Volumes 190/191 **Winter 2006/Spring 2007**

MILITARY LAW REVIEW

ARTICLES

BOOK REVIEW

Department of Army Pamphlet 27-100-190/191

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BOOK REVIEW

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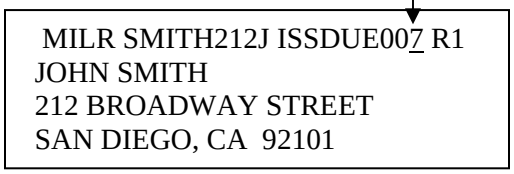

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MILITARY LAW REVIEW

Volumes 190/191 **Winter 2006/Spring 2007**

THE ECONOMIC EFFICIENCY OF THE ARMY'S MANEUVER DAMAGE CLAIMS PROGRAM: COASE, BUT NO CIGAR

MAJOR JERRETT W. DUNLAP, JR.*

> *It is my belief that the failure of economists to reach correct conclusions about the treatment of harmful effects cannot be ascribed simply to a few slips in analysis. It stems from basic defects in the current approach to problems of welfare economics. What is needed is a change of approach.*[1]

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[1] Ronald Coase, *The Problem of Social Cost*, 60 J.L. & ECON. 1, 21 (1960). Professor Ronald Coase received the Nobel Prize in Economic Sciences in 1991 "for his discovery and clarification of the significance of transaction costs and property rights for the

I. Introduction

In November 2002, a column of tracked vehicles from 1st Armored Division plunged off the paved roads and into the plowed fields in the countryside near Baumholder, Germany. The tracks sent mud flying into the air as they conducted battle drills across the German landscape. The unit commanders recognized that the training value of the maneuver exercise was enhanced by the unfamiliar terrain.[2] The cost of conducting the maneuver, however, was less certain. While the unit commanders were aware of the fuel and maintenance costs that would be incurred, they were not responsible for paying for the maneuver damage caused by the exercise.

The U.S. Army Claims Service, Europe (USACEUR) employs a civilian engineer, Mr. Craig Walmsley, to coordinate and investigate maneuver damage claims. During the preparation for a cavalry squadron training maneuver in Germany, Mr. Walmsley contacted the commander to discuss possible steps to reduce the maneuver damage caused by the tracked vehicles.[3] Mr. Walmsley advised that the vehicles would cause dramatically less damage if the squadron were to replace their worn track pads with new track pads.[4] In response, the squadron commander replaced the track pads because of the relatively minor replacement cost compared to the high maneuver damage costs the tracked vehicles likely would have caused otherwise.[5]

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institutional structure and functioning of the economy." The Bank of Sweden Nobel Prize in Economic Sciences in Memory of Alfred Nobel 1991, http://nobelprize.org/nobel_prizes/ economics/laureates/1991/ (last visited Mar. 3, 2006).

[2] *See* Baumholder Training Area (BTA) / Lager Aulenbach, Germany, http://www.globalsecurity.org/military/facility/baumholder-ta.htm (last visited Aug. 15, 2007) (discussing maneuver training exercises in the Baumholder Training Area).

[3] Telephone Interview with Aletha Friedel, Chief, European Torts Branch, U.S. Army Claims Service, Europe, in Mannheim, Germany (Jan. 28, 2006) [hereinafter Friedel Interview].

[4] *Id.* Track pads are the rubberized part of a tracked vehicle's metal track, which makes contact with the ground or road. If the rubberized track pad is not present, the metal will cause more damage to the ground or road. *See generally* Red River Army Depot, Rubber Products Operations, https://www.redriver.army.mil/Rubber/ RRADRubberProducts.htm (last visited Feb. 15, 2006) (discussing track shoes, track pads, and the replacement process).

[5] *Id.*

Although this example had a positive outcome, it shows a flaw in the current overseas maneuver damage claims process—commanders are not necessarily aware of the costs their maneuvers create. Commanders do not take such damage into consideration when planning their maneuvers because they do not pay for it. A more efficient result occurred in this case because Mr. Walmsley found a reasonable commander willing to spend unit funds in order to save another part of the Army from spending even more.[6] Unfortunately, whether during an overseas training maneuver or a deployed operational maneuver, commanders do not always consider all the costs of their maneuvers.[7] Regardless of whether the failure to take the costs into consideration is the result of a lack of information or is intentional, the result is often an inefficient allocation of resources.

This article proposes to shift the source of funding for overseas maneuver damage claims from the U.S. Army Claims Service (USARCS) to the unit responsible for causing the damage. As will be discussed, the underlying Law and Economics theory, relying heavily on the Coase Theorem,[8] supports the proposed change. Next, the statutory mechanisms for paying overseas maneuver damage claims will be outlined. Historic trends and Army doctrine related to maneuvers will be examined. Finally, the Law and Economics theory will be applied to the overseas maneuver damage claims mechanisms. Ultimately, this article submits that if overseas maneuver damage claims were to be paid with funds directly from the Operations and Maintenance (O&M)[9] budget of the maneuvering unit, rather than from USARCS funds, commanders would have to take those costs into consideration, resulting in a more efficient outcome.

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[6] Currently, funds to pay for maneuver damages come from the U.S. Army Claims Service, not from the unit that caused the damage. *See* discussion *infra* Part III.D.

[7] *Id.*

[8] *See* discussion *infra* Part II.A.2.

[9] The annual Operations and Maintenance (O&M) appropriation is the primary source of funding for a maneuver unit to undertake training and operations. *See, e.g.*, 10 U.S.C. § 116 (2005) (establishing annual O&M reporting requirements for the recommended number of training days for Army Combat Battalions by the Secretary of Defense).

II. Law and Economics Analysis and the Coase Theorem

Law and Economics[10] is a well-established economic discipline that continues to generate substantial interest from both economists and legal practitioners.[11] Scholarship in this area has expanded beyond the study of fields with obvious economic components, such as antitrust law, to such far-reaching legal fields as criminal law, family law and constitutional law.[12] Law and Economics employs economic analysis of the law for three purposes: first, to predict the effects of the law; second, to evaluate the economic efficiency of the law; and third, to determine what legal rules will be implemented due to voter preferences.[13] These objectives show the potential value that Law and Economics analysis holds for policy makers. They will have the tools to draft better law if they are able to predict the law's effects, its efficiency, and voters' preferences. At the center of the Law and Economics universe is the widely-recognized Coase Theorem.[14] The Coase Theorem has been so far-reaching that Richard Posner calls it "basic to the whole economic analysis of law."[15] Coase's groundbreaking article, *The Problem of Social Cost*,[16] is at or near the top of the most highly cited articles by the legal community.[17] The Law and Economics community has widely embraced the Coasian approach to dealing with actions that have harmful effects.[18]

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[10] *See generally* Thomas R. Ireland, *The Interface Between Law and Economics and Forensic Economics*, 7 J. LEGAL ECON. 60, 63 (1997) ("[L]aw and economics can be defined as the analysis of the impact of law on the behavior of individuals, and thus on the allocation of resources.").

[11] *Id.* at 60.

[12] John E. Noyes, *An Introduction to Law and Economics*, 59 N.Y.U. L. REV. 410, 410 (1984) (reviewing A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983)).

[13] *See* Ireland, *supra* note 10, at 63 (citing NEW PALGRAVE DICTIONARY OF ECONOMICS 3:144 (1987)).

[14] *See* Daniel A. Farber, *Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 VA. L. REV. 397, 397 (1997) ("[I]f there is anything that can be described as the canon of 'law and economics,' the Coase Theorem is at the heart of it.").

[15] RICHARD A. POSNER, OVERCOMING LAW 406 (1995), *quoted in* Farber, *supra* note 14, at 399.

[16] Coase, *supra* note 1, at 1.

[17] Farber, *supra* note 14, at 399; Stewart Schwab, *Coase Defends Coase: Why Lawyers Listen and Economists Do Not*, 87 MICH. L. REV. 1171, 1189 n.5 (1989) (outlining the broad impact of Coase's article).

[18] Farber, *supra* note 14, at 400. *But cf.* Daniel H. Cole, *Taking Coase Seriously: Neil Komesar on Law's Limits*, 29 LAW & SOC. INQUIRY 261, 261 (2004) ("[F]ew legal scholars [have] taken seriously Ronald Coase's call for comparative institutional analyses to comprehend and resolve problems of social cost."). This author attempts to answer

A. Overview of the Coase Theorem

1. The Pigouvian Approach to Welfare Economics

An understanding of the Coase Theorem begins with Arthur C. Pigou's *The Economics of Welfare*.[19] Pigou was the chair of Political Economy at Cambridge when he wrote *The Economics of Welfare*.[20] Consistent with his predecessors at Cambridge, Pigou espoused economic theories that intended to maximize societal welfare through legal or governmental mechanisms such as taxes.[21]

A hypothetical example will illustrate Pigou's approach to welfare economics[22] and the effect of tort liability rules.[23] In this example, pollution from a cement factory injures the property of a neighboring landowner.[24] The amount of damages to the landowner is $2000. If the tort liability rules hold the cement factory owner liable for the damages to the landowner, then the factory owner will only produce cement if her profits exceed $2000.[25] Any profit less than $2000 would result in a net loss to the factory owner after compensating the landowner. However, if the cement owner has profits in excess of $2000, then it will be profitable to produce the cement and pay the landowner for the pollution damages. Therefore, according to Pigou, establishment of tort liability rules by the government will lead to an economically efficient result.[26]

Professor Coase's call by undertaking a comparative institutional analysis of the overseas maneuver damage claims system.

[19] ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE (4th ed. 1932).

[20] A. W. Brian Simpson, *Coase v. Pigou Reexamined*, 25 J. LEGAL STUD. 53, 63 (1996).

[21] *See id.* at 64.

[22] Welfare economics is defined as:

> the branch of study which endeavors to formulate propositions by which we can say that the social welfare in one economic situation is higher or lower than in another," or equivalently as a means "by which we may rank, on the scale of better or worse, alternative economic situations open to society.

Louis Kaplow & Steven Shavell, *The Perils of Welfare Economics: Reviewing Fairness Versus Welfare*, 97 NW. U. L. REV. 351, 353 (2002) (quoting Y.K. NG, WELFARE ECONOMICS 2 (1979)).

[23] Farber, *supra* note 14, at 400.

[24] *Id.*

[25] *Id.*

[26] *Id.*

This example highlights several key economic principles related to welfare economics. First, in economic theory, a "perfectly functioning market" produces an optimal number of goods at a corresponding price.[27] Under the Pigouvian approach, the pollution case is an example of an imperfectly functioning market because the social benefit of producing the good is not optimal relative to social costs.[28] Economists today refer to this kind of market behavior as an externality.[29] The pollution generated by the cement factory, which injures the landowner, is a negative externality[30] because the factory owner's activity imposes a cost on the landowner for which the market economy's pricing system does not charge the factory owner.[31] In other words, the cost is external to the pricing system.[32] Generally, Pigou viewed government-imposed tort liability rules, or some form of tax on the producer of the negative externality, as necessary to force the factory owner to internalize the

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[27] The term "optimal" is defined as "the quantity (and corresponding price) at which the social cost of producing one more unit of a good exceeds the social benefit of that unit." Richard Morrison, *Price Fixing Among Elite Colleges and Universitie*s, 59 U. CHI. L. REV. 807, 828 (1992) (citing ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 279 (1989). The Pigouvian approach theorized that government intervention was necessary in the case of an externality to ensure the market produced at an efficient level. *See* Coase, *supra* note 1, at 12.

[28] Coase, *supra* note 1, at 12.

[29] The term externality has been defined as "a cost or benefit that the voluntary actions of one or more people imposes or confers on a third party or parties without their consent." ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 45 (1988).

[30] Externalities may be positive or negative. The polluting factory owner causing harm to a neighboring landowner is a classic example of a negative externality. *See supra* note 24 and accompanying text. An example of a positive externality would be when a homeowner paints his house, causing an increase of the value in the other homes in the neighborhood.

[31] John F. Duffy, *Intellectual Property Isolationism and the Average Cost Thesis*, 83 TEX. L. REV. 1077, 1081 (2005). *See generally* George J. Stigler, *Economic Theory: Price*, BRITANNICA (15th ed. 1998), *available at* http://www.britannica.com/nobel/macro/5001_98_11.html (discussing this Nobel Prize winning economist's views of the theory related to a market economy's pricing system) (last visited Feb. 24, 2006).

> The price system, as it exists in western Europe and the Americas, is a means of organizing economic activity. It does this primarily by coordinating the decisions of consumers, producers, and owners of productive resources. Millions of economic agents who have no direct communication with each other are led by the price system to supply each other's wants. In a modern economy the price system enables a consumer to buy a product he has never previously purchased, produced by a firm of whose existence he is unaware, which is operating with funds partially obtained from his own savings.

Id.

[32] Duffy, *supra* note 31, at 1081.

pollution costs in order to remedy the market inefficiencies caused by a negative externality.[33] It is this result that Coase attacks.

2. The Coasian Alternative

In *The Problem of Social Cost*, Coase refers to the pollution example described above and concludes that Pigou's "suggested courses of action are inappropriate, in that they lead to results which are not necessarily, or even usually, desirable."[34] Coase demonstrated that Pigou failed to consider an alternative to forced cost internalization that would prevent the predicted market inefficiencies,[35] that is, the prospect that the landowner and the factory owner may bargain with each other for an economically efficient outcome even without tort liability or another forced internalization.[36]

Coase demonstrated his position by using a hypothetical case involving a rancher who owns cattle that have a tendency to stray into a neighbor's crops.[37] The hypothetical involving the landowner and polluting factory owner also demonstrates his point. Let us assume there is no tort liability and the factory owner's profits will be less than the $2000 in damages that the pollution causes to the landowner. Pigou would argue that only government intervention would force the factory owner to internalize the costs and make an economically efficient production decision.[38] But what would stop the landowner from offering to pay the cement factory owner to not pollute? Using Coase's analysis, if the cement factory owner's profits were $1000 and the landowner's damages were $2000, then the landowner could offer the cement factory owner $1500 to not pollute.[39] This would result in an economically efficient outcome that is advantageous to both parties, without requiring government intervention.[40]

Coase's hypothetical demonstrates an important outcome called the Coase Theorem. It provides that regardless of any tort liability rule in

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[33] *See id.* at 1081-82.
[34] Coase, *supra* note 1, at 1.
[35] Farber, *supra* note 14, at 400-01.
[36] *Id.* at 401.
[37] Coase, *supra* note 1, at 2-8.
[38] *See supra* note 33 and accompanying text.
[39] Farber, *supra* note 14, at 401.
[40] *Id.*

effect, if the parties to a potential agreement are able to bargain without costs related to bargaining, they will reach an agreement that results in "an increase in economic efficiency,"[41] if such an outcome is possible.[42] This has also been expressed as follows:

> Given perfect knowledge about all alternatives to any problem, and assuming transaction costs are zero, disputants will always rearrange their rights, liabilities, and entitlements in a manner which produces a net gain in their combined well-being.[43]

The Coase Theorem lies at the center of Coase's criticism of Pigou.

Coase stated his Theorem not for the sake of the Theorem itself, but as support for his larger contention that the traditional Pigouvian approach to negative externalities should be reexamined. [44] The purpose of Coase's illustration was to establish the following thesis:[45]

> If we are to discuss the problem in terms of causation, both parties cause the damage. If we are to attain an optimum allocation of resources, it is therefore desirable that both parties should take the harmful effect (the nuisance) into account in deciding on their course of action. It is one of the beauties of a smoothly operating system that, as has already been explained, the fall in the value of production due to the harmful effect would be a cost for both parties.[46]

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[41] Richard S. Markovits, *On the Relevance of Economic Efficiency Conclusions*, 29 FLA. ST. U. L. REV. 1, 2-3 (2001) (stating three different definitions of "an increase in economic efficiency" are used by economists. First, a Pareto-superior outcome is one that "makes somebody better off while making nobody worse." Second, a "potentially Pareto-superior" outcome is one that if it occurred with a zero transaction cost transfer of resources, it would result in a Pareto-superior outcome. Third, a "monetized" outcome results in an increase in economic efficiency "if it gives its beneficiaries the equivalent of more dollars than it takes away from its victims.").

[42] Michael I. Swygert & Katherine Earle Yanes, *A Primer on the Coase Theorem: Making Law in a World of Zero Transaction Costs*, 11 DEPAUL BUS. L.J. 1, 1 (1998).

[43] *Id.* at 4.

[44] Farber, *supra* note 14, at 418-21.

[45] *Id.*

[46] RONALD COASE, THE FIRM, THE MARKET, AND THE LAW 13 (1988), *quoted in* Farber, *supra* note 14, at 417-18.

Coase's illustration included two important assumptions. First, transaction costs are assumed to be zero.[47] Second, perfect information is assumed to be available to the participants.[48] Although the perfect information assumption is not as widely discussed with regard to the Coase Theorem,[49] the zero transaction costs assumption has generated substantial discussion in academic circles.[50]

Coase recognized the assumption of zero transaction costs was not realistic.[51] He used the zero transaction cost assumption to establish three points.[52] The first point illustrated the "reciprocal nature" of a negative externality situation.[53] Coase looked at the action of both the tortfeasor and the "victim" in response to various incentives.[54] The second purpose for the zero transaction cost assumption was as a tool to analyze institutional behavior.[55] This allowed the comparison of a world

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[47] Swygert & Yanes, *supra* note 42, at 4. Swygert and Yanes refer to several definitions of transaction costs to illustrate the concept of transaction costs, which may be difficult to grasp. *Id.* at 21-22. These definitions of transaction costs are:

> 1. Costs that occur "when trading partners attempt to identify and contact one another (identification costs), when contracts are negotiated (negotiation costs), and when the terms of the contracts are verified and enforced." 2. The costs of bringing bargainers together, maintaining and revising the agreement, and the capital required to effect the agreement. 3. The costs "like those of getting large numbers of people together to bargain, and costs of excluding free loaders." 4. The three classes of "search and information costs, bargaining and decision costs, policing and enforcement costs . . . [which] reduce to a single one . . . [the] resources losses due to lack of information."

Id. (footnotes omitted).

[48] *Id* at 4.

[49] Joseph Farrell, *Information and the Coase Theorem*, 1 J. ECON. PERSP. 113, 117-21 (1987). One possible reason that the perfect information assumption has generated less attention may be the view that perfect information is directly related to the zero transaction cost assumption. *See* Herbert Hovenkamp, *Rationality in Law & Economics*, 60 GEO. WASH. L. REV. 293, 304 (1992) (stating "an assumption of zero transaction costs implies that information is perfect.").

[50] *See, e.g.*, Farber, *supra* note 14, at 404-05 ("[A] 'transaction cost' is something more than a label for failure to reach a bargain. Instead, it seems to refer to measurable costs of entering into transactions.").

[51] Coase, *supra* note 1, at 7.

[52] Farber, *supra* note 14, at 418.

[53] *Id.*

[54] *Id.* If transaction costs were present in Coase's hypothetical, there is no guarantee that the parties would reach an agreement. The transaction costs may have prevented the parties from reaching agreement. *Id.*

[55] *Id.*

where all parties could agree on an outcome that happens to be economically efficient, with the world of transaction costs.[56] The third point was to show that government intervention is not the only option to address a negative externality.[57] The last point directly attacked the Pigouvian approach to externalities which stressed government intervention.[58]

Coase described the problem encountered in addressing negative externalities.

> The problem which we face in dealing with actions which have harmful effects is not simply one of restraining those responsible for them. What has to be decided is whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm.[59]

Coase offered three alternative courses of action for dealing with negative externalities when transaction costs are enough to prevent a transaction that would have occurred in a zero transaction cost world.[60] First, a single firm could purchase the entities involved, such as a polluting firm purchasing the real estate of those injured by the pollution.[61] The polluter could then internalize the costs and reach an economically efficient result.[62] In the second option, the government acts as a "super-firm" and forces cost internalization through administrative regulation of an industry.[63] The government requires the industry to employ specific production methods or limits the geographic area where the industry may operate.[64] The third option is to do nothing, thereby avoiding all the administrative costs resulting from options one and two.[65] These courses of action represent the available options for addressing negative externalities.

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[56] *Id.*
[57] *Id.*
[58] Simpson, *supra* note 20, at 64.
[59] Coase, *supra* note 1, at 11.
[60] Farber, *supra* note 14, at 419.
[61] Coase, *supra* note 1, at 8, *construed in* Farber, *supra* note 14, at 419.
[62] *Id.*
[63] *Id.* at 9.
[64] *Id.*
[65] *Id.* at 10.

The choice of a course of action requires "a patient study of how, in practice, the market, firms and governments handle the problem of harmful effects."[66] Courts, or other government actors, are often required to decide how resources are to be used in cases of negative externalities.[67] Coase argues that a "better approach would seem to be to start our analysis with a situation approximating that which actually exists, to examine the effects of a proposed policy change and to attempt to decide whether the new situation would be, in total, better or worse than the original one."[68] Coase's desired outcome is "[t]hat institutional and organizational structure is best that, under the circumstances, minimizes on transaction costs in order to maximize the social product (or social welfare)."[69]

B. The Coase Theorem and Government Generated Negative Externalities

The Coasian comparative institutional analysis described above does not specifically address a case in which the government is the actor producing the negative externality. Does the analysis change if the government produces the negative externality? Under the Coase Theorem, does an increase in economic efficiency result for government produced negative externalities?[70] To make this determination, the analysis must compare the social benefit derived from the government production with any social harm caused by the negative externality.[71] The following discussion compares social benefits and costs to determine whether an increase in economic efficiency results for government produced negative externalities.

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[66] COASE, *supra* note 46, at 18.
[67] *See id.* at 27.
[68] *Id.* at 43, *quoted in* Farber, *supra* note 14, at 420.
[69] Cole, *supra* note 18, at 262.
[70] *See supra* note 41 and accompanying text.
[71] *See supra* notes 27-28 and accompanying text.

1. Public Goods and National Defense

The social benefit derived from maneuvers[72] is national defense. Undertaking this analysis relies on an additional economic concept, namely the concept of a public good.[73] Like other externalities,[74] a public good is an instance where the market is not functioning perfectly.[75] The market provides a less than optimal quantity of a public good.[76] The unique characteristics of a public good, namely being "both nonrival and nonexclusive," account for this underproduction.[77] A nonrival good is one that, once produced for the initial consumer, costs nothing to provide to an additional consumer.[78] A good is nonexclusive if the producer cannot exclude it from other consumers after providing it to the initial consumer.[79] In other words, the benefits of a nonexclusive good cannot be limited to the purchaser.[80] National defense is the archetypical example of a public good, because once made available to one consumer, his neighbors automatically enjoy the protection provided at no expense to them.[81]

For example, assume Bill Gates is in the market to purchase a missile defense system. The system costs a total of $10 billion, but he will only gain a personal benefit of $5 billion from the missile defense system. If he were to purchase the system, he could not stop his neighbors from enjoying its protection for a benefit of $15 billion, which they would

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[72] U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS para. 4-4 (14 June 2001) [hereinafter FM 3-0] ("Maneuver is the employment of forces, through movement combined with fire or fire potential, to achieve a position of advantage with respect to the enemy to accomplish the mission. Maneuver is the means by which commanders concentrate combat power to achieve surprise, shock, momentum, and dominance.").

[73] Public goods are distinguished from other goods by their unique characteristics. Public goods are defined by two characteristics, namely, being nonrival and nonexclusive. Morrison, *supra* note 27, at 828; *see also infra* notes 76-80 and accompanying text.

[74] *See supra* notes 29-30 and accompanying text.

[75] Morrison, *supra* note 27, at 828; *see also* Herbert Hovenkamp, *Bargaining in Coasian Markets: Servitudes and Alternative Land Use Controls*, 27 IOWA J. CORP. L. 519, 519-20 (2002) (discussing neoclassical and Coasian markets).

[76] Morrison, *supra* note 27, at 828.

[77] *Id.*

[78] *Id.* For example, a banana, a private good, is rival because it can only be consumed by the initial consumer. In contrast, a radio broadcast is nonrival, because additional consumers can tune in without adding any cost to the initial consumer.

[79] *Id.* A banana is exclusive because its benefits can be limited to the purchaser. A fireworks display would be an example of a good that cannot be excluded, at least in the local area.

[80] *Id.*

[81] *See id.*

reap without cost. The total social welfare, or social benefit, of the missile defense system would be $20 billion, with a resulting surplus in social welfare of $10 billion.[82] Under these facts, Mr. Gates would not purchase the missile defense system for himself because its $10 billion price tag is more than his $5 billion personal benefit. He could purchase the system and attempt to sell the right to missile defense protection to individuals in an effort to pay for the cost in excess of his personal benefit. However, no rational[83] consumer would pay for the protection once Mr. Gates had purchased it because the consumer would enjoy the protection due to its nonexclusive nature.[84] The consumer exhibiting this behavior related to a nonexclusive good is called a "free-rider."[85] The free-rider problem stands as a barrier to bargaining in the public good market.[86] The free-rider problem caused by the non-exclusive nature of the good "imposes substantial transaction costs."[87]

Returning to the hypothetical, an additional option would be for the consumers, to include Mr. Gates, to pool their resources to purchase the missile defense system. A rational consumer, armed with perfect information and free from transaction costs external to the free-rider problem, would desire to achieve the surplus social benefits from the missile defense system.[88] Furthermore, any outcome that results in an agreement to pay for the missile defense system would be Pareto efficient,[89] as it would realize the social benefit surplus.[90] However, if the possibility exists to enjoy the benefits of the missile defense system without incurring any personal costs, the consumer would opt out of the agreement, hoping to enjoy the benefit while the other consumers incur the costs.[91] Thus, the free-rider appeal will again stand as a barrier to

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[82] *Id.*; *see also* Hovenkamp, *supra* note 75, at 522 (discussing surplus social welfare of public goods).
[83] *See generally* Hovenkamp, *supra* note 49, at 293 (discussing the importance of the rationality assumption in law and economics).
[84] Morrison, *supra* note 27, at 828.
[85] Francesco Parisi, *The Market for Votes: Coasian Bargaining in an Arrovian Setting*, 6 GEO. MASON. L. REV. 745, 754 (1998).
[86] *Id.*
[87] *Id.*
[88] *See supra* note 82 and accompanying text.
[89] *See supra* note 41 (defining Pareto efficiency).
[90] *See* Hovenkamp, *supra* note 75, at 524 (discussing the role of transaction costs on stability in Coasian markets).
[91] The assumption of zero transaction costs external to the free-rider problem may actually lead to instability that prevents consumers from reaching an agreement. *Id.* ("If transacting is costless, the costs of one new proposal that increases the proponents' wealth (zero) are always equal to or less than anticipated gains (zero or something more).

participation.[92] In this hypothetical example, no one would purchase the system because the $10 billion cost exceeds what any individual would willingly pay. The result would be an underproduction in national defense and a loss of $10 billion in surplus social benefit.[93] This illustrates the problem of underproduction of public goods. Economists have argued that government production is required to overcome the market's underproduction of public goods, specifically national defense.[94] Accordingly, the market's failure to produce sufficient national defense justifies government production of this public good.[95] By increasing the production of national defense over the level produced by the market, the U.S. government attempts to realize a surplus in social welfare.[96]

2. Classifying Government Generated Negative Externalities: Tort versus Taking

Law and Economics theory helps examine procedures for addressing social harm caused by government-generated negative externalities.[97] The government generates negative externalities in myriad ways including through the "takings triangle" of eminent domain, taxes, and exercise of the police power.[98] A tort is another form of government-generated negative externality.[99] The legal system in the United States does not require compensation in all cases of government-generated negative externalities.[100] Various legal rules determine which negative externalities are compensable and which are not. For example, the negative externalities generated by taxes and the exercise of the police power are not compensable because the Constitution authorizes those

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But once transacting is costly, then the cost of a further proposal may exceed anticipated gains and equilibrium may eventually be reached.").

[92] *See supra* notes 84-86 and accompanying text.

[93] *See* Morrison, *supra* note 27, at 828-29.

[94] *Id.* at 829; *see also* Hovenkamp, *supra* note 75, at 522 ("[G]overnment intervention may be warranted in Coasian markets with large numbers of players, provided that the government can do better than private bargainers.").

[95] *See supra* notes 76-81 and accompanying text.

[96] *See supra* notes 82, 90 and accompanying text.

[97] *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 284 n.20 (2001) (analyzing government takings as a generator of externalities, both positive and negative).

[98] *Id.* at 284.

[99] *Id.* at 284 n.20.

[100] *Id.* at 284.

forms of government action.[101] The Constitution also authorizes the government to exercise its eminent domain power, but requires compensation for the taking.[102] Furthermore, given various waivers of sovereign immunity,[103] the government must provide compensation for the negative externalities generated by its torts.[104] An overview of the Law and Economics rationale behind government takings and government-caused torts provides useful background in the discussion of proper procedures for addressing government-generated negative externalities.

a. Government Takings

A taking of property occurs "when government action directly interferes with or substantially disturbs the owner's use and enjoyment of the property."[105] One approach to addressing government-generated negative externalities is to provide compensation for a government taking.[106] Scholars and courts have grappled with establishing appropriate rules for compensating for government takings under the Fifth Amendment's Takings Clause.[107] The government's compensation mechanisms are often inherently inefficient because of their high transaction costs.[108] Some individuals will not seek compensation because the cost of recovery is too high compared to the probability of receiving compensation.[109] The nature of government compensation rules creates inefficiencies and failed compensation efforts.[110] Additional factors that lead to inefficiencies include a lack of government information regarding the social costs of the negative externalities they generate, or the identity

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[101] *See id.*
[102] *See id.*
[103] *See, e.g.*, Federal Tort Claims Act, 10 U.S.C. § 1346(b) (2005); Military Claims Act, 10 U.S.C. § 2733 (2005); Foreign Claims Act, 10 U.S.C. § 2734 (2005) (containing partial waivers of sovereign immunity).
[104] Bell & Parchomovsky, *supra* note 97, at 284 n.20.
[105] BLACK'S LAW DICTIONARY 1454 (6th ed. 1990) [hereinafter BLACK'S] (citing Brothers v. United States, 594 F.2d 740, 741 (9th Cir. 1979)).
[106] *Id.* at 280.
[107] Bell & Parchomovsky, *supra* note 97, at 278 (discussing the difficulty in establishing standards for regulatory takings).
[108] *Id.* at 280, 299. The cost of litigating a taking is an example of these high transaction costs.
[109] *See id.* at 290.
[110] *Id.*

of those harmed.[111] The outcomes are inefficient because they allow the government to externalize costs that result in "inaccurate assessments of the cost effectiveness and desirability of government policies."[112]

A taking is efficient only when the net social benefits exceed the net social costs.[113] By requiring compensation, the government must internalize "the cost of its action to private property owners—a cost it could otherwise ignore."[114] A "fiscal illusion" occurs when the government is not required to internalize the social costs of its negative externalities because it "operates under the illusion that its actions are costless."[115] The inefficiencies stemming from takings compensation procedures also appear in other mechanisms designed to address government-generated negative externalities such as torts.

b. Government Torts

A tort is "[a] private or civil wrong or injury, including action for bad faith breach of contract, for which the court will provide a remedy in the form of an action for damages."[116] The primary Coasian justification for tort law is negligence liability.[117] According to this view,

> [l]iability is to be assessed only for harms resulting from those actions for which the social costs exceed the social benefits. This promise of liability is understood to inform the actor of the costs that will be charged him in the event of harm, so that he is able to assess these, discounted by the probability of their eventuation, against the cost of precautions to be taken against them.[118]

Noted Law and Economics scholar Guido Calabresi eventually accepted the application of the Coase Theorem's reciprocity assumption

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[111] *Id.* at 281.
[112] *Id.* at 280.
[113] *Id.* at 290.
[114] *Id.*
[115] *Id.* at 291 n.53.
[116] BLACK'S, *supra* note 105, at 1489 (citing K Mart Corp. v. Ponsock, 732 P.2d 1364, 1368 (Nev. 1987)).
[117] Nancy A. Weston, *The Metaphysics of Modern Tort Theory*, 28 VAL. U. L. REV. 919, 931 (1994).
[118] *Id.*

as a justification for tort liability theory.[119] Calabresi also accepted Coase's conclusion that, in the absence of transaction costs and with perfect information, the original assignment of legal responsibility for social costs from a negative externality is irrelevant to the final, efficient outcome.[120] Calabresi used these underlying principles from the Coase Theorem as grounds for a normative argument on how tort systems should operate.[121] Calabresi applied this Law and Economics analysis to tort law with the primary purpose of "reduc[ing] the sum of the costs of accidents and the costs of avoiding accidents."[122]

Recognizing that the zero transaction costs and perfect information assumptions are rarely, if ever, present, Guido Calabresi and Douglas Melamed advocated the employment of the following principles in establishing property entitlement rules for torts.[123] First, economic efficiency requires a system that awards property entitlements based on knowledgeable choices regarding social benefits and costs, and any related transaction costs.[124] Second, the transaction costs should be assigned to the party who is in the best position to make a cost-benefit analysis.[125] Third, costs should be assigned to the party who can most efficiently reduce them.[126] Fourth, if it is unclear who that party is, the costs should be assigned to the party that enjoys the lowest transaction costs for correcting an "error in entitlements."[127] Fifth, and finally, a choice may need to be made between the efficiency of market transactions or "collective fiat."[128] This approach to analyzing a tort liability system where transaction costs are present will not guarantee

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[119] Donald H. Gjerdingen, *The Coase Theorem and the Psychology of Common-Law Thought*, 56 S. CAL. L. REV. 711, 722 (1983). Although Calabresi's tort theories are based in part on the Coase Theorem, some scholars have distinguished Calabresi's approach with the Coasian approach. *See, e.g.*, Weston, *supra* note 117, at 926-42 (noting their common assumptions and background, but distinguishing their approach to tort theory).
[120] Gjerdingen, *supra* note 119, at 722; *see supra* notes 42-46 and accompanying text.
[121] Gjerdingen, *supra* note 119, at 722.
[122] *Id.* (quoting GUIDO CALABRESI, THE COSTS OF ACCIDENTS 26 (1970)).
[123] Guido Calabresi & Douglas A. Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1096-97 (1972), *construed in* Gjerdingen, *supra* note 119, at 722-23.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*

Pareto optimality,[129] but it will maximize the efficiency of a tort liability system.[130]

Calabresi used the above criteria to support his argument in favor of strict products liability.[131] Subsequent neoclassical Law and Economics scholars, such as Richard Posner, challenged this result.[132] Nevertheless, the criteria, employing principles of Coasian Law and Economics analysis, are still a valid mechanism for analyzing a system designed to address inefficiencies resulting from government generated negative externalities.[133] They also match many concerns of scholars who have analyzed takings law through a Law and Economics framework.[134]

III. Mechanisms for Compensating Overseas Maneuver Damage

Having outlined the principal Law and Economics theories for addressing government-generated negative externalities, this article now explores the existing statutory mechanisms for addressing overseas maneuver damages. There are four primary statutory mechanisms for the payment of damages caused during maneuvers:[135] the Federal Tort Claims Act (FTCA);[136] the Foreign Claims Act (FCA);[137] the Military Claims Act (MCA);[138] and the International Agreements Claims Act

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[129] *See supra* note 41 (defining economic efficiency).
[130] Calabresi & Melamed, *supra* note 123, at 1096.
[131] James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 LAW & HIST. REV. 275, 307-16 (1997).
[132] *Id.* at 317-21.
[133] *See supra* notes 119-21 and accompanying text.
[134] *See supra* Part II.B.2.a.
[135] Article 139 of the Uniform Code of Military Justice also allows for the payment of claims for intentional damage cause by a service member. UCMJ art. 139 (2005). Under Article 139, the individual service member responsible for intentionally causing the damage pays the claim. *Id.*; *see also* Colonel R. Peter Masterton, *Managing a Claims Office*, ARMY LAW., Sept. 2005, at 46, 63. This result is consistent with the responsible service member internalizing the social costs caused by the negative externality of their conduct. *See supra* notes 59-62 and accompanying text. Nevertheless, a further discussion of Article 139 claims is outside the scope of this topic because Article 139 claims relate to damages caused by the intentional conduct of a service member and not a decision of a commander. Similarly, the Non-Scope Claims Act is also beyond the scope of this article because it is based on activities that occur outside the scope of duty. Non-Scope Claims Act, 10 U.S.C. § 2737 (2005).
[136] Federal Tort Claims Act, 10 U.S.C. § 1346(b) (2005).
[137] Foreign Claims Act, 10 U.S.C. § 2734 (2005).
[138] Military Claims Act, 10 U.S.C. § 2733 (2005).

(IACA).[139] The FTCA does not apply outside the United States, making it inapplicable to foreign maneuver damage claims.[140] The armed service assigned single-service claims responsibility for the country where the incident occurred processes claims filed under the FCA, the MCA, and the IACA.[141]

A. The Foreign Claims Act

The first form of legislation used to provide compensation for negative externalities that result from Army overseas maneuvers is the FCA.[142]

1. Origin and History of the Foreign Claims Act

On 27 May 1941, President Roosevelt declared the Nazi aggression in Europe a national emergency.[143] Shortly thereafter, on 1 July 1941, Iceland formally invited the United States to send U.S. forces to its shores.[144] After the invitation, the Secretary of the Navy asked Congress for a statutory waiver of sovereign immunity and a mechanism for the payment of claims that resulted from the deployment of Marines to Iceland.[145] Congress passed the FCA on 2 January 1942, shortly after the beginning of World War II.[146] The statute was retroactive to President Roosevelt's 27 May 1941 national emergency declaration and was intended to only apply for the duration of the national emergency.[147]

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[139] International Agreements Claims Act, 10 U.S.C. § 2734a (2005).
[140] 10 U.S.C. § 1346.
[141] U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 1-20 (1 July 2003) [hereinafter AR 27-20].
[142] 10 U.S.C. § 2734.
[143] Proclamation No. 2487, 55 Stat. 1647 (1941), *cited in* U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 10-1 (8 Aug. 2003) [hereinafter DA PAM. 27-162].
[144] Message from the Prime Minister of Iceland to the President of the United States, U.S.-Ice., July 1, 1941, E.A.S. No. 232, *cited in* DA PAM. 27-162, *supra* note 143, para. 10.1.
[145] DA PAM. 27-162, *supra* note 143, para. 10-1.
[146] Foreign Claims Act, Pub. L. No. 77-393, 55 Stat. 880 (1941) (codified as amended at 10 U.S.C. § 2734).
[147] *Id.*

Congress extended the FCA multiple times, however, until it became a permanent statutory waiver of sovereign immunity in 1956.[148]

The purpose of the FCA was to promote "friendly relations" between host nations and U.S. forces.[149] The FCA initially authorized the compensation of a friendly inhabitant of a friendly foreign state.[150] Compensation was limited to $1000 and contained a one-year statute of limitations.[151] Congress amended the FCA in 1943 and increased the compensation to $5000.[152] A 1956 amendment expanded FCA application to maritime claims.[153] Prior to the 1956 amendment, only claims that arose in a foreign country were valid.[154] The same amendment broadened the definition of a proper claimant from an inhabitant of the country where the claim arose to any person who permanently resided outside the United States.[155] In 1984, Congress again increased the amount payable; this time to $100,000.[156] The FCA remains an important tool for commanders in any deployed environment, as well as when on maneuvers or in garrison overseas.[157]

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[148] Foreign Claims Act, Pub. L. No. 84-769, 70 Stat. 703 (1956) (codified as amended at 10 U.S.C. § 2734).

[149] 10 U.S.C. § 2734; Scott J. Borrowman, *Sosa v. Alvarez-Machain and Abu Ghraib—Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 B.Y.U. L. REV. 371, 376.

[150] 55 Stat. at 880 (codified as amended at 10 U.S.C. § 2734).

[151] *Id.*

[152] Foreign Claims Act, Pub. L. No. 78-393, 57 Stat. 66 (1943) (codified as amended at 10 U.S.C. § 2734).

[153] 70 Stat. at 703. However, the authority to settle a maritime claim under the FCA has been withheld to the Commander, U.S. Army Claims Service. AR 27-20, *supra* note 141, para. 10-2(c).

[154] 55 Stat. at 880; 57 Stat. at 66; DA PAM. 27-162, *supra* note 143, para. 10-1.

[155] 70 Stat. at 703; *see also* DA PAM. 27-162, *supra* note 143, para. 10-2(a) (providing detailed guidance on eligible claimants).

[156] Foreign Claims Act, Pub. L. No. 98-564, 98 Stat. 2918 (1984) (codified as amended at 10 U.S.C. § 2734).

[157] *See* Captain Karin Tackaberry, *Center for Law & Military Operations (CLAMO) Note from the Field, Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander's Emergency Response Program*, ARMY LAW., Feb. 2004, at 39 (describing compensation in Operation Iraqi Freedom using the Foreign Claims Act); *see also*, Masterton, *supra* note 135, at 62 (explaining the application of the FCA to in garrison tort claims); Major Jody M. Prescott, *Operational Claims in Bosnia-Herzegovina and Croatia*, ARMY LAW., June 1998, at 1 (describing compensation under the Dayton Status of Forces Agreement using the FCA).

2. Chapter 10, AR 27-20 and Chapter10, DA Pam. 27-162

Army procedures for processing claims under the FCA are contained in *AR 27-20*[158] and *DA Pam. 27-162*.[159] The USARCS, the proponent of the claims regulation and claims pamphlet, provides detailed guidance to claims personnel through both publications. Each chapter in these two claims publications deals with the same topic. For example, chapter two of both publications provides extensive general guidance on investigating and processing tort and tort related claims.[160] Chapter ten deals specifically with the FCA, causing many Army claims personnel to refer to claims processed under the FCA as "chapter ten claims." Chapter ten outlines the statutory authority and history of the FCA,[161] its scope in terms of proper claimants,[162] claims that are and are not payable, as well as the applicable law.[163]

The FCA allows the payment of claims for property damage, personal injury, and death caused by Soldiers or civilian employees when the death, injury, or damage resulted from the Soldier's or civilian employee's wrongful act or omission.[164] The FCA does not require the act or omission to be within the scope of the Soldier's or civilian employee's employment.[165] Claims for property damage, personal injury, or death are also payable when they are the result of a "noncombat activity."[166] The Army claims regulation defines noncombat activities as:

> Authorized activities essentially military in nature, having little parallel in civilian pursuits, which historically have been considered as furnishing a proper basis for payment of claims. Examples are practice firing of missiles and weapons, training and field exercises, maneuvers that include the operation of aircraft and vehicles, use and occupancy of real estate, and

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[158] AR 27-20, *supra* note 141.
[159] DA PAM. 27-162, *supra* note 143.
[160] AR 27-20, *supra* note 141, at ch. 10; DA PAM. 27-162, *supra* note 143, at ch. 10.
[161] *See supra* notes 143-57 and accompanying text.
[162] *See supra* note 155 and accompanying text.
[163] AR 27-20, *supra* note 141, at ch. 10, sec. 1; DA PAM. 27-162, *supra* note 143, at ch. 10, sec. 1.
[164] Foreign Claims Act, 10 U.S.C. § 2734 (2005).
[165] *Id. But see* DA PAM. 27-162, *supra* note 143, para. 10-3 (explaining the scope of employment rules for non-U.S. citizen employees who are locally hired).
[166] 10 U.S.C. § 2734.

> movement of combat or other vehicles designed especially for military use. Activities excluded are those incident to combat, whether in time of war or not, and use of military personnel and civilian employees in connection with civil disturbances.[167]

Claims for noncombat activities only require causation. Wrongfulness or negligence on the part of the Soldier or civilian employee is not necessary.[168] The FCA does not allow for the payment of claims caused incident to combat activities.[169] Claims under the FCA are adjudicated using the law and custom of the state where the claim arose.[170] This can be one of the most difficult aspects in applying the Foreign Claims Act, as claims personnel are usually not experts in the local law.

The FCA assigns authority to pay claims to one- or three-member Foreign Claims Commissions (FCCs).[171] Judge advocates or civilian claims attorneys normally constitute FCCs.[172] A one-member FCC can approve and deny claims up to $15,000.[173] A three-member FCC can approve claims up to $50,000 and may deny a claim in any amount.[174] The Judge Advocate General, the Assistant Judge Advocate General, and the Commander, USARCS, may approve or deny claims up to $100,000.[175] Claims in excess of $100,000 may only be approved by the

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[167] AR 27-20, *supra* note 141, at glossary.
[168] 10 U.S.C. § 2734; AR 27-20, *supra* note 141, para. 3-3.
[169] 10 U.S.C. § 2734. The FCA provides:

> A claim may be allowed under subsection (a) only if . . . it did not arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat, except that a claim may be allowed if it arises from an accident or malfunction incident to the operation of an aircraft of the armed forces of the United States, including its airborne ordnance, indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission.

Id.
[170] *Id.*; AR 27-20, *supra* note 141, para. 10-5.
[171] 10 U.S.C. § 2734.
[172] AR 27-20, *supra* note 141, para. 10-8.
[173] *Id.* para. 10-9.
[174] *Id.*
[175] *Id.*

Secretary of the Army or his designee.[176] U.S. Army claims funds pay all claims up to $100,000.[177]

Foreign Claims Commissions are responsible for investigating, adjudicating, negotiating, and settling foreign claims.[178] Although FCCs may ask for assistance in the investigation from units and organizations in the area of operations, they are not required to coordinate their activities with the command responsible for the act or omission at the heart of a claim.[179] The FCC is also independent of the command in adjudicating the claim.[180]

The appointment of a unit claims officer is one aspect of the Foreign Claims process in which the command is involved.[181] Unit claims officers are important assets for FCCs because the unit claims officers assist with the investigative process.[182] This is especially true when the FCC has difficulties investigating claims due to the logistical limitations which often arise in a deployed environment.[183] While the unit claims officer is a part of the command that is the source of the claim-causing activity, he does not adjudicate the claim.[184] These procedures limit the required level of command involvement.

B. The Military Claims Act

The MCA is the second form of legislation used to provide compensation for negative externalities that result from overseas Army maneuvers.[185]

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[176] 10 U.S.C. § 2734.
[177] *Id.*; *see also* AR 27-20, *supra* note 141, para. 10-9 (providing that any amount in excess of the first $100,000 will be reported to the Treasury Department for payment); *infra* note 266 and accompanying text.
[178] AR 27-20, *supra* note 141, para. 10-6.
[179] *See id.* para. 10-6.
[180] *Id.* para. 10-9.
[181] *Id.* paras. 2-1 to 2-4.
[182] *Id.* para. 10-9.
[183] *See* Tackaberry, *supra* note 157, at 40.
[184] AR 27-20, *supra* note 141, para. 10-9.
[185] Military Claims Act, 10 U.S.C. § 2733 (2005).

1. Origin and History of the Military Claims Act

On 3 July 1943, approximately six months after passing the FCA,[186] Congress enacted the MCA.[187] Like the FCA,[188] the MCA applied retroactively to President Roosevelt's 27 May 1941 proclamation[189] that declared an unlimited national emergency.[190] Congress designed the MCA as a companion statute to the FCA and provided a mechanism for compensating injuries and property damage caused by the large number of servicemembers stationed throughout the United States during World War II.[191] The MCA applies to those injured by a Soldier's or civilian employee's negligence or other wrongful acts or omissions or as a result of noncombat activities.[192] Unlike the FCA,[193] the MCA requires the conduct to be within the scope of duty to be compensable.[194] The MCA replaced the previous federal statutory system of compensation.[195] The limited waiver of sovereign immunity created by Congress is an administrative remedy ineligible for judicial review.[196]

Although Congress's primary purpose for the MCA was to compensate claimants in the United States,[197] the MCA has always provided jurisdiction over incidents both at home and abroad.[198] The MCA remained the primary method for compensating those injured by a Soldier's negligence or other wrongful acts in the United States until Congress implemented the FTCA as a part of the Legislative Reorganization Act of 1946.[199] The FTCA became the primary source for compensation of such wrongful acts within the United States, but it

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[186] *See supra* notes 143-46 and accompanying text.
[187] Military Claims Act, Pub. L. No. 78-112, 57 Stat. 372 (1943) (codified as amended at 10 U.S.C. § 2733), *cited in* DA PAM. 27-162, *supra* note 143, para. 3-1.
[188] *See supra* note 147 and accompanying text.
[189] Proclamation No. 2487, 55 Stat. 1647 (1941).
[190] 57 Stat. at 372 (codified as amended at 10 U.S.C. § 2733), *cited in* DA PAM. 27-162, *supra* note 143, para. 3-1.
[191] *See id.*
[192] *Id.*; *see also* note 167 and accompanying text.
[193] *See supra* note 165 and accompanying text.
[194] 57 Stat. at 372 (codified as amended at 10 U.S.C. § 2733).
[195] *Id.* (repealing Act of August 24, 1912, 37 Stat. 586, and Act of June 23, 1910, 36 Stat. 630, 676), *cited in* DA PAM. 27-162, *supra* note 143, para. 3-1.
[196] *Id.*; DA PAM. 27-162, *supra* note 143, para. 3-1.
[197] DA PAM. 27-162, *supra* note 143, para. 3-1.
[198] 57 Stat. at 372 (codified as amended at 10 U.S.C. § 2733); DA PAM. 27-162, *supra* note 143, para. 3-2.
[199] Legislative Reorganization Act of 1946, §§ 401-24, Pub. L. No. 79–601, 60 Stat. 842 (codified as amended as the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (2005)).

did not repeal the MCA.[200] The MCA remained applicable to overseas claims not covered by the FCA and to noncombat activities in the United States, because the FTCA does not apply overseas and does not cover noncombat activities.[201] Today, the majority of claimants under the MCA are overseas military Family members or other U.S. residents who are not covered by the FCA or a Status of Forces Agreement, or claimants in the United States who file claims resulting from noncombat activities.[202]

2. Army Regulations Governing the MCA

Under the MCA, settlement authority—meaning the authority to pay or deny a claim—rests at varying levels depending on the amount of the claim and the size of the settlement.[203] A staff judge advocate may settle a claim under the MCA up to $25,000 and may make a final offer or deny a claim for $25,000 or less.[204] Claims for more than $25,000 that cannot be settled for $25,000 or less are forwarded to the Commander, USARCS who has settlement authority up to $25,000 but may deny a claim in any amount.[205] The Judge Advocate General or The Assistant Judge Advocate General may deny a claim under the MCA in any amount and may settle a claim for up to $100,000.[206] The Secretary of the Army or his designee, to include the Army General Counsel or another designee, may settle claims in excess of $100,000.[207] As with the FCA,[208] claims officials may investigate and adjudicate a claim under the MCA without consultation with the unit that is responsible for the conduct that resulted in the claim.[209]

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[200] §§ 401-24 , 60 Stat. at 842 (codified as amended as 28 U.S.C. §§ 2671-80).
[201] Military Claims Act, 10 U.S.C. § 2733 (2005); Federal Tort Claims Act, 28 U.S.C. §§ 2671-80; *see also* note 155, 167, 192 and accompanying text.
[202] DA PAM. 27-162, *supra* note 143, para. 3-2(c).
[203] AR 27-20, *supra* note 141, para. 3-6.
[204] 10 U.S.C. § 2733(g); AR 27-20, *supra* note 141, para. 3-6.
[205] AR 27-20, *supra* note 141, para. 3-6.
[206] 10 U.S.C. § 2733; AR 27-20, *supra* note 141, para. 3-6.
[207] 10 U.S.C. § 2733(a); AR 27-20, *supra* note 141, para. 3-6.
[208] *See supra* notes 178-84 and accompanying text (detailing the role of FCCs in overseas maneuver damage claims).
[209] AR 27-20, *supra* note 141, para. 3-6. Other than producing a scope of duty statement, the commander of the Soldier or civilian employee responsible for causing the damage is not required to be consulted in the adjudication of the claim. *See* DA PAM. 27-162, *supra* note 143, para. 2-34.

The MCA initially limited payments to $500 per claim for medical, hospital, or burial expenses.[210] Originally, the maximum increased to $1,000 during times of war.[211] Over time, however, Congress increased the maximum until it eventually abolished it altogether.[212] Historically, USARCS paid the first $100,000 for a claim and submitted the amount in excess of $100,000 to Congress for an additional appropriation.[213] Currently, a claimant is paid with the first $100,000 coming from USARCS[214] and any excess amount comes from the Judgment Fund.[215]

C. The International Agreements Claims Act

The third and final primary piece of legislation used to provide compensation for negative externalities that result from Army maneuvers is the IACA.[216]

1. Origin and History of the International Agreements Claims Act

The member states signed the North Atlantic Treaty Status of Forces Agreement (NATO SOFA) in London on 19 June 1951.[217] The Senate advised ratification on 15 July 1953, which the President accomplished the same month.[218] The treaty entered into force on 23 August 1953.[219]

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[210] Military Claims Act, Pub. L. No. 78-112, 57 Stat. 372 (1943) (codified as amended at 10 U.S.C. § 2733).
[211] *Id.*
[212] Military Claims Act, Pub. L. No. 79-67, 59 Stat. 225 (1945); Military Claims Act, Pub. L. No. 79-466, 60 Stat. 332 (1946); Military Claims Act, Pub. L. No. 82-450, 66 Stat. 334 (1952) (codified at 10 U.S.C. § 2733), c*ited in* DA PAM. 27-162, *supra* note 143, para. 3-1.
[213] Act of 10 August 1956, ch. 1041, § 1, 70A Stat. 153 (1956) (codified as amended at 10 U.S.C. § 2733), *cited in* DA PAM. 27-162, *supra* note 143, para. 3-1.
[214] Military Claims Act, Pub. L. No. 98-564, 98 Stat. 2919 (1984) (codified as amended at 10 U.S.C. § 2733); DA PAM. 27-162, *supra* note 143, para. 3-1.
[215] 31 U.S.C. § 1304 (2005). The Judgment Fund is a permanent appropriation by Congress to fund judgments against the United States. Used extensively by the Department of Justice to pay judgments in federal court, the Judgment Fund is designed to fund judgments authorized under other statutes, such as the FTCA, FCA, and the MCA. *See* Trout v. Garrett, 891 F.2d 332, 335 (D.C. Cir. 1989); *see also infra* notes 266-68 and accompanying text.
[216] International Agreements Claims Act, 10 U.S.C. § 2734a (2005).
[217] North Atlantic Treaty Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792 [hereinafter NATO SOFA].
[218] *Id.* at 1792.
[219] *Id.*

The original signatories of the NATO SOFA were: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the United States.[220] In 1954, Congress passed and the President signed the IACA which, while not specific to the NATO SOFA, allowed for implementation of the NATO SOFA's claims provisions.[221]

The general language of the overseas provision of the IACA applies to agreements between the United States and other nations if the agreements provide for "settlement or adjudication and cost sharing of claims against the United States."[222] In addition to the cost sharing requirement, the claims must arise from acts or omissions of military and civilian employees acting within the scope of their duties while in the host nation's territory and for which the United States is responsible under the host nation law.[223] As with the FCA,[224] claims under the IACA may not result from combat activities.[225] When an international agreement provides for a claims mechanism that meets these requirements, the IACA allows the Department of Defense (DOD) to reimburse the host nation for the pro rata share stated in the agreement.[226] The IACA, while originally used to implement the NATO SOFA claims provisions, eventually became the authority for the payment of claims under several SOFAs,[227] to include the U.S. SOFAs with Iceland,[228] Japan,[229] Korea,[230] and Australia.[231] The NATO SOFA is an appropriate

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[220] *Id.* at 1822-25.

[221] International Agreements Claims Act, Pub. L. No. 87-651, 76 Stat. 512 (1962) (codified as amended at 10 U.S.C. § 2734a-b). Section 2734a applies to claims arising overseas, whereas section 2734b applies to claims arising within the United States. 10 U.S.C. § 2734a-b.

[222] 10 U.S.C. § 1034a.

[223] *Id.*

[224] *See supra* note 169 and accompanying text (detailing the FCA's combat exception).

[225] 10 U.S.C. § 1034a (stating "[A] claim arising out of an act of an enemy of the United States or arising, directly or indirectly, from an act of the armed forces, or a member thereof, while engaged in combat may not be considered or paid under this section.").

[226] *Id.*

[227] DA PAM. 27-162, *supra* note 143, para. 7-1.

[228] Annex on the status of United States personnel and property, May 8, 1951, U.S.-Ice., 2 U.S.T. 1533.

[229] Treaty of Mutual Cooperation and Security, Jan. 19, 1960, U.S.-Japan**,** 11 U.S.T. 1652.

[230] Agreement under Article IV of the Mutual Defense Treaty between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of the United States Armed Forces in the Republic of Korea, July 9, 1966, U.S.-S. Korea, 17 U.S.T. 1677.

model to describe how the IACA functions, because Congress designed the IACA as implementing legislation for the NATO SOFA.[232]

2. The Claims Provisions of the NATO SOFA

Article VIII of the NATO SOFA deals with claims.[233] The Army claims regulation provides for the payment of claims under Article VIII "arising from any act or omission of [S]oldiers or members of the civilian component of the U.S. Armed Services done in the performance of official duty or arising from any other act or omission or occurrence for which the U.S. Armed Services are responsible."[234] Article VIII breaks claims into three areas: intergovernmental claims; third-party scope claims; and third-party non-scope claims.[235] An intergovernmental claim is a claim that arises from one NATO member state against another NATO member state.[236] Intergovernmental claims must have a NATO connection to fall under Article VIII.[237] These intergovernmental claims are largely waived.[238] An intergovernmental claim for damage to military property or personnel is waived.[239] An intergovernmental claim for damage to non-military property is limited to $1,400.[240]

The second category of Article VIII claims are third-party scope claims.[241] Individuals or entities, to include state or local governments, which are not NATO member states are third parties under the NATO SOFA.[242] Article VIII, paragraph five establishes the procedures under which a third party may file a claim for damage arising from a service member's or civilian employee's duty-related act or omission.[243] These "scope claims" arise within the scope of duty of the service member or

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[231] Agreement Concerning the Status of United States Forces in Australia, May 9, 1963, U.S.-Austl., 14 U.S.T. 506.
[232] *See supra* note 221 and accompanying text.
[233] NATO SOFA, *supra* note 217, art. VIII.
[234] AR 27-20, *supra* note 141, para. 7-10.
[235] NATO SOFA, *supra* note 217, art. VIII.
[236] *Id.*
[237] *Id.*, *construed in* DA PAM. 27-162, *supra* note 143, para. 7-2.
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.*, *construed in* DA PAM. 27-162, *supra* note 143, para. 7-2.
[243] NATO SOFA, *supra* note 217, art. VIII(5).

civilian employee.[244] The sending state[245] must determine whether the incident was within the scope of duty, although local law determines legal responsibility.[246] If the sending state determines that the service member's or civilian employee's act or omission was outside the scope of duty, then the sending state categorizes the claim as a third-party non-scope claim.[247] An FCC adjudicates and pays third-party non-scope claims as *ex gratia* claims[248] under the FCA.[249]

Employing the same procedures used as if the host nation's forces had caused the injury,[250] third-parties file scope claims with the NATO host nation,[251] also called the receiving state.[252] For example, instead of filing with an Army claims office, a German national would file a claim with German authorities for damage inflicted by U.S. forces. [253] The German authorities would conduct an initial investigation to help determine which unit was involved and would then forward the claim to the U.S. Army Claims Service, Europe (USACSEUR).[254] The U.S. Army Claims Service, Europe, would then conduct its own investigation by contacting the unit and gathering information needed to make a determination of whether the incident was within the scope of duty.[255] If the USACSEUR determined the incident was within the scope of duty,

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[244] *See* DA PAM. 27-162, *supra* note 143, para. 7-2.
[245] The NATO member that has deployed forces to a foreign country is called the "sending state." *Id.* para. 7-1.
[246] NATO SOFA, *supra* note 217, art. VIII, *construed in* DA PAM. 27-162, *supra* note 143, para. 7-2.
[247] *Id.*
[248] *Id.*; *see also* AR 27-20, *supra* note 141, at glossary, sec. II.a ("Ex Gratia: 'As a matter of grace.'" In the case of *ex gratia* claims under the NATO SOFA, Article VIII, paragraph six, a claim considered by the grace of the sovereign or sending State without statutory obligation (under the Foreign Claims Act) to do so.").
[249] DA PAM. 27-162, *supra* note 143, para. 7-2; *see supra* Part III.A.2. *Ex gratia* claims fall outside the scope of this topic, as they do not arise within the scope of duty and are not a negative externality within a commander's control.
[250] NATO SOFA, *supra* note 217, art. VIII, *construed in* DA PAM. 27-162, *supra* note 143, para. 7-2.
[251] Although claims are properly filed with the receiving state, they may also be filed against the service member or civilian employee directly under local law. DA PAM. 27-162, *supra* note 143, para. 7-2. Although the service member or civilian employee may be subject to personal judgment, they are immune from enforcement proceedings for any judgment that arose out of the performance of official duties. *Id.*
[252] *Id.* para. 7-1.
[253] DA PAM. 27-162, *supra* note 143, para. 7-2; Major David J. Fletcher, *The Lifecycle of a NATO SOFA Claim*, ARMY LAW., Sept. 1990, at 44, 46-47.
[254] *See* Fletcher, *supra* note 253, at 46-47.
[255] *See id.*

they would issue a scope certificate for that claim to the German authorities.[256] The German authorities would then adjudicate the claim under German law and pay the claimant.[257] The adjudication by the receiving state is considered an exclusive remedy by U.S. courts.[258] After payment is made, USACSEUR reimburses the German government under the provisions of the NATO SOFA, usually seventy-five percent of the amount paid.[259]

As this example demonstrates, the involvement of the responsible command is even more limited than under the FCA[260] and the MCA.[261] Here, the command involvement is limited to providing input on whether the service member acted within the scope of duty.[262] The command does not even make the scope of duty decision. Rather, the receiving state conducts final adjudication and payment. After issuing a scope certificate, the United States' involvement is only to reimburse the receiving state.[263]

D. Funding Overseas Maneuver Damage Claims

The statutory provisions for the payment of overseas maneuver damage establish varying procedures for the payment of claims when the Army has been assigned single-service claims responsibility.[264] The procedures for the payment of claims under the FCA require the Army to assign FCCs to adjudicate and pay claims.[265] U.S. Army claims funds pay up to $100,000 for FCA claims, with any overage coming from the

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[256] *See id.*
[257] NATO SOFA, *supra* note 217, art. VIII; *see also* DA PAM. 27-162, *supra* note 143, para. 7-2 (describing procedures for claims adjudication under the NATO SOFA); Fletcher, *supra* note 253, at 47 (describing the adjudication of a NATO SOFA claim in Germany.)
[258] Dancy v. Dep't of Army, 897 F. Supp. 612, 614 (D.D.C. 1995); Aaskov v. Aldridge, 695 F. Supp. 595, 597 (D.D.C. 1988), *cited in* AR 27-20, *supra* note 141, para. 7-11.
[259] NATO SOFA, *supra* note 217, art. VIII; *see also* Fletcher, *supra* note 253, at 46-47 (describing the payment of NATO SOFA claims in Germany).
[260] *See supra* notes 179-84 and accompanying text.
[261] *See supra* notes 208-09 and accompanying text.
[262] *See supra* note 255 and accompanying text.
[263] Fletcher, *supra* note 253, at 47. The exception to this general rule is the "scope exceptional" claim. *Id.* A scope exceptional claim is a reservation by USACSEUR of the right to remain involved in the adjudication of the claim, which usually occurs in high value claims, such as environmental damage claims. Friedel Interview, *supra* note 3.
[264] AR 27-20, *supra* note 141, para. 2-62.
[265] *See supra* notes 171-74 and accompanying text.

Judgment Fund.[266] Similarly, for MCA[267] claims, USARCS pays the first $100,000 and the Judgment Fund covers any excess.[268] Essentially, the same funds pay claims under the FCA, the MCA, and the IACA.[269]

The USARCS established procedures for the payment of foreign tort claims.[270] These procedures include the maintenance of a fund from which foreign tort claims are paid, called the claims open allotment.[271] Each year, the DOD's congressional appropriation allots funds to the Department of the Army Operating Agency Twenty-two.[272] In turn, Operating Agency Twenty-two provides USARCS with open allotment funds each month. The USARCS uses the funds to pay claims.[273] The USARCS then establishes a claims expenditure allowance for every claims approval authority.[274] Claims personnel use the claims expenditure allowance to generate monthly reports, track the number of claims paid, and the amount available to be paid.[275]

The USARCS uses the data from the monthly reports to determine the amount needed for each fiscal year's claims open allotment.[276] In addition to historical data, these estimates consider "projected Army strength, the number of expected permanent change of station moves, planned major maneuvers, exercises, and deployments, base and unit realignment, and other information from field claims offices."[277] In essence, data flows from field claims offices through the Department of the Army, to the DOD, and then to Congress, to determine the size of the appropriation required. However, nothing in the statutes and procedures requires the maneuver units to consider the cost of maneuver related claims in planning their maneuvers.

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[266] AR 27-20, *supra* note 141, para. 10-9; DA PAM. 27-162, *supra* note 143, para. 2-100; *see supra* note 177 and accompanying text (describing funding sources for the FCA).
[267] DA PAM. 27-162, *supra* note 143, para. 3-1.
[268] 31 U.S.C. § 1304 (2005).
[269] DA PAM. 27-162, *supra* note 143, para. 2-100.
[270] *Id.* para. 13-11.
[271] *Id.*
[272] *See, e.g.*, Department of Defense Appropriations Act of 2006, Pub. L. No. 109-148, 119 Stat. 2680, 2682-83 (2005) (providing the Army Operations and Maintenance appropriation for fiscal year 2006); *see also* DA PAM. 27-162, *supra* note 143, para. 13-11 (describing Operating Agency Twenty-two's role in funding claims).
[273] DA PAM. 27-162, *supra* note 143, para. 13-11.
[274] *Id.* Similar to a bank account, the Claims Expenditure Allowance is the amount of funds allocated by USARCS to an individual claims approval authority to pay claims.
[275] *Id.*
[276] *Id.*
[277] *Id.*

IV. Army Maneuver Training Exercises and Operations

After discussing the statutory mechanisms and procedures providing compensation for damages caused during maneuvers, the next step is to explore the historic trends and doctrine concerning Army maneuver training and operations.

A. Trends in Overseas Maneuver Training Exercises and Operations

During the Cold War, the Army conducted numerous training exercises including massive exercises directed by the Chairman, Joint Chiefs of Staff, as well as smaller unit-level exercises.[278] During the mid-1980s, over 1,000 maneuvers were conducted by U.S. forces on private and public land in Germany each year.[279] The largest exercise during that period was traditionally Team Spirit, a Republic of Korea-U.S. Combined Forces Command exercise that involved over 200,000 forces, 60,000 of which were U.S. forces.[280]

Beginning in 1968, another major exercise, REFORGER,[281] took place each year in Germany.[282] The 1986 REFORGER involved the deployment of over 17,000 forces based in the continental United States to Germany for a field training exercise with European-based forces.[283] Despite the immensity of the 1986 REFORGER, planners nevertheless took the costs and public outcry from maneuver damage into consideration in determining the size and nature of the exercise.[284]

> In recent years, actual maneuver in the field-training phases of REFORGER has been scaled back due to environmental considerations. Adverse weather often

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[278] CENTER FOR ARMY HIST., DEPARTMENT OF THE ARMY HISTORICAL SUMMARY: FY 1980 (1983), at 52, *available at* http://www.army.mil/cmh/books/DAHSUM/1980/ch03.htm#b4.

[279] Major Horst G. Greczmiel, *Maneuver Damage Claims May Never Be the Same*, ARMY LAW., May 1988, at 60.

[280] CENTER FOR ARMY HIST., DEPARTMENT OF THE ARMY HISTORICAL SUMMARY: FY 1986, at 36-37 (1995) [hereinafter HISTORICAL SUMMARY: FY 1986], *available at* http://www.army.mil/cmh/books/DAHSUM/1986/ch03.htm.

[281] REFORGER stands for Return the Forces to Germany. Fletcher, *supra* note 253, at 44 n.1.

[282] HISTORICAL SUMMARY: FY 1986, *supra* note 280, at 36-37.

[283] *Id.*

[284] *Id.*

> makes the potential costs of maneuver damage claims unacceptable. To prepare for REFORGER 86, a combined U.S.-Federal Republic of Germany team traveled to the United States and provided damage prevention training. Field commanders made decisions during the exercise to scale down the scope of activities and reduce movements of heavy vehicles. This sensitivity to the host nation's needs has paid dividends in the reduction of claims costs, but also has reduced training opportunities.[285]

During the mid-1980s, annual reimbursement of the German government for maneuver-related claims averaged between seventy-five and eighty-five million Deutschmark,[286] or between thirty and thirty-five million dollars.[287] As the U.S. dollar weakened in currency exchange markets, these costs increased dramatically.[288] High maneuver damage costs attracted the attention of the General Accounting Office and other agencies, resulting in pressure to reduce costs. [289]

As the Cold War ended, the drawdown of the U.S. forces and the change in focus of Army doctrine resulted in a decrease in the size and number of training exercises.[290] Although the number of Chairman, Joint Chiefs of Staff-directed exercises continued to increase, the focus of these exercises changed.[291] In 1993, for example, REFORGER changed focus to simulate a deployment of forces in support of a combined operation inspired by the fighting in Bosnia-Herzegovina.[292] That last

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[285] *Id.*
[286] Greczmiel, *supra* note 279, at 60.
[287] Based on an exchange rate of 0.4076 U.S. dollars per German mark, the exchange rate for the first day of REFORGER '86, 21 January 1986. FXHistory, Historical Exchange rate, http://www.oanda.com/convert/fxhistory (last visited Aug. 27, 2007).
[288] Greczmiel, *supra* note 279, at 60. For example, the strength of the U.S. dollar on 21 January 1988 had declined to 0.6028 U.S. dollars per German mark. *See* FXHistory, Historical Exchange rate, http://www.oanda.com/convert/fxhistory (last visited Aug. 27, 2007). At that exchange rate, 85 million German marks were valued at $51,238,000.
[289] Greczmiel, *supra* note 279, at 60.
[290] *See* CENTER FOR ARMY HIST., DEPARTMENT OF THE ARMY HISTORICAL SUMMARY: FY 1993 (2002), at 7 (describing the objective to reduce Army forces by thirty-two percent by FY97), *available at* http://www.army.mil/cmh/books/DAHSUM/1993/ch02.htm#n1.
[291] *See id.* at 49 (stating that the Army participated in approximately fifty Chairman, Joint Chiefs of Staff sponsored exercises in FY 93).
[292] *See id.* at 50.

REFORGER exercise[293] proved prophetic regarding the increase in contingency operations for U.S. forces.

Overseas maneuver damage claims played an important role as U.S. forces deployed in support of numerous contingency operations during the 1990s.[294] By 1998, U.S. FCCs had paid over $1,500,000 in claims in Bosnia-Herzegovina and Croatia.[295] In fact, U.S. forces deployed on over twenty-five contingency operations between 1990 and 1998 alone.[296] The increase in contingency operations following the end of the Cold War and Operation Desert Shield /Desert Storm also resulted in a change in training practices and increased focus on employing role-players at Army training centers.[297]

While the U.S. was increasing its contingency operations, NATO began an eastward expansion. First, the Partnership for Peace expanded the number of combined training exercises in Eastern Europe in which the Army participated.[298] As NATO added new member states, U.S. forces began to train with its new NATO allies in several training exercises.[299] Although this shift revived the number of training exercises conducted outside training areas, they in no way compared with the size of the massive Cold War era training exercises.[300]

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[293] *See id.*

[294] *See* Masterton, *supra* note 135, at 68.

[295] Prescott, *supra* note 157, at 8.

[296] Major Karen V. Fair, *Environmental Compliance in Contingency Operations: In Search of a Standard*?, 157 MIL. L. REV. 112, 113 (1998).

[297] Lieutenant Colonel Jody M. Prescott & Captain Jerry Dunlap, *Law of War and Rules of Engagement Training for the Objective Force: A Proposed Methodology for Training Role-Players*, ARMY LAW., Sept. 2000, at 43.

[298] *See generally* Partnership for Peace, http://www.nato.int/issues/pfp/index.html (last visited Mar. 25, 2006) (describing the purpose and development of the Partnership for Peace).

[299] For example, Victory Strike is a large annual V Corps aviation training exercise conducted both on and off Polish training areas. GlobalSecurity.Org, Victory Strike, http://www.globalsecurity.org/military/ops/victory-strike.htm (last visited Mar. 25, 2006).

[300] Friedel Interview, *supra* note 3. The following figures from USASEUR for fiscal year 2005 demonstrate the current level of claims paid under the FCA, MCA, and IACA in USACSEUR's area of responsibility: FCA $369,000; MCA $281,000; IACA $6,300,000. E-mail from Joanne Roe, Budget Analyst, U.S. Army Claims Service, to MAJ Jerrett W. Dunlap, Jr., Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army (Mar. 7, 2006, 07:17 EST) (on file with author).

The Global War on Terrorism caused the most recent and perhaps most dramatic shift in maneuver damage. The deployment of forces to Afghanistan and Iraq has resulted in a dramatic increase in the number of maneuver damage claims paid.[301] As a result, the number of training exercises substantially decreased, but the number of deployment-related maneuver damage claims increased.[302]

B. Maneuver Training Doctrine and Objectives

As the previous discussion detailed, the Army traditionally provided combat training to Soldiers and maneuver units through field training exercises.[303] As the Army's training doctrine developed, it attempted "to ensure affordable training in the future" by emphasizing technology to promote a "synthetic environment consisting of live, virtual, and constructive simulation."[304] Army training programs must therefore:

> (1) Provide environmentally sensitive, accessible, cost-effective training that provides the necessary fidelity. (2) Replicate actual operational conditions so [S]oldiers can operate in the synthetic environment as they could expect to operate under wartime conditions. (3) Ensure leaders have needed technical and tactical skills and knowledge. (4) Support the Army as it executes operations at the tactical, operational, and strategic levels. (5) Support training for contingency missions.[305]

Given this desired situation, Army officials made a call for "continuing research into unit training strategies [to provide] an empirical basis for developing unit training strategies for the Army. Validated training

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[301] *See* Tackaberry, *supra* note 157, at 39. As of 22 February 2006, 19,086 claims had been filed in Iraq since the beginning of Operation Iraqi Freedom. Of those, 13,574 had been paid, for a total of $20,491,467. E-mail from Joanne Roe, Budget Analyst, U.S. Army Claims Service, to MAJ Jerrett W. Dunlap, Jr., Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army (Mar. 7, 2006, 13:01 EST) (on file with author).

[302] Friedel Interview, *supra* note 3.

[303] U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND EDUCATION para. 1-20 (4 Sept. 2003) [hereinafter AR 350-1 (2003)], *updated by* U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT (13 Jan. 2006) [hereinafter AR 350-1 (2006)].

[304] *Id.*

[305] *Id.*

methods determine optimal mixes of [training aids, devices, simulators, simulations], live fire, and field maneuver exercises." [306] Simulation based training became the standard for brigade, division and corps training because of increased operational tempo, costs, safety concerns and concerns over environmental damage caused by maneuver training.[307]

Army training doctrine continues to focus on developing the optimal mix of training platforms while "[e]xploiting emerging technology to offset restrictions imposed upon live and weapons training because of safety considerations, environmental sensitivities, and higher training costs." [308] Army doctrine directs commanders to reach the optimal mix of training methods and locations while considering, among other factors, the costs, safety and environmental impacts of their maneuvers. These safety and environmental factors are negative externalities because they are costs imposed on others which result from the unit's maneuver training.[309]

V. Law and Economics Analysis of Overseas Maneuver Damage Claims

After outlining the Law and Economics principles regarding the efficient treatment of negative externalities, and the mechanisms and doctrine related to maneuver damage, this article now examines how these two areas can combine to improve the efficiency of the maneuver damage claims process.

A. Application of the Coase Theorem to Overseas Maneuver Damage Claims

Recall that the thesis of Professor Coase's *The Problem of Social Cost* is that optimum resource allocation can be obtained in an economic activity affected by a negative externality by requiring the involved parties "to take the harmful effect (the nuisance) into account in deciding on their course of action."[310] The decision is "whether the gain from preventing the harm is greater than the loss which would be suffered

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[306] *Id.*
[307] *Id.*
[308] AR 350-1 (2006), *supra* note 303, para. 1-8.
[309] *See supra* notes 29-32 and accompanying text.
[310] COASE, *supra* note 46, at 13.

elsewhere as a result of stopping the action which produces the harm."[311] The available courses of action are: one of the parties internalizes the cost by purchasing the entities involved; the government forces cost internalization; or nothing.[312] Military planners must make this decision to optimize resource allocation with regard to maneuvers.

1. Social Benefits: Determining the Social Benefit of Maneuvers

Maneuver in both a training and operational environment is a key component of combat readiness which directly contributes to national defense.[313] Commanders are responsible for ensuring the combat readiness of their units through training.[314] Once deployed, commanders are responsible for defeating the enemy by effectively employing the elements of combat power. They accomplish this through maneuver. [315] National defense is a public good, subject to underproduction by the market without government intervention.[316] With the authority and responsibility they hold, commanders occupy an ideal position to measure the benefits a particular maneuver will have on accomplishing their mission.[317] This is true whether the maneuver is part of a training exercise or an operation.[318] Commanders are in the best position to measure how a particular maneuver will contribute to national security, because they have the authority to direct the use of the resources in their unit.[319]

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[311] Coase, *supra* note 1, at 11; *see supra* note 59 and accompanying text.
[312] Coase, *supra* note 1, at 8-10; *see supra* notes 61-65 and accompanying text.
[313] FM 3-0, *supra* note 72, paras. 1-1 to 1-4.
[314] *Id.* para. 3-35.
[315] *Id*. para. 3-14 (listing the elements of combat power as "maneuver, firepower, leadership, protection, and information").
[316] *See supra* Part II.B.1.
[317] *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-1(b) (15 July 1999).
[318] *See id.*
[319] Of course a commander does not have unfettered discretion in directing how to expend resources in their unit. Directives from higher headquarters, budget restraints, and other factors may limit a commander's discretion. *See supra* note 290 and accompanying text.

2. Social Costs: Classifying Negative Externalities Resulting from Overseas Maneuvers

The negative externalities resulting from both training and operational maneuvers do not fit neatly into a classification as either a tort or a taking.[320] At first glance, the nature of the negative externality resembles a tort.[321] For example, if while on maneuvers, an M1A2 Abrams main battle tank causes damage to a farmer's field, the resulting negative externality shares many elements with the tort of trespass.[322] Nevertheless, the entry onto the farmer's field is not unlawful because some form of legal authorization exists.[323] The underlying legal authorization makes this particular hypothetical maneuver-related negative externality more analogous to a government taking than a tort.[324] However, if while on maneuver, the M1A2 tank negligently crushes a parked car due to the driver's inattention, the resulting negative externality would not enjoy the same legal authorization and may be classified a tort.[325] The statutory mechanisms for overseas maneuver damage claims apply to both takings-like and tort-like government action.[326] Accordingly, the Law and Economics analysis applied to both government takings and tort rules applies to the statutory mechanisms for compensating overseas maneuver damages.

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[320] *See supra* Part II.B.2.

[321] *See supra* note 116 and accompanying text.

[322] *See* BLACK'S, *supra* note 105, at 1502 ("Any unauthorized intrusion or invasion of private premises or land of another.") (citations omitted).

[323] The form of legal authorization varies depending on the context of the maneuver. For example, a training maneuver in Germany is authorized by a Maneuver Right granted by the German government. *See* Greczmiel, *supra* note 279, at 60. When maneuvers conducted in Poland did not have a legal mechanism for a government granted Maneuver Right, planners obtained contracts for individual Maneuver Rights from the property owners. Friedel Interview, *supra* note 3. Maneuvers conducted in Afghanistan and Iraq are conducted based on authorizations from United Nations Resolutions. S.C. Res. 1623, ¶ 2, U.N. Doc. S/RES/1623 (Sept. 13, 2005). S.C. Res. 1546, ¶ 10, U.N. Doc. S/RES/1546 (June 8, 2004).

[324] *See supra* Part II.B.2.a.

[325] Bell & Parchomovsky, *supra* note 97, at 284 n.20 ("[I]t cannot be said that there is a government 'power' to commit torts.").

[326] *See, e.g.*, *supra* notes 164-68 (demonstrating that claims under the FCA are payable for both government negligence and non-combat activities, where no government negligence is required).

3. Applying the Calabresi and Melamed Factors to the Overseas Maneuver Damage Claims Process

As noted above, scholars have criticized government takings compensation mechanisms for inefficiencies.[327] The culprit is the government's lack of information regarding the social costs of the negative externalities. Without accurate information, the government will suffer from fiscal illusion and will underestimate the social costs of its actions.[328] Calabresi and Melamed's factors for evaluating the efficiency of a tort compensation scheme address the same concerns.[329] Their factors value a system that provides compensation based on informed choices regarding social benefits and costs, and transaction costs.[330] The transaction costs should fall on the party who can best make a cost-benefit analysis regarding social costs and social benefits and the one who also can reduce transaction costs.[331]

Changing the funding source for maneuver damage claims from USARCS to the Operations and Maintenance (O&M) funds of the responsible commander will maximize the efficiency of the overseas maneuver damage claims process.[332] Applying Calabresi and Melamed's five principles supports this conclusion.[333] First, a command-funded maneuver damage claims process would be efficient because the commander would then be in the best position to make knowledgeable choices regarding social benefits[334] and costs,[335] including any related transaction costs.[336] Second, the commander would be in the best position to make a cost-benefit analysis because he is armed with the best

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[327] *See supra* notes 107-12 and accompanying text (describing the inefficiencies present in takings compensation schemes).
[328] *See supra* notes 114-15 and accompanying text (detailing the fiscal illusion pneumonia).
[329] *See supra* notes 123-28 and accompanying text (listing Calabresi's and Melamed's factors).
[330] Calabresi & Melamed, *supra* note 123, at 1096-97; *see supra* note 124 and accompanying text.
[331] Calabresi & Melamed, *supra* note 123, at 1096-97; *see supra* notes 125-27 and accompanying text.
[332] *See* Calabresi & Melamed, *supra* note 123, at 1096.
[333] *See supra* notes 123-28 and accompanying text (detailing Calabresi's and Melamed's factors).
[334] *See supra* Part V.A.1 (describing the social benefits to National Security derived from maneuvers).
[335] *See supra* Part V.A.2 (describing the costs generated by maneuvers).
[336] *See* Calabresi & Melamed, *supra* note 123, at 1096; *see also supra* notes 315-20 and accompanying text (discussing command responsibility and authority).

information regarding the benefits derived by his unit from the maneuver.[337] Third, as the commander is in control of costs,[338] he would be the party who could most efficiently reduce them.[339]

The fourth and fifth principles do not need to be applied because the commander is clearly in the best position to reduce costs.[340] For purposes of illustration, however, applying the fourth and fifth principles emphasizes that the commander is the appropriate party to ensure the most efficient outcome. Looking at the fourth, as the commander determines how a maneuver is to be conducted, he will have the lowest transaction costs for correcting an "error in entitlements."[341] Turning finally to the fifth, as the preceding factors point to the commander, a choice does not need to be made between the efficiency of market transactions and "collective fiat."[342] Commanders are uniquely situated to balance the social benefits generated by their actions with the social costs of their actions. If commanders were required to internalize the negative externality costs, they would be in the best position to ensure resources were used in an optimal manner.[343] This result is consistent with Professor Coase's second option, namely that the government forces cost internalization, uniquely, onto itself.[344]

B. The Inefficiencies Encouraged by the Current Overseas Maneuver Damage Claims Process

1. Failure to Internalize Maneuver Damage Costs May Result in an Inefficient Allocation of Resources

The current overseas maneuver damage claims process suffers many of the same inefficiencies that affect takings and tort compensation schemes.[345] Under current procedures, commanders are not directly

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[337] *See supra* Part IV.A.1-2.
[338] *See supra* notes 315-20 and accompanying text (outlining a commander's authority and responsibilities).
[339] *See* Calabresi & Melamed, *supra* note 123, at 1096-97.
[340] *See id.* at 1097.
[341] *Id.*
[342] *Id.*
[343] COASE, *supra* note 46, at 13.
[344] Coase, *supra* note 1, at 8-10; *see supra* notes 63-64 and accompanying text (describing Professor Coase's options for internalizing negative externalities).
[345] *See supra* Part II.B.2.

involved in the maneuver damage claims process.[346] Funds to pay maneuver damage claims come from USARCS or the Judgment Fund, not from a unit's O&M funds.[347] Because maneuver unit commanders are not required to pay for maneuver damage claims, they are not forced to internalize those costs, which may lead to an inefficient allocation of resources.[348]

A hypothetical example illustrates how the current system may result in an inefficient outcome.[349] Assume that a maneuver will produce a benefit of $100,000 through increased national defense.[350] Now assume that two options exist for executing the maneuver. Option A takes the unit through a farmer's field. Option B is a more direct route through a forested area. Option B has the advantage of being more direct, which would save the commander $1000 in reduced fuel and vehicle maintenance compared to traveling through the farmer's field. Option A would cost the unit $51,000 for personnel, fuel, and maintenance, and would cause $40,000 in damage to a farmer's field. Option B would cost the unit $50,000 for personnel, fuel, and maintenance, and would cause $60,000 in damage to a forested area. Based on these factors alone, the commander would choose option B because he only considers his costs. The surplus benefit to the commander is $50,000 for option B, which exceeds the surplus benefit of $49,000 for option A.[351] Option B, however, creates an inefficient allocation of resources because its total

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[346] *See supra* notes 179-84, 208-09, 260-63 and accompanying text.

[347] *See supra* Part III.D (detailing the current procedures for funding overseas maneuver damage claims).

[348] *See supra* notes 311-13 and accompanying text (summarizing Professor Coase's views on addressing negative externalities).

[349] *See supra* notes 311-13 and accompanying text.

[350] *See supra* Part II.B.1 (explaining the social benefit derived from national defense). Many benefits related to national defense are not easily quantifiable, especially in monetary terms. Nevertheless, commanders are frequently required to make decisions involving monetary and nonmonetary variables. For example, a commander balances monetary and nonmonetary variables when he determines whether the cost of purchasing ballistic goggles for his Soldiers is too great in relation to the expected reduction in injuries that would be suffered if purchased. Similarly, a commander must balance the national security benefits from attempting to capture a terrorist (the social benefit) with the risk of casualties and the monetary cost of undertaking the operation (the social cost). While the commander may not be able to easily quantify the benefits and the costs, especially in monetary terms, he is nevertheless expected to make these decisions.

[351] *See supra* note 82 and accompanying text (describing the hypothetical social benefit derived from a hypothetical missile defense system).

cost of $110,000 exceeds the $100,000 benefit of the manuever.[352] The unit's costs of $50,000, combined with the $60,000 that would be paid by USARCS for the maneuver damage claim,[353] results in $110,000 in total costs from the maneuver.[354]

One could argue that even though commanders are not required to internalize the costs of the negative externalities caused by their maneuvers, they may still voluntarily take those costs into consideration when they make maneuver decisions.[355] After all, Army doctrine requires commanders to "[p]rovide environmentally sensitive, accessible, cost-effective training."[356] Additionally, the payment of overseas maneuver damage claims often acts as a force multiplier for deployed commanders[357] by promoting friendly relations with a local population.[358] For instance, the commander's inefficient choice of Option B[359] in the hypothetical above might change if the commander voluntarily considered external costs. If the commander placed more than $1000 in value on following the guidance to provide "environmentally sensitive" training,[360] then the commander would choose the efficient Option A.

Although a commander may voluntarily consider the costs of negative externalities, no mechanism ensures he will. As the cost of the "environmentally sensitive" option increases, the commander's incentive to minimize costs makes it less likely that he will choose that option.[361] This illustration indicates that a commander is not required to internalize the negative externalities of maneuvers and, although at times an efficient outcome may occur, the current structure for overseas maneuver damage claims does not produce an incentive for commanders to reach

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[352] *See supra* note 41 and accompanying text (defining economic efficiency in resource allocation).
[353] *See supra* Part III.D (detailing the funding of overseas maneuver damage claims).
[354] The $60,000 in damage to the forested area and the $50,000 in direct costs to the unit total $110,000.
[355] *See* Bell & Parchomovsky, *supra* note 97, at 291.
[356] AR 350-1 (2003), *supra* note 303, para. 1-20. The example of Mr. Walmsley and the Cavalry squadron commander in the introduction also provides some support to this contention. *See supra* Part I.
[357] *See generally* Tackaberry, *supra* note 157, at 39 (describing the benefits of using the FCA in efforts to rebuild Iraq).
[358] *See supra* note 149 and accompanying text (outlining the purpose of the FCA).
[359] *See supra* note 352 and accompanying text.
[360] AR 350-1 (2003), *supra* note 303, para. 1-20.
[361] *See supra* notes 309-10 and accompanying text (detailing Army guidance to provide "environmentally sensitive" and "cost-effective" training).

this efficient outcome.[362] Scholars have replied to arguments that the government will voluntarily internalize negative externalities by characterizing such arguments as Pollyanna-ish and unreliable at best.[363]

Recently, this author conducted a nonscientific survey of company commanders from a mechanized brigade combat team stationed overseas.[364] The survey attempted to obtain anecdotal evidence regarding the impact of potential environmental and other maneuver damages on a commander's decision-making process. After identifying that Army doctrine requires commanders to "[p]rovide environmentally sensitive, accessible, cost-effective training,"[365] the survey posed two questions.[366] First, "To what degree does potential harm to the environment or other damage caused by maneuvers impact your decisions on planning and executing maneuver training?"[367] The commanders were asked to choose one of four potential responses: "1- Most important factor in planning and executing maneuver training; 2- Significant factor in planning and executing maneuver training. 3- Minor factor in planning and executing maneuver training. 4- Not a factor in planning and executing maneuver training."[368] All of the respondents indicated potential environmental harm or other damage caused by training maneuvers was a minor factor in planning and executing maneuver training.[369]

The second survey question related to operational maneuvers instead of training maneuvers.[370] The question was: "To what degree does potential harm to the environment or other damage caused by operations impact your decisions on planning and executing operations?" [371] The

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[362] *See supra* note 41 and accompanying text (defining economic efficiency).
[363] Bell & Parchomovsky, *supra* note 97, at 291.
[364] In an effort to encourage candid responses, the commanders were informed that their names and units would remain confidential. E-mail from MAJ Jerrett W. Dunlap, Jr., Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, to company commanders (Feb. 25, 2006, 06:52 PM EST) [hereinafter E-mail from MAJ Jerrett W. Dunlap, Jr.] (on file with author).
[365] AR 350-1 (2003), *supra* note 303, para. 1-20.
[366] E-mail from MAJ Jerrett W. Dunlap, Jr., *supra* note 364.
[367] *Id.*
[368] *Id.*
[369] E-mails from company commanders to MAJ Jerrett W. Dunlap, Jr., Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army (Feb. 25-27, 2006) [hereinafter E-mails from company commanders] (on file with author).
[370] E-mail from MAJ Jerrett W. Dunlap, Jr., *supra* note 364.
[371] *Id.*

commanders were again asked to choose one of four potential responses: "1- Most important factor in planning and executing an operation; 2- Significant factor in planning and executing an operation; 3- Minor factor in planning and executing an operation; 4- Not a factor in planning and executing an operation."[372] The vast majority of respondents indicated that potential harm to the environment or other damage caused by operations was a minor factor in planning and executing operations, with one respondent indicating it was not a factor at all.[373] Unsolicited comments from some of the commanders indicate that they found host nation environmental regulations so restrictive as to override any consideration of actual environmental damage.[374] In essence, the only environmental factors considered by the commanders were the environmental restrictions, not the negative externality caused by the maneuver.[375] This survey, although by no means a scientific sampling of commanders, lends anecdotal support to the contention that commanders do not consider damages caused during training maneuvers or operations to be a significant factor during planning or execution.[376]

Although Army doctrine requires commanders to consider costs, safety, and environmental considerations,[377] only the costs paid from the commander's O&M budget must be internalized. Furthermore, arguing that commanders may voluntarily consider external costs only points to some possible incentives for commanders to consider the costs of the negative externalities produced by their maneuvers.[378] Policy driven incentives, however, have no mechanism to force cost internalization. A rational[379] commander will only voluntarily consider the costs of the negative externalities if it is in his best interest.

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[372] *Id.*
[373] E-mails from company commanders, *supra* note 369.
[374] *Id.*
[375] *See id.*
[376] *See supra* note 349 and accompanying text (arguing that the failure of unit commanders to pay for maneuver damage claims leads to inefficient resource allocation).
[377] *See supra* note 306 and accompanying text (detailing Army training guidance).
[378] *See supra* note 356 and accompanying text.
[379] *See generally* Hovenkamp, *supra* note 49, at 293 (discussing the importance of the rationality assumption in law and economics).

2. The Current Overseas Maneuver Damage Claims Process Promotes Imperfect Information

Army policy alone does nothing to remedy the lack of information commanders may have regarding the extent of the negative externality costs caused by their maneuvers.[380] Commanders lack information because they are not directly involved in the compensation process and would have to expend additional resources to become involved.[381] Transaction costs under the current procedure for the adjudication of maneuver damage claims are high because a third party, either an FCC,[382] U.S. Army claims personnel,[383] or a sending state's claims office,[384] is responsible for adjudicating and paying for maneuver damages. Therefore, even if a commander would otherwise be inclined to take the costs of the negative externalities into consideration when making maneuver-related decisions, the commander would still be subject to fiscal illusion problems due to the lack of information regarding those costs.[385] By requiring the commander responsible for the negative externality-causing maneuver to pay for the costs, he will be forced to internalize not only the costs of the negative externality, but also will have an incentive to gain more information on how he can lower those costs. The information gained will encourage more efficient decisions and resource allocations, whether applied to maneuvers during a training exercise or during an operation. [386]

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[380] *See supra* notes 114-15 and accompanying text (explaining the "fiscal illusion" created when the government fails to internalize costs related to government generated negative externalities).

[381] It should be noted that imperfect information would still exist in a command funded overseas maneuver damage claims system. However, the proposed system should create incentives to improve information flow. *See infra* note 387 and accompanying text.

[382] *See supra* note 171 and accompanying text (describing claims approval authority under the FCA).

[383] *See supra* notes 203-07 and accompanying text (describing claims approval authority under the MCA).

[384] *See supra* notes 257-59 and accompanying text (describing claims approval authority under the NATO SOFA).

[385] *See supra* notes 114-15 and accompanying text (explaining fiscal illusion).

[386] *See supra* notes 311-13 and accompanying text (summarizing Professor Coase's views on addressing negative externalities).

C. The Advantages of a Command-Funded Overseas Maneuver Damage Claims Process

Empirical evidence supports the contention that commanders who pay the costs of maneuver damage claims, thereby internalizing those costs, do factor those costs into their decisions regarding maneuvers.[387] The high costs of maneuver damage claims from REFORGER exercises in the mid-1980's resulted in a reevaluation of maneuver training and ultimately efforts to reduce the costs.[388] The proposed changes were not made at the lower level commands, even though they were the direct participants and most familiar with the exercise.[389] High-level Army officials decided to reform REFORGER because USARCS paid the funds at the Department of Army level.[390] The fact that the push for reform came from the bill payer—the Department of the Army level or higher—supports the contention that optimum resource allocation will only occur at the level where negative externalities are internalized.[391] By shifting the source of funding to the unit responsible for determining how to conduct the maneuver, the negative externalities will fall on the commander in the best position to allocate resources.[392]

1. The Impact of a Command-Funded Overseas Maneuver Damage Claims Process on Training and Unit Readiness

A potential criticism of this proposed change in funding is that it would result in a decrease in training that would, in turn, damage unit readiness. Optimal resource allocation, however, will actually result in more, not fewer, resources available for training.[393] Returning to the original hypothetical example, recall that if USARCS paid for the maneuver damage claims, the commander would choose the inefficient option B.[394] However, if the $60,000 were diverted from USARCS to the unit's O&M funds, and the unit were required to pay for their

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[387] *See supra* note 333 and accompanying text (arguing that requiring responsible commanders to use Operations and Maintenance funds to pay for maneuver damage claims will maximize the efficiency of maneuver related resource allocations).
[388] *See supra* notes 284-86 and accompanying text.
[389] *See id.*
[390] *See supra* Part III.D.
[391] *See supra* note 333 and accompanying text.
[392] *See supra* notes 339-44 and accompanying text.
[393] *See supra* note 41 and accompanying text.
[394] *See supra* note 352 and accompanying text (describing why the commander would choose option B).

maneuver damage claims, the result would be different. Under option B, the unit would have $50,000 in unit costs and $60,000 in costs for maneuver damage claims,[395] for a total of $110,000 for the maneuver. The commander would not choose option B because the total costs exceed the $100,000 national security benefit.[396] The commander would choose option A, with $91,000 in total costs from the maneuver ($51,000 in direct unit costs and $40,000 in maneuver damage claims costs).[397] As the $100,000 benefit to national security exceeds the $91,000 in total costs, option A results in a surplus of $9,000 and is therefore optimal.[398] This choice also results in the unit having $19,000 more than it would have had to expend on training under the current system.[399] By choosing the more efficient option A, the unit commander will have more funds to expend on training and unit readiness.

This illustration assumes that the commander knows the actual costs of the negative externalities that will be caused by his unit's maneuver prior to its execution.[400] A commander, however, cannot predict the future. The best a commander could do would be to estimate the costs of the negative externalities based on past experience and available intelligence. His imperfect estimate would not necessarily result in an efficient allocation of resources.[401] Nevertheless, the current system suffers from this same lack of information regarding the actual costs of negative externalities.[402] The USARCS has the same difficulty accurately predicting the amount of maneuver damage claims. Each year, USARCS estimates the amount of maneuver damage claims based on available information regarding planned exercises and past experience.[403] Under the proposed change, the unit commander would have a distinct advantage over USARCS's current ability to prepare this estimate. The unit commander has a more intimate knowledge of the maneuver. The commander plans and executes the maneuver, whereas USARCS, at best, will receive a report on the exercise, which will not

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[395] *See supra* note 351-52 and accompanying text.
[396] *See supra* note 351 and accompanying text.
[397] *See supra* notes 351-52 and accompanying text.
[398] *See supra* note 41 and accompanying text (defining economic efficiency).
[399] The unit would have its initial $50,000 from unit O&M funds, plus the additional $60,000 diverted from USARCS, totaling $110,000. After expending $91,000 for direct costs and maneuver damage claims, the unit would have $19,000 remaining.
[400] *See supra* notes 398-99 and accompanying text.
[401] *See supra* notes 129-30 and accompanying text (describing how results may increase economic efficiency without guaranteeing an optimal resource allocation).
[402] *See supra* Part V.B.2.
[403] *See supra* notes 276-77 and accompanying text.

provide the same level of detailed information.[404] Although a commander does not have perfect information, he would have better information than USARCS and could make a better estimate of the maneuver-related negative externalities.

It should be noted that by internalizing the negative externality costs, a commander will not necessarily always lower the amount, scale, or size of maneuvers. Under the current system, a commander may overestimate the costs of the maneuver-related negative externalities due to his lack of information regarding those costs.[405] This possibility is made more likely with the Army's policy on minimizing environmental damages and costs.[406] If a commander overestimated the costs of a negative externality, the result could be fewer maneuvers than optimal, which would also be inefficient.[407] Returning to the original hypothetical maneuver under the current system helps illustrate this point.[408] Assume that the maneuver would still produce a $100,000 benefit through increased national security.[409] Option A still costs $51,000 in direct expenses to the unit and $40,000 in damages external to the unit.[410] Option B still costs $50,000 in direct costs to the unit, with $60,000 in damages external to the unit.[411] In this illustration, assume the commander places a high priority on avoiding environmental damage.[412] The commander may consider the guidance to provide "environmentally sensitive"[413] training to be absolute and prohibit him from conducting the training under either option A or option B. The nation would lose the potential surplus national security benefits under this outcome. However, if the commander were required to pay the costs of the damage caused by his unit's maneuver, he would be forced to take the actual

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[404] *See id.*
[405] *See supra* Part V.B.2 (detailing how the current system promotes imperfect information).
[406] *See supra* note 306 and accompanying text (detailing Army training guidance regarding environmental sensitivity).
[407] *See supra* note 41 and accompanying text (defining economic efficiency).
[408] *See supra* notes 351-56 and accompanying text.
[409] *See supra* note 351 and accompanying text.
[410] *See supra* notes 351-52 and accompanying text.
[411] *See id.*
[412] *See supra* notes 360-61 and accompanying text (describing how a commander's consideration of Army guidance may affect his choices regarding maneuver planning and execution).
[413] *See supra* note 306 and accompanying text (detailing Army guidance regarding training).

costs into consideration.[414] The commander would have an incentive to develop a more accurate estimate of costs because he would not know the actual costs of the damage while planning the maneuver. Accordingly, the proposed system gives a commander an incentive to gain better information.[415] By internalizing the costs of the negative externality generated by the unit's maneuver, the commander would make a determination based on better information, not based on vague directives or imperfect information that may cause fiscal illusion.[416]

2. The Impact of a Command-Funded Overseas Maneuver Damage Claims Process on Combat Operations

A similar criticism could be made that requiring commanders to pay for the maneuver damage claims caused during operations would make a commander less aggressive in combat operations. However, the same analysis applies to an operational setting as to a training exercise.[417] The commander would still balance the advantage to be gained from a particular course of action with the costs of that course of action.[418] During an operation, the relative benefits to national security will probably be higher in comparison to maneuver damage costs than they would be in a training exercise.[419] Nevertheless, the commander would still be in a better position to choose an efficient course of action under this proposal because he could make a better-informed decision.[420] The proposed change in funding source from USARCS to the maneuver unit would have no detrimental effect on overall training, unit readiness, or operational performance. Fewer funds would be expended on less than optimal maneuvers or operations because commanders would have an

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[414] *See supra* notes 46, 311 and accompanying text (describing Professor Coase's view on addressing negative externalities).
[415] *See supra* Part V.B.2 (explaining how the current system promotes imperfect information).
[416] *See supra* notes 410-14 and accompanying text.
[417] *See supra* Part V.C.1 (describing the impact of a command-funded claims process on training).
[418] *See supra* notes 415-17 and accompanying text.
[419] Furthermore, as combat-related claims filed by those who do not ordinarily reside in the United States are not payable, a commander would pay relatively fewer claims during combat operations. Foreign Claims Act, 10 U.S.C. § 2734 (2005); International Agreements Claims Act, 10 U.S.C. § 2734a (2005); *see supra* notes 169, 225 and accompanying text (describing the FCA's and IACA's combat exception rule).
[420] *See supra* Part V.C.1.

incentive to use the Army's funds more efficiently.[421] This would make more funds available for efficient training and operations. Under the proposed system, a commander would enjoy the same freedom to determine what training is best for his unit.[422] He would also be free to determine how to undertake an operation. Ultimately, this change would allow commanders to be better informed on actual social costs and social benefits, thereby making more efficient decisions.

The factors discussed in the preceding paragraphs support a shift in the funding source of overseas maneuver damage claims from USARCS to the responsible unit. The Coase Theorem and Professor Coase's analysis support this result.[423] Professor Coase stated that both parties involved in a negative externality must consider harmful effects in order to reach "optimum allocation of resources." [424] Damages are not fully taken into account by the responsible unit under the current overseas maneuver damage claims system because the costs are paid by USARCS, not the responsible unit. [425] Transaction costs would be lower under the proposed system, because the responsible unit commander has the majority of the information related to his unit's maneuvers. [426] The proposed shift in funding the payment of overseas maneuver damage claims from USARCS to the responsible unit would force cost internalization on the responsible unit commander, which Professor Coase identified as an acceptable course of action to reach an optimum allocation of resources. [427]

D. Required Regulatory and Procedural Changes

Specific regulatory and procedural changes are required to implement the proposal that commanders pay overseas maneuver damage claims from unit funds. The current statutory structure allows

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[421] *See supra* notes 395-400 and accompanying text (hypothetical demonstrating incentives for more efficient resources allocation under the proposed command-funded overseas maneuver damage claims process).
[422] *See supra* notes 318-20 and accompanying text (detailing a commander's authority and responsibilities).
[423] *See supra* Part II.A.2 (detailing the Coase Theorem).
[424] *See supra* note 46 and accompanying text.
[425] *See supra* Part III.D (detailing the funding of overseas maneuver damage claims).
[426] *See supra* Part V.B.2 (discussing how the current overseas maneuver damage claims system promotes imperfect information by commanders).
[427] *See supra* notes 61-64 (describing the three alternative courses of action for dealing with negative externalities when transaction costs are present).

for the adjudication of overseas maneuver damage claims by FCCs for FCA claims,[428] U.S. Army claims offices for MCA claims,[429] and sending states' claims offices for IACA claims.[430] The statutory structure can remain the same because the statutes only grant authority to adjudicate claims. They do not require USARCS or any other agency to fund the payments.[431] A regulatory reallocation by Department of Army Operating Agency Twenty-two of funds from USARCS to maneuver units is all that is required to implement the funding change.[432] Instead of allocating the funds to USARCS each month to pay the claims,[433] the funds would be allocated to the O&M accounts of the maneuver units at the beginning of each fiscal year. Commanders would be required to incorporate anticipated claims into their annual planning and budget process.[434] By requiring commanders to balance the anticipated benefit of the maneuver with the anticipated social costs, including maneuver damages, the Army can achieve its desired cost savings.[435]

Under the current system, USARCS considers numerous factors in estimating the amount of funds that will be required to pay for maneuver damage claims.[436] If this proposal were to be implemented, USARCS's expertise in paying maneuver damage claims would ensure it remains a valuable resource in determining the aggregate amount of estimated maneuver damage claims.[437] When planning a particular maneuver under the proposal, a commander would have an incentive to work with claims personnel to estimate the amount of maneuver damage from a

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[428] *See supra* note 171 and accompanying text (describing claims approval authority under the FCA).
[429] *See supra* notes 203-07 and accompanying text (describing claims approval authority under the MCA).
[430] *See supra* notes 256-59 and accompanying text (describing claims approval authority under the NATO SOFA).
[431] *See* International Agreements Claims Act, 10 U.S.C. § 2734a (2005); Military Claims Act, 10 U.S.C. § 2733 (2005); Foreign Claims Act, 10 U.S.C. § 2734 (2005).
[432] *See supra* Part III.D (describing the current funding of overseas maneuver damage claims).
[433] *See supra* notes 272-73 and accompanying text (describing the current process for allocating funds for overseas maneuver damage claims from Operating Agency Twenty-two to USARCS).
[434] *See supra* notes 415-16 and accompanying text (hypothetical describing the incentives to gain information on maneuver related negative externalities).
[435] *See supra* notes 311-13 and accompanying text (describing Professor Coase's view on addressing negative externalities).
[436] DA PAM. 27-162, *supra* note 143, para. 13-11.
[437] *See supra* Part III.D (describing the procedures for the payment of overseas maneuver damage claims).

particular course of action,[438] as he would recognize claims personnel[439] as the subject matter experts responsible for adjudicating maneuver damage claims. The commander would want to minimize maneuver damage costs because he would be the bill payer.[440]

The shift in responsibility for paying maneuver damage claims has the result of switching the motive to work together and share information. Under the current system, as illustrated by the example of Mr. Walmsley and the cavalry squadron commander, the incentive to share information and cooperate to lower maneuver damage costs fell on the bill-payer, USARCS.[441] Under this proposal, the incentive to share information and cooperate to lower maneuver damage costs would transfer to the unit commander. The obvious advantage of this change is that it shifts the incentive to cooperate to the party in control of how the negative externalities are generated.[442] Mr. Walmsley and other similarly-situated claims personnel have an incentive to lower maneuver damage costs because it is their job.[443] Under the proposal, that incentive would be shared. This new incentive to work more closely with claims personnel would ensure that commanders have greater information which would reduce or eliminate the occurrence of fiscal illusion[444] and result in a more efficient allocation of resources.[445]

Under the proposal, the Department of the Army would determine the amount of funds allocated to maneuver units each year based on input from USARCS.[446] The Department of the Army would use the USARCS factors from the current system to estimate an aggregate amount necessary for overseas maneuver damage claims.[447] The factors include historical data, as well as "projected Army strength . . . planned major maneuvers, exercises, and deployments . . . and other information from field claims offices."[448] Customarily, under the Army Planning,

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[438] *See supra* notes 402-05 and accompanying text.
[439] *See supra* Part III (describing the overseas maneuver damage claims process).
[440] *See supra* note 392 and accompanying text (arguing that, based on experiences from REFORGER, bill-payers are more likely to take efforts to minimize overseas maneuver damage costs).
[441] *See supra* Part I.
[442] *See supra* Part V.A.3.
[443] *See supra* note 3 and accompanying text.
[444] *See supra* notes 114-15 and accompanying text (describing fiscal illusion).
[445] *See supra* note 41 and accompanying text (defining economic efficiency).
[446] *See supra* Part III.D.
[447] DA PAM. 27-162, *supra* note 143, para. 13-1.
[448] *Id.*

Programming, Budgeting, and Execution Process, Operations and Maintenance funds are budgeted based on input from major commands (MACOM) and their major subordinate commands.[449] The MACOMs would then distribute the funds to their maneuver units. The amount of funds an individual unit would receive would be based on numerous factors, to include type of unit, location, planned operations and exercises, and historic data regarding past maneuver damage claims.[450] As noted above, USARCS, together with the MACOMs, would help track and disseminate this information.[451] The MACOMs and major subordinate commands would be responsible for allocating these funds to their tenant units. Ideally, similarly-situated units would receive the same amount of funds. Once allocated, the funds would be available for the payment of maneuver damage claims or, if not expended for maneuver damage claims, for any other authorized purpose considered appropriate by the unit commander.

Although a wily unit commander could manipulate the proposed system to pad his Operations and Maintenance account by overestimating the amount of maneuver damage claims and using the excess amount for other purposes, such a scenario is unlikely because of continued oversight from higher headquarters. The amount of funds shifted to maneuver units for the payment of overseas maneuver damage claims would be determined from the top down.[452] The individual units would have input on the amount of O&M funds that they receive, but ultimately the amount received would be determined by the unit's headquarters.[453] Although a commander could overestimate his planned expenses and thereby receive more funds than he would spend, the same risk exists for other aspects of the Operations and Maintenance budgeting process.[454]

If the funds were fenced funds—only available for the payment of maneuver damage claims—the commander would lose the incentive to use the funds efficiently, because he would be unable to use them for

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[449] *See generally* U.S. ARMY WAR COLLEGE, HOW THE ARMY RUNS ch. 9 (2005) (outlining the Army Planning, Programming, Budgeting, and Execution Process).
[450] *See* DA PAM. 27-162, *supra* note 143, para. 13-11.
[451] *See supra* notes 276-77 and accompanying text (outlining the current process for estimating and funding overseas maneuver damage claims).
[452] *See supra* notes 447-52 and accompanying text (detailing the proposed method for funding overseas maneuver damage claims).
[453] *See supra* notes 447-52 and accompanying text.
[454] *See id.*

other purposes to directly benefit his mission.[455] In fact, if the funds were fenced, there may be an incentive to spend all the budgeted funds to ensure that he would receive the same amount during the next fiscal year.[456] As the amount of funds allocated is based on historic data,[457] a commander could ensure the data shows a continuing requirement for maneuver damage claims funds by spending them during the fiscal year.[458] In a system where funds are limited to a specific time period, there is occasionally an incentive to expend the funds on a lower priority item before they expire because the funds cannot be saved for a higher priority expense during the following fiscal year.[459] This phenomenon is often related to so-called "end of year money."[460] Although the proposed change may suffer from this phenomenon, it would only be exacerbated if the funds were limited to maneuver damage claims payments. In the fenced-funds scenario, the commander has no other option than to use the funds for maneuver damage claims payments, which eliminates the incentive to choose more efficient resource allocation choices.[461] While the proposed system may suffer from inefficiencies, they pale in comparison to the inefficiencies of the current system.

Note that under this proposal, commanders would not be responsible for adjudicating the maneuver damage claims. Adjudication would remain the responsibility of claims personnel authorized to adjudicate claims under the provisions of the FCA, MCA, and IACA.[462] A commander adjudicating proper compensation might have a strong incentive to award little or no relief because he would be able to use the funds for competing unit interests. An FCC, or other claims person responsible for adjudicating a claim, has no inherent incentive to award a less than appropriate amount because claims personnel cannot use the funds for their own benefit.[463]

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[455] *See supra* Part V.C (describing the advantages of the proposed command-funded overseas maneuver damage claims process).
[456] *See supra* note 449 and accompanying text.
[457] DA PAM. 27-162, *supra* note 143, para. 13-11.
[458] Interview with Major Michael L. Norris, Professor, Contract and Fiscal Law Department, The Judge Advocate General's Legal Center and School, Charlottesville, Va. (Mar. 3, 2006) [hereinafter Major Norris Interview].
[459] *Id.*
[460] The problem of the "end of year money" phenomena is beyond the scope of this article. However, it presents a potential incentive for inefficient government spending.
[461] *See supra* Part V.C .
[462] *See supra* Part III (detailing the current overseas maneuver damage claims process).
[463] *See supra* Part III.

Might a commander's poor use of his O&M funds result in a claimant not being paid? Under the proposal, a commander who does not have sufficient funds for maneuver-related claims would be required to find the funds from another source. Available options would include requesting additional funds from the unit's higher headquarters or eliminating other planned expenses.[464] A commander's ability to program funds would be another factor to be considered in his officer evaluation report, just as it is for other O&M expenditures. If a commander is unable to properly budget his funds and the readiness of his unit suffers, his superior officers will take necessary action to remedy this shortcoming.[465] An advantage of this proposed system is that it would result in command attention on maneuver damage throughout the chain of command because there is the potential for the expense to affect the budget throughout the command.[466] Furthermore, claims of over $100,000 would be submitted to the Judgment Fund.[467] The Judgment Fund would act as a cap to protect units from catastrophic damages. Although there is some risk that the proposed change could result in a delayed payment to a claimant, delays already occur under the current system at the beginning and end of the fiscal year.[468]

VI. Conclusion

The Coase Theorem's "frictionless" world without transaction costs[469] is indeed foreign territory for the combat arms commander, who trains to fight in a world occupied by the "friction of war."[470] Nevertheless, the positive economic analysis of systems designed to

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[464] Major Norris Interview, *supra* note 458.

[465] Available actions include counseling, a negative officer evaluation report, or even relief for cause.

[466] *See supra* note 450-52 and accompanying text (describing the proposed method of estimating and funding overseas maneuver damage claims through command channels).

[467] *See supra* notes 266-68 and accompanying text (describing the maximum amount of Army funds used to pay overseas maneuver damage claims and the role of the Judgment fund).

[468] E-mail from Aletha Friedel, Chief, European Torts Branch, U.S. Army Claims Service, Europe, to MAJ Jerrett W. Dunlap, Jr., Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army (Mar. 8, 2006, 04:09 EST) (on file with author).

[469] Weston, *supra* note 117, at 932.

[470] *See* CARL VON CLAUSEWITZ, ON WAR 122 (Michael Howard & Peter Paret eds. and trans., 1976).

address negative externalities advocated by Professor Coase[471] has direct application to the compensation scheme designed to address negative externalities that result from maneuvers in the Army.[472] The statutory structures of the FCA,[473] MCA, [474] and IACA[475] are designed to remedy market inefficiencies related to negative externalities caused by overseas maneuvers, by requiring the Army to internalize the costs of those negative externalities.[476] However, the costs are not truly internalized by the units responsible for causing the negative externalities because the costs of compensating the damage are paid by USARCS, a separate part of the Army.[477] If the Army were to implement this proposed change by requiring a maneuver unit to pay for its overseas maneuver damage claims, the costs of the maneuver-related negative externalities would be internalized.[478] Furthermore, a unit commander is uniquely situated to determine the advantage gained from a particular maneuver.[479] By making him aware of all maneuver related costs, he will make the most efficient decision regarding maneuvers,[480] resulting in a more efficient overall resource allocation and making more funds available for those maneuver units.[481] As the introductory example with Mr. Walmsley and the cavalry squadron commander demonstrates, if commanders are aware of the costs caused by their maneuvers, the Army will use its funds more efficiently, will minimize inefficient actions,[482] and will create an increase in overall social welfare.[483] As Professor Coase stated, "[w]hat is needed is a change of approach."[484]

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[471] Coase, *supra* note 1, at 21.
[472] *See supra* Part V.A.2.
[473] Foreign Claims Act, 10 U.S.C. § 2733 (2005); *see also supra* Part III.A (detailing the FCA).
[474] Military Claims Act, 10 U.S.C. § 2734 (2005); *see also supra* Part III.B (detailing the MCA).
[475] International Agreements Claims Act, 10 U.S.C. § 2734(a) (2005); *see also supra* Part III.C (detailing the MCA and NATO SOFA, *supra* note 217, art. VIII).
[476] *See supra* Part V.A.2.
[477] *See supra* Part III.D (describing the current method of funding of overseas maneuver damage claims).
[478] *See supra* Part II.B and V.A.5 (describing law and economic theory regarding internalization of negative externalities and how the proposed system would result in maneuver damage cost internalization).
[479] *See supra* note 318 and accompanying text (describing the authority and responsibilities of commanders).
[480] *See supra* Part V.C.
[481] *See supra* Part V.C.1.
[482] *See supra* Part I.
[483] *See supra* note 22 (defining welfare economics).
[484] Coase, *supra* note 1, at 21; *see supra* note 1 and accompanying text.

Appendix A

Proposed Changes to Army Regulation 27-20, Claims*

Section II
Responsibilities

1–9. The Commander, USARCS
The Commander, USARCS, will—
a. Supervise and inspect U.S. Army claims activities worldwide.
b. Formulate and implement claims policies and uniform standards for claims office operations.
c. Investigate, process and settle claims beyond field office monetary authority and consider appeals and requests for reconsideration on claims denied by the field offices.
d. Supervise the investigation, processing, and settlement of claims against, and in favor of, the United States under the statutes and regulations listed in paragraph 1–4, and pursuant to other appropriate statutes, regulations, and authorizations.
e. Designate ACOs, CPOs, and claims attorneys within DA and DOD components other than the Departments of the Navy and Air Force.
f. Designate continental United States (CONUS) geographic areas of claims responsibility.
g. Recommend action to be taken by the SA or the U.S. Attorney General, as appropriate, on claims in excess of $200,000 or the threshold amount then current under the FTCA, on claims in excess of $100,000 or the threshold amount then current under the FCA, the MCA, and the NGCA, and on other claims that have been appealed to the SA.
h. Operate the "receiving State office" for claims cognizable under Article VIII of the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA), as implemented by 10 USC 2734b (see chap 7).
i. Settle claims of the U.S. Postal Service for reimbursement under 39 USC 411 (see DOD Manual 4525.6–M).
j. Settle claims against carriers, warehouse firms, insurers, and other third parties for loss of, or damage to, personal property of DA or DOD

* Proposed changes are listed in bold. Headers are also in bold, but have not been modified from the original.

soldiers or civilians incurred while the goods are in storage or in transit at Government expense (chap 11).
k. Formulate and recommend legislation for Congressional enactment of new statutes and the amendment of existing statutes considered essential for the orderly and expeditious administrative settlement of noncontractual claims.
l. Perform post-settlement review of claims.
m. Prepare, justify, and defend estimates of budgetary requirements and administer the Army claims budget. **Coordinate with major Army commands (MACOMS) to determine supplemental budgetary requirements for the payment of maneuver claims from the Operations and Maintenance (O&M) funds of maneuvering units.**
n. Maintain permanent records of claims for which TJAG is responsible.
o. Assist in developing disaster and maneuver claims plans designed to implement the responsibilities set forth in paragraph 1–11*k* .

1–16. Commanders of major Army commands
Commanders of major Army commands (MACOM), through their SJAs, will—
a. Assist USARCS in monitoring ACOs and CPOs under their respective commands for compliance with the responsibilities assigned in paragraphs 1–11 and 1–12.
b. Assist claims personnel in obtaining qualified expert and technical advice from command units and organizations
on a nonreimbursable basis (although the requesting office may be required to provide TDY funding).
c. Assist TJAG, through the Commander, USARCS, in implementing the functions set forth in paragraph 1–9.
d. Coordinate with the ACO within whose jurisdiction a maneuver is scheduled, to ensure the prompt investigation and settlement of any claims arising from it.
e. **Coordinate with USARCS for the preparation, justification, and defense of estimates of supplemental budgetary requirements for the payment of maneuver claims from the O&M funds of maneuvering units. Distribute supplemental O&M funds to maneuvering units for the payment of maneuver damage claims by the maneuvering unit. Ensure subordinate maneuver units track the expenditure of O&M funds for maneuver damage claims and coordinate through their servicing ACO.**

Section III
Operations, Policies, and Guidance
1–17. Operations of claims components
(4) *Special claims processing offices.*
(a) Designation and authority. The Commander, USARCS, the chief of a command claims service, or the head of an ACO may designate special CPOs within his or her command for specific, short-term purposes (for example, maneuvers, civil disturbances and emergencies). These special CPOs may be delegated the approval authority necessary to effect the purpose of their creation, but in no case will this delegation exceed the maximum monetary approval authority set forth in other chapters of this publication for regular CPOs. All claims will be processed under the claims expenditure allowance and claims command and office code of the authority who established the office or under a code assigned by USARCS. The existence of any special CPO must be reported to the Commander, USARCS, and the chief of a command claims service, as appropriate.
(b) Maneuver damage and claims office jurisdiction. A special CPO is the proper organization to process and approve maneuver damage claims, except when a foreign government is responsible for adjudication pursuant to an international agreement (see chap 7). Personnel from the maneuvering command should be used to investigate claims and, at the ACO's discretion, may be assigned to the special CPO. **The maneuvering command is responsible for budgeting for the payment of maneuver damage claims from the unit's O&M funds. Commanders should carefully plan and execute maneuvers in an effort to balance the advantages of the maneuver with estimated maneuver damage claims. Commanders should coordinate with the ACO or special CPO in developing an estimate of maneuver damage claims.** The ACO will process claims filed after the maneuver terminates. The special CPO will investigate claims arising while units are traveling to or from the maneuver within the jurisdiction of other ACOs, and forward such claims for action to the ACO in whose area the claims arose. **The ACO will notify the resource manager of all approved claims to ensure unit funds are available for the payment of maneuver damage claims. Claims for maneuver damage not arising on private land that the Army has used under a permit will be paid from O&M funds specifically budgeted by the maneuver for the payment of maneuver damage claims.** Claims for damage to real or personal property arising on private land that the Army has used under a permit may be paid from funds specifically budgeted by the maneuver for such purposes in accordance with AR 405–15.

Section X
Payment Procedures

2–63. Sources of funds
a. To determine whether to pay a claim from Army or USACE funds or the Judgment Fund, a separate amount must be stated on each claimant's settlement agreement. A joint amount is not acceptable. A claim for injury to a spouse or a child is a separate claim from one for loss of consortium or services by a spouse or parent. The monetary limits of $2,500 set forth in chapter 4 and $100,000 set forth in chapters 3, 6, and 10, apply to each separate claim
b. A chapter 4, 5, or 7, section II, claim for $2,500 or less is paid from Army funds or, if arising from civil works, from USACE funds. The Department of Treasury pays any settlement exceeding $2,500 in its entirety, from the Judgment Fund.
c. The first $100,000 of a claim settled under chapters 3, 6, or 10 is paid from Army funds. Any amount over $100,000 is paid out of the Judgment Fund.
d. If not over $500,000, a claim arising under chapter 8 is paid from Army or civil works funds as appropriate. A claim exceeding $500,000 is paid entirely by a deficiency appropriation.
e. AAFES or NAFI claims are paid from nonappropriated funds, except when such claims are subject to apportionment between appropriated and nonappropriated funds. (See DA Pam 27–162, para 2–100*i*(2).)
***f.* The first $100,000 of a maneuver damage claim under chapter 3, section III of chapter 7, or chapter 10 is paid from O&M funds from the maneuvering unit. Any amount over $100,000 is paid out of the Judgment Fund.**

Section II
Monthly Claims Reporting System

13–7. General
a. A monthly status report of recovery actions and claims against the United States is prepared by the automation software in the Personnel Claims Management Program and the Tort and Special Claims Management Program. Use of the USARCS Claims Automation Program is explained in DA Pam 27–162, chapter 13, and software instructions, as well as periodic updates provided by the USARCS Information Management Office.
b. The data contained in the USARCS Claims Automation Program and the automated monthly claims office status reports provides useful

information for claims officers, heads of area claims offices, JAs and SJAs responsible for OCONUS command claims services, and the Commander, USARCS. The system provides a uniform method of assignment of claim file numbers, which permits easy identification and retrieval of individual claim files, identifies delays in claims processing, and permits worldwide management control of all claims against the Government. The automated monthly reports forwarded to USARCS from the databases are used to prepare claims budgetary status reports and periodic budget estimates to the Defense Finance Accounting Service (DFAS) and the Office of the Assistant Secretary of the Army (Financial Management and Comptroller). Claims office personnel will ensure that automated claims records are complete and accurate. **Maneuver damage claims paid from the O&M funds of the maneuvering unit will be tracked and reported using the USARCS Claims Automation Program. These reports will be used to assist MACOMS in preparing maneuver budget estimates.**

c. This section does not apply to the reporting of reimbursement obligations to foreign countries pursuant to the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA) or other similar treaties or agreements.

d. The Commander, USARCS, will furnish software and documentation relating to the Personnel Claims Management Program, the Affirmative Claims Management Program, the Affirmative Potentials Program, and the Tort and Special Claims Management Program, with updated versions as required. These are the only programs authorized for recording and reporting claims in the Army Claims System. Local modification of these programs is not authorized.

13–8. Reporting requirements

In accordance with paragraph 13–7, each CONUS area claims office and OCONUS claims processing office with approval authority must submit a monthly claims data upload to USARCS. OCONUS area claims offices and foreign claims commissions with a supervising command claims service will submit monthly claims data uploads through their respective command claims service to USARCS.

a. The monthly data upload for each claims office (except USACE claims offices) consists of electronically transmitted automation data for tort claims and/or personnel claims. **The report will also track maneuver damage claims adjudicated by claims offices and paid with the maneuvering units O&M funds.** A copy of the two-page SJA report from the tort claims program is submitted directly to the Tort Claims Division, USARCS. For USACE claims offices that do not

process personnel or affirmative claims, the monthly data upload will consist only of tort claims data.

b. The tort claims monthly data upload will be prepared by each claims office by the close of business of the last business day of the month. The personnel claims monthly data upload will be prepared by each claims office on the first working day of the month. The data upload will be forwarded to USARCS (or to the appropriate OCONUS command claims service in accordance with local directives) on the first working day of the month.

c. Claims offices are not required to send a monthly data upload for any of the two claims management programs if there are no data changes from the previous monthly data upload for that program. However, claims offices must send a written negative report so that USARCS can account for each claims office on a monthly basis. A short letter, memorandum, or electronic message will suffice.

Section III
Management of Claims Expenditure Allowance

13–10. Reserved
This section is reserved for future use.

13–11. General
Each claims settlement or approval authority who has been furnished a Claims Expenditure Allowance (CEA) by the USARCS budget office is responsible for managing that CEA. Sound fiscal management includes knowing at all times how much of the CEA has been obligated, its remaining balance, and assessing each month whether the balance will cover claims obligation needs in the local office for the remainder of the current fiscal year. **Claims offices responsible for adjudicating maneuver damage claims should assist the maneuvering unit in estimating and tracking the expenditure of the unit's O&M funds for maneuver damage claims. The claims office should assist the maneuvering unit in applying the same sound fiscal management that is required for a CEA.**

Appendix B

Proposed Changes to DA Pam 27-162, Claims Procedures

Section X
Payment Procedures

2–100. Fund sources
a. Military Claims Act.
***1. Maneuver damage claims*. Amounts less than $100,000 are paid from the O&M funds of the maneuvering unit responsible for causing the maneuver damage. Amounts over $100,000 are paid by the Department of the Treasury Financial Management Service from the Judgment Fund (see figure 2-64, extract from 31 USC 1304). This monetary limit applies to each claim, not to each incident within the maneuver.**
***2. All other claims*.** Amounts less than $100,000 are paid from Army Claims funds and amounts over $100,000 are paid by the Department of the Treasury Financial Management Service from the Judgment Fund (see figure 2-64, extract from 31 USC 1304). This monetary limit applies to each claim, not to each claims incident. For example, one incident may give rise to a claim for personal injury and a claim by the injured party's spouse for loss of consortium. These are considered two separate claims even though they arise from one incident. The limit applies also to claims filed jointly. Thus, settlement of a joint claim must specify the settlement amount for each claimant.
b. Federal Tort Claims Act. FTCA settlements of $2,500 or less are paid from Army funds on all claims except civil works claims, which are paid from civil works funds at the USACE District level. FMS pays all settlements above $2,500 on all FTCA claims, including civil works claims, from the Judgment Fund. This monetary limit applies to each claim, not each claims incident. For example, a subrogee's claim for $3,000, which includes the subrogor's paid and fully subrogated $500 deductible, constitutes one claim and is payable by the FMS. If the insurer is merely acting as its insured's collection agent, however, and has not paid the deductible, both claims are payable from Army funds.
c. Non-Scope Claims Act. Claims brought pursuant to this statute are payable from Army funds, even though the aggregate payment for all claims resulting from one incident exceeds $2,500.
d. NATO Status of Forces Agreement. NATO Status of Forces Agreement (SOFA) claims arising in the United States are paid in the

same manner as FTCA or MCA claims, 10 USC 2734b. After paying these claims, USARCS seeks reimbursement from the sending State for its 75 percent share in accordance with the treaty's terms. **Reimbursements for maneuver damage claims arising overseas are paid from the O&M funds of the maneuvering unit, up to the first $100,000, as under the MCA.**

e. Army Maritime Claims Settlement Act.

(1) Claims against the United States brought pursuant to this statute are paid from Army funds except where the claim arises out of civil works activities, in which case the claim is paid from civil works funds for amounts not to exceed $500,000. The Secretary of the Army certifies settlements greater than $500,000 in their entirety to Congress for payment.

(2) An AMCSA claim in favor of the United States is paid into the U.S. Treasury upon settlement but a claim arising from a civil works activity is paid into USACE operating funds at the USACE district level.

f. Foreign Claims Act. FCA claims payments are funded from the same source as are MCA claims. The methods for issuing these payments differ, however, as discussed in subparagraph *o* below. **FCA claims for maneuver damages are funded from the O&M funds of the maneuvering unit, up to the first $100,000, as under the MCA.**

g. Claims under Foreign Claims Act. The check will be drawn on the currency of the country in which payment is to be made in accordance with AR 27-20, paragraph 10-9, at the Foreign Currency Fluctuation Account exchange rate in effect on the date of approval action. If a payee requests payment in U.S. currency, or the currency of a country other than that of the payee's country of residence, obtain permission from the Commander, USARCS. Where payment must be approved at USARCS or a higher authority, USARCS will complete and sign the voucher and forward it to the original commission for local payment.

2–101. Payment documents

a. General. For tort claims paid from Army funds, submit the following documents to the appropriate DFAS:

(1) For all claims, a DA Form 7500 signed by a properly designated settlement or approval authority certifying payment. Figure 2-53 provides a suggested format for such a payment report. The DA Form 7500 serves as a settlement agreement and will be signed by the claimant unless a separate agreement is needed. A separate DA Form 7500 will be completed for each claimant, except in a structured settlement where the payee is the broker on behalf of all claimants. The proper accounting classification must be entered on the DA Form 7500 except for claims

paid by NAF, AAFES, or USACE. **Overseas maneuver damage claims will be coordinated with the resource manager of the responsible maneuvering unit, to obtain the proper accounting classification.**

(2) Two copies of a settlement agreement when a separate settlement agreement is used in lieu of DA Form 7500. If a separate agreement is used, the claimant's attorney's signature may appear as acknowledgment of the settlement; the claimant's attorney may not sign as a party to the settlement.

(3) Two copies of the claim, usually a SF Form 95 (figures 2-6a and b), and proof of authority to sign (guardianship decree, attorney's representation agreement, documents authorizing a corporate officer or a representative of the estate to sign, as appropriate).

(4) Two copies of an action (figure 2-51) or a Small Claims Certificate (DA Form 1668), as appropriate.

(5) When the claim will be paid electronically to the DFAS via STANFINS, transmit the information listed in subparagraph (*b*) below. Then mail DA Form 7500 to DFAS and retain the documents listed above in the claim file. It is suggested that claims officers meet with their DFAS point of contact and review the payment report to ensure acceptance by DFAS.

b. Tort Claim Payment Report (figure 2-53).

(1) Block 1. Enter identification number of your servicing DFAS office.

(2) Block 2. Date document forwarded to DFAS for payment.

(3) Block 3. Name of claims office approving payment.

(4) Block 4. Number assigned by USARCS to a claims office with payment authority.

(5) Block 5. Mailing address of claims office approving payment of claim.

(6) Block 6. Self-explanatory.

(7) Block 7. Self-explanatory.

(8) Block 8. Total amount claimed by claimant.

(9) Block 9. Insert appropriate accounting citation.

(a) Accounting citation. Charging an approved claim against a particular accounting citation creates an obligation against the claims appropriation for the current fiscal year. Accordingly, the payment report will bear the correct account code for both the appropriation charged and the current fiscal year, regardless of the date the claim accrued or was filed. Confusion sometimes arises at the end of a fiscal year. For example, an approved claim is certified for payment on 28 September, but it is obvious that the payment will not actually be processed until the next fiscal year, beginning 1 October. At the time the check is issued, the

accounting code will not be advanced to the next fiscal year. Only the accounting code for the fiscal year in which the funds were obligated and the claim was certified for payment (the payment report was signed) should be charged. **For overseas maneuver damage claims, coordinate with the resource manager of the responsible maneuvering unit, to obtain the proper accounting citation, as funds come from the O&M funds of the responsible unit.**

(b) Accounting codes. Each fiscal year, the AR 37-100 series publishes separate payment and refund codes for claims payments made pursuant to each chapter of AR 27-20. All elements of the accounting code for each type of claim, except the third digit, remain constant (unless otherwise notified by fiscal authorities)— the third digit represents the second digit of the fiscal year. For example, in the payment of an FY 03 FTCA claim, the FTCA payment code would appear as 2132020 22-0203 P436099.21-4200 FAJA S99999.

(10) Block 10. Name of claimant receiving payment.

(11) Block 11. Address of recipient of claims settlement check.

(12) Block 12. Enter Social Security number of payee or tax identification number if payee is a structured
settlement, broker, or business other than an individual claimant.

(13) Block 13. Amount approved for payment to claimant.

(14) Block 14. Enter either "PA"(advance payment) or "PF"(final payment.)

(15) Block 15. The routing number of the bank to which the electronic payment will be made.

(16) Block 16. The name of the person or business holding the account, and the account number.

(17) Block 17. Self-explanatory.

(18) Block 18. Self-explanatory.

(19) Blocks 19 & 20: To be dated and signed in original by claimant. Where another settlement acceptance
agreement has been executed, enter "See attached agreement".

(20) Blocks 21-23: To be completed by the CJA or claims attorney authorized to approve payment of settlement award.

(21) Block 24. Date that payment has been entered in the tort claims data base.

Editor's Note: On 18 July 2007, the Army launched a chain-teaching program to help Soldiers and their Families identify symptoms and seek treatment for those suffering from Post Traumatic Stress Disorder (PTSD) and mild Traumatic Brain Injury (mTBI). This program recognizes the significant and genuine impact of these conditions on Soldiers, Families, and military units. It also reflects the Army's ongoing effort to identify and treat those who are experiencing PTSD and mTBI. The following article highlights an area of special concern for Judge Advocates: dealing with survivors of PTSD in the military justice system.

POST-TRAUMATIC STRESS DISORDER ON TRIAL

MAJOR TIMOTHY P. HAYES, JR.*

It has come to my attention that a very small number of [S]oldiers are going to the hospital on the pretext that they are nervously incapable of combat. Such men are cowards and bring discredit on the army and disgrace to their comrades, whom they heartlessly leave to endure the dangers of battle while they, themselves, use the hospital as a means of escape. You will take measures to see that such cases are not sent to the hospital but are dealt with in their units. Those who are not willing to fight will be tried by Court-Martial for cowardice in the face of the enemy.[1]

Every summer when it rains
I smell the jungle, I hear the planes
Can't tell no one, I feel ashamed,

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* Judge Advocate, United States Army. Presently assigned as Senior Defense Counsel, Fort Hood, Texas. J.D., 2000, University of Maryland School of Law, Baltimore, Maryland; B.A., 1994, East Stroudsburg University, East Stroudsburg, Pennsylvania. Previous assignments include: Officer-in-Charge, Giessen Law Center, 1st Armored Division, Giessen, Germany, 2003, 2004-2005; Chief, Operational Law, 1st Armored Division, Baghdad, Iraq, 2003-2004; Trial Counsel, 17th Field Artillery Brigade and U.S. Army Field Artillery Training Center, Fort Sill, Oklahoma, 2001-2002; Administrative Law Attorney, Fort Sill, Oklahoma, 2001; Company Executive Officer, 204th Military Intelligence Battalion, Fort Kobbe, Panama, 1996-1997; Platoon Leader, 204th Military Intelligence Battalion, Fort Kobbe, Panama, 1995-1996. Member of the bars of Maryland (2000) and the Supreme Court of the United States (2006). This article was submitted in partial completion of the Master of Laws requirements of the 54th Judge Advocate Officer Graduate Course.

[1] Memorandum, General George S. Patton, to Seventh Army, (Aug. 5, 1943), *quoted in* Charles M. Province, *The Unknown Patton*, http://www.pattonhq.com/unknown/chap08.html (last visited Aug. 13, 2007).

Afraid someday I'll go insane . . .
Cause I'm still in Saigon . . . in my mind.[2]

I. Introduction

The above quotes from strikingly divergent sources indicate the widely differing viewpoints that are likely to be encountered when discussing the occurrence of post-traumatic stress disorder (PTSD), or as it is most commonly referred to, PTSD. An occurrence is perhaps the best way to describe PTSD at this juncture, because it is innocuous. To call it a disorder or disease, although technically correct,[3] would not satisfy those that would seek to label PTSD as an attractive excuse for criminal defendants or disgruntled Soldiers, and there are certainly individuals that continue to espouse those views.[4] As long as those people continue to be members of the jury pool, or court-martial panel population, that viewpoint must be taken into account by attorneys preparing to prosecute or defend a case where PTSD is at issue. As combat activities continue in theaters like Iraq and Afghanistan, it becomes increasingly likely that trial practitioners will have to become well-versed in understanding the complexities of PTSD as both a disorder and a defense. Therefore, the purpose of this article is to examine the current state of medical and legal understanding regarding combat-related PTSD,[5] especially when presented in courts-martial.

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[2] Samuel P. Menefee, *The "Vietnam Syndrome" Defense: A "G.I. Bill of Criminal Rights"?*, ARMY LAW., Feb. 1985, at 1 (quoting THE CHARLIE DANIELS BAND, *Still in Saigon, on* WINDOWS (Epic Records 1982)).

[3] *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424 (4th ed. 1994) [hereinafter DSM-IV].

[4] *See, e.g.*, National Defence and Canadian Forces [CF] Ombudsman, Systemic Treatment of CF Members with PTSD Complainant: Christian McEachern, http://www.ombudsman.forces.gc.ca/rep-rap/sr-rs/pts-ssp/rep-rap-02-eng.asp (last visited August 24, 2007), where reactions to PTSD are described under the heading "Resentment towards members with PTSD." For a more reasoned and thorough discussion, *see* CHRIS R. BREWIN, POSTTRAUMATIC STRESS DISORDER: MALADY OR MYTH? (2003). *See also* GERALD ROSEN, POSTTRAUMATIC STRESS DISORDER: ISSUES AND CONTROVERSIES (2004).

[5] Although the focus of this article is combat-related PTSD, there are, of course, several other stimuli that will trigger onset of the disorder, such as domestic violence, rape, or other violent crimes, and near death experiences in accidents or natural disasters. *See, e.g.*, Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9 (2001).

After examining PTSD, first historically and then medically, this article will address the prevalence of PTSD within various populations. The focus of the article will then shift to its main emphasis, an analysis of PTSD within the military courtroom. This analysis will include the impact of PTSD on the accused's competency to stand trial,[6] as well as its impact on the merits of the case as a defense for lack of mental responsibility[7] or a claim of partial mental responsibility.[8] The effects of these findings will also be discussed. Finally, the article will focus on the other areas of trial where PTSD can become a factor, such as when questioning a witness suffering from PTSD[9] or when presenting PTSD as extenuation evidence during pre-sentencing.[10] The final result is a resource for judge advocates to consult when preparing for a trial that in any way involves PTSD.

II. Post-Traumatic Stress Disorder

Post-traumatic stress disorder has been documented, in some form, for as long as man has recorded his reactions to combat. As far back as ancient Hebrew civilization, Soldiers have recognized and coped with the negative mental repercussions of combat.[11] Hundreds of years later, in the Greek historian Xenophon's obituary describing the life of Clearchus, one commentator suggests that we are presented with "the first known historical case of PTSD in the [W]estern literary tradition."[12] The great Greek historian Herodotus, writing of the Battle of Marathon in 490 B.C., told of a Soldier that went permanently blind upon witnessing the death of his comrade in battle, although the blinded Soldier himself had

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[6] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 909 (2005) [hereinafter MCM].
[7] *Id.* R.C.M. 916(k)(1).
[8] *Id.* R.C.M. 916(k)(2).
[9] *Id.* MIL. R. EVID. 104.
[10] *Id.* R.C.M. 1001(c).
[11] *See, e.g.*, *Psalms* 22:14 (King James) (where King David, a renowned warrior who lived in the 11th century B.C.E., describes his emotions in the face of his enemies as being "poured out like water" with all his "bones out of joint," with a "heart . . . like wax . . . melted in the midst of [his] bowels"). *See also Psalms* 55:3-5 (King James) (where David relates that "[b]ecause of the voice of the enemy . . . [m]y heart is sore pained within me: and the *terrors of death* are fallen upon me. Fearfulness and trembling are come upon me, and horror hath overwhelmed me" (emphasis added)).
[12] LAWRENCE A. TRITLE, FROM MELOS TO MY LAI: WAR AND SURVIVAL 56 (2000). Tritle's conclusion is suspect, in that he characterizes Xenophon's obituary as describing Clearchus as a victim of combat, when Xenophon's text actually seems to portray a heroic man fond of battle, rather than traumatized by it.

not been physically wounded.[13] The English King Alfred became so ill due to the horrors of a battle in 1003 A.D. that he vomited and was unable to lead his men.[14]

The first formal diagnosis occurred in 1678, when the Swiss coined the term "nostalgia" for a group of symptoms suffered by Soldiers that would arguably fall within the range of clinical PTSD, such as melancholy, insomnia, loss of appetite, and anxiety.[15] During the American Civil War, an Army surgeon named Dr. Jacob Mendes Decosta diagnosed many cases of tension, insomnia, and fear of returning to the front which could be manifested by paralysis, self-inflicted wounds, and increased cardiac palpitations. In 1871, Dr. Decosta labeled the condition "irritable heart" or "soldier's heart" in an article in the American Journal of Medical Sciences.[16] It was reported that veterans that had returned home would collapse due to emotional strain, even if they had shown no signs of mental illness on the battlefield.[17] Public outcry and the urging of surgeons led the United States to establish the first military hospital for the insane in 1863.[18] In the Russo-Japanese War of the early twentieth century, the Russian Army determined for the first time that mental collapse directly resulted from the stressors of combat, and that such collapses were "legitimate medical conditions"; their efforts to diagnose and especially to treat these conditions can fairly be regarded as the "birth of military psychiatry."[19]

During World War I, many attributed Soldiers' psychological injuries to higher calibers of weaponry. It was suggested that large artillery shells were causing concussions, or "shell shock" as it was then described.[20] Towards the end of the war, the medical establishment began to realize that these mental injuries had an emotional, rather than

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[13] Steve Bentley, *A Short History of PTSD: From Thermopylae to Hue, Soldiers Have Always Had a Disturbing Reaction to War*, THE VVA VETERAN, 1991, at 11-16.
[14] *Id.*
[15] *Id.*
[16] Jo Knox & David H. Price, *Healing America's Warriors, Vet Centers and the Social Contract*, http://www.vietnam.ttu.edu/vietnamcenter/events/1996_Symposium/96papers/healing.htm (citing A. Perkal, *War Related Posttraumatic Stress Disorder: A Historical Perspective*, CLINICAL NEWSLETTER (National Center for Posttraumatic Stress Disorder), 1992, at 2, (2) 19) (last visited Aug. 13, 2007).
[17] Bentley, *supra* note 13.
[18] *Id.*
[19] *Id.*
[20] *Id.*

physical, root.[21] In actuality, more American Soldiers were out of action due to psychiatric illness than died in combat.[22] The psychiatric community concluded that these injuries occurred only in "weak-minded" individuals and set out to solve the problem by screening such people out of the military before induction, to the extent they could be identified.[23]

World War II (WWII) produced psychiatric casualties in even more alarming numbers than had been experienced in World War I. One commentator asserts that, out of approximately 800,000 Soldiers that participated in direct combat, over thirty-seven percent had to be discharged for "psychiatric" reasons.[24] Regardless of the accuracy of those numbers, clearly it was not just the mentally "weak" that were susceptible to breakdowns. Regrettably, this recognition did not lead to the conclusion that such disorders were in fact mental diseases. On the contrary, the introduction and widespread use of such terms as "battle fatigue" and "mental exhaustion" reinforced the belief that a little rest would be all that was required to return the Soldier to the front.[25]

Psychiatric casualty rates remained high in the Korean and Vietnam Wars,[26] and the rates from Vietnam were possibly exacerbated by the moral questions that many American Soldiers had about the war itself.[27] No significant advances in the study or classification of the underlying causes and effects of these psychiatric injuries took place until after the Vietnam War ended. These advances followed widespread recognition of the mental trauma of Vietnam veterans, partly evidenced by the opening of over ninety counseling centers for veterans across the country by 1979.[28] Curiously, unlike in previous wars, the occurrence and frequency of reported psychiatric trauma increased as the war came to an

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[21] *Id.*

[22] *See id.* The author notes that while there were over 116,000 American deaths in Europe, there were 159,000 Soldiers out of action for psychiatric problems.

[23] *Id.* Mr. Bentley alleges that five *million* individuals were rejected for service as a result of this psychiatric screening.

[24] *Id.*

[25] *Id.*

[26] *Id.* Statistics from these wars will be examined in Section II.B of this article, *The Prevalence of Post-Traumatic Stress-Disorder in the Military*, as many of these veterans remain in the population today. *See infra* notes 50 to 72 and accompanying text.

[27] *Id.* It is conceivable that this exacerbation is due to the Soldiers' inner conflicts about the justification of the war, or the unpopularity of the war could have encouraged Soldiers to come forward about their trauma, or both.

[28] Menefee, *supra* note 2, at 3.

end.[29] Additionally, during the same period, there were a number of catastrophic events such as acts of terrorism, natural disasters, and plane crashes. Mental health professionals working with victims of these disasters noted almost identical symptoms among this population as those complained of by Vietnam veterans.[30] The medical community began to consider "battle fatigue" and other stress reactions as a certifiable, clinical diagnosis. After extensive research by veterans groups and recommendations by mental health workers, the 1980 update to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-III)[31] included a new category of illness: post-traumatic stress disorder.[32] The most recent update in 1994, DSM-IV, continues to list post-traumatic stress disorder as a mental disorder.[33] A text revision occurred in 2000 which did not affect the PTSD criteria.[34]

A. Post-Traumatic Stress Disorder from a Medical Perspective

> Post-Traumatic Stress Disorder (PTSD) is a debilitating condition that follows a terrifying event. Often, people with PTSD have persistent frightening thoughts and memories of their ordeal and feel emotionally numb, especially with people they were once close to. PTSD, once referred to as shell shock, was first brought to public attention by war veterans, but it can result from any number of traumatic incidents. These include kidnapping, serious accidents such as car or train wrecks, natural disasters such as floods or earthquakes, violent attacks such as mugging, rape, or torture, or being held captive. The event that triggers it may be

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[29] Jim Goodwin, *The Etiology of Combat-Related Post-Traumatic Stress Disorder*, *in* POST-TRAUMATIC STRESS DISORDERS: A HANDBOOK FOR CLINICIANS 1-18 (1987), *available at* http://home.earthlink.net/~dougyelmen/readjust.html (last visited Aug. 13, 2007).

[30] *Id.*

[31] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 236 (3d ed. 1980) [hereinafter DSM-III].

[32] Goodwin, *supra* note 29.

[33] DSM-IV, *supra* note 3, at 424.

[34] *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 468 (4th ed. 2000 Text Revision) [hereinafter DSM-IV-TR].

> something that threatened the person's life or the life of someone close to him or her.[35]

That, in laymen's terms, is an accurate description of PTSD. The DSM-IV criteria, which are provided in their entirety at Appendix A, are summarized below:

(1) A traumatic event that involved death or serious injury to self or others and included a response of intense fear, helplessness, or horror;
(2) The traumatic event distressingly recurs in recollections (such as images and thoughts), dreams, actions (including hallucinations and dissociative flashbacks), or intense responses or physiological reactions to certain cues;
(3) Persistent avoidance of trauma-associated stimuli and numbing of responsiveness as evidenced by at least three listed indicators (such as detachment and diminished interest);
(4) Persistent symptoms of increased arousal (such as insomnia, angry outbursts, and hypervigilance);
(5) The existence of these indicators for more than one month; and,
(6) The disturbance causes significant distress or impairment.

The diagnosis may be acute or chronic, depending on whether the symptoms endure for less or more than three months, respectively, and may be labeled "with delayed onset" if the symptoms do not appear until at least six months after the traumatic event.[36] There are numerous associated features such as depressed mood, somatic or sexual dysfunction, guilt or obsession, and addiction.[37] Diagnosis can be difficult because several disorders, such as major depressive disorder, obsessive-compulsive disorder, and schizophrenia, have similar or identical symptoms.[38] Additionally, PTSD is more common in people with a history of those disorders.[39]

Although the precise cause is unknown, several factors may contribute to a person acquiring PTSD, such as psychological, genetic,

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[35] Posttraumatic Stress Disorder, http://www.psychnet-uk.com/dsm_iv/posttraumatic_stress_disorder.htm [hereinafter Posttraumatic Stress Disorder] (last visited Aug. 13, 2007).
[36] DSM-IV-TR, *supra* note 34, at 468.
[37] *Id*. at 465.
[38] *Id.* at 467.
[39] *Id.* at 465.

physical, and social factors.[40] Individuals with a strong support network may be less likely to develop PTSD than those with poor support systems.[41] According to the National Center for PTSD, a division of the Department of Veterans Affairs, treatment of reported PTSD is often accomplished via individual or group therapy, medication, or both.[42] Therapy can include psychotherapy, exposure therapy, other less common treatments, or some combination of those methods.[43] Beneficial medications include antidepressants, mild tranquilizers, and antipsychotics.[44]

Some panel members may continue to doubt the authenticity of PTSD in a particular case, or as a mental disorder in general, despite its universal acceptance by the medical community as presented by expert testimony. In such cases, magnetic resonance images (MRIs) could possibly be used to illustrate the difference between a veteran suffering from PTSD and one who is not afflicted with the disorder. Such a comparison is provided at Appendix B.[45] Similar MRIs presented in a court-martial as verifiable scientific evidence of a mental disorder (or perhaps of a lack thereof) could be highly persuasive to a panel for either the defense or the prosecution. However, despite the existence of at least five published studies linking PTSD to reduced hippocampal size within the brain,[46] the reduction in size is relatively small—five to twenty percent[47]—and many PTSD patients have no or very minimal reduction in hippocampal size.[48] Therefore, MRIs are not used to diagnose or

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[40] *Id.* at 466.
[41] *Id*.
[42] *Treatment of PTSD - (National Center for PTSD)*, http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_treatmentforptsd.html (last visited Aug. 13, 2007).
[43] *Id.*
[44] *See* Posttraumatic Stress Disorder, *supra* note 35.
[45] Images found at Appendix B were reproduced from http://www.news-leader.com/apps/pbcs.dll/article?AID=/20050927/LIFE04/509270313 (last visited Nov. 1, 2005); *see also, e.g.*, Tamara v. Gurvits et al., *Magnetic Resonance Imaging Study of Hippocampal Volume in Chronic, Combat-Related Posttraumatic Stress Disorder*, 40 BIOL. PSYCHIATRY 1091 (1996).
[46] PTSD, http://www.lawandpsychiatry.com/html/ptsd.html (citing N. Schuff et al.,. *Reduced Hippocampal Volume and n-acetylaspartate in Post Traumatic Stress Disorder*, 821 ANNALS N. Y. ACAD. SCI. SUPP. PSYCHOBIOLOGY OF POSTTRAUMATIC STRESS DISORDER 516 (1997)) [hereinafter PTSD] (last visited Aug, 13, 2007). *See also* J. Douglas Bremner, *Neuroimaging Studies in PTSD*, NC-PTSD CLINICAL Q. (National Center for PTSD, White River Junction, Vt.), Fall 1997, at 70-71, 73, *available at* http://www.ncptsd.va.gov/ncmain/nc_archives/clnc_qtly/V7N4.pdf?opm=1&rr=rr249&srt=d&echorr=true.
[47] *See* PTSD, *supra* note 46.
[48] *Id.*

determine the severity of PTSD, but could be used to illustrate and verify the occurrence of PTSD within a particular individual. The ramifications of the resulting images should be carefully considered when contemplating an MRI request.[49]

B. The Prevalence of Post-Traumatic Stress Disorder in the Military

It is worth noting that the overall prevalence of PTSD in the general population is estimated to be anywhere from one to fourteen percent.[50] This statistic, although imprecise, helps put military PTSD statistics in context. One researcher has concluded that roughly one-third of combat veterans become affected by PTSD, and probably a higher proportion of prisoners of war.[51] The earliest statistical analysis of PTSD prevalence among war veterans involves Soldiers from WWII and Korea who are generally the oldest veterans still alive today. One study found the current prevalence of PTSD in veterans of those two wars, who had not previously sought psychiatric treatment, to be nine and seven percent, respectively; among those that *had* sought psychiatric treatment previously, thirty-seven percent of the WWII veterans and eighty percent of the Korean War veterans were currently suffering from PTSD.[52] Another study found that fifty-four percent of a group of psychiatric patients who had seen combat in WWII met the PTSD criteria, whether or not they had sought treatment for PTSD, and twenty-seven percent were continuing to suffer from PTSD at the time of the study.[53]

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[49] For example, the accused is not likely to have a pre-PTSD MRI of his brain, so his PTSD MRI would have to be compared to a non-PTSD individual's MRI, or simply explained by an expert, or both. However, the previous statistics have shown the likelihood that the accused's MRI will not reveal any significant reduction in hippocampal size. Such an MRI, if introduced into evidence, may persuade some panel members not to accept other PTSD evidence presented through expert or lay testimony.

[50] Garcia-Rill & Beecher-Monas, *supra* note 5, at 17 (citing Naomi Breslau & Glen Davis, *Posttraumatic Stress Disorder in an Urban Population of Young Adults: Risk Factors for Chronicity*, 149 ARCHIVES GEN. PSYCH. 671 (1992)). *See also* Ronald C. Kessler, *Posttraumatic Stress Disorder: The Burden to the Individual and to Society*, 61 J. CLIN. PSYCHIATRY 4, 6 (2000) (citing a lifetime prevalence of only one to two percent).

[51] Garcia-Rill & Beecher-Monas, *supra* note 5, at 17 (citing R.A. KULKA ET AL., TRAUMA AND THE VIETNAM WAR GENERATION 53 (1990)).

[52] Matthew J. Friedman et al., *Post-Traumatic Stress Disorder in the Military Veteran*, 17-2 PSYCH. CLIN. OF N. AM. 265, 267 (1994) (citing D. Blake et al., *Prevalence of PTSD Symptoms in Combat Veterans Seeking Medical Treatment*, J. TRAUM. STRESS 315 (1990)).

[53] Friedman et al., *supra* note 52, at 267 (citing J. Rosen et al., *Concurrent Posttraumatic Stress Disorder in Psychogeriatric Patients*, 2 J. GERIATRIC PSYCH. NEUROL. 65 (1989)).

Of the over one and one-half million American troops that served in the Korean War, almost 200,000 saw combat. Of those that saw combat, almost one-quarter were psychiatric casualties.[54] In Vietnam, although almost three million American troops served, it has been difficult to estimate the number of troops that actually saw combat given the nature of the fighting.[55] However, the Vietnam conflict was the first to fuel widespread statistical tracking of PTSD affliction among its veterans. One study concluded that approximately 480,000 troops became afflicted with PTSD as a result of their Vietnam experience, and another 350,000 acquired partial PTSD.[56] Of those 830,000 veterans with some form of PTSD, only about 55,000 had filed a claim, and only half of those have been certified by adjudication boards.[57] Estimates vary significantly, with some authorities contending that the prevalence of PTSD in Vietnam veterans is as high as seventy percent.[58]

Perhaps the most reliable study of Vietnam veterans estimated current prevalence of PTSD, at the time of the study, to be over fifteen percent in males and over eight percent in females.[59] Within that group, current PTSD was much higher in veterans with "high war-zone exposure": over thirty-five percent of men and over seventeen percent of women.[60] The prevalence of PTSD over the course of a lifetime for Vietnam veterans was estimated at over twenty-five percent for both men and women.[61] The same study notes that Vietnam veterans were less likely to be married but more likely, if married, to be divorced or have marital problems.[62] Of more significance to this article, one-quarter of the male Vietnam veterans afflicted with PTSD had engaged in *thirteen* or more violent acts in the previous year, and half had been arrested or

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[54] Bentley, *supra* note 13. The author notes that the chances of being a psychiatric casualty in Korea was 143 percent greater than the chances of being killed in combat.
[55] *Id.*
[56] *Id.* (citing R. A. KULKA, TRAUMA & THE VIETNAM WAR GENERATION: REPORT OF FINDINGS FROM THE NATIONAL VIETNAM VETERANS READJUSTMENT STUDY (1990)). "Partial" PTSD is undefined.
[57] *Id.* (data on claims and adjudications through July 1990).
[58] Michael J. Davidson, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415 (1988) (citing John Wilson & Sheldon Zigelbaum, *The Vietnam Veteran on Trial: The Relation of Post-Traumatic Stress Disorder to Criminal Behavior*, 1 BEHAV. SCI. & L. 70 (1983)).
[59] Friedman et al., *supra* note 52, at 266 (citing KULKA, *supra* note 56).
[60] *Id.*
[61] *Id.*
[62] *Id.* at 268.

incarcerated multiple times as an adult.[63] Even after the first Gulf War—a popular, brief, and successful endeavor—PTSD rates were almost ten percent among male veterans and almost twenty percent among female veterans.[64]

Of most interest to current military trial practitioners are the emerging statistics from the conflicts in Iraq and Afghanistan. The only comprehensive study to date has estimated the risk for depression, anxiety, or PTSD among Iraq veterans to be eighteen percent, and the risk among Afghanistan veterans to be eleven percent.[65] A study conducted before these conflicts commenced found that at least six percent of all U.S. active duty service members receive treatment for some form of mental disorder every year.[66]

Clearly, not every combat veteran will suffer from clinically diagnosed PTSD during their lifetime. There are many risk factors to weigh. These include pre-military factors such as education, economic deprivation, and history of abuse, prior psychiatric disorders, or behavioral problems; wartime factors such as high exposure to combat or being wounded or injured in combat; and post-military factors such as social support, coping skills, and physical disabilities resulting from combat, reminding the veteran of his or her traumatic experience.[67] Social support includes the various benefits a veteran with PTSD might receive from agencies like the Department of Veterans Affairs (VA). The VA recently announced that over 215,000 veterans received PTSD benefit payments in 2004 at a cost of $4.3 billion, a jump of over 150 percent in five years.[68] These increases do not even factor in Iraq and

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[63] *Id.* These astounding figures were culled from the National Vietnam Veterans' Readjustment Study which was ordered by Congress in 1983, *supra* note 56. *See also* http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_nvvrs.html?opm=1&rr=rr45&srt=d&echorr=true (last visited Aug. 14, 2007).

[64] *Id.* at 267 (citing unpublished data from 1993).

[65] Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. MED. 13 (2004).

[66] *Id.*

[67] Friedman et al., *supra* note 52, at 268-270. One study conducted by the Center for the Study of Traumatic Stress, an arm of the Uniformed Services University of Health Sciences, has found that a severely wounded veteran is not more likely to suffer from PTSD than a combat veteran who was not severely wounded. *See* Deborah Funk, *Study: PTSD Not More Likely in Severely Wounded Vets*, ARMY TIMES, Feb. 20, 2006, at 28.

[68] Shankar Vedantam, *A Political Debate on Stress Disorder*, WASH. POST, Dec. 27, 2005, at A01.

Afghanistan veterans, but reflect a growing number of Vietnam veterans seeking treatment.[69]

The preceding statistics illustrate that military trial practitioners are likely to encounter PTSD in some fashion in future trials involving combat veterans. This is due primarily to the vast number of participants in recent campaigns in Iraq and Afghanistan, but also due to the intensity, and perhaps the unpredictability, of those campaigns. As one expert has noted, "[t]here is no front line in Iraq,"[70] recognizing that combat support or combat service support Soldiers on a compound or in a convoy may be as susceptible to attack as the combat arms Soldiers that are on patrol. Others are quick to note that "[b]eing in the war zone does not constitute exposure to trauma . . . [i]t is just stressful."[71] While it is true that many, if not most, veterans will experience "[r]eadjustment and reintegration issues"[72] not amounting to PTSD, those veterans are not likely to commit court-martial offenses, or their readjustment/reintegration issues will not rise to the level of a legal defense. However, given the significant percentage of veterans who will return from deployment with PTSD or PTSD-like symptoms, the likelihood of PTSD evidence in future proceedings must be acknowledged and addressed. Therefore, the focus of this article now shifts to the potential impacts of PTSD upon those proceedings, beginning with a brief review of three seminal PTSD cases.

In *United States v. Cartagena-Carrasquillo*,[73] the defendant was convicted of cocaine trafficking after his PTSD evidence was excluded by the trial judge. This exclusion was one basis of his appeal. Mr. Lugo-Lopez,[74] a Vietnam veteran, had been diagnosed with PTSD and had spent time in a mental hospital for schizophrenia, albeit over ten years before his conviction.[75] Despite these favorable facts for the defense, they were undone by the psychiatrist's report, which noted a "significant" mental disease.[76] The trial judge found this characterization

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[69] *Id.*
[70] Shankar Vedantam, *Veterans Report Mental Distress*, WASH. POST, Mar. 1, 2006, at A01 (quoting Colonel Charles W. Hoge, Walter Reed Army Institute of Research).
[71] *Id.* (quoting Harvard University psychologist Richard J. McNally).
[72] *Id.* (quoting Michael J. Kussman, Principal Deputy Undersecretary for Health, Department of Veterans Affairs).
[73] 70 F.3d 706 (1st Cir. 1995).
[74] *Id*. at 709 (Mr. Lopez was one of three co-defendants in this case).
[75] *Id*. at 712.
[76] *Id.*

did not rise to the level of severe mental disease or defect required by the statute,[77] and excluded the evidence.[78] The appeals court found no abuse of discretion and affirmed.[79]

Robert Garwood was another Vietnam veteran who claimed, before recognition of PTSD as a mental disorder, that his combat experience as a Prisoner of War (POW) reduced him to a dissociative state.[80] He was charged with aiding the enemy[81] in a much-publicized case following his return from Vietnam several years after the war had ended. He alleged that he was literally beaten into insanity.[82] However, the Government presented contradictory evidence in the form of a psychiatric evaluation.[83] Most damning, other POWs testified that he had interrogated and guarded them, and even assaulted one.[84] Garwood was convicted and did not raise the insanity issue on appeal.[85] This is perhaps the most notorious case in which an insanity defense has been arguably concocted to avoid criminal responsibility. Defense counsel may need to distinguish *Garwood* from an accused's case, especially for older panel members that may recall its facts.

Finally, in *United States v. Correa*,[86] twelve months after his conviction of several offenses by a general court-martial, Correa underwent a psychiatric evaluation that determined he suffered from PTSD as a result of his combat duty in Vietnam.[87] Correa argued on appeal that his charges should be dismissed based on this diagnosis, but his conviction was affirmed. The Court of Military Review found "no evidence that would have alerted the trial judge to a potential insanity" defense.[88] The only abnormality manifested by Correa was repeated criminal behavior, which "cannot be the sole ground for a finding of mental disorder."[89] This case stands for the general proposition that a

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[77] 18 U.S.C. § 17 (2000). *See also* Part IV.A.1, *infra* notes 129 to 173 and accompanying text, for a closer study of the "severity" requirement.
[78] *Cartagena*, 70 F.3d. at 710.
[79] *Id*. at 712.
[80] United States v. Garwood, 16 M.J. 863 (N.M.C.M.R. 1983).
[81] UCMJ art. 104 (2005).
[82] *Garwood*, 16 M.J. at 867.
[83] *Id.*
[84] *Id.*
[85] United States v. Garwood, 20 M.J. 148 (C.M.A. 1985).
[86] 21 M.J. 719 (C.M.R. 1985).
[87] *Id.* at 719-20.
[88] *Id.* at 720.
[89] *Id.* (quoting United States v. Frederick, 3 M.J. 230, 234 (C.M.A. 1977)).

case of PTSD diagnosed after trial will not disturb the findings of the trial court, where there was no evidence of PTSD presented or indicated at trial.[90] The accused must show a lack of capacity to stand trial, or a lack of mental responsibility for the crime.

III. Capacity to Stand Trial

The Rules for Courts-Martial (RCMs) mandate that Soldiers may not be tried by court-martial if they are *presently* suffering from a mental disease or defect which renders them "mentally incompetent" to the extent that they are unable to understand the proceedings, or to conduct or intelligently cooperate in their defense.[91] Mental capacity focuses on the accused's mental state at the time of *trial*, whereas mental responsibility, the subject of Part IV of this article, concerns the accused's mental state at the time of the *offense*. Simply put, a finding of lack of capacity means no trial, while a finding of lack of mental responsibility means not guilty. Clearly, the same mental disease or defect could render a person incapable of standing trial, or not responsible for a crime, or both. Regarding capacity, unless the accused establishes sufficient evidence to the contrary, they are presumed to have the requisite mental capacity to stand trial.[92]

It follows then that a defense counsel (or any party) attempting to prove lack of capacity should first be prepared to establish, by a preponderance of the evidence,[93] that the accused is mentally incompetent due to a mental disease or defect from which he is presently suffering. Following that proffer, the moving party carries the same burden to prove that the lack of competency has rendered the accused either unable to understand the court proceedings or unable to conduct or intelligently cooperate in his defense. Each of these areas, while not defined in the RCMs, has been examined to some degree by military courts.

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[90] *See infra* note 238 for a discussion of the due diligence exception to this rule; *see also* Thompson v. United States, 60 M.J. 880 (N-M. Ct. Crim. App. 2005) (appellant became mentally incompetent while on appellate leave; court ordered proceeding stayed until appellant could competently assist in his appeal).
[91] MCM, *supra* note 6, R.C.M. 909(a).
[92] *Id.* R.C.M. 909(b).
[93] *Id.* R.C.M. 909(e)(2).

In *United States v. Proctor*,[94] the Court of Military Appeals (COMA) affirmed a trial judge's holding that an accused suffering from pedophilia and a personality disorder had the necessary mental capacity to stand trial because the accused had coherent ideas and control of his mental faculties as well as sufficient memory, intelligence, and ability to express himself.[95] Therefore, even presuming the accused suffered from a personality disorder that could be considered a mental disease or defect,[96] he was still able to cooperate intelligently in his defense. Previously, the Court of Military Review had noted that RCM 909 required that the accused

> must be able to comprehend rightly his own status and condition in reference to such proceedings; that he must have such coherency of ideas, such control of his mental faculties, and such power of memory as will enable him to identify witnesses, testify in his own behalf, if he so desires, and otherwise properly and intelligently aid his counsel in making a rational defense . . . .[97]

Further, the Supreme Court has held that the language of the rule means that the accused "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him."[98]

If the accused's mental capacity becomes an issue at any point before or after referral, to include post-trial, any party, be it the convening authority, investigating officer, panel members, counsel, or the military judge, can request a mental capacity inquiry.[99] The standard for ordering this inquiry, commonly referred to as a sanity board, is fairly low.[100]

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[94] 37 M.J. 330 (C.M.A. 1993).
[95] *Id.* at 334.
[96] There is a dearth of case law examining the sufficiency of a mental disease or defect as it affects mental capacity as opposed to mental responsibility, but the *Proctor* court did approve the trial judge's expansive definition of mental disease or defect regarding capacity as analogous to their holding in *United States v. Benedict*, 27 M.J. 253, 259 (C.M.A. 1988), that psychosis was not required to assert an affirmative defense based on lack of mental responsibility. *See Proctor*, 37 M.J. at 336.
[97] United States v. Williams, 17 C.M.R. 197, 204 (C.M.A. 1954).
[98] Dusky v. United States, 362 U.S. 402, 402 (1960).
[99] MCM, *supra* note 6, R.C.M. 706(a).
[100] *See* United States v. Kish, 20 M.J. 652, 654-55 (A.C.M.R. 1985).

Any request that "is not frivolous and is made in good faith" should be granted.[101]

A. Sanity Board

The sanity board, like the request preceding it, can come at any stage of the court-martial proceedings.[102] The request should include the underlying facts and basis of the belief or observation regarding mental capacity.[103] In some cases, a mental evaluation may have already been performed, and the trial counsel may wish to argue that this evaluation constituted an adequate substitute for a sanity board.[104] However, trial practitioners should be wary about summarily concluding that any prior mental evaluation is an adequate substitute for a requested sanity board.[105]

If the convening authority or military judge orders the sanity board,[106] a board consisting of one or more persons will be convened.[107] Typically, the commander of the medical treatment facility will appoint the members to the board. The members must all be either a physician or clinical psychologist.[108] At least one member of the board should be a psychiatrist or clinical psychologist.[109] The order for the board must contain the reasons for doubting the mental capacity of the accused or

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[101] *See* United States v. Nix, 36 C.M.R. 76, 79-80 (C.M.A. 1965).
[102] MCM, *supra* note 6, R.C.M. 706(b).
[103] *Id.* R.C.M. 706(a).
[104] *See* United States v. Jancarek, 22 M.J. 600 (C.M.A. 1986) (holding that a prior mental evaluation was an adequate substitute for a sanity board where the substance of the evaluation included a forensic mental evaluation by a professional).
[105] *See* United States v. Collins, 41 M.J. 610 (Army Ct. Crim. App. 1994) (holding that a prior mental evaluation does not equate to a sanity board *per se*. The substance of the evaluation must be assessed. Here, the evaluation was not administered with a view towards court-martial, so it was not a satisfying forensic examination).
[106] The convening authority orders a sanity board before referral. After referral, the military judge will order the inquiry; however, the convening authority may order the inquiry before any hearing commences, if the judge is not reasonably available. *See* MCM, *supra* note 6, R.C.M. 706(b).
[107] *Id.* R.C.M. 706(c)(1).
[108] *Id.*
[109] *Id. See also* United States v. Best, 61 M.J. 376, 387 (2005). (There is not a per se conflict if a member of the sanity board has treated or diagnosed the accused on a prior occasion, as long as his prior contact does not materially limit his ability to "objectively participate" in the sanity board.)

other reasons for the request.[110] The board must specifically answer four questions.[111] The board must then conclude whether or not the subject is presently suffering from a mental disease or defect rendering him incapable of understanding the court-martial proceedings or unable to conduct or cooperate in his defense.[112] The board can, and often does, consist of only one member. A reasonable amount of time to conduct the examination can be considered excusable delay when performing speedy trial calculations.[113]

When the sanity board has concluded, it submits written findings to the ordering officer, the accused's commander, the Article 32 investigating officer (if any), all counsel, the convening authority, and, after referral, the military judge.[114] Upon receipt of the report, further action may be suspended, the charges may be dismissed, administrative separation action may be taken, or the charges may be referred to court-martial.[115] The practical effects of an incompetency finding will be discussed in the next section, but for now we will discuss what happens when the convening authority refers the case to trial, either due to a finding of competence by the sanity board or because the convening authority disagreed with the board's finding of incompetence.

Once the case has been referred to trial, the sanity board is revisited. If the board found the accused to be mentally incompetent to stand trial because he suffered from a mental disease or defect such as PTSD, but the convening authority disagreed as evidenced by the referral, the military judge is required to conduct an in-court hearing to determine mental capacity to his or her own satisfaction.[116] At this point, the accused's mental competency becomes an interlocutory question of fact.[117] Trial cannot proceed if it is "established by a preponderance of the evidence that the accused is presently suffering from a mental disease

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[110] *See* MCM, *supra* note 6, R.C.M. 706(c)(2).
[111] *Id.* (listing the four questions the board must answer at a minimum).
[112] *Id*. At this point, it is important to note that sanity boards can also be directed to address the accused's mental responsibility, instead of, or in addition to, their mental capacity. The procedure is the same for both, although the findings will be different. Further discussion of mental responsibility is reserved for Part IV of this article.
[113] *Id*. R.C.M. 707(c)(1) discussion.
[114] *Id*. R.C.M. 706(c)(3)(A). The defense counsel will receive the full report, while the trial counsel will receive a sanitized version that serves to protect the accused's Article 31, UCMJ rights.
[115] *Id*. R.C.M. 706(c)(3) discussion.
[116] *Id*. R.C.M. 909(d).
[117] *Id*. R.C.M. 909(e)(1).

or defect rendering him or her mentally incompetent.[118] In making this determination, the military judge is not bound by the rules of evidence except with respect to privileges."[119] The judge can hear testimony from any or all of the sanity board members. If the judge finds the accused to be mentally incompetent, the proceedings are halted and the judge must report his or her finding to the general court-martial convening authority (GCMCA).[120]

Of course, a sanity board may not be requested or even contemplated until after referral. In fact, it may so happen that the accused does not show any symptoms of PTSD or other mental disease or defect until his trial is already underway. Or perhaps a sanity board found the accused to be competent, but the accused's condition subsequently deteriorated to the point that one or more parties feel that his capacity is again in question. In such cases, the parties are not without recourse. Either party may request a capacity determination hearing at any time before or after referral, and the judge may also conduct a hearing *sua sponte*.[121] Again, if the judge determines the accused to be mentally incompetent, the trial is stopped and his findings are reported to the GCMCA.[122]

B. Practical Effects of Incompetency Findings

At this point in the proceedings the GCMCA has received a report of the accused's mental incompetency to stand trial, either pre-referral from the sanity board, or post-referral from the military judge. In the former case, he or she can still refer the case to trial or pursue other options previously discussed. In the latter case, the GCMCA is out of options and must commit the accused to the custody of the Attorney General.[123]

The Attorney General is required to hospitalize the accused under Title 18 of the United States Code.[124] If the accused sufficiently recovers so that he or she has gained the capacity to stand trial, the Attorney General shall transfer custody of the accused back to the GCMCA.[125]

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[118] *Id*. R.C.M. 909(e)(2).
[119] *Id*.
[120] *Id*. R.C.M. 909(e)(3).
[121] *Id*. R.C.M. 909(d).
[122] *Id*. R.C.M. 909(e)(3).
[123] *Id*. R.C.M. 909(f).
[124] 18 U.S.C. § 4241(d) (2000). *See also* UCMJ art. 76b (2005).
[125] MCM, *supra* note 6, R.C.M. 909(f).

The GCMCA can then refer the case to trial, at which time the military judge will conduct another competency hearing. If, after hospitalization,[126] there is no improvement in the accused's mental capacity, the Attorney General will take action in accordance with Title 18 of the United States Code.[127] If the PTSD-affected Soldier has been declared competent to stand trial, there are still other options available to his or her counsel, which will now be discussed in detail.

IV. Lack of Mental Responsibility

If a Soldier's PTSD has not rendered him or her incompetent to stand trial, he or she is not without recourse. It may be that the effects of the disorder were greater at the time of the crime than at the time of trial, or perhaps he or she has since sought and received counseling or medication that have helped to control the disorder. In such cases, the defense counsel may be able to assert a defense of lack of mental responsibility. Such a defense, if proven and accepted by the judge or panel, could be a complete defense to the criminal conduct. There are two permutations to the mental responsibility defense, lack of mental responsibility and partial mental responsibility, and each will be discussed in turn.

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[126] The discussion accompanying RCM 909(f) notes that the initial period of hospitalization should not exceed four months under 18 U.S.C. § 4241(d). If, however, there is a substantial probability that the accused will regain capacity to stand trial in the near future, hospitalization may be continued for an additional reasonable period of time.

[127] 18 U.S.C. § 4246, part of the Insanity Defense Reform Act of 1984, directs that a person hospitalized for lack of mental capacity to stand trial may not be released, even if charges have subsequently been dismissed due to incapacity, if he or she continues to suffer from a mental disease or defect that would create a substantial risk of bodily injury to another person or serious damage to property if the person was released. This risk is determined via a hearing following a psychiatric or psychological examination. If the court finds clear and convincing evidence of such a substantial risk, custody should be remanded to the Attorney General, who shall release the accused to his or her state of domicile or trial provided that state will accept responsibility for the person. In any event, hospitalization will continue until such time as a periodic reevaluation determines that there is no longer a substantial risk of bodily harm to others or serious damage to property if the person is released. There is also a provision for conditional release under prescribed medical, psychiatric, or psychological care or treatment. *See* 18 U.S.C. § 4246(e)(2).

A. Affirmative Defense

The RCMs describe the lack of mental responsibility as follows:

> It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense.[128]

This definition requires a two-part analysis. First, the accused suffered from a severe mental disease or defect at the time of the crime. Simply put, when the crime was committed, he or she had a severe mental disorder, typically as defined within the DSM-IV. Second, the disorder rendered the accused mentally incapable of appreciating the nature and quality, or the wrongfulness, of his actions. In the most basic terms, the disorder made him unable to understand what he was doing, or that what he was doing was wrong. The courts have broken this definition into these two elements as well, and examined them at length. Following an analysis of those judicial examinations is a review of the burden of proof for this defense.

1. Severe Mental Disease or Defect

The Military Judges' Benchbook,[129] in the instruction for the lack of mental responsibility defense, attempts to define a severe mental disease or defect in the negative. It is not "an abnormality manifested only by repeated criminal or otherwise antisocial conduct or by nonpsychotic behavior disorders and personality disorders."[130] This assertion that recidivism or a significant personality disorder does not qualify an accused as suffering from a severe mental disease or defect is borne out in case law as well.[131] More important to this analysis, what would

[128] MCM, *supra* note 6, R.C.M. 916(k)(1).
[129] U.S. DEP'T OF ARMY, PAM 27-9, MILITARY JUDGES' BENCHBOOK (15 Sept. 2002).
[130] *Id*. at 820.
[131] *See, e.g.*, United States v. Freeman, 357 F.2d 606, 625 (2d Cir. 1966) (holding that repeated criminal behavior "cannot be the sole ground for a finding of mental disorder"); United States v. Cartagena-Carrasquillo, 70 F.3d 706, 712 (1st Cir. 1995) (stating that

constitute such a disorder? Answering this question is the most difficult hurdle to clear for the counsel representing or prosecuting a Soldier suffering from PTSD, at least with regard to the defense of lack of mental responsibility.

Determining whether PTSD constitutes a severe mental disease or defect is a question that can be broken into two parts. First, does PTSD qualify as a mental disease or defect?[132] Second, if so, what would constitute a severe enough case of it to warrant a finding of lack of mental responsibility? Both of these questions have been fairly answered in case law.

The first federal case to make the argument that PTSD could be a qualifying mental disease or defect was *United States v. Long Crow*.[133] Alvin Long Crow was a Native American living on a reservation in South Dakota who, after consuming eight or more beers as well as liquor, got in a fight at his son's birthday party and then left to retrieve a metal baseball bat and a .22 caliber rifle.[134] He returned to the party and opened fire, injuring four people. A licensed clinical psychologist diagnosed Long Crow with "mild severity Post Traumatic Stress Disorder"[135] as well as alcohol abuse and personality disorder. No indication was given as to how Long Crow acquired PTSD. However, the psychologist, Dr. Bickart, concluded that Long Crow was competent to stand trial and was not insane at the time of the offense.[136]

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even "significant" cases of PTSD and schizophrenia did not rise to the level of severe mental disease or defect).

[132] At lease one commentator has argued that the definition of "severe mental disease or defect" found in RCM 706 and in DA Pam. 27-9 is unsupported by statute and case law and is thus invalid. *See* Major Jeremy A. Ball, *Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Servicemembers*, ARMY LAW., Dec. 2005, at 1, 17-19. I have chosen to limit my focus to a discussion of how a case of PTSD may meet the RCM 916(k)(1) criteria as it is currently interpreted in order to best assist today's military justice practitioner, despite the sound arguments presented by Major Ball in his article. Nevertheless, I commend Major Ball's article to an attorney involved in a PTSD case, as it provides insightful practical advice in such areas as requests for instruction and eliciting expert testimony. *See* Ball, *supra*, at 19. Further, although sparingly but appropriately cited, I have consulted Major Ball's article frequently and with appreciation as a resource to help refine or expand the analysis contained in this article.

[133] 37 F.3d 1319 (8th Cir. 1994).

[134] *Id*. at 1321.

[135] *Id.* at 1322.

[136] *Id.*

Needless to say, Long Crow's attorney did not seek to introduce Dr. Bickart's diagnosis into evidence. Long Crow asserted at trial that after firing the first shot he blacked out,[137] and to support his theory called a different psychologist to testify. The new psychologist, Dr. Dame, never clinically examined Long Crow, but testified based on general expertise and courtroom observations.[138] Somehow, Dr. Dame was able to assert that if he were treating Long Crow, he would consider a PTSD diagnosis, and it was his belief that Long Crow appeared to be suffering from PTSD at the time of the offense.[139]

Recognizing that the defense held the burden of proving a severe mental disease or defect by clear and convincing evidence,[140] the trial judge refused to submit instructions to the jury regarding this defense for lack of sufficient evidence, and the jury found Long Crow guilty on three of five counts and the court sentenced him to ten years in prison.[141] The Eighth Circuit Court of Appeals reviewed *de novo* the judge's decision not to submit the instruction, as a matter of law.[142]

The only evidence of PTSD considered by any court was Long Crow's claim that he blacked out and Dr. Dame's testimony based on in-court observation and personal expertise. The Appeals Court found no evidence in the record as to the severity of Long Crow's PTSD, if in fact he had it at all. Most important was this language from the Eighth Circuit:

> We have found no cases that treat PTSD as a severe mental defect amounting to insanity, and Long Crow has cited none. Although we do not reject the possibility that PTSD could be a severe mental disorder in certain instances, there is no evidence that Long Crow suffered a severe case.[143]

The most helpful case for the defense counsel trying to make an argument for PTSD causing a lack of mental responsibility, *United States*

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[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *See* Part IV.A.3, *infra* notes 198 to 224 and accompanying text, for further discussion on the burden of proof.
[141] *Long Crow*, 37 F.3d at 1322.
[142] *Id.* at 1323.
[143] *Id.* at 1324.

v. Rezaq,[144] cites favorably the *Long Crow* case. Omar Mohammed Ali Rezaq, also known as Omar Marzouki or Omar Amr, is a Palestinian who was a member of a terrorist organization.[145] In 1985, Rezaq and two accomplices boarded an Air Egypt flight in Athens. After takeoff, the three hijacked the plane. Their leader, Salem, was killed and an Egyptian air marshal was wounded during the initial takeover.

After the gun battle and death of Salem, Rezaq took over the leadership of the hijacking and, as planned, ordered the pilot to fly the plane to Malta. Once the aircraft landed, Rezaq identified and separated the Israeli and American hostages from the rest of the passengers. When he was denied a requested refueling, Rezaq began shooting the Israelis and Americans. He shot five in all, wounding three and killing two. Then, in a tempting yet tragic case for aggravation evidence,[146] Egyptian forces stormed the plane in spectacularly inept fashion. They fired at random and employed explosives which caused the aircraft to burst into flames, killing fifty-seven passengers and the third hijacker. Rezaq was injured and captured.[147]

Rezaq was tried in Malta for murder, attempted murder, and hijacking. He pled guilty and was sentenced to twenty-five years in prison.[148] Incredibly, he was released after only seven years confinement and allowed to board a plane for Ghana, where he was detained for several months before being allowed to fly to Nigeria. In Nigeria, he was detained and transferred to U.S. custody and sent to the United States, where he was indicted and tried for air piracy in U.S. District Court.[149]

At his U.S. trial, Rezaq invoked the insanity defense and presented evidence that he suffered from PTSD.[150] He called as witnesses his family members and three psychologists, and offered his own testimony. Rezaq identified several traumatic events that may have triggered his

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[144] 918 F. Supp. 463 (D.D.C. 1996).
[145] United States v. Rezaq, 134 F.3d 1121, 1126 (3d Cir. 1998), *cert. denied*, 525 U.S. 834 (1998). The underlying facts of the case are best presented in this appeal. However, Rezaq appealed on grounds unrelated to the insanity defense, so, although the case was affirmed, the appellate decision is not important to this discussion.
[146] MCM, *supra* note 6, R.C.M. 1001(b)(4).
[147] *Rezaq*, 134 F.3d at 1126.
[148] *Id.*
[149] *Rezaq*, 918 F. Supp. at 463.
[150] *Rezaq*, 134 F.3d at 1126.

alleged PTSD. He spent much of his adolescence in a refugee camp in Jordan and later in Lebanon, where he was active in revolutionary organizations for several years.[151] He alleged to have seen the killings of hundreds of refugees as well as the extermination of entire village populations, in addition to a near-death experience of his own in a car bombing.[152] His family asserted that when he was in Jordan he was "normal, friendly, and extroverted, but when he returned from Lebanon he was pale, inattentive, prone to nightmares, antisocial, and had lost his sense of humor."[153] The defense psychologists identified these changes as "symptomatic of PTSD, and, based on their examination of Rezaq and on the testimony of other witnesses, they concluded that Rezaq was suffering from PTSD when he committed the hijacking."[154]

The Government countered with two of its own experts, who testified that the symptoms alleged by Rezaq "were not as intense as those usually associated with PTSD, and that Rezaq was able to reason and make judgments normally at the time he hijacked the plane."[155] In other words, even if Rezaq suffered from PTSD, it was not a severe case. The jury sided with the Government and rejected Rezaq's insanity defense. He was found guilty of aircraft piracy, sentenced to life imprisonment, and ordered to pay over $250,000 in restitution to the victims.[156]

Before the case got to the jury, however, Judge Lamberth considered a government motion to preclude the defense from offering evidence to prove the affirmative defense of insanity.[157] After first citing the affirmative defense of insanity,[158] the court concluded that the seminal question in determining whether to allow the introduction of the PTSD evidence was whether Rezaq's case of PTSD was sufficiently "severe" to constitute an affirmative defense.[159] Judge Lamberth noted that a court's "severity" analysis

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[151] *Id.*
[152] *Id.*
[153] *Id.* at 1127.
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] United States v. Rezaq, 918 F. Supp. 463, 466 (D.D.C. 1996).
[158] *Id.* at 467 (citing 18 U.S.C. § 17(a) (2000), which is identical in all substantive portions to RCM 916(k)(1), *supra* note 128).
[159] *Rezaq*, 918 F. Supp. at 467.

> consists of more than locating the magical word "severe" in the diagnosis. Rather, section 17(a) contemplates a more thoroughgoing approach, in which a court reviews the diagnosis for overall indications of the severity of defendant's mental disease or defect. The mere presence of the word "severe" in a diagnosis that suggests a mild condition will not constitute a defense under section 17(a). Similarly, the absence of the word "severe" will not necessarily mean that the condition diagnosed does not meet the standards of section 17(a).[160]

The court noted that, in considering the admissibility of evidence regarding an insanity defense, a liberal approach should be taken.[161] After reviewing the defense evidence, the court determined that Rezaq's diagnosis met the test of insanity.[162] One psychologist, Dr. Dondershine, had diagnosed a severe case of PTSD and depression that left Rezaq "seriously impaired."[163] Dr. Dondershine testified that, during the offense, Rezaq's "personality was fragmenting and the parts—perception, reason, judgment, contemplation of right and wrong, and assessment of consequences—were no longer fully [operative]."[164] A second defense expert, Dr. Wilson, also concluded that Rezaq suffered from PTSD and major depression at the time of the hijacking, and was therefore unable to understand that his conduct was wrongful.[165] Dr. Wilson described Rezaq's mental state during the commission of the offense as "fragile, vulnerable, and unstable."[166] A third defense expert diagnosed Rezaq with chronic PTSD which resulted in an inability to appreciate the wrongfulness of his acts.[167] Judge Lamberth did not find this diagnosis and supporting summary of Rezaq's condition to meet the test for a severe disease or defect, but when taken as a whole, the sum of the expert testimony satisfied the test.[168] The judge therefore found the

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[160] *Id*. at n.6.
[161] *Id.* at 467 (citing several cases, most notably United States v. Smith, 507 F.2d 710, 711 (4th Cir. 1974), holding that "[A] trial judge should permit 'an unrestricted inquiry into the whole personality of defendant' and should 'be free in his admission of all possibly relevant evidence'").
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.* at 468.
[166] *Id.*
[167] *Id.*
[168] *Id.*

evidence relevant, and more probative than prejudicial,[169] thus allowing the jury to hear the evidence. First though, Judge Lamberth noted that Federal Rule of Evidence 704(b) would preclude the experts from testifying to ultimate issues of fact such as Rezaq's ability or inability to appreciate the wrongfulness of his actions.[170] While he considered that portion of their testimony in motions hearings, the judge limited the expert's testimony before the jury to only the severity of Rezaq's illness.[171]

Of interest to both the prosecutor and the defense counsel, the *Rezaq* case established that a severe case of PTSD can in fact be a qualifying mental disease or defect that would support an insanity defense. Rezaq's PTSD-based insanity defense made it to the jury, where, unfortunately for him, it was rejected.[172] Thus, the summit not yet scaled: How does the defense counsel convince the fact-finder that her client's case of PTSD is not only a valid defense, or even a plausible defense, but a complete defense? The factors that Judge Lamberth considered in *Rezaq*[173] may be the most helpful currently reported. A diagnosis of a serious impairment in judgment would be beneficial to the defense, as would a diagnosis of a fragmented personality or a vulnerable or unstable mental state. Conceivably, these diagnoses could manifest themselves in several ways, such as witnesses' observations of unusual or unclear speech patterns, irrational decision-making, or perhaps extremely heightened and varied emotions. Eyewitness testimony to that effect could lead an expert to diagnose a severe case of PTSD; then it would normally be up to the trier of fact to determine whether the accused's PTSD was so severe that he or she was unable to appreciate the nature and quality, or the wrongfulness, of his acts. But, as we shall see, in military courts the defense expert has even more latitude, which may prove to be the extra boost needed to help the military defense counsel scale the PTSD summit.

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[169] *Id.*
[170] *Id.* at n.8.
[171] *Id. See infra* Part IV.A.2 for a discussion of how this evidentiary rule is relaxed in courts-martial. *See infra* notes 193-197 and accompanying text.
[172] *Rezaq*, 134 F.3d at 1126.
[173] *Rezaq* was affirmed on appeal by the Third Circuit on unrelated grounds. *See* United States v. Rezaq, 134 F.3d 1126 (3d Cir. 1998), *cert. denied*, 525 U.S. 834 (1998).

2. Appreciation of Nature and Quality or Wrongfulness

This second element of the insanity defense has only been analyzed in case law; it has not been defined by statute, by the Manual for Courts-Martial, the Military Judges' Benchbook, or legislative history.[174] The most insightful military case on point is *United States v. Martin*.[175] The facts of the case are not important to this analysis,[176] but the Court of Appeals for the Armed Forces (CAAF) did provide helpful examination of the key terms of the second element of the defense: "appreciate," "nature and quality," and "wrongfulness."

To "appreciate" is not merely to know that a fact is true, but also to incorporate an understanding of the significance or importance of that fact.[177] The *Martin* court recognized that an understanding of the "moral or legal import of behavior" was required.[178] This is key language because "import" would seem to signify an understanding of the consequences of your actions, which should make the case for a lack of mental responsibility easier to prove. Even if an accused knew what he was doing, for example shooting a weapon, if he did not understand what the results of his actions would be—perhaps the death of an innocent bystander—then this failure to understand the consequences of his actions may amount to a lack of mental responsibility under *Martin*.[179]

The terms "nature and quality" and "wrongfulness" are less satisfactorily defined by the *Martin* court; in fact, one could argue that CAAF only muddied the waters.[180] The simplest definition is that the accused either did not know what she was doing, or, since the element is disjunctive, that she did not know what she was doing was wrong.[181] For example, an accused on trial for choking his wife might have thought he was choking a member of the Iraqi Republican Guard with whom he was engaged in combat. Alternatively, knowing he was choking his wife, he did not know it was wrong because he thought he had been ordered to, be it by a superior being or a superior officer. The CAAF recognized that "wrongfulness" has been understood to include not only the illegality of

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[174] Ball, *supra* note 132, at 20.
[175] 56 M.J. 97 (2001).
[176] Major Martin did not have PTSD, but bipolar disorder. *Id.* at 100.
[177] *See, e.g.*, BLACK'S LAW DICTIONARY 97 (17th ed. 1999).
[178] *Martin*, 56 M.J. at 108.
[179] *Id.*
[180] *See* Ball, *supra* note 132, at 21.
[181] WHARTON'S CRIMINAL LAW § 101, at 17 (15th ed. 1993).

the act, but also the immorality of the act,[182] as defined by society, the individual, or both.[183]

United States v. Thomas[184] is an example of a military case in which a severe mental disease or defect did not amount to a lack of mental responsibility defense because it did not meet the requirements of this second element. Frederick Thomas was a Sailor who kidnapped his wife and son, eventually killing his son. A sanity board determined that, during his rampage, he was under the influence of a brief psychotic disorder amounting to a severe mental disease or defect, but that he was able to appreciate the nature and the wrongfulness of his conduct.[185] A civilian forensic psychiatrist concurred with these findings and additionally diagnosed significant symptoms of obsessive compulsive disorder and depression.[186] The accused pleaded guilty to the premeditated murder of his son, Freddy, as well as to other charges and specifications. Thomas entered into a stipulation of fact, stating that despite being under the influence of this psychotic episode amounting to a severe mental disease or defect, he "consciously and deliberately determined he would kill Freddy first and then kill himself."[187] During his providence inquiry, Thomas testified that although his psychotic episode led him to believe, incorrectly, that he was surrounded by state troopers, highway patrolmen, and SWAT[188] teams, he intended to kill his son and did not believe that he had a legal or moral defense for doing so.[189]

The *Thomas* case demonstrates that the defense must prove both distinct elements of R.C.M. 916(k)(1). The *Thomas* court held that it is not ineffective assistance of counsel to allow your client to plead guilty if one but not both elements can be proven.[190] Also noteworthy is its

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[182] *Martin*, 56 M.J. at 109.
[183] *See* Ball, *supra* note 132, at 22 (citing United States v. Danser, 110 F. Supp. 807, 826 (S.D. Ind. 1999) and United States v. Segna, 555 F.2d 226 (9th Cir. 1977), for the proposition that wrongfulness could include the subjective belief that the act did not violate the accused's own conscience).
[184] 56 M.J. 523 (N-M. Ct. Crim. App. 2001).
[185] *Id.* at 525.
[186] *Id.*
[187] *Id.* at 526 (citing Prosecution Exhibit 1 at 8-9).
[188] SWAT is an acronym for Special Weapons and Tactics. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1920 (2d ed. 1998).
[189] *Thomas*, 56 M.J. at 526-28 (the accused stated that he killed his son to mercifully spare him the pain of being shot to death by the perceived law enforcement personnel).
[190] *Id.* at 531.

holding that a failure to raise both of the elements at trial constitutes waiver.[191] Thomas appealed on the grounds that his counsel should have made a more thorough evaluation of the psychiatric evidence with an eye towards pursuing an insanity defense. The court held that his counsel, in procuring a civilian forensic psychiatrist and foregoing the two experts provided by the government, and then ending his inquiry when the psychiatrist sided with the sanity board, was not ineffective. The fact that the defense presented no evidence at the guilty plea of the accused's failure to appreciate the nature and quality or wrongfulness of his actions, compared with ample evidence to the contrary, precluded Thomas from alleging these matters on appeal absent new evidence.[192]

For military counsel, the most important aspect of this second element of the insanity defense may be how it is presented to the trier of fact. As previously noted, the *Rezaq* court recognized that Federal Rule of Evidence (FRE) 704(b) would preclude an expert from testifying to ultimate issues of fact such as an accused's ability or inability to appreciate the nature and quality or the wrongfulness of his actions.[193] However, Military Rule of Evidence (MRE) 704 contains no such limitation. Rather, it allows that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[194] So, unlike other federal courts, courts-martial allow defense experts to conclude in their testimony that the accused was not only laboring under a severe mental disease or defect, but was unable to appreciate the nature and quality or the wrongfulness of his actions. The CAAF, then known as the COMA, noted in *United States v. Combs*[195] that the MREs "liberally allow for expert testimony to assist the trier of fact."[196] Previously, the court had noted that the proper standard for admitting such expert testimony was "helpfulness, not absolute necessity."[197] Even if military fact-finders can conclude for themselves whether or not the accused knew what he was doing, or that what he was doing was wrong, if expert testimony will be

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[191] *Id.* at 532.
[192] *Id.*
[193] The expert could testify that the accused suffered from a severe mental disease or defect, but would not be able to conclude in his or her testimony that, because of that disease or defect, the accused did not subjectively appreciate his actions, or that they were wrong. *See* United States v. Rezaq, 918 F. Supp. 463, 468 n.8 (D.D.C. 1996).
[194] MCM, *supra* note 6, MIL R. EVID. 704.
[195] 39 M.J. 288 (C.M.A. 1994).
[196] *Id.* at 292.
[197] United States v. Meeks, 35 M.J. 64, 68 (C.M.A. 1992).

helpful in making that conclusion, the military judge should allow the testimony. Needless to say, eliciting such testimony from a qualified expert can powerfully affect the panel members, going a long way toward meeting the defense's burden of clear and convincing evidence.

3. Clear and Convincing Burden on Defense

The defense of mental responsibility is the only affirmative defense in the RCMs requiring the accused to prove the defense by clear and convincing evidence.[198] In fact, only one other defense puts the burden of proof on the accused at all.[199] At first glance, it may seem inapposite to put a burden of proof on a defendant in a criminal case under any circumstance, as such a practice would offend traditional notions of due process. However, the Supreme Court decided this issue over fifty years ago in *Leland v. Oregon*.[200] Mr. Leland was tried and convicted of killing a fifteen year-old girl. At trial, he unsuccessfully presented an insanity defense. Oregon state law at that time required the defendant to prove his insanity beyond a reasonable doubt.[201] Leland appealed on the grounds that this burden of proof violated his due process rights. The Court held, however, that this burden did not "violate generally accepted concepts of basic standards of justice."[202] The standard announced was whether assigning this particular burden to the defendant "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[203] Certainly, if assigning the insanity burden to the accused under the beyond a reasonable doubt standard was held constitutional, then the RCM's clear and convincing evidence standard, a lower threshold, is constitutionally sound as well.

The CAAF explored the clear and convincing evidence burden for the insanity defense in *United States v. Dubose*.[204] Lance Corporal Dubose was a troubled young man who made a pipe bomb, intending to kill himself. However, members of his unit found and disassembled the

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[198] MCM, *supra* note 6, R.C.M. 916(b).
[199] *Id.* The defense of mistake of fact as to age in a prosecution for carnal knowledge requires the accused to prove the defense by a preponderance of the evidence.
[200] 343 U.S. 790 (1952).
[201] OR. COMP. LAWS § 26-929 (1940). The defendant's current burden of proof in Oregon is a preponderance of the evidence. *See* OR. REV. STAT. § 161.055(2) (2003).
[202] *Leland*, 343 U.S. at 799.
[203] *Id.* at 798 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
[204] 47 M.J. 386 (1998).

bomb before it exploded.[205] At his court-martial, Dubose was found guilty of manufacturing and possessing the bomb among other charges, but not guilty of attempted murder or assault. Dubose raised the defense of lack of mental responsibility and presented four witnesses, including three experts, to prove the defense; nonetheless, a military judge found him mentally responsible for his acts.[206] Dubose appealed on the grounds that he had presented clear and convincing evidence of a severe mental disease or defect that rendered him unable to appreciate the nature and quality or wrongfulness of his conduct.[207]

The Navy-Marine Court of Criminal Appeals held that the defense of lack of mental responsibility required "clear and convincing objective evidence, not merely subjective medical opinion . . . ."[208] The CAAF, holding that the service court had improperly applied the standard of proof by interjecting the word "objective,"[209] pronounced that "[a]ll relevant evidence, whether 'objective' or 'subjective,' must be considered by the lower court in its review of sufficiency. There is no premium placed on lay opinion as opposed to expert opinion, nor on 'objective' as opposed to 'subjective' evidence."[210] This is an important ruling for the defense counsel that may have plentiful subjective evidence in the form of expert testimony that her client's disorder meets the insanity criteria, but a dearth of objective evidence of the disorder, such as testimony from a squad member that the accused was acting strangely.

Revisiting the *Long Crow* case,[211] this clear and convincing burden of proof for the affirmative defense of lack of mental responsibility appears to be the standard for a jury instruction on the insanity defense as well. There, the Eighth Circuit noted that generally, "the evidence to support a theory of defense need not be overwhelming; a defendant is entitled to an instruction on a theory of defense even though the evidentiary basis for that theory is 'weak, inconsistent, or of doubtful

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[205] *Id.* at 387.
[206] *Id.*
[207] *Id.*
[208] United States v. Dubose, 44 M.J. 782, 784 (N-M. Ct. Crim. App. 1996).
[209] *Dubose*, 47 M.J. at 388.
[210] *Id.* at 389.
[211] United States v. Long Crow, 37 F.3d 1319 (8th Cir. 1994); *see supra* notes 133 to 143 and accompanying text.

credibility.'"[212] However, the court went on to note that, as the defendant bears the burden of proof to establish insanity by clear and convincing evidence, "this statutorily imposed higher burden of proof calls for a correlating higher standard for determining the quantum of evidence necessary to entitle a defendant to such an instruction."[213] Thus, the wary defense counsel should not expect just any evidence to suffice in procuring a jury instruction. In *Long Crow*, the accused's own testimony and the testimony of one psychologist observing the trial, where there was no clinical diagnosis of PTSD admitted at trial, was held to be insufficient to merit a jury instruction.[214]

This same burden of proof applies not only to the affirmative defense of lack of mental responsibility, but also to the defense of partial mental responsibility. Though not a complete defense, partial mental responsibility may be offered to prove that the accused lacked the state of mind necessary to form the requisite specific intent for the alleged crime. This defense could be appropriate for an accused suffering from PTSD as discussed briefly below.

B. Partial Mental Responsibility and Negating Specific Intent

Partial mental responsibility is sparingly described in the RCMs as "[a] mental condition not amounting to a lack of mental responsibility."[215] The discussion sheds a little more light, if not on the meaning of partial mental responsibility, then at least on its admissibility: "Evidence of a mental condition not amounting to a lack of mental responsibility may be admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense."[216] As an example, for a charge of assault in which grievous bodily harm is intentionally inflicted, evidence of a traumatic episode of severe PTSD could be admitted to prove that the accused could not have formed the specific intent to inflict grievous bodily harm. The accused may still be

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[212] *Long Crow*, 37 F.3d at 1323 (quoting Closs v. Leapley, 18 F.3d 574, 580 (8th Cir. 1994)).
[213] *Id. See also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253 (1986) ("a higher burden of proof should have a corresponding effect on the judge when deciding to send the case to the jury").
[214] *Long Crow*, 37 F.3d at 1324.
[215] MCM, *supra* note 6, R.C.M. 916(k)(2).
[216] *Id.* R.C.M. 916(k)(2) discussion.

guilty of a lesser form of assault. To glean any more knowledge on the subject, it is necessary to turn to case law.

One of the seminal cases in the partial mental responsibility arena is *Ellis v. Jacob*.[217] Staff Sergeant Ellis was charged with the premeditated murder of his son. Colonel Jacob was the trial judge at his court-martial. Ellis submitted a motion requesting the introduction of expert opinion evidence to rebut the element of specific intent.[218] Ellis's theory was not one of insanity, but that extreme sleep deprivation prevented him from forming the specific intent necessary to kill his son. Judge Jacob denied the motion, and Ellis appealed. The COMA held that while Ellis could not present the expert testimony as an affirmative defense, he was entitled to present the evidence to support his claim that he lacked specific intent to kill.[219]

Although today's practitioner may see this holding as fairly intuitive given the language of RCM 916(k)(2) and its accompanying discussion, the 1984 edition of the *Manual for Courts-Martial*,[220] in effect at the time of this ruling, specifically prohibited the admission of partial mental responsibility evidence to negate the state of mind element of an offense.[221] In effect, *Ellis v. Jacob* and its progeny[222] overruled that prohibition, and President Bush removed it in 2004 as reflected in the 2005 *Manual for Courts-Martial*. It is important to note, however, that while the doctrine of partial mental responsibility was once considered an affirmative defense,[223] these cases and the updated *Manual for Courts-Martial* have not served to restore the doctrine to that position.[224]

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[217] 26 M.J. 90 (C.M.A. 1988).

[218] Premeditated murder requires a specific intent to kill a person. *See* MCM, *supra* note 6, pt. IV, ¶ 43c(2)(a).

[219] *Ellis*, 26 M.J. at 93-94.

[220] MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984).

[221] *Id.* R.C.M. 916(k)(2) ("A mental condition not amounting to a lack of mental responsibility under subsection (k)(1) of this rule is not a defense, nor is evidence of such a mental condition admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense.").

[222] *See, e.g.*, United States v. Berri, 33 M.J. 337, 344 (C.M.A. 1991) (holding that the trial judge erred by not instructing the panel to consider expert evidence possibly negating specific intent).

[223] *See* United States v. Frederick, 3 M.J. 230 (C.M.A. 1977) (holding that partial mental responsibility was an affirmative defense).

[224] There was some debate on that point. *See* Ball, *supra* note 132, at 29 n.306 (noting that some scholars saw this line of cases as resurrecting partial mental responsibility as an affirmative defense). However, the change to RCM 916(k)(2) effectively extinguished

It survives only to the extent that it allows an accused to present evidence of a mental condition, not amounting to a severe disease or defect, to rebut evidence that he harbored a specific intent to commit the crime. This will not be a complete defense, but may, for example, turn a charge of murder into involuntary manslaughter.

C. Practical Effects of Lack of Mental Responsibility Findings

Although partial mental responsibility is not a defense and will therefore serve only to potentially negate an element of a crime, a finding of complete lack of mental responsibility, unlike a finding of lack of capacity, will excuse the criminal conduct. Whereas capacity is established at a sanity board and finally determined by the GCMCA or the military judge, the lack of mental responsibility is determined by the fact-finder, during deliberations on findings.[225] Significantly, a finding of lack of capacity is frequently revisited and could eventually change if the accused's mental condition improves. A finding of lack of mental responsibility, because it applies to the accused's state of mind at the time of the crime, is a once and final determination. If the accused has made significant progress since the crime, hospitalization may not even be necessary, although continued therapy could be required. If hospitalization is ordered, the patient's status will be monitored for signs of recovery that could result in eventual discharge.[226]

V. Other Occasions for Post-Traumatic Stress Disorder Evidence at Trial

There are at least two other instances in which PTSD could play a role in courts-martial proceedings. The first is the examination of a witness who has suffered or is suffering from PTSD. The second is during sentencing. While neither is explored at length here, with the number of combat veterans in the ranks steadily increasing, corresponding increases of combat veterans in the courtroom are a foregone conclusion, some percentage of which will undoubtedly suffer from PTSD.

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that debate. For a fuller treatment of partial mental responsibility, *see* Ball, *supra* note 132, at 27-32.

[225] MCM, *supra* note 6, R.C.M. 921(c)(4).

[226] *See* 18 U.S.C. § 4246(e)(2) (2000).

A. Impeaching Witnesses

While not previously discussed, the criminally accused is not the only person in the courtroom that could be suffering from PTSD. Any of the attorneys, panel members, paralegals, witnesses, or even the military judge may be recovering from their experiences in combat. To be sure, the crime victims may also suffer from PTSD, be it combat-related or due to the crime to which they fell victim. How information is elicited from these witnesses could prove to be the most pivotal aspect of the case.

The questioning of witnesses is governed by the MREs.[227] These rules require that witnesses have personal knowledge of the matter in question.[228] Their credibility may be attacked by any party.[229] Witnesses that have suffered from or currently suffer from PTSD, be they an eyewitness to the crime, the victim of the crime, or a sentencing witness, warrant special consideration. It may be that they were suffering from PTSD at the time they witnessed or were victim of the crime, or during the time they formed an opinion of the accused for sentencing purposes. It is also possible these witnesses are suffering from PTSD during the trial. In some cases, a witness may fall into more than one category.

First, consider the witness who suffered from PTSD during the event about which they are testifying. While being careful not to offend the witness and alienate the judge or panel, it may be wise to inquire about the witness's disorder, especially as it might effect his perception and judgment. Perhaps the witness has acquired a heightened sensitivity to violence as a result of experiences in combat, which may lead the panel to believe that the accused's actions were not as egregious as the witness has described them. A mild case of PTSD in a witness, reported and treated, may not be worth delving into. In any case, the best course of action is to inquire into the matter in pre-trial interviews. Then, if necessary, a professional examination of the witness, as well as an examination of her medical records, may be in order. It may even be helpful to have the examining professional provide expert testimony on the effects of PTSD on the witness's perception and recollection of the event in question.

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[227] MCM, *supra* note 6, MIL. R. EVID. 601-615.
[228] *Id.* MIL. R. EVID. 602.
[229] *Id.* MIL. R. EVID. 607.

A witness suffering from PTSD at the time of trial but not at the time of the alleged crime may be less helpful. Unless the witness is suffering from such a severe case that he can be declared incompetent to be a witness,[230] it will likely be of no use to point out his disorder to the panel. In fact, it may do more harm than good for the defense if the panel links the witness's PTSD to the accused's conduct. However, a sentencing witness with PTSD may draw further attention towards, and credibility to, the accused's case of PTSD, which could be harmful or beneficial to either party, depending on the relative severity of each case. For example, if the accused's case of PTSD is less severe than the witness's case, the accused will likely engender less sympathy than she otherwise might have, and vice versa.

B. Sentencing

Until there is a landmark military case in which an accused's PTSD is accepted by the panel as a complete defense for his criminal conduct, the sentencing phase of the trial will continue to be the most likely and useful venue for PTSD evidence. This evidence will probably be received as extenuation evidence.[231] Matters in extenuation allow the defense counsel to present evidence that "serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse."[232] Perhaps the defense counsel was unsuccessful in persuading the panel to find her client not guilty for lack of mental responsibility, or was unable to argue successfully that her client lacked the ability to form the specific intent to commit the crime.[233] In such cases, the defense counsel may still be able to negotiate a reduced sentence for her client by presenting sentencing evidence that the accused's PTSD did have an effect on his actions and judgment, for which leniency would be appropriate.

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[230] For example, when questioning a witness about a horrific and unjustified killing he witnessed in a combat zone, the witness could conceivably become so distraught that he is unable to appreciate his current surroundings or understand the nature of the proceedings. For the legal standard for competency, *see* MCM, *supra* note 6, MIL R. EVID. sec. VI.

[231] *Id.* R.C.M. 1001(c)(1)(A).

[232] *Id.*

[233] Yet another possibility is that the counsel was successful in proving a lack of specific intent, but his client was convicted of a lesser included offense.

The most advantageous tactical decision may be to avoid all mention of the client's PTSD until the sentencing phase of the trial.[234] This strategy was examined by the Navy-Marine Court of Military Review in *United States v. Lewis*.[235] Seaman Recruit Lewis, prior to her conviction on four counts of communicating a threat, had been diagnosed with three different personality disorders. However, these disorders were not presented as evidence until after findings were announced.[236] She appealed her conviction on the grounds that the military judge should have ordered a sanity board upon receipt of evidence of her personality disorders during presentencing. The service court affirmed the conviction, noting that the RCMs require the accused to give notice of her intent to rely on the defense of lack of mental responsibility before the beginning of a trial on the merits.[237] Like other affirmative defenses, the insanity defense is generally waived if not raised before findings.[238] Once the tactical decision has been made to forego an insanity defense, the accused cannot reopen the door to the defense by her presentation of extenuation evidence in sentencing, although she is not foreclosed from presenting such evidence.[239] Of course, if the accused's capacity to understand the proceedings becomes an issue during the sentencing phase, a sanity board could then be appropriate.

Finally, a statement by the accused (sworn or unsworn), or a sworn statement by a relative or unit member, describing how PTSD has affected the accused both before and after the criminal conduct, may garner sympathy from a panel.[240] A rising number of panel members are likely to have combat experience, thereby increasing their familiarity with and appreciation of PTSD and its effects. That is not to say,

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[234] *Id.* R.C.M. 1001(c)(1) (allowing extenuation evidence to be presented even if the evidence was not offered prior to findings).
[235] 34 M.J. 745 (N-M. Ct. Crim. App. 1991).
[236] *Id.* at 752.
[237] *Id.* at 750 (citing MCM, *supra* note 6, R.C.M. 701(b)(2)).
[238] *Id.* (citing MCM, *supra* note 6, R.C.M. 905(e)). Of course it may be true that, despite due diligence on the part of the defense counsel, the accused's insanity did not become readily apparent, or was not firmly established, until after the conclusion of the trial. In such a case, it may be possible to raise the issue after trial. *See* United States v. Harris, 61 M.J. 391 (2005) (holding that newly discovered evidence after trial which established that the accused was bipolar justified a new trial).
[239] *See* MCM, *supra* note 6, R.C.M. 1001(c)(1)(A)-(B).
[240] Testimony from the accused may also have the unintended effect of demonstrating the need for a sanity board. *See, e.g.*, United States v. Estes, 62 M.J. 544 (Army Ct. Crim. App. 2005) (stating that appellant's unsworn testimony led the Army Court of Criminal Appeals to grant his request for an additional sanity board).

however, that a panel dominated by combat veterans is more or less likely to return a sympathetic sentence. Those without combat experience may doubt the authenticity of PTSD, while combat veterans may be repelled by the fact that the accused is using his reactions to his combat experience, which may have been less severe than theirs, as an excuse for his conduct. Care should be taken during voir dire to determine the members' standing on this controversial issue. Each individual member should be polled to discreetly determine if his or her combat experience, or lack thereof, will have a positive or negative impact on the member's perception of PTSD in general, and of the accused and his situation in particular. More personal questions may be better suited to a written questionnaire. Suggested defense-oriented PTSD voir dire questions that could be tailored to suit either side are provided at Appendix C.

VI. Conclusion

Ultimately, gaining an acquittal due to insanity in a PTSD case is a high hurdle to clear. Therefore, a decision to proceed on a PTSD-based insanity defense must be carefully weighed and discussed with the accused in light of the relevant case law. The accused must recognize that his chances for success when raising PTSD as a defense are slim. Nevertheless, the wary trial counsel must acknowledge the possibility that a severe case of PTSD could legally excuse criminal conduct, or negate the specific intent necessary to commit the conduct. Although this could result in hospitalization for the client if the PTSD persists despite treatment, it is the correct result if the accused was unable to appreciate the nature and quality, or wrongfulness, of his conduct. If the accused suffers from a less than severe case of PTSD, this diagnosis may still result in a conviction for a lesser offense or reduced punishment when presented as extenuation evidence. In any event, the proper recognition and consideration of PTSD in the proceedings will only help to ensure that justice is served.

Appendix A

DSM-IV Criteria for Posttraumatic Stress Disorder[241]

Diagnostic criteria for 309.81 Posttraumatic Stress Disorder

A. The person has been exposed to a traumatic event in which both of the following have been present:

(1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others

(2) the person's response involved intense fear, helplessness, or horror. **Note:** In children, this may be expressed instead by disorganized or agitated behavior

B. The traumatic event is persistently reexperienced in one (or more) of the following ways:

(1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. **Note:** In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.

(2) recurrent distressing dreams of the event. **Note:** In children, there may be frightening dreams without recognizable content.

(3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur upon awakening or when intoxicated). **Note:** In young children, trauma-specific reenactment may occur.

(4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event

(5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event

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[241] DSM-IV-TR , *supra* note 34 , at 467-68.

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:

(1) efforts to avoid thoughts, feelings, or conversations associated with the trauma

(2) efforts to avoid activities, places, or people that arouse recollections of the trauma

(3) inability to recall an important aspect of the trauma

(4) markedly diminished interest or participation in significant activities

(5) feeling of detachment or estrangement from others

(6) restricted range of affect (e.g., unable to have loving feelings)

(7) sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:

(1) difficulty falling or staying asleep

(2) irritability or outbursts of anger

(3) difficulty concentrating

(4) hypervigilance

(5) exaggerated startle response

E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than one month.

F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

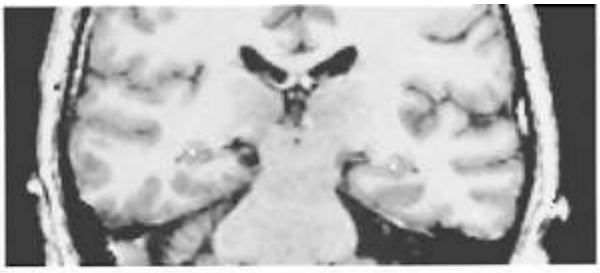
Specify if:
Acute: if duration of symptoms is less than 3 months

Chronic: if duration of symptoms is 3 months or more

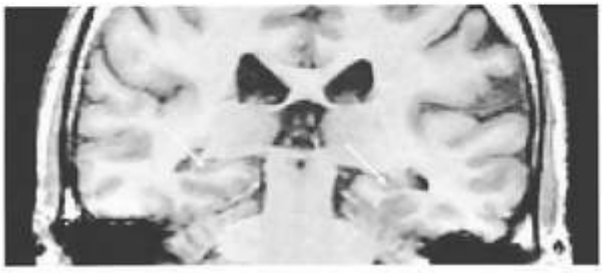
Specify if:
With Delayed Onset: if onset of symptoms is at least 6 months after the stressor

Appendix B

Magnetic Resonance Images



MR Image From Non-PTSD Veteran



MR Image From PTSD Veteran

Magnetic Resonance Images show the difference between the brain of a Soldier with post-traumatic stress disorder and one without. In PTSD, scientists believe that stress hormones like adrenaline scorch a painful event deep into the person's long-term memory.

Pictures and commentary derived from the following online article: http://www.news-leader.com/apps/pbcs.dll/article?AID=/20050927/LIFE04/509270313/1035

Appendix C

Suggested PTSD Voir Dire Questions

Ladies and Gentlemen, the defense of lack of mental responsibility will be presented in this case. The accused will attempt to prove that at the time of the offense, he suffered from a severe case of Post-Traumatic Stress Disorder. Further, he will assert that his PTSD made him unable to intend, understand, or appreciate his actions. PTSD is a mental disease listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. PTSD is basically a debilitating condition that results from a terrifying event.

1. Have you or anyone you are close to known or met people that suffered from combat-related PTSD, whether clinically diagnosed or not?

2. Do you believe a veteran with combat-related PTSD should be able to receive veteran's benefits for that diagnosis in the same manner, if perhaps not to the same degree, as a veteran with physical injuries?

3. Would you be surprised to learn that someone with a mental disorder like PTSD could often appear perfectly normal to a casual observer in many situations?

4. Would you be surprised to learn that the severity of a mental disorder like PTSD could change with time, therapy, medication, or outside factors?

5. Would you be surprised to learn that someone could have such a severe case of PTSD that they would be unable to intend, understand, or appreciate their actions?

6. Do you think it is possible for you to find that someone committed a crime but should not be found guilty because he was not mentally responsible at the time?

If the Military Judge allows individual voir dire:

7. SGM Smith, what types of symptoms would you expect a Soldier with PTSD to exhibit?

8. COL Wright, some of the symptoms of PTSD include detachment, irritability, anxiety, depression, anger, fear, guilt, insomnia, obsession, and addiction. Recognizing that almost every Soldier will experience some type of readjustment "pains" post-deployment, have you seen any of these symptoms in any of your Soldiers? To such a degree that it is possible they suffered from PTSD?

9. MAJ Sanchez, what would you do with a Soldier who came to you and stated that he believed he might have PTSD? If that Soldier later committed some type of misconduct, would you consider the possibility that his PTSD, if properly diagnosed, could have played a part in the misconduct? Do you think it could have been the primary cause?

UNDER NEW MANAGEMENT: THE OBLIGATION TO PROTECT CULTURAL PROPERTY DURING MILITARY OCCUPATION

MAJOR JOHN C. JOHNSON*

> *Works of art and sculpture, artifacts, great monuments and temples have been prized throughout history as being of significant importance. This has been so, not only because of their aesthetic worth, but also because they represent the talent and endurance of man and the history of diverse civilizations. The contributions made to this universal collection since time began have produced a store which comprises man's cultural heritage. This heritage is a compendium of the sufferings and the genius of mankind. It must be well-preserved to ensure that future generations can see and marvel at the accomplishments of their own epoch and those that came before.*[1]

I. Introduction

On 9 April 2003, before the eyes of the world, in the middle of Baghdad, Iraqi citizens and U.S. military personnel pulled down a statue

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[1] SHARON A. WILLIAMS, THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY 52 (1978).

of Saddam Hussein.[2] United States forces had begun to penetrate Baghdad days before against disintegrating opposition.[3] "The regime in Baghdad effectively ceased to function" on 9 April 2003.[4] For the U.S.-led coalition,[5] the invasion of Iraq appeared to be reaching a successful conclusion.

Yet elsewhere in Baghdad, a tragedy was beginning to unfold. Between 9 and 12 April 2003, unknown persons stole thousands of artifacts from the Iraqi National Museum.[6] The museum, the largest and most modern of its kind in the Middle East,[7] contained three-quarters of the archaeological artifacts discovered in Iraq during the preceding eighty years[8]—a collection ranging into the hundreds of thousands of items.[9] Exaggerated initial reports suggested the entire collection was lost. Investigation, however, revealed the actual loss was far less in terms of raw numbers, and the museum staff had previously hidden many of the most valuable items elsewhere.[10] Nevertheless, the damage to the cultural heritage of Iraq, and the world, was severe.[11]

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[2] TODD S. PURDUM ET AL., A TIME OF OUR CHOOSING 212 (2003).

[3] ANTHONY H. CORDESMAN, THE IRAQ WAR 94 (2003).

[4] *Id.* at 112.

[5] In the 2003 Iraq invasion, the United States and the United Kingdom led a multi-national coalition, which presently consists of twenty-six countries. *Multi-National Force Iraq*, http://www.mnf-iraq.com (follow "Inside the Force" hyperlink; then follow "Organization" hyperlink) (last visited Aug. 23, 2007).

[6] *See* United States Department of Defense News, *Briefing on the Investigation of Antiquity Loss from the Baghdad Museum*, Sept. 10, 2003, http://www.defense.link.mil/transcripts/2003/tr20030910-0660.html [hereinafter *Briefing*].

[7] Aaron Davis & Drew Brown, *Looting Imperils Precious Artifacts*, MIAMI HERALD, Apr. 12, 2003, at 20A.

[8] Daniel Rubin & Shannon McCaffrey, *Experts Deliver a Largely Depressing Update on Iraq's Looted Treasures*, MIAMI HERALD, Apr. 30, 2003, at 4A.

[9] *See* Andrew Lawler, *Ten Millennia of Culture Pilfered Amid Baghdad Chaos*, 300 SCIENCE 402 (Apr. 18, 2003). Modern Iraq is the site of several ancient civilizations, including Sumeria, Babylon, and Assyria; the Iraqi National Museum held "'an unparalleled collection of the world's earliest and greatest civilizations.'" *Id.* (quoting University of Oxford Assyriologist Eleanor Robinson). Marine Colonel (Col) Matthew Bogdanos, who led the U.S. military's investigation into the looting of the museum, estimates that well over 500,000 artifacts were in the museum before the war. MATTHEW BOGDANOS WITH WILLIAM PATRICK, THIEVES OF BAGHDAD 156 (2005). The estimate of 170,000 items, which was cited in numerous media articles at the time, may have derived from the approximately 170,000 Iraqi Museum (IM) numbers that had been given out since 1923, but one IM number could refer to up to "several dozen" items. *Id.* at 155-56.

[10] *See* BOGDANOS WITH PATRICK, *supra* note 9, at 142-57; PURDUM, ET AL., *supra* note 2, at 218; *Briefing*, *supra* note 6; Zainab Bahrani, *Lawless in Mesopotamia*, 113 NAT. HIST. 44 (Mar. 1, 2004). An exact accounting was impossible as many of the items in the museum's storerooms had not yet been recorded, and many of the records that did exist

The criticism leveled at the U.S. military was also severe. Certain experts complained they had previously warned U.S. government officials of the museum's vulnerability to looting in the event of war.[12] Critics noted the United States did secure certain other buildings in Baghdad, including the oil ministry.[13] In one oft-cited incident, a Marine officer allegedly denied multiple requests to stop the looting or to deter the looting by moving troops closer to the museum.[14] United States forces finally secured the museum on 16 April 2003, four days after the museum staff returned, and four days after media reports of this incident.[15]

Criticism of strategy or priorities aside, do critics have a colorable argument that the United States violated international law by failing to secure the Iraqi National Museum against looters prior to 16 April 2003? Specifically, did the United States violate its obligations under the laws pertaining to military occupation and the protection of cultural property?

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were destroyed. *Briefing*, *supra* note 6. Final estimates of the actual loss vary. In September 2003, Col Bogdanos estimated that 13,515 items had been stolen, of which slightly over 10,000 were still missing at that point. *Id.* Professor Zainab Bahrani, a professor of ancient Middle Eastern art history and archaeology at Columbia University and a native of Baghdad who returned to Iraq in June 2003 to assist in the museum's recovery, in March 2004 estimated the initial loss at 17,000 items. Bahrani, *supra*.

[11] *See* Bahrani, *supra* note 10 (describing the looting of the Museum as an "overwhelming disaster"). Some of the thieves targeted the most valuable of the remaining items, including forty display pieces left in the museum's galleries. *See id.*; *Briefing*, *supra* note 6.

[12] *See* BOGDANOS WITH PATRICK, *supra* note 10, at 201; Bahrani, *supra* note 10; Davis & Brown, *supra* note 6; Lawler, *supra* note 9.

[13] *See* PURDUM, ET AL., *supra* note 2, at 217 (noting U.S. forces secured the ministry of oil and other buildings); Rubin & McCaffrey, *supra* note 8 (noting Donny George, research director of the museum, "blames the American military for not protecting the museum for days while it guarded the ministry of oil"). Colonel Bogdanos takes issue with this line of argument. BOGDANOS WITH PATRICK, *supra* note 9, at 202. He finds the criticism without merit, pointing out that unlike the museum, the oil ministry was bombed first, was not occupied by Iraqi troops, and was a single building rather than an eleven-acre complex. *Id.* Nevertheless, the fact remains that the United States dedicated troops to secure the bombed-out oil ministry but not, initially, the Iraqi National Museum and its cultural treasures.

[14] *See* PURDUM, ET AL., *supra* note 2, at 214; Lawler, *supra* note 9; Rubin & McCaffrey, *supra* note 8.

[15] BOGDANOS WITH PATRICK, *supra* note 9, at 211; Bahrani, *supra* note 10; *see Briefing*, *supra* note 6. According to Col Bogdanos, on 10 April 2003 an American tank platoon near the museum had relayed reports of looting and was directed to investigate. BOGDANOS WITH PATRICK, *supra* note 9, at 205. The platoon approached the museum but halted and then withdrew after coming under fire, having fired one shell into the complex at an enemy RPG (Rocket-Propelled Grenade) position. *Id.* at 205-06.

This article addresses these questions by first examining the legal regime for the protection of cultural property during armed conflict. Next, it reviews the regime for protecting cultural property in time of peace. The article then reviews applicable international law relating to military occupation. Finally, it applies these rules to the Iraqi National Museum incident, concludes that there is cause for concern, and suggests that greater attention to this area of the law might help prevent similar instances in the future.

II. Protection of Cultural Property

The protection of cultural property can be divided into two distinct international legal regimes: one designed to avoid targeting of or damage to cultural property during armed conflict,[16] and another designed to prevent illegal trafficking in cultural property in times of peace.[17] Although the former is more directly applicable for present purposes, the latter is significant with respect to an occupier's responsibilities. We therefore review each in turn.

A. Protection of Cultural Property During Armed Conflict

1. History Through the Second World War

a. Ancient Times Through the Renaissance

In ancient times, the law of war presumed the victors could seize or destroy the works of art, public buildings, sacred sites, and other cultural

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[16] *See, e.g.*, The Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 539, *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 294 (2005) [hereinafter 1954 Hague Convention] (generally addressing the protection of cultural property during armed conflict).

[17] *See, e.g.*, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, 14 Nov. 1970, 10 I.L.M. 289, *available at* http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Aug. 15, 2007) [hereinafter 1970 UNESCO Convention] (seeking to prevent the illicit excavation, export, import, and transfer of cultural property).

treasures of the vanquished.[18] Instances from classical literature and history abound. Emperor Xerxes of Persia's destruction of artifacts during his invasion of Greece is one frequently cited example, perhaps due to Xerxes' vilification by Greek historians.[19] Some credit Alexander the Great of Macedon with a relatively enlightened view, for his era, regarding treatment of cultural property,[20] but his army sacked and plundered cities such as Thebes, Tyre, Gaza, and Persepolis—with much slaughter—when Alexander found it politically or economically expedient to do so.[21] Rome's total destruction of Carthage in 146 B.C. at the conclusion of the Punic Wars[22] and sack of Herod's Temple in

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[18] KIFLE JOTE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 25 (1994). *See* GROTIUS, THE LAW OF WAR AND PEACE bk. III, at 658-62 (Francis W. Kelsey trans., Clarendon Press 1925) (1646) (commenting on the pervasiveness and legality of the destruction of property in ancient warfare).

[19] *See, e.g.*, HERODOTUS, THE PERSIAN WARS 497 (George Rawlinson trans., First Modern Library ed. 1947) (Xerxes pledges to his people to capture and burn Athens); Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277, 281 (1997) (noting Herodotus comments on Persian plundering of Greek and Egyptian religious and political buildings). Hugo Grotius emphasized that when "Xerxes destroyed the images belonging to the Greeks, he did nothing contrary to the law of nations, although Greek writers exaggerate this greatly in order to arouse enmity." GROTIUS, *supra* note 18, at 661.

[20] *See, e.g.*, Kastenberg, *supra* note 19, at 281-82. Kastenberg asserts:

> Alexander's view on the protection of historic properties was certainly more enlightened than Xerxes'. His conquest of Persia was marked by a desire to preserve ancient treasures for the enhancement of a Hellenistic empire. It is probable that Alexander's early education by such luminaries as Aristotle left a desire to create museums and other centers of education ornamented by other culture's [sic] treasures. The enlightened attitudes of Greek and Macedonian war policy makers left a tradition that prevailed though [sic] subsequent European history.

Id. (citations omitted).

[21] *See* PETER GREEN, ALEXANDER OF MACEDON 145-48, 262, 267, 314-21 (1974) (describing the sack of Thebes, Tyre, Gaza, and Persepolis, respectively). Indeed, at Tyre, Alexander defaced the city's temple to the god Melkart and renamed it after himself. *Id.* at 262. At other times, Alexander did take care to respect local culture—when it was in his interest to do so. *See, e.g.*, *id.* at 268-71 (Alexander propitiates the Egyptian gods as he is crowned Pharaoh).

[22] ADRIAN GOLDSWORTHY, THE PUNIC WARS 353-57 (2000). The destruction was a very deliberate act directed by the highest levels of the Roman Republic; a "senatorial commission of ten" arrived to "supervise Scipio's systematic destruction of the city." *Id.* at 353.

Jerusalem in 70 A.D.[23] are additional renowned examples. Pleas by scholars of antiquity such as Polybius, Cicero, and Saint Augustine seeking to prevent or limit looting and destruction[24] were not representative of the practice or norms of early warfare.

The pervasive notion that the victor was entitled to the spoils of war and that cultural property was fair game continued through the Middle Ages and into Europe's Renaissance.[25] The deliberate looting and destruction of cultural treasures remained widespread during the Thirty Years War of 1618 to 1648.[26] In the mid-seventeenth century, when Hugo Grotius, a key figure in the development of international law, reviewed the practice of armies during millennia of warfare, he concluded: "[I]t is permitted to harm an enemy, both in his person and in his property; that is, it is permissible not merely for him who wages war for a just cause, and who injures within that limit . . . but for either side indiscriminately."[27] Grotius continued, "the law of nations has permitted the destruction and plunder of the property of enemies, the slaughter of whom it has permitted," and the law "does not exempt things that are sacred."[28]

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[23] *See* Andrea Cunning, *The Safeguarding of Cultural Property in Times of War and Peace*, 11 TULSA J. COMP. & INT'L L. 211, 212-13 (Fall 2003).

[24] *See* Harvey E. Oyer III, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict—Is it Working? A Case Study: The Persian Gulf War Experience*, 23 COLUM.-VLA J.L. & ARTS 49 (1999). Oyer relates that

> Polybius wrote that "no one can deny that to abandon oneself to the pointless destruction of temples, statues and other sacred objects is the action of a madman." Though the primary objective of Roman warfare was conquest, Cicero recommended moderation and selflessness in pillaging. Saint Augustine preached that the taking of booty was sinful.

Id. (citations omitted).

[25] *See* Cunning, *supra* note 23, at 212-13.

[26] *See* JOTE, *supra* note 18, at 26. It was standard practice to plunder cities that resisted invasion; the notorious sack of Magdeburg in 1631 was one particularly well-known and bloody example of a common phenomenon. GEOFFERY PARKER, THE THIRTY YEARS WAR 125 (1984).

[27] GROTIUS, *supra* note 18, at 643-44.

[28] *Id.* at 658.

b. The Enlightenment and the Napoleonic Era

The intellectual stirrings of the Enlightenment coincided with a gradual change in the treatment of cultural treasures during warfare. By the end of the seventeenth century, "axioms of international law exerted an undeniable influence on the mode and manner of warfare" and contributed to making eighteenth century warfare "a relatively humane and well-regulated enterprise."[29] The humanitarian tone of Swiss scholar Emmer[30] de Mattel's 1758 treatise *The Law of Nations* stands in marked contrast to Grotius's gloomy observations.[31] Foreshadowing modern principles of the law of war, de Mattel declared that "[a]ll acts of hostility which injure the enemy without necessity, or which do not tend to procure victory and bring about the end of the war, are unjustifiable, and as such condemned by the natural law."[32] With regard to cultural property in particular, de Mattel wrote

> For whatever cause a country be devastated, those buildings should be spared which are an honor to the human race and which do not add to the strength of the enemy, such as temples, tombs, public buildings, and all edifices of remarkable beauty. What is gained by destroying them? It is the act of a declared enemy of the human race thus wantonly to deprive men of these monuments of art and models of architecture . . . . We still abhor the acts of those barbarians who, in overrunning the Roman Empire, destroyed so many wonders of art.[33]

However, de Mattel clarified that it was not the destruction per se but the unnecessary destruction of such works that was unlawful.[34] He continued, "if in order to carry on the operations of the war . . . it is

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[29] Henry Guerlac, *Vauban: The Impact of Science on War*, *in* MAKERS OF MODERN STRATEGY 72 (Paret ed. 1986).

[30] Or "Emiric," or "Emheric." *See* David Keane, *The Failure to Protect Cultural Property in Wartime*, 14 DEPAUL-LCA J. ART & ENT. L. & POL'Y 1, 2 (2004); Cunning, *supra* note 23, at 214.

[31] *See* Cunning, *supra* note 23, at 214.

[32] EMER DE VATTEL, THE LAWS OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 294-95 (Charles G. Sedgwick trans., Carnegie Institution of Washington 1916) (1758).

[33] *Id.* at 294-95.

[34] *See id.* at 295.

necessary to destroy buildings of that character, we have an undoubted right to do so."[35]

During the Napoleonic era, military forces continued to plunder cultural property, including Napoleon's own forces.[36] The French method of acquiring and handling captured treasures differed from that of belligerents in earlier conflicts.[37] France commonly made the surrender of valuable cultural properties a condition of the armistices and treaties imposed on defeated territories, thereby accumulating vast amounts of art to be kept and displayed at the Louvre and other locations in France.[38] The regime created a committee for the specific purpose of managing these treasures.[39] It is interesting that Napoleonic France should take the trouble to create a veneer of legal legitimacy and regularity when, in the past, the victors had simply taken or destroyed cultural monuments and artifacts as they saw fit.[40] That France made such a gesture to legitimize its acquisitions suggests some recognition of an international norm against the brute seizure of a nation's cultural property. The 1815 Treaty of Paris following Napoleon's final defeat reinforced that expectations had indeed changed since Grotius's day.[41] The treaty disregarded the coercive treaties that purported to authorize the acquisitions and required France to return the treasures it had taken.[42] The British Foreign Minister Lord Castlereagh clarified that this was not merely victor's justice when he declared "the removal of works of art was 'contrary to every principle of justice and to the usages of modern warfare.'"[43]

c. The Lieber Code and the Late Nineteenth Century

Thus, by the middle of the nineteenth century, customary international law afforded some protection to the arts and sciences during

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[35] *Id.*
[36] *See* JOTE, *supra* note 18, at 27-28; WILLIAMS, *supra* note 1, at 7-9.
[37] JOTE, *supra* note 18, at 27.
[38] *Id. See* WILLIAMS, *supra* note 1, at 7-8.
[39] JOTE, *supra* note 18, at 27.
[40] *See id.*
[41] *See* Cunning, *supra* note 23, at 213; Karen J. Detling, *Comment: Eternal Silence: The Destruction of Cultural Property in Yugoslavia*, 17 MD. J. INT'L L. & TRADE 54 (Spring 1993); Keane, *supra* note 30, at 3.
[42] JOTE, *supra* note 18, at 28; WILLIAMS, *supra* note 1, at 8-9.
[43] Oyer, *supra* note 24, at 50 (quoting JIRI TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 5 (1996)).

war.[44] The earliest attempt to codify protection for cultural property during armed conflict came about in 1863 when Dr. Francis Lieber developed the Instructions for the Governance of the Armies of the United States in the Field[45]—better known as the Lieber Code.[46] The Lieber Code, which governed the conduct of the armies of the United States during the Civil War, authorized the army to seize, for its benefit, public property belonging to the hostile government.[47] Private property, in contrast, was generally protected, unless it was somehow involved in the enemy's war effort.[48] The Lieber Code provided that property belonging to, *inter alia*, churches, charitable institutions, institutions of learning, museums, and observatories should not be treated as public property subject to confiscation, but as private property to be respected and preserved.[49] The code provided additional protection to art, libraries, scientific equipment and facilities, and hospitals, which were to be protected from damage to the extent possible.[50] However, the code did authorize the removal of such property from the war zone if removal was possible without damaging the property, with the ultimate status of such property to be determined at the conclusion of the war.[51]

The Lieber Code, with its distinction between public and private property and its exception for cultural property, proved highly influential among international lawyers in the remaining years of the nineteenth century.[52] The ensuing decades saw a number of initiatives aimed at extending and refining the protection of cultural property. The 1874 Declaration of Brussels, the product of a conference of fifteen European countries, borrowed the concept of treating cultural property as private property and added that those who seize, destroy, or willfully damage

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[44] *Id.*; Detling, *supra* note 41, at 54.

[45] *See* Kastenberg, *supra* note 19, at 279 n.8 (citing General Order No. 100 Apr. 14, 1863, *in* 3 U.S. DEPT. OF WAR, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (SER. III), at 148, 151 (1902)).

[46] JOTE, *supra* note 18, at 47; WILLIAMS, *supra* note 1, at 15; John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INT'L L. 831, 833-34 (Oct. 1986) [hereinafter Merryman, *Two Ways*].

[47] WILLIAMS, *supra* note 1, at 15-16.

[48] *See id.* at 16; Keane, *supra* note 30, at 3-4.

[49] Keane, *supra* note 30, at 3-4; *see* WILLIAMS, *supra* note 1, at 16; Merryman, *Two Ways*, *supra* note 46, at 833; Detling, *supra* note 41, at 55.

[50] WILLIAMS, *supra* note 1, at 16.

[51] *Id.*

[52] JOTE, *supra* note 18, at 47. The Lieber Code impressed European military authorities as well; between 1871 and 1896 the Netherlands, France, Serbia, Britain, Spain, Portugal, and Italy followed the American example by enacting similar military regulations. *Id.* at 47 n.3.

such property should be prosecuted.[53] In 1880, the Institute of International Law drew upon the Declaration of Brussels in drafting the Laws of War on Land—also known as the Oxford Manual—which purported to codify existing customary practice.[54] The Oxford Manual required "that parties spare, if possible, buildings dedicated to religion, art, and science."[55] The manual further called upon the defender to visibly mark such buildings and inform adversaries of their location before the outbreak of hostilities.[56]

d. The Hague Conventions of 1899 and 1907

The Hague Conventions of 1899[57] and 1907[58] were "the first major global documents adopted to regulate the conduct of belligerents."[59] The conventions borrowed heavily from the Declaration of Brussels and, by extension, the Lieber Code.[60] Articles 28 and 47 of the Annex to the 1907 Convention generally prohibit pillage.[61] Article 46 generally prohibits the confiscation of private property.[62] Echoing the Lieber Code and Brussels Declaration, the 1907 Convention then calls for religious, charitable, educational, artistic, and scientific property to be treated as

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[53] *See id.* at 48; WILLIAMS, *supra* note 1, at 16-17; Merryman, *Two Ways*, *supra* note 46, at 834. The conference promulgated the Declaration of Brussels, but the Declaration never took effect as an international agreement. JOTE, *supra* note 18, at 48; WILLIAMS, *supra* note 1, at 16-17; Merryman, *Two Ways*, *supra* note 46, at 834.

[54] Detling, *supra* note 41, at 56.

[55] *Id.*

[56] JOTE, *supra* note 18, at 49.

[57] Convention with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1779, T.S. No. 392, *available at* http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument [hereinafter 1899 Hague Convention].

[58] Convention Respecting the Laws and Customs of War on Land and its Annex, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 148 (2005)) [hereinafter 1907 Hague Convention].

[59] JOTE, *supra* note 18, at 49. Twenty-six nations attended the 1899 conference, although none of them were from Africa or South America. *Id.* The 1907 conference included forty-four states from every continent except Africa. *Id.* The differences in the content of the two conventions are "insignificant." *Id.* at 49-50.

[60] *See id.*; WILLIAMS, *supra* note 1, at 17.

[61] 1907 Hague Convention, *supra* note 58, arts. 28, 47.

[62] *Id.* art. 46. However, Article 53 authorizes the seizure of news and transportation assets, even if privately owned, for the duration of the conflict. *Id.* art. 53.

"private" property, even if it belongs to the enemy state.[63] Article 56 continues, "[a]ll seizure of, willful destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."[64] As before, an exception existed where the property contributed to the enemy's war effort in some way.[65]

Thus, by 1907, the ancient presumption of a victor's right to plunder and destroy had been supplanted by a widely agreed-upon commitment to preserve cultural property. Indeed, following the Second World War, the International Military Tribunals at Nuremberg deemed the Hague provisions protecting cultural property to be customary international law and therefore binding even on non-signatories to the conventions.[66] Nonetheless, the Hague Conventions failed to prevent egregious offenses against cultural property in the first half of the twentieth century.

e. The First World War and the Inter-War Years

At the outset of the First World War in 1914, Kaiser Wilhelm II of Germany, perhaps carried away by the martial emotions of the day, reportedly directed that "every thing must be drowned in fire and blood . . . not a house is to be left, not a tree."[67] Although this declaration was surely rhetorical exuberance rather than a literal command, the German armies engaged in a series of highly-publicized and devastating attacks against cultural properties in Belgium, France, and elsewhere in their prosecution of the war.[68] The 1914 burning of the renowned library at Louvain, Belgium, containing "about 300,000 books manuscripts, scientific collections and works of art, many rare and ancient," provoked international outrage.[69] The 1914 German bombardment and destruction

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[63] *Id.* art. 56.
[64] *Id.*
[65] *See* Keane, *supra* note 30, at 5.
[66] *Id.*
[67] JOTE, *supra* note 18, at 37 (quoting I. ARTSIBANOV, IN DISREGARD OF THE LAW 33 (1982)).
[68] JOTE, *supra* note 18, at 37-38; WILLIAMS, *supra* note 1, at 17; Kastenberg, *supra* note 19, at 286-87; Keane, *supra* note 30, at 6-7.
[69] JOTE, *supra* note 18, at 37-38. This act was denounced in a contemporary American law journal as "the greatest crime committed against civilization and culture since the Thirty Years War—a shameless holocaust of irreparable treasures lit up by blind barbarian vengeance." J.W. Garner, *Some Questions of International Law in the European War*, 9 AM. J. INT'L L. 72, 101 (1915).

of the Rheims Cathedral in France also drew widespread condemnation.[70] Yet, Germany at least superficially acknowledged applicable international law protecting cultural property in the wake of the Rheims debacle. The Germans invoked the principle of military necessity by accusing the French of deploying forces around the cathedral and using its tower as an observation post.[71] Following these public-relations disasters, the German army attached art officers to its units "to protect cultural property under their control."[72] Nevertheless, many churches, museums, and other protected sites were looted in German-occupied territory in the course of the war.[73]

These violations did not pass unnoticed during the Paris Peace Conference and the resulting Treaty of Versailles.[74] Articles 245 and 247 of the Treaty required Germany to return cultural treasures it had acquired from France, Belgium, and other nations during the war, as well as French property seized during the Franco-Prussian War of 1870 and 1871.[75] In addition, Article 247 called for the Louvain collection to be rebuilt.[76] Although no German authorities were tried for offenses against cultural property during the war, the Treaty of Versailles was a strong international statement on the illegitimacy of targeting, destroying, or looting cultural property during war.[77]

Additional international agreements regarding cultural property followed in the years after the First World War. The advent of the warplane and the perception that air warfare might pose unique challenges to existing law governing land warfare led to the Washington Conference, held from December 1922 to February 1923.[78] Although never adopted, Articles 25 and 26 of the resulting draft convention on air warfare sought to protect cultural property by requiring the erection of visible signs on cultural buildings and monuments and the creation of military-free cultural safety zones.[79] In 1935, a number of nations in the Americas signed the Treaty for the Protection of Artistic and Scientific

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[70] JOTE, *supra* note 18, at 38; WILLIAMS, *supra* note 1, at 18.
[71] JOTE, *supra* note 18, at 38. The French denied these allegations and, moreover, asserted the cathedral had been marked by a Red Cross flag in order to protect it. *Id.*
[72] WILLIAMS, *supra* note 1, at 18.
[73] *Id.*; Keane, *supra* note 30, at 6-7.
[74] *See* WILLIAMS, *supra* note 1, at 19; Keane, *supra* note 30, at 7-8.
[75] *Id.*
[76] Keane, *supra* note 30, at 8.
[77] *See* JOTE, *supra* note 18, at 54-55; Keane, *supra* note 30, at 8.
[78] JOTE, *supra* note 18, at 51.
[79] *Id.* at 52.

Institutions and Historic Monuments, a regional agreement better known as the Roerich Pact.[80] The Pact includes the following requirements: "1) to respect cultural property and the persons engaged in its protection; 2) to adopt national legislation that guarantees protection; 3) to adopt a special emblem to identify cultural institutions, and the application of such emblems; 4) to register or prepare a list of protected cultural institutions."[81] The parties further agreed upon the design of a flag to designate protected cultural property.[82] As under pre-existing law, however, military use of cultural property forfeits its protection.[83]

f. The Second World War

The Second World War was a bleak period in the effort to protect cultural property during armed conflict. Cultural artifacts, sites and institutions were looted and destroyed "to an extreme degree," particularly by the German regime.[84] "Germany engaged in a policy of systematic plunder, confiscation and exploitation in complete disregard of Article 56 of the Hague Convention. International law had no effect whatsoever in preventing the wholesale looting of art galleries, churches and museums throughout Europe."[85] Hitler directed the creation of a special organization headed by Alfred Rosenberg—"*Einsatzstab*[86] Rosenberg"—to systematically seize cultural treasures from across Europe and bring them to Germany for the benefit of the regime.[87] The *Einsatzstab* photographed and carefully documented the seized items.[88] The quantities were enormous; records indicate the Germans seized at least 21,903 works of art from Western Europe alone.[89] German conduct on the Eastern Front was even more egregious:

> During the war Nazi Germany, mainly for ideological reasons, treated with exceptional hatred the cultural items most dear to the Soviet people. This resulted in

[80] *Id.*; Detling, *supra* note 41, at 58.
[81] JOTE, *supra* note 18, at 52.
[82] *Id.* at 53.
[83] *Id.*; Detling, *supra* note 41, at 58.
[84] HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 180 (2d ed. 1998).
[85] WILLIAMS, *supra* note 1, at 19.
[86] "Special Purpose Staff." Keane, *supra* note 30, at 8.
[87] WILLIAMS, *supra* note 1, at 26; Keane, *supra* note 30, at 8-9.
[88] WILLIAMS, *supra* note 1, at 25-28.
[89] *Id.* at 26, 28; *see* JOTE, *supra* note 18, at 42.

> the destruction of 427 museums, 1670 Greek Orthodox churches, 237 Roman Catholic churches, 67 chapels and 532 synagogues . . . . From the Ukrainian Socialist Republic alone, 4,000,000 artifacts disappeared while the cultural treasures transferred to Germany filled 40 railway cars.[90]

Selected works were sent to Hitler and Reich-Marshal Goring for their personal collections; others were to be sent to German museums, or held as potential sources of revenue or bargaining chips in future negotiations.[91]

The vast abuses of the German regime were undoubtedly a serious blow to the effort to protect cultural property during armed conflict. However, these abuses led to an important evolution in the enforcement of the protection of cultural property.[92] Prior to the war, the general presumption was that individuals, as opposed to states, were not criminally liable under international law.[93] Yet at Nuremberg, Alfred Rosenberg and other Nazi officials were prosecuted and sentenced to death for, among other offenses, crimes against cultural property.[94]

2. Post-War Developments

Thus, at the conclusion of the Second World War, there existed a generally accepted customary international law outlawing the theft or destruction of cultural property during armed conflict.[95] However, despite the successful prosecution of Rosenberg and others, the failure of existing Hague regulations to prevent the extensive abuses in both World Wars stimulated international efforts to make cultural property protections more specific, relevant, and effective.[96] Several

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[90] JOTE, *supra* note 18, at 41-42.
[91] WILLIAMS, *supra* note 1, at 26-28.
[92] JOTE, *supra* note 18, at 56.
[93] *Id.* (citing H.J. MERRYMAN & A.E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 27 (1979); Merryman, *Two Ways*, *supra* note 46, at 836.
[94] JOTE, *supra* note 18, at 56; WILLIAMS, *supra* note 1, at 28-29; Merryman, *Two Ways*, *supra* note 46, at 35-36. For a summary of the prosecution of Rosenberg, including arguments offered by the defense, *see* Keane, *supra* note 30, at 9-12.
[95] Kastenberg, *supra* note 19, at 288.
[96] JOTE, *supra* note 18, at 57. Through the Second World War, the 1899 and 1907 Hague Conventions were "the only relevant legal instruments" regarding the protection of

developments in the succeeding decades significantly refined international law in this area.

a. The 1954 Hague Convention on the Protection of Cultural Property

On 14 May 1954, under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO), an international conference at the Hague adopted the Convention for the Protection of Cultural Property in the Event of Armed Conflict[97] (1954 Hague Convention).[98] The 1954 Hague Convention was the first comprehensive international agreement for the protection of cultural property.[99] Indeed, the convention brought the term "cultural property" into international legal parlance.[100] Although several major states—including the United States, the United Kingdom, and Japan—have shown relatively little interest in formally adopting it[101] and some of its provisions are impractical,[102] the convention is nevertheless essential to any discussion of contemporary rules governing the protection of cultural property. Therefore, pertinent portions of the convention merit our attention.

The 1954 Hague Convention defines "cultural property" as follows:

> (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest, as well as scientific collections and important collections of

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cultural property. *Id.* at 58. Many felt the existing Hague rules were too bound to archaic distinctions between defended and undefended areas. *See id.* at 57.

[97] 1954 Hague Convention, *supra* note 16.

[98] JOTE, *supra* note 18, at 57-63.

[99] WILLIAMS, *supra* note 1, at 34.

[100] JOTE, *supra* note 18, at 64.

[101] *Id.* at 63. Nevertheless, the majority of its provisions likely constitute customary international law binding on all states. *See infra* notes 129-32 and accompanying text.

[102] *See, e.g.*, FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 50-51 (2001).

> books or archives or of reproductions of the property defined above;
> (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);
> (c) centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as "centres containing monuments."[103]

Thus the convention's concept of protected property includes not only movable and immovable cultural property, but buildings housing cultural property and designated areas of land ("centres") where large amounts of property, museums, and storage facilities are located.[104]

Article 4.1 of the convention enjoins a party from using cultural property, whether on its own territory or that of another party, in a manner likely to expose it to damage or destruction in armed conflict.[105] Article 4.1 further prohibits "any act of hostility directed against such property."[106] However, under Article 4.2, these prohibitions are waived "where military necessity imperatively requires such a waiver."[107] Article 4.3 of the convention requires parties to "prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property."[108] Article 4.5 clarifies that a party is not excused from these requirements should another party fail to take measures to safeguard the property prior to the armed conflict.[109]

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[103] 1954 Hague Convention, *supra* note 16, art. 1.
[104] *Id.*
[105] *Id.* art. 4.1.
[106] *Id.*
[107] *Id.* art. 4.2.
[108] *Id.* art. 4.3.
[109] *Id.* art. 4.5.

Article 5 of the convention specifically addresses military occupation.[110] Article 5.1 states a party occupying the territory of another party "shall as far as possible support the competent national authorities . . . in safeguarding and preserving its cultural property."[111] Personnel engaged in protecting cultural property are, "[a]s far as is consistent with the interests of security," to be respected and permitted to continue their duties should they fall into the hands of an opposing party.[112] In the event such authorities do not exist or are unable to take such measures, Article 5.2 puts the responsibility on the occupier to, "as far as possible . . . take the necessary measures of preservation" for property that has been "damaged by military operations."[113]

Except for those provisions designed to take effect in times of peace, the trigger for the convention's protections is armed conflict between two or more parties, total or partial occupation of a party's territory, or armed conflict between a party and a non-party to the convention which nevertheless declares it will adhere to the convention's provisions and in fact abides by them.[114] In non-international armed conflicts within a party's territory, "each party to the conflict shall be bound to apply, as a minimum, the provisions . . . which relate to respect for cultural property."[115] Pursuant to Article 28, parties agree to take, "within the framework of their ordinary jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit . . . a breach."[116] Article 36 clarifies that the 1954 Hague Convention is supplementary to the 1899 and 1907 Hague Conventions, as well as—where applicable—the Roerich Pact.[117]

The convention includes other provisions—of less significance for present purposes—addressing peacetime measures to safeguard cultural property,[118] training military personnel to respect cultural property,[119] designating special military personnel to work with civilian authorities to protect cultural property,[120] marking protected property with a distinctive

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[110] *Id.* art. 5.
[111] *Id.* art. 5.1.
[112] *Id.* art. 15.
[113] *Id.* art. 5.2.
[114] *Id.* art. 18.
[115] *Id.* art. 19.1.
[116] *Id.* art. 28.
[117] *Id.* art. 36; *see* WILLIAMS, *supra* note 1, at 34.
[118] 1954 Hague Convention, *supra* note 16, art. 3.
[119] *Id.* art. 7.1.
[120] *Id.* art. 7.2.

emblem,[121] detailing the role of UNESCO in assisting parties in implementing the convention,[122] and other matters. In addition to these "general" protections, the convention includes extensive provisions for creating "refuges" for movable cultural property and "centres" containing monuments and other immovable cultural property to be placed under a regime of "special protection."[123] Attaining special protection status requires meeting specific criteria as to location, marking, registration, and refraining from military use.[124] Cultural property that has achieved special protection is "immun[e] . . . from any act of hostility" absent a violation involving that property or "exceptional cases of unavoidable military necessity."[125] In practice, very few sites have been registered for special protection, and the special protection provisions have not been a significant factor in any armed conflict to date.[126]

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[121] *Id.* arts. 6, 16, 17.

[122] *Id.* art. 23.

[123] *Id.* arts. 8, 9, 10, 11; Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, arts. 11, 12, 13, 14, 15, 16, 249 U.N.T.S. 539, *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 301 (2005) [hereinafter 1954 Hague Regulations].

[124] 1954 Hague Convention, *supra* note 16, arts. 8, 10, 11, 12, 13, 14, 15, 16.

[125] *Id.* arts. 9, 11. By implication, the "exceptional cases of unavoidable military necessity" standard applicable to special protection is more restrictive than the "imperative military necessity" standard applicable to general protection. *See id.* arts. 4.2, 9, 11. Although the distinction is far from clear, special protection does at a minimum impose additional procedural requirements. *See* KALSHOVEN & ZEGVELD, *supra* note 102, at 50.

[126] *See* WILLIAMS, *supra* note 1, at 39; Detling, *supra* note 41, at 49; Keane, *supra* note 30, at 16. Worldwide, just one centre and eight refuges—including one refuge in Austria, six sites in the Netherlands, and the entire Vatican City—have been registered as provided by Article 8 of the 1954 Hague Convention. WILLIAMS, *supra* note 1, at 36; Keane, *supra* note 30, at 16. Three of those refuges were subsequently withdrawn in 1994. MARIA TERESA DUTLI, PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: REPORT ON THE MEETING OF EXPERTS (GENEVA, 5-6 OCTOBER 2000), at 41 (2002). One apparent reason for this is the requirement that centres and refuges be located an "adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication." 1954 Hague Convention, *supra* note 16, art. 8.1; *see* DUTLI, *supra* note 41, at 41-42; Keane, *supra* note 30, at 16. The term "adequate distance" is not defined. 1954 Hague Convention, *supra* note 16, art. 8.1; *see* Keane, *supra* note 30, at 16. Another contributing factor is that parties may object to a proposal to register a refuge or center. 1954 Hague Regulations, *supra* note 123, art. 14; Keane, *supra* note 30, at 16-17. When Cambodia

The military necessity exception stated in Article 4.2 is perhaps the convention's most controversial provision, and the most vexing to advocates of protecting cultural property.[127] To be sure, the exception creates a gray area that an absolute prohibition would avoid, and it may limit the effectiveness of the convention.[128] However, protecting cultural property is just one of several competing interests during an armed conflict. Refusing to recognize military necessity, fluid as that concept may be, could render the convention impractical and irrelevant.[129]

To date, 114 states have become parties to the 1954 Hague Convention.[130] The United States is not among them.[131] Disagreement exists as to the degree to which the convention's provisions reflect customary international law; however, the prevailing view is that at least the majority of its substantive provisions qualify.[132] In line with this

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attempted to register the Angor Wat complex in 1992, its application was opposed by several countries on the grounds that the Cambodian government was illegitimate. Keane, *supra* note 30, at 16-17. The site was not registered, and no state has attempted to register a refuge or center since. JOTE, *supra* note 18, at 69; Keane, *supra* note 30, at 17.

[127] *See, e.g.*, JOTE, *supra* note 18, at 66-67 ("In effect, inserting the clause on military necessity causes the warring parties to take the law into their own hands in such a way as to enable them to justify whatever crime they commit by adducing it."); Merryman, *Two Ways*, *supra* note 46, at 838 ("[C]ommanders can be expected to place other values higher than cultural preservation and to translate them into 'military necessity.'").

[128] *See* WILLIAMS, *supra* note 1, at 37.

[129] Claims that the precision of modern weapons renders the military necessity exception unnecessary are ill-founded. *See* Keane, *supra* note 30, at 20. Collateral damage remains a reality of armed conflict, even for forces equipped with the most modern weapons. However, improvements in weapon precision could affect the imperative military necessity analysis. For example, if the means exist to accomplish the objective without damaging cultural property, an imperative military necessity to target or damage the cultural property may not exist.

[130] *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO.ORG, http://portal.unesco.org/la/convention.asp?KO=13637&language=E (last visited Aug. 23, 2007).

[131] *See id.*

[132] *See, e.g.*, DUTLI, *supra* note 126, at 27 ("[T]he basic principles concerning respect for cultural property enshrined in [the 1954 Hague Convention] have become part of customary international law."); KALSHOVEN & ZEGFELD, *supra* note 102, at 48 ("[I]t cannot be said that all of [the 1954 Hague Convention's] substantive provisions are customary."); Geoffrey S. Corn, *"Snipers in the Minaret—What Is the Rule?" The law of War and the Protection of Cultural Property: A Complex Equation*, ARMY LAW, JULY, 2005, at 28, 40 (finding "ample implied support" for the conclusion that the 1954 Hague Convention provisions are customary international law); Kastenberg, *supra* note 19, at 301 ("The 1954 Hague Convention is a reflection of the development of customary international law, and . . . binding law in most of its provisions.").

view, U.S. armed forces have consistently adhered to the convention as a matter of policy.[133]

b. The Additional Protocols to the Geneva Conventions

The Geneva Conventions of 1949, relating to protected classes of persons during armed conflict, did not directly address the protection of cultural property.[134] But the 1977 Additional Protocols to the Geneva Conventions do address cultural property.[135] Article 52 of Additional Protocol I generally prohibits targeting "civilian objects" for attack or reprisal.[136] More specifically, Article 53 prohibits "any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples," as

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[133] *See* Kastenberg, *supra* note 19, at 299-301; Major Larry D. Youngner, TJAGSA Practice Note: *Protection of Cultural Property During Expeditionary Operations Other than War*, ARMY LAW., MAR. 1999, at 25, 26.

[134] *See* Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362 (1949), *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 175 (2005) [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363 (1949), *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 188 (2005) [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364 (1949), *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 199 (2005) [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 6 U.S.T. 3516, T.I.A.S. 3365 (1949), *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 235 (2005) [hereinafter Geneva Convention IV].

[135] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391 (1977), *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 348 (2005) [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391 (1977), *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 391 (2005) [hereinafter Additional Protocol II].

[136] Additional Protocol I, *supra* note 135, art. 52.

well as using such objects "in support of the military effort" or taking reprisals against such objects.[137] On its face, these prohibitions appear categorical, in which case they would constitute a dramatic tightening of restrictions imposed by the 1954 Hague Convention, which provided an exception for imperative military necessity.[138] Some commentators have read Additional Protocol I to attempt such a restriction.[139] However, Article 53 states its provisions are "without prejudice" to the provisions of the 1954 Hague Convention,[140] which expressly provides for the imperative military necessity exception.[141] Thus, the best reading appears to be that Article 53 of Additional Protocol I is merely a restatement of law already provided for in the 1954 Hague Convention and, in all likelihood, customary international law.[142]

c. The Additional Protocol to the 1954 Hague Convention

On 26 March 1999, again under the auspices of UNESCO, an international conference at the Hague produced the Second Protocol to the 1954 Hague Convention.[143] The Second Protocol is expressly supplementary to the 1954 Hague Convention,[144] but it substantially modifies the Convention, notably regarding the oft-criticized imperative military necessity exception and the "special" protection regime.[145] The

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[137] *Id.* art. 53. Article 16 of Additional Protocol II, addressed to non-international armed conflict, essentially mirrors Article 53 of Additional Protocol I in slightly truncated form, omitting the provision prohibiting reprisals. Additional Protocol II, *supra* note 135, art. 16. Article 16 also states that its terms are "without prejudice" to the 1954 Hague Convention. *Id.*

[138] *See* 1954 Hague Convention, *supra* note 16, art. 4.2.

[139] *See, e.g.*, Kastenberg, *supra* note 19, at 298-99 ("[Additional Protocol I] ignores both the exigencies of war, and the principles of necessity and proportionality to an unacceptable degree, and in [sic] contrary to customary international law.").

[140] Additional Protocol I, *supra* note 135, art. 53.

[141] 1954 Hague Convention, *supra* note 16, art. 4.2; *see* MCCOUBREY, *supra* note 84, at 181.

[142] *See, e.g.*, Corn, *supra* note 132, at 38 (Additional Protocols I and II are explicitly supplemental and must be read in harmony with the 1954 Hague Convention); Youngner, *supra* note 133, at 27 (Additional Protocols I and II restate existing principles regarding the protection of cultural property).

[143] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, March 26, 1999, 38 I.L.M. 769 (1999), *available at* http://www.icrc.org/ihl.nsf/FULL/590?OpenDocument [hereinafter Second Protocol].

[144] Second Protocol, *supra* note 143, art. 2.

[145] *See id.* arts. 6, 10, 11, 12, 13, 14. The Second Protocol restricts the invocation of "imperative military necessity" to direct an act of hostility against cultural property to

Second Protocol also adds to a party's responsibilities during military occupation, requiring the occupier to prevent the illicit export, removal, transfer, excavation, or alteration of cultural property.[146] The Second Protocol has been generally applauded by cultural property protection advocates as an improvement on the 1954 Hague Convention.[147] States have adopted the Protocol at a steady rate; however, the total number of parties is still small at this writing, and the Protocol's impact limited.[148] Time will tell how influential the Second Protocol will prove to be.

B. Protection of Cultural Property in Times of Peace

The primary concern at issue in protecting cultural property in times of peace differs from the primary concerns at issue in times of armed conflict.[149] As we have seen, the law of armed conflict is largely concerned with avoiding damage or destruction of cultural property during combat.[150] The peacetime regime, in contrast, largely seeks to protect the common cultural heritage of mankind by restricting the unauthorized excavation, export, import, or other transfer of cultural

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situations where "the cultural property has, by its function, been made into a military objective" and "there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective." *Id.* art. 6. The Second Protocol also requires that such a decision must be made "by an officer commanding a force the equivalent of a battalion in size or larger," if circumstances permit, and "an effective advance warning shall be given whenever circumstances permit." *Id.* The Second Protocol would also replace the system of "special" protection with a system of "enhanced" protection for property "of the greatest importance to humanity," provided domestic laws recognized and protected its "exceptional" status and the state controlling it declares it shall not be used for military purposes. *Id.* art. 10.

[146] *Id.* art. 9.

[147] *See, e.g.*, DUTLI, *supra* note 126, at 29-55 (noting improvements to perceived problem areas in the 1954 Hague Convention); KALSHOVEN & ZEGVELD, *supra* note 102, at 178 (finding the Second Protocol's new system "looks promising"); Keane, *supra* note 30, at 31-32 (finding the changes to the military necessity exception a "clear improvement").

[148] *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO.ORG, http://portal.unesco.org/la/convention.asp?KO=15207&language=E (last visited Aug. 23, 2007). Eleven states became parties in 2005, bringing the total to 37. *Id.*

[149] WILLIAMS, *supra* note 1, at 52.

[150] As previously discussed, international law also seeks to prevent plunder and looting during armed conflict. *See, e.g.*, 1954 Hague Convention, *supra* note 16, arts. 4.3, 5 (requiring parties to prevent theft, pillage, and misappropriation of cultural property, and enjoining occupiers to safeguard cultural property in occupied territory); 1907 Hague Convention, *supra* note 58, arts. 28, 46, 47, 56 (prohibiting pillage and confiscation of cultural property).

property.[151] Contemporary commentators tend to view peacetime cultural property regulation as a contest between, among other things, "source" nations seeking to retain cultural property in their territory on one side and "market" nations and "acquisitors" interested in obtaining such artifacts on the other.[152]

The law of armed conflict generally continues to apply during military occupation, even if active hostilities have subsided. Therefore, the peacetime regime regulating the transfer and transport of cultural property is of less immediate concern to an occupying force than the cultural property provisions of the law of armed conflict. However, as we shall see, an occupying force is responsible for restoring order and, in general, respecting the existing laws of the occupied territory.[153] Therefore, some review of the peacetime regime for protecting cultural property is appropriate.

This regime incorporates a number of elements.[154] International conventions and customary law, regional agreements, bilateral treaties, domestic laws, international law enforcement, and ethical standards for museums and other acquisitors all play a role.[155] This article concentrates on the most prominent international conventions in this area, the 1970 UNESCO Convention[156] and the 1972 World Heritage Convention.[157]

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[151] WILLIAMS, *supra* note 1, at 52.

[152] *See, e.g.*, John Henry Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. INT'L L. & POL. 1 (Fall 1998) (describing the competing interests involved in the regulation of international transfers of cultural property); Merryman, *Two Ways*, *supra* note 46, at 831-33 (describing the world as divided between "source" nations and "market" nations).

[153] *See* 1907 Hague Convention, *supra* note 58, art. 43.

[154] WILLIAMS, *supra* note 1, at 52.

[155] *Id.*

[156] 1970 UNESCO Convention, *supra* note 17.

[157] Convention Concerning the Protection of the World Cultural and Natural Heritage 1972, 16 November 1972, 27 U.S.T. 37, T.I.A.S. 8226 (1972), *available at* UNESCO.ORG, http://portal.unesco.org/en/ev.php-URL_ID=13055&URL_DO=DO-TOPIC&URL_SECTION=201.html (last visited Jan. 27, 2006) [hereinafter 1972 World Heritage Convention].

1. 1970 UNESCO Convention

The removal of artifacts and other cultural property from developing "source" nations to individuals and institutions in more developed "market" nations had long been a feature of the colonial era.[158] As the colonial era drew to a close in the 1960s, trafficking in the cultural property of the former colonies actually increased, heightening the perception that international action was needed.[159] After a decade of proposals and studies, the 16th General Conference of UNESCO adopted the final version of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention).[160] The more pertinent of the Convention's twenty-six articles are described below.

Article 1 defines cultural property as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science" and which fits into one of eleven broad categories.[161] This definition is more restrictive than the 1954 Hague Convention's definition in three significant respects.[162] First, being concerned primarily with

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[158] JOTE, *supra* note 18, at 196.
[159] *Id.*
[160] *Id.* at 196-200.
[161] 1970 UNESCO Convention, *supra* note 17, art. 1. The eleven categories are:

> (a) [r]are collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
> (b) property relating to history . . .;
> (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
> (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
> (e) antiquities more than one hundred years old . . .;
> (f) objects of ethnological interest;
> (g) property of artistic interest . . .;
> (h) rare manuscripts and incunabula, old books, documents and publications of special interest . . .;
> (i) postage, revenue and similar stamps . . .;
> (j) archives, including sound, photographic and cinematographic archives;
> (k) articles of furniture more than one hundred years old and old musical instruments.

Id.
[162] *See id.*; 1954 Hague Convention, *supra* note 16, art. 1.

trafficable—that is, movable—cultural property, the 1970 UNESCO Convention excludes centres, refuges, and other real property intended to shelter cultural property.[163] Second, the 1970 UNESCO Convention requires the property to fit one of eleven categories.[164] Although these categories are quite broad,[165] the 1954 Hague Convention imposed no such limitation, so long as the property was "of great importance to the cultural heritage of every people."[166] Third, and most important, the 1970 UNESCO Convention requires the property be "specifically designated by the State" in order to enjoy protection.[167] This requirement seriously limits the effectiveness of the Convention because "most of the cultural objects in developing countries are located not in museums but on sites and [are] still unexcavated."[168]

Article 2 of the 1970 UNESCO Convention states that "the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin."[169] Therefore, parties to the convention "undertake to oppose such practices with the means at their disposal."[170] Article 3 clarifies that the "import, export or transfer of ownership of cultural property" is "illicit" when "contrary to the provisions adopted under this Convention."[171] For example, Article 6 of the convention requires parties to develop an export certificate that must accompany any article of cultural property to be legitimately exported from the country.[172]

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[163] *See* 1970 UNESCO Convention, *supra* note 17, art. 1; 1954 Hague Convention, *supra* note 16, art. 1; *see also* JOTE, *supra* note 18, at 204 ("[I]t is obvious the scope of the [1970 UNESCO] Convention is limited to movable cultural property.").
[164] *See* 1970 UNESCO Convention, *supra* note 17, art. 1.
[165] *Id.*
[166] 1954 Hague Convention, *supra* note 16, art. 1.
[167] 1970 UNESCO Convention, *supra* note 17, art. 1.
[168] JOTE, *supra* note 18, at 202. In addition, developing countries frequently lack the funds and skilled personnel to seriously undertake the registration of their cultural property. *Id.* at 203.
[169] 1970 UNESCO Convention, *supra* note 17, art. 2.
[170] *Id.*
[171] *Id.* art. 3.
[172] *Id.* art. 6.

Article 11 touches on the military occupation of one country by another.[173] It provides that "[t]he export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit."[174] More generally, Article 13 requires parties, consistent with their own laws, to "prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property."[175]

A total of 109 nations are parties to the 1970 UNESCO Convention, including both Iraq and the United States.[176] At the time it ratified the convention, the United States issued a reservation, a declaration, and a number of understandings regarding certain provisions.[177] These statements have little impact on the particular provisions described above.[178] However, the convention is generally short on specific measures, and some commentators find most of its provisions more aspirational than operational.[179]

2. 1972 World Heritage Convention

On 16 November 1972, the 17th session of the UNESCO General Conference adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention).[180] The purpose of the convention is to identify and protect sites of mankind's cultural and natural heritage around the world that possess "outstanding universal value" from a standpoint of history, art, science, aesthetic value, ethnology, anthropology, science, conservation, or

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[173] *Id.* art. 11.
[174] *Id.*
[175] *Id.* art. 13.
[176] *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO.ORG, http://portal.unesco.org/la/convention.asp?KO=13039&language=E (last visited May 23, 2006). Iraq became a party in 1973, the United States in 1983. *Id.*
[177] *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO.ORG, http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVES (last visited May 23, 2006).
[178] *Id.*
[179] JOTE, *supra* note 18, at 227 (citing P.M. Bator, *An Essay on International Trade in Art*, 34 STAN. L. REV. 371 (1982)).
[180] *See* 1972 World Heritage Convention, *supra* note 157; JOTE, *supra* note 18, at 245.

natural beauty.[181] To this end, the Convention establishes a World Heritage List, a committee to administer the list, procedures to nominate sites for inclusion on the list, other procedures for international cooperation in protecting world heritage, and a World Heritage Fund to support these efforts.[182]

The convention has proven very popular, with 181 nations now party to it.[183] However, it is of limited relevance to the treatment of cultural property during military occupation. Unlike the 1954 and 1970 Conventions, it is not intended to protect cultural *property* per se, but "cultural and natural *heritage*."[184] Moreover, the convention does not

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[181] 1972 World Heritage Convention, *supra* note 157, arts. 1, 2.

[182] *Id.* arts. 5, 7-18, 20-28.

[183] *Convention Concerning the Protection of the World Cultural and Natural Heritage*, UNESCO.ORG, http://portal.unesco.org/la/convention.asp?KO=13055&language=E (last visited Jan. 27, 2006). The United States was the first country to become a party, in 1973. *Id.* The United States, like a small number of other parties, declared it would not be bound by Article 16, paragraph 1, calling for parties to make biannual contributions to the World Heritage Fund. 1972 World Heritage Convention, *supra* note 157, Declarations and Reservations. Iraq became a party in 1974, with the clarification that in doing so it did not recognize Israel in any way. *Id.*; *Convention Concerning the Protection of the World Cultural and Natural Heritage*, UNESCO.ORG, http://portal.unesco.org/la/convention.asp?KO=13055&language=E (last visited Jan. 27, 2006).

[184] *See* 1972 World Heritage Convention, *supra* note 157, arts. 1, 2 (emphasis added). The convention defines "cultural heritage" as

> monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding value from the point of view of history, art, or science;
> groups of buildings: groups of separate buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
> sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

Id. art. 1. "Natural heritage" is defined as

> natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
> geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals

establish any sanctions for states that fail to fulfill their responsibilities.[185] In addition, it does not apply during armed conflict.[186] Nevertheless, two aspects of the convention merit discussion.

Article 4 states that the parties recognize each state's primary responsibility for safeguarding cultural and natural heritage located in its territory.[187] However, under paragraph 3 of Article 6, each party to the convention "undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage . . . situated on the territory of other States Parties to this Convention."[188] On its face, this provision could significantly impact the conduct of armed conflict in the territory of a party—and nearly the entire world is party to the convention.[189] As previously discussed, however, the World Heritage Convention does not apply during armed conflict.

Unlike the 1954 Hague Convention's list of sites entitled to "special" protection,[190] the World Heritage List, like the World Heritage Convention, has proven very popular.[191] A total of 812 sites around the world have been included.[192] To be sure, there is a distinction between cultural sites included on the World Heritage List and cultural property qualifying for protection under the 1907 and 1954 Hague Conventions. In many cases entire cities are on the World Heritage List.[193] Nevertheless, a military force occupying a location on the World

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> and plants of outstanding universal value from the point of view of science or conservation;
> natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

Id. art. 2.
[185] *See* JOTE, *supra* note 18, at 251.
[186] *See id.* at 252.
[187] 1972 World Heritage Convention, *supra* note 157, art. 4.
[188] *Id.* art. 6.
[189] *See Convention Concerning the Protection of the World Cultural and Natural Heritage*, UNESCO.ORG, http://portal.unesco.org/la/convention.asp?KO=13055&language=E (last visited Aug. 23, 2007).
[190] *See* 1954 Hague Convention, *supra* note 16, arts. 8-11; 1954 Hague Regulations, *supra* note 123, arts. 11-16.
[191] *See World Heritage List*, UNESCO.ORG, http://whc.unesco.org/en/list/ (last visited Aug. 23, 2007).
[192] *Id.*
[193] *See id.*

Heritage List should be particularly mindful of the laws of armed conflict protecting cultural property.[194]

III. Military Occupation

A. Military Occupation Generally

International law applicable to military occupation "entails an enormously complex legal framework."[195] A host of applicable regulations address taxation, use of private property, use of public property, respect for customs and religious practices, criminal procedure, legislation, labor relations, and many other subjects.[196] However, the bulk of these provisions have little direct impact on the preservation of cultural property in occupied territories. Below, we consider the conditions under which military occupation exists—in other words, when it begins and when it ends.[197] We then review several provisions of the 1907 Hague Convention, the Fourth Geneva Convention, and the *Department of the Army Field Manual 27-10* (*FM 27-10*) that directly address the treatment of cultural property. These provisions can be grouped into three general categories: the occupier's duty to restore and maintain order; the occupier's responsibilities with respect to public and private property; and the occupier's rights and responsibilities with respect to local laws.[198]

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[194] Three sites in Iraq are currently on the World Heritage List: the ruins of the ancient cities of Hatra (listed in 1985), Ashur (listed in 2003), and Samarra (listed in 2007). *Id.* The Iraqi National Museum is not listed. *Id.*

[195] David J. Scheffer, *Future Implication of the Iraq Conflict: Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 847 (Oct. 2003).

[196] *See* 1907 Hague Convention, *supra* note 58, arts. 42-56; Geneva Convention IV, *supra* note 133, arts. 47-78; U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE paras. 351-48, 539 (18 July 1956) [hereinafter FM 27-10], *reprinted in* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 75-89 (2005)).

[197] *See* 1907 Hague Convention, *supra* note 58, arts. 42, 43; FM 27-10, *supra* note 196, paras. 351, 355, 356, 357, 360, 361.

[198] *See* 1907 Hague Convention, *supra* note 58, arts. 43, 55, 56; Geneva Convention IV, *supra* note 134, arts. 53, 64; FM 27-10, *supra* note 196, paras. 363, 400. In recent years, commentators have observed that the original vision of the drafters of the 1907 Hague Convention regarding occupation is at odds with the growing emphasis on the individual and collective rights of the populations of occupied territories. *See, e.g.*, EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 209-16 (2d ed. 2004) (contending the occupation framework of the 1907 Hague Convention cannot be reconciled with the

B. When Military Occupation Exists

1. Commencement

Article 42 of the 1907 Hague Convention establishes the basic criteria for the existence of a military occupation.[199] It states "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army."[200] Article 42 further provides that "occupation extends only to the territory where such authority has been established and can be exercised."[201] A military occupation may exist even if there was no armed resistance to the invasion.[202]

Field Manual 27-10 echoes this definition and elaborates upon it.[203] The manual notes that the existence of military occupation "is a question of fact,"[204] and "no proclamation of military occupation is necessary."[205]

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expected role of modern government or with the tensions between the interests of the occupier and those of the occupied population). The drafters of the 1907 Hague Convention were concerned with preserving the dormant sovereignty of the state displaced by the occupation. *See id.* at 29 (describing the convention's occupation provisions as a pact among government elites). However, international recognition of individual and communal rights, as opposed to the displaced government's rights, has increased over time. *Id.* at 210. "The fundamental concepts of human rights and self-determination of peoples, which had transformed international law in the latter half of the twentieth century, have not been duly reflected in the constituting documents of the law of occupation." *Id.* at x; *see also* Scheffer, *supra* note 195, at 848-49 (contending occupation law was not designed for transformational occupations such as in post-war Iraq). While this phenomenon is undoubtedly significant to the development of occupation law as a whole, its relevance to the treatment of cultural property is only indirect. It affects primarily the political aspects of military occupation and not, for example, the occupier's obligation to restore and maintain order or rules regarding the use of public property. *See* 1907 Hague Convention, *supra* note 58, arts. 43, 55. The major effect of such developments is likely to be on the *duration* of military occupation by providing for an early transfer of sovereignty that the 1907 Hague Convention drafters may not have anticipated.

[199] 1907 Hague Convention, *supra* note 58, art. 42.

[200] *Id.*

[201] *Id.*

[202] Wolff Heintschel von Heinegg, *The Rule of Law in Conflict and Post-Conflict Situations: Factors in War to Peace Transitions*, 27 HARV. J.L. & PUB. POL'Y 843, 844 (Summer 2004); *see* Geneva Convention IV, *supra* note 133, art. 2.

[203] *See* FM 27-10, *supra* note 196, paras. 351, 355, 356, 357.

[204] *Id.* para. 355; *see also* Jordan J. Paust, *The U.S. as Occupying Power Over Portions of Iraq and Relevant Responsibilities Under the Laws of War* 2 (May 2003), *available at* http://www.nimj.com/documents/occupation.doc (quoting *Department of the Army Pamphlet 27-161-2* and emphasizing that Articles 42 and 43 of the 1907 Hague Convention establish a factual test for military occupation).

The existence of military occupation "presupposes . . . the invader has successfully substituted his own authority for that of the legitimate government in the territory invaded."[206] Paragraph 356 of *FM 27-10* states the occupier "must have taken measures to establish its authority."[207] The number of troops necessary to establish or maintain an occupation will depend on the circumstances, but "[i]t is sufficient that the occupying force can, within a reasonable time, send detachments of troops to make its authority felt within the occupied district."[208] Finally, "[t]he mere existence of a . . . defended area within the occupied district, provided the . . . defended area is under attack, does not render the occupation of the remainder of the district ineffective. Similarly, the mere existence of local resistance groups does not render the occupation ineffective."[209]

2. Termination

Article 42 of the 1907 Hague Convention also establishes the criteria for the end of an occupation; when the territory is no longer "under the authority of the hostile army," the occupation has ended.[210] Perhaps not surprisingly, *FM 27-10* addresses the means of terminating this authority in military terms: the occupation ends when the occupier "evacuates the district or is driven out."[211] Yet, nowadays it seems that the end of this "authority" can also be brought about by political means while the occupying forces remain in place.[212]

The Fourth Geneva Convention somewhat muddies the waters in this area.[213] Article 2 states the convention will cease to apply to occupied territory "one year after the general close of military operations," except

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[205] *Id.* para. 357. *Field Manual 27-10* indicates U.S. policy is, nevertheless, to issue such proclamations. *Id.*
[206] *Id.* para. 355.
[207] *Id.* para. 356.
[208] *Id.*
[209] *Id.*; *see* Heinegg, *supra* note 202, at 859.
[210] 1907 Hague Convention, *supra* note 58, art. 42.
[211] FM 27-10, *supra* note 196, para. 360.
[212] *See* BENVENISTI, *supra* note 198, at ix (observing that United Nations Security Council Resolution 1546 deemed that transfer of sovereignty to an interim Iraqi government by 30 June 2004 would end the military occupation of Iraq). *But see id.* at xv (contending that to the extent foreign forces still wield effective control, they continue to be bound by military occupation law).
[213] *See* Geneva Convention IV, *supra* note 134, art. 6.

for certain articles that apply for the duration of the occupation.[214] This provision applies only to the Fourth Geneva Convention and not, for example, to the Hague Conventions.[215]

C. Obligations of the Occupier

1. Restoring and Maintaining Order

Article 43 of the 1907 Hague Convention provides, "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[216] The requirement to "take all measures in [its] power" sweeps broadly and seems to impose a heavy burden on the occupier to reestablish order.[217] However, the opening clause of the article underscores once again that military occupation is a question of fact, and these responsibilities are not triggered until the occupier "in fact" possesses this authority.[218] *Field Manual 27-10* echoes Article 43, repeating it verbatim at paragraph 363.[219]

Once a military occupation is established, the occupier's chain of command is responsible for deploying troops to establish law and order in areas that come under its control.[220] As noted by a post-Second World War military tribunal:

> A commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing

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[214] *Id.* Articles 1 through 12, 27, 29 through 34, 47, 49, 51-53, 59, 61-77, and 143 continue to apply beyond one year. *Id.*
[215] *See* FM 27-10, *supra* note 196, para. 361.
[216] 1907 Hague Convention, *supra* note 58, art. 43. On a related note, Article 55 declares an occupier is the "administrator and usufructuary" of public buildings in the occupied territory, and it "must safeguard the capital of these properties in accordance with the rules of usufruct." *Id.* art. 55. Although the context suggests the drafters intended to prevent the misuse or plundering of public institutions by the occupying forces, the requirement to "safeguard the capital" of public buildings would, on its face, encompass preventing civilians from looting or destroying such property as well. *Id.*
[217] *Id.*
[218] *Id.*
[219] FM 27-10, *supra* note 196, para. 363.
[220] Paust, *supra* note 204, at 4.

> crime, and protecting lives and property within the area of his command. His responsibility is coextensive with his area of command. He is charged with notice of occurrences taking place within that territory . . . dereliction of duty rests upon him . . . .[221]

Thus, the law of military occupation takes the restoration of order quite seriously.[222]

2. Respecting Private and Public Property

As previously discussed, a number of provisions bear on an occupier's obligation to respect private and public property. At this point, a brief review of these provisions is useful to appreciate the scope of an occupier's obligations under international law. Article 23(g) of the 1907 Hague Convention forbids the destruction or seizure of enemy property unless "imperatively demanded by the necessities of war."[223] Articles 28 and 47 prohibit pillage.[224] Article 46 prohibits the confiscation of private property.[225] Under Article 55, the occupier is "regarded only as administrator and usufructuary of public buildings . . . [and] must safeguard these properties, and administer them in accordance with the rules of usufruct."[226] Article 56 provides that the property of

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[221] *Id.* (quoting United States v. List, et al., 11 TRIALS OF WAR CRIMINALS 757 (1948)).

[222] *See also* BENVENISTI, *supra* note 198, at 11 ("The restoration [of order] process includes immediate acts needed to bring daily life as far as possible back to the previous state of affairs. The occupant's discretion in this process is limited.").

[223] 1907 Hague Convention, *supra* note 58, art. 23(g). The Fourth Geneva Convention substantially echoes this provision: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." Geneva Convention IV, *supra* note 134, art. 53.

[224] 1907 Hague Convention, *supra* note 58, arts. 28, 47. The Fourth Geneva Convention also prohibits pillage. Geneva Convention IV, *supra* note 134, art. 33.

[225] 1907 Hague Convention, *supra* note 58, art. 46.

[226] *Id.* art. 55. "Usufruct" means "the right of enjoying all the advantages derivable from the use of something that belongs to another, as far as is compatible with the substance of the thing not being destroyed or injured." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 2098 (2d ed. 1998). Although Article 55's context suggests the drafters intended to prevent the misuse or plundering of public institutions by the occupying forces, the requirement to "safeguard the capital" of public buildings would, on its face, encompass preventing civilians from looting or destroying such property as well. 1907 Hague Convention, *supra* note 58, art. 55.

"institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property," and "[a]ll seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."[227] *Field Manual 27-10* incorporates each of these provisions verbatim,[228] with additional provisions providing further guidance on these and related matters.[229]

As we have seen, the 1954 Hague Convention on cultural property also contains provisions regarding military occupation.[230] The convention requires parties occupying territory to cooperate with "competent national authorities" in "safeguarding and preserving" cultural property.[231] Where such authorities do not exist or cannot take adequate measures, the occupier should "as far as possible . . . take the most necessary measures of preservation" with respect to property damaged during "military operations."[232] Therefore, whereas the 1907 Hague Convention generally enjoins an occupier from destroying, damaging, or seizing cultural property, the 1954 Hague Convention imposes an affirmative duty to help ensure cultural property is protected from others.

3. Respecting Existing Laws

Article 43 of the 1907 Hague Convention calls upon occupiers to restore and maintain order.[233] However, the convention requires that when doing so, the occupier must "respect[], unless absolutely prevented, the laws in force in the country."[234] The Fourth Geneva Convention substantially echoes this provision with respect to criminal law, stating: "The penal laws of the occupied territory shall remain in force, with the

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[227] 1907 Hague Convention, *supra* note 58, art. 56.
[228] FM 27-10, *supra* note 196, paras. 393 (generally prohibiting destruction or seizure of enemy property absent military necessity), 397 (prohibiting pillage), 400 (occupier is administrator and usufructuary of public property), 405 (preserving cultural property), and 406 (forbidding confiscation of private property).
[229] *See generally id.* sec. V (comprising paragraphs 393 through 417, relating to "treatment of enemy property").
[230] 1954 Hague Convention, *supra* note 16, art. 5.
[231] *Id.* art. 5.1.
[232] *Id.* art 5.2.
[233] 1907 Hague Convention, *supra* note 58, art. 43.
[234] *Id.*

exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention."[235] The Fourth Geneva Convention also establishes extensive rules of criminal procedure for occupiers to comply with.[236]

The drafters of the 1907 Hague Convention likely intended strict military necessity to be the sole basis for changing the existing laws of occupied territories.[237] However, in recent decades the trend has been to afford occupiers greater discretion to make changes.[238] These changes have coincided with a lessening of concern for the prerogatives of the displaced government and increased concern for the individual and communal rights of the population of the occupied territories.[239] Changes made in the interests of increasing individual rights and self-determination are likely to receive a warm welcome in much of the international law community.[240] This trend has reached a new watermark in Iraq, where the United Nations Security Council has in effect endorsed the Coalition's effort to create a new Iraqi government and invest sovereignty in it.[241] However, whatever political changes come about are unlikely to change the regime for protection of cultural property.

IV. Synthesis

A. Cultural Property and Military Occupation

From the foregoing, we can discern at least four possible sources of U.S. responsibility to protect cultural property during a military occupation by U.S. forces.

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[235] Geneva Convention IV, *supra* note 134, art. 64.
[236] *Id.* arts. 64-78. These provisions are incorporated verbatim in *FM 27-10*, with additional provisions that provide additional guidance for U.S. armed forces. FM 27-10, *supra* note 196, paras. 432–48.
[237] BENVENISTI, *supra* note 198, at 14.
[238] *Id.* at 15.
[239] *See id.* at 209-15.
[240] *See, e.g.*, Heinegg, *supra* note 202, at 863-64 (stating that the United Nations Security Council recognizes occupiers can go beyond the traditional occupation law rules); Paust, *supra* note 204, at 23 (stating that United Nations Charter obligations to respect self-determination and human rights override inconsistent treaty obligations).
[241] *See* BENVENISTI, *supra* note 198, at ix n.6.

1. 1907 Hague Convention, Article 43: The Obligation to Restore Order

An occupier "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety."[242] This requirement appears to be the most clearly applicable of those we have reviewed. Although this article is aimed at public disorder and threats to public safety rather than cultural property specifically, it certainly would apply to the looting of the Iraqi National Museum, which was also a breach of public order. Therefore, by the terms of Article 43 of the 1907 Hague Convention, the occupying forces were obligated to stop the looting unless (1) the occupation had not actually commenced, or (2) intervention was impossible or not in the occupier's power.[243]

2. 1907 Hague Convention, Article 55: The Obligation to Safeguard Public Property

As "administrator and usufructuary of public buildings" in the occupied territory, the occupier must "safeguard the capital of these properties."[244] Although the language of Article 55 of the 1907 Hague Convention as a whole suggests the drafters' concern was that the occupier itself might misuse or plunder public buildings or other public resources, the phrase "safeguard the capital" is broad enough to include a duty to protect such facilities from third parties such as civilian looters.[245] Similarly, while an occupier can logically only act as an administrator or "usufructuary" with respect to facilities it has already occupied, Article 55 does not specifically include an actual occupation requirement.[246] Article 55 can be fairly read to require the protection of public buildings and other public resources, even if the occupier does not intend to use them.[247] Undoubtedly, the looting and vandalism of a museum is detrimental to the museum's capital. Assuming the museum is a public building, occupying forces arguably have a duty to prevent the looting, provided that (1) military occupation has begun, and (2) the occupying forces have the means to prevent the looting.[248]

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[242] 1907 Hague Convention, *supra* note 58, art. 43.
[243] *See id.*
[244] *Id.* art. 55.
[245] *See id.*
[246] *See id.*
[247] *See id.*
[248] *See id.*

3. 1954 Hague Convention, Article 5: The Obligation to Take Necessary Measures to Preserve Cultural Property

An occupying power shall "as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property."[249] If such authorities do not exist or are unable to act, the occupier must "as far as possible . . . take the necessary measures" to preserve cultural property "damaged by military operations."[250] Article 5 of the 1954 Hague Convention thus imposes a duty on the occupier to affirmatively protect cultural property in two circumstances. First, if the "competent national authorities" require or request assistance, the occupying forces should "support" them "as far as possible."[251] Second, if the national authorities cannot act, the occupier itself must take the "necessary measures of preservation," but only as to cultural property damaged by the military.[252] The United States is not a party to the 1954 Hague Convention, and it is not clear that this particular provision reflects customary international law,[253] although the U.S. military adheres to the convention as a matter of policy.[254] Regardless, a non-party involved in armed conflict with one or more parties may voluntarily submit to the convention's provisions.[255]

Therefore, Article 5 would require the occupier to act if: (1) the occupier was a party, or voluntarily submitted to, the 1954 Hague Convention, or Article 5 of the Convention reflects customary international law; (2) the competent national authorities either require or request the occupier's support in safeguarding cultural property, or the national authorities cannot act and the cultural property in question has

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[249] 1954 Hague Convention, *supra* note 16, art. 5.1.
[250] *Id.* art. 5.2.
[251] *Id.* art. 5.1.
[252] *Id.* art. 5.2.
[253] *See, e.g.*, DUTLI, *supra* note 126, at 27 ("[T]he basic principles concerning respect for cultural property enshrined in [the 1954 Hague Convention] have become part of customary international law."); KALSHOVEN & ZEGFELD, *supra* note 102, at 48 ("[I]t cannot be said that all of [the 1954 Hague Convention's] substantive provisions are customary."); Corn, *supra* note 132, at 40 (finding "ample implied support" for the conclusion that the 1954 Hague Convention provisions are customary international law); Kastenberg, *supra* note 19, at 301 ("The 1954 Hague Convention is a reflection of the development of customary international law, and . . . binding law in most of its provisions.")
[254] *See* Kastenberg, *supra* note 19, at 299-301; Youngner, *supra* note 133, at 26.
[255] 1954 Hague Convention, *supra* note 16, art. 18.3.

been damaged by military action; and (3) the occupying forces have the means to safeguard the property.[256]

4. 1907 Hague Convention, Article 43, and 1970 UNESCO Convention, Article 13: The Obligation to Respect Existing Law

Although an occupier has a duty to restore and ensure public order, it must "respect[], unless absolutely prevented, the laws in force in the country."[257] The 1970 UNESCO Convention requires parties to "prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property."[258] Therefore, the authority of the government having shifted to the occupier during a military occupation, the occupier would arguably be responsible for enforcing the 1970 UNESCO Convention if the occupied country were a party to the convention. In fact, unlike the previous three provisions, military occupation might not be required if the occupier is also a party to the Convention because Article 13 does not expressly limit its application to a party's own territory.[259] The injunction to "prevent . . . transfers of ownership . . . likely to promote the illicit import or export of [cultural] property" appears broad enough to include a requirement to prevent theft committed with an eye toward selling artifacts on the international black market.[260] The apparent triggers for the occupier's obligation include: (1) that the occupied country, the occupier, or both are parties to the 1970 UNESCO Convention; (2) presumably, that the occupier has the "appropriate means" to prevent the looting; and (3) the cultural property in question meets the definition set forth in Article 1 of the convention.[261]

B. Back to Iraq

With this understanding, we return to the scenario that opened this article—the looting of the Iraqi National Museum in Baghdad in April 2003. Was the United States remiss in its obligations under international law? As discussed, the answer hinges on two distinct, but related, issues:

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[256] *Id.* art. 5.
[257] 1907 Hague Convention, *supra* note 58, art. 43.
[258] 1970 UNESCO Convention, *supra* note 17, art. 13.
[259] *Id.*
[260] *See id.*
[261] *See id.* arts. 1, 13.

(1) whether a military occupation was in effect during the looting; and (2) whether the U.S. forces had the means to prevent the looting.[262]

1. Occupation?

As stated before, military occupation is not a question of intent, but of fact.[263] Article 42 of the 1907 Hague Convention states that "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army."[264] The existence of such authority will necessarily depend on the circumstances.[265] However, *FM 27-10* indicates the occupier has sufficient authority to maintain an occupation if it can send detachments to make its authority felt at a given point, in the occupied district, within a reasonable period of time.[266] The mere existence of pockets of resistance or local insurgents does not nullify a military occupation.[267] However, the occupier "must have taken measures to establish its authority."[268]

It is probably impossible to determine at what point, if any, the United States occupied Baghdad, or at least the vicinity of the Iraqi National Museum, between 9 and 16 April 2003. However, some circumstances support an argument that an occupation began prior to 16 April 2003. The Hussein regime had essentially ceased to function by 9 April 2003, although operations to eliminate resistance in Baghdad continued.[269] However, American investigators found evidence that Iraqi combatants had prepared positions in and around the museum buildings.[270] One source forcefully contends "intense fighting" took place around the museum from 8 April 2003 until the morning of 11 April 2003.[271] For their part, museum officials denied that combatants

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[262] *See* 1907 Hague Convention, *supra* note 58, arts. 42, 43; 1954 Hague Convention, *supra* note 16, art. 5; 1970 UNESCO Convention, *supra* note 17, art. 13. The question of military occupation is likely not controlling in the case of Article 13 of the 1970 UNESCO Convention. 1970 UNESCO Convention, *supra* note 17, art. 13.
[263] *See* 1907 Hague Convention, *supra* note 58, art. 42; FM 27-10, *supra* note 196, para. 355.
[264] 1907 Hague Convention, *supra* note 58, art. 42.
[265] FM 27-10, *supra* note 196, para. 355.
[266] *Id.* para. 356.
[267] *Id.*
[268] *Id.*
[269] CORDESMAN, *supra* note 3, at 112-13.
[270] *See* BOGDANOS WITH PATRICK, *supra* note 9, at 131-33; *Briefing*, *supra* note 6.
[271] BOGDANOS WITH PATRICK, *supra* note 9, at 204-06.

had occupied or fought from the museum.[272] American forces reportedly established a position a few hundred yards from the museum during the looting.[273] "By April 10 and 11, coalition forces had effectively defeated organized resistance in Baghdad and could begin to deploy elements of their land forces toward Tikrit."[274] In any event, Baghdad had fallen by 12 April 2003, four days before American troops entered the museum compound. If organized resistance ended on 10 or 11 April 2003, and the Iraqi regime had effectively collapsed, was the United States in fact exercising authority over Baghdad at that point?

Paragraph 356 of *FM 27-10* indicates the occupier must have "taken measures" to exert authority, but it does not specify what "measures" are necessary.[275] Are the presence of troops and checkpoints in the vicinity sufficient?[276] In any event, *FM 27-10* does not constitute international law. Article 42 of the 1907 Hague Convention, which does represent international law, does not speak of a "taken measures to exert authority" requirement.[277]

2. Means to Prevent?

Assuming *arguendo* that the United States occupied at least the vicinity of the Baghdad museum at some point between 9 and 16 April 2003, did it have the means to secure the museum? Some accounts suggest the United States had insufficient forces to do so.[278] Others contend that sending troops into the museum prior to 11 or 12 April 2003 would have done more harm than good.[279] To be sure, the war was not over yet.[280] However, a number of circumstances suggest the United

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[272] *See id.* at 131-33.
[273] *See* Lawler, *supra* note 9; Rubin & McCaffrey, *supra* note 8.
[274] CORDESMAN, *supra* note 3, at 114.
[275] FM 27-10, *supra* note 196, para. 356.
[276] *See* Lawler, *supra* note 9 (noting reports that American forces permitted looters from the museum to pass checkpoints).
[277] 1907 Hague Convention, *supra* note 58, art. 42.
[278] *See* PURDUM, ET AL., *supra* note 2, at 214. A Marine tank officer recounted he did receive repeated requests to prevent looting, but he had neither enough troops nor orders to do so. *Id.*
[279] BOGDANOS WITH PATRICK, *supra* note 9, at 201-11. Colonel Bogdanos contends Iraqi forces occupied the Museum until 11 April, and that an American attempt to secure the property before that point would have resulted in great damage to the Museum. *Id.*
[280] *See* CORDESMAN, *supra* note 3, at 125.

States might have intervened prior to 16 April 2003 with relatively little impact on its other, ongoing operations.

First, as noted above, by 10 and 11 April organized resistance in Baghdad had effectively ceased and American forces could redeploy towards Tikrit.[281] It is not unreasonable to expect a small contingent of the forces to remain in Baghdad at or near the museum. Second, U.S. forces were reportedly in relatively close proximity to the museum while the looting was going on.[282] Third, the fact that the looting ended when the museum staff returned on 12 April suggests that a major show of force would not have been required.[283] On 12 and 13 April, museum officials asked American officers to move forces to protect the museum.[284] Thus, even if the museum compound had been occupied by Iraqi combatants until 11 April, American forces could have secured the compound with no opposition days before 16 April.[285]

V. Conclusion

Too much uncertainty surrounds the events in Baghdad between 9 and 16 April 2003 to definitively conclude whether U.S. forces complied with international law with respect to the Iraqi National Museum.

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[281] *Id.* at 114.

[282] *See* Lawler, *supra* note 9; Rubin & McCaffrey, *supra* note 8. Afterwards, Mr. Donny George, research director for the museum, complained that a Marine officer refused to move a tank fifty or sixty yards closer to the museum to discourage looting, when asked by a museum employee. Rubin & McCaffrey, *supra* note 8; *see* PURDUM, ET AL., *supra* note 2, at 214.

[283] *See Briefing*, *supra* note 6.

[284] BOGDANOS WITH PATRICK, *supra* note 9, at 207, 210.

[285] *See id.* at 211. Col Bogdanos argues that the occupation of the museum compound by Iraqi forces and fighting in the area until 11 April precluded any American effort to secure the compound prior to 12 April other than by a significant assault which likely would have caused much damage to the museum. *See id.* at 201-12.

> [A]ny suggestion that U.S. forces could have done more than they did to secure the museum before the twelfth is based on wishful thinking rather than on any rational appreciation of military tactics, the reality of the conflict on the ground, the law of war, or the laws of physics.

Id. at 211. However, Col Bogdanos calls the post-12 April delay in securing the museum "inexcusable." *Id.* "Although nothing was taken during this period, that does not make the indictment any less valid—because our forces had no way of knowing that looters wouldn't come back. You can thank the museum staff for guarding the compound for those four days and not the U.S. military." *Id.*

However, based on the foregoing discussion, it appears there is cause for concern. This is particularly true if one phrases the question as "was the United States required to secure the museum sooner than it did"—that is, before 16 April 2003—rather than "should the United States have acted in time to prevent the looting that actually occurred"—that is, sometime before 12 April 2003.[286] The purpose here is not to suggest that strategy or tactics must be driven by the need to safeguard cultural property from looters. The "tail" of protection for cultural property does not wag the "dog" of military operations. Nor is the purpose to cast stones at any of the individuals involved from a vantage point distant in time and space from the events. Nonetheless, what happened to the Iraqi National Museum was unfortunate, and perhaps avoidable. This loss of cultural property representing the shared heritage of the world was the type of incident the drafters of the 1907 Hague Convention, the 1954 Hague Convention, and other provisions of international law hoped or even expected to prevent. Greater emphasis on this area of the law of armed conflict might prevent similar, tragic losses in future conflicts.

[286] *See id.* at 211.

FIRST GEORGE S. PRUGH LECTURE IN MILITARY LEGAL HISTORY[1]

JUDGE ADVOCATES, COURTS-MARTIAL, AND OPERATIONAL LAW ADVISORS

Lieutenant Colonel (Ret.) Gary Solis, USMC[2]

I. Introduction

I am proud to be the first Major General (MG) George S. Prugh Memorial Speaker. General Prugh's leadership, scholarship, and friendship extended to all—even to Marines.

In 1990, I had recently retired from active Marine Corps duty. I was living in London, where my wife, a U.S. Navy civilian employee, had been transferred. I was a new Ph.D. candidate in the Law Department of The London School of Economics and Political Science. My dissertation topic was an examination of whether the Uniform Code of Military Justice (UCMJ) adequately meets the 1949 Geneva Convention requirement to seek out and try those who commit grave breaches of the law of armed conflict.

Separated from my Marine Corps support group, and not yet familiar with the few local Navy judge advocates (JAs), I wanted someone familiar with American military law to talk to about my direction and sources. Among other resources, I was working with articles and a book written by General Prugh. Having just written my own book on military law in Vietnam, his was a familiar name. In 1991, gathering my nerve, I cold-called General Prugh at his California home. On both personal and substantive levels, he could not have been more helpful. I knew how competent he was. What I didn't know, or expect, was how personable

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[1] This is an edited transcript of a lecture delivered on 18 April 2007 by Lieutenant Colonel (Ret.) Gary Solis to the members of the staff and faculty, distinguished guests, and officers attending the 55th Graduate Course at The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia. The chair is named in honor of MG George S. Prugh (1920-2006).

[2] 2006-2007 Scholar in Residence, Law Library of the Library of Congress; Professor of Law, U.S. Military Academy (Ret.); Adjunct Professor of Law, Georgetown University Law Center; J.D., University of California, Davis; LL.M., George Washington University School of Law; Ph.D., The London School of Economics & Political Science.

and kind he would be to an unknown Marine. What I didn't initially appreciate was his deep and broad legal scholarship.

Throughout the next two years, as I wrote my dissertation I phoned him several times, each call received with graciousness. I mailed him my most troublesome chapter, which he returned with perceptive and helpful comments. When I finally defended my dissertation before five glowering British law professors gathered from throughout the Kingdom, they told me that my dissertation was screwed up in significant ways—but none of them involved the guidance or advice of George Prugh! (After some sanding and polishing I squeaked through my second exam.)

I was privileged to know General Prugh. I hope that somewhere today he's smiling, pleased to see one of his acolytes honoring his memory by discussing legal history.

I'm going to talk about one Marine JA's case in Iraq, and about other instances in which military lawyers have been court-martialed. Some of my historical trial examples relate directly to the JA's performance of duty, some to unrelated misconduct. Each case is instructive and cautionary. Santyana urged us to understand history lest we repeat it. I suspect that we repeat history, regardless, but these cases have an import and resonance beyond their sometimes tawdry facts. Perhaps our understanding them *will* prevent their repetition. They provide a chart by which we can navigate the shoals of military lawyering. Not often do we encounter misconduct, criminality, or culpable negligence in our ranks. But the cases that I recount are reminders that professional and personal disaster can be one misjudgment away.

Marine Corps Captain (Capt) Randy W. Stone stands accused of dereliction of duty for events in Haditha, Iraq. We know the broad outline of what happened in Haditha. But how did Capt Stone, the battalion's operational law advisor, become an accused? What does his charging suggest for those of you who may soon find yourselves in a combat zone? Is there something you should be doing, right now, to ensure that his fate isn't yours? Is there some law or regulation that you should re-read? UCMJ, Article 31(b), for instance?

II. The Judge Advocate General of the Army on Trial

Before considering Capt Stone's case, let's recall that his is far from the first case to come before the military bar. Through the years many military lawyers, American and foreign, have run afoul of the law, domestically and internationally.

General Prugh was the twenty-eighth Judge Advocate General (JAG) of the Army and, needless to say, he was never the subject of a court-martial. Brigadier General (BG) David G. Swaim, the eighth JAG of the Army, was court-martialed in November 1884.

Appointed JAG of the Army in 1881, when he was but a major, General Swaim negotiated a personal promissory note receivable with civilian bankers, knowing the promissory note was not actually due him. Four specifications of conduct unbecoming an officer was the charge, in violation of the sixty-first Article of War. A second charge of neglect of duty (Article 62) related to Swaim's allegedly having obligated Army pay accounts as security for a loan to a friend, one Lieutenant Colonel Narrow. The impressive court-martial panel included MG John M. Schofield as president; BG Alfred Terry, who was Custer's commander at the Little Big Horn; BG Nelson Miles who, four years later would be Commanding General of the Army; and BG Samuel Holabird. The panel of thirteen was rounded out by another three BGs and six colonels.

After fifty-two trial days, General Swaim was found guilty of charge one and sentenced to suspension of rank, duty, and pay for three years. In that era, the reviewing authority for the convictions of all officers was the President of the United States.[3] Also, court-martial results that dissatisfied the convening authority could be returned to the court for revision which, in practice, meant either that "not guilty findings" be changed to "guilty," and/or an upward revision of the sentence.[4] Finally, after the case was returned to the panel for revision not once but twice (!) President Chester Arthur reluctantly approved a sentence of suspension from rank, duty and *half* pay for *twelve* years. Arthur was dissatisfied

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[3] COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 459-62 (2d ed. 1920) (1886). Article 108 of the 1874 Articles of War states, "No sentence of a court-martial, either in time of peace or in time of war, respecting a general officer, shall be carried into execution, until it shall have been confirmed by the President." *Id*. at 459.

[4] *See id*. at 454-59 (providing an account of proceedings in revision, provided for in regulations of the Navy, 1870). The Supreme Court approved the practice in *Ex parte* Reed, 100 U.S. 13 (1879).

that, despite his sending it back twice, the sentence included no kick—no dismissal. That being the case, Swaim remained the JAG of the Army, despite being unable to exercise any portion of his duties—effectively rendering the office of the JAG vacant for twelve years.

Swaim continued to seek vindication and, nine years later, the remaining portion of his sentence was remitted and he was retired, much to the relief of Guido Norman Lieber, who had been the acting JAG for nine years—on colonel's pay. Lieber was then promoted and appointed Judge Advocate General of the Army.[5] (Lieber was the son of Francis Lieber, author of *Army General Orders 100*, the *Lieber Code*.)[6]

III. Hell-Roarin' Jake

Students of military history (and the law of war) are familiar with the 1902 general court-martial of Army BG Jacob H. Smith. In 1901, Smith commanded Army and Marine Corps troops on the island of Samar during the 1899-1902 U.S.-Philippine War. Samar had proven a difficult area to subdue—the *insurrectos*, a battle-hardened lot, not given to observing the law of war, such as it was. Smith, "a short, wizened sixty-two-year-old who had earned the nickname 'Hell-Roarin' Jake,'"[7] who was seriously wounded at Shiloh and who had spent twenty-seven years in grade as a captain, was determined to succeed where his predecessors had failed and quell all enemy resistance. General Smith summoned Marine Major (Maj) Littleton Waller, who was about to initiate a patrol against the *insurrectos*. According to his charge sheet, before witnesses General Smith told Waller, "I want no prisoners. I wish you to kill and burn. The more you kill and burn, the better you will please me. The interior of Samar must be made a howling wilderness." He added that he wanted all persons killed who were capable of bearing arms: anyone ten years of age or older.[8]

Referred to a general court-martial when his statements became public, Smith already had a record marred by not one, but two prior

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[5] THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, at 79-83 (1975). Shamefully, no author is credited.

[6] *See* Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1863), *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Tomas eds., 3d ed., 1988).

[7] MAX BOOT, THE SAVAGE WARS OF PEACE 120 (2002).

[8] LEON FRIEDMAN, THE LAW OF WAR: A DOCUMENTARY HISTORY 801 (1972).

general court-martial convictions! Five years before, he had been saved from dismissal from the Army pursuant to a court-martial sentence only by the intervention of President Grover Cleveland. This time, Smith was convicted merely of conduct to the prejudice of good order and discipline and was merely ordered retired.[9]

These facts are widely known, but it is usually overlooked that in 1869, as a brevet major, Smith had a four-year appointment as an acting JA.[10] He was not a law school graduate. (Neither were most Supreme Court justices of that day.)[11] Smith's efforts to make his appointment permanent were derailed by still other misconduct that, although recommended for court-martial, he escaped with no more than a poor efficiency report.[12]

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[9] Adjutant Office Documents, File 309120 (1901); Record Group 94; National Archives at College Park, College Park, MD.

[10] U.S. WAR DEPARTMENT, THE MILITARY LAWS OF THE UNITED STATES 1915, para. 194 (5th ed. 1917).

> 469. Acting judge-advocates . . . shall be detailed from officers of the grades of captain or first lieutenant of the line of the Army, who, while so serving, shall continue to hold their commissions in the arm of the service to which they permanently belong. Upon completion of a tour of duty, not exceeding four years, they shall be returned to the arm in which commissioned . . . .

Id. Colonel Winthrop describes the duties of a judge advocate of that day: "The designation of 'judge advocate' is now [1896], strictly, almost meaningless; the judge advocate in our procedure being neither a judge, nor, properly speaking, an advocate, but a prosecuting officer with the added duty of legal adviser to the court, and a recorder." WINTHROP, *supra* note 3, at 179.

[11] On the 1869 Court, although several Justices had privately studied law before their appointments to the Court, only Justice Benjamin Curtis was a law school graduate. Neither Chief Justice Chase nor any of the other Justices were. This is unsurprising, considering how very few law schools there were in early America. One of the last Supreme Court Justices not to have graduated from law school was Justice Robert Jackson, Chief Prosecutor at the post-World War II Nuremberg International Military Tribunal.

[12] David L. Fritz, *Before the 'Howling Wilderness': The Military Career of Jacob Herd Smith, 1862-1902*, MIL. AFFAIRS 186-90 (Dec. 1979).

During the war in the Philippines, at least eight Army and Marine Corps officers were court-martialed for acts constituting war crimes, in most instances for subjecting prisoners to the "water cure," a variation on today's "waterboarding." Among the most notorious of the convicted officers was Army Captain (CPT) Edwin Glenn who, besides torturing prisoners, was alleged to have burned to the ground the town of Igbaras while still occupied by its 10,000 inhabitants. Glenn was the JA of the island of Panay, even while committing the war crimes of which he was convicted.[13]

IV. Judge Advocate War Criminals

We hardly have time to detail all the JAs, flag or otherwise, who have been court-martialed, but a few additional cases merit our attention, some of the cases far more serious than that of Generals Swaim and Smith.

World War II's International Military Tribunals (IMTs) in Nuremberg and Tokyo were where the highest leaders of the Nazi and Japanese war-making machines were tried. Some of us are also familiar with Nuremberg's "Subsequent Proceedings."

In the European Theater immediately following the War, the Allied powers established a "Control Council" in Berlin, essentially a government of occupation. Berlin was divided into four sectors: the American, British, French, and Russian. The arrest and trial of suspected Nazi war criminals was high among the concerns of the allies. One of the first Control Council edicts was Law No. 10, establishing procedures for the prosecution of war criminals other than the twenty-four about to be tried by the IMT at Nuremberg. Control Council Law No. 10 provided that "[e]ach occupying authority, within its Zone of Occupation, (a) shall have the right to cause persons within such Zone suspected of having committed a crime . . . to be arrested . . . [and] brought to trial before an appropriate tribunal."[14] United States tribunals would consist of three judges and an alternate, all civilian lawyers and

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[13] MOORFIELD STOREY & JULIAN CODMAN, SECRETARY ROOT'S RECORD: "MARKED SEVERITIES" IN PHILIPPINE WARFARE 62 (1902). Glenn's sentence was a fine of fifty dollars and suspension from duty for one month, a risible sentence reflecting the military court's permissive view of the water cure. Glenn was subsequently promoted to major. *See id*.

[14] Control Council L. No. 10, art. III 1 (Dec. 20, 1945).

judges brought from the United States especially for the tribunals. The crimes to be charged at the Subsequent Proceedings were, with some variation, the same as those tried by the IMT: crimes against peace, war crimes, crimes against humanity, and conspiracy. Uniquely, the tribunals would group classes of defendants—Nazi doctors who had committed war crimes, jurists who had perverted justice in the name of National Socialism, government ministers, industrialists, and members of the Nazi military high command. Each category of criminality, with groups of accused in each trial, would be jointly tried. German defense lawyers were hired and paid for by the United States. There was a real effort to achieve fairness.

From August 1946 through April 1949, twelve "Subsequent Proceedings," were tried. The chief prosecutor was Army BG Telford Taylor, formerly a senior prosecutor in the Nuremberg IMT, and later the Dean of Columbia University's School of Law.

Perhaps the most significant of the Subsequent Proceedings was "The High Command Case," the defendants being Field Marshall Wilhelm von Leeb and thirteen other Nazi general officers. One of the thirteen was Lieutenant General Judge Advocate (*Generaloberstabsrichter*) Rudolf Lehmann, JAG of the OKW—the High Command of the German Armed Forces.[15] Lehmann had executed no POW. He commanded no extermination camp. He was perfidious on no World War II field of battle. But he was no less a military criminal.

In a perversion of his military and legal training, Lehmann had contributed substantial staff legal work to High Command plans for the invasions of Denmark, Norway, Greece and Yugoslavia. He contributed the legal gloss to the infamous Commissar Order, directing the summary execution of captured Russian political officers. He reviewed and wrote portions of the Barbarossa Order, ordering the summary execution of captured guerillas, partisans, or civilian suspects, and directing the execution of 100 Communists for each German Soldier killed. He played a leading role in writing the *Commando Order*, which directed the summary execution of any Allied Soldier captured behind Nazi lines or in any commando operation. He was a lead staff officer in creating the

[15] U.S. v. Wilhelm von Leeb ("The High Command Case"), vols. 10 and 11, TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS (1951).

Nacht und Nebel (Night and Fog) Order, directing the arrest, secret removal, and execution of civilians suspected of resistance or sabotage.[16]

We know as Field Manual 27-10, *The Law of Land Warfare*, states in paragraph 502, that obedience to orders is not a defense to war crime charges. Unlawful orders, if obeyed, render the subordinate as well as the senior guilty. Moreover, staff officers who knowingly pass on unlawful orders are subject to the same prosecution, conviction and punishment as the officer issuing the orders. It's the simple criminal law concept of principals, aiders, and abettors, found in both the common law and in civil law. Lehmann, who never fired a round in anger and never laid eyes on an enemy, was convicted of crimes against peace, crimes against humanity, and war crimes. He was sentenced to seven years confinement. The world will never know how many murders, and worse, might be laid at his feet. Seven years was a small price for the criminality of a senior Nazi JA.

In 1942, MG Shigeru Sawada was the Commanding General of the Japanese Imperial 13th Expeditionary Army in China. Eight Doolittle raiders were captured by his troops after their thirty seconds over Tokyo (and, in some cases, Nagoya, Kobe, and Osaka). While Sawada was visiting the front, 300 miles away from his Shanghai headquarters, the eight U.S. Army fliers were court-martialed. In a two-hour "trial," the Americans were not allowed to enter a plea, there was no defense counsel, no witnesses, and no evidence was offered. All eight were found guilty and sentenced to death. Tokyo confirmed three of the death sentences and, without explanation, ordered that five be commuted to life imprisonment. Three weeks after the court-martial General Sawada returned to his headquarters, where he was given a record of the trial to review. Sawada put his chop on the record, then went to Nanking, where he protested the death sentences as being too severe to the Commanding General of China Forces. But Imperial Headquarters trumped officers in the field. The three Americans were executed.

At a 1946 U.S. military commission, General Sawada was convicted of

> knowingly, unlawfully and willfully and by his official acts cause eight named members of the United States forces to be denied the status of Prisoners of War and to be tried and sentenced . . . in violation of the laws and

[16] *Id.* vol. 10 at 13-48 and vol. 11 at 690-96.

> customs of war . . . . [t]hereby causing the unlawful death of four of the fliers and the imprisonment of the others . . . .[17]

The same military commission convicted Lieutenant Wako Yusei, a JA, of being the judge at the bogus court-martial, and convicted JA Second Lieutenant Okada Ryuhei of being a member at the trial. The military commission record reads that they "unlawfully tried and adjudged the eight fliers under false and fraudulent charges without affording them a fair trial . . . counsel, or an opportunity to defend . . . ."[18] The military judge was sentenced to nine years confinement, the court member to five.

Each time I read the Sawada case, I think of the present star-crossed Guantanamo military commissions, and the ethical minefield they are. I do not equate them with the proceedings described in Sawada, but I wonder what history's assessment of the lawfulness of the Guantanamo proceedings, and the involvement of their senior participants, will be.[19]

V. Judge Advocates and Heroes

There no doubt were JAs prosecuted during the Vietnam War, but I'm unaware of them. Rather, when I think of JAs in Vietnam I recall the lieutenant and captain lawyers of the 3d Marine Division who served as combat platoon leaders and company commanders when there was a critical shortage of junior infantry officers.[20] The JA-infantrymen were all volunteers, all performed well, and some were notably valiant. None were killed, although two earned Purple Hearts. Eleven were awarded Bronze Stars, one the Silver Star. First Lieutenant (1st LT) Mike Neil was eighteen months out of law school when he led his surrounded platoon in an all-night battle, including hand-to-hand fighting, against a North Vietnamese battalion. Lieutenant Neil, later a Marine Corps

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[17] U.N. WAR CRIMES COMMISSION, 5 LAW REPORTS OF TRIALS OF WAR CRIMINALS, CASE NO. 25, TRIAL OF LIEUTENANT-GENERAL SHIGERU SAWADA AND THREE OTHERS 1 (1948).
[18] *Id.*
[19] Some suggest that they, and others, including civilian government lawyers, may be subject to war crime charges. *See* Scott Horton, When Lawyers Are War Criminals, Remarks at the American Society of International Law's Centennial Conference on the Nuremberg War Crime Trial (Oct. 7, 2006).
[20] LIEUTENANT COLONEL GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 93-96 (Government Printing Office 1989).

Recruit Depot trial counsel, earned the Navy Cross that night. One of his squad leaders, Corporal (Cpl) Larry Smedley, was posthumously awarded the Medal of Honor.[21]

In two of his books, Colonel (COL) Fred Borch, your Army JAG Corps Regimental Historian and Archivist, has documented the combat intrepidity of many Army JAs in Vietnam. As COL Borch notes, more than 350 Army JAs served in the field, often with combat units.[22] One of those JAs, CPT Howard R. Andrews, Jr., was initially an enlisted artilleryman with the 101st Airborne Division. He received a direct commission and proved himself a skilled JA. He was killed in action on 17 April 1970—thirty-seven years ago, yesterday—when the helicopter he was aboard crashed on takeoff, the only JA of any armed service killed in the Vietnam War.[23]

VI. Judge Advocates . . . Not

Another Vietnam-era JA should not go unmentioned. He was not a combatant lawyer in the mold of 1st Lt Neil or CPT Andrews. His case bears no international significance, but "Doc" Harris was one of a kind.

In 1969, Stephen P. Harris was a twenty-three-year old Marine Lance Corporal (LCpl) in San Diego's active Reserves. He was called "Doc" because he had the distinction of holding a doctorate from The University of London. The Vietnam War's conclusion was not in sight and, given the constant need for officers and his prestigious degree, LCpl Harris was pressed to apply for a commission. "Give us your college transcript and that Ph.D. certificate and you're on your way to Quantico," his C.O. [commanding officer] must have told him. No problem! In truth, Doc was very intelligent and—years ahead of his time—had real skills in desktop publishing. Within days, Doc produced both a transcript and doctorate. Doc was ordered to OCS [Officer Candidate School] and, in January 1973, was commissioned a second lieutenant of Marines. They weren't fools at Headquarters Marine Corps. At The Basic School, Doc let slip that, while at San Diego, he had completed law school at night. The 1968 Military Justice Act's requirement for military lawyers

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[21] *Id.* at 83.
[22] COLONEL FREDERIC L. BORCH III, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA, 1959-1975 60 (2003).
[23] *Id.* at 101-02.

for both parties at all levels of court-martial was straining JA recruiting efforts. Doc's Basic School platoon commander told Doc that he *would* go to Naval Justice School. "Just show us that J.D. and a bar certificate and you're on your way to Newport." No problem! Within days, Doc produced both a law degree and a New York state law license. Doc was ordered to Newport following his May Basic School graduation. They weren't fools at Headquarters Marine Corps.

He was in a class of fifty-five, including some notable Marines: Capt Jim Terry, later a colonel (Col), became Legal Advisor to General Colin Powell and, after retirement, is Chairman of the Veteran Administration's Board of Veterans' Appeals. Captain Jim Cathcart was later the SJA, 1st Marine Division, and then the Marine Corps' senior defense counsel. Captain Tom Meeker was later President of Churchill Downs, until retiring after last year's Kentucky Derby. Colonel Walter Donovan would soon make flag rank and become Staff Judge Advocate (SJA) to the Commandant—the Marine Corps' senior lawyer. Justice School graduation was in December 1973. Navy Lieutenant Rick Block was class honor man. Marine Lieutenant Colonel (LtCol) Jack Fretwell was number two. Colonel Walter Donovan was number four. The number three graduate: 2nd LT "Doc" Harris—whose commissioning date was back-dated three years for his time in law school, making him a captain nine months later.[24] They weren't fools at Headquarters Marine Corps.

Assigned to the 2d Marine Division, Doc was a notably successful trial counsel. The SJA said Doc was one of his best. Doc's wife, with whom he took occasional long-weekend trips to Geneva, was in Chicago at Northwestern University's medical school. (Doc usually made their plane reservations from the SJA's office.) Her medical school explained why no one had met her—and why Doc was entitled to BAQ at the "with-dependents" rate. Doc was a generous player in the Band of Brothers, giving the SJA a luxuriously expensive leather office chair. Every JA in the office received a leather briefcase and Montblanc fountain pen—bounty from the company that Doc's father owned, and in which Doc was still on retainer.

In late 1975, suspicious sorts opined that, at age twenty-nine, Doc was young to have accomplished so much. Colonel, later Brigadier

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[24] U.S. MARINE CORPS, COMBINED LINEAL LIST OF OFFICERS ON ACTIVE DUTY IN THE MARINE CORPS, 1 JANUARY 1973, at 109 (1973).

General (BGen), Jim King initiated an investigation. They weren't fools at Headquarters Marine Corps. The Naval Investigative Service questioned Doc, checked his documentation, and concluded that all was well. Stephen P. Harris had indeed been admitted to the New York bar—but wait! In 1953? Doc calmly assured Col Spence[25] that it was just a scrivener's error and, given a few days' leave, he would square it away. Granted. Doc drove a classic vintage Bentley automobile, recently purchased with funds borrowed from the credit union—on the strength of the Bentley's title, which Doc produced for them. Doc fired up the Bentley and drove to California. With his wife.

A month later, well beyond his leave period, at the Tijuana border crossing Mexican police handed over Doc to Camp Pendleton authorities. He had been found walking in the Baja California desert, naked and badly sunburned, reportedly with a rope around his neck. Doc related that hitchhiking Mexican bandits had stolen his clothes, money, Bentley, and wife. But, attractive as his story was, the jig was up. They weren't fools at Headquarters Marine Corps. Doc Harris was transported to the Quantico brig. In fact, Doc had but two years of junior college, no college degree, no law degree, no doctorate, no title to the never-located Bentley, and no wife.

On 20 January 1976, pursuant to pleas of guilty, Doc was convicted by general court-martial of a one-month unauthorized absence, two specifications of false official statement, two specs of larceny, one spec of wrongful appropriation, one spec of uttering a false check, and a false claim. He was sentenced to dismissal, loss of all pay and allowances, and three years confinement. On appeal, Doc argued the court's lack of jurisdiction in that the Marine Corps had been grossly negligent in failing to uncover his frauds. Sentence unanimously affirmed.[26] The moral of Doc's story? A Marine Lance Corporal can do anything he sets his mind to.[27]

No court-martial is a laughing matter, particularly to the accused. But to those who have participated in many trials, a few inevitably stand out as less tragic than others. Doc Harris's case, juxtaposed to that of

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[25] Colonel Spence was Doc's SJA at the time.
[26] United States v. Harris, 3. M.J. 627 (N.C.M.R. 1977).
[27] I am indebted to my friend, LtCol (Ret.) Ben Cero, USMC, for this moral of the Harris affair.

Marine JA Capt Jeffrey C. Zander, illustrates the difference between lighter cases and darker.

Jeffrey Zander was born on the fourth of July, 1955. His younger brother was a 1982 graduate of West Point.[28] Jeffrey Zander enlisted in the Marine Corps, rose to the grade of staff sergeant, and earned a college degree. He shifted to the Reserves and enrolled at Brigham Young Law, from which he graduated in 1987. Law school on the GI bill with two kids was tough—and the bar review course tougher. So Zander skipped the bar review—and the bar exam, as well. But he did want to be a JA. Following law school and before returning to active duty, he was temporarily assigned to the Marine Corps' Twentynine Palms law center. He found a California lawyer named James Zander in Martindale-Hubbell. Jeffrey pulled a name change decree from legal assistance files and doctored it to indicate that James had changed his name to Jeffrey. The Los Angeles bar office was pleased to give "James" a new bar card in his new name, Jeffrey.

While he was at it, Jeffrey doctored a DD-214 discharge certificate, awarding himself Marine Corps jump wings, a Humanitarian Service Medal, Combat Action ribbon, Purple Heart, Bronze Star (with V device), and the Antarctica Service Medal (with the coveted "Wintered Over" device). With an imaginative flourish, he added a French *Croix de Guerre*—the first American Marine given that award since 1917.[29] Like Doc Harris, Capt Zander was an outstanding student. He did well at The Basic School, and was first in his Naval Justice School class.[30] He went on to serve in Japan and Hawaii, garnering excellent fitness reports—OERs [officer evaluation reports] in Army parlance—and he was selected for the government-funded LL.M. program. They weren't fools at Headquarters Marine Corps. Asked about his *Croix de Guerre*, that recognized his heroism in the 1975 evacuation of Saigon, Capt Zander modestly explained that it was "only a third degree" *Croix de Guerre*.[31] But at Kaneohe Bay, a Marine client he defended alleged that Capt Zander had mishandled his court-martial. A *pro forma* inquiry into the allegation discovered a doctored record of trial and missing trial tapes,

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[28] BICENTENNIAL REGISTER OF GRADUATES, UNITED STATES MILITARY ACADEMY 4-711 (2002).
[29] Lincoln Caplan, *The Jagged Edge*, ABA J. 52 (Mar. 1995).
[30] Telephone Interview, Brigadier General James Walker, USMC (Mar. 18, 2007). As a captain, BGen Walker, who was first in his own Justice School class, recognized Capt Zander's wall-mounted certificate, and briefly discussed it with him.
[31] Telephone Interview with Col (Ret.) Kevin Winters, USMC (Mar. 15, 2007).

strongly implicating Zander.[32] The NCIS called the California bar where, several years previously, a puzzled James Zander had changed his bar membership back to his own name, erasing Jeffrey's. Captain Zander's LL.M. orders were cancelled and a general court-martial convened.

Tried judge-alone from July to September 1994, Capt Zander pleaded guilty to a false official statement, twenty specs of conduct unbecoming, and two of wearing unauthorized awards. His sentence of seven years, all pay and allowances, and dismissal, was reduced by a pretrial agreement to dismissal, lesser forfeitures, and 120 days [confinement].[33]

Say what you will about Doc Harris, he consistently resisted assignment as a defense counsel. He only prosecuted. Captain Zander's three-year courtroom backtrail was littered with defense cases that the Navy-Marine Corps Court of Criminal Appeals (N-MCCA) had to clean up. He had defended twenty Marines, winning acquittals in two cases. Eventually, two still-imprisoned clients were released, and thirteen bad conduct discharges were set aside with re-trials ordered.[34]

The Harris and Zander cases remain embarrassments to the Marine Corps and to the JA community. I've never met Doc Harris, but he strikes me as an interesting guy to have at the poker table, felony conviction and all. Jeffrey Zander, on the other hand, lied to the detriment of (literally) defenseless young Marines. Zander's clients might have been convicted even if defended by Mr. Charles Gittins—who was Zander's court-martial defender. But maybe they would not have been. Moreover, Capt Zander, who had eight years enlisted service in which to absorb the military ethos, lied about core aspects of what we all share and value as Soldiers and Marines: combat, and selflessness, and valor.

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[32] Rowan Scarborough, *Marine Captain Accused of Impersonating Lawyer*, WASH. TIMES, June 8, 1994, at A1.
[33] U.S. v. Zander, 46 M.J. 558 (N-M. Ct. Crim. App. 1997).
[34] Rowan Scarborough, *Great Pretender, Marines Plea Bargaining*, WASH. TIMES, Aug. 17, 1994, at A4. This article indicates that Zander served as defense counsel in twenty-three cases but the record of trial indicates twenty. The lesser number is used here.

VII. Trials and Non-Trials

What can one say about the U.S. Air Force in its hour of JA troubles? Major General Thomas Fiscus, JAG of the Air Force, NJP'd, demoted to colonel, and forced to retire after revelations of fraternization, conduct unbecoming, and obstruction of justice involving sexual affairs with more than two dozen enlisted women, officers, and civilian employees.[35] And Col. Michael Murphy, Commanding Officer of the Air Force Legal Operations Agency, former general counsel for the White House Military Office and former Commandant of the Air Force JAG School, recently discovered to have been permanently disbarred in both Texas and Louisiana in 1984.[36] Resolution of his case is pending.

But neither Col Fiscus nor Col Murphy have been court-martialed. For the most prosaic of crimes another Air Force JA was. For $25,000, a Lackland-based captain and his enlisted paralegal paramour hired a police informant to murder the captain's wife. At his September 2005 general court-martial, not yet reported, the Air Force JA pleaded guilty to attempted premeditated murder and fraternization and was sentenced to dismissal and eighteen years.[37]

VIII. Lest We Forget

The American cases mentioned here represent a small, an almost invisibly small, proportion of the Armed Service JA communities. It will be for another article, or for COL Borch's next book, to detail examples of the dedicated, even heroic, work performed every day by 1,300 Air Force JAs, 1,683 Army, 455 Marine Corps, and 750 Navy JAs.[38] Nor have we mentioned the sixteen military lawyers (eleven Army and five Marines) who have been wounded in combat in Iraq and Afghanistan. In Iraq, in October 2006, for example, Marine Maj Justin Constantine took an enemy sniper's round just under the rim of his helmet, behind his ear,

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[35] Thomas E. Ricks & William Branigin, *Air Force Reprimands Its Former Top Lawyer*, WASHINGTONPOST.COM (Dec. 22, 2004), *available at* www.washingtonpost.com/ac2/wp-dyn/A19083-2004Dec22 (last visited Aug. 9, 2007).

[36] Thomas E. Ricks, *Top Air Force Lawyer Had Been Disbarred*, WASH. POST, Dec. 10, 2006, at A22.

[37] *See* Air Force Link, *Military Lawyer Sentenced to 18 Years in Prison*, http://www.af.mil/news/story.asp?storyID=123011811 (last visited Aug. 8, 2007).

[38] Figures as of March 2007. Coast Guard numbers were unobtainable.

exiting his jaw. Through yet another miracle of battlefield medical care by amazingly capable military doctors, he survives and will recover, eventually. He has undergone nine surgeries with more to come. Major Constantine reminds us that, along with other U.S. and allied forces, JAs are in the line of fire every day, subject to wounding, maiming, and death. Army MAJ Michael R. Martinez, a former enlisted paralegal, died in a Blackhawk crash near Tal Afar, Iraq, in January 2006—a month before he was to return to his wife and five children. Major Martinez was the first JA to die in a combat zone since the Vietnam War.

IX. Captain Randy Stone

That brings us back to Marine Capt Randy Stone. On 19 November 2005 he was in Iraq, attached to the 3d Battalion, 1st Marines, at Forward Operating Base Sparta. In nearby Haditha, a Marine patrol from Kilo-3/1 is alleged to have murdered twenty-four Iraqi noncombatants. Over the next few months their courts-martial will take place at Camp Pendleton, California, prosecuted by JAs of the 1st Marine Division's SJA Office, where I was a trial counsel for six years. Along with four enlisted Marines who were in Haditha, their platoon commander, company commander, battalion commander, and Capt Stone are charged. Captain Stone is also represented by Mr. Charles Gittins. The significant fact that a JA is charged in relation to offenses against noncombatants—grave breaches of the law of armed conflict—has escaped the media's attention almost entirely.

The path to operational law advisors serving in infantry battalions is a lengthy one. In the Marine Corps, Capt Stone's branch, "there were no billets for attorneys in the fleet or at any post or station until 1942, when a billet for a capt-lawyer was included in each Fleet Marine Force division headquarters."[39] In 1950, the newly-enacted UCMJ mandated "law officers," and defense counsel who were required to be lawyers, at general courts-martial, but they were not required elsewhere. The Military Justice Act of 1968, a major re-ordering of the *Manual for Courts-Martial*, mandated lawyer-judges and lawyer representation for all accused at special and general courts.[40] The day was past when, during World War I, the Navy's JAG's office could boast that there was

[39] SOLIS, *supra* note 20, at 283.
[40] Pub. L. No. 90-632, 82 Stat. 1335 (1968).

not a single lawyer on its staff.[41] In fact, the JAG of the Navy was not required to be a lawyer until 1950.[42]

The 1977 Protocol I Additional to the 1949 Geneva Conventions,[43] for the first time, called for legal advisors to be available to counsel combat commanders. Article 82 reads: "The High Contracting Parties . . . shall ensure that legal advisors are available, when necessary, to advise military commanders . . . on the application of the conventions and this Protocol . . . ."[44] The mandate of Additional Protocol I is taken up in a Department of Defense directive and a Joint Chiefs of Staff instruction.[45] In the Marine Corps, it is further disseminated in *Marine Corps Order 3300.4*, directing senior commanders to "ensure qualified legal advisors are immediately available to operational commanders at all levels of command . . . to provide advice concerning law of war compliance."[46] The order refers to JAs as "operational law advisors."[47] The same order repeats the requirement, long in place, that alleged law of war violations

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[41] Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 172 (1953).

[42] 10 U.S.C. § 5148 (1950).

[43] Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, Dec. 7, 1978, 1125 U.N.T.S. 3.

[44] *Id*. at art. 82. The United States has signed but not ratified the two 1977 Additional Protocols. Nevertheless, the United States considers fifty-eight of Protocol I's 102 articles to be customary law to which there is no United States objection. Mike Matheson, *Additional Protocol I as Expressions of Customary International Law*, 2 AM. U. J. INT'L L. & POLICY 428 (1988).

[45] U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM para. 5.8.3 (9 Dec. 1998) (addressing briefly the "command legal advisor"); CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM para. 4.b (25 Mar. 2002). Joint Chiefs of Staff Instr. 5810.01B is more specific:

> At all appropriate levels of command and during all stages of operational planning and execution of joint and combined operations, legal advisors will provide advice concerning law of war compliance. Advice on law of war compliance will address not only legal constraints on operations but also legal rights to employ force.

Id. In 1972, it was then-Colonel George S. Prugh who first urged adoption of DOD Directive 5100.77, after having earlier written MACV Directive 20-4, *Inspections and Investigations of War Crimes*, in early 1965. BORCH, *supra*, note 22, at 20-21, 34-35, and 54.

[46] U.S. MARINE CORPS, ORDER 3300.4, MARINE CORPS LAW OF WAR PROGRAM para. 4.c(4) (20 Oct. 2003). The Marine Corps order is the most comprehensive of the Armed Services' current law of war compliance orders.

[47] *Id*.

be reported and investigated.[48] The law of war orders of the other Armed Services lay down the same requirements.

It took thirteen months to prefer Haditha charges.[49] The lengthy gestation is mitigated by the fact that no one beyond the battalion knew of possible crimes in Haditha until they were bought to light by *Time* magazine, four months after the event.[50] Whether suspicions *should* have been raised will be an issue at the trial of 3/1's battalion commander. Whether higher command should have suspected is a question beyond our scope. We do know that as soon as the possibility of a war crime was realized, investigations were immediately undertaken. Having learned a lesson from the Army's multiple and sometimes mistaken or contradictory investigations into the death of Corporal (CPL) Pat Tillman, the Marine Corps proceeded methodically and carefully. Before bringing charges, they considered formal Haditha investigations conducted by Army COL Gregory Watt, Army MG Eldon Bargewell, the Marine Corps itself, and by the Naval Criminal Investigative Service.[51] The NCIS investigation alone was 3,500 pages in length. Delay was a by-product.

Historically speaking, the specifics of Capt Stone's case are largely irrelevant. More important is what his being charged means to JAs in Iraq, in Afghanistan, and future combat zones. My research indicates that this is the first time an American JA has been charged with criminality in combat, albeit as a principal. Captain Stone didn't pass bad paper and misuse military funds, as did JAG Swaim. He certainly is no *Generaloberst* Lehmann, no LT Wako Yusei. But his case is not simply the court-martial of an operational law advisor, either. It is a trial involving a JA's advice, or its lack; its sufficiency or inadequacy; a trial for his taking or not taking a role. The charges suggest that Capt Stone's judgment was so poor that it rises to criminality; essentially, criminal professional negligence.

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[48] *Id.* para. 3.b.

[49] The homicides occurred on 19 November 2005, they were reported by *Time* magazine on 19 March 2006, and charges were preferred on 21 December 2006. *See* Thomas E. Ricks, *In Haditha Killings, Details Came Slowly*, WASH. POST, June 4, 2006, at A1.

[50] Tim McGirk, *Collateral Damage or Civilian Massacre in Haditha?*, TIME, Mar. 19, 2006, *available at* www.time.com/time/printout/0,8816,1174649,00.html (last visited Aug. 8, 2007).

[51] The Marine Corps JAG Manual investigation, convened by Major General Richard C. Zilmer, was eventually combined with MG Bargewell's AR 15-6 investigation.

He is charged with three specifications of a violation of UCMJ Article 92, two of which appear multiplicious: wrongfully failing to ensure accurate reporting and investigation of a suspected law of war violation; negligently failing to ensure its accurate reporting; and negligently failing to ensure a thorough investigation of the incident. The facts adduced at trial—if his case goes that far—may modify our view of his performance of duty, or not, but today Capt Stone is guilty of nothing.

His charging is a positive event in two respects. On a grand canvas, it demonstrates that the United States takes seriously its obligations under the law of armed conflict. The fact that the United States has not ratified Protocol I is irrelevant to the demonstration of the sincerity of our commitment to the law of war. We have disregarded it often enough, lately.

Captain Stone's charges are a positive event because they send two significant messages—and when the Marine Corps is mentioned, if you are not a Marine substitute your own armed force. The first message: "Commanders, in the combat zone, you remain responsible for the actions of your men and women. You are provided JAs to give you specialized advice. Integrate them into your staff and use them as you would your other staff members. Provide a command climate that allows them to assist you and, should you ignore their advice, have a reason for doing so." The unspoken subtext: ". . . or we'll court-martial you."

The second, stronger message: "Judge advocate, as a battalion staff member in combat, know and remember who your client is, and what your duty to your client is." That message is clear: Your client is the United States and the Marine Corps, embodied by your battalion commander. (Or task force commander, or regimental commander, *et cetera*.) To clarify what their duty is, JAs need only read the specifics of their branch's law of war order.

Operational law advisors have a broad range of responsibilities in each phase of combat operations. In the planning stage, a working knowledge of treaty-based and customary law of war is required, as well as U.S. law of war policy. Judge advocates must instruct their Soldiers and Marines in the basics of that law, occasionally remind commanders of the concept of command responsibility, and instruct all hands in the rules of engagement. Are there potential international human rights law

concerns? Will information operations be involved? The operational law advisor's expertise must be extensive.

In the execution phase of operations, the JA's responsibilities continue on a lower plane, yet it is here that the command's law of war problems will surely arise. Judge advocates must be alert to the progress of the operation and to potential issues related to the instruction they have previously accomplished.

In the follow-up phase of combat operations, JAs are, of course, tasked with recognizing, investigating and reporting possible law of war violations.[52] It has been a long time since military lawyers could prosper merely with an expertise in the courtroom.

We won't know the specifics of Capt Stone's charges until his Article 32 investigation concludes, and perhaps not until he presents his defense at trial. Did he mislead or lie to investigators? Did he actively cover-up events in Haditha? Did he identify too closely with Marines he served with and, in his reporting, shade or unduly minimize their acts? The court-martial process will reveal the facts. Or has he been rashly charged? But, as already mentioned, the specifics of Capt Stone's case are largely irrelevant. The very charging of a JA is the significant fact. Whether or not Capt Stone is found guilty, whether his case ever goes to trial, a precedent is established for all the armed services: when law of war violations occur, the performance of duty of operational law advisors—their decision-making—will be examined and, if found wanting, charges may follow.

No one in military service can complain that his or her service is open to review, with remedial, even disciplinary, action taken, if found deficient. Administrative reductions in grade and career-ending fitness reports have always been common conversational fare at enlisted and officer club bars. But where legal judgments are involved, the very term "judgment" incorporates a host of decisional factors, some virtually inarticulable. In the future, who will make the decision to charge or not charge a JA for the quality of her reporting, or for the absence of a

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[52] CENTER FOR LAW AND MILITARY OPERATIONS, DEPLOYED JUDGE ADVOCATE RESOURCE LIBRARY (The Judge Advocate General's Corps DVD, 8th ed. 2006). Army judge advocates are well-instructed in operational law responsibilities, for example in the subchapters *Coalition Operations/Military Justice* and *MJ in an Operational Setting*. *See id.*

report? Who will decide if the lawyer's judgment was deficient, and who will decide what the standard of adequacy is? The JA's reporting senior? Her staff judge advocate? The commanding general? An inspector general, perhaps? Will congressional interest and pressure—or its absence—be a factor? Will the media question decisions to charge or not charge, and will that matter?

"No change," you say? "The military justice process will continue to march as usual and the accustomed judgments will be made by the accustomed individuals," whoever they are. But Army Corporal Pat Tillman's case suggests otherwise. The statements of Congressman John Murtha remind us that political pressure from concerned politicians can initiate military action. Fallout from the Walter Reed Medical Center case illustrates the rightful power of the press. Ms. Cindy Sheehan is proof of the power of a single voice. No, the decision to charge the lawyer, and who makes the decision to do so, and what standards apply, are not as settled as we might wish.

X. Conclusion

In light of Capt Stone's charges, should Army OPLAW [operational law] advisors sit through combat engagements in the operations center, monitoring tactical radio traffic for possible problems? Shall Air Force JAs review gun camera footage for improper targeting choices? Must Marine lawyers review patrol reports and FDC logs? Does Capt Stone's case open the door to JAs peering over the shoulders of S-3s, air bosses, and battery execs? Should that targeting cell munitions assignment list undergo a second JA's scrub, just to be safe? Might the Stone case presage legal advisors becoming a hindrance to the command decision-making process they are supposed to facilitate? Might OPLAW advisors become fall guys for a commander's hesitancy to take aggressive combat action?[53]

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[53] An example of judge advocate scapegoating occurred during an early stage of the current war in Afghanistan. In October 2001, a Taliban convoy bearing Taliban leader Mullah Omar was allegedly sighted. Expedited permission for a loitering armed Predator to fire on the convoy was denied by Central Command Commanding General Tommy Franks. His widely reported feckless reply to the request: "My JAG doesn't like this, so we're not going to fire." Thereafter, General Frank's "JAG," Navy Captain Shelly Young, was pilloried in the unknowing media, sometimes by name. *See, e.g.*, Seymour M. Hersh, *King's Ransom: How Vulnerable Are the Saudi Royals*, NEW YORKER, Sept. 22, 2001, at 36; Thomas E. Ricks, *Target Approval Delays Cost Air Force Key Hits*,

Or will we merely continue to march, praying that another Haditha doesn't occur on our watch? What we can say with assurance is that Capt Stone's case raises the potential for a new range of problems for both JAs and for tactical commanders; legal problems that could result in incarceration, loss of career, and the stamp of criminality. Stone's case is a new phase of legal history. It may be the first of a new breed of court-martial charge, or it may pass without a further note. We can't know which, since history, including legal history, can only be viewed in retrospect.[54]

I suspect that General George Prugh would counsel operational law advisors to simply do their best, and not approach their duty with an eye to how they might defend their decisions at court-martial. Competence and diligence are always a JA's goals—and, if it comes to that, their best defense.

WASH. POST, Nov. 18, 2001, at A1 (providing a circumspect depiction of the event); Rebecca Grant, *An Air War Like No Other*, AIR FORCE, Nov. 2002, at 31-37, 34; and *Face the Nation* (CBS television broadcast Oct. 21, 2001) (dialogue between host Bob Shieffer and Secretary of State Colin Powell), *transcript available at* http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/cbstext_102101.html.

[54] Subsequent to this lecture, the convening authority dropped all charges against Capt Stone. *Charges Dropped for Two Marines in Haditha Case*, NPR.ORG, Aug. 9, 2007, http://www.npr.org/templates/story/story.php?storyId=12634743.

AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY[1]

REVIEWED BY MAJOR BRUCE D. PAGE, JR.[2]

If recent polls are to be believed, most Americans think the United States is headed in the wrong direction.[3] Kevin Phillips numbers himself among that majority and in his latest book, *American Theocracy: The Peril and Politics of Radical Religion, Oil, and Borrowed Money in the 21st Century*, tells his readers why. Phillips believes that America's superpower status is jeopardized by: national oil policy that is steeped in deceit, coupled with an unsustainable national oil consumption rate; excessive influence of conservative Christianity on governmental affairs; and unprecedented levels of private and public borrowing. He argues from history, contending that the world's greatest empires have fallen due in large measure to some variant of one or more of these national sins. Over the course of 394 pages, Phillips provides readers an enormous amount of statistical and anecdotal evidence in support of his thesis. Unfortunately, he invests almost as much energy in unnecessarily charged rhetoric and anti-Christian invective. This open bias costs him credibility, such that his book, while still highly thought provoking, comes across more as political diatribe than reasoned scholarship.

The book opens with an analysis of how problematic America's oil consumption habits have become. Phillips provides considerable evidence that with global oil production likely to peak within thirty

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[1] KEVIN PHILLIPS, AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY (2006).

[2] U. S. Air Force. Written while assigned as a student, 55th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia. The author wishes to thank Major Jeremy Ball for his helpful comments and suggestions offered during the writing of this review.

[3] Zogby International, *Bush Job Approval Hits 41%—All time Low; Would Lose to Every Modern President; Public Rates All Levels of Government Poorly in Katrina Handling; Red Cross Rated Higher Than Federal Government, 69%-17%—New Zogby America Poll* (Sept. 7, 2005), *available at* http://www.zogby.com/news/ReadNews.dbm?ID=1020 (Zogby International polling data indicating fifty-three percent of Americans believe the "nation [is] headed in the wrong direction"); *Ruy Teixera, Public Opinion Watch* (Oct. 26, 2005), *available at* http://www.americanprogress.org/issues/2005/10/b1138571.html (citing a Survey USA report that found that, "In not a single state do 50% of adults think the country is headed in the right direction.").

years, possibly sooner,[4] American oil consumption is quickly outstripping worldwide supply.[5] The outlook is, in Phillips's estimation, bleak: long-established individual patterns of behavior are unlikely to change,[6] and the government is too beholden to entrenched oil interests ("'Big Oil' executives"[7]) to take any meaningful action. Like Britain a century ago and, to a lesser extent, eighteenth-century Holland, America is at a pivotal crossroads: though oil consumption is foundational to modern American culture and wealth, and though the nation's oil infrastructure represents an enormous capital investment not easily or cheaply replaced, our oil culture may soon become an albatross around our necks, dragging down the economy of a nation that refuses to modernize.[8]

Phillips adeptly brings statistics to bear in arguing that America is too oil-thirsty,[9] and his analysis of the psychological phenomenon of national nostalgia regarding the oil industry[10] is quite interesting. But he overlooks the critical fact that America has already successfully shifted from pre-oil fuel sources to oil, without significant economic disruption. Phillips offers no reason why America's transition from oil dependence to renewable energy sources will be unsuccessful, particularly given the level of national attention the issue is receiving.[11] Thus, while

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[4] PHILLIPS, *supra* note 1, at 21-25.

[5] *Id*. at 90. "[I]n 1998 the United States for the first time . . . imported more than half of the petroleum it consumed." *Id*.

[6] *Id*. at 54. Americans, who "constitute the world's most intensive motoring culture," *id*. at 33, "cling to and defend an ingrained fuel habit. . . . The hardening of old attitudes and reaffirmation of the consumption ethic since [the 1980s] may signal an inability to turn back." *Id.* at 54.

[7] *Id*. at 95.

[8] *Id*. at 17. Americans have been "slow to grasp the possibility that a steep price might have to be paid for the graying temples of what had been a pioneering fuel culture and infrastructure." *Id*.

[9] *See, e.g.*, *id*. at 60-61, where Phillips explains the phenomenon of "micropolitan" development with its attendant increase in national fuel consumption.

[10] *Id*. at 52-54. Oil and gas "[m]useums are proliferating, especially in the leading energy states, gathering what Europeans might call the detritus of empire . . . ." *Id*. at 52.

[11] While critics maintain (perhaps with justification) that the federal government is not yet doing enough, or is misapplying its efforts, *see* Justin Blum, *Bill Wouldn't Wean U.S. Off Oil Imports*, WASH. POST, July 26, 2005, at A1, the question of *whether* America needs to move toward renewable energy has been definitively answered in the affirmative at the national level. Both the executive and legislative branches are grappling with potential solutions to America's need to find viable non-fossil fuel energy sources. In announcing his "Advanced Energy Initiative," the President said, "The best way to break [our oil] addiction is through technology. Since 2001, we have spent nearly $10 billion to develop cleaner, cheaper, and more reliable alternative energy sources—and we are on

overconsumption is unquestionably an important environmental, social, and even moral concern, Phillips's worries regarding dramatic oil shortages seem somewhat overwrought. This observation becomes important in judging Phillips's larger claim that access to foreign oil, increasingly a concern of presidents over the last half century,[12] is now the driving purpose for much of American foreign policy, including George W. Bush's decision to go to war in Iraq in 2003.

Here, Phillips pulls no rhetorical punches. Having accused Bush's "White House [of] misrepresentations . . . and incompetence,"[13] he asserts that the 2003 invasion of Iraq was "deceit cloaked"[14] and that official denials of the war's having been oil-motivated were "all but lies."[15] Instead, Phillips insists that Operation Iraqi Freedom was but "one hundred years of petro-imperialism in the Persian Gulf . . . come to a head."[16]

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the threshold of incredible advances." President George W. Bush, 2006 State of the Union Address (Jan. 31, 2006). *See also* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (dealing extensively with renewable energy sources and creating energy consumption reduction initiatives).

[12] PHILLIPS, *supra* note 1, at 37-57. In these pages, Phillips reviews the oil policies of every American president from Dwight Eisenhower to Bill Clinton, excluding John F. Kennedy. With the exception of his excoriation of President George H. W. Bush, Phillips's judgments are fair. He describes events following the first Gulf War as follows:

> Once military power had secured Middle Eastern oil supplies again, television news clips showed the forty-first president roaring along the Maine coast at the wheel of his rakish high-speed Cigarette boat, *Fidelity*. The broader symbolism leaped out: guilty complexes and hair shirts were gone, and with a Texas Republican at the helm the United States was back to practicing gunboat diplomacy and taking what it wanted.

Id. at 56. That Phillips could view the first Gulf War—after which the elder Bush was almost universally hailed as a hero for his success in leading a broad international coalition in repelling a dictator's illegal incursion into a sovereign nation—as the United States' "taking" anything strains credulity. His words at this early point in the book set the tone for the pages that follow.

[13] *Id.* at 62.

[14] *Id.* at 87.

[15] *Id.* at 69.

[16] *Id.* at 70.

This contention detracts from the book's better argued points. Phillips imputes guilt by association[17] and strains to find external support[18] for his belief that the 2003 Iraq war was "at bottom about access to oil and U.S. global supremacy."[19] Notwithstanding negative findings by independent investigators,[20] denials by high-ranking government spokespersons,[21] and current efforts to free the United States from dependence on oil, particularly foreign oil,[22] American oil imperialism becomes a thread Phillips weaves throughout the remainder of the book.

This imperialism, though, is not only economically motivated. In Part II of the book, Phillips argues that America's "powerful religiosity" and "biblical worldview" have led to a "crusader mentality ill fitt[ing] a great power decreasingly able to bear the rising economic costs of strategic and energy supply failure."[23]

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[17] Phillips methodically recounts for his readers Britain's imperial ambitions in the post-World War I Middle East, as well as how Western governments, to include the United States, have supported and even attempted coups in the Persian Gulf region. *Id*. at 70-72. He stoops to intellectual sleight of hand, however, in his attempt to prove an unbroken chain of British-American efforts spanning the last hundred years. Beyond pointing out that Washington and London "cooperated" to arm Iraq during the Iran-Iraq war of the 1980s, *id*. at 74, Phillips offers no factual evidence of the United States' complicity in British endeavors. Instead, he is content to employ repeated use of the term "Anglo-American," *id*. at 76, leaving his readers to infer a connection between the two nations' efforts.

[18] Phillips asserts that shortly after the 2003 Iraq invasion, "old hands with good memories harked back to 1973" when "Henry Kissinger and others . . . [had] promoted, just short of openly, a plan for using U.S. airborne forces to seize the oil fields of Saudi Arabia, Kuwait, and Abu Dhabi." *Id*. at 41. These "old hands" "began to talk of a 'Thirty Years War' over Middle Eastern Oil." *Id.* In attempting to prove that a different administration's invasion of a different country using different tactical means than those allegedly promoted by Kissinger and others was but a delayed implementation of a long-plotted Republican goal, Phillips offers little beyond the opinions of a former diplomat, fired in the 1970s, whose conclusions can, at best, be described as questionable. *Id*. at 41 n.23 (citing Robert Dreyfuss, *The Thirty-Year Itch*, MOTHER JONES, Mar.-Apr. 2003, at 40).

[19] *Id*. at 69.

[20] *Id*. at 74 n.16. Phillips dismisses U.S. Congressional and British judicial inquiries as "lackluster." *Id*. at 74.

[21] *Id*. at 69 (quoting White House Press Secretary Ari Fleischer, who "insisted on February 6, 2003, that 'if this had anything to do with oil, the position of the United States would be to lift the sanctions so the oil could flow. This is not about that. This is about saving lives by protecting the American people.'").

[22] *See supra* note 11.

[23] PHILLIPS, *supra* note 1, at 262.

The "religiosity" Phillips decries is found amongst "conservative fundamentalists"[24] generally, but is most embodied in the Southern Baptist Convention (SBC).[25] Phillips traces how the SBC, formerly a small sect but now the largest Protestant denomination in America, has benefited from a national increase in religious conservatism to become the "unofficial state church in Dixie"[26] and a major force in Republican politics. His sociological argument, which he supports with numerous statistical references, graphs, and diagrams, is provocative: according to Phillips, the setback to Southern culture the Civil War caused has been more than overcome by a "Second Reconstruction"[27] whereby "'Southern' no longer refer[s] to a region but to a culture and an evangelical mode."[28] This "Southernization of America"[29] has manifested itself in a "theological correctness" (TC)—the imposition of fundamentalist religious and moral views on America by force of law.[30] Phillips warns that if history does repeat itself, America's future is in jeopardy, as religious zeal in general and the influence of religion on the law in particular have often shortly predated the falls of other world empires.[31]

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[24] *Id*. at 100.
[25] *Id*. at 101.

> By the end of the twentieth century, the fundamentalist-leaning Southern Baptist Convention, wedded to biblical inerrancy, was by far the largest Protestant Group. Indeed, the SBC, together with once peripheral sects, boasted some forty million adherents versus a combined fifteen million members of the four leading mainline churches . . . .

Id.
[26] *Id*. at 213.
[27] *Id*. at 176.
[28] *Id*. at 167 (quoting EDWIN GAUSTAD & PHILLIP L. BARLOW, NEW HISTORICAL ATLAS OF RELIGION IN AMERICA 82 (2001)).
[29] *Id*. at 132.
[30] *Id*. at 236. Phillips describes "theological correctness" as "almost a mirror image of the political correctness displayed by secular liberals in discussing minority groups, women's rights, and environmental sanctity." *Id*. The issues swept into this "powerful conservative religious tide," *id*. at 183, include the worldwide AIDS epidemic, *id*. at 236, abortion, *id*., the role of judges, *id*. at 245, and government endorsement of Darwinian evolution, *id*. at 246, to name a few.
[31] *Id*. at 219. "[T]he precedents of past leading world economic powers show that blind faith and religious excesses . . . have often contributed to national decline, sometimes even being in its forefront." *Id*.

Phillips contends TC's insistence that other disciplines such as law, politics, and science be studied in light of biblical theology is relegating America to second-class status in the world in terms of education, technology, and even agriculture.[32] Most critical, though, is the United States' Middle East policy. Phillips sees the second Gulf War as but the latest in a series of religiously motivated campaigns ("Christendom's familiar mass excitements"[33]) that are ideologically indistinguishable from the crusades. He cites Rome, Holland, and even pre-World War I Britain as examples of nations who went to war not to secure liberty or defend the homeland, but instead because of theology run amuck.[34]

Ostensibly, Phillips's concern is not with religion itself.[35] His argument is framed in historical terms, without explicit reference to the moral rightness or wrongness of religious influence in the public sphere.[36] But the virulence with which he attacks the conservative position on virtually every significant issue of cultural moment[37] causes the reader to wonder whether Phillips's concern is more with the views of those religious people who would influence the public debate than the success they may (or may not) be achieving.[38] More concerning, though,

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[32] *Id.* at 248.
[33] *Id*. at 250.
[34] *Id*.
[35] Religion, Phillips allows, "has generally served humankind well." *Id*. at 219.
[36] Two thousand years of thoughtful debate have produced no universal consensus on the proper relationship between the kingdom of God and the kingdom of man. The apostles, St. Augustine, and John Calvin, are among the many who have wrestled with this deeply nuanced and challenging question. *See Acts* 1:6 (apostles), AUGUSTINE, CITY OF GOD (Random House 2000) (n.d.) (Augustine), and JOHN CALVIN: INSTITUTES OF THE CHRISTIAN RELIGION 1485-1521 (Ford Lewis Battles trans., John T. McNeill ed., 1960) (Calvin). *See also* MICHAEL HORTON, BEYOND CULTURE WARS: IS AMERICA A MISSION FIELD OR BATTLEFIELD? 16 (1994) (arguing that the church has abandoned her "chief mission [which is] the ministry of Word and sacrament" and instead is excessively focused on temporal cultural effects). Nor is this debate unique to Christianity. Many Islamic terrorists believe they effect God's will on earth by cleansing the evil from society. *Compare* Elaine Sciolino, *From Tapes, a Chilling Voice of Islamic Radicalism in Europe*, N.Y. TIMES, Nov. 18, 2005, at A1, *with* Laurie Goodstein, *Muslim Leaders Confront Terror Threat Within Islam*, N.Y. TIMES, Sept. 2, 2005, at A1 (demonstrating how some Muslim scholars have attempted to "provide a theological rebuttal to Muslim extremists who cite the Koran and Islamic texts to justify violence").
[37] *See supra* note 30.
[38] Phillips overstates his case when he contends that "[t]oday *the SBC and the Assemblies of God* are Washington power brokers." PHILLIPS, *supra* note 1, at 246 (emphasis added). Generally speaking, *churches* do not involve themselves in partisan politics, as any attempt to "influence legislation" or "intervene in . . . any political campaign" costs them their tax-exempt status. 26 U.S.C. § 501(c)(3) (2000). *See also*

is how Phillips leads his readers, many of whom are likely ignorant of Christian literature and theological subcurrents, to draw false inferences. He disingenuously implies, for instance, that the author of the inspirational reading in which the President "immers[ed himself] each morning" in the days leading up to the Iraq invasion was a war monger.[39] His ominous warnings regarding the influence of Christian Reconstructionists on social policy are likewise overblown and are not in the spirit of fair debate.[40]

Further, Phillips adamantly refuses to engage opposing viewpoints. Regarding the teaching of "intelligent design" in schools, for instance, Phillips blithely dismisses any who would question what he deems the irrefutable fact of evolution as religiously motivated and anti-science.[41]

Anti-War Sermon Leads IRS to Probe Church for Tax Violations, FOXNEWS.COM, Sept. 16, 2006, http://www.foxnews.com/story/0,2933,214132,00.html. Phillips' real opposition is to what he believes is the undue political influence he believes *members* of these respective churches exert.

[39] PHILLIPS, *supra* note 1, at 255. The book that Bush read was OSWALD CHAMBERS, MY UTMOST FOR HIS HIGHEST (Barbour Publ'g, Inc. 2005) (1935). Howard Fineman, *Bush and God*, NEWSWEEK, Mar. 10 2003, at 22. Of this very personal and non-warlike book Richard C. Halverson, a former chaplain to the United States Senate, said, "[I]t is the most popular book of daily devotions ever published. Millions of copies . . . are read every day by believers around the world . . . . No book except the Bible has influenced my walk with Christ at such deep and maturing levels." CHAMBERS, *supra* at i.

[40] Christian Reconstructionists, Phillips says, comprise one of the "two principal camps" among "the most intense" of those who "believe the Bible to be literally true." PHILLIPS, *supra* note 1, at 66. Phillips asserts without citation to any primary source that the Christian Reconstruction "movement . . . proclaims ambitions [including] imposing biblical law and limiting the franchise to male Christians," *id.* at 243, and that "[s]ome activists not only advocate the death penalty but support biblical death by stoning." *Id*. at 418 n.62. For a good introduction to the scope and delimitations of Christian Reconstructionism as set forth by its recognized leader, see ROUSAS JOHN RUSHDOONY, INSTITUTES OF BIBLICAL LAW 1-14 (1973), *reprinted in* JEFFERY A. BRAUCH, IS HIGHER LAW COMMON LAW? READINGS ON THE INFLUENCE OF CHRISTIANITY IN ANGLO-AMERICAN LAW 349-363 (1999). Perhaps the most succinct statement of the Reconstructionists' view toward the church's role in government is this: "[The Christian Reconstructionist] firmly believes in the separation of church and state, but not the separation of the state—or anything else—from God." Andrew Sandlin, *The Creed of Reconstructionism*, CHALCEDON REPORT (Aug. 1995), *reprinted in* BRAUCH, *supra*, at 362-63.

[41] PHILLIPS, *supra* note 1, at 246-48. In fact, brilliant scholars as credentialed as those Phillips cites have publicly argued the scientific and philosophical shortcomings of evolution. *See*, *e.g.*, MERE CREATION: SCIENCE, FAITH, & INTELLIGENT DESIGN (William A. Dembski, ed. 1998). This compilation of essays contributed by some of the 200 participants in a 1996 "conference [of] scientists and scholars who reject naturalism as an adequate framework for doing science," *id*. at 9, is a significant if underappreciated work. Participants were from diverse religious backgrounds, and one speaker at the conference

In the same manner, Phillips's assertions regarding the dangers of theological correctness are weakened by his failure to address serious reporting on the widespread and successful efforts of government and private groups to marginalize Christians and force them to keep their beliefs out of the public sphere entirely.[42]

If the second part of *American Theocracy* highlights a problem Phillips perceives as largely confined to one vocal minority, Part III addresses a more ubiquitous ill: the overwhelming debt levels America, and individual Americans, have accepted. Here, Phillips takes readers beyond the anti-Keynesian arguments proffered by politicians and academics over the last generation,[43] contending that America's "new dominant economic sector"[44]—the financial service industry, which is comprised of the insurance, investment, and lending industries[45] and which has surpassed manufacturing in percentage of the gross domestic product[46]—creates no new wealth. Rather, this industry merely shuffles money within the overall economy, inevitably from the poorer to the wealthier of society.[47] When this happens, Phillips says, society's wealth is ephemeral, at risk of disappearing in the face of an ill-conceived or poorly executed war,[48] aggressive financial moves by other countries,[49] or economic terrorism.[50] If any of these occurred, Phillips worries, the consequences would be far direr than even a severe stock market crash. He anticipates that when the piper finally demands his pay, the average American could have the effective status of an indentured servant.[51] Phillips again brings historical reference to bear, but this time his comparisons seem better grounded in fact. Many nations that first built

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openly welcomed atheists to the debate. *Id*. Contributors to the book have doctoral and postdoctoral credentials in disciplines ranging from biochemistry to anthropology to mathematics to philosophy, and include one former clerk to the Chief Justice of the United States. *Id*. at 460-64.

[42] *See*, *e.g.*, WILLIAM D. WATKINS, THE NEW ABSOLUTES (1996). Watkins traces the rise of aggressive secularism in the public sector, citing dozens of events in support of his thesis that a strong bias against conservative Christians is gaining traction in law and culture. *Id.* at 50-55.

[43] PHILLIPS, *supra* note 1, at 276-277.

[44] *Id*. at 266.

[45] *Id*.

[46] *Id*. at 265.

[47] *Id*. at 268.

[48] *Id*. at 339-43.

[49] *Id*. at 336-37. Phillips suggests several Asian nations as strong candidates to make such a move. *Id.*

[50] *Id*. at 343.

[51] *Id*. at 324.

significant wealth through "hard industries"[52] eventually migrated to "rentier" economies, which America's economy increasingly resembles.[53]

Part III of the book is the most compelling, and therefore the most concerning. If one can look past Phillips's insistence on blaming government for what is really a cultural epidemic,[54] one hears a legitimate warning in his thesis. Like the first two, though, this section is weakened by Phillips's condescending tone and dogmatic implication that religious fundamentalism lurks behind yet another societal malady. Rather than subject to rigorous analysis the wisdom of the laissez-faire approach to the marketplace often touted by Republicans, Phillips derisively chalks up the deregulation of the financial markets that has occurred under the Bush administration to a small-minded refusal or even inability to fathom the "awkward cultural and political externalities"[55] of macroeconomics. Phillips's ad hominem attacks continue through the end of his book. By his final chapter, the conservative cause has become a "caricature" advocated only by "zealots."[56]

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[52] *Id*. at 311.

[53] *Id*. at 307. "[I]n each major phase of the development of capitalism, the leading country of the capitalist world goes through a period of financialization, wherein the most important economic dynamic is the creation and trading of abstract financial instruments rather than the production of genuine goods and services." *Id*. at 302.

[54] Phillips contends that the nation's sixty percent increase in consumer and mortgage debt that occurred between 2000 and 2004 "reflected the government's emphasis on stimulating private debt . . . ." *Id*. at 328. While he condemns the Federal Reserve Bank's consistent reduction of interests rates during that time period, *id*. at 324, and President Bush's urging Americans to spend in the wake of 11 September 2001, in an attempt to stimulate the economy, *id*. at 281; *see also id.* at 323, he gives relatively short shrift to the overconsumption and "rampant and gullible materialism," *id.* at 294, that are really the heart of the matter: "True, overconsumption is not ideally addressed in a political arena, but considerations beyond finance pull it there today." *Id*.

[55] *Id*. at 318.

[56] *Id*. at 369. Phillips applies this pejorative to "covenant marriage" proponents. Covenant marriage concepts vary from state to state, but have in common an attempt to use the law to strengthen marriage, particularly in limiting divorce to traditional fault grounds or extended separation periods. Lynn Marie Kohm, *A Comparative Survey of Covenant Marriage Proposals in the United States*, 12 REGENT U.L. REV. 31, 31-32 (1999/2000). Significantly, the additional strictures of covenant marriages are voluntary—they are accepted by consent of the couple, rather than imposed by force of law. *Id*. at 40. As such, covenant marriage is but a partial return to basic family law principles accepted in the United States prior to the 1960s. JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION

Its flaws notwithstanding, *American Theocracy* confronts readers with a profoundly important question: what makes a great nation cease to be great? The book comes at a time when the issues it addresses—oil dependence, religion in public life, and the seemingly limitless growth of public and private debt—demand public attention. Due to its subject matter alone, Phillips's work is an important contribution to the national discussion. But such momentous issues demand honest and open debate, unencumbered by bias or dogmatism. In this, *American Theocracy* disappoints.

Ideally, a book of this sort would bring Americans of varying viewpoints together to address these issues thoughtfully.[57] Instead, *American Theocracy* is likely only to further convince those who share Phillips's mistrust of the Republican Party and his contempt for the Bush administration, while further isolating those with whom he disagrees. *American Theocracy* succeeds in raising some very important issues. America must look beyond Phillips's work, however, for real help in settling them.

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211 (1997). To Phillips, then, those who reject the social trends of but two generations cannot have reached their positions thoughtfully, rather only by zeal.

[57] As a former Republican strategist, Kevin Phillips is uniquely situated to stimulate such national conversation. *Cf.* EDWARD O. WILSON, THE CREATION: AN APPEAL TO SAVE LIFE ON EARTH (2006), which Professor Wilson describes as an attempt by a self-confessed secular Darwinist to reach across the intellectual divide to engage conservative Christians in environmentalism. *Talk of the Nation: Edward O. Wilson, Bridging Science and Religion* (NPR broadcast Sept. 8, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=5788810. Unlike Phillips, whose strident tone is unlikely to succeed in improving cooperation between evangelicals and secularists, Wilson may well, by his gentle approach and appeal to tenets of the Christian faith such as proper stewardship of the creation, effectively encourage positive communication and joint action.

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