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MILITARY LAW REVIEW

ARTICLES

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BOOK REVIEWS

Department of Army Pamphlet 27-100-212

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MILITARY LAW REVIEW

Volume 212 **Summer 2012**

NO NEED TO MAXIMIZE: REFORMING FOREIGN CRIMINAL JURISDICTION PRACTICE UNDER THE U.S.-JAPAN STATUS OF FORCES AGREEMENT

LIEUTENANT COMMANDER JONATHAN T. FLYNN, JAGC, USN*

"[T]he Status of Forces Agreement is humiliating . . . . We want to end the suffering and the burden . . . ."[1]

I. The Foreign Criminal Jurisdiction Dilemma

A. Background

In September of 1995, a U.S. sailor and two Marines brutally kidnapped, beat, and raped a 12-year-old Okinawa girl in the backseat of

---

* Judge Advocate, U.S. Navy. Presently assigned as Group Judge Advocate, Coastal Riverine Group TWO/Explosive Ordnance Disposal Group TWO, Portsmouth, Virginia. LL.M., 2011, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia; J.D., 2004, Brooklyn Law School; B.A., 1998, University of South Carolina. Previous assignments include Staff Judge Advocate, Region Legal Service Office, Yokosuka, Japan, 2007–2008; Military Liaison Office of the Central Criminal Court of Iraq, 2007–2008; Officer in Charge, Navy Legal Service Office Central, Branch Office Forth Worth, Texas, 2005–2007. Member of the bars of New York, U.S. Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 59th Judge Advocate Officer Graduate Course. The author would like to thank Lieutenant Colonel Brendan Klapak, USMC, and Major Andrew Gillman, USAF, for their invaluable assistance with this article. The views expressed in this article are the author's and do not necessarily represent those of the Judge Advocate General's Corps, the U.S. Navy, or the Department of Defense

[1] Kyoko Hasegawa, *Japan Minister: U.S. Troop Agreement 'Humiliating,'* DEF. NEWS, Oct. 15, 2009, *available at* http://www.defensenews.com/story.php?i=4325916 (quoting Japanese Minister of Defense Toshimi Kitazawa).

a car.[2] "Massive protests" erupted as Okinawans unleashed "pent-up emotions about the U.S. military," anger boiling after decades of hosting 70% of the U.S. forces in Japan.[3] The United States refused to remit custody of the suspects to Japanese police until formal indictment, citing servicemember protections afforded under the U.S.-Japan Status of Forces Agreement (SOFA).[4] The result was momentous controversy[5] and popular cries for SOFA reform.[6] In the following months and years, Japan would call for the total removal of U.S. bases from Okinawa.[7]

Fast forward to 2009. The Democratic Party of Japan (DPJ), seeking control of Japanese parliament, needed to wrest votes from the relatively pro-U.S. military Liberal Democratic Party (LDP).[8] With LDP rule virtually uninterrupted since 1955, this was no easy task. [9] As part of their platform, the DPJ vowed a "greater 'equality' in Japanese relations with the United States,"[10] including "radical" revision of the U.S.-Japan SOFA and a pledge to reduce the U.S. military presence in Okinawa.[11] In 2009, the DPJ won a "landslide victory" in parliamentary elections,

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[2] Andrew Pollack, *One Pleads Guilty to Okinawa Rape; 2 Others Admit Role*, N.Y. TIMES, Nov. 8, 1995, *available at* http://www.nytimes.com/1995/11/08/world/one-pleads-guilty-to-okinawa-rape-2-others-admit-role.html.

[3] William L. Brooks, *The Politics of the Futenma Base Issue in Okinawa*, ASIA-PAC. POL'Y PAPER SERIES, No. 9, at 4 (2010), *available at* http://www.sais-jhu.edu/centers/reischauer/publications.html.

[4] *See* Hilary E. Macgregor, *Rape Case Furor Provokes Legal Review by U.S., Japan: Diplomacy: Tokyo Wants Custody of Three GIs Accused of Assaulting a Japanese Girl*, 12, L.A. TIMES, Sep. 22, 1995, *available at* http://articles.latimes.com/1995-09-22/news/mn-48701_1_japanese-police; *see generally* Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, T.I.A.S. 4510, 11 U.S.T. 1652, 373 U.N.T.S. 186 [hereinafter U.S.-Japan SOFA].

[5] *See* Teresa Watanabe, *Japanese Take Custody of 3 Soldiers Accused of Rape*, L.A. TIMES, Sep. 30, 1995, *available at* http://articles.latimes.com/1995-09-30/news/mn-51615_1_japanese-media.

[6] Richard Lloyd Parry, *U.S. Asked to Cut Bases in Rape Row*, THE INDEPENDENT, Oct. 4, 1995, http://www.independent.co.uk/news/world/us-asked-to-cut-bases-in-okinawa-rape-row-1575892.html.

[7] Brooks, *supra* note 3, at 4.

[8] *See* EMMA CHANLETT-AVERY ET AL., CONG. RESEARCH SERV., RL 33436, JAPAN-U.S. RELATIONS: ISSUES FOR CONGRESS 1 (2009), http://assets.opencrs.com/rpts/RL33436_20091125.pdf.

[9] *See id.*

[10] *Id.*

[11] Wendell Minnick, *In Japan, Fiery Rhetoric Subsides After DPJ Landslide*, DEF. NEWS, Sept. 7, 2009, at 4.

marking the end of an era.[12] New Japanese Prime Minister Yukio Hatoyama publicly vowed to change the Japan-U.S. military relationship.[13]

Thus, fourteen years after the Okinawa rape, Japan had elected a ruling party that embraced the ideals of 1995 Okinawa protestors. In the interim, U.S. military-related crimes, accidents, and other basing issues received extensive Japanese media attention and popular opposition.[14] In response to these issues and the 1995 rape, the United States acquiesced to some of the demands for change. In 2006, a U.S.-Japan agreement reduced Okinawan troop-levels by 8,000.[15] Also, the United States agreed to "informal" SOFA revisions in 1995[16] and 2004,[17] giving Japanese law enforcement greater custodial rights over servicemember criminal suspects. Nevertheless, the reforms failed to stop the once perceived "leftist ideal" of SOFA revision from moving to the mainstream of Japanese politics.[18]

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[12] *See* CHANLETT-AVERY ET AL., *supra* note 8, at 1.

[13] *Former Opposition Leader Yukio Hatoyama Elected Japan's Prime Minister*, DAILY NEWS, Sep. 16, 2009, *available at* http://www.nydailynews.com/news/world/2009/09/16/2009-09-16_former_opposition_leader_yukio_hatoyama_elected_japans_prime_minister.html.

[14] *See* Noriko Namiki, *Japanese Arrest U.S. Sailor on Murder Charge*, ABC NEWS, Apr. 3, 2008, http://abcnews.go.com/International/story?id=4581947&page=1 (discussing a recent murder involving a U.S. sailor and how "crimes committed by U.S. military personnel are nothing new to Japan").

[15] Yoshio Shimoji, *The Futenma Base and the U.S.-Japan Controversy: an Okinawan Perspective*, ASIA-PAC. J.: JAPAN FOCUS, May 3, 2010, *available at* http://japanfocus.org/-Yoshio-SHIMOJI/3354.

[16] Press Release, U.S. Embassy in Japan, Joint Committee Agreement on Criminal Jurisdiction Procedures (October 25, 1995) (on file with author). The United States agreed to "give sympathetic consideration to any request for the transfer of custody prior to indictment of the accused which may be made by Japan in specific cases of heinous crimes of murder and rape." *Id.*

[17] Lieutenant Commander Timothy Stone, *U.S.-Japan SOFA: A Necessary Document Worth Preserving*, 53 NAVAL L. REV. 229, 254-55 (2006). In 2004, U.S. policy was further amended to include attempted murder and arson, with Japan agreeing to "allow a representative to be present during all stages of interrogation of a pre-indictment transferee." *Id.*

[18] *See* Hisahiko Okazaki, *The DPJ's Sense of Duty*, THE JAPAN TIMES ONLINE, Sep. 4, 2009, http://search.japantimes.co.jp/cgi-bin/eo20090904ho.html.

With ominous Chinese and North Korean threats looming over the East Asian region and other parts of the world,[19] the military presence in Japan[20] is a key United States and Japanese strategic asset.[21] In protecting this asset, the United States has firmly rejected Japanese propositions to further reduce its military footprint in the area.[22] Moreover, out of concerns with the fairness of the Japanese criminal system, it has shown reluctance to grant the Japanese greater control over servicemember criminal suspects.[23]

However, it would be strategic folly for the United States to underestimate Japan's building domestic pressures against its Japan-based military assets. Maintaining a peacetime military presence abroad requires consent from the host nation,[24] and domestic pressures have caused the United States to lose such consent in the past. It experienced a total loss of its French bases in the 1960s,[25] partial loss of its Spanish bases in the 1970s,[26] and total loss of its Philippine bases in the 1990s.[27]

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[19] *See* Admiral Timothy Keating, Commander, U.S. Pacific Command, Briefing to Japan Society of New York, May 7, 2008, http://www.pacom.mil/web/pacom_resources/pdf/20080507-Japan_Society.pdf.

[20] Japan hosts approximately 47,000 U.S. active duty troops and nearly 50,000 U.S. civilians and dependents. *About U.S. Forces Japan*, OFFICIAL MILITARY WEBSITE, U.S. FORCES JAPAN, http://www.usfj.mil/Welcome.html (last visited Nov. 29, 2010). Excluding Iraq and Afghanistan, this is second only to Germany in total overseas U.S. numbers, and just ahead of active duty force-levels in South Korea. *See also* DEP'T OF DEFENSE, BASE STRUCTURE REPORT: FISCAL YEAR 2009 BASELINE 78-95, *available at* http://www.defense.gov/pubs/pdfs/2009baseline.pdf.

[21] *See* Viola Gienger, *Gates Says US Troop Presence in Japan Necessary for Regional Stability*, BLOOMBERG, Jan. 14, 2011, http://www.bloomberg.com/news/2011-01-13/gates-says-u-s-troop-presence-in-japan-necessary-for-regional-stability.html.

[22] Eric Talmadge, *Futenma Dispute Stains Ties with Japan*, NAVY TIMES, Dec. 29, 2009, *available at* http://www.navytimes.com/news/2009/12/ap_japan_futenma_122909/.

[23] Chalmers Johnson, *Three Rapes: The Status of Forces Agreement and Okinawa* (Japan Policy Research Institute, Working Paper No. 97 2004, http://www.jpri.org/publications/workingpapers/wp97.html (asserting the United States "clings desperately to [the SOFA's] every stipulation" regarding foreign criminal jurisdiction).

[24] Major Mark D. Welton, *The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics*, 122 MIL. L. REV. 77, 87–88 (Fall 1988).

[25] *See id.* In the mid-1960s, France withdrew from NATO and told the United States to leave. *Id.* French President Charles de Gaulle and the French government exhibited an idealistic perspective on military bases, feeling the presence of foreign troops in France was a grave infringement on French sovereignty. *Id.* at 89. In 1967, 30,000 U.S. troops, civilians, and dependents departed the country. Jerry McAuliffe, *The USAF in France 1950-1967*, http://edmerck.tripod.com/history/francebases.html (last visited Jan. 29, 2011).

[26] ALEXANDER COOLEY, BASE POLITICS 76 (2008). In the late 1970s, local Spanish politicians and their constituents vigorously complained to the Spanish central

The United States has recognized the precedent and taken preventative measures in an attempt to avoid a similar fate in Japan. These include temporary curfews and restrictions of servicemembers to base, bans on alcohol consumption, and increased educational efforts in the areas of violence prevention and sexual assault.[28] In addition, military officials routinely make public apologies for crimes and provide symbolic monetary payments to victims.[29] Finally, Japanese victims of crime often receive additional compensation in the form of damages, either from the alleged perpetrators themselves[30] or through the SOFA-directed claims process.[31]

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government "about their inability to collect road taxes from the bases, SOFA procedures, and lack of compensation" from the central government. *Id*. In addition, due to deeply rooted domestic and political beliefs in a security stance of "neutrality," anti-base sentiments grew when revealed the United States had used Spanish-based assets to conduct Libyan air strikes; *See id*. at 78; SPAIN: A COUNTRY STUDY: STUDY ch. 5 (Eric Solsten & Sandra W. Meditz, eds., 2d, 1988). Ultimately, the Spanish government demanded drastic changes to U.S. military presence, resulting in the closing of two major U.S. airbases and a 40% reduction in troop presence. *Id.* ch 5.

[27] COOLEY, *supra* note 26, at 80–82. In 1991, political turmoil pervaded the Philippine government. *Id*. Also, the government disagreed with the United States over the length of a new basing agreement, including an inability for the two countries to resolve "perennially tricky criminal jurisdiction provisions" and U.S. financial compensation to the Philippine government. *Id*. Despite the United States offering $200 million per year, the Philippine Senate formally disapproved of continued U.S. presence. *Id.* In November 1992, U.S. forces departed, ending their nearly century-long presence in the country. *Id*. The United States would reenter the Philippines in 2000 and establish a much smaller presence over the following years. *Id*. at 85–89. Disputes regarding foreign criminal jurisdiction continue to the present. *See id*. (describing the United States recent demand of custody of a Marine after the Marine's conviction of rape of a local national).

[28] *See* David Allen, *Curfew, Alcohol Restrictions Imposed on Okinawa Airmen*, STARS & STRIPES, Sep. 27, 2010, *available at* http://www.stripes.com/news/pacific/okinawa/curfew-alcohol-restrictions-imposed-on-okinawa-airmen-1.119821; *U.S. Navy to Conduct Background Check Among All Members*, BREITBART NEWS, April 30, 2008, http://www.reitbart.com/article.php?id=D90BLDE00&show_article=1; Gidget Fuentes, *Navy Lifts Drinking Ban for Yokosuka*, NAVY TIMES, April 7, 2008, *available at* http://www/navytimes.com/news/2008/04/navy_alcohol_040708w/; Yoko Kubota, *Japan Arrests U.S. Sailor for Murder*, REUTERS, Apr. 3, 2008, http://www.reuters.com/article/id/UST8360820080403?sp=true; *Curfew on All Personnel in Okinawa*, MARINE TIMES, Feb. 16, 2008, *available at* http://www.marinecorpstimes.com/news/2008/02/ap_okinawa_curfew_080219/.

[29] *See* U.S. FORCES JAPAN, INSTR. 36-2612, CONDOLENCE PROCEDURES (Nov. 15, 2002) (discussing standard procedures for solatia payments and public apologies).

[30] *See, e.g.*, Charlie Reed & Hana Kusumoto, *U.S. Teen Gets Suspended Prison Sentence in Yokota Rope Stringing Case*, STARS & STRIPES, Nov. 12, 2010, *available at* http://www.stripes.com/news/u-s-teen-gets-suspended-prison-sentence-in-yokota-rope-stringing-case-1.125284 (citing $17,000 paid by a suspect's parent to victim of assault-type offense); Erik Slavin, *Robbery Charges Not Filed, but Three Dependents Sent Back to the*

These measures, while helpful, do not address the root of the problem. Despite the 1995 and 2004 reforms to the U.S.-Japan SOFA relationship, the United States continues to adhere to a nearly 60-year-old Department of Defense (DoD) policy of maximizing jurisdiction and custody in situations of servicemember crimes.[32] To illustrate, when a soldier physically assaults a Japanese national, the U.S. military must maintain physical custody of the soldier as long as possible and attempt all reasonable methods to obtain a waiver of foreign criminal jurisdiction (FCJ) from the host nation.[33] It is this "maximization policy" that fueled domestic unrest in the 1995 Okinawa rape and many criminal cases that followed, resulting in a dangerous Japanese domestic perception of a lack of independence and sovereign rights. In order to maintain the quantity and quality of its desired military presence in Okinawa, Yokosuka, and beyond, the United States should eliminate its application of the maximization policy to Japan. Such reform will return a wide degree of sovereignty to the Japanese people, enhance political relations, and create a more effective U.S.-Japanese alliance.

B. Roadmap

In Part II, the U.S.-Japan SOFA construct is explained and compared to the North Atlantic Treaty Organization (NATO) SOFA.[34] The two SOFAs exhibit striking similarities, but the NATO SOFA has not generated the same level of domestic angst. The distinguishing factor

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United States, STARS & STRIPES, Aug. 23, 2009, *available at* http://www.stripes.com/news/robbery-charges-not-filed-but-three-dependents-sent-back-to-states-1.94067 (citing "restitution" paid by suspects' parents to the Japanese victim of a theft).

[31] *See, e.g.*, Erik Slavin, *U.S. Sailor Ordered to Pay Japanese Murder Victim's Family $593,000*, STARS & STRIPES, Sep. 24, 2010, *available at* http://www.stripes.com/news/u-s-sailor-ordered-to-pay-japanese-murder-victim-s-family-593-000-1.119389 (noting that under the SOFA, if a servicemember is unable to pay a civil award, the United States and Japan share the burden in paying damages to the victim). For a general discussion of SOFA claims, see generally DIETER FLECK ET AL., THE HANDBOOK OF THE LAW OF VISITING FORCES 159–86 (2001). *See also* Mizushima Tomonori, *Yamaguchi v. United States*, 97 A.J.I.L. 406 (David D. Caron ed., Apr. 2003) (discussing SOFA claims in Japan).

[32] U.S. DEP'T OF ARMY, REG. 27-50; SEC'Y OF NAVY, INSTR. 5820.4G; U.S. DEP'T OF AIR FORCE, REG. 110-12, STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION para. 1-7 (14 Jan. 1990) [hereinafter TRI-SERVICE REG.].

[33] *See id.*

[34] *See generally* Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, Jun. 19, 1951, T.I.A.S. 2846, 4 U.S.T. 1792 [hereinafter NATO SOFA].

between them is not the facial scheme, but the unique method of application in Japan of an essentially domestic U.S. maximization policy. Ironically, the more favorable procedures, those in Japan, generate more controversy.

The subsequent parts of the article analyze the costs and benefits of this maximization policy in the context of "two-level game theory" concepts. Under two-level game theory, basing stability is a contest "in which key decision-makers must interact at dual levels in order to achieve a single interdependent outcome."[35] Base politics are an international issue between the host nation, sending state, and international community at large.[36] Equally important, however, is domestic politics, the "matter of domestic coordination—among foreign and defense ministries, local landlords, and protest groups, for example."[37]

As in any country, results on military basing issues in Japan depend on both—Japan needs U.S. military bases to further their foreign policy objectives and national security, but, if popular sentiment is strongly against U.S. bases, Japanese leaders may have no choice but to acquiesce to the desires of it populace. Of course, the United States has foreign and domestic concerns of its own—promoting security in East Asia while ensuring that its servicemember's are treated fairly. The two-level game is a method of analyzing these international and domestic concerns, aiding in determining the outcome of U.S.-Japanese interaction regarding military basing in Japan, and helping to determine whether more effective and efficient systems are desirable.

Within this contextual framework, Part III examines the international security considerations of the U.S.-Japanese alliance, and Part IV discusses the domestic impact of U.S. maximization policies on Japan. Part V turns to U.S. reasons for the maximization policy, including the primary U.S. concern: Japan's allegedly unfair system of criminal justice. In Part VI, the international and domestic interests of the United States and Japan are brought to the hypothetical U.S. military basing negotiating table, finding that the United States should make changes to its maximization policy. This in turn leads to Part VII's proposals for reform: (1) revise the Secretary-level SOFA instruction to allow

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[35] KENT E. CALDER, EMBATTLED GARRISONS 83 (2007).
[36] *Id*.
[37] *Id*.

Designated Commanding Officers (DCO) discretion to formulate region-specific "maximization" policies; (2) in cases of Japanese primary jurisdiction, eliminate the policy of automatic waiver requests; and (3) in cases of Japanese primary jurisdiction, immediately relinquish custody of U.S. Forces personnel to Japanese authorities upon request. In Part VIII, the Article concludes that such reforms will best serve both Japanese and U.S. interests—Japan's domestic interest in administering justice over military servicemembers will be strengthened, or at least perceived to be strengthened, while both Japanese and U.S. leaders will be better positioned to win Japanese domestic support for U.S. military bases in Japan. Meanwhile, it will cost the United States relatively little in regards to ensuring the protection of the rights of U.S. servicemembers.

II. The U.S.-Japanese FCJ Framework

A. Overview of the SOFA

Specifically defined, "A SOFA is an agreement that establishes the framework under which armed forces operate within a foreign country," providing for the "rights and privileges of covered individuals while in a foreign jurisdiction . . . ."[38] "Covered individuals," or "SOFA personnel," typically include U.S. active duty servicemembers, civilians, and dependents of these persons.[39] The United States currently has a SOFA or SOFA-like agreement with more than 100 countries,[40] all of which are bilateral in nature with the exception of the multilateral NATO SOFA.[41] Status of Forces Agreements often address matters such as "the wearing of uniforms, taxes and fees, carrying of weapons, use of radio frequencies, licenses, and customs regulations,"[42] as well as monetary claims procedures amongst signatories.[43] However, the most commonly

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[38] R. CHUCK MASON, CONG. RESEARCH SERV., RL 34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT AND HOW HAS IT BEEN UTILIZED? 1 (2011), http://www.fas.org/sgp/crs/natsec/RL34531.pdf.

[39] *See* JOHN WOODLIFFE, THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW 173–74 (1992).

[40] MASON, *supra* note 38, at 1.

[41] *Id*. Of these countries, twenty-six are parties to the NATO SOFA and another twenty-four are "subject to the NATO SOFA through their participation in the NATO Partnership for Peace (PfP) program." *See id*. at 2. In contrast, a "bilateral" treaty or agreement is one made between only two nations. *See id*.

[42] *Id*. at 3.

[43] *See* FLECK ET AL., *supra* note 31, 159–86 (giving a general overview of SOFA claims).

addressed provision in a SOFA is the application of FCJ to SOFA personnel.[44]

B. Foreign Criminal Jurisdiction Development after World War II

Following World War II, the United States concluded peace and security treaties with its fallen enemies, including the European 1949 North Atlantic Treaty[45] and the 1951 U.S.-Japan Security Treaty.[46] These treaties were general in nature, memorializing the requirement of peace and cooperation between nations. However, with United States' and other nations' militaries to be stationed in these areas for the indeterminate future, countries recognized that detailed rules were needed to govern foreign military forces.[47]

Prior to the War, two competing doctrines governed the status of U.S. forces abroad: the "Law of the Flag" versus the territorial sovereignty of states.[48] The United States subscribed to the former, deeming its military forces "immune from the jurisdiction of a foreign receiving state."[49] The United States judicially validated the "Law of the Flag" principle in an 1812 U.S. Supreme Court case.[50] The Court, while acknowledging the general rule of the territorial sovereignty of foreign nations, stated that military personnel passing through a foreign state at its invitation were representatives of the sovereign and entitled to sovereign immunity.[51]

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[44] MASON, *supra* note 38, at 1.
[45] North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.
[46] Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Jan. 19, 1960, 11 U.S.T. 1632, T.I.A.S. No. 4509, 373 U.N.T.S. 186.
[47] *See* FLECK ET AL., *supra* note 31, at 19–20.
[48] *See* Captain Benjamin P. Dean, *An International Human Rights Approach to Violations of NATO SOFA Minimum Trial Standards*, 106 MIL. L. REV. 219, 220 (1984).
[49] *Id*.
[50] *See id.*
[51] The Schooner Exchange v. McFaddon & Others, 11 U.S. 116 (1812). In *Coleman v. Tennessee*, the Court furthered the logic of *Schooner*, stating that foreign troops permanently stationed abroad with consent of the host nation were immune from the host nation's criminal jurisdiction. 97 U.S. 509, 515 (1878). In the modern day, it is accepted as customary international law that absent an international agreement, a host nation has "exclusive jurisdiction to punish offenses against its laws committed within its borders." Wilson et. al. v. Girard, 354 U.S. 524 (1957). *See also* WOODLIFFE, *supra* note 39, at 170–71. However, the U.S. Supreme Court has consistently held that "where a state of war exists between two nations, jurisdiction may not be exercised by the courts of one nation over the members of the armed forces of another." Donald T. Kramer, *Criminal Jurisdiction of Courts of Foreign Nations over American Armed Forces Stationed*

Generally, European countries involved in post-World War II SOFA negotiations heavily resisted this idea.[52] Thus, in the NATO SOFA, the United States and other European nations agreed to cede some criminal jurisdiction over their foreign-based forces to the host nation.[53]

Under the 1951 U.S.-Japan Security Treaty, Japan did not receive this jurisdictional benefit, with the United States maintaining the extraterritorial jurisdiction it had given up under the NATO SOFA.[54] However, Japan "would insistently request treatment similar to that the United States provided to its NATO allies."[55] In 1953, the parties modified the agreement to follow the NATO SOFA.[56]

C. Foreign Criminal Jurisdiction Scheme of the NATO and U.S.-Japan SOFAs

Under the NATO and U.S.-Japan SOFAs, jurisdiction over SOFA personnel[57] is either exclusive or concurrent. [58] The sending and

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Abroad, 17 A.L.R. FED. § 4, at 725, 737 (1978). In FCJ context, a "state of war" applies to military occupations. *Id*. Moreover, the doctrine of sovereign immunity is valid in other, non-installation contexts, such as misconduct committed aboard a naval vessel and diplomatic immunity. *See id*. § 5, at 743; RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES § 464 (1987); *id.* § 502.

[52] Kramer, *supra* note 51, § 2(a), at 731; Major Mark R. Ruppert, *Criminal Jurisdiction over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L. REV. 1, 5–6 (1996).

[53] *See* NATO SOFA, *supra* note 34, art. 7. In 1957, the U.S. Supreme Court recognized that the United States may constitutionally bargain away "Law of the Flag" immunity. *See Girard*, 354 U.S. 524 (1957). In some of its modern-day bilateral SOFAs (typically with less-developed countries), the United States has maintained a Law of the Flag-type criminal jurisdiction arrangement. Examples include Mongolia and Afghanistan. *See* MASON, *supra* note 38, at 4–8. *See also* Commander Trevor Rush, *Don't Call It a SOFA: An Overview of the U.S.-Iraq Security Agreement*, ARMY LAW., May 2009, at 34, 48–60 (laying out the parameters of criminal jurisdiction provisions entered into between Iraq and the United States, including the narrow Iraqi right of primary jurisdiction in "grave premeditated felonies" and expansive Iraqi jurisdictional rights over U.S. contractors).

[54] *See* FLECK ET AL., *supra* note 31, at 384; Administrative Agreement under Article III of the Security Treaty Between the United States of America and Japan, art. 17, Feb. 28, 1952, 3 U.S.T. 3341, T.I.A.S. 2492. The United States maintained "the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces, civilian component, and their dependents . . . ." *Id.*

[55] FLECK ET AL., *supra* note 31, at 384.

[56] *Id*. at 387.

[57] Overseas U.S. jurisdiction over civilians and dependents is limited by: (1) the first clause of each of the SOFAs; and (2) a line of Supreme Court cases eliminating the

receiving states have the exclusive right of jurisdiction over legal violations that are unique to their respective criminal codes.[59] For example, where a U.S. soldier stationed abroad is "absent without leave," a crime under the Uniform Code of Military Justice (UCMJ), the United States alone has exclusive criminal jurisdiction.[60] Meanwhile, a host nation may criminalize acts that the United States does not, such as treason, sabotage, or espionage against the host nation.[61]

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peacetime court-martial jurisdiction of the United States. *See* NATO SOFA, *supra* note 34, art. 7, para. 1; U.S.-Japan SOFA, *supra* note 4, art. 17, para. 1 (both explaining that military authorities may exercise jurisdiction only over "persons subject to the military law of the United States."); DIETER ET AL., *supra* note 31, at 109–11 (noting the series of cases, beginning with *Reid v. Covert*, 354 U.S. 1 (1957), that eliminated "military jurisdiction of the United States over American dependents and civilians in peacetime"). For a general discussion of the challenges associated with exercising jurisdiction over civilians in the overseas environment, see Captain Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, ARMY LAW., Aug. 200, at 23, 24–26. However, on the practicing levels, arguments can and are made that civilians fall under the "disciplinary jurisdiction" of the United States, administrative sanctions are sufficient, or an extraterritorial federal statute applies. *See* THE JUDGE ADVOCATE GENERAL'S SCHOOL, AIR FORCE OPERATIONS & THE LAW 56–57 (2d 2009) [hereinafter AIR FORCE OPERATIONS & THE LAW].

[58] *See generally* NATO SOFA, *supra* note 34, art. 7; U.S.-Japan SOFA, *supra* note 4, art. 17.

[59] NATO SOFA, *supra* note 34, art. 7, para. 2; U.S.-Japan SOFA, *supra* note 4, art. 17, para. 2.

[60] WOODLIFFE, *supra* note 39, at 176–77; UCMJ art. 86 (2012).

[61] *See* NATO SOFA, *supra* note 34, art. 7, para. 2(c); U.S.-Japan SOFA, *supra* note 4, art. 7, para. 2(c). Given the unique aspects of foreign country law, some may assume host nation exclusive jurisdiction is somewhat broad. For example, in Japan it is an offense to drive with a blood alcohol content of 0.03 or greater. Captain Gerardo Gonzales, *Japan Toughens Traffic, DUI Laws*, PAC. AIR FORCES, Sep. 7, 2007, http://www.pacaf.af.mil/news/story.asp?id=123066866. Moreover, it is an offense to possess certain types of knives with a blade longer than 2.1 inches. Master Sergeant Allison Day, *Revised Japanese Law Cuts Down on Knives*, MISAWA AIR BASE, Jan. 22, 2009, http://www.misawa.af.mil/news/story.asp?id=123132231. The United States is able to extend secondary criminal jurisdiction over such off-base offenses through two methods. First, for servicemembers, the UCMJ may punish such activity as "prejudicial to good order and discipline" pursuant to Article 134. *See* UCMJ art. 134. Second, Designated Commanding Officers and service regulations may impose disciplinary and administrative penalties for violating host nation law. *See, e.g.*, U.S. FORCES JAPAN, INSTR. 31-205, MOTOR VEHICLE OPERATIONS AND TRAFFIC SUPERVISION para. 4.6.3.2 (5 Apr. 2004) (allowing for adverse disciplinary/administrative action in violation of Japanese drinking and driving laws); Colonel Patrick T. Stackpole, U.S. Forces Japan Instruction 31-207 Addendum to Policy (Mar. 2, 2009) (on file with author) (unpublished memorandum prohibiting and restricting the possession of knives off-base pursuant to Japanese law).

However, most offenses involve concurrent jurisdiction,[62] where both states criminalize a suspected offense. In this situation, the host nation generally has "primary jurisdiction," with the initial right to decide whether to take prosecutorial action.[63] Should it decline, the sending state exercises its secondary right if it wishes.[64] There are two exceptions that give the sending state the primary right of jurisdiction: (1) "offenses solely against the property or security of [the sending state], or offenses solely against the person or property of another member of the force or civilian component of that [sending state] or of a dependent;" and (2) "offenses arising out of any act or omission done in the performance of official duty."[65]

An example of the first exception is soldier-on-soldier mutual assault at an off-base drinking establishment. Common examples of the second exception, "official duty," include U.S. military air, sea, and security operations resulting in off-base accidents that harm the property or persons of the host nation.[66] Also included is the travel of SOFA personnel directly to and from their place of duty.[67] Although the term has not been precisely defined in any SOFA,[68] the sending state initially

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[62] *See* Dean, *supra* note 48, at 220–21.

[63] NATO SOFA, *supra* note 34, art. 7, para. 3; U.S.-Japan SOFA, *supra* note 4, art. 17, para. 3.

[64] *See* NATO SOFA, *supra* note 34, art. 7, para. 3(c); U.S.-Japan SOFA, *supra* note 4, art. 17, para. 3(c).

[65] NATO SOFA, *supra* note 34, art. 7, para. 3(a)(ii); U.S.-Japan SOFA, *supra* note 4, art. 17, para. 3(a)(ii). Thus, under both the NATO and U.S.-Japan SOFAs, jurisdiction provisions are dependent on the persons and/or property involved, not the place of the crime. *See* MASON, *supra* note 38, at 4.

[66] For example, in 1957, a U.S. soldier guarding a firing range shot at and killed a Japanese female collecting expended cartridges in the area. Wilson et al. v. Girard, 354 U.S. 524, 525–26 (1957). The soldier's command initially asserted that the soldier was acting in the scope of official duty in protecting the area. *Id*. Ultimately, the United States reversed the command's initial official duty determination. *Id*.

[67] U.S. ARMY IN EUROPE, REG. 550-50; U.S. NAVAL FORCES EUROPE-UNITED STATES SIXTH FLEET, INSTR.5820.K; U.S. AIR FORCES IN EUROPE, INSTR. 51-706, EXERCISE OF FOREIGN CRIMINAL JURISDICTION OVER UNITED STATES FORCES PERSONNEL 58 (Nov. 26, 2007) [hereinafter TRI-SERVICE EUROPEAN FCJ INSTR.]; *Drinking at Work Part of '56 SOFA*, JAPAN TIMES ONLINE, Jun. 17, 2008, http://search.japantimes.co.jp/cgi-bin/nn20080617a7.html (describing a 1950s U.S.-Japan agreement that extended the definition of official duties to drinking at official parties followed by driving).

[68] Implementing military directives in Europe define "official duty" as an act "done pursuant to or in accordance with competent authority or directive, whether express or implied, and is reasonably related to the performance (by the individual concerned) of required or permissive official functions in his or her capacity as a member of the U.S. Forces. TRI-SERVICE EUROPEAN FCJ INSTR., *supra* note 67, at 58. "Competent authority

determines official duty status,[69] and the United States defines official duty expansively.[70]

Aside from a lack of specificity, the facial jurisdictional schemes of the NATO and U.S.-Japan SOFAs generally have not been a source of great international controversy.[71] A goal of the NATO SOFA drafting team was "to strike a balance as far as possible between the *legitimate* interests of the sending and receiving states."[72] When a crime involves only U.S. personnel or property, the United States will have a great interest in prosecution, the host nation will have little, and the United States will have the primary right of jurisdiction. Likewise, when a host national is victimized, the host nation will generally have a greater interest in prosecution. If one state is not satisfied with a jurisdictional result, the state may request a waiver of jurisdiction from the other.[73] The recipient must then give the request "sympathetic consideration."[74]

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or directive" includes but is not limited to statute, regulation, the order of superior, or military use commensurate with the specific factual situation and the circumstances involved." *Id*. In Japan, the term is defined in a supplemental agreement as "any duty or service required or authorized to be done by statute, regulation, the order of a superior, or military usage." *See* U.S. FORCES JAPAN, PAM. 125-1, CRIMINAL JURISDICTION IN JAPAN 22 (1 Jan. 1976). "The term 'official duty' is not intended to include all acts by USFJ personnel during periods while on duty, but rather is limited to those acts or omissions which are related to the performance of official duty." U.S. FORCES JAPAN, INSTR. 51-1, CRIMINAL AND DISCIPLINARY JURISDICTION UNDER THE STATUS OF FORCES AGREEMENT WITH JAPAN para. 4.4.2.2 (3 Oct. 1997). Some legal scholars have defined "official duty" as actions having a "nexus" with military or employment duty. *See* Lieutenant Colonel Chris Jenks, *A Sense of Duty: The Illusory Criminal Jurisdiction of the U.S./Iraq Status of Forces Agreement*, 11 SAN DIEGO INT'L L.J. 411, 421–23 (Spring 2010).

[69] Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, art. 18, Aug. 3, 1959 [hereinafter German Supplementary Agreement]; Agreed Minutes to the Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Force in Japan, art. 17, para. 2(c), Jan. 19, 1960, T.I.A.S. 4510, 11 U.S.T. 1749 [hereinafter Agreed Minutes]; FLECK ET AL., *supra* note 31, at 402 (explaining that if Japanese government objects to a United States official duty determination, the U.S.-Japan Joint Committee will decide the issue).

[70] SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 172 (1971).

[71] *See* WOODLIFFE, *supra* note 39, at 133 (finding that only "extreme nationalists" criticized Article 7 of the NATO SOFA). A possible exception to this lack of criticism is the U.S. definition of official duty. *See* Part IV.C, *supra*.

[72] LAZAREFF, *supra* note 70, at 131 (emphasis added).

[73] NATO SOFA, *supra* note 34, art. 7, para. 3(c) ("The authorities of the State having the primary right shall give sympathetic consideration to a request from authorities of the

D. The U.S. Senate/Department of Defense Mandate to Maximize

Perhaps the most strenuous objector to the facial FCJ scheme has been the United States.[75] In 1953, when the NATO SOFA was presented to the U.S. Senate for its advice and consent, the Senate ratified but expressed what were termed "reservations."[76] First, "where a person subject to the military jurisdiction of the United States is to be tried by the authorities of a receiving state . . . the Commanding Officer . . . in such state shall examine the laws of such state with particular reference to the procedural safeguards contained in the Constitution of the United States."[77] If, in the opinion of the commanding officer, "there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States, the commanding officer shall request authorities of the receiving state waive jurisdiction" in accordance with Article VII of the NATO SOFA.[78] If the receiving state then refuses to waive jurisdiction, "the commanding

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other State for a waiver of its right in cases where that other state considers such waiver to be of particular importance."); U.S.-Japan SOFA, *supra* note 4, art. 17, para. 3(c).

[74] NATO SOFA, *supra* note 34, art. 7, para. 3(c); U.S.-Japan SOFA, *supra* note 4, art. 17, para. 3(c).

[75] *See* WOODLIFFE, *supra* note 39, at 179–80. The debate surrounding the NATO SOFA was an emotional one. Various military commanders, the Under Secretary of State, and President Eisenhower himself claimed that the FCJ provisions of the NATO SOFA were fair and adequate. *See* LAZAREFF, *supra* note 70, at 130. Nevertheless, many in the Senate and Congress were appalled at the prospect of foreign courts trying American troops. *See id*. Critics saw it as ironic that servicemembers would be subject to criminal systems that denied the constitutional rights the members undertook to defend. *See id*. at 130. Emotions boiled to the point where, "several times during the course of the congressional hearings on SOFA it was stated that in France and Italy most judges were communists, and therefore hostile . . . toward American troops." *Id*. at 128.

[76] 32 C.F.R. § 151.6 (1953). These Senate "reservations" did not actually alter the treaty as ratified by the President. *See Subjection of American Military Personnel to Foreign Criminal Jurisdiction: The Territorial Imperative*, 58 IOWA L. REV. 532, 539 n.33 (1972–1973) [hereinafter *Subjection of American Military Personnel to Foreign Criminal Jurisdiction: The Territorial Imperative*] (arguing the Senate Resolution was "merely precatory," not internationally or domestically binding in nature); Edmund Schwenk, *Jurisdiction of the Receiving State over Forces of the Sending State under the NATO Status of Forces Agreement*, 6 INT'L L. 525, 530–31 (1972) (explaining the Senate "reservations" did not change the provisions of the NATO SOFA, and "are purely municipal in nature. . . ."); Captain Jack H. Williams, *An American's Trial in Foreign Court: The Role of the Military Trial Observer*, 34 MIL. L. REV. 1, 8 n.27 (1966).

[77] 32 C.F.R. § 151.6.

[78] *Id*.

officer shall request the Department of State to press such request through diplomatic channels . . . ."[79]

Some legal scholars have argued the Senate Resolution did not require the United States to use persuasive or coercive methods to wrest primary jurisdiction from the host nation.[80] That is, it merely required a request for waiver where U.S. constitutional protections lacked, and, failing that, host nation law might not afford a fair trial. A waiver request is required in only those cases where "there is a danger of concrete prejudice to the accused."[81]

The current version of a DoD Directive on SOFA policies generally supports this argument. It applies the Senate Resolution to all "overseas areas where U.S. Forces are regularly stationed."[82] If it appears "probable that a release of jurisdiction will not be obtained," it is the duty of the DCO, who is Commander, United States Forces Japan (USFJ), to determine whether there is a danger an accused will not receive a fair trial, "in light of legal procedures in effect in that country."[83] The directive explicitly states foreign trials need not mirror U.S. trial procedure to meet the standard of "fairness."[84] However, "due regard" is to be given to a list of seventeen "fair trial guarantees," guarantees "considered . . . applicable to U.S. state court criminal proceedings, by virtue of the 14th Amendment as interpreted by the [U.S. Supreme Court]."[85] If the DCO finds a risk of unfair trial, the DCO may "press a

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[79] *Id*. The reservations also called for a U.S. military representative to attend the trial of anyone subject to military jurisdiction and stated that Article VII of the NATO SOFA did not constitute precedence for future agreements. *Id*.

[80] *See* Ruppert, *supra* note 52, at 8 (arguing the Senate Resolution "did not expressly require the U.S. to obtain jurisdiction in all cases . . . ."); *Subjection of American Military Personnel to Foreign Criminal Jurisdiction: The Territorial Imperative*, *supra* note 76, at 570 (explaining that regardless of the constitutional protections of a foreign court, the waiver provisions of the Senate Resolution apply only when a deprivation of rights is in fact "harmful to the accused").

[81] *See* Williams, *supra* note 76, at 9 n.22 (quoting JOSEPH M. SNEE & KENNETH A. PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION 119 (1967)).

[82] U.S. DEP'T OF DEF., DIR. 5525.1, STATUS OF FORCES POLICY AND INFORMATION (7 Aug. 1979) [hereinafter DoDD 5525.1].

[83] *Id*. para. 4.5.1.

[84] *Id*. para. 4.5.2.

[85] *Id*. encl. (2).

request for waiver of jurisdiction through diplomatic channels."[86] The directive does not directly discuss maximization of waiver or custody.[87]

Nevertheless, from the 1953 Senate Resolution "grew our policy to secure jurisdiction whenever possible in cases where the receiving State had the primary right of jurisdiction."[88] A "Tri-Service" Secretary-level regulation adds to the language of the DoD Directive (DoDD) 5525.1, explicitly directing the U.S. military to liaison with host nation authorities and maximize of jurisdiction.[89] Consistent with this goal, "efforts will be made in all cases . . . to secure the release of an accused to the custody of U.S. authorities pending completion of all foreign judicial proceedings."[90] Finally, "military authorities will not grant a waiver of U.S. jurisdiction without prior approval of [the Judge Advocate General] of the accused's service."[91] In short, the Tri-Service regulation significantly restricted any existing DCO discretion afforded under DoDD 5525.1.

E. Operation of the Maximization Policy in Europe versus Japan

Unlike their nearly identical facial FCJ schemes, the operation of U.S. maximization policy in the NATO context differs from its application in Japan. In Europe, a number of host nations have formally agreed with the

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[86] *Id*. para. 4.5.3.

[87] *See generally* DODD 5525.1, *supra* note 82. *See also* Press Release, Backgrounder: Status of Forces Agreements, A Summary of U.S. Foreign Policy Issues (Apr. 12, 1996) (on file with author).

> U.S. military commanders . . . are directed by DoD not to consider a trial by the host country unfair merely because it is not identical with trial held in the United States. Nonetheless, if the U.S. commanding officer believes an American under his authority is not being protected under the host country's legal system because of the absence or denial of Constitutional rights the accused would enjoy in the United States, he will request that the host country waive its SOFA rights.

This guidance does not contemplate the maximization of waivers or custody. *See id*.

[88] Ruppert, *supra* note 52, at 8.

[89] TRI-SERVICE REG., *supra* note 32, para. 1-7 ("Constant efforts will be made to establish relationships and methods of operation with host country authorities that will maximize U.S. jurisdiction to the extent permitted by applicable agreements.").

[90] *Id*.

[91] *Id*. para. 1-7(c).

United States to presumptively waive all cases over which they have primary jurisdiction.[92] For example, if Germany wishes to exercise its right of primary jurisdiction over a case, they must notify the sending state within a set time limit.[93] Otherwise, they are presumed to waive.[94] Japan refused this arrangement in 1953, has not agreed to it since, and is thus presumed to exercise their primary right until they notify the United States of their intentions otherwise.[95]

The second difference lies in the practice of criminal custody. Both SOFAs facially state that where the sending state has custody of the suspect, the sending state will retain control "until he is charged by the receiving state."[96] Regardless of who has the primary right of jurisdiction, if the United States takes a SOFA person into custody before the host nation can arrest them, the United States maintains control until indictment. States such as Germany and Spain took this a step further, agreeing to relinquish pre-trial custody upon U.S. request.[97] Although the United States has reached similar agreements with non-NATO nations,[98] it has not done so with Japan.[99]

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[92] *See* FLECK ET AL., *supra* note 31, at 112–14; German Supplementary Agreement, *supra* note 69, art. 19.
[93] FLECK ET AL., *supra* note 31, at 112–14.
[94] *Id*.
[95] *Id*. at 387. An exception to this practice, albeit minor, is that the United States need not bother to inform Japanese authorities of incidents

> involving minor traffic offenses or other minor offenses, which in the opinion of the appropriate SJA/legal officer, based upon discussions with local prosecutors and police authorities and past experience, the local Japanese authorities have clearly indicated that in such cases Japanese prosecution is not contemplated and official written notices of such alleged offenses are not desired.

U.S. FORCES JAPAN, INSTR. 51-1, *supra* note 68, para. 4.4.1.2.4.
[96] NATO SOFA, *supra* note 34, art. 7, para. 5(c); U.S.-Japan SOFA, *supra* note 4, art. 17, para. 5(c).
[97] FLECK ET AL., *supra* note 31, at 118; German Supplementary Agreement, *supra* note 69, art. 22.
[98] FLECK ET AL., *supra* note 31, at 118. Based on 2001 SOFA reforms, South Korea now only immediately turns over the custody of civilians and dependents, not active duty servicemembers. *Id*.
[99] Under the U.S.-Japan SOFA Agreed Minutes, Japanese authorities agreed to relinquish such custody to the United States "unless they deem there is adequate cause and necessity to retain such offender." Agreed Minutes, *supra* note 69, art. 17, para. 5. In practice, Japanese authorities often have strong incentive to retain the offender. *See* Stone, *supra* note 17, at 255. In Germany, "where the arrest has been made by German authorities, the arrested person *shall* be handed over to the authorities of the sending State concerned if

F. Foreign Criminal Jurisdiction Practice in Japan

The Commander of U.S. Forces Japan, "establish(es) policies that maximize U.S. jurisdiction and custody."[100] Likewise, installation commanders throughout Japan are tasked with implementing "policies to maximize U.S. jurisdiction and custody of USFJ personnel."[101] Furthermore, at "all levels of command," the military will effectively liaison with "Japanese police, investigative agencies, and judicial, Ministry of Justice, and prosecutorial officials . . . in order that a maximum number of waivers of jurisdiction and releases from Japanese custody will be granted."[102] As one commentator has noted:

> Maximization of U.S. jurisdiction . . . involves a much more proactive posture than waiting until a SOFA person is facing actual charges and then requesting that the charges be waived or dropped. Procedures used within Japan to maximize U.S. jurisdiction include a variety of methods which attempt to obtain release of cases to the U.S. through a combination of non-indictments, U.S. investigation of crimes involving alleged U.S. perpetrators, lapse of time to provide a notice of intent to indict, and if necessary, waivers of cases already under indictment.[103]

Pursuant to the goal of maximizing custody,

> when both United States Armed Forces and Japanese law enforcement personnel are present on the scene where any violation of law has occurred, the arrest of [SOFA personnel] should be made by United States law enforcement personnel.[104]

Moreover, "unless the Japanese police have officially arrested the SOFA person prior to the arrival of U.S. law enforcement personnel, it is

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such authorities so request." German Supplementary Agreement, *supra* note 69, art. 22, para. 2(a) (emphasis added).

[100] U.S. FORCES JAPAN, INSTR. 31-203, LAW ENFORCEMENT PROCEDURES IN JAPAN para. 4.1.2 (24 June 2004).

[101] *Id*. para. 4.3.2.

[102] U.S. FORCES JAPAN, INSTR. 51-1, *supra* note 68, para. 3.

[103] FLECK ET AL., *supra* note 31, at 388.

[104] U.S. FORCES JAPAN, INSTR. 31-203, *supra* note 100, para. 7.2.

immaterial who arrived on the scene first."[105] Under such circumstances, U.S. law enforcement should "ensure they obtain and retain custody of personnel."[106] If Japanese police detain a SOFA person, "responding law enforcement personnel are to make a written request for custody of such members."[107] If U.S. authorities initially obtain custody, generally they must maintain it until Japanese authorities decide whether to formally indict.[108]

In addition to aggressive law enforcement approaches, SOFA procedural tactics, and creating effective liaisons with the host nation, another crucial method of maximizing jurisdiction is apology, or what implementing instructions term "condolence procedures."[109] In Japan, a harmonious community relationship is imperative,[110] placed above "abstract notions of 'just deserts' or 'debts to society' that require a particular penalty."[111] As one commentator explains, "Apology works. Confession of wrongdoing and acceptance of responsibility toward those harmed begins the process of correction," while creating a critical positive relationship with the victim.[112] Through such expressions of remorse and acceptance of accountability through compensation of the victim, the police, prosecution, and/or judge will be encouraged to "divert an offender out of the formal system and back into his or her community."[113] Furthermore, while sincere apologies for serious felony-level crimes will not keep a defendant out of prison,[114] they will often mitigate punitive impact.[115]

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[105] *Id*. para. 7.2.1.
[106] *Id*.
[107] *Id*. para. 9.2.4.1.1. The same request shall be made for members of the civilian component and dependents "unless the parent command directs otherwise." *Id*. para 9.2.4.1.2.
[108] U.S. FORCES JAPAN, INSTR. 51-1, *supra* note 68, para. 4.5.1.2.
[109] *See* U.S. FORCES JAPAN, INSTR. 36-2612, *supra* note 29; COMMANDER NAVAL FORCES JAPAN, INSTR. 5820.16E, COMNAVFORJAPAN JAPANESE JURISDICTION MANUAL sec. 10 (1 Aug. 2006).
[110] JACK OWEN HALEY, THE SPIRIT OF JAPANESE LAW 85 (1998).
[111] *Id*. at 79.
[112] *Id*. at 85.
[113] *Id*. at 76. Haley asserts that a very small percentage of prosecutable cases are actually prosecuted at the criminal trial level, and that the low rate is in large part due to the "apology" dynamic. *See id*. at 79.
[114] *Id*. at 74. As would be expected, serious crimes such as homicide, drug offenses, rape, and robbery are fully prosecuted at the criminal trial level most of the time, regardless of apology. *Id*.
[115] *Id*. at 79.

United States military authorities generally embrace this concept, and not only for individual personnel. In cases of death or serious injury, senior commanders and non-commissioned officers often make official apologies, sometimes offering solatium payments with the use of command funds.[116] Such actions not only help maintain the military's relationship with the community, but may also help further U.S. jurisdictional concerns in a particular case.[117]

G. Japan's Frustration with the Maximization Policy

If favorability of an FCJ agreement is judged in terms of jurisdictional control, Japan seems to have it. With no presumption of waiver and the ability to hold the military offenders they catch, Japan has benefits that NATO SOFA signatories lack. Also, while the United States uses various methods to obtain jurisdiction, one of those methods, condolences, is harmonious with the Japanese criminal system and not a source of controversy.[118]

However, U.S. maximization policies in NATO countries tend to be non-controversial,[119] while in Japan they are perceived as "failing to deter the abhorrent behavior of American servicemen and women,"[120] and "impeding investigation and favoring the accused United States citizen."[121] Unsurprisingly, Japan exercises its primary right of

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[116] U.S. FORCES JAPAN, INSTR. 36-2612, *supra* note 29, paras. 2, 3.5; COMMANDER, NAVAL FORCES JAPAN, INSTR. 5820.16E, *supra* note 109, secs. 1001–1005.

[117] *See* U.S. FORCES JAPAN, INSTR. 36-2612, *supra* note 29, para. 2.

[118] *See* HALEY, *supra* note 110, at 76–77. United States and Japanese authorities have publicly promoted the relative international Japanese advantage in their criminal jurisdiction arrangements. *See, e.g.*, *Cases Highlight Custody Issues*, JAPAN TIMES ONLINE, January 18, 2006 [hereinafter *Cases Highlight Custody Issues*], http://search.japantimes.co.jp/cgi-bin/ed20060118a1.html.

[119] *See* COOLEY, *supra* note 26, at 21 n.52; Major Wes Erickson, *Highlights of Amendments to the Supplementary Agreement*, ARMY LAW., Dec. 1993, at 15. In the late 1980s Germany sought changes to NATO SOFA-based provisions that "were no longer consistent with the Federal Republic's status as an equal partner in NATO." *Id*. In 1993, negotiating parties agreed to a number of significant revisions, including the controversial issue of the U.S. military's ability to execute the death penalty inside Germany. *See id.* at 19–25. However, there was no serious push for FCJ revisions during the process of negotiation. *See id*.

[120] Jaime M. Gher, *Status of Forces Agreements: Tools to Further Effective Policy and Lessons to be Learned from the United States-Japan Agreement*, 37 U.S.F. L. REV. 227, 229 (Fall 2002).

[121] *Id*.

jurisdiction at a higher rate than NATO countries.[122] As for the U.S.-Japan custody arrangement, a scholar characterizes the Japanese perception of it as follows:

> [T]he Japanese police are hobbled in carrying out an investigation and that prosecutors may thus be reluctant to indict an American serviceman because of insufficient evidence . . . . All servicemen in Okinawa know that if after committing a rape, a robbery, or an assault, they can make it back to the base before the police catch them, they will be free until indicted even though there is a Japanese arrest warrant out for their capture.[123]

Thus, although relatively more advantageous, U.S.-Japan's FCJ applicative structure has engendered more conflict than the FCJ structure in many NATO countries. Over years of practice, the NATO's automatic jurisdiction and custody provisions seem to have become institutionalized and given predictability to criminal jurisdiction actions. Such stability is lacking in Japan. Custody often hinges on which country arrests first, engendering international tension. In addition, condolences may fail to satisfy the victim, or, due to seriousness of the crime, waiver of jurisdiction may be impossible. In such situations, the military authorities will need to use persuasion with Japanese authorities, either polite or confrontational, to obtain the jurisdiction and custody it is required to seek in every case.

The following sections analyze the unique international and domestic influences that shape Japan's approach to FCJ issues. Attempts to improve the U.S.-Japan FCJ relationship should not be based on international uniformity, but should focus on addressing Japan's unique views and their interplay with Japan's unique FCJ construct.

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[122] In a study of 1988 FCJ numbers, one legal scholar found that NATO countries waived their primary right of jurisdiction over sending state criminal suspects in 12,269 of 12,674 cases, or 96.8%. WOODLIFFE, *supra* note 39, at 184–85. Germany waived at a rate of 99.9%. *Id*. *See also* Dean, *supra* note 48, at 33 (explaining that German waiver rates increased dramatically since 1978, with rates above 99% in 1984–1985). In the same year, Japan waived their primary right at a rate of 78.5%. WOODLIFFE, *supra* note 39, at 194 n.102. Estimated Japanese waiver rates in recent years are just above 70%. E-mail from Ms. Hiromi Takahasi, Foreign Criminal Jurisdiction Liaison, Region Legal Serv. Office Japan (Mar. 2, 2011, 01:54:00 EST) (on file with author).

[123] Johnson, *supra* note 23.

III. International Considerations in U.S.-Japan Military Basing

A. Two-Level Military Basing Games

Overseas bases have been a staple of U.S. defense policy for decades, and will continue to be important "as U.S. planners reconfigure the force structure and basing posture to cope with more regionally based threats."[124] Such bases allow the United States to "flexibly and rapidly concentrate resources from diverse locations for national advantage on land, at sea, and, ultimately, in the air."[125] They are a projection of American ideals abroad, "embodiments of U.S. power, identity, and diplomacy."[126] In the modern day, U.S. military bases stabilize regions with their mere presence.[127]

However, the United States has experienced changes to overseas basing terms, changes it did not necessarily want.[128] Military basing-related agreements, including SOFAs, typically take the form of "incomplete contracts," where "many clauses . . . remain initially unspecified or . . . deferred for future negotiation."[129] Even where an agreement is clear, "states cannot take for granted that other international actors will honor agreements."[130]

Two-level game theory is a useful construct in explaining the interaction of FCJ issues with the stability of the U.S. military presence in Japan. Any two-level game includes both international and domestic players, with somewhat unique interests for each. Thus, "the political complexities for the players in [a] two-level game are staggering."[131]

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[124] COOLEY, *supra* note 26, at 4.
[125] CALDER, *supra* note 35, at 8.
[126] COOLEY, *supra* note 26, at 7.
[127] *See* CALDER, *supra* note 35, at 9.
[128] *See* Part I.A; CALDER, *supra* note 35, at 255–56 (listing the host nation ejections of military bases belonging to the United States, Russian, British, and French military bases). Since 1990, South Korea and Germany have made extensive revisions to their SOFAs. *See* Amendments to the Agreed Minutes of July 9, 1966, to the Agreement under Article IV of the Mutual Defense Treaty Between the United States and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, as Amended, July 18, 2001, U.S.-S. Korea, Jan. 18, 2001, *available at* http://www.usfk.mil/usfk/sofa; Erickson, *supra* note 119, at 15.
[129] ALEXANDER COOLEY, CONTRACTING STATES 5 (2009).
[130] *Id.*
[131] Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORGANIZATIONS 427, 434 (Summer 1988).

Depending on the issue, one player may significantly affect the negotiation process.[132] Moreover, chief negotiators may be heavily influenced by domestic opinion, as their political careers may be at risk.[133] The purpose of the game is to engage in "international cooperation . . . where it allows for a superior aggregate outcome," considering both international and domestic interests.[134] The best outcome may include both the personal utilitarian interests of the players and more altruistic notions of public welfare.[135]

A crucial part of the game of base politics is the "catalyst," the action that results in the scrutinizing of military basing and may ultimately result in changes to the host-sending state relationship.[136] The political and military actions of China and North Korea have been catalysts in shaping the current U.S.-Japan basing structure.

B. Common Threats: China and North Korea

Over the last decade, China has undergone significant military modernization, with "deployment of fourth-generation jet fighters, aerial refueling capabilities, an impressive submarine fleet, new destroyers, and . . . plans for an Airborne Warning and Control System (AWACS) and aircraft carrier," and a "strengthening of virtually all the key elements that we traditionally associate with comprehensive national power . . . ."[137] They have continued to increase military expenditures, with a "whopping increase of 18%" in their 2008 defense budget.[138] In the most recent data available from the Central Intelligence Agency's (CIA) World Factbook, covering the years of 2005 to 2006, China's military expenditures accounted for 4.3% of gross domestic product (GDP),

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[132] *Id.*
[133] *See id.* at 457–59.
[134] Joel P. Tractman, *International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law*, 11 CHI. J. INT'L L. 127, 154 (Summer 2010). Tractman builds on the work of international relations theorists such as Putnam and creates a new game theory model focused on predicting a state's compliance with international law. *Id.*
[135] *See id.* at 140–47. In determining compliance with a particular international rule, "the government official's objective includes both the private interest in re-election and aggregate social welfare based on altruism." *Id.* at 140.
[136] *See* CALDER, *supra* note 35, at 86.
[137] RICHARD J. SAMUELS, SECURING JAPAN 140 (2007).
[138] DAVID M. SMICK, THE WORLD IS CURVED 116 (2009).

compared to the United States' 4.06%.[139] However, the United States suspects that China's official numbers are significantly underestimated.[140]

China has put their military prowess to use. In 2005, it "adopted an anti-secession law that legalized the use of force to block Taiwan independence." [141] Japanese intelligence indicates China is anticipatorily targeting U.S. forward-deployed assets in Japan, "installing seabed sensors on likely U.S. warship-routes in the event of their deployment to Taiwan," and, despite Japanese Coast Guard resistance, conducts surveys for submarine navigation.[142]

In addition, China asserts sovereignty over the Senkaku Islands in the East China Sea.[143] These islands were administered as part of Okinawa after WWII and were undisputed until 1968, when oil deposits were discovered nearby.[144] In 1992, lacking oil resources within its territory, China claimed the islands as their own, a claim that Japan summarily rejected.[145] Moreover, China asserts that its Exclusive Economic Zone (EEZ) extends all the way to the continental shelf of Okinawa.[146] Both China and Japan have attempted exploration of Senkaku energy resources, with diplomatic disputes and minor armed fighting resulting.[147]

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[139] *The World Factbook*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world- factbook/rankorder/2034rank.html?2034rank.html?countryName=United States&countryCode=us&regionCode=na&rank=24#us (last visited Jan. 29, 2011).
[140] *See* YUTAKA KAWASHIMA, JAPANESE FOREIGN POLICY AT A CROSSROADS 107 (2003); U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 43 (2010) [hereinafter U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA, http://www.defense.gob/pubs/pdfs/2010_CMPR_Final.pdf.
[141] SAMUELS, *supra* note 137, at 140.
[142] *Id*.
[143] *Id*.
[144] *Id*. at 142.
[145] *Id*.
[146] *See* KENT E. CALDER, PACIFIC ALLIANCE 143 (2009); Mark J. Valencia, *The East China Sea Dispute*, 31 ASIAN PERSPECTIVE, 127, 147–49 (2007).
[147] CALDER, *supra* note 146, at 143–44.

The United States and Japan recognize these threats and have publicly reaffirmed their alliance because of them.[148] While sometimes publicly promoting a positive relationship with China,[149] the United States recognizes the Chinese are rapidly building military capabilities in order to increase "options for using military force to gain diplomatic advantage or resolve disputes in its favor."[150] The United States has declared it will continue to utilize its Navy, Air Force, and other military assets to secure its Taiwanese interests.[151] The Japanese government, at least officially, generally agrees with these assessments.[152]

North Korea is also a major international security concern. For approximately two decades, North Korea has devoted a large amount of its national resources to military advancement.[153] It possesses weapons of mass destruction and is suspected of developing nuclear weapons.[154] In resistance to "nuclear diplomacy" efforts, North Korea has, on multiple occasions, conducted ballistic missile and anti-ship missile tests in the Sea of Japan.[155] They continually test the boundaries of South Korea with military operations and have harassed U.S. reconnaissance aircraft.[156] In

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[148] *Id*. at 145; Kate Anderson Brower, *Obama Calls Alliance with Japan a Cornerstone of Security in Kan Meeting*, BLOOMBERG NEWS, Sep. 23, 2010, http://www.bloomberg.com/news/2010-09-23/obama-calls-alliance-with-japan-a-cornerstone-of-security-in-kan-meeting.html (reporting President Obama's comment that the U.S.-Japan alliance is "one of the 'cornerstones' for global security." *Id*. Foreign policy analysts have recognized the U.S. military presence there as offering "breathing room for the rest of Asia" in terms of regional stability. ZBIGNIEW BRZEZINSKI, AMERICA AND THE WORLD: CONVERSATIONS ON THE FUTURE OF AMERICAN FOREIGN POLICY 132 (2008).

[149] John D. Banusiewicz, *Gates Urges Positive U.S.-China Military Relations*, U.S. DEP'T OF DEF., June 5, 2010, www.defense.gov/news/newsarticle.aspx?id=59504.

[150] U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 140, at 1.

[151] *Id*. at 25.

[152] *See generally* KAWASHIMA, *supra* note 140, at 96–109. In addition, Kawashima discusses two fears of China: (1) its economic success dangerously enables its military capability to the detriment of the world, or (2) the Chinese economic system, and its societal order along with it, crumbles. *Id*. at 101. If either projection comes true, it will be an unprecedented international security dilemma due to its massive population of 1.3 billion, who could either serve as a strong-armed force or create an epic humanitarian disaster. *Id*.

[153] SAMUELS, *supra* note 137, at 149. Exact numbers are not available, although one estimate puts North Korea expenditures at 25% of GDP. *See Military*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/ world/dprk/budget.htm.

[154] CALDER, *supra* note 146, at 144–45.

[155] SAMUELS, *supra* note 137, at 149.

[156] *Id*.

2001, "the Japanese Coast Guard sank a North Korean spy ship, in the first incident of Japanese hostile fire since World War II."[157]

If the North Korean threat was not deemed credible in the past, the recent events have crystallized the danger. On November 23, 2010, North Korea launched artillery strikes against South Korea.[158] With this attack occurring in the wake of a March 2010 North Korean sinking of a South Korean Navy ship, the United States called North Korea's actions "the latest sign . . . of continued belligerence" and deemed the attack as dangerous and destabilizing for the region.[159] In a country where every North Korean move dominates the Japanese news,[160] Japan's Prime Minister said the country would work with South Korea and the United States to address "North Korea's reckless and dangerous acts."[161] China, who supplies North Korea with the bulk of its energy resources, effectively blocked a UN Security Council Resolution that would have condemned the North Korean attacks and its continuing uranium enrichment program.[162]

C. Differences in Foreign Policy Outlook

Although the United States and Japan have similar security concerns, one foreign policy scholar has observed that "shared interests do not translate directly into shared policy."[163]

Perhaps the most pronounced divide between U.S. and Japanese perceptions of security threats is "immediacy." With their military capabilities, North Korea and China pose a physical danger to Japanese territory and its citizens. China lacks the weaponry and force capacity to attack mainland America, and it will likely be years before they have

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[157] *Id*. at 148.
[158] Jim Garamone, Mullen: *North Korea's Unpredictability Endangers Region*, U.S. DEP'T OF DEF., Nov. 28, 2010, www.defense.gov/news/article.aspx?id=61859.
[159] *Id*.
[160] Justin McCurry, *Japan's Response to North Korea Takes on a Sharper Edge*, CHRISTIAN SCI. MONITOR, Nov. 30, 2010, www.csmonitor.com/layout/set/print/content/view/print/346190.
[161] *Id*. (quoting Japanese Prime Minister Naoto Kan).
[162] Louis Charbonneau, *U.N. Push for North Korea Condemnation Falters*, REUTERS, Nov. 30, 2010, http://www.reuters.com/article/idUSTRE6B00A520101201.
[163] SAMUELS, *supra* note 137, at 142.

such ability.[164] However, Japan is well within reach of Chinese armaments.[165] Likewise, a number of North Korean weapons are "demonstrably capable of striking Japan."[166]

Moreover, a significant contingent of Japanese politicians and bureaucrats question the practical ability of U.S. military bases to defend against such threats, as well as the U.S. willingness to do so. For example, in early 2010 when "North Korea was threatening to go ahead with a series of missile launches," reporters asked "why Defense Secretary Robert Gates openly refused to defend Japan. . . ."[167] In 2011, former Prime Minister Hatoyama publicly stated that the presence of U.S. Marine Corps bases in Okinawa were not an effective deterrent to Chinese threats.[168] In the past, other prominent officials have openly raised similar concerns.[169]

Moreover, political and cultural history influence Japan's outlook. There is a winding trail of recurrent conflict between Japan and its neighbors, and with it a permeating animosity amongst Japan, China, and North Korea.[170] Over the last two centuries, Japan and China have engaged in armed conflict on multiple occasions, including the still-controversial Sino-Japanese War of 1937–1945.[171] Although Japan has repeated overtures of remorse for this event,[172] Chinese anger

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[164] U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 140, at 29–32.
[165] *Id*. at 32.
[166] CALDER, *supra* note 35, at 144.
[167] *See* Sheila A. Smith, *More Mature Basing Policy Needed in Japan*, ASAHI SHIMBUN, Jun. 5, 2010, *available at* http://www.asahi.com/english/TKY201006040369.html.
[168] *Hatoyama was Irresponsible to Use Presence of U.S. Marines in Okinawa as a Political Maneuver*, MAINICHI DAILY NEWS, Feb. 16, 2011, *available at* http://mdn.mainichi.jp/perspectives/editorial/archive/-news/2011/02/20110216p2a00m0na001000c.html?inb=rs&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+mdn%2Fall+%28Mainichi+Daily+News+-+All+Stories%29.
[169] *See* Morihiro Hosokawa, *Are U.S. Troops in Japan Needed? Reforming the Alliance*, COUNCIL ON FOREIGN RELATIONS, FOREIGN AFF. 2 (July/August 1998); *A Dialogue with Shunji Taoka*, (Japan Policy Research Institute, Working Paper No. 31 1997), http://www.jpri.org/publications/workingpapers/wp31.html.
[170] *See* SAMUELS, *supra* note 137, at 135–56.
[171] JAPAN: A COUNTRY STUDY ch. 8 (Ronald E. Dolan & Robert L. Worden eds., 1994). This war included the brutal "Rape of Nanjing," wherein some 100,000 Chinese civilians were killed. *Id*.
[172] Shiela K. Park, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, 3 ASIAN-PAC. L. & POL'Y J. 23, 43–44 (2002) (describing the apology attempts made by Japanese officials and arguing their inadequacy).

continues.[173] The Japan-North Korea relationship faces similar adversity. In 2002, North Korea admitted to kidnapping at least thirteen Japanese civilians in the 1970s and 80s.[174] These kidnappings have been a prominent subject of Japanese politics.[175] In 2008, the issue created friction between Japan and the United States, when, in an attempt to improve North Korean relations, the United States removed its designation of North Korea as a sponsor of terrorism without consulting Japan.[176] Japanese leaders were infuriated.[177]

Another policy divergence stems from Japan's dependence on Middle Eastern oil.[178] In 2001, seeking to ease the burden, Japanese corporations sought and won the rights to support exploitation of a massive Iranian oil field. Japan's Prime Minister provided official assistance to the project, even after Iran was found to have a secret nuclear enrichment program.[179] Despite the U.S. Secretary of State publicly and privately admonishing the business deal and pushing Japan to cease all Iranian contacts, Japan moved forward on it "as a matter of national interest."[180] It was not until late 2006, after the UN Security Council formally demanded that Iran cease uranium-enrichment, that Japan cut most of its ties to the Iranian

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[173] SAMUELS, *supra* note 137, at 138. Samuels states that "[i]n the Chinese media, there is no mention of Japanese development assistance or investment, no recognition of sixty years of Japanese pacifism, and little acknowledgment of formal Japanese apologies for wartime aggression." Moreover, Japanese citizens tend to believe the Chinese teach only a "one-sided, patriotic version of history." *Id*.

[174] Norimitsui Onishi, *Japan Rightists Fan Fury over North Korea Abductions*, N.Y. TIMES, Dec. 17, 2006. Since the admission, more abductees have been identified and many have not been returned. *Id*.

[175] *Id*. The issue was a critical factor in Shinzo Abe's victorious Prime Ministerial 2006 campaign. *Id*.

[176] Glenn Kessler, *U.S. Drops North Korea from Terrorism List*, WASH. POST, Oct. 12, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/10/11/AR2008101100261.html. For the current list of U.S. list of "State Sponsors of Terrorism," see U.S. DEP'T OF STATE: COUNTRY REPORTS ON TERRORISM 2009, ch. 3 (2009), http://www.state.gov/s/ct/rls/crt/2009/index.htm (last visited Aug. 15, 2010).

[177] Kessler, *supra* note 176. *See also See* EMMA CHANLETT-AVERY & WESTON S. KONISHI, CONG. RESEARCH, RL 33740, THE CHANGING U.S.-JAPAN ALLIANCE: IMPLICATIONS FOR U.S. INTERESTS 21 (2009), http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA504451 ("Political turmoil in Tokyo and shifting policy approaches toward North Korea challenge the robustness of the alliance. In the short to medium-term, some predict a downturn for U.S.-Japan relations.").

[178] SAMUELS, *supra* note 137, at 153. In 2005, the Middle East supplied 90.2% of Japan's oil. *Id*.

[179] *Id*.

[180] *Id.* at 155.

deal.[181] However, Japan maintains a 10% interest in the oil field, and there remains reason to believe "that oil and the Middle East could continue to strain the alliance."[182]

Oil is not the only resource concern of Japan. In general terms, the economic interests of Japan are not necessarily aligned with those of the United States.[183] The relative monetary U.S. share of Japanese trade has steadily declined. In 2002, the United States was Japan's top trade partner.[184] By 2009, China had firmly replaced the United States in that category, with Japanese exports and imports with China nearly two times that of the United States.[185] With this trade shift, there is an increasing recognition by Japanese leaders that economic relations with China, in the long term, must remain positive.[186]

Finally, underlying all of these unique perspectives is the 1946 Japanese Constitution. Article IX of the document proclaims: "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes."[187] Consistent with this aspiration and renunciation, the Article further declares that "war potential will never be maintained."[188] This clause has perhaps been the most influential factor in modern Japanese foreign security policy.

For many decades, the clause was interpreted quite literally. For example, in 1959 a Japanese district court found the presence of U.S. Forces to be unconstitutional.[189] Likewise, in 1973, a district court found the existence of the Japanese Self-Defense Forces (JSDF) to violate

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[181] *Id.*
[182] *Id.*
[183] KENNETH B. PYLE, JAPAN RISING 338 (2007).
[184] MINISTRY OF INTERNAL AFF. & COMM., STATISTICAL HANDBOOK OF JAPAN ch. 11 (2010) (Japan).
[185] *Id.*
[186] PYLE, *supra* note 183, at 338.
[187] NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 2 (Japan).
[188] *Id.*
[189] Japan v. Sakata, Tokyo Chiho Saibansho [Tokyo D. Ct] March 39, 1959, 89 Hanrei Taimuzu 79 (Japan), *reprinted in* JAPANESE LAW IN CONTEXT 157 (Curtis J. Milhaupt, J. Mark Ramseyer & Michael K. Young eds., 2001).

Article IX.[190] Although higher Japanese courts would later reverse these decisions,[191] there remains a significant contingent of Japanese politicians and citizens who insist the clause prohibits most, if not all, military capabilities.[192]

An important consequence of Article IX has been the reluctance of the country to develop and utilize JSDF. It was not until the turn of the 21st century, in response to rising international turmoil and the September 11, 2001, attacks, that Japan engaged JSDF in non-combat support activities.[193] However, significant limitations remain due to "pacifist" political beliefs.[194] Currently, the Japanese government officially recognizes that "the Constitution allows Japan to possess the

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[190] Ito v. Minister of Agric., Forestry and Fisheries, Sapporo Chiho Saibansho [Sapporo D. Ct] Sept 7, 1973, 712 Hanrei Jiho 24 (Japan), *reprinted in* JAPANESE LAW IN CONTEXT 163 (Curtis J. Milhaupt, J. Mark Ramseyer, & Michael K. Young eds., 2001).

[191] Sakata v. Japan, Saiko Saibansho [Supreme Ct., Grand Bench] March 39, 1959, 13 Keishu 3225 (Japan), *reprinted in* JAPANESE LAW IN CONTEXT 161 (Curtis J. Milhaupt, J. Mark Ramseyer & Michael K. Young eds., 2001) (stating that "we, the people of Japan, do not maintain the so-called war potential provided in paragraph 2, Article IX of the Constitution," and that Article IX "does not prohibit our country from seeking a guarantee from another country in order to maintain the peace and security of the country. . . ."); Minister of Agric., Forestry and Fisheries v. Ito, Sapporo Koto Saibansho [Sapporo High Ct] Sept 7, 1976, 27 Gyosai Reishi 1175 (Japan), *reprinted in* JAPANESE LAW IN CONTEXT 168 (Curtis J. Milhaupt, J. Mark Ramseyer & Michael K. Young eds., 2001). The Court compared the SDF with the war capabilities of other nations, finding that the SDF was not "clearly aggressive." *Id*. On this reasoning, the court said "the primary duty of the SDF is the defense of the nation," and "is exclusively for self-defense." *Id*.

[192] *See* KAWASHIMA, *supra note* 140, at 6–7; Kosuke Takahashi, *Pyongyang Shakes up Pacifist Japan*, ASIA TIMES ONLINE, May 30, 2009, http://www.atimes.com/atimes/Japan/KE30Dh01.html.

[193] KAWASHIMA, *supra* note 140, at 8.

[194] *Id*. Kawashima notes that former Prime Minister Koizumi suggested "the opposition's legal arguments against (JSDF legal reforms) were as relevant as medieval theological debates." *Id*. Nevertheless, "the issue has not been clearly sorted out." *Id. See also* Canon Pence, *Reform of the Rising Sun: Koizumi's Bid to Revise Japan's Pacifist Constitution*, 32 N.C.J. INT'L L. & COM. REG. 335 (Winter 2006) (discussing proposals of Japanese Art. IX constitutional reform and challenges to those proposals, including political and popular pacifist sentiment); *Abe Calls for Bold Review of Constitution*, N.Y. TIMES, May 3, 2007, *available at* http://www.nytimes.com/2007/05/03/world/asia/03iht-japan.1.5546774.html?_r=1 (describing polls showing continuing Japanese pacifist ideals and resistance to change of Article IX of its constitution, despite an increasingly active self-defense force); *Yomiuri Shimbun March 2008 Opinion Polls*, MAUREEN & MIKE MANSFIELD FOUND., http://www.mansfieldfdn.org/polls/2008/poll-08-06.htm (showing that a majority of Japanese do not support changing the renunciation of the war clause, nor do they support changing the clause prohibiting Japan's maintenance of armed forces capability).

minimum level of armed force" needed to exercise "Japan's inherent right to self-defense," while limiting the right based on "the principle of pacifism is enshrined in the Constitution."[195] Thus, Japan may not "possess certain armaments . . . [which] would cause its total military strength to exceed the constitutional limit," including "intercontinental ballistic missiles (ICBM), long-range strategic bombers, or attack aircraft carriers."[196] Although Japan recognizes that international law permits the right of collective self-defense, it specifically finds this right impermissible under its own Constitution.[197]

Since 9/11 in particular, the United States has encouraged Japan to effectively participate in collective self-defense.[198] If Japan were able to disregard pacifist ideology and politics, increased military operational capabilities might become a positive reality. It would appease current U.S. desires, increase Japan's ability to protect against imminent threats, and, if desired, enable the country to assert independence from the United States. On the other hand, a more militaristic Japan would have a significant "real dollar" economic cost and might alienate the United States. Also, an increase in military capacity would alarm China, resulting in increased tension between the region's powers.[199]

However, the status quo also presents potential problems for the alliance. While Japan and China harbor mutual animosity, "a number of forces encourage Beijing and Tokyo to pursue closer collaboration."[200] Foremost is economics. If an otherwise viable China-Japan economic relationship were truly threatened, Japan might see the financial costs of a reduced U.S. presence as inconsequential. Another commonality between the countries is suspicion of the United States. One analyst warns that "many Japanese leaders, as well as Chinese leaders, bridle at displays of unilateralism in U.S. policy and the hubris they often detect in official U.S. pronouncements . . . [and] empathize with China's . . . desire to check America's preponderance."[201] Another analyst posits:

> [T]he irony of the Japan-U.S. alliance is that the United States poses nearly as great a threat to Japan as any hostile neighbor

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[195] KAWASHIMA, *supra* note 140, at 8.
[196] *Id*.
[197] *Id*. at 138.
[198] SAMUELS, *supra* note 137, at 82.
[199] *See* PYLE, *supra* note 183, at 339.
[200] *Id*. at 338.
[201] *Id*.

> . . . . If Japan chooses to resist U.S. overtures to join . . . in military operations abroad or to deny the United States use of its bases, it risks abandonment. Without U.S. protection, Japan would have to increase its military spending considerably and would likely become a nuclear power itself, destabilizing the entire region. On the other hand, by joining the United States and declaring its security role to be global, Japan risks becoming entangled in wars not of its own choosing.[202]

D. Instability of the Status Quo

Fundamental to two-level game theory is the idea of win-sets: when one country enters into international negotiations, they have certain acceptable outcomes, or win-sets, that sufficiently satisfy both domestic and international concerns.[203] Each country attempting to reach an international agreement with another will have their own win-sets, and agreement between two or more countries "is possible only if . . . win-sets overlap, and the larger each win-set, the more likely they are to overlap."[204] The common security threats of China and North Korea enlarge and create overlap between the win sets of the current structure of U.S. military basing in Japan. Japan cannot effectively address those threats alone, due in part to pacifist aspects of its law, politics, and culture. However, Japan has foreign security perspectives distinct from the United States—the threats of China and North Korea are more immediate. Likewise, Japan has international trade considerations distinct from the United States—a relatively larger amount of trade with China and its differing approach to oil issues. These differences both lessen the overall size of Japan's U.S. military-basing win-set and reduce the overlap of its military basing win-set with the win-set of the United States. In turn, alternatives to the current U.S. military basing agreement, as well as the U.S-Japan alliance in general, may become more attractive. With such alternatives available, Japan's domestic issues, including the Japanese public's acceptance, or lack thereof, of the U.S.-Japan SOFA, with its attendant FCJ rules and procedures, are that much more influential in the outcome of the United States-Japan two-level military basing game.

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[202] SAMUELS, *supra* note 137, at 151.
[203] *See* Putnam, *supra* note 131, at 438.
[204] *Id.*

IV. Two-Level Game: Japan's Domestic Perspective

A. Introduction

In any two-level game, international cooperation occurs smoothly only when international agreements are domestically "ratified."[205] Ratification is not necessarily parliamentary consent, but acceptance through "[political] parties, social classes, interest groups (both economic and noneconomic), legislators, and . . . public opinion and elections . . . ."[206] It is not a one-time event, but an ongoing process in which "domestic factors can unravel previously reached agreements . . . ."[207] Generally, domestic ratification is more important in democracies than in autocracies, and one particular aspect of domestic politics may be more important than the other, depending on its influence in the domestic political system.[208]

In the decades following World War II, Japanese ruling elites "had extraordinary freedom to manage both domestic and foreign policy.[209] As the 2009 election of the DPJ demonstrated, this has changed:

> [S]everal factors [have made] the political process more responsive to electoral politics, including a sharp decline in party loyalty among voters; growing disenchantment with backroom politics; corruption, and policy failures; and electoral reforms that encouraged a more issue-oriented politics, and the proliferation of volunteer organizations. A new breed of young politicians who were more attuned to popular issues took advantage of the disarray in the bureaucracy to seize the initiative.[210]

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[205] *Id.* at 436.
[206] *Id*. at 432.
[207] JEFFREY S. LANTIS, DOMESTIC CONSTRAINTS AND THE BREAKDOWN OF INTERNATIONAL AGREEMENTS 5 (1997).
[208] *See generally* Carles Boix & Milan Svolik, Non-Tyrannical Autocracies (Apr. 2007) (unpublished paper presented at the UCLA Comparative Politics Seminar), http://www.sscnet.ucla.edu/polisci/cpworkshop/papers/Boix.pdf. An examination of U.S. military bases found that the United States places a many of its bases in non-democratic, dictatorship-led countries, and provides active support to those dictatorships. *See* CALDER, *supra* note 35, at 228. In such countries, host nation domestic influences are much less important in two-level games. *See* Boix & Svolik, *supra*, at 2–3.
[209] Pyle, *supra* note 183, at 356.
[210] *Id*. at 357.

Reflective of the trend, previously dormant non-governmental organizations (NGOs) have risen in prominence,[211] encouraged by technological advances in communication abilities and increased awareness of issues beyond one's immediate locale.[212] In particular, anti-military basing NGOs rose in influence following the 1995 Okinawa rape,[213] and now focus on several effects of military basing.[214] As information technology brings these actors together, "base politics becomes a mass political phenomenon," making base political issues "more volatile and confrontational than would otherwise be true."[215]

As in the international level of the military-basing game, catalysts are crucial on the domestic level. Several impacts of U.S. military bases serve as domestic catalysts for change, including military-related environmental degradation,[216] economic effects,[217] accidents, and crime.

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[211] KEIKO HIRATA, CIVIL SOCIETY IN JAPAN: THE GROWING ROLE OF NGOS IN TOKYO'S AID AND DEVELOPMENT POLICY 8 (2002).

[212] *Id*. at 63.

[213] CHALMERS JOHNSON, BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE 42 (2000).

[214] *See* Kim D. Reimann, *Security Issues and New Transnational Peace-Related Movements in East Asia, the 1990s and 2000s*, 13 INT'L J. OF PEACE STUD. 59, 66–70 (2008).

[215] CALDER, *supra* note 35, at 165.

[216] The routine operations of Japanese military bases often cause environmental pollution in the form of "oil spills, the dispersion of pesticide, and the disposal of waste and ammunition." Hayashi Kiminori et al., *Overcoming Military Base Pollution in Asia*, ASIA-PAC. J. JAPAN FOCUS, July 13, 2009, *available at* http://www.japanfocus.org/-Hayashi-Kiminori/3185. The biggest environmental objection of the local populace has been noise pollution emanating from air bases. For decades, the Japanese civil court system has routinely rewarded significant monetary damages in cases of noise pollution throughout Japan, with the Japanese government paying these damages. *See, e.g.*, Hana Kusumoto, *Plaintiffs Unite to Fight U.S. Jet Noise in Japan, Okinawa*, STARS & STRIPES, Sep. 8, 2009, *available at* http://www.stripes.com/news/plaintiffs-unite-to-fight-u-s-jet-noise-in-japan-okinawa-1.82796 (listing a number of noise pollution lawsuits against U.S. bases and the outcomes). Additionally, there have been ongoing calls for the United States to amend the SOFA, establishing "procedures to prevent and eliminate pollution." *U.S. Willing to Mull Base-Related Environment Pact with Japan*, BREITBART NEWS, November 7, 2009, http://www.breitbart.com/article.php?id=D9BQF7J80&show_article=1. The United States has indicated a willingness to explore SOFA changes with Japan. *See id*. The Japanese government's routine compensation of victims of such damage pursuant to the U.S.-Japan SOFA seems to have limited public outrage. *See* Kiminori et al., *supra*.

[217] The foreign "security blanket" of the United States has allowed Japan to keep defense expenditures at or below 1% of GDP since 1967, a positive influence on Japan's opinion of U.S. military bases. Akira Kawasaki, *Japan's Military Spending at a Crossroads*, 33 ASIAN PERSP. 129, 131 (Meri Joyce trans., 2009). However, Japan spends more in direct support of U.S. military bases than any country in the world. *'Sympathy budget': Japan's*

While each plays an important role in the two-level game, military-related crime and accidents most ignite the passion of the populace, invoke perceptions of U.S. affront to national sovereignty, and pose the greatest danger to military-basing stability.

B. Okinawa's History of FCJ Custody Disputes

A prime example of the interaction of catalysts and the two-level game was the 1995 Okinawa[218] rape, perpetrated by three U.S. servicemembers stationed at Marine Corps Air Station, Futenma. The crime was "painful" in many senses, "shaking both the United States and Japanese governments."[219] Then-U.S. President Bill Clinton and other U.S. officials apologized to Japan.[220] Reportedly, Okinawa citizens "staged the largest protest in history against a U.S. military base."[221] In

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Extraordinary Generosity to US Forces, JAPAN PRESS, Dec. 22, 2010, http://www.japan-press.co.jp/modules/news/index.php?id=1377. In fiscal year 2010, this amounted to some ¥188 billion ($2.27 billion). *Id*. These expenditures, often called the "sympathy budget," include utilities, local base employee salaries, facilities construction, and training relocation costs. MINISTRY OF DEF., DEFENSE OF JAPAN 2009, at 295 (2009) (Japan), http://www.mod.go.jp/e/publ/w_paper/2009.html. It has been an ongoing point of controversy amongst the Japanese, with objections founded on Japanese budgetary constraints, perceptions of unfairness, and overall objections to the U.S. military presence in Japan. *See US Begs Japan for Continuation of 'Sympathy Budget,'* JAPAN PRESS, Oct. 11, 2010, http://www.japanpress.co.jp/2010/2690/usf2.html; COOLEY, *supra* note 26, at 193–95; Yoshio Shimoji, *The Futenma Base and the U.S.-Japan Controversy: an Okinawan Perspective*, ASIA-PAC. J.: JAPAN FOCUS, May 3, 2010, *available at* http://japanfocus.org/-Yoshio-SHIMOJI/3354; CALDER, *supra* note 35, at 133–36, 173–74. In the military-basing two-level game, base-related economics seems an ambiguous factor, with the overall defense savings to Japan and its local, base-supported, businesses in favor of the status quo. Other base-related expenditures and their symbolism are against it.

[218] Okinawa hosts approximately 23,000 U.S. servicemembers. *See Living in Okinawa*, III MARINE EXPEDITIONARY FORCE, MARINE CORPS BASES JAPAN, http://www.marines.mil/unit/mcbjapan/Pages/Living/Living.aspx (last visited Mar. 2, 2010). Of these, 15,000 are Marines. Eric Talmadge, *Marines in Iraq Brace for Japan Restrictions*, MARINE CORPS TIMES, Feb. 19, 2008, *available at* http://www.marinecorpstimes.com/news/2008/02/marine_080219_restrictions/.

[219] Yasutaka Hanashiro, *Rape of Schoolgirl in 1995 Is the Origin of Futenma Issue*, JAPAN TODAY, 2010, http://www.japantoday.com/category/commentary/view/rape-of-schoolgirl-in-1995-is-origin-of-futenma-issue.

[220] Brooks, *supra* note 3, at 4; Mary Lee, *U.S. Apologetic over Okinawa Rape*, CNN, Sep. 19, 1995, http://www.cnn.com/WORLD/9509/japan_rape/index.html.

[221] Gher, *supra* note 120, at 242. Estimates put the number of protestors between 85,000 and 90,000. *See id.*; *90,000 Okinawans Call for Removal of U.S. Base from Prefecture*,

addition to demanding the withdrawal of U.S. forces from Okinawa,[222] the Japanese populace asserted U.S. custody practices were unfair, affording "the accused special treatment since local investigators could not conduct a traditional Japanese interrogation."[223]

In response to public reaction to "the horrible rape,"[224] U.S. officials started talks with Japan to change both FCJ provisions of the SOFA and the distribution of force levels throughout Okinawa.[225] First, in 1995, the United States conceded part of its extraterritorial criminal jurisdiction, agreeing to "give sympathetic consideration to any request for the transfer of custody prior to indictment of the accused which may be made by Japan in specific cases of heinous crimes of murder and rape."[226] Second, in April 1996, the countries reached an agreement to close U.S. Marine Corps Air Station Futenma[227] and relocate its assets to a less populated area of Okinawa.[228] Neither agreement ended basing controversy.

JAPAN TODAY, Apr. 25, 2010, http://www.japantoday.com/category/national/view/okinawans-hold-mass-rally-seeking-removal-of-base-from-prefecture.

[222] Brooks, *supra* note 3, at 4.

[223] John W. Egan, *The Future of Criminal Jurisdiction Over the Deployed American Soldier: Four Major Trends in Bilateral U.S. Status of Forces Agreements*, 20 EMORY INT'L L. REV. 291, 334 (Spring 2006).

[224] *See Newsmaker: Walter Mondale, U.S. Ambassador to Japan*, PBS, January 16, 1996, http://www.pbs.org/newshour/bb/asia/mondale_interview_1-10.html. Ambassador Walter Mondale stated:

> We have agreed to review . . . several matters surrounding our bases in Okinawa. This was triggered by the horrible rape that you've mentioned, and we are meeting now with Japanese officials. . . . Our bases in Okinawa are very important, and over this next year, we're going to see what we can do to make certain that we're as good a neighbor as we can possibly be in Okinawa, and yet be able to do what we must do. I think we're going to be able to get that done, and I hope the people of Okinawa will see the sincerity of our efforts.

Id.

[225] *See DoD News Briefing: Dr. Joseph Nye, ASD/ISA*, U.S. DEP'T OF DEF., Oct. 27, 1995, http://www.defense.gov/transcripts/transcript.aspx?transcriptid=184.

[226] Press Release, U.S. Embassy in Japan, *supra* note 16.

[227] This base is home to approximately 4000 U.S. Marines and Sailors. *See Futenma Marine Corps Air Station, Okinawa, Japan*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/facility/futenma.htm (last visited Mar. 2, 2011).

[228] Brooks, *supra* note 3, at 16. However, the Futenma agreement did not specify a site for relocation, an "ambiguity which would return to haunt the alliance." *Id*.

In 2001, after four days in U.S. custody, the U.S. military turned over an Air Force staff sergeant to Japanese authorities in a case of suspected rape.[229] The crime and the custody issues aggravated the Japanese, prompting a senior Japanese official to state: "[C]rimes in Japan should be treated in accordance with Japanese law. Privileges should not be applied in this case just because the suspect is a serviceman."[230] In 2002, the Okinawa governor publicly denounced a U.S. Marine Corps major's alleged attempted rape of a Japanese-Filipina national.[231] Despite requests from the central Japanese government, the United States refused to release custody of the Marine in the pre-indictment stage.[232]

United States FCJ policy was further amended in 2004, expanding pre-indictment waivers to include attempted murder and arson.[233] In return, Japan agreed to "allow a representative to be present during all stages of interrogation of a pre-indictment transferee."[234] Nevertheless, controversy continued. In 2009, the United States refused to remit pre-indictment custody of a soldier involved in a fatal hit-and-run, despite Japan's primary right of jurisdiction and the Japanese Prime Minister's public demand for custody.[235] Since the 2004 agreement did not cover this type of offense, there was no turnover, and more FCJ-based protests emerged.[236]

Over the same time period of these offenses, Okinawa continued its fight to end the U.S. military presence. All proposed Futenma relocation sites within Japan met with great resistance from local communities.[237] Moreover, many Japanese prefectural and central officials urged the removal of all U.S. forces in Okinawa despite the 1996 relocation

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[229] *U.S. Airman Jailed for Okinawa Rape*, BBC NEWS, Mar. 28, 2002, http://news.bbc.co.uk/2/hi/asia-pacific/1898004.stm.
[230] *Okinawa Rape Suspect Under Arrest*, BBC NEWS, Jul. 6, 2001, http://cdnedge.bbc.co.uk/1/hi/world/asia-pacific/1425181.stm.
[231] *See Japan Wants U.S. Marine Handed Over*, JAPAN TIMES ONLINE, Dec. 5, 2002, http://search.japantimes.co.jp/cgi-bin/nn20021205a5.html.
[232] *Id.*
[233] Stone, *supra* note 17, at 254–55.
[234] *Id.*
[235] *See U.S. Soldier 'Sorry' for Japan Hit-and-Run Death: Lawyer*, ASIAONE NEWS, Nov. 20, 2009, http://www.asiaone.com/News/AsiaOne%2BNews/World/Story/A1Story20091120-181303.html.
[236] *Okinawans Call for Handover of U.S. Serviceman over Hit-and-Run*, JAPAN TIMES ONLINE, Dec. 14, 2009, http://search.japantimes.co.jp/cgi-bin/nn20091214a2.html.
[237] Brooks, *supra* note 3, at 16–22.

agreement.[238] In the years to follow, both Japanese and U.S. politicians would argue about relocation details, with environmental and business interests asserting themselves.[239]

Finally, after years of publicly scrutinized military crime and a 2004 U.S. Futenma-based helicopter crash into Okinawa International University, an agreement was reached.[240] By 2014, Futenma operations would be relocated to Henkoku, a coastal Okinawa area in a more remote relocation.[241] Also by 2014, about 8000 Marines and their 9000 dependents would be relocated to Guam, a more than 50% reduction in Marine Corps forces in Okinawa.[242]

The post-1995-rape U.S. military basing story in Okinawa epitomized two-level game concepts. In response to a catalytic event, the domestic ratification of U.S.-Japan military basing agreements unraveled, with the populace demanding change. National-level Japanese politicians gained personal and party political capital in aggressively responding to the demands. Domestic uprisings gave Japan's leaders the bargaining leverage needed to pressure the United States to modify base agreements. Also, both the United States and Japan saw utility in preserving what it could of existing Okinawa security arrangements. The result was an international-level compromise on force number and FCJ issues.

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[238] *Id*.
[239] *See id*. at 22–37.
[240] The crash, which further angered Okinawans, did not cause any injuries to Japanese nationals. *See Background Brief on CH-53 Helicopter Accident*, U.S. EMBASSY, TOKYO, Aug. 27, 2004, http://webcache.googleusercontent.com/search?q=cache:XKYtM9oQxOUJ:tokyo.usembassy.gov/e/p/tp-20040827-61.html+Background+Brief+on+CH53+Helicopter+Accident&cd=1&hl=en&ct=clnk&gl=us&source=www.google.com. The accident was associated with SOFA revision on two fronts: (1) pursuant to implementing SOFA agreement, Japanese authorities were not allowed to investigate the crash scene; (2) U.S. servicemember crime. *See id*.; C. Douglas Lummis, *The U.S. Status of Forces Agreement and Okinawan Anger*, ASIA-PAC. J.: JAPAN FOCUS, Oct. 26, 2008, *available at* http://www.japanfocus.org/-C__Douglas-Lummis/2933. As for the criminal aspect, the case was one of "official duty," and thus one in which the United States had the primary right of jurisdiction. *See* David Allen & Chiyomi Sumida, *Okinawa Police Suggest Charges for 2004 Helicopter Crash*, STARS & STRIPES, Aug. 4, 2007, http://www.stripes.com/news/okinawa-police-suggest-charges-for-2004-helicopter-crash-1.67254. The military disciplined four Marines mechanics for "dereliction of duty." *Id*.
[241] Brooks, *supra* note 3, at 85–86.
[242] *See id.*

C. Accidents and U.S.-Japan Jurisdictional Disputes

Military-related accidents are a constant strain on the U.S.-Japan alliance.[243] Ship and aircraft crashes tend to raise the most animosity in the Japanese community.[244] Another critical source of angst is off-base car accidents involving U.S. Forces personnel. For example, in 2006 a sailor in the Tokyo-area hit and injured three Japanese children.[245] Although the Japanese police arrested the driver, the sailor's custody was quickly remitted to military authorities pursuant to a U.S. assertion of official duty.[246] While in recent years, the United States has avoided truly alliance-threatening official duty cases in Japan, such cases have occurred in other countries. For example, in 2002, several soldiers driving an armored vehicle hit and killed two teenage Korean nationals.[247] A subsequent U.S. official duty declaration prevented Korean prosecution of the vehicle operators, resulting in massive anti-American and anti-military demonstrations.[248]

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[243] One U.S. approach to accidents and potential official duty controversy has been avoidance: lowering force numbers in populated areas. Often called the "lily pad" basing strategy, it is first aimed at "creating a network of smaller bases closer to potential hot spots of the globe," with the desire of "taking the fight to the enemy." Ehsan Ahrari, *China's View of US 'Lily Pad' Strategy*, ASIA TIMES ONLINE, Aug. 24, 2004, http://www.atimes.com/atimes/China/FH24Ad04.html. In addition to these operational goals, U.S. policymakers have indicated that such bases "will minimize the U.S. military's footprint in host countries and avoid some of the social problems and accidents that surround larger bases . . . ." COOLEY, *supra* note 26, at 239. However, the United States has also expressed a reluctance to further reduce force levels in Japan. *See* Julian E. Barnes & Yuka Hayashi, *Gates Calls U.S.-Japan Ties Key to Asian Security*, WALL ST. J., Jan. 14, 2011, *available at* http://online.wsj.com/article/SB10001424052748703583404576080131813395682.html. *See also* Talmadge, *supra* note 22. Thus, for the indeterminate future, the risk of controversial accidents will continue.

[244] *See, e.g.*, Jaymes Song, *Nine Remain Missing After US Sub Hits Japanese Fishing Boat*, INDEPENDENT, Feb. 10, 2001, http://www.independent.co.uk/news/world/americas/nine-remain-missing-after-us-sub-hits-japanese-fishing-boat-691244.html; Sanechika Yoshio, *Anger Explodes as a U.S. Army Helicopter Crashes at Okinawa International University*, ASIA-PAC. J.: JAPAN FOCUS, Aug. 27, 2004, *available at* http://japanfocus.org/-Sanechika-Yoshio/1816.

[245] Allison Battdorff, *Navy on Accident: Three Kids Darted into the Street*, STARS & STRIPES, Jan. 2, 2006, *available at* http://www.stripes.com/news/navy-on-accident-three-kids-darted-into-the-street-1.43116.

[246] *See id.*; *U.S. Sailor in Hit and Run Freed Unjustifiably*, JAPAN PRESS WKLY., Jan.4, 2006, http://www.japan-press.co.jp/2006/2462/usf2.html.

[247] *See* Yougjin Jung & Jun-Shik Hwag, *Where Does Inequality Come From? An Analysis of the Korea-United States Status of Forces Agreement*, 18 AM. U. INT'L L. REV. 1103, 1105 (2003).

[248] *Id.*

Not all accidents will implicate FCJ concerns. In some, such as negligent ship collisions and airplane crashes, the nexus between the duty and the accident will be high, as will U.S. operational interests in exercising as much jurisdiction as possible. However, the U.S. definition of official duty is expansive, "and one that American authorities tend to broaden even further to the greatest extent possible, precisely in order to assert the primary right to exercise jurisdiction in the greatest number of cases."[249] If a traffic accident explodes into international conflict, the Tri-Service regulation limits the ability of U.S. military officials to weigh U.S. interests in a particular case, and potentially surrender jurisdiction.[250] In turn, this creates a risk of unnecessary aggravation of the host nation populace.

D. Two-Level Games in Mainland Japan

Foreign policy analysts have sometimes viewed mainland Japan[251] and Okinawa as two separate issues.[252] Unlike mainland Japan, Okinawa was the sight of brutal World War II battles and under U.S. military control until 1972, "infusing its antimilitarist culture with a sense of betrayal of mainland Japan, as well as resentment toward contemporary U.S. military presence."[253] Okinawa is a small island with a relatively larger per capita United States basing presence, while mainland Japan's central government deals directly with the United States and is thus relatively more influenced by international pressures.[254]

Thus, historically, catalytic incidents on mainland Japan have produced relatively less political opposition to basing arrangements.[255]

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[249] LAZAREFF, *supra* note 70, at 172.
[250] *See* TRI-SERVICE REG., *supra* note 32, at 1-7(c) ("Military authorities will not grant a waiver of U.S. jurisdiction without prior approval of TJAG of the accused's service.").
[251] Mainland Japan hosts U.S. Naval Base in Yokosuka City, a base supporting 24,000 active duty servicemembers, civilians, and dependents. *See About*, CNIC, COMMANDER FLEET ACTIVITIES YOKOSUKA, https://www.cnic.navy.mil/Yokosuka/AboutCNIC/index.htm (last visited Jan 9, 2011).
[252] *See, e.g.*, Alexander Cooley & Kimberly Martin, *Base Motives: The Political Economy of Okinawa's Antimilitarism*, 32 ARMED FORCES & SOC'Y 566 (July 2006).
[253] *Id*. at 568–69.
[254] *See id.* at 572.
[255] *See* James Brooke, *Sailor's Case Reflects a Shift in U.S. Image for Japanese*, N.Y. TIMES, Jan. 23, 2006, *available at* http://www.nytimes.com/2006/01/23/international/asia/23sailor.html?_r=1 (noting the gap in attitudes in Yokosuka and Okinawa following

However, the mainland's two-level game is no longer this simple. In 2006, an intoxicated sailor from Yokosuka robbed a middle-aged female local national, fatally beating her in the process.[256] The incident prompted public apologies from a number of senior U.S. officials, including the Secretary of Defense.[257] Although there was concern the incident would have serious negative impacts on military relations in the mainland area,[258] Japanese media scrutiny, protests, and calls for reform were relatively limited.[259] Nevertheless, the Japanese judge presiding over the case stated that the killing "shocked residents near the base and caused them great anxiety,"[260] and the Yokosuka City Assembly demanded reform of the FCJ provisions of the U.S.-Japan SOFA.[261]

A subsequent murder created more controversy. On March 19, 2008, a U.S. Navy deserter used a large kitchen knife to stab a taxi driver, thereby avoiding payment of the taxi fare.[262] The incident angered local residents, who demanded that "U.S. forces strengthen their supervision of servicemen. . . ." The Yokosuka mayor publicly demanded that in the future the United States notify the Japanese government of deserting servicemembers.[263] Japan's Foreign Minister urged the U.S. Ambassador

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a murder perpetrated by a U.S.-based sailor and the relatively little media coverage it received in the mainland press); COOLEY, *supra* note 26, at 210–11 (discussing the contrasts between Tokyo and Okinawa in the context of U.S. servicemember criminal incidents).

[256] *U.S. Sailor Convicted of Murder in Japan*, USA TODAY, June 2, 2006, *available at* http://www.usatoday.com/news/world/2006-06-02-sailor-murder_x.htm. This incident marked the first murder case in which the United States relinquished pre-indictment custody of U.S. servicemember to Japanese authorities pursuant to the 1995 post-Okinawa rape agreement. Chris Hogg, *Japan Jails US Sailor for Murder*, BBC NEWS, June 2, 2006, http://news.bbc.co.uk/2/hi/asia-pacific/5039754.stm.

[257] *Rumsfeld, Top U.S. Brass Regret Slaying*, JAPAN TIMES ONLINE, Jan. 13, 2006, http://search.japantimes.co.jp/cgi-bin/nn20060113a4.html.

[258] Sheila Smith, *Arrest of U.S. Sailor in Japan Murder Case Complicates U.S.-Japan Realignment Efforts*, EAST-WEST CTR., Jan. 9, 2006, http://www.eastwestcenter.org/news-center/east-west-wire/archived-news-wires/?class_call=view&news_ID=306.

[259] *See* Brooke, *supra* note 255.

[260] *U.S. Sailor Convicted of Murder in Japan*, *supra* note 256.

[261] Hana Kusumoto & Allison Batdorff, *Yokosuka City Lawmakers Call for SOFA Revision*, STARS & STRIPES, Mar. 10, 2006, *available at* http://www.stripes.com/news/yokosuka-city-lawmakers-call-for-sofa-revision-1.46037. The USFJ public affairs response: "the SOFA does not need revision . . . . The SOFA is a document that was drafted with great care and deliberation, and has been an effective instrument for many years." *Id*.

[262] *See U.S. Sailor Held Over Taxi Murder*, DAILY YOMIURI (Tokyo), Apr. 4, 2008, at 1.

[263] Zenta Uchida, Yasushi Kaneko & Satoshi Ogawa, *U.S. Side Failed to Reveal Desertion in Time*, DAILY YOMIURI (Tokyo), Apr. 5, 2008, at 3; *Yokosuka Residents Angered at Alleged Murder by U.S. Sailor*, JAPAN TODAY, Apr. 3, 2008, http://www.japan

to "do something about discipline."[264] The then-leading opposition party, the DPJ, asked for revision of the SOFA, including FCJ procedures.[265] Although a major revision would not happen, the United States agreed to immediately notify Japan of any servicemembers entering a deserter status.[266]

The mainland murders did not generate the same angst in Tokyo as they would have in Okinawa. However, there seemed to be a slight shift in Tokyo's two-level game, with central government politicians gaining mainland support for proposed changes in U.S.-Japan basing agreements. Moreover, by the time of the 2009 elections, Okinawa's concerns had clearly become a Tokyo matter. Military basing issues played a prominent role in the DPJ's historic victory, including promises of FCJ revisions and the outright closure of Futenma in addition to the Guam move.[267]

However, the United States refused to lose any more troops in Okinawa, firmly standing behind the 2006 Futenma relocation agreement.[268] The DPJ's Prime Minister Hatoyama would be forced to resign due to his failure to deliver on his Futenma promises and divisions within the relatively new DPJ.[269] New leadership would take a more U.S.-friendly tact, further reinforced by North Korea's frightening use of

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today.com/category/crime/view/yokosuka-residents-angered-at-alleged-murder-by-us-sailor.

[264] Blaine Harden, *U.S. Sailor's Murder Reignites Anger in Japan*, WASH. POST, Apr. 4, 2008, at 15.

[265] *Envoy Says No Need to Revise Accord on U.S. Forces over Crimes*, FREE LIBR., Apr. 7, 2008, http://www.thefreelibrary.com/LEAD%3A+Envoy+says+no+need+to+revise+accord+on+U.S.+forces+over+crimes.-a0177990360.

[266] Reiji Yoshida, *U.S. to Notify Japan About Any Deserters*, JAPAN TIMES ONLINE, Apr. 12, 2008, http://search.japantimes.co.jp/cgi-bin/nn20080412a1.html.

[267] *See* Daniel Leussink, *Okinawans Try to Vote Base Out*, ASIA TIMES ONLINE, Dec. 2, 2010, http://www.atimes.com/atimes/Japan/LL02Dh01.html; Wendell Minnick, *U.S. Military Relations with Japan will Remain Tricky*, DEF. NEWS, Dec. 14, 2009, *available at* http://www.defensenews.com/story.php?i=4417465; John Brinsley, *Hatoyama Seeks "Yukio-Obama" Rapport, China Ties*, BLOOMBERG, Sep. 1, 2009, http://.bloomberg.com/apps/news?pid=newsarchive&sid=aMQHSVfm4asE; *Japan's August 30 Parliamentary Election*, COUNCIL ON FOREIGN REL., Aug. 27, 2009, http://www.cfr.org/japan/japans-august-30th-parliamentary-election/p20104.

[268] CHANLETT-AVERY ET AL., *supra* note 8, at 2.

[269] *See generally* Terashima Jitsuro, *The U.S.-Japan Alliance Must Evolve: The Futenma Flip-Flop, the Hatoyama Failure, and the Future*, ASIA-PAC. J.: JAPAN FOCUS (John Junkerman trans., Aug. 9, 2010), *available at* http://www.japanfocus.org/-Terashima-Jitsuro/3398.

force against South Korea.[270] Nevertheless, the United States continues to be concerned with the future direction of the ruling DPJ, including its continuing policy stances on SOFA revision and cutting financial support of U.S. military basing.[271] Prime Minister Hatoyama's ambitious stances may well be seen as "a historic pivot in Japan that many view as inevitable: a gradual but unmistakable reordering of Tokyo's relationship with Washington and a reorientation of its foreign policy with an emphasis on the emerging power in East Asia."[272]

E. Role of FCJ since the 1995 rape

Some observers have downplayed the role of servicemember crime and FCJ in U.S. military basing-stability, claiming one particular criminal incident "rarely [has] long-term political repercussions."[273] However, the 1995 rape was the "one exception to this pattern,"[274] seeming to jumpstart the engine of military-basing protest in Japan. Since then, the seriousness and numbers of military-related crimes have not necessarily worsened,[275] yet each publicized crime has seemed to accelerate the engine of protest. After a 2008 U.S. Marine's alleged rape of a Japanese female, an activist effectively summed up this accumulative effect: "The U.S. military apologizes and promises us that it won't happen again, but it always does."[276]

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[270] *See* Kosuke Takahashi, *Testing Times for Japan-South Korea Ties*, ASIA TIMES ONLINE, Jan. 12, 2011, http://www.atimes.com/atimes/Japan/MA12Dh01.html; *U.S., Japan, South Korea Reply to Pyongyang in Unison*, NEWSROOM MAG., Dec. 8, 2010, *available at* http://newsroom-magazine.com/2010/governance/state-department/u-s-japan-south-korea-reply-to-pyongyang-in-unison/.

[271] EMMA CHANLETT-AVERY ET AL., CONG. RESEARCH SERV., RL33436, JAPANESE-U.S. RELATIONS: ISSUES FOR CONGRESS 9 (Oct. 6, 2010), http://assets.opencrs.com/rpts/RL33436_20101006.pdf.

[272] Bill Powell, *Hatoyama Failed as PM but Set Japan on a New Course*, TIME, Jan. 2, 2010, *available at* http://www.time.com/time/world/article/0,8599,1993402,00.html#ixzz1FHWLX6Pm.

[273] *See* COOLEY, *supra* note 26, at 260.

[274] *See id.*

[275] *See U.S. Troops in Japan Commit Less Crimes than Locals*, GOOGLE NEWS, July 15, 2008, http://afp.google.com/article/ALeqM5h7soxV14UlCnBFzEPsI9b8BCcMCw ("US forces in Japan commit half as many serious crimes on average as the general public, their commander said."). *See also* Jiyoung Cha, *Comparison and Analysis of Korea and Japan Status of Forces Agreements and Their Implications for Iraq's SOFA*, 18 CARDOZO J. INT'L & COMP. L. 487, 516 (Spring 2010). ("Between 1972 and 1995, there were over 4,500 U.S. military crimes against [Okinawa] locals, including 12 murders.").

[276] Justin McCurry, *Rice Says Sorry of US Troop Behaviour on Okinawa as Crimes Shake Alliance with Japan*, GUARDIAN, Feb. 28, 2008, at A17.

In some of these criminal cases, maximization policies have been truly at issue. In others, they have not. Yet, as exemplified in 2009 DPJ platforms, Japanese media and political groups now associate many FCJ-irrelevant criminal cases, as well as non-criminal basing issues, with FCJ revision.[277] In short, U.S. maximization policy represents more than de facto jurisdictional control. It is one of the symbols of all perceived negative impacts of U.S. military bases, ingrained into the core of Japanese anti-base discourse.

F. Domestic Ratification and U.S.-Japan Bargaining

In the sense of domestic acceptance, U.S.-Japan FCJ arrangements can no longer be considered "ratified." After the 1995 and 2004 reforms to FCJ practice, calls for revision have continued. U.S. measures to lessen both the frequency of servicemember crime and its quantitative military basing presence have not stopped the calls for reform. This in turn has changed the cooperative dynamics of the U.S.-Japan alliance, empowering Japanese negotiators when pushed to the bargaining table for renegotiation of military basing terms.

A critical concept in two-level games is the bargaining notion of "domestic constraints." An international agreement cannot be successful unless one party's international win set overlaps with its domestic win

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[277] *See, e.g.*, David Allen & Chiyomi Sumida, *Okinawa Official in U.S. for SOFA, Futenma Talks*, STARS & STRIPES, Nov. 6 2009, *available at* http://www.stripes.com/news/okinawa-official-in-u-s-for-sofa-futenma-talks-1.96166 (associating FCJ issues, SOFA environmental provisions, and Futenma relocation); Yoshida, *supra* note 266 (associating the 2008 Yokosuka murder, custody turnover, and SOFA revision with political opposition to extension of "Japan's host nation support budget for U.S. military installations"); David Allen & Chiyomi Sumida, *Japanese Officials Propose SOFA Revisions*, STARS & STRIPES, Mar. 16, 2008, *available at* http://www.stripes.com/news/japanese-officials-propose-sofa-revisions-1.76448 (describing Japanese political proposal to reform FCJ in response to an alleged rape, a rape in which Japanese police arrested the military suspect before the United States, nullifying potential FCJ issues); *Cases Highlight Custody Issues*, *supra* note 118 (associating the quick custody turnover in the Yokosuka 2006 murder with the future stationing of a U.S. nuclear-powered aircraft carrier at Yokosuka Naval Base); John R. Anderson, *Okinawa Governor Making Drastic New Proposal in Fight Over U.S. Military Presence*, STARS & STRIPES, Mar. 19, 2005, *available at* http://www.stripes.com/news/okinawa-governor-making-drastic-new-proposal-in-fight-over-u-s-military-presence-1.30697 (associating FCJ reform and the removal of all Marines from Okinawa).

set.[278] On the international-level of U.S.-Japanese basing negotiations, the domestic non-ratification of FCJ arrangements constrains the Japanese negotiator. Assuming the overall goal of the United States is the status quo, this constraint narrows the overlap of U.S.-Japanese international-level win-set. With lesser options available, the Japanese negotiator is better able to "coax a deal from their counterparts closer to their preferred outcome."[279] Concurrently, however, there is an increase in the danger of both non-agreement and inefficient agreement.[280]

Of course, Japan's side of the game is full of influences other than U.S. maximization policy. Since the DPJ's 2009 election, variables such as Japan's international security concerns have risen in importance, reducing the influence of the FCJ variable. However, as the last 15 years demonstrate, the FCJ issue has been firmly established as a constant and crucial variable in military-basing equation, one that can rise to dominance at any time.

V. Two-Level Game: U.S. Interests

A. Introduction

The U.S. rationale for its military bases in Japan is foremostly an international one: such basing furthers critical U.S. security interests. As in Japan's two-level game, the U.S. Government "must often reconcile obligations to domestic interest groups with the demands of international relations."[281] The rationales for adherence to its maximization policy are both international and domestic in character. This section first analyzes the validity of the idea that U.S. maximization policy promotes good order and discipline and is consistent with U.S. moral obligations toward its SOFA personnel. Next, it examines a purported U.S. fear underlying

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[278] Putnam, *supra* note 131, at 437–38. *See also* Tom Ginsburg, *National Courts Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs*, 20 EUR. J. INT'L L. 1021, 1024 (2009).

[279] *See* Chien-Peng Chung, *Resolving China's Island Disputes: A Two-Level Game Analysis*, 12 J. CHINESE POL. SCI. 49, 51 (2007).

[280] *See* Robert J.Schmidt, *International Negotiations Paralyzed by Domestic Politics: Two-Level Game Theory and the Problem of the Pacific Salmon Commission*, 26 ENVTL. L. 95, 117 (Spring 1996).

[281] Dafna Hochman, *Rehabilitating a Rogue: Libya's WMD Reversal and Lessons for US Policy*, PERSP. 63, 70 (Spring 2006).

both these notions: "[United States] servicemen would receive second-class justice at the hands of foreign courts."[282]

B. "Military Good Order" and "Morality" Rationales

Some assert the maximization policy is intended to maintain the "good order and discipline" of its forces, thereby making those stationed abroad more effective in all missions, including the furthering of U.S. international security interests.[283] Under this rationale, the jurisdiction of a host nation will unduly "limit the commander's disciplinary powers over the force."[284] In addition, "it creates a situation where U.S. forces personnel . . . are subject to unfamiliar laws and procedures of another country. This can affect morale and be extraordinarily time consuming for the command."[285]

These propositions are questionable. As for discipline, intuitively, the possibility of prosecution in a foreign criminal system is a significant deterrent. Wresting jurisdiction from host nation authorities may decrease the incentive a member has to avoid off-base violations of host nation law, contradicting a critical goal of any military unit stationed abroad.[286] As for host nation exercise of jurisdiction being "extraordinarily time consuming," there are arguably as many or more military resources invested in trying to obtain custody and jurisdiction than would be if these matters were merely ceded to the host nation.[287] Finally, insofar as "morale" is impacted by facing "unfamiliar laws and procedures of another country," this is already rectified through current procedures utilized in those many cases where the host nation fully exercises its right to primary jurisdiction. In Japan, such forms of assistance include an explanation of rights prior to every case, translator assistance, trial observation, and command assistance in meeting with Japanese authorities and victims.[288]

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[282] WOODLIFFE, *supra* note 39, at 182.
[283] *See* AIR FORCE OPERATIONS & THE LAW, *supra* note 57, at 151.
[284] *Id*. at 151.
[285] *Id*.
[286] *See* U.S.-Japan SOFA, *supra* note 4, art. 16 ("It is the duty of members of the United States armed forces, the civilian component, and their dependents to respect the law of Japan and to abstain from any activity inconsistent with the spirit of this Agreement . . . .").
[287] *See* FLECK ET AL., *supra* note 31, at 388; *infra* Part II.F.
[288] *See* U.S. FORCES JAPAN, INSTR. 51-1, *supra* note 68.

A second rationale stems from nationalistic and moral motives: it is wrong for the United States to order a soldier abroad and then willingly subject that soldier to a foreign criminal system.[289] Unfortunately, military soldiers are often subject to the reprehensible conditions of foreign systems, facing potential imprisonment and death at the hands of the enemy. While risk mitigation is undertaken to the fullest extent, U.S. soldiers bravely volunteer to face these dangers in the name of American national and international interests. Through the FCJ scheme of the SOFA itself and its 1995 and 2004 FCJ policy changes, the United States has negotiated away much of the risk protection in exchange for the ability to maintain military assets in Japan. Over the decades that have followed, in Japan and in other states, the trend of whittling away these protections has continued.[290] Moral or not, it is a fact that soldiers are subject to foreign systems of criminal justice.

Underlying both the "good order and discipline" and "morality" arguments is the perceived unfairness of Japanese system of criminal justice. If a host nation's criminal system carries with it unfair procedures and punishments, soldiers tried under that system might question the proportionality of their punishment in relation to their fellow soldiers. Moreover, servicemembers and civilians alike may experience lowered morale if subject to an unjust system.

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[289] In the 1953 Senate debate of the NATO SOFA, one senator's comments reflected this moralistic sentiment: "there is a general feeling, or some feeling among members, and I think perhaps the American people, that when a serviceman abroad is charged with a crime by that country, that somehow he is just thrown by us to the wolves and we have lost him, forgotten him, have no interest in him." Williams, *supra* note 76, at 14 (quoting Representative Harrison Williams, 86th Cong., 1st Sess. 20 (1959)).

[290] *See generally* Egan, *supra* note 223 (analyzing recent changes in the FCJ provisions of a number of bilateral SOFAs, which show a tendency toward changes in favor of host nation interests).

C. Perceived Unfairness of Japan's Criminal Justice System

1. Criticisms

On the surface, the American and Japanese systems of justice appear to have much in common. Japanese trials "are open to the public, and after the judge provides the defendant with his or her rights . . . the procurator and the defense present their cases."[291] Although "vestiges of inquisitorial procedure remain," the Japanese prosecutor has greater discretion than his European counterparts to dismiss cases, a discretion "similar to the power of the American prosecutor."[292] Furthermore, the two systems afford similar procedural rights.[293]

Differences arise because U.S. and Japanese courts "have not interpreted [criminal justice] provisions similarly."[294] Proponents of FCJ status quo assert the Japanese criminal system is "structurally deficient and incompatible with the American idea of due process and an individual's right to defend themselves."[295] The system places an overemphasis on confessions, and "the . . . orientation of the Japanese criminal system towards rehabilitation and reintegration instead of punishment" is not consistent with ideals of the American system.[296] This in turn constitutes "fodder for critics who argue that the Japanese system's effect is to treat foreigners unfairly."[297] One legal scholar has

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[291] HARRY R. DARMER, ERIKA FAIRCHILD & JAY S. ALBANESE, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 156 (3d 2006).
[292] *Id*. at 157.
[293] J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE 99 (2003).

> Although courts hesitate to mandate a blanket exclusionary rule, they do exclude confessions on reliability grounds, they impose a presumption of innocence, and they demand proof at levels close to the reasonable doubt standard at U.S. trials. They enforce a right to counsel at trial (with state-appointed counsel for the poor), a right to remain silent, and a right to interrogate witnesses, and they require warrants for searches and seizures. . . . Moreover, if defendants do happen to be acquitted at trial, they receive indemnity from the state as compensation for their trouble, unlike in the United States . . . ."

Id.
[294] PHILIP A. REICHEL, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 373 (1994).
[295] Stone, *supra* note 17, at 238.
[296] Lieutenant Commander Ian Wexler, *A Comfortable SOFA: The Need for an Equitable Foreign Criminal Jurisdiction Agreement with Iraq*, 56 NAVAL L. REV. 43, 67 (2008).
[297] *Id.*

compared Japanese criminal procedure with that of Iraq, citing a common "ingrained lack of an adversarial relationship between the defense and the government during the investigatory and subsequent phases of the criminal trial," one in which the "governments' version of events go virtually unchallenged."[298] Furthermore, "detentions in Japan can last as long as 23 days without access to an attorney, and physical abuse and food deprivation are not uncommon,"[299] Finally, Japanese trials are a mere judicial ratification of prosecutorial and police actions.[300] For these reasons, the U.S. military is reluctant "to turn over U.S. servicemembers to Japanese authorities."[301]

The following sections evaluate the current validity of these assertions. Japanese justice is fairer than critics allege.

2. Arrest and Bail

The most common source of criticism of Japanese criminal procedure stems from its pre-indictment detention system. As in the United States, the general rule in Japan is that arrest requires a judge-issued warrant substantiated with probable cause.[302] According to the U.S. Department of State, Japanese officials properly review warrants prior to issuance.[303] Unlike criminal suspects in the United States, where "arrest initiates most criminal cases,"[304] Japanese law enforcement arrests approximately 20% of suspects.[305] This reflects Japan's "institutionalization of informal sanctioning," where it is preferred to dispose of crimes through the process of apology and compensation,[306] a system conducive with U.S.

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[298] *Id.* at 68.
[299] *Id.* at 67.
[300] Stone, *supra* note 17, at 239.
[301] Wexler, *supra* note 296, at 67.
[302] UN & FAR EAST ASIA INST. FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, CRIMINAL JUSTICE IN JAPAN 17 (2004) [hereinafter UN & FAR EAST ASIA INST. FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS]. Japanese exceptions to the warrant requirement include the ability to apprehend an offender who is committing or has just committed a suspected crime, and suspected serious offenses where, due to "great urgency," a warrant cannot be obtained. *Id*.
[303] U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: JAPAN (Mar. 11, 2010), http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135993.htm ("Persons were apprehended openly with warrants based on sufficient evidence issued by a duly authorized official.").
[304] DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE 13–14 (2002).
[305] *Id*.
[306] REICHEL, *supra* note 294, at 374–75.

interests in jurisdictional control.[307] Moreover, in the minority of cases where Japan does make an arrest, more than half are pursuant to judicially approved warrants,[308] while 95% of U.S. arrests are without warrant.[309] Finally, upon arrest, Japanese police "must immediately inform [the suspect] of the alleged offense and their right to defense counsel."[310]

Once arrested, Japanese detention procedures resemble those of U.S. military pre-trial confinement (PTC). In Japan, police may hold a suspect for twenty-four hours prior to prosecutorial review, and a total of seventy-two hours prior to judicial review. [311] A U.S. military commander reviews pre-trial confinement at the forty-eight and 72-hour intervals,[312] with independent review by a "neutral and detached officer" not required for seven days.[313] The Japanese judicial review and U.S. military officer review have consistent legal standards: reasonable grounds/probable cause to believe the suspect committed the offense and may flee or may commit another offense.[314] Unsurprisingly, the suspect's chance of release is slim under both the Japanese[315] and military

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[307] *See* U.S. FORCES JAPAN, INSTR. 36-2612, *supra* note 29, paras. 2, 3.5.

[308] In 2007, Japanese police obtained a warrant in 50.1% of all arrests. *See* NAT'L POLICE AGENCY, CRIMES IN JAPAN IN 2007, at 82 (Police Poly Res. Ctr. Nat'l Police Acad. & Alumni Ass'n for the Nat'l Police Acad. eds., Oct. 8, 2008), http://www.npa.go.jp/english/seisaku5/20081008.pdf.

[309] ROLANDO V. DEL CARMEN, CRIMINAL PROCEDURE: LAW AND PRACTICE 184 (7th 2007).

[310] UN & FAR EAST ASIA INST. FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, *supra* note 302, at 17. *See also* MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 168 (1999).

[311] UN & FAR EAST ASIA INST. FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, *supra* note 302, at 18.

[312] *See* Major Brian P. Gavula, *Locking Down Pretrial Confinement Review: An Argument for Realigning RCM 305 with the Constitution*, 202 MIL. L. REV. 1, 1–6 (Winter 2009).

[313] *Id*. Not all military services require the military reviewing officer to have legal training. *See id.*

[314] Under Japanese law, a judge may order continued detention if "there are reasonable grounds to believe that the suspect has committed the offense, and: (1) the suspect has no fixed dwelling; (2) there are grounds to believe the suspect may destroy evidence; or (3) there are grounds to believe the suspect may try to escape." UN & FAR EAST ASIA INST. FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, *supra* note 302, at 18. Under the UCMJ, the reviewing officer must have probable cause to believe the suspect committed a triable offense, and further confinement is needed because the suspect may not appear at trial or will engage in serious misconduct. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 (2012) [hereinafter MCM].

[315] JOHNSON, *supra* note 304, at 62 (stating that in 1992, Japanese judges refused 1 out of every 705 prosecutorial detention requests).

systems.[316] Once arrested, Japanese prosecutors must either indict or release the suspect within 23 days,[317] while under the military system preferral and referral of charges is subject to lengthier speedy trial rules.[318]

Another criticized aspect of the detention process is the lack of bail.[319] In Japan, the right to bail attaches after an indictment is made,[320] which Japanese courts usually grant at a rate of nearly 20%.[321] This rate is near percentages of the U.S. Federal system,[322] and reflects a much better probability of bail than that of military-based PTC, which carries no right to bail.[323] Moreover, the U.S. military will potentially provide assistance

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[316] *See* Gavula, *supra* note 312, at 33–35 (explaining that the forty-eight and seventy-two-hour reviews are not meaningful and the seven-day review is often a matter of "checking the block").

[317] UN & FAR EAST ASIA INST. FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, *supra* note 302, at 18.

[318] A servicemember placed in military pretrial confinement need not be charged and tried until 120 days after confinement, subject to excludable delay and the requirement of prosecutorial "reasonable diligence." *See* Colonel Tomas G. Becker, USAF, *Games Lawyers Play, Pre-Preferral Delay, Due Process, and the Myth of Speedy Trial in the Military Justice System*, 45 A.F. L. REV. 1, 14–20 (1998); MCM, *supra* note 315, R.C.M. 707(a); 10 U.S.C. § 810 (2006). In Japan, while a detainee must be formally charged within three weeks of arrest, there is no absolute speedy trial requirement. In 2007, the average trial length, including trials for those not under arrest, was three months. SUPREME CT. OF JAPAN, TABLE 3 ANNUAL COMPARISON OF THE OF PERIOD TIME FOR TRIALS, AVERAGE TERM OF TRIALS, AND AVERAGE NUMBER AND INTERVAL OF TRIAL DATES, http://www.courts.go.jp/english/proceedings/pdf/statistics_criminal_cases/table03.pdf (last visited Mar. 14, 2011). Although the United States does not often express "speedy trial" concerns given the U.S.-Japan SOFA's special procedural rights, see *supra* note 347, the newly instituted lay-judge system is expected to further speed up trials. *See* Matthew Wilson, *The Dawn of Criminal Jury Trials in Japan: Success on the Horizon*, WIS. INT'L L. J. 835, 857 (2007); Part V.C, *supra*.

[319] *See* Melissa Clack, *Caught Between Hope and Despair: An Analysis of the Japanese Criminal Justice System*, 31 DENV. J. INT'L L. & POL'Y 525, 535 (Fall 2003).

[320] JOHNSON, *supra* note 304, at 62.

[321] *See id.* In 2007, of those Japanese police arrested, detained for twenty-three days, and actually prosecuted at public trial, 18% were released prior to trial, 86% of whom were freed pursuant to bail. MINISTRY OF JUST., WHITE PAPER ON CRIME 2008: CIRCUMSTANCES AND ATTRIBUTES OF ELDERLY OFFENDERS AND THEIR TREATMENT pt. 2, ch. 3, sec. 3 (Nov. 2008) [hereinafter WHITE PAPER ON CRIME 2008], *available at* http://hakusyo1.moj.go.jp/en/57/nfm/mokuji.html.

[322] In 2008, defendants arrested and pending Federal charges were granted pretrial release in 28.5% of cases. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 231822, FEDERAL JUSTICE STATISTICS 2008-STATISTICAL TABLES tbl.3.1 (Nov. 2010), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1745.

[323] Gavula, *supra* note 312, at 30. Under State systems, a military servicemember would have a better chance of release: In 2004, of felony defendants in the seventy-five largest

in both obtaining and funding bail.[324] Regardless, bail is often a non-issue—while prosecutorial discretion in Japan is frequently criticized, it has its benefits. Once a case reaches the prosecutorial level, prosecutors may "'suspend' prosecution [prior to trial] or simply drop the charges,"[325] even when they believe the case has enough evidence to support a successful prosecution.[326] In 2007, prosecutors disposed of approximately 50% of their cases in this manner.[327]

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urban U.S. counties, 58% were released prior to trial. THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 228944, STATE COURT PROCESSING STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 6 (May 2010), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2193. There are many likely reasons for the difference between U.S. state and federal rates: (1) state rates include misdemeanors and less severe crimes than are typical in the federal sphere; (2) the 1984 Bail Reform Act places a relatively higher burden on federal defendants; and (3) immigration offenses somewhat raise the federal rate. *See* Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 46–53 (2005).

[324] U.S. FORCES JAPAN, INSTR. 51-1, *supra* note 68, para. 4.5.3. For examples of SOFA personnel granted bail under the Japanese system, see, e.g., Chiyomi Sumida, *Soldier Charged in Okinawa Traffic Death Granted Bail*, STARS & STRIPES, Apr. 9, 2009, *available at* http://www.stripes.com/news/soldier-charged-in-okinawa-traffic-death-granted-bail-1.100644; Allison Batdorff & Hana Kusumoto, *Yokosuka Civilian Released on Bond*, STARS & STRIPES, Feb. 25, 2007, *available at* http://www.stripes.com/news/yokosuka-civilian-released-on-bond-1.60801; Chiyomi Sumida, *Three-Year Sentence Sought for Man Who Kept Rifles in Okinawa Home*, STARS & STRIPES, Jul. 23, 2006, *available at* http://www.stripes.com/news/three-year-sentence-sought-for-man-who-kept-rifles-in-okinawa-home-1.51909; Erik Slavin, *Japan's High Court Blocks Marine's Appeal*, STARS & STRIPES, Jul. 9, 2005, *available at* http://www.stripes.com/news/japan-s-high-court-blocks-marine-s-appeal-1.35572.

[325] CARL F. GOODMAN, THE RULE OF LAW IN JAPAN 412 (2d ed. 2008).

[326] Motoo Noguchi, *Criminal Justice in Asia and Japan and the International Criminal Court*, 6 INT'L CRIM. L. REV. 585 (2006). In 2004, "the rate of non-prosecution of cases that [had] sufficient evidence . . . was 52% of all cases." *Id.*

[327] WHITE PAPER ON CRIME 2008, *supra* note 321, pt. 2, ch. 2, sec. 3. In addition to this 50%, Japanese prosecutors referred 29.3% to administrative-type Summary Courts (in which a fine is typically the maximum penalty), 9.3% to family courts, and did not prosecute another 5.5% for other reasons. *Id*. In short, of the more than 1.9 million suspects whose cases made it past the police level to the prosecutorial level, only 6.6% were indicted for criminal trial. *Id*. For examples of Japanese authorities arresting SOFA personnel, then subsequently releasing them prior to criminal indictment, see, e.g., David Allen & Chiyomi Sumida, *Okinawa Marine has Trespassing Case Dropped*, STARS & STRIPES, Mar. 1, 2008, http://www.stripes.com/news/okinawa-marine-has-trespassing-case-dropped-1.75710. Allison Batdorff & Hana Kusumoto, *U.S. Sailor Accused of Punching Two Women Released*, STARS & STRIPES, Dec. 23, 2007, *available at* http://www.stripes.com/news/u-s-sailor-accused-of-punching2-womenreleased-1.72704; Allison Batdorff & Chiyomi Sumida, *Yokosuka Sailor Fined for Touching Girl, 15*, STARS & STRIPES, Jul. 12, 2006, *available at* http://www.stripes.com/news/yokosuka-sailor-fined-for-touching-girl-15-1.51448; Allison Batdorff & Hana Kusumoto, *Sailor*

3. Interrogations

Critics state that police and prosecutors only release a suspect upon confession, a show of remorse, and cooperation with investigators, notions purportedly incompatible with American ideas of criminal process. [328] This is partly true: in Japan, a suspect's cooperative and remorseful attitude will likely increase the chance police and prosecutors will drop the case against him.[329] However, this system is consistent with U.S. practices such as plea bargaining, a process that does not formally exist in the Japanese criminal system.[330] From a U.S. suspect's perspective, a plea bargain is essentially a trade: an admission of guilt for leniency.[331] Japan's informal system serves the same function, with the suspect's defense lawyer gathering "evidence to persuade the prosecutor that suspension [of prosecution] is appropriate."[332] At the level of police interrogation, there is also little practical difference between the two nations: U.S. courts typically allow interrogators to imply (but not explicitly state) to a suspect that "a sentencing judge would look at the cooperation and remorse . . . as a mitigating factor."[333] Recent reforms forbid Japanese police from explicitly "granting favors or proposing to do so, or making promises" to elicit a confession.[334]

Nevertheless, critics assert Japanese prosecutors are overly reliant on confessions, increasing the incentives for coercive interrogation techniques. At first glance, this appears true: in 2007, 91.3% of suspects

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Free After Paying Fine for Trespassing in Yokosuka, STARS & STRIPES, Apr. 15, 2006, *available at* http://www.stripes.com/news/sailor-free-after-paying-fine-for-trespassing-in-yokosuka-1.47683.

[328] *See* Stone, *supra* note 17, at 240–43; Clack, *supra* note 319, at 532–37.

[329] *See* HALEY, *supra* note 110, at 79.

[330] HARRY R. DAMMER & ERIKA FAIRCHILD, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 156 (3d ed. 2006).

[331] *See* GOODMAN, *supra* note 325, at 381, 418; Jean Choi DeSombre, *Comparing the Notions of the Japanese and the U.S. Criminal Justice System: An Examination of the Pretrial Rights of the Criminally Accused in Japan and the United States*, 14 UCLA PAC. BASIN L.J. 103, 144–45 (Fall 1995) (comparing the differing philosophies of the U.S. and Japanese criminal systems, and concluding U.S. plea bargaining moves its system away from procedural to a substantive focus, making it similar to the Japanese system).

[332] *See* GOODMAN, *supra* note 325, at 418.

[333] Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. 191, 199–200 (Spring 2005).

[334] *See* NAT'L POLICE AGENCY, POLICY ON ENSURING PROPRIETY OF EXAMINATION IN POLICE INVESTIGATIONS (Jan. 2008), *available at* http://www.npa.go.jp/english/index.htm.

criminally prosecuted in Japan confessed,[335] while "50% of all interrogations yield incriminating evidence" in the United States.[336] At trial, however, a similar percentage of defendants admit guilt under both the Japanese and U.S. federal systems.[337] Prosecutors in both countries have the same two general goals: "to convince the court to convict . . . [and] decide whom to prosecute."[338] In Japan, prosecutors spend vast amounts of time individually and collectively analyzing cases prior to making decisions to ensure a loss will not result.[339] In the most serious Japanese cases, cases in which the court utilizes three judges rather than one,[340] the confession rate was about 68%.[341] This suggests that in cases carrying higher public scrutiny and social importance, prosecutors have less ability to "cherry-pick" cases where the defendant has confessed.

Further criticisms target the length of interrogations, lack of a right to counsel, and an elusive right to silence.[342] To some extent, these

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[335] SUPREME CT. OF JAPAN, TABLE 2. ANNUAL COMPARISON OF RATE OF THE ACCUSED WHO CONFESS—ORDINARY CASES IN THE FIRST INSTANCE, http://www.courts.go.jp/ /english/proceedings/pdf/statistics_criminal_cases/table02.pdf (last visited Mar. 14, 2011).

[336] Paul Shechtman, *An Essay on Miranda's Fortieth Birthday*, 10 CHAP. L. REV. 655, 658 (Spring 2007).

[337] In 2007, 93.2% of all defendants prosecuted in Japanese court admitted guilt, and in 95.7% of all convictions the defendant had admitted guilt. *See* SUPREME CT. OF JAPAN, TABLE 4. ANNUAL COMPARISON OF NUMBER AND RATE OF THE ACCUSED FOUND NOT GUILTY OR PARTIALLY NOT GUILTY, http://www.courts.go.jp/english/proceedings/pdf/ statistics_criminal_cases/table04.pdf (last visited Mar. 14, 2011). By comparison, in 2004, 86.5% of all defendants in U.S. federal cases pled guilty and 96% of the cases resulting in conviction "were resolved by guilty pleas." Elkan Abramowitz & Barry A. Bohrer, *Thoughts on Federal Plea Bargaining, Trials, Acquittals*, 239 N.Y. L.J., No. 7 (Jan. 10, 2008).

[338] *See* Eric Rasmusen, Manu Raghav & Mark Ramseyer, *Conviction versus Conviction Rates: The Prosecutor's Choice*, 11 AM. L. & ECON. REV. 47, 48–50 (Spring 2009).

[339] DANIEL H. FOOTE ET AL., LAW IN JAPAN 347 (2007).

[340] *See* UN AND FAR EAST ASIA INST. FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, *supra* note 301, at 7 ([C]riminal cases involving possible sentences of death, life imprisonment, or 'imprisonment for a minimum period of not less than one year' are handled by a collegiate court of three judges, as well as any other cases deemed appropriate.").

[341] *See* SUPREME CT. OF JAPAN, TABLE 2. ANNUAL COMPARISON OF RATE OF THE ACCUSED WHO CONFESS—ORDINARY CASES IN THE FIRST INSTANCE, http://www.courts.go.jp/ english/proceedings/pdf/statistics_criminal_cases/table02.pdf (last visited Mar. 14, 2011); SUPREME CT. OF JAPAN, FIGURE 5, NUMBER OF CASES HANDLED BY SINGLE-JUDGE AND BY THREE-JUDGE PANEL—ORDINARY DISTRICT COURT CASES IN THE FIRST INSTANCE, 2007, http://www.courts.go.jp/english/proceedings/pdf/statistics_criminal_cases/fig05.pdf (last visited Mar. 14, 2011).

[342] Stone, *supra* note 17, at 242–43.

criticisms have merit. In the pre-indictment stage, suspects do have a right to consult counsel and remain silent,[343] but invocation does not terminate police questioning.[344] A suspect may refuse to talk to investigators and ask for a lawyer, but investigators may continue to ask questions to the suspect.[345] As for counsel, police and prosecutors may limit consultation times.[346]

However, SOFA protections are of great assistance at the interrogation stage.[347] First, it requires that Japanese police promptly notify U.S. authorities be upon the arrest of SOFA personnel.[348] Upon notification and prior to questioning, U.S. authorities travel to the police station to talk with the suspect, discussing his rights under the SOFA and his right to remain silent.[349] Soon after, a representative visits the suspect to discuss "condolence" procedures.[350] The suspect has the right to the services of a competent interpreter during interrogation,[351] and U.S. Government representatives can visit the suspect at any time.[352] Such ongoing access obviates many fears of abuse and coercive tactics, as does Japanese police officers' fear of causing tensions in U.S.-Japan

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[343] RAMSEYER & NAKAZATO, *supra* note 319, at 169. Although some scholars assert there is no right to pre-indictment counsel, several reforms from 2004 to 2009 resulted in the provisions of free pre-indictment counsel in any case punishable by a prison term of at least one year. *See* GOV'T OF JAPAN, COMMENTS BY THE GOVERNMENT OF JAPAN CONCERNING THE CONCLUSIONS AND RECOMMENDATIONS OF THE COMMITTEE AGAINST TORTURE 6 (May 2008), http://www.mofa.go.jp/policy/human/torture_com.pdf.
[344] GOODMAN, *supra* note 325, at 437–39.
[345] *Id*.
[346] REICHEL, *supra* note 294, at 359.
[347] The U.S.-Japan SOFA sets forth the following rights: (a) prompt and speedy trial; (b) notice in advance of trial of the specific charges against him; (c) confrontation with the witnesses against him; (d) compulsory process for obtaining witnesses in his favor; (e) legal representation in defense; (f) services of a competent interpreter; and (g) communication with a U.S. representative and right to have such representative present at trial. *See* U.S.-Japan SOFA, *supra* note 4, art. 17, para. 9. In addition, the Agreed Minutes guarantee that a defendant will have all rights afforded under the Japanese Constitution, including the right to be informed of the charges and a "show cause" hearing upon arrest, right to a public and impartial trial, right not to be compelled to testify against himself, a full opportunity to examine all witnesses, and right not to be subject to cruel punishments. Agreed Minutes, *supra* note 69, art. 17, para. 9. Finally, the United States is granted the right to have access to SOFA personnel at any time. *Id*.
[348] U.S.-Japan SOFA, *supra* note 4, art. 17, para. 5(b).
[349] U.S. FORCES JAPAN, INSTR. 31-203, *supra* note 100, para 9.2.
[350] *See generally* U.S. FORCES JAPAN, INSTR. 36-2612, *supra* note 29.
[351] U.S.-Japan SOFA, *supra* note 4, art. 17, para. 9(f).
[352] Agreed Minutes, *supra* note 69, art. 17, para. 9.

international relations.[353] While SOFA protections do not absolutely guarantee U.S.-style 4th and 5th Amendment rights, additional protections are ensured.

Moreover, Japan has recently reformed the interrogation system, lessening the potential of abuse in the interrogation process. Police are subject to the oversight of the National Public Safety Commission, who has the authority to dismiss senior police officers.[354] In 2008, the Commission issued new rules and procedures to eliminate the abusive practices of police.[355] First, it expressly prohibited "police from touching suspects (unless unavoidable), exerting force, threatening them, keeping them in fixed postures for long periods, verbally abusing them, or offering them favors in return for a confession."[356] Second, new guidelines expressly limit interrogation to eight hours a day and forbid overnight interrogation.[357] To enforce the policies, a supervisor from an independent agency was placed in each police station for the specific purpose of monitoring interrogation.[358] In addition, "police are liable for civil and criminal prosecution, and the media actively publicizes police misdeeds."[359]

Further obviating fears of coercion, recent trends show Japanese residents are much less willing to confess than in the past.[360] The Department of State recently found that "safeguards exist to ensure that suspects cannot be compelled to confess to a crime while in police

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[353] *See* Williams, *supra* note 76, at 48 (applying the same logic to the importance of U.S. military trial observers). In the modern day, there are virtually no reports of physical abuse of SOFA personnel during interrogations. *See, e.g.*, Wexler, *supra* note 296, at 67 n.172.

[354] Dr. Robert Winslow, *A Comparative Criminology Tour of the World: Japan*, CRIME & SOC'Y, http://www-rohan.sdsu.edu/faculty/rwinslow/asia_pacific/japan.html (last visited Mar. 14, 2011).

[355] U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: JAPAN, *supra* note 303. *See also Policing the Japanese Police*, JAPAN PROBE, Mar. 3, 2008, http://www.japanprobe.com/2008/03/28/policing-the-japanese-police/.

[356] U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: JAPAN, *supra* note 303.

[357] *Id*.

[358] NAT'L POLICE AGENCY, POLICY ON ENSURING PROPRIETY OF EXAMINATION IN POLICE INVESTIGATIONS (Jan. 2008), *available at* http://www.npa.go.jp/english/index.htm.

[359] Winslow, *supra* note 354.

[360] *See* FOOTE ET AL., *supra* note 339, at 360–61 (noting the increasing reluctance of Chinese suspects to confess, and that the "propensity to confess has declined among Japanese suspects as well").

custody."[361] Also, one legal scholar, who is generally suspicious of the interrogation process, believes there is "little evidence of actual physical force used in interrogation sessions."[362]

A number of scholars have differentiated the Japanese and U.S. systems in the following manner: The U.S. system is based on rights, Japan's on "truth,"[363] or, as one Japanese scholar characterized it: "America cares more about the procedure itself and less about the outcome."[364] Perhaps, but as the U.S. Supreme Court has declared, "(t)here is no gainsaying that arriving at the truth is a fundamental goal of our legal system."[365] Likewise, Japanese judges do not completely ignore the rights of the defendant: they routinely examine the voluntariness of confessions and sometimes suppress them.[366]

4. Trial

In 2007, Japanese police received reports of nearly 2.7 million crimes.[367] In the same year, Japanese prosecutors conducted approximately 69,400 public trials in district courts,[368] with over 99% convicted, and more than 40,000 of those cases resulting in suspended

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[361] U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: JAPAN, *supra* note 303. Unfortunately, false confessions have occurred under the Japanese system. *See* Hiroshi Matsubara, *Confession-Based Convictions Questioned*, JAPAN TIMES ONLINE, Apr. 15, 2003, http://search.japantimes.co.jp/cgi-bin/nn20030415b3.html (discussing five cases of suppressed confessions). However, they also occur under the United States system. *See* Shechtman, *supra* note 336, at 659 (citing a study finding 125 confirmed U.S. cases of false confession since the institution of *Miranda* rights). Reliable comparative data is lacking.

[362] GOODMAN, *supra* note 325, at 438 n.1256.

[363] *See, e.g.*, FOOTE ET AL., *supra* note 339, at 345.

[364] Takuya Katsuta, *Japan's Rejection of the American Criminal Jury*, 58 AM. J. COMP. L. 497, 514 (Summer 2010).

[365] United States v. Havens, 446 U.S. 620, 626 (1980).

[366] *See* NAT'L POLICE AGENCY, POLICY ON ENSURING PROPRIETY OF EXAMINATION IN POLICE INVESTIGATIONS (Jan. 2008), *available at* http://www.npa.go.jp/english/index.htm (explaining that 2008 Japanese interrogation reforms resulted from a recent spate of acquittals in serious cases); Hiroshi Matsubara, *Confession-Based Convictions Questioned*, JAPAN TIMES ONLINE, Apr. 15, 2003, http://search.japantimes.co.jp/cgi-bin/nn20030415b3.html (discussing five cases of suppressed confessions); RAMSEYER & RASMUSEN, *supra* note 292, at 99 (explaining that Japanese courts "do exclude coerced confessions on reliability grounds . . .").

[367] WHITE PAPER ON CRIME 2008, *supra* note 321, tbl.1-1-1-2.

[368] *Id*. tbl.2-3-1-3.

sentences.[369] Despite an approximate 2.6% chance of facing public trial when a crime is reported, and a 1.1% chance of imprisonment, many observers believe the 99% conviction rate indicates unjustness.[370]

First, some incorrectly assert judges are biased toward the prosecution.[371] High conviction rates stem from prosecutor diligence. Recognizing the social stigma a prosecution imports on a suspect, "prosecutors examine the evidence of cases extremely carefully and in principle do not prosecute cases if there is the slightest possibility of a not-guilty judgment."[372] Judges attribute high conviction rates to this diligence, while often expressing a genuine wish that more doubtful cases were tried and the evidence would allow them to acquit more often.[373] A study of Japanese judges found that conviction rates were not "due to any biased judicial incentives: judges do not suffer a career hit for acquitting defendants."[374] Finally, this "shocking" rate, when compared with rates in military courts-martial and federal cases, is not dissimilar when guilty pleas are included. For example, in FY09, the U.S. Navy-Marine Corps rate was 98.9%.[375]

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[369] *Id*. Of those pleading not guilty, 3% were acquitted. SUPREME CT. OF JAPAN, TABLE 4. ANNUAL COMPARISON OF NUMBER AND RATE OF THE ACCUSED FOUND NOT GUILTY OR PARTIALLY NOT GUILTY, http://www.courts.go.jp/english/proceedings/pdf/statistics_criminal_cases/table04.pdf (last visited Mar. 14, 2011).

[370] In comparison, in the United States, 4% of reported crimes go to trial. Rasmusen, Ragahv & Ramseyer, *supra* note 338, at 48–49. However, this number includes only contested, non-plea bargain cases. *Id*. In Japanese public trials, about 93% of defendants pled guilty. SUPREME CT. OF JAPAN, TABLE 4. ANNUAL COMPARISON OF NUMBER AND RATE OF THE ACCUSED FOUND NOT GUILTY OR PARTIALLY NOT GUILTY, http://www.courts.go.jp/english/proceedings/pdf/statistics_criminal_cases/table04.pdf (last visited Mar. 14, 2011).

[371] *See* JOHNSON, *supra* note 304, at 219–20.

[372] Noguchi, *supra* note 326, at 594. *See also* FOOTE ET AL., *supra* note 339, at 347 ("[M]any suspects who would be tried in other systems never get indicted in Japan. . . . [T]he high conviction rate reflects prosecutors' preference for the risk that an uncharged offender will re-offend over the converse risk that a charged suspect will be acquitted.").

[373] *Id*.

[374] Rasmusen, Ragahv & Ramseyer, *supra* note 338, at 47 (citing Ramseyer & Rasmusen, *supra* note 292).

[375] Annual Report of the Code Committee on Military Justice, U.S. Court of Appeals for the Armed Forces (Oct.1 2008–Sep. 30, 2009), *available at* http://www.armfor.uscourts.gov/annual/FY09AnnualReport.pdf. In the FY08 report, the Army convicted at the rate of 93.5% and the Coast Guard at 98.3%. Annual Report of the Code Committee on Military Justice, U.S. Court of Appeals for the Armed Forces (Oct.1 2007–Sep. 30, 2008), *available at* http://www.armfor.uscourts.gov/annual/FY08AnnualReport.pdf. In FY07, Air Force courts-martial convicted in 92.7% of its criminal cases. Annual Report of the Code Committee on Military Justice, U.S. Court of Appeals for the Armed Forces (Oct.1 2006-Sep. 30, 2007), *available at* http://www.armfor.uscourts.gov/annual/FY09

A second area of criticism concerns the limitations on the defense's ability to obtain discovery. In 2009, Japan began the "saiban-in" (lay-judge) system, "a monumental event for it was the first time in sixty years that Japanese citizens were allowed to participate in a criminal trial."[376] The system consists of three professional judges and six lay judges, with jurisdiction over felony-level crimes such as homicide, robbery, assaults, arson, kidnapping, and driving resulting in death.[377] Decisions are made by majority, requiring at least one professional judge and one lay judge to convict.[378]

The commencement of the system was quickly followed by significant changes to Japanese criminal procedure. First, the court has developed an exclusionary rule of hearsay evidence, in particular the statements contained within prosecutorial interrogation records.[379] Second, the court has initiated a system of pre-trial disclosure, whereby prosecutors are "forced to open up their evidentiary records for the defense attorneys."[380] Also of importance, the system has moved trials

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AnnualReport.pdf. In 2004, the federal conviction rate was 90%. Abramowitz & Bohrer, *supra* note 337. One legal scholar conducted a study of Japanese conviction rates covering the years 1989 to 1998, attempting to correct somewhat for the lack of plea bargaining in the Japanese system and comparing the results with conviction rates in other countries. JOHNSON, *supra* note 304, at 216–18. He found that the gap between "the propensity of American juries and Japanese judges to acquit . . . is far narrower than most commentators have supposed . . . ." *Id*. at 218. Moreover, while Japanese rates are higher than most Western countries, they are generally in line with the rates of many Asian countries. *See id*.

[376] Makoto Ibusuki, *Quo Vadis?: First Year Inspection to Japanese Mixed Jury Trial*, 12 ASIAN-PAC. L. & POL'Y J. 24, 25 (2010).

[377] *Id*. at 28–29.

[378] *Id*. at 32. Conversely, in order to acquit, the vote of a professional judge is not required.

> To combat the potential for judicial dominance, Japan established a voting system that could reduce such influence. Each of the nine jurors has a vote, but even if all three professional judges vote guilty, five of the lay jurors can essentially "veto" the judges by voting not guilty. However, if all six lay jurors vote guilty, they need at least one professional judge on board to prevail.

Raneta Lawson Mack, *Jury Trials in Japan: Off to a Good Start, But . . .*, JURIST, Aug. 21, 2009, *available at* http://jurist.law.pitt.edu/forumy/2009/08/jury-trials-in-japan-off-to-good-start.php.

[379] Ibusuki, *supra* note 376, at 50.

[380] *Id*.

away from mere paper procedures toward one in which trial and defense lawyers are expected to exercise effective oral advocacy.[381]

As of May 21, 2010, 1,881 cases had been tried.[382] A number of trends continued from the prior system, including strong prosecutorial evidence, defendant's acknowledgment of guilt, high conviction rates, and high rates of suspended sentences.[383] However, recent procedural changes have hit on many criticisms of the Japanese system, with likely further movement towards greater procedural rights.[384]

5. Corrections

Unlike the pre-trial and trial realms, criticisms of the corrections stage of the Japanese process are relatively quiet. The Department of State recently concluded that "prison conditions generally met international standards," while noting several deficiencies.[385] However, the SOFA affords U.S. Forces inmates unique protections, making the general state of Japanese prisons somewhat irrelevant. Addressing SOFA prisoners, SOFA Agreed View 23 requires Japan to "pay due consideration to the differences in language and customs between Japan and the United

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[381] *Id*. at 47.

[382] *Id*. at 36. On May 24, 2010, in Okinawa, the first trial of a U.S. military servicemember took place. Hiroshi Fukurai, Kay-Wah Chan & Setsuo Miyazawa, *The Resurgence of Lay Adjudicatory Systems in East Asia*, 12 ASIAN-PAC. L. & POL'Y J., at i. (2010). The jury sentenced the member, a Private First Class Marine, to three to four years in prison. David Allen & Chiyomi Sumida, *Kinser Marine Gets Jail Time for Robbing Cabbie*, STARS & STRIPES, May 29, 2010, *available at* http://www.stripes.com/news/kinser-marine-gets-jail-time-for-robbing-cabbie-1.104603. Demonstrating restorative goals of the Japanese system, the jury stated, "we know you can rehabilitate. You have strength to become a good, law-abiding citizen. We believe in you." *Id*.

[383] *See generally* Ibuski, *supra* note 376.

[384] *See* David T. Johnson, *Early Returns from Japan's New Criminal Trials*, ASIA-PAC. J.: JAPAN FOCUS, Sep. 7, 2009, *available at* http://www.japanfocus.org/-David_T_-Johnson/3212. Johnson discusses the system's already apparent positive effects on raising the performance standards of defense lawyers and bringing greater scrutiny to pretrial processes. *Id*. The institution of the lay judge system and the involvement of civilians in the criminal process have been moving Japan toward the electronic recording of all interrogations. *Id*. *See also Prosecutors to Try Audiovisual Recordings of Interrogations from March*, BREITBART, Feb. 23, 2011, http://www.breitbart.com/article.php?id=D9LIG7PO1&show_article=1.

[385] U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: JAPAN, *supra* note 303. *See also* Sheryl WuDunn, *Prisons in Japan are Safe but Harsh*, N.Y. TIMES, July 7, 1996, *available at* http://www.nytimes.com/1996/07/08/world/prisons-in-japan-are-safe-but-harsh.html.

States, and, shall not impose conditions of detention which because of those differences might be prejudicial to the health of such detained persons."[386] The Tri-Service regulation further requires that SOFA prisoners receive "the same or similar treatment . . . of personnel confined in U.S. military facilities."[387]

In practice, SOFA prisoners receive "legal assistance, visitation, medical attention, food, bedding, clothing, and health and comfort supplies."[388] Military representatives, including chaplains, visit each inmate at least once every 30 days, and U.S. military hospitals provide medical treatment.[389] Status of Forces Agreement prisoners have amenities such as individual cells, high-calorie diets, and, sometimes, televisions.[390] In short, the prison conditions of SOFA personnel are generally "equal to, or exceed conditions at similar US institutions."[391]

6. Fear of Unequal Application of Criminal Laws

Some have asserted that the Japanese criminal system may unfairly apply criminal procedures and laws in their disposition of SOFA personnel.[392] Such criticism is unfounded. Outside pressures bear little influence on courts, as "[j]udicial independence is ensured in terms of the institutional Government structure and actual practice, as well as in the judicial administration such as personnel and budgetary controlling

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[386] U.S. FORCES JAPAN, PAM. 125-1, *supra* note 68, at 19.
[387] TRI-SERVICE REG., *supra* note 32, para. 3-1.
[388] *Id.*
[389] *Id.*
[390] *See Preferential Treatment for U.S. Soldiers in Japanese Jails*, JAPAN PROBE, Apr. 18, 2008, http://www.japanprobe.com/2008/04/18/preferential-treatment-for-us-soldiers-in-japanese-jails/; Allison Batdorff, *A Helplessness that a Mother Can't Imagine*, STARS & STRIPES, Aug. 28, 2007, http://www.stripes.com/news/a-helplessness-that-a-mother-can-t-imagine-1.68166 ("SOFA prisoners live at a different standard than their Japanese peers, with more food, Western toilets, heaters, and English reading materials . . . .").
[391] *See 50 years of Japan-US Alliance SOFA, the Darkness—Part VII Japan Gives Special Privileges to US Personnel in Jail*, JAPAN PRESS WKLY., Apr. 9, 2010, http://www.japan-press.co.jp/modules/feature_articles/index.php?id=5.html (quoting a 1985 USFJ command history).
[392] Stone, *supra* note 17, at 241 (questioning whether prosecutorial benevolence in terms of dismissals and suspensions is "equally applied to foreigners," while acknowledging that SOFA provisions obviate concerns); *but see* Wexler, *supra* note 296, at 68 (stating the Japanese criminal justice system is alleged to have "a history of bias against foreigners . . .").

mechanisms."[393] In cases that draw media attention, SOFA personnel are more likely to receive lenient sentences in foreign courts than at courts-martial.[394] A number of publicized cases demonstrate the benefit SOFA personnel derive from the benevolence of the Japanese system at police, prosecutorial, and trial stages.[395] Finally, in Japan "[c]ases of corruption involving judges and prosecutors are very rare. Ordinary citizens would never imagine that they could influence court judgments. . . ."[396]

Moreover, while public opinion is negative towards aspects of U.S.-Japan bilateral relations,[397] polls do not indicate anti-Americanism, but a narrowed focus on military bases and the issues associated with them.[398] This notion was evident in a 1996 opinion poll taken a year after the Okinawa rape, with 70% of Japanese people supporting the U.S.-Japan alliance and 67% favoring a reduction in the number of U.S. military bases.[399] When SOFA personnel commit crimes, the public's desire

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[393] Noguchi, *supra* note 326, at 589. *See also* Rasmusen, Raghav & Ramseyer, *supra* note 338, at 47–48 (explaining that the high conviction rates in Japan are "not due to any biased judicial incentives: judges do not suffer a career hit for acquitting defendants").

[394] *See* Cha, *supra* note 275, at 506–10.

[395] *See, e.g.*, *Suspended Prison Term Given to U.S. Navy Officer over Accident*, JAPAN TODAY, Oct. 2, 2010, http://www.japantoday.com/category/crime/view/suspended-prison-term-given-to-us-navy-officer-over-accident; Peter Alford, *Marines Charged over Okinawa Rape*, AUSTRALIAN, Feb. 16, 2008, http://www.theaustralian.com.au/news/marines-charged-over-new-okinawa-rape/story-e6frg6t6-1111115563622 (describing a case in which Japan declined to prosecute an Okinawa rape despite public anger); David Allen, *Brown Convicted of 'Attempted Indecent Act,'* STARS & STRIPES, Jul. 10, 2004, http://www.stripes.com/news/brown-convicted-of-attempted-indecent-act-1.21709. *See infra* note 30; note 329 n.331.

[396] Noguchi, *supra* note 326, at 589.

[397] *See* Weston S. Konishi, *The United States Image of Japan: Is It Winning or Losing the Popularity Contest?*, MAUREEN & MIKE MANSFIELD FOUND. (2010), *available at* http://www.mansfieldfdn.org/polls/pdf/konishiusimageinjapan.pdf.

[398] In one recent poll, nearly 80% of the Japanese populace expressed a positive attitude towards the United States. Opinion Poll, The Maureen & Mike Mansfield Found., Nikkei Shimbun Cabinet Office of Japan 2009 Public Opinion Survey on Diplomacy (P09-35) (Dec. 2009), *available at* http://www.mansfieldfdn.org/polls/2009/poll-09-35.htm. Polls taken during the same general time frame have reflected an invariably negative view of the Futenma basing issue, with a majority of the populace against any relocation within Japan. *See, e.g.*, Opinion Poll, Maureen & Mike Mansfield Found., Mainichi Shimbun February 2010 Public Opinion Poll (P10-04) (Feb. 2010), *available at* http://www.mansfieldfdn.org/polls/2010/poll-10-04.htm.

[399] *See* Hosokawa, *supra* note 169.

seems focused on ensuring justice is done within their system, not on obtaining revenge against the U.S. military.[400]

7. The Irony of the "Unfairness" Rationale

Although U.S. habeas corpus proceedings have firmly established that Constitutional protections do not apply to foreign criminal proceedings in the SOFA context,[401] U.S. policy is to make them applicable as far as practicable. Ironically, however, in effectuating this interest through custody and waiver maximization, the U.S. has forced its leadership to ignore certain Constitutional protections.

The SOFA requires the United States to cooperate with Japan in investigations and ensure the presence of the suspect for both investigation and trial.[402] In ensuring presence, forms of restraint will often be placed on the suspect's freedom of movement, which in some cases includes confinement.[403] During such "SOFA confinement," the servicemember does not have the right to UCMJ-based review of the confinement, as an order of release would defeat SOFA requirements.[404] Moreover, the suspect may not have a right to defense counsel, despite the fact that the interest of maximizing jurisdiction may not be consistent with the suspect's own interests.[405] While such restrictions logically relate to international interests of the SOFA, they also directly contradict the rationales behind the maximization policy: availing SOFA personnel of constitutional protections and protecting the member from unfair treatment.

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[400] *See* Reimann, *supra* note 214, at 66–70 (explaining that the Korean NGO activities targeting military bases have been anti-American in nature, while Japanese NGOs have had more of an issue-based focus).

[401] *See generally* Holmes v. Laird, 459 F.2d 1211 (1972) (discussing Supreme Court precedent on the issue and finding that (1) the Constitution not apply to foreign trials involving servicemembers, and (2) the Constitution does not prevent the United States from handing over custody to foreign authorities pursuant to the NATO SOFA).

[402] U.S.-Japan SOFA, *supra* note 4, art. 17, paras. 5, 6. The NATO SOFA also requires such cooperation. NATO SOFA, *supra* note 34, art. 7, paras. 5, 6.

[403] FLECK ET AL., *supra* note 31, at 199.

[404] *See* Major William K. Lietzau, *A Comity of Errors: Ignoring the Constitutional Rights of Service Members*, ARMY LAW., DEC. 1996, at 3.

[405] Captain Robin L. Davis, *Trial Defense Service Notes: Waiver and Recall of Primary Concurrent Jurisdiction in Germany*, ARMY LAW., May 1988, at 30, 34.

8. Practical Effect of Maximization

Assuming *arguendo* that Japan's criminal system is suspect in terms of fairness, the U.S. military's most serious offenders are already subject to that system. In the catalytic 1995 Okinawa rape case and the two Tokyo murders some ten years later, defendants were subject to the gambit of the oft-criticized Japanese system, from interrogation, to trial, to imprisonment. Military-wide, in fiscal year 2009 there were 451 trials of U.S. forces personnel.[406] In the most politically sensitive cases, maximization policies have little effect. In Japan, these cases will even require pre-trial custody turnover. Yet irrelevant maximization procedures will be associated with these heinous cases to the detriment of United States relations.[407] The procedures may also work to the detriment of the suspect, creating the impression that the SOFA serves to "undermine the sovereignty of the host nation," thereby creating a more hostile atmosphere toward a particular defendant as well as military bases in general.[408]

D. Increased Fairness of the Japanese System

In the last five years, the Japanese criminal process has undergone tremendous change. Japan has shown a clear movement toward the procedural protections afforded in America. The process does not mirror U.S. constitutional mandates, but the general notion of "fairness" suggested by the NATO SOFA and its implementing directives is so met. In the two-level game, the United States is over-valuing this "fairness" constraint and losing potential international gains.

VI. The International Bargaining Table

A. Introduction

In the debates on the Senate Floor, U.S. Senator Bricker, a staunch opponent of the NATO SOFA's concurrent scheme of jurisdiction,

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[406] Annual Report of the Code Committee on Military Justice, U.S. Court of Appeals for the Armed Forces (Oct. 1 2008–Sep. 30, 2009), *available at* http://www.armfor.uscourts.gov/annual/FY09AnnualReport.pdf.
[407] *See supra* note 277.
[408] *See* Cha, *supra* note 275, at 492.

commented that the Senate's reservations stemmed from "a feeling that . . . we had 'given up' something and this was an attempt to get a little of it back."[409] The comment epitomized the U.S. approach to future FCJ controversy: keep as much as we can and give up only what we have to. This philosophy has outlived its usefulness. The United States should give up custody and jurisdictional rights if it results in an overall gain to the country.

B. Maximization Policy in Play

Like Japan, when the United States sits at the negotiating table and FCJ is an issue, it asserts a number of constraints that narrow its win-sets. Concerns of international security require that the current number of U.S. military forces in Japan remain roughly the same, but the asserted unfairness of Japan's criminal system places FCJ tradeoff somewhat off-limits. In addition, the United States may argue constraints stemming from the 1953 Senate Resolution[410] and a fear that revision may "extend its influence to similar agreements between the United States and any other country."[411]

The latter three constraints are problematic in terms of two-level game credibility. In order for any claimed constraint to provide power to a negotiator, it must be credible, or at least, the other side must think it is credible.[412] Somewhat ironically, the 1953 Senate Resolution and implementing DoD policy are not credible constraints because of the U.S. 1995 and 2004 FCJ concessions. If the United States can bend its asserted firm maximization policy in highly publicized heinous cases, it can bend in lesser ones. This in some part explains why Japanese

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[409] Williams, *supra* note 76, at 10 (citing 99 CONG. REC. 8780–82 (1953) (remarks of Senator Bricker)).

[410] *See, e.g.*, Weston S. Konishi, *Washington Japanwatch; SOFA Debate Threatens Security Alliance*, YOMIURI SHIMBUN, Oct. 26, 2004 at 4; *see generally* Murat Karagoz, *US Arms Embargo Against Turkey—After 30 Years an Institutional Approach Towards US Policy Making*, PERCEPTIONS 107 (Winter 2004–2005) (discussing the role of legislative constraints on executive deal-making in the two-level game).

[411] FLECK ET AL., *supra* note 31, at 415. Such was the justification behind keeping the Okinawa rape-related 1995 amendment to pre-trial custody procedures in the realm of an "informal" modification, fearing formal amendment "might provoke activities of other countries towards a major revision of existing agreements regarding the status of U.S. forces." *Id.*

[412] *See* Ahmer Tarar, *International Bargaining with Two-Sided Domestic Constraints*, 45 J. OF CONFLICT RESOLUTION 320, 331 (2001).

politicians have never had to remove FCJ desires from the table. For similar reasons, the constraint of "international FCJ uniformity" lacks credibility. Countries such as South Korea and the Philippines know of the 1995 and 2004 concessions, and have publicly demanded to be granted the same.[413] Yet, the United States has successfully resisted the demands.[414] Finally, the willingness of the United States to submit serious offenders to Japanese justice discredits its general stance against further modifications due to a perception that the Japanese system is unfair.

Both the United States and Japan know U.S. FCJ policy can be modified—the question remains as to whether the United States should modify its policy. The criminal system of Japan is fundamentally fair and does not significantly undermine military good order and discipline. Meanwhile, U.S. insistence on maximizing jurisdiction often accomplishes little more than aggravation of the Japanese populace in the most publicized and heinous crimes. While the utility of "maximization powers" to the United States is low, Japan values them highly. Thus, the United States should trade them off to enhance its win-set. Depending on the win-sets of Japan at the time of bargaining, this could be a tradeoff for additional servicemember constitutional-type protections. This tradeoff could provide gains in another international realm, such as additional Japanese financial support for U.S. military operations. In the least, such a tradeoff would be a strong step toward ensuring the status quo of U.S. Force levels in Japan in the event Japan's win-sets regarding the issue shrink in the future.

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[413] *See Philippine Senators Urge Manila to Demand Custody of U.S. Soldiers*, BBC MONITORING ASIA PAC., Jan. 9, 2006 (describing Philippine senators' demands to the United States for custody turnover arrangements similar to those of U.S-Japan); *Rules on U.S. Forces Needs Revision*, KOREA HERALD, Dec. 2, 2002 (demanding revisions to the U.S.-ROK SOFA "to get it to the level of agreements the United States signed with Japan and Germany").

[414] In 2001, the United States allowed South Korea to presumptively maintain pre-indictment custody over active duty servicemembers in certain types of cases, if South Korea was the first country to arrest. *See* Egan, *supra* note 223, at 319–20. Unlike the U.S.-Japan 1995 and 2004 arrangements, the 2001 South Korean revision does not contemplate U.S. pre-indictment transfers. *See id*. Since then, the United States has successfully resisted Korean demands to further reform FCJ provisions of the U.S.-ROK SOFA. *See* Rijie Ernie Gao, *Between a Rock and a Hard Place: Tensions Between the U.S.-ROK Status of Forces Agreement and the Duty to Ensure Individual Rights Under the ICCPR*, 33 FORDHAM INT'L L.J. 585, 618 (2009).

The state of Japanese win-sets is crucial to the next question: knowing the United States can relinquish FCJ power and should make this power available for tradeoff, when should it do so? The answer is now. The last fifteen years of U.S-Japan relations demonstrate the volatility of the issue. Unless the United States imposes furthers restrictions on all servicemembers in Japan, a problematic and unlikely possibility,[415] SOFA personnel will continue to interact with Japan society. During this interaction, another disastrous crime could occur, and U.S. maximization policy will again rise to prominence. As in the past, it will become a virtually immovable domestic constraint straddling the outer edges of Japan's U.S. military basing win-set. In such situations, Japan's bargaining power is at its strongest, increasing the chance of non-agreement if the United States refuses to bend far enough. Similar to the 1995 rape, the United States may be forced to agree to FCJ concessions, and undesired troop reductions in the thousands, with little in return.

The current bargaining situation is ideal for both the United States and Japan. The 2009 DPJ landslide has lost its momentum, as has the momentum of their proposed FCJ reforms. International security concerns have, for the moment, become an imperative concern, enhancing the stability of U.S. military bases. Most importantly, no truly heinous rape or murder has occurred in the last few years. However, the symbolic nature of the FCJ issue, as well as the aforementioned "disastrous crime" scenario, ensures its ongoing utility to Japanese negotiators. Thus, the United States can maximize its gains now, with Japanese domestic constraints relatively low, Japan's bargaining power relatively weak, and its valuation of FCJ power relatively high.

VII. Proposed Reforms

The U.S.-Japan military-basing two-level game reveals existing inefficiencies. United States FCJ power has low utility to the United States and high utility to Japan, yet there has been no tradeoff. If a tradeoff is to be made, the final question is how the United States may legally implement the new relationship.

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[415] Among many envisioned problems, the ongoing restriction to base of all SOFA personnel would likely damage the morale of U.S. forces, raise significant complaints within the DoD civilian and dependent communities, and perhaps have a negative impact on recruiting objectives.

First, the United States should allow USFJ the discretion to formulate its own region-specific FCJ policy. This may require revision to the Tri-Service regulation, or an exception to it. The 1995 and 2004 FCJ modifications indicate U.S. officials have previously made piecemeal exceptions to this instruction. The exception should become a blanket one. This would not conflict with the 1953 Senate Resolution or the DoD Directive on SOFA policies, as neither mandates the U.S. maximization policy.

Second, the SOFA scheme in Japan of concurrent jurisdiction should remain, with America exercising primary jurisdiction when it possesses the right, and exercising secondary jurisdiction when Japan chooses to allow it. The U.S. military in Japan should cease attempts to obtain jurisdiction over offenses when Japan has the exclusive or primary right. Moreover, in accord with the facial jurisdictional scheme of the U.S.-Japan SOFA, the primary right of jurisdiction in official duty cases should remain with the United States. However, in the context of Japan, the Tri-Service Regulation's prohibition on U.S. relinquishment of this primary right should be eliminated, allowing leading USFJ and U.S. diplomatic officials to weigh U.S. interests and waive the primary right when appropriate.

Third, pre-indictment custody should be turned over, on demand, to Japanese authorities when they have the primary right of jurisdiction. When the military apprehends a servicemember and it is clear that Japan has the primary right of jurisdiction, Japanese authorities should immediately be notified and given the opportunity to take custody of the suspect if they so desire, regardless of the categorization of the offense.

Finally, the alliance-enhancing process of "condolences" should continue. This process will often result in waivers of jurisdiction. In the Japanese system, "condolences" are not a jurisdictional-avoidance mechanism, but a method by which justice is achieved.

VIII. Conclusion

Since World War II, Japan has developed into an ally of the United States in a volatile East Asian region, and fortunately so: U.S.-military bases in Japan serve as a deterrent to Chinese and North Korean aggression, as well as enable a more effective military response to such aggression if required. However, the history of U.S. bases in other

countries, as well as recent changes to U.S. basing presence and troop-levels in Japan, suggest that the U.S. military presence in Japan cannot be taken for granted—the next crime or series of crimes could set off further unwanted changes. The United States can mitigate the risk by making several revisions to its FCJ-policies, revisions that do not significantly affect U.S. interests in protecting the rights of U.S. servicemembers.

The revisions proposed in this article will not eliminate the tension involved in U.S.-Japan base politics. There will continue to be adverse responses to crimes and accidents. However, on a domestic level, such revisions will allow the Japanese to exercise control over issues that are very much a Japanese matter, improve U.S.-Japan relations, and create a more effective alliance. In turn, this will help ensure that it is the United States, not Japan, who decides if and when it is time for the U.S. presence in Japan to be withdrawn.

DOCTRINALLY ACCOUNTING FOR HOST NATION SOVEREIGNTY DURING U.S. COUNTERINSURGENCY SECURITY OPERATIONS

MAJOR ANDREW R. ATKINS*

In the aftermath of the wars in Iraq and Afghanistan, the United States will emphasize non-military means and military-to-military cooperation to address instability and reduce the demand for significant U.S. force commitments to stability operations. U.S. forces will nevertheless be ready to conduct limited counterinsurgency and other stability operations if required, operating alongside coalition forces whenever possible.[1]

A [counterinsurgency] effort cannot achieve lasting success without the [host nation] government achieving legitimacy.[2]

I. Introduction

Some authors considering the United States' campaigns in Iraq and Afghanistan have argued U.S. forces were unprepared for high intensity counterinsurgency due to a lack of viable doctrine.[3] Aggressive capture

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* Judge Advocate, U.S. Army. Presently assigned as Brigade Judge Advocate, 3d Brigade Combat Team, 10th Mountain Division (Light Infantry), Fort Drum, New York. LL.M., 2012, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. J.D., 2007, University of Washington; B.S., 2000, U.S. Military Academy. Previous assignments include Legal Assistance Attorney, 1st Armored Division, Wiesbaden, Germany; Rule of Law Advisor, U.S. Division-Center, Ramadi, Iraq; Detainee Operations Attorney, U.S. Division-Center, Baghdad, Iraq; Trial Counsel, 1st Armored Division, Wiesbaden, Germany; Operational Law Attorney, 8th U.S. Army, Seoul, Korea; Assistant Operations Officer, 16th Cavalry Regiment, Fort Knox, Kentucky; Troop Executive Officer, 16th Cavalry Regiment, Fort Knox, Kentucky; Fire Support Officer, 16th Armored Cavalry Regiment, Fort Irwin, California; and Platoon Leader, 16th Armored Cavalry Regiment, Fort Irwin, California. Member of the bars of Washington, the U.S. Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 60th Judge Advocate Officer Graduate Course.

[1] SEC'Y OF DEF. LEON PANETTA, SUSTAINING U.S. GLOBAL LEADERSHIP: PRIORITIES FOR 21ST CENTURY DEFENSE 6 (2012).

[2] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-120 (Dec. 2006) [hereinafter FM 3-24].

[3] *See* Andrew F. Krepinevich Jr., *How to Win in Iraq*, FOREIGN AFF., Sept.-Oct. 2005, at 87 (calling for the development of a population-centric counterinsurgency strategy to turn

and detention practices manifested this unpreparedness, causing U.S. forces to alienate the very populations they sought to secure.[4] As a result, these tactical and operational practices undermined the broader strategic objective of building the supported governments' legitimacy in the eyes of the Iraqi and Afghan populations.[5]

In 2006, the U.S. Army's new Field Manual (FM) 3-24 introduced a counterinsurgency strategy to resolve this and the many other challenges forces faced.[6] Noting that U.S. forces had erroneously applied conventional, large-scale operational doctrine in Iraq, the manual called for a population-centric strategy requiring forces to both secure the population and foster the growth of an effective, legitimate government.[7]

Nevertheless, the manual applies legally permissive methods applicable during conventional operations, preventing security operations from themselves being a tool to build the government's legitimacy.[8] United States legal and policy obligations indicate that prolonged counterinsurgency campaigns will evolve into non-international armed conflicts in which U.S. forces support a sovereign host nation government.[9] During such conflicts, the law of armed conflict affirms the

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the tide of the war in Iraq); THOMAS E. RICKS, THE GAMBLE 15–17, 24–25 (2009) (noting the U.S. military's unpreparedness for counterinsurgency operations in 2003). *See also* THOMAS E. RICKS, FIASCO 109–11 (2006) (noting an inadequate post-conflict operational plan based on false assumptions); Brigadier General Mark Martins, Mea Culpa*: The Military's Proper Role in Strengthening the Rule of Law During Armed Conflict*, LAWFARE, Sept. 7, 2011, 11:03 AM, http://www.lawfareblog.com/2011/09/mea-culpa-the-militarys-proper-role-in-strengthening-the-rule-of-law-during-armed-conflict/ (calling post-conflict planning "superficial").

[4] *See, e.g.*, Alissa J. Rubin, *For Afghan-U.S. Accord, Night Raids Are a Sticking Point*, N.Y. TIMES, Dec. 3, 2011, at A14 (noting Afghan popular frustration with U.S. military raids of Afghan homes to detain suspected insurgents); JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 323 (2006) (noting Iraqi popular outrage following the Abu Ghraib abuse scandal).

[5] Rubin, *supra* note 4 (noting that night raids into Afghan private homes alienate citizens, offend cultural sensitivities, and lack sufficient military value); STROMSETH ET AL., *supra* note 4, at 6, 51 (noting Iraqi mistrust of U.S. forces given their "heavy-handedness," undermining U.S. credibility in improving the rule of law).

[6] FM 3-24, *supra* note 2, at foreword.

[7] *Id.* at ix.

[8] *See infra* Part IV.

[9] *See infra* Part II.B. This article assumes a long-term foreign deployment of conventional U.S. ground forces to assist a host nation in defeating an insurgency, distinguishing such counterinsurgency operations from stability or foreign internal defense operations entailing a more limited employment of U.S. forces. *See* FM 3-24, *supra* note 2, paras. 1-107, 1-134 (distinguishing counterinsurgency operations from stability operations by the

primacy of the host nation's domestic criminal laws to sanction insurgent conduct,[10] creating operational limitations the new FM did not account for.[11] Thus, as in Iraq, host nation criminal laws, evidentiary standards, and criminal justice institutional norms can operationally limit U.S. forces' ability to detain individuals.[12] Yet despite these obligations, the manual applies legally permissive conventional targeting, intelligence, and tactical methods.[13] Consequently, it does not identify how targeting, capture, and detention operations can further the greater strategic goal to build the government's popular support by fostering governmental accountability and capacity.[14]

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use of offensive and defensive kinetic operations). Additionally, this article assumes that counterinsurgencies arising from U.S. invasions will become non-international armed conflicts between a U.S.-supported government and a domestic insurgency. *See* David E. Graham, *Counterinsurgency, the War on Terror, and the Laws of War: A Response*, 95 VA. L. REV. IN BRIEF 79, 86 (2009) (considering Iraq and Afghanistan "atypical" counterinsurgencies for having arisen from U.S. invasions). This article does not address global insurgencies, but focuses on traditional insurgencies primarily operating from within one state and focused on affecting its government. For a description of the global insurgency theory, see, e.g., Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1776 (2009).

[10] *See infra* Part II.A.

[11] *See infra* Part IV. Operational limitations include "other restrictions" such as legal and policy obligations, and thus are broader than constraints (higher command requirements dictating an action) or restraints (prohibiting an action). *See* JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 69, 252–53, 293 (15 Nov. 2011) [hereinafter JP 1-02].

> [O]perational limitation: An action required or prohibited by higher authority, such as a constraint or a restraint, and other restrictions that limit the commander's freedom of action, such as diplomatic agreements, rules of engagement, political and economic conditions in affected countries, and host nation issues.

Id. at 252–53.

[12] *See infra* Part II.D.1.

[13] *See infra* Part IV.

[14] *See* U.N. DEP'T OF PEACEKEEPING OPERATIONS, POLICY ON JUSTICE COMPONENTS IN UNITED NATIONS PEACE OPERATIONS 6 (2009), *available at* http://www.unrol.org/doc.aspx?d=2920; Teri Weaver, *A Lack of Convictions: U.S., Iraqis Look to Address Catch-and-Release Justice System*, STARS & STRIPES, Oct. 17, 2010, at 1; Diana Cahn, *A Legal Purgatory: Bagram Detention Center Reviews Suspects' Cases but Finds Neither Guilt nor Innocence in a War Zone*, STARS & STRIPES, Feb. 22, 2011, at 1; *infra* Part III.

This doctrinal gap is particularly significant in light of a recent shift in U.S. national security strategy. The Department of Defense's January 2012 statement of U.S. defense priorities clearly indicates the United States will remain prepared to combat non-state threats, but will be less likely to undertake prolonged, resource-intensive counterinsurgency campaigns to effect regime change or promote democracy.[15] Consequently, future U.S. counterinsurgency campaigns may be more limited and multilateral, and thus may not feature the sweeping legal authorities that applied to security operations in Iraq and Afghanistan.[16] While the U.S. may require certain minimum detention authorities to safeguard U.S. security interests before assisting a host nation government,[17] this strategic shift makes the legally permissive FM 3-24 particularly ill-suited as a doctrinal template. And, as this article will argue, even if U.S. forces enjoy broad authorities, U.S. legal and policy obligations eventually will require conforming security operations to host nation criminal justice laws and procedures to achieve strategic campaign objectives—a paradigm doctrine does not currently identify.[18]

This article proposes revisions to FM 3-24 to close this doctrinal gap by accounting for the operational limitations of host nation criminal laws and procedures on the targeting, capture, and prosecution of insurgents. Through analysis of U.S. practices and historical experience, the article will derive practical recommendations for the forthcoming revised FM 3-24.[19] A proper revision will ensure the manual achieves its doctrinal

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[15] PANETTA, *supra* note 1, at 1, 6.

[16] *See, e.g.*, Robert Chesney, Address at The Judge Advocate Gen.'s Legal Ctr. & Sch.: Collision Course: The Second Post-9/11 Decade and the Evolving Law of the Conflict with al Qaeda (Feb. 27, 2012) [hereinafter Chesney Address] (proposing that the continuing conflict against al Qaeda and its affiliate organizations will present new legal challenges different from those the United States has encountered since 9/11 due to changes in both U.S. and al Qaeda strategy) (notes on file with author).

[17] *See infra* Part II.B.2; Robert Chesney, *The Daqduq Mess: Apportion Blame Widely*, LAWFARE (Dec. 20, 2011, 12:20 P.M.), http://www.lawfareblog.com/2011/12/the-daqduq-mess-apportion-blame-widely/ (noting the significance of the United States' failure to ensure the continued detention of alleged Hezbollah operative Ali Musa Daqduq).

[18] *See infra* Parts II.B.2, IV.

[19] *See* COMBINED ARMS CTR. & FORT LEAVENWORTH, U.S. ARMY, PROGRAM DIRECTIVE (PD) FOR FIELD MANUAL 3-24/MARINE CORPS WARFIGHTING PUB. 3-33.5, COUNTERINSURGENCY (Oct. 26, 2011) [hereinafter PROGRAM DIRECTIVE] (on file with author). This article omits discussion of broader rule of law and other matters possibly necessitating revision, focusing instead on targeting, capture, and detention operations. Additionally, it focuses on the legal basis to detain insurgents, rather than the legal obligations regarding their treatment, and does not propose more detailed tactics,

purpose by identifying a range of challenges future leaders may face, and ensure that observing host nation legal primacy is not an afterthought, but rather a central feature of future campaigns.[20]

Part II of this article argues that host nation domestic law assumes primacy during all prolonged counterinsurgency campaigns and identifies several operational effects of this primacy. Part III demonstrates how observing host nation law can further overall counterinsurgency campaign objectives. Part IV recommends specific changes to FM 3-24 to account for host nation legal primacy. Finally, Appendix A organizes Part IV's recommendations in comment matrix format for use in the U.S. Army's doctrine revision process.[21]

II. Host Nation Domestic Law Becomes the Primary Legal Basis to Detain Insurgents During Prolonged U.S. Counterinsurgency Campaigns

In 2011, U.S. forces participated in at least four counterinsurgency campaigns in Iraq, Afghanistan, Colombia, and the Philippines.[22] Although these campaigns differ greatly in scope and origin, U.S. forces have in each sought to comply with host nation domestic laws to enable the continued detention of insurgents. As this section will argue, whether an insurgency seeks to expel a foreign occupier or displace an established government,[23] the host nation's domestic laws will increasingly operationally limit U.S. security operations as the environment improves due to U.S. legal and policy obligations.

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techniques, or procedures suitable for an Army Techniques Publication. *See* COMBINED ARMS CTR., U.S. ARMY, DOCTRINE 2015 INFORMATION BRIEFING 7 (Oct. 27, 2011) [hereinafter DOCTRINE 2015], *available at* usacac.army.mil/cac2/adp/Repository /Doctrine%202015%20Briefing%2027%20Oct%202011.pdf.

[20] FM 3-24, *supra* note 2, at vii, para. D-4. *See also* MUNGO MELVIN, MANSTEIN: HITLER'S GREATEST GENERAL 153 (2011) (noting Field Marshal von Manstein's frustration with the lack of a suitable, modern doctrine to prepare German forces for their Eastern Front campaign during World War Two).

[21] *See infra* app. B (providing an explanation of the Combined Arms Center's comment matrix format).

[22] *See infra* Part II.B.3.

[23] FM 3-24, *supra* note 2, para. 1-2 ("[A]n insurgency is an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government, occupying power, or other political authority while increasing insurgent control."). *But see* IAN F. W. BECKETT, MODERN INSURGENCIES AND COUNTER-INSURGENCIES: GUERILLAS AND THEIR OPPONENTS SINCE 1750, at 2–4 (2001) (describing partisan insurgent activities during the American Revolutionary War incident to the broader conventional conflict).

Fortunately, as Part III argues, observing host nation criminal justice laws and procedures can both build popular support for the host nation government and promote post-conflict stability.[24]

A. Host Nation Domestic Law Provides the Primary Basis to Detain Insurgents During Non-International Armed Conflicts

The 20th century development of the law of armed conflict represents an international willingness to abrogate national sovereignty in exchange for certain benefits under specific circumstances.[25] Reflecting this balance, the Geneva Conventions classify persons, places, and conflicts to limit the circumstances in which the Conventions apply, thereby preserving state sovereignty.[26]

In contrast to international armed conflict, the Conventions' triggering criteria preserve states' sovereign authority to maintain law and order during their domestic, or non-international, armed conflicts.[27] Both Common Article 3 to the Geneva Conventions and Additional Protocol II, regulating the conduct of non-international armed conflicts, note that insurgents are not immune from domestic criminal prosecution for their acts of aggression.[28] Additionally, the occurrence of the triggers specified in Common Article 3 and Additional Protocol II does not invoke the entire Conventions, but only certain limited detainee treatment and due process guarantees.[29] Thus, while prisoners of war

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[24] *See infra* Part III.

[25] *See generally* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DESKBOOK 23–24 (2011) [hereinafter LOW DESKBOOK].

[26] *Id.* at 24. *See also, e.g.*, Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War arts. 2–4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 287 [hereinafter GCIV] (limiting the Convention's applicability based on the type of conflict, type of person, and the person's location).

[27] LOW DESKBOOK, *supra* note 25, at 26–28.

[28] GCIV, *supra* note 26, art. 3; Protocol Additional to the Geneva Conventions of Aug. 12, 2949, and Relating to the Protection of Victims of Non-International Armed Conflicts arts. 1, 3, Jun. 8, 1977, 1125 U.N.T.S. 609 [hereinafter APII] (limiting the criteria triggering the Protocol's application and reiterating the principle of non-intervention). *See also* Carina Bergal, *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*, 34 FORDHAM INT'L L.J. 1042, 1059–62 (discussing contemporary interpretations of the Geneva Conventions' non-international armed conflict triggering criteria).

[29] GCIV, *supra* note 26, art. 4; Bergal, *supra* note 28, at 1051–52. *But see* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY,

generally enjoy immunity from criminal prosecution during international armed conflict, states retain their sovereign authority to punish insurgents according to their domestic criminal laws.[30]

B. Long-Term U.S. Counterinsurgency Campaigns Will Become Subject to Host Nation Domestic Law by Operation of Law and Policy

Whether U.S. forces enter a country by force or by invitation, U.S. legal and policy obligations indicate that host nation domestic law will operationally limit long-term U.S. counterinsurgency campaigns. Both U.S. and international law contemplate and permit the detention of combatants during armed conflict.[31] Nevertheless, as this section argues, international law and the specific authorities governing a given contingency may operationally limit the authority to detain insurgents. Additionally, since U.S. policy does not include the forceful annexation of foreign territory, U.S. forces can expect host nation law to shape the eventual conduct of all long-term U.S. counterinsurgency campaigns.[32]

1. Prolonged U.S. Counterinsurgency Campaigns Beginning as International Armed Conflicts Will Become Non-International Armed Conflicts

While international law contemplates non-permissive armed interventions in foreign states, it does not authorize the forceful

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RULE OF LAW HANDBOOK 79 (2011) [hereinafter RoL HANDBOOK] (noting that international human rights law may bind coalition partners and host nations, constraining their detention practices).

[30] *See* LOW DESKBOOK, *supra* note 25, at 88 n.58 (discussing generally that while "[the Third Geneva Convention] does not specifically mention combatant immunity," it is customary international law and "can be inferred from the cumulative effects of protections within [the Convention]").

[31] The U.S. Supreme Court considers "detention to prevent a combatant's return to the battlefield [to be] a fundamental incident of waging war." Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004). Additionally, the Geneva Conventions and their Additional Protocols "plainly contemplate the detention of individuals during armed conflict." Major Christopher M. Ford, *From Nadir to Zenith: The Power to Detain in War*, 207 MIL. L. REV. 203, 208 (2011).

[32] PRESIDENT BARACK OBAMA, NATIONAL SECURITY STRATEGY 12–13, 22, 40–41 (2010) [hereinafter NATIONAL SECURITY STRATEGY], *available at* www.whitehouse.gov/sites/default/files/rss_viewer/security_strategy.pdf; U.N. Charter art. 2, para. 4.

annexation of foreign territory.[33] As the central foundation of international order, the United Nations (UN) Charter preserves state sovereignty and the principle of non-intervention in a state's territory or domestic affairs.[34] Nevertheless, the Charter recognizes the inevitability of armed conflict between states. Consequently, it establishes a framework to limit such conflicts, requiring a state to act either in self-defense or pursuant to a Security Council authorization under Chapter VII authority.[35] Even in the event of a lawful non-permissive armed intervention, though, international law presumes a temporary state of conflict and calls for the restoration of the *status quo ante*.[36]

During such a conflict, foreign occupying forces enjoy only temporary authorities. Occupation presumes a temporary state of control by foreign forces—distinguished from the exercise of sovereignty—with the occupying power eventually relinquishing its authority to a new or restored host nation government.[37] The Geneva Conventions' authorities for occupying forces only remain in effect until the termination of occupation, the restoration of sovereignty, or for a limited period of time after the conclusion of hostilities.[38]

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[33] While U.S. forces might enter a foreign state to topple the existing government and occupy the country in its entirety, U.S legal and policy obligations indicate forces either will leave the territory as soon as possible, or remain only at the invitation of a restored host nation government. Since FM 3-24 contemplates long-term campaigns, this article assumes the latter in the case of campaigns beginning as international armed conflicts. *See* FM 3-24, *supra* note 2, at x ("COIN campaigns are often long and difficult. . . . However, by focusing on efforts to secure the safety and support of the local populace, and through a concerted effort to truly function as learning organizations, the Army and Marine Corps can defeat their insurgent enemies.").

[34] U.N. Charter art. 2, para. 7. *See also* LOW DESKBOOK, *supra* note 25, at 32–34 (elaborating on the UN Charter's general prohibition against the threat or use of force against other states).

[35] U.N. Charter art. 51. *But see* Sean D. Murphy, *Protean* Jus Ad Bellum, 27 BERKELEY J. INT'L L. 22, 23 (2009) (arguing that emerging threats, state practices, and international legal norms undermine the *jus ad bellum* structure of the UN Charter and may merit its revision).

[36] GCIV, *supra* note 26, arts. 47, 64. *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, TITLE para. 358 (July 1956) ("Occupation Does Not Transfer Sovereignty"); ROL HANDBOOK, *supra* note 29, at 77 (noting that occupying powers must "preserve and adopt existing systems of government").

[37] EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION, at xi (2004).

[38] GCIV, *supra* note 26, art. 6; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 3, Jun. 8, 1977, 1125 U.N.T.S. 3.

Policy obligations indicate that U.S. forces would transfer sovereignty as soon as possible to a credible host nation authority, regardless of whether or not forces invaded to either topple a government or occupy an ungoverned failed state.[39] As a signatory of the UN Charter, U.S. national security policy does not advocate the forceful annexation of foreign territory.[40] Consequently, U.S. occupation authority would expire by either operation of law or policy. Operations in Iraq and Afghanistan confirm this, with the United States supporting the rapid establishment and transfer of sovereignty to interim governments.[41]

The resumption of sovereign powers by the host nation government and its application of host nation domestic law will displace U.S. occupation authority to detain insurgents. While there may be an ambiguous transition between U.S.-dictated security operations and host nation-directed law enforcement operations, host nation sovereignty and security responsibility implies the eventual complete primacy of its laws in the conduct of counterinsurgency operations. For example, while exercising occupation authorities, U.S. forces could establish courts to adjudicate offenses committed against U.S. forces, but otherwise must maintain existing local laws and institutions.[42] Upon the transfer of sovereignty from foreign occupying forces to the state's government, an ongoing counterinsurgency campaign within the state becomes a non-international armed conflict between the host nation and the insurgent forces.[43] Consequently, the legal regime described above applicable to non-international armed conflicts will eventually apply to an ongoing counterinsurgency within the state and bind U.S. forces.[44]

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[39] Some authors argue the Iraq and Afghanistan campaigns, invasions that resulted in insurgencies, are exceptions to a norm of providing assistance to a standing government. *See, e.g.*, Graham, *supra* note 9, at 86.

[40] OBAMA, *supra* note 32, at 12–13, 22, 40–41 (reiterating the United States' long-term commitment to multilateral international dispute resolution and the preservation of international order in accordance with international law, while maintaining the United States' prerogative to act unilaterally if necessary).

[41] STROMSETH ET AL., *supra* note 4, at 119–20, 128; GEORGE W. BUSH, DECISION POINTS 359–60 (2010).

[42] GCIV, *supra* note 26, art. 64.

[43] *See, e.g.*, LOW DESKBOOK, *supra* note 25, at 80–81 (describing how the 2001 U.S. invasion of Afghanistan constituted an international armed conflict, but arguably shifted to a non-international armed conflict after the assumption of sovereignty by President Hamid Karzai's Afghan government).

[44] *See supra* Part II.A; U.S. DEPT. OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.1 (21 Feb. 2011) (requiring the observation of the law of armed conflict during all U.S. military operations, and the application of Common Article 3 of the Geneva Conventions during all conflicts, however classified).

Even when U.S. forces enjoy broad authority to detain insurgents during a continuing Chapter VII campaign following the resumption of host nation sovereignty,[45] strategic goals and U.S. policy obligations may require limiting the exercise of that authority. U.S. forces might enjoy a broad UN authorization to use force allowing for the detention of suspected insurgents.[46] Nevertheless, as the host nation develops capacity and asserts it sovereignty, it might attempt to constrain that authorization by limiting aspects of U.S. security operations. As the United States has found in Afghanistan, this could require an unpleasant decision whether to continue exercising UN-derived detention authority at the risk of alienating the very government this authority seeks to support.[47]

2. Absent Agreement Otherwise, U.S. Forces Must Observe Host Nation Laws When Invited to Assist a Host Nation Government in a Counterinsurgency Campaign

Even when U.S. forces commence a counterinsurgency campaign at the invitation of a host nation government, this section will argue that

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[45] *See, e.g.*, S.C. Res. 2011, U.N. Doc. S/RES/2011, pmbl., ¶ 2 (Oct. 12, 2011) (authorizing the International Security Assistance Force (ISAF) and its participating Member States "to take all necessary measures to fulfill its mandate," while recognizing that the sovereign Afghan government has "responsibility for providing security law and order").

[46] *See, e.g.*, *id.*; S.C. Res. 1386, U.N. Doc. S/RES/1386, ¶ 3 (Dec. 20, 2001) (first authorizing "the Member States participating in [ISAF] to take all necessary measures to fulfill its mandate"). Authors have argued this "all necessary measures" language provides detention authority to ISAF members. *See* Ford, *supra* note 31, at 209 (citing Olga Marie Anderson & Katherine A. Krul, *Seven Detainee Operations Issues to Consider Prior to Your Deployment*, ARMY LAW., May 2009, at 7, 9–10 ("ISAF's detention authority appears to stem from the language in [Resolution 1386] that directs ISAF to 'take all necessary measures to fulfill its mandate.'")).

[47] *See* Rubin, *supra* note 4 (describing Afghan governmental calls to limit U.S. operations as part of a forthcoming security partnership agreement between the United States and Afghanistan). Nevertheless, U.S. forces also could find themselves arguing that a conflict is an international armed conflict, limiting the ability of both U.S. and host nation forces to criminally adjudicate insurgent offenses, while the host nation considers it a non-international armed conflict. *See* MAJOR GENERAL GEORGE S. PRUGH, LAW AT WAR: VIETNAM 63 (1975) (noting the South Vietnamese government's initial disagreement with the United States whether the 1964–1973 Vietnam war constituted an international armed conflict, complicating combined detention operations). Additionally, U.S. forces may be further constrained by U.S. domestic legal obligations despite having broader UN authority. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES para. 6 (13 Jun. 2005) [hereinafter JCSI 3121.01B] (requiring that commanders' rules of engagement comply with applicable domestic law).

international law generally requires the application of the host nation's domestic laws during security operations. Additionally, even if the U.S. obtains broader, independent security authorities, host nation sovereign interests and the impracticality of operating indefinite detention facilities indicate the United States would find it necessary to transfer all detention-related responsibility to the host nation government and its criminal justice system prior to the conclusion of conflict.[48]

Operations by invitation theoretically enable the host nation government to tailor U.S. forces' authorities. Chapter VI of the UN Charter provides for international armed assistance during a state's internal conflicts, but only with the state's consent.[49] Alternatively, a state could invite U.S. forces to assist in counterinsurgency operations outside of UN mechanisms.[50] In either case, the host nation would have the ability to tailor U.S. forces' authorities prior to their introduction. For example, the lack of a functioning government might effectively enable U.S. forces to operate with broad authorities in Somalia.[51] In contrast, were Mexico to request large-scale U.S. conventional forces to aid in defeating the drug cartels, Mexico would have to amend or repeal its own laws preventing foreign military operations on Mexican soil, possibly requiring limitations seen in ongoing counterinsurgency operations in Colombia and the Philippines.[52] Thus, lacking occupation

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[48] *See, e.g.*, Alissa Rubin, *U.S. Backs Trial for Four Detainees in Afghanistan*, N.Y. TIMES, Jul. 18, 2010, at A6.

> Although military officials believe that the United States can legally continue to detain Afghans under the law of war, they have come to see long-term detention as creating problems, including increased resentment from the local population that the Americans are trying to win over. The goal by next summer is to have more Afghan trials than American military administrative hearings . . . .

Id.

[49] U.N. Charter arts. 33–36 (providing for Security Council recommendations to resolve disputes between states when those states request the Council's assistance).

[50] *See infra* Part II.D.2 (describing the Philippine government's request for U.S. counterinsurgency assistance).

[51] *See generally* David C. Ellis & James Sisco, *Implementing COIN Doctrine in the Absence of a Legitimate State*, SMALL WARS J. (Oct. 13, 2010), *available at* http://smallwarsjournal.com/jrnl/art/implementing-coin-doctrine-in-the-absence-of-a-legitimate-state.

[52] *See* Ginger Thompson, *U.S. Widens Role in Battle Against Mexican Drug Cartels*, N.Y. TIMES, Aug. 7, 2011, at A1 (describing an increased U.S. intelligence, planning, and training role in Mexico's conflict with the drug cartels, excluding the use of conventional U.S. forces due to Mexican legal prohibitions); *infra* Part II.D.2 (describing legal

or other Geneva Convention authorities applicable during international armed conflict,[53] U.S. forces would have to be prepared to observe Mexican limitations.[54]

Given its experience at the ultimate conclusion of the Iraq conflict in 2011, the United States may be unwilling to accept a host nation's terms of assistance that excessively constrain U.S. operational authorities. As a result of the failure to reach agreement with the Iraqi government regarding the continued presence of U.S. forces in Iraq, the United States withdrew its forces from Iraq at the end of 2011 and closed its last remaining detention facility for insurgents captured in Iraq.[55] The United States then had no legal alternative but to transfer Hezbollah operative Ali Musa Daqduq to Iraqi authorities despite his threat to U.S. national security, with no assurance Iraqi authorities would continue to detain him.[56] This bitter experience is unlikely to prevent the United States from assisting allies combating insurgencies, but it may lead the United States to demand detention authority sufficient to safeguard its security interests as a condition of significant support.[57]

Particularly where an insurgent group might pose a transnational threat to U.S. interests, the United States might demand specific authority beyond the host nation's domestic law to detain certain insurgents. The emergence of insurgency and terrorist movements posing

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limitations to ongoing U.S. counterinsurgency operations in Colombia and the Philippines).

[53] The introduction of foreign forces might be sufficient to consider the conflict a non-international armed conflict and thus trigger the application of Common Article 3. Bergal, *supra* note 28, at 1063, 1065 (discussing the International Criminal Court's interpretation that a state's use of regular armed forces to combat a domestic threat to law and order is a potential factual trigger for a Common Article 3 non-international armed conflict).

[54] *See, e.g.*, Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq arts. 22, 24, U.S.-Iraq., Nov. 17, 2008, *available at* www.usf-iraq.com/images/CGs_Messages/security_ agreement.pdf [hereinafter Security Agreement] (requiring U.S. forces to conduct operations in accordance with Iraqi law).

[55] Mark Lander, *U.S. Troops to Leave Iraq by Year's End, Obama Says*, N.Y. TIMES, Oct. 21, 2011, at A1.

[56] Charlie Savage, *U.S. Transfers Its Last Prisoner in Iraq to Iraqi Custody*, N.Y. TIMES, Dec. 16, 2011, at A11. *See also infra* Part II.D.1 (describing the United States' eventual need to request Daqduq's extradition from the Iraqi government).

[57] *See* Chesney, *supra* note 17 (noting the significance of the United States' failure to ensure the continued detention of alleged Hezbollah operative Ali Musa Daqduq).

transnational threats has led the United States to intervene across the globe not only to assist allies in fighting these movements, but also to safeguard the United States' domestic and foreign interests.[58] Thus, it is conceivable the United States might accept a Yemeni request for additional, conventional U.S. military assistance to help it defeat al Qaeda in the Arabian Peninsula (AQAP) insurgents.[59] Nevertheless, to safeguard U.S. interests, the U.S. government might demand specific authority to detain and possibly even remove from Yemen certain AQAP individuals who threaten U.S. interests. In such a situation, the United States might seek a dual-track detention arrangement akin to that in Afghanistan, where the United States exercises authority under both a UN Security Council Resolution and a U.S. legislative authorization to use force to combat al Qaeda.[60]

Even if the United States were to insist on broad detention authority as a condition of assistance, policy and practice indicate an eventual necessity to seek host nation criminal prosecutions for most detained insurgents. Several problems may arise should the United States continue to exercise broad authorities not derived from host nation criminal law. First, at some point the United States would have to determine what to do with any remaining detainees it holds under its independent authority:

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[58] *See, e.g.*, *infra* Part II.D (describing U.S. support to the Philippines to combat al Qaeda-linked Islamic insurgencies that might threaten U.S. interests beyond the Philippines, and increases in U.S. counterinsurgency support to Colombia after Colombian insurgent groups began posing a transnational threat); Sitaraman, *supra* note 9 (proposing a global insurgency theory). *See also* Chesney Address, *supra* note 16 (noting that while some insurgent groups trace their origins to al Qaeda and other transnational terrorist influences, others, such as Somalia's al Shabaab, have developed relationships with al Qaeda and its affiliate organizations to further their nationalist objectives, only then drawing the attention of the U.S. intelligence community).

[59] *See* Eric Schmitt, *U.S. Teaming with New Yemen Government on Strategy to Combat Al Qaeda*, N.Y. TIMES, Feb. 27, 2012, at A6 (describing limited U.S. special operations and Central Intelligence Agency operations to assist Yemeni counterinsurgency efforts and "work together to kill or capture about two dozen of Al Qaeda's most dangerous operatives, who are focused on attacking America and its interests"); Chesney Address, *supra* note 16 (arguing that while before 2001, few would have considered Yemeni insurgent groups to be linked to a global ideology and pose a global threat, the United States has come to better understand the groups' relationships with terrorist organizations and ideology, and the threat they pose beyond Yemen's borders).

[60] *See infra* Part II.D.3; Jeh Charles Johnson, Address at Yale L. Sch.: National Security Law, Lawyers, and Lawyering in the Obama Administration (Feb. 22, 2012), *available at* http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/ (stating that the Obama Administration considers the 2001 legislative authorization to use force against al Qaeda to continue to apply to al Qaeda affiliate organizations) (citing Authorization for Use of Military Force, Pub. L. No.107-40, 115 Stat. 224 (2001)).

whether exercising UN-granted or host nation-granted detention authorities, military authority to detain persons indefinitely without charge during armed conflict derives from limited particular sources and expires at the conclusion of the conflict.[61] At this point, U.S. forces might lack any other legal, feasible alternative other than transferring the vast majority of detainees to the host nation, as occurred with Daqduq, particularly given international criticism of the use of the Guantanamo Bay detention facility and the domestic political challenges of bringing detainees to the United States for criminal prosecution.[62] Second, continuing to exercise broad, aggressive authorities despite the existence of a functioning host nation government could alienate both indigenous and international support for that government, as the Soviets discovered in Afghanistan in the 1980s, and Sri Lanka discovered during its campaign against the Tamil Tigers insurgency.[63]

C. Host Nation Domestic Laws May Limit U.S. Forces' Ability to Use Force and Detain Individuals

The likelihood that a prolonged U.S. counterinsurgency campaign would evolve into a non-international armed conflict requires U.S. forces to be prepared for host nation laws to operationally limit U.S. operations. As shown above, to the degree the host nation exercises its sovereignty by requiring the application of host nation law, U.S. forces generally

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[61] *See generally* Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 VA. J. INT'L L. 549 (2011); Ford, *supra* note 31.

[62] *See* Chesney, *supra* note 61, at 549; Chesney Address, *supra* note 16 (arguing that legal, political, and international relations challenges continue to hinder the U.S. Government's ability and willingness to remove detained insurgents and terrorists from the state in which they are captured and transfer them to the United States for criminal prosecution in U.S. Federal Courts or Military Commissions); Chesney, *supra* note 17.

[63] *See generally* Larry Goodson & Thomas H. Johnson, *Parallels with the Past—How the Soviets Lost in Afghanistan, How the Americans are Losing* (Apr. 2011), *available at* http://www.fpri.org/enotes/201104.goodson_johnson.afghanistan.pdf (arguing that an overly aggressive Soviet strategy alienated the Afghan people from the Soviet-supported government); Jon Lee Anderson, *Death of the Tiger: Sri Lanka's Brutal Victory over Its Tamil Insurgents*, NEW YORKER (Jan. 17, 2011), at 41 (arguing that Sri Lanka's aggressive tactics against the Tamil Tigers drew international criticism and isolated Sri Lanka, hindering Sri Lanka's efforts to obtain international assistance during the conflict).

must observe that law unless acting unilaterally.[64] This would therefore require U.S. forces to observe the host nation's penal and procedural codes, all of which may affect the United States' authority to capture and detain a particular insurgent.[65] A gradual transition, such as in Iraq and Afghanistan, may be the exception; constant host nation legal primacy, as in Colombia and the Philippines, may in fact be the norm for future U.S. counterinsurgency operations.[66] Consequently, U.S. forces must be prepared to operate wholly within the laws and structures of indigenous criminal justice institutions.

This section identifies three major categories of effects host nation laws can have on operations. First, targeting processes must account for host nation criminal procedural and evidentiary requirements. Second, forces must share intelligence with host nation authorities to obtain judicial detention authorizations. Finally, tactical procedures must facilitate the collection of evidence while capturing insurgents.

1. Criminal Evidentiary Requirements Affect Targeting Processes

During conventional Chapter VII campaigns, forces often enjoy broad authorities to target and detain enemy forces.[67] Commanders make decisions within the confines of the applicable rules of engagement and operations orders, which incorporate U.S. legal authorities to use force and detain individuals.[68] A commander's decision to detain an insurgent thus generally is based on the commander's knowledge and the effective detention authorities, not whether a foreign government approves of the particular detention.[69]

In contrast, host nation legal primacy may require U.S. forces to obtain host nation authorization to arrest or continue to detain suspected

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[64] *See supra* Part II.B.2. *But see* JCSI 3121.01B, *supra* note 47 (maintaining the prerogative of U.S. forces to act in self defense).
[65] *See infra* Part II.D.1 (discussing the effects of the Iraqi criminal procedure code on U.S. operations following implementation of the Security Agreement in Iraq).
[66] Graham, *supra* note 9, at 86.
[67] Ford, *supra* note 31, at 208.
[68] *See generally* JCSI 3121.01B, *supra* note 47, at 2.
[69] *See, e.g.*, S.C. Res. 2011, *supra* note 45, ¶ 2 (authorizing the International Security Assistance Force in Afghanistan "to take all necessary measures to fulfill its mandate," without requiring Afghan approval for those measures despite the existence of a sovereign Afghan government).

insurgents.[70] As described above, during non-international armed conflict, the host nation regulates law and order within its borders.[71] This may require forces to obtain host nation judicial authorizations to detain suspects,[72] effectively making this task a step in the targeting process and requiring units to consider the sufficiency of evidence against a suspected insurgent relative to criminal justice system requirements prior to commencing a capture operation.[73] Additionally, sufficient intelligence to warrant detention might not equate to sufficient evidence to support a lawful prolonged detention or criminal conviction. Factors not otherwise included in intelligence analyses thus assume increasing importance, including sufficiency of evidence, credibility of evidence, type of evidence, and the ability to share evidence with host nation authorities.[74] Finally, regardless of the care U.S. forces take in gathering evidence, forces must respect judicial acquittals, possibly requiring renewed efforts to target the same insurgents.[75]

2. Host Nation Criminal Prosecutions Require Sharing Intelligence with Host Nation Authorities

Since host nation criminal courts generally provide the primary venue to adjudicate insurgent offenses and authorize their continued detention, U.S. forces must be prepared to provide information to criminal justice authorities to support judicial proceedings.[76] Unfortunately, U.S. policy strictly limits the sharing of information with

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[70] *See* Steve D. Berlin, *Conviction Focused Targeting*, SMALL WARS J. (Aug. 24, 2010), http://smallwarsjournal.com/jrnl/art/conviction-focused-targeting (citing the Security Agreement and describing it required forces to work with and through the Iraqi criminal justice system). *See also supra* Part II.B.3; FM 3-24, *supra* note 2, para. D-15.

[71] *See supra* Part II.B.

[72] *See, e.g. infra* Part II.D.1 (discussing the Security Agreement).

[73] *See, e.g.*, Berlin, *supra* note 70 (describing how U.S. commanders in Iraq began requiring Iraqi warrants before detaining suspected insurgents).

[74] *See infra* Part IV.B.

[75] *See* LIEUTENANT COLONEL KEN TOVO, FROM THE ASHES OF THE PHOENIX: LESSONS FOR CONTEMPORARY COUNTERINSURGENCY OPERATIONS 14 (2005) (noting that American forces repeatedly targeted the same Vietcong insurgents due to low Vietnamese criminal court conviction rates); Savage, *supra* note 56 ("Many previous [U.S.-captured] detainees transferred to the Iraqi police have either been acquitted or released without charges.").

[76] *See* BECKETT, *supra* note 23, at 107 (considering intelligence coordination amongst counterinsurgent forces and authorities one of the six most critical aspects of a successful campaign).

foreign governments,[77] possibly complicating efforts to prosecute a U.S.-captured insurgent in host nation courts. Additionally, U.S. forces tend to over-classify factual information necessary to effect prosecution.[78] For example, information such as forensic blast analyses, recorded telephone conversations, and aerial video footage might not be eligible for disclosure to host nation judicial authorities due to U.S. foreign disclosure regulations, or it may be difficult to transfer because it is stored and transmitted on secure information systems.[79]

3. Criminal Prosecutions Require Tactical Evidence Gathering

The need to provide evidence to host nation judicial authorities can drive tactical actions while capturing an insurgent since information and materiel located with the insurgent might be critical to prove the insurgent's guilt in a subsequent prosecution. Host nation legal primacy may imply the need to convince a host nation judicial authority that a given insurgent merits arrest and prosecution under the host nation's criminal laws.[80] Even if U.S. forces can provide intelligence information, such as video imagery showing the insurgent emplacing an explosive device, host nation judicial authorities may nevertheless demand physical evidence and testimony more directly associated with the insurgent, such as items found at his or her home or the statements of witnesses to his or her actions.[81] These concerns may not be paramount during conventional capture operations,[82] but U.S. forces must prevent undermining an effective counterinsurgency capture operation by failing to provide evidence to a judicial authority.

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[77] U.S. DEPT. OF DEF., DIR. 5230.11, DISCLOSURE OF CLASSIFIED MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS (16 June 1992) [hereinafter DoDD 5230.11].

[78] Berlin, *supra* note 70. *See also* Old Blue, *COIN Primer: Unity of Effort*, AFGHAN QUEST (Feb. 15, 2011, 1:15 PM), http://afghanquest.com/?p=527 (noting that U.S. forces' reliance on secure information systems effectively prevents the sharing of unclassified factual information with Afghan forces).

[79] *See, e.g.*, DoDD 5230.11, *supra* note 77; Old Blue, *supra* note 78.

[80] *See infra* Part II.A.

[81] *See infra* Part II.D.1 (describing U.S. challenges in satisfying Iraqi investigative judges by providing sufficient evidence to obtain warrants and detention orders).

[82] *See generally* CTR. FOR ARMY LESSONS LEARNED, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., DETAINEE OPERATIONS AT THE POINT OF CAPTURE (2006) (describing conventional U.S. doctrine, tactics, techniques, and procedures incident to capturing enemy combatants during combat operations).

D. Recent U.S. Counterinsurgency Campaigns Illustrate Varying Degrees of Host Nation Legal Primacy

A survey of recent prolonged U.S. counterinsurgency campaigns illustrates the operational limitations of host nation legal primacy in a variety of contexts. While forces in Afghanistan enjoy broad UN authority to detain insurgents, the Philippines and Colombia have explicitly limited U.S. operations in those countries. Additionally, well before the Iraq conflict concluded, the Security Agreement between Iraq and the United States required the observation of Iraqi law.[83] Regardless of the degree host nation laws have operationally limited U.S. security operations, host nation sovereignty has been, at a minimum, a major planning factor for U.S. forces during these campaigns.

1. Operation Iraqi Freedom Required the Observation of Iraqi Law by 2009

The U.S. campaign in Iraq from 2003 to 2011 provides an example of a gradual transition toward host nation legal primacy. U.S. forces entered Iraq with broad authorities to detain persons, subsequently transferred select detainees to Iraqi courts for criminal prosecution, and eventually required Iraqi authorization to detain persons.

The United States began the campaign with broad authorities to secure the environment. Upon entering Iraq in 2003, U.S. forces derived their authority to detain persons from a Congressional authorization for the use of military force which implied the authority to detain individuals.[84] Following the 2004 transfer of sovereignty to the Iraqi government, U.S. forces detained individuals pursuant to a UN Security Council Resolution granting the multi-national force "the authority to take all necessary measures to contribute to the maintenance of security

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[83] Security Agreement, *supra* note 54.

[84] *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002) (authorizing "necessary and appropriate" U.S. military force "defend the national security of the United States against the continuing threat posed by Iraq"). While this authorization does not explicitly authorize detentions, the U.S. Supreme Court has found the similar 2001 Authorization for Use of Military Force to imply such authority in its "necessary and appropriate" clause. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (citing Authorization for Use of Military Force, Pub. L. No.107-40, 115 Stat. 224 (2001), and concluding that the authority to detain individuals during armed conflict is such a "fundamental and accepted incident to war" to be "necessary and appropriate" to combat the threat al Qaeda posed to the United States).

and stability in Iraq."[85] Nevertheless, U.S. forces provided a measure of due process and transferred selected detainees to Iraqi courts for prosecution.[86]

By 2007, U.S. forces realized the necessity to gather evidence not only to satisfy U.S. detainee review board procedures, but also to support Iraqi criminal prosecutions.[87] Units began collecting witness statements and completing site sketches at the point of capture, and carefully reviewing detainee files for completeness prior to forwarding the detainee to higher headquarters for continued detention.[88]

Beginning on January 1, 2009, the Security Agreement displaced these authorities, and Iraqi criminal law became the primary legal basis to detain insurgents.[89] Article 22 of the Agreement required U.S. forces to conform arrest and detention practices to Iraqi penal and criminal procedure laws.[90]

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[85] Matthew Greig, *Detention Operations in a Counterinsurgency: Pitfalls and the Inevitable Transition*, ARMY LAW., Dec. 2009, at 25, 26–28 (citing S.C. Res. 1546, ¶ 10, U.N . DOC. S/RES/1546 (Jun. 8, 2004)).

[86] While Iraq was a sovereign government by June 8, 2004, the Coalition continued to utilize UN-derived authority to detain insurgents. Coalition forces established a combined U.S.-Iraqi review and forwarding process pursuant to their authority under Resolution 1546, providing detainees some due process while determining whether to release them, detain them as a security internee, or forward their cases to the Central Criminal Court of Iraq for criminal prosecution in accordance with Iraqi law. For various reasons, Coalition and Iraqi authorities indefinitely detained "the vast majority" as security internees, rather than forwarding their cases to the Central Criminal Court of Iraq. Greig, *supra* note 85, at 26, 28 (citing Major W. James Annexstad, *The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants—A Look at the Task Force 134 Process and the Future of Detainee Prosecutions*, ARMY LAW., July 2007, at 76).

[87] *See* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR & SCH., FORGED IN THE FIRE: LESSONS LEARNED FROM MILITARY OPERATIONS 1994–2008 41 (2008) [hereinafter FORGED IN THE FIRE].

[88] *See id*. at 41–42, 49.

[89] Greig, *supra* note 85, at 28. The Security Agreement reflected both the United States' need to have clear authorities and protections for its forces stationed in Iraq following the expiration of Resolution 1546, and Iraq's increasing political maturity and assertion of its sovereignty. *See generally* Campbell Robertson & Stephen Farrell, *Pact, Approved in Iraq, Sets Time for U.S. Pullout*, N.Y. TIMES, Nov. 17, 2008, at A1; PETER BERGEN, THE LONGEST WAR 293 (2011).

[90] Greig, *supra* note 85, at 28 (citing Law on Criminal Proceedings with Amendments, No. 23, Feb. 14, 1971 (Iraq), *available at* http://law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf)).

The Security Agreement required U.S. forces to immediately change targeting, capture, and interrogation procedures to obtain judicial approval for each arrest and detention.[91] In addition to gathering evidence on already-detained insurgents, U.S. forces modified intelligence gathering protocols to yield evidence for Iraqi criminal proceedings.[92] Commanders trained Soldiers in basic crime scene preservation techniques to ensure the collection and safeguarding of information and items for future Iraqi judicial proceedings.[93] Additionally, to prevent the release of existing detainees for want of judicial authorization, U.S. forces often presented local Iraqi police and community leaders with lists and photographs of detainees to try to transfer them to local authorities for prosecution.[94] Finally, U.S. forces found they faced a new operational risk of alienating local populations when arresting persons without Iraqi judicial authorization.[95]

Some units in Iraq recommended that target execution criteria include an assessment of whether the available intelligence would provide sufficient evidence to support Iraqi criminal prosecution.[96] As units found, securing an arrest warrant was not sufficient to ensure an insurgent's continued detention.[97] Consequently, it became necessary to perfect evidence against a detained insurgent to obtain judicial

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[91] CTR. FOR ARMY LESSONS LEARNED, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., *Forensics and Warrant-Based Targeting*, NEWSLETTER, Mar. 2010, at i.

[92] Greig, *supra* note 85, at 31, 32. This evidence could include "witness statements, photographs, fingerprints, ballistics, DNA, and other evidence." *Id*. at 31.

[93] *Id.* at n.47 (describing military police-led investigative training courses for other Soldiers such as infantrymen, who lacked specialized evidence gathering training).

[94] Alissa Rubin, *A Puzzle Over Prisoners As Iraqis Take Control*, N.Y. TIMES, Oct. 24, 2008, A1. The United States and Iraq agreed to gradually reduce the U.S. detainee population. Greig, *supra* note 85, at 29; Press Release, Multinational Force Iraq, Coalition Begins Releasing Detainees Under new Security Agreement (Feb. 3, 2009) [hereinafter Press Release, Multinational Force Iraq], *available at* http://www.defense.gov/news newsarticle.aspx?id=52930.

[95] *See, e.g.*, *U.S. Forces Apologize for Killing Iraqi Citizen By Mistake*, AK NEWS, Nov. 24, 2010 (on file with author) (reporting a public U.S. apology and possible compensation to the family of an Iraqi citizen killed during a raid to arrest the man's brother, and the interest of Iraq's Prime Minister in the matter).

[96] *See* FORGED IN THE FIRE, *supra* note 87, at 36, 43 ("The ideal situation would have been to obtain enough evidence for a complete prosecution packet prior to detention.") (internal citations omitted).

[97] Greig, *supra* note 85, at 31 ("Securing high numbers of arrest warrants may appear to be an easy win, and the numbers will look good to headquarters; however, high warrant numbers can reflect artificial success and can ultimately undermine long-term rule of law gains.").

authorization to continue to detain the suspect and promote their eventual Iraqi prosecution.[98]

Classification requirements also stymied efforts to transfer insurgents to Iraqi authorities and secure their eventual prosecution. U.S. forces tended to classify information not requiring classification, complicating the sharing of information with Iraqi authorities.[99] Iraqi investigative judges often would not accept the unclassified, written statements of U.S. personnel as evidence during a detention order hearing.[100] Since units often could not disclose the classified information used to identify the insurgent, detention might depend on the detainee's willingness to confess before the investigative judge.[101] Consequently, units developed methods to conform to local judges' evidentiary and procedural expectations to the maximum extent possible.[102] Nevertheless, cumbersome foreign disclosure processes required time and manpower, and still were subject to theater classification criteria.[103]

As previously discussed, the conclusion of the Iraq conflict saw the United States struggling to best safeguard U.S. interests and reach agreement with an assertive, sovereign Iraqi government.[104] After having no legal alternative but to transfer Hezbollah operative Ali Musa Daqduq to Iraqi authorities in December 2011, the United States eventually requested that Iraqi authorities return him to U.S. custody to face trial by

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[98] *See* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR & SCH., TIP OF THE SPEAR: AFTER ACTION REPORTS FROM AUGUST 2009–AUGUST 2010, at 36 (2010) [hereinafter TIP OF THE SPEAR] ("[P]ractically, the [Brigade Combat Team (BCT)] needed to remove targets from the battlefield quickly, resulting in timely warrants with follow-through by the BCT Prosecution Task Force to complete the prosecution packet with the [Investigative Judge].") (internal citations omitted); JD, *Warrant Based Targeting: The Iraq Model*, AL SAHWA (Apr. 3, 2010, 10:29), http://al-sahwa.blogspot.com/2010/04/warrant-based-targeting-iraq-model.html ("[T]he warrant based targeting model forced us to slow down our targeting cycle. . . . The prior targeting model was simple, [sic.] once you have enough [intelligence] you launch your assault force. I think we are now more deliberate and wait to develop a more holistic network picture, with solid warrant packets.").

[99] TIP OF THE SPEAR, *supra* note 98, at 63 (arguing that the over-classification of factual information prevented the prosecution of detained insurgents in Iraqi courts).

[100] *Id.* at 36–37.

[101] *See id.* at 37 (noting a situation in which a U.S. military unit could not provide classified information to an Iraqi investigative judge and the judge refused to accept U.S. Soldiers' sworn statements into evidence, but the detainee confessed before the judge).

[102] *See id.* at 39 (describing one unit's best practice to obtain an Iraqi arrest warrant).

[103] Berlin, *supra* note 70, at 3.

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

U.S. military commission and better ensure he cannot threaten U.S. interests again in the future.[105] The United States' ultimate lack of control over Daqduq's detention demonstrates the degree of authority it lost between 2003 and 2011 over the detention of insurgents, and also implies the United States might be less willing in the future to entertain an Iraq-like security agreement that relinquishes control of such matters.[106]

2. Operations in Colombia and the Philippines Have Required the Continuous Observation of Host Nation Law

Ongoing U.S. counterinsurgency campaigns in Colombia and the Philippines have required the constant observation of the host nation's domestic laws during security operations. While U.S. forces in the Philippines enjoy certain U.S. domestic counterterrorism authorities related to the September 11, 2001, attacks, both the Colombian and Philippine governments have restricted U.S. forces from detaining insurgents.

The United States' security assistance to Colombia has featured both counter-narcotic and counterinsurgent components. Since the 1960s, the Revolutionary Armed Forces of Colombia (FARC) and other insurgent groups fighting the Colombian government generally did not support or participate in Colombia's drug trade.[107] In 1999, the United States' "Plan Colombia" significantly expanded ongoing U.S. counter-narcotic support, committing $1.3 billion in military and developmental assistance, and providing as many as 800 U.S. military and civilian personnel to advise and assist the Colombian armed forces and perform coca eradication missions.[108] While Plan Colombia's purpose was

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[105] Charlie Savage, *Prisoner in Iraq Tied to Hezbollah Faces U.S. Military Charges*, N.Y. TIMES, Feb. 24, 2012, at A12.

[106] *See id.* (noting that the Security Agreement gave Iraq the authority to determine whether and how to detain and prosecute insurgents, and that the United States did not wish to "violate Iraqi sovereignty" by unilaterally removing Daqduq from Iraq over the objection of Iraqi Prime Minister Nuri Kamal al-Maliki).

[107] *See generally See* MAJOR JON-PAUL N. MADDALONI, AN ANALYSIS OF THE FARC IN COLOMBIA: BREAKING THE FRAME OF FM 3-24, at 9–24 (2009) (describing the history of the FARC).

[108] *See* DOUG STOKES, AMERICA'S OTHER WAR: TERRORIZING COLOMBIA 84–85 (2005) (noting that the recipients of the $1.3 billion also included Bolivia, Peru, and Ecuador); BECKETT, *supra* note 23, at 209 ("In 1999, therefore, the United States began training the Colombian army once more to meet the twin challenge of the remaining insurgents and the drugs cartels . . . .").

primarily counter-narcotic, the United States has since assumed a counterinsurgency mission because of the FARC's increasing involvement in the drug trade, its use of terrorist tactics, and the drug trade's role in global terrorism financing.[109] For example, a 2003 appropriation funded the training and equipping of Colombian forces protecting a FARC-targeted oil pipeline.[110] Additionally, the United States has supported Colombian criminal justice system reforms to facilitate the prosecution of captured cartel and insurgent leaders.[111]

Military assistance to Colombia has not included active combat operations, has focused on counter-narcotic efforts, and has required compliance with Colombian limitations, criminal laws, and extradition treaties. The United States' primary focus in Colombia has remained combating drug production and trafficking, with advisors training and equipping the Colombian armed forces and sharing intelligence to support arrests and drug seizures.[112] The United States has largely relied

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[109] While the U.S. Congress initially limited assistance to prevent U.S. involvement in Colombia's counterinsurgency, by 2002 the United States considered the FARC a terrorist threat and more openly supported Colombia's counterinsurgency efforts. *See* THOMAS MARKS, COLOMBIAN ARMY ADAPTATION TO FARC INSURGENCY 3–4, 8 (2002) (on file with author); *Colombia: Counter-Insurgency vs. Counter-Narcotics: Hearing Before the S. Caucus on Int'l Narcotics Control*, 106th Cong. 1–2 (1999) (statement of Sen. Richard Grassley, Chairman, S. Caucus on Int'l Narcotics Control) [hereinafter Caucus] ("It would appear that the present tendency in U.S. policy would have us more deeply involved in Colombia's insurgency."); Marc Grossman, Under Sec'y of State for Political Affairs, Remarks before the Georgetown Univ. Joining Efforts for Colombia Conference (June 24, 2002), *available at* http://web.archive.org/web/20050411014930/http://bogota.usembassy.gov/wwwsmg13.shtml#English ("The FARC is a narco-terrorist organization. . . . We put [the FARC] on the [Foreign Terrorist Organizations] list last September 10 . . . . These criminal organizations must understand that the international community will not tolerate their violations of human rights and terrorist acts."); Jo Becker, *U.S. Sues Business It Says Helped Hezbollah*, N.Y. TIMES, Dec. 15, 2011, at A8 (reporting on Hezbollah's laundering of Colombian drug trade profits for use in its activities throughout the Middle East).

[110] Grossman, *supra* note 109.

[111] David T. Johnson, Assistant Sec'y, Bureau of Int'l Narcotics & Law Enforcement Affairs, Statement Before the Senate Judiciary Subcommittee on Human Rights and the Law, May 18, 2010, *available at http://www.state.gov/p/inl/rls/rm/141952.htm.*

[112] Hon. Brian E. Sheridan, Department of Defense Coordinator for Drug Enforcement Policy and Support, Statement for the Record, Caucus, *supra* note 109, at 23–27 (describing U.S. involvement in Colombia as including advising, assisting, and equipping the Colombian armed forces, as well as providing counter-narcotics surveillance and intelligence assistance); Rand Beers, Assistant Sec'y, Bureau of Int'l Narcotics & Law Enforcement, Answer to Question for the Record, Caucus, *supra* note 109, at 115 (describing U.S. assistance to Colombia as "intended for counternarcotics activity only. . . . To the extent that the [insurgents] are involved in the narcotics industry, or that

on private contractors, rather than on members of the armed forces.[113] Additionally, Colombia limited the geographic scope of U.S. operations to prevent U.S. domestic political concerns from interfering with Colombian operations.[114] Finally, Colombia did not grant U.S. forces the authority to detain insurgents, requiring reliance on Colombian forces and extradition treaties to secure custody of wanted insurgents.[115]

Operation Enduring Freedom-Philippines (OEF-P) has also featured U.S. forces advising, assisting, and equipping the Armed Forces of the Philippines (AFP) in counterinsurgency operations.[116] For over four decades, Philippine forces have combated communist and Muslim insurgencies and criminal groups.[117] The United States' interest in these internal conflicts elevated after the August 2001 kidnapping of a U.S. citizen by the al-Qaeda-linked Abu Sayyaf Group.[118] Following the September 11, 2001, attacks, Philippine President Gloria Arroyo invoked the 1951 Mutual Defense Treaty between the U.S. and the Philippines,[119]

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they attempt to hinder counternarcotics operations, U.S. assistance may be used appropriately to oppose them."); STOKES, *supra* note 108, at 101.

[113] STOKES, *supra* note 108, at 99.

[114] MARKS, *supra* note 109, at 25–26 (citing the Colombian armed forces' efforts to compartmentalize U.S. involvement in the counterinsurgency and counternarcotics conflicts to prevent U.S. domestic political concerns such as human rights conditions from interfering with Colombian decision-making primacy).

[115] U.S. DEP'T OF STATE, THIRD REPORT ON INTERNATIONAL EXTRADITION SUBMITTED TO CONGRESS PURSUANT TO SECTION 3203 OF THE EMERGENCY SUPPLEMENTAL ACT, 2000, AS ENACTED IN PUBLIC LAW 106-246 (2002), *available at* http://www.state.gov/s/1/16164.htm; MARKS, *supra* note 109, at 32–33.

[116] Colonel David S. Maxwell, *Operation Enduring Freedom-Philippines: What Would Sun Tzu Say?*, MIL. REV., May–June 2004, at 20–21. *See also* Gary Thomas, *US Maintains Quiet Counterterrorism Effort in Philippines*, VOICE OF AMER., Jul. 28, 2001, http://www.voanews.com/english/news/asia/US-Maintains-Quiet-Counterterrorism-Effort-in-Philippines-126348218.html; Colonel Gregory Wilson, *Anatomy of a Successful COIN Operation: OEF-Philippines and the Indirect Approach*, MIL. REV., Nov.–Dec. 2006, at 6 (describing OEF-P lines of operation, including developing the AFP, civil-military operations such as humanitarian missions, and information operations).

[117] Joe Penney, *Clinton, Counter-Insurgency and Hegemony: 60 Years Ago, the Philippines Signed a Defence Treaty with the US, and Has Been Backing US Wars Ever Since*, AL JAZEERA, Nov. 15, 2011, http://www.aljazeera.com/indepth/opinion/2011/11/2011111373127469575.html; Thomas D. Long, *The "Quiet" Side of Counter Terrorism Operations: Combating Islamic Extremism in Southeast Asia*, GLOBAL SECURITY STUD., Winter 2011, at 18, *available at* http://www.globalsecutiystudies.com/vol2isslwinter2011.htm (noting the objective of both Abu Sayyaf Group and the Moro Islamic Liberation Front to create Islamic states within the Philippines).

[118] Maxwell, *supra* note 116, at 20; *Abu Sayyaf an Enduring Threat in Philippines*; MANILA BULL. (Phil.), Apr. 13, 2010, http://www.mb.com.ph/node/252543/abu-.

[119] Mutual Defense Treaty, U.S.-Phil., Aug. 30, 1951, 3 U.S.T. 3947.

requesting U.S. military assistance in AFP counterinsurgency operations, and eventually providing Philippine troops to the multinational coalition in Iraq.[120]

Security operations in the Philippines explicitly exclude active U.S. combat operations and have required the continuous observation of Philippine domestic criminal law. The 1951 Mutual Defense Treaty is the primary basis for U.S. OEF-P operations, arguably enabling President Arroyo to overcome Philippine constitutional prohibitions on foreign military operations within the Philippines.[121] Even if the 2001 U.S. Authorization for the Use of Military Force against al Qaeda were to apply to Abu Sayyaf militants and enable U.S. detentions,[122] the U.S. and Philippine governments have prohibited U.S. forces from conducting combat operations to avoid Philippine constitutional violations.[123] These restrictions have left U.S. forces in a supporting role, advising the AFP and providing intelligence, with AFP forces and civil authorities engaged in the detention of insurgents.[124]

3. U.S. Forces Are Increasingly Promoting Afghan Criminal Prosecutions for Detained Insurgents to Further Overall Campaign Objectives

In Afghanistan, U.S. forces have begun promoting the prosecution of captured insurgents not out of necessity, but to legitimize and build the Afghan governmental capacity and facilitate post-conflict transition

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[120] Penney, *supra* note 117.

[121] The 1987 Philippine constitution bars foreign military bases and foreign combat operations within the Philippines absent a treaty otherwise. *Id.*; Craig Whitlock, *Philippines May Allow Greater U.S. Military Presence in Reaction to China's Rise*, WASH. POST, Jan. 27, 2011, http://www.washingtonpost.com/world/national-security/philippines-may-allow-greater-us-presence-in-latest-reaction-to-chinas-rise/2012/01/24/glQAhFIyQQ_story.html?hpid=z2; SALIGANG BATAS NG PHILIPINAS [CONSTITUTION] Feb. 11, 1987, art. 18 (Phil.). *But see* Maxwell, *supra* note 116, at 22 (arguing that the U.S. government misinterpreted the Philippine Constitution, unduly limiting U.S. tactical-level assistance and combat operations).

[122] *See* Pub. L. 107-40, 115 Stat. 224, Sept. 18, 2004.

[123] Maxwell, *supra* note 116, at 21–22.

[124] *See Abu Sayyaf an Enduring Threat in Philippines*, *supra* note 118 ("US intelligence and weaponry have helped Filipino soldiers capture or kill many of the Abu Sayyaf's main leader [sic]."); *Around the Nation: Transfer of Detention*, MANILA BULL., Jan. 25, 2011, http://mb.com.ph/articles/300610/transfer-detention (describing AFP detentions of captured insurgents).

stability.[125] U.S. forces in Afghanistan exercise at least two specifically-applicable authorities to use force and detain individuals without charge: the 2001 Authorization for Use of Military Force against al Qaeda, and the UN Security Council resolutions applicable to the International Security Assistance Force.[126] Although the United States has established thorough detainee review board procedures and provided other measures of due process, U.S. capture and detention practices have drawn criticism from Afghan citizens and governmental officials.[127] Consequently, U.S. forces established Combined Joint Interagency Task Force 435 and the Rule of Law Field Support Mission to promote increased Afghan criminal prosecutions for insurgents, improve popular perceptions, manage detainee populations, and build Afghan governmental capacity.[128] Simultaneously, international forces are seeking ways to create formal relationships between informal justice mechanisms such as local *shuras* and *jirgas* and the state justice system.[129] Nevertheless, limited intelligence-sharing continues to hamper U.S. efforts to transfer detainees and ensure their eventual Afghan criminal prosecution.[130] Also,

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[125] *See* Brigadier General Mark Martins, *Building the Rule of Law in Practice*, LAWFARE (Nov. 23, 2010, 12:01 AM), http://www.lawfareblog.com/2010/11/building-the-rule-of-law-in-practice/ ("Although U.S. forces in Afghanistan ultimately retain the option of detaining insurgents under Congress's 2001 Authorization to Use Military Force–as informed by longstanding law of armed conflict principles and as acknowledged by the Afghan government in various bilateral diplomatic exchanges–it is desirable in COIN to transition from combat operations to law enforcement as soon as that becomes feasible. The cause of quelling an insurgency, which ultimately must be defeated on a political level, is eventually better served by a government enforcing a country's own laws than through combat detentions by foreign forces."); TIP OF THE SPEAR, *supra* note 98, at 81 (noting that while forces can transfer detainees to U.S. facilities, transfers to Afghan authorities for criminal prosecution should occur by default).

[126] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); S.C. Res. 1386, *supra* note 46, ¶ 3. *See also* Brigadier General Mark Martins, DOD News Briefing with Army Brig. Gen. Mark Martins via Teleconference from Afghanistan, Feb. 10, 2011, http://www.defense.gov/transcripts/transcript.aspx?.

[127] *See* Cahn, *supra* note 14, at 20.

[128] United States Central Command, COMBINED JOINT INTERAGENCY TASK FORCE-435, http://www.centcom.mil/jtf435; North Atlantic Treaty Org., NATO RULE OF LAW FIELD SUPPORT MISSION (NROLFSM), *available at* http://www.isaf.nato.int/facts-and-figures.html; Brigadier General Mark Martins, *NATO Stands Up Rule of Law Field Support Mission in Afghanistan*, LAWFARE (Jul. 6, 2011, 2:07 PM), http://www.lawfareblog.com/2011/07/nato-stands-up-rule-of-law-field-support-mission-in-afghanistan/; Rubin, *supra* note 48.

[129] Amin Tarzi, Address at The Judge Advocate Gen.'s Legal Ctr. & Sch.: The Historical Relationship Between State Formation and Judicial System Reform in Afghanistan (Oct. 24, 2011) [hereinafter Tarzi Address] (notes on file with author).

[130] *See* Cahn, *supra* note 14, at 20 ("For Afghan prosecutors, who receive vague case files from U.S. officials at Bagram, there is skepticism that the right people are landing behind

as in Iraq, U.S. forces in Afghanistan are more carefully collecting evidence incident to capture operations for use in Afghan criminal court proceedings.[131]

III. Utilizing Host Nation Criminal Justice Institutions During Security Operations Furthers Strategic Counterinsurgency Objectives

While securing the population is a primary concern during a counterinsurgency campaign, ultimately even security operations must contribute to securing the host nation government's legitimacy.[132] Both the government and the insurgency seek to convince the population that they are the sole legitimate authority.[133] The insurgency relies not only on force, but also on the strength of its cause,[134] while the government must counter and eliminate the insurgency's causes to maintain popular

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bars because the detentions are based more on confidential intelligence than on releasable evidence."); Old Blue, *supra* note 78.

[131] *See* FORGED IN THE FIRE, *supra* note 87, at 49 ("As in Iraq, the prospect of criminal prosecutions required decreased reliance upon intelligence in favor of increased reliance upon physical evidence. . . . In order to increase the potential for successful prosecutions, the [82nd Airborne Division Office of the Staff Judge Advocate] recommended the collection of evidence at the time of capture or soon thereafter. . . . [A] decision to transfer [a detainee] several months after capture often meant that the capturing unit could no longer provide useful information or was, in fact, no longer in theater.") (citation omitted).

[132] ROBERT THOMPSON, DEFEATING COMMUNIST INSURGENCY: EXPERIENCES FROM MALAYA AND VIETNAM 54 (1978) (arguing counterinsurgent forces must act transparently and in accordance with established law, but acknowledging that "[s]ecurity must come first."); FM 3-24, *supra* note 2, paras. 1-3 (identifying the host nation government's popular legitimacy as a central objective of counterinsurgency operations), 1-113 ("The primary objective of any COIN operation is to foster development of effective governance by a legitimate government."). *See also* Thomas H. Johnson & M. Chris Mason, *Refighting the Last War: Afghanistan and the Vietnam Template*, MIL. REV., Nov.–Dec. 2009, at 2, 4 (noting that experts consider a successful counterinsurgency to require a government viewed as legitimate by at least 85% of the population). *But see, e.g.*, Major Edward C. Linneweber, *To Target, or Not to Target: Why 'Tis Nobler to Thwart the Afghan Narcotics Trade with Nonlethal Means*, 207 MIL. L. REV. 155, 196–97 (2011) ("Kinetic targeting also risks appearing excessive and unjust, which could undermine the [Afghanistan] counterinsurgency effort."); STROMSETH ET AL., *supra* note 4, at 173 (arguing that the UN Kosovo Force detention operations, including widespread arrests and prolonged detentions without charge, "undercut its own rule of law message").

[133] DAVID GALULA, COUNTERINSURGENCY WARFARE 9 (1965); FM 3-24, *supra* note 2, at 1-1; PRUGH, *supra* note 47, at 38.

[134] GALULA, *supra* note 133, at 18–25; FM 3-24, *supra* note 2, paras. 1-48 to 1-51.

consent to its authority.[135] Particularly if insurgent causes derive from the government's exercise of its police power, the host nation's targeting, capture, detention, and prosecution of insurgents can visibly demonstrate the government's worthiness and competency to maintain law and order.[136] Securing the population being essential to success, doing so in accordance with the law can simultaneously demonstrate governmental accountability and capacity, and promote post-conflict societal stability.

This section describes several benefits of conducting security operations and punishing insurgents according to host nation criminal justice laws and procedures. While other authors provide a more exhaustive discussion,[137] this section focuses on those benefits most relevant to U.S. doctrine.

A. Host Nation Criminal Prosecutions Demonstrate the Government's Accountability and Capacity to Enforce the Law

Criminal justice prosecutions enable the host nation government to demonstrate its own accountability and its capacity to enforce that law, both critical components of attaining popular legitimacy. The prosecution of insurgents in host nation criminal courts, including those insurgents U.S. forces capture, enables the government to achieve these intermediate steps in support of overall campaign objectives.

Transparent laws and open courts enable the public to judge whether the government is competent, accountable, and just. One way a government demonstrates its responsibility and accountability is by

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[135] FM 3-24, *supra* note 2, para. 1-3.

[136] *See* FM 3-24, *supra* note 2, para. 1-51; THOMPSON, *supra* note 132, at 68 (arguing that government adherence to the law shows the people that it is just and undermines the "insurgent conspiracy"); Sitaraman, *supra* note 9, at 1814–15 (arguing that providing security often requires a tradeoff between the populace's civil rights and military exigency). It is noteworthy that the Taliban exploited a lack of law and order following the departure of Soviet forces from Afghanistan, garnering support by promising to end lawlessness and disarming warring groups. Kawun Kakar, *An Introduction to the Taliban*, INST. FOR AFG. STUD. (Fall 2000), http://www.institute-for-afghan-studies.org/AFGHAN%20CONFLICT/TALIBAN/intro_kakar.htm.

[137] *See, e.g.*, Robert Chesney & Tom Nachbar, *Tom Nachbar on "Law as a Means to Counterinsurgency: Practical Considerations," in* LAWFARE (Jan. 9, 2011, 10:27 PM), http://www.lawfareblog.com/2011/01/tom-nachbar-on-law-as-a-means-to-counterinsurgency-practical-considerations/.

acting in accordance with published law.[138] By providing due process through open trials, the government need not justify its every action and provides citizens a forum to refute allegations against themselves.[139]

Acting transparently and in accordance with published laws does not necessarily undermine counterinsurgent forces' exigent need to secure the population. A counterinsurgent government can modify penal and procedural codes during a crisis to provide harsher emergency powers, provided it does so in a transparent matter that demonstrates fairness.[140] During the Malayan emergency, the government published and uniformly applied emergency legislation and kept civil courts open for public business.[141] Consequently, "the government itself functioned in accordance with the law and could be held responsible in the courts for its actions . . . [thus] the population could be required to fulfill its own obligation to obey the laws."[142] Similarly, Iraq's government provided

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[138] THOMPSON, *supra* note 132, at 54 (contending that the government's acting in accordance with the law makes each government official accountable to the people). *See also* MADDALONI, *supra* note 107, at 35–37 (arguing that Colombian success in combating the FARC since 2003 has in part been due to its "act[ing] in accordance with the law").

[139] *See* THOMPSON, *supra* note 132, at 54 ("Trials in camera, martial law, and military tribunals can never be satisfactorily justified. They are in themselves a tacit admission that government has broken down."); Cahn, *supra* note 14, at 20 ("[H]uman rights groups, along with the Bagram detainees themselves, say their inability to adequately refute the [American] claims against them breeds bitter contempt against the Americans."). *See also* MADDALONI, *supra* note 107, at 44–45 (noting Colombia's improvements to insurgent criminal prosecution procedures have both established the government's authority and improved the rule of law); DAVID KILCULLEN, COUNTERINSURGENCY 148 (2010) (noting the example of the Fifth Century B.C. King Deiokes, who recognized the possibility of gaining popular confidence by mediating the people's disputes openly and consistently).

[140] *See also* GALULA, *supra* note 133, at 31, 76 (arguing that the government should modify penal laws to suit emergency circumstances and more effectively combat an insurgency); THOMPSON, *supra* note 132, at 53 (using the Malayan Emergency as an example of a government's enacting and utilizing emergency legislation in an appropriate manner); KILCULLEN, *supra* note 139, at 152 ("Even if [laws] are harsh and oppressive, if people know they can be safe by following a certain set of rules, they will flock to the side that provides the most consistent and predictable set of rules. . . . [W]hat people most want is security, through order and predictability . . .). *But see* GALULA, *supra* note 133, at 65 (arguing that a government can defeat a nascent insurgency by immediately arresting its leaders and "impeaching them in the courts," but risks lending support to the insurgent cause if acting without popularly-perceived lawful justification).

[141] THOMPSON, *supra* note 132, at 52–53.

[142] *Id*. at 53.

broad, published, detention authorities to security forces.[143] Finally, while exercising martial authorities during the 1899–1902 Philippine Insurrection, the U.S. Army allowed local courts to continue to operate and established U.S.-managed provost courts for certain offenses.[144] These examples indicate that incidental tactical and operational compromises necessary to lawfully adjudicate insurgent offenses can yield greater strategic gains.

Additionally, utilizing host nation criminal justice systems to prosecute insurgents demonstrates the government's capacity to maintain law and order independent of foreign assistance. The government must demonstrate it is the sole provider of justice, and that insurgent institutions do not and cannot replace governmental institutions.[145] Similarly, U.S. forces must prevent an indigenous reliance on foreign troops, which otherwise "may supplant the need for the indigenous justice system."[146] U.S. forces likely cannot place the entire burden of adjudicating insurgent offenses on an unprepared host nation government, possibly requiring a gradual or partial transition of responsibility.[147] For example, following the enactment of the Security Agreement, the United States gradually transferred many of its remaining

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[143] *See, e.g.*, Anti-Terrorism Law, No. 13, Nov. 7, 2005 (Iraq), *available at* www.vertic.org/media/National%20Legislation/Iraq/IQ_Anti-Terrorism_Law.pdf (specifying acts of terrorism distinct from provisions of existing Iraqi penal codes and classifying these acts as egregious crimes eligible for heightened sentences); Prime Minister's Directive Under the State of Emergency Number 83/S, Feb. 7, 2007 (Iraq) (on file with author) (authorizing the Iraqi Security Forces, including the military, to perform law enforcement functions to carry out the Anti-Terrorism Law).

[144] Headquarters, U.S. Army Dep't of the Pac., Gen. Order No. 8 (22 Aug. 1898); Headquarters, U.S. Army Dep't of the Pac., Daily Order: To the People of the Philippines (14 Aug. 1898).

[145] Greig, *supra* note 85, at 25 ("A necessary condition for success in any counterinsurgency effort is the establishment of state institutions as the sole provider of key government functions."). *See also* MADDALONI, *supra* note 107, at 11 (arguing that the FARC gained support in rural, centrally-ungoverned areas by establishing "public order commissions" to adjudicate offenses against "unpopular criminals").

[146] Greig, *supra* note 85, at 25. *See also* STROMSETH ET AL., *supra* note 4, at 136 (calling for intervening foreign forces to incorporate host nation actors in security decisions to promote post-conflict transition).

[147] *See* FORGED IN THE FIRE, *supra* note 87, at 37; Robert Chesney, *Plan Ahead for End of Afghan Detention Operations*, LAWFARE (Jan. 6, 2012, 9:53 AM), http://www.lawfareblog.com/2012/01/plan-ahead-for-the-end-of-afghan-detention--operations/ (arguing that unlike in Iraq, which had a relatively well-established criminal justice system, the United States may find it much more difficult to ensure the Afghan criminal prosecution of captured insurgents as U.S. operations wind down).

15,000 detainees to the Iraqi criminal justice system.[148] In Afghanistan, the United States has endeavored to transfer detained insurgents to Afghan authorities not out of legal obligation, as in Iraq, but to ensure Afghan authorities are prepared to assume total responsibility for maintaining law and order following the departure of U.S. forces.[149]

B. Indigenous Criminal Justice Legitimizes the State's Claimed Monopoly on the Use of Force and the Dispensation of Justice

Modern political theorists consider the defining feature of a state to be its maintenance of a monopoly on the use of force.[150] Maintaining a stable society under the rule of a government requires continuous obedience, and the government itself must continuously exercise its authority to maintain its place.[151] Nevertheless, the government must rely on popular legitimacy rather than on fear to ensure its long-term survival.[152]

At the same time, maintaining this monopoly also requires demonstrating restraint and accountability.[153] Criminal prosecutions demonstrate the government's limited authority and its responsibility to

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[148] Press Release, Multinational Force Iraq, *supra* note 94.
[149] *See supra* Part II.D.3.
[150] MAX WEBER, POLITICS AS A VOCATION (1919), *available at* www.sscnet.ucla.edu/polisci/ethos/Weber-vocation.pdf ("[W]e have to say that a state is a human community that [successfully] claims the *monopoly of the legitimate use of physical force* within a given territory." (emphasis in original)); AYN RAND, *America's Persecuted Minority: Big Business*, *in* CAPITALISM: THE UNKNOWN IDEAL 42 (1986) ("The difference between political power and any other kind of social 'power,' between a government and any private organization, is the fact that a *government holds a legal monopoly on the use of physical force*." (emphasis in original)); THOMAS HOBBES, LEVIATHAN (1651), *available at* http://www.orgegonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html.
[151] KILCULLEN, *supra* note 139, at 151 ("In other words, support *follows* strength, not vice versa." (emphasis in original)).
[152] *See* MADDALONI, *supra* note 107, at 32; Johnson & Mason, *supra* note 132, at 4–5 (arguing that popularly elected Afghan President Hamid Karzai lacks culturally significant dynastic and religious sources of authority, and comparing this to the South Vietnamese government's similar lack of cultural legitimacy during the Vietnam War); WEBER, *supra* note 150 ("Organized domination, which calls for continuous administration, requires that human conduct be conditioned to obedience towards those masters who claim to be the bearers of legitimate power.").
[153] Ayn Rand, *The Nature of Government*, *in* THE VIRTUE OF SELFISHNESS 109 (1964) ("[The government's] actions have to be rigidly defined, delimited and circumscribed. . . . [I]f a society is to be free, its government has to be controlled.").

the people.[154] As an expression of society's disapproval, criminal prosecution also de-romanticizes the insurgent,[155] demonstrating the moral rightness of hating criminals[156] while differentiating the government from the insurgency by the former's use of lawful means to punish its enemies.[157] A just, effective criminal justice system in a counterinsurgency can cement the people's trust in the government's claim to the sole authority to use of force, and prevent the insurgent group from garnering lasting support as an alternative.[158]

C. Host Nation Criminal Justice Prosecutions Promote Post-Conflict Stability

The long-term stability of the host nation may depend in part on whether the criminal justice system furthers a stable relationship between the government and people grounded in popular consent. In theory, foreign forces will leave the country or cease from actively participating in security operations.[159] After this transition, the host nation government's long-term survival may depend on whether the population views it as legitimate and accepts its authority by coercion or consent.[160]

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[154] *See* Richard Warner, *Adjudication and Legal Reasoning*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY (Martin P. Golding & William A. Edmundson, eds., 2005) (arguing that judicial action is legitimate "when appropriately constrained decision makers reach decisions based on authoritative legal materials and selected moral principles"); THOMPSON, *supra* note 132, at 52, 54.

[155] THOMPSON, *supra* note 132, at 54. *But see* MADDALONI, *supra* note 107, at 11–12 (arguing that Colombia's 1978 National Security Statute, giving the military extensive authority to detain insurgents and adjudicate their offenses, led to widespread human rights abuses that created public sympathy for the FARC insurgency).

[156] JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883), *reprinted in* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 104 (2001).

[157] THOMPSON, *supra* note 132, at 54 ("If the government does not adhere to the law, then it loses respect and fails to fulfill its contractual obligation to the people as a government. . . . [T]here [becomes] so little difference between the [insurgent and the government] that the people have no reason to support the government.").

[158] THOMPSON, *supra* note 132, at 54; JOHN A. NAGL, LEARNING TO EAT SOUP WITH A KNIFE: COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM 25 (2005) (arguing that the state must be a protector of the population to defeat an insurgency).

[159] *See supra* Part II.B.

[160] FM 3-24, *supra* note 2, paras. 1-113, 1-115 (arguing that an illegitimate government preserves unresolved social contradictions that may undermine governmental authority), 1-119 (noting the relationship between "[t]he presence of the rule of law" and "widespread, enduring societal support").

Three indirect benefits of a functioning criminal justice system contribute to societal stability. First, criminal punishment maintains social equilibrium.[161] Second, criminal punishment both deters undesirable behavior and stimulates habitual law-abiding behavior, furthering a cultural commitment to the law.[162] Third, criminal punishment encourages respect for the law and government institutions.[163] Finally, the government's use of lawful means to combat the insurgency furthers the existence of participating opposition political parties, undermining the insurgent's claim as the sole avenue to oppose the government.[164]

Host nation prosecutions also reduce the risk of popular discontent directed toward legally non-responsible foreign forces, discontent which ultimately can fall upon the inviting host nation government. Placing responsibility on the host nation's shoulders removes the U.S. from the population's resolution of its disputes and provides an appearance of governmental responsibility to the population.[165] For example, U.S.

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[161] HERBERT MORRIS, ON GUILT AND INNOCENCE (1976), *reprinted in* KADISH & SCHULHOFER, *supra* note 156, at 109.

[162] Johannes Andenaes, *General Prevention–Illusion or Reality?*, 43 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 176 (1952), *reprinted in* KADISH & SCHULHOFER, *supra* note 156, at 109; STROMSETH ET AL., *supra* note 4, at 310 ("The rule of law is as much a culture as a set of institutions. . . . Institutions and codes are important, but without the cultural and political commitment to back them up, they are rarely more than window dressing."). *See also* Martin Krygier, *Approaching the Rule of Law*, *in* THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION 30 (Whit Mason, ed., 2011).

[163] ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE, MEMORANDUM SUBMITTED BY THE RT. HON. LORD JUSTICE DENNING 207 (Dec. 1, 1949) (U.K.), *reprinted in* KADISH & SCHULHOFER, *supra* note 156, at 104.

[164] THOMPSON, *supra* note 132, at 67 (using Malaya and Indonesia as examples of how a stable, functioning parliament provides outlets for political opposition separate from the insurgency). *But see* GALULA, *supra* note 133, at 65–66 (arguing that insurgencies may attempt to usurp legitimate political opposition groups); Jack Healy & Michael S. Schmidt, *Iraqi Moves to Embrace Militia Open New Fault Lines*, N.Y. TIMES, Jan. 6, 2012, at A1 (noting that leaders of the Iraqi militia Asaib Ahl al-Haq promised to foreswear violence and enter Iraq's political process in 2009, only returning to violence after U.S. forces agreed to release them).

[165] During the Second Chechen War, the Russian military sought to "Chechenize" the campaign to put a Chechen face on security operations, arming pro-Russian Chechen groups and withdrawing Russian troops to "reduce Russian casualties and enable hostilities to be depicted as a war between Chechen factions that Russia was helping to stabilize." Svante E. Cornell, *Russia's Gridlock in Chechnya: 'Normalization' or Deterioration?*, *in* INSTITUTE FOR PEACE RESEARCH AND SECURITY, OSCE YEARBOOK 2004 267–76 (Ursel Schlichting, ed., 2005), *available at* http://www.silkroadstudies.org/new/docs/publications/0407OSCE_Chechnya.htm. *But see* EIDGENÖSSICHE TECHNISCHE HOCHSCHULE ZÜRICH [SWISS FED. INST. TECH. ZURICH], ASSESSING RUSSIAN

Detainee Review and Release Boards do not necessarily legitimize U.S. detainee operations or lend credibility to the host nation government: they are not conducted in accordance with host nation laws to which the population is subject;[166] and their purpose is not to determine guilt or innocence under local law, but to determine whether the person continues to pose a threat.[167] They do not resolve the concerns of the populace to have a hearing to fairly determine their guilt or innocence.[168] In contrast, a court sitting by authority of the host nation's laws, and accountable to its people, is more likely to satisfy popular concerns and appear accountable.

IV. Field Manual 3-24 Requires Modification to Account for Host Nation Legal Primacy

While acknowledging the importance of host nation legal institutions, FM 3-24 presumes a legally permissive environment absent the operational limitations arising from host nation legal primacy. The manual repeatedly notes the importance of host nation domestic law and calls on forces to "transition security activities from combat operations to law enforcement as quickly as feasible" to further the host nation government's legitimacy.[169] Nevertheless, as this section will argue, the manual recommends methods applicable during a conventional, legally permissive environment, not accounting for the operational limitations of a law enforcement environment grounded in the host nation's criminal laws, procedures, and institutional norms; and not identifying how security operations can themselves promote the supported government's legitimacy and public trust.

This section recommends specific changes to FM 3-24 to close the gap between the manual's acknowledgment of host nation legal primacy

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CHECHENIZATION (2008) (Switz.) (arguing that, despite its objectives to draw down the Chechen conflict, Chechenization led to the arming of armed groups not subject to the rule of law and actually increased violence and instability in Chechnya following the departure of Russian forces).

[166] *See* Cahn, *supra* note 14.

[167] *Id.*

[168] *Id.*; FORGED IN THE FIRE, *supra* note 87, at 44–45 (arguing that the United States' overreliance on broad detention authority alienated Iraqi citizens who otherwise might have been sympathetic to coalition forces). *See also* TIP OF THE SPEAR, *supra* note 98, at 81 (arguing that units should by default transfer detainees to Afghan authorities for criminal prosecution to effect their criminal prosecution in Afghan courts).

[169] *See, e.g.*, FM 3-24, *supra* note 2, paras. 1-131, D-15.

and its doctrinal templates for counterinsurgency operations. To complement these recommendations, this section also proposes modifying counterinsurgency military information support operations, and recommends possible measures of performance and effectiveness.[170] Appendix A arranges these recommendations in a comment matrix for use in the formal revision process.[171]

A. U.S. Forces Must Account for Host Nation Legal Primacy and its Related Operational Limitations

1. Field Manual 3-24 Must Clearly Identify Host Nation Legal Primacy and the Benefits of Observing this Primacy

While FM 3-24 exposes leaders to some benefits of observing host nation law, it does not make clear the relationship between U.S. security operations and host nation legitimacy, and how host nation law may operationally limit U.S. operations. The manual's "Legal Considerations" appendix notes that "U.S. forces conducting [counterinsurgency operations] should remember that the insurgents are, as a legal matter, criminal suspects within the legal system of the host nation."[172] Similarly, the manual notes the importance of "[t]he presence

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[170] *See* BECKETT, *supra* note 23, at vii (counting "psychological" activities among the primary means by which governments counter insurgencies); KILCULLEN, *supra* note 139, at 76 (noting the importance of metrics and their interpretation to waging a successful counterinsurgency campaign).
[171] *See infra* apps. A, B.
[172] FM 3-24, *supra* note 2, para. D-15.

> The final sentence of Common Article 3 makes clear that insurgents have no special status under international law. They are not, when captured, prisoners of war. Insurgents may be prosecuted legally as criminals for bearing arms against the government and for other offenses, so long as they are accorded the minimum protections described in Common Article 3. U.S. forces conducting [counterinsurgency operations] should remember that the insurgents are, as a legal matter, criminal suspects within the legal system of the host nation. Counterinsurgents must carefully preserve weapons, witness statements, photographs, and other evidence collected at the scene. This evidence will be used to process the insurgents into the legal system and thus hold them accountable for their crimes while still promoting the rule of law.

of the rule of law . . . in assuring voluntary acceptance of a government's authority and therefore its legitimacy."[173] It notes several beneficial effects of the rule of law: first, criminalizing the insurgency erodes its public support; second, using the locally-based legal system to dispense criminal justice to insurgents builds the government's legitimacy; third, coercive actions, such as "unlawful detention . . . and punishment without trial" undermine the government's legitimacy.[174]

Nevertheless, to better identify the relationship between these objectives and U.S. operations, the manual must more clearly note that transparency is critical to both security and the rule of law.[175] It should more clearly state that not only host nation forces, but U.S. forces, should seek to transparently observe host nation laws to avoid undermining the government's legitimacy, even when not legally required to do so.[176] As previously discussed, host nation legal primacy presents tactical and operational challenges for U.S. forces.[177] Nevertheless, the previously discussed strategic benefits of observing this primacy are so critical to success that they outweigh these potential tactical and operational disadvantages at some point during a campaign.[178] To this end, the manual must emphasize how both strategic objectives and U.S. legal and policy obligations should call for observing host nation law when stability emerges during counterinsurgency campaigns.[179]

Id.

[173] *Id.* para. 1-119.

[174] *Id.* para. 1-132.

[175] *See* MADDALONI, *supra* note 107, at 44–45 (arguing that FM 3-24 does not sufficiently identify the importance of governmental transparency during counterinsurgency campaigns).

[176] *See* STROMSETH ET AL., *supra* note 4, at 324–25 (noting a paradox facing foreign efforts to restore host nation stability and governmental capacity, by which foreign forces' necessary exercise of military force to restore security can undermine broader efforts to promote the rule of law and build the host nation government); THOMPSON, *supra* note 132, at 54, 68; GALULA, *supra* note 133, at 89 (arguing that all military actions must support and be secondary to political goals). *See infra* app. A, items 1, 4.

[177] *See supra* Part II.C.

[178] *See supra* Part III.

[179] *See infra* app. A, items 2, 3.

2. U.S. Forces Must Be Prepared to Respect Host Nation Amnesty Laws, Informal Justice Institutions, and Post-Conflict Reconciliation Mechanisms

The manual also must identify the possible need to respect and promote the host nation's alternative justice mechanisms and promote post-conflict reconciliation.[180] A consensus is emerging among legal theorists that the law of war should not only account for actions before and during conflict, but also actions to promote post-conflict reconciliation and stability.[181] Additionally, Additional Protocol II to the Geneva Conventions calls for governing authorities to grant amnesty broadly at the end of an internal armed conflict.[182] To promote this stability, U.S. forces should be prepared to respect and aid in the implementation of host nation amnesty programs, truth commissions, or other peace initiatives.[183]

Counterinsurgent governments have effectively used amnesty both during and after a conflict to reduce insurgent populations, fracture insurgent movements, and promote post-conflict resolution.[184] In 2003, Colombian President Alvaro Uribe reached a peace and amnesty agreement with the Autodefensas Unidas de Colombia (AUC) insurgency, leading to the demobilization of 32,000 AUC insurgents.[185] This agreement effectively splintered the Colombian insurgency movements, enabling the government to focus on defeating the FARC.[186] Similarly, in 1994, Philippine President Fidel Ramos established a National Unification Commission to create an amnesty program for Mindanao National Liberation Front (MNLF) insurgents, leading to a

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[180] See *id.* item 22.
[181] Jaan K. Kleffner, *Introduction: From Here to There . . . And the Law in the Middle*, *in* JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE (Jann K. Kleffner & Carsten Staan, eds., 2008) (noting the evolution of state practice since the adoption of the UN Charter to consider states responsible for restoring post-conflict stability following foreign interventions).
[182] APII, *supra* note 28, art. 6.
[183] *See infra* app. A, items 1, 2, 22, 21.
[184] THOMPSON, *supra* note 132, at 90 (arguing that amnesty procedures "create an image of government both to the insurgents and to the population which is both firm and efficient but at the same time just and generous"). *See also* GALULA, *supra* note 133, at 26 (arguing that "a policy of leniency" can both effectively undermine the insurgency and prevent overwhelming the criminal justice system).
[185] MADDALONI, *supra* note 107, at 22.
[186] *Id.*

peace agreement with the MNLF and enabling the government to combat the remaining insurgency movements.[187]

Additionally, U.S. forces also should be prepared to respect and work with the indigenous culture's informal methods of holding insurgents accountable for their actions.[188] Informal justice mechanisms, also called "traditional," "indigenous," "cultural," or "customary" systems, are particularly common in nascent and post-conflict societies with weak governments, providing an alternative means to resolve disputes outside of the formal, or state justice systems.[189] Host nation informal institutions may have deep cultural roots, complicating U.S. efforts to promote formal structures.[190] Acknowledging their significance, international forces in Afghanistan have begun promoting tribal justice mechanisms as an irreplaceable component of the Afghan justice system.[191] This shift also reflects an acknowledgment that the Taliban, like the FARC in Colombia, has used these institutions to its

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[187] *Id.*

[188] See *infra* app. A, items 1, 2, 8.

[189] U.N. RULE OF L., INFORMAL JUSTICE, http://www.unrol.org/article.aspx?article_id=30 (last visited Feb. 10, 2012); KRISTINA THORNE, RULE OF LAW THROUGH IMPERFECT BODIES? THE INFORMAL JUSTICE SYSTEMS OF BURUNDI AND SOMALIA 1–2 (2005), *available at* http://www.peace-justice-conference.info/documents.asp (describing informal justice systems in post-conflict Somalia, East Timor, Rwanda, and Burundi).

[190] William Manley, *The Rule of Law and the Weight of Politics: Challenges and Trajectories*, *in* THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION, *supra* note 162, at 61, 69–70.

> A major challenge in the post-2001 era [in Afghanistan] has been to find ways of re-establishing *state-based* legal rules in the face of bodies of law with greater religious or traditional resonance. . . . A 2009 survey . . . showed that 79 per cent of respondents agreed that the local *jirga* or *shura* was accessible to them, while only 68 per cent said this of state courts; 69 per cent judged the local *jirga* or *shura* effective at delivering justice, while only 50 per cent said this of the state courts; 72 per cent labeled the local *jirga* or *shura* 'fair or trusted,' while only 50 per cent said this of the state courts; and 64 per cent stated that the local *jirga* or *shura* resolved cases 'timely and promptly', while only 40 per cent said this of the state courts.

(emphasis in original) (citations omitted)).

[191] Tarzi Address, *supra* note 129; Susanne Schmeidl, *Engaging Traditional Justice Mechanisms in Afghanistan: State-Building Opportunity or Dangerous Liaison?*, *in* THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION, *supra* note 162, at 149–50 (arguing that the prevalence of informal, customary justice mechanisms in Afghanistan "has forced the international community to reconsider its stance against customary justice").

advantage to build political legitimacy.[192] By respecting and utilizing these institutions to the extent practicable and consistent with U.S. policy objectives, U.S. forces can align local tribal and governmental leaders, thereby alienating and displacing insurgent leaders.[193]

3. U.S. Forces Must Be Prepared to Face the Risks and Challenges of Working With Host Nation Criminal Justice Institutions

The manual also should more clearly identify risks and challenges leaders will face by observing host nation legal primacy. In addition to those risks the manual already identifies,[194] risks may include ceding authority to host nation institutions possibly lacking sufficient capacity. Not accounting for these risks and challenges can hinder otherwise effective operations: for example, in Vietnam, the South Vietnamese government's inability to quickly and firmly adjudicate Vietcong insurgents' offenses undermined the considerable security gains achieved through the Phoenix Program.[195]

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[192] KILCULLEN, *supra* note 139, at 60–61 (2010) (arguing that the Taliban's use of informal mechanisms is "translating local dispute resolution and mediation into local rule of law and thus into political power"); Schmeidl, *supra* note 191, at 150 (noting the Afghan insurgency's establishment of Shari'a courts to provide access to justice to rural populations). *See also* MADDALONI, *supra* note 107, at 10–11 (noting the FARC's use of "public order commissions" to establish law and order in effectively ungoverned areas, enabling "the guerillas to gain influence and control of small villages and towns to further expand their logistical base").

[193] STROMSETH ET AL., *supra* note 4, at 338 (recommending evaluative questions for intervening authorities to ask to determine whether and how to utilize host nation informal justice mechanisms).

[194] *See, e.g.*, FM 3-24, *supra* note 2, para. D-21 (noting possible conditions in which U.S. legal obligations may prevent the transfer of detainees to host nation authorities). *See also* U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1964, 1465 U.N.T.S. 85 (prohibiting parties from transferring a person to the custody of a state "where there are substantial grounds for believing that he would be in danger of being subjected to torture").

[195] TOVO, *supra* note 75, at 14 (citations omitted). *See also* PRUGH, *supra* note 47, at 24–25, 64 (noting the tendency of South Vietnamese authorities to release judicially-tried Vietcong insurgents within six months according to domestic law due to a lack of criminal justice system capacity to adjudicate all offenses, while holding captured North Vietnamese soldiers indefinitely as prisoners of war).

To account for this risk, the manual should first prepare commanders to cede a measure of the autonomy they normally enjoy during security operations. Commanders' priorities may diverge with judges' priorities; while the former may be most concerned with eliminating security threats, the latter may primarily seek just outcomes, complicating unity of effort.[196] Additionally, insurgent criminal prosecutions may fail, possibly requiring units to target the same individuals repeatedly or decline transferring them to host nation authorities provided they have sufficient authority to retain custody.[197] Nevertheless, the practical difficulty of removing large numbers of detainees to the United States for U.S. criminal prosecution, as well as U.S. domestic political and foreign policy considerations, may leave no choice but to rely on the host nation as a campaign nears its conclusion.[198]

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[196] FM 3-24, *supra* note 2, para. 2-13; Greig, *supra* note 85, at 25, 34.

> While acting under the guise of furthering the rule of law, units may be tempted to take advantage of corrupt judges or use their influence with local officials to circumvent the judicial process in order to achieve certain security goals. These quick wins may be operationally expedient but undermine the host nation's capacity-building process . . . . Eventually the hard decision to sacrifice operational expediency for long term gains must be made, even at the risk that an insurgent might go free due to lack of evidence or corruption in the system.

Id. See also infra app. A, item 5.

[197] *See* HIGH JUD. COUNCIL, VERDICTS OF ALL CRIMINAL COURTS FOR 2009 (2010) (Iraq) (on file with author) (reporting a 47% 2009 felony conviction rate, with individual provincial rates as low as 25%); TIP OF THE SPEAR, *supra* note 98, at 52, 60–61 (identifying difficulties tracking detainees after their transfer to Iraqi authorities). Criminal justice system acquittals and problems also can frustrate host nation authorities, possibly requiring U.S. forces partnering with local authorities to encourage patience and trust in the system. *See* Jane Arraf, *In Baghdad, Police Chief Explains Why It's Tough to Enforce the Rule of Law*, CHRISTIAN SCI. MONITOR, Sept. 3, 2010, http://www.csmonitor.com/World/Middle-East/2010/0903/In-Baghdad-police-chief-explains-why-it-s-tough-to-enforce-the-rule-of-law (citing a Baghdad police official's frustration with the high rate of Iraqi criminal justice system acquittals, which the United States reported at the time to occur in 75% of cases).

[198] *See supra* Part II.B.2; *infra* app. A, item 3.

Second, the manual should reinforce the need to understand the host nation's criminal justice system prior to commencing operations.[199] The lack of institutional capacity in a nascent state may prevent U.S. forces from fully utilizing the host nation criminal justice system,[200] and even a functioning one may not necessarily contribute to societal stability.[201] As in Iraq, U.S. forces may have unrealistic expectations of this system.[202] To mitigate these risks, FM 3-24 should recommend ascertaining the capacity of the local criminal justice system when describing the effects of the operational environment.[203] The manual identifies several civil considerations related to criminal justice system effectiveness, such as tribal structure, roles and statuses, social norms, and the distribution of power and authority within the host nation society.[204] It recommends staffs identify societal grievances and ascertain whether the government is addressing them.[205] To link these factors to the criminal justice system, the manual should recommend assessing the relationship between socio-cultural factors and the government's criminal justice capacity.[206] Additionally, forces should deploy with a plan to reach out to central and

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[199] *See* TIP OF THE SPEAR, *supra* note 98, at 66 (arguing that U.S. forces should sufficiently understand Iraqi criminal justice system requirements prior to deploying); PRUGH, *supra* note 47, at vii (At the outset of the Vietnam war, U.S. forces "knew very little about Vietnamese law and how it actually worked. . . . To learn these facts, then, became a first priority . . . ."); *infra* app. A, item 6.

[200] *See, e.g.*, Ellis & Sisco, *supra* note 51 (arguing that the absence of functioning governmental institutions in Somalia would complicate achieving unity of effort with the Somali government in a hypothetical U.S. counterinsurgency campaign applying FM 3-24 population centric doctrine).

[201] *See* Ernesto Londono, *Many Sunnis See Iraqi Justice System as Shiite Cudgel*, WASH. POST, Nov. 22, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/22/AR2010112206760.html (noting Sunni mistrust of the Iraqi criminal justice system given the government's predominantly Shiite composition).

[202] Greig, *supra* note 85, at 31–32 (noting that Iraqi judges often required the testimony of two witnesses in accordance with the Iraqi Code of Criminal Procedure and Iraqi judicial tradition, and were reluctant to consider forensic evidence despite significant Coalition investment in judicial training and forensic facilities).

[203] FM 3-24, *supra* note 2, para. 3-19 (The manual emphasizes the necessity of civil considerations, that is, "how the . . . civilian institutions, and attitudes and activities of the civilian leaders, populations, and organizations within an area of operations influence the conduct of military operations.").

[204] *See id.* paras. 3-23–3-51.

[205] *Id.* tbl.3-1.

[206] *See* PRUGH, *supra* note 47, at 15 (arguing that working with a host nation government requires understanding the legal system's cultural and historical foundations); *infra* app. A, item 7.

local criminal justice authorities to ascertain their capabilities, norms, and expectations.[207]

B. Field Manual 3-24 Must Identify and Account for the Operational Limitations on Targeting, Intelligence, and Capture Procedures Arising from Host Nation Legal Primacy

While the manual notes the importance of host nation laws and criminal justice institutions to a counterinsurgency campaign, it must account for the specific operational limitations host nation law may cause. As described above, host nation criminal justice procedural and evidentiary requirements may affect U.S. forces' ability to target and continue to detain insurgents.[208] These operational limitations primarily will arise in targeting, intelligence sharing, and capture operations.

1. Field Manual 3-24 Should Modify Existing Targeting Doctrine for Use in a Counterinsurgency-Specific Environment

The use of a counterinsurgency-tailored targeting methodology will better prepare U.S. forces to lawfully capture insurgents, ensure their continued detention, and promote their criminal prosecution. Field Manual 3-24 calls for the use of the conventional "decide, detect, deliver, and assess" (D3A) targeting methodology without adjusting for the effects of host nation law.[209] While an effective methodology for lethal and nonlethal targeting,[210] it requires modification for use during population-centric counterinsurgency operations in which detentions must appear legitimate and not undermine the host nation government.

As previously discussed, prosecution raises unique problems not within the scope of ordinary targeting concerns and which FM 3-24 does

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[207] Some units in Iraq prepared for the Security Agreement by meeting with local judicial officials "to understand their standards and establish procedures for the presentation of evidence and the expeditious issuance of arrest warrants." TIP OF THE SPEAR, *supra* note 98, at 35; Greig, *supra* note 85, at 31. *See also infra* app. A, item 23.
[208] *See supra* Part II.
[209] FM 3-24, *supra* note 2, para. 5-104 (applying the D3A methodology found in U.S. DEP'T OF ARMY FIELD MANUAL 3-60, THE TARGETING PROCESS (26 Nov. 2010)).
[210] Lieutenant Colonel David N. Propes, *Targeting 101: Emerging Targeting Doctrine*, FIRES, Mar.–Apr. 2009, at 16; KILCULLEN, *supra* note 139, at 4.

not address.[211] The need for sufficient evidence may require tactical patience prior to executing an otherwise ready target, and the use of unique information sharing and tactical procedures to ensure the collection of evidence. Nevertheless, the manual focuses on *sufficient evidence in combat*, rather than *sufficient evidence in court*, noting that, for example, "captured equipment and documents . . . [must be sufficient] to justify using operational resources to apprehend the individuals in question; however, it does not necessarily need to be enough to convict in a court of law."[212]

To appropriately modify and apply D3A methodology, the manual should account for the necessity of satisfying host nation legal requirements. Modified targeting decision criteria might require *sufficient evidence in court*.[213] Preparing for this constraint may require coordination with host nation judicial authorities to ascertain applicable requirements.[214] During the "decide" phase, the intelligence cell and targeting board should not only analyze intelligence to identify insurgents, but analyze whether the intelligence available would satisfy host nation legal requirements to detain the person.[215] During the "detect" phase, the staff must prepare an exploitation plan that ensures post-capture intelligence exploitation of the detainee yields both intelligence and judicially admissible evidence.[216] The commander should be prepared to decide whether to "deliver"; that is, detain the insurgent, based on whether or not sufficient evidence exists to support continued detention, or whether absent such evidence he or she has sufficient authority to detain the person.[217] Finally, during the "assess" phase, units should be cognizant of the value of information acquired

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[211] *See supra* Part II.C.
[212] FM 3-24, *supra* note 2, para. 3-152.
[213] *See infra* app. A, item 16.
[214] FORGED IN THE FIRE, *supra* note 87, at 37–39, 42–43 (recommending that units deploying to Iraq both study Iraqi criminal law and criminal procedure before deploying, and develop relationships with local judges to better understand local requirements and facilitate the obtaining of warrants in the future).
[215] *See* TIP OF THE SPEAR, *supra* note 98, at 71 (noting efforts to modify targeting procedures to better assemble evidence throughout the targeting process for use in prosecuting Afghan detainees); *infra* app. A, item 17.
[216] *See infra* app. A, item 18.
[217] Chesney, *supra* note 16. *See also* TIP OF THE SPEAR, *supra* note 98, at 36 ("The ideal situation would have been to obtain enough evidence for a complete prosecution packet prior to detention." (citations omitted)), 75 (identifying challenges in keeping insurgents detained past 72 hours due to the Afghan criminal procedural requirement for prosecutors to verify a prima facie case against a person within 72 hours of arrest); *infra* app. A, item 19.

during the operation to prosecute targeted insurgents in court or support the detention and prosecution of other insurgents.[218]

2. FM 3-24 Must Identify the Greater Need to Share Intelligence to Enable Host Nation Criminal Justice Proceedings

Since host nation criminal justice institutions may have a role in targeting processes, FM 3-24 should prepare forces for the need to share intelligence with these institutions. As with targeting, FM 3-24 need not apply new intelligence doctrine, but must better apply existing processes to account for the operational limitations of host nation legal primacy.[219] This section proposes modifications to better tailor general intelligence processes to the legal conditions specific to a counterinsurgency.

The counterinsurgency manual must identify the possible need to divulge more information to host nation authorities than might otherwise occur during conventional operations.[220] As the United Staes experienced in Vietnam, Iraq, and Afghanistan, an unwillingness to share information with host nation judicial authorities can lead to the release of known insurgents.[221] Units should be prepared to provide information on suspected insurgents to community leaders and law enforcement authorities to ensure an arrest and prosecution in accordance with host nation domestic law.[222] Additionally, units must guard against unnecessarily complicating the transfer of unclassified information by erroneously classifying the information, or by unnecessarily placing unclassified information on a secure information system.[223]

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[218] *See infra* app. A, item 20.
[219] *See* FM 3-24, *supra* note 2, at foreword to ch. 3 (noting that the intelligence section of FM 3-24 does not supersede existing generally-applicable U.S. intelligence doctrine).
[220] *See infra* app. A, item 12.
[221] BECKETT, *supra* note 23, at 202 (noting South Vietnamese aversion to sharing intelligence information with U.S. forces during the Vietnam War); TIP OF THE SPEAR, *supra* note 98, at 63 (noting the tendency to over-classify information, limiting the ability to prosecute detained insurgents in Iraqi courts); Cahn, *supra* note 14.
[222] *See* TIP OF THE SPEAR, *supra* note 98, at 44 (recommending the use of unclassified "baseball cards" containing basic incriminating information on suspected insurgents to pass to local community and law enforcement leaders), 62 (noting one unit's intelligence officer briefing judges on detainees' activities, enabling the judge to frame his questioning of the detainee without disclosing classified materials to the judge).
[223] *See* Old Blue, *supra* note 78; *infra* app. A, item 11.

Units should implement methods to facilitate information-sharing with host nation criminal justice authorities while satisfying U.S. classification regulations.[224] Units can achieve this through several means. First, a dedicated staff cell can compile intelligence information and items for use as evidence in host nation courts and transfer this information to host nation authorities, either in whole or redacted.[225] Joint or multinational task force commanders may modify classification criteria to broaden the scope of information eligible for transfer to host nation authorities.[226] Establishing procedures with host nation authorities to vet certain judges or judicial personnel can enable in-camera intelligence sharing.[227] Finally, procedures to vet and protect human intelligence sources might encourage them to testify in court, while also ensuring they are sufficiently credible.[228] Nevertheless, forces must anticipate that it may not be feasible or possible to convince some sources to testify.

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[224] *See* TIP OF THE SPEAR, *supra* note 98, at 43 (recommending deploying units have systems to translate intelligence into evidence for use in host nation courts).

[225] *See id.* (recommending the use of Brigade Prosecution Task Forces (PTFs) to synchronize efforts related to the gathering of information against a suspected insurgent and the provision of this information to host nation authorities), 44 (recommending the pre-deployment identification and training of dedicated PTF personnel). *See infra* app. A, item 11.

[226] *See, e.g.*, U.S. DEPT. OF DEF., DIR. 5200.01, DOD INFORMATION SECURITY PROGRAM AND PROTECTION OF SENSITIVE COMPARTMENTED INFORMATION (13 June 2011) (requiring the classification of certain types of information while prohibiting "prevent[ing] or delay[ing] the release of information that does not require protection"). For example, techniques such as signals intelligence and unmanned aerial vehicle video recordings are widely known to exist; their resulting media need not necessarily be classified in light of their possible value during judicial proceedings. *See, e.g.*, Robert Siegel & Tom Bowman, *Navy SEALs Rescue Kidnapping Victims in Somalia*, NAT'L PUB. RADIO, Jan. 25, 2012 (transcript available at http://www.npr.org/2012/01/25/145859961/navy-seals-rescue-kidnapping-victims) (describing U.S.-intercepted cell phone or radio communications providing critical information for a U.S. raid to rescue two hostages in Somalia).

[227] *See, e.g.*, Classified Information Procedures Act, Pub. L. No, 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. app. §§ 1–16 (Suppl. 2006)) (providing a mechanism for the introduction of classified evidence in U.S. Federal Courts); 10 U.S.C. § 949 (2006) (providing a mechanism for the introduction of classified evidence in U.S. military courts-martial). *See infra* app. A, item 13.

[228] *See infra* app. A, items 9, 10. *See also, e.g.*, Bergal, *supra* note 28, at 1078 (discussing the Mexican government's effort to develop witness protection measures to facilitate the prosecution of cartel figures).

3. Field Manual 3-24 Must Identify Unique Tactical Considerations During Capture Operations to Enable the Criminal Prosecution of Captured Insurgents

Field Manual 3-24 notes the general importance of safeguarding the "forensic trace" left by insurgents for use in a criminal justice proceeding.[229] Nevertheless, the manual omits sufficient discussion of how units can best accomplish this during pre-deployment preparations and during counterinsurgency operations. This section recommends general items for inclusion in doctrine, recognizing that these tactical level considerations may require additional detail in a techniques publication.[230]

Units must be prepared to modify capture operation tactical actions to identify, collect, and safeguard information and items for use in criminal justice proceedings.[231] As indicated above, the "assess" phase of targeting may require an assessment of information and items acquired during an operation for use in judicial proceedings against a captured insurgent.[232] Units can prepare for this with pre-deployment evidence collection training tailored to host nation's criminal evidentiary standards.[233] Additionally, standard operating procedures can include the collection of evidence during capture operations,[234] including sworn statements, photographs and sketches, and items and materiel.[235]

C. Military Information Support Operations Related to the Dispensation of Criminal Justice Can Foster the Host Nation Government's Popular Legitimacy

Achieving popular support being essential to success during counterinsurgency campaigns, forces must be prepared to disseminate information about host nation criminal justice processes as a component

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[229] FM 3-24, *supra* note 2, para. 1-133.
[230] *See* DOCTRINE 2015, *supra* note 19, at 7.
[231] *See infra* app. A, item 20.
[232] *See supra* Part IV.B.2.
[233] FORGED IN THE FIRE, *supra* note 87, at 41.
[234] *See id.* at 41, 49 (describing procedures U.S. forces employed in Iraq and Afghanistan).
[235] *Id.* at 49 (describing typical Afghanistan point of capture evidence categories).

of military information support operations.[236] Field Manual 3-24 notes the importance of the information environment in counterinsurgency, both to the insurgent and the counterinsurgent.[237] Military information support operations are critical "to rally the population to the side of the government and encourage positive support for the government in its campaign"—that is, to counter the insurgent's propaganda and undermine the insurgency's cause.[238] Nevertheless, FM 3-24 fails to note how criminal prosecution outcomes must be a component of counterinsurgent military information support operations to shape the people's perception of the government's evenhandedness.[239]

The manual should call for criminal justice-related military information support operations to demonstrate the government's viability, trustworthiness, and accountability. As discussed above, the dispensation of justice is central to long-term societal stability and the popular perception of the government.[240] The insurgency and government each seek to visibly establish law and order, particularly at the local level.[241] Consequently, FM 3-24 should call for public

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[236] *See* U.S. DEPT. OF DEF., DIR. 3600.01, INFORMATION OPERATIONS (IO) paras. 3.1, E2.1.19 (23 May 2011) (defining military information support operations, formerly known as psychological operations, as a core information operations capability).

> Military Information Support Operations (MISO). Planned operations to convey selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign government, organizations, groups, and individuals. The purpose of MISO is to induce or reinforce foreign attitudes and behavior favorable to the originator's objectives.

Id.

[237] FM 3-24, *supra* note 2, para. 5-19 ("The [information operations (IO) logical line of operations (LOO)] may often be the decisive LLO. . . . IO make significant contributions to setting conditions for the success of all other LOOs."). *See also* KILCULLEN, *supra* note 139, at 42 (noting the importance of the counterinsurgent's "alternative narrative" to the insurgent's propaganda).

[238] THOMPSON, *supra* note 132, at 90.

[239] *See* FM 3-24, *supra* note 2, tbl.5-1 (not addressing the need to include host nation criminal justice procedures or outcomes as a component of information operations); STROMSETH ET AL., *supra* note 4, at 243 n.236 (arguing that the publication of judicial decisions is "of crucial importance" and that such actions in East Timor helped improve judicial transparency) (citations omitted).

[240] *See supra* Part III.

[241] *See supra* Part II.C.

education campaigns and the publication of judicial outcomes to build public awareness of governmentally imposed law and order.[242]

D. Measures of Performance and Measures of Effectiveness Should Isolate Causes and Effects Related to the Host Nation Criminal Justice System

Since commanders must be prepared to rely on host nation criminal justice authorities to facilitate the capture and detention of insurgents, measures of effectiveness related to these authorities and institutions should enable them to correctly determine causes of success or failure. These metrics should measure trends to best track performance over time and provide meaningful gauges of performance to the public.[243] Appendix A includes example criminal justice-related measures of performance and effectiveness,[244] including metrics related to informal justice mechanisms and criminal justice system accountability.[245]

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[242] *See* GALULA, *supra* note 133, at 122 (Information operations targeting rural populations are "most effective when [their] substance deals with local events, . . . with which the population is directly concerned . . . ."); STROMSETH ET AL., *supra* note 4, at 243 (calling for the publication of judicial decisions), 329 (calling for media campaigns to increase public understanding of the law); *infra* app. A, item 14.

[243] KILCULLEN, *supra* note 139, at 52.

[244] FM 3-24, *supra* note 2, para. 5-94.

> A *measure of effectiveness* is a criterion used to assess changes in system behavior, capability, or operational environment that is tied to measuring the attainment of an end state, achievement of an objective, or creation of an effect (JP 1-02). MOEs focus on the results or consequences of actions. MOEs answer the question, Are we achieving results that move us towards the desired end state, or are additional or alternative actions required? A *measure of performance* is a criterion to assess friendly actions that is tied to measuring mission accomplishment (JP 1-02). MOPs answer the question, Was the task or action performed as the commander intended?

Id. (emphasis in origina) (citing JP 1-02, *supra* note 11, at 214). *See infra* app. A,item 15.

[245] *See* KILCULLEN, *supra* note 139, at 60 (arguing that, in Afghanistan, the public's preference to turn to Taliban courts to resolve disputes may provide a useful metric of popular confidence in the government; that the public's willingness to turn to insurgents for dispute resolution may indicate a lack of trust in the integrity of government officials; and that conviction rates are useful not as much as an indicator of the rate of prosecution, but of the honesty and professionalism of the security forces).

V. Conclusion

Although the Iraq campaign has ended and the campaign in Afghanistan is winding down, the historical frequency of unconventional conflict implies that the United States must remain prepared to combat insurgencies.[246] Its experience waging counterinsurgency—in the diverse environments of Colombia, the Philippines, Iraq, Afghanistan, and beyond—calls for a cognizance of the ultimate disposition of captured insurgents during future campaigns.[247] Professor Robert Chesney has noted,

> First, and most significantly, the American experience in Iraq teaches that the capacity to employ military detention without criminal charge as a practical matter will decay over time. Regardless of whether such detention is legally and factually warranted in the first instance, it ultimately must be abandoned.
>
> . . . Changing strategic circumstances—including the dictates of counterinsurgency doctrine, the inevitable assertion of sovereign prerogatives by the host nation, the political infeasibility of importing detainees into the United States or Guantánamo, and the political and diplomatic infeasibility of maintaining covert detention facilities abroad—ensure it will be so.[248]

While counterinsurgencies may change and the lessons of one campaign may not be entirely applicable to another,[249] sound doctrine will enable the Army's future leaders to best prepare for—and win—conflicts whose legal detention regime inevitably will constrict over time.[250] As forces learned in Iraq, furthering the government's popular legitimacy requires

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[246] MAX BOOT, THE SAVAGE WARS OF PEACE, at xx, 336–41 (2002); KILCULLEN, *supra* note 139, at ix; BECKETT, *supra* note 23, at vii.

[247] *See* Lieutenant Colonel Gian Gentile, *Eating Soup With a Spoon: Missing from the New COIN Manual's Pages Is the Imperative to Fight*, ARMED FORCES J., Sept. 2009, at 30 (arguing FM 3-24 improperly minimizes the need for kinetic operations during counterinsurgency).

[248] Chesney, *supra* note 61, at 553.

[249] *See* KILCULLEN, *supra* note 139, at 3.

[250] *See id.* at 20 (arguing that doctrine ensure armies can best analyze and adapt to a specific counterinsurgency environment by "inculcat[ing] habits of mind and action that change organizational culture and behavior").

more than simply building courthouses while conducting aggressive conventional operations.[251]

Revising FM 3-24 to account for the operational limitations of host nation legal primacy will ensure forces remain prepared to target and detain insurgents in a way that will best support the ultimate objective—fostering the development of a legitimate government.[252] The manual's focus on a legally permissive environment is understandable given the issues forces faced in Iraq at the time of its development.[253] Yet future campaigns might not feature such a permissive environment. The United States surely will act in its national interests, perhaps demanding broad detention authorities to safeguard U.S. security interests prior to commencing operations supporting a host nation's counterinsurgency.[254] As Professor Chesney argues, regardless of the authorities they may enjoy, U.S. forces will find it necessary to transition away from security detentions without charge.[255] To satisfy U.S. legal and policy obligations, the best course of action is to use host nation legal primacy as a strategic tool, fostering the government's legitimacy by conducting security operations in accordance with the host nation's criminal laws and procedures to the maximum extent feasible.[256] A revised FM 3-24 will provide a relevant tool for U.S. military leaders to remain prepared to do so, wherever and however extensive future U.S. counterinsurgency campaigns may be.

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[251] ROL HANDBOOK, *supra* note 29, at 128–29; Keith Govern, *Rethinking Rule of Law Efforts in Iraq*, U. PITT. JURIST, Feb. 26, 2007, http://jurist..law.pitt.ed/forumy/2007/02/rethinking-rule-of-law-efforts-in-iraq.php (noting that U.S. rule of law initiatives in Iraq before 2005 focused heavily on physical infrastructure). *See also* STROMSETH, ET AL., *supra* note 4, at 14, 311 (arguing that building the rule of law requires inculcating a cultural commitment to the rule of law).

[252] The January 2012 strategic shift away from prolonged counterinsurgencies may erode the U.S. military's present proficiency in counterinsurgency operations. Craig Whitlock & Greg Jaffe, *Obama Announces New, Leaner Military Approach*, WASH. POST, Jan. 5, 2012, http://www.washingtonpost.com/world/national-security/obama-announces-new-military-approach/2012/01/05/gIQAFWcmcP_story.html.

[253] *See* MADDALONI, *supra* note 107, at 38 ("FM 3-24's focus was clearly Iraq and not a comprehensive approach to counterinsurgency. . . . The Iraq problem was the primary concern and received the bulk of resources.").

[254] Chesney, *supra* note 17; *infra* Part II.B.2.

[255] *See* Chesney, *supra* note 61, at 553.

[256] *See supra* Part II.B. *See also* TOVO, *supra* note 75, at 14–15 ("In the long term, the United States must establish a process . . . which yields intelligence for future operations, prevents detainees from rejoining the insurgency, meets basic legal and ethical standards, and maintains U.S. legitimacy.").

Appendix A

Comment Matrix

Item #	Source	Type	Page	Para	Line	Comment	Rationale
1	USA	M	1.22	1-119		Add before last sentence, "The government, and U.S. forces assisting the government, consequently must transparently demonstrate their adherence to the host nation's laws in the arrest, detention, and prosecution of all persons, or risk undermining the population's voluntary acceptance of the government's authority."	Emphasizes the potential for host nation and U.S capture and detention operations without lawful authority to lead to popular discontent with the government.
2	USA	M	1.23	1-131		Add after fifth sentence, "Like host nation forces, partnering U.S. forces must also observe the host nation's laws as required under orders and policies to also contribute to the government's legitimacy."	Notes that host nation criminal justice laws and procedures may operationally limit both host nation and U.S. forces.
3	USA	M	1.24	1-132		Add after fourth sentence, "U.S. forces should be prepared for host nation laws to begin limiting whether and for how long U.S. forces can detain suspected insurgents, particularly as the host nation assumes increasing security responsibility. Additionally, it may be impractical for the United States to detain and prosecute all captured	Emphasizes the possible U.S. legal obligation to observe host nation criminal justice laws while targeting and detaining insurgents.

							insurgents using U.S. domestic means, even if legally possible."	
	4	USA	M	1.24	1-133		Add at end of paragraph, "This "forensic trace" may be essential to obtain host nation judicial authorization when necessary to lawfully detain an insurgent."	Reiterates the potential need to observe host nation criminal justice evidentiary requirements to capture, detain, and prosecute insurgents.
	5	USA	M	2.3 – 2.4	2-14		Add new paragraph, "U.S. forces must be prepared to respect host nation institutions and interests, even when those appear to diverge with U.S. priorities. U.S. forces may demand the continued incarceration of an individual they deem a security threat, while host nation officials may face constituent pressure to release these individuals. Similarly, the host nation government might grant amnesty to an individual or group, appearing to undermine U.S. security efforts. Nevertheless, U.S. forces may have to accept these outcomes to respect host nation sovereignty and legal primacy and not alienate officials who may become unwilling to cooperate with U.S. forces."	Emphasizes host nation legal primacy and how U.S. forces' priorities may diverge from those of the host nation authorities.
	6	USA	M	2.8	2-36		Add new bullet example, "Judicial and other decisions regarding the prosecution of	Identifies how judicial independence may limit U.S. influence in

							insurgents."	host nation criminal proceedings.
	7	USA	M	3.3 – 3.4	3-19		Add after second sentence, "Assessing civil considerations includes assessing the relationship between socio-cultural factors and the government's capacity to perform its functions."	Encourages the consideration of whether government institutions will intentionally not perform their duties due to social and cultural pressures.
	8	USA	M	3.11	3-64		Add at end of paragraph, "Host nation societal institutions may feature a combination of all three types of authority. For example, a tribal leader may have authority to adjudicate civil and criminal disputes, reflecting both rational-legal authority grounded in the host nation's laws, and traditional authority reflected in the host nation's culture and societal structure."	Encourages leaders to consider different layers of authority in the host nation's society, and provides an example to illustrate the way these layers can intersect.
	9	USA	M	3.26	3-133		Add after last sentence, "Since HUMINT sources may provide information necessary to effect the criminal prosecution of an insurgent in host nation courts, units must have systems to sufficiently protect HUMINT sources that they are willing to testify."	Emphasizes need to protect sources to encourage their testimony in court against insurgents.
	10	USA	M	3.26	3-134		Add after last sentence, "Additionally, individual sources and their information must be	Ensures forces provide credible information to host nation courts for use

							sufficiently credible for use in host nation criminal justice proceedings against captured insurgents."	in criminal proceedings against insurgents.
	11	USA	MM	3.33	3-176		Add after last sentence, "Units must have systems to transfer intelligence information and items to host nation authorities in accordance with U.S. information security regulations to allow host nation criminal prosecution of targeted insurgents. Additionally, units must guard against unnecessarily classifying unclassified information or placing it on classified information systems which may complicate sharing the information with host nation authorities."	Established information sharing procedures and not over-classifying information will best facilitate timely support to host nation criminal justice authorities.
	12	USA	M	3.34	3-181		Add after second sentence, "Additionally, it may be necessary to share information with host nation criminal justice authorities to obtain the legal authorization to capture or continue to detain a suspected insurgent."	Emphasizes the need to share information to obtain the legal authorization to detain insurgents from host nation criminal justice authorities.
	13	USA	M	3.34 – 3.35	3-183		Replace last sentence with, "For example, procedures to vet host nation criminal justice personnel and allow for in-camera viewing of sensitive information may	Provides an example method to share information with host nation criminal justice authorities while

							enable the prosecution of insurgents while safeguarding intelligence information from compromise."	mitigating the risk of compromise.
	14	USA	M	5.8 – 5.9	Table 5-1		Add new bullet, "Criminal justice-related military information support operations may include general information to educate the public as to their rights under the law, and the publication of specific court case outcomes to demonstrate how the government is using its authority under the law to protect the population."	Encourages the inclusion of criminal justice outcomes and education as a component of operations to shape the information environment.
	15	USA	M	5.27	Table 5-7		Add new bullet and sub-bullets: • Effectiveness of Host Nation Criminal Justice Institutions. These indicators may over time enable commanders to evaluate the specific causes of success or failure in the prosecution of captured insurgents and the host nation's rule of law conditions generally. Proportion of targeted insurgents ultimately convicted due to U.S. restraints preventing the transfer of intelligence information or items for use in criminal justice proceedings. ▪ Degree of government coordination with	Recommends metrics for evaluating host nation criminal justice institutions and U.S. interaction with those institutions.

							informal justice mechanisms. ▪ Quantity of host nation actions to hold criminal justice officials accountable for failures or improper dealings. ▪ Conviction rate of host nation criminal courts. ▪ Percentage of criminal cases reaching various stages of completion (e.g. formal charges filed, indictment, or trial).	
	16	USA	M	5.29	5-105		Add new paragraph, "Effective intelligence that provides a sufficient basis for the commander to decide to target and detain an enemy combatant during conventional operations may be insufficient to detain an insurgent during a counterinsurgency. U.S. forces must anticipate host nation criminal justice laws limiting targeting processes by requiring forces to obtain host nation judicial authorization to detain insurgents. Commanders must be prepared to modify targeting methodology to amass evidence sufficient to satisfy host nation legal requirements."	Identifies the need to prepare for host nation criminal justice laws operationally limiting targeting processes.
	17	USA	M	5.29 – 5.30	5-106		Add after second sentence, "Due to host nation legal requirements, a target may not be	Notes the possibility of delaying target execution until sufficient

							sufficiently developed until the staff has amassed sufficient information that would be admissible as evidence in host nation legal proceedings to authorize detention."	evidence is available to support the target's criminal prosecution.
	18	USA	M	5.30	5-108		Add after last sentence, "The exploitation plan may also have to account for host nation criminal evidentiary requirements to ensure information acquired during exploitation is admissible in host nation judicial proceedings."	Notes the impact host nation criminal evidence laws may have on the exploitation of detainees.
	19	USA	M	5.30 – 5.31	5-110		Add at end of paragraph, "The commander may have to consider whether sufficient evidence exists to satisfy host nation legal requirements to arrest the person. If the commander lacks sufficient evidence to secure the person's continued detention, the commander may have to consider whether the person warrants what may be only a temporary detention."	Notes the possibility of exercising patience when executing a target in order to facilitate the target's criminal prosecution.
	20	USA	M	5.31	5-112		Add after second sentence, "Additionally, detainee statements, captured documents, and captured equipment may yield information usable as evidence during the host nation's criminal prosecution of the captured insurgent.	Reiterates the need to collect and safeguard all information and materials for use against the detainee in host nation criminal courts. Encourages efficient and effective collection of

							Units may have to specially train and task organize capture forces to ensure the identification, collection, and safeguarding of information and items at the point of capture for use in host nation criminal justice proceedings."	information and materiel for use against an insurgent in host nation criminal justice proceedings.
	21	USA	M	54.15	D-4		Add after last sentence, "U.S. forces also must remember that host nation authorities may disagree whether or how to hold insurgents criminally liable, but it may be legally necessary to respect the host nation's decisions on such matters."	Emphasizes host nation legal primacy and how U.S. forces' priorities may diverge from those of the host nation.
	22	USA	M	54.4	D-15		Add new paragraph, "Due to the possible primacy of host nation criminal laws, U.S. forces must be prepared to respect host nation decisions regarding whether and how to hold insurgents criminally responsible. U.S. forces must be prepared to respect and aid in the implementation of host nation programs granting amnesty to insurgents. Amnesty programs may appear inconsistent with U.S. objectives, but may further the host nation's societal reconciliation and political stability. Similarly, U.S. forces may find it	Emphasizes the possibility U.S. forces will have to respect host nation decisions and customs regarding whether and by which means to hold insurgents criminally accountable, including amnesty grants, informal mechanisms, and other means to promote post-conflict reconciliation and stability.

							necessary to respect and work with informal justice mechanisms, such as tribal courts, and other alternatives to formal criminal justice prosecution, such as truth and reconciliation commissions. Such mechanisms may be both legally and culturally necessary, and may best ensure long-term political stability following the departure of U.S. forces.”)	
	23	USA	M	54.4	D-16		Add new paragraph, “U.S. forces should attempt to ascertain the structure and capacity of the host nation’s criminal justice institutions prior to deploying to be able to work with these institutions. A pre-deployment study of the host nation’s criminal laws, and the use of host nation legal experts, may enable commanders to conduct targeting and detention operations in accordance with host nation laws and in support of campaign objectives.”	Encourages deploying units to prepare for conducting targeting operations within host nation criminal justice laws by developing an understanding of the host nation legal regime before deploying.

Appendix B

Combined Arms Center Standardized Comment Matrix

The comment matrix is a table to be used as a template for submitting comments on draft publications and draft program directives. Except as noted below, an entry is required in each of the columns.[1]

Column 1 – ITEM
Numeric order of comments. Accomplish when all comments from all sources are entered and sorted. To number the matrix rows, highlight this column only and then select the numbering ICON on the formatting tool bar.

Column 2 - #
Used to track comments by source. Manually enter numbers from the first comment to the last comment. These numbers will stay with the comment and will not change when consolidated with other comments.

Column 3 – SOURCE

J1 - J-1	JFCOM - US Joint Forces Command
J2 - J-2	NORTHCOM - US Northern Command
J3 - J-3	PACOM - US Pacific Command
J4 - J-4	SOCOM - US Special Operations Command
J5 - J-5	SOUTHCOM - US Southern Command
J6 - J-6	STRATCOM - US Strategic Command
J7 - J-7	TRANSCOM - US Transportation Command
J8 - J-8	DTRA – Defense Threat Reduction Agency

[1] This appendix includes relevant excerpts of the Combined Arms Center Standardized Comment Matrix Primer, available in enclosure 3 to the FM 3-24 revision Program Directive. PROGRAM DIRECTIVE, supra note 19.

USA – US Army
USN – US Navy
USAF – US Air Force
USMC – US Marine Corps
USCG – US Coast Guard
CENTCOM - US Central Command
EUCOM - US European Command
DIA – Defense Intelligence Agency
DLA – Defense Logistics Agency
MDO – Missile Defense Organization
NSA – National Security Agency
DISA – Defense Information Systems Agency
NGA – National Geospatial-Intelligence Agency
LC – Joint Staff Office of Legal Counsel

Column 4 – TYPE
C – Critical (Contentious issue that will cause non-concurrence with publication)
M – Major (Incorrect material that may cause non-concurrence with publication)
S – Substantive (Factually incorrect material)
A – Administrative (grammar, punctuation, style, etc.)

Column 5 – PAGE
Page numbers expressed in decimal form using the following convention:
(Page I-2 = 1.02, Page IV-56 = 4.56, etc.) This format enables proper sorting of consolidated comments.

0 – General Comments
0.xx - Preface, TOC, Executive Summary (Page i = 0.01, Page XI = 0.11)
1.xx – Chapter I
2.xx – Chapter II
3.xx – Chapter III
x.xx – Chapter x, etc.
51.xx – Appendix A
52.xx – Appendix B
52.01.xx - Annex A to Appendix B
53.xx – Appendix C, etc.
99.xx – Glossary

NOTE: For Program Directives enter the page number as a whole number, (1, 2, 3, etc.) PDs are normally sorted by paragraph and line number and the page number helps to find the paragraph.

Column 6 – PARA
Paragraph number that pertains to the comment expressed. (i.e. 4a, 6g, etc.)

NOTE: An entry in this column should be used when commenting on draft program directives.

Column 7 – LINE
Line number on the designated page that pertains to the comment, expressed in decimal form (i.e., line 1=1, line 4-5 = 4.5, line 45-67 = 45.67, etc.) For figures where there is no line number, use "F" with the figure number expressed in decimal form (i.e. figure II-2 as line number F2.02). For appendices, use the "F" and the appendix letter with the figure number (i.e appendix D, figure 13 as line number FD.13; appendix C, annex A, figure 7 as line number FCA.07)

Column 8 – COMMENT
Provide comments using line-in-line-out format according to JSM 5711.01A, Joint Staff Correspondence Preparation (Examples are provided in CJCSI 5120.02, Joint Doctrine Development System. To facilitate adjudication of comments, copy and insert complete sentences into the matrix. This makes it unnecessary to refer back to the publication to understand the rationale for the change. Do not use Tools, Track Changes mode to edit the comments in the matrix. Include deleted material in the comment in the strike through mode. Add material in the comment with underlining. Do not combine separate comments into one long comment in the matrix, (i.e. 5 comments rolled up into one).

Column 9 - RATIONALE
Provide concise, objective explanation of the rationale for the comment.

Column 10 - DECISION
A - Accept
R - Reject (Rationale required for rejection.)
M - Accept with modification (Rationale required for modification.)

NOTE: This column is for the LA and JSDS use only. No rationale required for accepted items. Rationale for rejection is placed in the

rationale comment box and highlighted for clarity. For modifications, the complete modified language will be placed (and annotated) as the bottom entry for that item in the "Comments" column and the rationale for the modification placed in the rationale comment box and highlighted for clarity.

THE CASE OF THE MURDERING WIVES: *REID V. COVERT* AND THE COMPLICATED QUESTION OF CIVILIANS AND COURTS-MARTIAL

CAPTAIN BRITTANY WARREN*

I. Introduction

In 1957, in a case known colloquially around chambers as "The Case of the Murdering Wives," the Supreme Court reversed itself. In *Reid v. Covert* (*Reid II*), it withdrew its barely one-year-old decision upholding the courts-martial of two military spouses, and instead held that for capital offenses in times of peace, the provisions of the Uniform Code of Military Justice (UCMJ) granting court-martial jurisdiction over persons accompanying the force could not be constitutionally applied to civilian dependents of overseas armed forces servicemembers.[1] For the first and only time, after already publishing its opinion, the Supreme Court reached a different result in identical litigation, following published opinions, and without a controlling change in the composition of the Court.[2]

Reid II is traditionally known for two things. To military lawyers, the case stands for the proposition that dependents may not be subject to trial by court-martial, because the Fifth Amendment's loophole for military jurisdiction ("except in cases arising in the land and naval forces") cannot override the rights to a jury trial embodied in the Fifth and Sixth Amendments.[3] To international law aficionados, *Reid II* is the

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* Captain, U.S. Army. J.D., 2012, The George Washington University Law School; B.S., 2004, Duke University. The opinions and conclusions represented in this article are solely those of the author and do not necessarily represent the views of the Department of Defense, the Department of the Army, the Judge Advocate General's Corps, or any governmental agency. I am profoundly grateful to Professor Gregory Maggs, Dean Lisa Schenck, and Colonel Denise Lind for helpful guidance in writing this article, as well as the staff of the *Military Law Review* for outstanding editing. No one is an island, least of all a lawyer, so my deepest appreciation goes to my husband, Lloyd, and to my children, Sophia and Sam, for their unwavering love and support. Material from the papers of Justice John Marshall Harlan II is quoted with the permission of the Seeley G. Mudd Manuscript Library, 20th Century Public Policy Papers. Material from the papers of Justice Hugo Black is quoted with the permission of Hugo L. Black, Jr.

[1] Reid v. Covert, 354 U.S. 1 (1957).

[2] Frederick Bernays Wiener, *Persuading the Court to Reverse Itself*, 14 LITIG. 6, 10 (1989). Wiener's excellent account of the case and its rehearing is referenced liberally in this article.

[3] *See infra* notes 308–309 and accompanying text.

landmark case wherein the Supreme Court ruled that the Constitution supersedes international treaties ratified by the United States.[4] From a vantage point nearly sixty years later, neither of those propositions strikes a modern reader as extreme. At the time, however, *Reid II* was incredibly controversial—before the Court,[5] among the Justices themselves,[6] and in the public's reaction to the Court's seemingly abrupt about-face.[7]

The story of *Reid II* is the story of the "murdering wives" at the center of the controversy, Clarice B. Covert and Dorothy Krueger Smith. They are in many ways unsympathetic figures. There is no doubt that these women, in exceptionally violent ways, murdered their husbands, but what is missing from that narrative is the fact that they were also two mothers who were let down by the very military health system from which they sought help.[8] The story of *Reid II* is also the story of Frederick Bernays Weiner, the retired Army lawyer who argued the case at all levels of the appeal, and his legal strategy that illustrated his vociferous belief that the civilian and military justice system must remain separate from one another.[9] Finally, the story of *Reid II* is the story of the Court itself: Justice Hugo Black, who distrusted what he saw as the encroachment of military power into civilian justice; Justice John Marshall Harlan II, who cast his vote one way, and then another; and Justice Felix Frankfurter, who initially refused to decide, and then finally did.[10]

This case, and its two decisions, sits at the intersection between Constitutional law, military law, and international law, and impacts fundamental questions about the scope of the Constitution, executive and legislative powers, and U.S. sovereignty. Can civilians be tried in military courts? After *Reid II*, many people would say that the answer is no, but like the women themselves, that answer is ultimately far more complicated.

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[4] *See infra* notes 304–307 and accompanying text.
[5] *See infra* Parts IV.–VI.
[6] *See infra* Part VII.A.
[7] *See infra* Part VIII.A.
[8] *See infra* Part III.
[9] *See infra* Part IV.A.
[10] *See infra* Parts IV.–VI.

II. Civilians Under Military Justice

For all its complexities, the issue of civilians in military courts was not a novel one at the time of *Reid II*. Neither was it new to the Founders when they were confronted with this issue back in 1787. Whether civilians are ever amenable to court-martial jurisdiction is a question almost as old as the concept of the court-martial itself—thus, understanding the contours of the problem requires a brief detour into legal and constitutional history.

A. The British Practice Before the Revolution

Tracing the origins of military jurisdiction over civilians begins with an analysis of British practice following the passing of the first Mutiny Act of 1689, which both legalized a standing army and brought it under the control of Parliament.[11] As tempting as it might be to think of the rise of the civilian contractor as a uniquely twenty-first century phenomenon, civilians were a common feature on the battlefield even then. At that time, three classes of civilians typically accompanied a British army during times of war: retainers, which included servants, volunteers, and women and children; sutlers, who sold provisions like tobacco and coffee to armies in the field;[12] and civil officers and civilian employees of the military.[13] Each of these groups was subjected to court-martial at various times,[14] though the power of the British Crown to court-martial these various groups tended to be construed narrowly, both under the provisions of the Mutiny Act and the later Articles of War.[15]

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[11] Courts-martial had existed before 1689, but they had traditionally been conducted by clergymen and members of the Doctors' Commons. It was not until the passage of the first Mutiny Act in 1689 that the peacetime courts-martial of soldiers was allowed. FREDERICK WIENER, CIVILIANS UNDER MILITARY JUSTICE 6, 165–66 (1967).

[12] DAVID MICHAEL DELO, PEDDLERS AND POST TRADERS: THE ARMY SUTLER ON THE FRONTIER 75 (1998).

[13] WIENER, *supra* note 11, at 7.

[14] Records from the 1691 Irish campaign, for example, indicate that a sutler was condemned for buying stolen goods, and a woman was condemned for inciting soldiers to desert. *Id.* at 12 n.37.

[15] The first Articles of War, for example, only granted court-martial jurisdiction for a narrow class of offenses; Articles of War 16 required that military personnel accused of crimes punishable "by the known laws of the land" be tried before a civilian magistrate. *Id.* at 13–14.

In the 1740s, a new "camp follower" provision was added to the Articles of War that read as follows:

> All Suttlers and Retainers to a Camp, and all Persons whatsoever Serving with Our Armys *in the Field*, tho' no inlisted Soldiers, are to be Subject to Orders, according to the Rules & Discipline of War.[16]

The term of art "in the Field" referred to a time of hostilities when military operations were underway.[17] As nineteenth century scholars pointed out, this language was intended to encompass those persons "of a private condition" who supported the troops in the field, and who would not otherwise be subject to civilian law:

> Being so blended together in their local situation, in their concerns, and their interests with the soldiery; it would seem almost impracticable to govern them by any other than a law common to them both . . . the temporary sojourners, and voluntary members of the camp, are thrown, from absolute need, under the influence of the prevailing law (for it can hardly be insisted that they could be safely left to themselves); whence alone results an uniform and consistent rule, and reciprocal protection.[18]

Wives of British soldiers, accompanying their husbands in the American Colonies during periods of hostility, were regularly tried and punished under the camp-follower provision.[19] Records indicate that these women were viewed as part of the Army and their conduct regulated accordingly.[20]

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[16] *Id.* at 22.

[17] Supplemental Brief on Rehearing on Behalf of Appellee and Respondent at 33, Reid v. Covert, 354 U.S. 1 (1957) (No. 701).

[18] E. SAMUEL, HISTORICAL ACCOUNT OF THE BRITISH ARMY, AND OF THE LAW MILITARY 691–92 (1816), *quoted in* Reply Brief for Appellant and Petitioner on Rehearing at 44–45, Reid v. Covert, 354 U.S. 1 (1957) (No. 701).

[19] *Id.* at 29–31.

[20] *Id.* The government devotes a significant portion of the brief discussing cases listed in the pamphlet, *Women Camp Followers of the American Revolution* by Walter Hart Blumenthal. *Id.* One case described was that of Elizabeth Clarke, who was tried in 1778 for plundering a farmer's house in violation of the articles of war, given 100 lashes and "drummed out of the Army." *Id.* at 31.

B. Civilians Under the U.S. Military

At the start of the Revolution, the Continental Congress enacted the Articles of War, copied from the British articles, to govern the newly formed Revolutionary Army.[21] Among the enacted articles was a camp-follower provision identical to the British version.[22] The court-martial of civilians was, at least in some form, a power given to the U.S. military from its inception. As scholars have noted, the records show that there were a number of military trials of civilians during the Revolutionary War, including at least two wives.[23]

The power to court-martial civilians was exercised only sporadically in the eighteenth and nineteenth centuries, tending to occur in "functional areas of war and in locales where there were no operating civilian courts." [24] The practice appeared to be relatively rare prior to the Civil War; only seven such trials were identified between 1800 and 1860.[25] More commonly, misbehaving camp followers were simply expelled from the camp.[26] Though the trial of civilians—primarily employees—spiked during the Civil War, the practice fell off again after that war's conclusion.[27] The reason for this relative rarity appears to have been the

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[21] For two excellent accounts of this period, see Frederick Bernays Wiener, *American Military Law in Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 4–10 (1989), and JUDGE ADVOCATE GENERAL'S OFFICE, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 7–25 (1975), http://www.loc.gov/rr/frd/Military_Law/pdf/lawyer.pdf.

[22] Robert A. Girard, *The Constitution and Court-Martial of Civilians Accompanying the Force: A Preliminary Analysis*, 13 STAN. L. REV. 461, 482 (1961).

[23] *Id.*

[24] John F. O'Connor, *Contractors and Courts-Martial*, 77 TENN. L. REV. 751, 764–65 (2010).

[25] *Id.*; *see also* Girard, *supra* note 22, at 489–90. As Professor Girard points out, however, this may have been a function of the record-keeping; most of the trials took place in remote locales and there may be additional records which did not survive. *Id.*

[26] O'Connor, *supra* note 24, at 765. A survey taken by the Judge Advocate General's office noted:

> Individuals, however, of the class termed "retainers to the camp," or officers' servants and the like, as well as camp followers generally, have rarely been subjected to trial in our service. For breaches of discipline committed by them, the punishment has generally been expulsion from the limits of the camp and dismissal from employment.

Id. at 765 n.7.

[27] *Id.*

narrow construction given to the phrase "in the field"—the leading commentators on military law agreed that this limited the application of court-martial jurisdiction to acts taking place both in times of war and in active theaters of battle.[28]

In 1916, Congress revised the Articles of War to extend court-martial jurisdiction to civilians accompanying the armed forces in times of peace.[29] The revised Article 2(d) provided for the courts-martial of the following classes of civilians:

> All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles.[30]

Despite the broad assertion of jurisdiction in the 1916 Articles, adopted unchanged in the 1920 revisions,[31] there were no courts-martial of civilians except during declared wars,[32] though a number of lower court decisions began construing the "in the field" requirement broadly.

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[28] *Id.* As Attorney General Williams wrote in 1872:

> To determine when an army is "in the field" is to decide the question raised. These words imply military operations with a view to an enemy. Hostilities with Indians seem to be as much within their meaning as any other kind of warfare. . . . When an army is engaged in offensive or defensive operations, I think it safe to say that it is an army "in the field."

Id.

[29] *Id.* at 767.

[30] *Id.* at 767 n.80.

[31] The need to revise the Articles became apparent almost immediately after their enactment. In 1917, a riot in Houston involving the all-African-American 24th Infantry killed eighteen people. Sixty-three members of the unit were tried and thirteen were hung one day after the convening authority approved the sentence, all without appellate review of any kind. Wiener, *supra* note 21, at 17–23.

[32] O'Connor, *supra* note 24, at 767–68; *see also* OVERSEAS JURISDICTION ADVISORY COMM., REPORT TO THE SECRETARY OF DEFENSE, THE ATTORNEY GENERAL, AND THE CONGRESS OF THE UNITED STATES 13 (1997), *available at* www.fas.org/irp/doddir/dod/ojac.pdf.

For example, one district court decision from 1919 determined that "in the field" necessarily included mobilization and training camps in the United States.[33] Similar cases arising during World War II were likewise upheld.[34]

The court-martial as it then existed was a "rude tribunal composed of men of the sword,"[35] focused primarily on the "swift and severe suppression of license and insubordination."[36] Its procedures reflected this. None of the court members—the trial counsel, judge, or defense counsel—had to be lawyers or have much familiarity with legal procedure;[37] the convening authority had an enormous amount of control over the proceedings; and there were no procedures in place for judicial review of sentences.[38] The system had drawn a great deal of criticism and calls from legal scholars for reform throughout the early years of the twentieth century,[39] but those criticisms gained little real traction until World War II. World War II was the largest military mobilization in history; more than 16 million men and women volunteered or were drafted into active military service.[40] There were 1.5 *million* courts-martial during World War II.[41] This assertion of military justice over individuals who were still, as Wiener called them, "civilians at heart,"

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[33] O'Connor, *supra* note 24, at 767–68.
[34] Girard, *supra* note 22, at 497 n.177.
[35] 3 MACAULAY, HISTORY OF ENGLAND 35 (1874 ed.), *quoted in* Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 320 n.7 (1964).
[36] Bishop, *supra* note 35, at 319–20.
[37] And it showed. Professor Morgan, in his 1919 article on the court-martial system, described the following case:

> In C. M. No. 119330 accused, on trial for desertion, was evidently of very low mental calibre. Counsel, a chaplain, instead of relying upon the defence of mental incapacity, complacently informed the court that he did not believe in sending men before "nut boards," i.e., boards of psychiatry, for such mentally irresponsible soldiers "should either be emasculated or sent to Leavenworth."

Edmund M. Morgan, *The Existing Court-Martial System and the Ansel Army Articles*, 29 YALE L.J. 52, 60 n.25 (1919).
[38] *Id.* at 59–67.
[39] *See, e.g.*, *id.*
[40] Keith M. Harrison, *Be All You Can Be (Without the Protection of the Constitution)*, 8 HARV. BLACKLETTER J. 221, 227 (1991).
[41] *Id.*

resulted in a predictable push for reform of the system following the war.[42]

> Substantial numbers of servicemen who had never been in trouble with the law in civilian life served time in military jails, and came home from the war with military records showing court-martial convictions or less than honorable discharges. Senators and Congressmen were flooded with complaints.[43]

In response to this criticism, Congress initiated a series of reforms of the Articles of War. The result, 1948's Elston Act, substantially reformed the Articles as they applied to the Army, but Congress then decided that all of the Armed Forces—recently consolidated into a single Department of Defense—should be governed by a single code.[44] This code, the UCMJ, was enacted in 1950, and made sweeping reforms to the military justice system as a whole.[45] In addition to modernizing the practice of military law,[46] the UCMJ also expanded the reach of military

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[42] Wiener's article on the subject posits that the push for reform could also be traced to the resentment felt on account of the Army's officer selection system. Commanders have a great deal of power in the military justice system, and unlike the Navy, which commissioned officers primarily on the basis of education, the Army required all officers to attend basic training and then Officer Candidate School. As a result of this system of selection, there was an inversion of societal roles—"the butler rather than the country club member frequently wound up as the commander who issued the orders." Wiener, *supra* note 21, at 25–27.

[43] THE ARMY LAWYER, *supra* note 21, at 194.

[44] Wiener, *supra* note 21, at 29–33.

[45] For an excellent overview of the enactment of the UCMJ written by the head of the committee tasked with its drafting, see Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 173 (1952–1953). For decided criticism of the enactment, and of Professor Morgan's draftsmanship in particular, see Wiener, *supra* note 21, at 32–36. Wiener, as discussed later in this article, was an outspoken critic of what he saw as the "civilianization" of the military justice system. *See supra* notes 199–202 and accompanying text. It is interesting to note that Professor Morgan favored a broad military jurisdiction over civilians accompanying the force overseas, reflected in Article 2(11), and a correspondingly broad reform of the military justice system, while Wiener favored an incredibly narrow application of military jurisdiction to civilians, and was highly critical of the reforms embodied in the UCMJ. *Cf.* THE ARMY LAWYER, *supra* note 21, at 199.

[46] These reforms included, among other things, a right to counsel and privilege against self incrimination; requiring a thorough and impartial investigation before referral to a general court-martial; the addition of prohibitions on unlawful command influence; and the right of an accused to be represented by a lawyer defense counsel. THE ARMY LAWYER, *supra* note 21, at 204–08.

law over civilians with three separate jurisdictional grants.[47] Article 2(10) of the UCMJ applied to all civilians accompanying the force in the field in times of war; Article 2(11) applied to all government employees serving with the force overseas and all civilian dependents accompanying their sponsors overseas in peace or war; and Article 3(a) applied to former servicemembers for crimes committed while on active service.[48]

As scholars have noted, this expansion of military jurisdiction gave rise to little debate either in committee or on the floor, as its "constitutionality was apparently assumed or not considered."[49]

C. The Problem of Dependents

After World War II, the United States began maintaining large military bases throughout the world.[50] Civilian employees accompanied the servicemembers to provide "needed skills"—common enough in light of historical practice—and lower federal courts regularly upheld the military's jurisdiction over them.[51] For the first time, however, servicemembers brought with them thousands of dependents—wives, husbands, and children.[52] These dependents—numbering almost half a million by the 1950s—were under the jurisdiction of the U.S. military per UCMJ Article 2(11),[53] as well as pursuant to agreements with host countries which exempted them from trial in foreign courts.[54] This jurisdiction does not appear to have been seriously questioned, and was certainly liberally exercised by the military. Between 1950 and 1956, the Army tried 2,454 civilians by court-martial.[55] In 1952, the Supreme Court upheld the conviction of a dependent, on facts which will become familiar, by military "occupation court" in post-WWII Germany.[56] Yvette Madsen murdered her Air Force officer husband and was tried by

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[47] O'Connor, *supra* note 24, at 772.
[48] *Id.*
[49] Girard, *supra* note 22, at 494–95.
[50] *Id.* at 464.
[51] *Id.* at 497 n.177.
[52] *Id.* at 497.
[53] *Id.*
[54] WIENER, *supra* note 11, at 238.
[55] Of these, 181 were general courts-martial, the process reserved for felony-level offenses. Girard, *supra* note 22, at 504 n.204; Supplemental Brief for Appellant and Petitioner on Rehearing at 30–31, Reid v. Covert, 354 U.S. 1 (1957) (No. 701).
[56] Madsen v. Kinsella, 343 U.S. 341 (1952).

an occupation court under the German Criminal Code.[57] She argued that the trial was improper because the jurisdiction of courts-martial over civilian dependents accompanying the force was exclusive.[58] The Court rejected this argument, finding that the jurisdiction of courts-martial and occupation courts was concurrent, but the Court did not question the legitimacy of applying military law to a servicemember's wife.[59]

This was the state of the law when military servicemember spouses Clarice Covert and Dorothy Krueger Smith joined their husbands in England and Japan.

III. Factual Background

A. The Cast of Characters

1. "I killed Eddie last night."

On March 11, 1953, at 2 p.m., Clarice Barksdale Covert arrived for her appointment with Captain Ivan Heisler, a psychiatrist assigned to the 5th Hospital Group in Upper Heyford, England.[60] The thirty-two year old mother of two appeared disheveled and obviously distressed.[61] Captain Heisler asked her how she was doing.[62] "I killed Eddie last night," she said.[63] She hit him with an ax while he was asleep in bed, about 11 p.m. the night before, and was sure he was dead.[64] Captain Heisler questioned her briefly, then left the room and found the base surgeon, Major Holloway.[65] The two of them went with a military policeman to the Covert home, where they found the mutilated body of Clarice's husband in their bedroom underneath some blankets.[66] The

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[57] *Id.* at 344–46.
[58] *Id.*
[59] At least one scholar argued in reviewing the case that this was because both parties had conceded court-martial jurisdiction, and any approval of such jurisdiction did "not bear the earmarks of a considered judgment." Girard, *supra* note 22, at 449.
[60] This and all background information is taken primarily from the Transcript of Record at 13, Reid v. Covert, 351 U.S. 487 (1956) (No. 701). The author has supplemented with newspaper articles and archival information.
[61] *Id.* at 22.
[62] *Id.* at 13.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*

Office of Special Investigations later found the hand ax that was allegedly used to bludgeon him to death, and a pair of bloody pajamas, unwashed and stuffed into the dirty-clothes hamper.[67] Clarice was convicted of murder under Article 118 of the UCMJ and sentenced to life in prison at Federal Reformatory for Women at Alderson, West Virginia.[68]

2. "It is too bad I did not get him in the heart."

Sometime during the early morning of October 4, 1952, Shigeko Tani, a housekeeper employed by Colonel and Mrs. Aubrey Dewitt Smith at their home in the Washington Heights housing project in Tokyo, Japan, heard Colonel Smith calling for her from the bedroom he shared with his wife Dorothy.[69] She found him between their two beds with a bloody wound in his side and an eight-inch Okinawa knife on his bed.[70] Colonel Smith said that Dorothy had stabbed him.[71] Tani went to call a neighbor, Colonel Joseph Hardin, for help; when she returned, she found Dorothy and Colonel Smith grappling over a six-inch kitchen knife.[72] Tani took the knife and returned it to the kitchen.[73] Colonel Hardin arrived and found Colonel Smith lying in a pool of blood.[74] Dorothy lay on her bed, trying and failing to light a cigarette.[75] She seemed highly intoxicated, her speech incoherent and irrational.[76] She eventually passed out, but before he left to accompanying Colonel Smith to the hospital, Colonel Hardin overheard her say, "It is too bad I did not get him in the heart."[77] Colonel Smith remained conscious all the way to the hospital, but the knife had severed veins in his kidney and punctured his inferior vena cava—he died on the operating table at 6 a.m. on October 4.[78] Dorothy was convicted of his murder under Article 118 of the

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[67] *Id.* at 14.
[68] *Id.* at 2.
[69] As above, this and all background information is taken primarily from the Kinsella v. Krueger. Transcript of Record at 24–27, 351 U.S. 470 (1956) (No. 713). The author has supplemented with newspaper articles and other archival information.
[70] *Id.* at 24.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 25.
[78] *Id.* at 27.

UCMJ, and like Clarice, was sentenced to life in prison at the Federal Reformatory for Women at Alderson, West Virginia.[79]

3. Clarice and Eddie

Clarice B. Covert was born December 21, 1920, in Augusta, Georgia, to May Cossi and Robert Laurent Barksdale.[80] The facts reveal a deeply unhappy woman who suffered through a lonely and isolated childhood. Her father, who went by Laurent, came from Augusta society—his own father, Robert Toombs, was a lawyer and former state legislator.[81] Laurent appears to have been something of a black sheep. Following the death of Robert Toombs in 1905, Laurent spent years at a time working various jobs throughout Central and South America, including as an accountant and movie theater operator.[82] He married May in 1919; her 1919 passport application indicates that she intended to travel abroad in order to join him in Tampico, Mexico, where he worked as an accountant for Island Oil and Transport Company.[83] Their time abroad was short. Shortly before Clarice's birth in 1920,[84] a pregnant May returned to Augusta to stay with Laurent's mother, Annie, and sister, also a Clarice. Whether it was due to the travel or some other complication of pregnancy, Clarice was born prematurely; she said later that her parents thought she was going to die and had even bought a

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[79] *Id.*

[80] *Id.* at 18.

[81] Robert Toombs Barksdale was an extremely well-respected member of the Augusta community. He was a member of the Kappa Alpha fraternity at the University of Georgia, graduating in 1869. He studied law under Judge E.H. Pottle in Warrenton and was admitted to the bar in 1880, served two terms in the Georgia State legislature, and then left the practice of law to work as a civil engineer in Augusta. HISTORY OF WARREN COUNTY, GEORGIA 1793–1974, at 245–46 (1976).

[82] Robert Lawrence Barksdale, U.S. Passport Application, 1919, *U.S. Passport Applications, 1795–1925* (National Archives Microform Publication M1372). One intriguing bit of information—Laurent registered for the draft in 1917 while working as a stenographer for Shannon Copper Company in Greenlee, Arizona—the registrar wrote "lost one eye" in the report accompanying the draft registration. Robert Laurent Barksdale, Draft Registration, June 5, 1917, World War I Draft Registration Cards, 1917–1918 (Roll: 1522447).

[83] May Cossi Barksdale, U.S. Passport Application, Aug. 28, 1919, *U.S. Passport Applications, 1795–1925* (National Archives Microform Publication, Roll: 0883).

[84] Records indicate May and Laurent crossed the border from Mexico into Laredo, Texas, on September 10, 1920. National Archives and Records Administration (NARA), Washington, D.C.; Nonstatistical Manifests and Statistical Index Cards of Aliens Arriving at Laredo, Texas, May 1903–November 1929; Record Group: *85*, Records of the Immigration and Naturalization Service; Microfilm Serial: A3379; Microfilm Roll: 6.

coffin in preparation for her death.[85] After that inauspicious beginning, Clarice's childhood continued to be unhappy, marked by loneliness and fear. She never felt wanted or loved by either of her parents.[86] May and Laurent fought regularly over money; Laurent was a gambler who had difficulty holding down a steady job.[87] A coldly indifferent man who never showed his daughter any affection, and who once attempted to throw her out of a window because she was not a boy,[88] Laurent finally abandoned the family in 1932. Clarice moved with her mother to Key West, Florida, to live with her grandmother, Lottie Lee Simmons.[89] Tall and awkward, Clarice spoke later of the shame she felt of her home: it was a "dirty, broken down three-bedroom house, next to a chicken yard and an alley."[90] Her shame led to isolation; she rarely brought friends home from school, feeling acutely "different" from her peers.[91] She traveled regularly to visit her aunt and namesake in Augusta.[92] This close relationship would later prove significant at her trial for her husband's murder.

Clarice left home after high school in order to train to become a nurse.[93] She abandoned this plan for reasons unclear—when she met Edward Covert on a blind date in January 1943, she was working as a secretary.[94] At twenty-two, she was ripe for romance—"Eddie" was a lieutenant in the Army stationed out of Camp Blanding. They married two months later, and in May of that year he was shipped to fight in World War II while Clarice settled down to work in the War Department at Camp Blanding.[95] The marriage ran into problems almost from the beginning—like her father, Eddie was a gambler. At one point, Clarice was forced to send him over six hundred dollars in order to "keep him

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[85] Transcript of Record, *supra* note 69.
[86] *Id.* at 18.
[87] *Id.*
[88] May Barksdale testified by stipulation at her daughter's court-martial that Laurent "delighted in tormenting" Clarice with his "cruel" behavior. *Id.* at 21.
[89] Lottie Lee Simmons, Sheet No. 45 (handwritten), *Tenth Census of the State of Florida, 1935*; (Microfilm ser. S 5, 30 reels); Record Group 001021; State Library and Archives of Florida, Tallahassee, Florida.
[90] Transcript of Record, *supra* note 69, at 18.
[91] *Id.*
[92] *Niece of Augustan Weds Army Officer at Camp Blanding*, AUGUSTA CHRON., Apr. 6, 1943, at A5.
[93] Transcript of Record, *supra* note 69, at 18.
[94] *See Niece of Augustan Weds Army Officer at Camp Blanding*, AUGUSTA CHRON., Apr. 6, 1943, at A5; *see also* Transcript of Record at 63, Reid v. Covert, 351 U.S. 487 (1956) (No. 701).
[95] Transcript of Record, *supra* note 69, at 18.

out of the stockade."[96] Their financial difficulties continued upon his return in November, 1945, when he quickly blew through the $5,000 that she'd been able to save while he was off fighting in Italy and Africa.[97] Unable to find suitable employment, Eddie reentered service as a master sergeant in the Air Force in 1946.[98] He moved with Clarice to Williams Air Force Base in Arizona where he established a pattern of behavior that would quickly become familiar—gambling debts, bad checks, and poor decisions that would leave his growing family (two sons were born, one each in 1947 and 1949) in desperate financial straits.[99] Significantly, Clarice attempted to leave him in 1948; she took her young son Bruce and her mother to Phoenix, where she filed for divorce.[100] The separation did not last. "I couldn't stay away from him. I was a nervous wreck . . . I couldn't eat; I couldn't sleep; I couldn't even hardly hold my job down."[101]

In 1951, Eddie was assigned to the Seventh Air Division in Upper Heyford, England.[102] Clarice had hoped for a fresh start, but Eddie quickly fell back into his old habits—he got into trouble over gambling debts, he drank too much, and he ignored the children.[103] His irresponsibility also caused him problems at work. Though he initially appeared efficient, his superiors quickly realized that his judgment was poor and childish, leading to his frequent reassignment.[104] Given her husband's behavior, Clarice assumed the bulk of the responsibility for her family because she was devoted to her children.[105] She began having difficulty sleeping and sought help from the military base psychologists for a variety of stressors in her life: Eddie's irresponsibility and their financial problems, the health of her children,[106] and "morbid thoughts" about her own childhood. The most significant stressor, based on the prosecution's case against her, came in December 1952, when Clarice

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[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.* at 19.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at 21.
[105] At the time of the murder, she had two—Bruce and Barry. The day after she killed her husband, she was informed that she was again pregnant. Her son Craig was born on December 7, 1953, and was taken from her on March 8, 1954. *Id.*
[106] Specifically, she was worried that her younger son, Barry, three at the time of the murder, had not yet begun to speak. *Id.* at 19.

received word that her Aunt Clarice had died and left her $40,000.[107] She wanted to use the money to pay off their debts and take care of their sons' education, but Eddie intended to spend the money on a new car and a trip around Europe.[108] On top of this disagreement with her husband, she also began fixating on the idea that Laurent Barksdale was going to reappear and attempt to claim a share of the inheritance.[109]

In hindsight, her failed attempts to obtain help from the military base are a tragic illustration of her increasingly desperate mental state. She felt like she was dying and unable to go on, but was turned away from the infirmary because she did not have a fever and thus there was no emergency.[110] She got an appointment with a doctor on base who decided she needed sedation and prescribed her Phenobarbital; she was later given sleeping pills from the hospital when an examination revealed no "organic difficulties."[111] On the night of March 7, 1953, she took four of the sleeping pills in what may have been a suicide attempt. The next night she went back to the dispensary in desperation and was given another appointment with the base doctor.[112] She told him at her appointment on March 9 that she wanted to be hospitalized, that there was something wrong with her and if he did not take her, she was going to explode.[113] Instead of hospitalization, the doctor gave her more pills.[114] On March 10, Clarice took a hand ax and bludgeoned her sleeping husband to death with it, then took all of the pills that she had left and climbed into bed with his corpse.[115] The next afternoon, she dropped her two boys off at the base nursery and went to her appointment with Captain Heisler, where she confessed to the murder.[116]

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[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.* at 20.
[114] *Id.*
[115] *Id.*
[116] *Id.*

4. Dorothy and Smittie

Dorothy Jane Krueger was born on January 24, 1913, while her parents were vacationing near Sacketts Harbor, New York.[117] Unlike Clarice, whose connection to the military came entirely through her husband, Dorothy was raised an Army brat. Her father was General Walter Krueger, a Prussian immigrant who would go on to become the first man to rise from the rank of Private to General in the U.S. Army.[118] She, along with her older brothers James and Walter, Jr., would accompany her father during his meteoric rise;[119] at the time of her birth, Captain Krueger was assigned to the Department of Languages at Fort Leavenworth as an instructor in Spanish and German.[120] Dorothy's mother was Grace Aileen Norvell; her parents had met in the Philippines

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[117] KEVIN C. HOLZIMMER, GENERAL WALTER KRUEGER: UNSUNG HERO OF THE PACIFIC 20 (2007).

[118] *Id.* at 10.

[119] He would be featured on the cover of Time Magazine in 1945 as the commander of the Sixth Army in the Pacific Theater during World War II. *See World Battlefronts: Old Soldier*, TIME, Jan. 29, 1945. General Krueger's life story is incredibly inspiring—he immigrated to the United States at the age of eight after his father's death and quit high school in order to enlist in the Army during the Spanish-American War. *Id.* He received a battlefield commission to second lieutenant in 1901 during the Philippine-American War, where he befriended fellow second lieutenant and future general Douglas MacArthur; received the Distinguished Service Medal for his service in France during World War I; taught at both the Army War College and the Naval War College during the inter-war years; and was one of the unsung heroes of the Pacific Theater, particularly the battle for Luzon, during World War II. He retired as a four-star general in 1946. *Walter Krueger, Led Sixth Army: General in Pacific, Noted as Strategist, Is Dead at 86*, L.A. TIMES, Aug. 21, 1967, at 31.

An incredibly successful officer at all levels of command, a feat all the more impressive for his lack of formal schooling, General Krueger had a reputation as one of the strictest disciplinarians in the Army, but his primary concern was for the men under his command. *See World Battlefronts: Old Soldier*, TIME, Jan. 29, 1945. In one instance, a soldier overheard General MacArthur tell General Krueger that he wanted to send the Rangers in a frontal assault on the heavily defended island of Corregidor, near Luzon. General Krueger refused: "If I want to kill those guys, I'll just line them up and shoot them." The soldiers were instead dropped in behind enemy lines. http://blog.oregonlive.com/oregonatwar/2011/10/two_wwii_vets_frank_smith_84_a.html.

General Krueger was considered by many to have had a greater impact on the training of the Army in the run up to World War II than anyone else, as he either commanded or trained against every division that went into action in either theater. General Krueger apparently only failed at one thing during his military career—in 1927 he attempted to transfer into the Army Air Corp, but his flight instructor, Lieutenant Claire Lee Chennault, flunked him. HOLZIMMER, *supra* note 117.

[120] General Krueger spoke four languages fluently—English, German, Spanish, and French. HOLZIMMER, *supra* note 117, at 18.

while Walter was assigned to the 30th Infantry on Marinduque.[121] Again contrasting with Clarice's unhappy upbringing, Dorothy's parents were by all accounts madly in love, very active socially,[122] and close to their children. Both of Dorothy's brothers followed their father into the service; James graduated from West Point in 1926 and Walter, Jr. in 1931.[123] It is probably no surprise at all that she herself chose to marry one of their classmates, Aubrey Dewitt Smith, class of 1930.

Handsome, blue-eyed Aubrey Dewitt Smith, known as "Smittie," grew up in Boonesville, Missouri, the son of a pipe fitter.[124] Charming and light-hearted, Smittie had a nonchalant attitude that made him popular with his fellow officers, but did not endear him to the administration at West Point—he graduated as a "clean sleeve," with no academic designation or cadet rank.[125] This apparent lack of military deportment may have been a source of friction with his future father-in-law, known in military circles as a strict disciplinarian. Both Dorothy's father and brother both tried to convince her not to marry Smittie,[126] but Dorothy, a difficult child and a headstrong woman, did not listen. They were married in 1934 at Jefferson Barracks, in Missouri, where her father was the base commander. The ceremony was lavish; more than 1,000 people attended, including the entire post command.[127] For a time, the marriage went smoothly—they welcomed a son, Aubrey Jr. (Tooey), in 1936, and a daughter, Sharon, in 1938.[128] Smittie was, despite his somewhat unpromising entry into service, considered an officer "with brilliant prospects for advancement."[129] A veteran of World War II and Korea, he was decorated twice for valor.[130] He was assigned to Far East Command in 1950 and became the chief of plans, operations, and

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[121] Grace was in the Phillipines visiting her sister, the wife of an Army chaplain. *Id.* at 15–16.
[122] Their social activities were frequently mentioned in local papers' "Notes of Society." While stationed at Fort Meade, Maryland, then-Colonel and Mrs. Krueger were noted to have dined with Representative John D. Dingell. *Notes of Society: Official and Resident*, WASH. POST, July 4, 1935, at 8.
[123] *See World Battlefronts: Old Soldier*, TIME, Jan. 29, 1945.
[124] Aubrey D. Smith, U.S. Military Academy Yearbook 1930.
[125] *Id.*
[126] Walter Jr.'s daughter, Carol Holben, told the author over the phone that her father thought Smittie was a "real sonofabitch." Telephonic Interview with Carol Holben, in Woodbridge, Va. (Oct. 2, 2011) [hereinafter Holben Interview].
[127] *Army Mum on Death of S.A. Colonel*, S.A. SUN. LT., Oct. 5, 1952, at 1.
[128] Holben Interview, *supra* note 126.
[129] *Hold Wife of Colonel Slain in Tokyo Home*, CHI. TRIB., Oct. 5, 1952.
[130] *Id.*

training under General Mark W. Clark in 1952.[131] He seemed primed for unlimited advancement, but under the surface, trouble was brewing.

According to Walter, Jr., Smittie was a gambler[132] and womanizer with a hard-partying lifestyle that rubbed off on his wife.[133] Dorothy drank heavily and abused prescription drugs—her medical records revealed that she began seeking treatment in 1946 for alcoholism, addiction to sedatives, suicidal tendencies, and a "violent and uncontrollable temper."[134] She was admitted to a mental hospital for three months in 1951, and attempted suicide while traveling to Japan by boat later that year.[135] The situation did not improve in Tokyo. At the end of April 1952, she was admitted to the base hospital after getting drunk and smashing her fist through a window.[136] She stayed in the hospital under treatment for just over two weeks; there was some discussion that she should be evacuated back to the United States as her "emotional instability" might prove "embarrassing," but these discussions were scuttled when Smittie pled for one more chance to help her get her problems under control.[137] She was released from the hospital on May 15, and until September of that year, Smittie appeared true to his word. Tani, the housekeeper, described the Smiths' home-life as "normal" and "happy."[138] Tragically, that sense of normalcy did not last.[139]

In September, Dorothy began drinking again, and kept pills around the house that her husband and children began hiding from her.[140] Smittie was overheard making sarcastic remarks about his wife's pill habit.[141] Friends noticed that she was nervous and prone to bouts of crying; she eventually sought medical help for "menopause," which

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[131] *Id.*
[132] A letter from General Krueger to Dorothy references Smittie's gambling obliquely. "I'm not going to bail him out anymore." Ms. Holben told the author about this letter but has not been able to obtain a copy. Holben Interview, *supra* note 126.
[133] *Id.*
[134] Transcript of Record at 28–29, Kinsella v. Kruege, 351 U.S. 470 (1956) No. 713).
[135] *Kin of Krueger Breaks Down at Murder Hearing*, CHI. TRIB., Jan. 5, 1953, at 8.
[136] Transcript of Record, *supra* note 69, at 28.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] In mid-September, a seventeen-year-old friend of their son's overheard Smittie make a sarcastic remark about her pills. She responded, "Some day I'm going to kill you." This exchange formed part of the prosecution's evidence of premeditation. *Id.* at 24.

resulted in her being prescribed a cocktail of medications—seconal, sodium amytal, Phenobarbital, hormones, and Dexedrine.[142] On September 29, 1952, when her condition had not improved and her doctor suggested hospitalization, she begged him not to hospitalize her because she could not leave her family.[143] Instead, he prescribed her paraldehyde, a liquid sedative.[144] There are differing accounts as to what happened next. According to the prosecution, Dorothy was told that she was being sent back to the United States alone, that she had been a detriment to her husband's career and cost him a promotion.[145] According to the defense, the entire family was being transferred back to the United States in order for Smittie to be promoted to Brigadier General.[146] In any event, the news of her impending move appeared to unbalance Dorothy further—on the morning of October 3, while so intoxicated she had trouble walking unassisted, she told a friend she wanted to kill herself but lacked the means of doing so.[147] That evening, she waited until Smittie had fallen asleep and then stabbed him in the side with an eight-inch Okinawa knife she had instructed Tani to get for her several days earlier.[148] The following morning, she was arrested for her husband's murder and kept under guard at the hospital.[149]

B. The Trials

Clarice was tried by general court-martial as a person "accompanying the force" under Article 2(11). The court-martial, convened by the commander of 7th Air Command, took place at Royal Air Force Station Brize Norton and lasted May 25–29, 1953.[150] Notably, her lawyers attempted at the outset to attack the jurisdiction of the court-martial through a motion to dismiss, arguing that the trial of a private citizen for a capital crime in a military court violated the Fifth and Sixth Amendments to the Constitution.[151] Her lawyers focused the entirety of

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[142] *Id.* at 30.
[143] *Id.*
[144] *Id.*
[145] *Defense to Open with Refutation of Motive Claim*, THE NEWS (Mt. Pleasant, Iowa), Jan. 7, 1953, at 4.
[146] *Id.*
[147] *Neighbor Takes Stand to Help Colonel's Wife*, CHI. TRIB., Jan. 8, 1953, at A5.
[148] Transcript of Record, *supra* note 69, at 25.
[149] *Id.*
[150] *Id.* at 1–2.
[151] *Id.* at 29. Her lawyers, in a creative but ultimately futile motion, attempted to have other dependent wives of servicemembers appointed as members of the panel. *Id.* at 30.

their case at trial on the question of her mental responsibility.[152] They argued that she had been legally insane at the time of the murder, pointing to her behavior both before and after the murder: her increasing anxiety, her repeated requests for hospitalization, and climbing into bed with her husband's corpse.[153] A sanity board, composed of three psychiatrists, had judged her to be sane under the standards laid out in the applicable Air Force regulation;[154] these three psychiatrists also testified during the prosecution's rebuttal of her insanity defense. She was found guilty of premeditated murder and sentenced to life in prison at Alderson Federal Reformatory for Women in West Virginia.[155] Following the trial, two of the three prosecution psychiatrists submitted affidavits to the reviewing authority stating that they vehemently disagreed with the findings of the general court-martial. Both believed that she was temporarily insane at the time of the murder, but had found her to be sane based on the overly strict requirements of the Air Force manual.[156]

Clarice appealed her case to the Air Force Board of Military Review, which affirmed in a two-to-one decision. In a lengthy opinion, Colonels Gordon O. Berg and H.L. Allensworth noted that the jurisdiction of the court-martial was not challenged on appeal, but they raised and dealt with the issue *sua sponte*; in their view, the Visiting Forces Agreement between the United Kingdom and the United States gave the U.S. jurisdiction over dependent wives accompanying their husbands.[157] The issue of whether Clarice could properly be tried by court-martial was thus disposed of easily—the bulk of the opinion was spent examining the validity of the court's findings "as to the sanity of the accused."[158] Colonel Pisciotta wrote a blistering dissent, arguing forcefully that

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The judge's decision to deny that motion prompted the attack on jurisdiction on Sixth Amendment grounds. *Id.*

[152] *Id.*

[153] *Id.*

[154] The applicable standard came from Air Force Manual 160-42, *Psychiatry in Military Law*, which advanced a "policeman at the side" test for whether a defendant was acting under an irresistible impulse. The prosecution psychiatrists testified that if a policeman had been present in the room at the time of the murder, Clarice would not have killed her husband. *Id.* at 24–28. The defense psychiatrists, of course, disagreed. *Id.* at 28.

[155] *Id.* at 12.

[156] *Id.* at 42–43.

[157] *Id.* at 32.

[158] *Id.* at 33.

Clarice was not legally sane at the time of the murder;[159] his opinion did not touch on the constitutionality—or lack thereof—of Article 2(11).

Clarice then petitioned the Court of Military Appeals (CMA) for review.[160] This time, she won—CMA reversed and remanded for a new trial. As in the lower court, the issue of Article 2(11)'s constitutionality was not raised. Judge Brosman spent the entirety of his opinion for the court determining that Clarice was "distinctly prejudiced" by a "palpable misconstruction" of the Air Force manual's policeman-at-the-elbow test.[161] She was released from Alderson Prison on July 14, 1955, and taken in the custody of the Air Force to the District of Columbia (D.C.) jail, where Curtis Reid, the named defendant in her federal habeas case, was superintendent.[162] The Secretary of the Air Force, Harold E. Talbott, determined that Clarice should be tried again.[163] Clarice underwent a psychiatric evaluation at St. Elizabeth's Hospital beginning July 25, and was returned to the D.C. jail having been found sane on September 23, 1955.[164] Her retrial, this time not treated as capital, was tentatively scheduled for November 28, 1955.[165]

Like Clarice, Dorothy was also tried by court-martial under Article 2(11) as a person accompanying the force. Before her trial, her lawyers, retired Brigadier General Adam Richmond and Lieutenant Colonel Howard S. Levie, attacked the jurisdiction of the court-martial, arguing that Dorothy should be tried in Japan.[166] Their argument was certainly creative, but it did not involve attacking the constitutionality of the tribunal itself—they argued that the Army had lost jurisdiction under Article 2(11) as soon as Colonel Smith had died.[167] At that point, she was no longer "accompanying" her husband and, in effect, merged with

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[159] *Id.* at 91. Colonel Pisciotta wrote: "It is a sad commentary on military justice for us to hold that Mrs. Covert, a civilian, is to be adjudged legally sane and responsible for her acts because of an erroneous, unsound, abandoned rule of military psychiatry, while if tried by a civilian court (except for her status as accompanying her husband overseas") would have been adjudged by civilian standards as insane and legally not responsible." *Id.*

[160] United States v. Covert, 19 C.M.R. 174 (C.M.A. 1955).

[161] *Id.* at 183–84.

[162] Transcript of Record, *supra* note 69, at 2.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Woman Loses Plea for Trial by Japan*, N.Y. TIMES, Jan. 5, 1953, at 4.

[167] United States v. Smith, 17 C.M.R. 314 (1954); *Woman Loses Plea for Trial by Japan*, *supra* note 166, at 4.

the Japanese population.[168] The court's legal officer,[169] Colonel John Pitzer, rejected this and the case went to trial.[170] The only real issue was whether Dorothy was mentally responsible at the time she stabbed her husband; Richmond focused his strategy on the argument that drug use had transformed Dorothy into a "wrecked personality" unable to distinguish right from wrong.[171] The prosecution, led by Lieutenant Colonel Willie H. H. Jones, put on a series of witnesses, including the housekeeper, Tani,[172] that painted a far colder picture.[173] The trial, owing in part to novelty of trying the daughter of a WWII hero, was something of a circus. At several points, it had to be recessed briefly as Dorothy broke down in hysterics.[174] The nine-member panel, including one officer of the Women's Army Corps,[175] returned a verdict of guilty in just over an hour—the president of the board, Major General Joseph

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[168] *Smith*, 17 C.M.R. at 319.

[169] At the time, courts-martial were not presided over by judges; the Army's field judiciary program would not be established until 1958. THE ARMY LAWYER, *supra* note 21, at 230–31.

[170] *Woman Loses Plea for Trial By Japan*, *supra* note 166, at 4.

[171] *Sentence General's Daughter to Life for Slaying Husband*, MILWAUKIE SENTINEL, Jan. 10, 1953, at 1.

[172] Family lore claimed Colonel Smith had gotten Tani pregnant while Dorothy was in the hospital for psychiatric treatment in early May, 1952. Holben Interview, *supra* note 126; *see also Triangle Rumor in Slaying of Colonel Denied*, WASH. POST, Oct. 6, 1952, at 3. If true, this might explain Dorothy's cryptic remarks the night of the murder—"What were you doing while I was at the hospital?" and "No one will ever know the reason why." Transcript of Record, *supra* note 134, at 25–26.

[173] During his one hour and forty-five minute summation, Lieutenant Colonel Jones said:

> Please examine these facts in sequence—these things Mrs. Smith was quoted as saying about her husband: "He told me I was a detriment to his career. He told me he was being shanghaied (transferred) from his job as a result of my behavior. He told me he was sending me back to the United States. Before that happens, I'll kill him."

Tokyo Trial of Colonel's Wife Near End, WASH. POST, Jan. 10, 1953, at 4.

[174] Dorothy began screaming when the prosecution introduced the morgue photo. *Kin of Krueger Breaks Down at Murder Hearing: General's Daughter on Trial for Knifing*, CHI. TRIB., Jan. 5, 1953, at 8. She also lost her composure during the prosecution's summation, when Lieutenant Colonel Jones said, "I defy you to produce one expression of regret from this woman for the crime she has committed." *Woman Guilty of Murder in Tokyo Slaying*, LEWISTON DAILY SUN, Jan. 10, 1953, at 7.

[175] The panel had originally included two women. One, Major Olive E. Mills, was excused when she told the court that she was opposed to the death penalty for a woman. The other, Lieutenant Colonel Lillian Harris, remained on the panel to render the verdict. *Krueger Daughter Tried*, N.Y. TIMES, Jan. 5, 1953, at 4.

Sullivan, wept as he read it to the court.[176] Dorothy, however, remained calm and took the verdict "like a soldier's daughter and a soldier's widow."[177]

Dorothy's case was appealed to the Army Board of Review, where a unanimous panel affirmed her sentence. The panel undertook a lengthy discussion of the jurisdictional argument raised below, that court-martial jurisdiction terminated upon the death of Colonel Smith, and held that while her status as a dependent may have terminated, "there is nothing . . . which remotely suggests . . . that her dual status as a person 'accompanying the U.S. armed forces in Japan' likewise ceases to exist."[178] Dorothy appealed her case to CMA,[179] where Judge Brosman, writing for a divided court,[180] affirmed the judgment of the court below—jurisdiction was discussed and upheld in a brief part of the forty-six page opinion.[181]

IV. Before the Court—*Reid I*

A. A Crack in the Wall

In 1954, when both women were still at Alderson Prison, noted Washington, D.C., attorney Frederick Bernays Wiener became involved with their appeals. He represented Clarice at all levels of her appeal in both military and federal court, and together with Brigadier General Richmond, was hired by General Krueger to represent Dorothy following

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[176] *Slain Colonel's Wife Gets Life*, CHI. TRIB., Jan. 10, 1953, at 1. Dorothy was saved from capital punishment by the fact that the verdict was not unanimous. Instead, she received life. The article does not mention why the president of the board wept. *Mrs. Smith Guilty, Sentenced to Life*, N.Y. TIMES, Jan. 10, 1953, at 2.

[177] *Colonel's Wife Takes Sentence Calmly*, CHI. TRIB., Jan. 11, 1953, at 11.

[178] Transcript of Record, *supra* note 69, at 38.

[179] Before appealing to Court of Military Appeals, Dorothy petitioned the Board of Review for a new trial on the basis of newly discovered evidence—one of the members of the sanity board had made a statement to the effect that he felt constrained by the narrow standards in Technical Manual 8-240, *Psychiatry in Military Law*, and that if he'd been asked to give his opinion in civilian practice he would have found Dorothy to be insane at the time of the murder. *Id.* at 48. The Board of Review denied the petition for failure to exercise due diligence in bringing the information to the court. *Id.* at 46.

[180] Chief Judge Quinn filed a dissent arguing that the lower courts had applied the legal definition of insanity too strictly; he did not address the jurisdictional issue. United States v. Smith, 17 C.M.R. 314, 345 (1954).

[181] *Id.* at 319–20.

the success of Clarice's federal habeas petition.[182] The run up to the Supreme Court will be thoroughly discussed below; first, however, it is important to get the measure of the men whose advocacy would prove so instrumental to the decision.

Brigadier General Adam Richmond was, like General Krueger, a career soldier. A native of Council Bluffs, Iowa,[183] he received both his undergraduate and law degrees from the University of Wisconsin.[184] He entered the Army as a second lieutenant infantryman in World War I; in the interwar years he was stationed in Washington, D.C., the Panama Canal Zone, and finally, San Antonio, where he served as the Judge Advocate General of the Third Army[185] under General Krueger.[186] He spent World War II in North Africa and the Mediterranean before a car accident in Naples in 1945 ended his Army career.[187] A devoted husband and father to three girls, Brigadier General Richmond moved to Bethesda, Maryland, and became very active in the community.[188] This loyalty and civic-mindedness would serve him well when General Krueger, his former boss at Third Army, requested that he go to Japan to defend Dorothy in her murder trial.[189] General Krueger could not go himself—Grace, his wife, was seriously ill.[190] As Dorothy had a contingent of defense lawyers headed up by Lieutenant Colonel Levie,[191] referred to in some reports as Chief Defense Counsel,[192] it is likely that Richmond served in large part as General Krueger's eyes and ears on the

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[182] Wiener, *supra* note 2, at 10.

[183] *Two Former D.C. Area Men Raised to Brigadier General*, WASH. POST, Mar. 26, 1943, at 4.

[184] Richmond received a B.A. in 1912 and an LL.B. in 1914. THE UNIVERSITY OF WISCONSIN ALUMNI DIRECTORY, 1849–1919, at 278 (1921).

[185] *Gen. Richmond—Community Leader*, WASH. POST, Dec. 3, 1959, at B2.

[186] Lieutenant Colonel Richmond even administered the oath of office to newly-pinned Brigadier General Dwight D. Eisenhower in General Krueger's office in San Antonio. *Eisenhower Moves Higher*, SAN ANTONIO LIGHT, Oct. 3, 1941, at 2.

[187] *Gen. Richmond—Community Leader*, WASH. POST, Dec. 3, 1959, at B2.

[188] *Id.*; *Two Former D.C. Area Men Raised to Brigadier General*, WASH. POST, Mar. 26, 1943, at 4.

[189] Wiener, *supra* note 2, at 10.

[190] *Eve of Trial: Widow of Colonel Calm*, SAN ANTONIO SUNDAY LIGHT, Jan. 4, 1953, at 1.

[191] Transcript of Record, *supra* note 69, at 49. Dorothy was defended by appointed counsel, Lieutenant Colonel Levie and Major Dudley Rae, *id.*, in addition to Brigadier General Richmond. Lieutenant Colonel Levie was a former New York City attorney who had served on the United Nations Armistice Staff in Korea. *Gen. Krueger's Daughter to Go on Trial Monday*, LIMA NEWS, Jan. 4, 1953, Page 4-A.

[192] *Defense to Open with Refutation of Motive Claim*, THE NEWS (Mt. Pleasant, La.), Jan, 7, 1953, at 4.

ground. After Dorothy's conviction, Brigadier General Richmond vowed to take the case "all the way to the President" if necessary.[193]

If Richmond was General Krueger's eyes and ears, Frederick Bernays Wiener was his muscle. Wiener, known as Fritz to his friends, was a towering figure in military law. Following his graduation magna cum laude from Harvard Law School in 1930,[194] he took a commission in the Army as a Judge Advocate General officer and served on active duty until 1945.[195] At the time he became involved with Clarice and Dorothy, he was a Colonel in the Army Reserves whose private practice specialized in military justice and constitutional law.[196] He was perhaps the best person to represent the women on their road to the Court; not only was he a respected scholar in military law[197] and a former student of Justice Frankfurter's,[198] but he also believed deeply that military justice "must remain a separate system because of a vast gulf between the objectives of a military and a civilian society."[199] During the Congressional hearings on the proposed enactment of a UCMJ, Wiener railed against the civilianization of military justice:

> It will be a grave error if by negligence we permit the military law to becone [sic] emasculated by allowing lawyers to inject into it the principles derived from their

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[193] *Mrs. Smith Balks Life Term*, N.Y. TIMES, Jan. 11, 1953, at 4.

[194] He graduated from Brown in 1927—while there, he was successful academically, but his fellow students found something in his conduct objectionable. During his junior year, several students were suspended for "tying [him] in his nightshirt to a Rehobeth cemetery tombstone." The students explained that they objected to "his conduct and bearing on campus." *Suspend 3 Brown Students*, OLEAN EVENING TIMES, Dec. 16, 1925, at 1.

[195] *Tribute to Colonel Frederick Bernays Wiener, 1906–1996*, 46 M.J. 204 (1996).

[196] *Id.*

[197] He taught at The George Washington University Law School from 1951 to 1956. *Id.*

[198] Justice Frankfurter thought so much of his former student, in fact, that he asked Wiener to write an opinion analyzing the Court's holding in *Ex parte Quirin*. 317 U.S. 1 (1942). *Quirin* upheld the trial by military tribunal and subsequent execution of eight German saboteurs captured in the United States in 1942. *Id.* Wiener, with characteristic bluntness, found serious deficiencies with the Court's work. Louis Fisher, *Military Tribunals: A Sorry History*, 33 PRESIDENTIAL STUD. Q. 484, 492–94 (Sept. 2003). The two men had a great deal in common; Justice Frankfurter, as a major in the Judge Advocate General Reserve Corps during World War I, helped revise the Articles of War. THE ARMY LAWYER, *supra* note 21, at 117–18.

[199] *Tribute to Colonel Frederick Bernays Wiener, 1906–1996*, 46 M.J. 204 (1996).

> practice in the civil courts, which belong to a totally different system of jurisprudence.[200]

In his brief on behalf of Clarice before the Court, Wiener would quote Colonel William Winthrop, a man often described as "The Blackstone of Military Law."[201] Winthrop had famously stated that "a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in a time of peace."[202] The use of this quote was not mere rhetorical flourish, as it is quite likely that Wiener subscribed to a similar view. In Wiener, Clarice and Dorothy had a true believer.

He was a fiercely intelligent man, physically imposing,[203] whose customary argument style was "cogent and persuasive," and "liberally sprinkled with supporting data and historical documentation."[204] An experienced advocate who had by this point written a treatise on appellate practice,[205] Wiener was also incredibly familiar with the Court and how best to conduct the business of advocacy in front of it. That included closely following the decision for a case whose subject matter bore more than a passing familiarity to his own—1955's *Toth v. Quarles*.

Robert W. Toth, along with an accomplice, Thomas L. Kinder, brutally murdered a Korean man while serving as a security guard in Korea.[206] Kinder was tried and convicted by court-martial, but by the time the crime was discovered, Toth had taken an honorable discharge and was back in the United States.[207] Toth was apprehended and returned to Korea, where he was tried by court-martial under Article 3(a), which granted military jurisdiction over former servicemembers

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[200] WILLIAM T. GENEROUS, JR., SWORDS AND SCALES 48 (1973). This would not be the last time that Wiener testified before Congress on matters of military justice—he appeared at every major congressional committee considering military justice between 1948 and 1966. *Tribute to Colonel Frederick Bernays Wiener, 1906–1996*, 46 M.J. 204 (1996).

[201] Most recently, indeed, that appellation became the title of a biography by Joshua Kastenburg. JOSHUA E. KASTENBURG, THE BLACKSTONE OF MILITARY LAW: COLONEL WILLIAM WINTHROP (2009).

[202] Brief for the Appellee at 40, Reid v. Covert, 351 U.S. 487 (1956) (No. 701).

[203] GENEROUS, *supra* note 200, at 49.

[204] *Id.*

[205] FREDERICK BERNAYS WIENER, EFFECTIVE APPELLATE ADVOCACY (1950).

[206] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 11 (1955).

[207] *Id.*

who had committed crimes before their discharge.[208] After his conviction, Toth's sister filed a habeas petition on his behalf.[209] The D.C. Circuit upheld the constitutionality of Article 3(a) on the grounds that a person is generally subject to trial in the jurisdiction where the offense was committed, but when Toth's sister appealed to the Supreme Court, it reversed 6-3.[210] Justice Black wrote the opinion for the Court, holding that Congress's Article I, section 8 power to "Make Rules for the Government and Regulation of the land and naval Forces" only allowed for court-martial jurisdiction over individuals who were actually *in* the land and naval forces at the time of trial.[211] Civilians were not in the land and naval forces, thus, Article 3(a)'s grant of jurisdiction over former servicemembers was invalid. Importantly for Clarice and Dorothy, the Court signaled a somewhat jaundiced view of military justice. Black wrote:

> [C]onceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.[212]

As indicated by the short amount written in the military courts of appeals' opinions on the issue of whether it was constitutional to subject a civilian wife to court-martial, the jurisdictional question pre-*Toth* was "more or less taken for granted."[213] After the Court's decision in *Toth*, and its erosion of some of the statutory bases for exercising military jurisdiction over civilians, Wiener shifted his emphasis to an attack on the constitutionality of Article 2(11).

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[208] GENEROUS, *supra* note 200, at 175.
[209] *Id.*
[210] *Id.*
[211] United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).
[212] *Id.* at 17. This view would be echoed in Justice Black's opinion for the Court in *Reid II*.
[213] GENEROUS, *supra* note 200, at 177.

B. The First (Unsuccessful) Try

Just ten days after the *Toth* decision, Clarice filed a habeas petition in the federal district court for the District of Columbia.[214] Judge Edward Tamm granted her petition. For Judge Tamm, the central teaching of *Toth* was that "a civilian is entitled to a civilian trial."[215] He recognized that his ruling would create "great difficulties," but thought that Congress could easily remedy those difficulties by drafting a long-arm statute to give federal district courts jurisdiction over such cases.[216]

Feeling encouraged by this ruling, General Krueger filed an identical petition in the federal district court for the Southern District of West Virginia.[217] Chief Judge Ben Moore, however, distinguished both *Toth* and Tamm's decision—while he rejected the idea that Dorothy was "part" of the armed forces, he worried that invalidating court-martial jurisdiction over dependents would lead to a "serious situation" where such civilians would either be triable only in local courts abroad or left "free from all restraints whatever."[218] Thus, he upheld Article 2(11), but on notably tepid terms—he could not say "with certainty" that court-martial jurisdiction over civilians accompanying the armed forces abroad is *not* "necessarily and properly incident" to Congress's rule-making power for the armed forces, so the statute should be upheld.[219]

Both cases were appealed to the Supreme Court—the Government filed a direct appeal of Judge Tamm's ruling, while General Krueger appealed Judge Moore's denial of habeas relief to the Fourth Circuit.[220] Nina Kinsella, Alderson's warden, brought the case to the Supreme Court before the Fourth Circuit could weigh in.[221] Because Wiener was by this point representing both women, he cooperated with the

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[214] United States *ex rel.* Covert v. Reid, H.C. No. 87-55, D.D.C., unreported, *per* Tamm, D.J. Nov. 22, 1955, Transcript of Record, *supra* note 69, at 131–32.
[215] *Id.* at 132.
[216] *Id.* Judge Tamm was somewhat ahead of his time in suggesting this course of action—forty-five years later, Congress would indeed pass a long-arm statute, known as the Military Extraterritorial Jurisdiction Act. *See infra*.
[217] United States *ex rel.* Krueger v. Kinsella, 137 F. Supp. 806 (S.D. W.Va. 1956); WIENER, *supra* note 11, at 238.
[218] *Id.* at 811.
[219] *Id.*
[220] Wiener, *supra* note 2, at 7.
[221] *Id.*

Government in expediting the cases so that they could be heard together at the Court's upcoming October term.[222]

The Government's argument, advanced by Solicitor General Simon E. Sobeloff and argued by assistant Solicitor General Marvin E. Frankel, concentrated on the constitutionality of Article 2(11) and its importance in international affairs.[223] Article 2(11), they argued, was a valid exercise of Congress's power to make rules for the regulation of the land and naval forces, the war power, and the power to make all laws necessary and proper for exercising the United States' sovereign authority in relation to other sovereigns.[224] Emphasizing the large number of civilians accompanying the armed forces abroad as both employees and dependents, the Government noted that:

> [C]ivilians . . . are part of the American military contingent abroad. Their actions directly affect the reputation, the status, and the discipline of our armed forces overseas, as well as their continued acceptability to host governments.[225]

Using historical examples from the British and American Articles of War which demonstrated the exercise of military court jurisdiction over certain classes of civilians, the Government argued that the constitutional provision for the Government and regulation of the armed forces "must be read as necessarily sanctioning" the trial by court-martial of civilians "intimately related to the armed forces."[226] That a committee of eminent scholars drafted the language in Article 2(11), which was then given "full consideration" by Congress and enacted as part of the UCMJ, should be given due weight.[227] Finally, the Government argued that the Court's

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[222] *Id.*

[223] One of the arguments was whether the Supreme Court had jurisdiction to hear the case at all—Wiener had argued that Reid, as superintendant of the District of Columbia jail, was an officer of the District of Columbia and not of the United States, and so was not entitled under the applicable statute, 28 U.S.C. § 1252, to take a direct appeal from a district court to the Supreme Court. FREDERICK BERNAYS WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 138 n.6 (Bryan A. Garner ed., 2009). The Court postponed the jurisdictional question until a hearing on the merits; both briefs dealt with the issue of jurisdiction in Point I and jurisdiction was ultimately sustained. *Id.*

[224] Brief for Appellant, Reid v. Covert, 351 U.S. 487 (1956) (No. 701).

[225] *Id.* at 31–32.

[226] *Id.* at 34.

[227] *Id.* at 37–40. The Government pointed to an exchange between Mr. Felix Larkin, general counsel to the Department of Defense, and Congressman Elston and Mr. Smart,

previous holding in *In re Ross*, upholding the jurisdiction of a consular court over a sailor who committed a shipboard murder near Japan, should control—consular courts could be analogized to military courts, and *Ross* stood for the proposition that in creating this kind of extraterritorial jurisdiction Congress was not required to follow the provisions of Article III.[228] Additionally, as the Court noted in *Ross*:

> [W]hen "the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other."[229]

Court-martial jurisdiction was exercised pursuant to agreements with Japan and England and, like the consular courts at issue in *Ross*, allowed the United States to try its own citizens under its own laws.[230]

Wiener, on the other hand, argued first on a non-constitutional ground—that jurisdiction had terminated over Clarice once she had been returned to the United States and placed in civilian custody following CMA's reversal of her conviction, before turning to the argument that Article 2(11) was unconstitutional "to the extent that it purports to

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during the hearings before the House Armed Services Committee on the adoption of the Uniform Code of Military Justice (UCMJ), as evidence that Congress knew and understood that Article 2(11) would subject military dependents to court-martial jurisdiction.

> Mr. Elston: It would not cover the family of soldiers, would it?
> Mr. Larkin: I think it would, if they were dependents. *Id.* at 39.

Mr. Smart later expanded on his point in response to a question of whether Article 2(11) would grant jurisdiction over family members who were only visiting their soldier abroad.

> Mr. Smart: [They] would not, in any case, in my opinion, be subject to this code. *Whereas the family of a soldier, be it officer or private, does accompany him and he is certainly part of the forces.* I do not think it could be considered that this provision would be broad enough to cover a relative who goes for a mere visit. *Id.* at 40 (emphasis in government's brief).

[228] *Id.* at 61–62.
[229] *Id.*
[230] *Id.* at 56.

authorize a trial of civilians by court-martial in time of peace."[231] To support his argument, Wiener went fishing in previously filed Government briefs. First, Wiener noted ironically that in the Solicitor General's brief for *Toth*, Sobeloff had argued:

> Indeed, we think that the constitutional case is, if anything, clearer for the court-martial of Toth, who was a soldier at the time of his offense, than it is for a civilian accompanying the armed forces.[232]

In Wiener's view, the Court's invalidation of Toth's court-martial as an ex-airman should lead *a fortiori* to the conclusion that a court-martial of a woman who had been a civilian all of her life was equally invalid.[233] The brief went on to argue that the treaty power was "completely irrelevant" to the case, using the Government's position in its brief for the recently decided case of *United States v. Capps*.

> The basic axiom is that, as a sovereign state, the United States possesses . . . all the normal powers of a fully independent nation . . . subject to constitutional limitations like the Bill of Rights which govern all exercise of governmental authority in this country.[234]

The Government filed a reply brief outlining the grave consequences for discipline and morale if the Court should invalidate Article 2(11), and reasserted the constitutionality of the statute under Congress's war power and rule-making authority for the armed forces.[235]

With their arguments marshaled, Wiener and Frankel went before the Court for oral argument.[236] At this point, Wiener's decision to expedite

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[231] Brief for Appellee, *supra* note 224, at 36.
[232] *Id.*
[233] *Id.*
[234] WIENER, *supra* note 223, at 164; Brief for Appellee, *supra* note 224, at 101. Wiener somewhat gleefully posits that this quoted passage, with which "Appellant heartily agrees," demolished the government's argument. *Id.* at 101.
[235] Reply Brief for Appellant and Petitioner, Reid v. Covert and Kinsella v. Krueger, 351 U.S. 487 (1956) (Nos. 701 and 713).
[236] Marvin E. Frankel, the young assistant to the Solicitor General, was himself a future legal titan—after graduating Columbia Law School, where he'd been the Editor-in-Chief of the Law Review, Frankel spent several years as Assistant Solicitor General before entering private practice. He later taught at Columbia Law School, sat on the federal bench as a district court judge for thirteen years, and was an influential writer in

the two cases revealed itself to be a mistake. The cases were heard on the last day of the term, May 3, 1956, in an oral argument that extended almost an hour beyond the normal time for the Court to adjourn.[237] Wiener was asked only three questions, one of which was not even on the merits of his argument.[238] In addition, he admitted later, his argument was "marred by sarcasm and bitterness."[239] He could not understand why the Government was so unwilling to admit that *Toth* "knocked the props out from under" what had been the purported basis for the assertion of military jurisdiction over civilians, and so allowed his emotions to get the better of him.[240] One particularly cutting example:

> So I say, I suggest, that it would be much better for the Air Force to devote its very considerable talents to the material and terrific problem of maintaining our air supremacy, in a word, sticking to the wild blue yonder, instead of trying civilian women by court martial.[241]

The Court's conference notes from May 4, 1956, indicate that the justices tentatively intended to come out for the wives, regardless of Wiener's own evaluation of his argument's deficiencies. Chief Justice Warren, Black, Reid, Frankfurter, and Douglas all registered tentative votes for the wives; Burton, Minton, and Harlan intended to vote for the Government; Clark passed.[242] However, in the days following the conference, opinion on the Court began to shift. On May 14, 1956, Justice Reed circulated a memorandum explaining that he had become

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constitutional law. In later life he was a tireless advocate for human rights and the separation of church and state; he argued his last case in front of the Supreme Court while in a wheelchair due to prostate cancer, succumbing to his illness two weeks after oral argument. Jack Greenberg, *Frankel—What a Life!*, 102 COLUM. L. REV. 1743, 1743–47 (2002).

[237] Wiener, *supra* note 2, at 7.

[238] *Id.* All three questions came from Justice Frankfurter. Transcript of Oral Argument at 28, 30, Reid v. Covert and Kinsella v. Krueger, 351 U.S. 487 (1956) (Nos. 701 and 713).

[239] *Id.*

[240] *Id.*

[241] WEINER, *supra* note 223, at 343 n.49. Later, in the "cold, clear, and infinitely painful light of the morning after," Wiener became aware of the harm his resentment had probably done to his case. *Id.*

[242] DEL DICKSON, ED., THE SUPREME COURT IN CONFERENCE 550–51 (2001). Interestingly for modern discussions on the rights of the military to try civilians, Warren and Black explicitly stated that employees of the armed forces could be subjected to military trials—Black stated that "there is no doubt about the right of the government to subject soldiers and those *working for the military* to military jurisdiction." *Id.* (emphasis added).

convinced that his tentative votes in favor of the wives had been in error.[243] He had concluded that the "long history of the jurisdiction of consular courts" over U.S. citizens abroad demonstrated that, while citizens were entitled due process, what process was due—what manner of trial, in other words—was not controlled by the Constitution.[244]

With Justice Reed's switch, the outcome of the case was then settled—the Court voted against the wives 5 to 4, upholding the military's exercise of jurisdiction over Clarice and Dorothy. Justice Tom C. Clark, writing for the majority, noted that the Court's precedent had "well established" the principle that Congress could establish extraterritorial legislative courts that did not need to comply with the standards required under the Constitution for Article III courts; *Ross*, thus, was controlling.[245] The majority held that the Constitution does not require trial before an Article III court in a foreign country for offenses committed there by an American citizen and that Congress may establish legislative courts for this purpose.[246] The majority then punted on the issue of where the power to try civilians by court-martial arose:

> Having determined that one in the circumstances of Mrs. Smith may be tried before a legislative court established by Congress, we have no need to examine the power of Congress "To make Rules for the Government and Regulation of the land and naval Forces" under Article I of the Constitution. If it is reasonable and consonant with due process for Congress to employ the existing system of courts-martial for this purpose, the enactment must be sustained.[247]

Chief Justice Warren, joined by Black and Douglas, worried that "[t]he military is given new powers not hitherto thought consistent with our scheme of government," but stated that they needed more time to

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[243] Memorandum from Justice Stanley Reed to the Justices (May 14, 1956) (on file with the Princeton University Stanley G. Mudd Manuscript Library).
[244] *Id.*
[245] Kinsella v. Krueger, 351 U.S. 470, 475 (1956).
[246] *Id.* Clark went on to praise the UCMJ as including the fundamentals of due process, including some which the states were not under an obligation to provide to citizens domestically—the inference here, as William Generous, Jr., noted in his historical study of military justice, is that "if Americans companying the troops overseas had to be tried for alleged crimes committed on foreign soil, they would enjoy greater protections under the UCMJ than in the foreign courts." GENEROUS, *supra* note 200, at 178.
[247] *Kinsella*, 351 U.S. at 476.

prepare their dissents and would submit them at the next term.[248] Instead of joining in the dissent, Justice Frankfurter published a sharply worded reservation, noting the majority's refusal to examine the scope of Congress's power under Article I to make rules regulating the armed forces: "The plain inference from this is that the Court is not prepared to support the constitutional basis upon which the Covert and Smith courts-martial were instituted and the convictions were secured."[249] Explaining that "[w]isdom, like good wine, needs maturing," he reserved his vote.[250] Frankfurter seemed to think that the majority was relying on obsolete, irrelevant precedent,[251] but why he chose the relatively uncommon route of writing a reservation instead of a dissent is somewhat unclear. One clue is supplied by Wiener years later, as he described the scene at the Court on the date the decisions were read:

> Sitting next to me in the courtroom when the three opinions were orally announced was an experienced Supreme Court advocate who had long been a close friend, Charles A. Horsky of the District of Columbia bar. As Justice Frankfurter was holding forth, Horsky whispered to me, "That's a command to file a petition for rehearing."[252]

In typically laconic fashion, Wiener wrote, "[w]hich, needless to say, I proceeded to do."[253]

V. The Grant of Petition for Rehearing

Wiener had previously been the reporter for the Supreme Court's 1952 to 1954 Committee on the Revision of its Rules, so he was "fully aware that most requests for rehearing enjoy the viability of snowballs beyond the River Styx."[254] Rule 58 of the Court requires that rehearing petitions only be granted if a justice who voted with the majority changes his mind or begins to doubt his original vote, accepts the petition, and

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[248] *Id.* at 485–86.
[249] *Id.* at 481.
[250] *Id.*
[251] GENEROUS, *supra* note 200, at 178.
[252] Wiener, *supra* note 2, at 8.
[253] *Id.*
[254] *Id.*

convinces a majority of the Court to rehear the case.[255] As "it is scarcely necessary to remind lawyer readers that appellate judges rarely suffer such qualms once they have publicly concurred in a decision,"[256] Wiener had to think strategically—which of the justices in the majority might be amenable to a suggestion that the original decision was wrong?

On the merits, he focused his argument for rehearing on four issues: (1) military considerations clearly underlay all of the decisions to uphold the court-martial proceedings, so the scope of Congress's rule-making authority for the armed forces was by necessity at issue; (2) the legislative history indicates that Congress never considered the constitutionality of Article 2(11) at the time it was adopted and never considered *Ross* during any of the legislative hearings; (3) that there had been no mention of any source of constitutional power by which Congress could strip two citizens of their protections under the Bill of Rights; and finally, (4) Article 2(11) asserted a jurisdiction limited to instances "without the continental limits of the United States," whereas Clarice was now back within those limits, so Article 2(11) was inapplicable.[257]

The last part of the petition, however, might have carried the most weight with the Justices—he raised the issue of the Court's adjudicatory procedure in the two cases: the oral argument took place on an accelerated schedule which "cut nearly in half" the time for briefs under the rules; the argument was the last of the day on the last day of the term and stretched well past the time for adjournment;[258] and the opinions

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[255] *Id.*
[256] WIENER, *supra* note 11, at 239.
[257] WIENER, *supra* note 223, at 433–40.
[258] *Id.* at 439. Here, Wiener noted that he'd been asked only three questions during oral argument, and suggested that:

> To the extent, therefore, that there is a "tradition of the Supreme Court as a tribunal not designed as a dozing audience for the reading of soliloquies, but as a questioning body, utilizing oral arguments as a means for exposing the difficulties of a case with a view to meeting them," the lateness of the hour perceptively impaired the probing process. *Id.*

Here, Wiener was quoting Justice Frankfurter. *Clue to Rehearing*, N.Y. TIMES, June 17, 1957, at 12.

were announced before the three dissenters had time to articulate their views, or Justice Frankfurter to make a decision at all.[259]

He decided to aim his argument at Justice John Marshall Harlan II. He knew that he was going to get the three dissenters and Justice Frankfurter to vote in favor of his petition, so he only needed to convince one other justice—someone who had been in the majority.[260] He knew that he could count out Justice Clark, who was highly unlikely to repudiate the very opinion he'd authored. Around the working bar in D.C., further, Justices Burton, Reed, and Minton were colloquially known as "The Battalion of Death" because they rarely voted against a conviction.[261] This meant that "Justice Harlan was, very plainly, the swing man."[262] In targeting Justice Harlan, Wiener focused on the fact that the accelerated argument schedule hurt the consideration of his case. After a friend informed him that Justice Harlan was an admirer of the late Justice Robert Jackson, Wiener added a quotation from Jackson's *The Supreme Court in the American System of Government*.

> Not infrequently the detailed study required to write an opinion, or the persuasiveness of an opinion or dissent, will lead to a change of a vote or even to a change of result.[263]

Wiener's decision to target Justice Harlan was a productive one. Justice Frankfurter appeared to also believe that Justice Harlan was the key to a rehearing—just after the petition came in, he determined that the justices had never considered Wiener's fourth issue, and solicited the views of one of Justice Harlan's clerks.[264] The clerk, Wayne G. Barnett, wrote in a memorandum to Justice Harlan that he had a "distinctly dissatisfied" feeling about the action taken, and believed that the issues were "deserving of a more deliberate consideration than could be given them at the close of the term."[265] Another clerk, Paul M. Bator, wrote a

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[259] WIENER, *supra* note 223, at 439.
[260] Wiener, *supra* note 2, at 8.
[261] *Id.*
[262] *Id.*
[263] WIENER, *supra* note 223, at 439.
[264] Memorandum from Felix Frankfurter to John Marshall Harlan II (Jul. 18, 1956) (on file with the Princeton University Stanley G. Mudd Manuscript Library). The clerk told Justice Frankfurter that, in his opinion, there was no answer to Wiener's argument. *Id.*
[265] Preliminary Memo on Rehearing, Oct. Term, 1955, Nos. 701 & 713 (n.d.) (on file with the Princeton University Stanley G. Mudd Manuscript Library).

lengthy memo analyzing the petition for rehearing, concluding that, contrary to Justice Clark's majority opinion, the case had to rest on some specific power given to Congress, not on a "mere combination" of "no prohibition" plus "reasonableness."[266] He also thought that there should be a rehearing, that in difficult cases "account ought to be taken" of the view of every member of the Court, "especially one so prominent in Constitutional law as Justice Frankfurter."[267] On September 5, 1956, Justice Harlan circulated a memorandum to Justices Reed, Burton, Clark, and Minton, where he explained that he intended, "as presently advised" to vote for rehearing. He was troubled by their failure to "hitch" the court-martial to some specific constitutional power.

> These cases are very close and troublesome, and I am sure that I have not exhausted all of their difficulties. . . . No doubt I should at least have recognized my own difficulties with the present opinions before they came down. All I can say to that is that it perhaps illustrates the unwisdom of deciding difficult and far-reaching issues under the hammer of getting through with the Term's business.[268]

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[266] Memorandum on *Covert* and *Krueger* (n.d.) (on file with the Princeton University Stanley G. Mudd Manuscript Library). Bator, a future law professor at Harvard and Chicago, raised a compelling case for de novo review of the grounds on which *Ross* rested—"isn't the question of whether the Constitution follows the flag a very different one today than it was 100 years ago? Doesn't the fact that American interests are today world-wide . . . call for a re-examination of the needs of extending certain Constitutional protections abroad?" *Id.*

[267] *Id.*

[268] Memorandum from John Marshall Harlan II (Sept. 5, 1956) (on file with the Princeton University Stanley G. Mudd Manuscript Library). Shortly thereafter, Justice Frankfurter wrote to Justice Harlan:

> Dear John,
> I must put a brake on my pen to appear sober-minded in the expression of my appreciation for the views you have expressed in your memo to your four brethren. No—not for your views but for the fact that you have so disinterestedly re-examined them. Of course the issues in Nos. 701 and 713 are important, very important. But as Holmes Jr. said of *Haddock v. Haddock*, "the world will not come to an end whichever way this case is decided." What is vastly more important than the ultimate outcome of these cases—the doctrines that are finally announced—is the intellectual procedure, the quality and nature of the adjudicatory process by which decision is reached. On that depends the justification and the enduring foundation of the Court and its function in our governmental scheme. And so I'm

The justices of the majority responded with a series of discussions and memoranda—Justice Reed, for example, expressed sympathy for Harlan's position but went on to appear to counsel against voting for rehearing:

> While congressional determination of a desirable way to handle the international aspects of crimes by our troops and their dependents on foreign soil does not determine constitutionality, I hope you will reconsider before raising again the danger of putting a constitutional block in reasonable dealing with such a far-flung situation as this.[269]

Justice Harlan may have reconsidered, but he did not change his mind—his second memorandum came on September 26, following the conference on rehearing, circulations by Justices Black and Frankfurter,[270] and further discussions.[271] He explained that he thought

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> profoundly grateful to you, as a passionate American citizen I'm grateful, for your conscientious re-examination and candid report on what your deeper reflections have found. I have not the least doubt that your forthright performance will have a far-reaching wholesome influence on the world of the Court.

Note from Felix Frankfurter to John Marshall Harlan II (n.d.) (on file with the Princeton University Stanley G. Mudd Manuscript Library).

[269] Memorandum from Stanley Reed to John Marshall Harlan II (Sept. 7, 1956) (on file with the Princeton University Stanley G. Mudd Manuscript Library).

[270] Interestingly, Justice Frankfurter originally circulated what he was calling a dissent on September 19th to only Chief Justice Warren, Justice Black, and Justice Douglas. He stated that he thought there was very good reason to keep the fact that a dissent had been prepared among the four of them, and had not even informed the law clerks that it had been written. Memorandum from Felix Frankfurter (Sept. 19, 1956) (on file with the Library of Congress). He determined on September 20th that the reason to keep the dissent private were no longer applicable, and circulated it to the rest of the Court. Memorandum from Felix Frankfurter (Sept. 20, 1956) (on file with the Library of Congress).

[271] The justices of the majority exchanged a series of memoranda explaining and elaborating on their views from the previous summer's majority opinion. Justice Burton would rest the constitutionality of Article 2(11) in Article I, section 8, noting that the rule-making power granted in Clause 14 does not say, "to make *some* of the rules," and noting that he saw no adequate reason to put limitations upon executive and legislative powers that "wisely have been left broad in the fields controlling our foreign relations and national defense." Memorandum from Harold Burton to John Marshall Harlan II (Sept. 7, 1956) (on file with the Princeton University Stanley G. Mudd Manuscript Library) (emphasis in original). Justice Minton wrote that this nation "in the exercise of its power over its foreign affairs may very properly negotiate and contract for the right to

their reliance on *Ross* the previous term was mistaken, that the Court needed to hear more argument on whether Congress had the power under Article I to try civilians in military courts, and that he intended to vote for rehearing.[272]

VI. Before the Court—*Reid II*

In October, the Court granted the petition—in its grant, the Court focused the parties on four issues: (1) the specific practical necessities justifying court-martial of civilians, and any practical alternatives; (2) historical evidence bearing on the scope of the Article I, Section 8, Clause 14 rule-making power and whether that power was understood to be narrow or broad; (3) any relevant differences between court-martial of dependents and that of employees; and (4) the relevance of distinctions between petty crimes and major offenses.[273]

This time, both sides had plenty of time to submit briefs and prepare for argument, which was set for February 1957.[274] The Government submitted a supplemental brief that focused on four arguments in turn—that court-martial jurisdiction over civilians accompanying the armed forces abroad was of practical necessity as a matter of international relations and to accomplish the military mission; that there were no practical alternatives; that the scope of the rule-making power, when read in conjunction with the Necessary and Proper Clause, was broad and susceptible to expansion under changing circumstances; and that the constitutional distinction between major crimes and petty offenses was

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try its own citizens in a foreign country," and would "stand flatly and securely upon *In re Ross*." Memorandum from Sherman Minton to John Marshall Harlan II (Sept. 10, 1956), (on file with the Princeton University Stanley G. Mudd Manuscript Library). Justice Reed expressed sympathy for Justice Harlan's concerns—"[a]s one who had preliminary difficulties himself, it is quite easy for me to understand your desire to rehear the Covert and Krueger cases"—but ultimately, would find the constitutional basis for the enactment of Article 2(11) in the power of Congress to punish crimes of U.S. nationals beyond the limits of its territorial sovereignty, under Article III, section 2. Memorandum from Stanley Reed to John Marshall Harlan II (Sept. 7, 1956) (on file with the Princeton University Stanley G. Mudd Manuscript Library).

[272] Memorandum from John Marshall Harlan II (Sept. 5, 1956)) (on file with the Princeton University Stanley G. Mudd Manuscript Library).

[273] Grant of Petition for Rehearing, 77 S. Ct. 123 (Nov. 5, 1956).

[274] The case continued to prove contentious—Wiener later described the Government's factual assertions as the triumph of advocacy over accuracy. Many of the assertions made in the Government's supplemental brief were "bitterly contested" in the Appellant's reply brief. WIENER, *supra* note 223, at 180 & n.189.

not a relevant distinction for purposes of court-martial jurisdiction over civilians abroad.[275]

The Government brief focused heavily on the facts—i.e., the "practical necessities" supporting court-martial jurisdiction over civilians, so Wiener decided to focus on the law. The brief for the wives argued first that consent of England and Japan to American military jurisdiction over civilians within their territories could not invest the courts-martial with jurisdiction; that nothing in the Constitution authorized the trial of civilians by court-martial in time of peace and not in occupied territory; that the result reached the previous June was completely irreconcilable with *Toth*; and that practical alternatives to courts-martial were available.[276]

The oral argument took place on February 27, 1957. At this point, several personnel changes had occurred—Justices Reed and Minton had retired, replaced by Justices Brennan and Whittaker. As Justice Whittaker had not yet taken his seat, the argument occurred before eight Justices.[277] Solicitor General J. Lee Rankin argued the case for the Government. During his argument, he produced a "little black book" entitled *Women Camp Followers of the American Revolution*, which contained an account of camp followers subject at the time to military law, as persuasive authority for the continuing vitality of the practice.[278] When asked by Chief Justice Warren if women living on military bases in this country could be tried by court-martial, Rankin answered that Congress had the power to subject them to military law but had never chosen to do so.[279]

Then it was Wiener's turn. Though he could not help but poke at Rankin's historical references,[280] he had practiced with his wife to remove any trace of bitterness and sarcasm from his argument. As he

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[275] Government's Supplemental Brief on Rehearing, Reid v. Covert, 354 U.S. 1 (1957) (Nos. 701 and 713).
[276] Supplemental Brief for Appellee, Reid v. Covert, 354 U.S. 1 (1957) (Nos. 701 and 713).
[277] Wiener, *supra* note 2, at 9–10.
[278] *Gov't Claims '76 Precedent in Forces Trying Civilians*, STARS & STRIPES, Mar. 1, 1957, at 5.
[279] *Id.*
[280] On Rankin's book, Wiener quipped that it only proved that "the most enduring and durable alliance of all is between Mars and Venus." *Id.*

had lived with the case for three years, however, he wanted to end his argument on an emotional note.[281]

> If Your Honors please, I have tried to argue this case with some degree of objectivity . . . . But I cannot conceal my concern over the seriousness of what is involved, because this is about as fundamental an issue as has ever come before this Court . . . . Because we have here . . . a question involving the impact on the one hand of the supposed needs of the garrison state upon, on the other, the immutable principles of a free nation.[282]

He then quoted the late Justice Benjamin Cardozo:

> The great ideals of liberty and equality are preserved . . . by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power . . . . tends to . . . hold the standard aloft . . . for those who must run the race and keep the faith.[283]

"If your Honors please," Wiener concluded, "I have been enrolled among the body of defenders. I hope this Court will keep the faith."[284]

Solicitor General Rankin then stood up to give a rebuttal, at which point Justice Black "undertook the role of the banderillero who plants barbed sticks in the harried bull that is about to face the matador," and launched into a difficult series of questions, taking up the remainder of Rankin's time.[285] Justice Black's law clerks were clearly conspirators in the pace of the questioning—they handed Justice Black a note exhorting him to "hit [Rankin] with Winthrop, with Toth, with the constitutional provisions, English practice before 1789, the fact that Congress never authorized even the trial of soldiers for civilian offenses during time of war until 1862."[286] They expressed surprise that Rankin was not being subjected to more "penetrating questioning," and highlighted some areas

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[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] Notes from Clerks (n.d.) (on file with the Library of Congress).

in Justice Black's memorandum which "he undoubtedly cannot satisfactorily explain."[287]

It was apparently obvious to all in the room that the case was going to come down differently than it had the previous term.[288] How different remained to be seen.

VII. The Decision

A. Conferences and Bargaining

The Justices' conference notes showed a solid majority in favor of the wives—Chief Justice Warren, Black, Brennan,[289] Frankfurter, and Douglas all voted to reverse both convictions, while Justices Burton, Clark, and Harlan voted to affirm—and in time, Justice Harlan was prevailed upon to change his vote.[290] What was up in the air, however, was the scope of the majority opinion, which Chief Justice Warren assigned to Justice Black.

Justice Black had circulated a memorandum opinion in November which broadly concluded that courts-martial of civilians accompanying the armed forces overseas during times of peace violated the Constitution—this memorandum formed the basis of his opinion in *Reid*

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[287] *Id.*

[288] Wiener, *supra* note 2, at 10.

[289] Justice Brennan's vote might have been at least a little up in the air. On March 4, Justice Clark wrote him a note expressing concern for the practical necessities of court-martial jurisdiction over civilians and worried that the Court would only be adding to the confusion by reversing its prior decision.

> [W]e should hesitate to repudiate our opinion of last June—and more so the power of the Congress that has been exercised *unquestioned* for over 40 years. It will have a disastrous effect on our foreign relations with 63 countries—cause the NATO agreement to be scrapped to the extent of the force treaties and undermine the morale of any armed forces in these foreign installations.

Note from Tom C. Clark to William J. Brennan (Mar. 4, 1957) (on file with the Library of Congress) (emphasis in original).

[290] DEL DICKSON, THE SUPREME COURT IN CONFERENCE 554–55 (2001).

II.[291] On March 6, Justice Frankfurter began agitating with Chief Justice Warren for a more "restricted" opinion than Justice Black was writing—he was confident that the views expressed in the circulated memorandum "could not possibly command a Court vote."[292] He wanted the decision to be on the narrowest ground possible—namely, invalidating the grant of jurisdiction *only* in capital cases, while reserving a decision for all other offenses.[293] On March 13, he sent a note to Justice Black, explaining that he intended to write separately concurring in the result; he explained that Justice Black might draw more votes if he would restrict his opinion to capital cases.[294] Justice Frankfurter urged him to adopt that view, arguing the importance of having as large a majority as possible when invalidating an Act of Congress.[295] Justice Black did not end up taking Justice Frankfurter's advice, and the ultimate opinion in *Reid II* is a "contrariety of opinions by a narrow majority," and one vigorously expressed dissent.[296]

B. Black's Broad Holding

Justice Black's plurality opinion, joined by Chief Justice Warren, and Justices Douglas and Brennan, opened by acknowledging that "[t]hese cases raise basic constitutional issues of the utmost concern,"[297] and rejected from the outset the idea that the U.S. Government could act against its own citizens abroad in a manner "free of the Bill of Rights."[298] This point was made in the most definitive terms possible—"The United

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[291] The published opinion in *Reid* is ultimately an expanded version of the memorandum Justice Black circulated in the fall of 1956. *See* Memorandum by Mr. Justice Black, Nos. 701 and 713—Oct. Term, 1955 (Nov. 20, 1956) (on file with the Library of Congress)..

[292] Memorandum from Felix Frankfurter (Mar. 6, 1957) (on file with the Library of Congress).

[293] *Id.* This is completely consistent with Justice Frankfurter's views on the role of the Court in Constitutional interpretation. *See generally* NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES (2010).

[294] He references that at least one of the dissenters is open-minded about a more restricted opinion; it seems likely here that he is referring to Justice Harlan, who does end up concurring with the majority on the more narrow grounds Justice Frankfurter proposed. Memorandum from Felix Frankfurter (Mar. 13, 1957) (on file with the Library of Congress)..

[295] *Id.*

[296] Memorandum from Felix Frankfurter (Mar. 6, 1957) (on file with the Library of Congress).

[297] Reid v. Covert (*Reid II*), 354 U.S. 1, 2 (1957).

[298] *Id.* at 5.

States," Black wrote, "is entirely a creature of the Constitution."[299] The rights and liberties of U.S. citizens were "jealously preserved from encroachments" by the express terms of the Constitution itself[300]—because the right to a jury trial was a fundamental right,[301] it could not be rendered "inoperative" when it became inconvenient.[302] This, Black wrote, would destroy the benefit of a written Constitution and undermine the basis of our government.[303]

Black then swept aside the two key pillars of the Government's argument—that *Ross* should control, and that Article 2(11) could be upheld as legislation necessary and proper to carry out the United States' international obligations. First, Black rejected the rationale underpinning *Ross*, calling it a "relic from a different era,"[304] and then turned to whether an international agreement could give the U.S. Government power which was not constrained by the Constitution.[305] In emphatic language, Black held that it could not—quoting from the Article VI Supremacy Clause, Black wrote that nothing in the text of the Constitution or in its legislative history suggested that treaties and other international agreements did not have to comply with the Constitution.[306]

> There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.[307]

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[299] *Id.* at 5–6.
[300] *Id.* at 6–7.
[301] The trial by jury is, according to Black, "one of our most vital barriers to governmental arbitrariness." *Id.* at 10.
[302] *Id.* at 14.
[303] Black wrote that "[t]he Ross case is one of those cases that cannot be understood except in its particular setting; even then, it seems highly unlikely that a similar result would be reached today." *Id.* at 10.
[304] *Id.* at 14.
[305] *Id.* at 16.
[306] *Id.*
[307] *Id.* at 17. Justice Frankfurter argued strenuously that this language should not go into the final opinion. At the time, one of the most contentious issues in Congress was the proposed Bricker Amendment, named for its sponsor Senator John Bricker, which would have among other things refused to give force or effect to any treaty which violated the Constitution. *See generally* Arthur H. Dean, *The Bricker Amendment and Authority Over Foreign Affairs*, FOREIGN AFF., Oct. 1953. Frankfurter thought that because the decision was merely a plurality, the Court would be needlessly projecting itself into the controversy by mentioning treaties or the treaty power at all. Memorandum from Felix Frankfurter (May 20, 1957) (on file with the Princeton University Stanley G. Mudd Manuscript Library).

All of this was prologue to the meat of the opinion—having concluded that the Constitution "in its entirety" applied to the wives' trials, Black then turned to the question of whether anything within the Constitution gave the government the power to authorize courts-martial of dependents overseas. The answer, unsurprisingly, was no—the rule-making power granted to Congress under Article 1, Section 8, Clause 14 only gave Congress power over members of the "land and naval forces." The wives were not such members, so Clause 14 was inapplicable. As to the Government's argument that the Necessary and Proper Clause combined with Clause 14 to constitute "a broad grant of power," Black scathingly dismissed it.

> [T]he jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, s 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts a deprivation of the right to jury trial and of other treasured constitutional protections. Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14.[308]

Black went on to condemn the entire business as against the tradition of keeping the military subordinate to civilian authority; it was a legislative scheme that the Framers would have feared—with a fear "rooted in history"—recognizing as they did that the army was "dangerous to liberty if not confined within its essential bounds."[309]

> The idea that the relatives of soldiers could be denied a jury trial in a court of law and instead be tried by court-martial under the guise of regulating the armed forces would have seemed incredible to those men, in whose lifetime the right of the military to try soldiers for any offenses in times of peace had only been grudgingly conceded.[310]

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[308] *Reid II*, 354 U.S. at 21.
[309] *Id.* at 23–24.
[310] *Id.* at 23.

The Court's previous precedents—*Toth*,[311] *Ex parte Milligan*,[312] *Duncan v. Kahanamoku*[313]—were manifestations of a "deeply rooted and ancient" opposition to the expansion of military control over civilians.[314] The only way such control could be justified, if at all, would be under Congress's "war powers," granting broad power to military commanders over individuals on the battlefield.[315] Because Japan and England were not areas of active hostilities, Congress's war powers were inapplicable.[316]

Finally—in an indication that Wiener's overtly emotional ending to oral reargument was effective—Black echoed Wiener's phrasing:

> We should not break faith with this nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution. . . . And under our Constitution courts of law alone are given power to try civilians for their offenses against the United States.[317]

As a whole, Black's opinion was critical of military law—he noted that, despite the improvements embodied in the 1950 enactment of the UCMJ, there was no trial by jury, no independent judiciary, no grand jury indictment, and, most damning of all, no indication that the Bill of Rights applied to courts-martial.[318] Applying such a system to the wives of military members was constitutionally impermissible; Clarice and Dorothy must be set free.

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[311] United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).
[312] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (holding that the trial by military tribunal of civilians, where civilian courts were still operating, was unconstitutional)
[313] Duncan v. Kahanamoku, 327 U.S. 304 (1946). *Duncan*, also written by Justice Black, held that military tribunals did not have legal authority to try civilians imprisoned in Hawaii, which had been placed under martial law after the attack on Pearl Harbor, as there was no reason why the civilian courts could not operate. *Id.*
[314] *Reid II*, 354 U.S. at 33.
[315] *Id.*
[316] *Id.* at 33–34.
[317] *Id.* at 40–41.
[318] *Id.* at 35–39; GENEROUS, *supra* note 200, at 179.

C. The Narrowing of the Plurality

Justice Black's opinion swept broadly, but as Justice Frankfurter predicted, it did not command a majority vote. It was narrowed to capital cases by the concurring opinions of Justice Frankfurter and Justice Harlan.

Justice Frankfurter's concurring opinion agreed with Justice Black on the narrow ground that military jurisdiction did not extend to civilian dependents accused of capital offenses in times of peace.[319] He agreed with Justice Black that Congress could only subject to trial by court-martial those persons who were part of the land or naval forces; where he differed from the plurality opinion was on the question of whether civilian dependents could *ever* be viewed in such a light.[320] In Frankfurter's view, this was a question that had to be answered in light of the entire Constitution.[321] In the unique situation before the Court, where two wives had been tried by court-martial for a capital crime, the women were not sufficiently closely related to what Congress "may allowably deem essential" for the regulation of the armed forces to justify the loss of their protections under Article III and the Fifth and Sixth Amendments.[322] He explicitly left open the question of whether the analysis would come out the same had different questions been before the Court. Frankfurter's opinion foreshadowed the consequences and open questions after *Reid II*: whether consular courts would also be constitutionally defective; whether civilian employees could be tried by court-martial, capital or otherwise; and whether the prohibition on courts-martial for civilian dependents extended to non-capital crimes.[323]

Justice Harlan concurred with Justice Frankfurter's view that this holding only embraced capital offenses. As the sole member of the previous majority to vote against the prior holding, Justice Harlan also took time to explain why he had changed his mind.[324] Justice Harlan thought that the plurality opinion had too rigid a view of Congress's rule-making power, and agreed with the Government that the Necessary and Proper Clause supplemented the scope of Clause 14.[325] However, he

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[319] *Id.* at 42–43 (Frankfurter, J., concurring).
[320] *Id.* at 44.
[321] *Id.*
[322] *Id.* at 44–45.
[323] *Id.* at 45.
[324] *Id.* at 65–67 (Harlan, J., concurring).
[325] *Id.* at 71–72.

agreed with the plurality that the Constitution guaranteed the protections of indictment by grand jury and jury trial to citizens charged with capital crimes,[326] but disagreed with the plurality's conclusion that the Constitution in its entirety applied extraterritorially.[327] In Justice Harlan's view, *Ross* and associated precedents put a "wise and necessary gloss" on the Constitution—that the provisions of the Constitution apply overseas only to the extent that "the particular local setting" and "the practical necessities" do not render their application "impractical and anomalous."[328] Unwilling to reach the question of whether Article III and the Fifth and Sixth Amendments apply to all trials by court-martial of civilian dependents overseas,[329] Justice Harlan instead confined his opinion to the holding that the requirements of due process in capital cases required a civilian trial.[330]

D. The Angry Dissent

Justice Clark's vigorous dissent, joined by Justice Burton, castigated the Court for turning loose two women who "brutally killed their husbands" in an opinion which impaired the "long-recognized vitality of an old and respected precedent in our law," and, in a pointed and very prescient critique, for failing to give any guidance to Congress as to how to remedy the problem.[331]

Clark noted that the three separate opinions left it doubtful that Congress could return to a system of consular courts, as the plurality explicitly attacked the rationale underlying *In re Ross*. Other alternatives were similarly unavailing: enacting Article III courts overseas would have such administrative obstacles as to be "manifestly impossible;" enacting a long-arm statute would be "equally impracticable" because trials in this country for misconduct committed abroad would require prohibitive expenditures of money and time. Foreign courts, the only option left, would leave American servicemen and their dependents subject to the "widely varying standards of justice in foreign courts

[326] *Id.* at 74.
[327] *Id.* at 75–76.
[328] *Id.* at 74–75.
[329] *Id.* at 76–77.
[330] *Id.* at 77–78.
[331] *Id.* at 78 (Clark, J., dissenting).

throughout the world."[332] He also argued that there was no principled basis in the Constitution for a distinction between capital and non-capital cases, and the concurring Justices' reliance on such a distinction to "abstain" from ruling with finality on the overall constitutionality of Article 2(11) injected uncertainty into the entire system of military justice.[333]

Clark's dissent, like Frankfurter's concurrence, foreshadowed the "sequels" to *Reid II* which would come before the Court in 1960, and in many ways also foreshadowed the current and continuing controversy over whether civilians may be subjected to military justice not in times of peace, but in times of not-quite-war.

VIII. The Aftermath—"Watch Your Wives, Boys"

A. Release

Public reaction to the decision was decidedly mixed. A Washington Post editorial noted that while the "soundness" of the principle handed down was "scarcely open to question," its application was troubling—the editorial pointed out many of the same problems raised by Justice Clark in his dissent, and wondered if the sound principle had been stretched to the point of producing "unsound consequences."[334]

The soundness of the principle articulated by the Court, however, was open to debate, at least in some circles. One widely syndicated New York columnist lit into the decision with almost comical ferocity—Justice Black was a "former Ku Kluxer" whose opinion came out in favor of condoned murder, and now might be an excellent time to accompany one's husband abroad in order to murder him.

> Madame Kreuger-Smith ran a knife into Col. Aubrey Smith who is just as dead as if he were killed in

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[332] *Id.* at 89. Justice Clark had raised this issue in his note to Justice Brennan, where he described the French system of presumption of guilt and dismissed the courts of Spain as "certainly no protection whatever." Note from Tom C. Clark (Mar. 4, 1957) (on file with the Library of Congress).

[333] *Reid II*, 354 U.S. at 89–90 (Clark, J., dissenting).

[334] Merlo J. Pusey, *Not Since 1930s Has Court Made Such Impact: Court Had Embarrassing Choice*, WASH. POST, June 30, 1957, at E1.

> Kentucky. Madame Covert took an ax, like Lizzie Borden, to her ever-loving and he is just as dead as if he got his head knocked off in New England.[335]

Time Magazine agreed, publishing an editorial which reflected with distaste that this decision proved that Court decisions depended heavily on the personalities and philosophical underpinnings of the various justices, and questioned whether the decision meant that the murdering wives were answerable to no forum at all.

> Discussing the decision with other officers last week, a top Pentagon lawyer joked grimly: "Watch your wives, boys, that's all I can say."[336]

Not every opinion was unfavorable, however—Justice Black received several letters roundly praising *Reid II* as one of the great constitutional decisions.[337] Professor Edmund Cahn of New York University School of Law, in language representative of the type, wrote that "[a] man who has written an opinion like this can feel confident that he has justified his life."[338]

B. What Happened to Clarice and Dorothy?

The women went on to live quiet lives with their families. Clarice was already out of prison on bail when the Supreme Court's decision was handed down. She left for Arizona, where she got a job working on a weekly paper in Coolidge, a small town southwest of Flagstaff. In 1958, she brought a custody suit in Pinal County and was re-awarded custody of her three children.[339] After that, she disappeared—perhaps gratefully—from the public eye.[340] She worked in the advertising section

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[335] Robert C. Ruark, *He Dissents Loudly on Murderesses*, EL PASO HERALD-POST, June 28, 1957, at 1.

[336] *The Supreme Court: No Man's Land*, TIME, Jun. 24, 1957, *available at* http://www.time.com/time/magazine/article/0,9171,825012,00.html.

[337] *See, e.g.*, Letter from Abe Krash to Hugo Black (June 12, 1957) (on file with the Library of Congress).

[338] Letter from Edmund Cahn to Hugo Black (June 12, 1957) (on file with the Library of Congress).

[339] *Woman Slayer Regains Custody of Children*, TUCSON DAILY CITIZEN, Mar. 22, 1958, at 4.

[340] Intriguing glimpses of Clarice and her family crop up in the margins of Arizona papers—she won a cash prize from Safeway Grocery in 1962. *PLUS Hundreds of Cash*

of the Arizona Sun in Flagstaff—quite successfully[341]—started going by the name "Kit," played bridge, sent her boys to summer camp, and took family vacations.[342] A woman with her name and birth date appears in the Social Security Death Index in 1992.[343]

Dorothy was released from prison on June 20, 1957;[344] sadly, her mother, Grace, died before she could see her daughter regain her freedom.[345] Dorothy was released into the custody of Brigadier General Richmond and his wife;[346] they accompanied her to San Antonio, where her father had been living with Tooey and Sharon.[347] Tooey entered the Air Force; Sharon married a sheriff and settled in Bee County, Texas.[348] Dorothy spent some time in a mental hospital getting treatment for her alcohol addiction, but eventually took some secretarial courses and began, very tentatively, to support herself.[349] She lived with her father until his death in 1962,[350] and lived quietly in San Antonio until her death in 1991.[351]

Adam Richmond died of cancer in 1959, remaining to the last an active member of the community, having supported the Echo Lake Park association for disadvantaged children until his death.[352] Frederick Wiener continued to work to constrain the government's ability to court-

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Winners!, ARIZ. DAILY SUN, Nov. 27, 1962, at 16. Her son Barry took part in a third and fourth-grade Christmas Pageant in 1958. *Marshall Third and Fourth Grades Present Program*, ARIZ. DAILY SUN, Dec. 19, 1958, at 3.

[341] An advertisement she prepared for Cheshire Motors won national recognition. *News and Views: Ad Wins Recognition*, ARIZ. DAILY SUN, July 13, 1961, at 1.

[342] Clarice, working in the *Sun*'s advertising department and going by "Kit," took her three children on vacation in 1960. *Purely Personal*, ARIZ. DAILY SUN, Aug. 3, 1960, at 5. Her son, Bruce, was a boy scout and went to summer camp. *Purely Personal*, ARIZ. DAILY SUN, Aug. 16, 1961, at 5. She also enjoyed bridge. *Flagstaff Pair Wins Duplicate Bridge Game*, CASA GRANDE DISPATCH, Dec. 4, 1963, at 7.

[343] Social Security Administration, Clarice B. Covert, Social Security Death Index, Master File.

[344] *Prison Frees Daughter of Krueger*, WASH. POST, June 20, 1957, at A3.

[345] *Mrs. Krueger Succumbs*, SAN ANTONIO EXPRESS, May 14, 1956, at 1.

[346] *Prison Frees Daughter of Krueger*, *supra* note 344, at A3.

[347] *Cf. Eve of Trial: Widow of Colonel Calm*, SAN ANTONIO SUNDAY LIGHT, Jan 4. 1953, at 1.

[348] Holben Interview, *supra* note 126.

[349] *Id.*

[350] *Id.*

[351] Dorothy Jane Kruger, 22 May 1991, Bexar County, Texas Death Index, 1964–1998. The record misspells her name, but it is likely this is the same woman as Bexar County contains San Antonio.

[352] Victoria Stone, *Gen. Richmond, County Leader*, WASH. POST, Dec. 3, 1959, at B2.

martial civilians—in 1960, he argued *United States ex rel. Kinsella v. Singleton* pro bono. He was active in military justice and constitutional law until his death in 1996.[353] Of all of the parties involved, he probably had the greatest grasp of what was at stake during the litigation, and could uniquely appreciate the enormous impact the case and all of its complexities had on military and international law.

C. Later Cases and Later Laws

As Justice Clark anticipated, the questions left open by the concurring opinions of Justice Frankfurter and Justice Harlan resurfaced a few years later. A series of cases raised and answered the question of whether the prohibition against military trials of civilians in time of peace extended to employees, and whether it applied to non-capital offenses.[354] After 1960, the authority of the government to order the courts-martial of civilians was clear—whether for capital or non-capital offenses, against employees or dependents, the Constitution absolutely barred the application of military justice against civilians *in times of peace*.[355] The Court never considered the scope of the power to court-martial civilians in times of war.

Then came the CMA case of *United States v. Averette*, in which a civilian contractor stationed at Long Binh, Vietnam, challenged his conviction for larceny before a court-martial under Article 2(10), which granted jurisdiction over all persons accompanying the force in the field

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[353] *Tribute to Colonel Frederick Bernays Wiener, 1906–1996*, 46 M.J. 204 (1996).

[354] In a display of stunning irony, the majority opinion in each of these cases was authored by Justice Clark, who wrote that the Court's decision to deny jurisdiction was controlled by the holding of *Reid II*. United States *ex rel.* Kinsella v. Singleton, 361 U.S. 234, 243–44 (1960) (civilian dependent, non-capital offense); Grisham v. Hagan, 361 U.S. 278, 280 (1960) (civilian employee, capital offense); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 283–84 (civilian employees, non-capital offenses).

[355] Interestingly, Justice Harlan strongly dissented in *Singleton* and *Guagliardo* (the non-capital cases), but concurred in *Hagan* (a capital case), arguing that the Court was misconstruing the rule laid down in *Reid II*—in his mind, the Court was reading Congress's power to make rules for land and naval forces too narrowly. When combined with the Necessary and Proper Clause, the rule-making power was broadened to reach those with a close enough relationship to the military that Congress deems it necessary to give the military jurisdiction over their offenses. McElroy v. United States *ex rel.* Guagliardo, 80 S. Ct. 311, 315–16 (1960) (Harlan, J., dissenting). The key distinguishing factor for Justice Harlan was whether the crime was noncapital, in which a closely related civilian would be amenable to courts-martial, or capital, in which a closely related civilian would *not* be so amenable. *Id.*

in time of war.[356] The CMA strictly construed the definition of "in time of war" and invalidated the court-martial because Congress never formally declared war in Vietnam.[357] This was the last word on the subject for thirty-six years.

The world has become more complicated since *Averette*. Civilian contractors are employed in ever-increasing numbers to fill the gaps left after a series of reductions in troop strength in the U.S. military.[358] Since the early 1990s, the role of civilian contractors has expanded to all areas of military operation—logistical support, training, and security,[359] and the numbers are enormous—the military recently estimated 104,100 such contractors in Afghanistan alone.[360] The question of how best to address contractor misconduct has embroiled legal scholars for years.[361] There have been two major attempts by Congress to address the problem—as might be expected, both have been somewhat controversial.

1. The Military Extraterritorial Jurisdiction Act[362]

The Military Extraterritorial Jurisdiction Act of 2000, or MEJA, was signed into law on November 22, 2000. Motivated in part by a complaint to Senator Jeff Sessions that a crime committed by a military

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[356] United States v. Averette, 41 C.M.R. 363, 365 (1970).
[357] *Id.*
[358] P.W. Singer, *Outsourcing War*, FOREIGN AFF., Mar./Apr. 2005, at 120, *available at* http://www.foreignaffairs.com/articles/60627/p-w-singer/outsourcing-war. After the first Gulf War, the Department of Defense reduced the size of the Armed Forces by thirty percent. *See* Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 374 (2004).
[359] *See* DEBORAH D. AVANT, THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY 1 (2005).
[360] Justin Elliot, *How Many Private Security Contractors Are There in Afghanistan? The Military Gives Us a Number*, TPMMUCKRAKER (Dec. 2, 2009), http://tpmmuckraker.talkingpointsmemo.com/2009/12/so_how_many_private_contractors_are_there_in_afgha.php.
[361] *See, e.g.*, P.W. Singer, *War, Profits, and the Vacuum of Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004); J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155 (2005); Jonathan Finer, *Holstering the Hired Gun: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT'L L. 259 (2008); Laura A. Dickinson, *Military Lawyers, Private Contractors, and the Problem of International Law Compliance*, 42 N.Y.U. J. INT'L L. & POL. 355 (2010).
[362] Military Extraterritorial Jurisdiction Act (MEJA) of 2000, Pub. L. No. 106-523, 114 Stat. 2488.

dependent on a base in Germany had gone unpunished,[363] MEJA provides a statutory basis for asserting federal jurisdiction over felony-level offenses committed by individuals "employed by or accompanying the Armed Forces" anywhere abroad.[364] The MEJA's drafters intended it to fill the gap between the reach of U.S. law—which often lacks an extraterritorial component—and the willingness, or lack thereof, of host nations to prosecute in their own justice systems.[365] As a gap-filling measure it has been used successfully in approximately thirty-five prosecutions: both military dependents and civilian employees have been convicted under MEJA for crimes as varied as possession of child pornography, fraud, and murder.[366]

While useful, MEJA is not without its detractions. Commentators point to a troubling lack of clarity on its jurisdictional reach, as well as the practical problems of investigating and prosecuting crimes which occurred thousands of miles from the federal courthouse.[367] These concerns primarily focus on MEJA's applicability to civilian contractors employed in contingency operations such as Iraq or Afghanistan.[368] By its terms, the ability of MEJA to reach certain classes of contractors is somewhat limited—MEJA encompasses only individuals employed by or supporting the mission of the Department of Defense, which has the practical effect of insulating government contractors working in support

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[363] For an account of MEJA's passage, see Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55, 80 (2001).

[364] *See* 18 U.S.C. §§ 3261(a)(1), 3267(1)(A) (2006). The "accompanying the force" language applies to all military dependents, while the "employed by" language has been limited to those persons employed by the Department of Defense.

[365] An oft-cited example is the 1990s Dyncorp scandal, where employees of the company providing logistical services to the Army in Bosnia were accused of sex trafficking in the purchase of women and young girls from local brothels. A Criminal Investigation Division investigation terminated when it became clear that the United States lacked a long-arm statute under which to prosecute, and the Bosnian government likewise insisted that it too lacked the legal authority to act. *See* Robert Capps, *Crime Without Punishment*, SALON (June 27, 2002, 5:03 PM), http://www.salon.com/2002/06/27/military_10/singleton.

[366] *MEJA Statistics as of June 30, 2010*, U.S. DEP'T OF DEF., http://www.dod.gov/dodgc/images/meja_statistics.pdf (last visited July 27, 2012).

[367] Johnathan Finer, Recent Developments, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE INT'L L. J. 259, 263 (2008).

[368] *Id.*

of other federal agencies, such as the State Department, from its reach.[369] Additionally, MEJA does not apply to individuals who are citizens of or "ordinarily resident" in the host nation.[370] However, while commentators have questioned MEJA's ability to adequately address contractor misconduct,[371] its utility as a tool for prosecuting military dependents has yet to be seriously challenged. Indeed, the first recorded prosecution under MEJA was a woman who might be seen as the spiritual heir of Clarice and Dorothy—Latasha Arnt stabbed her Air Force non-commissioned officer husband on Incirlik Air Base in Turkey in 2003.[372] Convicted of voluntary manslaughter in the Los Angeles District Court, Arnt was sentenced to eight years in prison.[373] Although the Ninth Circuit later overturned her conviction because the trial judge failed to give the jury an involuntary manslaughter instruction, MEJA itself was not questioned by the court.[374] Latasha Arnt pled guilty rather than face a third trial and was sentenced to time served in September 2007.[375]

The recognition that the intended gap-filler itself left a sizable enforcement gap has led to several attempts to either amend MEJA or enact a new law which would extend jurisdiction over all federal

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[369] Margaret Prystowsky, *The Constitutionality of Court-Martialing Civilian Contractors in Iraq*, 7 CARDOZO PUB. POL'Y & ETHICS J. 45, 56–57 (2008). This problem came to a head in 2007, when DOJ failed to prosecute under MEJA any of the contractors involved in the deaths of seventeen Iraqis in what came to be known as the Nissour Square shooting. Finer, *supra* note 367, at 259.

[370] 18 U.S.C. §§ 3267(1)(C), 3267(2)(C).

[371] *See, e.g.*, Brittany Warren, Note, *"If You Have a Zero-Tolerance Policy, Why Aren't You Doing Anything?": Using the Uniform Code of Military Justice to Combat Human Trafficking Abroad*, 80 G.W.U. L. REV. 1255, 1267–70 (2012); Margaret Maffai, Comment, *Accountability for Private Military and Security Company Employees That Engage in Sex Trafficking and Related Abuses While Under Contract with the United States Overseas*, 26 WIS. INT'L L.J. 1095, 1116 (2009).

[372] United States v. Arnt, 474 F.3d 1159 (9th Cir. 2007).

[373] *Id.*

[374] *Id.* This is not to say that MEJA has not been subjected to constitutional challenges. Several defendants have argued that MEJA is unconstitutional because Congress lacked the power to enact it, or that it was unconstitutional as applied to them, but as of yet these arguments have been unpersuasive to the federal courts. *See, e.g.*, United States v. Brehm, No. 1:11-CR-11 (E.D.Va Mar. 30, 2011) (rejecting a challenge to MEJA by a South African national contractor employed by DOD in Afghanistan); United States v. Green, 654 F.3d 637 (6th Cir. 2011) (rejecting a challenge to MEJA by a former servicemember convicted of rape and murder in Mahmoudiyah, Iraq).

[375] Richard K. De Atley, *Moreno Valley Woman's Sentence for Killing Husband Is Time Served*, PRESS ENTERPRISE, Sept. 12, 2007.

contractors abroad.[376] Congress soon enacted another, much more problematic, method for trying civilians accompanying the force.

2. Article 2(a)(10) and United States v. Ali

In 2006, Congress "clarified" what is now Article 2(a)(10) by amending its language—Article 2(a)(10) confers court-martial jurisdiction over civilians accompanying the force in times of declared war *or contingency operation*.[377] The Court has never questioned the power of Congress to court-martial civilians in times of war—indeed, even Justice Black's plurality opinion in *Reid II* acknowledged that "the extraordinary circumstances present in an area of actual fighting" have been considered sufficient to confer military justice jurisdiction over certain civilians present in those areas.[378] The question now becomes whether any of Congress's enumerated powers allow for the extension of jurisdiction embodied in the amended Article 2(a)(10). The term "contingency operation" is defined broadly in the U.S. Code, encompassing not only wars-by-any-other-name such as Iraq and Afghanistan but also, *inter alia*, deployments during national emergencies.[379] Commentators such as law professor Steve Vladeck have criticized this clarification as creating a slippery slope for application of military justice against civilians in violation of both the Constitution and the Court's *Reid* precedents.[380]

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[376] In response to public perceptions that MEJA was insufficient to effectively combat contractor misconduct, the House of Representatives passed the MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. (2007), which would have extended MEJA's reach to all civilian contractors operating in support of contingency operations as well as created Theater Investigative Units under the FBI to investigate allegations of criminal misconduct by such contractors. *H.R. 2740: MEJA Expansion and Enforcement Act of 2007*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=h110-2740 (last visited July 27, 2012). The bill died in the Senate. *Id.* Another bill, known as the Civilian Extraterritorial Jurisdiction Act, S. 1145, 112th Cong. (2011), is currently awaiting vote in the Senate. *See S.1145:CEJA*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=s112-1145 (last visited Mar. 14, 2012). The CEJA would grant U.S. courts jurisdiction over crimes committed by all federal contractors abroad, not merely ones employed by or supporting the DOD. *Id.*

[377] John Warner National Defense Authorizations Act for 2007, Pub. L. No. 109-364; 120 Stat. 2083, 2217; H.R. 5122, 109th Cong. (2007) (enacted) (emphasis added).

[378] Reid v. Covert, 354 U.S. 1, 33–34 (1957).

[379] 10 U.S.C. § 101(a)(13) (2006).

[380] Steve Vladeck, *Can The Military Court-Martial Civilian Contractors?: Reflections on the Oral Argument in* United States v. Ali, LAWFAREBLOG (Apr. 12, 2012, 12:05 AM).

The only case thus far to successfully subject Article 2(a)(10) to civilian court review is currently working its way through the appellate process.[381] On February 23, 2008, Alaa Mohammed Ali, a dual Iraqi-Canadian citizen[382] working as an interpreter for a military police unit in Iraq, stabbed another interpreter during a verbal altercation and was brought before a general court-martial under Article 2(a)(10)'s grant of jurisdiction.[383] At the time of the incident, Ali had been employed by L3 Communications as a linguist in support of L3's contract with Intelligence and Security Command, but L3 terminated his employment following the preferral of charges against him.[384] In a pre-trial motion, Ali challenged both the exercise of jurisdiction over him particularly, arguing that jurisdiction was lacking because his employment with L3 was terminated before trial, as well as Congress's power to expand Article 2(a)(10) generally.[385] After the military judge rejected both arguments and denied his motion to dismiss,[386] Ali pled guilty and was sentenced to six months confinement.[387] Thereafter, the Judge Advocate General certified the case for review to the Army Court of Criminal Appeals (ACCA).[388]

A three-judge ACCA panel unanimously upheld the constitutionality of the amended Article, distinguishing Supreme Court precedent by pointing out that prior exercises of court-martial jurisdiction occurred during times of peace or without an authorizing

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[381] Other courts-martial were attempted against civilian contractors following Ali's conviction. In at least two of those cases, the pending actions were challenged via habeas proceedings in federal court, but the military "agreed not to pursue the UCMJ charges against the employee before the court could rule on the habeas petitions." *Government Contracts Advisory—Court to Consider Constitutionality of Military Jurisdiction Over Civilian Contractor Employee Misconduct*, STEPTOE & JOHNSON, Nov. 23, 2011, *available at* http://www.steptoe.com/publications-newsletter-346.html.

[382] As an Iraqi citizen, Ali could not have been tried under MEJA because of the exception for host-country nationals. *See supra* note 370.

[383] United States v. Ali, slip op., No. 12-0008/AR, at *2 (C.A.A.F. July 18, 2012).

[384] *Id.* at *4–5.

[385] *Id.* at *7–8.

[386] The military judge relied on a World War II era case to hold that Ali's "relationship with his civilian employer is not determinative" of his status as a person accompanying the force. *Id.* at *7 (citing United States v. Perlstein, 151 F.2d 167, 169–70 (3d Cir. 1945)). In rejecting Ali's argument that Congress lacked the power to expand the jurisdictional reach of the UCMJ, the military judge found that Congress properly enacted Article 2(a)(10) pursuant to its power to make rules governing the land and naval forces under Article I, Section 8, Clause 14 of the U.S. Constitution. *Id.*

[387] *Id.* at *2.

[388] *Id.* at *9.

statute.[389] Finding that the exercise of jurisdiction under Article 2(a)(10) was appropriately limited by the dual requirements of a declared war or contingency operation, and a person accompanying the force in the field, ACCA affirmed Ali's conviction.[390]

The Court of Appeals for the Armed Forces (CAAF) granted review, and on July 18, 2012, also affirmed Ali's conviction.[391] Before the court, Ali renewed his arguments that exercise of UCMJ jurisdiction was improper both as to him in particular, and in general as an invalid action by Congress.[392] In writing for the majority, Judge Erdmann first found that Article 2(a)(10) applied to Ali because he was, in a contingency operation, serving with the Army[393] "in the field," defined as requiring an area of actual fighting.[394] Because Ali met the statutory requirements of Article 2(a)(10), court-martial jurisdiction could be properly exercised over him.[395] Judge Erdmann then turned to the more difficult question, which was whether Article 2(a)(10) itself violated the Constitution. This required a two-prong inquiry—first, whether Article 2(a)(10) was unconstitutional as-applied because it violated Ali's Fifth and Sixth Amendment rights, and second, whether Article 2(a)(10) was unconstitutional as exceeding Congress's enumerated powers. In

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[389] United States v. Ali, 70 M.J. 514, ARMY 20080559, slip op. at 2 (A. Ct. Crim. App. 2011).
[390] *Id.*
[391] United States v. Ali, slip op., No. 12-0008/AR, at *2 (C.A.A.F. July 18, 2012).
[392] This later point led to a memorable exchange during oral argument. Ali's appellate counsel argued that Congress's war powers were inapplicable to the Iraq conflict, and thus unavailable as a basis for enacting the amended article, because Congress had not formally declared war against Iraq. Judge Stucky responded: "Well, what were we doing over there [in Iraq] then? And in Korea? Dancing down the primrose path?" Mike Hanzel, *CAAF Outreach Argument in Seattle:* United States v. Ali, No 12-0008/AR, CAAFLOG (Apr. 6, 2012).
[393] In finding that Ali was serving with the Army, Judge Erdmann pointed to the military judge's findings of fact, including that Ali wore a uniform with a U.S. Army nametape on it, wore body armor and a helmet like the soldiers in the squad to which he was assigned, and was under the operational control of the squad leader. *Ali*, No 12-0008/AR, slip op. at *17.
[394] Ali had argued that "in the field" must be construed narrowly to require both a contingency operation and the practical unavailability of a civilian court. *Id.* at *18. The Court of Appeals for the Armed Forces found that unpersuasive, instead adopting the definition advanced by the Government, taken from the Cold War-era case United States v. Burney. 6 C.M.A. 776, 787–88 (1956). The majority also found his "practical unavailability" argument unavailing because there was no available Article III alternative—as a national of the host-nation, Ali could not have been tried under MEJA. *Ali*, No 12-0008/AR, slip op. at *34.
[395] *Ali*, No 12-0008/AR, slip op. at *19–20.

rejecting Ali's as-applied challenge, the majority distinguished *Reid II* by finding the concerns raised in that case and its progeny inapplicable to Ali—the protections of the Fifth and Sixth Amendment categorically did not apply to him because he was not an American citizen and was neither present in the United States nor had he developed "substantial connections" to the United States prior to the trial.[396] In a brief portion of the opinion, the majority then agreed with Ali's argument that Congress lacked the power to grant court-martial jurisdiction over civilians under Article I, Section 8, Clause 14 because that clause only gave Congress rule-making authority over actual members of the military, but found this argument to be "unpersuasive" because Congress could properly grant such jurisdiction pursuant to its war powers.[397]

These later two points were a source of contention in the concurrences. Chief Judge Baker wrote separately to criticize the majority's broad assertion that the Fifth and Sixth Amendments did not apply to Ali given the "more nuanced" approach to the extraterritoriality of the Constitution used by the Supreme Court in *Boumediene v. Bush*.[398] His concurrence also orbited a different center of gravity than did Judge Erdmann's majority opinion; Chief Judge Baker focused on the "structural question" of whether Congress has the power *as a threshold matter* to grant jurisdiction over civilian contractors accompanying the force.[399] In a careful and considered analysis, Chief Judge Baker concluded that in the narrow context of the case before the court, a combination of Article I powers—"the Rules and Regulations Clause, the war powers, and the Necessary and Proper Clause"—authorized the court-martial of this particular noncitizen contractor.[400] Judge Effron's

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[396] Here the majority was quoting *United States v. Verdugo-Urquidez*, a Supreme Court case where the Court found that the Fourth Amendment's protections did not apply to a noncitizen whose residence was searched without a warrant in Mexico. 494 U.S. 259, 263 (1990). Judge Erdmann's opinion also reviewed a series of Supreme Court cases which concluded that the protections of the Fifth and Sixth Amendments do not apply to aliens outside of the United States. *Ali*, No 12-0008/AR, slip op. at *29 (citing Balzac v. Porto Rico, 258 U.S. 298 (1922) (holding right to jury trial inapplicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914) (Fifth Amendment grand jury provision inapplicable in the Philippines); Dorr v. United States, 195 U.S. 138 (1904) (jury trial provision inapplicable in the Philippines)). Ali was not a resident of the United States, nor were his connections with the United States—predeployment training at Fort Benning and employment by a U.S. company—sufficient in light of *Verdugo-Urquidez*. *Id.* at 30.
[397] *Ali*, No 12-0008/AR, slip op. at *32–33.
[398] *Id.* at *2, *21–22 (Baker, C.J., concurring in part and in the result) (citing Boumediene v. Bush, 553 U.S. 723 (2008)).
[399] *Id.* at *3.
[400] *Id.* at *16.

concurrence was similarly narrowly drawn; court-martial jurisdiction over Ali was proper solely because there was no available Article III forum, as MEJA did not apply to Ali as a host-country national.[401] Noting that the differences between courts-martial and Article III criminal trials are issues of constitutional structure rather than due process, Judge Effron pointed out that while courts-martial comport with "general notions of fairness," the Constitution mandates a particular method of trial with which courts-martial do not comply.[402] For that reason, the case was not, in his view, the appropriate vehicle for assessing the constitutionality of Article 2(a)(10) in other contexts.

IX. Conclusion

Now that the military appellate courts have weighed in on the subject, the case will almost certainly end up before the Supreme Court. Even then, *Ali* is unlikely to provide a definitive answer to the question of civilians and courts-martial given the unique facts of the case highlighted in the CAAF concurrences. It is an open question whether a civilian otherwise subject to MEJA could ever be permissibly subjected to court-martial. While some commentators have argued that Congress lacks the power to subject civilians accompanying the forces in hostilities abroad to courts-martial,[403] it is not entirely clear that history and precedent would agree.[404] Given the complexities of the modern battlefield and the cautious skepticism courts have traditionally employed when considering questions of military jurisdiction over civilians, this is an issue which deserves—and will certainly receive—careful scrutiny going forward.

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[401] *Id.* at *5 (Effron, J., concurring in part and in the result).
[402] *Id.* at *10.
[403] O'Connor, *supra* note 24.
[404] It is important to keep in mind that the cases which would appear to articulate a blanket prohibition on the court-martial of civilians—*Toth*, *Reid II*, and *Singleton*—all dealt with attempts to court-martial individuals during a time of peace, and did not address individuals serving, as modern civilian contractors arguably do, as proxies of their military counterparts in areas of active hostilities. A civilian dependent, however intimately connected to the service, is not part of the armed forces because he or she does not serve a historically military function in a hostile area. It is far more difficult to argue that the civilian contractor providing direct logistical or operational support to combat operations in Afghanistan is not "part of" the armed forces as that phrase was traditionally understood.

As it stands, despite the broad language of the plurality opinion, *Reid II* created almost as many questions as it answered. The question of court-martial jurisdiction over civilians is as troubling today as it was sixty years ago. The problems of *Reid II* and its progeny are unlikely to resolve themselves any time soon.

THE INAUGURAL MAJOR GENERAL JOHN L. FUGH SYMPOSIUM ON LAW AND MILITARY OPERATIONS

INVESTIGATING MILITARY OPERATIONS: ADDED VALUE OR ADDED HYPE?

LIEUTENANT COLONEL MIKE P. J. COLE*

I. Introduction and Symposium Construct

On May 17, 2011, the Center for Law and Military Operations at The Judge Advocate General's Legal Center and School (TJAGLCS) hosted the inaugural Major General John L. Fugh Symposium on Law and Military Operations (Symposium).[1] The Symposium examined the trend towards the externally imposed and mandated investigation, analysis, and reporting on, of operations conducted by a nation's armed forces ("third-party investigations").[2]

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* Legal Advisor, British Army. The author is currently on exchange with the U.S. Army Judge Advocate General's Corps and serves with the Center for Law and Military Operations (CLAMO) at the Army's Judge Advocate General's Legal Center and School (TJAGLCS). The views expressed in this article are not necessarily his own, nor those of any organization he works for or represents. Instead, this article is intended to reflect the Fugh Symposium's dominant themes and the debate that they generated. The author is grateful for the assistance given to him in the preparation of this summary by Mr. David Graham, Lieutenant Colonel Rodney LeMay, Captain Thomas Nachbar, Ms. Kristi Devendorf, and the Fugh Symposium panelists and moderator.

[1] The Inaugural Major General Fugh Symposium on Law and Military Operations, Investigating Military Operations: Added Value or Added Hype, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia (May 17, 2011). The Fugh Symposium commemorates the name and memory of Major General John L. Fugh, who died in May 2010. General Fugh was the first Chinese-American general officer in the U.S. Army and served as the Judge Advocate General of the Army between 1991 and 1993. Prior to that, he served in a wide variety of assignments, including the Military Assistance Advisory Group for China, Legal Advisor to the Ballistic Missile Defense Office, Staff Judge Advocate for the Third Armored Division, Legal Advisor to the Assistant Secretary of Defense for Manpower and Reserve Affairs and Chief of Army Litigation. After retirement, MG Fugh held high-level executive positions in the defense industry and was a member of the "Group of 100," a non-partisan organization of Chinese-American leaders chartered to foster a positive dialogue and build relationships between China and the United States.

[2] For ease of reference, this article utilizes the term "third-party investigations" to identify an investigation into the conduct of military forces that is not carried out via the military's own internal investigation process.

This article summarizes the Symposium's dominant themes and is structured as follows. Part II discusses the multi-faceted nature of third-party investigations. Part III considers the genesis of an investigation and its associated mandates. Part IV focuses on investigation methodology, with Part V discussing the Symposium's views on whether third-party investigations deliver "added value or added hype." Part VI analyzes the second-order effects that investigations can produce. Section VII briefly articulates seven investigation challenges identified by the Symposium participants. Finally, Part VIII presents some of the Symposium's conclusions.

The Symposium centered around the conduct of international, national, and non-governmental organization (NGO) investigations such as the United Nations' (UN) "Goldstone Commission" into Israel's 2006 Operation CAST LEAD in the Gaza Strip; the International Independent Investigation Commission's (IIIC) investigation into, and indictments stemming from, the assassination of Prime Minister Rafik Hariri of Lebanon; the activities of the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR); and NGO investigations into the use of landmines and cluster munitions and their contribution toward the Mine Ban Treaty[3] and Convention on Cluster Munitions.[4]

Forty-eight experts from around the globe participated in the Symposium, to include members of the American, Israeli, Canadian, German, and British armed forces; academics from noted American institutions; representatives from the Departments of Defense, State, and Justice; and NGO members. Five panelists spoke of their personal involvement in, and perception of, third-party investigations.[5]

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[3] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 26 U.N.T.S. 5.

[4] Convention on Cluster Munitions, May 30, 2008, 26 U.N.T.S. 6.

[5] Bonnie Docherty, a lecturer at Harvard Law School and senior researcher at Human Rights Watch (HRW), spoke on HRW's field work into the use of cluster munitions in warfare. Beth van Schaack, professor at Santa Clara Law School, spoke on her involvement as the Legal Advisor for the Documentation Center of Cambodia investigating the Khmer Rouge's abuses. Colonel Sharon Afek, Deputy Military Advocate General (MAG), Israeli Defense Force (IDF), spoke on the IDF's experience of being the subject of international investigations. Professor Larry Johnson, Columbia Law School and former Assistant Secretary-General for Legal Affairs at the United Nations, spoke on the UN's Charter-based mandate to conduct international investigations and the UN Secretary General's role in the process. Finally, Ambassador Stephen Rapp, U.S. Ambassador-at-Large for War Crimes Issues, shared his experiences and thoughts on this

The Fugh Symposium's intent was to debate the *realpolitik* behind third-party investigations in order to understand whether they do, in fact, add value, or simply add to the "hype" surrounding a high profile event, and what second (or third) order effects flow from them. The panelists did this by juxtaposing theoretical academic issues within the pragmatic context of real world investigations. Similarly, the varied backgrounds and experience of the Symposium delegates ensured that the debate was factually based, searching in its direction and pragmatic in its conclusions. Taken together, the presentations and the debate added to the understanding, empathy and respect that the panelists and delegates felt for their fellow Symposium attendees - notwithstanding whether the attendee wore a uniform or a suit, represented an NGO or a government, or were, historically, viewed as being "on the other side" of the debate.

II. Investigations: Ubiquitous and Multi-Faceted (and Messy)

As night follows day, whenever a military operation hits the headlines (typically for the reason that "something" appears to have gone wrong), the cry for an independent and impartial investigation quickly follows. It is an increasingly loud cry. Understanding the rationale behind the cry often will depend upon from where it emanates. Anecdotally and historically, to misquote Nelson Mandela, where you stood in relation to the call for such an investigation depended upon where you sat in your day job. If it was an NGO chair, you were in favor. If it was a military chair, you were not. In essence, third-party investigations were typically viewed as a zero sum game by both sides to the debate.

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subject, borne from his personal involvement in a number of international criminal tribunals, including the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda. Professor Geoffrey Corn, a former U.S. Army Judge Advocate and current professor at South Texas College of Law, moderated the panels. Notwithstanding their professional affiliations, unless indicated otherwise, the Symposium panelists and attendees spoke on their own behalf, and their views do not necessarily reflect the views of the organizations with whom they are affiliated. Additionally, the use of the term "panelist" in the prose is intentional and is done for purposes of non-atrribution.

Few would deny that third-party investigations are becoming increasingly common. Wherever you stand (or sit), and whether you are primarily driven either by the requirement to accomplish the military mission, or to protect the humanitarian interests that are affected by military operations, it is critical to understand the role that such investigations play, the primary issues that they involve, and the second order effects they produce.

There is no better place to start than with the scene-setting words of Professor Beth van Schaack, who explained:

> I think that we just have to accept at this point in time that there will be multiple investigations into any major incident, right? Information is just too ubiquitous, everybody's got a helmet cam; there's Wikileaks; there's journalists embedded; there's NGOs crawling around. So, it will be inevitable that you may have an NGO investigation. You may have national/territorial state investigations, but you've also got universal jurisdiction, so you may have other national states opening investigations. The UN or the Security Council may appoint a body or a special rapporteur; you may have an official commission of experts that gets appointed through the UN. And they are all operating under different standards, different evidentiary rules. How are all these going to work together and reach any sort of conclusion? It's going to be messy. I think we have to accept it's going to be messy.[6]

The messiness inherent in multiple, overlapping investigations can easily rise to the level of chaos, partly because no two investigations are alike. Even the nomenclature used to describe investigations invites confusion: investigations are conducted under the auspices of Panels of Experts, Panels of Enquiry, International Independent Fact-Finding Missions, Commissions of Enquiry (sometimes "International," sometimes not), Criminal Tribunals, not to mention plain old Army

[6] Although the Fugh Symposium was conducted under the non-attribution policy applicable to most events at TJAGLCS, the author is grateful to the panelists for agreeing to a select number of exceptions to the policy.

Regulation 15-6 investigations[7] and common military (or civilian) criminal law investigations. These different forms of investigations compete on the same, crowded, investigation playing field, often resulting in multiple investigations of the same incident. Notwithstanding these differences, the Symposium's dominant themes provide a structured format within which to consider this subject.

III. A Responsibility to Investigate, an Investigatory Response, or Individual Self Interest?: The Genesis of an Investigation and its Associated Mandate

Typically, it is the facts of a situation, or perhaps, more accurately, the *perceived* facts, that will generate the calls for an investigation. In circumstances where there is an alleged violation of international humanitarian law (IHL), the definitive view of one of the panelists (which did not provoke dissent) was that the requirement for an investigation was a legal *duty*, not simply a moral *responsibility*. Not only was that duty implicitly prescribed in the Geneva Conventions,[8] but it also was viewed by the panelist as constituting customary international law. In such circumstances, the focus of the debate has moved largely on from "whether" to investigate, to "by whom" and "how" the investigation should be conducted. In addressing the second question, the panelists' starting assumption was that the duty suggests the requirement is for an internal, rather than a third-party, investigation. However, before "by whom" and "how" (or "how many") questions are assessed, it is important to fully understand the considerations that factor into the "whether" to investigate question. Doing so helps recognize that even if the duty is fulfilled by way of an effective military investigation, it is naïve to believe that this will abate the call for other third-party investigations.

In addition to those circumstances for which an internal duty to investigate exists, the Symposium highlighted a number of other factors that may provoke the call for a third-party investigation. For instance, NGOs often will conduct investigations in order to highlight a particular

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[7] U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS 13 (2 Oct. 2006).

[8] *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 75 U.N.T.S. 3. All four Geneva Conventions, as well as Additional Protocol 1 to the Geneva Conventions, have similar provisions.

humanitarian cause, as well as to document violations of the law. The Human Rights Watch (HRW) investigations into the use of cluster munitions provided just such an example. While the use of cluster munitions, especially in populated areas, raises *jus in bello* concerns from some audiences, few would argue that the use of cluster munitions is, *per se*, a crime or violation of *jus in bello*, whether under customary international law, or (prior to the 2008 Convention on Cluster Munitions[9]) by virtue of any treaty obligation. It would nevertheless be perfectly logical that an organization such as Human Rights Watch (HRW), with its focus on the protection of civilians during armed conflict (rather than the effectiveness of a specific military operation), would wish to study and publicize the use of such munitions, and the impact that they have on the civilian population during and after a conflict situation. A number of Symposium participants credited HRW investigation reports from countries such as Afghanistan, Iraq, Lebanon, Israel and Georgia on raising awareness about cluster munitions and helping to change laws and policies at the national and international level that govern their use.[10]

Other third-party investigations are driven by the national policy and law of the country *doing* the investigating. Those investigations can be internally or externally focused. The investigations conducted by the Documentation Center of Cambodia in Cambodia (DC-Cam) are an example of the latter. The DC-Cam had its genesis in the Cambodian Genocide Justice Act, a U.S. Act of Congress.[11] That legislation spelled out U.S. policy "to collect, or assist appropriate organizations and individuals to collect relevant data on crimes of genocide committed in

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[9] *Supra* note 4. *See also* Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, *Convention on Cluster Munitions*, May 30, 2008, CCM/77, *available at* http://www.unhcr.org/refworld/docid/4843e59c2.html (last visited July 20, 2012).

[10] It was noted that the concerns reflected in HRW investigations and reports for a comprehensive cluster munitions ban, the removal of a "self destruct" exception, remedial measures, clearance requirements, and victim assistance were reflected in the Convention on Cluster Munitions. The victim-centered approach adopted by HRW had been reflected in over a decade of reporting and civilian victim testimony, with the reported testimonies being supplemented at the preparatory and negotiating conferences by civilians who were able to give first-hand accounts. Although not discussed during the Symposium, the influence that such a cumulative depth of investigatory reporting brings should not be underestimated. As such, in order to generate the positive benefit that multiple investigations were viewed as providing, armed forces may wish to consider whether to address, on a report by report basis, any perceived inaccuracies or institutional bias that third-party investigation reporting generated.

[11] Cambodian Genocide Justice Act, 22 U.S.C. § 2656, pt. D, secs. §§ 571–574 (2006).

Cambodia."[12] Although constituted under U.S. domestic legislation, the nature of DC-Cam's investigations required it to be cognizant of international crimes, as well as the sort of evidence needed to prove them.[13]

Domestic legislation and policy also drive *internal* third-party investigations, where state appointed non-military bodies investigate allegations of violations of the law by its own armed forces. The public enquiries conducted in the United Kingdom about the conduct of its armed forces in Iraq are demonstrative of that phenomenon.[14] Those enquiries augmented the more routine process, whereby a military investigation would be used to investigate allegations about improper or illegal military conduct.

Sometimes, the call for an external third-party investigation emanates from the nation most closely connected to the incident being investigated. The United Nations' Commission of Inquiry into the death of Prime Minister Benazir Bhutto of Pakistan came at Pakistan's request. Such a call may follow an earlier domestic investigation, particularly when an interested party views the earlier investigation as being flawed or inadequate.[15] The International Independent Investigation Commission into the death of Lebanese Prime Minister Rafik Hariri (the Hariri

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[12] Central to this mandated task was a process to document crimes committed as a part of that genocide and to share that evidence with any domestic or international tribunal that had jurisdiction over those crimes. The Documentation Center of Cambodia in Cambodia (DC-Cam) other roles relate to legacy recording issues, victim trauma and mental health advocacy, educational and outreach work (including legal training on the procedures and outcomes of the Extraordinary Chambers in the Courts of Cambodia (ECCC) and rule of law principles at large), and the recording of interviews with certain people who, although involved in the genocide, fall below the prosecution's threshold for bearing the greatest responsibility for it (the latter role suggests a truth commission element to DC-Cam's investigatory remit).

[13] *E.g.*, Evidence tending to prove the specific intent of the crime of genocide. This element was of particular interest in Cambodia due to the nature of the genocide being political, rather than, necessarily, national, ethnical, racial, or religious in nature. Similarly, and importantly for the investigatory mandates of third-party investigations, war crimes charges require, amongst other matters, the existence of an armed conflict and a nexus between the act in question and the armed conflict.

[14] E.g., The Aitken Report. An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004, Jan. 25, 2008 and the subsequent report by Sir William Gage, Baha Mousa Public Enquiry Report, HC 1452-1 (Sept. 9, 2011).

[15] Lebanon's initial investigation into the death of Prime Minister Rafik Hariri had been viewed by a United Nations-led review of its findings as being "seriously flawed." *See* http://www.un.org/apps/news/story.asp?NewsID=20690&Cr=leban&Cr1. Please provide a copy of this news story.

Investigation) exemplifies such a view, demonstrating the possibility for variations even among this particular type of investigation. The call for the Commission came from the Lebanese Government and was reinforced by a concurrent United Nations Security Council (UNSC) Chapter VII resolution.[16] Sometimes the request for external engagement may appear less than sincere. Some commentators question Sri Lanka's call for investigations in the wake of the 2008-09 campaign against the Liberation Tigers of Tamil Elam in this respect. In that case, the "joint" statement of the President of Sri Lanka and the United Nations Secretary General speaks volumes about the accountability process needed to address allegations of IHL and human rights law violations in that campaign.. As Professor Johnson wryly pointed out during the symposium, it was a joint statement that will "go down in the annals of joint statements for saying nothing jointly."[17]

The mandate given to various United Nations bodies often will have an investigatory element to them. Professor Johnson's thoughtful analysis of UN bodies, and their mandates, included those that emanated from the UNSC, the Human Rights Council (HRC), and its predecessor, the Commission on Human Rights. The Chapter VII basis for a Security Council-mandated investigation can provide enhanced powers and legitimacy to the investigatory bodies created. Both the ICTY and the ICTR were investigatory and prosecution tribunals created by UNSC Chapter VII resolutions. For example, those mandates provided the tribunals' respective prosecutors the power to order countries to turn over documents or individuals to the court. Those orders are seen as having the force of law behind them. Both these tribunals had a pure IHL mandate, dealing as they were with allegations of serious violations of that body of law. Human Rights Council/Commission-mandated investigations have included inquiries into events in Sudan, Gaza, Libya, and Cote d'Ivoire.[18] Not surprisingly, the mandates in these cases have human rights law elements to them; the latter two exclusively so. Hybrid versions of these UN-created tribunals and commissions also exist,

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[16] S.C. Res 1664, U.N. Doc. S/RES/1664 (Mar. 29. 2006).

[17] U.N. Secretary General, Joint Statement by UN Secretary-General and the Government of Sri Lanka, U.N. Doc. SG/2151 (May 26, 2009), *available at* http://www.un.org/News/Press/docs/2009/sg2151.doc.htm.

[18] The Human Rights Council-mandated investigation into allegations of serious abuses and violations of human rights in Cote d'Ivoire, Libya and Sudan should not be confused with the separate Security Council referrals to the International Criminal Court relating to these countries.

whereby the investigation is conducted in accordance with an agreement between a specific State and the UN.[19]

In some circumstances, it is the United Nations Secretary General himself who will establish a fact-finding or investigative mission. That role is provided for in the UN Charter.[20] Indeed, one panelist suggested, in a lighthearted manner, that this may be the only substantive job that the Secretary General has under the UN Charter—his other roles being no more than would be performed by the Chief Administrative Officer of any large international organization! Although undoubtedly having the power to mandate such an investigation, and having historically done so, it is now more likely that the Secretary General's decision to call for an investigation would likely be buttressed by a General Assembly or, preferably, UNSC Chapter VII mandate. Given that a Chapter VII mandate will, by its nature, likely relate to situations that the Security Council views as threats to international peace and security, that fact underscores the importance the international community places upon such investigations.

In other circumstances, it is a United Nations Special Representative (UNSR) or Special Rapporteur who will *call* for an investigation into a specific incident or systemic situation. The recent call by the UNSR for Children and Armed Conflict to review the precautions necessary to prevent children from becoming casualties in Afghanistan is a case in point. However, whether those calls actually translate into a UN-sponsored investigation is not a foregone conclusion.

Of course, no current discussion about third-party investigations could fail to consider, in some detail, the Goldstone Commission's Report,[21] its mandate (rooted in both IHL and human rights law), findings, and fallout. One of the issues raised in that context, but which has implications beyond the confines of that specific investigation, was

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[19] *E.g.*, The ECCC was borne out of an agreement between the UN (General Assembly) and the Royal Government of Cambodia. *See* G.A. Res 52/135, ¶ 16, U.N. Doc. A/RES/52/132 (Dec. 12, 1997).

[20] U.N. Charter art. 99, *available at* http://www.un.org/en/documents/charter/chapter15.shtml ("The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.").

[21] *See, e.g.*, Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009).

Israel's capacity to conduct its own investigation. Investigating the adequacy of a state investigation is a familiar concept to those who follow European Court of Human Rights (ECtHR) jurisprudence. Notwithstanding the possibility of such an investigation, the general consensus during the symposium was that this line of investigation went beyond the Goldstone Commission's mandate.

IV. Methodology, Investigatory Protocols, and Standards of Investigation—A Minimum or Minimal Acceptability?

Assuming that there is, indeed, a duty to investigate, it would be logical to further assume that that duty has to be discharged against certain agreed standards. The Symposium debate made clear that the standards applicable to investigations, rather than the duty to investigate itself, are more problematic to identify and agree upon. The argument historically has been divided between an IHL and a human rights law basis for investigations. That divide, though, is becoming less clear-cut and more theoretical. The reality is that investigations, such as those conducted by the office of the prosecutor at the Special Court for Sierra Leone, often require both IHL and human rights jurisprudence to be considered. To blithely surmise that the military is concerned with IHL, and human rights organizations with human rights law, clearly ignores that reality.

For instance, the recent development ofECtHR jurisprudence has demonstrated the increasing impact that human rights principles can have on military forces. The nature of coalition operations means that forces outside the legal jurisdiction of a particular human rights convention also may be impacted by those principles. This will increasingly require forces to understand, contemplate, and operationalize their plans with more than just a passing nod to human rights principles. Similarly, some human rights organizations are mandated to specifically consider IHL and human rights law considerations in their field investigations. Indeed, one panelist suggested that, in light of the current comingling of IHL and human right law, willfully ignoring one camp was tantamount to essentially forum-shopping for the most favorable legal regime, with the rule of law largely suffering as a result.

What seems to unite the IHL and human rights camps is their commitment to the duty to investigate. The Symposium heard how Operation CAST LEAD resulted in the IDF receiving and examining

more than 400 allegations of IHL breaches, with the investigations lasting considerably longer than the three-week Operation. As panelist Colonel Afek pointed out, that level of investigatory commitment, coupled with being on the receiving end of another party's investigation, consumes many resources.

It is all too easy for investigations, from whatever source, to be disparaged by generic criticisms about their inadequate and opaque methodology. Some NGOs publish their methodology.[22] Bonnie Docherty's explanation of HRW's field mission methodology provided interesting detail and transparency in this respect.[23] That methodology was, in part, driven by HRW's investigatory focus—i.e., the analysis of the effects of armed conflict on civilians (which, among other factors, involves an IHL compliance assessment). Human Rights Watch researchers refer to the process that they undertake as "Humanitarian Battle Damage Assessment (BDA)." By way of comparison, Ms. Docherty suggested that the U.S. Department of Defense's BDA definition[24] indicates that a military investigation is more focused on establishing the (military) effectiveness of a specific military operation by looking at the enemy's post-strike capabilities.[25]

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[22] *See, e.g.*, *Human Rights Watch* publishes its research methodology on its website. Human Rights Watch, *Our Research Methodology*, *available at* http://www.hrw.org/node/75141.

[23] The integrity of HRW's investigations was demonstrated by a detailed discussion of their attributes: the personnel used (two-to-three person teams with IHL, human rights and relevant military experience, as well as country-specific experts); types of evidence collected (physical, testimonial and documentary), and from whom; and measures taken to minimize evidence loss. The important role that the military plays in providing a complete picture for the HRW investigation was also highlighted. The military can provide, for instance, first-hand explanations of why targets and weapon systems were chosen, and of what precautions were or were not taken. That information will often illuminate military specific factors, perhaps relating to enemy force capabilities, which would otherwise not be readily apparent to the external investigating team. These may help explain certain actions that otherwise appear perplexing, at best, or controversial, at worst. In addition to talking to uniformed personnel, HRW interviews government officials, journalists, other NGOs and civilians witnesses, amongst others, in order to understand the details of, and rationale behind, what happened.

[24] JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (8 Nov 2010) (as amended through 15 Feb. 2012) (defining "battle damage assessment" as "the estimate of damage resulting from the application of lethal or nonlethal military force. Battle damage assessment is composed of physical damage assessment, functional damage assessment, and target system assessment").

[25] The ability to reduce the negative effects of armed conflict on civilians does, of course, enhance military effectiveness. As such, it is important to note that when an untoward

Although the panel accepted that some NGOs[26] gathered reliable and important information during their investigations, others did not appear to adhere to any recognized standards in their methodology or the conduct of their investigations and reporting. This caused particular difficulties when their reports called for criminal prosecutions, but the evidence produced did not meet the requisite standards that would support issuing a criminal indictment. Of course, not all military investigations would meet an international credibility litmus test, either. Even as one considers the possibility of agreed upon standards for third-party investigations, the question of whether it is possible to point to such widely held standards for worldwide military investigations is left unanswered.

In relation to military methodology, the Symposium heard that the IDF investigatory process follows a policy-mandated process to examine allegations. The process utilizes a "field"[27] investigation and a subsequent (or in some cases a contemporaneous) criminal investigation. That investigation will prompt a decision to close a case, issue an indictment or commence with administrative disciplinary procedures. The assessment of the field investigation routinely accountsfor any other relevant information relating to the incident under examination, including information received from third parties. Other members of the Symposium expressed the view that third-party and military investigations should be used to supplement, and not replace, one another. It was noted that the manner in which these respective investigations record, present and release material can often display a certain institutional bias (whether unwittingly or not). As such, when looked at in totality, the value generated by separate, multiple investigations was greater than the sum of their parts.

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incident has occurred, the focus of a military investigation will typically be upon establishing facts, determining whether or not IHL and rules of engagement have been complied with, and making recommendations about how best to avoid such an incident in the future. In such a case, a military Battle Damage Assessment may, or may not, *also* be conducted. For completeness, a complementary (or sometimes inbuilt) military investigation is often conducted in order to inform and assist the management of any post-incident claims process.

[26] *E.g.* B'tselem, *available at* http://www.btselem.org (last visited July 20, 2012). B'tselem is also known as the Israeli Information Center for Human Rights in the Occupied Territories.

[27] Also known as a "command" investigation.

Notwithstanding that a national investigation might incorporate allegations and information reported through other investigative vehicles, the IDF position remains that IHL provides their own investigators with an exclusive framework for conducting (including the duty to conduct) investigations of alleged violations of the law by its own forces. That framework is supplemented by certain tenets of international criminal law. This allows a state to not only hold accountable, and prosecute, those who have crossed "red lines," but also facilitates a learning process that can be used to enhance the conduct and efficacy of its application of military force.

Given that not only the IDF, but also many military forces around the world regularly conduct such investigations, it is necessary to ask whether these investigations can ever be viewed as being impartial, fair, and effective in their own right. And even if they are, would that obviate the need or impetus for investigations by outside organizations? The IDF position[28] is that their internal authorities are not only willing and able to perform such investigations, but also that the functional independence of their Military Advocate General (who in his professional capacity is answerable only to the Israeli Attorney General and the oversight of the Israel Supreme Court), their Military Police Criminal Investigations Division and the military courts safeguard the effectiveness of that process.[29] That process as used in the IDF investigations into Operation CAST LEAD, panelist Colonel Afek pointed out, did not make the IDF's investigatory authorities the most popular element of the IDF. That in itself is, perhaps, a good indicator of the diligence with which those authorities performed their duties.

Of note, and a further check and balance, the Symposium was informed by a panelist that whenever an IDF investigation into an alleged IHL violation is closed without an indictment being issued, the complainant is provided with a summary of the investigation's findings

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[28] Given that the Fugh Symposium had an Israeli Military Advocate as a member of one of its panels, it was inevitable that many of the examples and comments centered on IDF practice. Although many other nations have internal (to the military) investigatory policy and legal requirements, the practice of those other nations was not specifically discussed during the Fugh Symposium.

[29] Following the three-week IDF Operation CAST LEAD, the IDF military investigatory bodies considered in excess of 400 allegations (including those made in NGO reports and media reports) of wrongdoing. That process resulted in fifty-two criminal investigations and, at the time of the Fugh Symposium, three criminal indictments. Israeli Defense Force, www.idf.il (providing further details).

and the grounds for the decision not to pursue criminal charges. This facilitates the complainant's ability to approach the Attorney General, and thereafter the Israel Supreme Court (which typically will review the entire investigation against recognized legal standards) with such requests as they deem appropriate. That review can, and has, resulted in investigations being re-opened and / or indictments to be filed or amended.[30]

Third-party investigations that are launched with the intent of promoting accountability (via a judicial mechanism) will need to contemplate the mandate and procedures of those bodies that have jurisdiction to try cases related to the incident. For example, the DC-Cam's investigations recognized that the ECCC would be prosecuting only high level officials, not foot soldiers. To that end, its investigatory terms of reference and methodology were necessarily slanted towards proving the different forms of responsibility for relevant offences, including, for instance, concepts of superior or command responsibility and joint criminal enterprise. Interestingly, the DC-Cam experience revealed that, although evidence collection will normally become increasingly hard with the passage of time, in some instances, the reverse is true. Cambodia is a case in point. Information that would have been hidden or classified earlier may be revealed with the passage of time; witnesses become more willing to speak when it is clear that the previous government will not return; mass graves are discovered; and journalists, academics, and historians have had more time to process an often substantial volume of raw material and evidence. This produces a clearer picture of events than may initially have been the case.

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[30] *See, e.g.*, HCJ 7195/08 Abu Rahme v. Military Advocate General (Isr.) [2009], *available at* http://elyon1.court.gov.il/files_eng/08/950/071/r09/08071950.r09.pdf. The case related to the close-range rubber-bullet shooting of a violent protester after he had been detained. Following a criminal investigation, the Military Advocate General (MAG) decided to prosecute the soldier who committed the shooting and his battalion commander for "conduct unbecoming." The petitioners (the victim and several Israeli NGOs) argued this offense did not adequately reflect the gravity of the alleged act. In a precedential ruling, the Israel Supreme Court accepted the petition, and in spite of the long-standing tradition of deference to prosecutorial discretion and the high threshold for judicial review thereof, ordered the MAG to re-file the indictment under more serious charges of the Military Justice Law.

V. Investigations: Added Value or Added Hype?

One question that arose throughout the discussion was that of whether third-party investigations add value, or just add hype. The almost inevitable conclusion: both.

Proponents of the position that investigations add value cite the likelihood that, in the fog of war, multiple investigatory sources will help "triangulate" the available evidence into a reliable conclusion. A multiplicity of investigations produces multiple voices and multiple sets of eyes which, in turn, add to the clarity of the picture being painted. One participant suggested that non-military investigating bodies, and NGOs in particular, may have better access to many civilian and "enemy" witnesses than a military investigation team. It was also suggested that the former are more likely to have the individual skill sets and cultural understanding required to produce effective witness statements from civilian witnesses and victims. On the other hand, military investigators will almost certainly have better access to classified information along with internal military information necessary for an informed assessment of considerations such as military necessity.

That is not to say that "the more the merrier" approach wins the day. The Symposium produced considerable agreement that a multiplicity of investigations could add to the confusion (with a "he said, she said" debate ensuing), undermine witness testimony (where multiple statements had been provided by individuals to different investigative bodies operating under different legal mandates[31]) or produce self-perpetuating factual claims that are not only unsubstantiated, but are also riddled with errors. After-the-fact attempts to correct those errors are akin to attempting to "un-ring" a bell.

Third-party investigations are also viewed as a way of ensuring or, more modestly, promoting accountability. Although the Symposium heard that the nature and success of the way by which the IDF is held to account by the Israel Supreme Court, it also was suggested that this may be a function of the Court's geographic proximity to the areas in which

[31] Witnesses (who may well be uneasy about giving evidence in open court, or who are simply baffled by the legal process they are a part of) can all too easily find themselves confronted, often in cross-examination, by multiple prior statements. In the absence of those witnesses being able to explain the differing auspices under which the multiple statements were given, it is not inconceivable that they may find their credibility, and the veracity of their testimony, being openly challenged in court.

IDF operations tend to be conducted. However, where the conflict occurs outside such a judicial body's investigatory jurisdiction, or where it does not exercise its powers in a comprehensive manner, third-party investigations may have comparative advantages.

Again, different perspectives can lead to different conclusions. Clearly, for those advocating for a particular cause, any responsible public investigation that supports that cause will benefit their campaign. That does not necessarily mean that the "other side" of the debate will not be able to benefit from such an investigation. Holding the military to account in relation to their IHL obligations may highlight, for example, how military effectiveness can be enhanced through improvements to the post-attack battle damage assessment process. Even where the initiation, conduct, and findings of an investigation are viewed as little more than political "state bashing," the state being "bashed" may be able to benefit positively from the report, whether by enhancing its own post-incident procedures in order to be able to counter such attacks, or by using a flawed investigation as evidence of the failings of the current lack of standards as part of its own campaign for better regulation and conformity to international standards for future reports.[32]

That said, simply by dint of repetition, criticism of a state's internal military investigation process can undermine the utility of this process in promoting accountability. If otherwise demonstrably effective military investigations are routinely castigated for politically motivated reasons, the military's and, potentially, the national legal system's credibility and role in upholding that public accountability can be undermined. In this respect, the point was well made during the Symposium that it was somewhat ironic that the more open and accountable a state is, the easier target it can become for critical comment. Those who use a state's openness as a means for criticizing the state's own processes have the potential to encourage a less open and transparent approach to investigations. Indeed, that approach becomes even more appealing when one considers the effectiveness of states that neither allow investigations by others, nor conduct them internally, in escaping criticism for egregious transgressions.

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[32] Following the Goldstone Commission's Report, the United Nations General Assembly adopted a resolution. G.A. Res 64/254, U.N. Doc. A/RES//64/254 (Mar. 25, 2010) (calling on both Israel and Palestine to conduct investigations that are independent, credible, and in conformity with international standards into allegations of serious violations of IHL and human rights law).

Clearly, the efficacy of a third-party investigation can be materially affected by the willingness of the nation being investigated to cooperate with the investigators.[33] A manifest unwillingness to cooperate can play into the hands of those who would seek to demonstrate a lack of accountability, and, inevitably, lend itself to conspiracy theory conjecture. Where state cooperation is not forthcoming, effective investigatory reporting should detail the attempts that were made to obtain information and appropriately caveat the basis upon which any conclusions were reached.

To cooperate or not to cooperate? That may be the question, but the answer is rarely easy to reach. The decision may be influenced by a variety of factors, from the state's perceived benefit of participating, to resource concerns. A government's decision may be driven by ideology (a rejection of the legitimacy of the investigating body, for instance), or a belief that the report will be biased against them, no matter what they do. Whatever the view, it will almost inevitably be influenced by the state's examination of the genesis, mandate, terms of reference, composition,[34] and independence that the third-party investigation brings with it.

The utility of a third-party investigation may go beyond an accountability or advocacy role. It may also become an independent resource to gather and preserve historical information for educational and reconciliation purposes. Their role in documenting the role and conduct of low level offenders may be of particular importance when relevant criminal tribunals are only mandated to prosecute those who bear the greatest responsibility for serious violations of IHL and human rights law. The value of that story-telling, or history-writing, will depend upon its completeness, the way in which it is told, and who is doing the telling. Some symposium participants were concerned about the increasing expectation that an international criminal tribunal will naturally perform a history-telling role. Trials traditionally have a very limited and specific purpose: answering the specific question of guilt or innocence of individuals for specific criminal acts, and it may not be appropriate, or

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[33] *E.g.*, By virtue of a refusal to provide requested information, or a denial of access to the *locus* in question.

[34] A view expressed during the Symposium was that if international fact-finding commissions and tribunals are going to be used to sit in judgment on the decisions of military commanders in complex operational environments, there must be some confidence that those sitting in judgment have the requisite background, not only in the law, but also in the operational art aspect critical to understanding why a commander may have reached a certain judgment.

serve the interests of justice, for trials to expand into broader efforts to collect and record historical information. Whether NGO field teams or military 15-6[35] investigations are more or less likely to record the full story is also open to debate. However, the Symposium debate appeared to endorse the contention that there is cumulative value in conducting alternative methods of investigation in order to provide a broader narrative to historical events.

The manner and timing in which the investigation report, or even the pre-report, is released is a further factor to consider in assessing the utility, veracity or efficacy of third-party investigations. The approach taken in this respect may well be driven by the underlying aims of those who have conducted or instigated the investigation.[36] If the objective of the investigation is to raise public awareness or to further policy advocacy during a specific armed conflict, real-time press releases and media commentary may be the best method. Advocacy directed at policymaking bodies may use long-term, in-depth published reports that have a more analytical content to them and are often replete with recommendations to warring parties, the international community and other third-party interlocutors. If the aims are understood, the methodology and timing of the information's release can be better targeted.

Finally, it was noted that some "third-party" investigations may, in reality, be nothing more than an element of the information operations campaign that one side to a conflict uses to undermine the morale, international community standing, and credibility of its adversary. No doubt, in such a case, any assessment of the investigation's tendency to add value (to the side promulgating it) will be directly proportional to the hype it produces.

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[35] *See supra* note 7.

[36] *E.g.*, To condemn, to deter, to promote accountability, to advocate for change (whether legal or otherwise).

VI. Second-Order Effects and Beyond

Quite apart from the immediate issues being looked at by third-party investigations, the potential for these investigations to generate second-order effects, and beyond, is clear. While some of those effects have been dealt with previously, others merit discussion.

Complementarity principle issues abound.[37] If an independent, or secondary, investigation reaches different conclusions to that which a state's investigation reached, does that automatically imply that the state's investigation should be viewed as not credible? Should a demonstrably competent military investigation and prosecution, under International Criminal Court (ICC) complementarity principles, prevent the ICC Office of the Prosecutor asserting his jurisdiction? Although it is probably too early in the ICC's jurisprudential history to form a definitive opinion on how the Court would respond to such investigations, two cases are worthy of note in terms of its practice to date. The (ongoing) *Lubanga* trial suggests that even where a nation's effective investigation, and indeed prosecution, is being conducted, the ICC's Prosecutor may choose to undertake his own investigations and prosecutions when a domestic investigation (and, in the case of *Lubanga*, prosecution) does not conform with the investigation and prosecution priorities of the ICC Prosecutor.[38]

The International Criminal Court Office of the Prosecutor demonstrated a different ICC complementarity approach in respect to certain Darfur-related cases. At first blush, it appeared that the Sudanese Government was proactively pursuing cases—by way of creating special trial chambers, appointing a special prosecutor, and referring to its various dossiers under investigation. However, the Office of the Prosecutor appeared to conclude that the Sudanese Government's actions were, at best, ineffective in holding those who were alleged to have committed the most serious of offenses to account or, at worst, were

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[37] *See, e.g.*, MOHAMED M. EL ZAHEIDY, THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW (BRILL 2008).

[38] The *Prosecutor v Thomas Lubanga Dyilo* is an ICC case focusing on the enlistment, conscription and use of child soldiers. Prosecutor v. Thomas Dyilo, Case No. ICC-01/04-01/06, Sentence (July 10, 2012), *available at* http://en.wikipedia.org/wiki/International_Criminal_Court_investigation_in_the_Democratic_Republic_of_the_Congo#The_Prosecutor_v._Thomas_Lubanga_Dyilo.

simply a smoke screen designed to keep the ICC at bay.[39] The corollary to its practice in Darfur, however, is the leeway the ICC has given to the Colombian *Fiscalia* to deal domestically with certain cases (notwithstanding the perception among some observers that the Colombian military is an organization that operates apart from the normal state oversight structure).[40]

The specter of ICC involvement in domestic cases is one that may loom large in the minds of those charged with the domestic requirement to investigate. Given the lack of ICC precedent to indicate how much leeway the ICC's Prosecutor will give to states to conduct their own investigations, it is not inconceivable that the potential for ICC involvement will affect the manner in which domestic investigations are conducted. It may be that the prospect of an ICC investigation alone will cause a trend towards more effective domestic investigations and a reduced need for the ICC (which in itself is one of the purposes of the complementarity principle). This could manifest itself in positive (open, diligent, and expeditious investigations) and negative (high profile, resource intensive, investigations and proceedings which are all smoke, and no fire) ways. It also may play on the minds of those charged (or who charge themselves) with conducting external investigations, or who are involved as experts, witnesses, or advisors to such investigations. Perhaps, however, if the concept of positive complementarity is one that should be promoted, a more efficient use of third-party assets would be to work with and build the capacity of those nations that do not have effective investigation and prosecutorial capabilities in the first instance.

Remaining in the realm of the ICC, but conceivably in the context of national, universal or extraterritorial jurisdiction prosecutions,[41] the Symposium considered the extent to which the ICC, and other international investigations, should be cognizant of the unpredictable results of the release of an indictment or critical investigation. Reports and indictments affect not only those implicated in the report or named on a charge sheet, but also the organizations and personnel who are engaged in ongoing developmental activities in a country involved. The ICC's indictment of sitting Sudanese President Omar Hassan Ahmad al

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[39] Press Release, UN Dep't of Public Information (June 8, 2011). *See* http://www.un.org/News/Press/docs//2011/sc10274.doc.htm.

[40] For a discussion of this issue, see http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/colombia/colombia?lan=en-GB.

[41] *E.g.*, A Belgian or Spanish indictment of an alleged despotic head of state.

Bashir (and its negative impact upon the work of the United Nations Mission in Sudan and other international organizations),[42] or the ICTY indictment of the (then) Prime Minister of Kosovo, Ramush Haradinaj,[43] are cases in point. Although a prosecutor inevitably would be cognizant of the potential impact, the view was expressed that the nature of a prosecutor's job (and in the case of the ICC, his United Nations Security Council mandate) was to identify crimes and suspects, investigate their circumstances, issue indictments, and prosecute cases. In fulfilling that role, a prosecutor might simply accept the consequences that follow, rather than concern himself with the developmental or complementarity effects that flow from that process.

The second order effects produced by an external "fact finding" investigation, as opposed to an external criminal investigation (by the ICC or another international criminal tribunal), also deserve consideration. Understanding which body (or bodies) of law is being applied by the fact finding investigation will be of particular importance in performing a comparative analysis of the efficacy of a concurrent or prior domestic investigation. In addition to the previously described problems that multiple conflicting accounts can give rise to, when an international investigation delivers headline-grabbing conclusions that appear to differ from the state's own account, the credibility of the latter's investigation and investigative mechanisms can sometimes erroneously or unwittingly be undermined. In moderating this element of the debate, Professor Corn made the point that (especially where a human rights-based investigation is at odds with one based on IHL) it is possible to erode the axiomatic understanding and principle that:

> [R]easonable doesn't always mean right. Under IHL, you can be reasonable and wrong. You can hit the wrong target, but you could have done it reasonably, where you have considered all the intelligence and information that you have. Instead, one is left with the sense that it is easy to look backwards, and, in retrospect, say, well, this is

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[42] Prosecutor v Omar Hassan Ahmad al Bashir, Case No. ICC-02/05-01/09, Indictment (Mar. 4, 2009onth day, year). The ICC arrest warrants for crimes against humanity, war crimes and genocide. Further details available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109.

[43] Prosecutor v. Haradinaj et al., Case No. IT-04-84, Trial Judgement (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008), *available at* http://www.icty.org/case/haradinaj/4.

> what happened in any event. What are you going to do about that?" He went on to posit that sometimes the perfectly valid response to such a question would be, "We're not going to do anything about it, because we based our actions upon reasonable judgments [in accordance with the relevant law].[44]

The distinction between fact-finding missions and investigations that directly or indirectly lead to criminal prosecutions was itself a topic of debate. Fact-finding investigations conducted by otherwise reputable organizations can have a hugely detrimental, and unjustifiable, impact upon the individuals and organizations that are criticized.[45] This is particularly true when sometimes abstract legal distinctions,like the one referred to above, are not adequately understood by those who read the investigation's report. In view of this, an enduring theme of the Symposium, from the panelists and audience alike, was the need for international investigations to operate within an understood and transparent "regulatory" framework. Whether this is a realistic possibility is another matter, and, as has already been suggested, perhaps we must simply accept that "it's going to be messy." Unfortunately, for those who are denied justice as a result, that mess may be impossible to clean up.

VII. Challenges

The Symposium presentations and debate highlighted a number of challenges that need to be addressed. That said, the "need" is only there if one is willing to accept that third-party investigations are here to stay and/or that accountability for wrongdoing, or transparency generally, is a goal worth pursuing.

A. Political Agendas

There was widespread feeling that the validity of a third-party investigation is undermined if the investigators are suspected of having a political agenda. That suspicion alone, even without an obvious

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[44] *See generally supra* note 1.

[45] The example was given of IDF soldiers and officers who, as a result of a "fact-finding" investigation were subjected to verbal and written (graffiti and Internet) abuse branding them (without the due process of criminal proceedings) traitors and war criminals.

manifestation of such an agenda, is likely to frustrate the achievement of the goal.

B. Common Challenges

The relationship between third-party investigations and concurrent or consecutive military or criminal investigation at a technical level was a recurring theme throughout the Symposium. Some difficulties can afflict both processes. The harsh reality of conducting an investigation in a conflict or non-permissive environment is a case in point. The difficulties involved in obtaining access to the scene of an incident, whether it is during a conflict, or post-conflict, when the control over the location is disputed, should not be underestimated. That lack of access makes the crime scene susceptible to manipulation by other interested parties and makes disproving the impressions created by that manipulation extremely difficult, if not impossible. The difficulties of gathering physical evidence, obtaining timely autopsies, the re-creation of a crime scene, and conducting door-to-door inquiries, to name but a few, all affect the veracity and timeliness of an investigation. Physical accessibility apart, conflict situations have the very real capacity to produce both inadvertently one-sided or incorrect accounts[46] and deliberately untruthful witness testimony,[47] even assuming that relevant witnesses can, in fact, be identified and located in the first place.[48] These problems are compounded by the fact that there are few agreed upon third-party investigation standards on issues such as what constitutes corroborating evidence, what evidence should be considered definitive, or what standard of reliability and relevance should be used to determine what should go in, and what should be left out, of the investigation report.

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[46] *E.g.*, The Symposium heard of one instance where a witness had testified that he thought he had come under aerial attack by planes, when it was known to the investigators that the attack in question had been launched from the ground.

[47] Third-party investigations will rarely have the inherent jurisdictional or procedural capacity to penalize those who may provide knowingly untruthful testimony.

[48] It is worth noting that third-party (often NGO) assistance in identifying and tracing witnesses, and taking their statements, was acknowledged as being able to enhance the efficacy of a military investigation.

C. Classified Information

Even if information is available, it may be classified and therefore not releasable. One of the Symposium participants made the point that much of the intelligence used in, for example, targeting decisions will fall into this category and, as a result, that it would be naïve to believe that any nation or coalition would be willing to undermine its security by routinely disclosing such information in order to either participate in or respond to a third-party investigation.

D. It's the Economics, Stupid

In the conflict environment, the diversion of scarce resources that will be needed to engage properly with a third-party investigation may not be viewed by commanders, with their focus on mission accomplishment, as good economics. That view may be more strongly held when the threat environment puts those resources at very real risk of death or injury, or when the rationale for the third-party investigation is itself disputed.

E. The International Threshold

No recognized, widely acceptable set of circumstances exists to help make a determination of whether any particular call for an investigation is justified. Identifying the litmus test or threshold circumstances indicative of the need for a third-party investigation would assist in legitimizing those investigations that pass the test, and vice versa. For instance, during the discussion on complementarity, the Symposium heard that HRW was more likely to call for an *international* investigation when the military force involved was being reluctant to aid them in their own investigative efforts. But one is forced to wonder why a state should necessarily be pressured into cooperating with an investigation that it believes will criticize it in any event? More fundamentally, a state that fails to employ its own legal system to investigate a threshold incident should be less than surprised to see that investigatory requirement being undertaken by others. Pre-existing investigations, whether military or otherwise, may also indicate whether additional investigations are of

nugatory benefit. The "Flotilla Incident,"[49] which spawned at least five investigations, was provided as an example of a case where motivations other than the desire for an unvarnished account may have contributed to the initiation of so many investigations. One possible threshold level suggested during the Symposium was when a necessity arises to investigate, and gather evidence of, serious violations of IHL, including crimes against humanity. A consecutive task may be that of ensuring that there was accountability for such crimes. But whether that would, of necessity, require an international lead or involvement would clearly depend upon the capacity and will of the national authority concerned.

F. Fact or Fiction?

The consequences when the investigation is flawed, and its findings are erroneous, are of particular concern. Third-party investigations often will have substantial legal and political effects and will carry much weight in shaping opinions. It was noted that other reputable bodies may use previous investigations as a factual source of information for future reports, with each repetitive telling, erroneous or truthful, increasing the perceived credibility of those claims. The impact on individual soldiers, commanders and their families who are implicated in this way can be profound. After-the-fact attempts to redress the balance of such an investigation's credibility are resource intensive and often of limited utility, particularly when the initial public interest in the incident has waned.

G. Jurisdictional Principles and Priorities

Where overlapping investigatory mandates arise, the suggestion was made that, in the absence of a bad faith or resource driven failure to properly investigate, priority should be given to national investigations. This is particularly relevant when such a national investigation is for the purposes of criminal prosecution. Symposium participants also raised concerns about the removal of evidence by competing investigations, or the taking of evidence, or confessions, without following domestic due

[49] A military operation by Israel against six ships of the "Gaza Freedom Flotilla" on May 31, 2010, in *international waters* of the Mediterranean Sea. *Q&A: The Gaza Freedom Flotilla*, GUARDIAN, *available at* http://www.guardian.co.uk/world/2010/may/31/q-a-gaza-freedom-flotilla (last visited July 30, 2012).

process requirements. Where third-party investigations allege criminal conduct, the methodology utilized by them for collecting,[50] securing, or accepting evidence, or discharging or meeting a burden of proof, must be properly documented and understood.[51] The ability to assess the relevant legal regime is, at a minimum, vital to accurately interpreting an investigation's findings. Potential conflicts between investigations need to be identified and addressed at an early stage.[52] In the first instance, there should be an enhanced dialogue between national authorities and international authorities that claim a mandate to investigate in order to reduce the capacity for conflict between them. There was also a recognition that investigators needed to be properly trained to spot problem issues and to think ahead about the potential future use of their work.

VIII. Conclusion

Ambassador Rapp concluded the Symposium by explaining:

> Fundamentally, what this comes down to, relates to, what the world began to do in 1993, and which in itself hearkens back to Nuremburg: holding people accountable, regardless of station, putting on fair trials in which those individuals are provided with an adequate defense and in which their responsibility for the most serious crimes in the world are proven, beyond a reasonable doubt, by disinterested judges. All of this has

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[50] *E.g.*, It was suggested, during the Symposium discussion, that some witnesses who gave evidence to the United Nation's Fact Finding Mission on the (2008–2009) Gaza Conflict (more commonly referred to as "the Goldstone Commission") were questioned by the Mission in the presence of Hamas activists. Clearly, if true, that in itself would give rise to evidence credibility concerns. In any event, more generically, it reinforces the wisdom of establishing and publishing transparent investigative methodologies and protocols, and of applying them in practice.

[51] *E.g.*, Investigations that record statements from U.S. military personnel would be well advised to consider the terms of the Uniform Code of Military Justice (UCMJ). UCMJ art. 31(b) (2012) (relating to the prohibition of compulsory self-incrimination). A further non-criminal procedure example was given of the evidentiary considerations that the Center for Justice and Accountability utilized—and its relationship with the U.S. Department of Justice. *See* www.cja.org (last visited Aug. 13, 2012).

[52] The terms of reference for the Hariri Commission included, amongst other matters, jurisdictional priorities between the tribunal and Lebanese national courts, the Lebanese/ international composition of the tribunal's trial and appeal chambers, and the appointment of the prosecutor.

> created an enormous expectation for justice elsewhere. It has also raised questions, like Jackson[53] did at Nuremburg, when he famously said, "If we pass these defendants a poisoned chalice, we might have to bring it to our own lips as well. We have to hold everyone to the same standards that we hold ourselves to." We have a great expectation that, in all situations, there needs to be justice. We are rightly proud of what we do at the national level when we hold our own people to account. Where it is not done, the expectation is that the international community now needs to be involved in order to find the facts and hold people to account, the belief being that where that is done, you can deter people from committing atrocities. Not everybody. You can discourage some. Persuade some to leave and not be [named] on a charge sheet. You can convince some people not to behave in the way that others have done. And, in doing so, we can begin to protect people, and that in the end is what all this is about.[54]

In isolation, it would be hard to fault the logic of that rationale. However, what the Fugh Symposium debate demonstrated was that the increasing trend towards the use of third-party investigations has other issues driving it, as well as second order effects flowing from it. Any one investigation must be considered in the light of those issues or effects, and that can be done by assessing an investigation's terms of reference, mandate and the legal construct within which the investigation was situated; the comprehensiveness of the evidence upon which the findings were based; and the motivation behind those who have commissioned, or are conducting, the investigation.

The general feeling of those on the receiving end of an external investigation can be summed up (in the words of one panelist) as being "like running a marathon; they hurt a lot, and you think they will never end." Of course, taking the analogy one step further, enduring the event is not without its benefits. If a nation's armed forces take note of, for

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[53] Robert Houghwout Jackson, Chief U.S. Prosecutor, Nuremberg Trials (Feb. 13, 1892–Oct. 9, 1954).

[54] Ambassador Stephen Rapp, U.S. Ambassador-at-Large for War Crimes Issues, shared his experiences and thoughts on this subject, borne from his personal involvement in a number of international criminal tribunals, including the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda.

instance, calls for improved targeting methodology that will enhance military effectiveness and minimize the risk of civilian casualties, the second order effects of the investigation may be beneficial to both states and third-party investigative interveners. Sometimes it takes an outsider to see the wood for the trees. That said, seeing the wood is one thing; determining the best way through it is quite another. Calling for "things to be done better" is easy. Determining how that should be done is less so.

One of the "doing things better" themes that emerged from the Symposium related to the dearth of any over-arching guidelines, regulations, or agreement that might govern the construct and conduct of third-party investigations.[55] That dearth was in stark contrast to the importance that such investigations are playing in shaping world affairs and international public opinion. The construct of that guidance, regulation, or agreement, if there is to be any, should guard against the filling of a vacuum by simply transplanting standards from one regime to another. The fear expressed during the Symposium was that the discernible move to do just this, in the form of incorporating human rights principles into military investigations, has the potential, when combined with *opinio juris*, to evolve (perhaps stealthily) into customary legal norms. That potential suggests that a state-led codification of investigation standards, even if only in a soft law instrument, is something that should be explored to ensure that the views of all interested parties are properly reflected.

Notwithstanding that there might be a need for a best-practice, consumer's guide to third-party investigations, an additional question must be asked. Is there the political will for states to get together to agree, or at least think about, best practices, and reach some form of consensus on, and the releasing of, a declaration on the conduct of, for instance, investigations of war crimes or allegations of IHL violations? Given the increasing trend towards the calls for and use of third-party investigations in recent years, and their willingness to investigate investigators, one wonders how long it will be before that possibility is itself investigated and implemented.

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[55] *But see* The United Nations High Commissioner on Human Rights' standard conditions for a commission of inquiry's terms of reference. These standardized terms were used as a framework for the terms of reference for the Independent International Commission of Inquiry into the Events in Southern Kyrgyzstan. They are_*available at* http://www.kic.org/en/about-kic.html (last visit July 30, 2012).

THE THIRTIETH CHARLES L. DECKER LECTURE IN ADMINISTRATIVE AND CIVIL LAW*

HONORABLE THOMAS. R. LAMONT[1]

Thank you, General Ayres. General Chipman, other general officers, distinguished guests, and members of the Office of the General Counsel, I hope you're not here to just to keep an eye on what I'm saying, but I'm fearful. As a matter of fact, Lincoln was in our law firm five years after

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* This is an edited transcript of a lecture delivered on October 5, 2011 by The Honorable Thomas R. Lamont to members of the staff and faculty, distinguished guests, and officers attending the 60th Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. The lecture is named in honor of Major General Charles L. Decker, the founder and first Commandant of The Judge Advocate General's School, U.S. Army, in Charlottesville, Va., and the 25th Judge Advocate of the Army. Every year, The Judge Advocate General invites a distinguished speaker to present the Charles L. Decker Lecture in Leadership.

[1] Mr. Thomas R. Lamont, Assistant Secretary of the Army (Manpower & Reserve Affairs), is responsible for the supervision of the manpower, personnel and reserve component affairs for the Department of Army. In this position, he serves as the Army's point person for policy and performance oversight of human resources (military, civilian and contractor) training, readiness, mobilization, military health affairs, force structure, manpower management, equal opportunity, equal employment opportunity and other critical matters as part of the Army leadership.

On April 27, 2009, President Barack H. Obama nominated Thomas R. Lamont as Assistant Secretary of the Army (Manpower & Reserve Affairs) and he was confirmed by the U.S. Senate on May 18, 2009. Prior to his appointment, he was the Chair of University of Illinois Board of Trustees and a longtime Springfield, Illinois attorney and resident partner for the Chicago firms of Gordon & Glickson and Altheimer & Gray, and the historic Springfield firm of Brown, Hay & Stephens, whose members previously included Abraham Lincoln. He concentrated his practice in Government Law and Legislative Affairs.

In the public arena, Mr. Lamont served as Assistant Illinois Attorney General, Executive Director of the Illinois Board of Higher Education, and Special Counsel and Adjunct Professor of Law to the University of Illinois. In the mid 1970's, he served as a Counsel to the Speaker of the Illinois House of Representatives.

In 1990, Mr. Lamont was elected to the University of Illinois Board of Trustees. In addition, he served as a trustee of the State University Retirement System, a member of the Illinois Board of Higher Education, and on U.S. Senator Alan J. Dixon's Military Academy Appointments Committee.

He is admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the Armed Forces, U.S. District Courts and Illinois State Courts.

Mr. Lamont served as a Judge Advocate General in the Illinois Army National Guard for over twenty-five years. He culminated his career serving as the Illinois Staff Judge Advocate and retired as a Colonel in 2007. His military awards and decorations include the Legion of Merit and the Meritorious Service Medal.

Mr. Lamont received his bachelor's degree from Illinois State University in 1969 and earned his law degree from the University of Illinois, College of Law in 1972.

we were founded, but he left five years later because he couldn't keep his hours up. *Laughter.*

He was always out on his own, riding the circuit, running for office, and he lost about five different positions before he was ever elected. And yes, I was the The Judge Advocate General (TJAG) for Illinois, Staff Judge Advocate for many years. I only had two of my governor Commanders in Chief go to jail under my term. *Laughter.* Otherwise, it was an interesting life, I can assure you.

Well, it's great to be back in the JAG school where I spent many hours sitting in this classroom. I really wanted to see what would happen if I brought an open cup of coffee in here today. *Laughter.* I don't know how many times I wanted to do that when I was back here, but we know that's not going to happen.

Pleasure to join with you all and talk about some of our current issues facing the Army. I want this to be a discussion now, not just a session where I talk and you listen. So I'm going to speak for a minutes, and then we can do some Q and A about Army personnel issues or anything else you have in mind.

Now, today is the first anniversary of the first ever televised presidential address given by the White House, October 5, 1947.[2] President Harry Truman addressed the nation on the topic of food conservation. Western Europe was experiencing a severe food shortage, and Americans were called upon to voluntarily conserve food in order to send supplies to Europe. Truman directed the American people along with all government agencies including the military, to conserve bread, use no meat on Tuesdays, and no poultry or eggs on Thursdays. Now, Truman's speech ran less than ten minutes, and my speech will run a bit longer, but the good news is I promise I won't say anything about what you eat for lunch after this session.

President Truman also famously said, and I quote, "Within a few months I discovered that being a president is like riding a tiger. A man has to keep on riding or be swallowed."[3] I think we can all identify with some of that sentiment these days.

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Let me give you a quick idea of what I oversee as Assistant Secretary for Manpower and Reserve Affairs. My organization, in essence, is responsible for the entire soldier life cycle, from recruitment to retention to retirement and in some cases even in death as we are responsible for the burial policies of Arlington National Cemetery.

We are deeply involved in Force Structure, Force Mix, the Reserve Component (RC)/Active Component (AC), budgeting of the same, Soldier and Soldier Family Programs, quality of life, suicide programs, sexual assault, Soldier records, Army correctional facilities and the list goes on and on. We oversee all personnel and work with the commands in between from the G-1 to Human Resources Command, Cadet Command, U.S. Army Recruiting Command, etc.. We have roughly 569,000 AC soldiers; 562,000, roughly, RC soldiers; 283,000 Department of Army civilians; and 300,000 contractors, give or take a few thousand, because we never know quite how many we have—a few things to work out in our Information Technology systems. But we are a very busy organization, as you might imagine.

I've asked to be topical today, so we are going to go through any number of things, and we'll have a little Q and A action afterwards.

Drawdown. It's no secret that things are tight financially all over the country, and the Army is feeling the strain of tightened resources. In February, with the approval of the Secretary of Defense, the Army achieved a temporary end strength increase of 22,000 soldiers to ensure that deploying units are adequately manned. In fiscal year 2012, we will begin to reduce that temporary increase. Additionally, the Secretary of Defense has directed another 27,000 in strength reduction to 520,000 by the end of FY16. Now, we hope this will be the end, but the demands for additional budget efficiencies will likely drive the numbers further down. Bear in mind, no matter those numbers are as of last month, we had 730,000 active-duty soldiers, on active-duty orders, right now when you count in the RC and you count in Active Duty for Operational Support (ADOS) and count in our retiree recalls. So our mission right now requires over 700,000 soldiers. Keep that in mind when we start talking about the drawdown.

The Army civilian workforce will also be smaller. In July, the Secretary of the Army directed the Army commands and agencies to cut more than 85,000 civilian positions by the end of Fiscal Year 2012. We'll try to mitigate the impact of the cuts with voluntary retirements

and separation incentives, but there will most likely be more cuts to come.

The Base Closure and Realignment Commission (BRAC) initiative will also lead to civilian reductions as the Army reduces its force structure. Approximately 25,000 civilian positions were affected by BRAC with the majority of them movements, transitions, and consolidations occurring this fiscal year; or going to occur, at least. Efforts to drawdown the Army aren't anything new. We had drawdowns after the Cold War, Vietnam, Korea, and there are two big differences now. First, we're still at war; and second, the economy is hardly in the best of shape with unemployment at very significant highs.

And a major concern, though, is our junior soldiers who are transitioning out of the Army and face a difficult job market. Last year more than 130,000 soldiers separated from the Army. In January of this year, the unemployment rate for veterans of Gulf War II era, ages twenty to twenty-four, was around thirty-one percent. We have an obligation to ensure that our transitioning soldiers are prepared for future opportunities and are aware of their available benefits after their service. And this is an obligation that the Army can't fulfill on its own. We need the commitment and support of business leaders, both at large corporations and small businesses, and of communities. And those of you who particularly are in the Guard and Reserves, you've seen what's going on with some of your Reserve component soldiers. I think you'll find those numbers of unemployment even high upon their return from deployments.

We are trying very hard to promote a new and better TAP program, Transition Assistance Program. And early reports suggest it has had considerable success. This is just being modified and put in places much broader than it has been in the past, and it's got some great things going with it. I think it will be a very significant improvement. And of course, on the RC side you have Yellow Ribbon Programs and things of that nature.

Cuts to benefits. I know most of you might want to go get a cup of coffee on this and not have to worry about it. You're only in it for today anyway. We're not worried about our retirement benefits or anything like that. But I'm going to briefly touch on them. Not a whole lot we can say about this. You read the papers. One question I get asked about a lot is what's going to happen to military benefits?

As you may know, on September 19th President Obama unveiled a $4.4 trillion deficit reduction plan that could raise healthcare costs for soldiers, retirees, and families and could lead to some rather significant changes to the military retirement system. Bottom line nothing has been decided. There are ideas and there are numerous models out there all being discussed, but we don't know anything for sure yet. There are no real concrete proposals even that I'm aware of.

Secretary of Defense Panetta has repeatedly stated that much study and analysis remains to be done. Effect on recruiting; what does it mean? Effect on retention; what would changes mean? What would be the actual savings with whatever model we come with? What level of grandfathering are we going to have? Implementation of a 401K, vesting of services that would allow you to retire without twenty or nothing, just like the federal government. All these things are being considered. And of course, we have to recognize the care and compassion of our soldiers who have repeatedly gone to the fight.

So a lot to be done there. A lot of questions with very few answers right now. But the Army is in transition. Transformation being a new buzzword, as well. And the military has always been at the forefront of social issues in our society from desegregation for the force in 1948; to the integration of the women into the Army; to issues we face today revolving around the repeal of "Don't Ask, Don't Tell"; exceptions to uniform policy on the basis of religion; and the assignment policy for our female soldiers.

"Don't Ask, Don't Tell." The repeal of "Don't Ask, Don't Tell" policies is one of the biggest changes to personnel policy the Army has ever seen. On September 20, the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff certified, with the advice of the service chiefs, service secretaries and combatant commanders, that the Department of Defense (DoD) was ready to make this change consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the armed forces.

We value the services and the heroism of any gay soldier with the same respect as all those who serve beside them without regard to sexual orientation. This legacy of respect should and will continue with the first generation of service members able to serve openly. Now, the repeal necessitated some changes to policies, but most of our policies were already neutral in regard to sexual orientation and required no change.

Servicemembers continue to have various benefits for which they may designate beneficiaries regardless of sexual orientation, such as the death gratuity, Soldier's Group Life Insurance, and the Thrift Savings Plan. Other benefits are restricted by DOMA, the Defense of Marriage Act, or other applicable statutes based on governing definitions of spouse and/or dependent. In connection with the repeal, the DoD is exploring the possibility of extending other benefits that are legally permitted to same sex partners.

Commanders will need to make case-by-case decisions on issues as they arise, and no doubt many of you will be advising the commanders. And these decisions are to be made based on individual circumstances, not sexual orientation. With any change there is apprehension. But to date, this transition's been very smooth, and I have confidence in the professionalism of the men and women in our military to continue to treat each other with the utmost respect.

Historically, the Army has placed a high value on the rights of soldiers to observe their religious faiths. The Army will generally approve requests for accommodations of religious practices unless accommodation will have an adverse impact on unit readiness or individual readiness, unit cohesion, morale, discipline, safety, or health reasons.

I don't know how many of you have had a question that's come up recently about this. We're not really into the religious practices. We're into the uniform policy on the basis of religion. Requests for things like time off from work for worship or prayer or the accommodation of a soldier's diet due to religious reasons are routinely handled at the command level.

However, the rub is requests for exceptions to policy for grooming in uniforms are not considered religious accommodation. They are considered exceptions to the uniform policy for religious reasons. And these exceptions are reviewed on a case-by-case basis, not liberally granted and are limited in nature. Unfortunately, Army policy may well be in conflict with the Religious Freedom Restoration Act (RFRA) of 1993 that raised the standard of review for religious accommodation request. The government may substantially burden a person's exercise in religion only if it is able to demonstrate the application of the burden, one, is in furtherance of a compelling governmental interest; and two, is the least restrictive means of furthering that compelling governmental

interest. Congress failed to exempt the military services from RFRA, so here we are.

Since October 2009, the Army has granted five limited exceptions to Army Regulation 670-1, *Wear and Appearance of Army Uniforms and Insignia*,[4] all related to religious-based requests. These limited exceptions are specific to assignment location with three-seek soldiers requested to have beards, unshorn hair, and to wear turbans. Two of these soldiers are doctors and one is a medic. Two Muslim soldiers, both doctors, requested to have beards. And two requests are currently pending, awaiting a decision from the Army G-1. A female Muslim soldier, who is a pediatric resident, is requesting to wear the head scarf, hijaab. And the Muslim soldier, who is a chaplain candidate, requesting to retain his beard.

We're also in the middle of a law-suit brought by a Jewish applicant who wishes to retain his beard, a Jewish rabbi. Don't worry, I'm not going to get into any details. Although, that case can, in some respects, be somewhat distinguished in that the person is an applicant. He's not in the Army. So he's seeking an exemption before he raised his hand; these others were already under contract. Any number of circumstances that are unique to this case suggest that we may not—we don't know what the standing question really is going to amount to here, but you can imagine. We have a lot of challenges ahead of us.

The challenges we face in regard to exception to uniform policy for religious reasons revolve around the fact that there is no formal DoD policy on this issue. Each service handles its own cases. But we don't want these cases turning into additional lawsuits if we can avoid it, and we obviously don't want the judiciary determining Army policy. But the cases we're seeing now will unlikely be the last ones, and this isn't an issue that's going to go away. We are actively working with DOD to develop a uniform policy for all services that ensures the soldiers religious freedoms are protected and balanced with the needs of the Army.

All right. Women in the Army. The role of women in the Army is also an issue that's getting a lot of attention lately. Women currently represent 13.5 percent of the active Army, a little over 14 percent in the

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[4] U.S. DEP'T OF ARMY, REG. WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (3 Feb. 2005).

National Guard, and almost 24 percent of the Army Reserve. The Army's current assignment policy does not allow the Army to assign women to units below brigade level whose, one, primary mission is to engage in direct ground combat; or two, which routinely co-locates—that's the key here—which routinely co-locate with units assigned a direct combat mission. Based on DoD and Army policies, female soldiers are restricted from specific specialties such as Infantry, Armor, Special Forces, Field Artillery, Combat Engineers, et cetera.

However, in our practice numerous unavoidable situations on the ground have resulted in females being involved in combat operations. With the kind of a 360-degree battlefield that we have now, it's kind of hard to avoid. They're involved in route clearance operations, so on and so forth. And many of you know far more of what I'm talking about from your own experiences.

The Army recently completed a routine cyclic review of its current assignment policy for female soldiers. As a result of this review, we are moving forward to align our policy with that of DoD by adopting DoD terminology and definitions and by eliminating the co-location requirement—the co-location restriction, I should say.

The results of the review revealed that the Army could potentially open currently closed MOS's, units, and positions to female soldiers resulting in several thousand more jobs being available to women soldiers.

However, the Secretary of the Army will not implement any changes until the more comprehensive fiscal year 2011 National Defense Authorization Act mandated review is completed; final report is due to Congress this month. The report is currently working its way to the appropriate channels and will serve as the required notification to Congress of changes the services are expecting to make and a timeframe in which they expect to implement these changes.

The report will consist of in-depth research, analysis, planning, sequential implementation, and review. And the end result will be to develop a common methodology across the services to be used in testing against occupational, physical standards. The Army will review open MOS's that have female restrictions such as Military Intelligence, and Signal, and Maneuver Battalions, and closed Military Occupations Skill's where females are completely restricted, such as I mentioned,

Infantry and Armor. In essence, the report is expected to challenge the current direct ground combat rule of 1994 that prohibits the assignment of females to battalions and below with a primary mission to conduct combat on the ground.

Sergeant (SGT) Monica Lynn Brown, SGT LeAnne Hester are just two examples of why the Army needs to review its assignment policy for women. Both SGT's Brown and Hester are the first female soldiers since World War II to receive the Silver Star which, as you know, requires extraordinary valor in combat. Changes are coming.

In conclusion, our all volunteer Army truly represents the best of our nation. It's made up of men and women who said, "I choose to serve. I will do my part." Everyday active-duty soldiers, Reservists, Guardsmen, Army civilians, family members, and contractors all work to ensure that our all volunteer Army is the best trained, equipped, and manned force in the world.

Many of these challenges to Army policy and the changes we are seeing are being fueled by the desire of individuals to serve their country. And lastly, I want to thank each of you for your role in taking care of our soldiers and their families.

All right. That's an abbreviated speech. But now I want to know what's on your mind. Let's open it up for some questions. We'll talk about all kinds of things. I'll be happy to elaborate on any of the things I've talked about here, so be brave.

THE SEVENTEENTH HUGH J. CLAUSEN LECTURE IN LEADERSHIP*

SERGEANT MAJOR OF THE ARMY RAYMOND F. CHANDLER III[1]

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* This is an edited transcript of a lecture delivered by Sergeant Major of the Army Raymond F. Chandler III to members of the staff and faculty, their distinguished guests, and officers attending the 60th Judge Advocate Officer Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia, on November 4, 2011. The Clausen Lecture is named in honor of Major General Hugh J. Clausen, who served as The Judge Advocate General, U.S. Army, from 1981 to 1985 and served over thirty years in the U.S. Army before retiring in 1985. His distinguished military career included assignments as the Executive Officer of The Judge Advocate General; Staff Judge Advocate, III Corps and Fort Hood; Commander, U.S. Army Legal Services Agency and Chief Judge, U.S. Army Court of Military Review; The Assistant Judge Advocate General; and finally, The Judge Advocate General. After his retirement from active duty, General Clausen served for a number of years as the Vice President for Administration and Secretary to the Board of Visitors at Clemson University.

[1] Sergeant Major of the Army Raymond F. Chandler III was sworn in as the 14th Sergeant Major of the Army on March 1, 2011. Sergeant Major of the Army Chandler has held a variety of leadership positions throughout his career ranging from tank crewman to command sergeant major (CSM).

As Sergeant Major of the Army, Chandler serves as the Army Chief of Staff's personal adviser on all enlisted-related matters, particularly in areas affecting Soldier training and quality of life. He devotes the majority of his time to traveling throughout the Army observing training and talking to Soldiers and their Families.

He sits on a wide variety of councils and boards that make decisions affecting enlisted Soldiers and their Families and is routinely invited to testify before Congress.

Chandler was born in Whittier, California, and entered the Army in Brockton, Massachusetts, in September 1981. He attended One Station Unit Training at Fort Knox, Kentucky, and graduated as a 19E, Armor Crewman.

Sergeant Major of the Army Chandler has served in all tank crewman positions and has had multiple tours as a troop, squadron, and regimental master gunner. He has served in the 1st Infantry Division (Forward), 2d Infantry Division, 4th Infantry Division, 1st Cavalry Division, 3d Armor Division, 2d ACR, 3d ACR, U.S. Army Armor School, and the U.S. Army Sergeants Major Academy. He also served as a first sergeant (1SG) in four different detachments, troops, and companies. As a sergeant major (SGM), he served as Operations SGM in 1/2 ACR and as CSM in 1/7 Cavalry, 1st Cavalry Division, U.S. Army Garrison Fort Leavenworth, Kansas, and the U.S. Army Armor School CSM. Chandler was assigned as the U.S. Army Sergeants Major Academy CSM in December 2007. In June 2009, Chandler became the 19th Commandant of the U.S. Army Sergeants Major Academy (USASMA) and the first enlisted commandant in USASMA history.

Chandler's military and civilian education includes all levels of the Noncommissioned Officer Education System, M60A3 and M1/M1A1 Tank Master Gunner Course, Battle Staff NCO Course, First Sergeant Course, Basic Instructor Training, Total Army Instructor Trainer Course, Small Group Instructor Trainer Course, Video Tele-Training Instructor Trainer Course, Army Management Staff Course,

Thanks. Appreciate it, man. Thank you. Thank you. Please, please, take your seats. Thanks.

You know, first of all, thanks for the opportunity to do this. You know, I was talking about this earlier with General Ayres, and you never realize or, I guess, understand the magnitude of things until you're actually sometimes presented with them. And I'm here representing 1.1 million soldiers and their families to you in a dissertation and some questions about leadership. And that's a pretty humbling experience, especially when you look at, you know, each one of the placards of folks that have actually come and spoken in this group. It's kind of overwhelming sometimes. It's just like, my God, how did I get here? How did this happen? Who set this up? *Laughter*. But it's truly an honor, and when you look at the individuals that could have come to speak to you about leadership I really have to ask the question of what am I going to add?

You've had sixteen different individuals that have come from all across the nation and the world to talk to you about their thoughts on leadership. And I'm number seventeen and I hope that I have some things that you're going to find worthy, and it's really going to be from noncommissioned officer's (NCO's) perspective. And I hope that there are some great questions that come out of this that I may be able to answer for you.

It is an honor to be here, it really is. I didn't really understand the importance of the legal community until I became a first sergeant (1SG) for the first time and really had to worry about not only leading soldiers in tank platoons, but really managing transitions for a piece of the Army. And part of that—it is those things that have to do with the law and over time developed a relationship with both paralegals and attorneys, JAGs,

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Garrison CSM Course, and various other professional development courses. He has a Bachelor of Science Degree in Public Administration from Upper Iowa University.

Sergeant Major of the Army Chandler's awards and decorations include the Legion of Merit, Bronze Star Medal, Meritorious Service Medal (7th OLC), Army Commendation Medal (7th OLC), Army Achievement Medal (1st OLC), Army Good Conduct Medal (9th Award), National Defense Service Medal (2nd Award), Army Service Ribbon, Korean Defense Service Medal, Overseas Service Medal (Numeral 4), Noncommissioned Officer Professional Service Ribbon (Numeral 4), Iraq Campaign Medal (with Campaign Star), Global War on Terrorism Service Medal, Meritorious Unit Commendation, the Superior Unit Award, and the Combat Action Badge. He is a recipient of the Order of Saint George (Bronze Medallion), the Distinguished Order of Saint Martin, and the Honorable Order of Saint Barbara.

to understand how to effectively lead an organization. And it is without a doubt a hard lesson learned—in some cases, bad mistakes or ill-informed decisions that caused the unit to be less effective than it have been. And I've learned some hard knocks.

First of all, really, thank you for what you do, each and every day, for what you do for our Army and ultimately our nation. And for those of you who are here from one of our partner nations, thanks for coming to be a part of this and to learn from us and how we do things. We don't always get it right. You know, and you'll probably see a way, but it is our way and it is what serves us best. And I appreciate you being here.

And are there some spouses here? I know there are. If you're a spouse, an Army spouse, a spouse of a service member, could you please stand up? Spouses of service members, please stand up. How about a round of applause?

Applause.

Hopefully, my greatest wish of a lot of things in the Army is that one day our spouses are recognized like our soldiers in the uniform in an airport where someone sees that they're military spouses, and tells them thank you, and gives them that seat in first class. Because, really for me, spouses have borne the brunt of the last ten years in a dignified way that I think few people really understand in our country. And I don't think we do enough, but just wanted to tell each and every one of you thank you. Really, from the bottom of my heart and my wife's, just thanks for all you do. You help each of us in uniform in ways I don't think any of us really imagine until we take a step back every now and then. So, thank you for what you do.

If you are a NCO in here, how about raising your hand? Noncommissioned officers.

Hooah.

Some of you probably heard me talk before; right? Okay. Well, I won't be quite as colorful as I have been in the past.

You may have heard some of this before, but it is really about leadership, and we'll talk about that. I think that's pretty much the same types of things I've talked about in the past. And then I think we've got

some from the 60th Graduate Course. If you're a member of that course, could you raise your hand? Hooah. Thank you for all you do. I really appreciate it, thanks.

And then our Senior Legal Administrator Symposium, our warrant officers; are you here? Awesome. Thanks for what you do. I really appreciate it. How many of you were former enlisted soldiers? Almost all of you; right? Well, thanks. Thanks for what you do and thank you for choosing to stay in the Army and contribute. It really makes a difference.

You know, and I'd really like to, again, recognize the Ayreses. Thank you both for inviting us down. Sergeant Major (SGM) Lister and your bride, thank you so much. And the Tylers, thank you so much for giving us an opportunity to be here.

I brought two people who are on my team that are actually from the 27D field. I've got SGM Warner. And I don't know if you know this or not, but SGM Warner is a part of a very small group of individuals for noncommissioned officers that work in the Congressional Liaison Office. We've only had that program for a couple of years; it started with the year of the NCO. And she represents our Army to our elected officials, and now is working for me as my "handler." I don't know if I help her very much in handling me, but she's really a testament to your Corps, that amongst a huge number of candidates, she was selected to do this job, that's really a testament to what you do here and what you do in the field.

And then I've got another—Staff Sergeant (SSG) Meadows, who is a 27D who worked for me at the Sergeants Major Academy. And this is really about the other part of what we'll talk about today is about leadership and finding people who have enormous potential and recognizing that how you manage talent and broaden people really comes down to not just what they do on their job, but those larger skill sets, that adaptability, agility, a resource manager, a leader developer. Those things that we say that are important to us as an NCO Corps, how do you help them achieve greater things than they may have thought possible?

When I became the Commandant at the Sergeants Major Academy, this wasfirst time that there had been an enlisted commandant who was vested with a great deal of authorities that hadn't been previously vested in our Army's history and that was a challenging time to understand

really what that meant.

Sergeant Meadows, who came to the Academy to be the 27D as a sergeant, took on this enormous challenge.

If you think about it, you've got a class of at least 600 Type A SGMs, students, who probably just left some 1SG or SGM position, and the only thing they know is about pushing troops and now they're in charge of no one but themselves. Okay. So she has to deal with all of them and a very senior academic faculty, a lot of retired SGMs who, some of them still think they're in the Army. You know, she managed, transitioning that command from a commissioned officer, a colonel-level billet in our Army, to an enlisted command and understanding how to develop the memorandum of understanding (MOU) and the memorandum of agreement (MOA) that needed to go in place and then work on some authorities and regulations to try to set that position for exception. She did that on her own, spent a lot of time doing research on top of the fact that she's a single-parent, raising three daughters, working on her Master's degree, and took on this enormous challenge; she could have gone to one of the brigades there at Fort Bliss. That's a testament to her leadership and desire to do what she did. So thanks again for all you do, and thanks for being part of the team.

Leadership. We have got a lot of things going on in the Army today. No kidding. We've had a lot of things going on in the Army for a long time, as long as the Army's been around. And if I can give you one thing that I'd ask you to do, as a leader, your real responsibility is to manage transitions. It really is. It's how you move your organization and the Army, ultimately, through periods of time.

Now, that may sound a bit different than what we've talked about or what may have been presented in the past, but it's about transition. We're in a transition right now. Okay. We have about 200,000 soldiers that are deployed somewhere around the world doing something for our Army and the nation. The major focus areas obviously are Iraq and Afghanistan. We've also got this drawdown that's going to take place across our entire army. We're going to probably have a much smaller Army in the near future than we do today. We're in the midst of conversations about entitlement reforms and whether or not we need to change our retirement system and change other compensation. And there's a huge amount of anxiety in our Army. There is.

I travel a little bit and intraveling around over the last several months, inevitably I will find a young soldier, a private, with about six months in the Army whose one question that they want to ask me is: Am I going to have a retirement? What do you do when you get asked that question, because that soldier really shouldn't be worried about retirement at this point in time. *Laughter*. Really should not. That is not what we want them focused on, is it? We want them focused on what they need to do to continue to develop their skills and not about some benefit that's at least nineteen years and six months down the road. That's a transition. That's something that you, as a leader, whether you're a green tab wearer or not, have to engage in.

We've had huge amounts of concerns in our Army about suicides, reducing high-risk behaviors, and sexual assaults and harassment, and the uptick in domestic violence, and other bad behavior in our force. How do we manage these transitions? We do that with engaged leadership.

We say that often, but how do you do that? How do you actually engage yourself as a leader? Well, really, again, from my perspective you have to be a person of candor.

I have a son who's an attorney. He's not in the military, but he is a partner in a law firm in Atlanta. I asked him a little bit about coming here to talk and he said, good luck. *Laughter***.**

One thing about attorneys is if you get them all in one room, you're going to have as many attorneys as you do opinions. But it's really about being candid and being able to look someone in the eye and say, "You are not right." But then what? Then it's okay, "Here's how we're going to get you right and then how we follow up." That's relatively easy when you say it, but it takes a good deal of courage to talk to someone candidly about where they may not be quite right. And we've got challenges in this area today, specifically with the health of our force, behavioral health. We do have challenges with behavioral health in our Army, and I know many of you understand that. But it takes courage to tell someone that you need some help.

So I'll give you a little bit of my experience. You know, I deployed to Iraq in 2004 and 2005, and at that time in our Army, we kind of thought that everybody was a tough guy or gal and you go there and do your thing and come back and this will be overwith.

Well, roughly in the June, July time frame things really started to change pretty drastically in Iraq. And I had a series of pretty traumatic events that happened to me. Coming out of Iraq, I was a changed person. I wasn't going to admit that to anybody because I was a tough guy. I was a SGM. You don't do that. You don't say on your post-deployment health risk assessment that you have some challenges in certain areas; right?

I'm not asking anyone else to compromise their integrity, but I'm going to be truthful with you and tell you that I did not lead at that time. I did what I needed to do to check the block and get out of there because I needed to move on to the next job or whatever. And over the next several years, what had happened in Iraq continued to eat away at me as a leader, as a person, as a father, and as a husband until ultimately, when I became the commandant of the Sergeants Major Academy, the stress of that drove me to a point where I was self-destructing. And it took some people that I love very much to tell me that I was not right.

I listened because that slap in the face is sometimes what it takes to tell you that you have to get back on the right track and be the leader that you sit up there and talk about in safety briefings or a session like this.

So I went and talked for two-and-a-half years and still today, I spend time with behavioral health care specialists to talk about my issues. I'm a better soldier. But that is the least important thing for me. I am a better man. I'm a better husband. And I'm a better father because of it. Now, it took an act of courage for people, whom I love very much, to tell me that was jacked up. It did. And that is important. I need you and the Army needs each of you to be that kind of leader.

You know, we all know when someone is not quite right. And it takes courage to say, "Hey brother, hey sister, let's go for a walk and talk about some things." We all need that. Ten years is a long time for the stress and strain of what's happened in our Army to build up, and it's going to take us a long time to recover from this. And it's not over yet.

So courage, candor, and taking that extra time. I need your help with that and the Army, our nation, needs your help with that. It is really about a commitment to the nation when you say that you're going to do this. You know, each of us takes an oath in their own way: I will support and defend the Constitution of the United States, or words to that effect, that oath which subordinates you to that civilian authority, which

ultimately places something on your collar or on the uniform that you wear, inherently, no matter who you are, also places the responsibility to be a leader upon you, no matter what your rank. We do not have any Specialists or Privates in here; right? No. Okay. So we've got noncommissioned officers, warrant officers, commissioned officers, and civilians.

We all have to be leaders. The challenges that our Army faces are challenges that will really shape where we are ten years from now. And it's going to take leaders who manage transitions to see us through this time. And you've got to ask the question: What type of an Army do you want to have?

I came in the Army in 1981. And I think the only person that's been in the Army longer, in this group, than I have is SGM Tyler. *Laughter*. Because you just look old, man. *Laughter*.

But seriously, in 1981 we had really just started to transition out of the hollow force. If you remember, I think that's when, General Whitcomb stood up in front of Congress and said, we have a hollow Army. And we started to really push towards recruiting folks and bringing up our level of competencies; we started to introduce systems. Well, we're not going to be in 1981 again if we choose not to have been an Army that is hollow because we'll be engaged leaders. That's up to you.

General Ayres and I, we're going to retire sometime in the very near future. You know, a few years from now, three-and-a-half years from now, I'll be retired. Sir, I'm not going to put anything on your plate or put any bad whoo-doo on you, you know, but sometime, eventually, you're going to be retired too. And you that are seated here are going to be in those senior positions to influence our Army.

So what kind of Army do you want to have? Do you want to have one that after ten years of war is without a doubt the most effective fighting force we've ever put on the battlefield, that is a little ragged around the edges, that really needs to put its arm around itself and say, it's okay to be a human, but to be moving forward? Or do you want have one that's hollow, broken, and you're going to have to try and rebuild it? I want the former. But it will be your legacy, your legacy of leadership that really gets us through the next ten years and into the 2020s.

How are we going to do that? With courage and candor, with managing transitions; with being able to look someone in the eye and say, "Ma'am, you are in left field with the hockey stick saying throw me the ball." *Laughter***.** But we can get there. Seriously though, it is about having the courage to tell somebody where they need to be.

We've got great programs right now. We're looking at our entire leader-developing strategy. We said this is where we want to be in the next several years. We're going to align some things for officers as far as Officer Evaluation Reports looking at where people are blocked so you can really start to separate the wheat from the chaffe. We're looking at the same type of thing for our NCO Corps to not only hold leaders, raters, and senior raters accountable for developing their subordinates but to also give that soldier some responsibility forhis future because I do believe it's a two-way street. You've got to have soldiers that are accountable for themselves and their development and leaders that are accountable to them. And throughout the NCO Corps, we've lost that a little bit. So we're going to continue to work on these things. But at the end of the day, NCOs do two things: They accomplish missions, and they take care of their soldiers. They get you the last few hundred yards, right? The officer is going to give you the plan, say this is the direction we want to go, and the Sergeant says, "Okay, sir, let's get after it" and get you to the objective.

So for us it's as an NCO Corps, we should spend less time being the absolute best technical expert you can be and instead be the the best leader because that's what I would expect of you. You're already technical experts, and there's really not that much you're going learn in your technical field beyond now. But you are going to learn to be more strategic and visionary leaders, helping your soldiers and pulling them along and moving our Army forward.

You know, we've done so many things with our NCO Corps over the last several years that we never expected them to do before 9/11. I'm sure that—well—actually where is SGM Woods? Okay. Sergeant Major Woods, perfect example. Up until about two years ago, we probably were not going to have a CSM from the JAG Corps except here at the school and at OTJAG; right? Now, you've got four. Why? Because of your leadership, what you offer in your skills and experience. We've got to continue to think about that, and I truthfully don't want you to come to the school some-day as the school SGM. That might be a great feather in your cap, but I bet you would be a brigade level CSM or

a division or post-level CSM because you've got the skills that we need, and we can't just keep that in one area.

So how do you really look at these broadening experiences? How do you challenge people to do something out of their comfort zone? That's one of these transitions that we're trying to accomplish within the NCO Corps. How do you look at somebody and say, "Hey SSG Meadows, I think you have great opportunity here in the future. And you're going to come up here to the office of the SGM and you're not going to do a single thing as a 27D, but your skills, your knowledge, and your experience, are going to serve the Army. And we're going to take a little risk and take you out of your comfort zone. We're going to broaden your mind because we have a much longer-term vision for where we see you in the future."

That's leadership. That's not just saying you're the best 27D Staff Sergeant since sliced bread. No. You're a great SSG who happens to be a 27D, who can do a lot more than just be a 27D. We don't want one-trick ponies. We want you to be as broadly skilled as possible.

You know, I actually had the fortune to have known a couple of great JAGs over my time. They all did tremendous things because they opened my mind to other possibilities besides where I wanted to go.

Now, as a 1SG we usually are in the skull-dragging business, you know. Really, it's about being a kind of father of the unit. That's what we say is the 1SG's responsibility. You're the father of the unit. You're the disciplinarian. You're the one that's supposed to set the standards, be the standard bearer, say this is what right looks like, and if you're not doing right, we're going to get you to right real quick. Or if not, we're going to have you exit Army. That's not always the best way there is to be the skull-dragger, so some attorney, some JAG, basically showed me other ways to get after the objective than through force and ignorance. That's kind of the methodology that we have for most of the Army's NCO Corps is we're going to get to this thing and we are going to bash our way through it and move on to the next event. And we'll pick up the pieces afterwards. It's great attorneys, though, that show you other ways to get after the objective and also teach you something along the way.

That's what you bring to the table. Your experiences outside of legal assistance or admin law or being a prosecutorial attorney or being defense or practicing international law: it's the experiences that help you

set the conditions for that leader to be effective. That's where I would tell you I would look for your help, where you're being a leader when you do that.

I also had the experience at times where you can't get an answer out of your JAG. We want to skirt inside of this thing and not hang ourselves out there and say, "Hey, sir or ma'am, this is my best advice." Can't have that; can't have that.

It's funny. I sit in this Chief of Staff of the Army's morning stand-up. General Odierno does a morning stand-up with the entire Army staff every morning, and it's always interesting to watch Lieutenant General Chipman. *Laughter***.** Now, you get the G3 in there talking about what's going on; and the G1 about something with people, you know; the G2 about something that's going on with Intel; and then you get the chaplain who wants to give a prayer. And you have to admire Lieutenant General Chipman because I'm sure after all of his career and everybody poking fun at the attorney, he always is in there with a smile on his face and is saying something that the boss needs to hear. That's leadership. That's leadership. He's helping manage Army transitions.

When you think about drawing the size of the Army down by 50,000 on active duty; that's one in ten soldiers. So when you talk about an infantry squad of nine soldiers, that's at least one out of every squad gone. That is tough. We're going to do it in five years, and it may not be the end, because for the Army it's about people, not systems. It's people. Our budget gives us people. Then you buy stuff for the people to use to fight and win our nation's wars. So it's the people business and how you manage that transition to say we do appreciate your service; there may not be a seat for you at the table anymore though. That is tough stuff. That's where courage and candor come in.

Again, like we talked about earlier, what is your advice to somebody who has two soldiers. One of them has been deployed and done great things and they just keep getting DUIs? And then we've got this other person that hasn't deployed and they're doing a good job. How do we shape that for the commander to do what's right? And that person who, even though they fought and won our nation's wars, are not being the total soldier that we want them to be, and frankly, if they're not willing to rehabilitate themselves, they don't have a seat at the table. They're not on the Army team. That's tough stuff. And when you see these four stars and three stars struggling with that or the Secretary saying, how do

we have soldiers do these things that we're asking them to do now? It's you that's going to help lead us through these challenging times.

We're going to retain fewer people in the Army. So for the enlisted population and officers, there are going to be fewer people who are afforded the privilege to serve. That's a transition. Up until now, every soldier that was qualified for reenlistment could reenlist. That may not be the case in the future. How do you tell somebody that you're fully qualified, but sorry? Thank you for your service. That, in and of itself, that mindset is a transition. Officers who have taken the oath of commission and have performed well, maybe we'll get to a point where we're not going to be able to have as many because of this ratio thing; it's about one officer for everyone 4.7 soldiers. So if you have fewer enlisted soldiers, you're going to have fewer officers. We haven't done that for a long time. And it was painful when we did a drawdown back in the '90s; and frankly, we didn't manage it very well. And we lost some of our best talent, especially in terms of commissioned officers.

How do we manage that transition differently this time so that we make the people feel that they're value added, they're important, and we want them to stay even if they don't have that personal satisfaction of deployment as much as we used to? That's going to be tough. That's a transition. That's going to take leaders with the courage and candor who look into the future and aren't just fixated on what happens tomorrow.

So what are you going to do about that? What are you going to do? Not, "what's the Army going to do?" Not, "what's the JAG Corps going to do? But what are you captain, major, colonel, sergeant, 1SG, SGM, what are you going to do to lead our Army in your piece of the pie? I'll tell you, the Chief does not want to be a 10,000-mile screwdriver. And I think you guys have probably heard me say this before. I don't want to be a 10,000-mile screwdriver from the Pentagon trying to adjust things from that building.

These issues that confront us—yeah, they're big. There are going to be challenges, but they're going to provide us opportunities. Those opportunities are going to be presented where you are. You're going to have to see it, and then seize the opportunity to shape the Army to where you want it to be. I hope where you want it to be is that place where we are today. And not someplace back in 1980 or '81, where only those really who didn't have another opportunity chose to stay in the Army. And we had to spend fifteen years building this thing back to something

that we're proud of today. Nor do I think that we really want to have as our legacy after losing so much of our treasure, losing so much of our blood, losing so many of our brothers and sisters in a place where we look in the mirror and say, how did we get here? Is that the legacy or the memory you want to leave them? So I challenge you with that, to think about that.

This is not all doom and gloom. A lot of great things are going on. I'll tell you that; you have great leadership in your Army. You know, one of the interesting people that I've met is Secretary McHugh. Anybody met Secretary McHugh before? The guy is incredible when you talk to him. I'd never been involved at this level of the Army before. I've never really met a Secretary of the Army or actually talked to him or spent any time around him. He's committed. He's very committed. He puts himself out there every day. He's an amazing leader.

General Odierno, many of you know. I did not know General Odierno very well when he became the Chief of Staff of the Army. I knew his son. His son was in my squadron in Iraq, and he's a great leader. He's exactly the right leader that we need, both of them, for our Army today. But who's next? And in twenty years, who's going to be the next TJAG for our Army? Do we know who that is? Probably somebody here is going to be in a position close to that. How do you set the conditions for that person to be seen? It's going to take leadership to point them out.

So those are my thoughts on leadership. It's about managing transitions. It really is about how you approach your subordinates, your peers, and just as importantly, your superiors with courage and candor. And to be able to look them in the face and say we've got a problem; not sugar coat it, not let it stay off to the side until you develop the situation, not say, "Hey, Chandler is not quite right; been moping around here for a while, showing up late to work. Somebody will handle it." You have got to handle it. I got to handle it. We all have to handle it because if not, we'll lose a soldier, either physically lose a soldier or lose them to the Army who may one day be up here presenting a lecture on leadership if we have paid attention. That's managing transitions.

So I appreciate the opportunity to speak to you. I think we've got some question time. I do have prerogative. Okay, I'm not Bobby Brown. *Laughter*. But as the SGM of the Army, I do get at least three questions, and we don't get to leave or go on to something else. I know

there was a bunch of questions that I was asked to talk about that had to do with the role of noncommissioned officers and officers and how do we build that team. I'd love to talk to you about that, and I'd like to talk to you about anything else. Sometimes when I come to these forums--and I'm sure it didn't happen here--soldiers say hey, you can't ask this question. Okay, I'm just going to put it out there: Don't ever tell that to your soldiers. Let them ask whatever they want; don't be afraid. You'd be amazed by their intellect, by their thoughts.

So I appreciate the opportunity to spend time with you and I look forward to your questions. Thank you very much.

THE SIXTH ANNUAL GEORGE S. PRUGH LECTURE IN MILITARY LEGAL HISTORY*

BRIGADIER GENERAL THOMAS L. HEMINGWAY[1]

Thank you. Thanks very much. Thanks for the invitation to be here today at this prestigious event. General Prugh, as most of you know better than I, was one of the most accomplished lawyers ever to wear the cloth of our nation. Interestingly when he was the Staff Judge Advocate of Military Assistance Command, Vietnam, in the 1960s, he faced some of the certain challenges that were similar to those we faced a generation later in 2001. In his monograph he wrote, "Most difficult for us was to determine applicable international law for much depended upon the legal characterization of the conflict and the American role in it."[2] And that is very much what I found—the position I found myself in when I was recalled to active duty.

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* This is an edited transcript of a lecture delivered on April 25, 2012 by Brigadier General (BrigGen) Thomas L. Hemingway to the members of the staff and faculty, distinguished guests, and officers attending the 60th Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Va. The chair lecture is named in honor of Major General George S. Prugh (1920–2006).

[1] A graduate of Willamette University (B.A. & J.D.), BrigGen Thomas L. Hemingway was commissioned in 1962 and entered the Air Force Judge Advocate General's Corps in 1965.

Over the next thirty years, he served in a variety of assignments, including staff judge advocate at the group, wing, numbered air force and unified command level. Brigadier General Hemingway also was an associate professor of law at the U.S. Air Force Academy and a senior judge on the Air Force Court of Military Review. His overseas service included one tour in Thailand and three tours in Germany.

Brigadier General Hemingway's final assignment was Chief, Counsel, U.S. Transportation Command, and Staff Judge Advocate, Headquarters, Air Mobility Command, Scott Air Force Base, Illinois. After retiring in October 1996, BrigGen Hemingway was recalled to active duty in August 2003 to serve in the Defense Department as Legal Advisor, Office of Military Commissions. He retired from active duty again in 2007, but continued his government service as the Senior Advisor to the Deputy Secretary of Commerce.

In addition to his many military awards and decorations, BrigGen Hemingway is the recipient of the Justice Tom C. Clark Award, which is given annually by the District of Columbia Federal Bar Association for outstanding accomplishments in career service to the U.S. Government. Willamette University College of Law presented him with its Outstanding Alumni Award in 2011. Brigadier General Hemingway presently serves as the corporate secretary of The Army and Navy Club, Washington, D.C.

[2] MAJOR GENERAL GEORGE S. PRUGH, VIETNAM STUDIES, LAW AT WAR, VIETNAM 1964-1973 (1975) (published by the Dep't of the Army).

The attack of the September 11, 2001, stunned not only the United States of America, but the international community, as well, and the legal community was no exception. No one in the world anticipated non-state actors being capable of waging war on an international scale, and we were totally unprepared for that. I can remember as a retired officer standing on my porch that afternoon smelling the smoke from the fire at the Pentagon. And when I came in that evening, my wife said to me how do you feel and I said, "Well, it's the first time since I've retired that I wished I were back on active duty." That falls under the heading of be careful what you ask for, because you may get it. (Laughter.) I think this was the only time in our history that we had been faced with nonstate actors since the 1800s, when Jefferson launched the U.S. Navy after the Barbary pirates. And the Congress responded to this with the Authorization for Use of Military Force, North Atlantic Treaty Organization, ANZUS, Organization of American States, all invoked their self-defense clause or recognized that this was an act of armed conflict. That position, of course, was not without critics. Lord Peter C. Goldsmith, QC—always remember the QC, that's important—the Attorney General of the United Kingdom, was of the opinion that this was a law enforcement issue that called for a law enforcement response. There were some people in the United States who shared that view. A small, but what I considered to be very vocal minority, but nevertheless that triggered a great deal of debate. And I think it's useful to remember that there was no existing international tribunal at the time that had jurisdiction over these offenses.

The ICTY, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, Sierra Leone, all of those had jurisdictional limits that were geographical to the area where the conflict they were addressing occurred and the ICC, the International Criminal Court, was created too late to have jurisdiction over these offenses. The international law at the time was pretty well limited to state practice and the Geneva Conventions. And as you know, Article IV of the Conventions gives privileges to those commanded by a person responsible or his subordinates, wearing a fixed, distinctive recognizable insignia and carry arms openly and who comply with the customs and laws of war. Al Qaeda and the Taliban did not qualify under any of those four bases. I think it is also important to remember, although some folks don't seem to, that the Taliban were never recognized by the international community as the government of Afghanistan.

The Bush Administration response to this was to declare that Al Qaeda and the Taliban were not entitled to the privileges of the Geneva Convention. I don't have any quarrel at all with the authority of the president to make that determination, but as to the individual belligerents, I think we should have conducted Article 5 Tribunals under the Geneva Conventions. I think a fair reading of the Conventions, so that when you get a belligerent you should run the tribunal to determine status. Now, once we did that and determined that they fit in with the president's category, I think that if we had done that the Administration could have avoided a lot of the criticism heaped on it in the media and in the courts. It is my understanding that both Southern Command (SOUTHCOM) and Central Command (CENTCOM) requested permission to run Article 5 Tribunals and they were told they should not because the president had already made the necessary determination.

In November of 2001, November 13, 2001, the president issued his military order directing the Secretary of Defense to create Military Commissions. And shortly thereafter Jim Haynes, the Department of Defense (DoD) General Counsel, suggested to The Army Judge Advocate General, Tom Romig, that he convene a Tiger Team to draft the beginning of military commissions. They did that and I reviewed some of the work of that Tiger Team later and not only was it good work, but I found it useful in some of what we developed later as we drafted additional directives. But for reasons that were never explained Jim Haynes shut down the Tiger Team and decided to create military commissions in-house within the Office of the General Counsel.

In January of 2002, I got a call from the Air Force Judge Advocate General asking if I were selected to be legal advisor for military commissions, if I would be willing to serve. And after a brief conversation with my wife, I told him sure, I'd be willing to serve. You know, bottom line is anytime you have spent your adult life in uniform, and somebody says will you serve? From my point of, view there's only one answer.

In any event, my first interview in the Office of the DoD General Counsel was in April of 2002. And I heard nothing for the rest of the year and I assumed, quite frankly, that I had fallen off the selection list. So I pressed on with other plans and I received another phone call from DoD General Counsel's Office in July of 2003 requesting that I come in for another interview. Several days after that interview, I was informed that I was selected and asked to come to work the following Monday.

Now, the only reason I mentioned that is because one of the frequent questions that I would get from Jim Haynes when we were dealing with this process was: What's taking so long? I might have said the same thing to him. (Laughter.) But when I arrived I found very small but dedicated staff working on DoD instructions and directives to establish the judicial structure which would be Military Commissions. The chief prosecutor and the chief defense counsel had already been appointed. But after learning of the appointment Secretary Rumsfeld pointed out to Jim Haynes that he had not approved those appointments. So for the next year, the chief prosecutor and the chief defense counsel had the title "acting" in front of their name, "Acting" Chief Prosecutor, and "Acting" Chief Defense Counsel, until such time as Secretary Rumsfeld felt that the DoD General Counsel understood where he fit in the pecking order.

Most of the development of the directives that had been completed when I got there dealt with substantive crimes. The author of most of those was Marine Corps Lieutenant Colonel Bill Lietzau, who went on and later retired as a Colonel. Interestingly he is now the Deputy Assistant Secretary for Law of War and Detainee Affairs in the Pentagon; so what goes around comes around, occasionally. But the remainder of the directives including rules of evidence had a tremendous amount of work to be accomplished. And so the staff devoted a tremendous amount of time to drafting these things and Jim Haynes, our general counsel, was an incurable editor. I honestly think if somebody gave him the King James Version of the Bible, he would edit it. (Laughter.) So we spent a lot of time, late into the evening, working on those things that I think, quite frankly, could have been avoided. But in any event the first six months was largely lost, from my point of view, to productive work because of our negotiations with Lord Goldsmith. At the time, we had three Brits down there at Guantánamo and the president had told the prime minister that we would either make accommodations for what they wanted in terms of trial or Britain could have them back. And so we spent a lot of time in discussions both in Washington and London and I've already mentioned that Goldsmith thought that this was a law enforcement issue. I really thought we were making progress in our negotiations with him until shortly before the end of six months, Goldsmith sent a note to DoD General Counsel that went all the way back to his original position, which meant Article III trials or nothing. And as a result of the President's promise to the Prime Minister, the so-called Tipton Three were returned to the United Kingdom and were never tried.

I can't criticize the president's decision. He'd already made that promise to the Prime Minister, but I was extraordinarily disappointed because we had what I thought were pretty solid cases against all three of those folks. Another issue that arose early on, was the authority or lack thereof of defense counsel to address the media and make public statements. Larry De Rita, who was the DoD Assistant Secretary for Public Affairs, was of the opinion that defense counsel should be gagged. When I asked why, he said because we can. I pointed out to him that none of the military departments had any such rules, all of them permitted public statements by defense counsel. And after several weeks of silence, he finally said okay, over to you it's your decision. As a result, we wrote a directive authorizing those public statements. Now, as far as the content of those statements and compliance with the cannons of ethics that was the responsibility of the individual service the Judge Advocates General. But anybody who's watched the media over the years has seen much of the defense counsel when they talk about their cases. And as I mentioned when we are talking earlier, before our session here this morning, most of the canons of ethics really deal with extra judicial statements of prosecutors not of defense counsel.

One of the challenges that I found in dealing with Reservists, not with any of the judge advocate's general (JAGs) who were members of the active force, but civilian attorneys who had been called or volunteered to be recalled to do defense work, some of them had the view that they weren't officers of the court unless they were before the Court. And whenever I had somebody express that opinion, in my usual calm direct manner I disabused them of that idea, that once you take the oath as an attorney, you are an officer of the court.

And pretty much I was satisfied with the behavior of and the statements of counsel, with a few exceptions which I discussed with some of the TJAGs. But as a result of the decision to turn over to us the responsibility for media we created what would best be called a shadow DoD public affairs office. And we found that it was a whole lot easier to teach a lawyer public affairs than it was to teach a public affairs officer the law. And so Air Force Captain John Smith was appointed the first public affairs officer. He was Air Force JAG, was appointed the first public affairs officer in Office of Military Commissions. And if any of you have ever dealt with the media, they don't sleep. So John's work schedule was horrendous. He did an exceptional job, but for the time he was working there he did not get a whole lot of sleep because he was there answering the phone until the wee hours of the morning. And he

and all of the officers who have succeeded him in that position, I think, have served with great distinction and all the JAGs from all the services; I think I had pretty much every service covered. All of the Title 10 services, including the Coast Guard which they always reminded me, oh, yeah, we're a Title 10 service, too. But we had JAGs from all the services as well as a number of civilians and later on, attorneys from the Department of Justice (DoJ) were added to the team.

Under the system which was developed at the time and consistent with the president's military order, there had to be a reason to believe determination (RTB) personally made by the president before we could prosecute a case. So, using classified information, the Office of the Prosecutor would prepare a memo to the president giving him facts from which to make a reason to believe determination that this individual was subject to the jurisdiction of a military commission. Once they were prepared I signed those, they went through the Secretary to the White House.

Before we got to that stage, we had to go through the Interagency Coordination Process. And I always thought, you know, anybody who was of the opinion that the Bush administration marched together in lockstep had never tried to get anything through the Interagency Coordination Process. Because each agency had his own view, from my point of view it seemed, gee, the president has made the determination, he wants these people tried by military commission, let's get with the program. But it was a greater challenge than I ever thought getting these things through. And once we got a signed RTB, a reason to believe, back then the prosecutor would go ahead and start drafting charges consistent with those that had been laid out in the original directives. I think it is fair to say that we had pushed, in those early directives, some of the international law dealing with war crimes in terms of a common understanding. But since the international law is determined not only by treaties but by state practice, I think it was a reasonable move to include some offenses simply because of the change of events as time developed within that directive. And there also was, it seemed to me, considerable angst as to whether judge advocates were up to prosecuting these cases. As a result Jim Haynes asked that a moot court be conducted with what were called SAGES. These were volunteer consultants to the secretary of defense. We were told that the moot court had to be done in two days. Kind of a tough challenge when you've got cases that are going to take weeks and maybe months to prosecute.

In any event, we did conduct the moot court before the SAGES. The first day was the actual moot court format just like some of you have gone through here. But the second day because of the time compression was more a briefing on what the prosecutors intended to do in terms of introduction of evidence, what they had, and things like that. As a result of that nobody criticized the JAGs, but we did get some suggestions as to trial strategy and things like that. From my point of view, I don't think we got any information from them that we hadn't already considered. But these people kept expressing any concerns about the talent that we had available to prosecute the cases.

As we continued to draft the rules, we spent a considerable amount of time looking at the rules of evidence for the different international tribunals that existed; ICTY, ICTR, and the International Criminal Court. And it always struck me as strange that some the greatest supporters of the international tribunals criticized our rules of evidence, because we tried to, as best we could, pattern them after existing international standards.

The hearsay was—the hearsay rule was the biggest target of criticism. And I have a somewhat cynical view of the hearsay rule. You know, there are in most jurisdictions, seventeen exceptions to the hearsay rule. So it seemed like we've already made the deal determination that in many circumstances hearsay is reliable evidence. And then the other is that there is no hearsay rule once you get outside of Anglo-Saxon jurisprudence. It's not recognized in Asia. The civil law in Europe even makes exceptions for it and of course all of the existing international tribunals permitted hearsay. And so it seemed that the crux of the argument was how far were you going to expand or contract the rule and how reliable was the evidence going to be? And then because we made adjustments to the rules of evidence as we went along, defense counsel said, oh, you know, look at this system, their changing the rules on us. Well, every time we changed the rules of evidence, it was to the benefit of the accused. And I remember addressing the American Society of International Law and I got a question about, well, you're willy-nilly changing the rules. I said we've changed the rules seven times, each time for the benefit of the accused. I said the International Criminal Tribunal for the former Yugoslavia changed their rules seventy-six times before they got rolling and quite frankly I never heard anybody complaining about that. So that fell in the category, from my point of view, of sit-down, shut up. (Laughter.)

Another issue that I thought was problematic in the Bush administration was their choice of words 'enemy combatant'. The problem you face is an enemy combatant can be either lawful or unlawful. So what are you talking about? When I testified before Congress, which I did a number of times; I had ruts in the road between my office and Capitol Hill, I always used the term 'unprivileged belligerent' to discuss the people at Guantanamo we wanted to try, because that is the language of the Geneva Convention. You have to meet certain requirements to have the privileges. So if you don't meet those requirements what are you? You're an unprivileged belligerent. And it just made a whole lot more sense to me.

I talked to Jack Goldsmith about that when he was over in the office of legal counsel. His comment was, "oh, Tom, I agree with you 100 percent, but we arrived too late." But that term has now been encompassed in the legislation that addresses military commissions. One of the other issues when we talk about unprivileged belligerents is that the media attention toward Guantánamo and the detainees down there. Defense counsel will say well, you know, my client's being held down there incommunicado. Well, incommunicado means without communication. During my four year tenure as the legal advisor, there were 90,000 pieces of mail in and out of there between detainees and their homeland. I scarcely call that incommunicado.

And the other thing was the International Committee of the Red Cross had access to detainees from two weeks after we opened the camp. As a matter fact, for the first two years, they maintained a permanent presence down there twenty-four hours a day and they were permitted to access to any detainee they chose to speak with. If they had complaint they were given immediate access to the camp commander. Sometimes they were well founded complaints, sometimes they—you know, we took note of the complaint and told them you will have to do some adjustments to your expectations. The ICRC has always had a presence there. After two years they started just dropping in. They quit having people stationed down there permanently; and just made periodic no notice visits. Also as far as the food is concerned down there, the detainees were offered and still are offered a diet which amounts to 4,000 calories a day. If they ate everything that was offered to them, they would all be 400 pounders by now. And it was good food. Every time I went down there, I always had at least one meal that was being served to them that day, whether it be breakfast, lunch, or dinner, and it was really good food.

Now, not everybody thought it was really good food. David Hicks, who is the Australian detainee, who was later tried and sent back to Australia. When his defense counsel went down there, the first question the defense counsel said is, is there anything we can do for you? And he said, yes, I'm tired of culturally appropriate food, could I have a hamburger? And so they went to the local Burger King on the camp there and got him a hamburger; but the food there is really good. And during Ramadan the galley shifts its schedule and so they serve them breakfast before five in the morning and serve them their evening meal after sundown. So they really do—the cooks down there really do a fantastic job of accommodating the needs of the detainees. I guess unrelated to military commissions, but the treatment of detainees, they are medically monitored. All of the detainees are medically monitored and if they lose too much weight because they are refusing to eat, then they are force-fed. That is done in the clinic by doctors.

There's been a great cue and cry occasionally about that, but I've observed it. One of the camp commanders had it done to him just to make sure it wasn't painful. If you've ever had your stomach pumped, it's not painful. The tube that goes in there is very narrow. The doctors doing everything they, can see to it that they don't create any health hazards. Now, most of the fellows who from time to time, have gone on food strike understand they are going to be fed by tube. They go in there sit down, their wrists or restrained as they can't pull the tube out but other than that they sit there have their meal and then return to their facility. (Laughter.) But they feel like they have to keep faith with the other detainees, so they continue to go through that process. Now, there were as, you know, several suicides down there. We had three at one time. Admiral Harris, the Navy commander, took a lot of criticism for saying, hey, its asymmetrical warfare. And I think his assessment was probably pretty good. Oh, no, how could somebody commit suicide? They hung themselves. Would you rather they blew themselves up? You know, they are doing that all over the globe. You know, so when somebody is a zealot and they want to sacrifice themselves they're going to do it one way or another, if they think it is going to advance their cause.

As we continued the drafting of the directives for military commissions, we also had administration lawyers who failed to appreciate the profound changes which had occurred in the military since World War II. Often compelling military advice was waved off. Benjamin Wittes commented in the Journal of Policy Review, "When the

history of this period is written I feel confident that Bush will be deemed exceedingly ill served by his top legal advisors." I tell you that jumped off of the page and slapped me in the face when I read it. But I am satisfied that that is probably a good assessment. Some of the senior DOJ attorneys we had to work with knew so little about military law. They thought military judges were bound by the presidential determination regarding jurisdiction over individual defendants and lacked the authority to make independent jurisdictional findings. They found out to the contrary, the hard way, when our judges had started making those findings. A statement by an attorney in the DOJ Office of Legal Counsel, "US troops have everything given to them, they are told where to eat, where to go, everything is given to them in one location, they suckle at the womb of the military," gives you some idea that the degree of sophistication we occasionally found in dealing with our civilian counterparts. Some of you know Ron White, he's a retired Army judge advocate who worked for me as a civilian. When he left the office I gave him that quote on a plaque, because he was at the negotiating session where that comment was made. That simply took my breath away. And I think you could understand it, but it gives you some idea of what we were up against. Another time I was called over for lunch with Alberto Gonzalez, when he was then the Attorney General. The issue of public release of charges as soon as they were signed rather than waiting until they were referred was discussed. This was puzzling to the attorney general and some of his senior staff. And they said what do you do if the charges are changed or aren't referred? I said, well, that's what we say publicly, they were altered, amended, or they weren't referred. And so anyway we didn't change our practice although I viewed having lunch with the Attorney General as a not-so-subtle hint that we ought to consider changing it, but we didn't. So, again, the unsophisticated view of military jurisprudence created some problems.

Another issue and I've talked about this publicly ever since I left the job, was the Bush administration, from my point of view, failed in their public diplomacy. As a result the public discussion was driven by the defense bar, nongovernmental organizations and the media. I've made several trips to Europe to talk about our position. I've published several law reviews, courtesy of my good staff and I spoken all over the United States and Asia once. But I have to tell you anytime a brigadier general is your principal spokesman on a matter of national importance, you are in deep kimchi. You have got to have somebody very senior in today's climate who's out there explaining what you are doing and why you are doing it and you better be out there at least every month because we now

live in a sound bite society. In dealing with matters of international law, military operations, and things like that, these topics are very sophisticated and sometimes arcane. And so you've got to keep reminding people what it is you're doing, why you're doing it. Otherwise you simply lose the debate. And I think that that cost the administration a great deal.

I also became convinced that federal judges read newspapers. Now, I know there is at least one on the Supreme Court who says he doesn't pay attention to newspapers, but at the federal district court level and at the circuit court level, they read newspapers. And you can see that reflected in their opinions that considered some of the litigation that developed later on. So that, from my point of view, is a foot-stomper as to why public diplomacy and explaining what you're doing and why you're doing it is so important. So that you can have a reasonable debate about public policy.

As we struggled to do directives for military commissions habeas counsel was just as busy. In 2004, in what I consider to be a major shift in the law, the Supreme Court in the *Rasul* case held that it was not necessary for the federal district court to have jurisdiction over the prisoner if they had jurisdiction over the custodian.[3] At the same time, the court pointed out that the habeas process was a statutory right. I took great note of that. In the *Hamdi* case, the Supreme Court held that a detainee with a claim of citizenship has a right to a hearing to contest the propriety of detention.[4] And in response to that, the DoD created the Combatant Status Review Tribunals, the CSRT, proceedings which are like Article V Tribunals on steroids. And they are quite detailed and would have been unnecessary if we had done Article V Tribunals in the first place. In addition to that, the DoD created the Administrative Review Boards which reviewed the file of every detainee, every year to determine whether or not they were eligible for release. The inquiry was: Is there a continuing intelligence value in detaining the individual? Are they a candidate for trial? Are they a continuing threat to the United States? If the answer to those was no, of course, they were into the shoot for the State Department to work out a return to their nation. I reviewed all of those cases; they came through my office for coordination, mainly to see if we had any exception on it whether or not they were candidate for prosecution. And the decider on those was the deputy secretary of

[3] Rasul v. Bush, 542 U.S. 466 (2004).
[4] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

defense. Gordon England was the secretary of defense the majority of time that I was on active duty for military commissions. And I never ever saw him overrule a decision to release, but I did see him—every time he disagreed with a recommendation of the Board, it was for release rather than detention. But the fact that it was so challenging for the State Department to find countries that would accept these people when they became a candidate for release, I think, demonstrates that we didn't have a camp at Guantánamo full of innocence; because the State Department has worked very long and very hard to find places. And, you know, we had at one time almost 600 people, I mean 800 people at one Guantánamo. And that's gone down to just around 200. So the system, I think, has worked very well. And it's the only time in history that a nation has set up that kind of review for belligerents who were being held off of the battlefield. Now, it gets some attention because some of those folks had returned to the battle. How do we know that? Because we either see them or we kill them. And some of them have shown up on TV from time to time. But I think that the rate of recidivism varies depending on the country that they are from, from ten percent to twenty percent. There has been an investigation going on in the House for over a year on how to deal with this. They called me in to interview me and they said, how do we guarantee there will be no recidivism? I said, that's easy, don't release them. (Laughter.)

But really there are sometimes when you just have to take a calculated risk if you want to do something. Now, during the time we were enjoying from trying cases General Altenburg asked the staff to create a new *Manual for Military Commissions*. And it is interesting, I think it was a stroke of leadership genius because it kept the staff busy at a time when otherwise the morale might have suffered. And when we were done with it, it looked very similar to what exists today. The political appointees above us viewed it as toxic and kept it from publication. It was toxic, I guess, because the vice president's office would have disagreed with it; that was their definition of toxic. In 2006, in the *Hamdan* case, and what I viewed as a clear misreading of the legislative history of the Uniform Code Military Justice, the Supreme Court held that existing military commissions were inconsistent with the grant of authority under Article's 21 and 36 of the Code.[5] And the court also held, in that case, that Common Article III, dealing with conflicts not of an international character applied to this conflict even though the travaux préparatiore (preparatory documents or negotiating record) made

[5] Hamdan v Rumsfeld, 548 U.S. 557 (2006).

it clear that the drafters of the article obviously intended it to apply only to civil wars. Justice Kennedy made the comment during oral argument that still gives me headache: "We have people from 23 nations with whom we are not at war involved here." What's your point? It is still an international armed conflict, from my point of view but, in any event, that's the law and we adjusted to that.

In 2006, also, Senator McCain introduced the Detainee Treatment Act and it and was passed.[6] I had lengthy conversations with Senator McCain's staff on that and they said, what's wrong with Common Article III? And I said its nowhere defined. I said, we're dealing with eighteen-, nineteen-year-old soldiers, there's no bright line, you've got to define it. And so his response to that, and I paraphrase here, was to say, okay, if the police can do it, then you can do it; if they can't do it, neither can you. And I thought boy, that's great. Anybody who spent any time reading constitutional law and criminal law in the United States realizes the police can do a lot. And so, but the point is, in doing that, you can develop bright minds just as the police do - therefore, you can train to it.

Common Article III, standing alone, I thought was too amorphous for military training purposes. Shortly after the *Hamdan* opinion released, and this has never received much publicity, we offered an amendment to the code which we called Article 135(a). Copies were provided to each of the TJAGs and it would have provided a structure for military commissions for now and eternity. What we've ended up with is a structure that addresses what we have at Guantánamo, so it is not an enduring thing. If we had gotten this Article 135(a) through, it would have been a continuing and viable and useful modification to the Code. But again, the only time it came up before Congress was General Rives, then the Judge Advocate General of the Air Force, mentioned the proposed Article 135(a) in his testimony before the Senate Armed Services Committee. But again, just like the manual that we had drafted, Article 135(a) suffered the same quiet death.

Among other things, we clarified, you know, how to handle classified proceedings. We also provided that the accused could not be excluded from any proceeding even though it was closed to the public. A year later in the *Boumediene* case, in what I view as the Supreme Court's version of King's X, they held that no habeas is a constitutional

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[6] Detainee Treatment Act of 2005, 42 U.S.C. ch. 21D (2006), *available at* http://uscode.house.gov/download/pls/42C21D.txt.

process not a statutory process.[7] So, again, that changed the rules. Now, all of that leaves us with the question: Is there any viability left to the *Eisentrager* case?[8] I've had discussions with a number of professors who maintained the Supreme Court didn't overrule the *Eisentrager* case. But in that case the court held that federal courts do not have jurisdiction in cases that arise in territories in which the United States sovereignty does not extend. In the *Hamdan* case the Supreme Court said that our lease of Guantánamo Naval Station was enough to grant jurisdiction. And they said that was different than the *Eisentrager* case. In *Eisentrager* case, the petitioners were being held in a confinement facility in occupied Germany. You never exercise more jurisdiction over another nation's territory then you do when you occupy it because you are the government. So I'll leave it to you, has *Eisentrager* been overturned? From my point of view, you know, it's no longer a viable precedent for anything the president or the military would want to do.

Another problem that plagued us was the release of classified information and how to use it in prosecutions. The intelligence community is familiar with collecting intelligence and sharing it for operational purposes, at least that's what we think they're collecting in for. General Schwarzkopf took some exception to that, but that is what they are supposed to be doing but they are not accustomed to collecting intelligence and sharing it with lawyers for purposes of prosecution.

We had a great deal of problems and a matter of fact it reached the point at one time when Secretary Rumsfeld classified on all photographs of detainees. All photographs. Didn't matter what the source was. We had open source photographs of detainees walking along with Osama bin Laden and things like that. They were now classified. Okay. Now, how do we go about getting them released? Since then, I found that there is a place to resolve that conflict is, of all places, in the archives; Office of the U.S. Archives. But in my discussions with the folks who have followed me that has been a continuing challenge. Now, I'm not concerned too much with the high-value of detainees because the CIA has been geared up and ready to participate in the prosecution of those cases. But in the other cases I found the Defense Intelligence Agency fairly cooperative, but the folks inside the building under the Under Secretary for Intelligence were less cooperative. Matter of fact, one time I was bellyaching to the General Counsel about this and he said—and I

[7] Boumediene v. Bush, 553 U.S. 723 (2004).
[8] Johnson v. Eisentrager, 339 U.S. 763 (1950).

was doing it in a fairly animated fashion—and he said, "Well, I want you to write me a memo, just say it just like that." So I did. Well, his idea of resolving this was, you know, putting a note in the upper right-hand corner, Steve can you help with this? Steve Cambone was the under secretary of defense for intelligence at the time and the answer came back: "Next time your Brigadier General should be a little more politic in his language." No intelligence information there. But that was a constant battle for the office and it is only when the secretary or deputy secretary got involved that I found that we were successful in getting what we needed. I can only say that I hope that the problem is no longer being held.

That leaves us with where are we now? It's interesting when I was dealing with the transition team before the current administration took office, I got the reaction from some of the folks who were looking at military commissions and the issues that surrounded them was, boy, this is really tough. And I think a lot of them had listened to and drank the Kool-Aid of the non-governmental organizations before they actually took office. And it is obvious that the views of national security of a candidate and the views of one with the ultimate responsibility for making national security decisions are quite different.

And I would commend you a book that has been written by Jack Goldsmith, a very interesting book called *Power and Constraint*, which discusses what has brought this administration to many of the same conclusions as its predecessor.[9] And there are other books out there that I commend to you one is Barton Gellman's book, *Angler*, which is about the Cheney period of vice presidency.[10] You read that, you'll understand why my job was a whole lot tougher than I ever imagined it would be. And then there is another one, shorter and at least from a lawyer's point of view an easy read, Charlie Savage wrote a book on *Takeover: The Return of the Imperial Presidency*.[11] He goes back to the tenor of Abraham Lincoln to the present time about the unitary executive, which a lot of critics of the Bush administration said that was over reach, but there are good examples of that throughout our history. Charlie and I had lunch together after that book was released, and I said, "Don't you

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[9] JACK GOLDSMITH, POWER AND CONSTRAINT, JACK GOLDSMITH (W.W. Norton & Co. 2012).
[10] BARTON GELLMAN, ANGLER (Penguin Press 2008).
[11] CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY (Little, Brown & Co. 2007).

think that this will change with the change of administrations?" And he said, "Oh, no." He said every administration builds and does not discard the precedence set by prior administrations. And I think we're seeing that in spades right before us now.

So anyway, those are books that I would commend to you, but we've now arrived at the point where our appellate processes provide for Article III, judicial review. Our rules of evidence are better than the international tribunals and have been significantly tightened. We have a state-of-the-art world class courtroom and our military judges have demonstrated to the American people they are every bit as capable as federal district court judges in dealing with the complex issues that face them. And as far as military commissions are concerned, there is absolutely nothing wrong with military commissions now that public education and transparency cannot address.

And with that, thank you, and I'm open to any of your questions.

IN THE GARDEN OF BEASTS, LOVE, TERROR, AND AN AMERICAN FAMILY IN HITLER'S BERLIN[1]

REVIEWED BY MAJOR MARGARET KURZ[*]

With that speech, Dodd embarked on a campaign to raise the alarm about Hitler and his plans, and to combat the increasing drift in America toward isolationism; later he would be dubbed the Cassandra of American diplomats. . . . He predicted, moreover, that Hitler would be free to pursue his ambitions without armed resistance from other European democracies, as they would choose concessions over war.[2]

The Cause of the Blindness

There is no doubt that in retrospect, Hitler was evil. The question then becomes, why was the world not able to see Hitler for what he was, before it became too late? The reader might be surprised to learn that Ambassador William Dodd made the speech referenced above in 1938, well after he had resigned his post as Ambassador to Germany and returned to America. After all, one hopes that America was not complicit in Hitler's rise, that she did not ignore a rational voice. In his latest book, *In the Garden of Beasts, Love, Terror, and an American Family in Hitler's Berlin*, Erik Larson[3] shows readers pre-World War II Berlin

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[*] Judge Advocate, U.S. Army. Presently assigned as Chief of Federal Litigation, Joint Base Lewis McChord, Washington. Written while a student of the 60th Graduate Course at The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[1] ERIC LARSON, IN THE GARDEN OF BEASTS, LOVE, TERROR, AND AN AMERICAN FAMILY IN HITLER'S BERLIN (2011).

[2] *Id.* at 350. Cassandra was a tragic figure from Greek mythology. She was the daughter of King Priam and Queen Hecuba of Troy, and described as one of the most beautiful women of her time. Her beauty caught the eye of Apollo, who granted her the gift of prophesy, in exchange for her love. When she failed to return his affections, he cursed her by causing no one to believe her predictions. Cassandra foresaw the destruction of Troy and her own death, but as no one would believe her, she was powerless to stop it and went insane in the process. AESCHYLUS, AGAMEMNON 75–78 (Richmond Lattimore ed., trans., Univ. of Chicago Press 1953) (458 B.C.).

[3] According to his website, Eric Larson is a *New York Times* Best Selling author. As one peruses Larson's other works, such as *Devil in the White City* and *Issac's Storm*, one can see that his specialty is historical non-fiction, but written in a sensational way to entice a reader to view the world and the time through a prominent personality. Eschewing the more academic and detailed treatment of history and events, Larson chooses to appeal to

through the eyes of its Ambassador, William Dodd, and his daughter, Martha Dodd. Using their diaries and other personal writings, he takes readers into the privileged and extremely insular world of American diplomacy during one of the most crucial times in history. Larson looks at Germany and Hitler from the perspective of the Dodd family and through them, attempts to answer the question of why Dodd as Ambassador, and moreover America, failed to recognize the monster that became Adolf Hitler.[4] The result is a vivid account of life in Berlin from 1933–1937, one that is eminently readable, if not particularly academic or analytical. This review examines Larson's personality-based approach as to how America missed Hitler's rise, looks at the more realistic and scholarly reasons for the success of Hitler, and concludes with a short prognostication on what we might learn from Larson's observations.

Larson's Use of Personality-Focused Writing Limits the Possibility of His Analysis

Larson's stated purpose on the very first page of the book is to understand why no one recognized Hitler for what he was before it was too late.

> I have always wondered what it would be like for an outsider to have witnessed firsthand the gathering dark of Hitler's rule. How did the city look, what did one hear, see, and smell, and how did diplomats and other visitors interpret the events occurring around them? Hindsight tells us that during that fragile time the course of history could so easily have been changed. Why, then did no one change it? Why did it take so long to recognize the real danger posed by Hitler and his regime?[5]

Unfortunately, Larson never explicitly answers the question he sets out to answer through his characters, but after reading Larson's book, the

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the broader base by using our current obsession with the cult of personality as his vehicle to present a historical event. Erik Larson, http://ericlarsonbooks.com (last visited July 27, 2012). Given the current popularity of reality television and "celebutants," the best-selling nature of Eric Larson's books, over that of a more academic and historical author such as Pulitzer Prize winner Doris Kearns Goodwin, should come as no surprise.

[4] LARSON, *supra* note 1, at xiii.

[5] *Id.*

reader can see that there were a number of failings along the road to World War II, both personal and systematic. This section will discuss Larson's implied answers to his thesis.

The Role of Personality—How Did Dodd as a Person Play in Blinding America to the Truth about Hitler During This Crucial Time?

Larson reveals that during his tenure as Ambassador, Dodd suffered from many of the same human weaknesses as all of the world's political leaders of the time, weaknesses which caused the West to fail to step in against Hitler during his first years. Though he recognized the truth of Hitler later in his tenure, even if he had recognized Hitler's end purpose from the start, Dodd had been marginalized by fellow diplomats for his frugality and lack of social birth, thereby diminishing his credibility.[6] Most disturbingly, Larson gently lays out the facts that Dodd was, as were many of the time, including Roosevelt, [7] prejudiced against Jews.[8] In focusing on the vulnerabilities and personal foibles of key players such as Dodd, his family and his German counterparts, Larson lays out in easy to read and understand prose how those weaknesses played a role in the crucial time preceding WWII.

Inability to Imagine the Unimaginable

In the moment of the mid-1930s, no one could imagine the scope of Hitler's cruelty. Through Dodd's daughter Martha's narrative, Larson shows how many were bedazzled by the show, the intellect and charm of German officials, the parties and the extravagance. Additionally, the seeming normalcy of German life on the street made many think the early reports of atrocities were not to be believed.[9] Even after the June 30, 1934, round-up and killing of the political opposition by Hitler, Dodd's reaction seems somewhat muted. He chose not to cancel his July 4th celebration or un-invite his German government guests.[10] At the time, the United States did not impose any travel restrictions on Americans seeking to tour Germany, finding no imminent danger.[11]

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[6] *Id.* at 109–12, 216–17.
[7] *Id.* at 28–29.
[8] *Id.* at 165–66.
[9] *Id.* at 50.
[10] *Id.* at 322.
[11] *Id.* at 325.

Germans themselves seemed indifferent to the purge.[12] Larson even portrays Dodd as less than outraged when he had to place a cotton-lined box over his telephone when it was not in use, believing it to be bugged.[13] Dodd, like the rest of the world, realized the truth too late, albeit before the rest of the nation. However, due to his marginalization, his dispatches and prognostications were ignored and he was ultimately labeled a Cassandra.[14]

Hitler's Claims Toward Peace

Hitler continued to profess peace and the author makes it clear that Dodd believed him. Dodd's meeting with Hitler on October 17, 1933, left him with no hint of Hitler's violent or militaristic intentions. Larson concluded, "Though the session had been difficult and strange, Dodd nonetheless left the chancellery feeling convinced that Hitler was sincere about wanting peace."[15] In telling the story through an American with such close proximity to Hitler, Larson implies that America likely had no chance at all of seeing Hitler's true intentions, despite all the obvious signs of military build-up.[16]

Larson Never Really Answers His Own Question

The author states that he intends to explore the world through the eyes of "his two innocents," Dodd and his daughter Martha.[17] But he never really answers the question posed in his thesis through his main characters. In reading the first few pages, Larson sets up the reader to expect significant historical analysis, to perhaps learn the dark secret of why Hitler rose unimpeded, to glean the magic lesson so that humanity will never again fall prey to a future Hitler. In the end however, Larson provides a small snippet of life in pre-war Berlin and leaves the reader to

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[12] *Id.* at 328.
[13] *Id.* at 225.
[14] *See supra* note 2 and accompanying text.
[15] LARSON, *supra* note 1, at 159.
[16] *Id.* at 341. *Contra* EUGENE DAVIDSON, THE MAKING OF HITLER 317 (1977) (Davidson posits that in 1933, political leaders around the world could have no doubt about the Nazi threat, given the immense build-up of arms, plans for militarization of the police with eventual government takeover.).
[17] LARSON, *supra* note 1, at iv.

their own conclusions. The author should not have promised such lofty insight.

In truth, the book is divided evenly between historical descriptions of the events and chronicling the personal lives, frustrations, parties, sexual escapades, professional victories and disappointments of the Dodd family, mainly the ambassador and his daughter. In particular, Larson toes the water of titillation in describing Martha's multiple liaisons with both high-ranking American and German sexual partners.

> [B]ut she knew sex and liked it, and especially liked the effect when a man learned the truth (that she was sexually experienced). "I suppose I practiced a great deception on the diplomatic corps by not indicating that I was a married woman at that time," she wrote. "But I must admit that I rather enjoyed being treated like a maiden of eighteen knowing all the while my dark secret."[18]

Perhaps the author does this to make it more readable and reach a larger audience, or perhaps the wider American public cannot read a historical work of non-fiction without it. If Larson's true purpose is to present a historical lesson as to why the world was wrong about Hitler, then the inclusion of details of at least a dozen of Martha's dalliances is unnecessary, other than to be amusing and voyeuristic. Admittedly, her presence in the book does become interesting as an illustration of how a pro-German foreigner had to reluctantly evolve her view of Germany, Hitler, and Socialism as Hitler's power and brutality increased. However, other than the one time Martha was brought into Hitler's presence as a possible liaison,[19] Martha's sexual life is irrelevant to the historical analysis.

It's the Economy, Stupid

In restricting the scope of the book to "personality," Larson leaves out many of the facts relevant to the analysis of why the world missed the boat on Hitler. Reading Larson's book was like having dessert before dinner and being left hungry. In choosing to focus on the narrow world

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[18] *Id.* at 113.
[19] *Id.* at 160–62.

of diplomacy, Larson does not discuss in depth the most prevalent reason for Hitler's rise, the German economy. Hence, it was interesting to learn that, as in many of the world's conflicts and troubles, economics was at the heart of Hitler's rise.

After World War I, the German people suffered not only an ignominious defeat on the world stage, injurious to their national pride, but a brutal lashing from the Great Depression. Hitler promised to get the German people out of the economic crisis and restore national pride.[20] He did, in fact, institute many economic policies which benefited the German working and middle class, and brought support for the Nazi party.[21] To the public, non-Jewish German, Hitler was a politician who brought a future.[22]

Eugene Davidson elaborates on why Hitler was so successful:

> The German society had withstood the shock of the lost war, the exactions and arrogance of the victors, the invasion of the Ruhr and Rhineland; it had survived the inflation and recurrent economic depressions; but the accumulation of all of them was too much. Too much at least for the almost 19 million out of 36.8 million voters who in July 1932 voted for the anti-republican parties of the National Socialist and the Communists. . . . Even Reichswehr generals like Hammerstein and Bussche, who continued to dislike and mistrust him, when forced to make hard decisions undoubtedly preferred a Hitler to a Papen cabinet with the promise of civil bloodletting.[23]

In hindsight, there is only black and white; we can only see Hitler as a terrible monster with no room for shades of gray. But Larson does give readers a glimpse into Hitler's charisma through Martha. Martha is drawn to him as were so many in his time. Larson uses Martha to show

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[20] Jacob G. Hornberger, *Why Germans Supported Hitler, Part 2* (July 18, 2007), http://www.fff.org/freedom/fd0703a.asp.
[21] *Id.*
[22] *Id.*
[23] EUGENE DAVIDSON, THE MAKING OF ADOLF HITLER 366–67 (1977). *Cf.* OTIS C. MITCHELL, HITLER OVER GERMANY, THE ESTABLISHMENT OF THE NAZI DICTATORSHIP 194–205 (1918–1934). Mitchell details a number of different factors which contributed to Hitler's rise to power, including, interestingly, the fact that Hitler had no plan or blueprint for his final takeover.

how Hitler offered many positives, and presented a vision that appealed to a German people who had been broken down, demoralized and economically devastated after World War I. But Martha, an intellectual lightweight, socialite and flibbertigibbet at best, cannot offer any substantive economic analysis through her observations.

In the Garden of Beasts Is Useful as an Illustration of Why We Became the World's Policeman

The reader may struggle with blaming Dodd for not taking a stronger stand, as he was in such an influential position during this crucial time. But understanding the historical context of why there was such a possibility for human blindness to a Hitler is crucial in not repeating such a mistake. Larson makes clear and helps provide historical context and understanding that it was not just Dodd who had perception issues, but many leaders and much of the world as well. Seventy years later, the world is perhaps still skittish from allowing Hitler to do what he did. One can argue that America acts as the world's military and economic policeman, getting involved in conflicts like Grenada, Panama, Somalia, Kuwait, Iraq, Afghanistan, and recently the Arab Spring, to ensure a "Hitler" never happens again. Hitler opened our eyes to the danger of isolationism. Fortunately, we will never know if Saddam Hussein or Osama Bin Laden was the next Adolf Hitler, as we have learned our lesson about what happens when the world turns a blind eye to a rising dictator.

Sources

In the sources and acknowledgement section, it is clear that Larsen did extensive research, interviews, and travel for the book, much of it quite scholarly in its scope.[24] But in choosing to focus the book on the personality, foibles, and other personal characteristics of the players involved limits his stated thesis. Certainly, if he meant to write an absorbing, readable voyeuristic work of non-fiction into Hitler's rise, he did an excellent job. After all, Larson is heralded as a writer who uses historical personalities, who writes non-fiction as if it were fiction.[25] Yet examining the endnotes in the back of this book, the majority of his

[24] LARSON, *supra* note 1, at 369–75.
[25] *See supra* note 3 and accompanying text.

citations are personal papers, letters, and unpublished diaries of the Dodd family and personal biographies of leaders of the time.[26] Throughout the book, Larson often mentions a sentence or idea from one of Dodd's official dispatches, yet he rarely quotes the actual language at any length. Using more direct quotations to diplomatic papers would certainly have given the work more muscle.

A Useful Vignette for Leadership Lessons and Today's JAG Corps

In the Garden of Beasts may serve as a cautionary tale of leadership mistakes. Dodd railed continually against the established diplomatic community he called the "Pretty Good Club" and their extravagances.[27] In doing so, he earned the ire of the diplomatic corps, which swiftly marginalized him intellectually. Perhaps the lesson is obvious: do not bite, or criticize so loudly, the very establishment you represent if you wish to still be part of the club and be heard. Or perhaps the converse is the lesson: do not ignore the message because of the social status of the messenger. Judge Advocates are often taught a variation of this lesson—earn the credibility of the command by learning what the unit does, fit in, speak the language, but be prepared to speak up and defend your position if you are legally correct. Dodd became a clear example of what happens when you make no effort to fit in but have an important message later on that goes ignored. The author does a good job of illustrating a leadership mistake.

Conclusion

While *In the Garden of the Beasts* is an absorbing and even at times scintillating read, it does not enter the heavyweight class of historical writing. Larson sets out a weighty task, but never comes out with a clear answer. While his real life characters are well drawn, lively, and charismatic, they are able to shed only a dim light on the question of why it took so long to recognize Hitler for what he was. While Larson does serve a purpose with his "personality" approach because he shows clearly how personality can affect history, that approach limits the intellectual and academic impact of his work. However, if you want a fun

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[26] LARSON, *supra* note 1 at 377–434.
[27] *Id.* at 109–12.

summer beach read with a serious cover to impress your friends, this is the book.

THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES[1]

REVIEWED BY MAJOR MATTHEW E. DUNHAM[*]

To be an American is not to be someone, but to believe in something.[2]

I. Introduction

In *The Idea of America: Reflections on the Birth of the United States*, Gordon S. Wood looks beyond mere dates and events of the American Revolution and examines the ideology of the men who founded the United States of America. By illuminating the beliefs and motivations behind the Founders' actions, Wood argues that the Revolution is the source of the nation's values and identity, and therefore, "the most important event in American history, bar none."[3] Full of anecdotes and careful analysis, *The Idea of America* bridges the 235-year gap between the Founders and this generation and persuasively illustrates an American identity forged by the American Revolution.

Part II of this review looks at this iconic author and his approach to the American Revolution. Next, Part III analyzes the essay structure and overall readability of the book. Parts IV and V examine two of Wood's essays, "The American Enlightenment" and "The American Revolutionary Tradition, or Why America Wants to Spread Democracy Around the World." These essays represent Wood's two central themes:—that history must be viewed through the eyes of contemporaries, and that the American Revolution was the most important event in American history because it provided America with its identity. Finally, Part VI will conclude this review.

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[*] Judge Advocate, U.S. Air Force. Presently assigned as Staff Judge Advocate, Office of Military Cooperation-Kuwait, U.S. Embassy, Kuwait City, Kuwait. Student, 60th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[1] GORDON S. WOOD, THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES (2011).

[2] *Id.* at 322.

[3] *Id*. at 2.

II. Gordon Wood and His Thoughts on America

Gordon Wood is "an American institution."[4] A former Air Force officer, he is the Alva O. Way University Professor and Professor of History at Brown University.[5] He is the author of the Pulitzer Prize-winning *The Radicalism of the American Revolution*, which is "considered among the definitive works on the social, political and economic consequences of the Revolutionary War."[6] His literary contributions also include *Empire of Liberty*; *The Creation of the American Republic, 1776–1787*; and *The Americanization of Benjamin Franklin*, all prize-winning books.[7]

The eleven essays in *The Idea of America* span Wood's entire career and provide an open window into his philosophy as a historian. According to Wood, "[t]he responsibility of the historian . . . is not to decide who in the past was right or who was wrong but to explain why the different contestants thought and behaved as they did."[8] In the 1960s, he began by reining in post-World War II consensus-era historians like Louis Hartz. In *The Liberal Tradition in America*, Hartz maintains that Americans have always been free and equal.[9] Wood believes such a characterization paints the American Revolution as "a peculiarly conservative affair, an endorsement and realization, not a transformation, of the society."[10] Wood turns Hartz's interpretation on its head and argues the American Revolution was one of the most radical republican movements the world has ever experienced.[11]

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[4] David Hacket Fisher, *The Revolution Re-envisioned*, N.Y. TIMES, Jul. 24, 2011, at BR12, *available at* http://www.nytimes.com/2011/07/24/books/review/the-idea-of-america-by-gordon-s-wood-book-review.html?pagewanted=all.

[5] Bonnie K. Goodman, *What They're Famous For*, HISTORY NEWS NETWORK (Apr. 2, 2006, 3:44 PM), http://hnn.us/blogs/entries/23524.html.

[6] *Id*.

[7] *Id*.

[8] WOOD, *supra* note 1, at 21.

[9] *Id*. at 8 (citing LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955)).

[10] *Id*. at 7–8.

[11] *See id.* at 198 (arguing that the heart of radicalism in the American Revolution was actual representation, ordinary men represented by ordinary men, because it constituted an extraordinary transformation in the relationship between society and government). Notably, some modern scholars view the American Revolution as less then revolutionary. For example, in *The American Revolution*, Jack Greene argues that "[i]n rejecting monarchy and the British connection and adopting republicanism, the leaders of these settler revolts did not have to preside over a wholesale, much less a violent, transformation of the radical political societies that colonial British Americans had constructed between 1607 and 1776." Jack P. Green, *The American Revolution*, AM.

Seeking to be objective, Wood also began revising the Progressive view of history, which came into vogue in the early twentieth century and views the Revolution as a conflict of competing economic interests. According to Wood, Progressive historians like Claude Bowers, who wrote *Jefferson and Hamilton: The Struggle for Democracy in America*, show partiality to the likes of Thomas Jefferson over Alexander Hamilton due to their disdain for the robber barons and big corporations of the era.[12]

Wood claims that "too much of our history writing tends to take sides . . . crudely reading back into the past the issues of the present."[13] "The drama, indeed the tragedy, of history," says Wood, "comes from our understanding of the tension that existed between the conscious wills and intentions of the participants in the past and the underlying conditions that constrained their actions and shaped their future."[14] In *The Idea of America*, Wood succeeds in his endeavor to understand these tensions and eloquently develops them for his readers.

III. The Structural Flow of *The Idea of America*

While revised for this publication, Wood originally wrote the individual essays to answer questions that emerged during his research.[15] As such, *The Idea of America* does not flow easily from chapter to chapter. Nevertheless, the book's subtitle, *Reflections on the Birth of the United States*, sets a clear theme for the collection. Whether enlightening the reader on the Founders' idolization of the Roman Republic, the tendency of world political leaders to believe in conspiracies as a means of explaining behavior, or explaining tensions over monarchism in the 1790s, Wood successfully illustrates the interplay between external events and our Founders' philosophies, and how this combination allowed the birth of a nation.

HIST. REV. (Feb. 2000), http://www.historycooperative.org/journals/ahr/105.1/ah000093.html#REF12.

[12] WOOD, *supra* note 1, at 19 (citing CLAUDE G. BOWERS, JEFFERSON AND HAMILTON: THE STRUGGLE FOR DEMOCRACY IN AMERICA 140 (1925)).

[13] *Id*.

[14] *Id*. at 22.

[15] Jeff Glor, *"The Idea of America:" Reflections on the Birth of the United States*, CBSNEWS.COM (May 16, 2011, 2:52 PM), http://www.cbsnews.com/8301-504367_162-20063242-504367.html.

In an effort to increase the book's cohesiveness, an "Afterword" follows each essay to explain context and tie in previous essays. Wood also compensates for not being able to delve deeper into the subject matter by graciously recommending additional readings from various historians. By including these recommendations, Wood makes *The Idea of America* a great primer and resource for further study.

Despite the essay format, most of *The Idea of America* reads as smoothly as David McCullough's *1776*[16] or Walter Isaacson's *Benjamin Franklin.*[17] Wood creates vivid imagery and successfully exposits difficult concepts, allowing the reader to comprehend the complex environment of the late eighteenth and early nineteenth centuries. Unfortunately, most of his first essay, "Rhetoric and Reality in the American Revolution," is written for academics. Wood fills thirty pages comparing and discussing different approaches historians have taken when writing on the American Revolution and discussing the concept of ideas in terms the general reader will have to read multiple times to comprehend. His overview of historical perspectives and his historical philosophy in the Introduction is sufficient. By leading off with "Rhetoric and Reality in the American Revolution" in chapter one, Wood unnecessarily risks his readers' loyalty. Whether one endures (or skips) Wood's first essay, the remainder of the book is splendidly written and an informative read.

IV. A Closer Look at "The American Enlightenment"

In his essay, "The American Enlightenment," Wood presents his philosophy that historians can explain the founding fathers' behavior by first understanding how they perceived themselves. Specifically, he shows that the Revolutionaries believed they were building an enlightened empire of liberty and were the most enlightened people on earth.[18] He provides a plethora of examples of the Founders pointing to their mass education programs, literacy levels, criminal justice reform, creation of civic and humanitarian societies, and widespread use of American English[19] as evidence of their enlightenment. According to Wood, it is critical to recognize the concept of the American

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[16] DAVID MCCULLOUGH, 1776 (2005).
[17] WALTER ISAACSON, BENJAMIN FRANKLIN (2003).
[18] WOOD, *supra* note 1, at 276.
[19] *Id*. at 280–85.

Enlightenment because "America became the first nation in the world to base its nationhood solely on Enlightenment values."[20]

Notably, scholars do not universally accept the reality of the American Enlightenment. In his essay, "Revolution Without Dogma," Daniel J. Boorstin argues that historians overlook the significance of our national birth certificate as a Declaration of Independence vice a French Revolutionary-style Declaration of the Rights of Man.[21] Boorstin relegates the American Revolution to a legal dispute, finding that when "[c]ompared even with other colonial rebellions, the American Revolution is notably lacking in cultural self-consciousness and in any passion for national unity."[22]

Wood disagrees with Boorstin's approach. According to Wood, it is irrelevant whether the Revolutionaries attained enlightenment to the level of David Hume and Adam Smith.[23] He argues it is more important to realize that the Founders saw themselves as enlightened and acted accordingly.[24] It is their "commitment to enlightenment" that brought about large-scale social change.[25]

"The American Enlightenment" is an intriguing essay that successfully shows how enlightenment ideals gave birth to the nation. Unfortunately, being constrained by the essay format of the book, Wood only provides a cursory examination of the topic. Further, while he thoroughly explains the Revolutionaries' commitment to enlightenment

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[20] *Id*. at 274–75.

[21] Daniel J. Boorstin, *Revolution Without Dogma*, http://clio.missouristate.edu/FTMiller/Revolution/Essays/ db.htm (last visited Sept. 15, 2011). Daniel J. Boorstin was a prize-winning author, who served as Librarian of Congress from 1975 to 1987. His book, *The Americans: The Democratic Experience* (1973), received the 1973 Pulitzer Prize in history. The Library of Congress, *Daniel J. Boorstin, 1914–1924* (Mar. 2, 2004), http://www.loc.gov/ homepage/boorstin.html.

[22] Boorstin, *supra* note 21.

[23] WOOD, *supra* note 1, at 289; David Hume (1711–1776) was an influential Scottish philosopher and is recognized as "a precursor of contemporary cognitive science, as well as one of the most thoroughgoing exponents of philosophical naturalism." William Morris, *David Hume's Life and Works*, HUME SOC'Y (December 29, 2010) http://www.humesociety.org/about/HumeBiography.asp. Like Hume, Adam Smith (1723–1790) was also a Scottish philosopher and is considered the father of modern political economics. *The Consise Encyclopedia of Economics: Adam Smith*, LIBR. OF ECONS. & LIBERTY, http://www.econlib.org/library/Enc/bios/Smith.html (last visited July 25, 2012).

[24] *Id*. at 288.

[25] *Id*.

ideals, he summarily attaches these ideals to modern Americans without illustration. This thin connection makes it difficult for the reader to associate "The American Enlightenment" with Wood's overall theme that the Revolution is the source of the nation's values and identity.

V. A Closer Look at "The American Revolutionary Tradition, or Why America Wants to Spread Democracy Around the World"

In his concluding essay, Wood showcases his belief that the American Revolution marked a fundamental shift in values and ideas and made Americans an ideological people.[26] "To be an American," Wood argues, "is not to be someone, but to believe in something."[27] Citing to Lincoln, Wood illustrates just how deeply the American Revolution affected American consciousness. "We are a grand experiment," Wood states, paraphrasing Lincoln's Gettysburg Address, "and it's worth fighting for that because the world counts on us . . . we are the last best hope and if we fail, democracy fails everywhere."[28]

Thankfully, the Union did not fail. Wood shows that Americans continued to believe that they were the standard for democracy in the world and cites several examples to effectively support this thesis.[29] One of the most audacious examples is a statement from President Grant to the French in response to the establishment of the Third French Republic in 1870. Completely ignoring French revolutionary tradition, Grant wrote, "[w]e cannot be indifferent to the spread of American political ideas in a great and civilized country like France."[30]

Wood describes American support and enthusiasm for revolutions in the nineteenth century so the reader can appreciate the aftermath of the 1917 Russian Revolution. According to Wood, when the Bolsheviks came to power the United States refused to extend diplomatic recognition for sixteen years, which was contrary to its historical practice of immediately extending relations to revolutionary governments.[31] Wood maintains this paradigm shift can only be understood in terms of

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[26] *Id*. at 320–21.
[27] *Id*. at 321.
[28] *Book TV: The Idea of America* (CSPAN2 television broadcast May 11, 2011), *available at* http://www.c-spanvideo.org/program/300328-1; WOOD, *supra* note 1, at 326.
[29] WOOD, *supra* note 1, at 326.
[30] *Id*. at 330.
[31] *Id*. at 331.

America seeing its core beliefs in liberty and democracy in fundamental opposition to the ideology of the Bolshevik revolution.[32] In other words, the Bolshevik Revolution was not the "*genus Americanus*" form of revolution.[33]

Typically, scholars argue that the Cold War began sometime immediately before, during, or immediately after World War II. For example, in his book *The Cold War is Over*, William Hyland argues the Cold War began in 1939.[34] Similarly, John Gaddis, who authored *The Long Peace*, claims the Cold War began immediately following World War II.[35] Wood, on the other hand, convincingly argues that the Cold War began in 1917.[36] This is material to Wood's thesis because it explains America's later support for non-communist authoritative governments in apparent contradiction to America's revolutionary tradition.[37] Wood cautions against characterizing the Cold War as a clash of markets or American abhorrence to revolution; rather, "our Cold War actions . . . represented our confused and sometimes desperate efforts to maintain our universalist revolutionary aspirations in the world."[38]

Wood's analysis of America's revolutionary tradition is brilliant. Not only does he make the case for the existence of such a tradition, he shows how the traditional paradigm shifted with the Bolshevik Revolution. The analysis offers an original perspective on American foreign policy in the twentieth century. A minor criticism flows from the essay's title. It is not clear why the "or Why American Wants to Spread Democracy Around the World" section of the title is needed. Further, Wood does not make that case in the essay. "The American Revolutionary Tradition" by itself seems more related to the subject matter.

This concluding essay to *The Idea of America* is particularly relevant in light of recent revolutions in Tunisia, Egypt, and Libya. American

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[32] *Id*. at 330–33.
[33] *Id*.
[34] WILLIAM G. HYLAND, THE COLD WAR IS OVER 11 (1990) (arguing that the Cold War began when Russia and Germany signed a nonaggression treaty only three weeks before the start of World War II).
[35] JOHN L. GADDIS, THE LONG PEACE 21 (1987).
[36] WOOD, *supra* note 1, at 331.
[37] *Id.* at 330–33.
[38] *Id*. at 333.

attitudes have been mixed, especially in Libya.[39] Wood observes that ten years of war in Iraq and Afghanistan have "drained away most of our idealism about changing the world," and that Americans "seem to be in a quandary about what to do, about what our role in the world ought to be."[40] It is hard to disagree with Wood on this point. For this reason, the nation's senior political and military leaders should read *The Idea of America* and put it on their subordinates' reading lists. A better understanding of the nation's origins and identity can only help remedy our current identity crisis. As Wood states, "history is to a society what memory is to a person . . . if you don't know where you come from it's going to be difficult to know where to go."[41]

VI. Conclusion

Gordon Wood's work is a must have on the shelf of any student of the American Revolution, and *The Idea of America: Reflections on the Birth of the United States* is no exception. Full of original thought and keen illustrations, Wood successfully argues his central thesis that the American Revolution is the most important event in our nation's history. *The Idea of America* is an enjoyable and informative read.

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[39] *See* David Frum, *Why U.S. Must Intervene in Libya*, CNN.COM (Mar. 7, 2011), http://articles.cnn.com/2011-03-07/opinion/frum.libya.choice_1_moammar-gadhafi-libya-friend?_s=PM:OPINION (arguing that the United States must intervene in Libya to oust Moammar Gadhafi); *but see* Edward N. Luttwak, *Libya: It's Not Our Fight*, L.A. TIMES (Mar. 21, 2011), http://articles.latimes.com/2011/mar/21/opinion/la-oe-luttwak-libya-20110321-31 (arguing that the United States should not intervene in Libya because it will be depicted as aggressive, predatory and anti-Muslim).

[40] WOOD, *supra* note 1, at 334.

[41] *Book TV: The Idea of America* (CSPAN2 television broadcast May 11, 2011), *available at* http://www.c-spanvideo.org/program/300328-1.

By Order of the Secretary of the Army:

RAYMOND T. ODIERNO
General, United States Army
Chief of Staff

Official:

JOYCE E. MORROW
Administrative Assistant to the
Secretary of the Army
1225501

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