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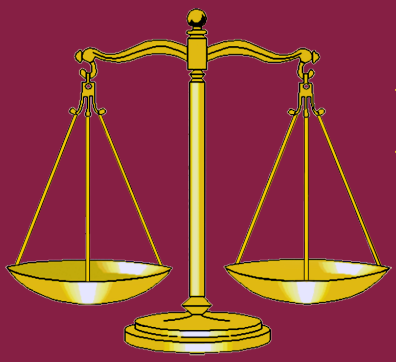

# Military Law Review

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*Captain Ryan M. Farrell & Lieutenant Colonel Christopher J. Goewert*

Command Prosecutorial Authority and the Uniform Code of Military Justice —A Redoubt Against Impunity and a National Security Imperative
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Headquarters, Department of the Army, Washington, D.C.

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# *Military Law Review*

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MILITARY LAW REVIEW

Volume 228 Issue 4

# VIRTUE LIES IN MODERATION: THE DEPARTMENT OF DEFENSE'S OVERBROAD DNA CRIMINAL INDEXING SYSTEM

CAPTAIN RYAN M. FARRELL*
& LIEUTENANT COLONEL CHRISTOPHER J. GOEWERT†

## I. Introduction

A young Airman on her first assignment in Japan spends a weekend night out with friends and loses track of time. Looking at her watch she realizes that it is now moments past curfew and trudges back to the base gate. After checking her military identification, guards temporarily detain her and take her statement, in which she admits to having been with friends at the local bar. They take her fingerprints, swab her cheeks for a deoxyribonucleic acid (DNA) sample and then release her to her first sergeant, who drops her off at her dormitory. The "investigation," if it can be called that, consisted of filing her written statement with that of the guard who recorded her late arrival. She likely will never be tried or convicted for this offense,[1] but instead will receive some form of administrative

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discipline to remind her of the importance of orders.[2] Nevertheless, because she violated a general order establishing a curfew, her DNA sample will be submitted to the national DNA criminal index,[3] where it will remain in perpetuity unless expunged.[4]

The DNA sample is more than a mere fingerprint—it has been called the "'nuclear weapon' of identifying technologies"[5] because it is the persistent personal identification of the individual[6] that reveals information about health risks, ancestry/ethnicity, parentage, and familial connections.[7]

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[1] A curfew violation can be an offense under the Uniform Code of Military Justice (UCMJ). *See* UCMJ art. 92(1) (1950) (failure to obey a lawful general order). The assertion that curfew violations, standing alone, do not ordinarily, result in trial by courts-martial is based on the authors' recent professional experiences.

[2] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306(c), 401(c)(2)(A) (2019) [hereinafter MCM]. Administrative actions are corrective in nature, not punitive, and may include measures ranging from verbal counseling to administrative separation (that is, discharge from the military). *Id.* R.C.M. 306(c)(2) and discussion. "Nonjudicial punishment is a disciplinary measure more serious than administrative [actions], but less serious than trial by court-martial." *Id.* pt. V, ¶ 1.b. It is designed as an efficient and prompt way of addressing minor offenses under the UCMJ in order to "maintain[] good order and discipline and . . . promote[] positive behavior changes in Servicemembers." *Id.* pt. V, ¶ 1.c.

[3] That a military member's DNA will be taken for a curfew violation or similar offense is not fanciful. Between 24 March 2019 and 24 September 2019, violating a lawful general order was the most common reason DNA was seized, constituting the basis for taking 659 of 6,143 samples. *See* Letter from Chester Longcor, Dir., U.S. Army Crime Recs. Ctr., to authors (Oct. 30, 2019) (on file with authors); CRIM. INVESTIGATION COMMAND, U.S. DEP'T OF ARMY, REPORT: COLLECTION OFFENSE STATISTICS 3, 22 (2019).

[4] Once entered into the system, a DNA record will not be removed unless expunged. To be eligible for expungement, individuals who are acquitted of all charges or whose charges are disposed of without trial may request of their commanding officer that their sample be destroyed and removed from the system. U.S. DEP'T OF DEF., INSTR. 5505.14, DEOXYRIBONUCLEIC ACID (DNA) COLLECTION REQUIREMENTS FOR CRIMINAL INVESTIGATIONS, LAW ENFORCEMENT, CORRECTIONS, AND COMMANDERS 14–16 (Dec. 22, 2015) (C1, Mar. 9, 2017) [hereinafter DODI 5505.14].

[5] Vera Eidleman & Jay Stanley, *Rapid DNA Machines in Police Departments Need Regulation*, AM. CIV. LIBERTIES UNION (Oct. 2, 2019, 3:45 PM), https://www.aclu.org/blog/privacy-technology/medical-and-genetic-privacy/rapid-dna-machines-police-departments-need.

[6] Raymond Keogh, *DNA & The Identity Crisis*, PHIL. NOW, Aug.–Sept. 2019, at 16.

[7] The explosion of DNA use in all biological sciences is ingrained in the popular mind; it is understood to provide information regarding a person's genetic relatives, identify a person's ethnicity, and predict a person's predisposition to disease, among other uses. *See* Jacque Wilson, *5 Cool Things DNA Testing Can Do*, CABLE NEWS NETWORK (Apr. 25, 2013, 6:53 AM), https://www.cnn.com/2013/04/25/health/national-dna-day-tests/index.html; Ian Murnaghan, *The Importance of DNA*, EXPLOREDNA (Jan. 7, 2019), http://www.exploredna.co.uk/the-importance-dna.html.

While only a fraction of the DNA taken will be indexed, the Government will store the remaining sample containing all of the individual's genetic information.[8]

This article describes the legal defects inherent in the Department of Defense's (DoD) law enforcement DNA indexing program. It highlights the Government's weak constitutional interest in taking DNA samples from Service members. Factors that set the DoD's program apart from its constitutionally approved civilian forebear are explored: the military does not have a system of bail, does not have difficulty identifying a suspect, does not use DNA to assess criminal risk, and does not use DNA to ensure availability for trial. Part II describes the historical background of DNA indexing, the legal environment governing the DoD's DNA collection, and the instruction at issue. Part III argues that many of the reasons upon which the Supreme Court relied to uphold DNA indexing in the civilian context do not apply in the military context, thus weakening the authority to take criminal indexing DNA in most instances. Part IV takes issue with specific provisions of the DoD's DNA indexing program as being unconstitutionally written, while Part V provides additional prudential reasons to narrow the scope of DoD DNA indexing.

## II. Background

### A. A Brief History of DNA Profiling

Forensic DNA profiling compares patterns in DNA extracted from crime scene samples of blood, hair, or semen with DNA taken from suspects.[9] Sir Alec Jeffreys, a geneticist at the University of Leicester in Britain, introduced the technique in the 1980s, with the first use in the legal

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[8] *See* EMILY J. HANSON, CONG. RSCH. SERV., R41800, THE USE OF DNA TESTING BY THE CRIMINAL JUSTICE SYSTEM AND FEDERAL ROLE: BACKGROUND, CURRENT LAW, AND GRANTS 5 (2020) ("Most jurisdictions retain the DNA sample used to generate the profile placed in CODIS. DNA samples are usually retained for quality assurance purposes, such as confirming a hit made using the NDIS, and it allows jurisdictions to retest the sample if new technology is developed in the future."); FED. BUREAU OF INVESTIGATION, NATIONAL DNA INDEX SYSTEM (NDIS) OPERATIONAL PROCEDURES MANUAL 79–81 (2020) [hereinafter NDIS OPMAN]; Letter from Longcor to authors, *supra* note 3.

[9] Sheila Jasanoff, *Just Evidence: The Limits of Science in the Legal Process*, 34 J.L., MED. & ETHICS 328, 330 (2006).

system occurring in a 1985 immigration case in the United Kingdom.[10] A year later saw its debut in the criminal justice arena, with DNA profiling used to clear one suspect and catch the true perpetrator of the rape and murder of two 15-year-old girls in Leicestershire.[11] By the end of 1986, DNA profiling was in use the world over,[12] and is now generally accepted in the forensic field as an accurate way to identify a person.[13] It has been heralded as possessing the "unparalleled ability both to exonerate the wrongly convicted and to identify the guilty."[14]

B. The DNA Identification Act of 1994 and Participating Jurisdictions Today

Soon thereafter, people in the United States recognized the utility of a national system for DNA profiling. The DNA Identification Act of 1994 (the Act)[15] authorized the Director of the Federal Bureau of Investigation (FBI) to create "an index of (1) DNA identification records of persons convicted of crimes; (2) analyses of DNA samples recovered from crime scenes; and (3) analyses of DNA samples recovered from unidentified human remains."[16] State and local law enforcement agencies were allowed to submit DNA records to and access the index, provided their sampling

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[10] Rana Saad, *Discovery, Development, and Current Applications of DNA Identity Testing*, 18 BAYLOR U. MED. CTR. PROC. 130, 130 (2005).
[11] *Id.* at 131.
[12] *Id.*
[13] While this article does not discuss the science underlying DNA identification, many sources do so in detail. *See, e.g.*, Saad, *supra* note 10; Lutz Roewer, *DNA Fingerprinting in Forensics: Past, Present, Future*, INVESTIGATIVE GENETICS 2–4 (Nov. 18, 2013), https://investigativegenetics.biomedcentral.com/track/pdf/10.1186/2041-2223-4-22.pdf; Henry T. Greely et al., *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, 34 J.L., MED. & ETHICS 248, 249–50 (2006).
[14] Dist. Att'y's Off. for the Third Jud. Cir. v. Osborne, 557 U.S. 52, 55 (2009). In keeping with the idea of freeing the wrongfully convicted, Barry Scheck and Peter Neufeld founded the Innocence Project in 1992 based on a simple premise: "If DNA technology could prove people guilty of crimes, it could also prove that people who had been wrongfully convicted were innocent." *DNA's Revolutionary Role in Freeing the Innocent*, INNOCENCE PROJECT (Apr. 18, 2018), https://innocenceproject.org/dna-revolutionary-role-freedom. As of November 2020, the Innocence Project has successfully exonerated 375 people and identified 137 real perpetrators using DNA profiling. *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states (last visited Nov. 23, 2020).
[15] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 210301–210306, 108 Stat. 1796, 2065–71 (codified as amended at 34 U.S.C. §§ 12591–12593).
[16] *Id.* § 210304(a)(1)–(3).

and analysis methods complied with the FBI's quality assurance and privacy standards.[17] The scope of the index—known as the National DNA Index System (NDIS)[18]—has since expanded to include DNA records of persons charged with a crime in an indictment or information and of "other persons whose DNA samples are collected under applicable legal authorities."[19] All fifty states, Puerto Rico, the District of Columbia, and Federal civilian and military law enforcement participate in NDIS, which uses the Combined DNA Index System (CODIS) program.[20]

The Act allows participating jurisdictions to set their own limits on law enforcement collection of DNA. The National DNA Index System will accept DNA records of samples collected from crime scenes, persons charged with or convicted of crimes, or "other persons whose DNA samples are collected under applicable legal authorities."[21] To increase the scope of collection, Federal grants are available to assist states in collecting DNA from arrestees.[22] While all fifty-four participating jurisdictions have

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[17] *Id.* § 210304(b)–(c). Of course, the DNA Identification Act of 1994 (the Act) incentivized states to participate by offering grants for them to establish and improve their DNA sampling laboratories. *Id.* § 210302 (codified at 34 U.S.C. § 40701).

[18] *Combined DNA Index System (CODIS)*, FBI, https://www.fbi.gov/services/laboratory/biometric-analysis/codis (last visited Nov. 23, 2020).

[19] 34 U.S.C. § 12592(a)(1)(B)–(C). Federal grants to states expanded as well, offering money to those that chose to implement a process for collecting DNA from arrestees in addition to convicts. *Id.* § 40742.

[20] *Combined DNA Index System (CODIS)*, *supra* note 18. As of September 2020, NDIS contained over 19,500,000 DNA profiles collected from convicts, detainees, arrestees, and crime scenes. *CODIS – NDIS Statistics*, FBI, https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics (last visited Nov. 23, 2020).

[21] 34 U.S.C. § 12592.

[22] *Id.* § 40742.

some form of DNA collection law,[23] only thirty-one collect DNA samples upon arrest.[24]

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[23] 10 U.S.C. § 1565 (military); 34 U.S.C. § 40702 (Federal Government generally); ALA. CODE § 36-18-25 (LexisNexis 2018); ALASKA STAT. § 44.41.035 (2018); ARIZ. REV. STAT. § 13-610 (LexisNexis 2018); ARK. CODE ANN. § 12-12-1006 (2018); CAL. PENAL CODE § 296 (Deering 2018); COLO. REV. STAT. § 16-23-103 (2018); CONN. GEN. STAT. § 54-102g (2018); DEL. CODE ANN. tit. 29, § 4713 (2018); D.C. CODE § 22-4151 (LexisNexis 2018) (defining only qualifying offenses, while substantive collection authority exists at 34 U.S.C. § 40703); FLA. STAT. ANN. § 943.325 (LexisNexis 2018); GA. CODE ANN. § 35-3-160 (2018); HAW. REV. STAT. ANN. § 844D-31 (LexisNexis 2018); IDAHO CODE ANN. § 19-5506 (2018); 730 ILL. COMP. STAT. ANN. 5/5-4-3 (LexisNexis 2018); IND. CODE ANN. § 10-13-6-10 (LexisNexis 2018); IOWA CODE §§ 81.2, 901.5(8A)(b) (2018); KAN. STAT. ANN. § 21-2511 (2018); KY. REV. STAT. ANN. § 17.170 (LexisNexis 2018); LA. REV. STAT. ANN. § 15:609 (2018); ME. REV. STAT. ANN. tit. 25, § 1574 (2018); MD. CODE ANN., PUB. SAFETY § 2-504 (LexisNexis 2018); MASS. ANN. LAWS ch. 22E, § 3 (LexisNexis 2018); MICH. COMP. LAWS SERV. § 750.520m (LexisNexis 2018); MINN. STAT. § 299C.105 (2006), *invalidated by In re* Welfare of C.T.L., 722 N.W.2d 484 (Minn. Ct. App. 2006); MISS. CODE ANN. §§ 45-33-37, 45-47-1, 47-5-183 (2018); MO. REV. STAT. § 650.055 (2018); MONT. CODE ANN. § 44-6-103 (2017); NEB. REV. STAT. ANN. § 29-4106 (2012), *invalidated in part by* Shepard v. Houston, 289 Neb. 399 (2014); NEV. REV. STAT. ANN. §§ 176.09123, .0913 (LexisNexis 2018); N.H. REV. STAT. ANN. § 651-C:2 (LexisNexis 2018); N.J. REV. STAT. § 53:1-20.20 (2018); N.M. STAT. ANN. §§ 29-3-10, -16-6 (LexisNexis 2018); N.Y. EXEC. LAW § 995-c (Consol. 2018); N.C. GEN. STAT. §§ 15A-266.3A to .4 (2018); N.D. CENT. CODE § 31-13-03 (2017); OHIO REV. CODE ANN. § 2901.07 (LexisNexis through file 56, 133d Gen. Assembly); OKLA. STAT. tit. 74, § 150.27a (2018); OR. REV. STAT. § 137.076 (2018); 44 PA. CONS. STAT. § 2316 (2018); P.R. LAWS ANN. tit. 34, § 4006 (2018); 12 R.I. GEN. LAWS § 12-1.5-8 (2018); S.C. CODE ANN. § 23-3-620 (2018); S.D. CODIFIED LAWS §§ 23-5A-5 to -5.2 (2018); TENN. CODE ANN. § 40-35-321 (2018); TEX. GOV'T CODE ANN. § 411.1471 (2018); UTAH CODE ANN. §§ 53-10-403 to -406 (LexisNexis 2018); VT. STAT. ANN. tit. 20, § 1933 (2018); VA. CODE ANN. §§ 19.2-310.2, .2:1 (2018); WASH. REV. CODE ANN. § 43.43.754 (LexisNexis 2018); W. VA. CODE ANN. § 15-2B-6 (LexisNexis 2018); WIS. STAT. § 165.76 (2018); WYO. STAT. ANN. § 7-19-403 (2018).

[24] 28 C.F.R. § 28.12(b) (2018) (implementing 34 U.S.C. § 40702 and imposing the collection requirement on all Federal agencies, including the Department of Defense); ALA. CODE § 36-18-25(c) (LexisNexis 2018); ALASKA STAT. § 44.41.035(b)(6) (2018); ARIZ. REV. STAT. § 13-610(K) (LexisNexis 2018); ARK. CODE ANN. § 12-12-1006(a)(2) (2018); CAL. PENAL CODE § 296(a)(2) (Deering 2018); COLO. REV. STAT. § 16-23-103(1)(a) (2018); CONN. GEN. STAT. § 54-102g(a) (2018); FLA. STAT. ANN. § 943.325(7) (LexisNexis 2018); 730 ILL. COMP. STAT. ANN. 5/5-4-3(a-3.2) (LexisNexis 2018); IND. CODE ANN. § 10-13-6-10(a)(1), (b) (LexisNexis 2018); KAN. STAT. ANN. § 21-2511(a) (2018); LA. REV. STAT. ANN. § 15:609(A) (2018); MICH. COMP. LAWS SERV. § 750.520m(1)(a) (LexisNexis 2018); MISS. CODE ANN. § 45-47-1(1) (2018); MO. REV. STAT. § 650.055(1)(2) (2018); NEV. REV. STAT. ANN. § 176.09123(1)–(2) (LexisNexis 2018); N.J. REV. STAT. § 53:1-20.20(a)–(b), (d), (e) (2018); N.M. STAT. ANN. § 29-3-10(A) (LexisNexis 2018); N.C. GEN. STAT. § 15A-266.3A(a) (2018); N.D. CENT. CODE § 31-13-03(1) (2017); OHIO REV. CODE ANN. § 2901.07(B)(1)(a) (LexisNexis through file 56, 133d Gen. Assembly); OKLA. STAT.

Whether the DNA sample is collected on arrest, charging, or conviction, the resulting process is largely the same. A laboratory in the state[25] will test the sample and generate a DNA profile.[26] The laboratory compares that profile against profiles in the state database.[27] The database generally contains two different indices.[28] The first—the Offender Index—contains the DNA profiles of people who have been arrested for or convicted of a qualifying offense under state law, or who have had a sample drawn under other applicable legal authority.[29] The second—the Forensic Index—contains the DNA profiles of samples collected from crime scenes.[30] If there is a match between collected and indexed samples, the laboratory will follow procedures to confirm the match.[31]

To make this more concrete, consider the example the FBI uses to explain the matching process at the state level.[32] Assume a person reports a sexual assault and undergoes a forensic examination. The state laboratory receives the examination kit and uses the swabs it contains to develop profiles for anyone whose DNA is present, to include the suspected perpetrator. The laboratory will compare that profile to the Offender and Forensic Indices in the state database. If the profile matches a profile in the Offender Index and the match is confirmed, the laboratory will have identified the suspected perpetrator. If the profile matches a profile in the Forensic Index (say, a profile from another sexual assault) and the match is confirmed, the laboratory will have linked two crimes together, though the perpetrator would remain unidentified.

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tit. 74, § 150.27a(A)(3) (2018); 12 R.I. GEN. LAWS § 12-1.5-8(b) (2018); S.C. CODE ANN. § 23-3-620(A) (2018); S.D. CODIFIED LAWS § 23-5A-5.2 (2018); TENN. CODE ANN. § 40-35-321(e)(1) (2018); UTAH CODE ANN. § 53-10-403(1)(d) (LexisNexis 2018); VA. CODE ANN. § 19.2-310.2:1 (2018); WIS. STAT. § 165.76(1)(gm) (2018).

[25] The Federal Government relies on the U.S. Army Criminal Investigation Laboratory (USACIL) for samples that the Department of Defense collects, DODI 5505.14, *supra* note 4, at 1, and the FBI's own laboratory for samples that all other Federal agencies collect, *CODIS – NDIS Statistics*, *supra* note 20.

[26] *See Frequently Asked Questions on CODIS and NDIS*, FBI, https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Nov. 23, 2020) [hereinafter *CODIS FAQ*].

[27] *Id.*

[28] *See id.*

[29] NDIS OPMAN, *supra* note 8, para. 5.1. The definitions for the indices named can be found in the Manual's glossary. *Id.* glossary at 95.

[30] *Id.* para. 5.1.

[31] *CODIS FAQ*, *supra* note 26.

[32] *See id.*

Regardless of whether there is a match in the state database, the laboratory may upload a DNA identification record to NDIS.[33] The record contains only the following information: (1) the DNA profile; (2) an identifier specific to the submitting agency; (3) an identification number unique to the DNA profile; and (4) points of contact assigned to the DNA analysis.[34] Though the state may know the identity of the person who provided the sample, personally identifiable information is excluded from the NDIS record.[35] That information remains at the laboratory, along with the DNA sample itself.[36]

The FBI subjects DNA profiles to a comparison at the national level.[37] Each day, NDIS staff compare each new and modified DNA record to all other records in NDIS.[38] If there is a match between a new or modified record and a record already in NDIS, the FBI notifies the laboratories that submitted the matching records.[39] The laboratories must confirm the match using procedures prescribed by the FBI before they can exchange personally identifying information.[40] Once the match is confirmed, the law enforcement agencies involved may coordinate to develop additional leads in their respective cases.[41] The match may serve as probable cause to seize an evidentiary DNA sample from the suspected perpetrator.[42]

### C. The Supreme Court Finds Law Enforcement DNA Collection of Arrestees to Be Constitutional—*Maryland v. King*

This very scenario played out in Maryland in 2009, which set the stage for the Supreme Court of the United States to weigh in on the DNA profiling system.

Alonzo King was arrested in Wicomico County, Maryland, for first- and second-degree assault for menacing a group of people with a shotgun.[43] During the booking process at the county jail, law enforcement personnel

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[33] See NDIS OPMAN, *supra* note 8, for an in-depth explanation of the NDIS process.
[34] *Id.* para. 3.1.4.
[35] *Id.*
[36] *Id.*
[37] *See* HANSON, *supra* note 8, at 2.
[38] NDIS OPMAN, *supra* note 8, para. 5.2.
[39] *Id.* para. 5.4.
[40] *See generally id.* ch. 6.
[41] *CODIS FAQ*, *supra* note 26.
[42] *Id.*
[43] Maryland v. King, 569 U.S. 435, 440 (2013).

took a DNA sample from him in accordance with the Maryland DNA Collection Act.[44] His DNA profile was matched to a sample collected from an unsolved 2003 rape.[45] Based solely on the match between the sample collected during booking and the DNA found at the scene of the 2003 rape, a grand jury indicted King for the rape.[46] The police obtained a search warrant and took another DNA sample from King, which also matched the evidence from the rape.[47]

King moved to suppress the DNA match, arguing that the Maryland DNA Collection Act violated the Fourth Amendment of the U.S. Constitution.[48] The trial judge disagreed, and King was convicted and sentenced to life in prison without the possibility of parole.[49] The Maryland Court of Appeals reversed, finding that taking a buccal swab from King during booking without a warrant was an unreasonable search because his expectation of privacy outweighed the state's interest in using DNA to identify him.[50]

When the case reached the U.S. Supreme Court, all nine justices agreed that swabbing the inside of a person's cheek to obtain a DNA sample constituted a search under the Fourth Amendment.[51] They divided sharply on whether it was constitutional to do so as part of routine booking

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[44] *Id.* at 441. The sample was taken by swabbing the inside of King's cheek with a cotton swab or filter paper (known as a "buccal swab"). *Id.* at 440. The Maryland DNA Collection Act in force at the time remains largely the same today. MD. CODE ANN., PUB. SAFETY §§ 2-501 to -514 (LexisNexis 2018); 2016 Md. Laws 49 (stylistic changes); 2012 Md. Laws 66 (stylistic changes). The only major change involves the provisions regarding arrestees, which were set to expire on 31 December 2013; the Maryland legislature abrogated the sunset clause effective 1 October 2013. 2013 Md. Laws 431.
[45] *King*, 569 U.S. at 441.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* (quoting King v. State, 42 A.3d 549, 556 (Md. 2012), *rev'd*, 569 U.S. 435). The Maryland Court of Appeals decided that the statute was unconstitutional as applied to King but declined to hold it facially unconstitutional "because there are conceivable, albeit somewhat unlikely, scenarios where an arrestee may have altered his or her fingerprints or facial features (making difficult or doubtful identification through comparison to earlier fingerprints or photographs on record) and the State may secure the use of DNA samples, without a warrant under the Act, as a means to identify an arrestee, *but not for investigatory purposes*, in any event." *King*, 42 A.3d at 580 (emphasis added).
[51] *King*, 569 U.S. at 446.

procedures when a person has been arrested for, but not yet convicted of, an offense.[52]

The narrow majority concluded that the practice of warrantless, suspicionless DNA sampling as part of routine booking procedures was constitutional.[53] The lack of a warrant did not trouble the majority because King "was already in valid police custody for a serious offense supported by probable cause," and the law enforcement officers involved had no discretion in the decision to sample his DNA.[54] Rather, Maryland law required them to take samples from all persons arrested for certain serious crimes.[55] Thus, "in light of the standardized nature of the [searches] and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate," and a warrant was not required.[56] However, the Fourth Amendment still required that the search be reasonable, both in its scope and its manner of execution.[57] To determine whether it was reasonable, the majority employed a simple balancing test, weighing the degree to which the search intrudes on a person's privacy against the promotion of legitimate government interests.[58]

Two factors influenced the majority's assessment of the infringement on an arrestee's privacy interests: (1) the strength of the arrestee's

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[52] *See generally id.* at 466–82 (Scalia, J., dissenting).

[53] *Id.* at 465–66 ("When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is . . . a legitimate police booking procedure that is reasonable under the Fourth Amendment.").

[54] *Id.* at 448. The majority stated that, "in some circumstances, such as '[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found certain general, or individual, circumstances may render a warrantless search or seizure reasonable.'" *Id.* at 447 (alteration in original) (quoting Illinois v. McArthur, 531 U.S. 326, 330 (2001)). However, it did not specify whether it was special needs, a diminished expectation of privacy, or the fact that the intrusion was minimal that made King's presence in valid police custody a key factor in finding that a warrant was not required. *See id.* at 447–48. Considering the totality of the majority's opinion, all three bases likely played a part.

[55] *Id.*

[56] *Id.* at 448 (quoting Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 622 (1989)).

[57] *Id.* The Fourth Amendment to the U.S. Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[58] *King*, 569 U.S. at 448 (citing Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

expectation of privacy and (2) the invasiveness of the search.[59] As for the former, the opinion emphasized that, "in considering those expectations . . . the necessary predicate of a valid arrest for a serious offense is fundamental."[60] A person's expectation of privacy vis-à-vis the police is "necessarily . . . of a diminished scope" in those circumstances.[61] After all, the police may perform a fairly extensive search of the arrestee's person as part of the booking process, even going so far as to force him to lift his genitals for examination.[62] Compared to the intimate nature of the search police could perform as part of the booking process, a "negligible" swab inside an arrestee's mouth seems insignificant.[63] The fact that the swab does not break the skin and involves "virtually no risk, trauma, or pain" was a "crucial factor" in determining that such a search is only a minor intrusion on an arrestee's already diminished privacy interest.[64]

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[59] *Id.* at 463 ("The reasonableness inquiry here considers two . . . circumstances in which the Court has held that particularized suspicion is not categorically required: 'diminished expectations of privacy [and] minimal intrusions.'" (alteration in original) (quoting *McArthur*, 531 U.S. at 330)). The majority went out of its way to disclaim reliance on the "special needs" doctrine, which allows law enforcement to conduct searches without individualized suspicion so long as the searches serve some purpose other than "detect[ing] evidence of ordinary criminal wrongdoing." *Id.* at 462–63 (first quoting Indianapolis v. Edmond, 531 U.S. 32 (2000) (stopping motorists at a checkpoint); and then citing Chandler v. Miller, 520 U.S. 305 (1997) (testing political candidates for illegal narcotics)). The distinguishing feature is the strength of the privacy interests at issue. *Id.* A special-needs search "intrude[s] upon substantial expectations of privacy," whereas someone who "has been arrested on probable cause for a dangerous offense that may require detention before trial" has a reduced expectation of privacy. *Id.* at 463. Therefore, while the majority felt the special-needs cases were "in full accord with the results reached here," that doctrine was not the basis for the decision in *King*.

[60] *Id.* at 461.

[61] *Id.* at 462 (quoting Bell v. Wolfish, 441 U.S. 520, 557 (1979)).

[62] *Id.* (citing Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 334 (2012)).

[63] *Id.* at 463 ("[B]y contrast to the approved standard procedures incident to any arrest . . . a buccal swab involves an even more brief and still minimal intrusion").

[64] *Id.* at 464. The majority went on to note that the testing of an arrestee's DNA sample did not make the search so intrusive as to be unconstitutional. *Id.* at 464–65. It based that determination on three factors. First, the alleles tested for identification purposes do not reveal any of the arrestee's genetic traits; they can only be used to identify the person who provided the sample. *Id.* at 464. Second, the majority found that even if these alleles could reveal other information (such as private medical information), law enforcement practice was to test only for identification purposes. *Id.* It is debatable that law enforcement's self-restraint would be a sufficient constitutional safeguard, but science had not at that time progressed to the point where that issue was considered. Third, the statutory prohibition against testing DNA samples for any purpose other than identification was sufficient to

The government interest on the other side of the balance was the "well established . . . need for law enforcement officers in a safe and accurate way to process and identify the persons . . . they must take into custody."[65] The majority stressed that a search of an arrestee as part of formally processing him into police custody is not done to find contraband or evidence of a crime.[66] Rather, such searches are done as part of "subjecting the body of the accused to [the law's] physical dominion," and different interests are at stake.[67] The majority set forth five such interests, which serve as pillars supporting the constitutional framework for this DNA collection scheme, determining that DNA identification played a "critical role in serving" each.[68]

The first interest is in identifying the arrestee.[69] According to the majority, a person's true identity means more than just his name and Social Security number.[70] Rather, identification "necessarily entails searching public and police records based on the identifying information provided by the arrestee to see what is already known about him," to include his criminal record.[71] Because an individual could falsify his identification documents or give a false name, the "irrefutable identification" possible through DNA matching is another way to associate public records to him.[72]

A second interest is in "[e]nsuring that the custody of the arrestee does not create inordinate 'risks for facility staff, for the existing detainee population, and for [the] new detainee.'"[73] Knowing the person's criminal history, as well as if he has a record of violence or mental disorder, allows law enforcement to make informed decisions about the conditions of his detention to minimize risks of harm.[74]

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allay any privacy concerns that may exist if the alleles could reveal other personal information. *Id.* at 465.

[65] *Id.* at 449.

[66] *Id.*

[67] *Id.* at 450 (quoting People v. Chiagles, 142 N.E. 583, 584 (N.Y. 1923)).

[68] *Id.* at 450–61 (discussing the five interests in detail).

[69] *Id.* at 450.

[70] *Id.*

[71] *Id.* at 451.

[72] *Id.*

[73] *Id.* at 452 (quoting Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 330 (2012)).

[74] *Id.*

Third, the government has an interest in ensuring that the arrestee is available for trial.[75] The majority speculated that "[a] person who has been arrested for one offense but knows that he has yet to answer for some past crime *may* be more inclined to flee the instant charges, lest continued contact with the criminal justice system expose one or more other serious offenses."[76] This also serves a safety interest, because a person who flees from custody poses a risk not only to law enforcement officers who may attempt to apprehend him but also to the general public.[77]

Fourth, there is an interest in providing a court with more information with which to make an appropriate decision on whether the arrestee should be released on bail.[78] The ability to link the arrestee to past violent offenses using DNA identification gives the court "critical information" to assess the threat the arrestee may pose to the community or particular victims of his crimes.[79] A final governmental interest exists in identifying arrestees as the perpetrators of past crimes to ensure the release of any person wrongfully imprisoned for that same offense.[80]

After describing those interests, the majority noted that DNA identification was a significant advance on the other techniques law enforcement had used to identify arrestees, from photography to the Bertillon method of identification to fingerprinting.[81] To the majority, DNA identification was simply a more sophisticated evolution of those constitutionally approved methods.[82] The majority saw "little reason to question 'the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he

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[75] *Id.*
[76] *Id.* at 453 (emphasis added).
[77] *Id.*
[78] *Id.*
[79] *Id.* To further support this rationale, the majority cited examples of eleven cases in three locations in the United States where felony arrestees committed additional crimes after release because DNA identification was not used to match them to previous crimes. *Id.* at 454 (noting such in Denver, Colorado; Chicago, Illinois; and Maryland).
[80] *Id.* at 455–56.
[81] *Id.* at 456–57. Alphonse Bertillon's system of identification consisted of several standardized measurements of the arrestee's body, along with an analysis of his or her facial features and precise locations of any distinguishing bodily features. *Id.* at 457.
[82] *See id.* at 456–61 ("Just as fingerprinting was constitutional for generations prior to the introduction of [the FBI's Integrated Automated Fingerprint Identification System], DNA identification of arrestees is a permissible tool of law enforcement today.").

flees prosecution.'"[83] Accordingly, the majority put "great weight" on the significance of the government interest at stake and DNA identification's potential to serve that interest.[84]

That weight was more than enough to tip the balance, especially in light of the minimal intrusion on already diminished privacy interests that DNA identification entailed.[85] It is important to note that the majority's ruling was grounded firmly in the context of "an arrest supported by probable cause to hold for a serious offense[, where the police] bring the suspect to the station to be detained in custody."[86] In that context, the majority held the practice of taking and analyzing a cheek swab of the arrestee's DNA without a warrant or particularized suspicion is a reasonable—and thus constitutional—search under the Fourth Amendment.[87] In sum, *King* held that the taking of DNA from arrestees is a reasonable search because the significant governmental interest in obtaining DNA information far outweighed the intrusion on the arrestee's diminished expectation of privacy in those circumstances.

Figure 1[88]

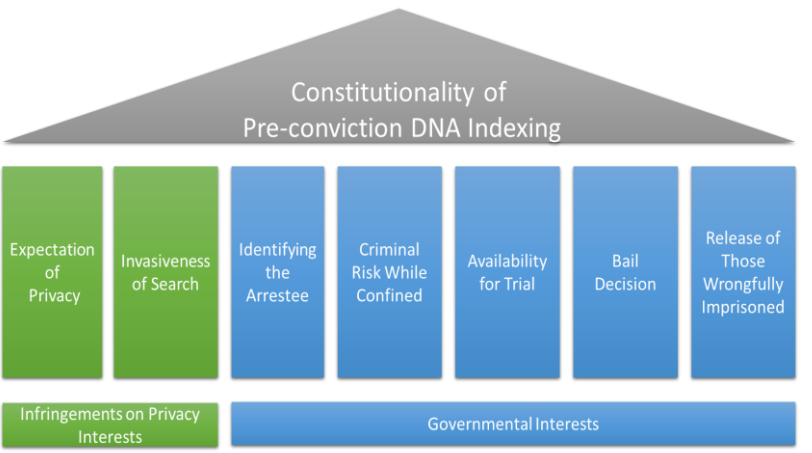


Figure 1: Constitutional Foundation of the Maryland DNA Collection Act.

[83] *Id.* at 461 (quoting WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.3(c) (5th ed. 2012)).
[84] *Id.*
[85] *Id.* at 465.
[86] *Id.*
[87] *Id.* at 465–66.
[88] The authors created this figure to graphically represent the legal framework underpinning DNA collection as devised by the *King* court.

D. Collection of DNA in the Federal Government and Department of Defense

Deoxyribonucleic acid profiling in the U.S. military follows substantially the same process used by many state laboratories, although the DoD is subject to two separate DNA collection requirements. The first is a statutory requirement under Title 10 of the U.S. Code that is specific to the military, which provides, in pertinent part, the following:

> The Secretary concerned shall collect a DNA sample from each member of the armed forces under the Secretary's jurisdiction who is, or has been, convicted of a qualifying military offense . . . . The Secretary concerned shall furnish each DNA sample collected . . . to the Secretary of Defense. The Secretary of Defense shall carry out a DNA analysis on each DNA sample in a manner that complies with the requirements for inclusion of that analysis in CODIS; and furnish the results of each such analysis to the Director of the [FBI] for inclusion in CODIS. . . . [A qualifying military offense is defined as a]ny offense under the Uniform Code of Military Justice for which a sentence of confinement for more than one year may be imposed[, and a]ny other offense under the Uniform Code of Military Justice that is comparable to a qualifying Federal offense (as determined under [34 U.S.C. § 40702]).[89]

There are three key points to note from this requirement. The first is that DNA profiling only triggers upon conviction for a qualifying offense, not at some earlier point in the investigative or judicial process.[90] Once the sample is collected, it must be analyzed and uploaded to CODIS.[91] The second is that only offenses under the Uniform Code of Military Justice (UCMJ) qualify.[92] The third is that the resulting DNA profile must be included in CODIS.[93]

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[89] 10 U.S.C. § 1565(a)–(b), (d). The UCMJ is the criminal code that applies to the U.S. military. *See generally id.* §§ 801–946a.
[90] *Id.* § 1565(a)(1).
[91] *Id.* § 1565(b).
[92] *Id.* § 1565(d).
[93] *Id.* § 1565(b)(2).

The second requirement, which is regulatory in nature, is found at 28 C.F.R. § 28.12.[94] This regulation was issued in accordance with the Attorney General's authority to "direct any other agency of the United States that arrests or detains individuals or supervises individuals facing charges to carry out any function and exercise any power of the Attorney General"[95] under the Federal DNA profiling statute, 34 U.S.C. § 40702. The regulation provides, in pertinent part, as follows:

> Any agency of the United States that arrests or detains individuals or supervises individuals facing charges shall collect DNA samples from individuals who are arrested, facing charges, or convicted . . . . Each agency required to collect DNA samples under this section shall . . . [f]urnish each DNA sample collected under this section to the Federal Bureau of Investigation, or to another agency or entity as authorized by the Attorney General, for purposes of analysis and entry of the results of the analysis into the Combined DNA Index System . . . .[96]

There are two notable differences between the regulatory mandate, which applies to all Federal agencies of the United States, and the Title 10 mandate, which applies only to the DoD. The first is that the Attorney General's regulatory mandate requires collection when a person is arrested or facing charges, in addition to the conviction trigger under Title 10.[97] The second involves which offenses qualify for collection. Only conviction for certain offenses under the UCMJ triggers collection under the Title 10 mandate.[98] In contrast, being arrested for, charged with, or convicted of any felony or certain other offenses under Federal law triggers the regulatory mandate.[99] The latter sweeps more broadly and includes all of the

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[94] 28 C.F.R. § 28.12 (2018).

[95] 34 U.S.C. § 40702(a)(1)(A). This section authorizes the Attorney General to "collect DNA samples from individuals who are arrested, facing charges, or convicted," presumably of a qualifying Federal offense. *Id.*

[96] 28 C.F.R. § 28.12(b), (f)(2) (2019).

[97] *Compare id.* § 28.12(b), *with* 10 U.S.C. § 1565(a)(1).

[98] 10 U.S.C. § 1565(a)(1), (d).

[99] *See* 28 C.F.R. § 28.12(b) (2019). Although neither 34 U.S.C. § 40702 nor 28 C.F.R. § 28.12 actually prescribe that the individual must be arrested for, charged with, or convicted of a qualifying Federal offense, the text of each implies such. *See* 34 U.S.C. § 40702(d); 28 C.F.R. § 28.2 (2019).

qualifying military offenses from the more limited Title 10 mandate within its scope.[100]

E. Requirements for Collection of DNA Under Department of Defense Instruction 5505.14

The DoD combined these separate Federal mandates into one regulation applicable to its components: Department of Defense Instruction 5505.14 (the DoDI).[101] The DoDI sets out five instances in which its defense criminal investigative organizations ("DCIOs") and other DoD law enforcement agencies collect DNA profiling samples for submission to CODIS: (1) when a military subject is under investigation for a qualifying offense and the investigator opines that probable cause exists to believe the subject committed the offense;[102] (2) when a court-martial charge for a qualifying offense is preferred in accordance with Rule for Courts-Martial 307;[103] (3) when a Service member is ordered into pretrial confinement for a qualifying offense;[104] (4) when a Service member is confined to a military correctional facility or temporarily housed in a civilian facility as a result of a conviction for a qualifying offense at a general or special court-martial;[105] or (5) when

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[100] *See* 28 C.F.R. § 28.2(a) (2019) ("Felony means a Federal offense that would be classified as a felony under 18 U.S.C. 3559(a) or that is specifically classified by a letter grade as a felony."). By that definition, a Federal offense punishable by more than one year of imprisonment is a felony. 18 U.S.C. § 3559(a). Although the UCMJ does not classify offenses as misdemeanors or felonies, the UCMJ's punitive articles are Federal offenses. Therefore, offenses under the UCMJ that are punishable by more than one year's imprisonment likely would be considered felonies. *See id.*

[101] DoDI 5505.14, *supra* note 4, at 1. While the DoDI cites 42 U.S.C. §§ 14132, 14135, and 14135a as part of its statutory authority in paragraph 1.b, those provisions were editorially reclassified as 34 U.S.C. §§ 12592, 40701, and 40702, respectively. This article cites to the current statutory provisions, even if the cited source refers to the original provision.

[102] *Id.* at 13. The investigator may collect a DNA sample from the subject at any time but may not forward it to USACIL for analysis and submission to CODIS until he or she has consulted with a judge advocate and made a probable cause determination. *Id.*

[103] *Id.* Preferral is the formal act of swearing that an accused committed an offense and is typical initiated by an accused's immediate commander.

[104] DoDI 5505.14, *supra* note 4, at 13. This condition is met only after the confined military member's commander decides that pretrial confinement will continue in accordance with Rule for Courts-Martial 305(h)(2)(A) and if a DNA sample has not already been submitted. *Id.*

[105] *Id.* The triggering mechanism is a military member's confinement "as a result of any general or special court-martial conviction" for a qualifying offense. *Id.* The requirement also applies to those instances where a military member does *not* receive confinement as a result of a general or special court-martial conviction for a qualifying offense. *Id.* The clear

a commander conducts or directs a command-level investigation or inquiry for a qualifying offense, if no criminal investigation was conducted by a DCIO, other DoD law enforcement agency, or the Coast Guard Investigative Service.[106]

Three of those five DNA collection triggers[107] go far beyond the constitutionally permissible rationale for DNA indexing as articulated in *King*. It is the inherent differences between military and civilian criminal justice processes, where terms like "arrest" and "facing charges" hold different meanings,[108] which set the stage for discord. The most commonly encountered trigger is the law enforcement investigation trigger (the investigative trigger), which often begins with the apprehension of a suspect. The preferral and command-level investigation triggers suffer from the same flaws as the investigative trigger. Additionally, the command-level investigation trigger is wholly discretionary—a fatal defect which has long been held unconstitutional under the Fourth Amendment.[109] The pretrial confinement and conviction triggers are not at issue in this article. In fact, the pretrial confinement trigger is most analogous to the arrest and booking scenario the Supreme Court addressed in *King*, as will be discussed below. As such, comparison between it and the three offending

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meaning of this portion of the DoDI is that a DNA sample must be collected upon conviction for a qualifying offense by a general or special court-martial and not by a summary court-martial. The military justice system has three different levels of court-martial: general, special, and summary. UCMJ art. 16 (1950). A conviction at a general or special court-martial is a Federal conviction; a finding of guilt at a summary court-martial is not. *See* United States v. Blair, 72 M.J. 720, 724 (A. Ct. Crim. App. 2013) (referring to a general court-martial conviction as a Federal conviction); United States v. Van Vliet, 64 M.J. 539, 543 (A.F. Ct. Crim. App. 2006) (same); United States v. Kebodeaux, 570 U.S. 387 (2013) (treating a special court-martial conviction as a Federal conviction); UCMJ art. 20(b) (1950) (stating that a finding of guilty by summary court-martial does not constitute a criminal conviction).

[106] DODI 5505.14, *supra* note 4, at 14.

[107] The DoDI also directs the collection of DNA samples from civilians who are detained and within the military's custody if there is probable cause to believe the civilian committed a qualifying Federal offense, as defined by 34 U.S.C. § 40702. *Id.* at 16.

[108] For example, a military "arrest" is defined as "the restraint of a person by an order . . . directing him to remain within certain specified limits." UCMJ art. 9(a) (1950). The ability to arrest is based on the military rank of both the member making the arrest and the member being arrested; law enforcement personnel are not necessarily empowered to arrest other military members. *Id.* art. 9(b)–(c). The military equivalent of a civilian arrest is "apprehension," which is simply "the taking of a person into custody." *Id.* art. 7(a). Military members performing law enforcement duties may apprehend any person subject to the UCMJ. MCM, *supra* note 2, R.C.M. 302(b)(1).

[109] *See infra* note 183.

triggers will highlight the deficiencies of the DNA collection scheme the DoDI has established.

F. The Military Justice System—Brief Overview for Non-Practitioners

As a final introductory matter, it is important to discuss how criminal charges are disposed of in the military. Commanders, not lawyers or law enforcement, decide what outcome is appropriate for given misconduct.[110] The range of outcomes include, in order of increasing severity: no action; administrative action, which encompasses written admonishment or counseling, demotion, or separation from the service; nonjudicial punishment; and trial by court-martial.[111] The facts and circumstances of the misconduct itself are but one factor that weighs into the decision of which outcome is appropriate. Another is the subject's history of misconduct[112]—a repeat offender likely faces more severe discipline than a first-time offender. The commander also considers factors uniquely within his or her purview, such as the misconduct's effect on the morale, welfare, and good order and discipline of the command; the offender's potential for continued service; the impact of each disposition option on the offender's ability to continue to serve; and the commander's responsibilities with respect to justice and good order and discipline.[113] Commanders generally do not decide which outcome is appropriate until an investigation is complete and they have reviewed its findings.

Because the disposition decision is not made until after the investigation is complete, law enforcement cannot know with certainty how the case will be handled. The UCMJ does not distinguish between felonies and misdemeanors.[114] While each offense under the UCMJ has a prescribed maximum punishment,[115] the signal for whether an offense is considered "minor" or "major" is the manner in which the commander decides to dispose of it after considering all relevant circumstances.

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[110] At the time of writing, legislation to alter which entity ultimately possesses the power to initiate court-martial proceedings is pending. *See generally* 166 CONG. REC. S3413–14 (daily ed. June 25, 2020) (statement of Sen. Gillibrand proposing the "Military Justice Improvement Act of 2020" as an amendment to the National Defense Authorization Act for Fiscal Year 2021).
[111] MCM, *supra* note 2, R.C.M. 306(c).
[112] *Id.* app. 2.1, ¶ 2.1(l).
[113] *Id.* ¶ 2.1(c), (n).
[114] *E.g.*, Matthew S. Freedus & Eugene R. Fidell, *Conviction by Special Courts-Martial: A Felony Conviction?*, 15 FED. SENT'G REP. 220, 221 (2003).
[115] MCM, *supra* note 2, app. 12.

To illustrate, let's return to our hypothetical curfew violator. If this is her first time getting in any sort of trouble, her commander may choose to issue her an administrative sanction, such as a written admonition or counseling, to remind her of the importance of obeying orders. However, if she has a short history of misconduct, from being late to work to violating the curfew order, her commander may choose to impose nonjudicial punishment, which could demote her to a lower grade or direct forfeiture of some pay. If she is regularly insubordinate, fails to follow orders, or has been disciplined several times, the commander may choose to prefer charges for trial by court-martial, hoping that this may finally get her attention and bring her back in line with expected standards of conduct. As this example demonstrates, the facts and circumstances of the particular incident under investigation are not the sole factor in determining the appropriate disposition.

As military law enforcement officers cannot predict what disposition will occur for a particular offense, their only consideration when making a probable cause determination under the investigative trigger for DNA collection[116] is whether the UCMJ offense itself is listed as a qualifying offense under the DoDI.[117] If the offense is listed and the investigator has probable cause to believe the subject committed it,[118] the investigator will collect DNA no matter how seemingly innocuous the incident was or what its likely disposition will be. For our curfew violator, it does not matter if she broke curfew by five minutes because the train was delayed or if she was hours late, heavily intoxicated, and belligerent with local police officers who delivered her to the front gate of base in handcuffs. In either case, she failed to obey a lawful general order, and so her DNA will be collected in accordance with the DoDI. With that background, we now address how the majority's rationale in *King* is inapposite to the military justice system.

## III. The Rationale Underlying *King* Does Not Apply in the Military Context

Unlike civilian criminal justice systems, military members are usually not incarcerated before conviction.[119] Thus, *King*'s bedrock assumption—arrests for serious offenses result in confinement and processing for

[116] DODI 5505.14, *supra* note 4, at 13.
[117] *Id.* at 8–12.
[118] An investigator makes such a determination only after consulting with a judge advocate. *Id.* at 13.
[119] *See, e.g.*, *infra* notes 141, 187–188.

confinement with its attendant loss of privacy—is not applicable to the military context. As most military apprehensions are much less invasive than their civilian equivalents, military members retain a greater degree of privacy to be free from warrantless searches and seizures—and should be free from those that do not fall within the factual scenario upon which *King* was decided.

While Service members do forfeit some constitutional rights upon their induction,[120] they retain Fourth Amendment protections against unreasonable search and seizure.[121] Though application of the Fourth Amendment may differ in the military context, military appellate courts have consistently upheld Fourth Amendment warrant requirements and reasonableness standards when analyzing searches and seizures by military authorities and law enforcement.[122] As Service members are protected from unreasonable searches and seizures, they are also protected from constitutionally impermissible seizures of DNA. The key assumptions supporting the holding in *King* generally do not hold true in the military context. Thus, the effects of the *King* holding must be adapted to the unique circumstances of military investigations and criminal procedures, rather than copied blindly from the civilian context.

### A. *King*'s Arrest and Custody Scenarios Rarely Occur in the Military

The Government interests in DNA indexing present in the civilian context are virtually absent from the military context. The Government's interests depend on the arrestee's imminent incarceration and the utility that additional information gained from DNA sampling would provide the confinement facility and the judge responsible for making a bail decision.[123]

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[120] *See, e.g.*, United States v. Curtis, 44 M.J. 106, 130 (C.A.A.F. 1996) (stating that Service members have no right to indictment by grand jury), *rev'd on other grounds*, 46 M.J. 129 (C.A.A.F. 1997).

[121] United States v. Long, 64 M.J. 57, 61 (C.A.A.F. 2006) ("The Fourth Amendment of the Constitution protects individuals, including servicemembers, against unreasonable searches and seizures.").

[122] See United States v. Eppes, 77 M.J. 339 (C.A.A.F. 2018) (reaffirming the strong judicial preference for warrants and finding that inevitable discovery would have resulted in the search of bags mentioned in an affidavit but omitted in a warrant), and United States v. Gurczynski, 76 M.J. 381 (C.A.A.F. 2017) (evidence of child pornography possession found on thumb drive suppressed where warrant only sought communications with child victim), for recent cases favoring Government efforts to secure warrants and disfavoring dragnet searches.

[123] *See* Maryland v. King, 569 U.S. 435, 449–56 (2013).

The Government's interests are correspondingly weaker under military law for three main reasons: the military justice system does not provide for bail,[124] an apprehended Service member generally does not undergo processing for immediate confinement, and Service members and their criminal histories can be readily identified without DNA testing.

Military members seldom are confined before trial. Military law enforcement agencies generally do not need to "ensure that the custody of [the subject of the investigation] does not create inordinate 'risks for facility staff, for the existing detainee population, and for a new detainee'"[125] because the military suspect is not incarcerated during the typical investigation. The rare case when a military suspect is put into pretrial confinement is its own trigger for DNA collection and submission to CODIS.[126] Thus, the investigative trigger for DNA collection does not serve the law enforcement interest of making informed decisions about the suspect's confinement because the military suspect is not being confined at this stage. If he or she is, the pretrial confinement trigger would apply.

*1. There Is No Bail in the Military*

None of the DoDI triggers, especially the investigative trigger, serve the interest of protecting society through the bail process because the military does not have a bail system. In the civilian criminal context, "bail is the release of an individual following his promise—secured or unsecured; conditioned or unconditioned—to appear at subsequent judicial proceedings."[127] Federal law requires that a person arrested under Federal authority be brought before a magistrate judge for an initial appearance without unnecessary delay.[128] At this hearing, the magistrate decides whether the arrestee will remain in detention pending trial or will be released and, if so, under what conditions.[129] The magistrate has four options: (1) release the individual on personal recognizance or upon execution of an

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[124] *See* Levy v. Resor, 37 C.M.R. 399, 402–03 (C.M.A. 1967) (quoting United States v. Hangsleben, 24 C.M.R. 130, 133 (C.M.A. 1957) ("[I]n the military bail is not available.")).
[125] *King*, 569 U.S. at 452 (quoting Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 330 (2012)).
[126] DoDI 5505.14, *supra* note 4, at 13.
[127] CHARLES DOYLE, CONG. RSCH. SERV., R40221, BAIL: AN OVERVIEW OF FEDERAL CRIMINAL LAW (2017) at summary; *see Bail*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To obtain the release of (oneself or another) by providing security for a future appearance in court.").
[128] FED. R. CRIM. P. 5(a).
[129] *Id.* 5(d)(3).

unsecured appearance bond; (2) release the individual subject to conditions; (3) detain the individual to allow proceedings for revocation of conditional release, deportation, or exclusion to run their course; or (4) detain the individual pending trial.[130]

When making such a decision, a magistrate's prime consideration is whether the conditions imposed will reasonably assure the arrestee's appearance at future proceedings and will adequately protect the safety of any other person or of the community.[131] Using DNA to determine if the arrestee has a criminal history—even connecting the arrestee to unsolved cases or "the defendant's unknown violent past"—arguably arms the magistrate with useful information in assessing the flight risk or threat to safety posed by the arrestee.[132] As the governing statute and procedural rules make clear, the default in the civilian criminal justice system is arrest and immediate confinement—even if of brief duration—followed by a bail hearing to decide if confinement continues.

The default position of the military justice system is the inverse. Rather than immediate confinement followed by a decision on release, the military investigator interviews the subject, conducts a minimal booking, and returns the subject to his or her command.[133] In this common scenario, the military subject is not confined for any period of time. Thus, DNA collection at this stage does not serve the interests identified by the majority in *King*: helping the relevant authorities make informed decisions about continued confinement and risk management in a detention facility. Those

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[130] 18 U.S.C. § 3142(a).

[131] *Id.* § 3142(b), (c)(1)(B), (d)(2), (e)(1).

[132] Maryland v. King, 569 U.S. 435, 452–55 (2013) (discussing the third and fourth interests identified by the Court). This argument is much more limited than it initially appears. While the DNA sampling scheme may link an individual with a previously unidentified forensic specimen, thus connecting an individual to an unsolved crime, it is unlikely to unearth prior offenses committed under different names. When a sample is taken from an arrestee, it is compared to the Forensic Index (unsolved crimes), not the Offender Index. The first time a person is arrested, DNA will be submitted to the Offender Index and compared to the Forensic Index. If the same individual reoffends under a false identity, when arrested his sample will be submitted to the Offender Index under the alias and compared to the Forensic Index. It will not be compared to the Offender Index where the original profile resides, which would have alerted law enforcement that the same person was reoffending under an alias. *See* NDIS OPMAN, *supra* note 8, para. 5.1 (showing that samples in the Offender Index are not compared to other samples in the Offender Index).

[133] *See, e.g.*, U.S. DEP'T OF AIR FORCE, INSTR. 31-115, LAW AND ORDER OPERATIONS, chs. 7, 8 (18 Aug. 2020) (containing identical language to the U.S. Air Force's now-superseded Instruction 31-118, Security Forces Standards and Procedures).

decisions are made only after the Service member is ordered into pretrial confinement, which is its own trigger for DNA collection.[134] The bail system simply does not exist; the default is to release the subject, with pretrial confinement occurring only when there is probable cause to believe (1) the subject committed an offense triable by court-martial, and (2) confinement is necessary because less severe forms of restraint are inadequate to prevent the subject from committing further serious criminal misconduct or to compel the subject's attendance at future proceedings.[135]

*2. The Military Equivalent of "Arrest?"*

In both practice and law, military members suspected of offenses rarely face confinement prior to conviction. Military law allows pretrial incarceration only when it is foreseeable that the accused either will not appear at trial or will engage in serious criminal misconduct and that no lesser form of restraint can prevent such malfeasance.[136] These restraints are not in the form of incarceration, but rather in requirements a commander imposes that may reduce the individual's freedom to some degree while allowing continued performance of his or her duties.[137] If restraints are imposed, they are not physical but moral, such as orders not to consume alcohol or not to return to a family home where domestic disturbances could occur.[138]

The military analogue to a civilian arrest is "apprehension," which in most contexts does not result in any confinement.[139] "Apprehension" is merely the taking of a person into custody based on probable cause until proper authority is notified and can act accordingly.[140] Suspects are

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[134] DoDI 5505.14, *supra* note 4, at 13.

[135] MCM, *supra* note 2, R.C.M. 305(d), (h)(2)(B). *See also id.* R.C.M. 304; 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 4-20.00 (4th ed. 2015).

[136] These lesser forms of restraint include restrictions on liberty and "arrest." "Arrest" is a term of art defined as a requirement to remain within specified limits and not synonymous with civilian arrest. MCM, *supra* note 2, R.C.M. 304(a)(1), 305(h)(2)(B)(iii)–(iv).

[137] *Id.* R.C.M. 304; GILLIGAN & LEDERER, *supra* note 135.

[138] GILLIGAN & LEDERER, *supra* note 135.

[139] MCM, *supra* note 2, R.C.M. 302. "'[A]pprehension' refers to the initial taking or seizing of a person into custody" and was chosen by the UCMJ drafters to eliminate confusion created by differing terms in the Articles of War. MIL. JUST. REV. GRP., U.S. DEP'T OF DEF., REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 183 (2015).

[140] MCM, *supra* note 2, R.C.M. 302(a)(1) discussion. "Apprehension" is a statutory term not coterminous with "investigative detentions," which do not require probable cause and do not authorize an extensive search of the person.

temporarily held—usually not in a confinement facility—until they can be picked up by an authority figure from their unit who will then assume responsibility for them, often returning them to their place of duty or home. Only in the most egregious cases, where suspects are likely to flee or commit further serious misconduct, are they held in pretrial confinement.[141] A suspect may be apprehended by a military law enforcement official[142] or by a commissioned, warrant, petty, or noncommissioned officer.[143] Apprehension occurs by notifying the person to be apprehended that they are in custody, and it can even be implied by the circumstances.[144] Apprehension is not required in every case and does not itself create criminal jurisdiction.[145] In the case of our curfew violator, the apprehension occurred when the guard told her to wait in his office while he called her supervisor.

B. Apprehended Military Members Are Rarely Processed for Confinement and Therefore Experience Little Deprivation of Privacy Due to Law Enforcement Detention

As in the example of our curfew violator who was intercepted by the gate guard on her way into base, apprehension may involve some level of procedure: identification via military identification, a possible search for weapons or evidence of a crime, requesting a statement, and a minimal booking to collect fingerprints and DNA, if required. The subject will then be returned to his or her command, not confined.

The *King* majority saw the invasiveness of the civilian booking process for custodial confinement as a key factor supporting the constitutionality

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[141] Military members apprehended on suspicion of very serious offenses such as possession of child pornography or sexual assault are routinely returned to their unit without any pretrial confinement. *See, e.g.*, United States v. Mitchell, 76 M.J. 413, 415 (C.A.A.F. 2017) (suspect facing allegations of sexually assaulting his wife and stalking was questioned for posting nude photos of her online before being escorted back to his unit); United States v. Christian, 63 M.J. 205, 209 (C.A.A.F. 2006) (suspect of multiple child molestations returned to his home unit and restricted to quarters); United States v. Brown, ARMY 20180176, 2019 CCA LEXIS 313, at *2 (A. Ct. Crim. App. July 31, 2019) (accused attempted to kill wife with a knife and was released to his unit after departing the military police station); United States v. Suarez, ARMY MISC 20170366, 2017 CCA LEXIS 631, at *2 (A. Ct. Crim. App. Sept. 27, 2017) (unpublished) (suspected offender was apprehended for possession of child pornography, interrogated, then released back to his unit).
[142] MCM, *supra* note 2, R.C.M. 302(b)(1).
[143] *Id.* R.C.M. 302(b)(2).
[144] *Id.* R.C.M. 302(d).
[145] *Id.* R.C.M. 302(a)(1) discussion.

of DNA testing incident to arrest.[146] The majority viewed the testing as inherently reasonable because the arrestee suffers a diminished expectation of privacy from the outset, pointing out that an arrestee is subject to such invasive searches as the lifting of genitalia or squatting and coughing.[147] However, the conditions present in a routine civilian police booking that diminish the expectation of privacy do not exist in the military investigative context because virtually all those apprehended or investigated will not be processed for confinement. Detention incident to apprehension is disfavored, as evidenced by current military law enforcement regulations, which provide for detention of apprehended military members only when necessary.[148] The default mode of the military justice system is that military members will remain at liberty while under investigation; if apprehended, they generally will be released to their respective commander.[149] Pretrial

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[146] *See* Maryland v. King, 569 U.S. 435, 461–64 (2013). "Booking" is the process of recording an arrestee's identifying information shortly after arrest in preparation for confinement. *See Book*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[147] *King*, 569 U.S. at 462.

[148] Army law enforcement "may detain personnel for identification and remand custody of persons to appropriate civil or military authority as necessary." U.S. DEP'T OF ARMY, REG. 190-30, MILITARY POLICE INVESTIGATIONS para. 4-11 (1 Nov. 2005). Detention is conducted "only when necessary [to p]revent escape[, e]nsure that the detained individual is safe[, and e]nsure that [law enforcement] and other personnel are safe." U.S. DEP'T OF ARMY, TECHNIQUES PUB. 3-39.10, POLICE OPERATIONS para. 3-81 (26 Jan. 2015). Army Technique Publication 3-39.10 requires a thorough search of any detained person for weapons and contraband but notes the limited nature of any detention, as "detention of military personnel typically will not exceed 24 hours," *id.*, and reminds law enforcement that "normally, military personnel awaiting trial remain under the control of their units," *id.* para. 3-86. Historically, the Air Force provides its Security Forces with discretion to apprehend as "apprehension considerations," which call for handcuffing and conducting a search of the suspect and area under their immediate control for weapons and evidence they could remove or destroy. "This emphasizes the safety of [Security Forces] members and the apprehended individual." U.S. DEP'T OF AIR FORCE, INSTR. 31-118, SECURITY FORCES STANDARDS AND PROCEDURES para. 6.1 (5 Mar. 2014) (C1, 2 Dec. 2015). Detention after apprehension is not required, only that a form of "booking" occurs, which is the administrative formality of collecting fingerprints and DNA for indexing "with the goal of establishing criminal records for offenders" which is unrelated to confinement itself. *Id.* para. 9.4. After reviewing the successor instruction, Air Force Instruction 31-115, the authors conclude that policy and practice are unchanged. *See* source cited *supra* note 133. Marine Corps policy is that apprehended personnel are to be detained "only when necessary to prevent escape, to ensure their safety, or the safety of others . . . ." U.S. MARINE CORPS, ORDER 5580.2B, LAW ENFORCEMENT MANUAL para. 11802.2 (27 Aug. 2008) (C2, 30 Dec. 2015). In the event it is required, apprehended or detained persons are generally not held longer than 8 to 24 hours. *Id.* paras. 11802.2.a, 11803.1–.2. Those held in such facilities are "thoroughly searched" prior to detention. *Id*. para. 11804.2.j.

[149] MCM, *supra* note 2, R.C.M. 302.

confinement occurs infrequently;[150] most military offenders are not incarcerated unless convicted and sentenced to a period of confinement, which means they are not processed for incarceration until after the complete adjudication of their case.

### C. The Governmental Interest at Stake in *King*: "Identification" Does Not Exist in the Military Context

The concept of "identity" was central to the *King* majority's reasoning; that concept meant more to the majority than verifying that an arrestee was who he claimed to be.[151] The majority considered a person's criminal history an integral part of that identity. Although the majority identified five different government interests served by DNA sampling on arrest,[152] the first four are so intertwined that they can be summarized into a single interest: the government has an interest in knowing a person's criminal history so law enforcement officers and the courts can make informed decisions about pretrial detention and bail.

However, the DoD is already well situated to learn the true identity of its Service members. Unlike the civilian world, the military is a closed community that maintains voluminous personnel records that provide a wealth of information about an individual's identity and history.[153] Much of an individual's pre-service identity will already be known and accessible through background and security clearance checks.[154] In light of the

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[150] *See supra* note 141 and accompany text.

[151] *See King*, 569 U.S. at 450–52.

[152] *See id.* at 450–56; *see also supra* text accompanying notes 68–80.

[153] The Defense Biometric Identification System monitors access to facilities using facial recognition and fingerprint and iris scans, and it tracks law enforcement warrants. *Defense Manpower Data Center Announces the Global Release of Defense Biometric Identification System (DBIDS) Version 5*, U.S. DEP'T OF DEF. (Mar. 19, 2018), http://dbids.dmdc.mil/docs/DBIDS%205%20Press%20Release.pdf. The Defense Enrollment Eligibility Reporting System requires frequent updating in order to access medical care. *Defense Enrollment Eligibility Reporting System*, TRICARE, https://tricare.mil/deers (Nov. 9, 2020). There are also service-specific records repositories such as the Air Force's Master Personnel Record Group. *See, e.g.*, *Military Personnel Record or Official Document Requests*, U.S. DEP'T OF AIR FORCE (Sept. 22, 2017), https://www.arpc.afrc.af.mil/News/Article-Display/Article/1321740/military-personnel-record-or-official-document-requests.

[154] All military members undergo a criminal background check as part of entrance processing, which includes Federal, state, county, and local law enforcement records. U.S. DEP'T OF DEF., INSTR. 1304.23, ACQUISITION AND USE OF CRIMINAL HISTORY RECORD INFORMATION FOR MILITARY RECRUITING PURPOSES 2, 5 (Oct. 7, 2005). Many military members hold a

expansive personnel records systems available to military law enforcement and the possibility of tapping into the human remains database, identification is not at issue. As explained below, there is little benefit to utilizing CODIS as an additional dragnet for what are often minor infractions. Military members' DNA samples are submitted to CODIS only to find evidence of a crime that investigators have no reason to believe the subject committed (i.e., no probable cause), not for identification.[155]

While it could be argued that the DoD has an additional need to learn about the "identity" of its military members to ensure the safety and integrity of its units—which manifests when members become suspected of offenses, calling into question their general character and the possibility that they may have been involved in other crimes—such a heightened "identity" argument is untenable. The DoDI does not claim heightened safety or security as a rationale for taking DNA samples; rather, the purposes for collection are "similar to those for taking fingerprints," and for "generating evidence to solve crimes."[156]

The value in indexing military offenders' DNA to ferret out an undiscovered rapist or murderer is hypothetical. Despite the submission of over 130,000 samples to CODIS,[157] the authors were unable to discover

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security clearance requiring an extensive background investigation with a periodic reinvestigation. *See* 50 U.S.C. § 3341.

[155] *See supra* note 140.

[156] DoDI 55051.14, *supra* note 4, at 1. One could argue DNA sampling helps the DoD satisfy its "overriding obligation to maintain complete and accurate identifying data regarding [its] servicemembers." United States v. Fagan, 28 M.J. 64, 69 (C.M.A. 1989). However, the purpose behind the obligation is "to identify combat casualties and aircraft-disaster victims for the purpose of notifying next of kin and assisting dependents." *Id.* The DNA sampling scheme is too narrow to meet that need because it only collects samples from those who run afoul of military justice, not from all Service members. Furthermore, the DoD collects DNA samples from all new recruits during induction to meet this need. Douglas J. Gillert, *Who Are You? DNA Registry Knows*, U.S. DEP'T OF DEF. (July 13, 1998), https://archive.defense.gov/news/newsarticle.aspx?id=41418 [https://web.archive.org/web/20150924005339/http://archive.defense.gov/news/newsarticle.aspx?id=41418]. *See also Armed Forces Repository of Specimen Samples for the Identification of Remains (AFRSSIR)*, HEALTH.MIL, https://www.health.mil/Military-Health-Topics/Research-and-Innovation/Armed-Forces-Medical-Examiner-System/DoD-DNA-Registry/Repository-of-Specimen-Samples-for-the-Identification-of-Remains (last visited Nov. 27, 2020) ("The Armed Forces Repository of Specimen Samples for the Identification of Remains (AFRSSIR) maintains a DNA reference specimen collection for all active duty and reserve service members and an automated database to assist in their retrieval for human remains identification.").

[157] The FBI reports all U.S. military CODIS statistics as coming from the U.S. Army, as the samples come from an Army lab. *See CODIS – NDIS Statistics*, *supra* note 20.

any instance in which a Service member's CODIS sample uncovered a hitherto unknown crime.[158] As explained below, the DoD's collection program has been the least helpful in aiding investigations generally, so there is unlikely any additional safety value to be wrung out of continued widespread collection.

The imagined safety value in collecting a large number of military "arrestee" samples must be contrasted against the very real administrative costs and burdens in collecting and disposing of the samples and in the resultant deprivation of privacy which occurs both when the sample is collected and maintained. Consider that the DoDI acknowledges the ongoing privacy interest of individuals whose samples have been taken but who were never convicted.[159] If the individuals had no ongoing privacy interest in their sample, there would be no reason to allow expungement. Once the Government possessed a sample, it could hold it in perpetuity, but such is not the case. Safety does not dictate that we needlessly retain a sample that is basically worthless in the hope that eventually a DNA sample might match.

The Combined DNA Index System is not a continuous DNA dragnet for arrestees;[160] it is meant for those likely to be convicted of a serious crime.[161] As most of the DoD's submissions are from those cases which are unlikely to result in conviction,[162] collecting and submitting military apprehendee samples is a worthless legal sleight of hand.[163] If the military truly had a heightened safety need that required a continuous DNA dragnet, the proper means would be legislative action making provision of DNA for continuous criminal indexing a condition of military accession and altering CODIS legislation to allow such submissions.

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[158] The figure provided by the FBI (229 U.S. Army "investigations aided"), *CODIS – NDIS Statistics*, *supra* note 20, is unhelpful in this regard as it provides no information about whether nature of investigation, whether the investigation was aided by a forensic sample or offender sample, and in what where the investigation was aided.

[159] *See* DODI 5505.14, *supra* note 4, at 14–16.

[160] The Combined DNA Index System requires the "prompt" expungement of samples when charges have resulted in an acquittal, have been dismissed, or, most importantly, have not been filed. *See* 34 U.S.C. § 12592(d)(1)(A)(ii); NDIS OPMAN, *supra* note 8, para. 3.5.

[161] *See* 34 U.S.C. § 12592(d)(1)(A)(ii); NDIS OPMAN, *supra* note 8, para. 3.5.

[162] *See infra* app.

[163] The U.S. Code establishing CODIS requires the prompt expungement of arrestee samples in which no conviction has occurred or can occur. *See supra* note 161. Collecting samples for cases which will almost never result in conviction and then placing the onus to initiate their removal on individual Service members contains an element of disingenuousness, even if inadvertent and well-intentioned.

## IV. Significant Omissions in the DoDI that Weigh Against Its Constitutionality

The DoDI has three significant failings that take it outside the constitutionally permissible realm set by the *King* decision: (1) the information taken from the DNA samples collected under the DoDI has no express limitations on its use, and there are no sanctions for those who might choose to use the DNA samples for purposes beyond CODIS identification; (2) the command-directed investigation trigger empowers commanders to choose whether DNA samples will be collected, rather than imposing a non-discretionary requirement; and (3) the preferral trigger authorizes DNA collection based solely on the commander's decision to recommend trial by court-martial, rather than on any heightened restriction on the accused's liberty or reduction of his privacy interests.

### A. There Are No Express Limitations on the Use of Collected DNA

The DoDI is a potential blank check to those wishing to use the collected DNA for purposes beyond identification, as it provides no guarantee against expanded governmental use of the information collected. In upholding the Maryland DNA Collection Act, the *King* majority observed that the Maryland Act expressly limited the ability to use collected DNA to guard against further invasions of privacy[164] and criminalized any use of the collected DNA beyond the identification of the individual.[165] The DoDI lacks any of the express limitations that were favored by the *King* court. The Maryland DNA Collection Act required that "*only* DNA records that directly related to the identification of individuals be collected and stored."[166] On its face, the DoDI makes no such limitation, which allows for the collection and storage of an entire genome. Though the DoDI's ostensible purpose for the collection of DNA is positive identification and database searching, it provides no safeguards similar to those imposed by the Maryland DNA Collection Act.

Deoxyribonucleic acid contains a wealth of information that is ripe for exploitation, which the *King* majority recognized when it endorsed the statutory limitations on its use and associated criminal penalties for

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[164] Maryland v. King, 569 U.S. 435, 465 (2013).
[165] *Id.* (citing MD. CODE ANN., PUB. SAFETY § 2-512(c) (2011) ("A person may not willfully test a DNA sample for information that does not relate to the identification of individuals . . . .")).
[166] *Id.*

exceeding those limitations as a significant safeguard against an unnecessary invasion of the arrestee's privacy.[167] These protections were undoubtedly a strong factor in the majority's conclusion that the Maryland DNA Collection Act was constitutional.[168] The DoDI contains no express limitation on the uses of the collected DNA and provides no sanctions for those who use the DNA for purposes other than criminal indexing.[169] While the stated purpose of the DoDI's DNA collection process is to gather DNA for identification and to solve crimes through database searches, there is nothing explicitly limiting the collected DNA to these uses.[170] The statutory safeguards that protect CODIS submission samples from abuse would not protect samples collected under the DoDI should the DoD later authorize other uses of the samples beyond indexing.[171]

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[167] *Id.*

[168] "[I]n light of the scientific and statutory safeguards," the invasion of privacy involved in Maryland's DNA collection and STR analysis was permissible under the Fourth Amendment. *Id*.

[169] *See* DoDI 5505.14, *supra* note 4. Simply inserting limiting language into the DoDI would not be enough to protect collected DNA against misuse for two reasons. First. nothing stops the DoD from amending the DoDI at any time to remove whatever procedural safeguards it might insert. *See infra* note 175. Second, penal enforcement of those safeguards would be limited to military members. While they could be charged under Article 92, UCMJ, for violating any safeguards, the DoDI cannot be criminally enforced against civilian personnel who violate those safeguards. At worst, civilians could lose their jobs. As discussed in Section VI, the strongest way to limit the use of collected DNA to criminal indexing only is to amend the authorizing statutes to expressly state that DNA samples collected under those authorities can only be used for the purposes stated in 34 U.S.C. § 12592(b)(3)(A)–(D). Those limitations could then be criminally enforced under 34 U.S.C. § 40706.

[170] DoDI 5505.14, *supra* note 4, at 13. While the statute establishing CODIS, 34 U.S.C. § 12592, requires that agencies collecting and analyzing DNA for submission to CODIS use the DNA collected only for law enforcement identification, judicial proceedings, and as a database for identification research and protocol development, it provides no penal sanction against misuse. 34 U.S.C. § 12592(b)(3). At worst, DoD's access to CODIS would be subject to possible cancellation if it authorized uses for the collected DNA beyond criminal identification. *Id.* § 12592(c).

[171] The law prohibiting expanded use of the DNA information under the Maryland DNA Collection Act was firm and clear, while any prohibitions on expanded use under the DoDI are subject to interpretation. 34 U.S.C. § 40706(c) protects samples collected under § 40702 from misuse and provides that "[a] person who knowingly discloses a sample or result described in subsection (a) in any manner to any person not authorized to receive it, or obtains or uses, without authorization, such sample or result, shall be fined not more than $250,000, or imprisoned for a period of not more than one year. Each instance of disclosure, obtaining, or use shall constitute a separate offense under this subsection." 34 U.S.C. § 40706(c). While this would prevent a rogue analyst from misusing data, it would not guard against an official, and thus authorized determination that DoD samples should be used beyond CODIS entries. The DoD derives its authority to seize pre-conviction DNA

The *King* majority refused to speculate about the permissibility of a DNA collection system that did not contain procedural safeguards akin to the Maryland DNA Collection Act.[172] The lack of safeguards in the DoDI are an open invitation to such speculation. Ambiguously protected information is always a temptation. Though obtained for a limited purpose, executive agencies may perceive other utilitarian uses for such information—and have recently been caught doing so.[173] The greater the possible value of information, the stronger the temptation to mine and extract it. The DNA information collected under the DoDI is potentially of immense value,[174] while the framework that controls it shifts with the stroke of a pen.[175] For example, military members are not covered by the Genetic Information Nondiscrimination Act,[176] so there is no legal impediment to amending the DoDI to allow analyzing the more than 121,500 collected samples[177] for genetic markers of disease and then choosing to separate from service those members who might have genetic indicators of disease.

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samples from 34 U.S.C. § 40702, which does not expressly limit the uses of seized DNA. *See id.* § 40702.

[172] Maryland v. King, 569 U.S. 435, 465 (2013).

[173] The FBI has been chastised by a Foreign Intelligence Surveillance Act court for abusing NSA mass surveillance data for domestic investigations. Trevor Aaronson, *A Declassified Court Ruling Shows How the FBI Abused NSA Mass Surveillance Data*, INTERCEPT (Oct. 10, 2019, 7:00 AM), https://theintercept.com/2019/10/10/fbi-nsa-mass-surveillance-abuse (describing the FBI's improper use of surveillance data collected in 2017 and 2018 under the Foreign Intelligence Surveillance Act).

[174] As DNA is better understood, its value grows. For example, its growing utility in diagnosing susceptibility to deadly diseases could be valuable information for insurance companies. *See A Brief Guide to Genomics*, NAT'L HUMAN GENOME RSCH. INST., https://www.genome.gov/about-genomics/fact-sheets/A-Brief-Guide-to-Genomics (Aug. 15, 2020) (explaining that DNA science is moving beyond identification of hereditary diseases and being used to treat complex diseases such as cancer and cardiovascular disease). Some DNA databases have demonstrated the ability to identify distant relatives in order to solve crimes. Heather Murphy, *Sooner or Later Your Cousin's DNA is Going to Solve a Murder*, N.Y. TIMES (Apr. 25, 2019), https://www.nytimes.com/2019/04/25/us/golden-state-killer-dna.html. Autocratic governments have already recognized the power of DNA databases in their efforts to control subject populations. *China: Minority Region Collects DNA from Millions*, HUMAN RTS. WATCH (Dec. 13, 2017, 10:48 AM), https://www.hrw.org/news/2017/12/13/china-minority-region-collects-dna-millions.

[175] Literally, as the DoD is not subject to the rule making procedures—namely, notice and comment—set forth in the Administrative Procedure Act. *See* 5 U.S.C. § 553(a)(1) (exempting military functions of the United States from the rule making procedures).

[176] The Genetic Information Nondiscrimination Act protects employees from employment discrimination. *See generally* 42 U.S.C. §§ 2000ff to 2000ff-11.

[177] *Id.*; *Genetic Discrimination*, NAT'L HUMAN GENOME RSCH. INST., https://www.genome.gov/about-genomics/policy-issues/Genetic-Discrimination (Sept. 16, 2020).

B. Allowing Command-Level Investigators to Take DNA Is a Violation of the Fourth Amendment as It Vests in Government Actors Discretion to Seize DNA

A command-level investigation or inquiry occurs when the command learns of an allegation of misconduct that is not being investigated by a law enforcement agency and the commander decides he or she needs additional facts. This usually occurs when offenses fall outside threshold requirements for law enforcement involvement, law enforcement resources are limited, or the offenses are better suited to be investigated by someone with subject matter expertise within the command.[178] Examples of cases ripe for command investigation could include, for example, inventory loss or workplace sexual harassment.

The decision to initiate a command-directed investigation is discretionary; commanders generally are not required to conduct such an investigation.[179] Not only do commanders have discretion to choose if they will conduct an investigation, but the DoDI also gives them discretion to decide if DNA will be collected from the subject, regardless of whether the allegation is substantiated.[180] The trigger *allows* commanders to collect DNA when they conduct or direct a command investigation into a covered offense, but only *requires* collection if the member is convicted by a general or special court-martial.[181]

Commander discretion must be removed from the DNA collection process to satisfy the Fourth Amendment. The majority in *King* noted that the constitutionally approved Maryland Act was a routine booking procedure that did not vest discretion or judgment to conduct a warrantless

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[178] Commanders have the inherent authority to investigate matters under the command unless preempted by higher authority. MCM, *supra* note 2, R.C.M. 303 discussion; OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF AIR FORCE, COMMANDER DIRECTED INVESTIGATION (CDI) GUIDE para. 1.2 (2018); *see* U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS para. 4-1 (1 Apr. 2016); U.S. DEP'T OF NAVY, JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL ch. 2 (26 June 2012) (C2, 26 Aug. 2019).

[179] *But see* 10 U.S.C. § 1561 (requiring commanders to conduct an investigation into sexual harassment allegations).

[180] DODI 5505.14, *supra* note 4, at 14.

[181] *Id.* The mandatory trigger is cumulative with the requirement to collect upon a general or special court-martial conviction, *id.* at 13, so the discretionary trigger *must* be an additional grant of authority. Otherwise, it is mere surplusage without effect.

search in law enforcement officers.[182] Granting a commander discretion to seize DNA in this manner runs afoul of the principle of arbitrariness in warrantless searches: the reasonableness of a warrantless search is correlated to the degree of discretion held by the official conducting the search—the greater the discretion, the more unreasonable the search.[183] As the DoDI vests discretion to seize DNA for indexing at any time during the course of an investigation, which is itself discretionary, it creates a constitutionally unreasonable search from the beginning.

### C. Seizing DNA Based Solely on the Act of Preferral Violates *King*

The DoDI mandates that DNA samples be collected from Service members upon the preferral of charges from those who had not yet had samples taken.[184] Preferral is nothing more than the formal act of accusing a Service member of a crime.[185] It is the first procedural step to a trial by court-martial. It is merely the acts of signing a charge sheet, which swears to the truth of the charge, and notifying the accused that a criminal charge has been alleged.

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[182] Maryland v. King, 569 U.S. 435, 448 (2013) ("The arrestee is already in valid police custody for a serious offense supported by probable case. The DNA collection is not subject to the judgment of officers whose perspective might be 'colored by their primary involvement in . . . ferreting out crime.'" (quoting Terry v. Ohio, 392 U.S. 1, 12 (1968))).

[183] *See, e.g.*, Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 667 (1989) (drug testing programs for covered employees do not require a warrant as there are no discretionary determination to be made); Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978) ("The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers."); South Dakota v. Opperman, 428 U.S. 364, 382–83 (1976) (allowing warrantless inventories of seized automobiles because officers must follow established procedures and do not make a discretionary determination to search); United States v. Ortiz, 422 U.S. 891 (1975) (warrantless searches at a traffic checkpoint held unconstitutional when officers "exercise[d] a substantial degree of discretion in deciding which cars to search," resulting in a 3% search rate for vehicles passing through the checkpoint).

[184] DoDI 5505.14, *supra* note 4, at 13.

[185] Any person subject to the UCMJ may prefer charges by asserting, under oath, that he or she "has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and the matters set forth in the charges and specifications are true to the best of the knowledge and belief of [that person]." MCM, *supra* note 2, R.C.M. 307(a)–(b). Following preferral, the accused is informed of the charge as soon as practicable. *Id.* R.C.M. 308(a). A charge states which article of the UCMJ the accused allegedly violated, and "[a] specification is a plain, concise, and definite statement of the essential facts constituting the offense charged." *Id.* R.C.M. 307(c)(2)–(3).

Unless suspected military offenders are apparent flight risks or likely to commit further serious misconduct, they are left to continue to perform their duties as they did during the investigation. For the rare suspect who poses a flight risk or is likely to commit further serious misconduct, pretrial confinement is available. Those suspects would be processed for confinement of more than passing duration and would be subject to the intrusive searches that accompany the subjugation of a human body to the "physical dominion" of a jailor.[186] The act of preferral alone does not result in incarceration.[187] The coercive and binding power of the command structure usually is sufficient to ensure that those accused of a crime continue performing their duties and do not reoffend while the military justice process runs its course. Even for an offense as grave as sexual assault, most accused remain at liberty up to the day a court-martial sentences them to confinement.[188] The complete lack of any accompanying booking procedure or incarceration makes preferral a constitutionally improper stage at which to seize DNA.

## V. Seizing and Storing DNA from the Broadest Possible Pool of Military Offenders Is Unwise Policy

Instead of seeing that only those reasonably suspected of a violent offense or those whose guilt was proven beyond a reasonable doubt be

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[186] *King*, 569 U.S. at 449. The DoDI makes pretrial confinement a trigger for DNA sampling. DoDI 5505.14, *supra* note 4, at 13.

[187] One principal reason the military does not routinely confine suspected offenders is that the mission cannot afford it. Congress controls the size of the American military to ensure national security in the event of two major regional contingencies. 10 U.S.C. § 691(a). The authorized end-strength is not designed to absorb the loss of personnel from routine incarceration only because they are suspected of committing an offense. As of the enactment of the National Defense Authorization Act for Fiscal Year 2020, the total authorized end-strength of the active duty armed forces was 1,339,500. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, §§ 401–402, 133 Stat. 1198, 1334 (2019).

[188] For example, the Judicial Proceedings Panel, a Federal advisory committee, found in fiscal years 2012 to 2014, of 1,270 cases across all services in which at least one charge alleging a penetrative or contact sexual offense was referred to trial, only 175 (13.8%) involved pretrial confinement. Cassia Spohn, Sexual Assault in the Military: Case Characteristics, Case Outcomes and Punishments, at slide 13 (Jan. 22, 2016), http://jpp.whs.mil/Public/docs/03_Topic-Areas/07-CM_Trends_Analysis/20160122/Case_Charact_Outcomes_Punish_20160122_Spohn.pdf. As sexual assault is undoubtedly one of the most severe categories of offenses, this should serve as a good indicator that the less severe categories of offenses are treated with even more circumspection regarding pretrial confinement.

subject to DNA indexing, the DoDI ensures that a vast number of Service members—those who are never processed for confinement and whose offenses are adjudicated through administrative means—will have their DNA indexed in perpetuity. Though of only limited assistance to law enforcement, the DoDI has been written to nearly maximize DNA indexing collection with the potential to result in unintended harms to those whose DNA has been seized. The extent of DNA indexing collection is one of policy, which ought to consider second order effects in pursuit of a happy medium where collection is narrowed to serious offenders.[189]

A. The Utility of U.S. Military CODIS Submissions Is Questionable

Assuming, for the sake of argument, that the military has a need to ensure security in its ranks by using CODIS to continually surveil those members that have had an encounter with the law, it has gained little practical good for its expansive collection efforts and has only created extra work and trouble in the process.

Popular support for CODIS indexing draws strength from DNA's perceived utility in solving crimes.[190] However, the breadth and sweep of DNA indexing—that is, under what circumstances DNA indexing is the right fit for the right group of persons—was not addressed in *King*.[191] On its face, the DoDI sweeps broadly in terms of the categories it seeks to include; it is not aimed solely at violent or serious offenders and has met with little obvious success thus far.[192] There are no reported military cases indicating that CODIS matches have generated identifications relating to prior

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[189] The *King* court validated only the collection of DNA in the context of "serious" and "dangerous" offenses. *See King*, 569 U.S. at 435 (describing the offenses or the offender as "serious" approximately twelve times).

[190] According to a Gallup poll, 85% of the American public surveyed in October 2005 thought that DNA evidence was "very" or "completely reliable." *Crime*, GALLUP, https://news.gallup.com/poll/1603/crime.aspx (last visited Nov. 28, 2020). During this time, there was a positive relationship noted between viewing crime television (such as CSI) and a belief in the reliability of DNA and between local news consumption and support for DNA databases. *See* Paul R. Brewer & Barbara L. Ley, *Media Use and Public Perceptions of DNA Evidence*, 32 SCI. COMMC'N 93, 109 (2010).

[191] Though not a part of its holding, the language in *King* seemed to envision DNA indexing for serious and dangerous offenses and dangerous offenders. *See King*, 569 U.S. at 453 ("identification of a suspect in a violent crime"); *id.* at 460 ("a serious offender"); *id.* at 461 ("valid arrest for a serious offense"); *id.* at 463 ("a dangerous offense").

[192] The DoD was mandated to collect samples for submission to CODIS starting not later than 17 June 2001. *See* DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, § 5(c), 114 Stat. 2726, 2733.

crimes, so there is yet no reported benefit to the military justice system. As of November 2020, the FBI has received from the U.S. military over 32,000 offender profiles, nearly 95,000 arrestee DNA submissions, and nearly 4,400 forensic profiles.[193] That pool of over 131,000 profiles has resulted in only 239 "investigations aided."[194] These 239 "investigations aided" are non-specific, in that it is unknown whether these matches are to military offenders, military arrestees, or to forensic evidence submissions.[195]

Figure 2[196]

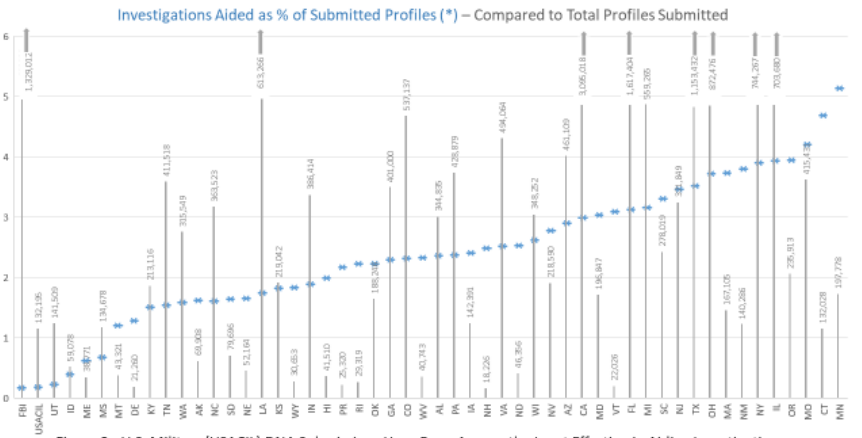


Figure 2: U.S. Military (USACIL) DNA Submissions Have Been Among the Least Effective in Aiding Investigations (based on Oct 2020 NDIS statistics).

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[193] Specifically, the U.S. Army has submitted on behalf of all services 32,842 offender profiles, 94,955 arrestee profiles, and 4,398 forensic profiles. *CODIS – NDIS Statistics*, *supra* note 20.

[194] *Id.* This means that 0.18% of submissions have contributed in some way to investigations nationally.

[195] "The procedure used for counting hits gives credit to those laboratories involved in analyzing and entering the relevant DNA records into CODIS. The system's hits are tracked as either an offender hit (where the identity of a potential suspect is generated) or as a forensic hit (where the DNA profiles obtained from two or more crime scenes are linked but the source of these profiles remains unknown). These hits are counted at the state and national levels. CODIS was established by Congress to assist in providing investigative leads for law enforcement in cases where no suspect has yet been identified; therefore a CODIS hit provides new investigative information on these cases. The hits are reported as 'Investigations Aided.'" *CODIS FAQ*, *supra* note 26.

[196] The authors created this figure based on data derived from the FBI's publically released CODIS statistics. *See CODIS – NDIS Statistics*, *supra* note 20.

A cursory analysis of the data may suggest that the effectiveness of DNA samples in aiding investigations is more closely linked to the submission of offender profiles than arrestee profiles.[197] The military is one of only a few jurisdictions that have managed to collect more arrestee than offender profiles (having collected almost three times as many arrestee profiles).[198] While the available data is generic, it appears that there is little utility for the military in collecting arrestee DNA insofar as the stated goal of the DNA collection program is to solve crimes; despite its large ratio of arrestee (military apprehendees) to offender samples, it is one of the smallest contributors to investigations aided.[199] This ineffectiveness is depicted in Figure 2, which shows the U.S. military (via the U.S. Army Criminal Investigation Laboratory (USACIL)) as being the second least helpful jurisdiction statistically. Overall, collecting samples from military apprehendees has done little but consume the time of investigators and analysts and incur expenses associated with unnecessarily collecting, testing, and storing the DNA.

## B. Unforeseen Problems Warrant a Cautious Approach to Avoid Overcollection

### *1. The Innocent May Be Erroneously Implicated*

Deoxyribonucleic acid is collected and indexed under the benign assumption that the samples will be used to ensure that the guilty are brought to justice. However, there is a risk that samples entered into the system could be incorrectly linked to offenses, resulting in erroneously implicating the innocent. Contamination, interpretation errors, and other human factors involved in the processing of DNA evidence have led to the misidentification and improper convictions of suspects.[200] As DNA is

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[197] If the effectiveness of a DNA collection program is measured by dividing the number investigations aided by the number of submitted samples, the average effectiveness of all jurisdictions is 2.39%. Of the thirty jurisdictions that collect both arrestee and offender profiles, the seventeen that are of above average effectiveness that collect both have substantially larger collections of offender profiles, while only one state (North Dakota) with above average effectiveness has more arrestees than offenders. *Id.*

[198] Only Colorado, Kansas, Louisiana, North Dakota, South Dakota, USACIL, and the FBI have collected more arrestee than offender profiles. *Id.*

[199] Despite the fact that USACIL ranks thirty-seventh of fifty-three in total CODIS submissions, only Puerto Rico has fewer absolute numbers of investigations aided. *See id.*

[200] Deoxyribonucleic acid samples can create false positives in a number of ways; background DNA (deposited before the crime took place and unrelated to it), secondary transfer, and contamination have been proven instances of DNA testing leading to miscarriages of

constantly innocuously transferred from individuals to their environment, the smaller sample size now required for DNA testing has resulted in individuals wrongly implicated in serious offenses due to DNA transference.[201] At least one Federal district court has recognized that the methodology for analyzing samples of so called "touch DNA," in which small fragments from multiple contributors are found together, fails to satisfy the *Daubert* standard of scientific reliability.[202]

While DNA evidence is given strong public credence, developed around the testing of larger sample sizes—a good indicator of the degree of contact between the subject and object—it would be easy to overestimate the value of a smaller sample.[203] Overconfidence in the promise of forensic techniques once widely touted as sound and reliable has resulted in the miscarriage of justice.[204] Does our curfew violator really deserve to face even the remote risk of being erroneously suspected or tried for an offense she may not have committed? Overcollection unnecessarily increases the risk that DNA samples may lead to wrongful conviction[205] and thus violates that axiom of American criminal justice that it is better that one hundred guilty men go free then an innocent man be convicted.[206]

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justice. *See* P. Gill, *DNA Evidence and Miscarriages of Justice*, FORENSIC SCI. INT'L, Jan. 2019, at e1, e1 to e3; Matthew Shaer, *The False Promise of DNA Testing*, ATLANTIC, https://www.theatlantic.com/magazine/archive/2016/06/a-reasonable-doubt/480747 (last visited Nov. 28, 2020) (identifying flaws inherent to DNA testing that have led to wrongful convictions and arrests).

[201] Shaer, *supra* note 200; Clive Thompson, *The Myth of Fingerprints*, SMITHSONIAN MAG., https://www.smithsonianmag.com/science-nature/myth-fingerprints-180971640 (Apr. 26, 2019) (referencing a deadlocked murder trial where the jury suspected that DNA contamination by the police resulted in the suspect's DNA making its way onto the victim's body).

[202] United States v. Gissantaner, No. 1:17-cr-130, 2019 U.S. Dist. LEXIS 178848, at *47 (W.D. Mich. Oct. 16, 2019) (complex statistical interpretation software did not pass *Daubert* test for small samples of DNA taken from three-person mixture as quantity was below the threshold that had been validated by the laboratory).

[203] *See* Shaer, *supra* note 200.

[204] Bullet lead examination, latent fingerprints, hair analysis, and bite-mark analysis have come under scrutiny for being far less certain than once believed. *See* PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFF. OF THE PRESIDENT, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 27–29 (2016).

[205] The larger the DNA database, the higher the risks of false positive matches. *See* Shaer, *supra* note 200.

[206] Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), *quoted in* Alexander Volokh, *Aside:* n *Guilty Men*, 146 U. PA. L. REV. 173, 175 (1997).

Overcollection can also potentially endanger military operations. The DoD warned its Service members against the use of consumer ancestry or health screening DNA kits because their results can compromise military readiness and limit career advancement.[207] This warning noted that DNA tests "could expose personal and genetic information, and potentially create unintended security consequences and increased risk to the joint force and mission."[208] While USACIL maintains many security precautions,[209] housing DNA of numerous Service members creates an unnecessary risk, even if remote, for exploitation by adversaries.[210]

*2. Developments in DNA Technology Merit Additional Caution*

The *King* court noted that "CODIS loci come from noncoding parts of the DNA that do not reveal the genetic traits . . . . [S]cience can always progress further, and those progressions may have Fourth Amendment consequences."[211] The court accepted that these loci were noncoding "junk" DNA—which would limit their use to identification purposes only—ensuring that DNA indexing was constitutional.[212] However, it is possible that advances in DNA technology will increase the pressure to use what was claimed to be informationally limited DNA for purposes beyond individual identity.

Scientists have recently demonstrated that the thirteen CODIS loci at issue in *King* have greater potential information than initially assumed, and can be analyzed to predict ancestry and ethnicity.[213] The Combined

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[207] Heather Murphy & Mihir Zaveri, *Pentagon Warns Military Personnel Against At-Home DNA*, N.Y. TIMES (Dec. 24, 2019), https://www.nytimes.com/2019/12/24/us/military-dna-tests.html.

[208] *Id.*

[209] For example, USACIL allows only those with security clearances to access DNA samples that are protected by continuous electronic security and cypher lock. Letter from Longcor to authors, *supra* note 3.

[210] *See, e.g.*, *Cybersecurity Incidents*, U.S. OFF. OF PERS. MGMT., https://www.opm.gov/cybersecurity/cybersecurity-incidents (last visited Nov. 28, 2020).

[211] Maryland v. King, 569 U.S. 435, 464 (2013). The CODIS loci were not at that time revealing information beyond identification. The *King* majority also found persuasive the fact that law enforcement officers analyzed DNA for the sole purpose of identity.

[212] *Id.* at 445.

[213] Ancestry information is contained in CODIS loci that could potentially be used for race and ethnic phenotyping. *See generally* Bridget F.B. Algee-Hewitt et al., *Individual Identifiability Predicts Population Identifiability in Forensic Microsatellite Markers*, 26 CURRENT BIOLOGY 935 (2016). *But see* Sara H. Katsanis & Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 58 J. FORENSIC SCIS.

DNA Index System now collects more genetic information than at the time of *King*, as the FBI recently increased the number of core loci required to be reported to CODIS from thirteen to twenty.[214] Thus, the possibility for additional, unforeseen information being unintentionally gathered has increased.[215] The same Federal district court judge that found problems with "touch DNA" analysis warned: "[a]dvancements in [DNA testing technology] are accompanied with unique concerns when life, liberty and justice are at stake."[216] While these developments alone would not yet tilt the constitutional balance in favor of privacy interests, they argue in favor of a limited approach to collection. The curfew violator does not deserve the risk of exposure to future invasions of genetic privacy because of developments in technology.

*3. A Looming Problem: Parking Samples in CODIS for Cases that Will Never Proceed to Court-Martial*

Apart from reaping only sparse reward for indexing its apprehendees' DNA, the DoD is quickly creating a heavy administrative burden for itself. Many of the DNA samples submitted to CODIS will soon have no business being there,[217] but by making Service member-initiated expungement the means of removal, the DoD is allowing a large pool of samples to remain in CODIS contrary to the law's intent. The DoD does not contend that it is entitled to keep samples from those whose offenses did not result in a conviction.[218] Between the DoDI's publication in late 2015 and October

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S169 (2013) (stating that, as of 2013, CODIS profiles provide no sensitive or biomedically relevant information).

[214] This additional requirement was undertaken to facilitate greater discrimination, assist in missing person investigations, and encourage international data sharing efforts by having more loci in common with other countries for comparison purposes. *See Combined DNA Index System (CODIS)*, *supra* note 18.

[215] Seth Augenstein, *CODIS Has More ID Information than Believed, Scientists Find*, FORENSIC SCI. MAG. (May 15, 2017), https://www.forensicmag.com/news/2017/05/codis-has-more-id-information-believed-scientists-find (discussing findings that the thirteen CODIS loci had enough predictive power about the whole genome that they could be linked to other genome data sets that had no shared markers); Michael D. Edge et al., *Linkage Disequilibrium Matches Forensic Genetic Records to Disjoint Genomic Marker Sets*, 114 PROC. NAT'L ACAD. SCIS. 5671 (2017).

[216] United States v. Gissantaner, No. 1:17-cr-130, 2019 U.S. Dist. LEXIS 178848, at *47 (W.D. Mich. Oct. 16, 2019).

[217] Combined DNA Index System indexing is not intended for those acquitted of charges or for those cases in which no charges have been filed in the applicable time period. 34 U.S.C. § 12592(d)(1)(A)(ii); NDIS OPMAN, *supra* note 8, para. 3.5.

[218] DODI 5505.14, *supra* note 4, para. 5.

2019, USACIL has submitted 45,696 profiles to CODIS but processed only 383 requests for expungement.[219] Of those profiles, only a small percentage of the offenses for which DNA was seized will ever result in a court-martial or conviction.[220] Nonetheless, samples are routinely taken from offenders who will almost certainly receive only administrative punishment—and it was foreseeable at the time of their offense that they would never receive more than administrative punishment.

As maintaining a CODIS profile and retaining a DNA sample on the basis of administrative punishment alone is invalid, it stands to reason that most of the USACIL CODIS samples should be expunged without Service member request. Those individuals will likely never face criminal charges because it is either not prudent to charge them or not possible to do so due to the expiration of the statute of limitations.[221] Indeed, the CODIS legislation and operating procedures themselves require "prompt" removal of arrestee DNA[222] when it is established that "no charge was filed within the applicable time period."[223] Accruing tens of thousands of DNA samples for those who receive only administrative punishment and then requiring the offender to meet the DoD's obligations to "promptly" remove the improperly retained DNA is an enormous administrative burden in the making—someone must invest significant time and energy to determine how many of those samples are no longer legitimately in CODIS and seek

[219] This information is accurate as of 24 October 2019, when USACIL answered the authors' Freedom of Information Act request. The authors specifically requested to know, *inter alia*, the number of samples prepared for CODIS submission since 22 December 2015 (the date of the revised DoDI) and the number of expungement requests processed by USACIL. *See* Letter from Longcor to authors, *supra* note 3. Presumably, additional requests have been made, but their numbers are not publically available.

[220] The services reported to Congress that in fiscal year 2018 (i.e., 30 September 2017 to 1 October 2018), there were 1,636 general and special courts-martial with 742 cases referred and awaiting trial, with these figures including acquittals and cases arraigned but not tried. JOINT SERV. COMM. ON MIL. JUSTICE, U.S. DEP'T OF DEF., REPORTS OF THE SERVICES ON MILITARY JUSTICE FOR FISCAL YEAR 2018 (2019). The services similarly reported approximately 1,708 general and special courts-martial for Fiscal Year 2017 (i.e., 30 September 2016 to 1 October 2017). *Id.* Even with an overestimation of courts-martial that have occurred since the DoDI was published (for example, 2,000 per each of the four fiscal years), more than 37,500 samples have been taken that will never result in a court-martial conviction.

[221] The statute of limitations for most UCMJ offenses is five years (except sexual assaults, murder, desertion and certain child abuse offenses). UCMJ art. 43 (1950).

[222] 34 U.S.C. § 12592(d)(1)(A)(ii); NDIS OPMAN, *supra* note 8, para. 3.5.

[223] 34 U.S.C. § 12592(d)(1)(A)(ii); NDIS OPMAN, *supra* note 8, para. 3.5.

their removal.[224] This overcollection is further cause for removing investigation as a trigger for DNA seizure, as there is no necessity for and little utility in seizing DNA prior to conviction.

## VI. Proposal

The flaws in the DoD's DNA collection scheme can be fixed, but the DoD cannot do it alone. Both the DoD and Congress need to act. The DoD can amend the DoDI to remove the three offensive triggers, limiting DNA collection to only those areas in line with the *King* rationale. Meanwhile, Congress must enact penal sanctions for those who use DNA samples for purposes other than those for which they were collected.

The DoD should amend the DoDI to remove the investigative, preferral, and command-directed investigation triggers for DNA collection.[225] Once amended, DNA would be collected only when the subject is ordered into pretrial confinement for, or convicted of, a qualifying offense.[226] Collecting DNA when a Service member is ordered into pretrial confinement meets the need identified in *King*: to enable confinement personnel to make informed decisions about risk management in the detention facility.[227] Collecting DNA on conviction serves the same purpose if the accused is sentenced to confinement and can be considered a reasonable condition of release in the event confinement is not adjudged.

Striking the three offending triggers removes what is, in the military context, a warrantless search for evidence of crimes that law enforcement has no reason to believe the subject has committed (that is, without probable cause). Removing the command-directed investigation trigger has the added constitutional benefit of limiting command discretion as to whether a DNA sample should be taken. In addition to protecting Service members' privacy interests consistent with the Fourth Amendment, abolishing the dragnet approach to DNA collection also alleviates the administrative and financial burden associated with taking, analyzing, and

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[224] As no charges will have been filed during the applicable time period, most investigative samples will be maintained invalidly after that point.
[225] DODI 5505.14, *supra* note 4, at 13–14.
[226] *See id.*
[227] *See* Maryland v. King, 569 U.S. 435, 449–55 (2013).

processing DNA samples that have a vanishingly small chance of connecting the subject with an unsolved crime.[228]

Amending the DoDI alone is insufficient to prevent wrongful use of collected samples.[229] First, the DoD cannot establish a criminal offense that can be enforced against its civilians.[230] At worst, a civilian employee might be fired for using collected DNA for an improper purpose, which falls short of the criminal sanction approved by the Supreme Court in *King*.[231] Second, the DoDI can be amended at any time without following the rule-making procedures required by the Administrative Procedure Act.[232] Nothing prevents the DoD from adding procedural safeguards now, and later amending the DoDI to remove those safeguards.

Thus, Congress must enact statutory safeguards against abuse. A criminal sanction already exists in 34 U.S.C. § 40706, which imposes a fine or imprisonment for using or disclosing DNA samples for unauthorized purposes. However, there are two flaws. The first is that an unauthorized purpose is "a purpose [not] specified in[, *inter alia*, § 40702]."[233] But § 40702 does not specify the purposes for which collected samples may be used or disclosed. The second flaw is that § 40706 does not impose any sanctions for misuse of DNA samples the DoD collects pursuant to its authority under 10 U.S.C. § 1565.

This deficiency is easily remedied. Congress should amend 34 U.S.C. § 40702 and 10 U.S.C. § 1565 to direct that collected DNA samples may be disclosed and used only for the purposes specified in 34 U.S.C. § 12592(b)(3)(A)–(D), the statute creating CODIS.[234] This would add

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[228] *See supra* Section V.A.

[229] *See supra* note 182.

[230] A common mechanism to criminalize violation of a service regulation is to insert language stating that violations are punishable under Article 92, UCMJ. However, only individuals subject to the UCMJ can enforce such a provision; such a category generally does not include civilian employees of the DoD or service departments. *See* UCMJ art. 2 (1950).

[231] *See King*, 569 U.S. at 465 (citing MD. CODE ANN., PUB. SAFETY § 2-512(c) (2011)).

[232] *See supra* note 175.

[233] 34 U.S.C. § 40706(a).

[234] The permissible disclosures are "to criminal justice agencies for law enforcement identification purposes; in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules; for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged; or if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes." *Id.* § 12592(b)(3)(A)–(D).

substance to § 40706's criminal sanction by specifying purposes for which DNA samples collected under § 40702 could be used. In addition, § 40706 should be amended to include 10 U.S.C. § 1565 in its scope, making it a crime to use samples collected under § 1565 for purposes not authorized in that section. This would ensure that anyone—civilian or military—who misused a DNA sample collected under either the Title 10 or Title 34 authority could be prosecuted and subject to the same penalty.

This two-step approach—removing the three offensive triggers from the DoDI and adding statutory criminal sanctions for misusing samples—would bring the DoD's DNA collection scheme in line with the constitutional rationale endorsed in *King*, as applied to the military environment.[235]

## VII. Conclusion

There are multiple defects with many of the collection triggers contained in the DoDI. These triggers suffer from constitutional concerns as the Government has only a weak interest in taking DNA indexing samples from Service members: the military does not have a system of bail, does not have difficulty identifying a suspect, does not use DNA to assess criminal risk, and does not use DNA to ensure availability for trial.

In order to ensure that the DoDI is unquestionably constitutional and reasonably calibrated, the Secretary of Defense should eliminate the investigative, preferral, and command-directed investigation triggers, thus ensuring only those who have entered pretrial confinement or been convicted of a qualifying offense have their DNA collected and indexed. In addition, Congress should enact criminal penalties to prevent and punish the misuse of collected DNA.

[235] See *infra* app., for proposed language.

## Appendix

What follows are the proposed amendments to the regulatory and statutory language described in Part VI. The original text for each source is provided, with proposed deletions struck through and additions underlined.

*Administrative Provisions*

**DoDI 5505.14, Enclosure 4, paragraphs 3–4**

3. The DCIOs, other DoD law enforcement organizations, DoD correctional facilities, CGIS and commanders will take DNA samples from Service members and expeditiously forward them to USACIL in accordance with Reference (e) and the Manual for Courts-Martial (Reference (n)) when:

~~a. DNA is taken in connection with an investigation, for offenses identified in Enclosure 3 of this instruction and Commandant Instruction M5527.1 (Reference (o)), conducted by a DCIO, other DoD law enforcement organization, or CGIS, and in which the investigator concludes there is probable cause to believe that the subject has committed the offense under investigation. The investigator must consult with a judge advocate before making a probable-cause determination. DNA samples may be collected, but not forwarded, before consultation. DNA will be taken from all drug suspects, except those who are apprehended or detained for the offenses of simple possession and personal use. However, DNA will be taken from those excluded suspects when charges are preferred for or the subject is convicted at special or general court-martial of simple possession or use.~~

~~b. Court-martial charges are preferred in accordance with Rule for Courts-Martial 307 of Reference (n) for an offense referenced in Enclosure 3 if a DNA sample has not already been submitted.~~

~~c.~~a. A Service member is ordered into pretrial confinement for an offense referenced in Enclosure 3 by a competent military authority after the completion of the commander's 72-hour memorandum required by Rule for Courts-Martial 305(h)(2)(C) of Reference (n) if a DNA sample has not already been submitted.

~~d.~~b. A Service member is confined to a military correctional facility or temporarily housed in civilian facilities as a result of any general or

special court-martial conviction for an offense referenced in Enclosure 3 if a DNA sample has not already been submitted in accordance with DoD Instruction 1325.07 (Reference (p)). This also applies to those instances where a Service member is not sentenced to confinement as a result of any general or special court-martial conviction for an offense identified in Enclosure 3 if a DNA sample has not already been submitted.

~~e. A commander conducts or directs a command-level investigation or inquiry when no criminal investigation was conducted by a DCIO, other DoD law enforcement agency, or CGIS, nor processed through DoD corrections authorities (e.g., no previous DNA collection), for all offenses identified in Enclosure 3. In those instances, after consultation with his or her supporting Staff Judge Advocate, the commander is responsible for collecting DNA samples from the Service member. The commander is responsible for ensuring that the Service member's DNA sample is collected in accordance with the commander's specific Military Department or U.S. Coast Guard procedures and in accordance with the DNA collection kit instructions. Commanders may obtain kits from local military law enforcement offices.~~

~~4. If a commander conducts or directs a command-level investigation or inquiry for offenses identified in Enclosure 3 of this instruction and Reference (o), the collection of DNA samples from Service members is not mandated if the Service member is punished via non-judicial punishment (e.g., Article 15 of the UCMJ) or found guilty by a summary court-martial. A commander is only mandated to collect a DNA sample if the Service member was convicted of a qualifying offense by a general or special court-martial.~~

*Statutory Provisions*

**10 U.S.C. § 1565. DNA identification information: collection from certain offenders; use**

(a) Collection of DNA Samples.—(1) The Secretary concerned shall collect a DNA sample from each member of the armed forces under the Secretary's jurisdiction who is, or has been, convicted of a qualifying military offense (as determined under subsection (d)).

(2) For each member described in paragraph (1), if the Combined DNA Index System (in this section referred to as "CODIS") of the Federal Bureau of Investigation contains a DNA analysis with respect to that member, or if a DNA sample has been or is to be collected from that

member under section 3(a) of the DNA Analysis Backlog Elimination Act of 2000, the Secretary concerned may (but need not) collect a DNA sample from that member.

(3) The Secretary concerned may enter into agreements with other Federal agencies, units of State or local government, or private entities to provide for the collection of samples described in paragraph (1).

(b) Analysis and Use of Samples.—The Secretary concerned shall furnish each DNA sample collected under subsection (a) to the Secretary of Defense. The Secretary of Defense shall—

(1) carry out a DNA analysis on each such DNA sample in a manner that complies with the requirements for inclusion of that analysis in CODIS; and

(2) furnish the results of each such analysis to the Director of the Federal Bureau of Investigation for inclusion in CODIS.

<u>(3) ensure that DNA samples and the results of any analysis of DNA samples are disclosed or used only for the purposes specified in section 12592(b)(3) of title 34.</u>

(c) Definitions.—In this section:

(1) The term "DNA sample" means a tissue, fluid, or other bodily sample of an individual on which a DNA analysis can be carried out.

(2) The term "DNA analysis" means analysis of the deoxyribonucleic acid (DNA) identification information in a bodily sample.

(d) Qualifying Military Offenses.—The offenses that shall be treated for purposes of this section as qualifying military offenses are the following offenses, as determined by the Secretary of Defense, in consultation with the Attorney General:

(1) Any offense under the Uniform Code of Military Justice for which a sentence of confinement for more than one year may be imposed.

(2) Any other offense under the Uniform Code of Military Justice that is comparable to a qualifying Federal offense (as determined under section 3(d) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a(d))).

(e) Expungement.—(1) The Secretary of Defense shall promptly expunge, from the index described in subsection (a) of section 210304 of the Violent Crime Control and Law Enforcement Act of 1994, the DNA analysis of a person included in the index on the basis of a qualifying military offense if the Secretary receives, for each conviction of the person

of a qualifying offense, a certified copy of a final court order establishing that such conviction has been overturned.

(2) For purposes of paragraph (1), the term "qualifying offense" means any of the following offenses:

(A) A qualifying Federal offense, as determined under section 3 of the DNA Analysis Backlog Elimination Act of 2000.

(B) A qualifying District of Columbia offense, as determined under section 4 of the DNA Analysis Backlog Elimination Act of 2000.

(C) A qualifying military offense.

(3) For purposes of paragraph (1), a court order is not "final" if time remains for an appeal or application for discretionary review with respect to the order.

(f) Regulations.—This section shall be carried out under regulations prescribed by the Secretary of Defense, in consultation with the Secretary of Homeland Security and the Attorney General. Those regulations shall apply, to the extent practicable, uniformly throughout the armed forces.

**34 U.S.C. § 40702. Collection and use of DNA identification information from certain Federal offenders**

(a) Collection of DNA samples

(1) From individuals in custody

(A) The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States. The Attorney General may delegate this function within the Department of Justice as provided in section 510 of title 28 and may also authorize and direct any other agency of the United States that arrests or detains individuals or supervises individuals facing charges to carry out any function and exercise any power of the Attorney General under this section.

(B) The Director of the Bureau of Prisons shall collect a DNA sample from each individual in the custody of the Bureau of Prisons who is, or has been, convicted of a qualifying Federal offense (as determined under subsection (d)) or a qualifying military offense, as determined under section 1565 of title 10.

(2) From individuals on release, parole, or probation

The probation office responsible for the supervision under Federal law of an individual on probation, parole, or supervised release shall collect a DNA sample from each such individual who is, or has been, convicted of a qualifying Federal offense (as determined under subsection

(d)) or a qualifying military offense, as determined under section 1565 of title 10.

(3) Individuals already in CODIS

For each individual described in paragraph (1) or (2), if the Combined DNA Index System (in this section referred to as "CODIS") of the Federal Bureau of Investigation contains a DNA analysis with respect to that individual, or if a DNA sample has been collected from that individual under section 1565 of title 10, the Attorney General, the Director of the Bureau of Prisons, or the probation office responsible (as applicable) may (but need not) collect a DNA sample from that individual.

(4) Collection procedures

(A) The Attorney General, the Director of the Bureau of Prisons, or the probation office responsible (as applicable) may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual who refuses to cooperate in the collection of the sample.

(B) The Attorney General, the Director of the Bureau of Prisons, or the probation office, as appropriate, may enter into agreements with units of State or local government or with private entities to provide for the collection of the samples described in paragraph (1) or (2).

(5) Criminal penalty

An individual from whom the collection of a DNA sample is authorized under this subsection who fails to cooperate in the collection of that sample shall be—

(A) guilty of a class A misdemeanor; and

(B) punished in accordance with title 18.

(b) Analysis and use of samples

<u>(1)</u> The Attorney General, the Director of the Bureau of Prisons, or the probation office responsible (as applicable) shall furnish each DNA sample collected under subsection (a) to the Director of the Federal Bureau of Investigation, who shall carry out a DNA analysis on each such DNA sample and include the results in CODIS. The Director of the Federal Bureau of Investigation may waive the requirements under this subsection if DNA samples are analyzed by means of Rapid DNA instruments and the results are included in CODIS.

<u>(2) DNA samples and the results of any DNA analysis samples may be disclosed or used only for the purposes specified in section 12592(b)(3) of this title.</u>

(c) Definitions

In this section:

(1) The term "DNA sample" means a tissue, fluid, or other bodily sample of an individual on which a DNA analysis can be carried out.

(2) The term "DNA analysis" means analysis of the deoxyribonucleic acid (DNA) identification information in a bodily sample.

(3) The term "Rapid DNA instruments" means instrumentation that carries out a fully automated process to derive a DNA analysis from a DNA sample.

(d) Qualifying Federal offenses

The offenses that shall be treated for purposes of this section as qualifying Federal offenses are the following offenses, as determined by the Attorney General:

(1) Any felony.

(2) Any offense under chapter 109A of title 18.

(3) Any crime of violence (as that term is defined in section 16 of title 18).

(4) Any attempt or conspiracy to commit any of the offenses in paragraphs (1) through (3).

(e) Regulations

(1) In general

Except as provided in paragraph (2), this section shall be carried out under regulations prescribed by the Attorney General.

(2) Probation officers

The Director of the Administrative Office of the United States Courts shall make available model procedures for the activities of probation officers in carrying out this section.

(f) Commencement of collection

Collection of DNA samples under subsection (a) shall, subject to the availability of appropriations, commence not later than the date that is 180 days after December 19, 2000.

**34 U.S.C. § 40706. Privacy protection standards**

(a) In general

Except as provided in subsection (b), any sample collected under, or any result of any analysis carried out under, section 40701, 40702, or 40703 of

this title, or section 1565 of title 10, may be used only for a purpose specified in such section.

(b) Permissive uses

A sample or result described in subsection (a) may be disclosed under the circumstances under which disclosure of information included in the Combined DNA Index System is allowed, as specified in subparagraphs (A) through (D) of section 12592(b)(3) of this title.

(c) Criminal penalty

A person who knowingly discloses a sample or result described in subsection (a) in any manner to any person not authorized to receive it, or obtains or uses, without authorization, such sample or result, shall be fined not more than $250,000, or imprisoned for a period of not more than one year. Each instance of disclosure, obtaining, or use shall constitute a separate offense under this subsection.

# COMMAND PROSECUTORIAL AUTHORITY AND THE UNIFORM CODE OF MILITARY JUSTICE—A REDOUBT AGAINST IMPUNITY AND A NATIONAL SECURITY IMPERATIVE

LIEUTENANT COLONEL JAMES T. HILL*

## I. Introduction

During the American Revolution, the Continental Congress delegated executive responsibility to convene courts-martial to military commanders,[1] an arrangement that survives to this day in the U.S. military justice system. Under the Uniform Code of Military Justice (UCMJ),[2] commanders have the authority to refer a case to a special or general court-martial,[3] provided requisite consultation has been provided by a "judge advocate,"[4] that is, a

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[1] "[G]enerals commanding in the separate States . . . [were] expressly delegated by Congress [authority to convene courts-martial] by resolution of April 14, 1777, but it is noticeable that the authority, as ascribed to and exercised by the commander-in-chief, rested upon no express grant, but was apparently derived mainly by implication from the terms of [George] Washington's commission." WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 59 (2d ed. 1920) (citation and emphasis omitted).

[2] *See generally* 10 U.S.C. §§ 801–946.

[3] A special court-martial (SPCM) can try most UCMJ offenses but lacks jurisdiction over penetrative sex offenses and attempts thereof, MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(f)(2)(D) (2019) [hereinafter MCM], has limited jurisdiction over capital offenses, *id.* R.C.M. 201(f)(2)(C)(i), and imposes a maximum sentence to confinement of six months or one year, depending how the case is referred, *id.* R.C.M. 201(f)(2)(B). A limited subset of offenses can be referred to a SPCM presided over by a military judge alone, which can impose a maximum sentence to confinement of six months, as determined solely by the judge. *Id.* R.C.M. 201(f)(2)(B), (E). For all other SPCMs, the maximum sentence to confinement is one year and, while presided over by a military judge, at the accused's behest, military jurors ("members" who sit on a "panel") may adjudicate the case. *See id.* R.C.M. 201(f)(2)(E), 501(a)(2). A general court-martial (GCM) has jurisdiction over all UCMJ offenses and can adjudge the maximum authorized punishment authorized for an alleged offense, including death. *Id.* R.C.M. 201(f)(1)(A). Further, a GCM is presided over by a military judge and, at the behest of the accused, can be adjudicated by a military panel, unless the Government referred the case for capital punishment, in which case a panel is mandatory. *Id.* R.C.M. 501(a)(1).

[4] UCMJ art. 34 (2016).

uniformed military lawyer.[5] Legislation recently proposed in the Senate, the Military Justice Improvement Act of 2020 (MJIA),[6] would strip the commander of this authority,[7] including the authority to initiate court-martial proceedings,[8] and vest these authorities in a judge advocate outside the chain of command.[9] This delegation of authority to judge advocates would, however, be limited to "covered offenses," which are those primarily contained in Articles 118 through 132, UCMJ,[10] and any conspiracy, solicitation, or attempt to commit a "covered offense."[11]

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[5] MCM, *supra* note 3, R.C.M. 103(18).

[6] 166 CONG. REC. S3413–14 (daily ed. June 25, 2020) (statement of Sen. Gillibrand proposing the "Military Justice Improvement Act of 2020" as an amendment to the National Defense Authorization Act for Fiscal Year 2021).

[7] *Id.* at S3413 (proposing so in section 539A(d)(2)).

[8] *Id.* (proposing so in section 539A(d)(1)). Under the proposed legislation, if the prosecutor decided against preferring charges with an eye toward a GCM or SPCM, the allegation could be adjudicated by a commander via a summary court-martial (SCM) or by means of a non-judicial punishment (NJP) proceeding. *Id.* (proposing so in section 539A(d)(6)). An SCM is "a simple disciplinary proceeding" that is not a "criminal forum," has no jurisdiction over capital offenses and penetrative sex offenses and can adjudicate a maximum sentence to confinement of no more than 30 days. MCM, *supra* note 3, R.C.M. 1301(a)–(d). An NJP proceeding is an administrative one adjudicated solely by a commander who can impose sanctions such as restriction, rank reduction, and forfeiture of pay. *See generally* UCMJ art. 15 (2016).

[9] 166 CONG. REC. S3413 (daily ed. June 25, 2020) (proposing so in section 539A(d)(1)).

[10] The reform only applies to "covered offenses," which are all UCMJ offenses that are not deemed "excluded offenses." *See id.* (bifurcating offenses in section 539A(b)–(c)). "Excluded offenses" include those enumerated in Article 122a, UCMJ (receiving stolen property), Article 123, UCMJ (offenses concerning Government computers), and Article 123a, UCMJ (making, drawing, or uttering check, draft, or order without sufficient funds). *Id.* (enumerating offenses in section 539A(c)(2)). "Excluded offenses" also include those contained in Articles 83 through 117, UCMJ, while Article 93a, UCMJ (cruelty and maltreatment) and Article 117a, UCMJ (wrongful broadcast), remain covered offenses. *Id.* (enumerating offenses in section 539A(c)(1)–(2)). Other "excluded offenses" include all Article 133, UCMJ, offenses (conduct unbecoming an officer and a gentleman) and offenses under Article 134, UCMJ (conduct which is service discrediting or prejudicial to good order and discipline), except that the following Article 134 offenses remain "covered offenses:" "child pornography, negligent homicide, indecent conduct, [and] pandering and prostitution." *Id.* (enumerating offenses in section 539A(c)(1), (3)). Finally, "excluded offenses" also include any conspiracy, solicitation, or attempt to commit any "excluded offense." *Id.* (stating so in section 539A(c)(4)–(6)).

[11] *Id.* (identifying so in section 539A(b)(2)–(4)). Note that even for "covered offenses," MJIA applies only to those offenses "for which the maximum punishment authorized . . . includes confinement for more than one year." *Id.* (proposing so in section 539A(b)(1)). Consequently, the following otherwise "covered offenses" would be excluded from the reform based on this limitation: wrongful appropriation under Article 121, UCMJ, where the value of the property is $1,000 or less; simple assault under Article 128, UCMJ; assault consummated

While these "covered offenses" would encompass a broad swath of crimes, predominantly those familiar to the common law,[12] the impetus for the reform narrowly relates to the prevalence of sexual violence crimes in the military. As MJIA's primary legislative sponsor explained in 2019:

> [T]he chairman of the Joint Chiefs of Staff, Martin Dempsey, said the military was "on the clock" to fix [sexual assaults in the military]—and indicated we would be right to bring a bill back to the floor in a year if they hadn't solved the problem. It's now been five years. . . . Not only is sexual assault still pervasive across all branches of our military, but it has dramatically increased over the last two years . . . .[13]

The 2019 Department of Defense Sexual Assault Prevention and Response (SAPR) Report estimated the number of penetrative and non-penetrative sex offenses in the military, which remained virtually unchanged from 20,300 in 2014 to 20,500 in 2018.[14] However, this latter number was registered after sexual assaults were estimated to have dropped to 14,900 in 2016, only to spike an estimated 38% in 2018.[15]

Assessing whether removing command prosecutorial authority would improve these numbers requires understanding the purpose military law

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by a battery under Article 128, UCMJ; assault upon a noncommissioned or petty officer, not in the execution of office under Article 128, UCMJ; unlawful entry under Article 129, UCMJ; unnecessary delay in disposing of a case under Article 131f, UCMJ. MCM, *supra* note 3, app. 12 (providing a survey of maximum punishments for violations of the UCMJ).

[12] "Covered offenses" are primarily those contained in Articles 118 through 132, UCMJ, and are mostly common law-like in nature. These articles cover offenses such as murder, involuntary manslaughter, death or injury of an unborn child, child endangerment, rape, sexual assault, other sexual misconduct, larceny, wrongful appropriation, robbery, kidnapping, arson, burning property with intent to defraud, assault, maiming, burglary, and unlawful entry. *See generally* 10 U.S.C. §§ 918–932.

[13] Kirsten Gillibrand, *Gillibrand: The Military Justice Improvement Act Would Give Service Members a Justice System That Works*, MIL. TIMES (June 30, 2019), https://www.militarytimes.com/opinion/commentary/2019/06/30/gillibrand-the-military-justice-improvement-act-would-give-service-members-a-justice-system-that-works.

[14] SEXUAL ASSAULT PREVENTION & RESPONSE OFF., DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2018, at 5 (2019) [hereinafter SAPR REPORT], https://www.sapr.mil/sites/default/files/FY18_DOD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf (reporting the results of a survey of Service members).

[15] *Id.* (indicating that there were an estimated 20,500 sexual assaults in the military in 2018, versus 14,900 in 2016, which amounts to a 38% increase).

serves and the separate responsibilities of commanders and lawyers in furthering that purpose. The 2019 *Manual for Courts-Martial* articulates the purpose of military law as follows: "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[16]

Note that "maintaining good order and discipline" is the commander's duty in military law.[17] That is, commanders are duty-bound to exact their subordinates' obedience to law and disciplinary standards, also referred to as the duty "to control," an obligation that is criminally enforceable in both war and peace.[18] By contrast, lawyers have no such duty, but they do have an obligation that squarely aligns with military law's purpose to "promote justice." That is, prosecutors have a duty to "seek justice,"[19] a duty which empowers them to take action that commanders could be prosecuted for taking—decisions not to prosecute sexual assaults and other serious crimes.[20]

A commander's responsibility is best understood as a byproduct of authority that all formal leaders possess to varying degrees. It has two components: "[t]he right to give orders" to subordinates and "[t]he power

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[16] MCM, *supra* note 3, pt. I, ¶ 3.

[17] *See* Brown v. Glines, 444 U.S. 348, 356 (1980) (stating it is the military commander's duty to maintain "morale, discipline, and readiness" in the conduct of operations); United States v. Harris, 5 M.J. 44, 62 (C.M.A. 1978) (stating "the courts have recognized the commander's duty to maintain the order, security and discipline necessary to military operations." (quoting United States v. Burrow, 396 F. Supp. 890, 898 (D. Md. 1975))). *See also* MCM, *supra* note 3, app. 2.1, ¶ 2.1 ("The military justice system is a powerful tool that preserves good order and discipline . . . . It is a commander's duty to use it appropriately [for that purpose].").

[18] *See infra* Part II.

[19] *Criminal Justice Standards for the Prosecution Function*, AM. BAR ASS'N, https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition (last visited Oct. 28, 2020) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."); *see* Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially . . . and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

[20] *Criminal Justice Standards for the Prosecution Function*, *supra* note 19 ("The prosecutor serves the public interest . . . by exercising discretion to not pursue criminal charges in appropriate circumstances."). *See infra* Part II.A (explaining that commanders lack discretion to *sua sponte* forgo prosecuting certain serious crimes, including sexual assaults).

to exact obedience."[21] "Responsibility," by contrast "is a corollary of [that] authority, it is the natural consequence and essential counterpart, and whatsoever authority is exercised, responsibility arises."[22] Removing a commander's authority to "exact obedience" therefore necessarily eliminates his responsibility for its exercise, which, in turn, risks subordinates' diminished obedience to command directives—a risk U.S. courts have long sought to counter in the military context.[23]

General Dwight Eisenhower recognized this very risk, long ago warning, "If you make a completely separate staff body to whom is charged no responsibility for winning the war and say, 'You can do as you please about these people,' you are going to have trouble."[24] That "trouble" arises when commanders lack the formal authority to "employ . . . forces in pursuit of a common purpose," that is, when they lack "unity of command."[25] Necessary to achieve unity of command is "unity of effort," also known as "unity of direction,"[26] a principal that can be expressed as "one head and one plan for a group of activities having the same objective."[27]

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[21] HENRI FAYOL, GENERAL AND INDUSTRIAL MANAGEMENT 21 (Constance Storrs trans., 2d prtg. 1955) (1916).
[22] *Id.*
[23] *See* Parker v. Levy, 417 U.S. 733, 755 (1974) ("An Army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." (quoting *In re* Grimley, 137 U.S. 147, 153 (1890))); United States v. New, 55 M.J. 95, 111 (C.A.A.F. 2001) ("To persevere and prevail amidst the danger, death, destruction, and chaos of armed combat, military personnel must develop the disciplined habit of prompt obedience to the directives of their superiors."); McCall v. McDowell, 15 F. Cas. 1235, 1240 (C.C.D. Cal. 1867) ("The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army.").
[24] *Officer Personnel Act of 1947: Hearing on H.R. 3830 Before the S. Comm. on Armed Servs.*, 80th Cong. 19 (1947) [hereinafter *Hearing on H.R. 3830*] (statement of General Dwight D. Eisenhower).
[25] JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at GL-17 (17 Jan. 2017) (C1, 22 Oct. 2018) [hereinafter JP 3-0] (defining "unity of command" as "[t]he operation of all forces under a single responsible commander who has the requisite authority to direct and employ those forces in pursuit of a common purpose.").
[26] *Id.* at A-2 to A-3 ("Unity of effort—the coordination and cooperation toward common objectives, even if the participants are not necessarily part of the same command or organization—is the product of successful unified action."); FAYOL, *supra* note 21, at 25–26 ("Unity of direction (one head one plan) must not be confused with unity of command (one employee to have orders from one superior only) . . . . Unity of command does not exist without unity of direction, but does not flow from it.").
[27] FAYOL, *supra* note 21, at 25.

The UCMJ recognizes commanders' formal authority to direct the employment of force towards that single mission objective, towards "winning the war,"[28] and ensures the prosecutor's objective to "seek justice" remains subordinate thereto. In particular, the UCMJ vests in commanders, rather than lawyers, authority over offenses that directly bear upon the ability to exact obedience in military operations, what can be referred to as "operational offenses."[29] These offenses, for the most part, are uniquely military in nature and primarily classified by MJIA as "excluded offenses" that are precluded from the reform, including Articles 83 through 117, 133, and 134, UCMJ,[30] and any alleged conspiracy, solicitation, or attempt to violate these articles.[31]

There is a category of operational offenses, however, which MJIA does not exclude from the reform and which governs the application of lethal force on the battlefield: law of war targeting offenses.[32] These offenses are not contained in the UCMJ because, under long-standing U.S. policy, "[o]rdinarily persons subject to the UCMJ should be charged with a specific violation of the UCMJ rather than a violation of the law of war."[33]

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[28] *Hearing on H.R. 3830*, *supra* note 24 (statement of General Dwight D. Eisenhower).

[29] Eugene R. Fidell, *U.S. Military Justice and "Operational Mishaps": A Primer*, JUST SEC. (Apr. 24, 2017), https://www.justsecurity.org/40208/u-s-military-justice-operational-mishaps-primer (defining "operational offenses" as "acts or omissions that are committed in the course of an approved and by hypothesis approvable military mission.").

[30] "Excluded offenses" are primarily those contained in Articles 83 through 117, 133, and 134, UCMJ, and are, for the most part, uniquely military in nature. These articles cover offenses such as malingering, missing movement, jumping from a vessel, dereliction of duty, failure to obey a lawful order, mutiny, sedition, unlawful detention, misbehavior before the enemy, subordinate compelling surrender, improper use of a countersign, forcing a safeguard, spying, espionage, aiding the enemy, damage or loss of military property, waste or destruction of non-military property, endangerment offenses, riot, breach of peace, conduct unbecoming an officer, and conduct which is service-discrediting or prejudicial to good order and discipline. *See generally* 10 U.S.C. §§ 883–917, 933–934.

[31] 166 CONG. REC. S3413 (daily ed. June 25, 2020) (proposing so in section 539A(c)(4)–(6)).

[32] Law of war targeting offenses punish violations of the following duties imposed by the laws of war: "target identification," "specialized warnings," "generalized warnings," "feasible precautions," "principle of proportionality," and "command responsibility." OFF. OF THE JUDGE ADVOC. GEN., U.S. DEP'T OF ARMY, TARGETING AND THE LAW OF WAR: ADMINISTRATIVE INVESTIGATIONS & CRIMINAL LAW SUPPLEMENT tbl.1 (2017) [hereinafter TARGETING SUPPLEMENT].

[33] MCM, *supra* note 3, R.C.M. 307(c)(2) discussion.

Nonetheless, targeting offenses are primarily punished under the "covered offenses" that MJIA would remove command authority to prosecute.[34]

Regarding the removal of these "covered offenses" from command authority, MJIA would compromise the ability of commanders "to control" military operations with consequences its drafters surely did not intend—impunity for serious crime, including sexual assaults, and a military less capable of overcoming its adversaries. Part II of this article explains how the law punishes commanders for failure "to control" their subordinates, how they are presumed to have caused subordinate crimes occurring after they "knew" or "should have known" of them, but only to the extent of their authority to exercise that control. Part III demonstrates that by eliminating prosecutorial authority as a means to exercise that control, MJIA fosters impunity for serious crimes, including sexual assaults, while the status quo reduces criminality, provided the duty "to control" is enforced. Part IV shifts focus to law of war targeting offenses, explaining why commanders are most qualified to assess compliance with these norms, and how MJIA vests lawyers with prosecutorial discretion over them. In so doing, Part V explains how commanders and lawyers would share prosecutorial authority over norms governing the same lethal targeting operation, that their divergent objectives would compromise "unity of effort" in those operations, and that "trouble" would therefore result.

## II. The Duty to Control Subordinates—Responsibility of the Commander

### A. The Four Command Responsibility Obligations

"Trouble" abounds in military operations, and the law therefore attempts to protect against it by obligating commanders to exact obedience from their subordinates.[35] In particular, on the battlefield the law of war obligates commanders to take "reasonable measures . . . [to] control their

[34] *See* discussion *infra* Part IV (explaining that law of war targeting offenses are enforced under Articles 109, 118, 119, 128, and 134, UCMJ, and how MJIA impacts their enforcement).

[35] This article uses the terms "duty," "obligation," and "obligating" interchangeably. *See Duty*, BLACK'S LAW DICTIONARY (6th ed. 1990) ("An *obligation*, recognized by the law, requiring [the] actor to conform to certain standard[s] of conduct for the protection of others against unreasonable risk." (emphasis added)).

subordinates,"[36] a duty derived from treaty law regulating the conduct of hostilities[37] and enforceable by means of the UCMJ.[38] Federal courts, however, in recognizing the obligation, have determined it also applies outside of hostilities.[39] Federal statutes similarly reflect a customary obligation of commanders in all situations to prevent, discipline, and discover unlawful subordinate behavior,[40] a dereliction of which is also punishable under the UCMJ.[41] Other U.S. and international sources have extrapolated the duty "to control" as imposing obligations nearly identical to those in Federal statute that require commanders to take "necessary and reasonable" measures in relation to their subordinates as follows:

(1) Prevent unlawful harm to persons and property;[42]

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[36] *In re* Yamashita, 327 U.S. 1, 15 (1946) ("[The] purpose [of the law of war] to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take *reasonable measures* for their protection. Hence the law of war presupposes that its violation is to be avoided through the *control* of the operations of war by commanders who are to some extent responsible for their subordinates." (emphasis added)).

[37] *Id.* at 15–16.

[38] A duty enforceable under the UCMJ may be imposed by "the law of war, written and customary," United States v. Payne, 40 C.M.R. 516, 519 (A.C.M.R. 1969), as well as "by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the Service." MCM, *supra* note 3, pt. IV, ¶ 18.c.(3)(a). While the UCMJ has no specific provision that would punish a commander's violation of the duty to control, such violation would be punishable under Article 134, UCMJ, which criminalizes "all disorders and neglects to the prejudice of good order and discipline in the armed forces," UCMJ art. 134 (2016), including acts or omissions that violate "customs of the Service." MCM, *supra* note 3, pt. IV, ¶ 91.c.(2)(b) ("Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them.").

[39] Hilao v. Estate of Marcos, 103 F.3d 767, 777 (9th Cir. 1996) (stating the command responsibility doctrine applies not only in "wartime," but also in "peacetime"); Mamani v. Berzaín, 309 F. Supp. 3d 1274, 1305 (S.D. Fla. 2018).

[40] 10 U.S.C. §§ 3583, 8583, 5947 (requiring "commanding officers" and "others in authority" to be "vigilant in inspecting the conduct" of persons placed under their authority and "to guard against and suppress all dissolute and immoral practices, and to correct . . . all persons who are guilty of them.").

[41] *See supra* note 38 and accompanying text (explaining that a violation of "customs of the Service" may be prosecuted under Article 134, UCMJ).

[42] TARGETING SUPPLEMENT, *supra* note 32 ("Take 'necessary and reasonable measures' to prevent subordinates from unlawfully harming persons and property protected by the Law of War."); U.S. DEP'T OF ARMY, FIELD MANUAL 6-27, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE para. 8-31 (7 Aug. 2019) (C, 20 Sept. 2019) [hereinafter FM 6-27] (stating "commanders or certain civilian superiors with similar authorities" are responsible if they "failed to take 'necessary and reasonable' measures to prevent or repress those violations."); Statute of the International Tribunal for the Prosecution of Persons

(2) Discipline subordinates who unlawfully harm persons and property;[43]

(3) Diligently monitor subordinate conduct;[44] and

(4) Inquire into allegations that subordinates unlawfully harmed persons or property.[45]

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Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 art. 7(3), May 25 1993, 32 I.L.M. 1192, 1194 [hereinafter ICTY Statute] (stating in the context of subordinate law of war violations, a commander must "take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."); Statute of the International Tribunal for Rwanda art. 6(3), Nov. 8, 1994, 33 I.L.M. 1602, 1604–05 [hereinafter ICTR Statute] (stating in the context of subordinate law of war violations a commander must "take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."); Rome Statute of the International Criminal Court, 17 July 1998 art. 28(a)(i)–(ii), U.N. Doc. A/CONF.183/9 (2002) [hereinafter Rome Statute] ("That military commander . . . [must] take all necessary and reasonable measures within his or her power to prevent or repress their commission . . . .").

[43] *See* FM 6-27, *supra* note 42 (stating "commanders" have a duty to "punish"); ICTY Statute, *supra* note 42 (articulating that a "superior" has a duty "to punish"); ICTR Statute, *supra* note 42 (articulating that a "superior" has a duty "to punish"); Rome Statute, *supra* note 42, art. 28(a)(ii) (stating the "commander" has a duty "to repress" subordinate crimes).

[44] TARGETING SUPPLEMENT, *supra* note 32 ("Take reasonable steps to monitor subordinate compliance with the Law of War."); Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 433 (June 15, 2009) (stating that a commander has an "active duty . . . to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime." (citation omitted)); United States v. List (The Hostage Case), Case No. 7, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1271 (Feb. 19, 1948) ("Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports . . . constitutes a *dereliction of duty* which he cannot use in his own behalf." (emphasis added)). *Editor's Note* in Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7, 10 (1972) (quoting the instruction provided to Captain Ernest Medina's panel during his court-martial for the "My Lai massacre:" "[A] military superior in command is responsible . . . to make certain the proper performance by his subordinates of their duties as assigned by him.").

[45] MCM, *supra* note 3, R.C.M. 303 ("Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses."); Rome Statute, *supra* note 42, art. 28(a)(ii) (requiring commanders to report law of war violations "to the competent authorities for investigation and prosecution."). *See* OFF. OF GEN. COUNS., DEP'T OF DEF., DIR. 2311.01, DOD LAW OF WAR PROGRAM 15 (2020) (defining a "reportable incident" as "[a]n incident that a unit

## B. The Elements of Command Responsibility

### *1. Reasonable Measures Required*

Understanding how MJIA impacts the enforcement of these obligations under the UCMJ first requires understanding how they are enforced outside the UCMJ context. In any context, the first step to assess a dereliction of a command responsibility obligation requires assessing whether the action was reasonable in the circumstances as they appeared at the time.[46] An alleged unlawful act or omission is subjectively reasonable if undertaken in good faith, that is, if the commander "could honestly conclude" his or her behavior was lawful.[47] Such act or omission is unreasonable if done in bad faith,[48] if the accused acted with "actual knowledge" the act or omission contravened his or her duties.[49] If there is insufficient evidence of subjective unreasonableness, an alleged act or omission may still be objectively unreasonable if it violated the "*plain, known Rules*" superiors are expected to uphold.[50] "This may be demonstrated by regulations, training or operating manuals, customs of the Service, academic literature or testimony,

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commander or other responsible official determines, based on *credible information*, potentially involves: a war crime; other violations of the law of war; or conduct during military operations that would be a war crime if the military operations occurred in the context of an armed conflict" (emphasis added)).

[46] *See* MCM, *supra* note 3, pt. IV, ¶ 18.c.(3)(b) (articulating the objective and subjective reasonableness standards for assessing a negligent and willful dereliction of duty under Article 92, UCMJ); Prosecutor v. Gombo, Case No. ICC-01/05-01/08 A, Appeals Chamber Judgment, ¶ 170 (June 8, 2018) ("There is a very real risk, to be avoided in adjudication, of evaluating what a commander should have done with the benefit of hindsight. Simply juxtaposing the fact that certain crimes were committed by the subordinates of a commander with a list of measures which the commander could hypothetically have taken does not, in and of itself, show that the commander acted unreasonably at the time.").

[47] *See infra* notes 185–88 and accompanying text (discussing the application of subjective assessment in the context of operational norms).

[48] *See infra* notes 186–87 and accompanying text (discussing the "good faith" requirement in the context of operational norms).

[49] MCM, *supra* note 3, pt. IV, ¶ 18.c.(3)(b) (stating that a willful dereliction of duties requires the accused to have had "actual knowledge" of the obligation at issue). *See infra* notes 185–88 and accompanying text) (explaining in the context of discretionary duties that an accused has not acted in "good faith" when he or she acted with "actual knowledge" that the act in question violated a duty).

[50] *See infra* notes 180–83 and accompanying text (discussing the application of the objective assessment in the context of operational offenses).

testimony of persons who have held similar or superior positions, or similar evidence."[51]

*2. Assessing a Dereliction*

If the alleged act or omission was either subjectively or objectively unreasonable, liability may ensue if that act or omission was the product of a deliberate dereliction of duty or of culpable neglect.[52] In the case of culpable neglect, the dereliction must be willful[53] or, at a minimum, culpably negligent if done in violation of the laws of war.[54] In the case of deliberate omissions, the dereliction must, at a minimum, be willful and with intent to cause the resulting harm.[55] The elements of each will be discussed in turn.

*a. Culpable Neglects*

Regarding culpable neglects, liability is established when the commander's alleged dereliction satisfies the "elements of proof" generally applicable in military law in establishing a neglect of duties.[56] Those elements are as follows:

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[51] MCM, *supra* note 3, pt. IV, ¶ 18.c.(3)(b) (discussing the knowledge requirement in the context of establishing a dereliction of duty under Article 92, UCMJ).

[52] Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Judgment, ¶ 35 (July 3, 2003) ("A military commander . . . may . . . be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or wilfully [sic] disregarding them."); UNITED NATIONS WAR CRIMES COMM'N, 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS 60 (1949) ("In order to succeed the prosecution must prove . . . that war crimes were committed as a result of the accused's failure to discharge his duties as a commander, either by deliberately failing in his duties or by culpably or wilfully [sic] disregarding them, not caring whether this resulted in the commission of a war crime or not.").

[53] *Bagilishema*, Case No. ICTR-95-1A-A, Judgment, ¶ 35; UNITED NATIONS WAR CRIMES COMM'N, *supra* note 52; *see* MCM, *supra* note 3, pt. IV, ¶ 18.c.(3)(c) ("'Willfully' means intentionally. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act.").

[54] *See infra* notes 118–19 and accompanying text (explaining "culpable negligence" is the lowest level of *mens rea* required to establish a law of war violation).

[55] *See Bagilishema*, Case No. ICTR-95-1A-A, Judgment, ¶ 35; UNITED NATIONS WAR CRIMES COMM'N, *supra* note 52.

[56] TARGETING SUPPLEMENT, *supra* note 32, ¶ 9(a)–(b) (citing Article 92, UCMJ (dereliction of duty), in articulating the "elements of proof" to establish a law of war violation, including a command responsibility dereliction).

(1) That the accused had a certain duty;[57]

(2) That the accused by willfulness or [culpable] negligence was derelict in the performance of that duty; and

(3) That such dereliction of duty resulted in unlawful harm to persons or property.[58]

*b. Deliberate Omissions*

Regarding deliberate violations, liability is established by showing the accused's act or omission establishes principal liability,[59] a type of liability that can be established when there is a deliberate omission accompanied by an intent to cause any resulting harm.[60] The required elements to establish principal liability for a command responsibility dereliction are as follows:

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[57] *Id.* ¶ 4(c) ("Whether a service member is bound by a particular . . . duty will depend upon whether he or she has authority to exercise the discretion implied by the . . . duty in question. For example, . . . the duty to conduct proportionate attacks will 'normally' only arise if the service member 'has authority over military operations.'").

[58] Note that "harm" is not limited to physical harm to persons and property, but also extends to a violation of a legal protection afforded to persons and property. For instance, "harm" occurs when there is a "taking of hostages" prohibited by the laws of war, even when the victims suffer no physical harm. Geneva Conventions Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; *Injury*, BLACK'S LAW DICTIONARY (7th ed. 1999) (defining "injury" as synonymous with "harm or damage" which occurs when there is a "violation of another's legal right, for which the law provides a remedy"). Similarly, "extensive . . . appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" in violation of the law of war also amounts to harm even if no physical harm resulted to the property. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I].

[59] 10 U.S.C. § 950q ("[A] superior commander who, with regard to acts punishable by this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof, is a *principal*." (emphasis added)).

[60] *See, e.g.*, MCM, *supra* note 3, pt. IV, ¶ 1.b.(2)(b)(ii) ("If a person (for example, a security guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime if such a noninterference is *intended to and does operate as an aid or encouragement to the actual perpetrator*." (emphasis added)).

(1) That the accused had certain duties to interfere in the commission of an unlawful act;[61]

(2) That the accused did not perform those duties;[62]

(3) That unlawful harm occurred;[63]

(4) That such dereliction was intended to operate as an aid or encouragement to the actual perpetrator;[64] and

(5) That such dereliction did operate as an aide or encouragement to the actual perpetrator.[65]

*3. The Causation Element*

*a. Physical Harm Not Required; Causation Not Always Relevant*

Note that under either of the aforementioned theories, there is a causation of "harm" element. Causation is generally established in criminal law by showing an alleged criminal act was the "but for" cause of the

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[61] *See supra* notes 42–45 and accompanying text (discussing the four command responsibility obligations); MCM, *supra* note 3, pt. IV, ¶ 1.b.(2)(b) (explaining principal liability under Article 77, UCMJ). *See also* United States v. Simmons, 63 M.J. 89, 94 (C.A.A.F. 2006) (Effron, J., concurring) ("The crime of aiding and abetting [under Article 77, UCMJ,] through nonperformance of a duty has four components: (1) duty (the accused has "a duty to act"); (2) inaction (the accused "has a duty to interfere in the commission of an offense, but does not interfere"); (3) intent (the "noninterference is intended to . . . operate as an aid or encouragement to the actual perpetrator" of the underlying crime); and (4) effect on the perpetrator (the "noninterference . . . does operate as an aid or encouragement to the actual perpetrator")." (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 1.b.(2)(b) (2005))).

[62] MCM, *supra* note 3, pt. IV, ¶ 1.b.(2)(b) (explaining that to establish principal liability for a failure to act under Article 77, UCMJ, it must be proven that the accused "has a duty to interfere in the commission of an offense, but does not interfere . . .").

[63] Principal liability theory presupposes that an actual perpetrator committed an underlying crime, and this element ensures that the underlying crime is established. *See, e.g.*, *id.* ("If a person . . . has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime . . . ."). *See also supra* note 58 and accompanying text (explaining that unlawful "harm" includes not just physical harm to persons and property, but also harm to a legal protection afforded to such persons and property).

[64] MCM, *supra* note 3, pt. IV, ¶ 1.b.(2)(b) (stating that principal liability for a failure to act requires establishment that the "noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.").

[65] *Id.*

resulting harm.[66] Causation, however, has particular application in the command responsibility context that requires further clarification. First, when the alleged dereliction is that the commander failed to discipline the subordinate, causation of harm is not required to establish guilt. This is because the obligation to discipline arises after the subordinate has committed the unlawful harm; therefore, it is not possible for a commander's dereliction to have caused that harm.[67] On the other hand, if the commander fails to discipline the subordinate, and that failure causes further unlawful harm, the commander can be held liable for this latter harm.[68]

*b. Rebuttable Presumption of Causation*

Demonstrating how that commander is held liable for this latter harm requires further explanation. While causation is required in the context of command responsibility,[69] any causation analysis involving omissions requires a "highly speculative" inquiry as to "how a human being would have reacted if the precaution [in question] had been taken."[70] Consequently,

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[66] *See* Burrage v. United States, 571 U.S. 204, 211 (2014) (stating that "but for" causation represents "*the minimum* requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result." (quoting MODEL PENAL CODE § 2.03 explanatory note (AM. L. INST. 2019))); United States v. Bailey, 75 M.J. 527, 532–33 (A. Ct. Crim. App. 2015) (stating the proximate cause and intervening cause instructions in the Military Judges' Benchbook sufficiently address the "but for" causation requirement the Supreme Court addressed in *Burrage*); Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 399 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (stating in the context of commander's duty to prevent, "but for" causation establishes the "necessary causal nexus" between the crimes committed by subordinates and the superior's failure to act). *But see* Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 211 (Mar. 21, 2016) (stating that in the context of command responsibility, there is no requirement under the Statute of the International Criminal Court to show "'but for' causation between the commander's omission and the crimes committed." (citation omitted)).

[67] Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Judgment, ¶ 188 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006) ("[N]o causal link can possibly exist between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator of that same offence." (citation omitted)).

[68] *See id.* ¶ 133 ("[T]he Chamber is of the opinion that by failing to take [necessary and reasonable] measures to punish crimes of which he has knowledge, the superior has reason to know that there is a real and reasonable risk those unlawful acts might recur.").

[69] *Gombo*, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 211 ("It is a core principle of criminal law that a person should not be found individually criminally responsible for a crime in the absence of some form of personal nexus to it.").

[70] David A. Fischer, *Causation in Fact in Omission Cases*, 1992 UTAH L. REV. 1335, 1343 (1992).

"[a] court's resolution of these post-hoc-speculative proof problems actually is a question of policy" that is sometimes resolved by establishing "a rebuttable presumption that the omitted precaution would have prevented the harm."[71] This is precisely the approach that the U.S. Congress has taken in the Military Commissions Act[72] and that both U.S. Federal courts and international tribunals have endorsed in the context of command responsibility.[73]

The logic underpinning this approach is that commanders are presumptively in "effective control" of their subordinates, and "but for" their dereliction in properly executing that control, the harm would not have occurred.[74] Therefore, once the commander-subordinate relationship is established, the presumption of causation triggers, though it can be rebutted one of two ways. First, the presumption is rebutted if the commander proves there is no casual "nexus" between the dereliction and the harm caused,[75]

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[71] *Id.* at 1344.

[72] *See* 10 U.S.C. § 950q (establishing command responsibility liability for foreign commanders without requiring a causation element).

[73] In particular, those courts and tribunals agree that proof an accused was the commander of the subordinate who caused the unlawful harm triggers the presumption. Ford *ex rel.* Estate of Ford v. Garcia, 289 F.3d 1283, 1299 (11th Cir. 2002) (stating with respect to a commander's responsibility for subordinate crimes under the Torture Victims Protection Act that "causation is presumed to be the result of their failure to prevent those individual crimes."); Chavez v. Carranza, 559 F.3d 486, 499 (6th Cir. 2009) (following *Ford*). *Cf.* Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Judgment, ¶ 193 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006) ("It is presumed that there is such a [casual] nexus between the superior's omission and those crimes. The Prosecution therefore has no duty to establish evidence of that nexus. Instead, the Accused must disprove it."). This approach is also consistent with how U.S. war crime tribunals have applied the doctrine. *E.g.*, United States v. Toyoda, Transcript, at 5005–06 (Int'l Mil. Trib. for the Far East Sept. 6, 1949), https://digital.lib.usu.edu/digital/collection/p16944coll30/id/9 (listing the elements of command responsibility without causation).

[74] *See* Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 399 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) ("This is not to say that, conceptually, the principle of causality [in the command responsibility context] is without application . . . . In this situation, the superior may be considered to be causally linked to the offences, in that, but for his failure to fulfil his duty to act, the acts of his subordinates would not have been committed.").

[75] While a "casual nexus" is presumed in the context of command responsibility, tribunals have not defined what that causal nexus entails or how it is rebutted. *Hadžihasanović*, Case No. IT-01-47-T, Judgment, ¶ 193 (stating "the Accused must disprove" the casual "nexus" in the context of superior responsibility); Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 211 (Mar. 21, 2016) ("It is a core principle of criminal law that a person should not be found individually criminally responsible for a crime in the absence of some form of personal nexus to it. . . . [However,

which is established for U.S. commanders by showing the omission did not "operate as an aide or encouragement to the actual perpetrator."[76] Second, it is rebutted if the accused lacked the "material ability" to take the necessary measures alleged.[77]

*4. The Duty Element—Material Ability Required*

The phrase "material ability" here refers to the "authority" of the commander to have taken a "necessary" omitted action, and is requisite to establish the commander had a duty to act to prevent, discipline, monitor, or inquire.[78] Moreover, even if the commander had the "material ability" to take the omitted measure alleged, to be punishable, that measure must have been "necessary," that is, a measure in the circumstances which the commander had no discretion but to affirmatively exercise.[79]

The first step in assessing "material ability," therefore, is to ask whether the accused possessed the requisite command authority over the

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the law] does not require the establishment of 'but for' causation between the commander's omission and the crimes committed." (citation omitted)).

[76] While the Military Commission Act's principal liability provision presumes causation, *see* 10 U.S.C. § 950q, the UCMJ's principal liability requires a causal nexus between the omission and the resulting harm, MCM, *supra* note 3, pt. IV, ¶ 1.b.(2)(b). That causal nexus is established under the UCMJ if the alleged omission "operated as an aide or encouragement to the actual perpetrator." MCM, *supra* note 3, pt. IV, ¶ 1.b.(2)(b). Consequently, this degree of causation can be deduced as the "causal nexus" applicable to U.S. commanders in the command responsibility context.

[77] *Delalić*, Case No. IT-96-21-T, Judgment, ¶ 378 ("[I]t is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have . . . the material ability to prevent and punish the commission of these offences."); *see* Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶ 588 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016) ("[N]ecessary measures can include reporting the matter to competent authorities where this report is likely to trigger an investigation or initiate disciplinary proceedings, carrying out an effective investigation to establish the facts, issuing specific orders prohibiting or stopping the criminal activities and securing implementation of those orders, protesting or criticising criminal action and taking disciplinary action against the commission of crimes." (citations omitted)).

[78] Prosecutor v. Gombo, Case No. ICC-01/05-01/08 A, Appeals Chamber Judgment, ¶ 5 (June 8, 2018) ("The scope of the duty to take 'all necessary and reasonable measures' is intrinsically connected to the extent of a commander's material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities for investigation and prosecution. Indeed, a commander cannot be blamed for not having done something he or she had no power to do.")

[79] *See infra* notes 172–77 (discussing discretionary duties and "errors in judgment" in the context of operational offenses).

perpetrator.[80] This is shown by establishing the accused had "effective control" over the perpetrator.[81] However, *de jure* command authority is *prima facie* evidence of effective control,[82] is shown through written orders demonstrating the superior-subordinate relationship,[83] and extends to subordinates of units for which that commander formally assumes administrative control.[84]

## C. Responsibility After the Military Justice Improvement Act

### *1. "Actual Knowledge" Obligations—Disciplining and Preventing*

When "effective control" is established, the actions commanders must take depend upon their knowledge of unlawful subordinate behavior. For example, when circumstantial evidence demonstrates they had "actual knowledge" their subordinates violated the law,[85] they must have taken

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[80] Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 256 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) ("The concept of effective control over a subordinate—in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised—is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of [establishing criminal liability]."); TARGETING SUPPLEMENT, *supra* note 32, ¶ 4(c) ("[C]ommand responsibility cannot arise unless the service member's military duties provide the authority to exercise command discretion, that is, he or she must be a commander.").

[81] *See infra* notes 159–65 and accompanying text (discussing responsibility of superiors who do not possess *de jure* command authority); *Delalić*, Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 378; Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶ 378 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005).

[82] Mamani v. Berzaín, 309 F. Supp. 3d 1274, 1306 (S.D. Fla. 2018).

[83] *Id.* at 1306 n.35 ("A *de jure* superior-subordinate relationship exists for purposes of the command responsibility doctrine when 'the superior has been appointed, elected or otherwise assigned to a position of authority *for the purpose of commanding or leading* other persons who are thereby to be legally considered his subordinates.' A formal title or position of authority is insufficient to establish a superior-subordinate relationship; rather, 'any inference concerning the relationship of subordination' must be 'accompanied by the powers and authority normally attached to such a role.' A defendant in a position of *de jure* authority exercises effective control over his subordinates when he 'was effectively able to enforce his legal authority through the exercise of his legal powers over the perpetrators.'" (citations omitted)).

[84] *See Delalić*, Case No. IT-96-21-T, ¶ 373 ("An officer with only operational and not administrative authority does not have formal authority to take administrative action to uphold discipline.").

[85] *Compare* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 7-3 n.3 (29 Feb. 2020) [hereinafter JBB] (explaining that circumstantial evidence of knowledge can be inferred from "all relevant facts and circumstances"), *with* Preparatory Comm'n for the Int'l Crim. Ct., Finalized Draft Text of the Elements of Crimes, ¶ 3, U.N. Doc.

"necessary" measures within their "material ability" to "discipline" them and "prevent" further harm.[86]

As both the duties to "discipline" and "prevent" bear upon commanders' exercise of disciplinary authority,[87] ascertaining MJIA's impact on how they are applied requires understanding the "material ability" and discretion at each U.S. command echelon to exercise that authority. The UCMJ empowers only senior commanders—those with special court-martial convening authority (SPCMCA) and general court-martial convening authority (GCMCA)—to prosecute cases at a criminal forum,[88] that is, at a special or general court-martial.[89] Non-criminal disposition is also available to these and lower echelons, including punitive options such as summary courts-martial or non-judicial punishment[90] and non-punitive options

PCNICC/2000/1/Add.2 (Nov. 2, 2000) ("Existence of intent and knowledge can be inferred from relevant facts and circumstances.").

[86] *See supra* note 43 and accompanying text (explaining the commander's duty to discipline). *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 501 (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10] ("The commander is . . . responsible if he has actual knowledge . . . that troops . . . subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.").

[87] While perhaps not intuitive, the duty to prevent harm is violated if the commander takes no disciplinary action against unlawful acts and further harm results. Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Judgment, ¶ 133 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006) ("[T]he Chamber is of the opinion that by failing to take [necessary and reasonable] measures to punish crimes of which he has knowledge, the superior has reason to know that there is a real and reasonable risk those unlawful acts might recur." (citation omitted)).

[88] For example, "the commanding officer of a brigade, regiment, detached battalion" and "the commanding officer of a district, garrison, fort, camp, station, [or] Air Force base" have special courts-martial convening authority (SPCMCA) unless otherwise specified by competent authority. UCMJ art. 23(a)(2)–(3) (1950). Further, the President of the United States, the Secretary of Defense, and "the commanding officer of a unified or specified combatant command," among others, have general courts-martial convening authority (GCMCA). *Id.* art. 22(a)(1)–(3). While commanders serving as a GCMCA can refer a case to a SPCM, a SPCMCA cannot refer a case to a GCM. *See* MCM, *supra* note 3, R.C.M. 504(b)(2) discussion; *see also supra* note 3 (discussing generally what offenses can be adjudicated at a special and general courts-martial respectively).

[89] *See supra* note 3 and accompanying text (explaining the difference between SPCMs and GCMs).

[90] *See supra* note 8 and accompanying text (explaining SCM and NJP procedures).

ranging from no action whatsoever, to adverse counseling, reprimand, and corrective training.[91]

While commanders have various options available to address subordinate crime, their discretion to act within their "material ability" is informed by policy, regulation, statute, and, if enacted, MJIA.[92] Regarding sex offenses, for example, Army regulation and Federal statute withhold from GCMCA commanders discretion to dispose of these offenses via any means other than referral to court-martial.[93] These same commanders also lack discretion to dispose of grave breaches of the 1949 Geneva Conventions through any means other than courts-martial, as the conventions require those breaches be prosecuted at trial.[94] A disposition

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[91] MCM, *supra* note 3, R.C.M. 306(c)(1) ("A commander may decide to take no action on an offense. If charges have been preferred, they may be dismissed."); U.S. DEP'T OF ARMY, INTERIM REG. 27-10, MILITARY JUSTICE para. 3-3 (1 Jan. 2019) [hereinafter AR 27-10] (explaining the "[r]elationship of nonjudicial punishment to nonpunitive measures").

[92] *See, e.g.*, MCM, *supra* note 3, R.C.M. 306(a) ("Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense. A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.").

[93] AR 27-10, *supra* note 91, para. 5-28*c*(5)*(a)* (requiring the GCMCA to forward to the Secretary of the Army for review any case where the staff judge advocate recommended a sex-related offense be referred to trial and the GCMCA disagrees); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No 113-66, § 1744(d), 127 Stat. 672, 981 (2013) ("In any case where a staff judge advocate . . . recommends that charges of a sex-related offense should not be referred [to] trial by court-martial and the convening authority decides not to refer any charges to a court-martial, the convening authority shall forward the case file for review to the next superior commander authorized to exercise general court-martial convening authority.").

[94] The 1949 Geneva Conventions specify that when a grave breach has occurred, the High Contracting Parties are obligated to "bring such persons . . . before its own courts" or "may . . . hand such persons over for trial to another High Contracting Party concerned." GC I, *supra* note 58, art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; GC IV, *supra* note 58, art. 146; *see* OFF. OF GEN. COUNS., DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL para. 18.9.3 (2015) [hereinafter DOD LAW OF WAR MANUAL] ("Each Party to the 1949 Geneva Conventions shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."). The 1949 Geneva Conventions also specify that when any other breach of those conventions occurs, the High Contracting Parties are obligated to take "measures necessary

contrary to these withholdings could serve as *prima facie* evidence of a crime, one which MJIA would abolish. That is, the commander failed to take a necessary measure to "discipline" or "prevent" by not referring allegations of sexual assault or grave breaches to court-martial proceedings.[95]

Below the GCMCA level, MJIA similarly would curtail commander responsibility for serious offenses. First, note that commanders below the SPCMCA echelon already lack authority to dispose of sexually violent crimes.[96] Further note that GCMCAs "nearly universally" by internal command policy withhold from subordinate commanders the "material ability" to dispose of serious offenses, such as those that involve "death or serious injury."[97] As a result, below the SPCMCA echelon, commanders "nearly universally" lack independent authority to take any action other than the initiation of court-martial proceedings for sexual assaults and those cases involving death or serious injury.[98] Consequently, at the company command echelon, where initial disposition decisions are generally made,[99] an action

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for the suppression" of those breaches. GC I, *supra* note 58, art. 49; GC II, *supra*, art. 50; GC III, *supra*, art. 129; GC IV, *supra* note 58, art. 146. Those actions could include "a wide range of measures, such as the promulgation or revision of policies and regulations, administrative or corrective measures, or retraining of personnel." DOD LAW OF WAR MANUAL, *supra*, para. 18.9.3.3.

[95] *See* Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶ 588 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24 2016).

[96] U.S. DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROCEDURES 58 (Mar. 28, 2013) (C4, Sept. 11, 2020) ("[T]he initial disposition authority is withheld from all commanders within the Department of Defense who do not possess at least special court-martial convening authority and who are not in the grade of 0-6 (i.e., colonel or Navy captain) or higher, with respect to the alleged offenses of rape, sexual assault, and forcible sodomy; all attempts to commit such offenses, in violation of Articles 120, 125, and 80 of the UCMJ . . . .").

[97] In the U.S. military, commanders who are GCMCAs "nearly universally" withhold authority from lower echelon commanders to dispose of serious crimes, including those involving "death or serious injury." Brigadier General Charles Pede, *Guest Post: BG Chuck Pede's Response to Gene Fidell's Essay on Operational Mishaps and Military Justice*, LAWFIRE (May 31, 2017), https://sites.duke.edu/lawfire/2017/05/31/guest-post-bg-chuck-pedes-response-to-gene-fidells-essay-on-operational-mishaps-and-military-justice ("General Officer level commanders nearly universally withhold prosecutorial authority from lower level commanders for incidents involving death or serious injury . . . .").

[98] Withholding policies do not limit the authority of lower echelon commands to initiate disciplinary proceedings such as courts-martial charges that can be disposed of by the higher echelon commander. *See* MCM, *supra* note 3, R.C.M. 306(a).

[99] While each command echelon has a responsibility to discipline a subordinate, absent extraordinary circumstances, the company commander takes initial action. *See, e.g.*, *id.* R.C.M. 401 discussion ("Ordinarily charges should be forwarded to the accused's immediate

other than the preferral of court-martial charges could serve as *prima facie* evidence of a crime, one that MJIA would abolish. That is, that the commander failed to take necessary measures to "prevent" or "discipline" in failing to initiate court-martial proceedings for sexual violence offenses and others involving death or serious injury.[100]

*2. Impact on the Constructive Knowledge Obligations—Monitoring and Inquiring*

Also abolished by MJIA therefore would be the crime of failing to ensure the initiation of court-martial proceedings for these same offenses when the commander "should have known" of the allegations. Specifically, while "actual knowledge" is required to trigger the obligations to "discipline" and "prevent," that knowledge may be imputed when there is a failure to "monitor" or "inquire."[101] The duties to "monitor" and "inquire" therefore are best understood as implied because they require discovery of information necessary to carry out the duties to "prevent" and "discipline."[102] In other words, accused commanders "should have known" of sexual violence allegations and others involving death or serious injury

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commander for initial consideration as to disposition. Each commander has independent discretion to determine how charges will be disposed of, except to the extent that the commander's authority has been withheld by superior competent authority."). While the company commander generally takes initial action, there is no technical requirement that he or she actually prefer court-martial charges. *Id.* R.C.M. 307(a) ("Any person subject to the UCMJ may prefer charges.").

[100] *See Karadžić*, Case No. IT-95-5/18-T, ¶ 588.

[101] *See* FM 27-10, *supra* note 86 ("The commander is also responsible if he . . . should have knowledge, through reports received by him or through other means, that troops . . . subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.").

[102] For example, it is well established in U.S. military jurisprudence that one may be held responsible for violating a principle duty if the accused remained negligently or intentionally ignorant of the information that would have triggered a duty to act. JBB, *supra* note 85, para. 5-11-2 n.1 ("[T]he (ignorance) (mistake) cannot be based on a negligent failure to discover the true facts."); *id.* para. 3-10-1(d) n.2 ("The accused may not . . . willfully and intentionally remain ignorant of a fact important and material to (his) (her) conduct in order to escape the consequences of criminal law. . . . Such deliberate avoidance of positive knowledge is the equivalent of actual knowledge.").

when they fail to take a "necessary" measure to "monitor" or "inquire,"[103] foreclosing a defense of ignorance arising from their own dereliction.[104]

Consider then the following scenario as to how a commander might be held liable on a "should have known" theory for failing to monitor. A regulation, for example, might limit discretion as to how to monitor subordinates by requiring a confinement facility commander to conduct periodic inspections of his or her facilities.[105] If a commander willfully or negligently did not comply with that regulation and, as a result, was unaware subordinates were committing sexual assaults against prisoners, that commander would have failed to take a "necessary" measure within his or her "material ability" to monitor.[106] Consequently, the accused commander here may be liable for his or her subordinates' crimes on the grounds he or she "should have known" of the allegations, foreclosing a defense of ignorance arising from his or her own dereliction.[107]

Next consider how "should have known" liability might be imposed when the commander failed to act within his or her "material ability" to inquire. First, note this duty is triggered whenever there is a "credible" allegation a crime was committed—in other words, when the commander "had reason to know" of subordinate crimes.[108] For serious crimes, such

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[103] 10 U.S.C. § 950q (holding foreign commanders responsible for their subordinates' crimes when they "should have known" or "had reason to know" of those crimes and failed to act).
[104] United States v. Pohl (The Pohl Case), Case No. 4, 5 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1055 (Nov. 3, 1947) ("Mummenthey's assertions that he did not know what was happening in the labor camps and enterprises under his jurisdiction does not exonerate him. It was his duty to know."); United States v. Weizsaecker (The Ministries Case), Case No. 11, 14 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1088 (Apr. 13, 1949) ("[I]t was his duty . . . to inquire into the treatment accorded to the foreign workers and to the prisoners of war whose employment in his war plants was . . . forbidden by the rules of warfare . . . .").
[105] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 7-2*a*(4) (15 June 2006) ("A person from a healthcare provider or medical technician designated by the commander of the supporting medical treatment facility, will perform a monthly inspection of the facility, to ensure that the operation of the facility is consistent with accepted preventive medicine standards. The facility commander or designated representative will be provided a copy of all such inspection results at the time of the inspection.").
[106] Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶ 588.
[107] JBB, *supra* note 85.
[108] The obligation to conduct an inquiry or investigation, or report the matter to competent authorities, only applies to an allegation that is "credible." In other words, rumor, innuendo, and specious allegations do not meet the threshold, but only those allegations "about whom some credible information exists to believe that the person committed a particular criminal

as sexual assault and death cases, Army regulation mandates only the U.S. Army Criminal Investigation Command (CID) investigate credible allegations of these crimes.[109] Commanders do not act within their "material ability" when they investigate the matter themselves or fail to report the matter to CID to investigate. If, as a result of such dereliction, the commander remains ignorant of actual knowledge the crime occurred, he or she cannot assert this ignorance in his or her own defense. [110] The accused commander "should have known" to initiate court-martial proceedings in such cases, foreclosing a defense of ignorance arising from his own dereliction.[111]

This is not to suggest that MJIA would eliminate a commander's responsibility on a "should have known" theory by removing authority to initiate courts-martial. It certainly would not, but it would lessen the seriousness of the commander's crime by lessening the authority the commander "should have known" to exercise. For example, while the pre-MJIA theory of liability might be that the accused "should have known" to initiate court-martial proceedings, the only post-MJIA theory for covered offenses would be that the commander "should have known" to report the allegation to the prosecutor.[112] The aggravating factor in the former case is

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offense." U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS 59 (1 Apr. 2016) [hereinafter AR 15-6] (defining a "suspect"); *see* OFF. OF GEN. COUNS., *supra* note 45, ¶ 3.2. (defining a "reportable incident" as "[a]n incident that a unit commander or other responsible official determines, based on *credible information*, potentially involves: a war crime; other violations of the law of war; or conduct during military operations that would be a war crime if the military operations occurred in the context of an armed conflict" (emphasis added)). When credible information does exist and the accused does not take appropriate action, international law justifies liability on the grounds the commander "had reason to know" of subordinate crimes. 10 U.S.C. § 950q (holding foreign commanders responsible for their subordinates' crimes when "had reason to know" of those crimes and failed to act); *Karadžić,* Case No. IT-95-5/18-T, Judgment, ¶ 586 ("To prove that the accused had reason to know of crimes committed, it is necessary to show that he had information available to him which would have put him on notice of unlawful acts committed or about to be committed by his subordinates. In this regard 'it must be established whether, in the circumstances of the case, he possessed information sufficiently alarming to justify further inquiry.' This information does not need to contain extensive or specific details about the unlawful acts committed or about to be committed." (citations omitted)).

[109] U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES app. B-1 (9 June 2014).

[110] JBB, *supra* note 85.

[111] *Id.*

[112] *See., e.g.*, Rome Statute, *supra* note 42, art. 28(a)(ii) (requiring commanders to report law of war violations "to the competent authorities for . . . prosecution").

that it was the commander's duty to ensure court-martial proceedings were initiated, while extenuating in the latter case is a prosecutor had independent discretion not to do so.[113]

*3. Reasonableness and Mens Rea*

In summary, commanders must always take "necessary" measures within their "material ability" to "monitor" or "inquire," and if they fail to do so, they risk prosecution for failing to "prevent" or "discipline" on the theory they "should have known" of their subordinates' crimes. Recall, however, liability does not ensue unless the omissions were unreasonable,[114] which must be assessed in reference to the limitations placed on their "material ability" by policy, regulation, and, if enacted, MJIA.[115]

Also note that liability on a "should have known" theory in U.S. military jurisprudence is normally established by showing simple negligence,[116] and there is support that "should have known" connotes the same meaning in command responsibility doctrine.[117] Nonetheless, for U.S. Service members, when that doctrine is enforced under the laws of war, the

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[113] *Criminal Justice Standards for the Prosecution Function*, *supra* note 19. *See also* Berger v. United States, 295 U.S. 78, 88 (1935).

[114] *See supra* notes 46–51 (explaining the application of subjective and objective reasonableness tests in the context of command responsibility).

[115] *See, e.g.*, *supra* notes 92–100 and accompanying text (discussing how withholdings of authority via regulation, statute, and policy impact a commander's "material ability" to investigate or discipline certain offenses).

[116] JBB, *supra* note 85 ("[T]he (ignorance) (mistake) cannot be based on a negligent failure to discover the true facts.").

[117] U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Records of the Meetings of the Committee of the Whole: 1st Meeting*, ¶ 67, U.N. Doc. A/CONF.183/C.1/SR.1 (Vol. II) (June 16, 1998) (quoting a U.S. representative for the proposition that a showing of mere negligence is sufficient to establish liability on a command responsibility theory); Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶¶ 313–33 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (asserting command responsibility is a negligence-based assessment); Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 429 (June 15, 2009) (asserting "the term 'should have known' is in fact a form of negligence."). *But see* Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶ 63 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004) (rejecting the trial chamber's determination that command responsibility is a negligence-based assessment).

minimum *mens rea* must be culpable negligence,[118] though simple negligence can be applied outside this context.[119]

## III. Command Prosecutorial Authority—A Safeguard Against Injustice

### A. A Redoubt Against Impunity

#### *1. Protecting Victims*

In any context, commanders, by virtue of their duty "to control," currently risk extensive criminal responsibility in the exercise of their prosecutorial authority, which MJIA would eliminate if it were to become

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[118] TARGETING SUPPLEMENT, *supra* note 32, at 7 & 20 n.57 (articulating the minimum *mens rea* for law of war violations as "gross" or "culpable" negligence); United States v. Schultz, 4 C.M.R. 104, 115 (C.M.A. 1952) (holding that in the context of the "law of war" that "[i]mposing criminal liability for less than culpable negligence . . . has not, as yet, been given universal acceptance by civilized nations."); JBB, *supra* note 85, para. 3-44-2(d) (defining culpable negligence as "a negligent act or failure to act accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others."); *see* United States v. Von Leeb (High Command Case), Case No. 12, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 543 (Oct. 27, 1948) ("There must be a personal dereliction [by the commander] . . . where his failure to properly supervise his subordinates constitutes criminal negligence on his part."); ANTONIO CASSESE ET AL., CASSESE'S INTERNATIONAL CRIMINAL LAW 53 (3d ed. 2013) ("It would seem that, given the intrinsic nature of international crimes . . . negligence operates as a standard of liability only when it reaches the threshold of gross or culpable negligence."); FM 6-27, *supra* note 42, para. 8-31 (stating command responsibility requires a showing of "criminal negligence").

[119] In the law of war context, the U.S. Army has indicated it follows the Model Penal Code approach to mistake defenses which would ensure the *mens rea* applicable thereto is never less than what is required by the laws of war: culpable negligence. *See* TARGETING SUPPLEMENT, *supra* note 32, at 21 n.61. In particular, the Model Penal Code provides that "[i]gnorance or mistake as to a matter of fact or law is a defense if the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense." MODEL PENAL CODE § 2.04(1)(a) (AM. L. INST. 2019). Under this approach, a mere simply negligent failure to obtain knowledge when demonstrated could in fact serve as a defense to an alleged willful or culpably negligent failure to prevent harm or discipline subordinates. *See id.* In fact, a culpably negligent failure to obtain information would be a defense to an alleged willful failure to prevent harm, though the accused here could be liable for that culpably negligent failure. *See id.* § 2.04(2) ("Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.").

law. Specifically, commanders currently violate the law when they fail to ensure initiation of court-martial proceedings when they "knew" or "should have known" of serious offenses committed by their subordinates, such as sexual assault, murder, and other crimes involving death or serious injury.[120] Further, GCMCA commanders also risk prosecution for not referring grave breaches and sexual assaults to court-martial.[121] If MJIA were enacted, these offenses, which are punished principally under Articles 118 through 130, UCMJ,[122] would become "covered offenses" under MJIA,[123] offenses over which prosecutors would hold prosecutorial discretion.[124] Unlike commanders, these prosecutors would risk no criminal liability if they failed to prosecute when they "knew" or "should have known" of these crimes, as their obligation is to "seek justice," that is, they have "discretion to not pursue criminal charges in appropriate circumstances."[125]

As a result, in the context of sexual violence crimes, fewer resources would be dedicated to prosecuting these cases. Consider that in fiscal year 2018, the acquittal rate for sexual violence offenses adjudicated at court-martial was approximately 70%.[126] This compares to an approximate 98%

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[120] *See supra* notes 85–111 and accompanying text (explaining when a commander can be held liable when he or she "knew" or "should have known" of his or her subordinates' crimes and failed to act).

[121] *See supra* notes 93–95 and accompanying text (explaining that GCMCA commanders lack authority to dispose of grave breaches and sexual assaults via any means other than referral to courts-martial).

[122] *See supra* notes 10–12 and accompanying text (explaining that "covered offenses" are primarily those contained in Articles 118 through 130, UCMJ); TARGETING SUPPLEMENT, *supra* note 32, ¶ 10(c) (specifying the grave breaches of "wilful [sic] killing" and "wilfully [sic] . . . causing serious injury to body or health" are punishable under Article 118, UCMJ (murder), and Article 128, UCMJ (assault), respectively).

[123] 166 CONG. REC. S3413 (daily ed. June 25, 2020) (stating in section 539A(b)–(c) that "covered offenses," with limited exception, generally exclude UCMJ "articles 83 through 117" and "articles 133 and 134" and a "conspiracy," "solicitation," and "attempt" to commit such offenses).

[124] *See, e.g.*, UCMJ arts. 118 (2016) (murder), 119 (1950) (involuntary manslaughter), 119a (2017) (death or injury of an unborn child), 119b (2019) (child endangerment), 120 (2017) (rape and sexual assault generally), 120b (2016) (rape and sexual assault of a child), 120c (2012) (other sexual misconduct), 121 (1950) (larceny and wrongful appropriation), 122 (2016) (robbery), 125 (2016) (kidnapping), 126 (2016) (arson; burning property with intent to defraud), 128 (2018) (assault), 128a (2016) (maiming), 129 (2016) (burglary; unlawful entry).

[125] *Criminal Justice Standards for the Prosecution Function*, *supra* note 19. *See also* Berger v. United States, 295 U.S. 78, 88 (1935).

[126] Chuck Mason, Att'y-Advisor, Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) 21 (Aug. 23,

conviction rate for those offenses prosecuted in Federal district court over the same period.[127] It follows that an independent military prosecutor, unhindered by safeguards that steer even the most difficult sexual violence cases towards trial,[128] would simply be more sparing with scarce prosecutorial resources. The likely result, therefore, of removing command prosecutorial authority is of little doubt: fewer resources dedicated to sexual violence prosecutions in the interest of "justice."[129]

"Justice" is a subjective concept, underscoring the risk that impunity for grave breaches could proliferate under its guise if MJIA were to become law. Consider a recent poll by the Clarion Project that revealed that 77% of respondents believe war crimes should not be prosecuted,[130] as well as the President's public criticism of such prosecutions[131] and the judge

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2019) (stating the acquittal rate of sex-related offenses "is about 70 percent"), https://dacipad.whs.mil/images/Public/05-Transcripts/20190823_DACIPAD_Transcript_Final.pdf.

[127] *U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2018*, U.S. CTS. 3, https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2018.pdf (last visited Nov. 7, 2020) (showing that of the 733 sexual abuse cases adjudicated in Federal district courts, 720 resulted in conviction at trial, which amounts to a conviction rate over 98%).

[128] The following safeguards which steer sexual assault cases towards prosecution would become obsolete if commanders had no authority to convene courts-martial. First, in any case where the staff judge advocate has recommended a case not be prosecuted, a commander can go against that advice and refer the case to trial. UCMJ art. 34 (2016). Second, in the U.S. Army, if the judge advocate recommends a case involving a sex-related offense be referred to trial and the commander disagrees, that commander would lack the authority to dismiss the case until the Secretary of the Army completes a review. AR 27-10, *supra* note 91, ¶ 5-28*c*(5)*(a)* ("In any case where a GCMCA decides not to refer any sex-related offense to trial by court-martial after receiving [a staff judge advocate's] Article 134 pretrial advice recommending that a sex related offense be referred to trial by court-martial, the GCMCA must forward the case to the Secretary of the Army for review."). Third, Federal law requires that even when the commander and staff judge advocate agree that a case involving a sex-related offense should not be prosecuted, the commander must forward the case "to the next superior commander authorized to exercise general court-martial convening authority." National Defense Authorization Act for Fiscal Year 2014, Pub. L. No 113-66, § 1744(d), 127 Stat. 672, 981 (2013).

[129] *Criminal Justice Standards for the Prosecution Function*, *supra* note 19.

[130] *Should We Prosecute for Overseas War Crimes? Poll Results*, CLARION PROJECT (Nov. 14, 2018), https://clarionproject.org/should-we-prosecute-for-overseas-war-crimes-poll-results.

[131] Roberta Rampton, *Trump Says Considering Pardons for Some U.S. Soldiers Accused of War Crimes*, REUTERS (May 24, 2019, 2:24 PM), https://www.reuters.com/article/us-usa-trump-pardons/trump-says-will-consider-pardons-for-us-soldiers-accused-of-war-crimes-idUSKCN1SU26W.

advocates who carried them out.[132] It would be unsurprising, therefore, if a military prosecutor determined that "justice" merited not prosecuting grave breaches, particularly when the victim was a captured combatant who fought for the Islamic State,[133] a terrorist organization that has committed among the most horrific crimes of our age.[134] It is precisely in these circumstances where a commander's responsibility is needed most; unlike prosecutors, commanders have no discretion to forego prosecuting such crime.[135] In other words, command authority over military justice serves as a redoubt against impunity, even when it is unpopular to do so.

*2. Accountability for Command Climate*

Impunity would proliferate in at least one other way, were MJIA to become law: prosecutors, unlike commanders, would risk no criminal liability for fostering a climate where lawbreaking is acceptable. In particular, recall that commanders can be criminally responsible not only for failing to bring grave breaches and sexual violence allegations to trial, but their culpability is also presumed for any crimes that flow from that failure.[136] In other words, commanders are liable for their "failure to create or sustain . . . an environment of discipline and respect for the law,"[137] such liability lawyers do not have if they fail to prosecute.

Commander liability, by contrast, is so vast that U.S. tribunals have held commanders responsible for the mere failure to act within their "material ability" to protest crimes carried out by those only nominally under their control. In the "Hostage Case," for example, a commander was held

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[132] Peter Baker, *Trump Orders Navy to Strip Medals from Prosecutors in War Crimes Trial*, N.Y. TIMES (July 31, 2019), https://www.nytimes.com/2019/07/31/us/politics/trump-navy-seal-war-crimes.html.

[133] *Navy SEAL Killed Young Prisoner and Called Him "ISIS Dirtbag," Witnesses Testify*, CBS NEWS (June 20, 2019, 10:22 AM), https://www.cbsnews.com/news/edward-gallagher-us-navy-seal-charged-war-crimes-service-iraq-hears-testimony-trial-san-diego.

[134] *See generally* Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, *"They Came to Destroy:" ISIS Crimes Against the Yazidis*, U.N. Doc. A/HRC/32/CRP.2 (June 16, 2016).

[135] *See supra* note 94 and accompanying text (explaining that GCMCA commanders lack unilateral authority to forego prosecuting grave breaches of the 1949 Geneva Conventions).

[136] *See supra* notes 69–73 and accompanying text (discussing the applicability of the rebuttable presumption of causation to command responsibility doctrine).

[137] Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment, ¶ 50 (June 7, 2001); *see* Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶ 96 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005) ("This failure to [appropriately] punish on the part of a commander can only be seen by the troops to whom the preventative orders are issued as an implicit acceptance that such orders are not binding.").

accountable for the crimes carried out by security police in his area of responsibility even though he had no authority over them.[138] The tribunal justified the commander's responsibility in part on the grounds that, "Not once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts."[139] In the "High Command Case," a commander was similarly held responsible for the crimes of a security force unit operating in his area of responsibility, partly on the grounds he "[had not] in any way protested against or criticized the action of the SD [security service] or requested their removal or punishment."[140]

B. An Incentive to Intervene

The policy assumption for holding leaders accountable in this manner is that incentivizing the proper exercise of leadership authority reduces criminality, and empirical data supports this conclusion. In the context of sexual assault, for example, a 2014 study demonstrated that leadership intervention, even among informal leaders of high school age, can dramatically reduce sexual assault rates.[141] That study assessed the effectiveness of those leaders taking steps pursuant to training to discourage and prevent sexual violence amongst their peers at school.[142] By the end of year four of the study, the number of sexual assaults decreased by 48% at those schools where the interventions occurred,[143] leading the Air Force to incorporate the study's methodology into its training protocols.[144]

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[138] United States v. List (The Hostage Case), Case No. 7, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1271–72 (Feb. 19, 1948).

[139] *Id.* at 1272.

[140] United States v. Von Leeb (High Command Case), Case No. 12, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 623 (Oct. 27, 1948) (emphasis added).

[141] Ann L. Coker et al., *RCT Testing Bystander Effectiveness to Reduce Violence*, 52 AM. J. PREVENTIVE MED. 566, 566 (2017).

[142] *Id.*

[143] In the first year after the intervention training was implemented, there was a mean number of 300 acts of self-reported sexual violence in the group of schools that received the intervention, versus 157 in year four, which is a 48% decrease. *Id.* tbl.1. This contrasts with the control group of schools for which there were 211 acts of self-reported sexual violence in year one, versus 245 in year four—a 16% increase. *Id.*

[144] The Air Force has adopted the "Green Dot" leadership intervention training methodology used in the study. SAPR REPORT, *supra* note 14, enclosure 3, at 31; *id.* enclosure 3, at 7

These findings comport with several other studies focusing on sexual assault in the military. A 2017 study found that "[n]egative leader behaviors" such as military leaders allowing "sexually demeaning comments to occur" were associated with "[an] increased assault risk, at least doubling servicewomen's odds of [sexual assault in the military]."[145] These findings are consistent with a 2003 study which determined that military leaders "allowing or initiating sexually demeaning comments or gestures towards female soldiers was associated with a three- to four-fold increase in likelihood of rape."[146] The 2019 SAPR report also determined that "[t]he odds of sexual assault were . . . higher for members indicating their command took less responsibility for preventing sexual assault, encouraging reporting, or creating a climate based on mutual respect."[147]

C. Enforcement Required

Taken together, the data makes clear that the key to reducing criminality is not less command authority, as MJIA seeks, but the exercise of more leadership authority as the command responsibility doctrine seeks to incentivize. Yet the UCMJ contains no specific command responsibility provision to inculcate that incentive across the military services. Rather, the doctrine's obligations must be "boot strapped" under existing UCMJ offenses,[148] for example, as articulated in Part II of this article.[149] This has

("The development of targeted rather than universal training and approaches (e.g. the leadership and bystander intervention toolkit, Cadet Healthy Personal Skills) are a significant step in the Air Force's plan to provide high quality and evidence-based prevention training from accession to separation or retirement.").

[145] Anne G. Sadler et al., *The Relationship Between US Military Officer Leadership Behaviors and Risk of Sexual Assault of Reserve, National Guard, and Active Component Servicewomen in Nondeployed Locations*, 107 AM. J. PUB. HEALTH 147, 147 (2017).

[146] Anne G. Sadler et al., *Factors Associated with Women's Risk of Rape in the Military Environment*, 43 AM. J. INDUS. MED. 262, 268 (2003).

[147] SAPR REPORT, *supra* note 14, at 12.

[148] *See, e.g.*, William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1, 14 (1982) (stating in reference to Captain Ernest Medina's prosecution relating to the My Lai Massacre, "Shockingly, a commander's responsibility had to be boosted by 'boot strapping' his individual responsibility [under the UCMJ] on top of his command responsibility to give it more depth."); Victor Hansen, *What's Good for the Goose is Good for the Gander—Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards its Own*, 42 GONZ. L. REV. 335, 394 (stating "in the Medina case the prosecution was forced to establish the scope of a commander's responsibility by bootstrapping from sources outside the UCMJ because no clear standard of command authority and responsibility was contained in the UCMJ.").

[149] *See supra* notes 38–41 and accompanying text (explaining how command responsibility derelictions can be punished under Article 134's "general article").

led to the non-enforcement of the doctrine in high-profile cases,[150] fostered confusion regarding the United States' interpretation of the doctrine,[151] resulted in its misapplication at court-martial,[152] and feeds misconceptions within the military services that leaders are impugn from accountability.[153] Promulgating a command responsibility provision would eliminate misunderstanding and "provide commanders with the needed incentive to make detection and prevention of sexual assault within the ranks a top priority."[154] That is, it would "send a powerful message to commanders that it is their responsibility" to "investigate, suppress and punish" all suspected crime, a message that would bring about a "cultural shift" within the military services.[155]

That cultural shift could not come a moment too soon. The 2019 SAPR report determined the overwhelming majority of military sexual assaults in

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[150] *See, e.g.*, Victor Hansen, *The Jordan Abu Ghraib Verdict: Command Responsibility in the UCMJ*, JURIST (Sept. 1, 2007, 8:01 AM) ("[A]nother reason why the case against Lieutenant Colonel Jordan ultimately failed . . . is quite simply that under the Uniform Code of Military Justice (UCMJ) there is no adequate mechanism to hold commanders and supervisors criminally accountable for the law of war violations committed by forces under their command."); Hansen, *supra* note 148, at 339 ("To date . . . no criminal proceedings have yet been initiated against any commander at the battalion level or higher for the detainee abuse that occurred at Abu Ghraib." (citations omitted)).

[151] Eckhardt, *supra* note 148, at 28 ("The failure of our government to clearly articulate domestic standard [of command responsibility] . . . has caused considerable misunderstanding, confusion, and embarrassment. That failure provides a dangerous vacuum in the vital area of a soldier's social contract with the citizenry he serves."); Hansen, *supra* note 148, at 341 (asserting that there is "a lack of understanding by even members of Congress and senior Department of Defense officials about the legal doctrine of command responsibility.").

[152] *See, e.g.*, *Editor's Note*, *supra* note 44, at 8 (quoting the instruction to Captain Ernest Medina's military panel during his prosecution related to the My Lai massacre: "While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities.").

[153] CHRISTOPHER SWECKER ET AL., FORT HOOD INDEP. REV. COMM., REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE 115 (2020), https://www.army.mil/e2/downloads/rv7/forthoodreview/2020-12-03_FHIRC_report_redacted.pdf ("[There is] an overwhelming perception on the part of interviewees within the Fort Hood community that they would likely be subjected to direct or indirect retaliation, reprisal, intimidation or adverse reputational impact by their respective chains of command if they filed reports of sexual harassment or sexual assault . . . .").

[154] Victor M. Hansen, *Introduction to* Discipline, Justice, and Command in the U.S. Military: Maximizing Strengths and Minimizing Weakness in a Special Society, 50 NEW ENG. L. REV. 13, 19 (2015).

[155] *Id.*

2018 occurred on military installations,[156] with 26% of women and 43% of men even reporting they occurred at work or during duty hours.[157] While the Department of Defense asserts it will "prepare and hold new leaders and first-line supervisors accountable for advancing a culture free from sexual assault,"[158] it has identified no mechanism to enforce that accountability. This article's appendix proposes such a mechanism through an amendment to Article 134, UCMJ, that would punish "superior responsibility" derelictions.[159] More to the point, irrespective of *de jure* command status, it would require even the most junior "superiors" to control their subordinates, as required by the law of war[160] and Federal statute.[161]

Even if lacking *de jure* command status, "[junior] leaders . . . command large numbers of subordinates [in the military],"[162] and are most likely to

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[156] SAPR REPORT, *supra* note 14, at 11 (citing a 2018 Workplace and Gender Relations Survey of Active Duty Members that found "62 percent of women and 57 percent of men indicated the situation with the greatest impact occurred at a military installation or on a ship").
[157] *Id.*
[158] *Id.* at 4.
[159] This proposal combines the aforementioned "elements of proof" that are modeled after Article 92, UCMJ, TARGETING SUPPLEMENT, *supra* note 32, at 21–22 n.66, with the UCMJ offenses the Army has identified as punishing command/superior responsibility derelictions in the context of targeting, *id.* at 7–8 (identifying, among others, the following UCMJ articles: 81 (principals), 109 (unlawful harm to non-government property), 118 (murder), 119 (involuntary manslaughter), and 128 (assault)). The proposal, however, removes the causation elements of these offenses to reflect the rebuttable presumption but does leave their maximum punishments intact.
[160] ICTY Statute, *supra* note 42 ("The fact that any of the acts referred to in . . . the present Statute was committed by a subordinate does not relieve his *superior* of criminal responsibility . . . .") (emphasis added); ICTR Statute, *supra* note 42 (same); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 86(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] ("The fact that a breach . . . was committed by a subordinate does not absolve his *superiors* from penal or disciplinary responsibility . . . ." (emphasis added)). *See also* Rome Statute, *supra* note 42, art. 28(a) (stating "[a] military commander or person effectively acting as a military commander" can be responsible for the crimes of subordinates).
[161] 10 U.S.C. §§ 7233, 8167, 9233 (requiring "commanding officers *and others in authority*" to be "vigilant in inspecting the conduct" of persons placed under their authority, and "to guard against and suppress all dissolute and immoral practices, and to correct . . . all persons who are guilty of them" (emphasis added)).
[162] Leonard Wong et al., *Military Leadership: A Context Specific Review*, 14 LEADERSHIP Q. 657, 659 (2003).

directly supervise the perpetrators of sexual assault.[163] Therefore, holding these leaders criminally accountable for their leadership failure is key to reducing sexual assault rates, albeit more difficult to establish at trial than for *de jure* commanders. Specifically, it must be shown the leader in question actually had a duty "to control" the putative subordinates in the first place. This can be established by showing the leader had "actual knowledge" or "reasonably should have known"[164] of the following: (1) the authority to take the allegedly omitted measure "to control" and (2) that the putative subordinate was subject to that authority.[165] Once the duty "to control" attaches, as with *de jure* commanders, any leader who failed to take "necessary" and "reasonable" measures within his material ability to exercise that control would risk criminal prosecution.[166]

## IV. Operational Offense Prosecutions

### A. Commander Expertise Required

While the risk of criminal prosecution can incentivize the lawful performance of duties, it can also discourage compliance if Service

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[163] Non-commissioned officers in the military generally range in pay grades from E-5 to E-9, while most sexual assault perpetrators across the military services served in grades between E-3 and E-5. SAPR REPORT, *supra* note 14, at 4 ("[T]he vast majority of sexual assaults of Service members occurred between people aged 17 to 24 who work, train, or live in close proximity . . . . In addition, the alleged offender's rank was most often the same as the victim's or one rank higher, with most alleged incidents involving junior enlisted women in the grades of E3 and E4.").

[164] *See* MCM, *supra* note 3, pt. IV, ¶18.c.(3)(b) ("Actual knowledge [of duties] need not be shown if the individual reasonably should have known . . . . This may be demonstrated by regulations, training, or operations manuals, customs of the Service, academic literature or testimony, testimony of persons who have held similar or superior positions, or similar evidence.").

[165] *See* Mamani v. Berzaín, 309 F. Supp. 3d 1274, 1306 n.35 (S.D. Fla. 2018) ("A de facto superior must be (1) 'cognizant of his position vis-à-vis other persons whose conduct he is responsible for,' and (2) 'aware of the duties which his relationship with another person, or group of persons, implied for him (in particular, a duty to prevent and punish crimes) and must have accepted this role and responsibility, albeit implicitly.'" (quoting GUÉNAËL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 145 (2009))).

[166] Ford *ex rel.* Estate of Ford v. Garcia, 289 F.3d 1283, 1290–91 (11th Cir. 2002) ("[A] showing of the defendant's actual ability to control the guilty troops is required as part of the plaintiff's burden under the superior-subordinate prong of command responsibility, whether the plaintiff attempts to assert liability under a theory of *de facto* or *de jure* authority." (citing Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 256 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001))).

members risk prosecution in the course of that lawful performance, and MJIA fosters this risk in the context of operational offenses. This risk stems in part from the fact that "[a]ttorneys, no matter how experienced in criminal prosecution or defense, generally don't engage in actual combat or plan or execute kinetic operations. Therefore, in the unique context of operational offenses, commanders are critical in defining and recognizing a criminal dereliction."[167]

Consider, for instance, operational offenses MJIA does not impact: Article 99, UCMJ, (misbehavior before the enemy) and Article 110, UCMJ, (improper hazarding of a vessel or aircraft). Both are *malum prohibitum* offenses that regulate technical aspects of conducting operations that commanders are bound to understand better than lawyers by virtue of their professional competence and experience as operational commanders. For example, Article 99, UCMJ, penalizes one who "shamefully abandons, surrenders, or delivers up any command, unit, place, or military property . . . ."[168] It also criminalizes, among other behavior, "cowardly conduct"[169] and one's willful failure to do "his utmost to encounter, engage, capture, or destroy any enemy troops."[170] Similarly, Article 110, UCMJ, penalizes one who "hazards or suffers to be hazarded any vessel or aircraft of the armed forces."[171]

The technical reason commanders are uniquely qualified to assess compliance with these UCMJ articles is that both require evaluating whether operators exercised appropriate professional judgment, the standards for which commanders are responsible for instilling. In particular, both articles distinguish between a criminal dereliction and an operational "error in judgment,"[172] an attribute they share with norms enforceable under the

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[167] Pede, *supra* note 97.
[168] UCMJ art. 99(2) (1950).
[169] *Id.* art. 99(5).
[170] *Id.* art. 99(8).
[171] *Id.* art. 110(a) (2016).
[172] The *Manual for Courts-Martial* states in the discussion of Article 110, UCMJ, that "[a] mere error in judgment . . . does not constitute an offense" under that article, MCM, *supra* note 3, pt. IV, ¶ 47.c.(3), and at Article 99, UCMJ, that "'[i]ntentional misconduct' does not include a mere error in judgment," *id.* pt. IV, ¶ 27.c.(3)(b).

laws of war,[173] including targeting norms.[174] "Errors in judgment" can occur only in the context of "discretionary" duties,[175] mandatory legal obligations which leave discretion for "judgment and decision" on how to comply,[176] that is, "judgment as to which of a range of permissible courses is the wisest."[177] These "permissible courses," as such, are what "commanders are critical in defining,"[178] a feat they accomplish by instilling professionalism through training and other means as their duties require.[179]

## B. Objective and Subjective Reasonableness

### *1. The Objective Test*

Command-instilled professional standards inform the juridical analysis of whether a discretionary duty was violated, undergirding commanders'

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[173] United States v. List (The Hostage Case), Case No. 7, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1246 (Feb. 19, 1948) ("Where room for an honest error in judgment exists [an accused] is entitled to the benefit thereof by virtue of the presumption of his innocence."); *id.* at 1297 (holding that while an accused in a particular case "[m]ay have erred in the exercise of his judgment . . . he was guilty of no criminal act."); United States v. Von Leeb (High Command Case), Case No. 12, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 511 (Oct. 27, 1948) (stating that an accused "[c]annot be held criminally responsible for a mere error in judgment as to disputable legal questions.").

[174] TARGETING SUPPLEMENT, *supra* note 32, ¶ 6 (distinguishing between an "error in judgment" and a criminal dereliction in the context of law of war targeting norms).

[175] *Compare Discretionary Act*, BLACK'S LAW DICTIONARY (6th ed. 1990) (defining a "discretionary act" as one guided by no "hard and fast rule"), *with* Mississippi v. Johnson, 71 U.S. 475, 498 (1866) (describing ministerial obligations as those for which "nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law."). *See also Ministerial Duty*, BLACK'S LAW DICTIONARY (6th ed. 1990) (defining "ministerial duty" as one for "which nothing is left to discretion—a simple definite duty, imposed by law, and arising under conditions admitted or proved to exist.").

[176] Dalehite v. United States, 346 U.S. 15, 36 (1953).

[177] United States v. Gaubert, 499 U.S. 315, 325 (1991); *see* Prosecutor v. Gombo, Case No. ICC-01/05-01/08 A, Appeals Chamber Judgment, ¶ 170 (June 8, 2018) ("[C]ommander[s] may take into consideration the impact of measures to prevent or repress criminal behavior on ongoing or planned operations and may choose the least disruptive measure as long as it can reasonably be expected that this measure will prevent or repress the crimes.").

[178] Pede, *supra* note 97.

[179] DOD LAW OF WAR MANUAL, *supra* note 94, ¶ 18.4.4 ("[C]ommanders should ensure that members of the armed forces under their command are, commensurate with their duties, aware of their duties under the law of war."); AP I, *supra* note 160, art. 87(2) ("In order to prevent and suppress breaches . . . commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.").

ability to recognize derelictions of those duties. Specifically, an objective test assesses compliance with a discretionary duty by asking "if officers of reasonable competence could disagree on the issue" because, if they can, the act will be considered lawful.[180] Another way of articulating the objective test is to say that "[i]f the facts were such as would justify the action by the exercise of judgment . . . it cannot be said to be criminal."[181] Conversely, an act will be considered unlawful if "every reasonable official would have understood that what he is doing violates" the law[182] or if "no reasonably competent officer would have concluded"[183] his or her acts were lawful. Perhaps the clearest articulation of the objective test, and clearest indication that professional standards inform the test, was by an eighteenth-century author, who wrote:

> There are in every Art certain Maxims and in which all Artists agree: thus far there is *Certainty*, and no *Artist doubts*; But farther than this there may be *Doubt* and Difficulty; and there Artists *may* and *will*, as often as consulted, though impartial, *differ*. The *single* Point therefore is, *Has the [accused] observed the plain, known Rules of his Profession?*[184]

*2. The Subjective Test*

"*[P]lain, known*" professional standards also inform the subjective test. That test requires an assessment of whether those accused willfully violated any aspect of their discretionary duties, as those who have cannot

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[180] Malley v. Briggs, 475 U.S. 335, 341 (1986) (addressing whether a state trooper was entitled to qualified immunity against a civil claim for damages under 42 U.S.C. § 1983 alleging the state trooper, by applying for an arrest warrant, violated of the respondent's Fourth and Fourteenth Amendment rights).

[181] United States v. List (The Hostage Case), Case No. 7, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1296 (Feb. 19, 1948).

[182] Mullenix v. Luna, 577 U.S. 7, 11 (2015) (quoting Reichle v. Howards, 566 U.S 658, 664 (2012).

[183] *Malley*, 475 U.S. at 341.

[184] DAVID MALLET, OBSERVATIONS ON THE TWELFTH ARTICLE OF WAR 27 (1757) (distinguishing between an "innocent error of judgment" and a commander's alleged criminal failure to do his "utmost" in confronting enemy forces). *See also* Pede, *supra* note 97 ("[S]enior level field commanders bring decades of operational experience to bear upon the key legal issue in [operational offense] cases which they are uniquely qualified to analyze—whether the accused '*observed the plain, known Rules of his Profession*.'").

be said to have committed a "mere error in judgment."[185] Put another way, the law imposes an obligation to act in "good faith," a phrase which means "the absence of malice," an "honesty of intention," and "being faithful to one's duty or obligation."[186] Thus, if a Service member "could honestly conclude" his or her decision was justified in the context of the discretionary duty at issue, there is no criminal act.[187] On the other hand, if one acted with "actual knowledge" the act or omission contravened one's military duties, that individual has not acted in good faith.[188] A Nuremberg tribunal, in making clear that military expertise informs the subjective test, articulated it as follows:

> One trained in military science will ordinarily have no difficulty in arriving at a [legally] correct decision and, *if he willfully refrains from so doing for any reason*, he will be held criminally responsible . . . . Where room exists for an honest error in judgment, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence.[189]

C. Targeting Norms and the Military Justice Improvement Act

It follows that safeguarding the presumption of innocence in the context of discretionary obligations requires the prosecutorial authority to have a thorough understanding of the standard of professional competence which

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[185] MCM, *supra* note 3, pt. IV, ¶ 27.c.(3)(b) (specifying "intentional misconduct" is not "a mere error in judgment"); Wilkes v. Dinsman, 48 U.S. 89, 131 (1849) ("In short, it is not enough to show he committed an error in judgment, but it must have been a malicious and wilful [sic] error"). *See also* MCM, *supra* note 3, pt. IV, ¶ 18.c.(3)(c) ("'Willfully' means intentionally. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act.").

[186] *Good Faith*, BLACK'S LAW DICTIONARY (6th ed. 1990).

[187] United States v. List (The Hostage Case), Case No. 7, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1297 (Feb. 19, 1948); *see* Fox v. Hayes, 600 F.3d 819, 834–35 (7th Cir. 2010) ("[W]e make all reasonable credibility determinations and inferences in favor of the [public official], asking whether under their version of the facts *a reasonable officer could conclude* [their actions were in compliance with the law]." (emphasis added)).

[188] MCM, *supra* note 3, pt. IV, ¶¶ 18.b.(3)(b), 18.c.(3)(b) (articulating that a willful dereliction occurs under Article 92, UCMJ, when one has "actual knowledge" of their duties and nonetheless acts in contravention of them).

[189] United States v. List (The Hostage Case), Case No. 7, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1245–46 (Feb. 19, 1948) (emphasis added).

Soldiers are expected to uphold in their field of expertise. The drafters of MJIA thus wisely excluded both Articles 99 and 110, UCMJ, from the reform, ensuring commanders will maintain prosecutorial authority over these operational offenses. However, MJIA's drafters failed to exclude law of war targeting norms, which govern how the military applies lethal force on the battlefield. These norms are listed in the following table.

Table[190]

| | **Targeting Duties** | **Information Assessment Duties** |
|---|---|---|
| **Target Identification** | Attack lawful targets only.[191] | Take reasonable steps to identify a person or object as legal target. |
| **Specialized Warnings** | Do not attack objects subject to special protection (e.g., medical units, enemy hospitals, medical transports) unless the enemy has misused them.[192] | Exercise due regard in determining whether an object subject to special protection lost its protected status under the law of war. |
| | Provide "due warning" before attacking an object subject to special protection,[193] unless acting in self-defense.[194] | Take reasonable steps to determine what means of communicating the warning would be adequate. |
| **Generalized Warnings** | Provide advance warning before conducting an attack where protected persons may be injured, unless the | Take reasonable steps to determine whether the circumstances permit |

[190] The targeting obligations listed in this table and their citations are taken verbatim from the U.S. Army's targeting investigation supplement. TARGETING SUPPLEMENT, *supra* note 32, tbl.1.

[191] DOD LAW OF WAR MANUAL, *supra* note 94, ¶ 5.6.3 (criteria for determining if an object is a lawful military objective); *id.* ¶ 5.8.3 (criteria for determining if an individual can be targeted as a member of an armed group or for directly or actively participating in hostilities); *id.* ¶ 4.3 (criteria for determining if an individual can be targeted as a lawful combatant or unprivileged belligerent). *See also id.* ¶ 5.5.2 (stating which persons and property are protected from attack).

[192] *See id.* ¶ 7.10.3.3–.6 (explaining the factors that bear upon whether an object has lost its special protection).

[193] *Id.* ¶¶ 7.10.3.2, 7.11.1 (explaining that "due warning" is required before attacking an object subject to special protection); *id.* ¶ 5.11.5.2 (explaining what type of advanced warning may be "effective").

[194] *Id.* ¶ 7.10.3.2 (stating the requirement to provide warning "does not prohibit the exercise of the right of self-defense.").

| | | |
|---|---|---|
| | circumstances do not permit.[195] | providing an advanced warning. |
| | When warning is required, provide "effective advance warning."[196] | Take reasonable steps to determine what means of communicating the warning would be adequate. |
| **Feasible Precautions** | Take feasible measures to minimize incidental ham.[197] | Take reasonable steps to determine what precautionary measures are feasible. |
| **Principle of Proportionality** | Conduct proportionate attacks—the expected incidental injury must not be excessive in relation to the direct and concrete military advantage anticipated.[198] | Take reasonable steps to determine whether the incidental harm would be excessive in relation to the direct and concrete military advantage anticipated. |

### 1. *Enforcement Under the Laws of War*

To understand how MJIA relates to the enforcement of the duties in the table, one must first understand how those duties are enforced outside the UCMJ context. In any context, attacks made in compliance with law of war targeting duties can justify even the premeditated killing of innocents, for example, when death is collateral and proportionate to an attack on a lawful target.[199] Assessing whether a death can be so justified requires the prosecutorial authorities to understand the "*the plain, known Rules*" that inform the targeting duties in the table, and to distinguish between a decision that was subjectively and objectively reasonable from unlawfully caused harm.[200]

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[195] *Id.* ¶ 5.11.5 (stating advance warning must be given if "circumstances permit"); *id.* ¶ 5.11.5.2 (explaining what type of advance warning may be "effective").
[196] *Id.* ¶ 5.11.1.1 (explaining that "effective warning" must be given unless "circumstances do not permit"); *id.* ¶ 5.11.5.2 (explaining what type of advance warning may be "effective").
[197] *Id.* ¶ 5.2.3 (articulating the general rule that feasible precautions must be taken); *id.* ¶ 5.11.3 (explaining that adjusting the timing of an attack is a form of precaution); *id.* ¶ 5.11.6 (explaining that "weaponeering" is a form of precaution); *id.* ¶ 5.2.3.2. (listing factors that bear on what precautions are feasible).
[198] *Id.* ¶ 5.12 (explaining pertinent factual considerations to be assessed in determining whether an attack would be proportionate).
[199] *See id.*
[200] *See supra* notes 172–88 and accompanying text (discussing application objective and subjective reasonableness).

When a targeting decision was unreasonable, the accused will have violated the laws of war if he or she either acted willfully or was culpably negligent, provided the accused's dereliction actually caused the alleged harm, as required by the "elements of proof."[201] Even if no harm was inflicted, liability still ensues under the laws of war if one has attempted or conspired to violate a targeting duty.[202] Moreover, those who aided and abetted an unlawful targeting decision are liable to the same extent as the actual perpetrator, both under the laws of war and the UCMJ.[203] In any case, an accused is not required to have engaged in detached reflection in assessing legal compliance,[204] and the lawfulness of targeting decisions must be assessed from "the conditions as they appeared to the defendant at the time."[205]

### 2. *Enforcement Under the UCMJ*

If in those conditions the accused willfully violated a targeting duty, MJIA will impact the prosecutorial authority to the extent the "elements of proof" applicable thereto also establish an offense under a MJIA-covered UCMJ article.[206] In the case of willful derelictions resulting in

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[201] *See supra* notes 57–58 and accompanying text (explaining the "elements of proof" necessary to establish a law of war violation); TARGETING SUPPLEMENT, *supra* note 32, ¶ 2 ("Law of War [targeting] obligations . . . are violated when an individual willfully or through culpable negligence is derelict in complying with them, resulting in harm to persons or property protected by the Law of War. A Law of War violation also occurs when an individual attempts to commit, conspires to commit, or aids and abets the commission of such unlawful acts of harm.").

[202] TARGETING SUPPLEMENT, *supra* note 32, ¶ 2.

[203] *Id.* (specifying one who "aids and abets the commission" of a law of war violation violates the law of war); MCM, *supra* note 3, pt. IV, ¶ 1.b.(1) (explaining that a "principal" is a "person who aids, [or] abets . . . the commission of an offense . . . [and as such] is equally guilty of the offense as one who commits it directly . . .").

[204] Brown v. United States, 256 U.S. 335, 353 (1921) ("Detached reflection cannot be demanded in the presence of an uplifted knife").

[205] United States v. List (The Hostage Case), Case No. 7, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 401 (Feb. 19, 1948); *see* TARGETING SUPPLEMENT, *supra* note 32, ¶ 6(c)(1)(c) ("In analyzing the 'conditions as they appeared to the defendant at the time,' *Rendulic* established those conditions by analyzing what current U.S. Army doctrine would refer to as the 'METT-TC' variables—'mission, enemy, terrain and weather, troops and support available, time available, and civil considerations.' It was only after analyzing these factors that the tribunal determined the accused 'could honestly conclude' the actions taken were justified." (citations omitted)).

[206] *See supra* notes 56–58 and accompanying text (explaining the necessary elements to establish "culpable neglect"); 166 CONG. REC. S3413 (daily ed. June 25, 2020) (establishing in section 539A(b)–(c) that "covered offenses" generally exclude UCMJ "articles 83

death, the applicable UCMJ offense encompassing those elements would be premeditated or unpremeditated murder under Article 118, UCMJ.[207] For willful targeting derelictions not resulting in death, Article 128, UCMJ, would punish the act based upon one of the following theories: assault consummated by a battery[208] or aggravated assault in which either "substantial bodily harm is inflicted"[209] or "grievous bodily harm is inflicted."[210] For willful derelictions resulting in property damage, liability would ensue under Article 109, UCMJ, which prohibits intentional unlawful harm to both real and personal property.[211] Note that for all but the latter offense, MJIA would vest prosecutorial discretion in a lawyer when the maximum punishment for a violation of the UCMJ article in question is greater than one year[212] and in any conspiracy, solicitation, or attempt to commit such offenses.[213]

If, by culpable negligence, an accused failed to comply with a targeting duty, MJIA's impact again would depend upon the extent to which the "elements of proof" applicable to that dereliction also establish a "covered offense" under MJIA. If death resulted from such dereliction, the accused

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through 117" and "articles 133 and 134" and a "conspiracy," "solicitation," and "attempt" to commit such offenses).

[207] MCM, *supra* note 3, pt. IV, ¶ 56.b.(1) (listing the elements of premeditated murder); *id.* pt. IV, ¶ 56.b.(2) (listing the elements of "intent to kill or inflict great bodily harm"). *See also* TARGETING SUPPLEMENT, *supra* note 32, ¶ 9(a)(3)(a) (explaining that willful violations of one's targeting duties are prosecutable as premeditated or unpremeditated murder under Article 118, UCMJ).

[208] MCM, *supra* note 3, pt. IV, ¶ 77.b.(2) (listing the elements of assault consummated by a battery). *See also* TARGETING SUPPLEMENT, *supra* note 32, ¶ 9(a)(3)(a) (explaining that a willful violation of one's targeting duties are prosecutable as an assault consummated by a battery under Article 128, UCMJ).

[209] MCM, *supra* note 3, pt. IV, ¶ 77.b.(4)(b) (listing the elements of aggravated assault in which substantial bodily harm is inflicted).

[210] *Id.* pt. IV, ¶ 77.b.(4)(c) (listing the elements of aggravated assault in which grievous bodily harm is inflicted). *See also* TARGETING SUPPLEMENT, *supra* note 32, ¶ 9(a)(3)(a) (explaining that a willful violation of one's targeting duties is prosecutable as an assault in which grievous bodily harm is intentionally inflicted under Article 128, UCMJ).

[211] MCM, *supra* note 3, pt. IV, ¶ 45.b.(1)–(3) (listing the elements of waste, spoilage, or destruction of property other than military property of United States). *See also* TARGETING SUPPLEMENT, *supra* note 32, ¶ 9(a)(3)(a) (explaining that a willful violation of one's targeting duties can be prosecuted as intentional harm to both real and personal property under Article 109, UCMJ).

[212] *See supra* notes 29–31 and accompanying text (explaining what offenses are not covered by MJIA).

[213] 166 CONG. REC. S3413 (daily ed. June 25, 2020) (distinguishing in section 539A(b)–(c) "covered offenses" and "excluded offenses").

could be prosecuted for involuntary manslaughter under Article 119, UCMJ.[214] In the case of culpably negligent harm not resulting in death, the accused could be prosecuted for violating Article 128 under one of the following theories: assault consummated by a battery[215] or aggravated assault in which either "substantial bodily harm is inflicted"[216] or "grievous bodily harm is inflicted."[217] In the case of harm to real property, the accused would be liable under Article 109,[218] and in the case of harm to personal property, the accused would be liable under Article 134.[219] Again, note that for all but the latter two offenses, MJIA would vest prosecutorial discretion in a lawyer when the maximum punishment for a violation of the UCMJ article in question is greater than one year.[220]

## V. The Impact on the Battlefield

### A. Compromising Unity of Command

Vesting prosecutorial discretion in lawyers and removing primary prosecutorial authority from commanders would compromise the "unity of command." It would do so by creating what is known as "dual command,"

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[214] MCM, *supra* note 3, pt. IV, ¶ 57.b.(2).

[215] *Id.* pt. IV, ¶ 77.b.(2) (listing the elements of assault consummated by a battery). *See also* TARGETING SUPPLEMENT, *supra* note 32, ¶ 9(a)(3)(a) (explaining that culpably negligent violations of one's targeting duties are prosecutable as assault consummated by a battery under Article 128, UCMJ).

[216] MCM, *supra* note 3, pt. IV, ¶ 77.b.(4)(b) (listing the elements of aggravated assault in which substantial bodily harm is inflicted).

[217] *Id.* pt. IV, ¶ 77.b.(4)(c) (listing the elements of aggravated assault in which grievous bodily harm is inflicted). *See also* TARGETING SUPPLEMENT, *supra* note 32, ¶ 9(a)(3)(a) (explaining that a willful violation of one's targeting duties is prosecutable as an assault in which grievous bodily harm is intentionally inflicted under Article 128, UCMJ).

[218] MCM, *supra* note 3, pt. IV, ¶ 45.b.(1) (listing the elements of wasting or spoiling of non-military real property when the accused's actions amount to the "reckless" form of culpable negligence). *See also* JBB, *supra* note 85, para. 3-44-2(d) (defining culpable negligence as "a negligent act or failure to act accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others.").

[219] The UCMJ does not contain a provision that allows an accused to be prosecuted for the culpably negligent destruction of private property that is personal in nature. However, an Article 134, UCMJ, offense could be crafted to encompass such an offense. United States v. Garcia, 29 M.J. 721, 723 (C.G.C.M.R. 1989) ("The offense of recklessly spoiling or wasting property applies exclusively to real property, not personal property. . . . [W]hile an offense under Article 134 might be crafted, such was not done at trial.").

[220] *See supra* notes 29–31 and accompanying text (explaining what offenses are not covered by MJIA).

which is defined as "[e]xercising the same powers and having the same authority over the same men."[221] Under MJIA, for example, if a Soldier allegedly disobeys directives to attack a target in violation of Article 92, UCMJ, or is allegedly derelict in doing so under that same article,[222] a commander would possess prosecutorial authority.[223] However, if a Soldier does as directed and attacks the target in compliance with Article 92, UCMJ, but allegedly violates a targeting norm implicating a MJIA "covered offense," a prosecutor would possess that authority.[224] Thus, MJIA would vest commanders and prosecutors with prosecutorial authority over the same targeting operation, and there is no guarantee those individuals will possess the same views regarding lawfulness. This arrangement risks creating "hesitation on the part of the subordinate, irritation on the part of the superior set aside, and disorder in the work."[225]

The tendency towards disorder might be tempered were commanders and prosecutors able to achieve a degree of "unity of direction," what contemporary military doctrine refers to as "unity of effort."[226] That feat would require both commanders and prosecutors to have the same objectives in exercising their prosecutorial authority.[227] That feat, however, would likely not be achieved, as commanders must "win the war,"[228] while prosecutors must "seek justice."[229] This is not to suggest that the pursuit of "justice" cannot coincide with a commander's mission objectives. "Legitimacy," for example, guides command decision-making as an

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[221] FAYOL, *supra* note 21, at 25.
[222] UCMJ art. 92 (1950) (criminalizing dereliction of duty and failure to obey an order).
[223] 166 CONG. REC. S3413 (daily ed. June 25, 2020) (listing "covered offenses" in section 539A(b)).
[224] *Id.*
[225] FAYOL, *supra* note 21, at 24.
[226] *Id.* at 25.
[227] U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS para. 73 (27 Sept. 1954) (C3, 24 Jan. 1958) [hereinafter FM 100-5] ("Unity of command obtains unity of effort by the coordinated action of all forces toward a common goal. . . . Unity of effort is furthered by willing and intelligent cooperation among all elements of the forces involved.").
[228] *Hearing on H.R. 3830*, *supra* note 24 (statement of General Dwight D. Eisenhower) ("Remember this: You keep an Army and Navy to win wars. That is what you keep them for. The line officer is concerned with the 4,000,000 men on the battle line far more than he is with the small number who get in trouble. The lawyer is there, of course, to protect their absolute rights under our system to the ultimate, but those men who are in charge of and are responsible for these things which come from the President through the Secretary of War to the commanders, have to win the war.").
[229] *Criminal Justice Standards for the Prosecution Function*, *supra* note 19.

abiding principle of warfare,[230] the purpose of which can be summarized as follows: "lose moral legitimacy, lose the war."[231] Nonetheless, divergent objectives—and divergent expertise between commanders and prosecutors—will inevitably foster doubts that they would share the same views regarding the lawfulness of a contemplated targeting operation.

B. Legal Uncertainty and Targeting Norms

Uncertainty fostered by the divergent objectives of commanders and prosecutors would compound the legal uncertainty law of war targeting duties inherently engender. These duties are akin to what Louis Kaplow refers to as "standard"-like norms, a type of norm he distinguishes from "rule"-like norms. A "rule"-like norm "might prohibit 'driving in excess of 55 miles per hour on expressways,'" while "[a] standard might prohibit 'driving at an excessive speed on expressways.'"[232] Rules, as such, tend to provide "advance determination of what conduct is permissible, leaving only factual issues for the adjudicator,"[233] resultantly making pre-decision legal advice less costly than standards.[234] By contrast "individuals tend to be less well informed concerning [what is permissible with] standards,"[235] and, as a consequence, they tend to "place a greater value on legal advice because advice reduces their uncertainty."[236]

Currently, to assuage that uncertainty in the targeting context, authoritative advice can be attained simply by consulting operational experts on the battlefield, including one's peers and superiors, those who live by the "*plain, known Rules*" infused by operational expertise.[237] Were lawyers

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[230] The other nine traditional principles are: objective, offensive, mass, economy of force, maneuver, unity of command, security, surprise, simplicity, restraint and perseverance. JP 3-0, *supra* note 25, at I-2.
[231] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 7-9 (15 Dec. 2006).
[232] Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992).
[233] *Id.*
[234] *Id.* at 569 ("Because a standard requires a prediction of how an enforcement authority will decide questions that are already answered in the case of a rule, advice about a standard is more costly.").
[235] *Id.* at 605.
[236] *Id.*
[237] *See, e.g.*, Interview by John McCool & Matt Matthews Major Erik Krivda, Exec. Officer, Task Force 2-2 (Feb. 6, 2006), *in* 1 COMBAT STUD. INST., EYEWITNESS TO WAR: THE US ARMY IN OPERATION AL-FAJR: AN ORAL HISTORY 231 (Kendall D. Gott ed., 2006) ("[I]t was a very simple tactic [the enemy] would use—they knew that we wouldn't shoot at them

to attain prosecutorial authority over targeting norms, that operational expertise would naturally become less authoritative, less likely to reduce uncertainty, for two principal reasons. First, while operational expertise might be useful in gauging how a contemplated targeting decision would be received by an operational commander who seeks "to win the war," its predictive utility would certainly be less with a prosecutor who "seeks justice." Second, "[a]ttorneys, no matter how experienced in criminal prosecution or defense, generally don't engage in actual combat or plan or execute kinetic operations."[238] Operational expertise, therefore, can be expected to play a lesser role in informing a lawyer's prosecutorial decisions than it would an operational commander's.

Post MJIA, three consequences will logically follow to undermine "*[t]he decisive application of full combat power*" by U.S. forces.[239] First, the time necessary to reach a target engagement decision will necessarily increase due to the increased legal uncertainty engendered by a prosecutor who not only lacks operational experience but also "seek[s] justice," thereby creating opportunities for enemy forces on the battlefield.[240] Second, in more "legally complicated and doubtful cases," U.S. forces simply will not "struggle through to decision," as they will lack the time and resources to assuage their uncertainty.[241] Third, U.S. adversaries will be further

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if they didn't have a weapon, if they were walking in the street. So a lot of times they would fire from one building, drop their weapon and run to another building, where another cache was. We kept finding these caches strategically located throughout the city. So they'd run from one to another without a weapon, thinking that we wouldn't shoot at them because that was against our ROE [Rules of Engagement]. But at that point, we were 100 percent sure that everyone to our front was our enemy, and we were coming through to kill everything we possibly could as we came though the city.").

[238] Pede, *supra* note 97.

[239] FM 100-5, *supra* note 227.

[240] *See, e.g.*, Charlie Dunlap, *LTG Pede on the COIN/CT "Hangover"; ROE, War-Sustaining Targets, and Much More!*, LAWFIRE (Mar. 7, 2020), https://sites.duke.edu/lawfire/2020/03/07/ltg-pede-on-the-coin-ct-hangover-roe-war-sustaining-targets-and-much-more ("According to published reports, a drone hovered over two Ukrainian mechanized infantry battalions for 30 seconds before Russian artillery began pummeling the units. The Ukrainian commanders hesitated to return counterbattery fire against the Russian artillery because they had been warned not to be provocative. That hesitation cost them. Within three minutes, both battalions were destroyed by Russian artillery, including 23 dead, 93 wounded. That is the speed and character of nation state, near-peer fighting—and our National Defense Strategy demands that we be ready for it.").

[241] United States v. List (The Hostage Case), Case No. 7, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 1227 (Feb. 19, 1972) ("If the Tribunal passes sentence in cases such as that of Field Marshal List, then Your Honors will create a juridical precedent which may have incalculable

incentivized to employ tactics that create legal uncertainty, such as human shielding,[242] to exploit the "asymmetry" that MJIA fosters.[243]

C. The Nangar Khel Incident

That MJIA would foster such asymmetry is illustrated by the so-called Nangar Khel incident, which involved Polish forces.[244] The Polish have a military justice system that, as MJIA endeavors to establish, vests prosecutorial discretion in uniformed attorneys who are assigned to a "prosecutor's office."[245] That system's detrimental impact on "*[t]he decisive application of full combat power*"[246] became glaringly apparent after a Polish patrol in Afghanistan came under attack from a nearby

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consequences. Because in the future no commanders will ever dare to issue an order with any bearing on international law without first obtaining a legal opinion on it. In legally complicated and doubtful cases he will probably never struggle through to a decision. Your Honors would thereby hit the core and the striking power of Your Honors' own army. *In practice this means that in the future the course of military events would be determined not by soldiers, but by lawyers!* May it please the Tribunal. The consequences of this would be that an enemy with no scruples concerning international law would be given colossal opportunities, and he will not hesitate to make every possible use of them.").

[242] *See, e.g.*, Yoram Dinstein, Conduct of Hostilities: The Practice, the Law and the Future (Sept. 4, 2014) (unpublished manuscript) (on file with the International Institute of Humanitarian Law) ("[T]oday . . . most organized armed groups in non-international armed conflicts are deliberately using the shield of civilians, trying to screen military operations, military objectives and so forth, on a widespread and massive scale. This is unprecedented."); Mike N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292, 294 (2009) ("Tragically, human shielding has become endemic in contemporary conflict, taking place across the legal spectrum of conflict.").

[243] STEVEN METZ & DOUGLAS V. JOHNSON II, U.S. ARMY STRATEGIC STUD. INST., ASYMMETRY AND U.S. MILITARY STRATEGY: DEFINITION, BACKGROUND, AND STRATEGIC CONCEPTS 5–6 (2001) ("In the realm of military affairs and national security, asymmetry is acting, organizing, and thinking differently than opponents in order to maximize one's own advantages, exploit an opponent's weaknesses, attain the initiative, or gain greater freedom of action. It can be *political-strategic*, *military strategic*, *operational*, or a *combination* of these. It can entail different *methods*, *technologies*, *values*, *organizations*, *time perspectives*, or some *combination* of these. It can be *short-term* or *long-term*. It can be *deliberate* or *by default*. It can be *discrete* or pursued in *conjunction with* symmetric approaches. It can have both *psychological* and *physical* dimensions.").

[244] Aleksandra Kulczuga, *Poland's 'Vietnam Syndrome' in Afghanistan*, FOREIGN POL'Y (July 7, 2011, 8:54 PM), http://foreignpolicy.com/2011/07/07/polands-vietnam-syndrome-in-afghanistan.

[245] VENICE COMM'N, EUR. COMM'N FOR DEMOCRACY THROUGH L., POLAND: ACT ON THE PUBLIC PROSECUTOR'S OFFICE 3 (2017), https://www.legislationline.org/download/action/download/id/7416/file/Poland_act_public_prosecutors_office_2016_am2017_en.pdf.

[246] FM 100-5, *supra* note 227.

village in August 2007.[247] The patrol returned fire with mortar rounds, one of which killed several civilians, including a pregnant woman and some children.[248] A Polish prosecutor in Warsaw filed murder charges against seven of the soldiers; afterwards, the "Nangar Khel Syndrome" set in as the Polish soldiers became reluctant to engage the enemy, as they came to believe they could no longer trust their leaders.[249]

That lack of trust was grounded in the fact that prosecutors, rather than commanders, possessed ultimate authority "to control" Polish operations. The commanding general for Polish forces in Afghanistan later tacitly acknowledged:

> The worst thing before was that we never knew if we were right or not, according to the law, in using force. . . . [I]t was easier to be hurt or dead than to act and be potentially jailed because you reacted to something. It wasn't fair to send people here without the proper rules of engagement.[250]

Most revealing is the general's assertion is that Polish forces "never knew if [they] were right or not, according to the law, in using force," as it highlights legal uncertainty engendered by operational norms. It also highlights that Polish soldiers could not assuage that uncertainty by relying on their peers, superiors, and commanders on the battlefield, those who live by the "*plain, known Rules*" undergirding those norms. A U.S. Soldier who accompanied Polish units on patrol after the Nangar Khel incident explained how that uncertainty impacted the Polish soldiers' tactical decision-making:

> If there was even a chance of killing a civilian, they wouldn't shoot. . . . I would try to explain to them, "You're with me—if I shoot, you need to shoot too." . . . They were afraid of going to jail. They were always thinking about [Nangar Khel]. They would say, "You don't understand—I go to jail if I kill people."[251]

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[247] Kulczuga, *supra* note 244.
[248] *Id.*
[249] *Id.*
[250] *Id.* (quoting Slawomir Wojciechowski).
[251] *Id.* (quoting Nicolae Bunea).

## VI. Conclusion

While MJIA's sponsors do not intend to undermine military readiness in ways illustrated by the Nangar Khel incident, the reform would do so by weakening the formal leadership authority commanders require to maintain "unity of command." Maintaining that unity has made the difference in many a war,[252] and in weakening it, MJIA would increase the likelihood of Nangar Khel Syndrome, "beset[ing] U.S. forces, the implications [of which] would be global in scale."[253] Indeed, the danger is that U.S. forces would go "into action with an invisible disadvantage which no amount of personal courage or numerical strength could entirely make up for."[254]

This is not to deny that immediate action is necessary to address the continued prevalence of sexual assault in the military. The prevalence of indiscipline in any organization has long been understood as a hallmark of leadership failure,[255] one which justice requires be remedied,[256] as MJIA's sponsors are attempting to do.[257] Nonetheless, for two principal reasons MJIA would ultimately fail to promote the justice its sponsors seek. First, it is premised upon the incorrect notion that reducing the occurrence of sexual assaults requires removing leadership authority. The empirical data shows just the opposite is true: that the proper exercise of leadership authority reduces the occurrence of sexual assaults.[258] Second, rather than promote justice, MJIA removes prosecutorial authority from commanders

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[252] CTR. OF MIL. HIST., U.S. ARMY, AMERICAN MILITARY HISTORY 9 (rev. ed. 1989) ("Unity of command was successfully achieved for the Union under Grant in 1864, for the Allies under Marshal Foch in World War I, and for the Allied forces under General Eisenhower in the European Theater of Operations in World War II. Divided command of British forces in America played an important role in leading to the surrender at Saratoga. The lack of unity of command or even effective co-operation between Admiral Halsey's Third Fleet and MacArthur's landing force in Leyte might have cost American forces dearly in 1944. . . . [A]n interesting case in divided command was MacArthur's failure to place X Corps of the United Nations forces under the command of the Eighth Army in Korea during the fall and early winter of 1950.").

[253] Pede, *supra* note 97.

[254] NICHOLAS RODGER, THE COMMAND OF THE OCEAN: A NAVAL HISTORY OF BRITAIN, 1649–1815, at 272 (2005).

[255] FAYOL, *supra* note 21, at 23 ("When a defect in discipline is apparent . . . and subordinates leave much to be desired . . . the ill mostly results from ineptitude of leaders.").

[256] *Id.* at 21 ("The need for sanction, which has its origin in a sense of justice, is strengthened by this consideration, that in the general interest useful actions have to be encouraged, and the opposite discouraged.").

[257] Gillibrand, *supra* note 13.

[258] *See supra* notes 141–47 and accompanying text (discussing empirical data showing how leadership climate affects a sexual violence crimes).

who are criminally accountable for prosecuting sexual assaults, and transfers it to prosecutors who are immune from that accountability.[259] In other words, MJIA guarantees impunity for the very leadership failure it seeks to remedy.

This article has proposed amending the *Manual for Courts-Martial* to include a superior responsibility provision that would promote the justice MJIA seeks without compromising military readiness. The military services, however, need not wait to begin implementing reform, as superior responsibility derelictions are already punishable under Article 134, UCMJ, in the manner reflected in the Appendix. As a first step toward punishing those derelictions, the military services should implement a leader-focused intervention training methodology to instill the "*plain, known Rules*" undergirding superior responsibility obligations. That training methodology would preferably be one proven to reduce sexual assault rates, such as the Air Force has implemented,[260] and targeted at those junior leaders most likely to supervise perpetrators of sexual assault.[261] Then, when leaders fail "to control" their subordinates in violation of the "*plain, known Rules*" instilled by the training, they would need to be disciplined to incentivize the prevention of sexual violence. In this way, the military services would promote justice without undermining military readiness.

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[259] *See supra* notes 120–25 and accompanying text (discussing a commander's responsibilities *vis-à-vis* a prosecutor's responsibilities in the context of MJIA's "covered offenses").

[260] *See supra* notes 143–44 and accompanying text (discussing the "Green Dot" intervention training, and the Air Force's implementation thereof).

[261] *See supra* note 163 and accompanying text (explaining that "junior leaders" are most likely to directly supervise the perpetrators of sexual assault).

## Appendix

### Article 134—(Superior Responsibility—failure to prevent, discipline, or discover criminal acts)

a. *Text of statute.* See paragraph 91.

b. *Elements.*

(1) *Deliberate failure to prevent, discipline, or discover criminal acts.*

(a) That the accused was a superior who had certain duties to control one or more subordinates;

(b) That the accused did not perform those duties;

(c) One or more of those subordinates inflicted unlawful harm;

(d) That such dereliction was intended to operate as an aid or encouragement to the actual perpetrator; and

(e) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(2) *Culpable neglect resulting in unlawful harm to another person.*

(a) That the accused was a superior who had certain duties to control subordinates;

(b) That the accused knew or reasonably should have known of those duties;

(c) That the accused was (willfully) (through culpable negligence) derelict in the performance of those duties;

(d) That one or more of those subordinates unlawfully inflicted bodily harm, substantial bodily harm, grievous bodily harm, or death to another person; and

(e) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

[Note: Add the following elements only when the dereliction was willful and death was inflicted—both elements must be satisfied to be applicable.]

(f) That the omission was inherently dangerous to another and showed a wanton disregard for human life; and

(g) That the accused knew that death or great bodily harm was a probable consequence of the omission.

(3) *Culpable neglect resulting in damage or destruction to non-military property*.

(a) That the accused was a superior who had certain duties to control one or more subordinates;

(b) That the accused knew or reasonably should have known of those duties;

(c) That the accused was (willfully) (recklessly) derelict in the performance of those duties;

(d) That one or more of those subordinates damaged or destroyed non-military personal property, or wasted or spoiled non-military real property;

(e) That the destroyed personal property or the wasted or spoiled real property were of a certain value, or the damage to personal property was of a certain amount; and

(f) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *In general.*

(a) *Harm*. "Harm," except as it relates to the person and property of the accused, refers to any unlawful damage to property, injury to persons, or a violation of a legal protection afforded to property and persons.

(b) *Superior*. "Superior" refers to one who has a duty "to control" a subordinate and can be *de jure* or *de facto*.

(i) De jure *superior authority*. "*De jure* superior authority" is shown through written orders formally appointing an individual as a commander, and extends to subordinates of units for which that commander formally assumes administrative control.

(ii) De facto *superior authority*. "*De facto* superior authority" is established by demonstrating the accused had actual knowledge, or reasonably should have known, of the following: (1) the possession of authority to have taken a particular action "to control" a putative subordinate; and (2) that the putative subordinate was subject to that authority.

(c) *Duty to control*. "Duty to control" means the duty of superiors to take those measures within their authority that are necessary in the circumstances to prevent, discipline, or discover unlawful acts carried out by their subordinates. The following are measures which may be necessary in the circumstances:

(i) *Preventing*—protesting or criticizing criminal action; issuing specific orders prohibiting or stopping the criminal activities and securing implementation of those orders; training subordinates on compliance with the law.

(ii) *Disciplining*—counseling the subordinate; initiating disciplinary or criminal proceedings against the commission of unlawful acts; or referring the matter to courts-martial or to competent authority to initiate such proceedings;

(iii) *Monitoring*—reviewing reports of subordinate conduct sent to superiors for their special benefit; periodically inspecting detention facilities or barracks;

(iv) *Inquiring*—initiating and carrying out an investigative inquiry when in receipt of credible information that subordinates caused unlawful harm; or reporting information to competent authorities to do so.

(d) *Knowledge.* Actual knowledge of duties or authority may be proved by circumstantial evidence. Actual knowledge need not be shown if the individual reasonably should have known of their duties or authority to take a particular action. This may be demonstrated by regulations, training or operating manuals, customs of the Service, academic literature or testimony, testimony of persons who have held similar or superior positions, or similar evidence.

d. *Deliberate failure to prevent, discipline, or discover criminal acts*—[Principal Liability].

(1) *Maximum punishment.* A superior who commits this offense is equally guilty of the offense committed directly by a subordinate and may be punished to the same extent.

(2) *Sample specification.*

In that, _____ (personal jurisdiction data), (at/on board—location) (subject-matter jurisdiction data, if required), (on or about ____ 20__) (from about ____ 20__ to about ____ 20__), failed to (protest or criticize unlawful acts) (issue specific orders prohibiting or stopping criminal activities and securing implementation of those orders) (initiate (disciplinary) (investigative) (criminal) proceedings against the commission of unlawful act(s)) (refer (credible information) (reports) of criminal wrongdoing to competent authority to initiate (disciplinary) (criminal) (investigative) proceedings) (review reports of subordinate conduct sent for (his) (her) special benefit containing credible information of criminal allegations) (periodically inspect (detention facilities)(barracks), as it was (his) (her) duty to do, which (was) (were) (a) measure(s) necessary (to discipline) (to prevent) (to discover) unlawful harm inflicted by_____, who (was) (were) than (his)(her) subordinate(s), and that the accused intended the omission to operate as an aide or encouragement to the said subordinate(s) who committed an offense under the Uniform Code of Military Justice, to wit: (larceny of _____, of a value of (about) $____, the property of _____), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

e. *Culpable neglect—failure to prevent, discipline, or discover unlawful acts that unlawfully inflict injury or death.*

(1) *Derelict.* A person is derelict in the performance of duties when that person willfully or by culpable negligence fails to perform that person's duties. "Willfully" means intentionally. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act. An act is not willful if the person could have honestly concluded the act or omission was lawful. "Culpable negligence" means an act or omission which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others.

(2) Where the dereliction of duty resulted in death or injury, the intent to cause the harm is not required.

(3) *Harm.* When specified "harm" also has the same meaning ascribed it as "bodily harm," "substantial harm," and "grievous harm" in Article 128 (paragraph 77).

(4) *Great bodily harm.* For purposes of this offense, the phrase "great bodily harm" has the same meaning ascribed to it in Article 118 (paragraph 56).

(5) *Act or omission inherently dangerous to others.*

(a) Intentionally engaging in an act or omission inherently dangerous to another—although without an intent to cause the death of or great bodily harm to any particular person, or even with a wish that death will not be caused—may enhance criminal liability if the act or omission shows wanton disregard of human life. Such disregard is characterized by heedlessness of the probable consequences of the act or omission, or indifference to the likelihood of death or great bodily harm.

(b) Knowledge. The accused must know that death or great bodily harm was a probable consequence of the inherently dangerous act or omission. Such knowledge may be proved by circumstantial evidence.

(6) *Maximum punishment.*

(a) *Willful derelictions.*

(i) *Without bodily harm*—[Dereliction of duty]. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(ii) *Resulting in death or grievous bodily harm*—[Dereliction of duty]. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(iii) *Resulting in death from an act or omission inherently dangerous to others*—[Murder—Act inherently dangerous to another]. Mandatory minimum—imprisonment for life with the eligibility for parole.

(b) *Culpably negligent derelictions.*

(i) *Without bodily harm*—[Dereliction of duty]. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(ii) *Resulting in bodily harm to a child under 16 years*—[Assault consummated by a battery upon a child under 16 years]. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(iii) *Other cases*—[Assault consummated by a battery]. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(c) *Culpably negligent dereliction resulting in substantial bodily harm*—[Aggravated assault in which substantial bodily harm is inflicted].

(i) *When substantial bodily harm is inflicted with a loaded firearm*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 8 years.

(ii) *Resulting in substantial bodily harm to a child under the age of 16 years*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 6 years.

(iii) *Other cases*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(d) *Culpably negligent dereliction resulting in grievous bodily harm*—[Aggravated assault in which grievous bodily harm is inflicted].

(i) *When the injury is inflicted with a loaded firearm*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(ii) *Resulting in grievous bodily harm upon a child under the age of 16 years.* Dishonorable discharge, total forfeitures, and confinement for 8 years.

(iii) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(e) *Culpable negligent dereliction resulting in death.*

(i) *Resulting in death upon a child under the age of 16 years*—[Involuntary Manslaughter]. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(ii) *Other cases*—[Involuntary Manslaughter]. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(7) *Sample specification.*

In that, _____ (personal jurisdiction data), who (knew) (should have known) of (his) (her) duties (at/on board—location) (subject-matter jurisdiction data, if required), (on or about ____ 20__) (from about ____ 20__ to about _____ 20__), was derelict in the performance of those duties in that (he) (she) (willfully) (by culpable negligence) failed to (protest or criticize unlawful acts) (issue specific orders prohibiting or stopping criminal activities and securing implementation of those orders) (initiate (disciplinary) (investigative) (criminal) proceedings against the commission of unlawful act(s)) (refer (credible information) (reports) of criminal wrongdoing to competent authority to initiate (disciplinary) (criminal) (investigative) proceedings) (review reports of subordinate conduct sent for (his) (her) special benefit containing credible information of criminal allegations) (periodically inspect (detention facilities) (barracks), as it was (his) (her) duty to do, which (was) (were) (a) measure(s) necessary (to discipline) (to prevent) (to discover) unlawful harm inflicted by_____, who (was) (were) then (his)(her) subordinate, and who inflicted [(bodily harm) by (striking) (_____) _____ (on) (in) the _____ with _____.] [substantial bodily harm by (shooting) (striking) (cutting) (___) (him) (her) (on) the _____ with a (loaded firearm) (club) (rock) (brick) (_____)], [by (shooting)

(striking) (cutting) (___) (him) (her) (on) the _____ with a (loaded firearm) (club) (rock) (brick) (_____) and did thereby inflict grievous bodily harm upon (him) (her), to wit: a (broken leg) (deep cut) (fractured skull) (_____).] [, to a child under the age of 16 years] [, that the dereliction was inherently dangerous to one or more persons, and evinced a wanton disregard for human life and that the accused knew that death or great bodily harm was a probable consequence of the act], and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

g. *Culpable neglect—failure to prevent, discipline, or discover unlawful acts that damage or destroy non-military property.*

(1) *Wasting or spoiling non-military property*. For purposes of this offense, the terms "wasting" or "spoiling" have the same meanings ascribed to them in Article 109 (paragraph 45).

(2) *Destroying or damaging non-military property.* For purposes of this offense, the terms "destroying" or "damaging" have the same meanings ascribed to them in Article 109 (paragraph 45).

(3) *Value and damage.* For purposes of this offense, the value and damage of the harm is determined in the same manner as in Article 109 (paragraph 45).

(4) *Maximum punishment*—[Property other than military property of United States—waste, spoilage, or destruction].

(a) *Wasting or spoiling, non-military property—real property.*

(i) *Of property valued at $1,000 or less*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(ii) *Of property valued at more than $1,000*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(b) *Damaging any property other than military property of the United States.*

(i) *Inflicting damage of $1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(ii) *Inflicting damage of more than $1,000.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(c) *Destroying any property other than military property of the United States.*

(i) *Destroying property valued at $1,000 or less*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(ii) *Destroying property valued at more than $1,000*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(5) *Sample Specification.*

In that, _____ (personal jurisdiction data), who (knew) (should have known) of (his) (her) duties (at/on board—location) (subject-matter jurisdiction data, if required), (on or about ____ 20__) (from about ____ 20__ to about ____ 20__), was derelict in the performance of those duties in that (he) (she) (willfully) (recklessly) failed to (protest or criticize unlawful acts) (issue specific orders prohibiting or stopping criminal activities and securing implementation of those orders) (initiate (disciplinary) (investigative) (criminal) proceedings against the commission of unlawful act(s)) (refer (credible information) (reports) of criminal wrongdoing to competent authority to initiate (disciplinary) (criminal) (investigative) proceedings) (review reports of subordinate conduct sent for (his) (her) special benefit containing credible information of criminal allegations), as it was (his) (her) duty to do, which (was) (were) (a) measure(s) necessary and (to discipline) (to prevent) (to discover) the unlawful harm inflicted by _____ who (was) (were) than (his) (her) subordinate, and who did [(waste) (spoil) of real property, to wit: _____) (wrongfully (destroy) by (method of damage) (identify personal property destroyed_____), of a value of (about) $_____] [(wrongfully damage by (method of damage) (identify personal property damaged), the amount of said damage being in the sum of (about) $_____), the (personal) property of _____], and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

# THIRTY YEARS AFTER *EGAN*: DEFINING EXECUTIVE BRANCH AUTHORITY IN CIVILIAN PERSONNEL DECISIONS MOTIVATED BY NATIONAL SECURITY CONCERNS

MICHAEL J. CARLSON*

## I. Introduction

In April 2015, the Army's Blue Grass Army Depot (BGAD) failed an annual safety inspection by the Joint Munitions Command (JMC).[1] The JMC concluded that BGAD neglected to properly maintain its Intrusion Detection System (IDS) in compliance with the Army regulations governing its Arms, Ammunition, and Explosives (AA&E) program. The IDS is a key component of the security system designed to guard some of the Army's most dangerous conventional weapons from theft or sabotage. The weapons systems at BGAD included Stinger missiles in ready-to-fire status and other weapons that would pose an immediate threat of mass casualties if they were stolen by a terrorist organization, a criminal enterprise, or a disgruntled employee intent on perpetrating a mass homicide.

A subsequent internal inspection revealed that two electronics mechanics charged with maintaining the IDS, both Federal civilian employees, violated Army regulations by installing unauthorized devices that would prevent the IDS from alarming in the event an intruder accessed buildings in which weapons were stored.

The BGAD commander acted promptly, suspending the employees' employment and their certifications under the AA&E program, pending the results of an internal investigation. The certification is a condition of

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[1] The facts recited in this section are based on those underlying *Bilski v. McCarthy*, Civil Action No. 5: 16-322-DCR, 2017 WL 3484686 (E.D. Ky. Aug. 14, 2017). Some facts have been altered for ease of presenting the issues considered in this article. To avoid confusion with the actual facts at issue in *Bilski*, this article simply references the case as the "BGAD case" or the "situation at BGAD."

employment for personnel working with sensitive AA&E; it includes a requirement that employees go through screening beyond that required to receive their security clearances. When the investigation was completed, the commander revoked the employees' certifications and terminated their employment. The commander neither suspended nor sought revocation of the employees' security clearances.

If the Army had revoked the electronics mechanics' security clearances, the revocations and the commander's removal of the employees would have been dismissed in any related court action pursuant to the Supreme Court's decision in *Department of the Navy v. Egan*.[2] In *Egan*, the Court held that notwithstanding a legislative scheme permitting review of Federal employment decisions by the Merit Systems Protection Board (MSPB), security clearance determinations involving a delegation of the President's power as Commander in Chief under Article II of the Constitution are not subject to judicial review.[3]

While the central holding of *Egan* is unambiguous, the lower courts do not always extend deference to Executive Branch security-related decisions beyond security clearance determinations.[4] Disagreements among the appellate courts as to whether national security-related employment actions, including the decisions involving AA&E certifications at BGAD, will be afforded deference, create challenges for Federal court litigators in developing litigation strategies. The uncertainty also places potential burdens on agency decision makers who may become immersed in litigation for years.[5]

These challenges unexpectedly presented themselves in the BGAD case. After their suspensions and removals, the electronics mechanics initiated a complaint for retaliation based on the commander's actions. Once the employees exhausted the administrative process, they filed a lawsuit against the Army in the U.S. District Court for the Eastern District of Kentucky. In response to the employees' complaint, the Army filed a motion to dismiss the plaintiffs' claims, arguing that *Egan* precluded review of the

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[2] Dep't of the Navy v. Egan, 484 U.S. 518 (1988).
[3] *Id.* at 527, 529.
[4] *See, e.g.*, Toy v. Holder, 714 F.3d 881 (5th Cir. 2013).
[5] During the course of fully litigated employment case, an agency decision maker may expect to make four or five statements during the investigation and litigation processes, in addition to spending time preparing to testify, assisting in discovery, and potentially serving as the agency representative at trial, which typically lasts several days. This assertion is based on the author's recent professional experiences as a Litigation Attorney with the Army's Litigation Division from 30 March 2010 to present [hereinafter Professional Experiences].

Army's AA&E certification decisions and the resulting employment actions.

Before the plaintiffs responded to the motion, the Sixth Circuit Court of Appeals[6] ruled in another case that the Tennessee Valley Authority's revocation of a security guard's medical certification, a precondition to working at a nuclear power plant, was not exempt from review under *Egan*.[7] The Sixth Circuit's decision effectively undercut the Army's motion to dismiss and left the BGAD commander's decisions at issue in litigation that would continue for more than four-and-a-half years.[8]

This article focuses on the practice of agency lawyers in Federal courts with the goal of determining the most logical and effective means of protecting agency discretion on national security-related decisions. The approach aims to minimize the litigation burden on agency decision makers and to provide predictability for leaders charged with crafting agency policies.

Part II provides an overview of the civilian personnel system and describes the prevailing law at the time in which *Egan* was decided, giving context to the Supreme Court's decision. Part III reviews the Supreme Court's decision in *Egan*, explaining how it arrived at the conclusion that security clearance determinations are protected from scrutiny by the MSPB and the courts. Part IV is a look forward from *Egan*, examining four appellate decisions that represent divergent views of *Egan*. The examination of these cases defines the common problems confronted by the Federal court litigators charged with handling *Egan*-related issues in civilian employment cases. Part V argues for a logical application of *Egan*, with an interpretation based on consistent adherence to the Supreme Court's guidance and consideration of the authorities on which the Court relied in making its ruling. Finally, Parts VI and VII explore potential exceptions to *Egan*, with Part VI examining potential exceptions for constitutional claims and Part VII considering exceptions that may apply to certain aspects of cases that

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[6] The Sixth Circuit Court of Appeals has appellate jurisdiction over Federal cases originating in U.S. District Courts in Kentucky. *Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf (last visited Nov. 28, 2020).
[7] Hale v. Johnson, 845 F.3d 224 (6th Cir. 2016).
[8] Bilski v. McCarthy, 790 F. App'x 756 (6th Cir. 2019) (affirming, in relevant part, the award of summary judgment to the Army on plaintiffs' retaliation claims related to the commander's disciplinary actions).

may be examined even when *Egan* prevents review of a national security-based employment action.

## II. Background

*Egan* arose in a constitutionally complex setting involving the balancing of constitutional powers of the President and Congress with the constitutionally protected interests of Federal employees. The President and Congress both have significant constitutional powers on matters affecting national security, foreign affairs, and civilian employment.[9] The assertion of these constitutional powers by the political branches may conflict with notions of due process that accompany property interests to which civilian employees are normally entitled in their positions.[10] Such assertions of constitutional powers can also encroach on other constitutionally protected liberties.[11]

Subsection A of this background briefly describes the Federal personnel system established by the Civil Service Reform Act of 1978 (CSRA),[12] with a focus on the key provisions considered by the Supreme Court in *Egan*. The CSRA dictates the due process owed to Federal employees in the making of employment decisions and establishes workplace protections for them. Subsection B provides the legal backdrop to *Egan* through a brief examination of two prior Supreme Court cases involving the tension between the Government's exercise of its national security powers and the rights of its employees.

### A. An Overview of the Federal Civilian Personnel System[13]

The current iteration of the personnel system governing Federal civilian employment was established by the CSRA and is found in Title V of the

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[9] *See* U.S. CONST. art. I, § 8; *id.* art. II, § 2.

[10] A property interest in a Government position arises when a person has a "reasonable expectation" of continued employment deriving from the applicable of laws or regulations. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

[11] *See, e.g.*, Webster v. Doe, 486 U.S. 592, 596 (1988) (considering alleged violations of an employee's rights under the First, Fourth, Fifth, and Ninth Amendments of the Constitution).

[12] Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5, 10, 15, 28, 31, 39, and 42 U.S.C.).

[13] The system covering Federal personnel practices is detailed and often difficult to understand. *See* Professional Experiences, *supra* note 5; *see also* Transcript of Oral Argument at 43, Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975 (2017) (No. 16-399) ("[W]ho wrote this statute? Somebody who . . . takes pleasure out of pulling the wings off flies?")

U.S. Code. The CSRA governs a broad array of Federal personnel actions,[14] which must be made in accordance with certain merit system principles[15] and free from illegal discrimination or other motivations contrary to the CSRA's purpose.[16] These principles include the obligation on the part of Government decision-makers to refrain from encroaching on an individual's constitutionally protected rights in making personnel decisions.[17] The CSRA provides for due process[18] and the opportunity to appeal the most significant adverse actions, such as removals, directly to the MSPB.[19] The CSRA affords employees an appeals process, which starts with an appeal to the MSPB[20] and culminates at the U.S. Court of Appeals for the Federal Circuit.[21]

Beyond the process described above, Chapter 75 of Title V establishes an alternative procedure for suspensions and removals of a Federal employee "in the interests of national security."[22] The employee is entitled to a statement of charges, an opportunity to respond, and a hearing before an agency authority.[23] This process ends with an unappealable written decision by the head of the agency.[24]

The CSRA allows for provides alternate methods of review for claims under the various statutes prohibiting discrimination, such as Title VII of the Civil Rights Act of 1964,[25] which have their own administrative processes that generally culminate in the right to file an action in a U.S. district court.[26]

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(Alito, J.). This overview provides a description of the principles, decision-making process, and review mechanisms most relevant to this article.

[14] 5 U.S.C. § 2302(a)(2)(A).

[15] *Id.* § 2301(b).

[16] *Id.* § 2302(b).

[17] The CSRA expressly requires that "[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management . . . [including] proper regard for their privacy and constitutional rights." *Id.* § 2301(b).

[18] *Id.* § 7543(b).

[19] *Id.* § 7543(d).

[20] *Id.* § 7701; *id.* § 1204.

[21] *Id.* § 1204; *id.* § 7703.

[22] *Id.* § 7532(a)–(b).

[23] *Id.* § 7532(c)(3).

[24] *Id.*

[25] 42 U.S.C. § 2000e-16(a) (prohibiting discrimination based on race, color, religion, sex, or national origin).

[26] *See, e.g.*, *id.* § 2000e-16(c).

B. Prelude to *Egan*: Supreme Court Cases Considering Presidential Authority

Almost twenty years before *Egan*, the Supreme Court decided two cases—*Greene v. McElroy*[27] and *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy* (*Cafeteria Workers*)[28]—that laid the foundation for the Court's decision in *Egan*. Both cases involved claims by Government contractors' employees who lost their positions for security-related reasons without being afforded the opportunity to hear and respond to the evidence supporting the Government's position.

In *Greene*, the employee's loss of his security clearance not only cost him his job but also made it impossible to gain other employment within his field.[29] The Court found the employee had no ability to pursue "his chosen profession free from unreasonable governmental interference," a protected interest under the Fifth Amendment.[30] Based on this "immutable" principle, the Court observed that where the Government contemplates an action that will seriously affect an individual's ability to pursue their occupation, the Government's evidence "must be disclosed to the individual so he has an opportunity to show that it is untrue."[31]

The Court acknowledged that both the President and Congress had the right to limit the procedural rights of an individual based on assertions of their national security powers.[32] The Court found, however, that neither the Executive Orders mandating classification and protection of sensitive information nor Congress' enactment of legislation to support the agency's classification program constituted an authorization for the agency to rescind a security clearance without due process.[33] The Court reasoned that the right to due process is so fundamental to any governmental decision-making process that authorization for a program lacking such provisions is invalid unless it is "clear that the President or Congress, within their respective constitutional powers, specifically decided that the imposed procedures are necessary and warranted and has authorized their use."[34]

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[27] Greene v. McElroy, 360 U.S. 474 (1959).
[28] Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886 (1961).
[29] *Greene*, 360 U.S. at 492.
[30] *Id.*
[31] *Id.* at 496.
[32] *Id.*
[33] *Id.* at 499–507.
[34] *Id.* at 507.

The Supreme Court's subsequent decision in *Cafeteria Workers* addressed similar issues, but reached a different conclusion.[35] The employee, who worked as a cook, lost her job after the Navy commander summarily barred her from the installation based on security concerns without providing an explanation.[36] The commander's action was in accordance with the Navy's regulations.[37] The Court rejected the employee's claim that she was entitled to notice and an opportunity to respond to the allegations based on the facts of the case.[38] The Court found that Congress' enactment of legislation authorizing the Secretary of the Navy to promulgate necessary regulations, coupled with the statute's requirement that the President approve any such regulations, was a specific delegation of constitutional power required under *Greene*.[39] The President had "endowed" the regulations "with the sanction of the law."[40]

The Court further observed that while due process is generally required for any Government action, the "Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest."[41] The Court further found that the employee lacked a protected interest because the Navy's action did not affect her "right to follow a chosen trade or profession," but merely prevented her from working in a position at one location.[42]

## III. *Egan* in Sum

In *Egan*, the Supreme Court considered the justiciability of the Navy's decision to revoke the security clearance of a civilian employee, Thomas Egan, and to remove him from Federal employment.[43] Egan was hired for a civilian laborer leader position at the Navy's Trident Naval Refit Facility to work on the maintenance and repair of nuclear-powered Trident

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[35] Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886, 891 (1961).
[36] *Id.* at 887–88.
[37] *Id.* at 888.
[38] *Id.* at 898.
[39] *Id.* at 891.
[40] *Id.* (citing United States v. Maurice, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747)).
[41] *Id.* at 894.
[42] *Id.* at 896–97.
[43] Dep't of the Navy v. Egan, 484 U.S. 518, 525–26 (1988).

submarines.[44] Egan's position required a security clearance as a condition of employment.[45]

When Egan began work, he performed non-sensitive duties pending completion of his security investigation.[46] Following completion of the investigation, the Navy denied him a clearance based on the discovery of four criminal convictions and a prior drinking problem.[47] The Navy then removed Egan from his position using the procedure established under 5 U.S.C. § 7513, which governs most significant Federal employment actions, rather than § 7532. The § 7513 process allows for review by the MSPB and the Court of Federal Claims,[48] whereas § 7532, which allows national security-related removals, culminates in an unreviewable decision by the head of the agency.[49] Yet, in *Egan*, the Supreme Court held that the security clearance determination was unreviewable notwithstanding the Navy's use of § 7513.[50] The Court found that the presumption of reviewability "runs aground when it encounters concerns of national security" where a security clearance determination is "committed by law" to the Executive Branch.[51]

Justice Blackmon explained the Court's constitutional basis for reversal:

> The President, after all, is the "Commander in Chief of the Army and Navy of the United States." His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.[52]

As the Court expounded, Presidents have exercised their authority over the protection of sensitive information through a series of Executive Orders, which delegate the President's authority to Federal agencies and

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[44] *Id.* at 520.
[45] *Id.*
[46] *Id.* at 521.
[47] *Id.*
[48] 5 U.S.C. § 7532.
[49] *Egan*, 484 U.S. at 521–22.
[50] *Id.* at 526.
[51] *Id.* at 526–27.
[52] *Id.* at 527 (quoting U.S. CONST. art. II, § 2).

dictate the manner in which information is classified and protected.[53] The requirement that a security clearance be granted only when "clearly consistent with the interests of the national security" requires the type of expertise and "predictive judgment" found only at the agency.[54] The agency must therefore have "broad discretion to determine who may have access to" sensitive information.[55]

At the heart of the Supreme Court's decision is its holding that courts have no role in reviewing security clearance determinations:

> Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.[56]

In reaching this determination, the Court rejected the application of due process jurisprudence holding that an employee's rights may be implicated when Government action would deprive him or her of future employment prospects.[57] The Court posited that "[i]t should be obvious that no one has a 'right' to a security clearance."[58]

Rejecting Egan's argument that the Navy subjected its removal decision to review by using § 7513, the Supreme Court found that the existence of the two administrative procedures under the CSRA—§§ 7513 and 7532—merely provided alternative structures for handling removals related to security clearance decisions.[59] The Court explained that such decisions are not reviewable by the MSPB regardless of the process elected by the agency.[60]

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[53] *Id.*
[54] *Id.* at 528.
[55] *Id.* at 529.
[56] *Id.*
[57] *Id.* at 528–29.
[58] *Id.* at 528.
[59] *Id.* at 530–34.
[60] *Id.* at 533–34.

## IV. Courts' Divergent Interpretations of *Egan*

In the wake of *Egan*, Federal courts of appeals have consistently applied the Supreme Court's central holding—that the merits of an agency's security clearance determination are protected from judicial review—and have done so in a variety of cases.[61] However, there are significant disagreements among the courts of appeals as to the scope of *Egan*'s application.[62] These disagreements center primarily on two general questions. First, to what extent are an agency's actions related to a security clearance determination protected from judicial scrutiny?[63] This includes decisions to report security issues and to initiate a security investigation.[64] There is also a related question about whether the actions of every person involved in the security clearance process are protected under *Egan*.[65] The second question is to what extent *Egan* extends to agency actions other than security clearance determinations that bear on national security.[66] Such actions include certifications under personnel reliability programs like those used in the AA&E program at BGAD, and other conditions of employment imposed to protect national security.[67]

The appellate courts' divergent interpretations of *Egan* on these issues is well illustrated by four courts of appeals opinions from the Fourth, Sixth, and D.C. Circuits, discussed in pairs below. Each pair of decisions represents application of *Egan* in strikingly similar factual scenarios, but with different conclusions as to the requirement for judicial abstention.

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[61] *E.g.*, Becerra v. Dalton, 94 F.3d 145, 149 (4th Cir. 1996) (barring claim under Title VII); Guillot v. Garrett, 970 F.2d 1320, 1325 (4th Cir. 1992) (barring claim under the Rehabilitation Act of 1973); Perez v. FBI, 71 F.3d 513 (5th Cir. 1995) (barring claim under Title VII); Brazil v. U.S. Dep't of the Navy, 66 F.3d 193, 195 (9th Cir. 1995) (barring claim under Title VII); Hill v. Dep't of Air Force, 844 F.2d 1407, 1413 (10th Cir. 1988) (barring claim under the Fifth Amendment and the Administrative Procedures Act); Ryan v. Reno, 168 F.3d 520, 523 (D.C. Cir. 1999) (barring claim under Title VII).

[62] *Compare, e.g.*, *Becerra*, 94 F.3d 145 (extending *Egan*'s bar on judicial review to complaints about the instigation of a security investigation), *with* Rattigan v. Holder, 643 F.3d 975 (D.C. Cir. 2011) (rejecting the application of *Egan* to a complaint about the instigation of a security investigation).

[63] *Becerra*, 94 F.3d 145; *Rattigan*, 643 F.3d 975.

[64] *Rattigan*, 643 F.3d 975.

[65] *Id.*

[66] *Compare, e.g.*, Hale v. Johnson, 845 F.3d 224 (6th Cir. 2016) (declining to extend *Egan* to a security-related medical certification decision), *with* Foote v. Moniz, 751 F.3d 656, 657 (D.C. Cir. 2014) (extending *Egan* to a security-related certification program).

[67] *See, e.g.*, *Foote*, 751 F.3d at 657 (applying *Egan* to the Department of Energy's Human Reliability Program).

First, in *Becerra v. Dalton*[68] and *Rattigan v. Holder*,[69] the Fourth and D.C. Circuits considered whether an agency's instigation of a security investigation for purposes of making a clearance determination is protected from judicial review. Second, the question of whether *Egan* extends to employment actions other than security clearance determinations is exemplified by the differing approaches of the Sixth Circuit in *Hale v. Johnson*[70] and the D.C. Circuit in *Foote v. Moniz*.[71]

A. Does *Egan* Extend to the Entire Security Clearance Process?

In *Becerra* and *Rattigan*, the Fourth and D.C. Circuits considered claims in which plaintiffs sought to circumvent *Egan* by challenging the initiation of the security clearance process rather than the final security determination.[72] In both cases, the plaintiffs alleged that they were wrongfully targeted by coworkers who provided false information to security officials for retaliatory reasons.[73] In *Becerra*, the plaintiff's security clearance was revoked, resulting in the loss of his clearance.[74] In *Rattigan*, the Federal Bureau of Investigation's (FBI) Security Division found that the concerns raised by Rattigan's coworker did not necessitate action on his security clearance.[75]

The courts applied different standards and arrived at different results as to whether these referrals of concerning information were protected from court review. The Fourth Circuit rejected Becerra's attempt to distinguish between instigation of a security clearance investigation and the decision ultimately resulting from that investigation, explaining:

> We find that the distinction between the initiation of a security investigation and the denial of a security clearance is a distinction without a difference. The question of whether the Navy had sufficient reasons to investigate the plaintiff as a potential security risk goes to the very heart

[68] *Becerra*, 94 F.3d 145.
[69] *Rattigan*, 643 F.3d 975.
[70] *Hale*, 845 F.3d 224.
[71] *Foote*, 751 F.3d at 657.
[72] *Becerra*, 94 F.3d at 149 (challenging only the instigation of the security investigation based on false information). In *Rattigan*, the FBI's Security Division found that the concerns raised by Rattigan's coworker did not necessitate action on his security clearance. *Rattigan*, 643 F.3d at 984–86.
[73] *Becerra*, 94 F.3d at 149.
[74] *Id.*
[75] *Rattigan*, 643 F.3d at 979.

> of the "protection of classified information [that] must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." The reasons why a security investigation is initiated may very well be the same reasons why the final security clearance decision is made. Thus, if permitted to review the initial stage of a security clearance determination to ascertain whether it was a retaliatory act, the court would be required to review the very issues that the Supreme Court has held are non-reviewable.[76]

In contrast, the D.C. Circuit found that *Egan* did not apply because "Rattigan's claim implicates neither the denial nor revocation of his security clearance nor the loss of employment resulting from such action."[77] The court further held "that *Egan* shields from review only those security decisions made by the FBI's Security Division, not the actions of thousands of other FBI employees who, like Rattigan's . . . supervisors, may from time to time refer matters to the Division."[78] The court explained, "decisions about whether to grant or deny security clearance require '[p]redictive judgment . . . by those with the *necessary expertise* in protecting classified information.'"[79] The court observed that "such expert predictive judgments are made by 'appropriately trained adjudicative personnel.'"[80] Since Rattigan did not challenge the decision of those trained personnel, *Egan* did not apply.[81]

Significant to the differing opinions is the Fourth Circuit's focus on the extent to which the agency's decision-making implicates a constitutionally delegated authority to the agency as a whole.[82] By contrast, the D.C. Circuit limits protection from judicial scrutiny to the actions of trained security experts who protect the same type of sensitive information.[83]

These divergent applications of *Egan* have significant implications for Federal court litigators, depending on the jurisdiction in which they

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[76] *Becerra*, 94 F.3d at 149 (alteration in original) (quoting Dep't of the Navy v. Egan, 484 U.S. 518, 529 (1988)).
[77] *Rattigan*, 643 F.3d at 981.
[78] *Id.* at 983.
[79] *Id.* (alteration in original) (quoting *Egan*, 484 U.S. at 529).
[80] *Id.* (quoting Exec. Order No. 12968, 60 Fed. Reg. 40,250 (Aug. 7, 1995)).
[81] *Id.*
[82] Becerra v. Dalton, 94 F.3d 145, 149 (4th Cir. 1996).
[83] *Rattigan*, 643 F.3d at 983.

practice. *Rattigan* subjects the security referral decisions by non-experts to court review; it also creates questions about whether an employee involved in the security clearance process may be subjected to a claim in court in other situations. For example, if the BGAD commander had decided to suspend the security clearances of the electronics mechanics pending a final determination, would he be considered sufficiently expert in the exercise of the "predictive judgment" such that his decision would be insulated from judicial review? This is an open question, which, at least in the D.C. Circuit, necessitates litigation on a case-by-case basis to determine the level of expertise of all personnel involved in the security clearance process.

B. Does *Egan* Apply to Security-Related Decisions Other than Security Clearances?

Whether and to what extent *Egan* applies to decisions other than security clearances is a question of significant debate. In *Foote v. Moniz*, the D.C. Circuit extended the application of *Egan* to a reliability program similar to the AA&E program at BGAD.[84] Employing a different analysis, the Sixth Circuit declined to apply *Egan* outside of the security clearance context in *Hale v. Johnson*.[85]

Both *Foote* and *Hale* considered an agency's removal decisions after an employee lost security-related certifications that were a condition of employment at a nuclear facility.[86] In *Foote*, the D.C. Circuit considered the reviewability of the Department of Energy's refusal to certify the plaintiff under its Human Reliability Program, which is used to "carefully evaluate[] employment applicants for certain positions, such as those where the employees would have access to nuclear devices, materials, or facilities."[87] The court's analysis closely followed the analysis in *Egan*, recognizing that the program was established pursuant to an Executive Order to protect a "substantial national security interest in denying unreliable or unstable individuals access to nuclear . . . facilities."[88] The court concluded that the certification decision was insulated from review because, "like the decision whether to grant a regular security clearance,

[84] Foote v. Moniz, 751 F.3d 656 (D.C. Cir. 2014).
[85] Hale v. Johnson, 845 F.3d 224 (6th Cir. 2016).
[86] *Id.*; *Foote*, 751 F.3d at 656.
[87] *Foote*, 751 F.3d at 657.
[88] *Id.* at 658.

[it was] 'an attempt to predict' an applicant's 'future behavior and to assess whether . . . he might compromise sensitive information.'"[89]

The Sixth Circuit took a contrary approach. In *Hale v. Johnson*, the court rejected the application of *Egan* to the Tennessee Valley Authority's revocation of a security guard's medical certification. The certification was a condition of the guard's employment at a Tennessee Valley Authority nuclear power plant.[90]

The Sixth Circuit noted that *Egan* involved protection of "national-security *information*, not general national-security concerns such as those applicable in determining whether an individual has the physical capacity to guard a nuclear plant."[91] The court observed that Hale's case was markedly different than Egan's in that it did not involve revocation of a security clearance.[92] The court further explained that, while clearance determinations are made by an agency based on its "expertise" in making the "predictive judgment,"[93] no such expertise was needed in "the determination of an individual's physical capability to perform a job," which is the type of decision that "has historically been reviewed by courts."[94] Accordingly, the *Hale* court declined to "extend *Egan* to preclude judicial review of an agency's determination regarding an employee's physical capability to perform the duties of his or her position" or to put itself in a position in which it is deprived of jurisdiction to review employment decisions merely because they are made "in the name of national security."[95]

Significant to the analyses of the D.C. Circuit and the Sixth Circuit in these cases is the different application of *Egan*'s reference to the agency expertise in exercising predictive judgment on national security issues. *Foote* applies this principle broadly as an explanation for why the agency is vested with the power to deny employment to someone who might "compromise sensitive information."[96] By contrast, in *Hale*, the court used this language as a basis to deny the application of *Egan* in scenarios where expertise is not needed.[97] Additionally, while the D.C. Circuit recognized

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[89] *Id.* (quoting Dep't of the Navy v. Egan, 484 U.S. 518, 528 (1988)).
[90] *Hale*, 845 F.3d at 226.
[91] *Id.* at 230 (citation omitted).
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 231.
[96] Foote v. Moniz, 751 F.3d 656, 658–59 (D.C. Cir. 2014) (quoting Dep't of the Navy v. Egan, 484 U.S. 518, 528 (1988)).
[97] *Hale*, 845 F.3d at 230.

that protecting a nuclear facility was a sufficient national security interest, the Sixth Circuit viewed such an interest as outside the scope of *Egan* because it did not involve protection of the type of "national security *information*" referenced in *Egan*.[98]

The uncertainty that such disparate analytical approaches creates for agency decision-makers and attorneys litigating on their behalf is considerable. The Sixth Circuit's opinion, including its reluctance to apply *Egan* beyond decisions involving security clearances, creates substantial uncertainty as to whether *Egan* would apply even in a situation such as the BGAD case, which involved undeniable national security interests.[99]

## V. The Logical Application of *Egan*

A logical and consistent application of *Egan* necessitates a thorough consideration of each legal principle applied by the Court and the legal underpinnings of the decision. A focused approach provides for a straightforward application of the President's powers as Commander in Chief to protect national security interests. Such an approach will allow litigators to effectively advance arguments that create consistency in the law and an appropriate level of protection for agency decision-making in national security matters.

*Egan*'s consideration of the constitutional issues is relatively direct, spanning only four pages.[100] In that distilled analysis, the Court draws on numerous legal authorities to define the scope of the President's authority over national security matters. This jurisprudence provides ample information from which a litigator can draw the proper application of the *Egan* doctrine.

*Egan*'s analytical framework defines the President's constitutional powers on national security matters, Congress' ability to check those powers, and the extent to which a Federal employee's due process rights may affect the decision-making process.[101] *Egan* also provides guidance as to when the President will be deemed to have asserted his or her powers

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[98] *Id.* at 231.

[99] Given the uncertainty associated with the applicability of *Egan* to reliability programs, counsel advising agency decision-makers should recommend that personnel actions premised on national security concerns be addressed by the security clearance process, if that process is appropriate under the circumstances.

[100] *Egan*, 484 U.S. at 526–30.

[101] *Id.*

over national security issues, a necessary predicate to any defense that an agency decision is unreviewable by the courts.[102] As discussed below, full consideration of the principles recognized in *Egan* resolves most of the questions—certainly, the most prominent questions—raised by the courts of appeals' decisions discussed in the previous section.

A. Has the President Exerted His or Her Powers Under the Constitution?

Central to any analysis under *Egan* is the question of whether a plaintiff in Federal court is challenging the President's authority as Commander in Chief under Article II of the Constitution. The Supreme Court explained that "[t]he authority to protect [national security] information falls on the President as head of the Executive Branch and Commander in Chief."[103] *Egan* principles may also be implicated if a plaintiff challenges a constitutional delegation of power to an agency by Congress: "It cannot be doubted that both the legislative and executive branches are wholly legitimate potential sources of such explicit authority" to make national security-related decisions.[104]

The question of delegation of power is critical because, where neither the President nor Congress have delegated power to an agency, an agency decision is presumed to be subject to judicial review.[105] Similarly, where the President or Congress makes a general delegation of power to an agency, its decisions will likely be subject to judicial review absent a specific expression of the intent and necessity of removing an employee's due process rights.[106] Yet, where the President asserts his or her national security powers, any presumption of reviewability by the courts disappears.[107]

The President can delegate his or her constitutional authority by different mechanisms.[108] In *Egan*, the Court found that the issuance of

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[102] *Id.* at 527–30.
[103] *Id.* at 527.
[104] Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886, 890 (1961) (referring to a base commander's power to bar a civilian from a military installation).
[105] Webster v. Doe, 486 U.S. 592, 603 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.").
[106] Greene v. McElroy, 360 U.S. 474, 507 (1959). *See also Cafeteria Workers*, 367 U.S. at 890 ("We proceed on the premise that the explicit authorization found wanting in *Greene* must be shown in the present case."); *Webster*, 486 U.S. at 603 ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.").
[107] *Egan*, 484 U.S. at 527.
[108] *Greene*, 360 U.S. at 507.

numerous Executive Orders governing the classification of information and the issuance of security clearances constituted clear exertions of the President's power as Commander in Chief.[109] In *Cafeteria Workers*, the Court held that a President may also delegate his or her constitutional powers by his or her review and approval of regulations governing national security matters.[110]

Consistent with these holdings, litigators considering the application of *Egan* must initially determine not only whether a matter is within the sphere of the President's constitutional powers, but whether he or she delegated that power. While there is not extensive authority on the topic, presumably any mechanism by which the President or Congress explicitly state their intention to delegate authority to an agency will suffice.

B. General Principles Affecting the Scope of the President's Power

The considerable breadth of the President's authority over national security matters is the central issue defining the application of *Egan* in matters affecting civilian employees of the Federal Government.[111] Congress' powers to address national security issues are also wide ranging. Such powers derive from constitutional provisions affording Congress the authority to declare war, appropriate funds "for the common Defence [sic] and general Welfare of the United States," and raise and support an Army and a Navy.[112]

As the Supreme Court has observed, the division of interrelated powers between the President and Congress creates a range of situations that may affect the deference given to the President on defense and foreign policy issues.[113] When "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[114] Where both branches have authority over a subject but Congress has not acted, "'congressional inertia, indifference or quiescence may' invite the exercise of executive power."[115] Finally, at the other end

[109] *Egan*, 484 U.S. at 527–30.
[110] *Cafeteria Workers*, 367 U.S. at 891 ("Navy Regulations approved by the President are, in the words of Chief Justice Marshall, endowed with 'the sanction of the law.'" (quoting United States v. Maurice, 26 F. Cas. 1211, 1215 (D. Va. 1823) (No. 15,747))).
[111] *Egan*, 484 U.S. at 527–30.
[112] U.S. CONST. art I, § 8.
[113] Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 10–12 (2015).
[114] *Id.* at 10 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 635 (1952)).
[115] *Id.* (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637).

of the spectrum, where "'the President takes measures incompatible with the expressed or implied will of Congress . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.' To succeed in this [scenario], the President's asserted power must be both 'exclusive' and 'conclusive' on the issue."[116]

*Egan* refines this analysis by recognizing that the President's "authority to classify and control access to information bearing on national security" is central to his or her powers as Commander in Chief and "exists quite apart from any explicit congressional grant."[117] *Egan* further informs that the President's authority to control sensitive information is so strong that courts must defer to the President unless "Congress *specifically* has provided otherwise."[118] The fact that Congress enacted provisions for administrative and judicial review of Federal employment decisions in Chapter 75 of Title V of the U.S. Code was not enough to deprive the agency of its protection from judicial scrutiny in making a security clearance determination.[119]

While these general principles are necessary considerations in *Egan* cases, the lower court decisions discussed in Part III highlight the more specific and commonly recurring questions bearing on the scope of the President's national security powers.[120] Resolution of those questions will go a long way toward establishing the consistency needed in applying *Egan*.

C. Is Deference to Agency National Security Employment Actions Limited to Security Clearances or to the Protection of National Security Information?

The Sixth Circuit's decision in *Hale v. Johnson* raises two important questions. First, to what extent does *Egan* extend protection from judicial review to decisions other than security clearance determinations.[121] In other words, does *Egan* apply to any agency decision "so long as it is made in the

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[116] *Id.* (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637–38).
[117] Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988) (citing Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886, 890 (1961)).
[118] *Id.* at 530 (emphasis added).
[119] *Id.* at 527–30.
[120] *Id.* at 526–30.
[121] Hale v. Johnson, 845 F.3d 224, 230 (6th Cir. 2016) ("The [*Egan*] Court explicitly narrowed its holding to address the review of decisions to revoke or deny security clearances."). *See also* Toy v. Holder, 714 F.3d 881, 885 (5th Cir. 2013) ("No court has extended *Egan* beyond security clearances, and we decline to do so.").

name of national security?"[122] Second, is deference to presidential powers limited to "national-security *information*, not general national-security concerns?"[123] These are important questions for any litigator to consider when raising *Egan* as a bar to a plaintiff's claim.

*1.* Egan *Applies Beyond Security Clearances*

Based on a review of *Egan* and other Supreme Court decisions, the answer to the first question is simple: *Egan* principles apply to a range of national security-related employment decisions. The boundaries of that power, however, are less certain.

A review of the *Egan* decision does not support a restrictive application of its principles. Although the Court necessarily speaks to the facts of Egan's claim and the specific legal issues related to security clearances, the Court's holding is made in the context of broader principles, which the Court forcefully explains in its opinion.[124]

The *Egan* ruling is rooted in the principle of separation of powers, which compels judicial abstention from areas constitutionally reserved to the President.[125] Based on *Egan*'s explicit language, it is beyond cavil that the President's powers include a "compelling interest in withholding national security information from unauthorized persons in the course of executive business."[126]

The President's constitutional interest in protecting national security information by various means is well established. The President's authority in this area derives from his role as Commander in Chief[127] and his or her authority to conduct foreign policy.[128] In 1788, Founding Father John Jay explained that the President was assigned the authority to conclude treaties under Article II, Section 2 of the proposed Constitution.[129] The drafters of

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[122] *Hale*, 845 F.3d at 231.
[123] *Id.*
[124] *Egan*, 484 U.S. at 527–29.
[125] *Id.* at 527.
[126] *Id.*
[127] U.S. CONST. art II, § 2.
[128] *Egan*, 484 U.S. at 529 ("[F]oreign policy was the province and responsibility of the Executive." (quoting Haig v. Agee, 453 U.S. 280, 293–94 (1981))).
[129] THE FEDERALIST NO. 64 (John Jay). The Federalist Papers are considered a reliable source of the framers' intent for the Constitution, having been cited by the Supreme Court in hundreds of opinions. *See* Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here than Meets the Eye?*, 14 WM. & MARY BILL OF RTS. J. 243 (2005).

the Constitution decided the President was in the best position "to receive secret information" needed for negotiations with foreign powers.[130] Although the President is bound to "act by the advice and consent of the Senate" on the substance of any treaty, "he will be able to manage the business of intelligence in such a manner as prudence may suggest."[131]

While cases considering judicial deference to presidential prerogatives may speak of the question in terms of "extending *Egan*"[132] beyond security clearances, the application of such deference to the security measures other than security clearances was not new at the time *Egan* was decided. This is apparent from the cases upon which *Egan* relied.

In *Totten v. United States*,[133] the Supreme Court rejected a breach of contract claim filed by the estate of a former spy based on the secret nature of the contract.[134] The Court reasoned that "a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent."[135] In *Snepp v. United States*, the Court similarly recognized the Government's "compelling interest" in shielding national security information by way of a non-disclosure agreement with an employee of the Central Intelligence Agency (CIA).[136]

The Court's decision in *Cafeteria Workers* goes further than *Totten* or *Snepp*. It applies deference to a commander's summary removal of an employee from a shipyard where the Navy was developing new weapons systems.[137] The Court rejected the reviewability of the commander's decision based solely on the Navy's assertion that the employee failed to meet the "security requirements" of the installation.[138] The Court held that the employee was not entitled to be informed of the "specific grounds for her exclusion" or "accorded a hearing."[139]

These Supreme Court decisions make it pellucidly clear that the President's authority to protect sensitive information extends beyond

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[130] THE FEDERALIST NO. 64 (John Jay).
[131] *Id.*
[132] *See, e.g.*, Hale v. Johnson, 845 F.3d 224, 231 (6th Cir. 2016).
[133] Totten v. United States, 92 U.S. 105, 106 (1876).
[134] *Id.*
[135] *Totten*, 92 U.S. at 106.
[136] Snepp v. United States, 444 U.S. 507, 509 n.3 (1980).
[137] Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886 (1961).
[138] *Id.* at 887.
[139] *Id.* at 894.

security clearance determinations. The D.C. Circuit found *Egan* is properly extended to reliability programs and other situations in which the President delegates authority to an agency within his national security powers.[140]

*2.* Egan *Extends Beyond the Protection of National Security Information*

The President's authority over national security matters necessarily extends beyond the protection of sensitive information. *Egan* directly supports this conclusion. The majority's opinion opens and concludes the discussion of the constitutional issues before the Court with broad statements concerning the President's powers.[141] The Court initially acknowledges the general presumption in favor of reviewability of Government administrative actions, but explains that this presumption "runs aground when it encounters concerns of *national security*."[142] Likewise, the Court bolsters its holding at the end of the analysis while explaining that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive *in military and national security affairs*."[143] The Court's opinion speaks of the President's interest in protecting sensitive information, but in no way limits his or her authority to protect such information.[144] Indeed, since *Egan*, the Court has reiterated the broad powers of the President over national security matters in a variety of contexts.[145]

The *Hale* court did not explain its conclusion that *Egan* only extends to the protection of national security information. *Egan* and the BGAD case both demonstrate the implausibility of the limitation suggested in *Hale*. Egan was required to maintain a security clearance because his position involved maintaining the Navy's Trident submarines, which are nuclear-powered and carry nuclear weapons.[146] In the BGAD case, the

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[140] Foote v. Moniz, 751 F.3d 656, 658 (D.C. Cir. 2014) (discussing cases in which *Egan* was extended beyond security clearance determinations).
[141] Dep't of the Navy v. Egan, 484 U.S. 518, 526–30 (1988).
[142] *Id.* at 527 (emphasis added).
[143] *Id.* at 530 (emphasis added).
[144] *Id.* at 526–30.
[145] *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1849 (2017) ("National-security policy, however, is the prerogative of Congress and the President, and courts are 'reluctant to intrude upon' that authority absent congressional authorization." (quoting *Egan*, 484 U.S. at 530)); Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004) ("Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." (citing *Egan*, 484 U.S. at 530)).
[146] *Egan*, 484 U.S. at 520.

electronics engineers maintained a system designed to protect highly sensitive conventional weapons. While there was undoubtedly sensitive information at both sites, the obvious concern in each case was the protection of the weapons themselves. It would be illogical to conclude that "sensitive information" concerning weapons would be subject to *Egan*, but not the weapons themselves. As the court properly found in *Foote*, *Egan* is not limited to the protection of sensitive information; it was properly applied to the Department of Energy's reliability program because the "Government has a substantial national security interest in denying unreliable or unstable individuals access to nuclear devices, materials, and facilities."[147]

Given the extensive jurisprudence recognizing the President's authority over national security information, Federal Government litigators will have an advantage in advancing an *Egan* argument if they highlight security concerns based on a potential compromise of sensitive information. They should also be prepared to explain any broader security concerns. Importantly, litigators should also be aware that "information" in some contexts may be a defined term that may not be limited to information as a layperson understands that term. For example, pursuant to Executive Order 12356, referenced in *Egan*,[148] "'information' means any information *or material*, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government."[149] Depending on the nature and date of a claim, litigation attorneys should consider the existence of other Executive Orders or statutes that may define "information" in a relevant context.

Understandably, courts try to identify limitations on the scope of presidential power in the Federal workplace. Faced with a paucity of case law involving application of *Egan* to national security issues beyond the protection of sensitive information, attorneys should look for persuasive or direct authority deriving from Congress to support their contention that *Egan* applies in a given case.[150] In terms of providing a workable definition of national security, the Supreme Court's interpretation of 5 U.S.C. § 7532 provides some guidance. Interpreting "national security" under that section, the Court explained that it "comprehend[s] only those activities of

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[147] Foote v. Moniz, 751 F.3d 656, 658 (D.C. Cir. 2014).
[148] *Egan*, 484 U.S. at 528.
[149] Exec. Order No. 12356, 3 C.F.R. 174 (1983) (emphasis added).
[150] Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886, 890 (1961).

the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare."[151] That is a reasonable definition and one that arguably could assuage concerns, such as those expressed in *Hale*, that courts not slip "into an untenable position wherein [they] are precluded from reviewing any federal agency's employment decision so long as it is made in the name of national security."[152]

D. Is an Agency's Expertise a Factor in Determining the Application of *Egan*?

In *Hale* and *Rattigan*, the courts of appeals rejected the application of *Egan* to security-related decisions based in part on *Egan*'s finding that "it is not reasonably possible for an outside nonexpert body [i.e., a court] to review the substance" of a security clearance determination and to "decide whether the agency should have been able to make the necessary affirmative prediction" concerning an employee's suitability.[153] Looking to the purported requirement for expertise, *Rattigan* used this language as a basis for denying protection of agency decisions made by *individuals* lacking expertise in security matters.[154] The *Hale* court applied the purported requirement for expertise to deny the application of *Egan* in a *situation* in which the court deemed that security expertise was not required.[155] Determining whether these courts applied the proper analysis to conclude when a court should abstain from reviewing an agency's employment decision requires a close examination of *Egan*.

Section III of the *Egan* opinion contains the Court's substantive analysis of the constitutional basis for its decision.[156] Consideration of the jurisprudence underlying the *Egan* decision leaves no doubt that the President's national security powers, including his or her interest in protecting sensitive information and materials, derives from his or her authority as Commander in Chief. Of the sixteen cases the majority cites in Section III of the *Egan* opinion, none support the proposition that a

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[151] Cole v. Young, 351 U.S. 536, 544 (1956).
[152] Hale v. Johnson, 845 F.3d 224, 231 (6th Cir. 2016).
[153] *Egan*, 484 U.S. at 529.
[154] Rattigan v. Holder, 643 F.3d 975, 983 (D.C. Cir. 2011) (finding the reporting of security concerns by non-experts to be reviewable).
[155] *Hale*, 845 F.3d at 230 (finding reviewable an agency determination that a security guard failed a medical examination required as part of a security certification).
[156] *Egan*, 484 U.S. at 526–30.

court's ability to review a national security-related decision turns on the expertise of a particular person or on the need for expertise in a particular situation.[157] *Egan* itself makes no suggestion that deference to an agency would turn on whether expertise was required in order to make a determination.[158]

While some agencies undoubtedly have expertise over matters involving national security and good public policy supports affording those agencies discretion over such matters, there is no logical basis for affording that discretion on a case-by-case basis on matters that undeniably involve the President's constitutional powers.

Through their attempts to qualify presidential power, the *Rattigan* and *Hale* decisions expose agencies to litigation where expertise in predictive judgment arguably is not demonstrated or not needed. The discovery needed for a court to make the necessary determination is, by itself, contrary to *Egan*'s dictate that presidentially-endorsed national security decisions are unreviewable.[159] *Rattigan*'s and *Hale*'s attempts to qualify *Egan* also run counter to *Egan*'s dictate that the courts should not intrude on the President's decisions in national security affairs except when "Congress *specifically*" authorizes them to do so.[160] *Egan* does not support the imposition of an expertise prerequisite for judicial deference.[161]

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[157] Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886, 890 (1961); Snepp v. United States, 444 U.S. 507, 509 n.3 (1980); United States v. Robel, 389 U.S. 258, 267 (1967); United States v. Reynolds, 345 U.S. 1, 10 (1953); Totten v. United States, 92 U.S. 105, 106 (1876); Molerio v. FBI, 749 F.2d 815, 824 (D.C. Cir. 1984); Adams v. Laird, 420 F.2d 230, 239 (D.C. Cir. 1969); CIA v. Sims, 471 U.S. 159, 170 (1985); Cole v. Young, 351 U.S. 536, 546 (1956); Haig v. Agee, 453 U.S. 280, 293–94 (1981); United States v. Nixon, 418 U.S. 683, 710 (1974); Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953); Burns v. Wilson, 346 U.S. 137, 142, 144 (1953); Gilligan v. Morgan, 413 U.S. 1, 10 (1973); Schlesinger v. Councilman, 420 U.S. 738, 757–58 (1975); Chappell v. Wallace, 462 U.S. 296 (1983).

[158] *Egan*, 484 U.S. at 529.

[159] *Id.* at 520.

[160] *Id.* at 530.

[161] *Rattigan* and *Hale* also ignore the reality that security clearance determinations do not always involve the exercise of predictive judgment as was the case in *Egan*. Such judgment is needed "to predict [an employee's] possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information." *Id.* at 528. Some security clearance decisions, however, are made based on actual acts known to have jeopardized national security, including sabotage and espionage. Such was the situation in the BGAD case.

## VI. Are Constitutional Claims an Exception to *Egan*?

Only four months after the Supreme Court decided *Egan*, the Court issued an opinion raising questions about the breadth of its application. In *Webster v. Doe*,[162] the Court recognized the potential viability of a constitutional claim where an employee of the CIA was summarily removed from his position on national security grounds. The employee sought injunctive and other equitable relief to stop his removal based on statutory and constitutional grounds.

The *Webster* decision presented questions as to the precise circumstances in which an employee can challenge an agency's national security-related employment decision by way of a constitutional claim. Decisions at the courts of appeals are divided on whether *Egan* is subject to an exception on constitutional grounds.[163] Constitutional claims can come in a variety of forms. They can challenge the constitutionality of a statute or the application of a statute to a particular circumstance.[164] Claims can also implicate either substantive or procedural rights of the Constitution.[165] Such claims may target the agency or be filed against an agency official in his or her individual capacity (known as a *Bivens* claim).[166] Claimants may seek monetary damages or be limited to equitable relief.[167] While *Webster* opened the door to constitutional challenges seeking equitable relief, the implications of *Webster* for national security-related employment decisions are narrower than they may appear on the face of the decision itself.

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[162] Webster v. Doe, 486 U.S. 592, 601 (1988).

[163] *Compare* Brazil v. U.S. Dep't of the Navy, 66 F.3d 193, 197–98 (9th Cir. 1995) (holding that Title VII precluded a constitutional challenge to a security clearance decision), *and* Perez v. FBI, 71 F.3d 513, 515 (5th Cir. 1995) (per curiam), *with* Stehney v. Perry, 101 F.3d 925, 932 (3d Cir. 1996) (allowing constitutional claims to proceed and declaring that "not all claims arising from security clearance revocations violate separation of powers"), *and* Dubbs v. CIA, 866 F.2d 1114, 1120 (9th Cir. 1989) (holding that security clearance decisions are reviewable on constitutional grounds and explaining that *Webster* "is dispositive on this question").

[164] *Webster*, 486 U.S. at 586 (alleging the unequal application of the National Security Act); Elgin v. Dep't of the Treasury, 567 U.S. 1, 6–7 (2012) (alleging Military Selective Service Act violated equal protection rights by discriminating on the basis of sex).

[165] *Webster*, 486 U.S. at 596 (alleging procedural and substantive constitutional violations).

[166] *Id.* (presenting a claim against the Director of the CIA in his official capacity); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (presenting a claim against six Federal agents in their individual capacities).

[167] *Webster*, 486 U.S. 592 (seeking equitable relief); *Bivens*, 403 U.S. 388 (seeking compensatory damages).

A. The *Doe v. Webster* Decision

In *Webster*, the Court considered the reviewability of a decision by the Director of Central Intelligence to remove a CIA analyst under a provision of the National Security Act. The National Security Act includes a broad delegation of power to the Director to, "in [his or her discretion], terminate the employment of any officer or employee of the [CIA] whenever the Director deems the termination of employment necessary or advisable in the interests of the United States."[168] Doe alleged that the Director failed to follow agency procedures and acted "arbitrarily and capriciously," thus violating the Administrative Procedures Act (APA) and denying him his constitutionally protected rights "in violation of the First, Fourth, Fifth, and Ninth Amendments."[169] Doe sought equitable relief, including reinstatement or an order compelling the Director to reevaluate the removal.[170] Doe sought no monetary damages.[171]

Noting that the National Security Act specifically permitted the Director to carry out removals outside of the "standard discharge procedures," the Court rejected the reviewability of the Director's actions under the APA.[172] The National Security Act, the Court ruled, provides no standard for legal review and "exhibits . . . extraordinary deference to the Director in his decision to terminate individual employees."[173] Thus, the "language and structure of [the Act] indicate that Congress meant . . . [to] preclude[] judicial review of these decisions under the APA."[174]

Turning to the employee's constitutional claims, the Court rejected the Government's argument that "employment termination decisions, even those based on policies normally repugnant to the Constitution" are unreviewable by the courts.[175] The Court reasoned that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."[176] In reaching this conclusion, the Court emphasized that "this heightened showing [is required] in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed

[168] 50 U.S.C. § 3036(e)(1).
[169] *Webster*, 486 U.S. at 596.
[170] *Id.* at 596–97.
[171] *Id.* at 597.
[172] *Id.* at 598.
[173] *Id.* at 601.
[174] *Id.*
[175] *Id.* at 603.
[176] *Id.* (citing Johnson v. Robison, 415 U.S. 361, 373–74 (1974)).

to deny any judicial forum for a colorable constitutional claim."[177] Applying that standard, the Court found that the language of the National Security Act did not evince a congressional intent to foreclose district court review of a constitutional challenge to a decision under the Act.[178]

B. Reading *Webster* and *Egan* Together

Read in isolation, *Webster* may represent a significant change of direction by the Court on the reviewability of employment decisions bearing on national security grounds. Given that *Webster* was decided by the same justices during the same term as *Egan*, it is unlikely that *Webster* reflected a desire by the Court to undermine its recently issued decision in *Egan*. This is particularly true because the *Webster* opinion was written by Justice Rehnquist, who joined the majority in *Egan*. Complicating the analysis is the fact that *Webster* did not analyze or even reference *Egan* in reaching its holding.[179] While recognizing the potential viability of Doe's constitutional claims, the Court offered no guidance as to the legal boundaries of any such claims.

While the Court's failure to harmonize *Webster* and *Egan* creates some uncertainty, a closer examination of these decisions, as well as other jurisprudence, clarifies that the ability of an employee to challenge a national security-based employment decision on a constitutional basis is relatively narrow in scope. Reading *Webster* and *Egan* together, it is evident that the Court holds diverging views when congressional versus presidential delegations of power over national security matters will be subjected to review. Significantly, the holding in *Webster* was based purely on case law involving executive application of, or compliance with, a legislative enactment.[180] *Webster* did not involve a challenge to the delegation of presidential powers such as those involved in *Egan* (Executive Orders) or *Cafeteria Workers* (presidentially-approved regulations).

Where there is a question about the constitutionality of an agency's compliance with a congressional delegation of power, the Court found that there is a presumption of reviewability.[181] This presumption is rebutted

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[177] *Id.* (citing Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 681 n.12 (1986)).
[178] *Id.*
[179] *Egan* is only referenced in the two dissenting opinions in *Webster*. In those opinions, Justices O'Connor, *id.* at 605–06 (O'Connor, J., dissenting) and Scalia, *id.* at 606–21 (Scalia, J., dissenting), found the *Doe* decision inconsistent with *Egan*.
[180] *Id.* at 603.
[181] *Id.*

only where it is "clear" that Congress intended to preclude review by the courts.[182] By contrast, *Egan* counsels that any presumption of reviewability "runs aground" when it involves presidential action in national security matters.[183] Given the judiciary's historic reluctance "to intrude upon the authority of the Executive in military and national security affairs," *Egan* extends this more deferential standard to the President unless Congress "specifically" states otherwise.[184] *Egan*'s recognition of presidential authority is consistent with the Court's ruling in *Cafeteria Workers*. In *Cafeteria Workers*, the Court "acknowledge[d] that there exist constitutional restraints upon state and federal governments in dealing with their employees," but held that not "all such employees have a constitutional right to notice and a hearing before they can be removed."[185]

C. Are Decisions Covered by *Egan* Ever Reviewable?

While *Webster* subjected Government employment actions premised on summary dismissal statutes to review on constitutional grounds, there is a question as to if and when Federal actions premised on presidentially-delegated national security powers are subject to review. Likewise, there is a parallel question as to when a law allowing summary dismissal of an employee would be reviewable if Congress, in accordance with *Webster*, provided that such a law was not subject to review on constitutional grounds. Case law suggests that, notwithstanding the announced limits on review in such circumstances, these decisions could be challenged in limited circumstances.

*1. Equal Protection Claims May Be an Exception to* Egan

A review of Supreme Court case law suggests that some equal protection claims present a likely exception to *Egan*. By the 1970s, it was an "established practice for th[e Supreme] Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do."[186] Equal protection is "essentially

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[182] *Id.*
[183] Dep't of the Navy v. Egan, 484 U.S. 518, 526 (1988).
[184] *Id.* at 530.
[185] Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886, 898 (1961).
[186] Davis v. Passman, 442 U.S. 228, 242 (1979) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)). *See also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 400 (1971) (Harlan, J., concurring).

a direction that all persons similarly situated should be treated alike."[187] Where there is Government action based on characteristics of a person, including such things as race, sex, or religion, equal protection analysis requires a balancing of Government interests with the rights of the individual.[188]

Courts have held open the possibility of review on equal protection grounds in cases seeking injunctive relief against a Federal agency even where national security concerns are involved. As explained above, *Webster* left open the possibility of review of the CIA's application of the National Security Act on Fifth Amendment grounds. While the D.C. Circuit subsequently ruled in the Government's favor on Doe's equal protection claim, the decision was made on a factual basis.[189] The court stated explicitly that "the equal protection argument [is] properly before us."[190]

More importantly, considering the President's delegation of power in *Cafeteria Workers*, the Court found that the Navy's security-related decision was unreviewable while acknowledging cases expressly forbidding facially discriminatory regulation.[191] The Court also posited that the employee "could not constitutionally have been excluded from the Gun Factory if the *announced* grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist."[192] *Cafeteria Workers*' distinction between facially discriminatory policies or decisions and facially

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[187] Plyler v. Doe, 457 U.S. 202, 216 (1982).

[188] Depending on the category of people affected by Government action, the level of scrutiny applied by a court varies. *E.g.*, City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985).

[189] Doe v. Gates, 981 F.2d 1316, 1322–24 (D.C. Cir. 1993).

[190] *Id.* at 1322. There are at least three other national security cases involving sexual orientation in which a court of appeals ruled for the Government, but failed to categorically rule out the possibility of challenging agency decision on equal protection grounds. *See* U.S. Info. Agency v. Krc, 989 F.2d 1211, 1214 (D.C. Cir. 1993); High Tech Gays v. Def. Indus. Sec. Clearance Off., 895 F.2d 563 (9th Cir. 1990); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987).

[191] Cafeteria & Rest. Workers Union, Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886, 897 (1961) ("'[N]one would deny' that 'Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work."'" (quoting United Pub. Workers v. Mitchell, 330 U.S. 75, 100 (1947))); Wieman v. Updegraff, 344 U.S. 183, 192 (1952) ("It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.").

[192] *Cafeteria Workers*, 367 U.S. at 898 (emphasis added).

legitimate actions is consistent with more recent case law. Commenting on *Korematsu v. United States*,[193] the World War II era case in which the Supreme Court upheld orders forcing citizens of Japanese heritage into concentration camps, the Court recently stated that

> [t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission.[194]

Thus, while *Egan* provides great deference to the President's national security powers, even national security-related decisions are likely subject to judicial review when Government action is taken for overtly discriminatory reasons.

*2. Due Process Claims Are an Unlikely Exception to* Egan

In contrast to equal protection claims, due process claims are unlikely to succeed in the face of either presidential or congressional delegation of authority on national security matters. When an employee's protected liberty or property interests are encroached upon by the Government, the employee is normally entitled to advanced notice and "the right to some kind of prior hearing."[195] Given this general rule, due process claims are a likely avenue for any claim being advanced by a Government employee summarily removed from a position based on national security grounds. Such claims, however, are unlikely to be successful in the face of prevailing case law.

Due process claims typically fall into two potential categories: cases involving infringements on an individual's liberty and those implicating the loss of a property interest.[196] An employee may be deemed to have a protected liberty interest where Government action would "seriously damage his standing and associations in his community [by], for example,

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[193] Korematsu v. United States, 323 U. S. 214 (1944).
[194] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018); *see also* Hegab v. Long, 716 F.3d 790, 798 (4th Cir. 2013) (Motz, J., concurring) ("In light of the holding in *Egan*, at most *Webster* permits judicial review of a security clearance denial only when that denial results from the application of an allegedly unconstitutional *policy*.").
[195] Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569–70, 573 (1972).
[196] *Id.* at 569–70.

[stating] that he had been guilty of dishonesty, or immorality."[197] The liberty interests protected by the Constitution are broad and encompass "the right of the individual to contract, to engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[198] A person may suffer an actionable loss of liberty where the government "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities."[199] This would occur, for example, in circumstances where the Government "regulat[es] eligibility for a type of professional employment."[200]

A person may also raise a claim that he or she has a protected property interest in their Government position, which cannot be taken away without due process.[201] A property interest protected by the Constitution requires that a person "have more than an abstract need or desire for it" and "more than a unilateral expectation of it."[202] A person "must, instead, have a legitimate claim of entitlement to [his or her Government position]."[203] Such "[p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . that support claims of entitlement to those benefits."[204]

Despite the surface appeal of potential due process claims, courts of appeals have rejected due process claims in the face of statutes authorizing summary removal of employees. In the aftermath of the Supreme Court's

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[197] *Id.* at 573; *see* Wieman v. Updegraff, 344 U.S. 183, 191 (1952); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); United States v. Lovett, 328 U.S. 303, 316–17 (1946); Peters v. Hobby, 349 U.S. 331, 352 (1955) (Douglas, J., concurring); *Cafeteria Workers*, 367 U.S. at 898. Where an otherwise defamatory comment has not been publicized, however, there is no infringement on an employee's liberty interests. Hodge v. Jones, 31 F.3d 157, 165 (4th Cir. 1994) ("[G]iven the extensive confidentiality provisions protecting the Hodge investigation report, we see no avenue by which a stigma or defamation labeling the Hodges as child abusers could attach."); Bollow v. Fed. Rsrv. Bank, 650 F.2d 1093, 1101 (9th Cir. 1981) ("Unpublicized accusations do not infringe constitutional liberty interests because, by definition, they cannot harm 'good name, reputation, honor, or integrity.'" (quoting Bishop v. Wood, 426 U.S. 341, 348 (1975))).
[198] *Bd. of Regents of State Colls.*, 408 U.S. at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
[199] *Id.* at 573.
[200] *Id.* at 573–74.
[201] *Id.* at 576–79.
[202] *Id.* at 577.
[203] *Id.*
[204] *Id.*

decision in *Webster*, the case eventually returned to the D.C. Circuit.[205] The D.C. Circuit Court of Appeals rejected Doe's claim that he had an expectation of continued employment based on the CIA employee handbook and comments made by CIA employees at the beginning of his employment.[206] Observing that "the National Security Act of 1947 'exhibits . . . extraordinary deference to the Director in his decision to terminate individual employees,'"[207] the court found that statements made by employees and in agency documents "[can]not create a property interest for purposes of due process when they are contrary to the express provisions of regulations and statutes."[208] The D.C. Circuit's holding that no expectation of continued employment in the face of a summary dismissal statute comports with the great weight of authority on this issue.[209]

These cases, along with *Egan*'s finding that "no one has a 'right' to a security clearance,"[210] effectively foreclose the possibility of a due process claim in the national security context.

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[205] Doe v. Gates, 981 F.2d 1316 (D.C. Cir. 1993), *aff'g in part, rev'ing in part* Doe v. Webster, 769 F.Supp. 1 (D.D.C. 1993).
[206] *Id.* at 1320–21.
[207] *Id.* at 1320 (quoting Webster v. Doe, 486 U.S. 592, 601 (1986)).
[208] *Id.* at 1321 (alteration in original) (quoting Baden v. Koch, 638 F.2d 486, 492 (2d Cir. 1980)).
[209] *Baden*, 638 F.2d at 492; Malkan v. Mutua, 699 F. App'x 81, 82–83 (2d Cir. 2017); Batterton v. Tex. Gen. Land Off., 783 F.2d 1220, 1224 (5th Cir. 1986) ("To say that customs entirely contrary to a statute's meaning may stem from that statute would defy reason; only if consistent with official law may such practices create a property interest in one's job."); Puckett v. Lexington-Fayette Urb. Cnty. Gov't, 566 F. App'x 462, 468 (6th Cir. 2014) (holding in a non-employment case that understandings cannot create a due process interest contrary to the law); Heck v. City of Freeport, 985 F.2d 305, 311 (7th Cir. 1993) (same); Bollow v. Fed. Rsrv. Bank, 650 F.2d 1093, 1099 (9th Cir. 1981) ("[T]he United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to do what the law does not sanction or permit." (quoting Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917)); Driggins v. City of Okla. City, Okla., 954 F.2d 1511, 1514–15 (10th Cir. 1992) (holding that representations or mutual understandings contrary to an explicit city charter provision cannot lead to a property interest where those officials making the representations did not have the authority to deviate from the express city charter provisions); Brett v. Jefferson Cnty., Ga., 123 F.3d 1429, 1434 (11th Cir. 1997) ("While protected property interests in continued employment can arise from the policies and practices of an institution, a property interest contrary to state law cannot arise by informal custom." (citations omitted)).
[210] Dep't of the Navy v. Egan, 484 U.S. 518, 528 (1988).

D. Limitations on Constitutional Claims

Constitutional claims arising out of the Federal workplace face numerous obstacles, some of which have developed after the Court's decision in *Webster*. It is important for agency attorneys to be aware of these threshold issues in defending national security cases. These limitations preclude constitutional tort claims seeking money damages and typically limit review of constitutional claims to the system and remedies established by the CSRA.

*1. The United States Has Not Waived Sovereign Immunity for Constitutional Torts*

As the Supreme Court has explained, "[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for [subject matter] jurisdiction."[211] A "waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text."[212] That waiver "will be strictly construed, in terms of its scope, in favor of the sovereign."[213] And "the *terms* of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit."[214]

In *FDIC v. Meyer*, the Supreme Court found that Congress did not waive sovereign immunity for constitutional claims for money damages against the United States under the Federal Torts Claims Act (FTCA).[215] It explained that for a claim to be actionable under the FTCA,

> a claim must allege, *inter alia*, that the United States "would be liable to the claimant" as "a private person" "in accordance with the law of the place where the act or omission occurred." A constitutional tort claim such as Meyer's could not contain such an allegation. Indeed, we have consistently held that § 1346(b)'s reference to the

[211] United States v. Mitchell, 463 U.S. 206, 212 (1983); *see* FDIC v. Meyer, 510 U.S. 471, 475 (1994).
[212] Gomez-Perez v. Potter, 553 U.S. 474, 491 (2008) (quoting Lane v. Peña, 518 U.S. 187, 192 (1996)).
[213] *Id.* (quoting *Lane*, 518 U.S. at 192).
[214] Lehman v. Nakshian, 453 U.S. 156, 160 (1981) (quoting United States v. Testan, 424 U.S. 584, 586 (1976)).
[215] *Meyer*, 510 U.S. at 475.

> "law of the place" means law of the State—the source of substantive liability under the FTCA.[216]

At the same time, the Court rejected Meyer's request to recognize a Federal common law tort against the United States based on an agency's violation of the Constitution. Observing the potential fiscal impact on the Federal Government of recognizing such a claim, the Court declined to extend such liability.[217]

*2. Constitutional Claims Are Preempted by the Civil Service Reform Act*

The CSRA "established a comprehensive system for reviewing personnel actions taken against federal employees."[218] The Supreme Court has repeatedly recognized that the CSRA precludes challenges arising out of the Federal workplace except through the administrative and judicial review expressly authorized by the statute.[219]

The Supreme Court explained that "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the 'outdated patchwork of statutes and rules built up over almost a century' that was the civil service system."[220] Congress enacted the CSRA to replace this patchwork system "with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration."[221]

Employees covered by the CSRA can seek review of an employment decision if they are subjected to personnel actions "'for such cause as will promote the efficiency of the service.'"[222] "[T]he route prescribed is by appeal to the MSPB and, if dissatisfied with the result, appeal to the Federal

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[216] *Id.* at 477–78 (quoting 28 U.S.C. § 1346(b)). *See, e.g.*, Miree v. DeKalb Cnty., Ga., 433 U.S. 25, 29 n.4 (1977); United States v. Muniz, 374 U.S. 150, 153 (1963); Rayonier Inc. v. United States, 352 U.S. 315, 318 (1957).
[217] *Meyer*, 510 U.S. at 486 ("We leave it to Congress to weigh the implications of such a significant expansion of Government liability.").
[218] Elgin v. Dep't of the Treasury, 567 U.S. 1, 5 (2012) (quoting United States v. Fausto, 484 U.S. 439, 455 (1988)).
[219] *Id.*; *Fausto*, 484 U.S. 439; Bush v. Lucas, 462 U.S. 367 (1983).
[220] *Fausto*, 484 U.S. at 444 (citing S. REP. NO. 95-969, at 3 (1978)).
[221] *Id.* at 445.
[222] *Elgin*, 567 U.S. at 5 (citing 5 U.S.C. §§ 7513(a), 7503(a)).

Circuit, whose decisions in turn are reviewable by the Supreme Court."[223] In other words, "the remedy [offered by the CSRA] displaces the plenary district court action entirely, just as a statute channeling agency review to a circuit court displaces a direct review action in the district court."[224] Even where the CSRA provides no remedy to a covered employee, claims pursued through statutes not explicitly excepted under the CSRA are precluded.[225]

*a. Challenges to the Constitutionality of a Statute Are Preempted*

There is no implied exception to permit constitutional claims arising out of the Federal workplace.[226] In *Elgin*, the Supreme Court held that a facial challenge to the constitutionality of a statute was preempted by the CSRA. The claim was advanced by a Department of Treasury employee who had been removed from his position pursuant 5 U.S.C. § 3328 based on his failure to register with the Selective Service as required by the Military Selective Service Act.[227]

After unsuccessfully appealing to the MSPB, Elgin challenged the constitutional validity of the statutes in U.S. District Court rather than completing the review process established by the CSRA.[228] Elgin argued that the Court's decision in *Webster* authorized suit in Federal court "to

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[223] Elgin v. U.S. Dep't of the Treasury, 641 F.3d 6, 8 (1st Cir. 2011), *aff'd*, 567 U.S. 1. *See* 5 U.S.C §§ 7513(d), 7701(a)(1)–(2), 7703(b).

[224] *Elgin*, 641 F.3d at 9 (citing Whitman v. Dep't of Transp., 547 U.S. 512, 513–14 (2006) (per curiam)). The precise path of a case can vary, however, depending on the nature of the claims. Where there is a "mixed" case involving claims of discrimination, the district court will have jurisdiction after review by the MSPB. *See* 5 U.S.C. § 7702(a)(1)(B); 29 C.F.R. § 1614.310(b) (2019).

[225] *Fausto*, 484 U.S. at 455 (stating that the CSRA's "deliberate exclusion of employees in respondent's service category from the provisions establishing administrative and judicial review for personnel action of the sort at issue here prevents respondent from seeking review in the Claims Court under the Back Pay Act."). Pursuant to the CSRA, the only additional statutory remedies available to Federal employees are those provided by various anti-discrimination laws. *See* 5 U.S.C. § 2302(d). The statutory schemes established under these laws also preempt other remedies. *See, e.g.*, Brown v. Gen. Servs. Admin., 425 U.S. 820 (1976) (holding that Title VII provides the exclusive remedy for race discrimination for Federal employees).

[226] *Elgin*, 567 U.S. at 13 ("The purpose of the CSRA . . . supports our conclusion that the statutory review scheme is exclusive, even for employees who bring constitutional challenges to federal statutes.").

[227] *Id.* at 6–7. Elgin alleged that "Section 3328 [was] an unconstitutional bill of attainder and unconstitutionally discriminate[d] on the basis of sex when combined with the registration requirement of the Military Selective Service Act." *Id.* at 7.

[228] *Id.* at 6–7.

avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."[229] The Court rejected the application of *Webster*, explaining that the heightened presumption of reviewability only applies when no other forum is available.[230] In Elgin's case, the CSRA allowed for review of the claim by the CSRA because "*Webster*'s standard does not apply where Congress simply channels judicial review of a constitutional claim to a particular court."[231]

*b.* Bivens *Claims Are Preempted by the CSRA*

The Supreme Court has explicitly ruled that *Bivens*-style constitutional claims[232] against individual supervisors are preempted by the CSRA.[233] In *Bush v. Lucas*, the Court considered the *Bivens* claim of a National Aeronautics and Space Administration employee who alleged that he was demoted in violation of his First Amendment rights.[234]

The court action was filed during the pendency of Bush's administrative claim. Although Bush secured reinstatement and back pay through the administrative process, he asserted that the limited remedies were inadequate and asked the Court to recognize a *Bivens* claim to recover full damages.[235] The Court rejected the employee's argument, stating:

> The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be

[229] *Id.* at 9 (quoting Webster v. Doe, 486 U.S. 592, 603 (1988)).
[230] *Id.* at 9–10.
[231] *Id.* at 10.
[232] *Bivens* actions are now disfavored by the Supreme Court, which limits future claims to facts very closely tracking the three such claims previously approved by the Court. *E.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1856 (2017) (declining to recognize a *Bivens* claim for putative violations of the Fourth and Fifth Amendments arising out of the plaintiffs' detention after the September 11, 2001 attacks and articulating the particular inappropriateness of doing so in response to presidential action on a matter affecting national security).
[233] Bush v. Lucas, 462 U.S. 367 (1983).
[234] *Id.* at 368–70.
[235] *Id.* at 369–71.

> answered simply by noting that existing remedies do not provide complete relief for the plaintiff.[236]

The Court concluded that the CSRA's detailed review process demonstrated Congress' intent to create a system that preempts other potential remedies.[237] As the Court observed, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service."[238]

## VII. Matters Potentially Subject to Review Notwithstanding the Application of *Egan*

Even when *Egan* bars judicial review of an agency's personnel action for national security reasons, there may be aspects of the case that a court may properly consider. First, under limited circumstances, a court can consider whether an employee who has lost or been denied a security clearance may be entitled to transfer to a non-sensitive position. Second, a court may consider whether an agency has complied with its own regulations in executing an employment action. While neither situation is common, it is important for agency counsel to be aware of these situations as they prepare for an *Egan* defense.

### A. Did *Egan* Establish Transfer to a New Position as a Substantive Right?

At the conclusion of its opinion, the *Egan* Court held that when the denial of a clearance is the basis for denying an employee a position, the MSPB—and by extension, the courts—may review the corresponding employment decision to determine whether the clearance was a requirement of the position and whether it was denied.[239] The Court explained that the reviewing body can then consider "whether transfer to a non-sensitive position [is] feasible."[240] This raises the question of whether *Egan* established an affirmative obligation on the part of an agency to transfer employees who have been denied clearances. The answer to this question is "no."

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[236] *Id.* at 388.
[237] *Id*. at 388–90.
[238] *Id.* at 389.
[239] Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988).
[240] *Id.*

At first glance, *Egan*'s observation about considering the feasibility of a transfer appears to be directive in that it is listed along with other issues that are reviewable by the MSPB.[241] Relevant to the point, the Court makes a factual finding that the Navy considered transferring Egan to another position but had no options at the Trident Naval Refit Facility.[242]

The Supreme Court provided no statute or case law to support a conclusion that an employer is obligated to consider transferring an employee who fails to maintain a security clearance. After summarizing the MSPB's limited power of review, the Court cited four cases in support of its finding. Each of those cases stands for the proposition that a civilian who fails to maintain a condition of employment is properly removed by an agency.[243] None of those cases suggests an obligation on the part of an agency to transfer an employee.[244] As a matter of longstanding law, there is generally no statutory requirement that an employee who fails to meet a condition of employment is entitled to consideration for another position.[245]

Shortly after *Egan*, the Federal Circuit considered the case of a Defense Mapping Agency employee who claimed that *Egan* created an agency obligation to transfer employees to non-sensitive positions after loss of a security clearance.[246] Rejecting that argument, the court opined:

> we are not inclined to the view that the [Supreme] Court so casually created a new substantive requirement never thought to exist before. We see this passage as recognition of a Board role in reviewing the feasibility of transfer to a nonsensitive position if that substantive right is available from some other source, such as a statute or regulation.[247]

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[241] *Id.*
[242] *Id.* at 522.
[243] *See id.* at 530–31 (first citing Zimmerman v. Dep't of the Army, 755 F.2d 156 (Fed. Cir. 1985); then citing Buriani v. Dep't of the Air Force, 777 F.2d 674, 677 (Fed. Cir. 1985); then citing Bacon v. Dep't of Hous. & Urb. Dev., 757 F.2d 265, 269–70 (Fed. Cir. 1985); and then citing Madsen v. Veterans Admin., 754 F.2d 343 (Fed. Cir. 1985)).
[244] *Zimmerman*, 755 F.2d 156; *Buriani*, 777 F.2d at 677; *Bacon*, 757 F.2d at 269–70; *Madsen*, 754 F.2d 343.
[245] Griffin v. Def. Mapping Agency, 864 F.2d 1579, 1580 (Fed. Cir. 1989) ("The case law is clear that, if . . . [an] employee cannot do his job, he can be fired, and the employer is not required to assign him to alternative employment." (alteration in original) (quoting Carter v. Tisch, 822 F.2d 465, 467 (4th Cir. 1987))).
[246] *Id.*
[247] *Id.*

Only "if Defense Mapping Agency had an 'existing policy,' manifested by regulation, to transfer applicants who unsuccessfully seek a security clearance to nonsensitive positions if available [could it] be held to that policy and the Board could review its efforts."[248]

Counsel should be aware of other potential situations when there may be an obligation to consider transferring an employee. For example, the Ninth Circuit held that *Egan* did not bar review of the Department of Energy's decision to remove a disabled employee without considering the possibility of first transferring him to a new position.[249] The employee, whose job required that he maintain a reliability program certification, had a reading disorder that rendered him unable to perform tasks central to his job.[250] The Court acknowledged that "[b]ecause his job required him to provide transportation information to nuclear convoys, his reading disorder presented a potential threat to national safety."[251] During the decertification process, the employee conceded that he could not perform the required functions of his position and instead requested a transfer as a reasonable accommodation under the Rehabilitation Act; he did not challenge the decertification decision in any way.[252] The Court found that while the Department of Energy's "'investigation, suspension, and recommended revocation of' Sanchez's [reliability program] clearance are all shielded by *Egan*, the later decisions not to engage with him when he requested a non-[reliability program] job or to reassign him to a non-sensitive, non-[reliability program] job are not."[253]

The Court explained that judicial review of the reasonable accommodation claim was not barred by *Egan* because it did not have "'to examine the legitimacy of the [Department's] proffered reasons and the

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[248] *Id.* at 1580–81. *See* Campbell v. McCarthy, 952 F.3d 193, 206–07 (4th Cir. 2020), *cert. denied*, No. 20-435, 2020 WL 6829153 (U.S. Nov. 23, 2020) ("We do not see how, in these circumstances, the [Army's] past practice [in transferring employees whose clearances had been suspended] provides an 'independent source for a right to a transfer' as contemplated by *Egan* and our precedents." (citing Jamil v. Sec'y, Dep't of Def., 910 F.2d 1203, 1208–09 (4th Cir. 1990))); *see also* Lyles v. Dep't of the Army, 864 F.2d 1581 (Fed. Cir. 1989) (finding that the Army had an obligation to search for a non-sensitive position because its own regulations created such an obligation).

[249] Sanchez v. U.S. Dep't of Energy, 870 F.3d 1185 (10th Cir. 2017).

[250] *Id.*

[251] *Id.* at 1188. When attempting to relay critical information, Sanchez "mixed up the order of words and numbers, skipped over sections, and gave briefing points out of order." *Id.*

[252] *Id.* at 1191.

[253] *Id.* at 1195–96 (quoting Hall v. U.S. Dep't of Labor, Admin. Rev. Bd., 476 F.3d 847, 852 (10th Cir. 2007)).

merits of the revocation decision' or 'the circumstances under which the [Department] recommended revocation.'"[254]

The *Griffin* and *Sanchez* cases illustrate a logical caveat to non-reviewability of national security cases—one which was implicitly recognized in *Egan* itself. Litigators should therefore consider whether by regulation or statute an employee has a substantive right to be considered for a transfer to another position after losing or failing to obtain a security clearance or security-related certification.[255] At the same time, absent a right established by statute or regulation, an employee's claim that he or she should have been transferred instead of removed encroaches on the basis for agency's security determination, even where there is an alleged history of such decisions.[256] In the absence of an affirmative obligation to consider a transfer, reviewing an agency decision against transferring an employee involves second-guessing the agency's determination of the degree of risk associated with retaining an employee and is therefore inconsistent with *Egan*.[257]

B. Courts May Review Agency Compliance with a Regulation or a Statute

When carrying out a removal or other employment action, an agency must generally follow the procedures established by its own regulations or by the applicable statute. While courts cannot examine the merits of a security clearance determination, this does not preclude a court from reviewing the agency's compliance with the proper procedures.[258] This principle is entirely consistent with the court decisions finding that an

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[254] *Id.* (alterations in original) (quoting *Hall*, 476 F.3d at 852–53). The obligation of the agency to consider transferring an employee cannot be based solely on the existence of a physical or mental inability to maintain a required security-related certification but comes into play only if the employee can show "(1) he [or she] is disabled; (2) he [or she] is 'otherwise qualified'; and (3) he [or she] requested a plausibly reasonable accommodation." *Id.* at 1195 (citing Sanchez v. Vilsack, 695 F.3d 1174, 1177 (10th Cir. 2012)).

[255] Griffin v. Def. Mapping Agency, 864 F.2d 1579, 1580–81 (Fed. Cir. 1989); Sanchez v. U.S. Dep't of Energy, 870 F.3d 1185 (10th Cir. 2017).

[256] Campbell v. McCarthy, 952 F.3d 193, 206–07 (4th Cir. 2020), *cert. denied*, No. 20-435, 2020 WL 6829153 (U.S. Nov. 23, 2020).

[257] *Id.*

[258] Service v. Dulles, 354 U.S. 363 (1957) (recognizing the right of Federal courts to review an agency's actions to ensure that its own regulations have been followed); Sampson v. Murray, 415 U.S. 61, 71 (1974) ("[F]ederal courts do have authority to review the claim of a discharged governmental employee that the agency effectuating the discharge has not followed administrative regulations."); *see* Cole v. Young, 351 U.S. 536 (1956) (reviewing both a removal under § 7532 and the terms of an Executive Order).

agency must consider transferring an employee if the agency's regulations require such consideration.[259]

While being cognizant of the obligation to adhere to mandatory procedures, counsel should be mindful of the possibility of alternate procedures available for a given personnel action.[260] Agency attorneys should also be aware of the likelihood that any challenge to the procedures used by the agency should be considered in the process set forth in the CSRA.[261]

## VIII. Conclusion

There is substantial disagreement among the Federal Circuit Courts as to the extent to which *Egan* precludes judicial consideration of agency national security-related personnel actions. The reasons for such divergence of opinion is attributable to the selective application of *Egan*'s central principles. A comprehensive approach to *Egan*, including careful consideration of each of the principles discussed in the case and its jurisprudential underpinnings, provides a reliable strategy to promote a more consistent application of the law.

A Federal litigation attorney should consider several questions when contemplating whether to raise an *Egan* defense in a particular case. Does the employment decision at issue raise a national security concern? And, if so, is it a generalized concern or one that involves an immediate potential risk if the decision had not been made? Is it possible to characterize the concern as one about national security information? Has either the President or Congress taken action, through an Executive Order, legislation, or otherwise, that potentially constitutes a delegation of authority to the Executive Branch? Does any delegation of authority have provisions that would specifically and necessarily limit an employee's right to a review of the employment decision at issue? What due process provisions does such delegation include and to what extent has the agency

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[259] *See Campbell*, 952 F.3d at 206–07; Jamil v. Sec'y, Dep't of Def., 910 F.2d 1203, 1208–09 (4th Cir. 1990); *Griffin*, 864 F.2d 1579, 1580–81; Lyles v. Dep't of the Army, 864 F.2d 1581 (Fed. Cir. 1989).

[260] Dep't of the Navy v. Egan, 484 U.S. 518, 530–34 (1988) (discussing alternate remedies under §§ 7513 and 7532 of Title V).

[261] Elgin v. Dep't of the Treasury, 567 U.S. 1, 6–7 (2012) (the CSRA preempts claims not provided by the CSRA).

complied with them? Is there a potential conflict in actions taken by the President or Congress?[262]

Even when *Egan* is directly applicable to an agency action, Government attorneys should consider whether there is a potential constitutional issue or other matters that may be reviewable by a court. Such matters would include the possibility that the agency must consider transferring an employee who loses his or her security clearance and whether the agency has complied with the procedures established by its own regulations or the applicable statute under which it made its employment decision.

While not all factors are equally important, these questions frame the issues that employment litigators should consider in Federal court. Consideration of these points will not only help in legal analysis but will also assist in collecting the appropriate information to present to a court considering an *Egan* defense. Such a comprehensive approach will benefit the clients and bring clarity to national security-related employment jurisprudence.

[262] For example, do the employment review schemes established by the CSRA run contrary to a presidential action? If so, did Congress state a specific intention to create a review process?