognize and foster innovation occurring in their midst.

This imperative applies uniquely to judge advocates. Not only must judge advocates innovate to accomplish daily missions,⁵⁴ judge advocates must enable commanders and clients to innovate. In facilitating commanders' focus on the

mission, it is always easy to cite a rule as to why a course of action will not work. It is often more difficult to innovate, to help develop a new course of action that will work. Judge advocates will learn much from the innovative spirit embodied in McCullough's *The Wright Brothers*.

IV. Conclusion

David McCullough's *The Wright Brothers* is an outstanding read for even the casual student of history. His smooth account is as thought provoking as it is enjoyable. Moreover, McCullough delivers a compelling case study in innovation. Civilians and military members of all occupations and services will find tremendous value in following the Wrights' journey from their Dayton bicycle shop to worldwide recognition as the fathers of modern aviation.

⁴⁹ General Mark Welsh, *Global Vigilance, Global Reach, Global Power for America: The World's Greatest Air Force—Powered by Airmen, Fueled by Innovation*, AIR AND SPACE POWER JOURNAL 4-5 (Mar.-Apr. 2014), <http://www.airpower.maxwell.af.mil/article.asp?id=191>.

⁵⁰ See, e.g., MCCULLOUGH, *supra* note 1, at 69 (discussing how the Wrights determined that Lilienthal & Chanute erred, and how the Wrights set out to "crack the code of aeronautics themselves").

⁵¹ *Id.* 69-70 (discussing the Wrights' development of a wind tunnel for testing wings). Chanute remarked that they were "better equipped to test the endless variety of curved surfaces than anybody has ever been." *Id.* at 70.

⁵² *Id.* at 238. It took the War Department until 1909 to understand the value of the Wright Flyer. *Id.* They paid \$30,000 for a flyer after it demonstrated a successful flight from Fort Myer, VA to Alexandria, VA. *Id.*

⁵³ Colin Clark, *Can the Air Force Innovate? Snake Clark and Buzz Moseley*, BREAKING DEFENSE (Jul. 24, 2015), [http://breakingdefense.com/2015/07/can-the-air-force-innovate-snake-clark-](http://breakingdefense.com/2015/07/can-the-air-force-innovate-snake-clark-and-buzz-moseley/)

[and-buzz-moseley/](http://breakingdefense.com/2015/07/can-the-air-force-innovate-snake-clark-and-buzz-moseley/). Clark cites examples of military officers attempting to innovate at the expense of their careers. *Id.* Former Air Force Chief of Staff, General T. Michael "Buzz" Moseley, remarked that Moody Suter was such an individual who faced detractors trying to silence his innovation. *Id.* Suter was critical in the development of the Air Force's Red Flag exercise, which became a marquee training event. *Id.* Suter developed Red Flag to be "highly realistic training designed to ensure American and allied pilots survived their first ten missions, when a pilot historically faced the greatest chances of being shot down . . ." *Id.*

⁵⁴ Innovations in legal offices may be as small as refining the way attorneys provide legal assistance. A recent *Air Force Reporter* article highlighted using a "Legal Assistance Prescription Pad" for improving client services. See Captain Rodney Glassman and Senior Airman Diego Bermudez, *Exporting Best Practices to Your Next Base: The Legal Assistance Prescription Pad*, 24 THE REPORTER 34 (2015), <http://www.afjag.af.mil/shared/media/document/AFD-150427-034.pdf>.

Book Reviews

Pay Any Price: Greed, Power, and Endless War¹

Reviewed by Lieutenant Commander Aaron M. Riggio*

*Confirmation Bias: The tendency to interpret new evidence as confirmation of one's existing beliefs or theories.*²

I. Introduction

Billions of U.S. dollars were flown into Iraq and remain completely unaccounted for. The U.S. government paid for fraudulent technology purported to sniff out terror plots that nearly resulted in the downing of civilian airliners. Without legal basis, two consecutive presidential administrations promoted enhanced interrogation techniques and domestic surveillance. In the 2014 book *Pay Any Price*, renowned journalist James Risen³ promises these examples and more as evidence of the moral decay of Washington, D.C., fueled by greed, a thirst for power, and an addiction to a state of war.⁴ Risen attempts to expose the hidden costs of the global war on terror, if not in terms of currency, then as an erosion of transparency, legitimacy, and national morals.

Risen builds his case with vignettes categorized under the headings of greed, power, and endless war. While the sum of the stories paints a compelling picture of the secondary and tertiary effects of the global war on terror, *Pay Any Price* fails to serve as a convincing argument for anything. Rather, the book espouses the belief that the excesses of war and the broadening governmental powers of the past fourteen years are sins of the greedy and power-hungry and never considers whether simpler explanations are plausible.

A reading of *Pay Any Price* is incomplete without some understanding of Risen's background. In December 2005, Risen published an expose in *The New York Times* on the National Security Agency's domestic surveillance program; two weeks following the *Times* story, Risen's book *State of War* was published discussing the domestic surveillance

program in great detail in addition to previously undisclosed intelligence and covert military operations.⁵ As one reviewer describes, *State of War* focused intently on the abuses of the senior-most members of the Bush administration in the years immediately following the terrorist attacks of 9/11.⁶

A seven-year-long legal battle ensued, as Risen locked horns with the Justice Department over the naming of his sources for the book.⁷ The Bush administration investigated, and ultimately the Obama administration prosecuted a former Central Intelligence Agency (CIA) officer for unauthorized disclosure of classified material.⁸ Through the criminal discovery process, the Department of Justice sought the names of Risen's sources for *State of War* through court orders.⁹ Risen refused.¹⁰ The Fourth Circuit ordered Risen to comply, and his writ of certiorari to the U.S. Supreme Court was denied;¹¹ nonetheless, the Department of Justice relented and Risen remained silent.¹² During this prolonged legal battle, Risen wrote *Pay Any Price*.¹³ It is difficult to read *Pay Any Price* and ignore Risen's palpable frustration with the U.S. government. While Risen tells a compelling story that forces the reader to consider the impacts of broad government power and prolonged armed conflict under the post-9/11 paradigm, one can not help but think his conclusion was drawn long before he found the supporting stories. Combined with Risen's reliance on anonymous sources, the book's tone undercuts the overall persuasiveness. It is an unfortunate result, because the stories Risen tells, if factually accurate, are troubling; and it is unfortunate that the reader is left with that lingering question: Are the stories factually accurate?

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¹ JAMES RISEN, *PAY ANY PRICE: GREED, POWER, AND ENDESS WAR* (2014).

² *Confirmation Bias*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/confirmation-bias (last visited Sept. 18, 2015).

³ A short biography of Mr. Risen chronicles twenty years of experience reporting on national security and intelligence for the *Los Angeles Times* and *The New York Times*. *James E. Risen Biography*, THE PULITZER PRIZES, <http://www.pulitzer.org/biography/2006-National-Reporting-Group1> (last visited Sept. 18, 2015).

⁴ According to Risen, "the central narrative of the war on terror" is a combination of "those trying to monetize America's obsession with terrorism," "[a]mbition and a hunger for power, status, and glory," and "troubling . . . abuses of power that have extended across two presidencies for well over a decade." RISEN, *supra* note 1, at xxvvi.

⁵ *Id.* at 272.

⁶ Major Danyele M. Jordan, *State of War: The Secret History of the CIA and the Bush Administration*, ARMY LAW., Aug. 2007, at 68 (book review).

⁷ RISEN, *supra* note 1, at 269-70.

⁸ Matt Apuzzo, *Times Reporter Will Not Be Called to Testify in Leak Case*, N.Y. TIMES (Jan. 12, 2015), <http://www.nytimes.com/2015/01/13/us/times-reporter-james-risen-will-not-be-called-to-testify-in-leak-caselawyers-say.html>.

⁹ *Id.*

¹⁰ *See id.*

¹¹ *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014).

¹² Apuzzo, *supra* note 8.

¹³ RISEN, *supra* note 1, at 273.

II. Unifying Themes

Risen exposes his bias from the start with the book's section titles: greed, power, and endless war. Although effective distinctions in theory, the stories within the book rarely fit neatly into just one of these categories, or even in any of the three. By forcing this construct on the reader, Risen is attempting to bolster his theory that the outcomes of the war on terror can all be attributed to government action.

The first example of this failed construct is the chapter titled "The New Oligarchs." This chapter devotes significant discussion to private individuals and companies who have enjoyed enormous success as financial partners in the global war on terror. First, Risen turns to brothers Neal and Linden Blue, owners of General Atomics, the company responsible for production of Predator and Reaper remotely piloted aircraft (RPA).¹⁴ In the same breath that Risen discusses how much money the Blue brothers have made off RPA sales, he criticizes the government's use of RPAs due to the danger to civilians, issues of territorial sovereignty, and international rebuke.¹⁵ Risen gives similar treatment to two other companies, equating firms that were granted government contracts and were tangentially involved in controversy with the controversy itself.¹⁶

However, there is no evidence put forward to suggest that the subjects of the chapter secured these lucrative deals with the government because they were greedy;¹⁷ they were simply in the right place at the right time. Moreover, the fact that the companies experienced a windfall hardly links them to government policies or actions.¹⁸ Risen's insistence on discussing these contracts shows his desire to discuss controversial government actions in any way possible.

Risen has similar difficulty in the chapter titled "Alarbus." By all accounts, the intelligence operation described in this chapter, which includes use of a notorious Palestinian money launderer, contracted assassinations, and black market sales of RPAs, is worthy of criminal investigation and appropriate accountability.¹⁹ However, "Alarbus" falls under the section titled "Power," yet little of Risen's exposé into the program is unique to government

contracts, wartime in general, or the war on terror. Similar criminal activity can be found anywhere.

By misdirecting the attention toward the government, Risen misses an opportunity to discuss the real issues in these stories. When discussing "The New Oligarchs," Risen never addresses the questions underlying whether targeted strikes by RPAs is legally or morally justified; he simply blames the manufacturers for getting rich.²⁰ Risen could discuss governmental oversight of contractors or the lack of communication between executive agencies in "Alarbus." Instead, the author chooses to force a square peg into a round hole by implying that federal agents were behind the planned criminal acts.²¹

Many of the stories within *Pay Any Price* depict over-compartmentalization and a lack of transparency. Unfortunately, these themes do not fit Risen's narrative as he intends. An unwieldy bureaucracy rife with inefficiency (particularly when dealing with classified matters), is less Orwellian than the over-reaching and morally corrupt government that Risen wants to depict. Where Risen sees opportunistic grabs for power and money, an unbiased reader sees over-classification, interagency firewalls, and a government struggling to adapt to an unconventional enemy. The problems may be clear through either lens, but while the latter could lead to proposals for resolution, the former simply demonizes the people involved.

III. The Peril of Anonymity

Risen conducts a preemptory strike against the undeniably largest criticism of *Pay Any Price*. Preceding the prologue, Risen provides "A Note on Sources," indicating he is at least aware of the stark lack of citation to any authority in his work. The author would have the reader accept that "[t]his book would not be possible without the cooperation of many current and former government officials . . . willing to discuss sensitive matters only on condition of anonymity."²²

Undoubtedly, the use of anonymous sources remains a key component to investigative journalism.²³ Risen himself

¹⁴ *Id.* at 56.

¹⁵ *Id.* at 59-62.

¹⁶ The second of the "New Oligarchs" is CACI International Inc., a defense and intelligence contractor that employed interrogators at Abu Ghraib prison in Iraq; Risen takes issue with CACI's role in detainee abuse at the prison and the fact that CACI continued to secure government contracts after the scandal became public. *Id.* at 62-64. The third example is Robert McKeon, a Wall Street investor who made substantial profit in buying and selling a company that secured contracts for training police in Iraq and Afghanistan; the link to greed is most tenuous with this example and Risen even struggles to find much controversy with the specific contract, making McKeon's inclusion in this chapter all the more questionable. *Id.* at 64-66.

¹⁷ This criticism is echoed by Risen's own employer in a book review of *Pay Any Price*. See Louise Richardson, *James Risen's 'Pay Any Price'*, N.Y. TIMES (Oct. 15, 2014),

http://www.nytimes.com/2014/10/26/books/review/james-risens-pay-any-price.html?_r=0.

¹⁸ The *New York Times* review similarly agrees with this criticism. *Id.*

¹⁹ RISEN, *supra* note 1, at 123-41.

²⁰ By analogy, "The New Oligarchs" reads like a hypothetical rebuke of Ford Motor Company for profiting on vehicle sales when some of those vehicles result in motor vehicle deaths due to negligent drivers—the logic is specious.

²¹ RISEN, *supra* note 1, at 123-41.

²² *Id.* at ix.

²³ For discussion of the current legal construct of a "reporter's privilege" under the First Amendment, particularly in light of Risen's involvement in the Fourth Circuit Court of Appeals, see Amanda A. Konarski, *The*

remains committed to protecting his sources, even in the face of potential judicial contempt proceedings.²⁴ However, as noted in *The New York Times* review of *Pay Any Price*, Risen seems to apply the principle of anonymous sourcing to every proposition within the book, even those clearly not requiring such protections.²⁵ The effect on the reader is a tendency to question every statement, especially in light of Risen's clear bias.²⁶

IV. A Hoax of Epic Proportions

In the chapter titled "The Emperor of the War on Terror," Risen details the exploits of Dennis Montgomery, a man who convinced the government to invest heavily in software technology that likely never existed.²⁷ It is Risen's best work. In addition to his penchant for gambling and his ability to attain wealthy investors, Montgomery repeatedly managed to hoodwink government agencies into believing he had the next greatest tool in combatting terrorists.²⁸

According to Risen, Montgomery peddled video compression software, facial recognition technology, and a proprietary video decoding program to the CIA and the Pentagon.²⁹ To secure these contracts, Montgomery staged fraudulent demonstrations of the recognition technology³⁰ and provided volumes of false "hidden codes" pulled from network news broadcasts, supposedly directives to Al Qaeda sleeper cells.³¹ Due to the highly classified nature of the programs there appears to have been little or no verification of Montgomery's claims or oversight of his operations;³² similarly, because the contracting officials were likely embarrassed, Montgomery was able to secure subsequent government contracts even after suspicions were raised because each agency kept its suspicions internal.³³

It is a remarkable tale not only for Montgomery's willingness and ability to con the U.S. government, but for the federal agencies' inability or unwillingness to verify what

they were buying. It also starkly displays the danger of over-classification and compartmentalization; as Risen shows, when a program is labeled "secret," it is imbued with authority and there is less oversight allowed.³⁴ Montgomery's tale has garnered more attention than many of the other stories from *Pay Any Price*,³⁵ and not surprisingly it is one of Risen's better sourced chapters.³⁶ Following publication of *Pay Any Price*, Montgomery sued Risen for defamation, and the case is currently pending.³⁷

V. Conclusion

Pay Any Price is compelling. The stories within are unsettling. Simply exposing the details of each story (with more robust citations) would add Risen's latest publication to the national dialogue about our nation's response to the lingering threat of terrorism.

Unfortunately, Risen cannot help himself and simply brings too much personal baggage to the discussion to make this book a scholarly work. Risen admits as much in the afterword:

In 2009, when the new Obama administration continued the government's legal campaign against me, I realized, in a very personal way, that the war on terror had become a bipartisan enterprise. . . . And so my answer—both to the government's long campaign against me and to this endless war—is this new book, *Pay Any Price*. . . . *Pay Any Price* is my answer to how best to challenge the government's draconian efforts to crack down on aggressive investigative reporting and suppress the truth in the name of ceaseless war.³⁸

Risen may justifiably feel persecuted, but this book is anything but unbiased. Unfortunately, with Risen's background in mind, *Pay Any Price* reads like the latest

Reporter's Privilege is Essential to Checks and Balances Being Accessible to the American Public, 11 SETON HALL CIR. REV. 258 (2014).

²⁴ Discussed *infra*, Section I.

²⁵ Richardson, *supra* note 16. One example Richardson points to is a quote for how much money the U.S. government has spent on the global war on terror.

²⁶ See *infra* Section I.

²⁷ RISEN, *supra* note 1, at 31-53.

²⁸ *Id.*

²⁹ *Id.* at 35.

³⁰ *Id.* at 37.

³¹ *Id.* at 44-46.

³² *Id.* at 43.

³³ RISEN, *supra* note 1, at 47-48.

³⁴ *Id.* at 44.

³⁵ See, e.g., Aram Roston, *The Man Who Conned the Pentagon*, PLAYBOY MAGAZINE, Jan.-Feb. 2010, http://www.stopdown.net/Dennis_Montgomery_Playboy.html; Eric Lichtbau & James Risen, *Hiding Details of Dubious Deals, U.S. Invokes National Security*, N.Y. TIMES (Feb. 19, 2011), http://www.nytimes.com/2011/02/20/us/politics/20data.html?_r=2; Morgan Till, *James Risen: Government Crackdown on Whistleblowers Bad for Democracy*, PBS NEWSHOUR (Oct. 13, 2014), <http://www.pbs.org/newshour/rundown/james-risen/>.

³⁶ Risen's sources include former employees of Montgomery, court documents from related lawsuits between Montgomery and investors, former CIA and White House officials, and Montgomery's former attorney. RISEN, *supra* note 1, at 31-53.

³⁷ Steven Nelson, *Journalist James Risen Sued for Reporting Post-9/11 Contractor Was Con Man*, U.S. NEWS & WORLD REPORT (Feb. 25, 2015), <http://www.usnews.com/news/articles/2015/02/25/journalist-james-risensued-for-reporting-post-9-11-contractor-was-con-man>.

³⁸ RISEN, *supra* note 1, at 272-73.

sophomoric volley in a war between intransigent sides. As if publishing further examples of government waste or incompetence will prolong the author's status as a media hero, Risen seems at least equally interested in provoking a response as he does in promoting change. Perhaps this explains why, despite the compelling narrative, *Pay Any Price* falls short of any concrete recommendations for how to move forward.

Unfortunately, Risen's best ideas are the victims of his tone and motivation. Where he succeeds in detailing what he terms the "homeland security-industrial complex," the never-ending supply of cash and demand for solutions to the new problem of terrorism, he never suggests how the nation could have responded to 9/11 that would have avoided this outcome.³⁹ Likewise, his stories are devoid of any analysis about the controversial topics (such as enhanced interrogation or domestic surveillance) that he calls immoral and illegal; for Risen, those issues have been long-since settled.

Lastly, almost lost in the book is a profound statement worthy of its own treatise. In reviewing the immediate aftermath of the attacks of 9/11, Risen draws a significant conclusion. He states:

But for the Bush administration, using the courts was never an option. . . . Bush brushed aside the FBI and Justice Department, and turned instead to the Pentagon and Central Intelligence Agency . . . [and] reached for a national security answer to terrorism rather than a law enforcement solution. That would turn out to be the crucial decision that would alter the history of the next decade.⁴⁰

One wonders how compelling *Pay Any Price* could have been with this as its main theme.

For civil liberty advocates, anti-war voices, and Risen's sympathizers, *Pay Any Price* provides ample cause for teeth-gnashing and consternation and will only confirm the original biases brought to the reading. For those readers seeking more—either furtherance of a dialogue or new research to consider—they are likely to be disappointed. Regardless of the audience's predisposition, the themes of *Pay Any Price* are troubling and thought-provoking and merit further discussion, even if Risen shows little interest in engaging in that discussion himself.

³⁹ *Id.* at xiii.

Soon, a counterterrorism bubble, like a financial bubble, grew in Washington, and a new breed of entrepreneur learned that one of the surest and easiest paths to riches could be found not in Silicon Valley building computers or New York designing clothes but rather in Tysons Corner, Virginia, coming up with new ways to predict, analyze, and prevent terrorist attacks—

or, short of that, at least in convincing a few government bureaucrats that you had some magic formula for doing so.

Id. at 31.

⁴⁰ *Id.* at 76.

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