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COMBAT STRESS CLAIMS: VETERANS' BENEFITS AND POST-SEPARATION CHARACTER OF SERVICE UPGRADES FOR "BAD PAPER" VETERANS AFTER THE FAIRNESS FOR VETERANS ACT

MAJOR BRYANT A. BOOHAR[*]

"The painful paradox is that fighting for one's country can render one unfit to be its citizen."[1]

I. Introduction

After seventeen straight years of fighting wars in foreign lands, the United States now faces a significant public health epidemic here at home. The U.S. Department of Veterans Affairs (VA) estimates that twenty veterans commit suicide every day.[2] Alarmingly, only thirty percent of

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[1] JONATHAN SHAY, ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER xx (2010).

[2] *See* News Release, U.S. Department of Veterans Affairs, VA Releases Veterans Suicide Statistics by State (Sept. 15, 2017), https://www.va.gov/opa/pressrel/includes/viewPDF.cfm?id=2951.

those veterans who take their own lives receive services through the VA.[3] While some veterans voluntarily choose not to seek VA services, there remain a great number of former service members who find themselves ineligible for many VA services due to misconduct that they engaged in while on active duty.[4]

When deciding to separate service members for misconduct, commanders routinely turn to their legal advisors for advice on how the character of service of the proposed discharge is likely to impact the service member's future eligibility for VA services. However, recent changes to both law and policy, including the Fairness for Veterans Act,[5] make the analysis more complex and the outcome less certain. The purpose of this article is to provide command legal advisors with a better understanding of the effect that the character of service of a service member's discharge may have on his or her VA eligibility and the challenges that he or she is likely to encounter when attempting to upgrade the character of service post-separation under the current law and policy.

Put simply, if a service member commits misconduct while on active duty and is then separated from the military with "bad paper," or a less than honorable character of service, his or her access to VA services may be severely limited or even completely cut off. Unfortunately, many of these "bad paper" veterans also suffer from the invisible wounds of war, including Post-Traumatic Stress Disorder (PTSD) and related behavioral health conditions.[6] Especially when left untreated, these conditions can lead to widespread negative effects for former service members and for society at large, including the devastating impact of suicide and the commission of violent criminal acts by veterans.[7]

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[3] *See id.*

[4] *See* Major John W. Brooker et al., *Beyond "T.B.D.": Understanding Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1, 17 (2012) (discussing in depth the challenges of "'bad paper' veterans" as they navigate the complex system of veterans benefits).

[5] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2919 (2016), *amended by* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 520, 131 Stat. 1332 (2017).

[6] *See* HANNAH FISCHER, CONG. RESEARCH SERV., RS22452, A GUIDE TO MILITARY CASUALTY STATISTICS: OPERATION FREEDOM'S SENTINEL, OPERATION INHERENT RESOLVE, OPERATION NEW DAWN, OPERATION IRAQI FREEDOM, AND OPERATION ENDURING FREEDOM 2-5 (2015).

[7] *See* Brandt A. Smith, *Posttraumatic Stress Disorder (PTSD) in the Criminal Justice System*, 29 MILITARY PSYCHOLOGIST 8 (2014),

In the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017), Congress passed, and the President signed into law, the bipartisan Fairness for Veterans Act.[8] This law was designed to make it easier for Iraq and Afghanistan-era "bad paper" veterans suffering from PTSD and related behavioral health conditions to successfully upgrade their character of service, thereby removing a significant barrier to VA services.[9] The law states that Discharge Review Boards shall give "liberal consideration" to character of service upgrade petitions by former service members suffering from PTSD and related behavioral health conditions.[10] Discharge Review Boards have a fifteen-year statute of limitations from the date of discharge and, accordingly, are typically used by more recently discharged veterans.[11]

Then, on 25 August 2017, the Department of Defense (DoD) issued clarifying guidance that interprets, and in some cases may limit, the application of the "liberal consideration" standard.[12] Lawmakers reaffirmed their stance on this issue on 12 December 2017, when the application of the "liberal consideration" standard was expanded to Boards for the Correction of Military Records, which have a waivable three-year statute of limitations and are more typically used by veterans of older conflicts, such as Vietnam veterans, who are beyond the statute of limitations for the Discharge Review Boards.[13]

The recent policy changes and the Fairness for Veterans Act take substantial steps towards expanding access to VA services for "bad paper" veterans suffering from PTSD and related behavioral health conditions.

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https://www.militarypsych.org/uploads/8/5/4/5/85456500/military_psychologist_29-1.pdf (discussing the prevalence of violent crimes committed by veterans with PTSD).

[8] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2919 (2016), *amended by* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 520, 131 Stat. 1332 (2017).

[9] *See Charlie Foxtrot*, WXIA-TV (Nov. 2016), http://www.charliefoxtrot.org [hereinafter Charlie Foxtrot].

[10] *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2919 (2016), *amended by* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 520, 131 Stat. 1332 (2017).

[11] *See* 10 U.S.C. § 1553(a) (2018).

[12] *See* Memorandum from Under Sec'y of Defense to Sec'ys of the Military Departments, subject: Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment (25 Aug. 2017) [hereinafter Clarifying Guidance].

[13] *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 § 520, 131 Stat. 1332 (2017).

However, it is critically important for legal advisors in the field to understand the process for VA eligibility and post-separation character of service upgrades when advising commanders prior to a service member's separation. To that end, this article begins with a discussion of the barriers to entry into the VA system as well as the development of the military's understanding of the symptoms and prevalence of PTSD within the ranks. This article then analyzes the development of the "liberal consideration" standard that is applied to post-separation character of service upgrade petitions, the problems with the standard's application at the board level, and the potential impact of the Fairness for Veterans Act and current DoD policy. Finally, this article suggests considerations that legal advisors in the field can incorporate into their advice to commanders prior to separating service members suffering from PTSD and related behavioral health conditions. By understanding the challenges that "bad paper" veterans face after separation, commanders can better ensure that their intent is being met and that the interests of the military, "bad paper" veterans, and the public are properly balanced.

II. "Bad-Paper" Paradox: Barriers to VA Services

Combat stress related disorders are as old as combat itself. In his book *Achilles in Vietnam*,[14] Dr. Jonathan Shay highlights this point by showing the similarities between his Vietnam veteran patients still suffering from PTSD and Homer's epic portraits in *The Illiad* of the negative effects of combat stress on Trojan War soldiers.[15] Dr. Shay explains that "unhealed PTSD can devastate life and incapacitate its victims from participation in the domestic, economic, and political life of the nation."[16]

Obviously, some physical combat injuries are relatively easy for medical professionals to observe and promptly initiate profiles, or even medical separations or retirements. The invisible wounds of PTSD, however, lurk beneath the surface and are often much more difficult to

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[14] SHAY, *supra* note 1.

[15] *See id.* For example, Dr. Shay describes Achilles' reaction to Agamemnon's theft of his war prize, the captured woman Briseis, and Hector's killing of Achilles' close friend Patroklos, as follows, "His [indignant wrath], restrained at the brink of cutting down Agamemnon, is diverted to hacking away emotional bonds and driving away those he used to love . . . . [Indignant wrath] is also the first and primary trauma that converted subsequent terror, horror, grief, and guilt into a lifelong disability for Vietnam veterans." *Id.* at 21.

[16] *Id.* at xx.

recognize, assess, and diagnose.[17] Complicating the issue, PTSD often does not fully manifest until a service member returns to garrison and begins having difficulty reintegrating to life at home.[18] Making matters worse, some service members try to self-medicate the symptoms by turning to alcohol and illegal drugs.[19] These untreated symptoms, especially when fueled by substance abuse, can quickly send a service member into a spiraling decent of poor work performance, undesired behaviors at work and at home, and eventually career ending misconduct.[20] These misbehaviors can cause these suffering service members to place themselves at risk of misconduct separations.[21]

In order to better understand the challenges that "bad paper" veterans face after separation, it is important to understand their operating environment. To that end, this section discusses the framework for attaining access to VA services, the current understanding of PTSD symptoms and its prevalence among service members, and the significant correlation between PTSD and misconduct.

A. "Veteran" Status: The Threshold for Accessing VA Services

Generally, a former service member must apply for "veteran" status with the VA before accessing services though the VA.[22] "Veteran" status

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[17] *See* Rand Corp., Invisible Wounds: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery (Terri Tanielian & Lisa H. Jaycox eds., 2008).

[18] *See* Hans Pols & Stephanie Oak, *War and Military Mental Health: The U.S. Psychiatric Response in the 20th Century*, 97 AM. J. PUB. HEALTH 2132 (2007); Major Cara-Ann M. Hamaguchi, *A Precarious Balance: Managing Stigma, Confidentiality, and Command Awareness in the Mental Health Arena*, 222 MIL. L. REV. 156 (2014).

[19] *See* Karen H. Seal et al., *Substance Abuse Disorders in Iraq and Afghanistan Veterans in VA Healthcare, 2001-2010*, 116 DRUG AND ALCOHOL DEPENDENCE 93 (2011).

[20] *See id.*

[21] *See* U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS, para. 14-12 (19 Dec. 2016) [hereinafter AR 635-200].

[22] On 9 January 2018, President Donald Trump signed an executive order stating his policy to "improve mental healthcare and access to suicide prevention resources available to veterans." President Trump further ordered "the Secretary of Defense, the Secretary of Veterans Affairs, and the Secretary of Homeland Security [to] submit . . . a Joint Action Plan that describes concrete actions to provide, to the extent consistent with law, seamless access to mental health treatment and suicide prevention resources for transitioning uniformed service members in the year following discharge, separation, or retirement." Exec. Order. No. 13,822, Fed. Reg. 1513 (Jan. 9, 2018). On 3 May 2018, the Secretary of the Department of Veterans Affairs (VA) Robert L. Wilkie submitted to President Donald Trump a Joint Action Plan which sets out three primary goals:

requires that a former service member meet the minimum service requirement and have a qualifying character of service.[23] In order to meet the service requirement, a former service member must serve the lesser of twenty-four months, or the full period of his or her initial obligation period, on "active military, naval, or air service."[24] Former service members who meet the service requirement must also have a discharge with a qualifying character of service that is not subject to a statutory bar. A character of service of either honorable or general, under honorable conditions, require the VA to grant a former service member "veteran" status except when the discharge is the result of conscientious objection or desertion.[25] However, any character of service less favorable than honorable renders a former service member ineligible to receive his or her earned G.I. Bill education benefits.[26]

Former service members with a character of service of other than honorable or a punitive discharge[27] require further analysis. If a former service member is sentenced to a punitive discharge by a general court-martial, in general, he or she does not receive "veteran" status.[28] If he or she receives a character of service of other than honorable, or a bad-conduct discharge from a special court-martial, then it may still be possible to receive "veteran" status. However, eligibility for "veteran" status requires that the reason for the discharge does not fall within one of the disqualifying categories below or give rise to a statutory bar.

There are five circumstances of discharge that disqualify former service members from "veteran" status without a statutory bar:

"Improve actions to ensure ALL transitioning Service members are aware of and have access to mental health services," "Improve actions to ensure the needs of at risk Veterans are identified and met," and "Improve mental health and suicide prevention services for individuals that have been identified . . . in need of care." JOINT ACTION PLAN FOR SUPPORTING VETERANS DURING THEIR TRANSITION FROM UNIFORMED SERVICE TO CIVILIAN LIFE (Mar. 6, 2018, *rev*. Apr. 18, 2018).

[23] Determination of "veteran" status is a complex process that is governed by federal law and is administered on a case-by-case basis by the VA. This article provides only a broad overview of the process for general awareness and contextual purposes.

[24] 38 U.S.C. § 101(24) (2008); 38 U.S.C. § 5303A (2016).

[25] *See* 38 C.F.R. § 3.12(a) (2017). "A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge." *Id.*

[26] *See* 38 C.F.R. § 21.9520 (2009) (describing the basic eligibility requirements for the G.I. Bill).

[27] Punitive discharges include dismissal, dishonorable discharge, and bad-conduct discharge adjudged at a court-martial. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(b)(8) (2019).

[28] *See* 38 U.S.C. § 5303(a) (2016).

> (1) Acceptance of an undesirable discharge to escape trial by general court-martial[29].
> (2) Mutiny or spying.
> (3) An offense involving moral turpitude . . . .
> (4) Willful and persistent misconduct . . . . [and]
> (5) [Certain h]omosexual acts."[30]

In cases of other than honorable characterizations of service, a former service member may still be eligible to receive health care through the VA for the limited purpose of treating service-connected or service-aggravated injuries.[31] If a Discharge Review Board later upgrades a former service member's character of service to honorable or general, under honorable conditions, then "veteran" status is likely restored.[32]

On the other hand, there are six absolute statutory bars to "veteran" status:

> [1][D]ischarge or dismissal by reason of the sentence of a general court-martial . . . ,
> [2][C]onscientious objector . . . ,
> [3][D]eserter,
> [4][A]bsence without authority from active duty for a continuous period of at least one hundred and eighty days . . . ,
> [5][O]fficer's resignation for the good of the service,[33] or
> [6][D]ischarge of any individual during a period of hostilities as an alien . . . .[34]

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[29] For United States Army personnel, this refers to a chapter 10 discharge for enlisted service members. *See* AR 635-200, *supra* note 21, chapter 10.

[30] 38 C.F.R. § 3.12(d) (2017). Even though homosexuality is no longer a basis for separation from military service, prior discharges based on homosexual acts still disqualify former service members from "veteran" status. *See* AR 635-200, *supra* note 21.

[31] *See* 38 C.F.R. § 3.360(a) (2017). "[H]ealth-care . . . shall be provided to certain former service persons with administrative discharges under other than honorable conditions for any disability incurred or aggravated during active military, naval, or air service in line of duty." *Id.*

[32] *See* 38 C.F.R. § 3.12(g) (2017).

[33] For United States Army personnel, this refers to a resignation for the good of the service in lieu of general court-martial for officers. *See* U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES, chapter 3, section VI (12 Apr. 2006).

[34] 38 U.S.C. § 5303(a) (2016). *See* 38 C.F.R. § 3.12(c) (2017).

A former service member is ineligible to receive VA services when a statutory bar applies, including service-connected and emergency health care.[35] In contrast to the disqualifying circumstances in the previous paragraph, the statutory bars generally still apply and deny "veteran" status to a former service member even if a Discharge Review Board subsequently upgrades the character of service.[36]

Unfortunately for many "bad paper" veterans, the disqualifying circumstances and statutory bars contain a broad range of misconduct that is commonly seen in situations involving former service members suffering from PTSD. Some of these common offenses include desertion or long-term absence without leave, as well as abuse of illegal drugs, assault, and domestic violence resulting in punitive discharges from general courts-martial or discharges in lieu of court-martial.

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[35] On 5 July 2017, the VA rolled out a new initiative to provide up to ninety days of emergency health care for service members with other than honorable discharges, whose "veteran" status has not yet been determined. However, "bad paper" veterans with a statutory bar remain ineligible to receive benefits under this program. *See* U.S. Department of Veterans Affairs, *Emergent Mental Health Care for Former Service Members* (June 2017), https://www.mentalhealth.va.gov/docs/Fact_Sheet-Emergent_Mental_Health_Care_Former_Service_Members.pdf

> Effective July 5 [2017], all Veterans Health Administration (VHA) medical centers are prepared to offer emergency stabilization care for former service members who present at the facility with an emergent mental health need. What this means in that former service members with an OTH administrative discharge may receive care for their mental health emergency for an initial period of up to 90 days, which can include inpatient, residential or outpatient care . . . . Current character of discharge statutory still bars eligibility of this initiative to individuals with a dismissal, dishonorable discharge, or bad conduct discharge from a general court-martial . . . . If an individual received an OTH administrative discharge, he or she will be eligible for treatment at a VA medical facility for any disabilities determined to be service-connected, unless one of the statutory bars specified in 38 U.S.C. 5303 applies.

Id.

[36] *See* 38 C.F.R. § 3.12(g) (2017). "An honorable or general discharge issued on or after October 8, 1977, by a discharge review board . . . , sets aside a bar to benefits imposed under paragraph (d) [disqualifying circumstances], but not paragraph (c) [statutory bars], of this section . . . ." *Id.*

B. PTSD Awareness: Yesterday and Today

Today, more than three thousand years after the Trojan War, the recognition, diagnosis, and treatment of PTSD and related behavioral health conditions continue to be a challenge. During World War I, combat stress disorders were thought to be the result of a physical brain injury caused by the impact of artillery blasts, referred to as "shell shock."[37] Common symptoms of "shell shock" included "stuttering, crying, trembling, paralysis, stupor, mutism, deafness, blindness, anxiety attacks, insomnia, confusion, amnesia, hallucinations, nightmares, heart problems, vomiting, and intestinal disorders."[38] Then, during World War II, combat stress disorders began to be viewed as less of a physical injury and more of a mental health or psychiatric disorder. This shift in thinking caused a move away from the use of the term "shell shock" towards terms including "wartime neurosis" and "combat exhaustion."[39]

The understanding of combat stress disorders continued to develop throughout the Korean and Vietnam Wars, but PTSD was not officially recognized as a mental health diagnosis until 1980 when it was first included in the third edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Health Disorders (DSM-III).[40] However, its inclusion in the DSM-III was controversial among mental health professionals and many in the field could not agree on the proper diagnostic symptoms.[41]

Increased interest and study of PTSD in recent years led to further changes in the understanding and diagnosis of the disorder. In 2013, the

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[37] *See* Pols & Oak, *supra* note 18, at 2,134.
[38] *Id.*
[39] Hamaguchi, *supra* note 18, at 164-65.

> [T]here was a huge disparity among medical professionals in diagnosing and treating Soldiers who presented psychiatric symptoms . . . . The Army often used the number of psychological breakdowns in a unit as a gauge for the unit's morale . . . . As a result, many Soldiers did not receive proper care and mental-health issues became further stigmatized."

Id.
[40] *See id.* at 166. *See also* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III) 247-51 (3d ed. 1980) [hereinafter DSM III].
[41] *See* Hamaguchi, *supra* note 18, at 166. "[D]espite its recognition in the DSM III, PTSD was not widely diagnosed of studied in the 1980s. This lack of focus on PTSD continued through the Gulf War." *Id.*

American Psychiatric Association made several revisions to the classification and diagnostic criteria of PTSD in the fifth edition of the Diagnostic and Statistical Manual of Mental Health Disorders (DSM-5).[42] In the DSM-5, PTSD was no longer classified as an "anxiety disorder." Rather, it was now considered a "trauma- and stressor-related disorder."[43] The DSM-5 explained that PTSD was associated with behaviors such as "irritable behavior or angry outbursts [and] [r]eckless or self-destructive behavior . . . ."[44] Based on these changes, the American Psychiatric Association explained that PTSD "causes clinically significant distress or impairment in the individual's social interactions, capacity to work or other important areas of functioning."[45]

C. PTSD: Correlation with Misconduct and Prevalence in the Ranks

The difficulty in determining how to fairly treat "bad paper" veterans is that it can never really be known whether their PTSD or related behavioral health condition is actually the cause of the misconduct at issue.[46] Further, it is common for the misconduct to be the product, or byproduct, of alcohol and drug abuse.[47] This dilemma makes it extremely

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[42] *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5) 271-80 (5th ed. 2013).

[43] *Id. See* Robert F. Worth, *What If PTSD is More Physical Than Psychological?*, N.Y. TIMES (June 10, 2016), https://www.nytimes.com/2016/06/12/magazine/what-if-ptsd-is-more-physical-than-psychological.html. This article discusses a recent study by neuropathologist Dr. Daniel Perl suggesting that the shockwaves from combat related blasts cause significant physical damage to the brain resulting in PTSD symptoms. *See id.* In some ways, Dr. Perl's findings may again loop us back to a World War I-era "shell shock" view of combat related stress disorders as a physical injury.

[44] DSM-5, *supra* note 42, at 272.

[45] AM. PSYCHIATRIC ASS'N, POSTTRAUMATIC STRESS DISORDER (2013).

[46] *See* Brooker et al., *supra* note 4, at 9-10.

> The number of servicemembers with undiagnosed and untreated psychological wounds of war increases with each passing day. Associated with this general dilemma is the unconfirmed but highly suspected and logical connection between untreated mental illness and criminal offenses committed by combat veterans with specialized training in the art of war.

Id.

[47] *See* Seal et al., *supra* note 19, at 98. "[S]tudies have demonstrated that PTSD and depression symptoms precede or exacerbate drug and alcohol misuse, supporting the hypothesis that self-medication of psychiatric symptoms drives substance abuse in the context of PTSD and/or depression." *Id. See also* Joshua E. Wilk et al., *Relationship of*

difficult for commanders, Discharge Review Boards, and the VA, to determine which cases truly deserve mitigation and which do not. Not surprisingly, this problem does not end with the service member's release from active duty. Highlighting the impact of this issue on society at large, one study of former service members suggests that as many as "[f]orty percent of veterans who suffer from PTSD are noted to have committed a violent crime since their completion of military service."[48]

In order to fully appreciate how deeply this issue affects the military and society, it is helpful to consider how many current and former service members suffer from PTSD and related behavioral health conditions. A study published by the Congressional Research Service in 2015 found that between 2000 and 2015, approximately 177,461 service members were diagnosed with new cases of PTSD, including 138,197 deployment related cases.[49] An additional 327,299 service members were diagnosed with mild to severe Traumatic Brain Injury (TBI).[50] While these statistics are staggering, it not uncommon for both current and former service members suffering from PTSD to remain unidentified, undiagnosed, and untreated.[51] Accordingly, the true numbers may be significantly higher.

III. Character of Service Upgrades and the Fairness for Veterans Act

"Bad paper" veterans who are ineligible for VA services may petition the appropriate Discharge Review Board to request an upgrade of their character of service.[52] If successful, the upgrade can make a former service member eligible for "veteran" status with the VA so long as there

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Combat Experiences to Alcohol Misuse Among U.S. Soldiers Returning from the Iraq War, 108 DRUG AND ALCOHOL DEPENDENCE 115, 117 (2011) "[Service members] who screened positive for alcohol misuse had significantly more mental health problems (i.e., symptoms of PTSD, major depression, and other anxiety disorders), and had significantly more combat experiences than those that screened negative for alcohol misuse". *Id.*

[48] Smith, *supra* note 7. "This surge [of violent crime] has an apparent link to certain symptoms of PTSD, specifically hyper-vigilance and hyper-aggression." *Id.*

[49] *See* FISCHER, *supra* note 6, at 2-5 (2015). This report counted the number of new PTSD cases with a "threshold of two or more outpatient visits . . . ." *Id.*

[50] *See id.*

[51] *See* Hamaguchi, *supra* note 18 (discussing the negative stigma that causes many active duty service members to avoid mental health treatment). *See also* Michael R Spoont et al., *Impact of Treatment Beliefs and Social Network Encouragement on Initiation of Care by VA Service Users with PTSD*, 65 PSYCHIATRIC SERVICES 654 (2014). "Despite the [VA]'s expansion of mental health services to treat VA service users with [PTSD], many with PTSD do not engage in treatment." *Id.*

[52] *See* 10 U.S.C. § 1553 (2018).

is not a statutory bar in place.[53] The intent of the Fairness for Veterans Act was to make this process easier for "bad paper" veterans whose PTSD and related behavioral conditions "potentially contributed to the circumstances resulting in the discharge or dismissal or to the original characterization of the member's discharge or dismissal."[54]

In order to better understand the Fairness for Veterans Act, and the subsequent DoD clarifying guidance, it is important to first consider the events leading up to the current law and policy. First, this section discusses key policy changes designed to assist "bad paper" veterans, including then-DoD Secretary Chuck Hagel's memorandum dated 3 September 2014, known as the "Hagel Memo."[55] These policies changed the landscape for many "bad paper" veterans suffering with PTSD and related behavioral health conditions by giving them a better chance to successfully upgrade their character of service and access VA services. Then, this section analyzes the conditions leading to the enactment of the Fairness for Veterans Act and the issuance of the subsequent DoD clarifying guidance, as well as the problems with applying the standard at the Board level.

A. Vietnam-Era Veterans Pave the Way for Change

As Vietnam-era veterans have aged and several have risen to positions of political power, they have become more organized in their advocacy efforts than veterans of more recent conflicts. In fact, these veterans have created an organization called the Vietnam Veterans of America (VVA) which is "the nation's only congressionally chartered veterans' service organization dedicated to the needs of Vietnam-era veterans and their families."[56] This organization is constantly pressuring lawmakers, the

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[53] *See* 38 C.F.R. § 3.12(g) (2017).

[54] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2919 (2016), *amended by* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 520, 131 Stat. 1332 (2017).. *See* Charlie Foxtrot, *supra* note 9.

[55] *See* Memorandum from Sec'y of Defense to Sec'ys of the Military Departments, subject: Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder (3 Sept. 2014) [hereinafter Hagel Memo].

[56] *See* Press Release, Vietnam Veterans of America, VVA Celebrates Passage of Fairness for Veterans Act; Calls for Investigation into "Bad-Paper" Discharges (Dec. 13, 2016), https://vva.org/wp-content/uploads/2016/12/VVA-Press-Release-16-35.pdf [hereinafter VVA Press Release].

VA, and the DoD to institute reforms for the betterment of veterans from all conflicts, including "bad paper" veterans.

Over the past decade, under pressure from the VVA and with an increasing understanding of PTSD and related behavioral health conditions, the VA and DoD have implemented policy changes designed to decrease barriers to care for "bad paper" veterans. For example, for a former service member to receive VA benefits related to a claim of PTSD prior to 2010, the former service member was required to present corroborating evidence that he or she "actually experienced a stressor related to hostile military activity."[57] This proved to be an onerous requirement since many service members did not have any such documentation in their official military files.[58] On 12 July 2010, then-Secretary of the VA Eric Shinseki removed this evidentiary requirement and published a new rule which allowed PTSD claims to be approved "if a VA doctor confirm[ed] that the stressful experience recalled by the Veteran adequately support[ed] a diagnosis of PTSD and the Veteran's symptoms [were] related to the claimed stressor."[59] This rule removed a major hurdle for many former service members and signaled a shift in the VA's overall approach to providing PTSD care.

On 3 September 2014, then-Secretary of Defense Chuck Hagel issued the "Hagel Memo."[60] This DoD memorandum represented a critical change in the way that Discharge Review Boards were instructed to adjudicate character of service upgrade petitions by "bad paper" veterans who claimed that they suffered from PTSD and related behavioral health conditions.[61] This new guidance was prompted by the large numbers of discharge upgrade petitions by Vietnam-era veterans based on undiagnosed PTSD at the time of their discharges, many of which occurred a decade or more before PTSD was even officially recognized as a mental health diagnosis in the DSM-III.[62] Due to the lack of available medical documentation, the DoD recognized the challenges of attempting to retroactively determine whether a former service member was affected by

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[57] News Release, U.S. Department of Veterans Affairs, VA Simplifies Access to Health Care and Benefits for Veterans with PTSD (July 12, 2010, 8:00 AM), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=1922.
[58] *See id.*
[59] *Id.*
[60] *See* Hagel Memo, *supra* note 55.
[61] *See id.*
[62] *See id. See also* DSM-III, *supra* note 40, at 247-51.

service-related PTSD during their Vietnam-era service and, accordingly, changed course.[63]

The "Hagel Memo" instructed Discharge Review Boards that "[l]iberal consideration will be given in petitions for changes in characterization of service to Service treatment record entries which document one or more symptoms which meet the diagnostic criteria of Post-Traumatic Stress Disorder (PTSD) or related conditions."[64] While this change did allow many "bad paper" veterans to get their foot back in the door of the VA, the "Hagel Memo" was far from a guaranteed upgrade for "bad paper" veterans suffering from PTSD and related behavioral health conditions, especially in cases of serious or premeditated misconduct.[65]

Despite its limiting language, the impact of the "Hagel Memo" was striking. In 2015, the Veterans Legal Services Clinic, a veterans' advocacy organization operated by the Yale Law School, published a report based on information obtained under the Freedom of Information Act that analyzed the numbers of successful character of service upgrade petitions both before and after the implementation of the "Hagel Memo."[66] The report stated that "[t]he overall grant rate for all veterans applying for PTSD-based discharge upgrades at the Army Board for the Correction of Military Records (ABCMR) has risen twelve-fold from 3.7% in 2013 to 45%" following the implementation of the "Hagel Memo."[67] The report also noted that "Vietnam veterans applying are the most numerous

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[63] *See* Hagel Memo, *supra* note 55.
[64] *Id.*
[65] *See id.*

> Correction Boards will exercise caution in weighing evidence of mitigation in cases in which serious misconduct precipitated a discharge with a characterization of service of other than honorable conditions. Potentially mitigating evidence of the existence of undiagnosed combat-related PTSD or PTSD-related conditions as a causative factor in the misconduct resulting in discharge will be carefully weighed against the severity of the misconduct . . . . PTSD is not a likely cause of premeditated misconduct.

Id.
[66] *See* Sundiata Sideba & Francisco Unger, *Unfinished Business: Correcting "Bad Paper" for Veterans with PTSD*, JEROME N. FRANK LEGAL SERVICES ORGANIZATION AT YALE LAW SCHOOL, https://law.yale.edu/system/files/documents/pdf/unfinishedbusiness.pdf.
[67] *Id.* at 2.

applicants (67%) and have a higher grant rate at the ABCMR (59%) than veterans from other conflicts."[68] These statistics showed a marked improvement for "bad paper" veterans and further highlighted the DOD's changing attitudes and approach to these difficult cases.

B. Post-9/11 Veterans Push for Further Reforms

Notwithstanding the significant changes caused by the "Hagel Memo," some argued that the guidance was "interpreted narrowly by the military's review board agencies, impact[ed] a handful of Vietnam veterans," and did not do enough to assist Post-9/11 veterans.[69] In November 2016, a team of investigative journalists from WXIA-TV based in Atlanta, Georgia, released a documentary series entitled *Charlie Foxtrot*.[70] The series told the stories of several former service members who claimed that they experienced combat related trauma in Iraq and Afghanistan and suffered the damaging effects of PTSD and TBI.[71] The series focused on the difficulties that these service members had reintegrating into their units after deployment and their claims that the military unfairly and adversely discharged them for misconduct without properly considering their combat-related mental health conditions.

Within days, *Charlie Foxtrot* grabbed the attention of both the public and lawmakers.[72] On 5 December 2016, one month after the series was released, the filmmakers were invited to the Capitol and the documentary series was shown to lawmakers in the Congressional Auditorium.[73] During that event, Senator Mike Coffman (R-CO), a sponsor of the

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[68] *Id.* at 2.
[69] VVA Press Release, *supra* note 56.
[70] *See* Charlie Foxtrot, *supra* note 9.
[71] *See id.* This series included stories of former service members such as: Private First Class Nicolas Jackson, U.S. Army, who reported having severe PTSD related to a suicide car bomb attack and multiple firefights while deployed and who was discharged under other than honorable conditions for absence without leave following his redeployment, and Sergeant Kristopher Goldsmith, U.S. Army, who reported having PTSD related to photographing bodies of dead and tortured people during his deployment and who was discharged for patterns of misconduct with a general under honorable conditions following a suicide attempt. *See id.*
[72] *See id.* The filmmakers also created a petition in support of the Fairness for Veterans Act and collected 12,163 signatures, which they forwarded to Congress. *See id.*
[73] *See id. See also* WXIA Staff, *Video Forces Congress to Face Tragedy Among Troops*, 11ALIVE (Dec. 11, 2016), http://www.11alive.com/article/news/investigations/charlie-foxtrot/video-forces-congress-to-face-tragedy-among-troops/85-362138515.

Fairness for Veterans Act said, "What we're trying to do is to go back and to reverse these discharges to get access to care."[74] Senator Gary Peters (D-MI), another sponsor, said, "This is about basic fairness and it is about justice."[75] Three days later, the Senate passed the Conference Report for the NDAA 2017 that included the Fairness for Veterans Act.[76] The NDAA 2017 was then signed into law by President Barack Obama on 23 December 2016.[77]

The president of the VVA described the passage of the Fairness for Veterans Act as a "reason for every American to celebrate" saying that the NDAA 2017 both codified the "Hagel Memo" and "clarifie[d] and strengthen[ed] the spirit of the Hagel Memo by applying it more broadly to Post-9/11 veterans with less-than-honorable discharges."[78] Similarly, the bill's sponsors lauded its passage as a codification of the "Hagel Memo."[79] One sponsor, Senator Kirsten Gillibrand (D-NY) stated that "[t]his provision will ensure that veterans who have PTSD or have experienced Military Sexual Trauma can more easily have their discharges upgraded . . . so that they can get the care they need and the benefits they earned."[80]

C. What the Fairness for Veterans Act Changes

The Fairness for Veterans Act is a short provision of the NDAA 2017 that amends 10 U.S.C. § 1553, Review of Discharge or Dismissal, in two significant ways.[81] First, 10 U.S.C. § 1553 now contains a statutory

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[74] Charlie Foxtrot, *supra* note 9.
[75] *Id.*
[76] *See id.*
[77] *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2919 (2016).
[78] VVA Press Release, *supra* note 56.
[79] *See* Press Release, Office of Senator Thom Tillis, Peters, Daines, Tillis & Gillibrand Fairness for Veterans Provision to be Signed into Law (Dec. 8, 2016), https://www.tillis.senate.gov/public/index.cfm/2016/12/peters-daines-tillis-gillibrand-fairness-for-veterans-provision-to-be-signed-into-law. "The provision . . . codifies the principles of the 2014 Hagel memo to give liberal consideration to petitions for changes in discharge status to honorable if the servicemember has been diagnosed with PTSD, TBI or related conditions in connection with their military service." *Id.*
[80] *Id.*
[81] *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2919 (2016), *amended by* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 § 520, 131 Stat. 1332 (2017); 10 U.S.C. § 1553 (2016), amended by 10 U.S.C. § 1553 (2017).

standard that the military's Discharge Review Boards are required to apply to character of service upgrade petitions. "[T]he Board shall . . . review the case with liberal consideration to the former member that post-traumatic stress disorder or traumatic brain injury potentially contributed to the circumstances resulting in the discharge or dismissal or to the original characterization of the member's discharge or dismissal."[82] This standard is similar to, but arguably broader than, the "Hagel Memo" guidance.

Secondly, 10 U.S.C. § 1553 expands the application of the "liberal consideration" standard to a larger class of former service members, as follows:

> [either] a former member of the armed forces who, while serving on active duty as a member of the armed forces, was deployed in support of a contingency operation and who, at any time after such deployment, was diagnosed by a physician, clinical psychologist, or psychiatrist as experiencing post-traumatic stress disorder or traumatic brain injury as a consequence of that deployment . . . .[83]
>
> [or] a former member whose application for relief is based in whole or in part on matters relating to post-traumatic stress disorder or traumatic brain injury as supporting rationale . . . whose post-traumatic stress disorder or traumatic brain injury is related to combat or military sexual trauma, as determined by the Secretary concerned.[84]

Importantly, the law now specifically includes former service members suffering from TBI and military sexual trauma, and it levels the playing field for Post 9/11 veterans by removing the focus of the "Hagel Memo" on Vietnam-era veterans.[85]

The following year, Congress passed, and President Donald Trump signed into law the National Defense Authorization Act for Fiscal Year 2018 (NDAA 2018) which contains a nearly identical provision expanding

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[82] *Id.* § 1553(d)(3)(A)(ii).
[83] *Id.* § 1553(d)(1).
[84] *Id.* § 1553(d)(3)(B).
[85] *See id.* § 1553(d)(3)(B).

the application of the "liberal consideration" standard to the Boards for the Correction of Military Records.[86]

Notably, neither the Fairness for Veterans Act nor its companion provision in the NDAA 2018 defines the term "liberal consideration" and neither specifically states whether the limitations contained in the "Hagel Memo" guidance are superseded or remain in effect. The law also does not expressly grant the Secretary of Defense discretion to define, or otherwise limit, the "liberal consideration" standard.

D. Class Action Lawsuits and Clarifying Guidance

The brevity of the Fairness to Veterans Act is becoming problematic in the field as "bad paper" veterans and their advocates challenge the Discharge Review Boards' application of the "liberal consideration" standard. On 17 April 2017, four months after the Fairness for Veterans Act became law, former service members Stephen Kennedy and Alicia Carson filed a class action lawsuit on behalf of "bad paper" veterans against the Honorable Robert Speer, then-acting Secretary of the Army.[87] The lawsuit sought to upgrade the character of service of the named plaintiffs as well as the entire class.[88] The crux of the plaintiff's argument was that the Army Discharge Review Board "still frequently ignores the standards actually set out by the Hagel Memo . . . [and] follows these binding instructions only sporadically and unpredictably, and when it does purport to follow them, it does so inadequately."[89] The plaintiff's counsel

[86] *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 520, 131 Stat. 1332(2017); 10 U.S.C. § 1552 (2017) (including a minor conforming amendment to 10 U.S.C. § 1553 to match the statutory language of the two provisions).
[87] *See* Amended Complaint, Kennedy v. Speer, No. 3:16-cv-2010-EEW (D. Conn. Apr. 17, 2017) (Defendant Acting Secretary of the Army Robert Speer has since been substituted with Secretary of the Army Mark Esper). Stephen Kennedy is a former service member who served in Iraq and claims to be suffering from deployment related PTSD which he believes contributed to his two-week absence without leave, which ultimately led to his misconduct separation with a character of service of general under honorable conditions. Alicia Carson is a former Guardsman who served in Afghanistan and claims to be suffering from deployment related PTSD and TBI that she believes led to her missing drills, which ultimately led to her separation with a character of service of general under honorable conditions. *See id.*
[88] *See id* at 33-34.
[89] *Id.* at 23.

estimated the size of the proposed class at approximately 50,000 "bad paper" veterans.[90]

Then, on 25 August 2017, while the *Kennedy v. Esper (formerly Speer)* lawsuit was pending and prior to class certification or substantive rulings, the DoD issued clarifying guidance for Discharge Review Boards.[91] Shortly after the issuance of the clarifying guidance, the court allowed the Army to voluntarily remand Stephen Kennedy and Alicia Carson's upgrade petitions to the Army Discharge Review Board for reconsideration consistent with the new policy.[92]

Interestingly, the clarifying guidance memorandum issued by the Under Secretary of Defense revived the "Hagel Memo" stating that it still applied to the Discharge Review Boards, but the memorandum did not contain any express reference to the Fairness for Veterans Act.[93] The clarifying guidance was favorable to "bad paper" veterans in many respects. It significantly reduced the evidentiary burden placed upon an upgrade petitioner stating that a "veteran's testimony alone, oral or written, may establish the existence of a condition or experience, that the condition or experience existed during or was aggravated by military service, and that the condition or experience excuses or mitigates the discharge."[94] The memorandum also clarified the Secretary's position that any "bad paper" veteran who "assert[s] a mental health condition without a corresponding diagnosis . . . will receive liberal consideration,"[95] a question that was left unanswered by the Fairness for Veterans Act.

On the other hand, the clarifying guidance did set some limits on the application of "liberal consideration" standard. Specifically, it contained language similar to the "Hagel Memo" which placed limitations on the application of the standard to discharges resulting from serious misconduct and premeditated misconduct.

The clarifying guidance memorandum explained that "[l]iberal consideration does not mandate an upgrade. Relief may be appropriate,

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[90] *See* Veterans Legal Services Clinic, *Kennedy v. Esper*, YALE LAW SCHOOL, https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/veterans-legal-services-clinic/kennedy-v-speer (last visited Mar. 14, 2019).
[91] *See* Clarifying Guidance, *supra* note 12.
[92] *See* Kennedy v. Speer, No. 3:16-cv-2010-WWE (D. Conn. Sept. 19, 2017).
[93] *See* Clarifying Guidance, *supra* note 12.
[94] *Id.* at 2.
[95] *Id.* at 2.

however, for minor misconduct commonly associated with mental health conditions, including PTSD; TBI; . . . and some significant misconduct sufficiently justified or outweighed by the facts and circumstances."[96] The memorandum also explained that "[p]remeditated misconduct is not generally excused by mental health conditions, including PTSD . . . . However, substance-seeking behavior and efforts to self-medicate symptoms of a mental health condition may warrant consideration. Review Boards will exercise caution in assessing the causal relationship between asserted conditions or experiences and premeditated misconduct."[97] By contrast, the Fairness for Veterans Act did not contain these limitations on serious misconduct or premeditated misconduct and the comments by its legislative sponsors did not reveal any intent to place limitations on the application of the "liberal consideration" standard.[98]

Following the voluntary remand in *Kennedy v. Esper*, the Army Discharge Review Board upgraded both Stephen Kennedy and Alicia Carson to a characterization of service of honorable.[99] Despite the Army's argument that the characterization of service upgrades of the named plaintiffs rendered the issue moot, on 21 December 2018, the court certified the plaintiff class and allowed the lawsuit to proceed.[100] The certified class now includes:

> All Army, Army Reserve, and Army National Guard veterans of the Iraq and Afghanistan era - the period between October 7, 2001 to present - who: (a) were discharged with a less-than Honorable service characterization (this includes General and Other than Honorable discharges from the Army, Army Reserve, and Army National Guard, but not Bad Conduct or Dishonorable discharges); (b) have not received discharge upgrades to Honorable; and (c) have diagnoses of PTSD or PTSD-related conditions or record documenting one or

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[96] *Id.* at 4.
[97] *Id.* at 3.
[98] *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2919 (2016), *amended by* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 520, 131 Stat. 1332 (2017); 10 U.S.C. § 1553 (2016), *amended by* 10 U.S.C. § 1553 (2017).
[99] *See* Memorandum of Decision, Kennedy v. Esper, No. 3:16-cv-2010-WWE (D. Conn. Dec. 21, 2018), https://law.yale.edu/system/files/area/clinic/document/vlsc_order_12.21.18_074.00_-_order_granting_class_cert.pdf.
[100] *See id.*

> more symptoms of PTSD or PTSD-related conditions at the time of discharge attributable to their military service under the Hagel Memo standards of liberal and special consideration.[101]

The litigation in *Kennedy v. Esper* remains ongoing.

Also, on 2 March 2018, Mr. Tyson Manker filed a separate class action lawsuit against the Honorable Richard Spencer, Secretary of the Navy.[102] The complaint in *Manker v. Spencer* alleged that the Navy Discharge Review Board improperly applied the "liberal consideration" standard when it denied Mr. Manker's character of service upgrade petition, and that it consistently and arbitrarily denied "almost 90 percent of applications alleging PTSD or PTSD-related conditions."[103] This lawsuit is still pending, however, on 15 November 2018, the court certified a plaintiff class that mirrors the plaintiff class in *Kennedy v. Esper*.[104] Until the courts weigh in and settle the application of the "liberal consideration" standard for character of service upgrades, the fate of "bad paper" veterans

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[101] *See id.* at 16.

[102] *See* Complaint, Manker v. Spencer, No. 3:18-cv-372 (D. Conn. Mar. 2, 2017), https://law.yale.edu/system/files/area/clinic/manker_v._spencer_complaint.pdf). Tyson Manker is a former service member who served in Iraq and claims to be suffering from deployment related PTSD that he believes contributed to his use of an illegal drug, and that ultimately led to his misconduct separation with a character of service of other than honorable. *See id.*

[103] *Id.* at 3.

[104] *See* Ruling, Manker v. Spencer, No. 3:18-cv-372 (D. Conn. Nov. 5, 2018), https://law.yale.edu/system/files/documents/pdf/lso/manker_rulingonclasscert_11.15.18.pdf. The certified plaintiff class includes:

> Veterans who served during the Iraq and Afghanistan Era—defined as the period between October 7, 2001, and the present—who: (a) were discharged from the Navy, Navy Reserves, Marine Corps, or Marine Corps Reserve with less-than-Honorable statuses, including General and Other-than-Honorable discharges but excluding Bad Conduct or Dishonorable discharges; (b) have not received upgrades of their discharge statuses to Honorable from the NDRB; and (c) have diagnoses of PTSD, TBI, or other related mental health conditions, or records documenting one or more symptoms of PTSD, TBI, or other related mental health conditions at the time of discharge, attributable to their military service under the Hagel Memo standards of liberal or special consideration.

Id. at 21.

suffering from PTSD and related behavioral health conditions continues to hang in the balance.

IV. Best Practices: Advising Commanders in the Field

When deciding to separate a service member for misconduct, commanders must balance the needs of the service member, the unit, the military, and society at large. Even though the individual service member's time in the military may be necessarily at an end, Congress, the President, the DoD, and the VA all indicate that a great deal of thought must go into the manner in which he or she departs service. This is particularly so for cases in which the service member suffers from PTSD or related behavioral health conditions.[105] Not surprisingly, many commanders spend a significant amount of time wrestling with this decision in every case before signing the final paperwork and sending the service member to the transition point. Understanding the impact that the character of service has on attaining "veteran" status and receiving VA services allows legal advisors in the field to better advise their commanders who are charged with making these life-altering decisions.

A. Match the Separation Narrative to the Commander's Intent

When adjudicating character of service upgrade petitions and applying the "liberal consideration" standard, the Discharge Review Board considers both the former service member's submissions and the available documents in his or her official file.[106] This includes the separation packet.[107] In applying the "liberal consideration" standard, the Board balances the former service member's mitigating evidence against the basis for the separation.[108] In cases that involve claims of PTSD or related

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[105] *See* AR 635-200, *supra* note 21, chapter 3, section II. This section discusses the types of discharges available, the potential impact on the separated service member, and the importance of the commander's decision. *See id.*

[106] *See* Department of Defense, Boards of Review Reading Rooms, http://boards.law.af.mil (last visited Mar. 14, 2019). *See, e.g.*, Army Discharge Review Board, AR20160000703 (2016), http://boards.law.af.mil/ARMY/DRB/CY2016/AR20160000703.txt.

[107] *See, e.g.*, Army Discharge Review Board, AR20160000658 (2016), http://boards.law.af.mil/ARMY/DRB/CY2016/AR20160000658.txt.

[108] *See id.*

behavioral health conditions, the Discharge Review Board attempts to determine whether there is a nexus between the mitigating condition and the misconduct.[109] The Discharge Review Board particularly focuses on the reason for the separation as it is described in the separation documents.[110] The description of the misconduct the separation paperwork can make the difference between an upgrade petitioner's success or failure. Therefore, legal advisors ought to inform commanders of the lasting impact of the misconduct description.

In more severe cases, commanders may believe that the misconduct warrants a permanent loss of VA services. However, in other cases, commanders may want to send a strong message to the service member and the unit, but may not feel that the effects of the character of service should be a lifelong barrier to VA services. The legal advisor ought to ascertain the commander's intent and tailor the misconduct description accordingly, to either foreclose or leave open the possibility of access to VA services or a future character of service upgrade.

> Liberal consideration will be given in petitions for changes in characterization of service to service treatment record entries which document one or more symptoms which meet the diagnostic criteria of [PTSD] or related conditions. Special consideration will be given to [VA] determinations which document PTSD or PTSD-related conditions connected to military services . . . or when any other evidence which may reasonably indicate that PTSD or a PTSD-related disorder existed at the time of discharge which might have mitigated the misconduct that caused the under other than honorable conditions characterization of service.

Id.

[109] *See, e.g.*, Army Discharge Review Board, AR20160000396 (2016), http://boards.law.af.mil/ARMY/DRB/CY2016/AR20160000396.txt.

> [T]here is a nexus between the applicant's diagnosis of [PTSD] and some, but not all, of the charges. The applicant was diagnosed with PTSD and TBI by qualified professionals. It is possible that the PTSD symptoms were present while he was still on active duty. Because PTSD symptoms can be associated with use of illicit drugs, alcohol, and/or abuse of prescription medications, avoidance behavior such as going AWOL, and defiance of superiors, there is more likely than not a nexus between the PTSD and the misconduct.

Id.

[110] *See id.*

B. Consider the Application of the Statutory Bars

Additionally, in describing the misconduct in the separation documents, the legal advisor should remain mindful of the six statutory bars that can totally cut off a former service member's eligibility for VA services, regardless of whether his or her discharge is eventually upgraded by a Discharge Review Board.[111] For example, while misconduct that is described as an absence without leave for less than one hundred seventy-nine days does not subject a former service member to a statutory bar, adding one additional day of absence or characterizing the absence as a desertion does trigger such a bar.[112] Thus, the decisions that commanders and their legal advisors make in describing the misconduct in the separation documents can have an enormous impact on the "bad paper" veteran's post-separation life.

V. Conclusion

While there are still significant barriers to VA services for "bad paper" veterans suffering from PTSD and related behavioral health conditions, the clear trend over the past decade is to reduce these barriers. This shift has substantially increased the number of veterans who now have access to care. However, even after the enactment of the Fairness for Veterans Act, many "bad paper" veterans are still unable to access VA services and unable to upgrade their character of service. By understanding the challenges that these "bad paper" veterans face post-separation, legal advisors can assist commanders to make more informed decisions concerning misconduct separations, thereby limiting unintended and potentially inequitable consequences to these most vulnerable veterans.

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[111] *See* 38 C.F.R. § 3.12(g) (2017).
[112] *See* 38 U.S.C. § 5303(a) (2016).

THE SPECIAL COURT FOR SIERRA LEONE: A POTENTIAL MODEL FOR ESTABLISHING THE RULE OF LAW AFTER LARGE SCALE COMBAT OPERATIONS

MAJOR DALE MCFEATTERS*

I. Introduction

In October 2017, the Army revised Field Manual (FM) 3-0, *Operations*, the capstone doctrine on unified land operations, to focus on conducting and sustaining large-scale combat operations.[1] Large-scale combat operations are the employment of the range of military operations occurring at the extremes of the conflict continuum.[2] The purpose of FM 3-0 is to reorient the Army's training and education curricula on decisive action, which is the heart of the Army's operating concept.[3] Decisive action is "the continuous, simultaneous combinations of offensive, defensive, and stability or defense support of civil authorities tasks"[4] in the broader context of the ways of unified action to achieve national strategic ends.

A crucial element of the stability component of decisive action is establishing civil control, which fosters the rule of law.[5] The rule of law is the fundamental principle of human rights that "all persons, institutions, and entities—public and private, *including the state itself*—are accountable to laws . . . equally enforced [and] independently adjudicated . . . ."[6]

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[1] U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (6 Oct. 2017) [hereinafter FM 3-0].

[2] *Id.* at 1-1.

[3] *Id.*

[4] *Id.* at 1-16.

[5] *Id.* at 8-12.

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

However, according to FM 3-0, paragraph 1-4:

> Large-scale combat operations are intense, lethal, and brutal. Their conditions include complexity, chaos, fear, violence, fatigue, and uncertainty. Future battlefields will include noncombatants, and they will be crowded in and around large cities. Enemies will employ conventional tactics, terror, criminal activity, and information warfare to further complicate operations. To an ever-increasing degree, activities in the information environment are inseparable from ground operations. Large-scale combat operations present the greatest challenge for Army forces.

Given the unavoidable destructive nature of large-scale combat operations, FM 3-0 does not provide a framework for establishing the rule of law when civil infrastructure has been destroyed and critical civic institutions, like the judicial system, are no longer functioning. Neither is there any framework found in joint doctrine, the Uniform Code of Military Justice, or the Military Commissions Act.[7] If the U.S. Army were tasked to conduct conflict resolution after large-scale combat operations, it would not have an existing framework for constructing a legal system to reestablish the rule of law. In other words, there is a capability gap in the Army's ability to conduct Phase IV stability operations.

The Special Court for Sierra Leone, an ad hoc international tribunal, provides an instructive example for addressing this gap:

In April 2012, the Special Court for Sierra Leone (SCSL) convicted Charles Taylor, the former president of Liberia, of war crimes, human rights violations, and crimes against humanity for his involvement in Sierra Leone's ten-year civil war.[8] The same court later sentenced Taylor to fifty years in prison.[9] The SCSL's conviction made Taylor the

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[7] 10 U.S.C. §§ 948–949.

[8] Marlise Simons, *Ex-President of Liberia Aided War Crimes, Court Rules*, N.Y. TIMES (April 26, 2012), http://www.nytimes.com/2012/04/27/world/africa/charles-taylor-liberia-sierra-leone-war-crimes-court-verdict.html?pagewanted=all&_r=0.

[9] Marlise Simons & David Goodman, *Ex- Liberian Leader Gets 50 Years for War Crimes*, N.Y. TIMES (May 30, 2012),

first former head of state to be convicted by an international court since the Nuremberg trials that followed World War II.[10]

The SCSL, though flawed and imperfect, can provide a workable model for restoring the rule of law and establishing civil control, in the final phases of decisive action, where national courts or the International Criminal Court (ICC) cannot.

II. Background

Eighteen years ago, as Sierra Leone's civil war began to wind down, the country's president, Ahmed Tejan Kabbah, asked the United Nations Security Council to develop an international tribunal to assist in prosecuting members of the rebelling Revolutionary United Front for crimes against the country's citizens and United Nations peacekeepers.[11] In response, the Security Council passed Resolution 1315 that authorized the United Nations' Secretary-General to develop a special ad hoc tribunal in cooperation with Sierra Leone's government.[12] Both the United Nations (U.N.) and the Sierra Leonean government agreed to the resulting draft legislation and the Special Court for Sierra Leone (SCSL) was born.[13]

Many in the international community met the creation of the SCSL with high expectations, believing its success would be a watershed event for the future use of ad hoc international criminal courts.[14] The court's conception sought to avoid the difficulties and setbacks of previous ad hoc international criminal tribunals and the shortcomings of the ICC.[15]

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http://www.nytimes.com/2012/05/31/world/africa/charles-taylor-sentenced-to-50-years-for-war-crimes.html?pagewanted=all.

[10] *Id.* Admiral Karl Dönitz, a German naval officer who succeeded Adolph Hitler, was convicted of war crimes at Nuremburg. ROBERT E. CONOT, JUSTICE AT NUREMBERG 33 (1983).

[11] Permanent Rep. of Sierra Leone to the U.N., Letter Dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2000/786 (Aug. 10, 2000) [hereinafter Kabbah's Letter].

[12] S.C. Res. 1315, at 2, (Aug. 14, 2000) [hereinafter UNSCR 1315].

[13] HUMAN RIGHTS WATCH, WORLD REPORT 2003: EVENTS OF 2002 at 67, 69 (2003).

[14] Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 MICH. J. INT'L L. 395 (2011).

[15] J. Peter Pham, *A Viable Model for International Criminal Justice: The Special Court for Sierra Leone*, 19 N.Y. INT'L L. REV. 37, 42 (2006).

This article will begin by briefly discussing Sierra Leone's civil war and the genesis of the SCSL. It will then explore the framework and jurisdiction of the Court, the precedents upon which it was based, and its unique composition as an international hybrid tribunal. From there, the article will discuss the court's prosecutions, particularly that of Charles Taylor. The article will argue that there is an accountability gap between the ICC and national courts. Finally, the article will conclude that the SCSL, though far from perfect, has made important contributions to the field of international criminal law and is a practical and necessary model for the future of international ad hoc tribunals. These contributions may be instructive if the U.S. military seeks to impose the rule of law in the stability phase of large-scale combat operations.

II. The Genesis of the Special Court for Sierra Leone

A. Sierra Leone's Civil War

1. A Savage Conflict

In March of 1991, the Revolutionary United Front (RUF), a group of Sierra Leonean dissidents based in Liberia and linked to Libyan president Mohamar Qaddafi,[16] invaded Sierra Leone with support and direction from Charles Taylor.[17] The RUF's pretext was liberating Sierra Leone from its corrupt dictatorship,[18] but after looting the country's eastern diamond mines and massacring the civilian population, the RUF proved to be nothing more than a bloodthirsty criminal enterprise.[19]

The decade-long conflict that followed was waged almost entirely against civilians[20] and characterized by systematic atrocities such as the mass executions of noncombatants, rape, mutilations, and the forced conscription of child soldiers.[21] The death toll is estimated to be

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[16] GREG CAMPBELL, BLOOD DIAMONDS: TRACING THE DEADLY PATH OF THE WORLD'S MOST PRECIOUS STONES 71 (2004).
[17] COLIN WAUGH, CHARLES TAYLOR AND LIBERIA: AMBITION AND ATROCITY IN AFRICA'S LONE STAR STATE 208-209 (2011).
[18] *Footpaths to Democracy: Toward a New Sierra Leone* (1995), at http://www.fas.org/irp/world/para/docs/footpaths.htm (last visited February 10, 2019) (the RUF's manifesto).
[19] LANSANA GBERIE, A DIRTY WAR IN WEST AFRICA: THE RUF AND THE DESTRUCTION OF SIERRA LEONE 96 (2005).
[20] Simons, *supra* note 8.
[21] *Id.*

50,000.[22] In explaining that the combatants' behavior amounted to "some of the most heinous, brutal, and atrocious crimes ever recorded in human history," the SCSL noted:

> Innocent civilians – babies, children, men and women of all ages – were murdered by being shot, hacked to death, burned alive, beaten to death. Women and young girls were gang raped to death. Some had their genitals mutilated by the insertion of foreign objects. Sons were forced to rape mothers, brothers were forced to rape sisters. Pregnant women were killed by having their stomachs split open and the [fetus] removed merely to settle a bet amongst the troops as to the gender of the [fetus] . . . . Hacking off the limbs of innocent civilians was commonplace. . . . Children were forcibly taken away from their families, often drugged and used as child soldiers who were trained to kill and commit other brutal crimes against the civilian population.[23]

2. *The Lomé Agreement*

After a particularly heinous and shocking RUF attack on the capital city of Freetown, which killed 6,000 civilians in just two weeks, the international community finally forced the combatants to the negotiating table.[24] The subsequent peace agreement, signed in Lomé, Togo, and known as the Lomé Agreement, folded the RUF into the government and established a truth and reconciliation commission.[25]

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[22] *Id.*

[23] Prosecutor v. Brima, Kamara, & Kanu, Case No. SCSL-04-16-T, Sentencing Judgment, 8 (July 19, 2007), http://www.worldcourts.com/scsl/eng/decisions/2007.07.19_Prosecutor_v_Brima_Kamara_Kanu1.pdf.

[24] GBERIE, *supra* note 199, at 161. In "Operation No Living Thing," the RUF attacked Freetown's civilian population with orders to murder, rape, or mutilate by amputation every person they encountered, including infants and children. CAMPBELL, *supra* note 16, at 86. The Nigerian peacekeeping soldiers deployed in the city, who panicked and lost control, counterattacked by summarily executing, raping, or torturing anyone remotely suspected of assisting the RUF. *Id.*

[25] Peace Agreement Between the Government of Sierra Leone and the Rebel United Front of Sierra Leone (July 7, 1999), http://www.sierra-leone.org/lomeaccord.html [hereinafter the Lomé Agreement].

Controversially, the Lomé Agreement contained an amnesty provision, which conferred immunity from any legal or official adverse action by the government of Sierra Leone on any member of the conflict's principal combatants: the RUF, the Sierra Leone Army (SLA), the Armed Forces Revolutionary Council (AFRC), and the Civilian Defense Force (CDF).[26] In a belated act of protest to the amnesty clause, the United Nations Special Representative to the Lomé negotiations appended a handwritten statement to the agreement stating that the U.N. would not endorse amnesty for "international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."[27]

3. The Conflict's End

As part of the Lomé Agreement, the U.N. also agreed to deploy 6,000 additional soldiers to Sierra Leone, whom the RUF immediately attacked.[28] Furthermore, the RUF leadership, now government ministers, resumed plundering the diamond mines.[29] With violence spinning out of control yet again, the British government forcefully intervened and largely pacified Sierra Leone by the end of 2001.[30] After Charles Taylor pulled his support for the RUF under international pressure, its leadership disarmed, and Sierra Leone's civil war finally ended.[31]

B. Establishing the Special Court for Sierra Leone

1. The Need for a Hybrid Tribunal

The Lomé Agreement's failure forced Sierra Leone's government to rethink the controversial amnesty provision and consider a different approach to a stable peace.[32] On 12 June 2000, Sierra Leone's president,

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[26] *Id.* at Article IX.
[27] William A. Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS J. INT'L L. & POL'Y 145, 148-149 (2004).
[28] CAMPBELL, *supra* note 16, at 93.
[29] *Id.*
[30] WAUGH, *supra* note 17, at 224.
[31] *Id.* at 225. Sierra Leone's government officially declared the war's end on 18 January 2002. DANNY HOFFMAN, THE WAR MACHINES: YOUNG MEN AND VIOLENCE IN SIERRA LEONE AND LIBERIA xii (2011).
[32] Pham, *supra* note 15, at 76.

Ahmed Tejan Kabbah,[33] wrote to the United Nations Security Council requesting international support for a "special court" to "bring credible justice" to the RUF for its crimes against Sierra Leone's people and U.N. peacekeepers.[34] Kabbah argued that the RUF had "reneged" on the Lomé Agreement and would continue its violence with impunity if its members were not prosecuted.[35] Citing the U.N.'s response to crimes against humanity in Rwanda and the former Yugoslavia, Kabbah argued that a similar legal framework was needed given the magnitude of the RUF's atrocities.[36]

Kabbah suggested a tribunal with a framework and mandate to apply both a blend of international and domestic Sierra Leonean law.[37] This was necessary because the gaps in the country's existing criminal legal code and the extensive nature of the RUF's crimes were well beyond the capacity of the country's existing judicial infrastructure.[38] However, Kabbah was concerned that serious crimes like kidnapping and arson were unlikely to be prosecuted through international law.[39]

2. Security Council Resolution 1315

In response to Kabbah's letter, the United Nations Security Council passed Resolution (UNSCR) 1315, which authorized the Secretary-General to begin working with the Sierra Leonean government to establish a special court.[40] United Nations Security Council Resolution 1315 noted an earlier reservation by the UN Special Representative to the Lomé Agreement's amnesty provision,[41] but curiously made no mention of the RUF. Instead, UNSCR 1315 recommended that the

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[33] President Kabbah took office through surprisingly fair elections that were the result of the failed Abidjan Peace Accord, signed in Abidjan, Côte d'Ivoire in 1996. GBERIE, *supra* note 19, at 95.
[34] Kabbah's Letter, *supra* note 11, at 2.
[35] *Id.*
[36] *Id.* Furthermore, the ICC, which began its operations in July 2002, did not have retroactive jurisdiction over the conflict, though Sierra Leone was a party to the Rome Statute. Jalloh, *supra* note 14, at 458. *See also*, Rome Statute of the International Criminal Court, art. 11(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter the Rome Statute].
[37] Kabbah's Letter, *supra* note 11, at 3.
[38] *Id.*
[39] Pham, *supra* note 15, at 82, 83.
[40] UNSCR 1315, *supra* note 12.
[41] *Id.*

proposed special court "have personal jurisdiction over persons who bear the greatest responsibility" for "crimes against humanity, war crimes and other serious violations of international humanitarian law . . . ."[42] The language, "greatest responsibility," would become especially significant later.

3. The Court's Structure: A New Model

Despite UNSCR 1315, there was no political will in the international community for setting up another international criminal tribunal because of the expense and longevity of the existing tribunals.[43] To address these concerns, the SCSL's framework was designed to operate more efficiently than its predecessors.[44] The tribunals on which the SCSL was based, the International Criminal Tribunals for Rwanda and Yugoslavia (ICTR and ICTY, respectively), were subsidiary organs of the United Nations and subject to unavoidable delays and bureaucracy.[45] The SCSL was its own independent entity and could function faster and more economically. The SCSL was also independent of Sierra Leone's judiciary, which was an effort to make the court more credible.[46]

a. Structure

The court was divided into three principal branches: chambers, registry, and prosecution.[47] The chambers branch consisted of two trial

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[42] *Id.*

[43] Avril McDonald, *Sierra Leone's Shoestring Special Court*, 84 INT'L REV. RED CROSS 121, 124 (2002).

[44] David Crane, *The Take Down: Case Studies Regarding "Lawfare" in International Criminal Justice: The West African Experience*, 43 CASE W. RES. J. INT'L L. 201, 204 (2010). Mr. Crane, who recently retired from teaching at Syracuse University's College of Law, was the founding Chief Prosecutor for the Special Court for Sierra Leone, serving from 2002-2005.

[45] *Id.* The U.N. briefly considered expanding the jurisdiction of the ICTR to include Sierra Leone, but decided against it. Peter Penfold, "The Special Court for Sierra Leone: A Critical Analysis" *in* RESCUING A FRAGILE STATE: SIERRA LEONE 2002-2008 at 55 (Lansana Gberie ed., 2009).

[46] Kabbah's Letter, *supra* note 11, at 2. Although the SCSL is independent of the Sierra Leonean judiciary, Sierra Leone's courts have concurrent jurisdiction. *See*, Statute of the Special Court for Sierra Leone, art. 8(2) (Aug. 14, 2000), http://www.rscsl.org/Documents/scsl-statute.pdf [hereinafter the SCSL Statute].

[47] Vincent O. Nmehielle & Charles Chernor Jalloh, *The Legacy of the Special Court for Sierra Leone*, 30 FLETCHER F. WORLD AFF. 107, 108 (2006).

courts and one appellate court, with the latter's presiding judge serving as the President of the Court.[48] The head prosecutor, appointed by the U.N. Secretary-General, was responsible for investigating and prosecuting cases before the court.[49] The registry, the administrative branch of the court, was responsible for the court's operation, and housed the Office of the Principal Defender.[50]

b. Financing

Significant criticism of the previous ad hoc international tribunals has much to do with their expense.[51] Rwanda's government criticized the ICTR for spending $1.5 billion over eleven years to secure fewer than forty verdicts.[52] The country's government complained that the ICTR's slow pace damaged the perception among Rwandans that the tribunal would achieve justice.[53] Similarly, the ICTY has spent well over a billion dollars, at a cost of approximately $10 million per defendant.[54]

This frustration and dissatisfaction with the cost of the ICTY and ICTR drove the Security Council to institute a novel method of funding the SCSL—voluntary donations.[55]

Those countries that donated to the SCSL comprised a Management Committee to handle the general administration of the court.[56] The advantage to having the court funded through donations was that the

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[48] *Id.*
[49] *Id.* The government of Sierra Leone appointed the SCSL's deputy prosecutor. *Id.*
[50] *Id.*
[51] *See generally*, Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT'L CRIM. JUST. 541 (2004).
[52] Jalloh, *supra* note 14, at 429.
[53] Permanent Rep. of Rwanda to the U.N., Letter Dated 26 July 2002 from the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council, 6 U.N. Doc. S/2002/842 (July 26, 2002).
[54] Rupert Skilbeck, *Funding Justice: The Price of War Crimes Trials*, HUM. RTS. BRIEF, Spring 2008, at 6.
[55] UNSCR 1315, *supra* note 12, art. 8. The Security Council chose this method of financing against the advice of the Secretary-General, Kofi Annan, who believed assessed contributions were the only say to "produce a viable and sustainable financial mechanism affording secure and continuous funding." *See*, Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, U.N. Doc. S/2000/915, para. 71 (2000).
[56] Pham, *supra* note 15, at 89.

SCSL would be accountable to its donors.[57]

c. Temporal Jurisdiction

One of the most controversial decisions made by the tribunal was the SCSL's expansive temporal jurisdiction,[58] implemented because the amnesty provision of the 1999 Lomé Agreement[59] posed a significant hurdle to prosecuting members of the RUF, many of whom may not have ceased fighting without it.[60] If the amnesty provision was valid, the SCSL would only have jurisdiction for offenses that took place after 7 July 1999.[61] Conversely, if the SCSL disregarded the provision, offenses could be prosecuted dating back to 30 November 1996, when the Abidjan Peace Agreement failed.[62]

Furthermore, given the sheer number and atrocious nature of the crimes committed during the conflict, the parties to the Lomé Agreement believed that a truth and reconciliation commission was necessary for the country to properly heal.[63] In order to do so, amnesty would encourage those responsible for the conflict's crimes to testify before the commission without risk of penal consequences.[64] Yet UNSCR 1315's preamble noted that the Secretary-General's Special Representative had appended to the Lomé Agreement the U.N.'s understanding that the amnesty provision would not apply to international crimes.[65]

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[57] Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L L. 436, 453 (2002).

[58] Temporal jurisdiction is defined as "jurisdiction based on the court's having authority to adjudicate a matter when the underlying event occurred." *Temporal Jurisdiction*, BLACK'S LAW DICTIONARY 931 (9th ed. 2009).

[59] The Amnesty clause in the Lomé Agreement reads "[a]fter the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the Agreement." Lomé Agreement, *supra* note 25, at article IX.

[60] HOFFMAN, *supra* note 3131, at 49.

[61] U.N. Secretary-General, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, (2000).

[62] *Id.* The Abidjan Peace Agreement also had an amnesty provision that dated back to 1991, when the conflict began. Peace Agreement Between the Government of Sierra Leone and the Rebel United Front of Sierra Leone (Nov. 30, 1996) http://www.sierra-leone.org/abidjanaccord.html [hereinafter the Abidjan Agreement].

[63] GBERIE, *supra* note 19, at 207.

[64] Schabas, *supra* note 2727, at 150.

[65] UNSCR 1315, *supra* note 12.

Disregarding the amnesty provision, the Security Council proposed:

> [T]hat the special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of [crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law], including those leaders, who in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.[66]

The Government of Sierra Leone, which never supported the 1996 amnesty provision,[67] agreed with the draft jurisdictional language and expressed its belief that the Lomé Agreement did not bar prosecution for international crimes or crimes under Sierra Leonean law.[68] Though negotiations over the draft statute continued for more than a year, there is no evidence of either party revisiting the issue.[69] The draft language remained and was incorporated into the Special Court's statute in Article 10.[70]

d. Personal Jurisdiction

As noted above, the personal jurisdiction of the SCSL extended to those "who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."[71] Out of concern that the language would be interpreted to allow for the prosecution of peacekeepers and child soldiers, the Security

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[66] *Id.* at 2.

[67] Sierra Leone's government felt pressured by the international community into the Lomé Agreement and the amnesty provision caused national outrage. GBERIE, *supra* note 19, at 157-158.

[68] Amnesty International objected to granting amnesty to any combatant, including the amnesty granted under the Abidjan Agreement in 1996. Amnesty International, *Sierra Leone: The U.N. Security Council Must Make the Special Court Effective and Viable*, RELIEFWEB (Feb. 13, 2001), https://reliefweb.int/report/sierra-leone/sierra-leone-un-security-council-must-make-special-court-effective-and-viable.

[69] Schabas, *supra* note 27, at 156.

[70] SCSL Statute, *supra* note 46, art. 10.

[71] *Id.* art. 1.

Council restricted jurisdiction over peacekeepers[72] to the sending state and barred prosecution of anyone under the age of 15.[73]

4. The World's First International Hybrid Tribunal

On 16 January 2002, the U.N. and Sierra Leone reached an agreement establishing the SCSL.[74] Appended to the agreement was a statute passed by Sierra Leone's government that established the court under Sierra Leonean law[75] making the SCSL the world's first international hybrid tribunal. In July 2002, the court began operating.[76]

IV. The Special Court's Prosecutions Begin

A. Indictments

In March 2003, the SCSL Chief Prosecutor announced seven initial indictments against the RUF leader, Foday Sankoh, his chief of staff, Sam Bockarie, RUF commanders, Issa Hassan Sessay and Morris Kallon, AFRC leaders, Johnny Paul Koroma and Alex Brima, and Sierra Leone's interior minister, Sam Hinga Norman, who founded the CDF and served as President Kabbah's deputy defense minister during the fighting.[77] The indictments against the RUF leader, the RUF chief of staff, and Sierra Leone's interior minister were later dismissed due to their deaths.[78] Johnny Koroma fled to Liberia and died under mysterious

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[72] *Id.* art. 2.

[73] *Id.* art 7. This was a break with the prevailing view of international criminal justice. The Rome Statute for International Criminal Court bars prosecution of any offender who was under the age of eighteen at the time of the alleged commission of the offense. The Rome Statute, s*upra* note 36, art. 26.

[74] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Jan. 16, 2002), http://www.rscsl.org/Documents/scsl-agreement.pdf [hereinafter SCSL Agreement].

[75] SCSL Statute, *supra* note 46.

[76] Schabas, *supra* note 27, at 157.

[77] Pham, *supra* note 15, at 95. At trial, Norman called President Kabbah as a defense witness, but he refused to testify. The SCSL sided with Kabbah. Penfold, *supra* note 45, at 64.

[78] Sankoh died of a stroke while in custody. *Foday Sankoh*, ECONOMIST.COM, (AUG. 7, 2003), http://www.economist.com/node/1974062 . Charles Taylor murdered Bockarie presumably to prevent him from testifying. Crane, *supra* note 44, at 211. Taylor maintains that Bockarie died while resisting arrest, but in a defiant and gruesome gesture, shipped Bockarie's corpse directly to the SCSL's chief prosecutor in a box. *Id.* Norman

circumstances.[79]

Within the next few months, the Chief Prosecutor also indicted Augustine Gbao of the RUF, Ibrahim Kamara and Santigie Kanu of the AFRC, and Moinina Fofana and Allieu Kondewa of the CDF.[80] All of the defendants were charged with war crimes, crimes against humanity, and serious violations of international humanitarian law.[81]

B. Jurisdictional Challenges

As expected, the Lomé Agreement's amnesty clause was the first major hurdle to prosecution. Article IX of the Agreement stated:

> To consolidate peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those [organizations] since March 1991, up to the signing of the present Agreement.[82]

Morris Kallon, Ibrahim Kamara, Moinina Fofana, and Augustine Gbao all filed preliminary motions with the Special Court arguing that the amnesty provision of the Lomé Agreement barred their prosecutions.[83] The argument was not without merit. The defendants claimed that the entire purpose of the Lomé Agreement was irreconcilable with the establishment of the SCSL.[84] Furthermore, they argued, it was arbitrary and capricious for the government of Sierra Leone to honor its commitments to the Abidjan Agreement and the U.N.,

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died of natural causes during the proceedings and his case was dismissed. Prosecutor v. Norman, Fofana, & Kondewa, Case No. SCSL-04-14-T, Decision on Registrar's Submission of Evidence of Death of Accused Samuel Hinga Norman and Consequential Issues (May 21, 2007), http://www.rscsl.org/Documents/Decisions/CDF/776/SCSL-04-14-T-776.pdf.

[79] Penfold, *supra* note 45, at 67.

[80] Pham, *supra* note 15, at 96.

[81] *Id.*

[82] The Lomé Agreement, s*upra* note 2525, at Article IX.

[83] Noah Novogrodsky, *Speaking to Africa: The Early Success of the Special Court for Sierra Leone*, 5 SANTA CLARA J. INT'L L. 194, 199 (2006).

[84] *Id.*

but disregard its commitments under the Lomé Agreement.[85]

The Appeals Chamber for the Special Court disagreed. Ruling that domestic amnesty laws cannot prohibit prosecutions under international law for crimes of universal jurisdiction by simple decree, the court noted:

> The Lomé Agreement created neither rights nor obligations capable of being regulated by international law. An agreement such as the Lomé Agreement which brings to an end an internal armed conflict no doubt creates a factual situation of restoration of peace that the international community acting through the Security Council may take note of. That, however, will not convert it to an international agreement which creates an obligation enforceable in international, as distinguished from municipal law.[86]

"States cannot use domestic legislation to bar international criminal liability."[87] The prosecution could now present its case.

C. Convictions

In 2007, Alex Brima, Ibrahim Kamara, and Santigie Kanu were all convicted of war crimes, crimes against humanity, and serious violations of international humanitarian law.[88] Brima and Kanu each received fifty years in prison, while Kamara received forty-five years.[89]

The next year, Issa Hassan Sessay, Morris Kallon, Augustine Gbao,[90]

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[85] *Id.*
[86] Prosecutor v. Kallon & Kamara, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, para. 42 (Mar. 13, 2004), https://www.legal-tools.org/doc/b67cdd/pdf/.
[87] Novogrodsky, *supra* note 8383, at 200.
[88] Prosecutor v. Brima, Kamara, & Kanu, Case No. SCSL-04-16-T, Sentencing Judgement 13 (July 19, 2007), http://www.worldcourts.com/scsl/eng/decisions/2007.07.19_Prosecutor_v_Brima_Kamara_Kanu1.pdf.
[89] *Id.* at 36.
[90] Prosecutor v. Sesay, Kallon, & Gbao, Case No. SCSL-04-15-A, Judgment 477-80 (Oct. 26, 2009), http://www.rscsl.org/Documents/Decisions/RUF/Appeal/1321/RUF%20Appeal%20Judgment.pdf.

Allieu Kondewa, and Moinina Fofana[91] were all convicted and sentenced to fifty-two, forty, twenty-five, twenty, and fifteen years respectively.[92]

D. Prosecutor vs. Taylor

The SCSL was under serious threat of losing credibility in Sierra Leone if Charles Taylor was not brought to justice.[93] Taylor was widely believed to have directed the RUF to invade Sierra Leone to support his own civil war in Liberia.[94] His warlord economy prolonged both conflicts, especially Sierra Leone's, because he traded logistical and operational support to the RUF for access to Sierra Leone's eastern diamond mines.[95] Taylor would then sell these diamonds for an enormous profit.[96] Yet, indicting Taylor would be immensely problematic because he was still Liberia's sitting president at a time when the country was fighting its own civil war.[97] If Taylor were indicted, there would be no incentive for him to make peace.

1. The Indictment

In March 2003, the SCSL's chief prosecutor, David Crane, indicted Charles Taylor under seal for crimes against humanity, war crimes, and other serious violations of international humanitarian law.[98] The indictment was sealed because Crane feared that publicizing it would destabilize Sierra Leone and increase violence in Liberia.[99] Hoping to seize an opportunity to apprehend Taylor outside Liberia, Crane unsealed the indictment while Taylor was in Ghana for peace talks.[100] Yet, Ghanaian authorities balked at apprehending Taylor and he fled back to

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[91] Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-A, Judgment (May 28, 2008), http://www.rscsl.org/Documents/Decisions/CDF/Appeal/829/SCSL-04-14-A-829.pdf.
[92] For a complete list of the SCSL's indictments and sentences, see Appendix C, *infra*.
[93] Jalloh, *supra* note 14, at 419.
[94] The SCSL found that the Prosecutor failed to prove Taylor had directly commanded the RUF. Simons, *supra* note 8.
[95] *Id.*
[96] *Id.*
[97] WAUGH, *supra* note 17, at 273.
[98] Crane, *supra* note 44, at 209.
[99] *Id.*
[100] *Id.* at 211.

Liberia.[101] Later, as part of a compromise to bring peace to Liberia, Nigeria offered Taylor asylum if he stepped down as president, which he accepted under intense international pressure.[102] After Taylor violated the terms of his asylum by attempting to flee to Cameroon, Nigeria extradited him to Sierra Leone.[103] Taylor was then transferred from Sierra Leone to The Hague, where a branch of the SCSL had opened amid security concerns in Freetown.[104]

2. Head of State Immunity

Shortly after Taylor was indicted, his attorneys filed a motion to quash the SCSL's indictment citing head of state immunity.[105] Taylor argued that customary international law did not give the national courts of another sovereign an exception to head of state immunity.[106]

The SCSL rejected Taylor's argument and ruled that heads of state are not immune from international tribunals.[107] The Court further held that, even though the SCSL originated with a treaty between the U.N. and Sierra Leone, as opposed to Chapter VII of the U.N. Charter, the fact that the Security Council passed a resolution creating the SCSL gave it distinct international characteristics trumping head of state immunity.[108]

3. Verdict

Charles Taylor's trial began in June of 2007, but was postponed when Taylor, in behavior typical of a despot facing trial, fired his defense

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[101] *Id.*
[102] WAUGH, *supra* note 17, at 281.
[103] *Id.* at 285-286.
[104] Jalloh, *supra* note 14, at 411. The SCSL's president feared that trying Taylor in Sierra Leone could spark a return to violence in the fragile region. *Id.* After the Dutch government agreed to host the trial, the Security Council, relying on its authority under Chapter VII of the U.N. Charter, adopted Resolution 1688, authorizing the change in venue. *Id.* This was incredibly controversial at the time because of a feared loss of the SCSL's legitimacy. *Id.*
[105] Novogrodsky, *supra* note 83, at 203.
[106] *Id.* at 204.
[107] *Id.*
[108] *Id.*

attorneys and boycotted the proceedings.[109] The trial resumed in January 2008[110] and concluded on 11 March 2011 after the presentation of tens of thousands of pages of evidence, more than 1,000 exhibits, and testimony from 120 witnesses, including Taylor himself.[111] On 26 April 2012, after thirteen months of deliberation, the panel of three judges, from Uganda, Samoa, and Ireland, convicted Taylor of aiding, abetting, and planning the atrocities committed by the RUF and AFRC during the war.[112] One month later, the same three judges sentenced Taylor to fifty years in prison.[113]

E. Criticisms of the Special Court for Sierra Leone

Though successful in its limited prosecutions, the SCSL is far from perfect and the Court is not without its critics.

1. Lack of Resources

a. Funding

Many of the SCSL's problems revolved around funding. The UNSC established the SCSL to be funded with voluntary contributions from U.N. member states.[114] This meant that those most interested in the SCSL's success, the U.N. and the people of Sierra Leone, were now entirely dependent on donations.[115] At one point, the Court became so cash-strapped that it needed a bailout from the U.N. just to meet its mandate.[116]

The SCSL's limited budget significantly restricted its capabilities

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[109] Jason McClurg, *Witnesses Begin Testifying as Charles Taylor's War Crimes Trial Resumes*, 24 INT'L ENFORCEMENT L. REP. 114 (2008).
[110] *Id.*
[111] Marlise Simons, *The Netherlands: Taylor Trial Ends*, N.Y. TIMES (Mar. 11, 2011), http://www.nytimes.com/2011/03/12/world/europe/12briefs-Netherlands.html?_r=0.
[112] Simons, *supra* note 8. *See also*, Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgement (May 18, 2012), http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf.
[113] Prosecutor v. Taylor, Case No. SCSL-03-01-T, Sentencing Judgment 40 (May 30, 2012), http://www.rscsl.org/Documents/Decisions/Taylor/1285/SCSL-03-01-T-1285.pdf.
[114] UNSCR 1315, *supra* note 12, art. 8.
[115] Jalloh, *supra* note 14, at 430.
[116] Nmehielle & Jalloh, *supra* note 47, at 121.

and forced the court's chief prosecutor to limit the number of indictments and prosecutions.[117]

b. Support to the Defense Office

The Court's shoestring budget also limited the resources that could be provided to the defense attorneys. Though Taylor sat atop a vast and lucrative criminal enterprise, investigators were never able to track down the millions of dollars he allegedly sent offshore.[118] As a result of Taylor's penury, the SCSL funded Taylor's defense, which cost $100,000 a month.[119] Even so, Taylor's defense attorneys complained that they were significantly underfunded and that the Registrar often asked the Defense Office to make decisions that undermined the representation of its clients.[120]

2. Narrow Interpretation

The SCSL's mandate was to "prosecute persons who bear the greatest responsibility" for the conflict's violence.[121] Obviously, there were differing opinions on whom and how many were most responsible for the atrocities in Sierra Leone. This was, after all, a decade long conflict waged primarily against a civilian population. Concerned that the phrasing of the mandate would overly restrict the number of prosecutions, the U.N. Secretary General urged the Security Council to widen the personal jurisdiction of the Court's mandate.[122] His proposal was rejected.[123]

The limited funding available and the SCSL's narrow jurisdiction lead the Prosecutor to charge only a tiny fraction of the conflict's worst perpetrators, allowing some of the most notorious to escape justice.[124]

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[117] McDonald, *supra* note 43, at 124.
[118] Simons, *supra* note 8.
[119] *Id.*
[120] Jalloh, *supra* note 14, at 443.
[121] SCSL Agreement, *supra* note 74, art. 1.
[122] Jalloh, *supra* note 14, at 414.
[123] *Id.*
[124] *Id.* at 421-422.

3. Selective Prosecutions

At the SCSL's formation, juveniles and peacekeepers were specifically excluded from prosecution.[125] These exclusions were controversial in Sierra Leone. Though there was a segment of the population that wanted to see juveniles prosecuted,[126] the United Nations Children's Fund and other human rights organizations were adamantly against it.[127] In contrast, the failure to hold peacekeepers accountable, especially those assigned to the Economic Community of West African States Monitoring Group (ECOMOG), caused outrage and instantly damaged the SCSL's credibility.[128] The ECOMOG was responsible for crimes against Sierra Leone's population, including summary executions, rape, and looting.[129]

Finally, Sierra Leone's civil war began, almost inevitably, because of terrible governance, rampant corruption, and regional instability.[130] Yet the conflict was fueled and perpetuated by the factions' exploitation of the country's diamond mines, both for greed and revenue.[131] These "conflict diamonds" were sold on the international market with the complicity of the diamond industry.[132] The SCSL's failure to hold foreign businesses accountable for knowingly profiting from conflict diamonds diminished the court's legitimacy.[133]

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[125] SCSL Statute, *supra* note 46, art., 1, 7.
[126] Under Sierra Leonean law, the age of majority is 17. Nicole Fritz and Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT'L L. J. 391, 415 (2001).
[127] Schocken, *supra* note 57, at 449, *citing* Chris McGreal, Unique Court to Try Killers of Sierra Leone: Those Who Were Enslaved, Raped and Mutilated Demand Justice, THE GUARDIAN (LONDON) (Jan. 17, 2002) at 15.
[128] GBERIE, s*upra* note 19, at 212.
[129] *Id.* at 131.
[130] Ozzonia Ojielo, "Beyond the TRC" *in* RESCUING A FRAGILE STATE: SIERRA LEONE 2002-2008 at 43 (Lansana Gberie ed., 2009).
[131] *Id.*
[132] Ian Smillie, Lansana Gberie, & Ralph Hazleton, The Heart of the Matter: Sierra Leone, Diamond & Human Security (2000), https://www.africaportal.org/publications/the-heart-of-the-matter-sierra-leone-diamonds-and-human-security/.
[133] *Id.* at 11-12.

VII. The Special Court for Sierra Leone's Legacy and the Future of International Hybrid Tribunals

A. Contributions

1. A "Nationalized" International Tribunal

The SCSL was the world's first international hybrid tribunal empowered to adjudicate its cases under both international and national law.[134] The use of national law can be important to a country as devastated as Sierra Leone and trying to regain a sense of nationhood and seeking a return to normalcy. In other words, the hybrid nature of the court can give a country a feeling of "ownership" over the process, even where international law is necessary because national courts and law are not capable.[135]

The rule of law had effectively vanished in Sierra Leone. Though the government was functioning at the time of the SCSL's creation, its civil and judicial infrastructure had been destroyed and the RUF was on the verge of another coup.[136] Exposure to highly publicized and fair trials held in *locus criminis* would significantly improve Sierra Leone's rule of law.

2. Bilateral Creation

The SCSL, in contrast to the ICTR and ICTY, was the first criminal tribunal created by treaty between the U.N. and a member state.[137] The ICTR and ICTY were created by the Security Council under its Chapter VII authority and imposed on Rwanda and the former Yugoslavia.[138] As Charles Jalloh, a law professor and SCSL scholar noted:

> While Chapter VII resolutions are coercive in the sense of being binding on all UN Member States, the SCSL consensual bilateral treaty approach offers a practical alternative to the use of such exceptional powers where

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[134] SCSL Agreement, *supra* note74.
[135] Charles Chernor Jalloh, *The Contribution of the Special Court for Sierra Leone to the Development of International Law*, 15 AFR. J. INT'L & COMP. L. 165, 173 (2007).
[136] GBERIE, *supra* note 19, at 166.
[137] SCSL Agreement, *supra* note 74.
[138] Jalloh, *supra* note135, at 172.

> the affected State is willing to prosecute serious international law violations but is unable to do so for some reason . . . .[139]

The SCSL's model may also assist a U.N. member state in sparking interest among the international community for assistance in resolving a conflict.[140] For instance, the international community had no real interest or motivation to resolve Sierra Leone's conflict until the jaw-dropping horror of the RUF's attack on Freetown.[141] When the international community finally intervened, it obviously did not understand the war.[142] The resulting and doomed Lomé Agreement and its amnesty clause, which President Kabbah was pressured into signing, were a give-away to the RUF.[143] It was only through the creation of the SCSL that the conflict could end with any sense of justice.

3. An Existing Template

The SCSL was designed to avoid the deficiencies of the ICTR and ICTY.[144] Yet it also borrowed from what the two previous tribunals used effectively, such as rules of evidence, procedure, and the jurisprudence of their appellate chambers.[145] Future hybrid tribunals can benefit by inheriting and employing the robust contributions and precedents these tribunals have made to international criminal law.

B. Did the Special Court "Work"?

Sierra Leone is unquestionably better off than it was in 2002. Since the SCSL began operating, the country has had four transparent, fair

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[139] *Id.*
[140] *Id.*
[141] GBERIE, *supra* note 19, at 161.
[142] *Id.* at 157. The United States' envoy and mediator to the Lomé talks, Jesse Jackson, called the RUF's Sankoh, a "true revolutionary" and compared him to Nelson Mandela. HOFFMAN, *supra* note 31, at 49. Jackson, for his part, said that an isolationist U.S. Congress gave him no leverage over the RUF and he had no alternative to negotiation. Steve Coll, *The Other War*, WASH. POST (Jan. 9, 2000), http://www.washingtonpost.com/wp-dyn/content/article/2006/11/28/AR2006112800682.html.
[143] *Id.* at 157.
[144] Crane, *supra* note 44, at 204. *See also*, McDonald, *supra* note 4343, at 124.
[145] Pham, *supra* note 15, at 85.

elections with relatively peaceful transfers of power.[146] Though still plagued by government corruption, tribalism, and regionalism, the country has endured economic turmoil and devastating natural disasters, including an Ebola outbreak that killed 4,000, without mass violence or breakdown of civil-society.[147]

It is impossible to gauge how much of progress was due to the SCSL. Post-conflict tribunals are relatively new initiatives in international law and their contributions to conflict resolution may take decades to accurately access. In the short term, the prosecution and incarceration of Charles Taylor was vital to stabilizing West Africa.

C. Bridging the Accountability Gap

1. A Supplement to the International Criminal Court

The United States is not a party to the ICC.[148] Neither are China, India, Pakistan, Indonesia, Turkey, and a number of other states.[149] Therefore, resorting to the ICC may not be feasible after a large-scale conflict. Furthermore, while the ICC was intended to be a court of last resort,[150] there are many instances where the national courts of countries victimized by war are not capable of handling the conflict's fallout. In protracted internal armed conflicts like in Sierra Leone and Liberia, a devastated judicial infrastructure, corruption, or bias may render domestic prosecutions impossible. Furthermore, given the dissatisfaction with the cost and inefficiencies of the ICTR and ITCY, it is unlikely that the U.N. will return to Chapter VII tribunals that are centrally funded by its member states. International hybrid tribunals, like the SCSL, can be used to effectively bridge the existing gap between the ICC and incapacitated, incapable, or overwhelmed national courts.

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[146] *A Little Hope in Sierra Leone: Sierra Leone's New President has Made Big Promises*, ECONOMIST.COM (Apr. 12, 2018), https://www.economist.com/middle-east-and-africa/2018/04/12/sierra-leones-new-president-has-made-big-promises.
[147] *Id.*
[148] *What Does the International Criminal Court Do?*, BBC NEWS.COM (June 25, 2015), https://www.bbc.com/news/world-11809908.
[149] *Id.*
[150] *See* Rome Statute, *supra* note 36.

2. Recommendations

a. Funding

Funding will continue to be a problem for future hybrid tribunals. For the ICTR and ICTY, the costs were too high. For the SCSL, there was never enough money in the first place, which damaged its credibility.[151] Ideally, the U.N. would consider setting up a standing global fund that its member states can augment through voluntary donations when the next hybrid tribunal is established. The next hybrid tribunal should also have a clear mandate and jurisdiction before its creation. This will allow for a better prediction of its costs.

Finally, the U.N. should create a workable template for the logistics of physically setting up and running a tribunal. This includes office management, translation equipment, case file management systems, and witness accommodations. This type of institutional knowledge can lower initial startup costs.

b. Chapter VII Authority

Tribunals created by bilateral treaty do not have extraterritorial jurisdiction or extradition authority. This could have been problematic for the SCSL given the cross-border nature of the conflict and that three of the principle defendants—Taylor, Bockarie, and Koroma—were in Liberia while under indictment. The U.N. Security Council should consider augmenting a hybrid tribunal with Chapter VII authority to allow for extradition.

VIII. Conclusion

There will never be a one-sized approach for hybrid tribunals and conflict resolution. What worked in Sierra Leone may not work in Syria or the Democratic Republic of the Congo. Despite valid criticism, the SCSL made important contributions to the field of international criminal law and Sierra Leone has been at peace for nearly two decades.

The worst evils of war too often fall on those who have no stake in it.

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[151] Jalloh, *supra* note 14, at 421-422. *See also*, GBERIE, *supra* note 19, at 212.

The culture of impunity and the willingness of combatants to terrorize civilians are too common in the world. The SCSL is a necessary and practical model for providing justice and establishing the rule of law where the ICC and national courts cannot. If the United States finds itself prosecuting large-scale combat operations, something akin to the Special Court for Sierra Leone may become necessary.

THE DEPUTY "TO[O]" PROBLEM: AN OFFICER, AN EMPLOYEE SUPERVISOR, AND THE APPOINTMENTS CLAUSE

MAJOR JUSTIN C. BARNES*

Both the Oath and Commission Clauses confirm an important point: Those who exercise the power of Government are set apart from ordinary citizens. Because they exercise greater power, they are subject to special restraints. There should never be a question whether someone is an officer of the United States because, to be an officer, the person should have sworn an oath and possess a commission.[1]

I. Introduction

In the armed forces, officers command.[2] As a consequence—or, perhaps, by necessity—officers are entrusted with tremendous, even terrible, authority.[3] It perhaps should be unsurprising, therefore, that the

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[1] U.S. Dep't of Transp. v. Ass'n of Am. R.R.s, 135 S. Ct. 1225, 1235 (2015) (Alito, J., concurring).

[2] Importantly, officers in general–not just commanders–command. *See infra* notes 130-133 and accompanying text (noting who may issue a lawful command, which includes officers who are in superior in rank to the recipient, not just officers who have been designated as commanders).

[3] *See infra* note 118 (discussing the maximum punishment for the disobedience of a lawful command).

Constitution restricts those who may wield such power.[4] Further, for military officers, authority is balanced by accountability: if their authority is abused, they can be called to account, administratively *and* criminally.[5] But are officers really the only "commanders" in the armed forces? Are there others who are able to exercise that sort of power? The short answer is "yes." They are the civilian employees who supervise officers.

Take this hypothetical unit's headquarters. An active-duty Army brigadier general commands this headquarters. A civilian who is employed in a General-Schedule (GS) 15 position serves as the deputy to the commander.[6] The previous commander's predecessor's predecessor—importantly, who was also an active-duty brigadier general—appointed the civilian employee into the civil service. Below the civilian deputy, there are two staff sections. An Army officer in the grade of lieutenant colonel leads the first staff section; the other is led by a civilian employee. The lieutenant colonel has three subordinates: one is a civilian employee and the other two are officers, including a Captain (CPT) Robert J. Snuffy.[7] The deputy to the commander is the rater for each of the staff-section heads, while the commander serves as the lieutenant colonel's senior rater.

At a morning meeting, the deputy to the commander instructs CPT Snuffy's staff-section head to have CPT Snuffy prepare a short briefing for the deputy on a pending contract action. The briefing is due the following morning at 0800. The staff-section head dutifully instructs CPT Snuffy accordingly. But alas, CPT Snuffy fails to comply. (The reason why does not really matter, but for the sake of the story, the reason was no good reason at all: the good captain just did not want to do it, as unlikely as that may be.) At 0800 the next morning, there is no briefing.

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[4] *See infra* Section II.A. (discussing the Appointment Clause's significant-authority test).
[5] *See infra* notes 257-265 and accompanying text (discussing accountability measures).
[6] The general-schedule system is a "classification and pay system [that] covers the majority of civilian white-collar Federal employees (about 1.5 million worldwide) in professional, technical, administrative, and clerical positions." *Pay & Leave: Pay Systems*, OFFICE OF PERS. MGMT., https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/ (last visited Feb. 6, 2019) [hereinafter OPM GS]; *see also infra* note 42 (noting other categories of people who work for the U.S. government). An agency "establishes (classifies)" each position based on that position's "level of difficulty, responsibility, and qualifications required," which, in turn, determines pay. OPM GS, *supra* note 6.
[7] *See infra* appendix.

To be sure, the deputy's instruction was arguably the definition of mundane. Across the Army, countless supervisors instruct an even greater number of staff officers to present innumerable briefings to what must be a lengthy list of leaders. Some of those harried officers fail. It happens. Indeed, had the deputy given the instruction himself, this would be an aptly named leadership challenge—something to be addressed but not, like the instruction itself, that big of a deal.

But the deputy to the commander did not give CPT Snuffy the instruction himself. Instead, he had CPT Snuffy's superior commissioned officer do that. That instruction, therefore, became a superior commissioned officer's command.[8] As a result, CPT Snuffy's disobedience was something more than just a leadership challenge; it was a felony.[9]

The difference here is a result of an important distinction: the deputy is a civilian employee, but the staff-section head, a lieutenant colonel, is an officer of the United States. Moreover, this distinction reflects a very real difference. In short, an officer of the United States may wield a remarkable authority—"the power of [the] Government" of the United States.[10] Indeed, that remarkable authority takes on a different character in the armed forces. This is because the lieutenant colonel is not just any old officer of the United States, but rather, CPT Snuffy's "superior commissioned officer."[11] Thus, their authority is the power to issue a command, and a command, if disobeyed, carries with it a criminal penalty that can be quite severe.[12]

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[8] *See* 10 U.S.C. § 890 (2018). This punitive article was amended by the *Military Justice Act of 2016*. The changes are not substantive: the amendment splits the offense of assaulting a superior commissioned officer from this article and adds it to the article that prohibits disrespecting such an officer. Military Justice Act of 2016, Pub. L. No. 114-328, §§ 5408, 5409, 130 Stat. 2000, 2941-42 (2016). This change was effective on January 2019. For simplicity purposes, the current U.S. Code version is referred to throughout this article.

[9] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 16d(1)-(2) (2019) [hereinafter MCM] (defining maximum punishment for disobedience of a lawful command as, among other things, five years' confinement or, in time of war, death).

[10] U.S. Dep't of Transp. v. Ass'n of Am. R.R.s, 135 S. Ct. 1225, 1235 (2015) (Alito, J., concurring).

[11] 10 U.S.C. § 801(5) (2018) (defining a superior commissioned officer as "a commissioned officer superior in rank or command"); 10 U.S.C. § 101(b)(1), (2), (8) (2018) (defining the terms "officer," "commissioned officer," and "rank").

[12] 10 U.S.C § 890(2); MCM, *supra* note 9, pt. IV, ¶ 16(d)(1)-(2) (defining maximum punishment).

The Constitution identifies a specific process to appoint officers. Its Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . officers of the United States."[13] The clause is not merely a matter of "etiquette or protocol"; rather, "it is among the significant structural safeguards of the constitutional scheme."[14] The clause is "designed to preserve political accountability relative to important government assignments,"[15] and it reflects the framers' concern regarding "who should be permitted to exercise the awesome and coercive power of the government."[16] In short, the clause is about ensuring that those who exercise "significant authority pursuant to the laws of the United States"[17] are "accountable to political force and the will of the people."[18]

At the same time, the Court's chosen qualifier, *significant*, suggests that non-officers may be given some level of authority; the question is how much. Indeed, the Supreme Court has long recognized that a person may be "an agent or employé [sic] working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its officers."[19] These are "employees of the United States," who are "lesser functionaries subordinate to officers."[20] Yet, despite the rather lengthy history of these categories, the line separating one from the other has been, and remains, "not altogether clear."[21]

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[13] U.S. CONST. art. II, § 2.
[14] Edmond v. United States, 520 U.S. 651, 659 (1997) (internal quotation omitted).
[15] *Id*. at 663 (discussing Appointment Clause's distinction between principal and inferior officers).
[16] Ass'n of Am. R.R.s v. U.S. Dep't of Transp., 821 F.3d 19, 36 (D.C. Cir. 2016) (discussing history of Appointments Clause) (original emphasis omitted), *reh'g en banc denied*, No. 12-5204 (D.C. Cir. Sept. 9, 2016).
[17] Buckley v. Valeo, 424 U.S. 1, 126-27 (1976); *see also infra* text accompany notes 74-115 (discussing development of the significant-authority test).
[18] Freytag v. Comm'r, 501 U.S. 868, 884 (1991).
[19] United States v. Germaine, 99 U.S. 508, 509 (1878).
[20] Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976).
[21] Tucker v. Comm'r, 676 F.3d 1129, 1133 (D.C. Cir. 2012) (discussing cases dealing with the line between officers and employees); *see also* Lucia v. Sec. & Exch. Comm., 138 S. Ct. 2044, 2052 (2018) ("And maybe one day we will see a need to refine or enhance the test *Buckley* set out so concisely. But that day is not this one . . . .")

Despite that haziness—and ongoing disputes over who is, or must be, an officer[22]—a point has emerged in case law in which a person's authority becomes significant. That point occurs when that authority is, among other things, the power to create or determine a legal obligation.[23] For the armed forces, this occurs rather regularly in a very common practice: it is called, colloquially, giving orders. Of course, that is precisely what the lieutenant colonel's request to CPT Snuffy was: it was an order—really, a command[24]—which is nothing more, or less, than a binding, criminally-enforceable legal obligation.[25]

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[22] *See, e.g.*, Raymond J. Lucia Cos. Inc. v. Sec. & Exch. Comm., 832 F.3d 277 (D.C. Cir. 2016) (evaluating the constitutionality of the Security and Exchange Commission's use of administrative law judges and concluding that such judges are not officers), *rev'd*, 138 S. Ct. 2044 (2018) (holding that administrative law judges are inferior officers but declining to further define the significant-authority test). As pure speculation, it is not necessarily surprising that these issues continually surface. It is simply easier to hire employees than to appoint officers. U.S. CONST. art. II, § 2 (the Appointments Clause); *see also* Edmond v. United States, 520 U.S. 651, 660 (1997) (stating that "[t]he prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers"). Even for non-principal officers, Congress "may" by law allow the President, the heads of the departments, or the courts to appoint such "inferior officers." U.S. CONST. art. II, § 2. That is a circumscribed list of people compared to who can hire an employee, which includes, among other people, another employee or by a member of the uniformed services. *See* 5 U.S.C. § 2105(a)(1) (2018).

[23] *See infra* Section II.A.2 (discussing when authority is significant under the Appointments Clause).

[24] The term "order" versus "command" is often misunderstood. In short, a "superior commissioned officer" gives commands, while noncommissioned officers and other officers who do not otherwise qualify as a superior commissioned officer give orders. *Compare* 10 U.S.C. § 890 (2018) (prohibiting the disobedience of the "lawful command" of a "superior commissioned officer"), *with* 10 U.S.C. §§ 891(2), 892(2) (2018) (prohibiting the disobedience of the "lawful order" of a warrant officer, noncommissioned officer, or petty officer or "any other lawful order issued by a member of the armed forces"); *see also* MCM, *supra* note 9, pt. IV, ¶¶ 15c(1), 18c(2)(c)(i) (defining "superior commissioned officer" and stating that "[a] member of one armed force who is senior in rank to a member of another armed force is the superior of that member with authority to issue orders . . . .") Of course, the penalty for disobeying an order is far less severe than that for disobeying a command. *Compare id*. pt IV, ¶¶ 17d(4)-(5), 18d(2) (providing a penalty of bad-conduct discharge, total forfeitures, and one-year confinement for disobeying a noncommissioned officer, or dishonorable discharge, total forfeitures, two years' confinement if a warrant officer, and a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months for disobeying another lawful order), *with id.* pt. IV, ¶ 16d(2) (providing for a dishonorable discharge, total forfeitures, and five-years' confinement for disobeying a superior commissioned officer).

[25] 10 U.S.C. § 890 (2018); *see also* MCM, *supra* note 9, pt. IV, ¶ 16d(1)-(2) (defining the maximum punishment).

Yet, the true source of that command was not the lieutenant colonel; it was really the deputy to the commander. There is no reason to think that had the deputy not asked for that unfortunate briefing, the lieutenant colonel would have issued this command. Indeed, it was the deputy to the commander who decided CPT Snuffy would brief, the briefing's content, and its deadline. Still, that detailed, if routine, "request" became a legal obligation only because the lieutenant colonel issued it as a command. In effect—importantly, even if it not in intent—the deputy to the commander commandeered the lieutenant colonel's authority.

There is a problem with that, though. The deputy to the commander is not an officer of the United States. He was not appointed in accordance with the Appointments Clause. He was hired. Despite that fact, because he was the lieutenant colonel's supervisor, the deputy was able to exercise his subordinate officer's authority, an authority that the Appointments Clause reserves to officers. Simply put, this contravenes the Constitution.

To establish that conclusion, this article proceeds in three parts. Naturally enough, it begins with the Appointments Clause. Drawing on Supreme Court and lower-court opinions, the article will argue that significant authority is, among other things, the power to create or determine a legal obligation. It will then apply this test to an officer's power to issue commands under the Uniform Code of Military of Justice (UCMJ), and will argue that that power is the power to create just such a legal obligation and that, consequently, it is the exercise of significant authority. Ultimately, this section will conclude that only an officer of the United States, who has been appointed in accordance with the Appointments Clause, may issue a command.[26]

In the second section, this article applies that conclusion to an organizational structure like that presented in the hypothetical, namely, a civilian employee who supervises a military officer who, in turn, supervises military subordinates. Essentially, this structure inserts a civilian employee into a military organization's supervisory chain. This section begins by identifying those tools that are available to a

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[26] That military officers are, well, officers and are, consequently, subject to the Appointments Clause are not particularly controversial conclusions although their reasoning has rarely been articulated. For instance, in *Weiss v. United States*, a case about military judges, the Court stated simply as a matter of fact and without further elaboration that military judges are officers and "that the Appointments Clause applies to military officers." 510 U.S. 163, 169-70 (1994).

civilian employee to control military subordinates. Among these tools is a supervisor's authority to "direct[] and assess[]"—rate—a subordinate military officer.[27] Those tools gives the civilian supervisor the ability to fire—that is, relieve—the officer from that officer's current assignment.[28] Together, they allow the supervisor to essentially, albeit generally not immediately, end an officer's career—likely resulting in the officer's discharge.[29]

The courts have long recognized the principle that one who can remove an officer is one who can control that officer.[30] Applying that principle, the second part of this section will argue that, in some circumstances, those tools give the civilian supervisor the ability to effectively exercise a subordinate officer's authority. The supervisor does so by instructing the officer to create a legal obligation for a subordinate service member—that is, to issue a command. This section will argue in its second part that the exercise of this supervisory authority violates the Appointments Clause.

In the third and final section, this article will identify potential resolutions. These include appointing civilian employees as civil officers; restricting the authority of civilian employees such that they can no longer require subordinate officers to issue commands; or restructuring organizations to prevent this issue from emerging at all. Although each solution carries real costs, this article will argue that the latter solution is the better solution—in part based on a policy preference that significant authority should come with substantial accountability.

Two important caveats are in order. First, this article addresses only the specific organizational relationship in which a civilian *employee* supervises a military officer who, in turn, supervises military subordinates.

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[27] *See* U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM para. 2-5(a) (4 Nov. 2015).

[28] As discussed further below, a civilian supervisor who serves as a rater or a senior rater may relieve a Soldier. *See id*., para. 3-54 (defining relief for cause as an "early release of an officer from a specific duty or assignment directed by superior authority and based on a decision that the officer has failed in his or her performance of duty"), para. 3-54(d) (providing that the identity of the authority that relieved the officer will be identified in the evaluation and that "the rating official directing the relief will clearly explain the reason for the relief in his or her portion of the OER").

[29] *See infra* notes 208-209 and accompanying text (discussing practical effect of a relief for cause on an officer's continued service).

[30] *See infra* text accompanying notes 215-222 (discussing power to remove an officer as power to control that officer).

It does not address any other circumstance in which a civilian—including a civil *officer*, e.g., the Secretary of Defense—supervises an officer.[31]

Further, as a matter of constitutional law, an officer may perform all the functions of an employee.[32] When a civilian employee supervises an officer in a circumstance in which the officer acts only as an employee—and specifically, when the officer has no directly reporting military subordinates—the Appointment Clause issue discussed here *may* not arise.[33] In any event, such a supervisory arrangement is not the subject of this article.

Second, this article focuses only on the authority of a civilian employee over a military officer and not any other grade of service member. To be sure, other service members give orders, namely, warrant officers, noncommissioned officers, and petty officers.[34] As these

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[31] To be clear, this article says *nothing* about civilian control of the military. Constitutionally civilian control of the military is effectuated by the exercise of authority over military officers by the *civil* officer, namely, the President. *See* U.S. CONST. art. II, § 2 (commander-in-chief clause). More specifically, the Appointments Clause does not prohibit a *civil* officer from supervising a military officer, i.e., the Secretary of Defense, the service secretaries, or the veritable legion of deputy, under, and assistant secretaries that make up the Defense Department or the service secretariats. *See also infra* note 176 (discussing types of officers that are described in the Constitution). Indeed, the list of such civil-officer supervisors is lengthy. For instance, in just the Office of the Secretary of Defense alone, the list includes: the secretary of defense, the deputy secretary of defense, the undersecretaries of defense, the principal deputy undersecretaries of defense, and the assistant secretaries of defense, among many, many others. 10 U.S.C. §§ 113(a), 132, 133(a-b), 134, 135, 136, 137, 137a, 138. This article is solely concerned with the supervision of military officers by civilian *employees*. *See supra* note 6 and *infra* notes 42-43 and accompanying text (discussing employees).

[32] *See, e.g.*, Freytag v. Comm'r, 501 U.S. 868, 882 (1991) (stating that "[t]he fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution").

[33] That said, even when an officer has no subordinates, that officer still has authority over junior service members. *See* Section II.B.1 (discussing officer's authority to issue commands).

[34] 10 U.S.C. § 891(2) (2018) (providing for the punishment of any person subject to the code who "willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer"); *see also* 10 U.S.C. 892(2) (prohibiting a person who is subject to the code from disobeying "any other lawful order" that was "issued by a member of the armed forces" to which the person has a "duty to obey"). Of note, warrant officers in the grade of warrant officer, W-1 are appointed by warrant, that is, they are not commissioned officers, unless the secretary of the armed force provides otherwise by regulation. 10 U.S.C. § 571(b) (2018) (providing that the President issues both the

titles aptly suggest, such orders are issued by persons not appointed as officers. But, the penalty for disobeying these orders is considerably less than the penalty for disobeying a superior commissioned officer's command.[35] It could be argued, consequently, that such orders do not reflect the exercise of significant authority. Regardless, this is not the article's subject.

Who decides is the basic question at the core of the United States'—and really any—constitutional scheme.[36] The Constitution establishes a process for appointing those who will decide, that is, those who will exercise the "sovereign authority" of the United States.[37] The power to create a legal obligation is the exercise of such authority, and that is just what a military officer's command is—a binding legal obligation, one that carries a substantial criminal penalty if disobeyed. In short, to exercise such a tremendous, even awesome, power under the Constitution, one must be appointed in accordance with it, and a deputy to a commander is not.

II. The Appointments Clause and the Military Officer

A. U.S. Officers and the Exercise of Significant Authority

In its entirety, the Appointments Clause reads:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint

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warrant and the commission). In any event, warrant officers are commissioned when promoted to the grade of chief warrant officer, W-2. *Id*.

[35] *Compare* MCM, *supra* note 9, pt. IV, ¶ 17d(4), (5) (providing in addition to a punitive discharge and total forfeiture of all pay and allowances, a maximum penalty of two years' or one year confinement for disobeying a warrant officer's or non-commissioned officer's order, respectively), ¶ 18d(2) (providing a maximum term of confinement for the disobedience of "other lawful order" of six months' confinement), *with id.* pt. IV, ¶ 16d(1), (2) (providing that in addition to a dishonorable discharge and total forfeitures of all pay or allowances, a maximum term of confinement of five years for disobeying a lawful command or, in time of war, "[d]eath or such other punishment as a court-martial may direct").

[36] *See, e.g.*, Ass'n of Am. R.R.s v. U.S. Dep't of Transp., 821 F.3d 19, 36 (D.C. 2016) (noting that "among the Framers' chief concerns at the constitutional convention were questions of who should be permitted to exercise the awesome and coercive power of the government"), *reh'g en banc denied*, 12-5204 (D.C. Cir. Sept. 9, 2016).

[37] *See* Raymond J. Lucia Cos. Inc. v Sec. & Exch. Comm., 832 F.3d 277, 285 (2016) (discussing the Appointments Clause), *rev'd on other grounds*, 138 S. Ct. 2044 (2018).

> Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[38]

It is a relatively short clause, measuring all of eighty-one words, but it has generated a fair share of confusion. For example, sitting as a circuit justice, Chief Justice Marshall wrote of the clause: "I feel no diminution of reverence for the framers of this sacred instrument, when I say that some ambiguity of expression has found its way into this clause."[39] Indeed, the third Chief Justice's lament regarding the clause's ambiguity has continued to the present day.[40]

Despite that ambiguity, the clause clearly has one built-in limitation: it applies only to officers of the United States.[41] Yet, not everyone who works for the United States is an officer. One category of such persons[42] is employees, who the Supreme Court has described as "lesser functionaries subordinate to officers of the United States."[43]

The fact that the clause applies to only some persons, but not others, also implies that the two categories are constitutionally distinct. Unfortunately, the "line between 'mere' employees and . . .

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[38] U.S. CONST. art. II, § 2.

[39] United States v. Maurice, 2 Brock 96, 26 F.Cas. 1211, 1213 (Marshall, Circuit Justice, C.C.D. Va. 1823).

[40] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 671 (1988) (noting that "[t]he line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn").

[41] U.S. CONST. art II., § 2.

[42] There are many other categories of persons who perform work for the United States: enlisted persons; contractors, and even occasionally volunteers. 10 U.S.C. §§ 505 (authorizing a service secretary to accept persons for enlistment), 1588 (authorizing volunteers in specific circumstances) (2018); FAR 1.104, 2.101 (2017) (stating that the regulation applies to "all acquisitions" and defining acquisitions as the "acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government"). *But see* 31 U.S.C. § 1342 (2018) (prohibiting the use of volunteers generally).

[43] Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976).

officers is anything, but bright."[44] In part, that ambiguity arises from the simple fact that "[i]t is relatively rare for a case to raise an issue involving the fundamental structural provisions devised by the Framers in allocating power within the government they constructed."[45] More importantly, in its earliest cases, the Supreme Court did not really attempt to draw that line at all. Instead, it essentially concluded that so long as one of the three constitutional appointment authorities—namely, the President, the courts, or the heads of the departments—appointed a person to an office "established by Law," the person was an officer.[46] It was, in the words of one circuit court, "circular logic."[47]

That changed in 1976. In the case of *Buckley v. Valeo*, the Supreme Court decided that the Appointments Clause was not just concerned with titles, but rather contained a "substantive meaning"—really a limitation.[48] In essence, the Court read the clause to restrict the exercise of some government powers to officers.[49] Specifically, only an officer appointed to an office that was established by law[50] could exercise

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[44] Landry v. Fed. Deposit Ins. Corp., 204 F.3d 1125, 1132 (D.C. Cir. 2000), *overruled on other grounds*, Lucia v. Sec. & Exch. Comm., 138 S. Ct. 2044 (2018).

[45] United States v. Janssen, 73 M.J. 221, 222 (C.A.A.F. 2014). Anecdotally it seems to be happening with greater frequency. The U.S. Court of Appeals for the Armed Forces (C.A.A.F) and the Supreme Court has recently wrestled with the issue of appellate military judges who have been cross-appointed to the U.S. Court of Military Commission Review (CMCR). *See* United States v. Dalmazzi, 76 M.J. 1 (C.A.A.F. 2016) (affirming case based on fact that the participating judge had not been commissioned a CMCR judge when the case was decided); *see also* United States v. Ortiz, 76 M.J. 189, 190 (C.A.A.F. 2017) (determining that appellate military judges who hold CMCR commissions could sit as courts of criminal appeals judges), *affirmed*, 138 S. Ct. 2165 (2018). That said, these cases are not about whether a person has exercised an officer's authority, but whether a principal officer may sit on an armed force's court of criminal appeals. *See, e.g.*, *Ortiz*, 76 M.J. at 190 (describing petition for review as whether a court of criminal appeals judge may serve simultaneously on both that court and the CMCR under the Appointments Clause and statute).

[46] *See* United States v. Mouat, 124 U.S. 303, 307 (1888) (stating that "[u]nless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment," the person is not an officer); *see also infra* text note 77 and accompanying text (discussing earlier cases regarding established by law requirement).

[47] *Landry*, 204 F.3d at 1132-33 (noting that "[i]n fact, the earliest Appointments Clause cases often employed circular logic, granting officer status to an official based in part upon his appointment by the head of a department").

[48] Buckley v. Valeo, 424 U.S. 1, 126 (1976).

[49] *Id.*

[50] U.S. CONST. art. II, § 2; *see also* Freytag v. Comm'r, 501 U.S. 868, 881 (1991) (noting that the "office of special trial judge is 'established by Law'").

"significant authority pursuant to the laws of the United States."[51] Despite that conclusion, however, the nature of those two requirements remains the subject of debate; it is to their meanings to which this article turns next.

1. "Established by Law"

To begin with, the Appointments Clause states that the President shall nominate and appoint "all other Officers of the United States . . . which shall be *established by Law*."[52] Since relatively early in the Constitution's history, the meaning of the qualifier clause—established by law—has been the subject of debate. In an 1823 case, *Maurice v. United States*, Chief Justice Marshall, sitting as a circuit justice, wrote that the clause was subject to two interpretations: first, "that all offices of the United States shall be established by law" or, second, that the Appointments Clause only applied "to such offices."[53] In the latter interpretation, the clause would "leav[e] it to the power of the executive . . . [to] create in all laws of legislative omission, such offices as might be deemed necessary for their execution, and afterwards to fill those offices."[54] Put another way, the President could unilaterally create, and fill, an office.

In *Maurice*, the Chief Justice rejected that latter interpretation.[55] Later, the Supreme Court itself required that before a person could be an officer, that person must be appointed to an office that had been established by law.[56] Since *Buckley v. Valeo*, consistent with *Maurice*, and as recently as 2018, the Supreme Court has never suggested that a person may exercise significant authority even though the person holds no office established by law.[57]

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[51] *Buckley*, 424 U.S. at 126-27.
[52] U.S. CONST. art. II, § 2 (emphasis added).
[53] United States v. Maurice, 2 Brock 96, 26 F.Cas. 1211, 1213 (Marshall, J., Circuit Justice, C.C.D. Va. 1823).
[54] *Id.*
[55] *Id.* (noting that the requirement that the Congress establish all offices, among other things, "accords best with the general spirit of the constitution, which seems to have arranged the creation of office among legislative powers").
[56] *See* United States v. Smith, 124 U.S. 525, 533 (1888) (noting that "[t]here must be, therefore, a law authorizing the head of a department to appoint clerks" and that because there was no such law, the clerk was not an officer).
[57] *See* Freytag v. Comm'r, 501 U.S. 868, 881 (1991) (concluding that special trial judges held an office established by law); *see also* Lucia v. Sec. & Exch. Comm., 138 S. Ct.

Despite that fact, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has at least suggested that that may not be the case. Specifically, and literally parenthetically, the D.C. Circuit has called the established-by-law requirement "the threshold trigger for the Appointments Clause."[58] By calling it a "threshold trigger,"[59] the court could be suggesting that the Clause, in its entirety, applies only to those positions that are established by statute. But if the clause does not apply *at all*, that necessarily implies that the

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2044, 2051 (2018) (noting that "an individual must occupy a 'continuing' position established by law to qualify as an officer"). As discussed below, an agency's general authority to hire may be sufficient to establish an employee's "office." *See infra* note 59. Perhaps so. But even then, employees are not generally appointed in accordance with the Clause, which is the very issue. *See* 5 U.S.C. § 2105(a)(1) (2018) (describing who may appoint an employee).

[58] Landry v. Fed. Deposit Ins. Corp., 204 F.3d 1125, 1133 (D.C. Cir. 2012), *overruled on other grounds*, *Lucia*, 138 S. Ct. at 2044. The Supreme Court recently overruled the D.C. Circuit's previous holding that administrative law judges (ALJs) were employees, not officers. *Compare Lucia*, 138 S. Ct. at 2044 (holding that SEC ALJs were officers), *with* Raymond J. Lucia Cos. Inc. v Sec. & Exch. Comm., 832 F.3d 277, 285-86 (2016) (concluding that SEC ALJs were employees), *rev'd*, 138 S. Ct. at 2044; *Landry*, 204 F.3d at 1134 (concluding same for FDIC ALJs), *overruled*, *Lucia*, 138 S. Ct. at 2044. In do so, it (rather mechanically) applied an earlier case, *Freytag*. *Lucia*, 138 S. Ct. at 2052. Indeed, the majority expressly disclaimed providing any "more detailed legal criteria" despite some interesting arguments in the concurrence and dissents. *Id*. *But see id*. at 2057 (Thomas, J., concurring) ("The Founders likely understood the term 'Officers of the United States' to encompass all federal civil officials who perform an ongoing, statutory duty—no matter who important or significant that duty."), 2065-66 (Sotomayor, J., dissenting) (stating that "I would hold that one requisite component of 'significant authority' is the ability to make final, binding decisions on behalf of the Government" and concluding that ALJs are not officers because their decisions lack finality). As a consequence of this narrow and, probably, compromise holding, the Court's decision in *Lucia* itself is of little help in defining the difference between an officer and an employee.

[59] *Landry*, 204 F.3d at 1133. That said, if it is a threshold trigger, it seems to be a pretty easy one to pull. Specifically, the D.C. Circuit has suggested, albeit in dicta, that even an agency's general statutory authority to hire a person may be sufficient to establish an office. *See* Tucker v. Comm'r, 676 F.3d 1129, 1133 (D.C. Cir. 2012) (noting that IRS employees at issue appear to be hired "by the Commissioner pursuant to his general hiring power"). This is not an irrational conclusion. For instance, it could be argued that the existence of that statutory authority means that the agency is not acting unilaterally to bring an office into existence. *See, e.g.*, 5 U.S.C. § 3101 (2018) (providing general authority to hire). Further, that grant of authority could, and probably should, be read in light of the agency's general authority to prescribe regulations to carry out—and, therefore, delegate—its functions. *See, e.g.*, 10 U.S.C. § 3013(g)(3) (2018) (providing that the Secretary of the Army shall have the authority to "prescribe regulations to carry out his functions, powers, and duties under this title").

clause's restriction on the exercise of significant authority does not apply either.[60]

It is, at best, difficult to square the D.C. Circuit's approach with Chief Justice Marshall's construction of the Appointments Clause in *Maurice*.[61] Moreover, such a threshold is even harder to square with *Buckley*'s overall holding that the clause contains a substantive limitation on the exercise of authority.[62] Indeed, if the established-by-law qualifier was really a threshold that must be satisfied before the clause, including its limitation on the exercise of significant authority, was applicable, the limitation would be simple to avoid:[63] delegate

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[60] In fairness, it is possible to read the D.C. Circuit's "threshold trigger" consistent with the construction advanced below, namely, that it is really another prerequisite that must be met before a person may exercise significant authority. *See infra* notes 65-66 and accompanying text. The threshold-trigger language is literally a parenthetical in the part of the opinion comparing the ALJs at issue in that case to the Tax Court's special trial judges, who the Supreme Court concluded were officers. *Landry*, 204 F.3d at 1133; *see also Freytag*, 501 U.S. at 882. Because the D.C. Circuit ultimately concluded that the ALJs held a position established by law, it did not address whether the Supreme Court's significant-authority test would have even applied to positions that were not so established. *Landry*, 204 F.3d at 1133. Ultimately, the D.C. Circuit decided that the ALJs did not exercise significant authority. *Id.*; *see also Tucker*, 676 F.3d at 1133 ("In any event, because we conclude below that Appeals employees do not exercise significant authority within the meaning of the Appointments Clause cases, we need not resolve whether their positions were "established by Law" for purposes of that clause."). The Supreme Court concluded that ALJs were officers, but the majority did not further elaborate on whether the "established by Law" was a "threshold" to the clause's application at all or whether holding such an office was a pre-requisite to the exercise of "significant authority." *See Lucia*, 138 S. Ct. at 2052 (noting the established-by-law requirement but not further elaborating on it).

[61] *See* notes 53-55 and accompanying text (discussing *Maurice*).

[62] Buckley v. Valeo, 424 U.S. 1, 126 (1976); *see also* Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 118 (2007) (internal quotation omitted) ("Any position that is an office in the constitutional sense under the two elements we have described, and has not been created ultra vires, will have been created by law in some fashion, regardless of how labeled.") [hereinafter OLC Opinion].

[63] As the D.C. Circuit itself has noted, "it would seem anomalous if the Appointments Clause were inapplicable to positions extant in the bureaucratic hierarchy" to which were "assigned 'significant authority,' merely because neither Congress nor the executive branch had formally created the positions." *Tucker*, 676 F.3d at 1133. To illustrate this, assume for the sake of argument that the established-by-law requirement is actually a *threshold* determination to the Appointment Clause's limitation on who may exercise significant authority is even applicable and that statutory authority to hire is insufficient to establish an office. An employee may hired another employee. 5 U.S.C. §§ 2105(a)(1)(d), 3101 (2018) (providing a general authority to hire and noting that an employee includes a person appointed into the civil service by "an individual who is an employee"). Such persons cannot be officers, as the Constitution permits only certain

significant authority to someone holding a position not established by law.[64]

Consequently, the better construction of the clause is that a person must hold an office established by law *before* that person may exercise significant authority. An appointment to an office is, in other words, a prerequisite to the exercise of significant authority,[65] and consistent with *Maurice*, a person can only be appointed to an office established by law. Thus, that *additional* requirement does not void the clause's *overall* limitation.

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persons to appoint officers, which does not include employees. *See* U.S. CONST. art. II, § 2. Consequently, if the Clause's limitation on who may exercise authority does not even apply to those employees because they hold no office established by law, those persons could exercise significant authority despite not being officers. The Clause is flanked into irrelevancy. *See also* OLC Opinion, *supra* note 62, at 117 ("But the rule for which sorts of positions have been 'established by Law' such that they amount to offices subject to the Appointments Clause cannot be whether a position was formally and directly created as an 'office' by law. Such a view would conflict with the substantive requirements of the Appointments Clause.").

[64] The U.S. Court of Appeals for the Armed Forces case of *United States v. Janssen* illustrates, albeit indirectly, why this cannot work. In *Janssen*, the Air Force Judge Advocate General and, later, the Secretary of Defense purported to appoint a civilian employee to the Air Force Court of Criminal Appeals. 73 M.J. 221, 222 (C.A.A.F. 2014). It was undisputed that the Appointments Clause required a military judge to be an officer. Weiss v. United States, 510 U.S. 163, 169 (1994) ("We begin our analysis on common ground. The parties do not dispute that military judges, because of the authority and responsibilities they possess, act as 'Officers' of the United States."). The issue in *Janssen* was whether the Secretary of Defense had the statutory right to appoint inferior officers. *Janssen*, 73 M.J. at 224; *see also* U.S. Const. art. II, § 2 (providing that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, . . . in the Heads of Departments"). Ultimately, the court concluded that the Secretary lacked that right. *Jansenn*, 73 M.J. at 225 (noting that "[o]ne searches the sections of Title 10 in vain for any provision conferring a general appointment power for officers"). Yet, like all cabinet secretaries, the Secretary also had general statutory authority to run his department, and in any event, that civilian employee had been originally assigned to the court by the very officer who created the court. *See id*. at 222 (noting the assignment by the service judge advocate general); 5 U.S.C. § 301 (2018) (authorizing a head of a department to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property"); 10 U.S.C. § 866(a) (requiring the service judge advocates general to create the courts of criminal appeals and authorizing those officers to "assign" appellate military judges to them, including civilians). As a consequence, if significant authority *could* be delegated to a non-officer employee, that delegation must have occurred, even if by implication, when either the Secretary appointed or the Judge Advocate General assigned the civilian employee to the court. If that is so, *Janssen*'s result was wrong.

[65] *See infra* Section II.A.2 (discussing the Supreme Court's significant-authority test).

Assuming that is the case, the inquiry of whether an office is established by law is holistic, taking into account a number of authorities. For instance, how a statute defines an office's "duties, salary, and means of appointment" is relevant.[66] Thus, a statute need not specifically authorize the appointment of an officer to a particular position in a particular agency.

For instance, in *Landry v. Federal Deposit Insurance Corporation*, the D.C. Circuit considered whether a Federal Deposit Insurance Corporation (FDIC) administrative law judge (ALJ) must be appointed as an officer.[67] The FDIC appointed this particular ALJ pursuant to an executive branch-wide authority to appoint ALJs; that is, the statutory authority to hire an ALJ was not specific to this ALJ or even to all of the FDIC's ALJs.[68] The D.C. Circuit found that the ALJ's position was established by law despite the agency-agnostic statutory authority.[69] Indeed, outside of certain designated positions that require a dual appointment, military officers hold an office described by grade, not position.[70]

In sum, a person can only be appointed to an office established by law and only such a person, if otherwise properly appointed, may exercise "significant authority pursuant to the laws of the United States."[71] It is to that type of authority to which this article turns to next.

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[66] Landry v. Fed. Deposit Ins. Corp., 204 F.3d 1125, 1133 (D.C. Cir. 2000) (quoting Freytag v. Comm'r, 501 U.S. 868, 881 (1991)); *see also* Lucia v. Sec. & Exch. Comm., 138 S. Ct. 2044, 2051 (2018) ("Stressing 'ideas of tenure [and] duration,' the Court . . . made clear that an individual must occupy a 'continuing' position established by law to qualify as an officer.").

[67] *Landry*, 204 F.3d at 1130, *overruled on other grounds*, *Lucia*, 138 S. Ct. at 2044.

[68] In support, the court cited to a general statutory authority to appoint ALJs. *Id*. at 1133; *see* 5 U.S.C. § 3105 (2018) (general appointment authority); *see also* 5 U.S.C. §§ 5372, 556-57 (2018) (defining rates of pay for administrative law judges appointed under section 3105, and functions and duties of such judges generally).

[69] *Landry*, 204 F.3d at 1133 (concluding that "[t]he ALJ position here is also 'established by Law,' as are its specific duties, salary, and means of appointment").

[70] 10 U.S.C §§ 531(a), 624(c) (2018) (providing for original appointments and appointments based on promotion for regular officers in all of the armed forces); *see also* 10 U.S.C. § 741 (2018) (establishing officer ranks). *But see, e.g.*, 10 U.S.C §§ 3037(a), 5148(b), 8037(a) (2018) (providing for the appointment of the Army, Navy, and Air Force judge advocates general).

[71] Buckley v. Valeo, 424 U.S. 1, 126 (1976).

2. *Significant Authority*

Only an officer may exercise "significant authority pursuant to the laws of the United States" consistent with the Appointments Clause.[72] But what amount of authority is significant? To be sure, the cases concerning this standard have not been, in the words of the D.C. Circuit, "altogether clear."[73] At its core, however, a person exercises significant authority when that person employs the "sovereign authority" of the United States.[74] That occurs, generally, when the person has the power to create or determine a binding legal obligation.[75]

As an initial matter, the "significant authority" test is of a somewhat more recent vintage. It emerged in 1976 from the Supreme Court's decision of *Buckley v. Valeo*—a seminal case concerning federal election law.[76] Before *Buckley*, whether a person was an officer—or not—largely turned on who appointed the person,[77] not on the powers that the person exercised. Thus, an officer was an officer if appointed by one of the constitutional appointment authorities, namely, the President with the advice and consent of the Senate or, if authorized by statute, the President alone, the heads of the departments, or the courts.[78]

That changed in 1976. In *Buckley v. Valeo*, the Supreme Court addressed the constitutionality of the appointment of the commissioners

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[72] Edmond v. United States, 520 U.S. 651, 662 (1997) ("The exercise of 'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather, as we said in *Buckley*, the line between officer and non-officer.").

[73] Tucker v. Comm'r, 676 F.3d 1129, 1133 (D.C. Cir. 2012); *see also Landry*, 204 F.3d at 1132 ("The line between 'mere' employees and inferior officers is anything but bright.").

[74] Raymond J. Lucia Cos. Inc. v. Sec. & Exch. Comm., 832 F.3d 277, 285 (D.C. Cir. 2016), *rev'd*, 138 S. Ct. 2044 (2018).

[75] *See* notes 96-100 and accompanying text (discussing test).

[76] Buckley v. Valeo, 424 U.S. 1, 6 (1976).

[77] For example, in an 1888 case in which the Court determined that a Navy paymaster was not an officer of the United States, it noted that unless a person is appointed "by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States." United States v. Mouat, 124 U.S. 303, 307 (1888); *see also* Burnap v. United States, 252 U.S. 512, 516 (1920) (noting that "[w]hether the incumbent is an officer or an employé [*sic*] is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto").

[78] Landry v. Fed. Deposit Ins. Corp., 204 F.3d 1125, 1132-33 (D.C. Cir. 2000) (noting that "[i]n fact, the earliest Appointments Clause cases often employed circular logic, granting officer status to an official based in part upon his appointment by the head of a department").

of the Federal Elections Commission. This was a body that, the Court said, possessed both "extensive rulemaking and adjudicative powers," and it had an "enforcement power that was direct and wide-ranging."[79] Perhaps because of that wide-ranging authority, three separate authorities appointed the six voting commissioners: the President pro tempore of the Senate appointed two (after receiving the majority and minority leaders' recommendations); the Speaker of the House appointed two ("likewise upon the recommendations of [the House's] respective majority and minority leaders"); and the President appointed the remaining two.[80] Further, *both* houses of Congress had to "confirm[]" those members—the President's appointees along with everyone else.[81]

In determining that this unusual appointment scheme violated the Appointments Clause, the Court stated first that the clause had a "substantive meaning"[82] although, in effect, it meant limitation. Specifically, the Court held, it was "fair import" of the clause that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer'" and that such an officer must be appointed in accordance with the clause.[83] Citing earlier cases in which the Court had determined that a postmaster general and a district-court clerk were officers, the Court concluded that "the Commissioners before [it] are at the very least such 'inferior Officers' within the meaning of that Clause."[84]

Unfortunately, beyond drawing that analogy, the Court did not expressly articulate a standard for how much authority it took before that authority became significant. It did, however, identify a number "of those powers . . . exercised by the present voting Commissioners," that must be reserved to officers.[85] Those identified powers, in turn, shed light on the significant-authority threshold. Thus, the Court noted both the Commission's "broad administrative powers"—namely its ability to make rules, issue advisory opinions, and determine a candidate's eligibility for funds—and its "enforcement

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[79] *Buckley*, 424 U.S. at 109-11.
[80] *Id*. at 113.
[81] *Id*.
[82] *Id*. at 126.
[83] *Id*.
[84] *Id*.
[85] Buckley v. Valeo, 424 U.S. 1, 137 (1976).

power," including its authority to seek judicial relief.[86] It concluded that these powers "represent[ed] the performance of a significant governmental duty exercised pursuant to a public law" and held that, therefore, they must be exercised by properly-appointed officers.[87]

The Supreme Court revisited the substance of the significant-authority test in *Freytag v. Commissioner Internal Revenue*. In that case, the Court considered whether the U.S. Tax Court's special trial judges (STJs) were inferior officers.[88] Similar to district-court magistrate judges,[89] the Tax Court's chief judge could assign a STJ to a case for the purpose of preparing recommended findings and conclusions, and importantly, the STJ could also actually decide declaratory judgment and small-dollar cases.[90]

The Supreme Court ultimately held that STJs were inferior officers because of the "significance of the[ir] duties and discretion."[91] To reach this conclusion, the Court relied on two specific factors: the STJs' discretion and the finality of some their decisions. Regarding discretion, the Court noted that the judges performed "more than ministerial tasks," including taking testimony, conducting trials, ruling on motions, and enforcing discovery orders.[92] Similarly, the STJs issued the Tax Court's final decision in certain cases.[93]

Interestingly, the Court specifically rejected the argument that a person could be an officer for some duties, but a "mere employee[] with respect to other responsibilities."[94] Thus, if some of a position's authority could only be exercised by an officer, the person who holds that position

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[86] *Id*. at 138-40 ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'").
[87] *Id*. at 141.
[88] 501 U.S. 868, 870-71 (1991).
[89] Magistrate judges are officers. *See Rice v. Ames*, 180 U.S. 371, 378 (1901) (determining that the Congress could vest the appointment of a commissioner in the courts); *see also History of the Federal Judiciary: Magistrate Judgeships*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/judges_magistrate.html (last visited Feb. 7, 2019) (noting that magistrate judges replaced commissioners).
[90] *Freytag*, 501 U.S. at 873.
[91] *Id*. at 881.
[92] *Id*. at 881-82. The term *ministerial* is defined as, inter alia, "[o]f, relating to, or involving an act that involves obedience to instructions or laws instead of discretion, judgment, or skill." *Ministerial*, BLACK'S LAW DICTIONARY (10th Ed. 2014).
[93] *Freytag*, 501 U.S. at 882.
[94] *Id*.

must be an officer regardless of whether that person "on occasion performs duties that may be performed by an employee not subject to the Appointments Clause."[95] In other words, an officer can do anything an employee can do, but an employee cannot do what only an officer can do.

Taken together, in both *Buckley* and *Freytag*, whether a person exercised significant authority turned on whether that person had the power to create or determine, or decide to judicially enforce, a specific legal obligation.[96] Thus in *Buckley*, among the commission's "broad

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[95] *Id*.

[96] In her dissent in *Lucia*, which was joined by Justice Ginsburg, Justice Sotomayor incorporates at least part of this test into her construction of the Clause, arguing that "one requisite component of 'significant authority' is the ability to make final, binding decisions on behalf of the Government." Lucia v. SEC, 138 S. Ct. 2044, 2065 (2018) (Sotomayor, J., dissenting). Of course, Justice Sotomayor does not say what *type* of decisions need to be final: a decision to hire an employee, for instance, is "final" when the employee is hired. Regardless, to create an *actual* legal obligation one must be able to make a final decision: by definition, a recommendation does not a legal obligation make. Of note, some of the parties' arguments in *Lucia* majority also describe a test along these lines. *Id*. at 2051-52 (noting argument that a person "wields 'significant authority' when he has," among other things, "the power to bind the government or private parties.") Although the majority does not adopt these standards, it also does not reject them. *Id.* at 2051-52. In addition, this test is similar, but not identical to, the standard proposed by the Office of Legal Counsel (OLC). The OLC argues that an officer is a person appointed to an office under the Appointments Clause, which exists when that position "is invested by legal authority with a portion of the sovereign power of the federal government" if that position is "continuing," which means, essentially, "not personal, transient, or incidental." OLC Opinion, *supra* note 62, at 73. In the OLC's view, "one could define delegated sovereign authority as power lawfully conferred by the Government to bind third parties, or the Government itself, for the public benefit." *Id.* at 87. That could be another way of saying the power to create a legal obligation. But, it seems insufficient to suggest that the exercise of "a portion of sovereign power" is enough to create an office. *Id.* at 73 (articulating standard). It is difficult to imagine what type of authority that government employees' exercise other than sovereign authority—and they can exercise a *portion* of government authority, just not a *significant portion*. *Cf.* Edmond v. United States, 520 U.S. 651, 662 (1997) (noting that the significant-authority test "marks . . . the line between officer and nonofficer"). Further, relying on historical cases, the OLC argues that a broad range of positions—some of which arguably create no legal obligation—exercise such power. *See id*. at 88, 91 (arguing that "public authority to arrest criminals" and "delegated sovereign authority to speak . . . on behalf of the United States toward or in other nations" is sovereign power). To be sure, even under the legal-obligation standard discussed in this paper, not all legal obligations are created equal—or, to put it another way, not all legal obligations are significant. *See* notes 34-35 and accompanying text (discussing authority of non-commissioned service members to issue orders but noting the reduced penalty for such orders). In any event, under essentially any test, the question remains, at its core, how much authority is *too* much

administrative powers"[97] was the power to issue rules and adjudicated cases—that is, to *create* (rule-making) and *determine* (adjudicating) legal obligations.[98] The commission was also given primary jurisdiction for the civil enforcement—namely, it decided whether to seek judicial enforcement—of several statutes.[99] Similarly, in *Freytag*, an STJ, among other things, decided "declaratory judgment proceedings and limited-amount tax cases."[100] Thus, there too the STJ was *determining* a legal obligation, namely, a person's tax liability.

The D.C. Circuit has identified three factors it uses, if inconsistently, to determine what degree of authority amounts to significant authority.[101] Regardless, they are consistent with the view that significant authority is the power to create or determine a legal

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authority? *See* OLC Opinion, *supra* note 62, at 87 (noting that "the particulars of what constitutes 'delegated sovereign authority' will not always be beyond debate"). Further, and more importantly, whatever significant authority is, there is little debate that a military officer exercises it and is, therefore, subject to the clause. *See id.* at 91 (noting that "there are military offices[,]" which are "primarily characterized by the authority to command in the Armed Forces – commanding both people and the force of government"); *see also* Weiss v. United States, 510 U.S. 163, 170 (1994) ("The parties are also in agreement, and rightly so, that the Appointments Clause applies to military officers."). Thus, if a military officer exercises significant authority, the civilian supervisor's authority over that military officer creates the Appointment Clause issue. *See infra* Section III (discussing civilian-supervisor control).

[97] Buckley v. Valeo, 424 U.S. 1, 140 (1976).

[98] The Court termed this "extensive rulemaking and adjudicative power." *Id.* at 110. Specifically, the Commission was authorized to issue regulations to carry out its statutory mandate, and it had the power to issue advisory opinions, which amounted to a safe-harbor if followed in good faith. *Id.* at 110-11.

[99] *Id.* at 111-13.

[100] *Freytag*, 501 U.S. at 882; *see also* Lucia v. Sec. & Exch. Comm., 138 S. Ct. 2044, 2054 (2018) ("And at the close of . . . proceedings, ALJs issue decisions much like that in *Freytag*—except with potentially more independent effect" because "when the SEC declines review . . . , the ALJ's decision itself 'becomes final' and is 'deemed the action of the Commission.").

[101] Tucker v. Comm'r, 676 F.3d 1129, 1133 (D.C. Cir. 2012). To be sure, the D.C. Circuit has not universally applied its three-factor significant-authority test. *See* Ass'n of Am. R.R.s v. U.S. Dep't of Trans., 821 F.3d 19, 36-39 (D.C. Cir. 2016) (concluding that an arbitrator exercised significant authority but not applying, or even citing, the *Tucker* test). That may be a consequence of the fact that there have been arguments raised that at least some of the test's factors do not reflect Supreme Court precedent. *See* Raymond J. Lucia Cos v. Sec. & Exch. Comm., 832 F.3d 277, 285 (D.C. Cir. 2016) (noting that "the court must reject petitioners' view, relying on *Edmond*, that the ability to 'render a final decision on behalf of the United States,' while having a bearing on the dividing line between principal and inferior Officers, is irrelevant to the distinction between . . . Officers and employees"), *overruled on other grounds*, 138 S. Ct. 2044 (2018).

obligation.[102] Specifically, under these factors, a court considers "the significance of the matters resolved by the official[]"; the "discretion" exercised by that person in reaching that decision; and the "finality" of the decision.[103] All three factors must be met for there to be an exercise of significant authority.[104]

First, as applied by the D.C. Circuit, a matter is significant if it actually creates or determines a legal obligation. Thus, in one case, the D.C. Circuit called an IRS determination of a person's tax liability "substantively significant enough."[105] In another case, the court treated an arbitrator's decision to establish metrics that would "immediately impact the freight railroads [legal] obligations" to Amtrak—essentially creating a new legal requirement—as significant.[106]

What both cases share is that the consequence of the would-be officer's decision was the determination or creation of a legal obligation. In the former case, the IRS determined the person's tax liability.[107] In the latter case, the arbitrator essentially created an

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[102] Outside of certain specialized contexts, military officers do not generally decide whether to seek judicial enforcement of a legal obligation. *But see* 10 U.S.C. § 806(d)(1)(2018) (permitting judge advocates to, among other things, represent the United States in civilian courts in both civil and criminal cases). As a consequence, this aspect of significant authority is not discussed further in the article. But it is noteworthy that in several cases, the courts held or noted that a person who could make the final decision to seek judicial involvement was an officer. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 661, 670 (1988) (stating that in a case involving the independent counsel, who could exercise the Justice Department's authority to prosecute an individual, "[t]he initial question is, accordingly, whether appellant is an 'inferior' or a 'principal' officer"); United States v. Gantt, 194 F.3d 987 (9th Cir. 1999) (concluding that U.S. Attorneys were inferior officers), *overruled on other grounds* United States v. Grace, 526 F.3d 499 (9th Cir. 2008); *see also* United States v. Hilario, 218 F.3d 19 (1st Cir. 2000) (accord).

[103] Tucker v. Comm'r, 676 F.3d 1129, 1133 (D.C. Cir. 2012). As noted above, the finality of an individual's decision to bind the government is part of the "requisite component" of significant authority in Justice Sotomayor's construction of the test. *Lucia*, 138 S. Ct. at 2065.

[104] *See Tucker*, 676 F.3d at 1134 (noting that in an earlier case, "the absence of any authority to render final decisions [was] fatal to the claim that the administrative law judges at issue there were Officers rather than employees").

[105] *Id.* at 1133.

[106] Ass'n of Am. R.R.s v. U.S. Dep't of Trans., 821 F.3d 19, 37 (D.C. Cir. 2016).

[107] *Tucker*, 676 F.3d at 1131; *see also* 26 U.S.C. §§ 6320, 6330 (2018) (establishing framework for appeals).

obligation to amend statutorily-mandated agreements between Amtrak and freight railroad operators.[108]

Second, the discretion and the finality prongs of the D.C. Circuit's test recognize that it matters *what* or *who* is really creating or determining the legal obligation. For instance, if constraints on an employee's decision making allow for no discretion, that particular employee really makes no decision.[109] In that case, the person is performing a ministerial action, not exercising any authority.[110] In short, when external constraints allow for no discretion, it is those constraints—really, and importantly, the person who imposed those constraints in the first place—that actually create the legal obligation, not the employee.[111]

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[108] *Ass'n of Am. R.R.s*, 821 F.3d at 24, 37. The statutory mechanism at issue in *Association of American Railroads* is somewhat complex. But essentially, Amtrak uses freight railroads' tracks and facilities and has a statutory preference in that use. U.S. Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct 1225, 1229 (2015). In 2008, the Congress required the Federal Railroad Administration and Amtrak to develop metrics and standards governing inter-city train performance. *Id*. If the parties do not reach agreement on those metrics and standards, an arbitrator is appointed, who decides upon the metrics and standards through arbitration. *Id*. As a general matter, these metrics and standards are incorporated into agreements between Amtrak and the railroads. *Id.* Further, if the requirements of the metrics and standards are not met, that can prompt enforcement action by federal authorities in which the railroads could be fined or made to pay damages to Amtrak. *Id*. at 1229-30.

[109] For instance, in *Tucker v. Commissioner Internal Revenue*, in concluding that an IRS appeals office employees were not officers, the court went to some pains to describe just how constrained they really were in making a decision. 676 F.3d at 1134-35.

[110] *See* Raymond J. Lucia Cos. Inc. v. Sec. & Exch. Comm., 832 F.3d 277, 287 (D.C. Cir. 2016) ("[P]etitioners have not substantiated that a finality order is just like a clerk automatically issuing a mandate, . . . and, in so asserting, have ignored that clerks have no authority to review orders or decline to issue mandates."), *overruled*, 138 S. Ct. 2044 (2018).

[111] In its opinion, OLC downplays the importance of discretion, arguing that "'independent discretion' is not a necessary attribute of delegated sovereign authority." OLC Opinion, *supra* note 62, at 93. Of course, the OLC opinion pre-dates *Tucker*. In any event, the OLC opinion relies on an historical understanding of the term "office" to support its conclusion discretion is not a necessary attribute. *Id.* at 94. Given the relatively recent birth of the significant-authority standard, it is not clear to what degree much of that historical authority is useful. *See supra* notes 76-78 and accompanying text (discussing date of the test). In his *Lucia* concurrence, Justice Thomas also downplays discretion's role, again based on historical authority. *See Lucia*, 134 S. Ct. at 2057 (noting that the "Founders considered individuals to be officers even if they performed only ministerial statutory duties—including recordkeepers, clerks, and tidewaiters (individuals who watched goods land at a customhouse)"). Importantly under either OLC's interpretation or Justice Thomas's concurrence, the diminishment of the requirement for independent discretion actually expands the universe of employees who must be officers.

Similarly, if an employee's decision must be ratified by a higher authority, the employee's decision is actually a recommendation. A recommendation—even one generally followed—does not create or determine anything at all;[112] and if the higher-level official rejects the recommendation, there is no legal obligation. Rather, it is that higher authority's decision to accept the recommendation that turns the recommendation into a legal obligation[113]

In sum, a person must be appointed an officer if that person holds an office "established by Law"[114] in which the person exercises "significant authority pursuant to the laws of the United States."[115] Such authority is the power to create or determine a legal obligation,[116] which is precisely the scope of an officer's authority over military subordinates.

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[112] OLC Opinion, *supra* note 62, at 98 ("Even at the time of its broadest prior reading of the Appointments Clause, this Office recognized that "advisory, investigative, informative, or ceremonial functions" are not subject to the Clause.")

[113] This was a significant part of the circuit court's holding in *Landry v. Federal Deposit Insurance Corporation.* In that case, the court held that an administrative law judge employed by the FDIC was not an inferior officer in part, because, "the ALJs . . . can never render the decision of the FDIC." 204 F.3d 1125, 1133 (D.C. Cir. 2000); *see also id*. at 1133-34 (noting also that although it was "uncertain just what role the STJs' power to make final decisions played in Freytag," the Supreme Court had emphasized finality in other aspects of its decision). *But see supra* note 58 (discussing the Supreme Court's recent decision that overruled the D.C. Circuit's conclusion that ALJs were not officers). Justice Sotomayor's dissent in *Lucia* also argues that the authority to recommend was not significant enough to make one into an officer. Lucia v. Sec. & Exch. Comm., 138 S. Ct. 2044, 2066 (2018) (Sotomayor, J., dissenting).

[114] U.S. CONST. art. II, § 2; *see also supra* Section II.A.1.

[115] Buckley v. Valeo, 424 U.S. 1, 126-27 (1976).

[116] *See supra* text accompanying notes 72-113. This standard is also similar to the standard for when an agency's action is "final" and, therefore, reviewable under the Administrative Procedures Act (APA). *See* 5 U.S.C. § 704 (2012) (APA judicial review). An agency action is final if it, first, "mark[s] the consummation of the agency's decisionmaking process." Bennett v. Spear, 520 U.S. 154, 177 (1997) (internal quotation omitted). Second, "action must be one by which rights or obligations have been determined" or "from which legal consequences will flow." *Id.* (internal quotation omitted). In other words, an agency action is reviewable if it actually creates or determines a legal obligation. To be sure, it is hard to imagine when a person could decide a final agency action and not exercise significant authority.

B. Significant Authority and the Military Officer

An officer of the armed forces exercises authority over subordinate members of the armed forces by creating legal obligations. Those legal obligations are simply called "command[s]."[117] Their significance is reflected in the maximum penalty for disobeying them, which is quite harsh: among other things, five years' confinement or, in time of war, even death.[118]

This section proceeds in two parts. First, it discusses the UCMJ article that enforces compliance with a superior officer's commands. It will argue that under that article, the enforceability of a command does not turn on the command's but-for cause. Thus, an otherwise lawful command that is issued at a civilian employee's request is an enforceable command under the statute. Second, the section applies the Appointment Clause to that authority, and it ultimately concludes that only a properly-appointed officer may, consistent with the Constitution, issue, or be the source of, a command.

1. Article 90, UCMJ: Statutory Authority to Issue Commands

"It is the primary business of armies and navies to fight or [be] ready to fight wars should the occasion arise."[119] "To prepare for and perform [this] vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life."[120] Indeed, "to accomplish its mission, the military must foster instinctive obedience, unity, commitment, and esprit de corps."[121] "There must be a first instinct to obey orders if the military is to function,"[122] and this instinct must be honed in peacetime and wartime, as "conduct in combat inevitably reflects the training that precedes combat."[123]

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[117] 10 U.S.C. § 890(2) (2012).
[118] MCM, *supra* note 9, pt. IV, ¶ 16d(1)-(2) (defining maximum punishment for disobeying lawful command of a superior commissioned officer as dishonorable discharge, forfeiture of all pay and allowances, and five years confinement or, in time of war, death).
[119] Parker v. Levy, 417 U.S. 733, 743 (1974) (quoting United States ex rel. Toth v. Quarles, 350 U.S.11, 17 (1955)).
[120] Schlesinger v. Councilman, 420 U.S. 738, 757 (1975).
[121] Goldman v. Weinberger, 475 U.S. 503, 507 (1986).
[122] United States v. McDaniels, 50 M.J. 407, 408 (C.A.A.F. 1999).
[123] Chappell v. Wallace, 462 U.S. 296, 300 (1983).

"[C]enturies of experience," so says the Supreme Court, has "developed [this] hierarchical structure of discipline and obedience to command."[124] It is, therefore, perhaps not surprising that much of the UCMJ is concerned with ensuring just such discipline. Indeed, there are punitive articles in the Code that prohibit just about everything from contemptuous words to malingering to disrespect and dereliction.[125]

Of primary concern here are those articles that prohibit the disobedience of orders. There are three relevant articles that concern disobedience.[126] Of those three, the one at issue here specifically is Article 90, which provides that any person subject to the UCMJ:

> who willfully disobeys a lawful command of that person's superior commissioned officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.[127]

The penalty for disobeying a lawful command is significant: in a time other than war, it carries a maximum penalty of dishonorable discharge, forfeiture of all pay and allowances, and five years' confinement;[128] in a time of war, the penalty borders on draconian: "Death or such other punishment as a court-martial may direct."[129]

The "essential attributes" of a lawful command are the "communication of words that express a specific mandate to do or not

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[124] *Id.*

[125] 10 U.S.C. §§ 888, 889, 890, 891(2-3), 892, 883 (2018) (prohibiting, respectively, contemptuous words, disrespect and disobedience of a superior commissioned officer, disobedience and disrespect of a warrant officer, noncommissioned officer, or petty officer, disobedience of any other lawful order, and malingering).

[126] First, Article 90 concerns disobedience of the "lawful command" of a "superior commissioned officer." 10 U.S.C. § 890. This is the subject of much of this article and will be discussed, in great detail *infra*. In addition to Article 90, Article 91 prohibits the disobedience of the "lawful order" of a "warrant officer, noncommissioned officer, or petty officer," while Article 92 extends such prohibition to "any lawful general order or regulation" or "any other lawful order [that is] issued by a member of the armed forces which it is [the person's] duty to obey." 10 U.S.C. §§ 891(2), 892(1)-(2).

[127] 10 U.S.C. § 890.

[128] MCM, *supra* note 9, pt. IV, ¶ 16d(2).

[129] MCM, *supra* note 9, pt. IV, ¶ 16d(1).

to do a specific act" that is "issu[ed] by competent authority" when there is a "relationship [between] the mandate [and] a military duty."[130] For the purpose of Article 90, that competent authority is a "superior commissioned officer," who may be a commissioned officer or a commissioned warrant officer.[131] That officer is superior when senior "in rank or command"[132] to the command's recipient. Rank is the "order of precedence among members of the armed forces" and is, for the commissioned officer corps, established by statute: General is at the top, second lieutenant is on the bottom, and the rest of the ranks are ordered sequentially between the two.[133] Command is the "authority to direct and control the conduct and duties of a person subject to the Code,"[134] and a commander is a "commissioned or [warrant officer] who, by virtue of grade and assignment, exercises primary command authority over a military organization . . . that under pertinent official directives is recognized as a 'command.'"[135]

Even if issued by a competent authority, only a lawful command may be enforced.[136] That truism, however, comes with an important caveat: a

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[130] United States v. Kisala, 64 M.J. 50, 52 (C.A.A.F. 2006) (discussing case in which accused violated Article 90, UCMJ, by refusing anthrax vaccine after being commanded to take the vaccine by battalion commander). The *Manual for Courts-Martial* identifies the elements of an Article 90(2), UCMJ, offense as: "That the accused received a lawful command from a superior commissioned officer; . . . [t]hat this officer was the superior commissioned officer of the accused; . . . [t]hat the accused then knew that this officer was the accused's superior commissioned officer; and . . . [t]hat the accused willfully disobeyed the lawful command." MCM, *supra* note 9, pt. IV, ¶ 16b. Despite the inclusion of the word "lawful" in the statute and, of course, in the *Manual*'s recitation of that statute's elements, a command's purported lawfulness is not an element to be determined by the panel, but rather is a question of law to be decided by the judge. United States v. New, 55 M.J. 95, 96, 105 (C.A.A.F. 2001) (discussing a charge of violating lawful general regulation under Article 90(2), UCMJ).

[131] 10 U.S.C. § 101(b)(2) (2018) (providing that the definition of commissioned officer includes a commissioned warrant officer); *see also supra* note 34 (describing difference between commissioned and noncommissioned warrant officers).

[132] 10 U.S.C. § 801(5) (2018).

[133] 10 U.S.C. § 101(b)(8); *see also* 10 U.S.C. § 741 (2018) (establishing the order of precedence among the officer ranks of the armed forces, providing that "[r]ank among officers of the same grade or equivalent grades is determined by comparing dates of ranks," with the earlier date of rank as senior, and allowing the Secretary of Defense to prescribe regulations to determine the relative rank among officers with the same date of rank).

[134] United States v. Nelson, 33 C.M.R. 305, 308 (C.M.A. 1963).

[135] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 1-5(a) (6 Nov. 2014) [hereinafter AR 600-20] (providing further that "a civilian, other than the President as Commander-in-Chief (or National Command Authority), may not exercise command").

[136] United States v. Washington, 57 M.J. 394, 398 (C.A.A.F. 2002) (describing some of the circumstances in which an accused "may challenge the lawfulness of [an] order").

command carries the presumption of lawfulness.[137] As the U.S. Court of Appeals for the Armed Forces (CAAF) has noted, it "[l]ong ago . . . recognized the foundational principle of military discipline: Fundamental to an effective armed force is the obligation of obedience to lawful orders."[138] "Reflecting the authority of this principle,"[139] a service member who challenges the lawfulness of a command "bears the burden of rebutting that presumption."[140] In short, any command "is disobeyed at the peril of the subordinate" service member.[141]

Further, that peril is heightened by the broad array of potential areas that are subject to military control. A command is lawful if it has "a valid military purpose" (and is "clear, specific, and narrowly drawn").[142] A valid military purpose is one that "relate[s] to military duty."[143] And military duty is a broad term. The *Manual for Courts-Martial* states that it includes "all activities" that are "reasonably necessary to accomplish a military mission . . . ."[144] In some circumstances, that could be quite the list.

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[137] United States v. Deisher, 61 M.J. 313, 317 (C.A.A.F. 2005) (discussing a charge of disobeying a lawful order).

[138] United States v. Kisala, 64 M.J. 50, 51 (C.A.A.F. 2006) (internal quotation omitted).

[139] *Id*. at 52.

[140] United States v. Sterling, 75 M.J. 407, 414 (C.A.A.F. 2016); *see also Kisala*, 64 M.J. at 52 (stating that "long-standing principles of military justice place the burden of rebutting this presumption on the accused").

[141] MCM, *supra* note 9, pt. IV, ¶ 16c(2)(A)(i) (noting also that the presumption does not apply to a " . . . patently illegal order, such as one that directs the commission of a crime.").

[142] United States v. Moore, 58 M.J. 466, 468 (C.A.A.F. 2003). Of note, in *Moore*, the CAAF was evaluating an order against a First Amendment and a due-process void-for-vagueness challenges. *Id.* (noting that the accused did not challenge "the validity of the order's purpose" but rather argues that the order was "unconstitutionally broad and vague"). Although it is possible that the constitutional nature of the challenge led the court to look to the narrowness of the order, the court later applied this "clear, specific, and narrowly drawn" language to a general lawfulness challenge to an order, albeit in the context of a lawfulness challenge based on the Religious Freedom Restoration Act (RFRA), which also has a First Amendment context. *See* United States v. Sterling, 75 M.J. 407, 414 (C.A.A.F. 2016); *see also* City of Boerne v. Flores, 521 U.S. 507, 515 (1997) (noting that a purpose of the RFRA was to restore an overruled First Amendment test).

[143] *Sterling*, 75 M.J. at 414 (C.A.A.F. 2016) (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14c(2)(A)(iv) (2012) [hereinafter MCM 2012]).

[144] MCM, *supra* note 9, pt. IV, ¶ 16c(2)(a)(iv); *see* United States v. McDaniels, 50 M.J. 407, 408 (C.A.A.F. 1999) (accord); *see also* United States v. Washington, 57 M.J. 394, 398 (C.A.A.F. 2002) ("When a commander gives an order that is reasonably necessary to accomplish the mission[,] . . . the servicemember is obligated to obey or face punishment under Articles 90, 91, or 92, UCMJ.") In addition to those actions that are reasonably

To be sure, despite the broadness of the term, it is also not without limits. First, a command cannot mandate an act that is prohibited by law[145]—arguably the very essence of unlawfulness. Second, a command cannot conflict with the recipient's constitutional and statutory rights[146] although such rights may apply differently to that service member—that is, to a lesser extent—than to a civilian.[147] Third, "its sole object [cannot be] the attainment of some private end . . . ."[148] Fourth, a command cannot be issued "for the sole purpose of increasing the penalty . . . " for the disobedience of some other duty.[149] Finally, the command must be clear, that is, it "must be worded so as to make it specific, definite, and certain,"[150] or to put it another way, it cannot be void for vagueness.[151]

2. Commands Issued for Another are Still Commands under Article 90

But what if an officer issued a command because his civilian-employee supervisor told him to do so? Is that still a command under Article 90? The short answer is also "yes." To establish this, recall the hypothetical: the deputy to the commander, a civilian employee in a GS-15 position, asked a lieutenant colonel staff section head to have a captain present the deputy with a briefing on one of the captain's projects the following morning. The captain failed to comply. In this case, the captain violated Article 90, UCMJ.

First, a competent authority issued the command. The lieutenant colonel was superior to the captain, who is not a commander, in rank, and

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necessary to accomplish a military mission, military duty also includes those orders that "safeguard or promote" a unit's good order and discipline or the "usefulness" of unit members. MCM, *supra* note 9, pt. IV, ¶ 16c(2)(a)(iv).

[145] United States v. Deisher, 61 M.J. 313, 317 (C.A.A.F. 2005).

[146] *Washington*, 57 M.J. at 398; *see also* MCM, *supra* note 9, pt. IV, ¶ 16c(2)(a)(v) (accord).

[147] *See, e.g.*, United States v. Moore, 58 M.J. 466, 468 (C.A.A.F. 2003) (discussing the applicability of the First Amendment in the context of a challenge to an order).

[148] United States v. Washington, 57 M.J. 394, 398 (C.A.A.F. 2002); *see* MCM, *supra* note 9, pt. IV, ¶ 16c(2)(a)(iv) (accord).

[149] United States v. Phillips, 74 M.J. 20, 23 (C.A.A.F. 2015); *see also* MCM, *supra* note 9, pt. IV, ¶ 16c(2)(a)(iv) (accord); *infra* notes 165-167 and accompanying text (discussing the demise of the preexisting duty doctrine).

[150] United States v. Womack, 29 M.J. 88, 90 (C.M.A. 1989) (discussing a safe-sex order).

[151] *Moore*, 58 M.J. at 469 (evaluating an order in light of the void-for-vagueness challenge).

therefore, the captain's superior commissioned officer.[152] When the command was received, the captain also knew that his supervisor was such an officer because he knew that the lieutenant colonel was, in fact, a lieutenant colonel.[153]

Second, the command was lawful. As an initial matter, it is difficult to imagine a more routine military duty than to give a status briefing on an official tasking. Setting that aside, regular briefings on an ongoing mission is a key requirement for coordination within and across organizations, which is necessary for mission accomplishment.[154] Further, the order required the commission of no crime, and it is neither designed to achieve a purely personal purpose nor does it conflict within the recipient's constitutional or statutory rights.[155] Finally, a command to present a briefing at a specific time and specific place on a specific subject is about as clear as a command can get.[156] The captain's reason why he disobeyed—what one could call his motive—does not really matter, but remember, it was for as poor of reason as the command was mundane: he just did not want to give the briefing. As a consequence, by not complying with the command, the captain "willfully disobeyed" it and, therefore, violated Article 90.[157]

A command's ultimate source is—and generally cannot be—a barrier to enforcing that command. To borrow an example from mythology, there is nothing in Article 90, UCMJ, that requires commands to, like Athena from Zeus, spring wholly formed from the head of the issuing officer. Indeed, it is difficult to imagine how that could be a requirement. Military officers must coordinate with and among each other and with other agencies and organizations. As a

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[152] *See* 10 U.S.C. § 741(a) (2012) (establishing precedence among officer ranks); *see also* MCM, *supra* note 9, pt. IV, ¶ 16c(b)(2) (defining as an element that the issuing officer was, in fact, a superior commissioned officer).

[153] *See* MCM, *supra* note 9, pt. IV, ¶ 15b(3) (defining as an element that when the command was issued by the officer, the recipient knew that that officer was his superior commissioned officer).

[154] *See supra* notes 145-144 and accompanying text (discussing requirement that an order relate to a military duty).

[155] *See supra* notes 145-149 and accompanying text (discussing aspects of a lawful order).

[156] *See supra* notes 150-151 and accompanying text (discussing void-for-vagueness arguments).

[157] *See* MCM, *supra* note 9, pt. IV, ¶ 16b(4) (defining as an element that the recipient willfully disobeyed the command).

consequence, the officer's decision to issue the command may not be that command's but-for cause.

Two examples from case law illustrate this point. First, in *United States v. Kisala*, the CAAF affirmed a Fort Bragg-assigned Soldier's conviction for disobeying his battalion commander's August 2000 command to receive the anthrax vaccine.[158] Although these facts are not specifically addressed in the court's opinion, a Defense Department-wide vaccine effort began in March 1998, with "early deploying forces" receiving their vaccines between January 2000 and January 2004.[159] As a consequence, it was probably not the battalion commander's idea to mandate the vaccine;[160] it was likely the Secretary of Defense's.[161] In other words, but-for the Secretary's vaccination program, it is unlikely that the command in *Kisala* would have been issued; yet, the command was enforced just the same.

Similarly, in *United States v. Womack*, the accused was convicted under Article 90, UCMJ, for violating his commander's "safe sex" command despite the fact that the command was issued "[i]n accordance with Air Force policy."[162] There is no indication that without the policy, the command would otherwise have been given. Thus, the command's but-for cause was that Air Force policy, but it too was enforced.

But did the captain not have a pre-existing duty—arising from somewhere—to obey the civilian supervisor? It is true that until relatively recently, an order to perform a preexisting duty was unenforceable under Article 90 because the "ultimate offense" was really the breach of that duty.[163] That said, this doctrine did not apply to a command to perform that duty if the issuing officer used "the full authority of his office" to "lift

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[158] *Kisala*, 64 M.J. at 51.

[159] H.R. REP. NO. 106-556, at 5-6 (2000), *available at* https://www.congress.gov/106/crpt/hrpt556/CRPT-106hrpt556.pdf.

[160] 64 M.J. 50, 50 (C.A.A.F. 2006).

[161] H.R. REP. NO. 106-556, at 6 ("On May 18, 1998, Secretary Cohen pronounced the four conditions fulfilled and approved the total force program."). To be sure, the secretary of defense is an officer of the United States. *See* 10 U.S.C. § 113(a) (2018) (establishing the position of secretary of defense). Whether the secretary can issue a command is not the point, however; the point is that the ultimate source of a command does not, by itself, render the command unenforceable.

[162] 29 M.J. 88, 88-89 (C.A.A.F. 1989).

[163] *See, e.g.*, United States v. Phillips, 74 M.J. 20, 22 (C.A.A.F. 2015) (stating that "[t]he ultimate offense doctrine has a lengthy military history"); *see also* United States v. Ranney, 67 M.J. 297, 299 (C.A.A.F. 2009), *overruled Phillips*, 74 M.J. at 20.

[it] above the common ruck."[164] Unless the officer did so, however, the Soldier committed no violation of Article 90, UCMJ.[165] This doctrine has been narrowed, however. It now applies only to those circumstances in which a command is given "solely to improperly escalate the punishment" for "an offense which it is expected the accused may commit."[166]

Yet, this now-narrowed doctrine is also no bar to the enforcement of an otherwise lawful command issued by a military officer at the behest of that officer's civilian supervisor. Assume for argument's sake that such a duty exists and that, therefore, the disobedience of a civilian employee's instruction is by itself some sort of an offense.[167] Even so, in the hypothetical, the lieutenant colonel did not give the command solely to escalate any punishment the captain may have faced for disobeying the deputy to the commander. Indeed, there was no reason for the lieutenant colonel to even consider punishment—escalating it or otherwise—because the captain simply gave no indication that he was going to disobey the command. Instead, the lieutenant colonel gave the command for a far more simple, if common, reason: namely, to ensure that the boss—the civilian deputy—received the briefing that the deputy wanted.

In sum, a superior commissioned officer's command—provided that it is otherwise lawful—is enforceable under Article 90, UCMJ,

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[164] United States v. Loos, 16 C.M.R. 52, 54 (C.M.A. 1954), *overruled Phillips*, 74 M.J. at 20.

[165] *Id*. at 54-55 (reversing conviction on disobedience because the ultimate offense was a violation of Article 86, UCMJ, and there was no evidence that the issuing Soldier intended to lift a failure to obey order above "the common ruck")

[166] *Phillips*, 74 M.J. at 23; MCM, *supra* note 9, pt. IV, ¶ 16c(2)(a)(iv).

[167] That said, the Air Force seems to think that a service members' failure to follow "a directive" issued by a civilian employee is dereliction of duty in violation of Article 92(3), UCMJ. U.S. DEP'T OF AIR FORCE, INST. 51-604, APPOINTMENT TO AND ASSUMPTION OF COMMAND attachment 2, fig. A.2.1 (11 Feb. 2016) [hereinafter AFI 51-604]. The instruction relies on the fact that a duty under Article 91(3), UCMJ, can be imposed by custom of the service. *Id.*; *see also* MCM, *supra* note 9, pt. IV, ¶ 18c(3)(a) (discussing duty). Apparently, the Air Force has a custom of obeying civilian directors. Even so, if the Air Force is right, that too raises the Appointments Clause issue because, in this case, the civilian employee is creating the legal obligation *directly* even if the penalty for failing in that "duty" is substantially less than disobeying a superior commissioned officer. *See supra* note 34-35 and accompanying text (noting other service members who are not commissioned, but yet have the power to issue orders, and noting the fact such orders carry a reduced penalty).

even if the command's but-for cause was that officer's civilian supervisor's instruction.[168]

C. Commands Create Legal Obligations—and Reflect Significant Authority

Put together, the issuance of a lawful command creates a legal obligation. Specifically, the obligation is to do or not to do whatever it is that the command requires. The legal nature of that obligation is evidenced by the substantial legal penalty for disobeying it. Thus, the power to issue a command under Article 90 is the exercise of significant authority.

This is true under the D.C. Circuit's three-factor analysis.[169] The very nature of the term military duty allows the issuing officer substantial discretion in crafting a command, which is, by its penalty, significant.[170] Second, the command is effective, and the legal obligation is created, upon issuance. An officer generally needs no one's permission to issue a command,[171] and a command is binding when given even if the command's deadline may be in the future.[172] An officer's decision to create the legal obligation is, therefore, final.

Thus, an officer who issues a command under Article 90, UCMJ, creates a legal obligation for the subordinate service member who receives that command. The creation of a legal obligation is the exercise of significant authority, which is reserved to officers. Consequently, under the Appointments Clause, only officers may issue commands under Article 90, UCMJ.[173]

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[168] *See supra* note 130 and accompanying text (discussing the essential attributes of a lawful command).

[169] *See supra* notes 101-104 and accompanying text (discussing test).

[170] *See supra* notes 142-144 and accompanying text (discussing term military duty); *see* also MCM, *supra* note 9, pt. IV, ¶ 16d(1)-(2) (maximum punishment). It is worth noting that OLC argues that the existence of "independent discretion" is not necessary for a person to exercise significant authority under the Appointments Clause. OLC Opinion, *supra* note 62, at 93.

[171] *Cf. supra* note 112 and accompanying text (arguing that making a recommendation is not exercising authority).

[172] *See* MCM, *supra* note 9, pt. IV, ¶ 16c(2)(g) (discussing time for compliance).

[173] S*ee also infra* notes 174-177 (discussing fact that a civilian employee cannot issue a command under Article 90).

But in the hypothetical, it was the civilian supervisor who decided the command's content and instructed the lieutenant colonel to issue it. Essentially, the officer was a conduit of the supervisor's decision, or to use another term, the civilian supervisor effectively (even if not intentionally) commandeered the officer's authority. The Appointment Clause implications of that fact are the issues to which this article turns to next.

III. Constitutionality of Civilian Supervisors Exercise of Officers' Authority

An officer who issues a command under Article 90, UCMJ, creates a legal obligation—a power reserved to officers of the United States. As a matter of statutory construction, a command's but-for cause is essentially irrelevant to the command's enforceability under Article 90, UCMJ. But when the officer has effectively no choice whether to issue a command, that cause is relevant to determining who *actually* created the legal obligation. This section applies those principles to the deputy to the commander and concludes that the deputy's supervision of the lieutenant colonel allows that deputy to exercise the officer's authority in violation of the Constitution.

First, this section identifies those tools that a civilian supervisor has to ensure that a subordinate officer will obey the supervisor's instructions generally. These tools include a general supervisory authority; the right to evaluate the officer, which includes an ability to substantially reduce the likelihood that the officer can remain in the service; and the power to relieve an officer from that officer's current position. Second, it considers whether these tools allow the civilian supervisor sufficient control over the officer that it is the civilian—not the officer—who really creates the legal obligation. Finding that such tools do allow the civilian supervisor sufficient control, this section concludes that, as a consequence, this organizational arrangement violates the Appointments Clause.

A. A Supervisor's Tools

A civilian supervisor has a number of tools that allow her to exercise authority over her military subordinates. These tools can be divided into three broad categories: the power to supervise, the power

to evaluate, and the power to relieve. Together, these tools allow a supervisor a substantial degree of control.

As an initial matter, it is important to note that missing among those tools is a significant one that is available to the supervisor's military counterparts. Under Article 90, the civilian supervisor cannot issue, in the supervisor's own name, a lawful command. Specifically, a "superior commissioned officer" must be, at the least, "a commissioned officer."[174] A civilian employee who has not been "[c]ommission[ed] [an] Officer[] of the United States"[175] is not, and cannot be, such an officer.[176] In addition, even if the employee's status as a non-officer is ignored, the employee lacks both rank and command—the two qualifications that make a commissioned officer a "superior" commissioned officer.[177] Thus, a civilian employee cannot satisfy the statutory definition of superior commissioned officer.

That said, even most civilians who have been commissioned civil officers of the United States—and are, therefore, not employees in the constitutional sense—also probably do not meet that definition. A superior commissioned officer may be superior in "rank" or "command."[178] For the purpose of Title 10 of the United States Code, which includes the UCMJ, rank is "the order of precedence among members of the armed forces."[179] In turn, section 741 establishes that

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[174] 10 U.S.C. §§ 101(b)(2), 801(5) (2018) (defining terms "commissioned officer" and "superior commissioned officer").

[175] U.S. CONST. art. II, § 3 (providing that the President "shall Commission all Officers of the United States").

[176] The Constitution draws an apparent distinction among types of officers. First, Article II provides that only "civil Officers"— along with the President and vice President—are liable for impeachment. U.S. Const. art. II, § 4. The specific modifier *civil* implies that non-civil officers—presumably, military officers—are not subject to impeachment. Second, the two houses of Congress are empowered to select their own "Officers," among these are the Speaker of the House and the President pro Tempore of the Senate. U.S. CONST. art. I, § 2, cl. 5, § 3, cl. 5. Third, the states retain the right to select the "Officers" for their militias. U.S. CONST. art. I, § 8, cl. 16. Since these latter two categories of officers are appointed by a mechanism other than the Appointments Clause—i.e., the houses of Congress and the states, not the President, heads of the departments, or the courts—presumably such officers are not officers of the United States. *See* U.S. CONST. art. II, § 2 (providing for the nomination and appointment of "all other Officers of the United States"), § 3 (providing that the President "shall Commission all the Officers of the United States").

[177] *See* 10 U.S.C. § 801(5) (defining superior commissioned officers).

[178] 10 U.S.C. § 801(5).

[179] 10 U.S.C. § 101(b)(8).

order among the officer corps.[180] Even assuming for argument's sake that a civilian officer is a member of the armed forces, there is no mention of a civil officer in that section.[181] In short, a civil officer—like a civilian employee—has no rank.[182]

The issue of command is more complicated. A civilian officer—again, not a civilian employee—may meet the UCMJ's somewhat restrictive definition of a commander.[183] But an Army regulation states bluntly that: "A civilian, other than the President as Commander-in-Chief (or National Command Authority), may not exercise command."[184] Thus, other than the President and, perhaps, a few other high-level positions,[185] a civilian officer, who has no rank,

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[180] 10 U.S.C. § 741(a) (2018).

[181] *Id.* (providing that "[a]mong the grades listed below, the grades of general and admiral are equivalent and are senior to other grades and the grades of second lieutenant and ensign are equivalent and are junior to other grades"), (b) (providing that officers with the same rank are placed in order of seniority by their dates of rank), (c) (allowing the Secretary of Defense to further delineate seniority)(*Id.*).

[182] This fact has not prevented the Defense Department from creating equivalency charts between them, not all of which are consistent. *See, e.g.*, U.S. DEP'T OF DEF., INST. 1000.01, Identification (ID) Cards Required by the Geneva Conventions encl. 3, tbl. 2 (16 Apr. 2012) (C1, 9 Jun. 2014) [hereinafter DODD 1000.01], *available at* https://www.cac.mil/Portals/53/Documents/DODI-1000.01.pdf (providing that an O-4's, that is, a Major's, equivalent civilian grade is a GS-12); U.S. DEP'T OF DEF. DIR. 7000.14-R, DOD Financial Management Regulation, vol. 11A, ch. 6, app. B (Feb. 1998) [hereinafter DOD FMR], *available at* http://comptroller.defense.gov/Portals/45/documents/fmr/archive/11aarch/11a_06_appendix_b_Feb98.pdf (providing that the civilian equivalent of an O-4 is a GS-13).

[183] 10 U.S.C. § 801(3) (2018) (noting that the term "'commanding officer' includes only commissioned officers"). *But see* AR 600-20, *supra* note 135, para. 1-5(a) ("A commander is . . . a commissioned or [warrant officer] who, by virtue of grade and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a 'command.'").

[184] AR 600-20, *supra* note 135, para. 1-5(a). Interestingly, even the Air Force shares this restrictive definition of commander, albeit without warrant officers, and its policy also states expressly "civilian employees cannot command AF units or AF personnel in any duty states." *See* AFI 51-604, *supra* note 167, para. 3.8, attachment 1. That said, the Army does permit a civilian to "be designated to exercise general supervision over an Army installation or activity (for example, Dugway Proving Ground)." AR 600-20, *supra* note 135; *see also* AFI 51-604, *supra* note 167, para. 3.8 (providing that civilian employees "may lead certain units . . . hold supervisory positions, supervise, and provide work direction to military members and civilian personnel within their unit or defined sphere of supervision").

[185] Although beyond the scope of this article, Army Regulation 600-20 seems to exclude from command both the secretary of defense and the service secretaries. By statute, the secretary of defense is in the chain of command, at least for forces assigned to a

also cannot exercise command—and cannot meet Article 90's definition of superior commissioned officer. Yet, even without this (admittedly quite) substantial tool, the civilian supervisor has other tools to enforce compliance.[186]

1. The General Supervisory Power

The general supervisory power may be the least impressive legally, but in practice, it probably carries the greatest weight. A civilian supervisor is just that, the supervisor. The day-to-day practical authority to direct subordinate officers is a significant source of that civilian supervisor's control. Put simply, if an officer's designated boss tells the officer to do something and that something is not illegal or inappropriate—like tell your subordinate to give the boss a briefing—the common, everyday expectation is that the officer will do it.

In addition, there may be no Army regulation that states expressly the authority of an employee supervisor over an officer.[187] Yet, there are

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combatant command. 10 U.S.C. § 162(b) (2018). Further, the service secretaries, as well as the president and the secretary of defense, are general courts-martial convening authorities, suggesting that they do exercise a degree of command. 10 U.S.C. § 822(a)(1), (2), (4) (2018).

[186] To be sure, Article 90 is not the only method of punishing disobedience of a directive: Article 91 and 92 do the same in other circumstances. 10 U.S.C. §§ 891(2), 892(2) (2018); *see also* Washington v. United States 57 M.J. 394, 398 (C.A.A.F. 2002) ("Congress has expressly provided criminal sanctions in Article 90, UCMJ, as well as Articles 91 and 92, UCMJ, . . . for failure to obey a lawful order."). But Article 91(2), UCMJ, provides no basis for punishing the disobedience of a civilian employee's instruction, as it is limited to orders that are issued by "a warrant officer, non-commissioned officer, or petty officer." 10 U.S.C. § 891(2). Although Article 92(2) applies to "any other lawful order . . . which it is [the person's] duty to obey," such an order must be issued by a member of the armed forces. 10 U.S.C. § 892(2) (2018). One appellate court has concluded that a civilian employee is not such a member. United States v. Parisi, No. 20020970, 2005 WL 6519936 (A. Ct. Crim. App. Dec. 8, 2005) (concluding that a Department of the Army Civilian Police officer was not a member of the Armed Forces for the purpose of Article 92(2)).

[187] In the Air Force, that is not so. *See supra* note 167 (discussing the Air Force instruction that provides that a civilian director may issue directives to military members). That said, even in the Army, its evaluation regulation states that among the responsibilities of the rated officer—that is, the officer who "is the subject of the evaluation"—is to "[p]erform each assigned or implied duty to the best of [that officer's] ability." U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM para. 2-10(a)(1), (b)(1) (4 Nov. 2015) [hereinafter AR 623-3]. That certainly seems to suggest

a number of publications, including regulations that imply that authority. Those regulations shape the practical scope of the civilian employee's authority over his subordinates.

First, as discussed in greater length below, a civilian supervisor may rate—that is, serve as the evaluator of—an officer.[188] But just like when one Soldier serves as another Soldier's rater, a civilian employee may only serve as the officer's rater if that civilian employee is responsible for "directing and assessing"—that is, supervising—the officer's performance.[189] By authorizing a civilian employee to rate an officer only when that employee can direct that officer, the Army implicitly recognizes the existence of such authority—and in the regulation, it communicates that recognition to its officers.

Moreover, in a number of contexts, the Defense Department has promulgated equivalency charts between officer and civilian pay grades.[190] To be sure, these regulations do not purport to—if for no other reason than because, as discussed, they cannot—grant civilian employees equal authority to the equivalent officer grades.[191] Regardless, the existence of the equivalency charts implies at least a degree of authority associated with the civilian grades—an

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that the rater, who is, after all, responsible for "directing" that officer has the authority to assign tasks. *Id.* para. 2-5(a).

[188] A rater is "[f]irst-line supervisor of the rated Soldier who is designated as the rater on the rating scheme." AR 623-3, *supra* note 187, glossary. By contrast, a senior rater is "the second-line rating official who is in the direct line of supervision of the rated Soldier and senior to the rater by either pay grade or date of rank . . . [whose p]rimary role is evaluating and focusing on the potential of the rated Soldier." *Id.*

[189] AR 623-5, *supra* note 187, para. 2-5(a).

[190] *See supra* note 182 (discussing Defense Department equivalency charts).

[191] Specifically, any attempt to do so would be futile, as a civilian employee cannot be a superior commissioned officer for the purpose of Article 90, UCMJ. *See supra* notes 174-186 and accompanying text. Indeed, many of these equivalency charts are for the purpose of protocol or allocating costs, not necessarily for the purpose of establishing claim to authority. *See, e.g.*, DODI 1000.01, *supra* note 182, encl. 2, para. 4 (establishing military and civilian equivalent grades for the purpose of POW stipends under the Geneva Convention IV); DOD FMR, *supra* note 182, vol. 11A, ch. 6, app. B (providing that the military personnel costs for activities financed by the Defense Working Capital Fund will be "costed" consistent with the table of equivalent pay grades); *see also* U.S. DEP'T OF DEF., 4165.3-M, DOD HOUSING MANAGEMENT encl. 3, tbl. 1 (28 Oct. 2010) (providing for rank equivalents for housing); U.S. DEP'T NAVY, CHIEF, NAVAL OPERATIONS INSTR. 1710.7A, SOCIAL USAGE AND PROTOCOL annex D (15 Jun. 2001). The Army has an equivalency chart to show the minimum requirements to serve as a Soldier's senior rater. AR 623-3, *supra* note 187, tbl. 2-1.

implication that is strengthened when such an employee is assigned as an officer's supervisor.

2. Rating

A civilian employee may serve as an Army officer's rater or the senior rater.[192] A rater and senior rater are nothing more than evaluators.[193] Although the two roles are similar in purpose, they are different in function: The rater is the officer's "immediate supervisor," who is, as noted above, "responsible for directing and assessing the rated Soldier's performance."[194] As a rater, the supervisor provides "an objective and comprehensive evaluation of the rated Soldier's performance . . . on the evaluation report."[195] The senior rater is generally the "immediate supervisor of the rater."[196] Based on the senior rater's "position[] and experience[]," a senior rater "evaluate[s] the rated Soldier's performance and/or potential within a broad organizational framework."[197] The senior rater's evaluation has a particular impact on the rated officer's career, as that "evaluation is the link between the day-to-day observation" of the officer "and the longer-term evaluation of the rated Soldier's potential by [promotion] selection boards."[198]

Civilian employees may serve as an officer's rater or senior rater or both. Specifically, any civilian employee—no matter that employee's grade—may rate an officer provided that the employee is the officer's "immediate supervisor" for at least 90 days before issuing the evaluation.[199] There is a pay-grade requirement for a civilian employee to be an officer's senior rater, and the senior rater must also be "a designated supervisor."[200]

The evaluations process plays a key role in determining whether an officer's career advances, slows, or even ends. Evaluations are placed in

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[192] AR 623-3, *supra* note 187, paras. 2-5(a), 2-7(a)(2), tbl. 2-1.
[193] *See supra* note 188 and accompanying text (defining raters).
[194] AR 623-3, *supra* note 187, para. 2-5(a).
[195] *Id.* para. 2-12(i).
[196] *Id.* para. 2-7(a)(3).
[197] *Id.* para. 2-14(a).
[198] *Id.*
[199] *Id.* para. 2-5(a)(1), (b)(4).
[200] *Id.* para. 2-7(a)(2), tbl. 2-1.

an officer's official record,[201] and they are subsequently reviewed by selection boards that are considering whether to recommend the officer for promotion or retention.[202] Of course, an officer in the grade of major or below who fails to be selected for promotion is subject to a mandatory discharge unless specifically continued on active duty.[203]

3. Relief

Finally, a civilian supervisor who is an officer's rater or senior rater has the authority to relieve that officer from the officer's current assignment.[204] A relief is an "early release" from "a specific duty or assignment" that is "based on a decision that the officer has failed in his or her performance of duty."[205] It is, in short, the military's version of being fired from a specific assignment. For that fairly obvious reason, a relief for cause is an adverse act.[206]

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[201] *Id.* para. 1-12(b); *see also id*. para. 1-8(b)(1) (stating that the evaluation system "assesses the quality of Soldiers and determines the selection of future Army leaders and the course of their individual careers").

[202] 10 U.S.C. §§ 611(a), (b) (2018) (providing for the convening of selection boards to select officers for promotion, continuation on active duty or early retirement). Active duty selection boards are composed of five officers of the same armed force as the officers under consideration. 10 U.S.C. § 612(a)(1) (2018). Those boards consider the contents of an officer's official record. 10 U.S.C. § 615(a)(2)(A) (2018); *see also* U.S. DEP'T OF DEF., INSTR. 1320.14, COMMISSIONED OFFICER PROMOTION PROGRAM PROCEDURES encl. 3, para. 2(c)(2)(a) (11 Dec. 2013).

[203] The actual type of discharge depends on the grade held by the officer. In general, for officers holding a grade below that of lieutenant colonel and who twice fail to be selected for promotion are subject to a mandatory discharge. 10 U.S.C. § 631(a) (first lieutenants); 10 U.S.C. § 632(a) (captains and majors). *But see id*. (a)(3) (allowing an officer in the grade of captain or major who is within two years of retirement eligibility to remain on active duty until retirement eligible). For officers above the grade of major, the statute imposes a retirement after a certain number of years of service unless the officer is on a list of officers who are recommended for promotion. 10 U.S.C. § 633(a) (2018) (providing a maximum of 28 years of service for officers in the grade of lieutenant colonel); 10 U.S.C. § 634(a) (2018) (providing a maximum of 30 years of service for officers in the grade of colonel).

[204] AR 623-3, *supra* note 187, para. 3-54(d), (g).

[205] *Id.* para. 3-54; *see also id*. glossary (defining relief as "[t]he removal of a rated Soldier from an assigned position . . . by a member of the Soldier's chain of command/supervisory chain" because of the officer's "personal or professional characteristics, conduct, behavior, or performance of duty warrant his or her removal from the position in the best interests of the U.S. Army").

[206] *See id.* para. 3-26(b) (defining types of evaluations that must be referred to the officer for comment).

To be sure, a relief does not automatically, or even immediately, result in an officer's discharge.[207] That said, by regulation, any officer who is relieved must be considered for discharge from the service.[208] Regardless, because of its impact on the officer's potential for promotion—namely, it generally nullifies that potential—it effectively ends the officer's career.[209]

B. These Tools Allow a Supervisor to Exercise a Subordinate's Authority

Standing alone, these tools are not unusual—a civilian supervisor has similar tools for her civilian employees. The Appointments Clause implications arise from the fact that these tools—by design—give the supervisor actual authority over, and the consequent ability to control, the officer. Specifically, because of that authority, when a civilian supervisor instructs a subordinate officer to issue a command, the officer lacks any real choice in whether to give it;[210] the supervisor's decision is effectively final.[211] Indeed, much like when a court's clerk issues the court's judgment, the officer is essentially memorializing the supervisor's decision as a command. As such, the officer's issuance of the command amounts to a ministerial act.[212] It is the employee who really creates the recipient's legal obligation.

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[207] Officer discharges are handled under a separate set of procedures, and as a consequence, a discharge is not the automatic consequence of a relief. *See* U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (RAR, 13 Sept. 2011) [hereinafter AR 600-8-24]. That said, the failure to perform assigned duties is also a ground for discharge. *Id*. para. 4-2(b)(7).

[208] *See id*. 4-2(c)(4) (providing that a relief for cause evaluation report "require[s] an officer's to be reviewed for consideration of terminating [the officer's] appointment").

[209] This assertion is based on the author's professional experiences as a judge advocate, including a tour as a Senior Defense Counsel for the U.S. Army Trial Defense Service from October 2012 to June 2014.

[210] *Cf.* Tucker v. Comm'r, 676 F.3d 1129, 1134 (D.C. Cir. 2012) ("If the tasks assigned a position allowed the holder no choice, obviously, it would be pointless to classify him as an 'Officer' even though the consequences of his ministerial decisions were both vital and final."). *But see* OLC Opinion, *supra* note 62, at 93 (arguing discretion is not necessary to a determination that a person is an officer).

[211] *See* notes 103-104 and accompanying text (discussing the D.C. Circuit's factors of discretion and finality in determining whether a person exercised significant authority).

[212] *See* Raymond J. Lucia Cos., Inc. v. Sec. & Exch. Comm., 832 F.3d 277, 287 (D.C. Cir. 2016) ("That is, petitioners have not substantiated that a finality order is just like a clerk automatically issuing a mandate, . . . and, in so asserting, have ignored that clerks have no authority to review orders or decline to issue mandates."), *rev'd*, 138 S. Ct. 2044 (2018).

To illustrate this, consider what would happen if, in the hypothetical, the lieutenant colonel refused to issue the command. As noted, the command itself is not illegal, and there is nothing immoral or unethical about it.[213] There is no apparent reason why the officer would be justified in refusing, and if the officer did so without a reason, the officer failed to perform an assigned task. That failure could be reflected in a worse evaluation—jeopardizing the officer's chances for promotion—or the officer could, at least in theory, be relieved.[214]

Put another way, what can the civilian employee do if the officer refuses to issue the supervisor's command? Nearly exactly what a judge can do to a clerk who refuses to issue a judgment[215] or even a president can do to a cabinet officer who will not put into effect the president's decision;[216] namely, that supervisor can fire the officer.

Fundamentally, "[t]he power to remove is the power to control."[217] As the Supreme Court put it, "[i]t is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."[218] Indeed, "[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed

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[213] On a side note, the phrase "illegal, immoral, or unethical" is well known in the Army. *See, e.g.*, LTC Clark C. Barrett, *The Right Way: A Proposal for an Army Ethic*, MIL. REV., Nov./Dec. 2012, at 3 (asserting that "[f]or loyal soldiers, disobeying even an illegal, immoral, or unethical order is difficult but nonetheless required). Yet, the latter nouns—immoral or unethical—are simply not grounds to disobey an order. Thus, "[i]f the command was lawful, the dictates of the accused's conscience, religion, or personal philosophy could not justify or excuse disobedience." United States v. Wilson, 41 C.M.R. 100, 101 (C.M.A. 1969); *see also* MCM, *supra* note 9, pt. IV, ¶ 14c(2)(A)(iv) (noting that "the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order").

[214] *See* notes 204-208 and accompanying text (discussing the standard for relief). To be sure, it may well be that it is highly unlikely that the officer would be relieved. The question is not what actual decision any given decision maker would make. Decisions are subject to a number of considerations. The question is rather what the supervisor can do in response.

[215] In re Hennen, 38 U.S. 230 (1839) (concluding that a district court clerk is subject to removal by the district court judge).

[216] *See* Myers v. United States, 272 U.S. 52 (1926) (concluding that the president generally has the power to fire executive officers).

[217] Silver v. United States Postal Serv., 951 F.2d 1033, 1039 (9th Cir. 1991) (evaluating the Appointments Clause implications of the postal service's board of governors).

[218] Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).

him, that he must fear and, in the performance of his functions, obey."[219]

As a consequence, the civilian supervisor's power to relieve the officer is, in the Supreme Court's words, "a powerful tool for control of that officer."[220] The power is so poignant that it need not be actually exercised to be effective: as one court put it, "the mere existence of removal authority is likely to influence behavior."[221] Indeed, if federal judges must be constitutionally protected from removal to protect their independence,[222] it makes sense that officers subject to removal would not be independent—at least not independent enough—of the person who can do the removing.

The fact that an officer who violates a civilian supervisor's instruction, including an instruction to issue a subordinate a command, faces no criminal liability[223]—unlike a subordinate service member's disobedience of the officer's command—does not change this analysis. Article 90, UCMJ, is unique to the armed forces.[224] No other executive-branch officer has that particular authority, and the potential for criminal liability cannot, therefore, be a requirement for one officer to effectively control another officer's actions. If it were, few civil officers would be under a superior officer's control, and thus, few would qualify as an inferior officer within the meaning of the Appointments Clause.[225]

An illustrative, and relatively recent, example arising from another executive-branch agency helps illuminate this point. As an initial matter, executive-branch authorities are often vested in executive-branch officers

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[219] Bowsher v. Synar, 478 U.S. 714, 726 (1986) (internal quotation omitted).
[220] *See* Edmond v. United States, 520 U.S. 651, 664 (1997) (discussing whether appellate military judges were principal or inferior officers).
[221] *Silver*, 951 F.3d at 1039.
[222] U.S. CONST. art. III, § 1.
[223] *See* notes 174-186 and accompanying text (discussing why a civilian supervisor's direction is not enforceable under Article 90, UCMJ).
[224] 10 U.S.C. § 890 (2018) (subjecting to prohibition on the disobedience of a lawful command only "[a]ny person subject to this chapter"); *see also id.* § 802 (defining those persons who are subject to the UMCJ).
[225] Indeed, the very definition of an inferior officer is an officer "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." Edmond v. United States, 520 U.S. 651, 662-63 (1997) (stating also that "[w]hether one is an "inferior" officer depends on whether he has a superior").

below the President, including authorities related to immigration;[226] and yet, the President exercises those officer's authorities. For instance, in November 2014, President Obama announced an immigration policy in which certain categories of immigrants would be permitted to "apply to stay in this country temporarily without fear of deportation."[227] That same day, the Secretary of Homeland Security issued a memorandum implementing that decision.[228] In other words, it was the Secretary who actually put into effect the President's decision.[229]

But had the Secretary failed to obey the President, the Secretary would have likely committed no crime. Indeed, cabinet officers do, occasionally, decline presidential directives.[230] In that case, the President's recourse is simple: fire the secretary.[231]

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[226] *See, e.g.*, 8 U.S.C. §§ 1103(a)(1) (2018) (providing that "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State"), 1227(a) (providing that "[a]ny alien . . . in and admitted to the United States shall, upon order of the Attorney General, be removed if the alien is within one or more of the following classes"), 1229b (allowing the attorney general to cancel certain removals).

[227] In full, the President's policy was: "If you've been in America for more than five years; if you have children who are American citizens or legal residents; if you register, pass a criminal background check, and you're willing to pay your fair share of taxes -- you'll be able to apply to stay in this country temporarily without fear of deportation." President Barack Obama, Remarks by the President in an Address to the Nation on Immigration (Nov. 20, 2014), *available at* https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

[228] Memorandum from Jeh Johnson, Sec'ty, Homeland Sec'y, to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., et. al (Nov. 20, 2014).

[229] As the U.S. District Court that imposed an injunction against the program put it "both sides agree that the President in his official capacity has not directly instituted any program at issue in this case. Regardless of the fact that the Executive Branch has made public statements to the contrary, there are no executive orders or other presidential proclamations or communique that exist regarding [the program]"; rather "[t]he DAPA Memorandum issued by Secretary Johnson is the focus in this suit." Texas v. United States, 86 F.Supp. 3d 591, 607 (S.D. Tex. 2015).

[230] *See, e.g.*, Evans Andrews, *What was the Saturday Night Massacre*, HISTORY, http://www.history.com/news/ask-history/what-was-the-saturday-night-massacre (Dec. 4, 2013) (describing President Nixon's decision to fire his attorney general and deputy attorney general when both refused to fire the independent counsel who was investigating the President).

[231] *See, e.g.*, Michael D. Shear et. al, *Trump Fires Acting Attorney General Who Defied Him*, N.Y. TIMES (Jan. 30, 2017), https://www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html?_r=0; *see also* Jack Goldsmith, *Quick Thoughts on Sally Yates' Unpersuasive Statement*, LAWFARE (Jan. 30, 2017, at 9:32 p.m.),

To be sure, the President and a cabinet officer are at a higher level than the civilian supervisor and a military officer, but the underlying rationale holds true even for less lofty positions. The civilian supervisor of a military officer is empowered to direct the officer in the performance of her duties, evaluate the officer, and even remove that officer from her current assignment, effectively ending her career. This is not "*practical* authority";[232] it is *actual* authority over the officer. Thus, if the civilian employee tells a subordinate officer to give a command, the officer has no real choice, but to do so.

To be sure, it may well be that a Soldier who disobeys an officer's command that was issued at the direction of a civilian supervisor will never be criminally punished for that offense. The civilian supervisor may not even want the Soldier to be punished. It may be that, in most circumstances, this is treated as simply a leadership challenge, which is what it would have been had the Soldier disobeyed the civilian supervisor directly. It could be argued, consequently, that the Article 90 authority here is really illusory.

That argument, however, misses the point. As an initial matter, while a civilian supervisor's opinion on punishment may be given great weight, the decision rests with the Soldier's commander.[233] More importantly, a decision not to prosecute does not mean that there was no crime. A crime is complete "[w]hen it is committed" at which point "the party is guilty," and is, therefore, "subject to criminal prosecution."[234] In the hypothetical, the crime was complete when CPT Snuffy disobeyed his superior officer's command.

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https://www.lawfareblog.com/quick-thoughts-sally-yates-unpersuasive-statement (concluding that Acting Attorney General Sally Yate's decision not to enforce the President's executive order "seems like an act of insubordination that invites the President to fire her. Which he did.")

[232] *Cf.* OLC Opinion, *supra* note 62, at 98 (arguing "that the President may, without creating any issue under the Appointments Clause, . . . grant [advisors] substantial *practical* authority to . . . coordinate policy among federal agencies . . . so long as he does not purport to grant such advisers any 'legal power' over an agency") (emphasis added). Further, it is authority exercised by the supervisor under that supervisor's own name.

[233] *See* MCM, *supra* note 9, R.C.M. 401(a) (providing who may dispose of charges and limiting such persons to those who are authorized to convene courts-martial or administer non-judicial punishment).

[234] *See, e.g.*, United States v. Irvine, 98 U.S. 450, 452 (1878) (discussing statutes of limitations).

As a consequence, even if not by intent, the hypothetical's civilian deputy commandeered the lieutenant colonel's authority. Specifically, the civilian deputy's instruction was transformed into a legal obligation because that officer issued it, and that officer had no effective choice, but to give the command. Indeed, the command's specific content was determined by the civilian supervisor's instruction. Other than the deputy's instruction, there was no reason for the lieutenant colonel to issue this command; after all, he did not want the briefing. Put another way, the legal obligation at issue here was decided finally not by the commissioned officer, but by the civilian employee. Thus, the civilian employee exercised significant authority pursuant to the laws of the United States—in violation of its Constitution.

IV. Options

The exercise of significant authority on behalf of the United States is reserved to officers of the United States. Civilian employee supervisors of military officers are able to exercise that authority by directing their subordinate officers to issue commands to more junior Soldiers. As a consequence, it is the civilian employee's authority to require a subordinate officer to exercise her statutory power that creates the Appointments Clause violation.

Setting aside the possibility that the Constitution could be amended to remove the Appointments Clause, this raises three potential solutions. First, transform the employee into an officer by appointing that employee consistent with the clause, something that would likely require legislation. Second, restrict the employee's power to issue such a direction. That restriction, however, likely turns the supervisor into a supervisor in name only.

That leaves the third potential solution: remove civilian employees from chains of supervision in circumstances in which the officers that they lead supervise other more junior Soldiers. This third option is likely disruptive over the near and mid-terms; it also restricts how an armed force is organized. But it can be implemented locally—no need for Congress to act—and it solves entirely the Appointments Clause issue. Most importantly, from a policy perspective and unlike the other two options, this option aligns authority with accountability, and it is more consistent with the statutory duties and responsibilities of the officer corps.

There is one additional potential resolution that should be discussed before addressing the other three—specifically, do nothing at all. In this case, *if* a Soldier disobeys an officer's command and *if* that command was issued at the behest of that officer's civilian supervisor and *if* the Soldier is punished for that disobedience—a substantial number of contingencies—the Soldier is free to argue that the command was unconstitutional.[235]

This solution should fail for a simple reason: the constitutional violation remains uncured. But if that is not enough of a justification, it fails for three other reasons too. First, a command is presumed lawful and disobeyed at the "peril" of the subordinate service member, who bears the burden of rebutting that presumption.[236] This wait-and-see-if-this-is-really-an-issue solution requires the service member to bear that burden, and practically, the service member would require evidence of the ultimate source of the command—something that may well be hard to come by—to even try and make the case that the supervisory arrangement giving rise to the command made the command unlawful. Second, the service member needs a forum to hear the challenge, and that requires the service member to disobey the command, court punishment, and then hope that the punishment will be imposed before a forum that can act on the constitutional challenge. Those are no small risks. Third, this solution threatens good order and discipline. Commands that otherwise seek the same (lawful) objects and are issued by the same officer are sometimes enforceable and sometimes not based on the degree of a civilian supervisor's involvement. Discipline requires a culture of obedience,[237] and this fluidity of enforceability threatens that culture.

A. Appoint as Officers

As an initial matter, civilian supervisors could be appointed as officers of the United States. This would likely require a statutory change to specifically provide for such appointments.[238] Much like their military

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[235] Using the framework identified above, the person could argue that the command was unlawful or that no competent authority issued the command. *See* note 130 and accompanying text (discussing essential attributes of a lawful command).

[236] *See* notes 137-141 and accompany text (discussing presumption of lawfulness).

[237] United States v. McDaniels, 50 M.J. 407, 408 (C.A.A.F. 1999).

[238] *See* Section II.A.1 (discussing the established-by-law requirement); *see also* 5 U.S.C. § 2104(a)(1) (2018) (defining an officer for the purpose of title 5, which covers

counterparts,[239] such civilian-employees-turned-officers would likely be inferior officers under the Appointments Clause. Consequently, if the Congress approved, the appointment power could be vested in the President or the Secretary of Defense.

This would likely solve the Appointments Clause issue, but it creates additional issues.[240] First it is not clear that the Congress will so approve.[241] Without statutory authorization, "[t]he prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers,"[242] that is, Senate confirmation. Second, a civilian employee may generally be hired by a member of

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government organizations and employees, as a person who is "required by law" to be appointed by the president, a court, the head of an executive agency, or the secretary of a military department); *see also* United States v. Janssen, 73 M.J. 221 (C.A.A.F. 2014) (concluding that the Secretary of Defense lacked the statutory authority to appoint a civilian employee an appellate military judge even though such a judge is an inferior officer).

[239] *See* Weiss v. United States, 510 U.S. 163, 182 (1994) (Souter, J., concurring) ("Military officers performing ordinary military duties are inferior officers, and none of the parties to this case contends otherwise. Though military officers are appointed in the manner of principal officers, no analysis permits the conclusion that each of the more than 240,000 active military officers . . . is a principal officer.").

[240] The existence of civil-service protections poses an especially interesting issue. As noted below, non-probationary civil service employees generally have a right to appeal their termination from the civil service to the Merit Systems Protection Board (MSPB), whose members serve seven-year terms and may be removed by the President before the expiration of those terms only for "for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(a), (d) (2018); *see also infra* notes 263-264 and accompanying text (discussing MSPB). In 2010, the Supreme Court held that a law permitting the Securities and Exchange Commission (SEC), whose members the President also may remove only for "inefficiency, neglect of duty, or malfeasance in office," to fire members of a subordinate board for only good cause violated the President's executive power. Free Enter. Fund v. Pub. Accounting Oversight Bd., 561 U.S. 477, 484, 486-87 (2010). The Court noted that it was not deciding on the constitutionality of employees' civil-service protections because, among other things, many of those employees "would not qualify as officers." *Id*. at 506. But if those employees were turned into officers, MSPB's "multilevel protection," in the Court's words, could create a constitutional issue. *Id*. at 484. This is also part of the concern animating the dissents in *Lucia*. Lucia v. Sec. & Exch. Comm., 138 S. Ct. 2044, 2060 (2018) (Breyer, J., dissenting) ("Similarly, to apply *Free Enterprise Fund*'s holding to high-level civil servants threatens to change the nature of our merit-based civil service . . . .")

[241] For instance, in the regular forces, the Congress permits the President alone to only appoint such officers to grades below O-4, i.e., Majors in the Army; for grades at or above O-4, those officers must be nominated and confirmed. *See* 10 U.S.C § 531(a), 624(c) (original appointments and appointments as a result of promotions, respectively).

[242] Edmond v. United States, 520 U.S. 651, 660 (1997).

the uniformed service or by another employee,[243] but an inferior officer may only be appointed by a constitutional appointment authority.[244] In other words, this option takes a relatively straightforward process to hire a civilian employee and makes it more complicated and, consequently, resource consuming.[245]

B. Restrict the Power of Civilian Employee Supervisors

If appointing civilian supervisors as officers is impracticable, a second option is to restrict by regulation the authority of those supervisors. The Secretary of the Army likely has the authority to enact such a regulation.[246] Further, the D.C. Circuit has relied on, in the past, regulatory restrictions on an employee's authority to conclude that the employee did not exercise significant authority, at least where the restrictions were real.[247] The greater the restrictions on a civilian supervisor's exercise of the tools identified above, the greater the likelihood that they do not exercise significant authority.

These restrictions could take two forms. First, in principle, a regulation could prevent the supervisor from issuing an authoritative direction to a subordinate officer that requires that officer to issue a command to other service members. In practice, though, it would strip the civilian supervisor of the ability to supervise subordinate elements

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[243] 5 U.S.C. § 2105(a)(1)(c)-(d) (2018).
[244] U.S. CONST. art. II, § 2.
[245] *See* U.S. CONST. art. II, § 2 (permitting the Congress to vest the appointment of inferior officers in the President alone, heads of the departments, and the courts).
[246] *See* 10 U.S.C. § 3013(g)(3) (2018) (providing that the Secretary may "prescribe regulations to carry out his functions, powers, duties"). Indeed, as discussed above, much of the authority of civilian supervisors is derived from regulations. *See* discussion *infra* Section III.A. (supervisor's tools).
[247] *See, e.g.*, Raymond J. Lucia Cos. Inc. v. Sec. & Exch. Comm'n, 832 F.3d 277, 286 (D.C. Cir. 2016) (noting that "[f]or the purposes of the Appointments Clause, the Commission's regulations on the scope of its ALJ's authority are no less controlling than the FDIC regulations to which this court looked in *Landry"), rev'd*, 138 S. Ct. 2044, 2053 (2018) (concluding that administrative-law judges exercise more "independent effect" than the Tax Court's special trial judges, who had been held to be officers). *See also* 15 U.S.C. § 78d-1(c) (2018) (providing that if review of an ALJ's decision, among others, is not sought within the time period established for review, the decision of the ALJ "shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission").

headed by an officer.[248] At the very least, it would make it difficult for that deputy to coordinate all the sections.

Second, a civilian employee could be prohibited from rating and relieving a military officer. Such a role could be assigned to another officer, much like the current requirement for a supplementary review if there is no military officer in a rating chain.[249] This is relatively easy to implement, as it does not require defining a standard by which some of a supervisor's directions are relayed, but not others. Further, it preserves a degree of control, as the supervisor could recommend an evaluation to the actual rater or senior rater even though the civilian supervisor would not be the one who issues that evaluation.

Of course, a supervisor who does not evaluate an officer is not *really* that officer's supervisor—at least not the officer's *only* supervisor because to be the officer's rater, the person must be a supervisor of the officer.[250] Under Army regulations, an officer is also entitled to meet with her actual rater and senior rater,[251] and even if the civilian supervisor is allowed input on the evaluation, it is likely that the officer will be more responsive to her actual rater and senior rater than to her civilian supervisor. As a consequence, this is not an ideal solution either.

C. Remove Civilian Employees as Supervisors

As a final option, the Appointment Clause issue can be eliminated by ending the practice of assigning civilian employees as the supervisors of military officers in circumstances in which those officers supervise other service members. This would resolve the Appointments Clause issue entirely.

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[248] Essentially, the regulation would have to state: "A civilian supervisor of an officer will not direct that officer to issue any command to any Soldier who is junior to the officer." In practice, this would mean that the civilian supervisor would either have to bypass the chain of supervision and issue instructions directly to those junior Soldiers, or the supervisor would have to give all taskings to the officer. In the hypothetical, this could take the form of an instruction that the lieutenant colonel, not the captain, present the briefing.

[249] *See* AR 623-3, *supra* note 187, para. 2-8(a)(2).

[250] *See* note 189 and accompanying text (discussing when a person can be another person's rater).

[251] *See* AR 623-3, *supra* note 187, paras. 2-12(b),(c), 2-14(c)(2).

It bears repeating that this option does not eliminate all civilian-supervisor positions. As discussed at length, the Appointment Clause issue arises when a civilian supervisor can commandeer a military officer's authority. For instance, a civilian supervisor of a military officer who has *no* military subordinates likely cannot commandeer that officer's authority.[252] It is also undoubtedly true that an officer in certain assignments may perform only duties that also could be performed by an employee.[253] In these cases, a civilian employee likely may supervise the officer.

Further, this solution better aligns authority with accountability. When a civilian employee acts in the role of deputy to the commander, there is a mismatch between that supervisor's authority and the supervisor's accountability that simply is not present when one civilian employee supervises another civilian employee. This mismatch arises from the fact that the rights and obligations of supervising military officers and their subordinate Soldiers differ from that of supervising civilian employees and their subordinate civilian employees.

From the perspective of the rights of a subordinate, a civilian employee has a considerably larger array of options to respond to bad leadership than a Soldier does. Two of those options illustrate the point. First, a civilian employee has a rather basic option that a Soldier lacks: the civilian employee can quit; the Soldier cannot.[254] Second, a civilian

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[252] Although beyond the scope of this article, there remains an interesting question whether it is ever appropriate for a civilian employee—as opposed to a civil officer—to supervise a military officer. The Supreme Court has stated that employees are "subordinate to officers of the United States." Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976). Put simply, employees work for officers. It seems strange that officers can work for employees who work for other officers.

[253] Consider, for instance, the role of an administrative-law attorney in a garrison environment. It is unlikely that in reviewing investigations and advising on ethics, this officer ever exercises his authority under Article 90, UCMJ. This is not inconsistent with the officer's status as an officer. Freytag v. Comm'r, 501 U.S. 868, 882 (1991) (noting that officers may perform, on occasion, the duties of an employee).

[254] 10 U.S.C. § 885(a)(1) (2018) (prohibiting desertion); *see also* MCM, *supra* note 9, pt. IV, ¶ 9d(2)(b) (providing a maximum term of confinement for desertion not terminated by apprehension of two years' confinement). Interestingly, even an employee who quits a position can sometimes obtain review of that resignation if the resignation was caused by deception or misinformation from the agency or the employee was coerced into resigning by the agency. *See* Terbin v. Dep't of Energy, 216 F.3d 1021, 1024 (Fed. Cir. 2000) (discussing when the Merit Systems Protection Board has jurisdiction over resignations and retirements); *see also* 5 C.F.R. § 1201.3(a)(1) (2019) (defining "an involuntary resignation or retirement" as a "removal").

employee can, in certain circumstances, sue the government for tort and discrimination-related claims.[255] A Soldier is generally barred from suing the government under the *Feres* doctrine.[256]

From the perspective of supervisor accountability, officers face an equally large array of accountability measures that civilian supervisors do not, including criminal liability. The list of potential criminal violations arising from an abuse of authority is impressive. An officer can be tried by court-martial for, among other things, dereliction of duty,[257] cruelty and maltreatment,[258] conduct unbecoming an officer and a gentlemen,[259] and, of course, acts or omission that are either

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[255] *See Overview of Federal Sector EEO Complaint Process*, EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm (last visited Feb. 8, 2019) (describing administrative and legal processes for complaints of discrimination based upon an employee's "race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information" and identifying when the employee may sue in court); *see also* 28 U.S.C. § 2674 (tort claims). To be sure, litigating with the federal government is no easy matter in light of sovereign immunity, but if the necessary procedural steps are met, it can be done.

[256] *See* Feres v. United States, 340 U.S. 135, 146 (1950) (holding that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service"). The *Feres* decision has been the subject of significant criticism, but it remains the law. United States v. Johnson, 481 U.S. 681, 688 (1987) (stating that the Court "decline[s] to modify the [*Feres*] doctrine at this late date"); *but see id.* at 700 (Scalia, J., dissenting) ("*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received.") (internal quotation omitted).

[257] 10 U.S.C. § 892(3) (2012); *see also* MCM, *supra* note 9, pt. IV, ¶¶ 18d(3) (defining the maximum punishment for dereliction of duty, depending on the specific type of dereliction, as forfeiture of two-thirds pay for three months and confinement for three months to a dishonorable discharge, total forfeitures, and two years' confinement). A duty "may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the Service," and the officer "is derelict in the performance of duties when that [officer] willfully or negligently fails to perform that person's duties or when that [officer] performs them in a culpably inefficient manner." MCM, *supra* note 9, pt. IV, ¶ 18c(3)(a), (c).

[258] 10 U.S.C. § 893 (2018) (criminalizing acts that amount to "cruelty toward, or oppression or maltreatment, of any person subject to [the officer's] orders"); *see also* MCM, *supra* note 9, pt. IV, ¶ 19d (establishing the maximum punishment as dishonorable discharge, total forfeitures, and confinement for three years). Of note, a person is protected by this article if the person, "subject to the UCMJ or not, . . . by reason of some duty are required to obey the lawful orders of the" officer; this would, consequently, include civilian employees. MCM, *supra* note 9, pt. IV, ¶ 19c(1).

[259] 10 U.S.C. § 933 (2012); *see also* MCM, *supra* note 9, pt. IV, ¶ 90d (providing for a maximum punishment of "[d]ismissal, forfeiture of all pay and allowances, and confinement for a period not in excess of that authorized for the most analogous offense

prejudicial to good order and discipline or service discrediting.[260] Yet absent an unusual set of circumstance, a civilian supervisor cannot be tried by court-martial at all.[261] Further, an attempt to create a civilian equivalent for some of these offenses that could be tried before a civilian court may well be found to be unconstitutional.[262]

To be sure, both the military officer and the civilian supervisor face the possibility of being fired for the same bad acts. For the supervisor, this is likely the harshest sanction that can be levied in most circumstances. But here, too, there are significant differences. A non-probationary employee is entitled to appeal that employee's termination to the Merit Systems Protection Board,[263] which is, as noted by the Supreme Court, "an independent adjudicator of federal employment disputes."[264] An officer facing elimination has no such recourse: the decision to eliminate the officer is, for the most part, made internal to the service.[265]

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for which a punishment is prescribed in this Manual, or, if none is prescribed, for 1 year.") Conduct is unbecoming if it "seriously compromises" the officer's character or "standing as an officer." MCM, *supra* note 9, pt. IV, ¶ 90c(2).

[260] 10 U.S.C. § 934 (2018).

[261] *See* 10 U.S.C. § 802 (2018) (defining those people who are subject to the Code); *see also* Solorio v. United States, 483 U.S. 435 (1987) (holding that the military status of the accused is the constitutional basis to try that person by court-martial).

[262] *See, e.g.*, Parker v. Levy, 417 U.S. 733, 754 (1974) ("[W]e think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the [military] shall be governed than it is when prescribing rules for the [civil society].").

[263] In general, an employee must have a certain amount of time in the civil service—generally, one or two years—before appealing an adverse action. *See* 5 U.S.C. § 7511(a) (2018) (defining term "employee" for purpose of determining who can appeal to MSPB). Of course, an officer also serves a probationary period, which determines what procedural rights the officer possesses if facing elimination. *See* AR 600-8-24, *supra* note 208, para. 4-20(b), (e) (defining a probationary officer as an officer with fewer than five years of commissioned service and providing that such an officer may be eliminated without a board of inquiry unless the officer is recommended for an other than honorable discharge). In fairness, the Army's definition of probationary is more favorable to the officer than the Congress's, but both are less favorable than that applicable to civilian employees. *Compare id.* para. 4-20(b) (establishing a five-year probationary period), 10 U.S.C. § 630(1)(a) (2018) (allowing a service secretary to discharge an officer with fewer than six years of commissioned service), *with* 5 U.S.C. § 7511(a) (establishing probationary periods between one and two years of service for most employees).

[264] Kloeckner v. Solis, 568 U.S. 41, 133 S. Ct. 596, 600, 184 L.Ed. 2d 433 (2012).

[265] AR 600-8-24, *supra* note 208, ch. 4 (governing officer eliminations). Although beyond the scope of this article, there is a narrow avenue by which the process that led to an officer's discharge—not the substantive decision to discharge itself—may be reviewed by the courts. *See* Kreis v. Sec'y of Air Force, 866 F.2d 1508, 1511 (D.C. Cir. 1989) (rejecting as nonjusticiable a claim for retroactive promotion, but providing for review

In short, there is a difference between Soldiers and employees, and between officers and civilian-employee supervisors. That difference is manifest in each party's respective rights and obligations. Removing the position of civilian deputy to the commander resolves the Appointments Clause issue, and it also recognizes those real differences in both authority and accountability.

V. Conclusion

The Appointments Clause is "among the significant structural safeguards" of the Constitution.[266] Fundamental to the clause—and the Constitution itself—is the issue of who decides. As one court put it, "among the framer's chief concerns . . . were questions of *who* should be permitted to exercise the awesome and coercive power of the government."[267] An officer's command under Article 90, UCMJ, is the exercise of just such an "awesome and coercive power of the government."[268] Indeed, as the Court of Military Appeals noted, "The force of an order by a superior officer can hardly be equated to a moral sanction. On the contrary, it is a tremendously powerful force in military law. In time of war, a willful refusal to obey is punishable by death."[269] Yet, in some circumstances—such as when an officer has a civilian supervisor and military subordinates—someone who is not appointed in accordance with the clause has that authority. That transgresses the Constitution.

Ultimately, every officer and employee swears an oath to support and defend the Constitution.[270] The fact that an organizational structure violates the Constitution should be enough reason to change that structure. But if it is not, this should be: authority and accountability are really two parts of the same concept. An officer has substantial authority,

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under the Administrative Procedures Act of a board for correction of military records' decision in circumstances in which "[a]djudication of th[o]se claims requires the district court to determine only whether the Secretary's decision making process was deficient, not whether his decision was correct"); *see also* Lindsay v. United States, 295 F.3d 1252, 1257-58 (Fed. Cir. 2002) (permitting review in U.S. Court of Federal Claims of violation of officer-evaluation regulation in the Air Force).

[266] Edmond v. United States, 520 U.S. 651, 659 (1997).

[267] Ass'n of American Railroads v. Dep't of Trans., 821 F.3d 19, 36 (D.C. Cir. 2016) (emphasis original).

[268] *Id.*

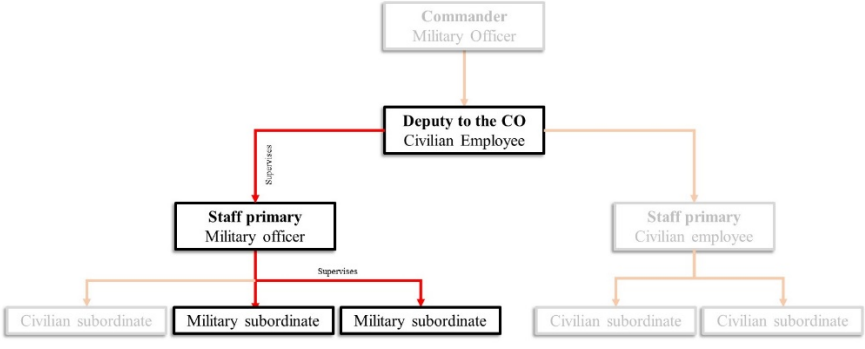
[269] United States v. Jordan, 22 C.M.R. 242, 244 (C.M.A. 1957).

[270] 5 U.S.C. § 3331 (2018).

but can be held accountable for the misuse of that authority in equal measure, including by criminal sanction. If there is an axiom here, it is this: one should not exercise power if one is not held commensurately accountable for it. As a consequence, the solution to the "Deputy To[o] problem" is simple in description, yet complex in execution: elimination.

Appendix A: Organizational Structure

Organizational Structure: Deputy to the Commander



NB: Organizational relationship that raises the Appointments Clause issue is in bold.

PETITIONING THE ARMY COURT OF CRIMINAL APPEALS FOR A WRIT: A PRACTICAL GUIDE FOR SPECIAL VICTIMS' COUNSEL

MAJOR CHRISTOPHER D. DONLIN*

> *I dared not trust the case on the presumption that the court knows everything. In fact, I argued it on the presumption that the court didn't know anything.*[1]

I. Introduction

As you approached the final days as a trial counsel representing the government, your Deputy Staff Judge Advocate sat you down and told you that you were headed to the Legal Assistance Office to serve as a special victims' counsel (SVC). As you pondered what you could have done wrong as a trial counsel to be "sent back" to legal assistance, you remembered the frustrations you endured with SVCs over the last eighteen months. You relaxed a little when you imagined going back to normal duty hours. You started to look forward to not having to worry about a military judge scheduling you for hearings after every long weekend and stress-free days clicking through the fields of DL Wills when you are not busy with SVC clients.

Later, you sit next to your client behind the bar and listen as the military judge announces their decision on the Military Rule of Evidence (MRE) 513 motion you expertly crafted and argued. You cannot believe that the government is willing to accept the decision and allow the violation of your client's privacy with no discernable advantage to the

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[1] RECOLLECTED WORDS OF ABRAHAM LINCOLN 243 (Don E. Fehrenbacher & Virginia Fehrenbacher eds., 1996).

prosecution's case. You promised this client that you would have their back and that their mental health history was no one's business and there was no reason that the judge would let the defense bring it up in court. Your client turns to you and whispers, "You said they wouldn't be able to bring this up! I don't want to talk about this in court."

Fortunately, you had a contingency plan for this very situation. You discussed this possibility with your client. You explained the costs and benefits of petitioning the Army Court of Criminal Appeals (ACCA) if the judge's decision did not go your way. You know that your client's number one goal, more important than even the outcome of the trial, is preventing their mental health records from being examined by the judge and possibly shown to the accused. You stand on shaky legs and request permission to address the ACCA. The military judge looks at you over their reading glasses and tells you to move to the lectern in the well. You clear your throat and say, "Your Honor, I respectfully request a stay of these proceedings to allow time to petition the ACCA for a writ of mandamus."

Mandamus is "[a] writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usu[ally] to correct a prior action or failure to act."[2] A petition for a writ of mandamus from the ACCA is a powerful tool in the SVC arsenal. Special victims' counsel have used it on several occasions to protect the rights of their clients. The ACCA has issued writs and decisions in response to some of these petitions and several of those writs will protect victims for years to come. Like any tool, it is only helpful if the user knows how to employ it properly. This article is intended to serve as a practical guide for an SVC who is faced with an unfavorable decision from the military judge and must figure out whether and how to file such a petition.

This article has three parts. It begins with a brief discussion of the history leading to the creation of the SVC position. Next, it examines, in chronological order, the petitions submitted to the ACCA by SVCs, as well as the responses from the ACCA. Finally, it walks the practitioner through the mechanics of preparing and submitting a petition for a writ of mandamus to the ACCA.

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[2] *Mandamus*, BLACK'S LAW DICTIONARY (9th ed. 2009).

II. Background

A series of well-publicized events led to the creation of the SVC position. The most notable event was a hearing conducted under Article 32, Uniform Code of Military Justice (UCMJ), at the United States Naval Academy, held to investigate charges of sexual assault against three midshipmen.[3] In another incident, an Air Force three-star general overturned a court-martial conviction and sentence of a lieutenant colonel.[4] These two cases were followed by an Air Force case and multiple statutory changes.

A. The First Case

LRM v. Kastenberg, is the landmark case in which the Court of Appeals for the Armed Forces (CAAF) acknowledged the right of a victim of sex assault to have an attorney address the court on their behalf in defense of their rights under Military Rules of Evidence (MRE) 412, 513, and 514, UCMJ. The case arrived at the CAAF on order for review by the U.S. Air Force Judge Advocate General.

The Court of Appeals for the Armed Forces confirmed "a holder of a privilege has a right to contest and protect the privilege"[5] and that the

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[3] The victim, a female midshipman testified for nearly thirty hours over five days. Jennifer Steinhauer, *Navy Hearing in Rape Case Raises Alarm*, New York Times (Sept. 20, 2013), http://www.nytimes.com/2013/09/21/us/intrusive-grilling-in-rape-case-raises-alarm-on-military-hearings.html. During the hearing, the defense counsel questioned her regarding a consensual sexual encounter she had the day after she was assaulted, her "oral sex technique," and whether she "felt like a ho" after the incident. *Id.*

[4] Lt. Gen. Craig Franklin overturned the aggravated sexual assault court-martial conviction and sentence of Lt. Col. James Wilkerson citing "insufficient evidence to prove guilt beyond a reasonable doubt." Craig Whitlock, *Air Force General's Reversal of Pilot's Sexual-assault Conviction Angers Lawmakers*, WASH. POST (Mar. 8, 2013), https://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?utm_term=.198d3fc72bd8. Lt. Gen. Franklin wrote that he found Lt. Col. Wilkerson and his wife more credible than the accuser, doubting that Lt. Col. Wilkerson would risk his stellar career and happy family to engage in sexual misconduct. Nancy Montgomery, *Wilkerson had Affair That Produced a Child, Air Force Confirms*, STARS AND STRIPES (June 13, 2013), https://www.stripes.com/news/us/wilkerson-had-affair-that-produced-a-child-air-force-confirms-1.225660. Wilkerson was later found to have engaged in an extramarital affair and fathered a child through that affair, for which he gave up parental rights. *Id.*

[5] *L.R.M. v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013).

victim has "[l]imited participant standing" as recognized by the Supreme Court.[6] In addition, the CAAF stated, "the President intended, or at a minimum did not preclude, that the right to be heard in evidentiary hearings under MRE 412 and 513 be defined as the right to be heard through counsel on legal issues, rather than as a witness."[7] This right to be heard and be heard through counsel is the bedrock the SVC position was constructed upon.

B. New Statutory Position

The National Defense Authorization Act (NDAA) for Fiscal Year 2013 directed the Secretary of each military department to "establish special victim capabilities" for investigating and prosecuting a special set of crimes and providing support to the victims of those crimes.[8] Congress directed the Secretary of each military department to include certain personnel to accomplish the newly established capabilities. One set of personnel Congress directed the Secretaries to identify was a group of "specially trained and selected" judge advocates to provide support for victims of sex offenses, although the position was not yet named.[9] The NDAA for Fiscal Year 2014 created the position we now know as the SVC.[10]

C. New Article 6b

The rights of victims continued to evolve through subsequent NDAAs modifying 10 U.S.C. § 806b which appears in the Manual for Courts-Martial (MCM) at Article 6b, UCMJ. In addition to the changes mentioned above, the NDAA for Fiscal Year 2014 extended crime

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[6] *Id.* at 368.
[7] *Id.* at 370.
[8] *See* National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 573, 126 Stat. 1632, 2312 (2013).
[9] *Id.*
[10] "The Secretary concerned shall designate legal counsel (to be known as 'Special Victims' Counsel') for the purpose of providing legal assistance under section 1044 of this title who is the victim of an alleged sex-related offense, regardless of whether the report of that offense is restricted or unrestricted." National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, § 1716, 127 Stat. 672, 1164 (2013).

victims' rights[11] to victims of any offenses under the UCMJ.[12] Congress implemented the new statute almost word for word, except for the addition of some language to make the provisions specific to military proceedings.[13] The NDAA for Fiscal Year 2015 provided the right to petition the ACCA for a writ of mandamus when the victim believes a court-martial ruling violates the rights afforded by the UCMJ.[14] The NDAA for 2016 added the ability to petition the ACCA for a writ of mandamus when the victim feels the decision of an Article 32 preliminary hearing officer violates the rights afforded by the code, or to quash a subpoena if they are "subject to an order to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense."[15] These appellate rights are codified at 10 U.S.C. § 806b(e), Article 6b, UCMJ.

III. Petitions Submitted

Special victims' counsel have submitted eight petitions for writs of mandamus to the ACCA. Below is a chronological overview of the petitions that have been submitted and the responses to those petitions.

A. First Petition

In *C.C. v. Lippert*, the victim petitioned the ACCA for a writ of mandamus asking the court to issue a writ of mandamus ordering the military judge to conduct an evidentiary hearing and make the findings of fact and conclusions of law required by MRE 513(e)(2),[16] and stay a military judge's order for the production of mental health records.[17] The victim alleged that the military judge violated her due process rights by

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[11] Scott Campbell, Stephanie, Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. 108-405, § 101, 118 Stat. 2260, 2293 (2004). The Crime Victims' Rights Act amended Title 18 of the U.S.C. to include § 3771.

[12] National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, § 1701, 127 Stat. 672, 1164 (2013).

[13] *See id.*

[14] *See* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, § 535, 128 Stat. 3292, 3988 (2014).

[15] National Defense Authorization Act for Fiscal Year 2016, Pub. L. 114-92, § 531, 129 Stat. 726, 1309 (2015).

[16] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 513 (2012).

[17] Brief for Petitioner at 1-2, C.C. v. Lippert, ARMY MISC 20140779 (A. Ct. Crim. App. Oct. 16, 2014).

denying her the reasonable right to be heard on the record when he ordered production of her mental health records without conducting the required evidentiary hearing.[18] The victim filed her petition citing the All Writs Act arguing that review of the petition under the All Writs Act was "properly a matter in aid of the jurisdiction of this court in its supervisory capacity over Army trial courts."[19]

The ACCA did not present any discussion of its reasoning or decision other than their order and the statement regarding jurisdiction.[20] The ACCA cited the All Writs Act and *LRM v. Kastenberg* as its jurisdiction to hear the case.[21] The ACCA granted the victim's petition and issued a writ of mandamus vacating the order for production of the victim's mental health records and ordering the military judge to "comply with MRE 513(e)(2) prior to deciding whether to order production of Petitioner's mental health records."[22] This case gives clear authority for SVCs to use whenever the MRE requires that a military judge conduct a hearing and make findings prior to issuing a decision on a motion, as is the case in MREs 412,[23] 513,[24] and 514.[25]

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[18] *Id.* at 1.
[19] *Id.* at 5.
[20] C.C. v. Lippert, ARMY MISC 20140779 (A. Ct. Crim. App. Oct. 16, 2014) (order).
[21] *Id.* at 1.
[22] *Id.* at 2.
[23] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412(c)(2–3) (2019) [hereinafter MCM] (requiring the military judge, before ordering production of evidence, to conduct a closed hearing and make findings, if evidence is to be admissible, that the evidence is relevant for a purpose under the rule and that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy). *But see United States v. Gaddis*, 70 M.J. 248, 250 (C.A.A.F. 2011) (holding MRE 412(c)(3) is needlessly confusing and could lead a military judge to exclude constitutionally required evidence and the "alleged victim's privacy" interests cannot preclude the admission of evidence "the exclusion of which would violate the constitutional rights of the accused).
[24] MCM, *supra* note 24, MIL R. EVID. 513(e)(2–3) (requiring that before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed and that prior to conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party showed: a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege; that the requested information meets one of the enumerated exceptions under subsection (d) of this rule; that the information sought is not merely cumulative of other information available; and that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources).
[25] MCM, *supra* note 24, MIL R. EVID. 514(e)(2-3) (requiring that before ordering the production or admission of evidence of a victim's records or communication, the military judge must conduct a hearing, which shall be closed and requiring that prior to

B. Second Petition

In *H.C. v. Bridges*, the victim petitioned the ACCA for a writ of mandamus ordering the trial court to grant the victim's request for a continuance."[26] The victim's SVC would not be able to attend the trial on the date set by the military judge because the SVC was already scheduled to appear in another trial on that date.[27] The victim argued that her right to be present included the right to have her SVC present to advise her during all portions of the trial.[28] The victim further argued that her relationship to her attorney was "the relationship between an attorney and client"[29] and was therefore not fungible and her counsel's availability must be considered in docketing.[30]

The ACCA acknowledged that they did have jurisdiction to review the petition based on the All Writs Act and *LRM v. Kastenberg*. However, they denied the petition for a writ of mandamus. The ACCA cited three reasons for their decision. First, they stated that "petitioning a superior court to de-conflict calendars and schedules . . . cannot be the only, or even the best or most practical, means to set trial dates . . . ."[31] Second, the ACCA stated, "2.3.1 of the Rules of Practice Before Army Courts-Martial facilitates notice; it does not mandate personal inclusion of SVC in all future docketing discussions between military judge and the parties and no basis for relief for victims."[32] The ACCA also stated that the victim had not demonstrated that the military judge had violated any other rights provided for in *Kastenberg* and Article 6b, UCMJ.[33] Finally, the ACCA cited a military judge's "broad discretion when ruling on requests for

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conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party showed: a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would contain or lead to the discovery of evidence admissible under an exception to the privilege; that the requested information meets one of the enumerated exceptions under subsection (d) of this rule; that the information sought is not merely cumulative of other information available; and that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources).

[26] Brief for Petitioner at 1, H.C. v. Bridges, ARMY MISC 20140793 (A. Ct. Crim. App. Dec. 1, 2014) (order).

[27] *Id.* at 2.

[28] Petitioner's Response to Court's Order at 8-10, H.C. v. Bridges, ARMY MISC 20140793 (A. Ct. Crim. App. Dec 1, 2014)

[29] *Id.* at 12 (citing 10 U.S. § 1044e(c)).

[30] *Id.* at 16.

[31] H.C. v. Bridges, ARMY MISC 20140793 (A. Ct. Crim. App. Dec. 1, 2014) (order).

[32] *Id.* at 4.

[33] *Id.* at 5.

continuances."[34] This issue has faced many SVCs practicing in the field. Special victims' counsel should consider how they might deal with this situation or plan appropriately to prevent it, to the extent possible. Most importantly, SVCs should ensure that their clients are aware of, and understand this possibility at the outset of their representation.

C. Third Petition

In *S.C. v. Schubert*, the victim petitioned the ACCA for a writ of mandamus quashing a subpoena to appear before the deposition and vacating the military judge's order for a deposition.[35] This petition was filed under the All Writs Act.[36] The victim argued that the military judge erred as a matter of law in ordering the deposition based on the victim being allowed to refuse to testify at the Article 32 hearing.[37] The victim also argued that the military judge had good cause for denial of the request for a deposition because she was within her right to refuse a pre-trial interview, and she would be available to testify at trial.[38]

The ACCA rendered an opinion without substantial legal analysis. The ACCA said that the military judge did not abuse his discretion because Rules for Courts-Martial (RCM) 702(c)(3)(A) designated "unavailability of an essential witness at an Article 32 hearing" as an "unusual circumstance" so that there was no good cause for denial of the request for a deposition.[39] The ACCA added that even though they knew that the law was changing, they were "bound by the current rules and controlling precedent."[40] The law has since changed to provide a much higher standard for the ordering of a deposition.[41]

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[34] *Id.* at 6 (citing United States v. Thomas, 22 M.J. 57 (C.M.A. 1986)).
[35] Petition for Writ of Mandamus at 1, S.C. v. Schubert, ARMY MISC 20140813 (A. Ct. Crim. App. Nov. 12,. 2014).
[36] *Id.* at 3.
[37] Brief for Petitioner at 8-9, S.C. v. Schubert, ARMY MISC 20140813 (A. Ct. Crim. App. Nov. 12, 2014).
[38] *Id.* at 11-12.
[39] S.C. v. Schubert, ARMY MISC 20140813 (A. Ct. Crim. App. Nov. 12, 2014) (order).
[40] *Id.* at 2.
[41] The current version of the rule states, "(2) 'Exceptional circumstances' under this rule includes circumstances under which the deponent is likely to be unavailable to testify at the time of trial. (3) A victim's declination to testify at a preliminary hearing or a victim's declination to submit to pretrial interviews shall not, by themselves, be considered 'exceptional circumstances' under this rule." MCM, *supra* note 24, R.C.M. 702(a)(2-3) (2019).

D. Fourth Petition

In *A.T. v. Lippert*, the victim petitioned the ACCA for a writ of mandamus vacating the military judge's order.[42] The military judge had ordered that records of communication between the victim and her victim advocate be produced for in camera review.[43] The victim alleged three errors on the part of the military judge: (1) that the military judge erred as a matter of law by finding that communications between a victim and a victim advocate were not confidential; (2) that the military judge abused his discretion by ordering the production of the victim's sexual harassment/assault response and prevention records be produced for an in camera review without requiring any threshold showing by the defense; (3) that the defense counsel had not met the standard required for production of victim advocate records in their motion to compel discovery.[44]

The ACCA denied the petitioners request and stated that the military judge did not abuse his discretion as the accused "adequately demonstrated a reasonable likelihood that petitioner's communications to the victim advocate about the very allegations that serve as the basis for the charges against him include evidence admissible under Mil. R. Evid. 514(d)(6) that may not otherwise be discovered."[45] The ACCA did point out that "it is the victim who defines the scope of information to be disclosed to third persons under Mil. R. Evid. 514" [46] conveying the message that communications by a victim to a victim advocate are confidential, even if those communications included the intent to make an unrestricted report of sex assault.

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[42] Brief for Petitioner at 1, A.T. v. Lippert, ARMY MISC 20150387 (A. Ct. Crim. App. June 11, 2015).
[43] *Id.* at 1.
[44] The military judge had ordered production of the records for in camera review without receiving evidence from the government, defense, or SVC. *Id* at 4-5. The SVC made a motion for reconsideration and offered evidence at the resulting 39(a) session. *Id.* The military judge denied the SVC's motion for reconsideration and stated that he would conduct an in camera review of the records. *Id.*
[45] A.T. v. Lippert, ARMY MISC 20150387, 2015 CCA LEXIS 257 at *2 (A. Ct. Crim. App. Jun. 11, 2015).
[46] *Id.* at *2.

E. Fifth Petition

D.B. v. Lippert, ARMY MISC 20150769, 2016 CCA LEXIS 63 (A. Ct. Crim. App. Feb. 1, 2016), was the first case of a petition for a writ submitted under the new authority provided by the amended Article 6b, UCMJ.[47] The victim also provided the All Writs Act as authority for the ACCA to hear the case.[48]

The victim argued that the military judge erred as a matter of law when he ordered production of the victim's mental health records for in camera review without first conducting an evidentiary hearing as required by MRE 513(e)(2).[49] The victim also argued that the military judge erred as a matter of law when he ruled that MRE 513(d)(3) required mandatory disclosure of the victim's mental health records based on Alaskan law.[50] Finally, the victim argued that the military judge erred when he ruled that the "constitutional exception" applied under MRE 513, UCMJ.[51]

The ACCA first addressed jurisdiction by stating that the new Article 6b is, "a new and separate statutory authority for this court to issue writs" and "Article 6b, UCMJ, is a distinct authority from the All Writs Act."[52] Due to this change, the ACCA no longer needed to find that the matters raised in the petition had "potential to directly affect the findings and sentence."[53] The ACCA stated that in order for them to issue a writ they "need only to determine that the petition addresses the limited circumstances specifically enumerated under Article 6b(e)."[54]

The ACCA reiterated the three-part test that a petition must meet in order to qualify for extraordinary relief. Specifically, the petitioner must

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[47] Petition for Writ of Mandamus at 3, D.B. v. Lippert, ARMY MISC 20150769, 2016 CCA LEXIS 63 (A. Ct. Crim. App. Feb. 1, 2016).
[48] *Id.* at 5.
[49] Brief for Petitioner at 7, D.B. v. Lippert, ARMY MISC 20150769, 2016 CCA LEXIS 63 (A. Ct. Crim. App. Feb. 1, 2016).
[50] *Id.* at 17-19. "[P]ractitioners of the healing arts" who "have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect shall immediately report the harm to the nearest office of the department." Alaska Statute 47.17.020(a)(1).
[51] Brief for Petitioner at 19, D.B. v. Lippert, ARMY MISC 20150769, 2016 CCA LEXIS 63 (A. Ct. Crim. App. Feb. 1, 2016).
[52] D.B. v. Lippert, ARMY MISC 20150769, 2016 CCA LEXIS 63 at *5 (A. Ct. Crim. App. Feb. 1, 2016) (mem. op.).
[53] *Id.* at *7.
[54] *Id.* at *7.

show: (1) that there is "no other adequate means to attain relief"; (2) that the "right to issuance of the writ is clear and indisputable"; and (3) the issuance of the writ is "appropriate under the circumstances."[55]

The ACCA emphasized that MRE 513 requires that, "the military judge must 'narrowly tailor' any ruling directing the production or release of records to the purposes stated in the [defense] motion."[56] The ACCA also emphasized that MRE 513 is "the means by which a patient is provided due process prior to the production or disclosure of privileged communications."[57]

The ACCA provided clarity in addressing the principle that "there is not a constitutional right of confrontation during sentencing procedures."[58] The rules of evidence that provide for cross-examination of sentencing witnesses "are regulatory confrontation rights rather than *constitutional* right of confrontation that could form the basis for piercing a privileged communication."[59] This means that a victim may choose not to testify during the merits phase of the court-martial regarding the impact of the accused's actions, but may testify during the pre-sentencing phase regarding the impact of the crimes for which the accused has been convicted without having to disclose their mental health records.

Finally, the ACCA stated that their order restored the disclosed records to their privileged status.[60] Special victims' counsel can cite to this language when records have been inadvertently or erroneously disclosed. When this happens, defense counsel often argue to the military judge that the government has seen the records, and therefore the defense is entitled to them. Special victims' counsel can now argue that the ACCA has recognized the ability of the trial court to "unring the bell," and prevent the defense from using any of the erroneously-disclosed information as the basis for a motion to compel in camera review of mental health records.

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[55] *Id.* at *7-8 (citing Cheney v. United States Dist. Ct. for the Dist. Of Columbia, 542 U.S. 367, 380-81 (2004.)).
[56] *Id.* at *17 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL R. EVID. 513(e)(4) (2016)).
[57] D.B. v. Lippert, ARMY MISC 20150769, 2016 CCA LEXIS 63 at *17 (A. Ct. Crim. App. Feb. 1, 2016) (mem. op.) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL R. EVID. 513(e)(4) (2016)).
[58] *Id.* at *20.
[59] *Id.* at *20.
[60] *Id.* at *33.

F. Sixth Petition

In *L.K. v. Acosta*, 76 M.J. 611 (A. Ct. Crim. App. 2017), the victim petitioned the ACCA for "a writ of mandamus ordering the trial court and military judge to hold an evidentiary hearing pursuant to Mil. R. Evid. 513."[61] The victim argued that the ACCA had jurisdiction to issue the writ under the All Writs Act.[62] The victim further argued that the ACCA had jurisdiction to issue the requested writ under the amended Article 6b, UCMJ.[63]

Specifically, the victim alleged three errors on the part of the military judge. First, the victim argued that "the military judge erred by ruling that the defense counsel met the evidentiary standard required for production of mental health records for in camera review."[64] Second, the victim argued that "the military judge erred by failing to narrowly tailor his order piercing her mental health records privilege."[65] Finally, the victim alleged that "the military judge erred by ruling that a plain reading of Mil. R. Evid. 513(d)(2) applies as an exception [her] mental health records privilege."[66]

The ACCA set aside the military judge's ruling and allowed the judge to "reconsider the real party in interest, the accused's motion ab initio in light of their decision," and to "allow the parties and petitioner to file supplemental matters in light of this opinion."[67] The ACCA acknowledged the "unclear guidance" provided to military judges by MRE 513.[68]

The ACCA stated that military justice practitioners must "focus on the fact that MRE 513 is a rule of privilege, not discovery."[69] The ACCA acknowledged that part of the confusion with this rule stems from the standard they set in previous cases and "viewing the issue as one of discovery, governed by Article 46, UCMJ, and Rule for Courts-Martial

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[61] Brief for Petitioner at 2, L.K. v. Acosta, 76 M.J. 611 (A. Ct. Crim. App. 2017).
[62] *Id.* at 4.
[63] *Id.* at 5.
[64] *Id.* at 11-15.
[65] *Id.* at 15.
[66] Brief for Petitioner at 16-19, L.K. v. Acosta, 76 M.J. 611 (A. Ct. Crim. App. 2017).
[67] L.K. v. Acosta, 76 M.J. 611, 620 (A. Ct. Crim. App. 2017).
[68] *Id.* at 613.
[69] "[D]isclosure involves the right to possess information that one currently does not possess" "'admission' involves the right to introduce into a criminal trial information one already possesses." *Id.* at 615.

(RCM) 701, not as a request to access privileged mental health records."[70] This is no longer the standard. The ACCA even acknowledged acceptance of the risk that "when a certain matter is declared privileged, it means the accuracy of the proceeding will, at least occasionally, suffer in order to maintain the privilege."[71] Special victims' counsel need to have a solid understanding of this information and be prepared to argue it to a judge.

Additionally, the ACCA clarified the "constitutional" exception in MRE 513 stating, "the reach of the constitutional exception is the same today as it was prior to the deletion of the constitutional exception pursuant to NDAA 2015."[72] Understanding this principle will save SVCs valuable time when litigating MRE 412, 513, and 514 motions.

The issue that the ACCA had to determine was "if in this case the Constitution requires the 'disclosure' of otherwise privileged material."[73] While acknowledging the constitutional right to confrontation, the ACCA stated that "[t]he right to confront witnesses does not include the right to *discover* information to use in confrontation."[74] Additionally, the ACCA cited *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977), to clarify that "[t]here 'is no general constitutional right to discovery in a criminal case'" and that "constitutional 'discovery' is usually delineated by the contours of the seminal case of *Brady*."[75] Accordingly, while the constitutional exception still exists, it only extends to records that are in the possession of the government and disclosable under *Brady*. The ACCA ultimately concluded that, "[m]ental health records located in military or civilian healthcare facilities *that have not been made part of the investigation* are not 'in the possession of prosecution' and therefore cannot be '*Brady*

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[70] "This court initially accorded privileged mental health records the same standards for disclosure as any other matter: which is to say, we treated privileged mental health records s having no privilege at all." *Id.* at 614. "In United States v. Cano, we addressed the propriety of a military judge's order to disclose privileged mental health records of an eleven-year-old sexual assault victim. ARMY 20010086, 2004 CCA LEXIS 331 (Army Ct. Crim. App. 4 Feb. 2004)." *Id.* We described the military judge's order to produce 'everything…even remotely potentially helpful to the defense" from the records as a "fair trial standard." *Id.*

[71] *Id.* at 614-615.

[72] The Army Court of Criminal Appeals (ACCA) clarified that "the Constitution is no more or less applicable to a rule of evidence because it happens to be specifically mentioned in the Military Rules of Evidence." L.K. v. Acosta, 76 M.J. 611, 615 (A. Ct. Crim. App. 2017).

[73] *Id.* at 615.

[74] *Id.* at 615 (citing Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987).

[75] *Id.* at 616 (citing Brady v. Maryland, 373 U.S. 83 (1963).

evidence.'"[76] Special victims' counsel will find this language useful if they are ever faced with the defense motion to compel in camera review of mental health records claiming that the military treatment facility has those records, and therefore they are in possession of the "government."

With respect to the exception regarding evidence of child abuse, the ACCA examined the two clauses separately.[77] The ACCA provided clear guidance that the intent of the exception in the first clause was for psychotherapists to provide "information that is necessary for the safety and security of military personnel, operations, installations, and equipment."[78] If a psychotherapist has information that child abuse occurred, they may reveal that information even if privileged. That exception does not apply to "privileged communications that would establish the *absence* of abuse."[79] In examining the second clause of the exception, the ACCA found that the reading of the exception advocated by the defense was absurd.[80] The ACCA made it clear that the "purpose of the exception was not to turn over every alleged child-victim's mental health records to the alleged abuser."[81] The ACCA also stated conclusively that they "read this rule as applying only to the *admission* of psychotherapist patient communications."[82]

Finally, the ACCA addressed the need for the defense motion to compel production to "specifically describ[e] the evidence."[83] This allows both the "opposing party *and the patient*" to have notice of the potential disclosure.[84]

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[76] *Id.* at 616.
[77] "(d) *Exceptions.* There is no privilege under this rule: . . . (2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse; . . . ." MCM, *supra* note 24, MIL R. EVID. 513(d)(2).
[78] L.K. v. Acosta, 76 M.J. 611, 615 (A. Ct. Crim. App. 2017).
[79] *Id.* at 618.
[80] *Id.* at 618.
[81] *Id.* at 619.
[82] *Id.* at 618.
[83] L.K. v. Acosta, 76 M.J. 611, 620 (A. Ct. Crim. App. 2017) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL R. EVID. 513 (e)(1)(A) (2016)).
[84] *Id.* at 620.

G. Seventh Petition

In *T.C. v. Cook*, ARMY MISC 20170204 (A. Ct. Crim. App. May 5, 2017), the victim petitioned the ACCA for a writ of mandamus alleging three errors on the part of the military judge.[85] The ACCA declined to overturn military judge's decision to allow the admission of MRE 412 evidence.[86]

H. Eighth Petition

In *A.G. v. Hargis*, 77 M.J. 501 (A. Ct. Crim. App. 2017), the victim petitioned the ACCA for a writ under 18 U.S.C. § 3771 and the All Writs Act.[87] "During CID's investigation, a military magistrate signed a search authorization for AG's cell phone . . . ."[88] The victim alleged that the military judge erred in instructing the military magistrate to deny A.G.'s request for the affidavit and documents used to support the government's request for the search and seizure authorization.[89] The victim also alleged that the military judge erred in refusing to consider A.G.'s request that the military judge disclose the same documents.[90]

The ACCA dismissed the petition for lack of jurisdiction because the petitioner failed to establish that the ACCA could take action in a case before referral.[91] The ACCA rejected "petitioner's invitation to extend the jurisdiction of this court under the All Writs Act to the pre-preferral matter raised."[92] They also rejected the argument that they had jurisdiction under 18 U.S.C. § 3771(d)(8), stating "a right to be treated with fairness, dignity, and privacy does not give a victim a right to receipt of discovery and

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[85] The victim alleged "[t]he trial court erred in ruling that defense met its burden to show that the evidence they sought to introduce fell within an enumerated exception to Mil. R. Evid. 412, the trial court erred in ruling that defense met its burden to show the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members under Mil. R. Evid. 403, and the trial court erred in failing to narrowly tailor it's order granting defense motion to introduce evidence under Mil. R. Evid. 412." Brief for Petitioner at 2, T.C. v. Cook, ARMY MISC 20170204 (A. Ct. Crim. App. May 5, 2017).

[86] T.C. v. Cook, ARMY MISC 20170204 (A. Ct. Crim. App. May 5, 2017) (order).

[87] Brief for Petitioner at 8 and 11, A.G. v. Hargis, 77 M.J. 501 (A. Ct. Crim. App. 2017).

[88] A.G. v. Hargis, 77 M.J. 501, 502 (A. Ct. Crim. App. 2017).

[89] Brief for Petitioner at 8 and 11, A.G. v. Hargis, 77 M.J. 501 (A. Ct. Crim. App. 2017).

[90] *Id.* at 18.

[91] A.G. v. Hargis, 77 M.J. 501, 502 (A. Ct. Crim. App. 2017).

[92] *Id.* at 504.

documents without an analysis of the case status and pending legal issue."[93] Additionally, the ACCA stated that "an alleged victim's discovery and production request is not ripe for decision by a military judge in a non-referred case" in spite of the guidance in the Standing Operating Procedure for Military Magistrates, Section IV, dated 10 September 2013.[94] The ACCA further held that "the military judge did not err by advising the military magistrate to deny the SVC's discovery request or by not acting on the SVC request, which created a de facto ruling denying the SVC's discovery and production request."[95] *A.G. v. Hargis* is an example that shows that there are times in which, regardless of the actions of anyone involved in the investigation or prosecution process, a petition for a writ of mandamus from the ACCA is not appropriate.

IV. The Process

A writ of mandamus a very specific remedy for a very specific set of violations of your client's rights. The SVC must provide their clients with the information necessary to make the best decision. By the time the ACCA is considering motions the SVC should already know the client's ultimate desire for the outcome of the case. If the client's goal is to conclude the process as quickly as possible, petitioning the ACCA for a writ will not be a good option as it will likely lead to a stay in the proceedings. Even though the law requires the ACCA to make the petition for a writ a priority,[96] there is no accurate way to predict how long the ACCA will take to make a decision, whether they will invite briefs from amici curiae, and whether they will allow for oral argument. Any of these could result in a considerable delay in the processing of the trial even if the ACCA ultimately decides in favor of the victim.

A writ petition poses additional concerns for a victim. The ACCA could deny the petition and not issue a writ or they could issue a writ that harms the government's case against the accused. It is the SVC's duty as the victim's advocate to ensure that their client is aware of as many of the potential outcomes as possible so that they can make an informed decision.

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[93] *Id.*
[94] *Id.*
[95] *Id.* at 502.
[96] UCMJ art. 6b (2016).

A. Trial Court

The following is a process SVCs are recommended to follow if, and when, they decide to petition the ACCA for a writ.

Once the SVC is certain of their client's wishes and they believe that the victim has made the informed decision to petition the ACCA for a writ, the SVC should contact the SVC Program Manager's Office at the Pentagon.[97] The SVC may contact the SVC Program Manager's Office for assistance with any issue when representing a victim of sexual assault. The Program Manager's office is the SVCs technical chain of command, and therefore SVCs can discuss the specifics of their client's case without violating attorney-client privilege.[98]

The SVC Program Manager's Office does not approve or disapprove an SVC submitting a petition for a writ, but they may be able to offer advice about whether it is advisable for the SVC to take this action. The Program Manager's Office may also be aware of cases similar to theirs that represent a trend that the Program Manager wants to address. The Program Manager's Office could also be aware of recent changes in the law that would make the proposed petition moot. While the victim certainly would not want to hear this, it may save the SVC a lot of time and effort and prevent delays in the trial. In addition, the Program Manager's Office may be able to get the SVC in contact with attorneys with experience in the sister service Courts of Criminal Appeals who are often willing to review petitions drafted by SVCs and offer advice. Finally, it is a professional courtesy to ensure that the Program Manager's Office is aware of a petition that will be submitted to the ACCA so that they are not "blindsided" by someone in the Office of The Judge Advocate General bringing up an SVC issue that they have never heard of.

The SVC should notify the trial court that they intend to petition the ACCA for a writ. They must take special care that this notification is not conveyed as a threat to the military judge. If the SVC has discovered evidence or law that they believe the military judge did not consider when rendering their original decision, the SVC should make a motion for reconsideration to the trial court before petitioning the ACCA for a writ. Soon after, or contemporaneous to, the SVC notifying the military judge

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[97] SPECIAL VICTIMS' COUNSEL PROGRAM, U.S. ARMY, SPECIAL VICTIMS' COUNSEL HANDBOOK FOURTH EDITION para. 10.a.(2) (9 June 2017) [hereinafter SVC HANDBOOK].
[98] *Id.*, para. 8-3.c.

that they intend to petition the ACCA for a writ, it is good practice to request a stay of the proceedings in the court-martial. While military judges are unlikely to grant this stay, it could be helpful in speeding the process of the petition at the ACCA or convincing them to order a stay.

B. Army Court of Criminal Appeals

1. Mechanics

In accordance with the United States Army Court of Criminal Appeals Rules of Practice and Procedure, if SVCs are not already admitted to practice in front of the ACCA, they will need to include a Motion for Leave of the ACCA to Appear pro hac vice.[99] This is required to be submitted with the pleading.[100] This motion must include a Certificate of Good Standing from a qualified bar and an affidavit stating that the SVC has never been disbarred or suspended from the practice of law and is not currently under investigation or pending disciplinary action.[101]

The ACCA requires electronic filing unless given permission by the Clerk of Court.[102] The SVC must adhere to very specific formatting rules for their filing and for the email to which they attach it.[103] The SVC should then serve pleadings on all counsel of record.[104] Finally, they must attach a Certificate of Service attestation to their pleading.[105]

The ACCA requires that SVCs submit a petition for extraordinary relief in accordance with strict formatting rules.[106] The caption of the petition must "specify the type of writ sought (for example, Petition for Extraordinary Relief in the Nature of a writ of Mandamus)."[107] A brief in support of the petition is also required.[108] This is where the SVCs make their legal arguments.

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[99] UNITED STATES ARMY COURT OF CRIMINAL APPEALS, RULES OF APPELLATE PROCEDURE r. 13.1(b) (15 Jan. 2019).
[100] *Id.*
[101] *Id.* r. 13.3.
[102] Filing must be sent to the following email address: usarmy.pentagon.hqda-otjag.mbx.us-army-clerk-of-Court-efiling@mail.mil. *Id.* r. 5.1.
[103] *Id.* r. 5.2.
[104] *Id.* r. 5.6.
[105] *Id.* r. 5.7.
[106] *Id.* r. 20.
[107] *Id.* r. 20.2(a).
[108] *Id.* r. 20(e).

2. Content and Tone

When an SVC begins to draft a brief in support of a petition for a writ, they must first determine if the ACCA has jurisdiction. As mentioned above, the ACCA recognizes the new Article 6b(e)(3), UCMJ, as "a new and separate authority for this court to issue writs" and a "distinct authority from the All Writs Act."[109] In order to find jurisdiction to issue a writ under Article 6b, UCMJ, the ACCA "need only determine that the petition addresses the limited circumstances specifically enumerated under Article 6b(e)."[110] This is all that is required to be cited in the jurisdictional analysis when submitting a petition for a writ to the ACCA. Special victims' counsel should not "rely on pre-1999 cases that assert that the All Writs Act permits military appellate courts to exercise supervisory control over military justice."[111] Notably, in *A.G. v. Hargis*, the ACCA signaled their reluctance to exercise jurisdiction to address rights beyond those contained in Article 6b, UCMJ.[112]

If the SVC believes that the ACCA has jurisdiction, they must determine whether they can make an argument that the petition meets the standards from the *Cheney* decision.[113]

When drafting the brief in support of their petition, it is important that SVCs remember that the ACCA is less accepting of or willing to entertain some of the behavior that is allowed in trial courts. Extreme language or incredulity do not lend weight to the argument or increase the chances that the ACCA will rule in favor of the victim.[114] "Lay off the bluster and the adverbs 'truly, madly, deeply unreasonable.'"[115] It is more likely that the Government Appellate Division will be interested in drafting a brief in support of a petition if it is not offensive to the ACCA on its face.[116]

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[109] D.B. v. Lippert, ARMY MISC 20150769, 2016 CCA LEXIS 63 at *5 (A. Ct. Crim. App. Feb. 1, 2016) (mem. op.).
[110] *Id.*
[111] E-mail from Captain Samuel E. Landes, Chief, Branch, Government Appellate Division, to author (Oct. 30, 2017, 09:47 EST) (on file with author) [hereinafter CPT Landes E-mail].
[112] A.G. v. Hargis, 77 M.J. 501, 504 (A. Ct. Crim. App. 2017) (denying petitioner's request for writ of mandamus because "jurisdiction does not exist at this juncture under 10 U.S.C. §806b(e)(1) based on the nature of petitioner's writ").
[113] *See infra* note 55.
[114] Interview with Captain Catherine Parnell, Chief, Branch 4, Government Appellate Division (Jan. 25, 2018) [hereinafter CPT Parnell Interview].
[115] CPT Landes E-mail, *supra* note 111.
[116] CPT Parnell Interview, *supra* note 114.

Instead, draft a quality brief applying the facts to the law.[117] Finally, "You have to treat ACCA with the professionalism it is accustomed to from the more frequent litigants from the government and defense bar."[118]

3. Oral Argument

It is possible, if unlikely, that the SVC will get the opportunity to make oral argument in front of the ACCA in support of their petition. If an SVC gets this opportunity, they should notify the SVC Program Manager's Office right away. The Program Manager's Office will likely be able to assist them in their preparation and get them in contact with judge advocates with experience making arguments to the ACCA.

VI. Conclusion

The petition for a writ of mandamus is a useful tool to for an SVC to assist in the zealous representation of your clients. However, it must be used wisely. First, the SVC must help their client decide if this is the best course of action for them. Next, the SVC must master the relevant statutory and case law discussed above. Then, the SVC must leverage the resources available to them to draft a quality petition and brief in support of that petition. For some, petitioning an appellate court is an exciting prospect. For others, it is overwhelming to imagine. Hopefully, with the guidance offered herein, SVCs will be able to properly employ this valuable tool to protect their clients' rights, and possibly those of other victims for years to come.

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[117] CPT Landes E-mail, *supra* note 111.
[118] *Id.*