

MILITARY LAW REVIEW

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THE LAW OF ARMED CONFLICT

Reviewed by Fred L. Borch III

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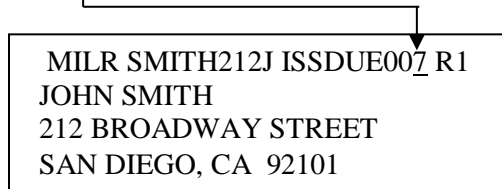
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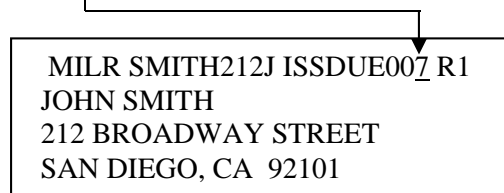
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THE SJA'S ARTICLE 34 VETO: A FORCE AWAKENING?

CAPTAIN GARY E. FELICETTI, USCG*

I. Introduction

The work environment, incentives, motivations, and culture drive the actions of well-trained people within an organization.¹ These factors have been energetically managed for the last several years to change the way servicemembers view and respond to apparent sexual misconduct. To encourage reporting, victim/survivors² are quickly provided personal legal counsel, a victim advocate, and a sexual assault response coordinator.³ De facto immunity for associated minor misconduct is standard, along with a transfer, if desired, to almost any location.⁴ Report everything! No bystanders!

* Judge Advocate, U.S. Coast Guard. Presently assigned as a senior military judge in the Coast Guard trial judiciary. Served in a variety of afloat, operational, training, and legal billets from 1981–2011, retiring as the Chief Trial Judge. Recalled to active duty in 2014. Although partially based on prior cases, this article does not predetermine any future ruling.

¹ See Allison Rossett, *Analysis of Human Performance Problems*, in HANDBOOK OF HUMAN PERFORMANCE TECHNOLOGY 101–02 (James A. Pershing ed., 1992); see also Gary Felicetti, *The Limits of Training in Iraqi Force Development*, 36 PARAMETERS 74 (2006) (illustrating how these factors are often more significant than training).

² The terms “survivor” and “victim” are commonly used within the U.S. Armed Forces to describe individuals reporting some type of sexual offense but are said *not* to presume the commission of a crime or the guilt of any individual. See, e.g., U.S. DEP’T OF DEF., ANN. REP. ON SEXUAL ASSAULT IN THE MIL. 5 (2014).

³ National Defense Authorization Act (NDAA) for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1704, 1716, 1724, 1725, 127 Stat. 672 (2013). Each service also provides a vehicle for confidential or “restricted” reports of sexual assault. E.g., U.S. COAST GUARD, COMMANDANT INSTR. M1754.10D, SEXUAL ASSAULT AND RESPONSE PROGRAM ¶3.C.2. (2012).

⁴ U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 8-5.o. (6 Nov. 2014). As an incentive to file unrestricted reports, the Coast Guard reinforces that

The incentives, culture, and environment for military commanders are equally clear.⁵ You are being closely watched and evaluated on your response to sexual assault allegations.⁶ Anyone who declines to refer a penetrative sexual allegation to a general court-martial must report himself/herself to superiors.⁷ The career of anyone who grants clemency or leniency in a sexual misconduct matter is at significant risk.⁸ Support victim/survivors!

While the desired behaviors, culture, and results are clear, debate continues about the role and utility of the lawyers involved in the pretrial process. Some political leaders view lawyers as the solution to the problem of underwhelming prosecution rates.⁹ Others find that cautious lawyers are the problem.¹⁰

victims can reasonably anticipate a transfer to a desired location with suitable support resources for his or her recovery. All Coast Guard Message, 362/14, 291230Z Aug. 14, U.S. Coast Guard, subject: Fiscal Year 14 NDAA Sexual Assault Prevention and Response CG-1 Implementation.

⁵ Article 37 of the Uniform Code of Military Justice (UCMJ), only explicitly addresses the judicial acts of a convening authority, which do not include exercising prosecutorial discretion by referring a case to a court-martial. In other words, generalized pressure to refer sexual cases to a general court-martial as part of a “zero tolerance” policy appears to be lawful command influence, especially since it is based on the application of the NDAA for Fiscal Year 2014 section 1744 and other laws. See *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003); *contra* Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 144 (2014).

⁶ Murphy, *supra* note 5, at 138–39; Lisa M. Schenck, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense its Own Worst Enemy?*, 11 OHIO ST. J. CRIM. L. 579, 579–82, 589–92 (2014); NDAA for Fiscal Year 2014 § 1721, 1751.

⁷ NDAA for Fiscal Year 2014 § 1744. The Coast Guard voluntarily adopted the requirements of section 1744 in September 2014. See All Coast Guard Message, 372/14, 051427Z Sept. 14, U.S. Coast Guard, subject: Higher Level Review of Cases Involving Certain Sex-Related Offenses.

⁸ See Robert E. Murdough, *Barracks, Dormitories, and Capitol Hill: Finding Justice in the Divergent Politics of Military and College Sexual Assault*, 223-2 MIL. L. REV. 234, 244 n.53, 245 nn.52, 62 (discussing Air Force Lieutenant General Craig Franklin and Air Force Lt Gen Susan Helms); Murphy, *supra* note 5, at 129–30, 149 n.106, 163 n.182. The NDAA for Fiscal Year 2014, sections 1752 and 1753, expresses Congress’s “sense” that commanders should court-martial rape, sexual assault, forcible sodomy cases, and attempts, and if they decide not to do so, a written justification for their decision should be placed in the file. A convening authority’s ability to grant leniency or clemency was also severely limited. NDAA for Fiscal Year 2014 § 1702(b).

⁹ Andrew Tilghman, *Military sex assault: Just 4 percent of complaints results in conviction*, MIL. TIMES (May 5, 2016), <http://www.militarytimes.com/story/veterans/2016/05/05/military-sexual-assault-complaints-result-few-convictions/83980218/> (discussing the total number of sexual assault reports, prosecution rates, and conviction

Few, if any, appear to understand the statutory and ethical responsibilities of the staff judge advocate (SJA).¹¹ Is his or her independent legal judgment a critical part of statutory due process? Or is the SJA just another advisor—in other words—a tool of discipline? This ambiguity may be due, in part, to the serious misalignment between the Uniform Code of Military Justice (UCMJ) and the *Manual for Courts-Martial (MCM)*.¹² This article seeks to clearly identify the misalignment, explicitly acknowledge the potential ethical dilemmas, and stimulate discussion on how SJAs may exercise their lawful authority within the current environment while maintaining the commander's confidence.

II. Brief History of the SJA's Pretrial Role

Under the 1920 Articles of War, a pretrial investigation and pre-referral case review by the SJA was required before a general court-martial.¹³ Both pretrial steps provided only non-binding advice to the

rates for 2015). A new article in Senator Kirsten Gillibrand's Military Justice Improvement Act (MJIA) would have given independent military attorneys in the grade of O-6 the sole authority to decide whether to refer certain charges, notably including sexual assault, to courts-martial. Murdough, *supra* note 8, at 262 n.127. While the MJIA did not pass, some aspects of the lawyer-as-solution model became law. NDAA for Fiscal Year 2014 § 1744, amended by NDAA for Fiscal Year 2015, Pub. L. No. 113-291, § 541, 128 Stat. 3292 (2014). For example, a convening authority who declines to refer a sexual allegation to a general court-martial with the concurrence of his Staff Judge Advocate (SJA) need only report the non-referral to the next superior military commander. *Id.* However, direct reviews by the service secretary are required if the SJA, or the newly created "chief prosecutor," disagrees with the original convening authority. *Id.*

¹⁰ Murdough, *supra* note 8, at 157 n.151.

¹¹ Murphy, *supra* note 5, at 166 (highlighting congressional hearings on a bill to move prosecutorial discretion for sexual offenses from convening authorities to military lawyers).

¹² MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. II, (2012) [hereinafter MCM].

¹³ The first statutory requirement for pre-referral SJA advice appeared in the 1920 Articles of War: "Before directing the trial of any charge by general court-martial the appointing authority will refer it to his SJA for consideration and advice." Articles of War, Article 70 (1920). The *Army Manual for Courts-Martial* expanded on this, stating,

Subject to the provisions of this paragraph (35b) reference to a SJA will be made and his advice submitted in such manner and form as the appointing authority may direct. No appointing authority shall direct the trial of any charge by general court-martial until he has considered the advice of his staff judge advocate based on all the

convening authority.¹⁴ As remains true today, the pretrial investigation and SJA review were closely linked. The SJA, however, often had only a superficial, or even no, pretrial investigation to consider.¹⁵ In a post-war reform, the requirements for a pretrial investigation and SJA review became more prominent.¹⁶ Both procedures were incorporated without controversy into the new Uniform Code of Military Justice (UCMJ) as Articles 32 and 34, respectively.¹⁷ As with the Articles of War, the SJA's pretrial input to the commander was purely advisory.¹⁸

The 1950 UCMJ corrected many of the abuses perceived by the citizen-warriors who fought World War II and provided significant due process for the accused.¹⁹ Yet, it was still largely a disciplinary system controlled by the military commander. Article III courts acknowledged the improved due process, but remained critical.²⁰ Most significantly, a divided U.S. Supreme Court limited court-martial jurisdiction to "service connected" offenses for almost twenty years.²¹ The Court stated a court-

information relating to the case, including any report made under 35c, which is reasonably available at the time trial is directed.

MANUAL FOR COURTS-MARTIAL, U.S. Army pt. VII, ¶35b (1928 corrected to Apr. 20, 1943). For a detailed military justice history, see *Report of the Military Justice Review Group, Part I: UCMJ Recommendations* 41 (Dec. 22, 2015), http://www.dod.gov/dodgc/images/report_part1.pdf [hereinafter MJRG Report].

¹⁴ *Id.*

¹⁵ Pretrial investigations were often "precursory, a mere matter of form." *The Administration of Military Justice* 7 (July 1946), http://www.loc.gov/rr/frd/Military_Law/pdf/Vanderbilt-A_Summary.pdf. Investigating officers were "generally inexperienced, uninformed, uninterested, and not thorough." *Id.* "The provision of Article of War 70, that no charge will be referred to a general court-martial for trial until after a thorough, impartial investigation thereof shall be made, should be enforced." *Report of U.S. War Department, Advisory Committee on Military Justice* 13 (Dec. 1946), http://www.loc.gov/rr/frd/Military_Law/pdf/report-war-dept-advisory-committee.pdf.

¹⁶ The Selective Service Act of 1948, Pub. L. No. 80-759, § 223, 62 Stat. 627 (amending 1920 Articles of War, Article 47b).

¹⁷ UCMJ art. 34 (1950); Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 107.

¹⁸ *Id.*

¹⁹ Murdough, *supra* note 8, at 238–39.

²⁰ *Id.* at 239 n.19 (discussing several Supreme Court decisions); MJRG Report, *supra* note 13, at 71 (discussing judicial decisions during the same period). The Secretary of Defense directed the General Counsel of the Department of Defense to conduct a comprehensive review of the military justice system. MJRG Report, *supra* note 13, at 13. To carry out the review, the General Counsel established the Military Justice Review Group. *Id.* at 14.

²¹ *O'Callahan v. Parker*, 395 U.S. 258, 272–73 (1969) (*rev'd*, *Solorio v. United States*, 843 U.S. 435 (1987)). As a result, a soldier on liberty in 1956, who admitted breaking

martial lacked the competence to address the subtleties of constitutional law and was “not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.”²²

Congress and the public heartily agreed.²³ The existing procedures did not adequately protect the constitutional rights of service members—especially from the improper influence of military commanders.²⁴ Significant reforms discussed in the 1960s included the following: (1) independent military judges “to assure that accused servicemen receive due process” and a “fair and impartial trial;” (2) a Judge Advocate General’s Corps in the Navy; and (3) broadened prohibitions on command influence over a court-martial.²⁵ In October 1968, Congress established an independent trial judiciary with a role comparable to those of civilian judges and reinforced the prohibition against unlawful command influence.²⁶

The general trend toward a more universally recognized justice system continued. In 1980, the President promulgated the Military Rules of Evidence, modeled after the Federal Rules of Evidence.²⁷ In 1983, along with other significant changes, Congress authorized the service secretaries to remove defense counsel from the supervision of the convening authority,²⁸ amended the UCMJ to state that qualified defense

into a hotel room and assaulting and attempting to rape a young girl, could not properly be tried by court-martial. *Id.*

²² *Id.* at 265. The Court called attention to “sobering accounts of the impact of so-called military justice on civil rights of members” documented in a series of congressional reports. *Id.* at 266 n.7. However, the “service connected” doctrine proved unworkable and was abandoned in 1987. *Solorio*, 843 U.S. at 435. The *Solorio* Court emphasized the plenary power of Congress under the Constitution to strike the balance between justice and discipline. *Id.* at 440–41 (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953) and discussing U.S. CONST. art. I, § 8, cl. 14).

²³ *Infra* notes 24–26.

²⁴ *Constitutional Rights of Military Personnel, Summary Report of Hearings by the Subcommittee on Constitutional Rights of the Committee of the Judiciary, United States Senate Pursuant to S. Res. 58, 88th Cong. 15–22, 26–30 (1963).*

²⁵ *Joint Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary and a Special Subcommittee of the Committee on Armed Services, United States Senate, 89th Cong. 3, 464, 468 (1966).*

²⁶ Military Justice Act of 1968, Pub L. No. 90-632, § 2-21, 82 Stat. 1335, 1336–40.

²⁷ Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980). There had been a longstanding requirement to follow the Federal Rules of Evidence to the extent practicable. UCMJ art. 36 (1950).

²⁸ Military Justice Act of 1983, Pub L. No. 98-209, § 3, 98 Stat. 1394, 1394–95.

counsel must be appointed in almost all special courts-martial,²⁹ authorized interlocutory appeals by the prosecution of certain adverse trial rulings,³⁰ permitted the accused's defense counsel to submit a rebuttal to the SJA's post-trial recommendation before the convening authority took action on the case, and provided for a direct appeal of rulings to the U.S. Supreme Court by the accused.³¹

III. The SJA's Mere Legal Advice Transformed into Veto Power

In 1983, Congress also made a significant change to the SJA's pretrial role under Article 34, UCMJ. As it originally appeared,

The convening authority may not refer a charge to a general court-martial for trial unless *he has found* that the charge alleges an offense under this chapter and is warranted by evidence indicated in the report of investigation.³²

The convening authority was required to refer the charge to his SJA, or legal officer, for "consideration and advice" prior to making his own determination.³³ However, the 1950 UCMJ specifically reserved the final determination to the convening authority.³⁴ In other words, the convening authority personally made legal findings as to the legality of the charge, legal sufficiency of the evidence, and (implicitly) court-martial jurisdiction.³⁵

The Military Justice Act of 1983 explicitly shifted this responsibility

²⁹ *Id.* § 3(c)(2).

³⁰ *Id.* § 5.

³¹ *Id.* § 10.

³² UCMJ art. 34(a) (1950) (emphasis added). The long-standing phrase "warranted by the evidence" has never been defined in the statute. It is contained in the first draft of the UCMJ commonly known as the "Morgan Draft." UCMJ (1949).

³³ UCMJ art. 34(a) (1950).

³⁴ *Id.*

³⁵ See S. REP. NO. 98-53 at 16-17 (1983) (discussing the existing Article 34). "Current law requires the convening authority, normally a layman, to assess the legality of prospective general courts-martial." H. REP. NO. 98-549 at 14 (1983). In practice, the SJA did the actual legal sufficiency evaluations. S. REP. NO. 98-53 at 16 (1983); Hearings Before the Subcommittee on Manpower and Personnel 16-17, 29-30, 45-46, 72-73 (Sept. 1982), http://www.loc.gov/rr/frd/Military_Law/pdf/act_1982.pdf. However, the law permitted the convening authority to overrule the SJA. See also *supra* note 32.

for technical legal determinations to the SJA.³⁶ The law replaced the prior language with:

The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate that—(1) the specification alleges an offense under this chapter; (2) the specification is warranted by the evidence indicated in the report of investigation under section 832 of this title (article 32) // 10 USC 832. // (if there is such a report); and (3) a court-martial would have jurisdiction over the accused and the offense.³⁷

This statutory text is clear, as is what changed. The substantive pretrial requirements did not vanish. After 1983, however, these legal tasks were exclusively reserved to the officer trained, developed, and qualified to perform them. Only the SJA could make the required findings. The convening authority, therefore, lacked the power to refer a specification to a general court-martial unless he had been advised in a signed writing by the SJA that, *inter alia*, it was “warranted by the evidence” presented at the Article 32 Investigation.³⁸

Of course, this explicit prohibition remained in Article 34, UCMJ, titled “Advice of the Staff Judge Advocate and Reference for Trial.”³⁹ The title was not changed to something along the lines of the SJA’s advice and consent.⁴⁰ The law continued to crowd the roles of the SJA and convening authority into one article. So the new statutory text, while clear, has the commander being “advised” on critical legal conclusions.⁴¹ These binding legal conclusions are provided in the same “advice” document as the SJA’s non-binding disposition recommendation.⁴² In short, the new Article 34 made a significant change with, perhaps, too

³⁶ Military Justice Act of 1983, Pub. L. No. 98-209, § 4.

³⁷ Act of Dec. 6, 1983, Pub. L. No. 98-209, § 4, 97 Stat. 1393, 1395.

³⁸ *Id.* The statutory phrase “warranted by the evidence indicated in the report of investigation” probably leaves room for the SJA to consider evidence developed and available at the Article 32 procedure but not fully discussed in the written report. *Id.*; see Hearings Before the Subcommittee on Manpower and Personnel, *supra* note 35.

³⁹ UCMJ art. 34 (1984). The title remains unchanged in 2016.

⁴⁰ *C.f.* U.S. CONST. art. II, § 2 (regarding advice and consent of the Senate).

⁴¹ UCMJ arts. 34(a), 34(b) (1984).

⁴² UCMJ art. 34(b) (1984).

few words.

Nonetheless, the significance was obvious. It convinced at least one Senator, or some Senate staff, it was necessary to emphasize that military commanders remained in command. They referred charges, not the SJAs. The resulting report language was, unfortunately, imprecise, and can be interpreted as affirming that absolutely nothing changed.⁴³ Deleting language granting commanders authority to make pretrial legal determinations did not change anything. Replacement language requiring the SJA to communicate specific legal conclusions before a charge could be referred to a general court-martial was likewise nothing new. Under this interpretation of the Senate report⁴⁴, the commander still determines court-martial jurisdiction, if each specification states an offense, and if each specification is “warranted by the evidence” indicated in the Article 32 report.⁴⁵ The SJA’s input is merely advice, as it always had been. The legislative act was substantively pointless.

This interpretation of the Senate report language contradicts the statute’s plain text and the contemporaneous views of the executive branch on the bill.⁴⁶ These “views letters” were sent to the House Armed Services Committee, which took up S.974 next.⁴⁷ The House substituted its own language for the entire Senate bill and returned the House substitute bill to the Senate where it passed without amendment.⁴⁸ In

⁴³ S. REP. NO. 98-53, *supra* note 35, at 16–17. Section 4 amends Article 34 of the UCMJ to require that the convening authority receive written advice of the SJA before referral of charges to a general court-martial. The authority to refer cases to trial is a fundamental responsibility of commanders, and *nothing in the amendments made by the Committee changes the convening authority’s role in this regard*. *Id.* (emphasis added). Current law, however, requires that a commander, prior to referring a case to a general court-martial, must make specific legal determinations as to the legality of the charge, legal sufficiency of the evidence, and court-martial jurisdiction. *Id.* These questions can involve complex legal determinations, and commanders normally rely on SJAs for advice on such legal conclusions. The amendments to Article 34 will provide formal recognition of current practice, *without any derogation of the commander’s prerogative to make a command decision about whether a case should be tried*. *Id.* (emphasis added). The author of this report language appears to believe that all convening authorities always defer to the legal determinations of the SJA.

⁴⁴ S. REP. NO. 98-53 on S.974, *supra* note 35.

⁴⁵ *Id.*; see also Hearings Before the Subcommittee on Manpower and Personnel, *supra* note 35.

⁴⁶ H. REP. NO. 98-549 at 17 (1983). The executive branch articulated the same position on administration-proposed bill language included in S.2521 during the prior Congress. See Hearings Before the Subcommittee on Manpower and Personnel, *supra* note 35.

⁴⁷ *Id.*

⁴⁸ An Act of Dec. 6, 1983, Pub. L. No. 98-209, 97 Stat 139.

other words, the House version became the law. Tellingly, the House report also contradicted the relevant language in the Senate report.⁴⁹

In other words, the House report recognized that the pre-existing law explicitly established the then-current practice. That is, the convening authority received legal advice and then determined if the charge stated an offense and was warranted by the evidence.⁵⁰ It was counterproductive to amend Article 34 if the goal was to preserve or recognize the perfectly clear status quo. A significant change was being made, albeit one with no practical impact for the convening authority who always acceded to the SJA's legal sufficiency analysis.

This change aligned with the historical context and trend. The dominant issue in 1983 was more justice for the accused.⁵¹ *O'Callahan v. Parker* remained the law of the land.⁵² Both the Supreme Court and general public distrusted the court-martial process.⁵³ Insufficient control over that process by military commanders was not the problem being solved. A "nothing changed" interpretation would eliminate, without discussion, a significant reform of the late 1940s and UCMJ, that is, a pretrial finding that each specification state an offense, be subject to court-martial jurisdiction, and be warranted by the evidence.⁵⁴ In other

⁴⁹ H. REP. NO. 98-549, *supra* note 35, at 14.

Current law requires the convening authority, normally a layman, to assess the legality of prospective general courts-martial. This burdens line commanders with the need to make complex legal judgments, even though in current practice the staff judge advocate advises the convening authority on the matter. *The committee amendment would require these judgments to be made by the staff judge advocate* to relieve the commanders of an unnecessary task while fully protecting the rights of the accused.

Id. (emphasis added).

⁵⁰ *United States v. Hardin*, 7 M.J. 399, 403-04 (C.M.A. 1979). Article 34 advice is a fundamental right of the accused, but non-binding at this time. *Id.*

⁵¹ See *supra* Section II for further discussion.

⁵² *O'Callahan v. Parker*, 395 U.S. 258, 272-73 (1969).

⁵³ *Id.*

⁵⁴ The original UCMJ Article 34 required the convening authority to determine that each specification is warranted by the evidence. UCMJ art. 34(a) (1950). The new Article 34, as interpreted by one view of the Senate report, has the SJA making this determination but permitting the convening authority to ignore it. S. REP. NO. 98-53, *supra* note 35, at 16-17. Thus, the pretrial requirement that someone determine that all specifications state an offense and be warranted by the evidence has been eliminated, unless the language removed in 1983 implicitly survived. *C.f.* UCMJ art. 34(a) (1984); UCMJ art. 34(a)

words, it would give the commander more control over a discipline-centric system.

Given this alternative, the actual statute appears even clearer.⁵⁵ The contemporaneous “statutory history” is also supportive.⁵⁶ While many courts engage in it, there is no need to divine an ambiguous, after-the-fact Senate report written by staff, never voted on by any member of Congress, and, in many instances, never even read by any member of Congress.⁵⁷ The imperfect statute means exactly what it says. The SJA provides “advice” to the commander; the commander is prohibited from referring a specification to a general court-martial unless this “advice” states the mandatory legal sufficiency conclusions.⁵⁸ This is a polite and genteel veto-in-advance.

Most recently, Article 34, UCMJ was amended to account for the new Article 32, UCMJ: “No charge or specification may be referred to a general court-martial for trial until completion of a *preliminary hearing*.”⁵⁹ The statute goes on to define the purpose and procedures for

(1950); S. REP. NO. 98-53, *supra* note 35, at 16–17. In other words, the commander still has statutory authority to make his or her own legal sufficiency findings. The *Manual for Courts-Martial (MCM)* Rule based on this interpretation of Senate Report 98-53 implicitly takes this approach. See MCM, *supra* note 12, R.C.M. 601(d)(1) (2012).

⁵⁵ See *United States v. Harrison*, 23 M.J. 907, 910 (N.M.C.M.R. 1987); *United States v. Hardin*, 7 M.J. 399, 403–04 (C.M.A. 1979) (finding that Article 34 advice, while non-binding in 1979, is both a prosecutorial function and a fundamental right of the accused).

⁵⁶ Comparing a law’s final language with the original and amended bill that produced the law is a generally recognized form of legislative history since it reflects actual votes by the members of Congress. See Norman J. Singer & J.D. Shambie Singer, *The Use of Legislative History in a System of Separated Powers*, in SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION ch. 5 § 5A:5 (6th ed.). Members’ remarks during floor argument may be helpful, but the comments may only reflect the speaker’s views or be directed toward unrelated political concerns. *Id.* Committee reports or other published “legislative histories” are written by congressional staff, often after the bill becomes law. *Id.* They are not voted on, or even viewed in many instances, by the members. *Id.* This form of “legislative history,” therefore, normally receives less, or in some cases no, consideration. *Id.*

⁵⁷ *Id.*; GEORGE COSTELLO, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 41–44 (Mar. 30, 2006). This form of legislative history, moreover, is sometimes intentionally misleading. See Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 175 MIL. L. REV. 87, 87–93 (2003) (documenting the intentionally false and misleading legislative history of the Posse Comitatus Act).

⁵⁸ UCMJ arts. 34(a), 34(b) (2015).

⁵⁹ 10 U.S.C. §832 (2013) (emphasis added). The change to Article 32 was accomplished in two steps. The first was the NDAA for Fiscal Year 2014, which established the new

this new “preliminary hearing” which replaced the “thorough and impartial investigation” required by Article 32 prior to December 27, 2014.⁶⁰

The slightly modified text of Article 34 remains explicit, however.⁶¹ The convening authority may not refer a specification under a charge to a general court-martial for trial unless he or she has been advised in a signed writing that the staff judge advocate concludes: (1) the specification states an offense under the UCMJ; (2) the specification is “warranted by the evidence” indicated in the report of the preliminary hearing officer (if there is such a report);⁶² and (3) a court-martial would have jurisdiction over the accused and offense.⁶³

In short, the three technical legal conclusion required by Article 34 are binding on the convening authority—and have been since 1983.⁶⁴

process but limited its application to offenses committed on or after December 26, 2013. NDAA for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013). The second was the NDAA for Fiscal Year 2015, which applied the new process to all Article 32 hearings conducted on or after December 26, 2014. NDAA for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014). In other words, only the date of the hearing mattered.

⁶⁰ UCMJ art. 32 (2015); *See* Murphy, *supra* note 5, at 154–56.

⁶¹ MJRG report, *supra* note 13, at 18, 343.

⁶² Practice caution: Rule for Courts-Martial (RCM) 601(d)(1) states the convening authority or judge advocate may consider information from any source prior to referral. MCM, *supra* note 12, R.C.M. 601(d)(1). This would appear to authorize pre-referral input from alleged victims. *C.f.* UCMJ art. 60(d) (2015) (victim opportunity to submit matters to the convening authority taking action on sentence), UCMJ art. 6B(a)(5) (victim right to confer with counsel representing the government). However, by its express terms, Article 34 limits what the SJA may consider when making the mandatory legal conclusions. UCMJ art. 34(a) (2015). The Article 34 advice should, therefore, explicitly state what is, and is not, being relied on.

⁶³ Table 1: Mandatory Pretrial Findings (excluding disposition recommendation).

Preliminary Hearing Officer—Art. 32	SJA—Art. 34
Determining whether there is probable cause	Conclusion each specification is warranted by the evidence indicated in the report of the preliminary hearing officer
Determining whether the convening authority has court-martial jurisdiction	Conclusion a court-martial would have jurisdiction
Considering the form of charges	Conclusion each specification alleges an offense

UCMJ art. 34, tbl. 1 (2015).

⁶⁴ United States v. Harrison, 23 M.J. 907, 910 (N.M.C.M.R. 1987). *But see infra* notes 77–81 and accompanying text.

The SJA has de facto veto power over referral of any specification to a general court-martial.⁶⁵

IV. The Less Clear Rules for Courts-Martial

Unfortunately, the *MCM* does not match the statute's ultimate clarity. The rules, unlike Article 34, helpfully separate the actions of the SJA and convening authority. This provides an opportunity for more precision. However, both Rules for Courts-Martial (RCMs) 406 and 407 omit a lot. Rule for Court-Martial 406, the "Pretrial advice," only requires that the charges be routed for the SJA's "consideration and advice" which must include legal sufficiency conclusions.⁶⁶ There is no requirement here that the SJA actually find the charges legally sufficient. The next step, at RCM 407, indicates that the commander may refer them to a general court-martial upon receipt. This decision is subject only to RCM 601(d), "When charges may be referred."⁶⁷

Subsection RCM 601(d)(1) is the "[b]asis for referral." The title sounds universal but it was not originally thought to apply to general courts-martial.⁶⁸ Some parts of it do not make sense in this setting.⁶⁹ However, it contains the only explicit requirement that *anyone* find the evidence and specifications legally sufficient before referral to a general court-martial.⁷⁰ A mandatory pre-referral legal sufficiency finding was a significant reform of the 1950 UCMJ.⁷¹ This may be why RCM 407(a)(6) explicitly subjects the convening authority's referral decision to all of RCM 601(d) instead of just the general court martial section at

⁶⁵ *Harrison*, 23 M.J. at 907; MJRG report, *supra* note 13, at 343; *United States v. Mercier*, 75 M.J. 643, 646 (C. G. Ct. Crim. App. 2016).

⁶⁶ *MCM*, *supra* note 12, R.C.M. 406(a).

⁶⁷ *Id.* R.C.M. 407(a)(6).

⁶⁸ *Id.* R.C.M. 601(d) analysis, at A21-27 & 28 (1984).

⁶⁹ For example, a commander who dislikes the SJA's Article 34 advice probably cannot seek a second legal opinion from "a judge advocate" who is not the SJA. *Id.* R.C.M. 601(d)(1).

⁷⁰ *Id.* R.C.M. 601(d)(2). The rule merely requires receipt of the SJA's Article 34 advice, which will occasionally conclude that the charges are not warranted by the evidence or are otherwise defective. *Id.* If RCM 601(d)(1) does not apply to all referral decisions, it would be lawful for the commander to refer even baseless charges to a general court-martial. *Id.*

⁷¹ *See supra* notes 16–18, 32.

RCM 601(d)(2).⁷² It may also be why the discussion following RCM 406(b) directs the SJA who is drafting pretrial advice to see RCM 601(d)(1).⁷³

In any event, the interlocking RCMs significantly cloud the picture, as does the *MCM*'s analysis. The analysis indicates that the rules and discussion were adjusted to account for changes to Article 34, UCMJ in the Military Justice Act of 1983.⁷⁴ Digging deeper, the analysis splits into conflicting positions. It cites an improbable interpretation of Senate Report 98-53 on S.974 (the bill changed nothing) yet also states that the SJA must make the pre-referral legal sufficiency determination.⁷⁵ Ultimately, it appears that the conflict was resolved with ambiguous RCM language and confusing cross-references that appear to reject the most explicit language of Article 34, UCMJ.⁷⁶

Under the resulting RCMs, the convening authority may refer any specification to a general court-martial after receiving the SJA's Article 34 advice.⁷⁷ The content does not matter.⁷⁸ The convening authority may make his or her own determination that there are "reasonable grounds to believe" an offense triable by a court-martial has been committed and that the specification states an offense.⁷⁹ Moreover, the convening authority is not limited to the information developed in the Article 32 hearing.⁸⁰ He or she may consider anything, including inadmissible information not provided to the defense.⁸¹ In other words,

⁷² MCM, *supra* note 12, R.C.M. 601(d)(2) (requiring mere receipt of the SJA's Article 34 advice and substantial compliance with the Article 32, UCMJ procedure). The SJA is only required to discuss legal sufficiency. *Id.* R.C.M. 406 (2012) (showing that there is no requirement that the SJA conclude the charges are legally sufficient).

⁷³ MCM, *supra* note 12, R.C.M. 406(b) discussion (indicating that the standard of proof used by the SJA when making the "warranted by the evidence" determination is "probable cause" due to RCM 601(d)(1)).

⁷⁴ MCM, *supra* note 12, R.C.M. 601(d)(1) analysis, at A21-27, 32.

⁷⁵ *Id.* at 27-28; S. REP NO. 98-53, *supra* note 35. Ironically, the analysis of the rule on the SJA's pretrial advice given in RCM 406 alludes to the improbable interpretation of Senate Report No. 98-53. It does not say that the legal sufficiency determination must be made by the SJA. *Id.*

⁷⁶ Act of Dec. 6, 1983, *supra* note 36.

⁷⁷ MCM, *supra* note 12, R.C.M. 406, 407(a)(6), 601(d)(2)(B).

⁷⁸ *Id.* A portion of the rule text directly contradicts the analysis section: "In general courts-martial, the legal sufficiency determination must be made by the staff judge advocate." *Id.* R.C.M. 601(d)(1) analysis, at A21-31.

⁷⁹ *Id.* R.C.M. 601(d)(1).

⁸⁰ *Id.*

⁸¹ MCM, *supra* note 12, R.C.M. 601(d)(1).

the commander remains in total control. The SJA's legal sufficiency conclusions are merely advice from a component of the discipline system.⁸²

This is not the law and may not be the intent behind the RCMs, however, many continue to reasonably rely on the rule text, perhaps via direct references to them in service policy,⁸³ out of long habit, or maybe even a bit of institutional blindness.⁸⁴ In the past, it probably didn't matter. Most convening authorities were reluctant to embark on a prosecution when the SJA said the evidence was weak.⁸⁵ Given the current environment and incentives for commanders, however, this may be less true.⁸⁶ Referral = Action Supporting Victims/Survivors, even on Twitter.⁸⁷

V. Warranted by the Evidence and Rules of Professional Responsibility

Updating the *MCM* to align with Article 34, UCMJ will provide an

⁸² *Id.* Rule for Courts-Martial 601(d)(1), as applied to general courts-martial, also appears to contradict the statutory requirements imposed on the SJA. The rule states that the convening authority *or judge advocate* may consider information from any source and is not limited to the information reviewed by any previous authority. *Id.* (emphasis added). Article 34 of the UCMJ, however, clearly requires that the SJA's legal conclusions be based on the evidence indicated in the report of the preliminary hearing officer (if there is such a report). Act of Dec. 6, 1983, *supra* note 36.

⁸³ See U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE § 4.5 (2013); U.S. DEP'T OF ARMY REG. 27-10, MILITARY JUSTICE 5-19 (3 Oct. 2011) [hereinafter AR 27-10] (referencing RCM 601 in the referral of charges section); U.S. COAST GUARD COMMANDANT INSTR. M5810.1E, MILITARY JUSTICE MANUAL 3.G.3, 3.A.3.a (2011) [hereinafter COMDTINST M5810.1E].

⁸⁴ See Murphy, *supra* note 5, at n.62, 136. "One constant that has remained from the Articles of War to the present-day *MCM* is that military commanders have full disposition authority, or ultimate prosecutorial discretion, for offenses committed by those subject to the UCMJ." *Id.* David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 8-10 (2013) (making no mention of the SJA in an extensive discussion of the pretrial process).

⁸⁵ See S. REP. NO. 98-53, *supra* note 35, at 16-17. The author of this report language appears to believe that all convening authorities always defer to non-binding advice from the SJA that the evidence does not warrant a charge or specification. *Id.*

⁸⁶ See *supra* notes 6-8 and accompanying text. See also Keaton H. Harrell, *Discretion and Discontent: A Discourse on Prosecutorial Merit Under the Uniform Code of Military Justice*, ARMY LAW., Aug. 2015, at 26-27.

⁸⁷ *Twitter* is an online social networking service that enables users to send and read short, 140-character messages called "tweets." TWITTER, https://twitter.com/?lang=en&logged_out=1.

opportunity to address the mandatory “warranted by the evidence” conclusion, which the law never defined.⁸⁸ Long practice placed it somewhere at or near the familiar “probable cause” or “that degree of proof which would convince a reasonable, prudent person there is probable cause to believe a crime was committed and the accused committed it.”⁸⁹ That’s the approach taken in the *MCM*.⁹⁰

However, the foundation of the *MCM*’s approach is less solid than it initially appears. The discussion to the rule on the SJA’s pretrial advice states, “[t]he standard of proof to be applied in RCM 406(b)(2) is *probable cause*.”⁹¹ It then directs the reader to RCM 601(d)(1) which states,

If the convening authority finds or is advised by a judge advocate that there are *reasonable grounds to believe* that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification states an offense, the convening authority may refer it.⁹²

Neither the “probable cause” nor “reasonable grounds to believe” standard appears in the relevant statute⁹³ or in any previous *MCM*.⁹⁴ According to the *MCM* analysis, they are based on the “warranted by the evidence” language in Article 34, UCMJ.⁹⁵ The theory reflected in the *MCM* analysis appears to be: (1) the statutory “warranted by the evidence” finding is based on the report of investigation under Article 32, UCMJ; (2) the legislative history of Article 32 indicates that the advisory report of investigation was to use a “reasonable grounds to

⁸⁸ UCMJ art. 34(a) (1950). The undefined phrase “warranted by the evidence” is contained in the first draft of the UCMJ commonly known as the “Morgan Draft.” UCMJ (1949).

⁸⁹ See *Gerstein v. Pugh*, 420 U.S. 103 (1975).

⁹⁰ *MCM*, *supra* note 12, R.C.M. 601(d)(1); R.C.M. 406(b)(2) discussion (2012). The 2012 *MCM* offers two formulations of “warranted by the evidence”: reasonable grounds to believe and probable cause. *Id.*

⁹¹ *Id.*, R.C.M. 406(b) discussion (emphasis added). The standard of proof was added to the discussion in 1991. *Id.* analysis, at A21-27, 28.

⁹² *Id.*, R.C.M. 601(d) (1984) (emphasis added). The rule remains unchanged in the 2012 *MCM*. *Id.*, R.C.M. 601(d)(1).

⁹³ UCMJ art. 34 (2012) (applying only to a general court-martial); UCMJ art. 34(a) (1950).

⁹⁴ *MCM*, *supra* note 12, R.C.M. 601(d)(1) analysis, at A21-32; *MCM* (1969 (Rev.))

⁹⁵ *Id.* at A21-32.

believe” standard; (3) therefore, “warranted by the evidence” also means “reasonable grounds to believe.”⁹⁶ In other words, the Article 34 referral decision is a continuation of the advisory Article 32 process; they merge. One can, therefore, reverse-engineer the statutory definition of the “warranted by the evidence” standard from the Article 32 legislative history.⁹⁷

The analysis to RCM 601(d) broadens the merger concept by comparing the prosecution decision under Article 34 with a preliminary hearing before a federal magistrate judge.⁹⁸ A preliminary hearing, however, occurs *after* the prosecution decision and an initial hearing/arraignment.⁹⁹ The preliminary hearing, if held, is a mini-trial to determine if probable cause exists.¹⁰⁰ If the judge concludes there is probable cause, a trial will be scheduled. If not, the charges will be dismissed.¹⁰¹ While there are some parallels to the SJA’s and convening authority’s pretrial roles, the comparison with a federal preliminary hearing is inapt. The more appropriate federal reference for the legal sufficiency of the evidence when initially exercising prosecutorial discretion is the U.S. Attorney’s Manual.¹⁰²

⁹⁶ *Id.*

⁹⁷ Applying this comparison technique to the current Article 32 and Article 34 could produce a different result now that the Article 32 standard of proof is explicitly contained in the statute. *See supra* notes 59–63 and accompanying text.

⁹⁸ MCM, *supra* note 12, R.C.M. 601(d)(1) analysis, at A21-31 (“consistent with Fed. R. Crim. P. 5.1(a)”).

⁹⁹ *See Justice 101, Charging*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/usao/justice-101/charging> (last visited Aug. 12, 2016); *Justice 101, Initial Hearing/Arraignment*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/usao/justice-101/initial-hearing> (last visited Aug. 12, 2016); Fed. R. Crim. P. 5.1(a) (2014).

¹⁰⁰ *Justice 101, Preliminary Hearing*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/usao/justice-101/preliminary-hearing> (last visited Aug. 12, 2016); Fed. R. Crim. P. 5.1(a) (2014).

¹⁰¹ *Id.*

¹⁰² *See Manual, Title 9, Criminal § 9-27.220.A., Grounds for Commencing or Declining Prosecution*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.200> (last visited Aug. 12, 2016).

The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person’s conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless no substantial Federal interest would be served by prosecution

Id.

Moreover, explicit judicial support for the *MCM*'s prosecution standard is elusive.¹⁰³ It appears to have originated when defense counsel moved to dismiss charges due to a lack of evidence at the Article 32 investigation.¹⁰⁴ The Air Force Board of Review found that the Article 32 investigation had established probable cause, thus "warranting" referral of the charges to a general court-martial.¹⁰⁵ Over a decade later, an appeal based on SJA disqualification compared the pretrial and post-trial review duties of the SJA.¹⁰⁶ Dicta in a footnote described Article 34's "warranted by the evidence" standard by citing the constitutional probable cause standard for arrest and pretrial detention.¹⁰⁷ This may have been the only realistic standard an appellate court could apply retroactively; however, it does not necessarily articulate the correct standard for when the SJA prospectively determines if the evidence warrants a prosecution. Fortunately, a separate line of military cases more directly articulates the prospective prosecution standard.¹⁰⁸

These military cases parallel the development of, and eventually cite, the *American Bar Association Standards Prosecution Function*.¹⁰⁹ The analysis to RCM 601(d) also references the then-current *ABA Standards*.¹¹⁰ In fact, the *ABA Standards* are thoroughly infused into state, federal, military, and local laws.¹¹¹ They are frequently cited in cases involving defense counsel ineffectiveness and prosecutorial misconduct.¹¹² The current *ABA Standard* for a criminal prosecution is substantively identical to the ones used by the U.S. Attorney (USA) and

¹⁰³ See *MCM*, *supra* note 12, R.C.M. 601(d)(1) analysis, at A21-32.

¹⁰⁴ *United States v. Kauffman*, 33 C.M.R. 748, 795 (A.F.B.R. 1963) (*rev'd* on other grounds, 14 C.M.A 283 (1963)).

¹⁰⁵ *Id.*

¹⁰⁶ *United States v. Engle*, 1 M.J. 387, 389 (C.M.A. 1976).

¹⁰⁷ *United States v. Engle*, 1 M.J. 387, 389 n.4 (C.M.A. 1976) (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975)). At this point, the accused had been convicted and the reviewing courts had implicitly found the evidence at trial sufficient to support the conviction. *Id.*

¹⁰⁸ See *infra* notes 127–31 and accompanying text.

¹⁰⁹ *Criminal Justice Standards*, AM. BAR ASS'N, http://www.americanbar.org/groups/criminal_justice/standards.html (last visited Aug. 12, 2016); see also *infra* notes 128–31 and accompanying text.

¹¹⁰ *MCM*, *supra* note 12, R.C.M. 601(d)(1) analysis, at A21-31.

¹¹¹ Martin Marcus, *The Making of the ABA Criminal Justice Standards: 40 Years of Excellence*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/makingofstandards_marcus.authcheckdam.pdf (last visited Aug. 12, 2016).

¹¹² *E.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010); *Cone v. Bell*, 556 U.S. 449, 469 n.15 (2009); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Giglio v. United States*, 405 U.S. 150, 153–54 (1972).

the National District Attorneys Association:¹¹³

A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.¹¹⁴

Rule for Court-Martial 601(d) does not, obviously, include the language concerning admissible evidence sufficient to support a conviction.¹¹⁵ It articulates the 1970s formulation of probable cause to arrest and detain.¹¹⁶ However, the rule was apparently understood to be in accord with the then-current *ABA Criminal Standard*.¹¹⁷ This technique remains a common method of adopting the *ABA Standards* into legal ethics codes. The rule requires “probable cause” while the

¹¹³ *Manual*, *supra* note 102; *National Prosecution Standards (3d ed.)*, 4-2.2, *Propriety of Charges* 52 NAT’L DIST. ATT’YS ASS’N, <http://www.ndaajustice.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf> (last visited Aug. 11, 2016) (instructing prosecutors to file charges that they believe adequately encompass the accused’s criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial).

¹¹⁴ AM. BAR ASS’N, *supra* note 109. See also *ABA Criminal Justice Standards for the Prosecution Function Standard (4th ed.)* 3-4.4, AM. BAR ASS’N, http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html (last visited May 4, 2016) (“the prosecutor should not file or maintain charges greater in number or degree than can reasonably be supported with evidence at trial and are necessary to fairly reflect the gravity of the offense or deter similar conduct”).

¹¹⁵ The non-binding discussion following RCM 406 appears to be inconsistent with the ABA/U.S. Attorney’s Office/National District Attorneys Association approach and therefore precludes their application. The discussion to RCM 406 states that “warranted by the evidence” is the same as probable cause and cites RCM 601(d)(1) as authority. However, Part I of the *MCM* states that the discussion sections are unofficial, supplementary materials and do not constitute rules. In addition, the cited authority, RCM 601(d)(1), states that “reasonable grounds to believe” is the standard for referral. No such language appears anywhere in the statutory general court-martial pretrial process. See generally *MCM*, *supra* note 12, R.C.M. 601. Finally, RCM 601(d)(1), if applied to general court-martial, also appears to directly contradict Article 34, UCMJ. *Id.* A non-binding, unofficial, and incorrect or outdated *MCM* discussion should not be an impediment to application of the ABA standards.

¹¹⁶ See *United States v. Engle*, 1 M.J. 387, 389 n.4 (C.M.A. 1976); *MCM*, *supra* note 12, R.C.M. 601(d)(1) analysis, at A21-31.

¹¹⁷ *MCM*, *supra* note 12, R.C.M. 601(d)(1) analysis, at A21-31.

discussion/comment section, or some other mechanism, fully incorporates the *ABA Standards of Criminal Justice Relating to the Prosecution Function*.¹¹⁸

For example, Florida's Rule 4-3.8 on the special responsibilities of a prosecutor, like all other jurisdictions, requires the prosecutor to know the case is supported by probable cause.¹¹⁹ The comments, however, explicitly state that Florida has adopted the *ABA Standards of Criminal Justice Relating to the Prosecution Function*.¹²⁰ In other words, Florida's Rule 4-3.8 definition of "supported by probable cause" is informed by ABA criminal justice standard 3-3.9 and ultimately means "sufficient admissible evidence to support a conviction." Other states take a less direct approach to the same result.¹²¹

¹¹⁸ Uncommonly, the District of Columbia Bar's *Rules of Professional Conduct* contain ABA-like language within the rule itself. *Rules of Professional Conduct, Rule 3.8—Special Responsibilities of a Prosecutor*, D.C. BAR, <https://www.dcbbar.org/bar-resources/legal-ethics/amended-rules/rule3-08.cfm> (last visited Aug. 12, 2016). A prosecutor must know the charge is supported by probable cause and that there is evidence sufficient to establish a prima facie showing of guilt. *Id.*

¹¹⁹ FL Bar Rules of Professional Responsibility, Rule 4-3.8, <https://www.floridabar.org/divexe/rrtfb.nsf/FV/1535A73735C78F6C85256BBC0051BDCF> (last visited May 16, 2016).

¹²⁰ *Id.*

¹²¹ While Florida explicitly adopted the ABA's Criminal Justice Standards, North Carolina's approach of referring to them is more common.

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See the ABA Standards of Criminal Justice Relating to the Prosecution Function. A systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Rules, N.C. BAR, <http://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-38-special-responsibilities-of-a-prosecutor/> (last visited May 16, 2016). In California, The ABA's *Model Rules and Standards*, while not formally binding, are a particularly influential source. Three of the California Supreme Court's seminal prosecutorial misconduct cases cite the ABA standards: *People v. Hill*, 17 Cal.4th 800, 833 (1998) (partially reversed on other grounds); *People v. Bolton* 23 Cal.3d 208, 212–13, 217 (1979); *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal.4th 839, 852 (2006). Not surprisingly, the ABA's standards are prominent in formal state ethics opinions. See, e.g., State Bar of Cal., Formal Op. 1975-35 (1975), (citing the ABA's Standards Relating to the Defense Function stand. 3.5(c)); State Bar of Cal. Formal Op.

Many branches of the armed forces do the same via legal professional responsibility programs.¹²² The service rules are modeled on the current *American Bar Association (ABA) Model Rules of Professional Conduct*.¹²³ Moreover, each service makes specific *ABA Standards* applicable to its personnel.¹²⁴ Of course, each attorney must

1989-106 (1989) (citing standard 3-3.9 of the ABA's Standards Relating to the Administration of Criminal Justice).

¹²² U.S. DEP'T OF ARMY REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1992) [hereinafter AR 27-26]; U.S. COAST GUARD, COMMANDANT INSTR. M5800.1, COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM (2005) [hereinafter COMDTINST 5800.1]; U.S. DEP'T OF NAVY, JAGINST 5803.1E, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL (2015) [hereinafter JAGINST 5803.1E]; U.S. DEP'T OF AIR FORCE, INSTRUCTION 51-110, PROFESSIONAL RESPONSIBILITY PROGRAM (2014 with 2015 amend.) [hereinafter AFRPC].

¹²³ See, e.g., AFRPC, *supra* note 122, at 21 ("The AFRPC are directly adapted from the *American Bar Association (ABA) Model Rules of Professional Conduct*, with important contributions from [the] Army[']s *Rules of Professional Conduct for Lawyers* and the Navy instruction: *Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of The Judge Advocate General.*").

¹²⁴ AR 27-10, *supra* note 83, ch. 5-8].

Judges, counsel, and court-martial clerical support personnel will comply with the American Bar Association Standards for Criminal Justice (current edition) to the extent they are not inconsistent with the UCMJ, the *MCM*, directives, regulations, the "Code of Judicial Conduct for Army Trial and Appellate Judges," or other rules governing provision of legal services in the Army.

Id. apps. C-1, C-2 (directing attention to ABA standards section 3.5, The Defense Function, and section 3.4(b), the Function of the Trial Judge); COMDTINST M5810.1E, 6.C.1. (2011), *supra* note 83.

As far as practicable and not inconsistent with law, the *MCM*, and Coast Guard Regulations, COMDTINST M5000.3 (series), the following American Bar Association Standards for the Administration of Criminal Justice are also applicable to Coast Guard courts-martial: The Prosecution Function and the Defense Function, The Function of the Trial Judge, and Fair Trial and Free Press.

JAGINST 5803.1E, Rule 3.8, cmt. 6 ("The 'ABA Standards for Criminal Justice: The Prosecution Function,' (3d ed. 1993), has been used by appellate courts in analyzing issues concerning trial counsel conduct. To the extent consistent with these Rules, the ABA standards may be used to guide trial counsel in the prosecution of criminal cases."). See *United States v. Howe*, 37 M.J. 1062 (N.M.C.M.R. 1993); *United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993); *United States v. Hamilton*, 41 M.J. 22 (C.M.A. 1994); *United States v. Meek*, 44 M.J. 1 (C.M.A. 1996); U.S. DEP'T OF AIR FORCE INSTR. 51-201,

be licensed and is also subject to the ethical standards of the state issuing their law license.¹²⁵ The *ABA Standard on the Prosecution Function* is also the basis for part of the discussion section of RCM 306(b) (Initial Disposition).¹²⁶

A line of court decisions shows the integration of the *ABA Standards* for a criminal prosecution into military law. It began in 1961, at the Coast Guard Board of Review:

As a matter of basic fairness in a criminal trial, if a charge preferred against an accused cannot be substantiated by competent legal evidence, it should not be brought to the notice of the court which is trying him on other charges. The accused is entitled to be protected against the risk of having a mere accusation influence a determination of guilty. . . . When a prosecutor is aware before the trial begins that he is not going to be able to make out a case on one of the charges but nevertheless arraigns the accused on it, it is just as unfair to the accused as though he had given the members of the court copies of a withdrawn charge. . . . We agree with the staff legal officer's comment that the trial counsel should have advised the convening authority prior to trial that he could not produce corroborating evidence.¹²⁷

The Court of Military Appeals approvingly quoted this language in a 1972 decision.¹²⁸ Army and Navy appellate courts of the 1990s went even further—clearly stating that the government's prosecutorial duty requires that it not permit the continued pendency of criminal charges in the absence of sufficient evidence to support a conviction.¹²⁹ Both courts

ADMINISTRATION OF MILITARY JUSTICE attachment 3 (6 June 2013) [hereinafter AFI 51-201].

¹²⁵ According to the ABA, fifty-one licensing jurisdictions have adopted the ABA's *Model Rules of Professional Conduct*. A complete list can be found at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Aug. 11, 2016).

¹²⁶ MCM, *supra* note 12, R.C.M. 306, 601(d)(1) analysis, at A21-21, A21-31.

¹²⁷ *United States v. Bird*, 30 C.M.R. 752, 755 (C.G.B.R. 1961).

¹²⁸ *United States v. Phare*, 45 C.M.R. 18, 22 (C.M.A. 1972).

¹²⁹ *United States v. Asfeld*, 30 M.J. 917, 929 (A.C.M.R. 1990).

explicitly cited the updated *ABA Criminal Standards*.¹³⁰ One emphasized the due process implications.¹³¹

Given this judicial and professional adoption of the ABA prosecution standard, “warranted by the evidence” has become functionally indistinguishable from it—at least when applied prospectively. Using it when evaluating pretrial legal sufficiency reflects both common sense and good stewardship. “Both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact.”¹³² Can this be reasonably disputed in any justice system?

Recent changes to both Article 32 and Article 34 show that “warranted by the evidence” is not the exact same as “probable cause.” In 2013, Congress amended both Article 32 and 34 within the same legislative act.¹³³ Obviously aware of the existing “warranted by the evidence” standard in Article 34, Congress chose different language (“probable cause”) for the preliminary hearing officer’s determinations in the new Article 32.¹³⁴ Congress, while amending Article 34, did not change its standard to read “probable cause.” Absent evidence of a contrary intent, the use of different statutory language within the same

However, as the case proceeds to prosecution, the Government must make a good-faith assessment of its case and withdraw any charge which it cannot substantiate by competent, legal evidence. The Government’s prosecutorial duty requires that it not “permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.”

ABA, *Standards for Criminal Justice* (1986), Standard 3.8(a). *United States v. Howe*, 37 M.J. 1062, 1064 (N.M.C.M.R. 1993) (The government’s prosecutorial duty requires that it not “permit the continued pendency of criminal charges in the absence of sufficient evidence to support a conviction.” (citing Standard 3.8(a), ABA STANDARDS FOR CRIMINAL JUSTICE (1986), and Navy Rule 3.8 in JAGINST 5803.1A of 13 July 1992)). The *Howe* case was subsequently reversed on other grounds but continues to be cited in the *Navy Rules of Professional Responsibility*. *U.S. v. Driver*, 57 M.J. 760 (N. M. Ct. Crim. App. 2002); JAGINST 5803.1E.

¹³⁰ *Asfeld*, 30 M.J. at 929; *Howe*, 37 M.J. at 1064.

¹³¹ See *Asfeld*, 30 M.J. at 917, 928 (citing *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986) (misjoinder); *United States v. Baker*, 14 M.J. 361, 365 (C.M.A.1983) (multiplicity); Harrell, *supra* note 86, at 28–29, 29 n.66.

¹³² U.S. DEP’T JUSTICE, *supra* note 102, § 9-27.220.B (comment).

¹³³ NDAA for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

¹³⁴ UCMJ arts. 32(a)(2)(A), 34(a)(2)(2015).

legislative act normally shows a different meaning.¹³⁵ Within the overall statutory context, an Article 34 standard that approaches the issue of legal sufficiency of the evidence from the perspective of a criminal trial is a logical interpretation. In short, the statute itself arguably now implements a version of the ABA/USA/National District Attorney's Association model.

This statutory interpretation would align well with the functional definition and help avoid ethical dilemmas based on incorporation of the *ABA Standards* into military and state ethics rules.¹³⁶ The SJA's Article 34 advice is clearly part of the prosecution function.¹³⁷ A conclusion that a specification is "warranted by the evidence" permits it to be resolved at a general court-martial.¹³⁸

If the admissible evidence does not actually support proof beyond probable cause, the SJA's Article 34 conclusion permits the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction. This is true even if the SJA recommends against referral in the Article 34 advice.¹³⁹ Only the "warranted by the evidence" legal conclusion is binding.¹⁴⁰ The rest is merely advice, but hopefully a mitigating factor. Thus, it might be unethical for a licensed SJA to do so. This is in addition to potential issues with the service's own professional responsibility program.

Moreover, the SJA and trial counsel have an ongoing duty to remain informed on significant pretrial evidentiary rulings and take appropriate action if the evidence supporting a specification becomes inadmissible.¹⁴¹

¹³⁵ Costello, *supra* note 57, at 14.

¹³⁶ See, e.g., AFI 51-201, *supra* note 124, at Standard 3-3.9(a) ("A trial counsel should not institute or permit the continued pendency of criminal charges in the absence of admissible evidence to support a conviction.").

¹³⁷ See, e.g., *United States v. Hardin*, 7 M.J. 399, 403-04 (C.M.A. 1979).

¹³⁸ Until its definition is ultimately resolved, all Article 34 advice should clearly and separately use the phrase "warranted by the evidence." Also, the *Solorio* Court emphasized the plenary power of Congress under the Constitution to strike the balance between justice and discipline. *Solorio v. United States*, 483 U.S. 435, 440, 441 (1987). This suggests that strict adherence to the statutory pretrial process is prudent. *Id.*

¹³⁹ *C.f.* UCMJ arts. 34(a), (b)(2) (only the specific items in article 34(a) are a precondition to referral to a general court-martial).

¹⁴⁰ *Id.*

¹⁴¹ AR 27-26, Rule 3.8; COMDTINST 5800.1, Rule 3.8; U.S. COAST GUARD, MILITARY JUSTICE MANUAL § 6.C.2.; JAGINST 5803.1E, comment to Rule 3.8; AFRPC Rule 3.8.; AFI 51-201 Standard 3-3.9(a).

At this point, the primary option is to advise the convening authority that the evidence is now lacking.¹⁴²

The SJA who continues to hold that all of the Article 34 advice is merely advisory, in accordance RCMs 406, 407, and 601, faces an even starker ethical situation. Under these rules, it does not matter what the SJA says about the specifications: “no probable cause,” “not warranted by the evidence,” or even “baseless.” The mere submission clears the way for the convening authority to refer even ethically weak specifications to a general court-martial.¹⁴³ Under these hopefully very rare circumstances, is it ethical for the SJA to even submit the empowering Article 34 advice? Should they, and their entire staffs, be recused? This is yet another reason for adopting the statutory-based approach discussed in Part III.

VI. Conclusion

The last several years have been stressful times for the military justice system. More is almost certainly on the way.¹⁴⁴ There have been genuine reforms, exploitation of bad and misleading statistics,¹⁴⁵ and plenty of political opportunism.¹⁴⁶ More than a few experienced practitioners think “the force” of military justice—that is, discipline, efficiency, and justice—is out of balance.¹⁴⁷

¹⁴² *Id.*

¹⁴³ MCM, *supra* note 12, R.C.M. 407(a)(6), 601(d)(1) & (2)(B)(stating that the convening authority may refer a specification to a general court-martial after the mere receipt of SJA’s Article 34 advice provided that either the convening authority or a judge advocate finds, based on information from any source, that there are reasonable grounds to believe an offense was committed by the accused).

¹⁴⁴ See NDAA for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015); MJRG report, *supra* note 13. Section B of the report contains an article-by-article index of UCMJ recommendations followed by a detailed analysis of each provision, including recommended amendments. Section C contains consolidated draft legislation that includes all proposed amendments to the UCMJ. *Id.*

¹⁴⁵ Schenck, *supra* note 6, at nn.6, 8, section III.

¹⁴⁶ Murdough, *supra* note 8 at section III; Dwight Sullivan, *The Politicization of the Military’s Response to Sexual Assaults*, CAAFLOG (Jan. 1, 2013), <http://www.caaflog.com/2013/01/01/top-10-military-justice-stories-of-2012-1-the-politicization-of-the-militarys-response-to-sexual-assaults/>.

¹⁴⁷ See *Report of the Response Systems to Adult Sexual Assault Crimes Panel*, RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 37 (June 27, 2014), http://140.185.104.231/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf [hereinafter RSP Report]; Murphy, *supra* note 5, at 135.

The SJA is uniquely positioned to retain and stabilize this balance. Contrary to the *MCM* rule text,¹⁴⁸ the independent legal judgment of the SJA is a cornerstone of pretrial statutory due process. The SJA does not merely provide advice. He or she is a highly empowered partner in the decision-making leading to a general court-martial.¹⁴⁹ The SJA also has a unique perspective on courtroom realities and fundamental legal fairness. Language reflecting this perspective is contained in the prosecution standards of the American Bar Association, U.S. Attorney's Manual, National District Attorneys Association, and military case law. It should be used when explaining why a specification is not "warranted by the evidence" and cannot, therefore, be referred to a general court-martial.¹⁵⁰ There is a reason Congress put the SJA in charge of pre-referral legal determinations. No SJA, therefore, should fear hearing that they are "thinking like a lawyer."

Of course, being a more highly-empowered partner, with a virtual veto pen, will not be easy. The military work environment, culture, and incentives are designed to ensure every questionable sexual encounter is reported and investigated. Political leaders expect subsequent prosecutions and convictions.¹⁵¹ Special interests seek more "gotcha" moments to generate publicity for their causes.¹⁵² The path of least resistance may be referral to a general court-martial. Legal ethics, however, and the need for a genuine justice system, may occasionally impose contrary demands. The modern successors of the lawyers who implemented the UCMJ during a major war are more than up for the challenge.¹⁵³

¹⁴⁸ *MCM*, *supra* note 12, R.C.M. 601, 406–07.

¹⁴⁹ There is also a proposal to add the SJA to special court-martial referral decisions. *See* MJRG report, *supra* note 13, at 107, 346 (Dec 22, 2015). In the meantime, the jurisdictional limitation of Article 120 offenses to a general court-martial ensures SJA involvement in this hot-button issue. NDAA of Fiscal Year 2014, Pub. L. No. 113-66, § 1705(b), 127 Stat. 672 (2013) (applicable to all offenses committed on or after June 24, 2014).

¹⁵⁰ *C.f.* RSP Report, *supra* note 147, at 129 (describing over 100 instances in which commanders referred sexual misconduct charges when the local civilian authorities had declined to prosecute).

¹⁵¹ *See, e.g.*, Sen. Gillibrand Press Release of May 5, 2016, <https://www.gillibrand.senate.gov/newsroom/press/release/gillibrand-statement-on-latest-dod-report-on-sexual-assault-in-the-military> (last visited May 16, 2016); Tilghman, *supra* note 9.

¹⁵² *See, e.g.*, *Debunked: Fact-Checking the Pentagon's Claims Regarding Military Justice*, PROTECT OUR DEFENDERS, <http://www.protectourdefenders.com/debunked/> (last visited May 16, 2016).

¹⁵³ President Truman signed the UCMJ into law on May 5, 1950. The Korean War began on June 25, 1950. The UCMJ went into effect on May 31, 1951.

**A PERMANENT FRAMEWORK FOR CONDOLENCE
PAYMENTS IN ARMED CONFLICT: A VITAL
COMMANDER'S TOOL**

MAJOR KATHARINE M. E. ADAMS*

*We offer our apology and condolences to the victims' families. We accept full responsibility for what happened in the hospital and will pay blood money for the victims' families.*¹

I. Introduction

In December 2013, members of al Qaeda in the Arabian Peninsula (AQAP) stormed a hospital attached to the Ministry of Defense in Yemen, killing fifty-six patients and staff and leaving over two hundred innocent civilians wounded.² In a surprising public apology, the leader of AQAP announced that the hospital attack had been carried out against his orders, and that he intended to offer “blood money” to the families of the victims.³ What was the reasoning behind this unexpected gesture? First, “blood money,” or a condolence payment, is culturally appropriate and expected

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¹ *Al Qaeda Branch in Yemen Regrets Hospital Attack*, N.Y. TIMES, Dec. 23, 2013, at A10 (quoting Qassim al-Raimi, the commander of Al Qaeda in the Arabian Peninsula).

² Ali Ibrahim al Moshki, *AQAP Apologizes for Hospital Attack in Ministry of Defense Operation*, YEMEN TIMES (Dec. 24, 2013), <http://www.yementimes.com/en/1740/news/3270/AQAP-apologizes-for-hospital-attack-in-Ministry-of-Defense-operation.htm>.

³ *Id.*

in Yemeni culture.⁴ Second, AQAP claims to be a champion of the Yemeni people, carrying out attacks on their behalf, and depends on the Yemeni population's backing.⁵ Video footage of the hospital attack caused widespread outrage among the Yemeni people, weakening popular support for AQAP.⁶ Arguably, AQAP did not offer blood money to the hospital victims because of a newfound desire to respect and honor human life. Rather, they did so because it was strategically advantageous to their insurgency.

Also in December 2013, the United States launched a drone strike in central Yemen on what was thought to be an AQAP convoy. The missile actually hit a convoy travelling to a wedding party, killing thirteen civilians.⁷ Civilian deaths caused by the U.S. drone program in Yemen have bred resentment among Yemenis, undermining the United States' efforts to gain support from the local population in its campaign against AQAP.⁸ The families of the victims rioted for condolence payments, yet the United States did not provide any money directly to the families, despite the knowledge that failure to do so could provoke increased anger toward the United States and encourage local support for AQAP.⁹

⁴ *Yemen: Dozens Jailed for Debts*, HUMAN RIGHTS WATCH (Apr. 21, 2014), <https://www.hrw.org/news/2014/04/21/yemen-dozens-jailed-debts> (discussing imprisonment of individuals who failed to pay blood money).

⁵ See generally Katherine Zimmerman, *A New Model for Defeating al Qaeda in Yemen*, AEI.COM (Sept. 2015), <https://www.aei.org/wp-content/uploads/2015/09/A-New-Model-for-Defeating-al-Qaeda-in-Yemen.pdf>.

⁶ See *Yemen's Hospital Massacre*, VICE NEWS (May 1, 2014), <https://news.vice.com/video/yemens-hospital-massacre>.

⁷ Ahmed al-Haj, *Officials: U.S. drone strike kills 13 in Yemen*, WASH. POST (Dec. 12, 2013), https://www.washingtonpost.com/world/officials-us-drone-strike-kills-13-in-yemen/2013/12/12/3b070f0a-6375-11e3-91b3-f2bb96304e34_story.html.

⁸ *Id.*

⁹ See Greg Miller, *Yemeni Victims of U.S. Military Drone Strike Get More than \$1 Million in Compensation*, WASH. POST (Aug. 18, 2014), https://www.washingtonpost.com/world/national-security/yemeni-victims-of-us-military-drone-strike-get-more-than-1million-in-compensation/2014/08/18/670926f0-26e4-11e4-8593-da634b334390_story.html; see also Gregory D. Johnsen, *Nothing Says "Sorry Our Drones Hit Your Wedding Party" Like \$800,000 and Some Guns*, BUZZ FEED (Aug. 7, 2014), www.buzzfeed.com/gregorydjohnsen/wedding-party-drone-strike#.dqXdLn6XP.

Stunningly, the Yemeni government ended up providing more than one million dollars in condolence payments to the families of the victims. *Id.* The authors of two articles cited previously in this footnote have theorized that the money actually came from the United States, funneled through the Yemeni government, but U.S. officials have refused to confirm that they had any involvement in the condolence payments. *Id.*; see also Cora Currier, *Hearts, Minds and Dollars: Condolence Payments in the Drone Strike Age*, PROPUBLICA (Apr. 5, 2013, 9:15 AM), <http://www.propublica.org/article/hearts-minds->

During past years of protracted conflict in Iraq and Afghanistan, U.S. military commanders have found that taking the moral high ground during counterinsurgency operations is strategically advantageous, including payment of compensation or condolence for civilian collateral damage.¹⁰ Generally, U.S. military commanders have learned that it is beneficial to the security of U.S. forces to (1) adhere to the laws of armed conflict¹¹ even when enemies like AQAP do not; (2) attempt to minimize collateral damage; and (3) make amends for collateral damage when possible.¹²

and-dollars-condolence-payments-in-the-drone-strike-age (claiming that Al Qaida in the Arabian Peninsula (AQAP) offered to send condolence payments to the drone victims in an attempt to inflame the population's resentment of the United States and to foster Yemeni support for AQAP).

¹⁰ *Interview by Frontline with David Petraeus, Retired General, U.S. Army*, PUBLIC BROADCASTING SERVICE (Aug. 1, 2007), <http://www.pbs.org/wgbh/pages/frontline/haditha/interviews/petraeus.html> [hereinafter *Petraeus Interview*] (David Petraeus was the general responsible for revamping the U.S. military's counterinsurgency (COIN) strategy).

Maintaining the moral high ground, if you will, is actually important at every level: tactical, operational and strategic. At the tactical level . . . if you're seen as being less brutal, more concerned about the population, they are more likely to support you if they think there's a chance you can win. And that's an important distinction. At a strategic level, it's important because it does not give the enemy strategically—in this case, say, Al Qaeda central—opportunities to criticize us throughout the world. That's very, very important as well, because a lot of this struggle is being carried out in the marketplace of ideas: It's being carried out in cyberspace, on the Internet, in newspapers, on television. [There are a] certain number of inevitable incidents [of civilian harm]. But the more that you can minimize those, and the more you can, again, avoid those, of course the better off you are.

Id.

¹¹ See generally INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, LAW OF ARMED CONFLICT DESKBOOK (2014).

¹² See Luke N. Condra & Jacob N. Shapiro, *Who Takes the Blame? The Strategic Effects of Collateral Damage*, 56 AM. J. OF POL. SCI., 167–87 (2012). After conducting a statistical analysis of the relationship between civilian deaths and retaliation against U.S. forces, Condra and Shapiro reached the following conclusion:

Both Coalition forces and insurgents paid for their (mis)handling of civilians, at least in terms of subsequent violence. The argument is often made that even though terrorists or insurgents may not abide by the laws of war or seek to minimize collateral damage, abiding by those rules and taking on added risk is a moral obligation for forces representing liberal democracies. It turns out to be strategically advantageous: such behavior will be attractive to civilians. It also turns out that insurgents' sanguinary tendencies hurt them, at least in this

How, then, is it possible that in similar cases involving civilian casualties in Yemen, a terrorist organization like AQAP acted with more generosity to the civilian population, and with a higher degree of strategic long-term thinking, than did the U.S. military? Quite simply, the U.S. military did not have the legal authority to offer condolence payments to the Yemeni families in the first place.¹³ Unlike AQAP, the U.S. military is dependent on a legislative branch holding the purse strings, and is constrained by the military's own rules and regulations controlling the means and methods of granting compensation or condolence for collateral damage.

The United States currently lacks a standing framework for addressing harm caused to civilians during all combat operations. However, history demonstrates that U.S. military commanders in almost every modern conflict have found the need to express condolences for civilian harm arising out of combat, and have come up with creative means to do so.¹⁴ Without a standing condolence payment procedure in place, the U.S. military has, time after time, created *ad hoc* systems to enable commanders to address civilian harm, such as the Commander's Emergency Response Program (CERP) condolence payments used in Iraq and Afghanistan.¹⁵ The United States' ability to provide CERP condolence payments in Iraq and Afghanistan has proven to be a valuable commander's tool, but these funding sources must be congressionally authorized and are both temporally and geographically limited.¹⁶ By the time President Obama

case, where information is a key constraint on the production of violence.

Id.

¹³ See *infra* Section II.

¹⁴ See Jordan Walerstein, *Coping with Combat Claims: An Analysis of the Foreign Claims Act's Combat Exclusion*, 11 CARDOZO J. CONFLICT RESOL. 319 (2009) (summarizing the various methods commanders have used to compensate civilian harm).

¹⁵ See Marla Keenan & Jonathan Tracy, *White Paper—US Military Claims System for Civilians in Armed Conflict*, CENT. FOR CIV. IN CONFLICT (May 2010), http://civiliansinconflict.org/uploads/files/publications/CENTER_Condolence_White_Paper_2010.pdf [hereinafter *Center 2010 White Paper*] (summarizing the history of condolence payments in Iraq and Afghanistan). In September 2003, the highest level of command in Iraq authorized condolence payments to be made out of the Commander's Emergency Response Program (CERP). *Id.* In November 2005, condolence payments were approved for use in Afghanistan. *Id.* Condolences are considered a gesture of sympathy only, given to ease civilian suffering. *Id.* They are not formal reparation, legal compensation, or an admission of fault or negligence. *Id.*

¹⁶ U.S. DEP'T OF ARMY, FIELD MANUAL 3-24.2, TACTICS IN COUNTERINSURGENCY para. 7-89 (Apr. 2009) [hereinafter FM 3-24.2]. "Recent experiences have shown the effectiveness of using money to win popular support and further the interests and goals of units conducting counterinsurgency operations A counterinsurgency force can use money

leaves office, the United States may be engaged in combat actions in Iraq, Afghanistan, Syria, Libya, Yemen, and unknown other countries.¹⁷ However, CERP condolence payments are only authorized currently in two active combat zones, Iraq and Afghanistan.¹⁸ Despite the strategic advantage of condolence payments, the United States has not developed a condolence payment program that can be transferred from one combat zone to another in order to keep pace with incidents unfolding on the world stage.

Under the current statutory and legislative framework, the Department of Defense (DoD) will require additional authorization to make condolence payments for combat damage as our operations shift beyond Iraq and Afghanistan.¹⁹ As U.S. forces move toward a global strategy based on regionally aligned forces and security cooperation with foreign militaries, U.S. troops will find themselves operating in nations all around the world without condolence tools at hand, should the need arise.²⁰ Enemies such as the self-proclaimed Islamic State in Iraq and Syria (ISIS) ignore country borders, making country-specific condolence authorizations less useful to commanders as U.S. troops follow the fight.²¹ Now is the time for the United States to come to terms with the need for a permanent framework to offer condolence to civilian victims of conflict around the world. The aforementioned piecemeal approach, requiring congressional authorization to issue CERP condolence payments for combat damage in each new conflict, leaves commanders on the ground

to . . . [p]rovide condolence payments to civilians for casualties from combined and coalition operations.” *Id.* See also *infra* Section II(B) for a discussion of the temporal and geographic restrictions of *ad hoc* condolence payment systems.

¹⁷ Greg Jaffe, *Hope Fades on Obama’s Vow to Bring Troops Home before Presidency Ends*, WASH. POST (Oct. 12, 2015), https://www.washingtonpost.com/politics/hope-fades-on-obamas-vow-to-bring-troops-home-before-presidency-ends/2015/10/12/cc0daaec-6781-11e5-9ef3-fde182507eac_story.html (discussing President Obama’s intent upon taking office to withdraw U.S. troops from Afghanistan and Iraq, only to then launch military strikes in seven different countries, recommit troops to Iraq to address the rise of Islamic State insurgents, and commit troops to remain in Afghanistan).

¹⁸ See *infra* Section II(B)(2).

¹⁹ See Captain Jeffrey Palmer, *Claims Encountered during an Operational Contingency*, 42 A. F. L. REV. 227, 227 (1997). “Claims personnel should be aware that their authority is limited by geographic boundaries and that contingencies, such as regional conflicts or humanitarian operations, frequently spill over into neighboring countries. These areas may not be considered within the parameters of a claims team’s settlement authority.” *Id.*

²⁰ See *infra* Section III(B).

²¹ See Meghan Tinsley, *ISIS’s Aversion to Sykes-Picot Tells Us Much About the Group’s Future Plans*, MUFTAH.ORG (Apr. 23, 2015), <http://muftah.org/the-sykes-picot-agreement-isis/#.VOMhikdf1PF>.

in immature conflicts without a useful tool to shape their battlespace, as legislators in Washington lag behind. Commanders need a more efficient process to adequately express their sympathy when innocent civilians are harmed by their operations. Today's conflicts, mostly prolonged counter-insurgency (COIN) operations where condolence payments can be a tool to "win hearts and minds, make a permanent condolence scheme more important than ever."²²

This article surveys the compensation and condolence systems available to U.S. military commanders, identifies their strengths and weaknesses, and proposes a legislative change to create a permanent condolence payment system for commanders to use in situations such as the drone attack on the Yemeni convoy. This article proposes a permanent condolence payment program that is strategically beneficial to commanders by adding world-wide portability and increased flexibility to condolence payment procedures. The U.S. military has received substantial external criticism for its compensation and condolence payment practices during conflicts in recent decades.²³ However, the commanders whose daily operations are impacted by the current system's flaws have voiced internal criticism as well.²⁴ It is within the legislative

²² See Yaël Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict*, 42 VAND. J. TRANSNAT'L L. 181 (2009).

[I]njury and death as incidental outcomes of military attack . . . have grown more prevalent and visible with new military technology and changes in warfare. Some of this growth owes to the expansion of battlefields into "battlespaces" . . . and some of it to the escalating frequency of asymmetric conflicts, where the principle of distinction is less than rigorously observed, especially, but not exclusively, by the technologically inferior party.

Id.

²³ See Elizabeth Gilbert, *The Gift of War: Cash, Counterinsurgency, and "Collateral Damage"*, 46 SECURITY DIALOGUE 403–21. "Victims don't want money, they want justice and accountability. Putting a price on a life can be insulting and have the opposite effect."

Id.

²⁴ E-mail from Colonel (Retired) Peter Mansoor, Professor of Military History, Ohio St. University, to author (Feb. 23, 1:09 PM) (on file with author) [hereinafter Mansoor E-mail].

In the Iraq War it took too long to approve a system for the awarding of *solatia* payments to civilian victims of American combat actions. Once procedures were in place the system worked more smoothly. The biggest issue was the limitation of damages awarded (\$1000 for a serious injury and \$2500 for an unintended death). For a woman

branch's power to create a new condolence payment system for commanders that will be a force multiplier, and now is the right time to do so.

II. A Survey of Current Compensation and Condolence Programs

The U.S. military has developed both compensation and condolence programs. While compensation programs are more akin to "insurance" programs, attempting to make a victim whole for their loss, condolence programs are only meant to express sympathy to a victim for their loss.²⁵ This section will survey the various programs available to today's military commanders and analyze their suitability as modern commanders' tools.

A. The Foreign Claims Act

The U.S. military already has a permanent compensation system for civilian harm in foreign countries, the Foreign Claims Act (FCA).²⁶ However, this compensation system does not cover harm caused by combat activities.²⁷ Due to the FCA's limitations, commanders, along with their judge advocates, have frequently engaged in legal and fiscal gymnastics to find a way to express condolence for harm caused to civilians arising out of combat activities.²⁸

The purpose of the FCA is to promote and maintain friendly relations between the United States and "host countries" through the prompt settlement of meritorious claims when U.S. forces have caused harm in a foreign country.²⁹ The FCA can only be used to address harm caused by U.S. forces, a source of frustration when a coalition partner has caused civilian harm, but U.S. forces are the ones suffering from the local

who just lost her husband and three children in a combat action (an actual event in my brigade's zone), the provision of \$10,000 was simply not enough to even begin to assuage her grief.

Id.

²⁵ See *infra* Section II(D).

²⁶ Foreign Claims Act, 10 U.S.C. § 2734 (2000).

²⁷ U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 10.3(b) (21 Mar. 2008) [hereinafter DA PAM 27-162]. "Claims arising 'directly or indirectly' from combat activities of the U.S. armed forces are not payable." *Id.*

²⁸ See *infra* Section II(B) (discussing *ad hoc* condolence and compensation systems).

²⁹ Foreign Claims Act § 2734(a).

population's retaliation for the harm.³⁰ An Afghan whose car was struck by a coalition partner's convoy does not necessarily care whether the convoy was driven by American or British soldiers; he simply wants compensation. The FCA also does not compensate an individual who is harmed while supporting U.S. forces, such as a local interpreter.³¹ The FCA's most significant limitation is its prohibition on payment of claims that result directly or indirectly from acts of combat, preventing the United States from using compensation to maintain friendly relations with those it accidentally harms when bombs are dropping and bullets are flying.³² This "combat activity exclusion" continues to be a source of confusion and controversy due to its inconsistent application.³³ It is also a major source of frustration for combat units seeking to maintain the support of local national populations.

1. The Combat Activity Exclusion

The FCA's combat activity exclusion prohibits payment of claims related to harm caused by "activities resulting directly or indirectly from

³⁰ *Id.*

³¹ *Id.*

³² See *Koohi v. United States*, 976 F.2d 1328, 1330 (9th Cir. 1992) (explaining the combat activities exception to the Foreign Claims Act (FCA)).

The combatant activities exception applies whether U.S. military forces hit a prescribed or an unintended target, whether those selecting the target act wisely or foolishly, whether the missiles we employ turn out to be "smart" or dumb, whether the target we choose performs the function we believe it does or whether our choice of an object for destruction is a result of error or miscalculation. In other words, it simply does not matter for purposes of the "time of war" exception whether the military makes or executes its decisions carefully or negligently, properly or improperly. It is the nature of the act and not the manner of its performance that counts.

Id.

³³ See Major Michael Jones, *Consistency and Equality: A Framework for Analyzing the "Combat Activities Exclusion" of the Foreign Claims Act*, 204 MIL. L. REV. 144 (2010); see also Marla Keenan & Jonathan Tracy, *White Paper—U.S. Military Claims System for Civilians*, CENT. FOR CIV. IN CONFLICT (2008), http://civiliansinconflict.org/uploads/files/civilian_casualties_white_paper_.pdf [hereinafter *Center 2008 White Paper*]. "The FCA 'combat exclusion' appears to be applied arbitrarily . . . FCCs almost universally invoke the 'combat exclusion' anytime gunfire is involved. In our experience, erring on the side of the 'combat exclusion' . . . is [frequently] inappropriate as other factors may in fact prove the incident did not involve combat." *Id.*

action by the enemy, or by the Armed Forces of the United States engaged in armed conflict, or in immediate preparation for impending armed conflict.”³⁴ This exclusion has suffered from haphazard application, and some judge advocates have stretched logic to circumvent the combat activity exclusion to pay a claim.³⁵ Different judge advocates have interpreted the combat exclusion narrowly or broadly, often depending on how motivated they are to pay a certain claim.³⁶ For example, in an escalation of force incident involving a civilian approaching a checkpoint in Iraq, one judge advocate determined that the combat activity exclusion did not apply and paid \$7000 for a civilian’s death.³⁷ Another unit with a substantially similar claim determined that the combat activity exclusion did apply, and denied the claim entirely.³⁸

³⁴ U.S. DEP’T OF ARMY, REG. 27-20, CLAIMS (8 Feb. 2008) [hereinafter AR 27-20].

³⁵ Jonathan Tracy, Testimony before the U.S. Senate Committee on Appropriations Subcommittee on Foreign Relations, Apr. 1, 2009 [hereinafter Tracy Testimony]. “Some units and lawyers handled substantially similar cases in drastically different ways. For example, different rules of evidence and procedure were applied in adjacent areas of Baghdad.” *Id.*

³⁶ One judge advocate refused to pay any claims whatsoever, believing the money would all go to “terrorists.” This assertion is based on the author’s professional experiences as the Chief of Claims for Multinational Corps-Iraq in 2008.

³⁷ *Center 2008 White Paper*, *supra* note 33.

On February 28, 2005, U.S. forces erected a checkpoint in Baghdad near Al Mahdya. Kamal was driving his truck in the area around 7:30 pm. As he approached the checkpoint, U.S. forces opened fire on the vehicle. He sustained multiple gunshot wounds and the car burned with him inside it. Witnesses stated that he was “very far away (130 [meters])” from the forces and was driving very slowly. His father filed a claim on behalf of his son with the 4th Combat Team, 3rd Infantry Division. The adjudicating [judge advocate] stated, “Statements and pictures support story. No weapons found in vehicle and civilian was [approximately] 130 [meters away].” The [judge advocate] recommended a payment of \$7000.

Id.

³⁸ *Id.*

Consider [a similar case] in which the claimant’s brother was killed while driving near a checkpoint. In the file is a note from a U.S. servicemember stating the “man is innocent . . . [the unit] fired a warning shot. It accidentally ricocheted and hit the truck.” The man died of his injuries but the claim was denied because of the “combat exclusion.” The Foreign Claims Act is intended to provide continuity, but this case is irreconcilable with the previous claim. One unit’s conclusion was the exact opposite of the second unit’s, illustrating an inconsistent method of adjudication.

Inconsistent application of the combat activity exclusion has led to resentment of the United States among some civilian populations, having the opposite effect of “promoting friendly relations.”³⁹ As one judge advocate noted,

Unfortunately, the use of the combat exclusion can undermine support of U.S. military efforts from the local population. In much the same way that payment of claims can create goodwill and a positive perception of U.S. forces, denial of payment can have the opposite effect. While any claimant who is denied compensation will be upset and dissatisfied, the situation can become exponentially worse when a claimant is denied compensation due to improper analysis or lack of sufficient investigation. While the claimant may not immediately realize that his claim was improperly adjudicated, subsequent discussions with other successful claimants may reveal inconsistencies between [units handling claims]. These inconsistencies ultimately result in distrust of the foreign claims system and U.S. forces.⁴⁰

There are valid arguments for maintaining a combat activity exclusion. The United States does not have unlimited wealth from which to pay for every act of destruction carried out during armed conflict, war being destructive by nature. One judge advocate termed the desire to pay for as much damage as possible as the “Santa Clause Syndrome” and cautioned judge advocates that a certain degree of callousness is required when applying the combat activity exclusion.⁴¹

In the publication *Legal Lessons Learned from Afghanistan and Iraq*, the consensus of judge advocates implementing the FCA was that the combat activity exclusion did not further friendly relations with local nationals, but these judge advocates also displayed a practical

Id.

³⁹ See Jones, *supra* note 33, at 156.

⁴⁰ *Id.*

⁴¹ See Palmer, *supra* note 19, at 231. “Avoid the ‘Santa Claus Syndrome,’ not only because there is no legal authority for claims payments based solely on compassion, but also because it creates a disparity in how other claimants may be treated by claims personnel who follow.” *Id.*

understanding that the FCA is not an endless source of funds and must be limited in some way:

Many [judge advocates] argue that excluding combat claims runs afoul of the spirit and intent of the FCA, which is “to promote and maintain friendly relations through the prompt settlement of meritorious claims.” A broad reading of the combat exception, so the argument goes, results in complaints and difficulties with host nation inhabitants when seemingly legitimate claims go unpaid; on the other hand, a narrow reading of the exception is a “force multiplier” and helps “win the hearts and minds” when more claims are paid. A counterargument is that Congress did not intend for the FCA to be the statutory mechanism for rebuilding a country in the middle of or in the wake of combat—such a large undertaking should be a separate legislative and political undertaking, not unlike the *Marshall Plan* to rebuild Germany in the aftermath of World War II. Thus, one lesson might be that Congress should reconsider the combat exception under the FCA so that [judge advocates] will have greater flexibility and authority to pay claims in combat.⁴²

It would be fiscally impossible for the United States to act as “Santa Clause,” or to use compensation or condolence payments to rebuild a country. Not only is it fiscally impossible, there is no established legal norm requiring the United States to pay for collateral damage during armed conflict.⁴³ As the DoD’s recently published *Law of War Manual* states, “Although reasonable efforts should be made to spare civilians from unnecessary harm when seizing or destroying enemy property, the law of war imposes no obligation to compensate for loss of, or damage to, private property imperatively demanded by the necessities of war, including damage incidental to combat operations.”⁴⁴ The combat activity exclusion of the FCA essentially restates the law of war norm that lawful combatants are privileged to commit necessary and proportionate harm without

⁴² See CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEP. 2001–1 MAY 2003) 180–81 (2004).

⁴³ U.S. DEP’T OF DEF., DOD LAW OF WAR MANUAL para. 5.17.5.1 (June 2015) [hereinafter DOD LAW OF WAR MANUAL].

⁴⁴ *Id.*

obligation to compensate for that harm.⁴⁵

However, the *Law of War Manual* goes on to highlight the use of compensation during counterinsurgency operations: “As a matter of practice, during counter-insurgency operations, U.S. forces have often made payments to, or taken other actions on behalf of, civilians suffering loss.”⁴⁶ The fact that the United States has addressed the FCA’s combat activity exclusion through *ad hoc* condolence and compensation programs in most recent conflicts, most of them being counterinsurgency operations, highlights that the current FCA framework fails to meet the needs of today’s commanders. One of the FCA’s main strengths, on the other hand, is thoroughly developed and detailed procedures and regulations for its enactment, providing excellent guidance for the Foreign Claims Commissions (FCCs) that adjudicate claims under the FCA.

2. Foreign Claims Commissions

Compensation decisions under the FCA are made by FCCs, normally consisting entirely of judge advocates with no requirement for input from a commander or intelligence officers.⁴⁷ In that sense, the FCA is a legal-centered apparatus as opposed to a commander’s tool. Judge advocates may make compensation decisions in a vacuum with no discussion of the

⁴⁵ Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1790 (2009). “In essence, the FCA internalizes the law of war norm of the combatant’s privilege, allowing compensation for tort and other injuries caused by the U.S. military only as long as those injuries occurred outside combat operations.” *Id.*

⁴⁶ DOD LAW OF WAR MANUAL, *supra* note 43, para. 5.17.5.1.

⁴⁷ See AR 27-20, *supra* note 34, para. 10-8:

Normally, a member of a [Foreign Claims Commission (FCC)] will be either a commissioned officer or a claims attorney. At least two members of a three-member FCC must be [judge advocates] or claims attorneys. In exigent circumstances, a qualified non-lawyer employee of the Armed Forces may be appointed to an FCC, subject to prior approval by the Commander, [U.S. Army Claims Service]. Such approval may be granted only upon a showing of the employee’s status and qualifications and adequate justification for such appointment (for example, the lack of legally qualified personnel). The FCC will be limited to employees who are citizens of the United States. An officer, claims attorney, or employee of another Armed Force will be appointed a member of an Army FCC only if approved by the Commander, [U.S. Army Claims Service].

Id.

impact of injecting large sums of money into the battlespace, and without a true understanding of the claimant's position in the area of operations.⁴⁸ Although an FCC is required to determine that a claimant is friendly to the United States, there is no requirement for the FCC to consult with intelligence officers who may possess critical information regarding a certain claimant's allegiances, before handing them large sums of money.⁴⁹

A non-judge advocate FCC has the authority to pay a claim up to \$5000, while a single judge advocate FCC may authorize payments up to \$15,000. Single FCCs may also deny claims within their monetary authority.⁵⁰ A three-member FCC, which must include at least two judge advocates, may pay up to \$50,000 and may deny claims in any amount.⁵¹ Claims valued over \$50,000 must be sent to the U.S. Army Claims Service (USARCS) at Fort Meade, Maryland, for approval.⁵² The USARCS must forward any claim over \$100,000 to the Secretary of the Army (SECARMY) for approval.⁵³

⁴⁸ See Frank J. McGovern, *Paying the Claims of War*, 31 PA. LAW. 32, 43–44 (2009) (discussing the reaction of Iraqis to the large sums of money paid under the FCA).

If a claim has been paid previously, some Iraqis will try to resubmit a claim that worked to see if it will work again when a new unit takes over an area. It is important to realize that the average Iraqi earns approximately \$1500 to \$2000 per year. A claims card can be like a winning lottery ticket. Soldiers are advised not to give out claims cards unless the incident is actually witnessed. Often we hear stories about having many children to feed, being a widow or just having an extremely difficult time and needing assistance. We have to explain that we are not a welfare office and that although we wish that we could help every individual who walks in the door that is not possible. This is U.S. taxpayer money and we can use the funds only for the specific purpose for which it is designated.

Id. See also Heidi Lynn Osterhout, *No More Mad Money: Salvaging the Commander's Emergency Response Program*, 40 PUB. CONTRACT L. J. 4 (2011) (In general, injection of large sums of money into a counterinsurgency battlespace may have unintended consequences. Although distribution of funds may initially reduce violence, "the funding can spark new tensions and rivalries in local communities. It also causes local populations to feel entitled to help. Without proper prioritization, the assistance can hurt the local economy in the long run.").

⁴⁹ See AR 27-20, *supra* note 34.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

Understandably, claims forwarded from a conflict zone to the USARCS or SECARMY may take weeks or months to be received depending on communication conditions in the battlespace concerned, and even longer to be resolved once it is received, given the workload of these important entities. This timeline is often too slow for the unit on the ground, which may be dealing with an unhappy local national who may see such a delay as an insult.⁵⁴ Moreover, claims in such large amounts inherently involve significant damage or harm. As an example, U.S. forces may destroy a large orchard owned by a prominent local sheikh, causing \$150,000 in damage. The loss of the orchard not only means its field hands are now out of work, and more likely to be drawn to support the insurgency, but an important sheikh with significant influence over the local population now has no reason to support U.S. forces, and every reason to use his influence against them. Such dynamics on the ground mean that swift payment to the sheikh is crucial to the security of U.S. troops in the area.

Currently, FCA payments come from money budgeted by the Headquarters of the Department of the Army (HQDA) to USARCS, not from unit operational funds.⁵⁵ Accordingly, there is no battlespace commander making a decision whether a claim is worth paying out of unit funds that could be used for another important mission. While it is an advantage that FCA payments are not fiscally constrained by a unit's other

⁵⁴ See *Center 2010 White Paper*, *supra* note 155 (citing Senate Committee on Foreign Relations, The Mutual Security Act of 1956, 84th Cong., 2d sess., 1956, S. Rep. 2273, 9–10).

⁵⁵ See AR 27-20, *supra* note 34, para. 13-6(b).

The claims open allotment is the fund from which personnel, torts, and foreign tort claims are paid Following the annual [c]ongressional appropriation to the [Department of Defense], funds are allotted to [Headquarters, Department of the Army] Operating Agency 22 (OA22), an office of Resource Services-Washington (RS-W). The OA22 provides [the U.S. Army Claims Service (USARCS)] with open allotment funds on a quarterly or monthly basis. In turn, as USARCS receives this funding, it updates the budget allocations for each claims office. Centrally managed by the USARCS budget office, the allotment provides the flexibility essential for the worldwide administration of claims funds that by law are paid from [fifteen] separate accounts, including civilian personnel, marine casualty, and Federal and foreign tort claims. The management of this allotment by USARCS allows the organization to move funds quickly in order to pay claims around the world without unnecessary delay.

Id.

obligations, the fact that a commander, along with intelligence staff, is not required to be involved in the compensation process means that a judge advocate may not be making a decision on a claim with a comprehensive and global understanding of its impact.⁵⁶ In the example above regarding the sheikh's orchard, the commander and intelligence staff would likely have key information to assist the judge advocate in making a determination or expediting the claim.

3. *Compensation—Not Condolence*

The FCA is designed to compensate for a loss as opposed to merely expressing condolence for a loss. The Army regulation implementing the FCA uses terms such as “damages” and “entitlement to compensation,” discusses factors in determining compensation amounts, and requires deduction of any insurance coverage from a compensation amount.⁵⁷ On the other hand, the FCA is explicitly prohibited from compensation that is “based solely on compassionate grounds,” placing the FCA squarely in the realm of compensation out of a sense of legal or policy-based obligation, and not as a mere expression of condolence for a loss.⁵⁸ Because the FCA is a compensation scheme, as opposed to a condolence scheme, it actually provides for an appellate process, allowing claimants who are dissatisfied with the handling of their claim an avenue for reconsideration.⁵⁹

4. *The FCA as a Tool for Traditional Warfare*

The FCA has some significant benefits in addition to its appellate process, such as its high compensation thresholds obtained from an independent funding source.⁶⁰ However, it should be noted that the FCA and its predecessor, the 1918 Indemnity Act, are creatures of the world wars of the last century, traditional wars with clear front lines.⁶¹ The 1918 Indemnity Act was a compensation scheme directed to address harm

⁵⁶ See *infra* Section IV(E).

⁵⁷ See AR 27-20, *supra* note 34, para. 10-2(a).

⁵⁸ *Id.* para. 10-4(d).

⁵⁹ *Id.* para. 10-10.

⁶⁰ AR 27-20.

⁶¹ John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 LOY. L.A. L. REV. 1455, 1460 (2008); Indemnity Act (American Forces Abroad), ch. 57, Pub. L. No. 65-133, 40 Stat. 532 (1918), *repealed by* Act of Apr. 22, 1943, 57 Stat. 66, § 5 (1943).

caused by American soldiers camped far behind the front lines during World War I.⁶² During World War I, the first large-scale mechanized war, the United States shipped over 100,000 motor vehicles to Europe:

The cars and trucks America had so successfully delivered to the western front quickly began to cause mayhem. Soldiers were driving motorized vehicles on roads built for horse-drawn vehicles in towns accustomed to horse-drawn speeds. The situation was a prescription for injury and accidental death. The carnage was so great that it even affected those who were sent to try to resolve it. In May 1916, an auto accident took the life of the British officer charged with compensating French civilians injured by British army vehicles.⁶³

As a predecessor to the FCA, the 1918 Indemnity Act was not concerned with combat-related damage.⁶⁴ Rather, it aimed to compensate for damage caused by U.S. soldiers engaged in non-combat activities such as driving a vehicle from one camp to another.⁶⁵ Following the United States' entry into World War II, President Franklin Roosevelt quickly moved to update the 1918 Indemnity Act, taking steps toward creating what is today's FCA.⁶⁶ The move to update the law was prompted by the United States' plan to station troops in Iceland, far from any front lines.⁶⁷ The Prime Minister of Iceland would agree to the presence of U.S. troops only if the United States agreed to compensate the inhabitants of Iceland for any damage occasioned by U.S. military activities.⁶⁸ President Roosevelt agreed to this condition, and the 1918 Indemnity Act evolved into the FCA.⁶⁹

The key takeaway behind the historical underpinnings of the FCA is clear: the United States created the FCA to address U.S. soldiers causing negligent damage in foreign countries, far behind the front lines and unrelated to combat. Given that today's counterinsurgency operations

⁶² John Fabian Witt, *supra* note 61.

⁶³ *Id.*

⁶⁴ *Id.* at 1458–61.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Christopher V. Daming, *When in Rome: Analyzing the Local Law and Custom Provision of the Foreign Claims Act*, 39 WASH. U. J. L. AND POL'Y 309, 316–17 (2012).

⁶⁸ *Id.*

⁶⁹ *Id.*

lack front lines, it is doubtful that a compensation system designed for traditional warfare can truly be a valuable modern commander's tool.⁷⁰ As one judge advocate astutely observed, "In contrast to the clearly defined trenches of World War I and the massive fronts of World War II, the conflicts of the post-World War II era, from the hazy, jungle warfare of Vietnam to the nation-building in Iraq and Afghanistan, have strained the FCA to the breaking point."⁷¹ It is the limitations of the FCA that have spurred the use of *ad hoc* condolence and compensation systems.

B. *Ad Hoc* Condolence and Compensation Systems

Judge advocates and commanders alike have historically struggled with using the FCA in conflict zones and sought means to legally circumvent the combat activity exclusion.⁷² The United States has instituted some sort of FCA work-around in almost every armed conflict since World War I.⁷³ However, *ad hoc* systems are often implemented arbitrarily with little guidance, sometimes increasing resentment among the local population rather than fostering goodwill.⁷⁴

In Vietnam, U.S. Forces frustrated with the combat activity exclusion of the FCA began processing combat claims funded by "assistance-in-kind funds" from Military Assistance Command, Vietnam.⁷⁵ In Grenada, judge advocates frustrated by the combat activity exclusion worked with USARCS to establish a combat claims compensation program using funds from the U.S. Agency for International Development (USAID).⁷⁶ In Panama, the FCCs on the ground received DoD Operations and Maintenance Funds to pay combat claims, while the Department of State (DoS) set up its own combat claim program through a Letter of Instruction with the government of Panama covering a compensation system to be run

⁷⁰ See Walerstein, *supra* note 14, at 331.

⁷¹ *Id.*

⁷² See Tracy Testimony, *supra* note 35; see also FREDERIC L. BORCH, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959–1975 41 (2003).

⁷³ See Tracy Testimony, *supra* note 35.

⁷⁴ See *White Paper—US Military Claims System for Civilians*, CENTER FOR INNOCENT VICTIMS IN ARMED CONFLICT, http://civiliansinconflict.org/uploads/files/civilian_casualties_white_paper_.pdf (last visited May 26, 2016).

⁷⁵ FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI, 42 (2004).

⁷⁶ Walerstein, *supra* note 14 at 333.

by Panama and funded by the DoS.⁷⁷ In other conflicts, units have sought authorization to use what are known as *solatia* payments.

1. *Solatia*

The term *solatium*⁷⁸ is derived from Latin, and refers to an expression of sympathy or recognition of loss. *Solatia* is “defined as ‘anything that alleviates or compensates for suffering or loss—compensation,’ derived from solace, ‘to give comfort to in grief or misfortune.’”⁷⁹ *Solatia* payments are distinguished from claims under the FCA because they are purely expressions of sympathy, not an admission of any form of liability or obligation to compensate.⁸⁰ Additionally, unlike the FCA, *solatia* payments are not explicitly limited to cases where U.S. forces caused the harm.⁸¹ The term “compensation” is often used when discussing *solatia*, but these payments are not meant necessarily to make a victim financially whole.⁸² *Solatia* may be made through monetary donation, but might also include funeral flowers or some other expression of sympathy.⁸³ *Solatia* should be made in accordance with local custom as an expression of sympathy toward a victim or his or her family and is common in some overseas commands.⁸⁴ *Solatia* payments are paid from unit operations and maintenance funds, not from USARCS disbursements or some other

⁷⁷ BORCH, *supra* note 75.

⁷⁸ The term *solatium* is defined in law as “[d]amages allowed for injury to the feelings.” LAW DICTIONARY, <http://thelawdictionary.org/solatium/> (last visited May 13, 2016) (plural: *solatia*).

⁷⁹ Jacqueline H. Wilson, Blood Money in Sudan and Beyond: Restorative Justice or Face-Saving Measure? (Mar. 25, 2014) (unpublished Ph.D. thesis, Georgetown University), https://m.repository.library.georgetown.edu/bitstream/handle/10822/709806/Wilson_georgetown_0076D_12674.pdf?sequence=1&isAllowed=y.

⁸⁰ U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-699, MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE'S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN (2007) [hereinafter GAO CONDOLENCE REPORT].

⁸¹ See AR 27-20, *supra* note 34, para. 10-11; see also DA PAM 27-162, *supra* note 27, para. 10-10.

⁸² DA PAM 27-162, *supra* note 27, para. 10-10.

⁸³ See Palmer, *supra* note 19, at 238–39.

In some foreign countries, especially parts of the Far East and Southwest Asia, a person who is involved in an accident is expected to immediately express sympathy to the victim or the victim's family by making a solatium payment Examples of “in kind” solatia are floral arrangements and fruit baskets.

Id.

⁸⁴ See AR 27-20, *supra* note 34, para. 10-11.

appropriated fund.⁸⁵ This distinction means that a commander's decision to offer a *solatia* payment in a given case means those funds will not be available for some other part of the unit's mission.

Solatia payments are only authorized in four countries on a permanent basis: Micronesia, Japan, Korea, and Thailand.⁸⁶ In order to make *solatia* payments in other countries, some authority must first determine that *solatia* payments are culturally appropriate for the area concerned.⁸⁷ It is unclear who the approval must be for these *ad hoc* determinations. One regulation refers to a Command Claims Service or USARCS as appropriate authorities.⁸⁸ Another authoritative source refers to local commanders having the authority to determine the propriety of *solatia* in a certain country.⁸⁹ In actual practice, the DoD General Counsel and U.S. ambassadors have also made *solatia* determinations in the past.⁹⁰ Contradictory regulations and practice make it difficult to determine who truly has the authority to authorize *solatia* in a given country.

Until 2004, the DoD specifically prohibited the use of *solatia* in Afghanistan and Iraq, having determined (incorrectly) that condolence payments were not a commonly accepted practice in these countries.⁹¹

⁸⁵ *Id.*

⁸⁶ *Id.*

Payment of *solatia* in accordance with local custom as an expression of sympathy toward a victim or his or her Family is common in some overseas commands. *Solatia* payments are known to be a custom in the Federated States of Micronesia, Japan, Korea, and Thailand. In other countries, the FCC should consult the CCS or Commander, USARCS for guidance.

Id.

⁸⁷ See AR 27-20, *supra* note 34, para. 10-11.

⁸⁸ *Id.*

⁸⁹ See DA PAM 27-162, *supra* note 27, para. 10.10(b) (21 Mar. 2008). "Although *solatia* programs are usually administered under the supervision of a command claims service, they are essentially a theater command function, whose propriety is based on a local finding that *solatia* payments are consistent with prevailing customs." *Id.*

⁹⁰ See Memorandum, Deputy General Counsel (International Affairs), Department of Defense, to Chairman, Joint Chiefs of Staff, Subject: *Solatia* (26 Nov. 2004) [hereinafter *Solatia* Memorandum] (determining that *solatia* is appropriate in Iraq and Afghanistan); see also BORCH, *supra* note 75, 211 (discussing the U.S. Ambassador to Somalia approving *solatia* payments in Somalia and delegating authority to make payments to the Unified Task Force Commander and Chief of Staff).

⁹¹ See Tracy Testimony, *supra* note 35.

Exactly how the DoD reached this conclusion is confusing.⁹² There is abundant evidence that such payments are common in both countries.⁹³ One commander in Iraq admitted that, out of necessity, he had scraped together cash to make condolence payments before *solatia* was even authorized.⁹⁴ In response to commanders on the ground clamoring for a way to make condolence payments, and with urging from judge advocates in the field, in 2004 the DoD General Counsel issued an opinion that *solatia* was appropriate under Iraqi and Afghani custom.⁹⁵

Although commanders were happy to have another tool in their kit-bag, *solatia* is not the best commander's tool for two main reasons. First, as noted above, *solatia* requires a high-level authority to determine that it is appropriate in any given country—and in the past that determination has been incorrect—leaving commanders on the ground at a disadvantage.⁹⁶

Between October 2001 and September 2003 all condolence-type payments were specifically prohibited in Afghanistan and Iraq by order of Central Command. In fact, originally, the U.S. Central Command, the command responsible for Iraq, ordered *Solatia* or sympathy payments not be allowed in Iraq, meaning there was no supplement to fill the gap left by the combat exclusion of the FCA. This order also applied to Afghanistan. Because of this rule, when I began adjudicating claims and meeting with Iraqis, I could offer no monetary assistance for civilian casualties caused during combat operations. This lasted until October 2003.

Id.

⁹² Both the 2003 and 2008 versions of Department of Army Pamphlet 27-162 state in paragraph 10-10 that *solatia* is common in the Middle East:

In certain countries, particularly those within Asia and the Middle East, an individual involved in an incident in which another is injured or killed or property is damaged may, in accordance with local custom, pay *solatia* to a victim, the victim's family or another person authorized by the victim (such as a tribal leader) without regard to liability.

See DA PAM 27-162, *supra* note 27. It is an interesting point that our own Pamphlet acknowledges that it is common in the Middle East and yet it was deemed inappropriate.

⁹³ See *infra* Section II(C) for a discussion of blood money.

⁹⁴ See Cora Currier, *How Much Does the U.S. Pay for Accidentally Killing a Civilian in a Drone Strike*, YAHOO! NEWS (Apr. 5, 2013), http://news.yahoo.com/much-does-u-pay-accidentally-killing-civilian-drone-160332955.html;_ylt=A0LEVj_n4J9WHAsACUcnnIIQ;_ylu=X3oDMTByNXM5bzY5BGNvbG8DYmYxBHBvcwMzBHZ0aWQDBHNlYwNzcg (citing a retired General who admitted finding his own funds to make condolence payments before they were authorized).

⁹⁵ *Solatia* Memorandum, *supra* note 90.

⁹⁶ Compare *id.* with Tracy Testimony, *supra* note 35.

Second, *solatia* payments are funded by unit operations and maintenance funds and therefore compete with a commander's other mission priorities.⁹⁷ On the other hand, *solatia* is useful because it has no combat activity exclusion, and few procedural obstacles to swift payment once authorized in a country. Commanders used *solatia* payments in Iraq from June 2004 to January 2005, and in Afghanistan from October 2005 to the present.⁹⁸ *Solatia* payments became less frequent as a program called the Commander's Emergency Response Program became a new source for condolence payments.

2. *The Commander's Emergency Response Program*

The CERP was conceived as a funding mechanism to allow commanders in Iraq to quickly respond to the needs of the local population, such as humanitarian relief and reconstruction projects.⁹⁹ The program was initially funded from the discovery of secret caches of millions of U.S. dollars hidden by the Saddam Hussein regime.¹⁰⁰ The CERP funds were authorized for condolence payments in Iraq in September 2003, and extended to Afghanistan in November 2005.¹⁰¹ Although judge advocates now had a resource to address the FCA's combat exclusion, little guidance was issued regarding how to process condolence payments using CERP.¹⁰² Additionally, just as *solatia* payments must compete with other missions funded by a unit's operation and maintenance funds, CERP condolence payments had to compete with other CERP projects, such as humanitarian relief and reconstruction, rather than coming from claims-specific funding like FCA claims.¹⁰³ One claims judge advocate explained his frustration with CERP as follows:

I lacked money because the vast majority of my brigade's CERP funds went to various reconstruction projects.

⁹⁷ See AR 27-20, *supra* note 34, para. 10-11.

⁹⁸ See GAO CONDOLENCE REPORT, *supra* note 80.

⁹⁹ Memorandum, Administrator of the Coalition Provisional Authority, to the Commander of Coalition Forces, Subject: Commanders' Emergency Response Program (16 June 2003).

¹⁰⁰ Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, at 1, 3.

¹⁰¹ See *Center 2010 White Paper*, *supra* note 15.

¹⁰² See Tracy Testimony, *supra* note 35. "Another significant problem I encountered with the program arose from the *ad hoc* nature inherent to the program because of the manner in which it was created. There were no rules or solid guidance provided." *Id.*

¹⁰³ *Id.*

Understandably, my commander prioritized CERP funds for hospitals, schools, or power stations, at the expense of condolence payments. The perception was that fixing a school and employing Iraqi contractors allowed funds to go further than paying a widow for her husband's death.¹⁰⁴

Just as with *solatia*, condolence payments under CERP became a matter of prioritizing which funds would go to other unit missions. Although it was initially funded by secret caches of U.S. dollars, the CERP evolved into an appropriated fund, subject to yearly congressional action.¹⁰⁵ Therefore, the availability of CERP in any conflict zone for a specific time period is merely temporary, and is subject to the legislative process.¹⁰⁶

Some guidance on the handling of the CERP condolence payments was provided in *The Commander's Guide to Money as a Weapons System: Tactics, Techniques and Procedures*, referred to as the Money as a Weapons System (MAAWS).¹⁰⁷ The MAAWS was a creation of the conflicts in Iraq and Afghanistan, where "money is touted as a 'non-kinetic force' that can win the hearts and minds of the local population by stimulating the economy through infrastructure development, job creation, and business stimulation."¹⁰⁸ The MAAWS clearly defined how units should use money as a weapon in COIN operations.

As its title suggests, [the MAAWS] provides guidelines on how and why money is to be deployed in the field. The rationale for the weaponization of money is captured as follows: "Warfighters at brigade, battalion, and company level in a counterinsurgency (COIN) environment employ money as a weapons system to win the hearts and minds of the indigenous population to facilitate defeating the insurgents."¹⁰⁹

¹⁰⁴ *Id.*

¹⁰⁵ Army Techniques Publication Number 1-06.2, The Commander's Emergency Response Program (CERP), 5 April 2013, para. 1-1.

¹⁰⁶ *Id.*

¹⁰⁷ Multi-National Corps-Iraq, Money as a Weapon System (Nov. 1, 2009); U.S. Forces-Afghanistan Pub 1-06, Commander's Emergency Response Program SOP (2009) [hereinafter Afghanistan CERP SOP].

¹⁰⁸ Emily Gilbert, *Money as a "Weapons System" and the Entrepreneurial Way of War*, 1 CRITICAL MIL. STUD. 202 (2015).

¹⁰⁹ *Id.* (citations omitted).

Under the Afghanistan CERP Standard Operating Procedure (SOP), a supplement to the MAAWS, CERP condolence payments may be paid to express sympathy and to provide urgent humanitarian relief to individual Afghans or Afghan people in general.¹¹⁰ Urgent humanitarian relief might include a payment to assist a family that has lost its breadwinner due to U.S. action.¹¹¹ However, unlike the FCA, the CERP evolved to allow for condolence payments even when U.S. forces were not responsible for the harm.¹¹² Payments termed as “hero payments” or “martyr payments” quickly became tools for commanders to encourage Iraqi and Afghan nationals to continue to fight insurgent forces.¹¹³ The direct kin of local nationals lost fighting against insurgents could qualify for these types of CERP payments.

Condolence payments from CERP funds are only authorized if an FCA claim is not available, and most claims SOPs state that claims denied under the FCA must be reconsidered for suitability as CERP payments.¹¹⁴ However, in practice, this often does not happen, and claims are denied outright.¹¹⁵ Additionally, the local population does not care which U.S. law allows for payment of their claim, they simply want to be recompensed in some manner.¹¹⁶

The Afghanistan CERP SOP defines “condolence payment” as follows:

¹¹⁰ Afghanistan CERP SOP, *supra* note 107.

¹¹¹ The loss of a male breadwinner in a patriarchal society is completely devastating to a family as a wife/mother may have no means to support her family. *See generally Women 2000*, UNITED NATIONS (Dec. 2001), http://www.un.org/womenwatch/daw/public/wom_Dec%2001%20single%20pg.pdf.

¹¹² Memorandum for Secretaries of the Military Departments, Dec. 18, 2008, Commander’s Emergency Response Fund (CERP) Guidance, 15, http://comptroller.defense.gov/Portals/45/documents/fmr/archive/12arch/12_27_Dec08.pdf.

¹¹³ Marlin Paschal, *Knowing When to Say No and Providing a Way Forward: The Commander’s Emergency Response Program and the Advising Judge Advocate*, ARMY LAW. Sept. 2011, at 29.

¹¹⁴ *See* LESSONS LEARNED, *supra* note 42, at 185.

¹¹⁵ *See Center 2010 White Paper*, *supra* note 15. “Some brigades recognized the necessity of appropriately adjudicating each claim and systematically referred meritorious, yet non-compensable FCA claims to receive condolences, while others summarily denied any claim filed because of the FCA’s combat exclusion.” *Id.*

¹¹⁶ Mansoor E-mail, *supra* note 24. “Local nationals do not read, much less understand, U.S. laws. Telling them that the Foreign Claims Act, a law passed in Washington, had any validity whatsoever on their soil would be just plain weird.” *Id.*

Damage to property or person caused by [United States], coalition, or supporting military organizations during a specific combat operation. For example, a Task Force enters a village to perform a clearing operation. Upon arrival at the village, one vehicle in the convoy hits an individual on a bicycle. Since the Task Force was conducting a combat operation, this is a condolence/battle damage situation.¹¹⁷

Under the Afghanistan CERP program, a U.S. commander in the grade of O-5 can approve up to \$2500 per person or damaged property, while a U.S. commander in the grade of O-6 can approve up to \$5000 per person or damaged property.¹¹⁸ Commander's Emergency Response Program condolence payments do not require a legal review, but in practice most condolence payments have been reviewed by a judge advocate, especially because of the requirement that they be vetted for FCA applicability.¹¹⁹

The authority to use CERP funds in Iraq expired in 2011 along with the United States' withdrawal from Iraq.¹²⁰ However, following the rise of the self-proclaimed Islamic State and the United States' subsequent military reengagement in Iraq, Congress authorized up to \$5,000,000 of CERP funds already approved for use in Afghanistan for fiscal year 2016 to be available for use as condolence payments in Iraq.¹²¹ This renewed authority to use CERP funds in Iraq is a tacit admission that the United States anticipates future collateral damage from operations in Iraq despite the previous "withdrawal."¹²² A retired Marine colonel stated that he was

¹¹⁷ Afghanistan CERP SOP, *supra* note 107.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 4.B.2.

¹²⁰ Stuart W. Bowen, *Learning from Iraq: A Final Report from the Special Inspector General for Iraq Reconstruction, March 2013*, COUNCIL ON FOREIGN RELATIONS 45 (Mar. 6, 2013), <http://www.cfr.org/iraq/learning-iraq-final-report-special-inspector-general-iraq-reconstruction-march-2013/p30167>; *Learning From Iraq*, GLOBAL SEC'Y (Mar. 2013), <http://www.globalsecurity.org/military/library/report/2013/sigir-learning-from-iraq.pdf>.

¹²¹ National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92 §1211, Stat. 1356 (2015) [hereinafter NDAA 2016].

¹²² See Kate Brannan, *Pentagon Ready to Pay for the Iraqi Civilians It Kills. Next Step: Admit It Kills Civilians*, DAILY BEAST (Nov. 8, 2015, 9:00 PM), <http://www.thedailybeast.com/articles/2015/11/08/pentagon-ready-to-pay-for-the-iraqi-civilians-it-kills-next-step-admit-it-kills-civilians.html>. In the spring of 2015, the House and Senate defense committees debated whether CERP should be authorized again in Iraq. *Id.* The committees agreed to give the Department of Defense (DoD) access to Afghanistan CERP dollars for use in Iraq, on the condition that they would be used to cover accidental damage and death payments only, not for infrastructure or reconstruction. *Id.*

not surprised that U.S. military commanders wanted to start another CERP fund in Iraq, noting that CERP can make life easier for commanders due to its lack of bureaucratic procedural requirements. In commenting on its usefulness, the Marine Colonel stated, “They can respond quickly to things that come up You don’t have to put in forms and wait.”¹²³ Commander’s Emergency Response Program money is essentially “walking around money” for commanders, hence its popularity as a commander’s tool.¹²⁴

3. *United States Agency for International Development Ad Hoc Programs*

Judge advocates in Grenada, frustrated by the combat activity exclusion of the FCA, turned to the USAID for funds to pay claims. In both Afghanistan and Iraq, the USAID has supplemented military condolence and compensation programs with its own aid programs including assistance for victims of conflict.¹²⁵ In May 2003, and in subsequent annual appropriations, Congress authorized the USAID to spend approximately \$40,000,000 to assist victims of U.S. military operations in Iraq.¹²⁶ Congress likewise has authorized \$60,000,000 for the *Afghan Civilian Assistance Program*, which includes assistance for victims of war.¹²⁷

The USAID, however, has been careful to distinguish its programs in Iraq and Afghanistan from military condolence and compensation programs, specifying that its assistance is not “compensation” or “reparations.”¹²⁸ Rather, USAID assistance is “provided through contracts with local vendors to provide war victims with needed medical care, establish a livelihood, and/or rebuild homes destroyed by the war.”¹²⁹ Although the USAID has stepped in to work with judge advocates in the

¹²³ *Id.* (quoting Retired Marine Colonel Mark Cancian).

¹²⁴ *Id.* “[The] CERP was originally envisioned to be walking-around money that commanders could use quickly and with few strings attached to respond quickly to the needs of the people they were supposed to be protecting in either Iraq or Afghanistan.” *Id.*

¹²⁵ OFFICE OF THE INSPECTOR GENERAL, U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, REPORT NO. E-267-08-002-P, AUDIT OF USAID/IRAQ’S MANAGEMENT OF THE MARLA RUZICKA IRAQI WAR VICTIMS FUND, (2008) [hereinafter RUZICKA REPORT].

¹²⁶ *Id.*

¹²⁷ Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 164 (2003).

¹²⁸ RUZICKA REPORT, *supra* note 125.

¹²⁹ *Id.*

past, such as in Grenada, their true role is long-term development.¹³⁰ Relying on the USAID to assist commanders requiring condolence funds is not a realistic way ahead, especially because the USAID does not operate in immature theaters.

C. Condolence Payments around the World

While Army Regulation (AR) 27-20 only recognizes *solatia* as a known custom in the Federated States of Micronesia, Japan, Korea, and Thailand, *solatia*-like concepts such as “blood money” are traditional in many cultures around the world.¹³¹ *Solatia*-like concepts are part of tribal or religious legal systems in some countries, while other countries have actually codified condolence payments into their formal judicial systems.¹³²

1. Blood Money in Islam

The U.S. military has been engaged in long-term kinetic operations in Iraq¹³³ and Afghanistan,¹³⁴ brief kinetic operations in Libya¹³⁵ and Pakistan,¹³⁶ joint security operations in Nigeria, maintains a permanent

¹³⁰ Walerstein, *supra* note 14, at 333.

¹³¹ See AR 27-10, *supra* note 34.

Payment of *solatia* in accordance with local custom as an expression of sympathy toward a victim or his or her Family is common in some overseas commands. *Solatia* payments are known to be a custom in the Federated States of Micronesia, Japan, Korea, and Thailand. In other countries, the FCC should consult the CCS or Commander, USARCS for guidance.

Id.

¹³² Noreen Malone, *How Does Blood Money Work?*, SLATE (Mar. 20, 2009), http://www.slate.com/articles/news_and_politics/explainer/2009/03/how_does_blood_money_work.html.

¹³³ BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2015 (2015).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Philip Rucker et al., *Osama bin Laden buried at sea after being killed by U.S. forces in Pakistan*, WASH. POST (May 2, 2011), https://www.washingtonpost.com/politics/osama-bin-laden-is-killed-by-us-forces-in-pakistan/2011/05/01/AFXMZyVF_story.html

camp in Djibouti,¹³⁷ and maintains air bases in Turkey¹³⁸ and Qatar.¹³⁹ A common thread tying these countries together is the religion of Islam.¹⁴⁰ The bulk of the U.S. military's activities in the past decades have taken place in Muslim-majority countries, where the payment of *diya*, meaning "blood money" or "financial compensation for homicide or injury" in Arabic, is either codified in statute or expected under common or tribal law.¹⁴¹ *Diya* is not necessarily an admission of legal liability or acceptance of individual accountability or guilt. Rather, the payment of *diya* is a conciliatory act, often taking place among tribes or clans rather than between individuals.¹⁴² In many cultures where *diya* is commonly practiced, collective guilt is also common, meaning members of a victim's group or tribe might view every member of a perpetrator's group or tribe as legitimate targets for revenge.¹⁴³ *Diya* payments are often collected from a group of people and accepted by a victim's group collectively, as opposed to being a transaction between individuals.¹⁴⁴

The goal of *diya* is to stem retaliatory violence and restore peaceful relations, and the acceptance of *diya* is often viewed as a tacit agreement not to retaliate for perceived harm.¹⁴⁵

The ultimate goal of blood money is to bring relationships, if not to the point of forgiveness and reconciliation, at least to the point where the aggrieved no longer feel the need for retribution or revenge above and beyond an accepted level of retaliation on par, or in lieu of retaliation at all; in essence, to break the cycle of deadly violence.¹⁴⁶

¹³⁷ SALAZAR, *supra* note 133; see also *Welcome to Camp Lemonnier, Djibouti*, CNIC, http://www.cnic.navy.mil/regions/cnreurafswa/installations/camp_lemonnier_djibouti.html (last visited May 26, 2016).

¹³⁸ *Incirlik Air Base*, AIR FORCE, <http://www.incirlik.af.mil/> (last visited May 26, 2016).

¹³⁹ Kia Atkins, *CSAF visits Al Udeid*, AIR FORCE (Dec. 22, 2014), <http://www.af.mil/News/ArticleDisplay/tabid/223/Article/558627/csaf-visits-al-udeid.aspx>.

¹⁴⁰ *The world in muslim populations, every country listed*, DATABLOG, <http://www.the-guardian.com/news/datablog/2009/oct/08/muslim-population-islam-religion> (last visited May 26, 2016).

¹⁴¹ See Scott C. Lucas, *Diya*, THE OXFORD ENCYCLOPEDIA OF ISLAM AND LAW (2016), <http://www.oxfordislamicstudies.com/article/opr/t349/e0039>; see also M. J. L. HARDY, BLOOD FEUDS AND THE PAYMENT OF BLOOD MONEY IN THE MIDDLE EAST (1963).

¹⁴² See Wilson, *supra* note 79.

¹⁴³ *Id.* at 27.

¹⁴⁴ *Id.* at 110.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 16

American commanders in Iraq realized that they could take advantage of the tribal settlement concept to enhance their own security.

[In Iraq] the claims program was not only expanded to promote general goodwill; it was also intended to allow U.S. soldiers to take advantage of the Iraqi system of tribal settlement. In this system, the extended family of the victim of a death, injury or slight to honor gives up the right of revenge against the extended family of the perpetrator and reconciles with them after receiving a payment of blood money Such payments by U.S. forces would limit violence against them by those whose civilian family members had been injured or killed in U.S. operations.¹⁴⁷

Interestingly, the concept of *diya* mirrors customary international law by acknowledging that those actually participating in combat are not entitled to condolence payments.¹⁴⁸ Under the *diya* framework, the family of an insurgent killed by U.S. forces during combat would not seek condolence.¹⁴⁹ However, the family of an innocent civilian killed by U.S. forces would feel entitled to *diya*.¹⁵⁰

In April of 2003, U.S. forces killed eighteen civilians in Fallujah, Iraq.¹⁵¹ Even more civilians were wounded in the incident, and the mayor of Fallujah informed U.S. forces that the only way to prevent mass retaliation for the incident would be to pay *diya*.¹⁵² As one news source

¹⁴⁷ Katherine Blue Carroll, *The Strangest Tribe: U.S. Military Claims in Iraq*, 22 MIDDLE EAST POLICY 40–41 (2015).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 43.

The restriction here to civilian deaths, and not those of Iraqis engaged in attacking U.S. forces, is an important one. Not only did the U.S. military not pay condolence payments in such situations, but Iraqi tribal law also suspends the system of negotiated payment during times of declared warfare. Iraqis seldom attempted to make claims for those hurt or killed while fighting.

Id.

¹⁵¹ Hamza Hedawi, *U.S. Military Uses Unorthodox Tactics to Woo Violent Iraqi City*, ASS'D PRESS (July 30, 2003), <http://www.freerepublic.com/focus/f-news/955437/posts>.

¹⁵² *Id.*

noted, the condolence payment did prevent retaliation. “Attacks against U.S. forces in Fallujah and its outlying districts which raged sporadically from May through early July have dropped markedly. It has been nearly two weeks since an American was killed in the area.”¹⁵³ Clearly, condolence payments are an accepted part of Iraqi culture, as well as in other Muslim cultures, and the period of conflict in Iraq and Afghanistan during which condolence payments were not authorized placed U.S. troops at risk of retaliation for civilian harm. A permanent condolence system would prevent such a mistake from occurring.

2. *Blood Money in Non-Muslim Countries*

The concept of blood money is not present solely in Muslim societies, and even in Muslim countries the concept of blood money existed in pre-Islamic tribal societies.¹⁵⁴ As one scholar noted, “One of the most amazing aspects of blood money is that it can be Islamic and non-Islamic, it can work with pastoralists and farmers, and it has functioned from Papua New Guinea to Albania.”¹⁵⁵

Key elements across geographical, historical, ethnic and religious boundaries include:

1. Compensation in cases of homicide;
2. Payment (or contributions) by the perpetrator’s extended family or community passed to the community or family of the victim (with family being defined by degrees of closeness);
3. A sense that this collection and transference of payment constitutes a form of accountability for the wrong or harm; and,
4. Some sense of remedy; in essence, an intent to prevent or stop the taking of vengeance or a continual cycle of escalating revenge; in other words, breaking the cycle of violence.¹⁵⁶

None of the four countries in which *solatia* is permanently authorized

¹⁵³ *Id.*

¹⁵⁴ Wilson *supra* note 79, at 45.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 17.

are majority Muslim countries.¹⁵⁷ The U.S. military's most developed *solatia* program is in practice in Korea. The U.S. military's use of *solatia* in Korea, locally referred to as *hapuigeum*, is highly regulated down to the type of envelope to be used to present payment.¹⁵⁸ In Korea, *hapuigeum* is often brokered by the police as a way to settle matters outside of court.¹⁵⁹

In Japan, condolence payments are known as *mimaikin* and are clearly distinguished from compensation because they are given as an expression of sympathy rather than an effort to make the victim whole.¹⁶⁰ The U.S. military has a permanent presence in Korea and Japan, and therefore has a strong interest in doing whatever it can to maintain good relations with the local population. The presence of the United States in Iraq and Afghanistan has been so prolonged, the same considerations should apply. In fact, these considerations should apply in any COIN conflict when U.S. forces must maintain the support of the local population.

D. Condolence—Not Compensation

While the FCA is a compensation scheme, *solatia* is clearly a condolence scheme. Condolence payments are not an admission of legal liability and in no way constitute a waiver of sovereign immunity exposing the United States to legal suit. It is crucial to distinguish between condolence payments and compensation payments. As discussed briefly above, it is also important to acknowledge that there is no legal obligation for the United States to make compensation or condolence payments for harm arising out of legal activities during armed conflict.¹⁶¹ This distinction is key for the United States to avoid creating a new legal norm—that there is an obligation to pay for combat damage.

While International Humanitarian Law (IHL) provides for compensation resulting from a violation of IHL, such as the intentional killing of a civilian, there is no international legal obligation for a party to a conflict to compensate for legal collateral damage, such as the

¹⁵⁷ DATABLOG, *supra* note 140.

¹⁵⁸ U.S. Forces Kor., REG. 526-11, UNITED STATES FORCES KOREA RELATIONS WITH KOREAN NATIONALS: CONDOLENCE VISITS AND SOLATIA, (28 Jan. 2010).

¹⁵⁹ Adam Walsh, *Rape Victim Speaks Out*, KOREA HERALD (Mar. 30, 2010), <http://www.koreaherald.com/view.php?ud=20090812000108>.

¹⁶⁰ Eric A. Feldman, *Fukushima: Catastrophe, Compensation, and Justice in Japan*, 62 DEPAUL L. REV. 335 (2013).

¹⁶¹ DoD LAW OF WAR MANUAL, *supra* note 43, para. 5.17.5.1.

unintentional killing of a civilian in an otherwise legal attack.¹⁶² Notwithstanding the absence of any legal obligation, some have argued that there is a moral imperative to compensate for harm to civilians in armed conflict.¹⁶³ Amends are beginning to be recognized at the United Nations. The 2010 and 2012 United Nations Reports of the Secretary-General on the Protection of Civilians in Armed Conflict describe the making of amends as an emerging norm in international law; however, the norm is discussed in the context of harm caused by a law of war violation as opposed to lawful collateral damage.¹⁶⁴ The 2010 report of the United Nations Special Rapporteur on Extrajudicial Killings called on the international community to pay attention to the emerging practice of making amends and to study its significance, but again, the amends are in the context of a breach of the laws of armed conflict.¹⁶⁵ Making amends for lawful collateral damage is akin to a strict liability standard, where wrongfulness or negligence is not a factor, and would be financially unfeasible for most parties to an armed conflict.

There is a trend in international law over the past decade to conflate

¹⁶² *Id.*

¹⁶³ See generally Harvard International Human Rights Law Clinic, *Frequently Asked Questions on Amends*, CIVILIANS IN CONFLICT, http://civiliansinconflict.org/uploads/files/publications/Amends_FAQ_2013.pdf. “U.S. Senator Patrick Leahy made the case for the moral imperative behind making amends when he stated in 2009, ‘To not respond, I think, goes to our very conscience and our very morality.’” *Id.*

¹⁶⁴ U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2012/376 (May 22, 2012), <https://docs.unocha.org/sites/dms/Documents/SG%20Report%20on%20PoC%2022%20May%202012.pdf>; U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, U.N. Soc. S/2010/579 (Nov. 11, 2010), <http://reliefweb.int/node/375487>. The 2010 report states,

I note the emerging practice of several States, one that other parties to armed conflict might consider, of acknowledging the harm they cause to civilians and compensating victims. The practice of making amends may range from public apologies to financial payments and livelihood assistance provided to individuals, families and communities. This practice must not be seen, however, as an alternative to prosecuting those responsible for violations of international humanitarian and human rights law and delivering justice to the victims and their families and communities.

Id.

¹⁶⁵ U.N. Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston*, U.N. Doc. A/HRC/14/24 paras. 84–88 (May 20, 2010), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.pdf>.

human rights law with international humanitarian law, and a growing expectation that parties to an armed conflict comport themselves like a domestic police force as opposed to a combat force.¹⁶⁶ The United States takes the position that in an armed conflict, international humanitarian law is the *lex specialis*, and there is no legal obligation to make compensation or condolence payments during an armed conflict.¹⁶⁷ Any decision to make a condolence payment is a policy decision, not based on any legal requirement. Harm to civilians in armed conflict is tragic but often unavoidable. Collateral damage that is lawful under the laws of armed conflict should not require compensation.

In fact, the United States has likely refrained from adopting a permanent condolence system because of concern about creating a new international norm which would then bind it to pay for collateral damage in all future conflicts.¹⁶⁸ The United States should not bind itself to mandatory compensation in all future counterinsurgency operations, let alone total war situations. Such a legal norm would be impractical and financially disastrous. A practical approach prevents the United States from accepting compensation or condolence payments as a legal obligation.

The United States must avoid creating a new international legal norm by being clear that a permanent condolence system is an expression of sympathy only and not compensation. The provision of condolence payments is not *prima facie* evidence of legal liability for causing harm, and in no way is a waiver of sovereign immunity.¹⁶⁹ At the same time, a

¹⁶⁶ Wells Bennett, *The Extraterritorial Effect of Human Rights: The ECHR's Al-Skeini Decision*, LAWFARE (July 12, 2011), <https://www.lawfareblog.com/extraterritorial-effect-human-rights-echrs-al-skeini-decision>.

¹⁶⁷ See Silvia Borelli, *The (Mis)-Use of General Principles of Law: Lex Specialis and the Relationship Between International Human Rights Law and the Laws of Armed Conflict*, 46 IUS GENTIUM 265, 289 (2015).

¹⁶⁸ See Ryan Scoville, *How Do American Courts (and Scholars) Ascertain Customary International Law?*, LAWFARE (Oct. 29, 2015), <https://lawfareblog.com/how-do-american-courts-and-scholars-ascertain-customary-international-law>. “The established doctrine is that custom arises from general and consistent state practice that is backed by a sense of legal obligation. For the most part, this has been understood to require broad surveys of foreign state practice, plus inquiries into official motives.” *Id.*; see also Gilbert, *supra* note 23, at 412. “This may explain why [the] campaign to have military payments recognized as an *entitlement* of war (and not optional) received considerable pushback, especially from militaries, for it would transform the international norms of war and principle of ‘collateral damage’ as they currently exist.” *Id.*

¹⁶⁹ See Witt, *supra* note 61, at 1458–59 (2008).

condolence payment should not constitute a bar to future claims against the United States. Condolence payments must be accompanied by culturally appropriate and earnest condolence expressions. In fact, criticism of recent U.S. compensation schemes have involved allegations that the United States seeks to wash its hands of any liability for civilian harm through condolence payments.¹⁷⁰ By adopting a practical approach to the handling of condolence payments, the United States not only addresses some of the criticisms currently leveled against it, it creates the foundation from which to argue against any future efforts to make such payments a legal obligation under international law.

III. Condolence Payments as a Commander's Tool

A. Counterinsurgency Operations

Counterinsurgency is the primary philosophical tactic used to address security challenges faced by the United States in this century.¹⁷¹ The U.S. Army's own doctrine has established condolence payments as a valuable tool in COIN operations.¹⁷² Commanders and judge advocates have

The basic jurisdictional rule in American law (as in international law) was one of sovereign immunity: a state may not be hauled against its will into its own civil courts or into those of coequal sovereigns [Under] traditional international law rules, members of the armed forces of one state who go with their armies into the territory of another are generally accountable only to their own legal system, not to the legal system of the state in which they find themselves.

Id.

¹⁷⁰ See Gilbert, *supra* note 23, at 412. "The profligate disbursement of money by troops is thus used not only to constitute civilian harm as accidental but to deny accountability."

Id.

¹⁷¹ Eliot A. Cohen, *Preface to U.S. Gov't Interagency Counterinsurgency Initiative*, U.S. GOV'T COUNTERINSURGENCY GUIDE (Jan. 2009), <http://www.state.gov/documents/organization/119629.pdf>.

¹⁷² See FM 3-24.2, *supra* note 16, para. 7-89.

Recent experiences have shown the effectiveness of using money to win popular support and further the interests and goals of units conducting counterinsurgency operations A counterinsurgency force can use money to . . . [r]epair damage resulting from combined and coalition operations . . . [and p]rovide condolence payments to civilians for casualties from combined and coalition operations.

Id.

observed that condolence payments can contribute to a unit's overall force protection and mission objective.¹⁷³ In fact, a unit's lack of ability to provide condolence payments has been shown to make a unit more vulnerable.¹⁷⁴

In Afghanistan in 2001, the Taliban was offering aid to civilians harmed by U.S. attacks, while the U.S. military still lacked authority to provide condolence payments.¹⁷⁵ This lack of authority to express condolence "exposed a strategic vulnerability and opened [the United States] to charges of indifference to the plight of civilians."¹⁷⁶ This absence of condolence authority does little to draw the allegiance of the local population towards the United States and away from armed insurgents. As one American lawyer and former intelligence officer in Iraq noted,

By foregoing a broader, culturally expected reconciliative process [such as a condolence payment], the U.S. military misses valuable opportunities to engage aggrieved Iraqi family members, demonstrate genuine compassion and sympathy, explain their objectives in Iraq, and increase mutual understanding. This missed opportunity sacrifices a chance to potentially win that Iraqi parent's "heart and mind" through dialogue.¹⁷⁷

Commanders value the ability to make condolence payments as quickly as possible, and add that the payment transaction offers an opportunity for dialogue with the local population and personal expression of sympathy.¹⁷⁸

¹⁷³ See CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, FORGED IN THE FIRE: LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 1994–2008, 256 (1 Sept. 2008) [hereinafter FORGED IN THE FIRE].

¹⁷⁴ See *infra* Section IV(F).

¹⁷⁵ See Ronen, *supra* note 22, at 101–02.

¹⁷⁶ *Id.*

¹⁷⁷ Jeremy Joseph, *Mediation in War: Winning Hearts and Minds Using Mediated Condolence Payments*, 23 NEGOT'N J. 219, 221 (2007).

¹⁷⁸ See *Marines Continue Condolence Payments in Najaf*, GLOBAL SEC'Y (Oct. 6, 2004), <http://www.globalsecurity.org/military/library/news/2004/10/mil-041006-centcom01.htm>. In September 2004, following weeks of intense fighting in Najaf, Iraq, by multinational and Iraqi security forces against Shiite militias, a Marine unit sent a mobile condolence payment team through neighborhoods to expedite condolence payments to civilians caught in the crossfire. *Id.*

In both Iraq and Afghanistan, condolence payments became key commanders' tools. Protracted COIN operations ideally limit fighting, but can involve a great degree of unwanted civilian harm due to fighting in populated areas and lack of a uniformed or clearly distinguished enemy.¹⁷⁹ At the same time, COIN operations include a focus on nation-building and winning hearts and minds, fostering positive relationships with the local population crucial to mission success.¹⁸⁰ Contemporary COIN theory focuses on avoiding the alienation of the civilian population.¹⁸¹

We've gone mobile to ensure every Najafi gets the opportunity to get quickly compensated for legitimate losses or injury," said [Colonel] Anthony Haslam, commanding officer of the Marine unit. "We're thinking outside the box to expedite a slow process, motivated by the desire to make life better for the locals.

Id.

¹⁷⁹ See Ronen, *supra* note 22.

¹⁸⁰ *Id.* at 215–16.

Ex gratia payments are limited to a discrete type of conflict, even if those constitute the principal conflicts in which the [United States] and its allies have been involved since World War II. These are conflicts where the injuring Western powers have perceived their opponents not as a monolithic enemy but as a mixture of potential allies and enemy insurgents. The objectives of the Western powers have been broader than merely a military counterinsurgency victory, and include nation and state-building and reconstruction. These powers also maintain a visible presence among the civilian population.

Id.

¹⁸¹ W. Michael Reisman, *Compensating Collateral Damage in Elective International Conflict*, 8 INTERCULTURAL HUM. RTS. L. REV. 1 (2013).

Yet, there are compelling pragmatic, strategic reasons why payment for collateral damage in elective armed conflict should not fall prey to these economic disinclinations. In the so-called second and third generation modes of warfare, innovated and used with devastating effect by Chairman Mao and General Giap, the support of the non-combatant population is deemed vital. Hence, contemporary counterinsurgency theory now focuses on avoiding alienating the non-combatant population. In those terms, timely compensation to individuals who have suffered collateral damage should be seen as a strategic device The point is that "strategic compensation" is self-serving; in the area of collateral damage, strategic compensation and international human rights converge.

Id.

Condolence payments have proven to be an effective tool in “winning hearts and minds” and stemming violence against U.S. servicemembers.¹⁸² This is in contrast to the FCA, which, as discussed above, was designed as a tool for traditional warfare, not COIN operations, and explicitly prohibits payments made solely out of compassion.¹⁸³

Condolence payments in COIN operations mirror the concept of blood money, particularly because counterinsurgency operations often involve protracted presence of U.S. military among a foreign population. The U.S. combat unit represents the group from whom the payment is collected. The payment is made by a certain unit on behalf of persons, whether known or unknown, who inflicted harm that is being attributed to the unit or to the U.S. military writ large. The payment may be made to the individual harmed, but might be made to that individual’s dependents or some other representative group. The hope of the U.S. military is that the payment will foster good relations and dissuade retaliation.¹⁸⁴ In theory, a group that feels their loss has been properly acknowledged by the U.S. military is less likely to retaliate by supporting insurgent groups or joining insurgent groups themselves.¹⁸⁵

Professor Katharine Blue Carroll, a professor of political science at Vanderbilt University, was part of a human terrain team in Iraq in 2008 and 2009.¹⁸⁶ She observed how important it is for soldiers to integrate cultural knowledge into their COIN operations, especially regarding the handling of claims and condolence payments, by stating,

¹⁸² See Ronen, *supra* note 22, at 215–16.

¹⁸³ See *supra* Section II(A)(4) (discussing the FCA’s roots in traditional warfare).

¹⁸⁴ Reisman, *supra* note 181.

¹⁸⁵ See Carroll, *supra* note 147, at 50.

Iraqis were, in fact, willing to treat the U.S. military as a fellow tribe to the extent that they offered it access to their ancient system of tribal settlement, allowing American soldiers to pay [condolence] and avoid the revenge attacks that tribal-minded Iraqis, at least, were culturally required to attempt. This was probably most likely when the payments were appropriate and, ideally, not unilaterally set; when the U.S. military took responsibility for the incident; and when the claims process did not dishonor the victim or his or her family.

Id.

¹⁸⁶ See Carroll, *supra* note 147, at 41.

Examining U.S. military claims payments through the lens of Iraq's system of tribal settlement contributes to the ongoing debate about the role of cultural knowledge in U.S. military operations It may also assist in developing U.S. military claims system in future conflicts, as similar forms of customary dispute resolution exist throughout much of the Middle East, Africa, Southeast Asia and even Latin America. In fact, these forms of customary law may not only be relevant to issues of designing claims systems where they are prevalent, but also to negotiating the peaceful end to conflicts in those places.¹⁸⁷

Professor Carroll also noted that in a country where blood money is expected as condolence, it is crucial to emphasize that a condolence payment is not a form of compensation or an attempt to relieve the United States of legal liability for the harm caused.¹⁸⁸ This is in contrast to the majority of the standard forms given to local nationals during the claims process, which indicate that accepting compensation or condolence relieves the United States of legal liability for the harm caused.¹⁸⁹ A commander on the ground is not likely to be concerned with a potential lawsuit against the United States down the road. The commander's concern is accomplishing the mission and keeping troops safe, including being safe from retaliation for collateral damage.

B. Non-Combat Operations

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 47.

¹⁸⁹ An example of a legal liability waiver is available for viewing on the American Civil Liberties Union (ACLU) website pursuant to a Freedom of Information Act disclosure. Documents received from the Department of the Army in response to ACLU Freedom of Information Act Request, Army Bates 24349-24394, <https://www.aclu.org/sites/default/files/webroot/natsec/foia/log2.html>. The language on the form states the following:

Your claim . . . filed pursuant to the Foreign Claims Act has been approved in the amount of \$3500.00. The proposed payment, if accepted, will constitute a full and final satisfaction of your claim against the United States and against any of its entities and a full and final waiver by you of your claim against the United States and against any of its entities.

Id.

Condolence payments are not only important during combat operations. For instance, legal personnel assigned to Combined Joint Task Force-Horn of Africa (CJTF-HOA) conducting non-combat operations noted in an after-action report (AAR) that a condolence payment made within twenty-four hours of an incident is customary in many East African cultures, and that this quick timeline did not allow for the thorough investigation and adjudication process required under the FCA.¹⁹⁰ When CJTF-HOA fell under the authority of U.S. Central Command, they had been authorized to pay *solatia*.¹⁹¹ However, when CJTF-HOA was reorganized to fall under Africa Command (AFRICOM) they lost *solatia* authority and lacked any mechanism for a quick payment to an aggrieved foreign national in the form of a condolence or *solatia* payment.¹⁹² While the CJTF-HOA AAR recommended working with AFRICOM Office of Legal Counsel (OLC) to institute a condolence payment mechanism, this authority gap would not have existed in the first place if a permanent condolence payment scheme were in place.¹⁹³

The Army is moving toward a regionally aligned force model, directing units to align with specific foreign nations for training and operations.¹⁹⁴ This training concept includes increased security cooperation operations, meaning U.S. troops find themselves engaged in training exercises with foreign militaries around the world.¹⁹⁵ For example, one brigade stationed at Fort Riley, Kansas, was engaged in 128 separate missions in twenty-eight different African countries in 2013 alone.¹⁹⁶

Not only does the U.S. military increasingly engage in military training abroad, it also sends troops to act as “advisors” in active combat zones, such as advising the Ugandan military in areas where the Lord’s

¹⁹⁰ Combined Joint Task Force-Horn of Africa, Staff Judge Advocate AFTER ACTION REPORT: CAMP LEMMONIER DEPLOYMENT JULY 11–MAY 12 (May 22, 2012) (maintained by CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See Rosa Brooks, *Portrait of the Army as a Work in Progress*, FOREIGN POL. (May 8, 2014), <http://foreignpolicy.com/2014/05/08/portrait-of-the-army-as-a-work-in-progress/>.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

Resistance Army is active.¹⁹⁷ The presence of U.S. troops in countries with compromised security and weak rule of law has the potential to quickly escalate. The possibility for U.S. troops to find themselves suddenly engaged in combat in any of these nations is not far-fetched. While the FCA would apply in any of these countries for non-combat damage, there is no current, permanent framework to address the possibility of addressing collateral damage from combat should it arise in any of these nations around the world.

C. Condolence Payment Program Challenges

Condolence payments are a commander's tool, and just like any tool, they are only as effective as the individual who wields them. Insensitive condolence payment procedures can have an opposite effect than their intent and insinuate that the United States is attempting to absolve itself of any responsibility.¹⁹⁸ Even in countries where "blood money" is culturally accepted, condolence payments may be insulting to local populations if they are not accompanied by an appropriate expression of apology.¹⁹⁹ One Iraqi sheikh explained, "You can never pay the price of a human soul; it is too valuable. So the family has to accept that the [condolence payment] is not that. It is a payment for forgiveness and moving forward."²⁰⁰ If a condolence payment is not handled properly, it may be counter-productive.

Condolence payments have not always been accepted as effective commander's tools by U.S. courts. *Koohi v. United States*, the seminal case discussing the combat activities exception, set forth three main arguments against paying combat claims: first, the possibility of paying for damage might have a chilling effect on our troops and make them more timid at a time when they should be forcefully overcoming enemy forces; second, combat by its very nature is overwhelmingly violent, and it is not

¹⁹⁷ Karl Wycoff, Deputy Assistant Secretary, Bureau of African Affairs, Department of State, Remarks at The Center for Strategic and International Studies (Feb. 23, 2012) (explaining that President Obama had authorized a small number of U.S. troops to work with Ugandan forces pursuing the Lord's Resistance Army, engaging in training and operational planning).

¹⁹⁸ See Gilbert, *supra* note 23, at 407. "[T]he military's appeal to local customs are somewhat disingenuous, in that military compensation has a much longer genealogy that suggests that the money is paid out of military self-interest rather than response to local needs." *Id.*

¹⁹⁹ *Id.* at 403–21 (2015).

²⁰⁰ See Carroll, *supra* note 147, at 47.

logical to compensate a few claimants when violence is impacting an entire population; and third, servicemembers should not be punished for injuring members of the enemy military or civilian population during combat.²⁰¹ None of these arguments actually apply in the context of COIN operations.

There is no evidence that the possibility of having to pay a condolence claim has ever impacted a combat mission. The actual restraint on decision-making in combat is the commander's adherence to rules of engagement, not the financial considerations of a condolence payment.²⁰² Especially in the COIN context, the negative reaction caused by civilian harm is more persuasive than financial considerations. When a commander determines whether and how to attack a target, the assessment includes whether the expected military advantage will be disproportionate to the potential civilian casualties, and the associated negative impact of the operation in the long term.²⁰³

The argument that it is illogical to compensate just a few victims of conflict when an entire region is at war may be consistent with conventional war, where the focus is kinetic operations and total defeat of the enemy. However, this argument is not persuasive in the context of

²⁰¹ *Koohi v. United States*, 976 F.2d 1328, 1334–35 (9th Cir. 1992).

²⁰² See James F. Garrett, *Necessity and Proportionality in the Operation Enduring Freedom VII Campaign* (Mar. 15, 2008) (Strategy Research Project, U.S. Army War College), <http://www.dtic.mil/dtic/tr/fulltext/u2/a479007.pdf> (discussing the analysis a commander and judge advocate engage in when determining whether to engage a target, financial considerations not being mentioned among the criteria).

²⁰³ See GANESH SITARAMAN, *THE COUNTERINSURGENT'S CONSTITUTION: LAW IN THE AGE OF SMALL WARS* 50 (2012).

In counterinsurgency, the military side of the proportionality balancing test is thus handicapped by the fact that any attack may cause backlash. As a result, counterinsurgency might interpret proportionality not as military benefits versus humanitarian costs but rather as a cost-benefit analysis, in which humanitarian and strategic interests operate on both sides of the scale and incorporate direct and indirect effects. Most important, military action appears both as a cost and a benefit, not just as a benefit: killing civilians and even legitimate targets might be costly in terms of winning over the population if it could result in substantial backlash. Counterinsurgency's proportionality test therefore places a thumb on the scale against military action. As a result, proportionality in counterinsurgency is likely to be far more humanitarian in its orientation than was proportionality in conventional warfare.

Id.

COIN operations, where the mission shifts from total war to winning hearts and minds:

Counterinsurgency's win-the-population approach differs from kill-capture in two ways. First, although counterinsurgency has a place for killing and capturing enemies, kill-capture is not the primary focus. Because insurgents gain strength from the acquiescence of the population, the focus of counterinsurgency is building the population's trust, confidence, and cooperation with the government. Second, counterinsurgency is not limited to military operations. It includes political, legal, economic, and social reconstruction in order to develop a stable, orderly society, in which the population itself prevents the emergence or success of the insurgency.²⁰⁴

The final *Koohi* argument, that servicemembers should not be punished for injuring enemies or civilians, makes little sense. Should a servicemember harm someone in a manner violating the laws of war, the Uniform Code of Military Justice will provide for their punishment.²⁰⁵ However, a condolence payment cannot be construed to be a punishment against that servicemember, especially if the payment comes from a condolence-specific fund and not from the servicemember's unit's operational or CERP funds. A soldier should be punished for violating the laws of war.²⁰⁶ The fact that those acts required a condolence payment does not enter into the decision to punish for commission of a crime.

Condolence payments are not a perfect instrument, but if the United States can trust its military commanders to make life-and-death decisions, they should be trusted to use their own judgment in determining whether condolence payments should be used in a certain battlespace and in which cases. When necessary, the use of condolence payments could always be withheld by higher authorities or restricted through operational orders, and in joint and coalition environments, in consultation with U.S. multinational partners. The permanent condolence payment system proposed below relies on the good judgment of commanders at all levels,

²⁰⁴ See Sitaraman, *supra* note 45, at 1771.

²⁰⁵ See DoD LAW OF WAR MANUAL, *supra* note 43, para. 18.19.3.1 "The principal way for the United States to punish members of the U.S. armed forces for violations of the law of war is through the Uniform Code of Military Justice." *Id.*

²⁰⁶ U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 507 (18 July 1956).

judge advocates, and other key staff on the ground.

IV. A New Approach: A Permanent Condolence Payment System

This article's proposed permanent condolence payment framework would be a commander's tool available throughout the DoD. Congress has taken the steps to create a DoD-wide authority for condolence payments, and the President has emphasized the need to make such payments, but the DoD has not taken any steps to operationalize the condolence payment framework through a directive or service-specific updates to regulations governing claims and condolence payments.

A. Executive Order 13732

On July 1, 2016, President Obama signed Executive Order 13732, titled United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving Use of Force.²⁰⁷ Executive Order 13732 directs all relevant U.S. departments and agencies to enhance their focus on the prevention of harm to civilians in conflict, as well as to offer condolence payments.²⁰⁸ Executive Order 13732 states, "In furtherance of U.S. Government efforts to protect civilians in U.S. operations involving the use of force in armed conflict . . . , and with a view toward enhancing such efforts, relevant departments and agencies shall continue to take certain measures in present and future operations."²⁰⁹ The order continues, "In particular, relevant agencies shall, consistent with mission objectives and applicable law, including the law of armed conflict . . . acknowledge U.S. Government responsibility for civilian casualties and offer condolences, including *ex gratia* payments, to civilians who are injured or to the families of civilians who are killed."²¹⁰ At first glance, it appears that the President of the United States has ordered the DoD to offer condolence payments in all future armed conflicts. The implied task, then, would be for the DoD to create a permanent condolence payment system. However, the DoD has not yet taken any steps to put the order into effect, and the tasking is extremely broad. In fact, the position of the DoD is that Executive Order 13732 is not actually a tasking for agencies to take any

²⁰⁷ Exec. Order No. 13732, 3 C.F.R. 81 (2016).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

action at all.²¹¹ Rather, it is simply a restatement of best practices already in place:

Executive Order 13732 is declaratory in nature, expressing the best practices currently in place, including those related to offering condolence payments to the families of civilians harmed in combat operations. Such *ex gratia* payments are a tool available to commanders for addressing civilian harm, where the commander determines they are feasible, appropriate, and consistent with military objectives. As such, commanders have the authority they need to implement effective condolence payments programs.²¹²

This interpretation does seem consistent with the language of the order, which states: “The U.S. Government shall maintain and promote best practices that reduce the likelihood of civilian casualties, take appropriate steps when such casualties occur, and draw lessons from our operations to further enhance the protection of civilians.”²¹³ Further, even if President Obama’s intent was to order the creation of a new condolence payment mechanism, he does not possess the power to fund such a mechanism.²¹⁴

²¹¹ E-mail from Tara Jones, Foreign Affairs Specialist, Office of the Under Secretary of Defense for Policy (August 19, 2016 4:17 PM) (on file with the author) [hereinafter Jones E-mail].

²¹² *Id.*

²¹³ Exec. Order No. 13732, *supra* note 207.

²¹⁴ See Dino P. Christenson & Douglas L. Kriner, *Symposium: Executive Discretion and the Administrative State: Political Constraints on Unilateral Executive Action*, 65 CASE W. RES. L. REV. 897, 908 (2015).

[W]e argue that presidents consider more than just whether Congress or the courts will act affirmatively to overturn a unilateral presidential order. Rather, presidents consider the longer-term political costs that unilateral action may entail. These political costs can take many forms, two of which are particularly important. First, when presidents act unilaterally, they may burn bridges with members of Congress opposed to the action on political, ideological, or even constitutional grounds. To be sure, in almost all circumstances, presidents will be able to carry the day and beat back any legislative effort to undo what they have done unilaterally. However, the ill will so generated on Capitol Hill may prove politically costly the next time the president’s policy wishes require action that only Congress can take. For example, despite being a rather blunt instrument, Congress retains the power of the purse and therefore, ultimately, the power to support or de-fund most policies that presidents begin unilaterally.

Congress, on the other hand, does have the ability to fund a condolence payment program, but without the powers to fund a program and the powers to authorize a program acting in concert, a permanent condolence payment program will never be realized.

B. Operationalizing Section 8121

Vermont Senator Patrick Leahy has been a long-time proponent of a permanent condolence payment system for civilian harm.²¹⁵ During a contentious and hurried legislative session regarding the 2015 federal budget, Senator Leahy's staff slipped a framework and funding authorization for battle compensation into Section 8121 of the 2015 Consolidated and Further Continuing Appropriations Act.²¹⁶ Section 8121 allows the Secretary of Defense to allocate funding from the Pentagon budget to an *ex gratia* payment program.²¹⁷ Even though Section 8121 passed into law along with the rest of the Appropriations Act, the DoD has not yet taken any steps to put Section 8121 into action.²¹⁸ The Department of Defense states that Section 8121 created an appropriation only, and not the actual authority to create a payment program.²¹⁹ The fact that U.S.

²¹⁵ See Johnsen, *supra* note 9.

²¹⁶ See Consolidated and Further Continuing Appropriations Act, 2015, Pub. Law No. 113-235, 128 Stat. 2130 (2014); see also Johnsen, *supra* note 9.

Senator Leahy's Staff Member, [Tim Rieser], was working on slipping the provision directly into the appropriations bill . . . a giant end run around the Pentagon's defenses to give the department money it didn't want. Nothing could be stripped out; either everything went through or nothing did. That was the setup—an all-or-nothing bill against a ticking clock—that Rieser used to turn his language into law. No one from the Pentagon had time to find it, let alone block it. More than 300 pages into the bill, the single paragraph, innocuously titled Section [*sic*] 8127, and its eight subsections, taking up just over two pages of text, were easy to miss.

Id.

²¹⁷ *Ex gratia*, meaning “from favor” in Latin, is a common legal term for a payment made out of a sense of moral obligation as opposed to legal obligation. MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/ex%20gratia> (last visited May 26, 2016).

²¹⁸ E-mail from The Office of Senator Patrick Leahy (D-Vt), author of section 8121 (May 18, 2016 5:46 PM) (on file with the author) [hereinafter Leahy E-mail].

²¹⁹ Jones E-mail, *supra* note 212.

legislators would rather extend the Afghanistan CERP fund to cover new U.S. engagements in Iraq rather than breathe life into Section 8121 may indicate the U.S. government prefers to continue a piecemeal approach to honoring civilian harm caused by our forces.

Section 8121 of the 2015 Consolidated and Further Continuing Appropriations Act is a starting point, but it is not a permanent solution by any means. First, Section 8121 only tapped into the \$30,824,752,000 in DoD-wide funds appropriated for Fiscal Year 2015.²²⁰ These funds were only made available for Fiscal Year 2015, meaning that this funding source has already elapsed without an authorization in place to use the funds. Second, Section 8121 provided that the Secretary of Defense could prescribe regulations governing *ex gratia* payments for damage, personal injury, or death that is incident to combat operations of the U.S. Armed Forces in a foreign country.²²¹ The Secretary of Defense has not prescribed any such regulations. The Secretary also has not appointed or delegated the authority to appoint any military commanders as individuals authorized to provide *ex gratia* payments in their discretion, as section 8121 allows.²²²

Although Section 8121 appears to be dead in the water, it is useful to evaluate its well thought-out details. Under Section 8121 an *ex gratia* payment may only be provided if: (1) the prospective foreign civilian recipient is determined by the local military commander to be friendly to the United States; (2) a claim for damages would not be compensable under [the FCA]; and (3) the property damage, personal injury, or death was not caused by action by an enemy.²²³ Section 8121 clearly states that any *ex gratia* payments are not admission or acknowledgment of legal

Regarding Section 8121 of Consolidated and Further Continuing Appropriations Act, 2015, Pub. Law No. 113-235, 128 Stat. 2130 (2014), it is my understanding that this provision created an appropriation only. As previously stated, we believe DoD currently has the appropriate tools necessary to ensure an effective condolence payment program as one tool for commanders to address civilian harm.

Id.

²²⁰ H.R. Rep. No. 114-139, 114th Cong., (2015–2016) Department of Defense Appropriations Bill, 2016 (2016) “Fiscal year 2015 appropriation . . . [is] \$30,824,752,000.” *Id.*

²²¹ See Consolidated and Further Continuing Appropriations Act, 2015, Pub. Law No. 113-235, 128 Stat. 2130 (2014).

²²² Leahy E-mail, *supra* note 218.

²²³ Consolidated and Further Continuing Appropriations Act, *supra* note 221.

obligation to compensate, just like *solatia*.²²⁴

Section 8121 also provides that the Secretary of Defense should determine whether an *ex gratia* program is appropriate in a particular setting, and,

The amounts of payments, if any, to be provided to civilians determined to have suffered harm incident to combat operations of the Armed Forces under the program should be determined pursuant to regulations prescribed by the Secretary and based on an assessment, which should include such factors as cultural appropriateness and prevailing economic conditions.²²⁵

Section 8121 mandates that any payments require legal review, and a written record of any payment offered or denied must be kept by the local commander and submitted to an appropriate office designated by the Secretary of Defense.²²⁶ Section 8121 also places a reporting requirement on the Secretary of Defense, requiring an annual report to congressional defense committees on the efficacy of the *ex gratia* payment program, “including the number of types of cases considered, amounts offered, the response from *ex gratia* payment recipients, and any recommended modifications to the program.”²²⁷

This article’s proposed permanent condolence payment program mirrors Section 8121, but suggests additional enhancements and details to ensure that such a program will be as useful and flexible as possible for commanders. One such suggestion is an annual reporting requirement.²²⁸ Although an annual reporting requirement would be one more task burdening a commander’s already significant reporting obligations, the data gathered would be valuable for assessing how U.S. forces are causing and addressing collateral damage. Additionally, Section 8121, recommends that the Secretary of Defense hold the authority for condolence payments to be made in certain areas of operations.²²⁹ In contrast, the proposed permanent condolence system would operate from the standpoint that the authority to offer condolence is a default

²²⁴ *See id.*

²²⁵ *Id.*

²²⁶ *See id.*

²²⁷ *Id.*

²²⁸ *See id.*

²²⁹ *Id.*

presumption that may then be withheld by higher authorities should they choose to do so, an already familiar approach to managing authorities, with the most notable example being the U.S. Standing Rules of Engagement.²³⁰

C. An Envelope of Money Is Not Enough—Actual Condolence Is Required

Simply dispensing money to victims does not meet the intent of condolence payments.²³¹ A condolence payment will only foster reconciliation if the victims feel that their loss is truly recognized.

Unfortunately [the condolence payment] process as it currently stands—condolence payment *sans* dialogue—is relatively ineffective because it lacks what lies at the core of the traditional Arab practice associated with condolence payments: a reconciliative process. By handing out payments with minimal dialogue and interaction, America is failing to achieve its counterinsurgency goal in this area, and both the Iraqi population and U.S. troops pay the price.²³²

²³⁰ *Id.*; see INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY JA 422, OPERATIONAL LAW HANDBOOK 81–84 (2015).

Discussing the standing rules of engagement and use of supplemental measures: “Absent implementation of supplemental measures, commanders are generally allowed to use any weapon or tactic available and to employ reasonable force to accomplish his or her mission, without having to get permission first.

Id.

²³¹ See Carroll, *supra* note 147, at 43.

I argue that Iraqis did accept such payments as [condolence], especially when U.S. payments were negotiated, came with an acceptance of responsibility, and were not paid in a way that further dishonored the victim’s family. However, the U.S. military was inconsistent in applying these three criteria to its claims payments across the course of the war.

Id.

²³² Joseph, *supra* note 177, at 224.

The ability to engage in a truly reconciliative process is both resource- and security-dependent. Sufficient staff, including translators and security personnel, are necessary to carry out a reconciliation mission. Security considerations are paramount, and a unit may not always have the ability to engage in a dialogue safely.

One suggestion for truly effective mediation is to involve a respected local authority as a mediator of the condolence payment event, such as a religious leader, mayor, tribal elder, or a nongovernmental organization worker.²³³ In the context of Iraq, one scholar suggested that “the mediator should be a respected community figure, to ensure the aggrieved Iraqi feels the process is meaningful, independent and credible: an Iraqi process, led by Iraqis for the purpose of Iraqi rehabilitation, but with American participation.”²³⁴ This is in contrast to the “perfunctory, quota-driven, shrink-wrapped, and prescribed DoD mediation program where Iraqi participants are ushered through like extras on a movie set.”²³⁵ One brigade commander in Iraq regularly engaged local sheikhs to facilitate condolence payments.²³⁶ “The benefit of this was not only that the family gave up their right of revenge; it also strengthened the influence of those sheikhs willing to work with that brigade.”²³⁷

When the actual payment method of condolence is culturally appropriate, it is more likely to meet the aim of enhancing U.S. security. For example, in Iraq, when a *diya* payment is made, members of both tribes then sit together for coffee or a meal.²³⁸ In Iraqi tribal culture, it is against custom to share food with someone involved in an outstanding dispute.²³⁹

Iraqis intending to take revenge against Americans despite having received payments would have been unlikely to share meals with them, yet Iraqis did eat with Americans who delivered payments. [One unit that ate lunch with the Iraqis accepting a condolence payment]

²³³ *Id.* at 234.

²³⁴ *Id.* at 245. “The independent value of a cathartic, reconciliative, culturally-tailored process can play a role beyond Iraq, such as ongoing operations in Afghanistan, and future nation-building operations.” *Id.*

²³⁵ *Id.* at 235.

²³⁶ See Carroll, *supra* note 147, at 48.

²³⁷ *Id.*

²³⁸ *Id.* at 44.

²³⁹ *Id.*

never experienced subsequent violence traceable to the [death for which condolence was made].²⁴⁰

In regions where security allows for non-military agencies, such as USAID or units akin to provincial reconstruction teams (PRTs), there may be an opportunity for units to augment whatever expertise their own civil affairs officers possess by teaming with PRTs or offices such as the USAID Office of Conflict Management and Mitigation, which conducts field work around the world fostering reconciliation.²⁴¹

D. Combat Activity as a Factor, Not an Exclusion

Under the FCA framework, the combat activity exclusion is a total bar to compensation, whereas *solatia* and CERP condolence payments procedures contain no guidance at all regarding the nature of the causation of harm.²⁴² A middle-ground for a permanent condolence payment framework would include the combat-related causation of the harm as a factor to be weighed in determining whether to make a payment, rather than a total bar.²⁴³ The gravity of the harm should be taken into

²⁴⁰ *Id.* Another example of a culturally appropriate condolence payment being an effective means of preventing violence is quite powerful.

In late 2003, north of Baghdad, soldiers shot at what they believed were insurgents hiding in the bushes near where an IED had recently gone off, but they killed two young sisters from a village near their base. Although the girls' village had previously been quiet, each night for a week after their deaths, mortars were shot from their village into the base. The unit's commander ultimately paid the girls' family \$2000, an amount that was suggested to him by the local police chief. The payment was delivered at a meeting modeled on the tribal system. The mortars stopped immediately, and it was six months or more before the base had any problem from the village again. The girls' family was very poor, and the American soldiers handled the payment well, both of which probably encouraged the family to accept the amount (the police chief may have checked it with them in advance).

Id.

²⁴¹ See Joseph, *supra* note 177, at 239.

²⁴² See DA PAM 27-162, *supra* note 27, para. 10-101-06 (discussing payment of *solatia* "without regard to liability" and not deriving necessarily "from legal responsibility"); see also Afghanistan CERP SOP, *supra* note 107, at 13-14 (stating only that the death, injury, or battle damage must be caused by U.S. or coalition forces, placing no further restrictions on causation of harm).

²⁴³ See Jones, *supra* note 33, at 144.

consideration, and whether the harm was incurred during combat should be considered. Combat elements should also be taken into consideration as a part of the totality of the circumstances. The causation of the harm would be weighed as a factor just as the “friendliness” of the victim is weighed.

E. The Condolence Committee

In order for condolence payments to be truly useful as a commander’s tool, the commander and commander’s staff must have meaningful input and coordination regarding the condolence payment process. A Condolence Committee, an entity akin to an FCC, should be created to involve the battlespace commander and judge advocate at a minimum, and intelligence officers and civil affairs personnel, when such assets are assigned to the unit concerned. A single judge advocate or trio of judge advocates should not be making condolence payments in a vacuum. Consultation with the commander and intelligence officers should be required for substantial payments. Where civil affairs assets are available for consult, they may also prove a valuable part of a condolence determination.

Intelligence staff officer involvement in the Condolence Committee would be a two-way street: the intelligence officer can inform the Condolence Committee regarding knowledge of the alleged incident, the nature of the victim, and the impact of the potential payment on the battlespace. The intelligence officer, along with civil affairs officers, could then also play a key role in planning the actual payment event. Involvement of intelligence assets in the condolence process would be a key intelligence-gathering tool, offering an opportunity to interact closely with the local population.²⁴⁴

Because there will always be situations where claims must be denied, this article does not advocate elimination of the combat exclusion altogether; the combat exclusion serves a valid purpose. The funds allocated to pay foreign claims are obviously limited and courts have recognized that there are legitimate reasons for denying claims that result from combat.

Id.

²⁴⁴ See, e.g., Walerstein, *supra* note 14. “Furthermore, based upon information from those claims and related investigations, the claims lawyers were so successful in intelligence-gathering, including locating a hidden weapons cache and arresting an enemy soldier, that

Most brigades have intelligence officers with the capacity to gather human intelligence and counter-intelligence.²⁴⁵ A unit's mission would benefit from intelligence officers routinely debriefing Condolence Committee members and interpreters regarding their interaction with local citizens during the claims process.²⁴⁶ Intelligence officers are actually encouraged to integrate with other operations. "It has the advantage of placing the team in contact with the local population and allowing it to spot, assess, and interact with potential sources of information."²⁴⁷

Involving intelligence officers in the Condolence Committee process would also highlight any overlap between the local citizens meeting with the Condolence Committee and persons, areas, and activities already known to have intelligence significance.²⁴⁸ Moreover, depending on

a counterintelligence soldier was assigned to the claims office." *Id.* (citing Borch); *see also* BORCH, *supra* note 74, at 75–76.

²⁴⁵ U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTION OPERATIONS (Sept. 2006).

²⁴⁶ *Id.* at 5-22.

U.S. forces have many opportunities to interact with the local population in the normal course of their duties in operations. This source perhaps is the most under-utilized [Human Intelligence] collection resource. Some U.S. forces, such as combat and reconnaissance patrols, are routinely tasked and debriefed by the appropriate level G2/S2. Others, such as medical teams or engineers who have extensive contact with the local population, should also be debriefed.

Id.

²⁴⁷ *Id.* at 3-6.

²⁴⁸ Note that a civilian population's response to collateral damage is often to withhold information from the armed force that caused the damage. In that respect, attempting to make amends for the collateral damage is both an opportunity to collect information from the local population and to increase the likelihood that the population will continue to provide information. *See* Condra & Shapiro, *supra* note 12, at 167–87.

We hypothesize that collateral damage causes local noncombatants to effectively punish the armed group responsible by sharing more (less) information about insurgents with government forces and their allies when insurgent (government) forces kill civilians. Such actions affect subsequent levels of attacks because information shared with counterinsurgents facilitates raids, arrests, and targeted security operations which reduce insurgents' ability to produce violence. It thus follows that collateral damage by Coalition forces should lead to increased insurgent attacks against Coalition forces, while collateral damage caused by insurgents should lead to fewer such attacks. Our

whether the Condolence Committee operates in a secured area or travels into unsecured areas, force protection considerations must be taken into account. Intelligence officers involved in the Condolence Committee could advise on situational awareness and force protection issues to ensure the Condolence Committee mission is carried out safely.

F. Higher Payment Thresholds

Many commanders and judge advocates have observed that the ability to pay claims quickly is essential.²⁴⁹ Failure to offer condolence quickly may be perceived as adding insult to injury by the victim or victim's kin. As the Acting Secretary of the Navy wrote to Congress in 1956,

Experience in connection with the presence of our armed forces in foreign countries has demonstrated that the failure to pay promptly for damages done to native residents by members of our forces is one of the principal sources of irritation which adds considerable difficulty to the maintenance of cordial relations with foreign people.²⁵⁰

Low payment thresholds requiring higher and higher levels of approval hamper the prompt settlement of claims. Sending claims to USARCS or SECARMY is especially cumbersome and delays condolence payments. Some soldiers in Iraq became aware of local tribal custom's three day limit to make condolence payments.²⁵¹ As one soldier noted,

data not only are consistent with this argument, but also allow us to cast doubt on several prominent alternative explanations.

Id.

²⁴⁹ See Petreaus Interview, *supra* note 10.

You can certainly do everything you can to minimize those types of injuries and deaths, to minimize damage to infrastructure and so forth, but there will be some, and over time you'd have to have a quick response to that. And the *solatia* payment for death or for injury, payments for damage—you have to have a very rapid response capability.

Id.

²⁵⁰ See *Center 2010 White Paper*, *supra* note 15 (citing Senate Committee on Foreign Relations, The Mutual Security Act of 1956, 84th Cong., 2d sess., 1956, S. Rep. 2273, 9–10).

²⁵¹ See Carroll, *supra* note 147, at 49.

“we had three days before it was ‘game on’ for them.”²⁵² Failure to pay a condolence claim in a timely manner can jeopardize the security of a unit. Retired Colonel Peter Mansoor, who commanded a brigade in Baghdad in 2004, noted,

[Condolence] payments must be timely enough to forestall revenge killings and halt the rumor mill before it takes off at light speed. In the Ready First Combat Team, we would work [condolence] payments as much as possible through local dignitaries such as tribal sheiks or imams. Normally the payments were made in a matter of days, after we had enough time to investigate the incident in question. Sooner is better in these cases.²⁵³

Low thresholds for payments may also be insulting, leading local nationals to the conclusion that lives are not valued by the United States.²⁵⁴ One former claims judge advocate in Iraq explained,

Every Iraqi I spoke with on the issue expressed disbelief I could only offer \$2500 for the death of a human being. Not one Iraqi I encountered ever said the amount made sense or was equitable. The irony is that if an Iraqi filed a claim with me because a military truck on a routine patrol hit the man’s parked car, I could pay him for the full value of his vehicle [as a non-combat claim under the FCA]. However, if the same man filed a claim because his five-year-old daughter was killed by a stray bullet from a firefight involving U.S. forces, I could only pay the man \$2500—if that. Binding a brigade to \$2500 in

²⁵² *Id.*

²⁵³ See Mansoor E-mail, *supra* note 24.

²⁵⁴ See *Center 2010 White Paper*, *supra* note 15.

Under the FCA, the full market value may be paid for a Toyota run over by a tank, but under the current condolence system only 2500 [U.S. dollars] (standard) may be paid for a breadwinner killed in Iraq or Afghanistan. Valuation of life, injury, or property should be decided with guidance from experts on local cultures and local leaders, and ultimately on a case-by-case basis with no arbitrary ceiling. The amount must demonstrate genuine regret for losses suffered and must not be so low as to add insult to injury.

Id.

every case limits the unit's ability to adequately assist in most cases. The artificial limit left survivors bitter and frustrated with the process and[,] in turn[,] the U.S. military.²⁵⁵

On the other hand, there must be some control and fiscal accountability. As the Special Inspector Generals for Iraq Reconstruction and Afghanistan Reconstruction have noted, neither of the U.S. military's recent long-term engagements have given the American taxpayer good value for their money.²⁵⁶

This article's suggested Condolence Committee scheme would ensure accountability and fiscal responsibility while offering swifter response and greater flexibility: a one-member judge advocate Condolence Committee may grant condolence payments up to \$1000. A two-member Condolence Committee consisting of one judge advocate and one company commander may grant condolence payments up to \$10,000. A three-member Condolence Committee consisting of one judge advocate, one battalion commander, and one additional staff officer (judge advocate, civil affairs, or intelligence officer) may grant up to \$50,000. A three-member condolence committee consisting of one judge advocate, one brigade commander (or Special Court-Martial Convening Authority), and one additional staff officer (judge advocate, civil affairs, or intelligence officer) may grant up to a \$75,000 condolence payment. A four-member condolence committee consisting of one judge advocate, one staff judge advocate, one flag officer (or General Court Martial Convening Authority) and one additional staff officer (judge advocate, civil affairs, or intelligence officer) may approve a condolence payment of up to \$150,000. Payments over \$150,000 are submitted to USARCS for approval. To ensure flexibility, commanders may withhold or delegate authorization levels as they see fit to meet the needs of a particular battlespace.

G. Funding Sources

While the FCA has its disadvantages, one of its positive aspects is that FCA payments are centrally funded from USARCS.²⁵⁷ Commanders on

²⁵⁵ See Tracy Testimony, *supra* note 35.

²⁵⁶ See Osterhout, *supra* note 48.

²⁵⁷ See *supra* Section II(A).

the ground do not need to weigh the choice to make a claim payment against their other mission priorities or other funding needs, as with *solatia*, which is funded from a unit's operations and maintenance funds.²⁵⁸ Also, unlike with CERP, commanders do not need to prioritize a key infrastructure project over the decision to pay condolence.²⁵⁹ Ideally, a permanent condolence payment system would be centrally funded by augmenting the budget of USARCS and its sister-service equivalents to fund the program.

H. Filing Procedures and Preliminary Review

Currently, condolence payments come about in two ways: a unit aware of an incident may affirmatively seek out a victim to make amends, or a victim will attempt to file a claim with a unit, and if it is denied under the FCA, it may then be paid out as a condolence payment.²⁶⁰ Local nationals who file claims with U.S. units are not concerned with which legal authority or regulation will lead to their payment, they are only concerned with receiving some acknowledgment of their loss.²⁶¹ This article's proposed framework will make it easier for units to make condolence payments. Moreover, it will allow a local national to file a claim with a unit that may result in either a FCA payment or condolence payment, depending on the nature of the cause of the harm. This article's proposed framework allows units to streamline procedures for FCA and condolence payments, lessening frustration among the local population who may not understand why differing payment authorities are important.

Arguments for a unified claims system have recommended extending an appellate process similar to that of the FCA to condolence payments.²⁶² However, given that this recommendation is for a condolence framework and not a compensation framework, one could argue it does not make sense to have an appellate process. Either the United States wants to extend condolence or it does not. Allowing for an appeals process makes the condolence payment more of an entitlement rather than an offer of sympathy, and drags the United States toward dangerous ground where

²⁵⁸ See *supra* Section II(B)(1).

²⁵⁹ See *supra* Section II(B)(2).

²⁶⁰ But see *Center 2010 White Paper*, *supra* note 15 (noting that some units summarily denied claims under the FCA and did not then consider them as condolence claims).

²⁶¹ See Mansoor E-mail, *supra* note 24.

²⁶² See *Center 2010 White Paper*, *supra* note 15 (arguing for a uniform appeals process for condolence payments).

there is a real risk of creating a new international legal norm for compensation.

However, the U.S. military does not always get its facts correct when investigating whether condolence should be paid. For example, a unit may refuse to offer condolence based on its misunderstanding of an incident. Rather than offering an appellate process, individuals seeking condolence payments should have the opportunity for a “preliminary review” of their situation, upon which a member of the Condolence Committee can provide guidance concerning information that must be gathered in order to likely result in a condolence payment. For instance, if time and security considerations allow, a Condolence Committee should conduct an initial review of an individual’s request for condolence; they may advise the individual as to what additional information or evidence they would need to perfect their request and allow them an opportunity to return to the Condolence Committee for an official review. This preliminary review offers the harmed individual a quasi-appellate process, in that a condolence packet that may have otherwise been denied outright could be improved and brought back for further consideration.

I. No Uniform Valuations

A major criticism of the use of the FCA, CERP, and *solatia* in Iraq and Afghanistan has been the lack of consistency in payment valuations.²⁶³ Another major criticism, the inconsistent application of the FCA’s combat activities exception, would likely be solved through implementation of the permanent condolence payment system. However, the problem of valuation remains. While the loss of one life might be valued at \$1000,

²⁶³ See Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499, 549 (2014).

Of the relatively few claims paid in Iraq and Afghanistan between 2003 and 2006, the average payment for loss of life under the FCA is slightly more than \$4200. However, much variance exists, with one family being paid \$33,000 for the loss of three of their children’s lives and payments at the lower end reaching about \$2400. Given the variations in ease of claims and in the amounts paid, we echo John Fabian Witt’s call for additional systemization in this realm, for example through the development of disposition and payment matrixes similar to the Federal Sentencing Guidelines.

Id.

another local national might receive \$5000 for damage to a crop. Frequently, larger dollar amounts were handed out for vehicle damage than for the loss of life.²⁶⁴ Inconsistent valuations can prove extremely insulting to victims and often fail to convey true sympathy. Some have suggested the development of systematic matrices to calculate damages, similar to tables used by insurance claims or adjusters.²⁶⁵ Judge advocates on the ground have developed their own compensation tables in the past.²⁶⁶ For example, a brigade might develop a valuation table listing the standard valuation for a chicken, a vehicle, and even for the value of a child versus a mother.

The need for greater consistency in valuing condolence payments is directly at odds with the need for U.S. forces to maintain flexibility to suit missions in diverse regions and circumstances.

In recent years the damages law of the United States armed forces has cast the problem in bold relief. Call it the dilemma of law and strategy. In the law of foreign claims, as the field is known, the relationship between legality and tactical advantage is often inverse. The more law-like the claims payment system, the less tactical flexibility soldiers have to deploy money as a weapon tailored to the terrain of the battlefield. The more flexible it is, the less law-like it tends to be. Commanders and claims officers in Afghanistan and Iraq seem to understand this much better than the official doctrine suggests. But in these theaters, the opposite problem has come to the fore. Unconstrained tactical flexibility produces inconsistent determinations, and lawless inconsistency may be as strategically harmful as overly legalistic rigidity. The nub of the law strategy dilemma is that legality is both a threat and an imperative.²⁶⁷

Developing a standard valuation tool at a high echelon, whether DoD-wide or service-specific, while helpful in standardizing condolence payments, would remove the ability of U.S. forces to adapt the condolence payment

²⁶⁴ See Witt, *supra* note 61, at 1474.

²⁶⁵ *Id.* at 1477.

²⁶⁶ See COMBINED JOINT TASK FORCE-82, AFGHANISTAN FOREIGN CLAIMS STANDARD OPERATING PROCEDURE (2007) (on file with author).

²⁶⁷ See Witt, *supra* note 61, at 1457.

system to their specific missions.

A permanent condolence payment system should not require a standardization of payment values, but such a measure should be allowed at different levels of command. Just as echelons of command restrict rules of engagement for their area of operations, echelons of command should endeavor to conduct cultural and economic research to create a standard valuation tool if they deem such a measure appropriate for their mission.

V. Conclusion

If necessity is the mother of invention, commanders and judge advocates have shown time after time that condolence payment systems are necessary by creating work-arounds to the FCA. Condolence payments are crucial to successful implementation of COIN strategy, and all signs point toward COIN being the conflict of our future. Without a permanent condolence payment system, U.S. commanders are trapped in a permanent game of “catch-up,” lobbying for condolence payment authority, and as in the cases of Iraq and Afghanistan, waiting years for a response from Congress or higher DoD authorities. This lack of condolence authority has, in fact, proved to be a security risk for U.S. forces. Rather than doom ourselves to recreating the wheel in every new conflict, it is in the interest of U.S. forces to have a standing condolence payment mechanism. Legislating a perfect condolence payment system is impossible, but by giving commanders the authority and funds to make condolence payments, along with minimal regulatory guidance, we can trust our commanders and their staff to employ a condolence payment program in a manner that is both compassionate and leads to mission success.

The key to an effective condolence payment program is portability and flexibility, allowing commanders to use their good judgment in its implementation, with the aid of key staff members such as intelligence personnel and judge advocates. Congress might balk at the concept of dedicating a large pot of money to condolence payments, but as can be seen in its recent renewal of CERP in Iraq in the amount of \$5,000,000, the legislature does seem to understand the importance of condolence payments.²⁶⁸ The U.S. government has a track record of funding projects that commanders on the ground simply do not want, whether it is a

²⁶⁸ See NDAA 2016, *supra* note 121.

\$34,000,000 building in Afghanistan that commanders repeatedly said was not needed, or \$436,000,000 spent on Abrams tanks that the Army has flatly stated they do not want.²⁶⁹

History has shown that commanders truly do want access to condolence payments to assist them in their missions. Failure to enact a permanent condolence payment system will lead to future periods of insecurity for commanders, just as in Iraq and Afghanistan. As U.S. forces continue to operate in more and more nations around the world—entirely in COIN operations—the U.S. government is at a key juncture to give commanders the tool that they want and need.

²⁶⁹ See Rajiv Chandrasekaran, *A Brand New Military Headquarters in Afghanistan and Nobody to Use It.*, WASH. POST (July 10, 2013), https://www.washingtonpost.com/world/national-security/a-brand-new-us-military-headquarters-in-afghanistan-and-nobody-to-use-it/2013/07/09/2bb73728-e8cd-11e2-a301-ea5a8116d211_story.html; see also Richard Lardner, *Abrams Tank Pushed by Congress Despite Army's Protests*, HUFF. POST (June 28, 2013), http://www.huffingtonpost.com/2013/04/28/abrams-tank-congressarmy_n_3173717.html.

**THE CRIME OF AGGRESSION: SHOULD AGGRESSION
BE PROSECUTED AS A CRIME IN THE ICC?**

TAL ZISKOVICH*

I. Introduction

Being a head of State is a hard job, regardless of which state you lead. But leading a State signatory to the Rome Statute of the International Criminal Court (ICC)¹ is all the more difficult, because that leader can end up being prosecuted as a criminal in the ICC. The ICC was established in 1998, and was given international jurisdiction over war crimes and crimes against humanity.² But recently a troubling development emerged, and the crime of aggression has been defined and enacted into the Rome Statute.³

To demonstrate how troubling that development is, consider the following hypothetical scenario: The head of the Armed Forces of Malta (AFM) delivers a special intelligence report to the Maltese Prime Minister (PM), stating that a Libyan ship filled with terrorists from The Islamic State in Iraq and Syria (ISIS) disguised as tourists is making its way to the Maltese territorial waters. Once there, the head of the AFM

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¹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute].

² *Id.*

³ Assembly of State Parties Res. RC/Res. 6 (June 11, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf [hereinafter Kampala Amendments].

reports, the terrorists plan to strike a deadly series of terrorist attacks on Maltese soil and infiltrate Europe's main continent in order to continue the terror attacks. Additionally, the head of the AFM says that members of the Libyan army are operating the ship, commanded by a Libyan admiral with connections to the regime. There is no time for politics; Malta has to act if it wants to stop the attack.

After much deliberation and discussion between the PM and his close cabinet of ministers, the PM orders the AFM to strike the ship in international waters, so the terrorists will not reach the Maltese shores. In a heroic military operation, three pilots of the Air Wing of the AFM drop six bombs on the Libyan ship, sinking it with all passengers and crew. The PM and his cabinet have prevented the attack.

Malta is a signatory state to the Rome Statute, and in January of 2015, Malta signed and ratified an amendment to the Rome Statute that defined the crime of aggression and granted the ICC jurisdiction over it.⁴ And so, the PM of Malta could find himself on the defendant's bench of the ICC, charged with committing a crime of aggression for doing what he thought was necessary for his country. That unwanted—but possible—outcome and its ramifications will be the focus of this article.

The State parties to the Rome Statute have tried to include a definition for the crime of aggression from the time of its drafting.⁵ In 2010, the work was completed, and the Assembly of States Parties ended more than a decade of legal void by amending the Rome Statute with a definition for the crime of aggression.⁶ But, it seems that the parties have taken a step too far, and created a crime that could prove more harmful than beneficial to the States.

There is no doubt the parties to the Rome Statute were seeking to promote international peace and security by criminalizing unjust wars when they included the crime of aggression within the ICC's jurisdiction. However, the outcome is far from perfect, and the current definition of

⁴ Rome Statute of the International Criminal Court, art. 5(2), July 17, 1998, 2187 U.N.T.S. 90.

⁵ *Id.* The original text of the Rome Statute included the crime of aggression, but did not include a definition for it. It merely stated that "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime." *Id.*

⁶ Kampala Amendments, *supra* note 3.

“aggression” as a crime is lacking in many aspects. The crime of aggression stands in contradiction to basic principles of international law—the principles of legality, head of State immunity, and the inherent right to self-defense.⁷ Those contradictions raise the question: should the crime of aggression even be a crime under the jurisdiction of the ICC? Is criminal enforcement the right way to prevent aggression? This article will discuss those contradictions, propose that the crime of aggression be left out of the Rome Statute, and argue that efforts to prevent unjust wars and acts of aggression be left in the diplomatic field.

This article will begin by examining the three principles of international law that stand in direct contradiction to the new crime of aggression in Part I. Part II of this article will provide a brief overview of the concept of aggression within the history of international law and in various international agreements, as well as provide an overview of the work that led to the enactment and adoption of the new definition to the crime of aggression. Part III will examine the principle of legality and discuss how the new crime of aggression contradicts it, while Part IV will analyze the principle of heads of State immunity, and the difficulties in prosecuting heads of States based on the current definition. The right of self-defense will be the focus of Part V, and it will argue that the crime of aggression limits and narrows the State parties’ inherent right of self-defense. Finally, Part VI will conclude that the crime of aggression is not a viable crime, and argue that addressing aggression should be left to the diplomatic field.

II. The History of Aggression

Before discussing the different elements of the new crime of aggression and how it stands in direct contradiction to some of the basic principles of international law, one must understand the origins of the term “aggression,” how it developed over the years, and the different rationales behind it.

⁷ See Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L. J. 119, 122 (2008); RAMONA PEDRETTI, IMMUNITY OF HEADS OF STATE AND STATE OFFICIALS FOR INTERNATIONAL CRIMES 1 (2015); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 189 (5th ed. 2011).

A. Early Attempts to Define Aggression

The first major international document that used the term aggression is the 1924 Covenant of the League of Nations (LN)⁸. The LN, established after World War I, made it a declared goal to “promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war.”⁹ Article 10 to the Covenant states:

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression[,] the Council shall advise upon the means by which this obligation shall be fulfilled.¹⁰

The term aggression is not defined in the Covenant. However, from the context of Article 10, it is evident that aggression is considered a breach of a State’s territorial integrity, or existing political independence, by another State. It is important to note that the term aggression was distinguished from the term “war,” which is the subject of Article 11 of the Covenant.¹¹ That is to say, not every act of aggression is an act of war, and although both are disfavored by the LN, aggression is somewhat less aggravating.¹²

In 1928, another important step in outlawing war was made when

⁸ The League of Nations (LN) was an international organization created as part of the Paris Peace Conference of 1919 that ended the First World War. *See The League of Nations, 1920*, U.S. DEP’T OF STATE OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1914-1920/league> (last visited July 12, 2016). During the conference, the Treaty of Versailles was drafted and signed which included the planned formation of the LN. *Id.* The LN was to provide a forum for resolving international disputes. *Id.*

⁹ *Id.* preamble.

¹⁰ *Id.* art. 10.

¹¹ *Id.* art. 11 (“Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.”).

¹² This is due to the fact the while war is “a matter of concern to the whole League, and the League shall take any action . . . to safeguard the peace of nations”. *Id.* Aggression only leads “the Council [to] advise upon the means by which this obligation [to avoid aggression] shall be fulfilled.” *Id.* art. 10.

several States signed the Kellogg-Briand Pact,¹³ which “condemn[ed] recourse to war for the solution of international controversies, and renounce[d] it, as an instrument of national policy.”¹⁴ The word aggression was not mentioned in the Kellogg-Briand Pact, but it was central in later attempts to define the term.

And so, since its inclusion in the Covenant of the LN, the term aggression remained untouched by the international community. Although several definitions were suggested by individual countries and were debated in international forums, none gave rise to a widely accepted definition for aggression.¹⁵

B. The Nuremberg Trials

In the aftermath of World War II, it was clear that the steps taken to stop wars up to that point were insufficient. The allied forces convened in London to form what is commonly referred to as the Nuremberg Charter,¹⁶ in which the International Military Tribunal (IMT) for the prosecution of the major war criminals of the European axis was established.¹⁷ It was the first time an international tribunal was convened to hold individuals criminally accountable for acts done in the name of a State.

The Nuremberg Charter granted the IMT authority to judge individuals who committed “crimes against the peace,” which were

¹³ General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

¹⁴ *Id.* art. 1.

¹⁵ Vernon Cassin et al., *The Definition of Aggression*, 16 HARV. INT’L. L. J. 589, 589–90 (1975) (outlining the various attempts to define aggression in the years 1924–1945). *But see* Convention for the Definition of Aggression, art. II-III, July 3, 1933, 147 L.N.T.S. 67 (defining an aggressor as “the State which is first to commit . . . [a] declaration of war upon another state . . .” and goes on to declare that “[n]o political, military, economic or other considerations may serve as an excuse or justification for the aggression . . .”).

¹⁶ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

¹⁷ The International Military Tribunal (IMT) was established in the Nuremberg Charter by the four signatories: the United Kingdom, the United States, France and the Union of Soviet Socialist Republics. *See id.* at Preamble. Its purpose was to try individuals from Nazi Germany who committed war crimes during World War II. *Id.*

considered to be the equivalent to the modern crime of aggression.¹⁸ Crimes against the peace were defined as: “namely, planning, preparation, initiation or waging of a war of aggression[,] . . . a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”¹⁹

Much like previous attempts to define aggression, the definition provided by the Nuremberg Charter was general in nature, and did not elaborate what a war of aggression was, nor what the elements of such a crime were.²⁰ Moreover, the crime itself did not reflect any existing principle in customary international law from which an interpretation could be learned.²¹ This broad and entirely new definition was the target of extensive criticism, mainly from American jurists who considered it an *ex post facto* determination of “uncertain foundation and uncertain limits.”²² It is no wonder that the IMT’s main challenge in prosecuting the crimes against the peace was not gathering evidence, but establishing the legitimacy and the elements of the crime.²³

However, one can distill some basic ideas from the Nuremberg Charter’s definition. First, a war of aggression is not a war “in violation of international treaties, agreements or assurances.”²⁴ Second, similarly to the definition in Article 10 of the Covenant of the LN, the definition implied that not all wars are wars of aggression. Third, based on some of the suggestions made by individual countries prior to the enactment of the Nuremberg Charter,²⁵ one can assume that an act of aggression can be attributed to the State who first used an armed force.²⁶

¹⁸ Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT’L L. 71, 74 (2010).

¹⁹ Nuremberg Charter, *supra* note 16, Annex art. 6(a).

²⁰ Roger S. Clark, *Nuremberg and the Crime Against Peace*, 6 WASH. U. GLOBAL STUD. L. REV. 527, 529–31 (2007).

²¹ See DINSTEIN, *supra* note 7, at 128.

²² Charles E. Wyzanski, Jr., *Nuremberg-A Fair Trial? A Dangerous Precedent*, ATLANTIC, Apr. 1946, (citing Glennon, *supra* note 18, at 74–77 (providing the opinion of additional jurists criticizing the crime)).

²³ Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT’L L. J. 161, 165 (2008).

²⁴ Nuremberg Charter, *supra* note 16, Annex art. 6(a).

²⁵ Cassin et al., *supra* note 15, at 589–90 (1975) (outlining the various attempts to define aggression in the years 1924–1945).

²⁶ See, e.g., Convention for the Definition of Aggression, art. II-III, July 3, 1933, 147 L.N.T.S. 67. See also Robert H. Jackson, *Report of Robert H. Jackson—United States Representative to the International Conference on Military Trials* (Dep’t of State 1945), at 375 (cited in Clark, *supra* note 20, at 530).

The Tribunal itself did not give a clear answer to what aggression was in its judgment of the major war criminal of the European axis. The Tribunal was faced with both the argument that aggression was never defined properly and that it was an *ex post facto* crime created by the Nuremberg Charter. The IMT's ruling on those arguments was general and vague in nature,²⁷ but it relied heavily on the Kellogg-Briand Pact as reflecting customary international law and banning wars of aggression:

All these expressions . . . reinforce the construction which the Tribunal placed upon the [Kellogg-Briand Pact] that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world finds its expression in the series of pacts and treaties to which the Tribunal has just referred.²⁸

This can be read to say that the roots of the crime of aggression lay in the Kellogg-Briand Pact, and that the ban on war as an instrument of national policy is considered to reflect customary international law. It is important to note, however, that the trials following World War II were the first and only time that such a crime has been prosecuted.²⁹

C. The United Nations

The Charter of the United Nations (UN), which came to life in 1945 after the atrocities of World War II, is another important milestone in understanding aggression.³⁰ The UN Charter states that one of the purposes of the UN is “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.”³¹

Even though the UN Charter does not define aggression, one can

²⁷ Clark, *supra* note 20, at 543.

²⁸ *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 220 (1947) [hereinafter *Nuremberg Judgment*].

²⁹ Glennon, *supra* note 18, at 74–75. These include trials before the International Military Tribunal for the Far East, established by the allied forces to prosecute Japanese war criminals after World War II. *Id.*

³⁰ U.N. Charter art. 1, ¶ 1.

³¹ *Id.*

assume from the language of the Charter that it is a form of breach of the peace.³² A closer look on the UN's approach toward international peace provides one of the basic principles of international law in the UN era:

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.³³

The UN Charter does provide two exceptions to the prohibition on the threat or use of force,³⁴ both laid out in Chapter VII to the Charter, titled *Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression*.³⁵ Although the title hints that the chapter defines what aggression is, it simply states: “[t]he Security Council³⁶ shall determine the existence of any threat to the peace, breach of the peace, or act of aggression.”³⁷

And so, while it is clear that according to the UN Charter, any breach of the peace is prohibited, the Charter does not provide a definition of aggression, or explain how it is different from other breaches of the peace. However, the UN did try to define aggression as early as 1967. In its twenty-second session, the United Nations General Assembly³⁸

³² Such assumption is made even clearer due to the language included in the Nuremberg Charter that classified the “planning, preparation, initiation or waging of a war of aggression” as a crime against the peace. *See* Nuremberg Charter, *supra* note 16, Annex art. 6(a).

³³ U.N. Charter art. 2, ¶¶ 3–4.

³⁴ U.N. Charter arts. 42, 51. Those exceptions are actions by the United Nations Security Council (UNSC) and actions in self-defense. *Id.*

³⁵ *Id.* ch. 7.

³⁶ The UNSC is an organ of the United Nations (UN) comprised of five permanent members—the United States, the United Kingdom, the Republic of China, France, and Russia—and ten temporary members elected every two years. *Id.* art. 23, ¶¶ 1–2. The UNSC's primary responsibility is to maintain international peace and security. *See id.* art. 24, ¶ 1. In order for the UNSC to perform its responsibility, it is granted specific authorities throughout the Charter. *Id.* chs. 6, 7, 8, 12. Decisions of the UNSC are binding upon members of the UN. *Id.* art. 25.

³⁷ *Id.* art. 39.

³⁸ The United Nations General Assembly (UNGA) is the main deliberative, policymaking and representative organ of the United Nations. *See Main Organs*, UNITED

(UNGA) adopted Resolution 2330, which recognized “there is still no generally recognized definition of aggression”³⁹ and stressed “the need to expedite the definition of aggression.”⁴⁰ To do that, the UNGA established a special committee to prepare and submit a definition of aggression to the UNGA⁴¹.

Eventually, in 1974, the UNGA adopted a definition of aggression in Resolution 3314.⁴² The definition contains several interesting points, but it does not provide a clear understanding of what aggression really is.⁴³ On one hand, the resolution considers aggression to be “the most serious and dangerous form of the illegal use of force,”⁴⁴ implying that not every use of force will amount to an act of aggression. But on the other hand, the resolution goes on to define aggression simply as “the use of armed force by a State against . . . another State, or in any other manner inconsistent with the Charter of the United Nations.”⁴⁵ It even concludes that “[t]he first use of armed force by a State . . . shall constitute *prima facie* evidence of an act of aggression.”⁴⁶

However central, Resolution 3314 did not provide a clear and final definition of aggression. Instead, it only supplied listed examples of acts that would qualify as acts of aggression, subject to a decision of the UN Security Council (UNSC) that maintained its authority to declare what is and is not an act of aggression. To this day, the resolution has not been used by the UNSC in declaring an act of State as an act of aggression,⁴⁷ although the International Court of Justice (ICJ) did recognize Resolution 3314 as reflective of customary international law.⁴⁸

NATIONS, <http://www.un.org/en/sections/about-un/main-organs/index.html> (last visited July 12, 2016). All 193 member States are represented in the UNGA, making it the only United Nations body with universal representation. *Id.* However, its decisions and resolutions are not binding on the member States. U.N. Charter art. 10.

³⁹ G.A. Res. 2330 (XXII), Preamble (Dec. 18, 1967).

⁴⁰ *Id.* ¶ 1.

⁴¹ G.A. Res. 2330 (XXII), ¶¶ 2-3 (Dec. 18, 1967).

⁴² G.A. Res. 3314 (XXIX) (Dec. 14, 1974), <http://www.un-documents.net/a29r3314.htm>.

⁴³ Benjamin B. Ferencz, *The United Nations Consensus Definition of Aggression: Sieve or Substance*, 10 J. INT'L L & ECON. 701, 709 (1975).

⁴⁴ G.A. Res. 3314 (XXIX), Annex, preamble, ¶ 5 (Dec. 14, 1974).

⁴⁵ *Id.* art. 1.

⁴⁶ *Id.* art. 2.

⁴⁷ Weisbord, *supra* note 23, at 161, 169.

⁴⁸ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14 (June 27), cited at Dr. Troy Lavers, *(Pre)determining the Crime of Aggression: Has the Time Come to Allow the International Criminal Court Its Freedom?*, 71 ALB. L. REV. 299, 301 (2008).

D. The Rome Statute of the ICC

The Rome Statute of the ICC brought a groundbreaking change into international law in 1998. For the first time in history, an international criminal tribunal was established not for a specific war or hostilities, but to serve as a permanent court to try individuals responsible for international crimes.

The original text of the Rome Statute included four core crimes that fell under the jurisdiction of the court, including the crime of aggression. But, unlike the other three crimes that are thoroughly defined in the Statute,⁴⁹ the original text of the Statute stated, “[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime.”⁵⁰ This shows the States parties to the Rome Statute intention to grant jurisdiction to the ICC over aggression, even if aggression could not be properly defined at the time.

Following the original text of the Rome Statute, and in order to properly define aggression, the assembly of States parties to the Rome Statute established the Special Working Group on the Crime of Aggression (SWGCA) to “submit proposals . . . with a view to arriving at an acceptable provision on the crime of aggression.”⁵¹ The SWGCA dealt not only with the definition of the crime of aggression, but with various legal issues, like the application of general criminal principles on the crime of aggression and how other provisions of the Rome Statute effect the crime or are affected by it.⁵²

⁴⁹ See Rome Statute, *supra* note 1, art. 6 (defining the crime of genocide); *see also id.* art. 7 (defining crimes against humanity); *id.* art. 8 (defining war crimes). These three crimes are often referred to as the core crimes. Lavers, *supra* note 48, at 303.

⁵⁰ Rome Statute of the International Criminal Court, art. 5(2), July 17, 1998, 2187 U.N.T.S. 90.

⁵¹ Assembly of the States Parties Res. ICC-ASP/1/Res.1, art. 3 (Sept. 9, 2002), https://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP1-Res-01-ENG.pdf. The Special Working Group on the Crime of Aggression (SWGCA) continued the work of a Preparatory Commission that submitted a draft definition for the crime of aggression earlier in 2002. Preparatory Comm’n Int’l Criminal Court, Report of the Preparatory Commission for the International Criminal Court (Continued), Addendum, Part II, PCNICC/2002/2/Add.2 (July 24, 2002).

⁵² Most of the discussions about the actual definition of the crime of aggression were made in the informal inter-sessional meeting during the fifth session of the SWGCA. Assembly of the States Parties ICC-ASP/5/SWGCA/INF.1 (Sept. 5, 2006), https://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/ICC-ASP-5-SWGCAINF1_English.pdf [hereinafter Informal Inter-Sessional Meeting].

The work of the SWGCA culminated in a proposal for several new articles for the Rome Statute defining the crime of aggression⁵³ and also establishing procedural rules for referring cases to the ICC.⁵⁴ The proposal contained a change to the Elements of Crimes document⁵⁵ and included an additional document containing several understandings regarding the exercise of jurisdiction by the ICC on cases concerning the new crime.⁵⁶

Those amendments, along with other minor additions, were viewed as a single amendment package that was brought before a review conference held in 2010, in Kampala, Uganda.⁵⁷ During the Kampala conference, the State parties to the Rome Statute voted to accept the SWGCA's proposal, and amend the Rome Statute as proposed.⁵⁸ According to the amendment, the ICC's jurisdiction over the crime of aggression will begin no sooner than January 1, 2017.⁵⁹

The definition of the crime of aggression that was eventually amended to the Rome Statute consisted of two main parts: the conduct of the individual and the conduct of the state.⁶⁰ The conduct of the individual is the *crime of aggression* itself, and is "the planning, preparation, initiation or execution . . . of an act of aggression which . . . constitute[s] a manifest violation of the Charter of the United Nations."⁶¹ The conduct of the state, or the *act of aggression*, is "[t]he use of armed force by a State against the sovereignty, territorial integrity[,] or political independence of another State"⁶² The Article defining the crime of

⁵³ Rome Statute, *supra* note 1, art. 8 *bis*.

⁵⁴ *Id.* art. 15 *bis*, 15 *ter*.

⁵⁵ Kampala Amendments, *supra* note 3, annex II. The Elements of Crimes is a document supplemented to the Rome Statute that is meant to "assist the [ICC] in the interpretation and application of articles 6, 7, 8 and 8 *bis*." Rome Statute, *supra* note 1, art. 9. The Elements of Crimes were adopted and amended by the assembly of the States parties to the Rome Statute. See Assembly of the States Parties ICC-ASP/1/3; Corr. 1, § II.B (Sept. 9, 2002), http://legal.un.org/icc/asp/1stsession/report/first_report_contents.htm. [hereinafter Elements of Crimes]

⁵⁶ Kampala Amendments, *supra* note 3, Annex III.

⁵⁷ DINSTEIN, *supra* note 7, at 132–33.

⁵⁸ Kampala Amendments, *supra* note 3.

⁵⁹ *Id.* art. 3(3) (stating that the ICC will exercise its jurisdiction only "subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute").

⁶⁰ See Informal Inter-Sessional Meeting, *supra* note 52, ¶¶ 7-50, 84–95 (discussion made by the SWGCA were divided to separately define both those parts).

⁶¹ Rome Statute, *supra* note 1, art. 8 *bis*(1).

⁶² *Id.* art. 8 *bis*(2).

aggression also lists seven examples of acts that qualify as an act of aggression “in accordance with the UNGA Resolution 3314.”⁶³

As mentioned previously, the new amendment also includes a unique mechanism for referring cases concerning the crime of aggression. A prosecutor can initiate an investigation⁶⁴ concerning an alleged crime of aggression only if the UNSC has previously determined that an act of aggression was committed by a State.⁶⁵ If such a declaration was not made, the investigation can proceed only after the pre-trial chamber of the ICC authorized it.⁶⁶

To summarize, the new definition of the crime of aggression holds several elements: the conduct of a state, meaning that an act of aggression is made by a state, and that such an act is declared as an act of aggression by either the UNSC or the ICC’s pre-trial chamber; the conduct of the individual, meaning that the act was planned, prepared, initiated, or executed by an individual in a position of power; and the gravity of the violation of the UN Charter, meaning that a manifest violation has occurred.

III. The Principle of Legality

After reviewing the history of the concept of aggression, as well as the development of the Rome Statute’s crime of aggression, this article turns to discuss the first principle that the crime of aggression contradicts—the principle of legality. It will be shown that the crime of aggression is not properly defined as a criminal offense, and does not give potential violators an opportunity to direct their behavior and avoid being aggressors.

⁶³ *Id.*

⁶⁴ Criminal procedures before the ICC can only be initiated by the prosecutor’s decision to investigate a matter that was referred to her by either a State party to the Rome Statute or by the UNSC. *Id.* art. 13-15. The prosecutor also has authority to initiate investigations by her own initiative (*proprio motu*). *Id.*

⁶⁵ Rome Statute, *supra* note 1, art. 15 *bis*(6)–(10).

⁶⁶ *Id.* It is important to note that according to Article 15, the prosecutor is obligated to inform the UNSC of her intention to initiate an investigation and must ascertain whether the UNSC has declared an act of aggression has occurred. *Id.* If such a declaration is not made within six months of the prosecutor’s notification to the UNSC, the question is brought before the pre-trial chamber of the ICC. *Id.*

A. Legality: an Overview

1. The Principle of Legality in General

The principle of *nullum crimen sine lege*, or no crime without law, is rooted in legal tradition and can be traced as far as ancient Greek and Roman law.⁶⁷ Broadly speaking, the principle is meant to prevent *ex post facto* laws, and to give notice or “fair warning” to the population that a certain act is prohibited and punishable.⁶⁸ By prohibiting *ex post facto* laws, the principle of legality is considered a protection for citizens against arbitrary actions of their government and possible judicial discretion from courts.⁶⁹

The principle of legality usually refers to four basic notions: first, criminal offenses should be a part of a written law; second, the principle of specificity, meaning that the criminal prohibition must be sufficiently precise and specifically defined to determine the criminal conduct and distinguish it from permissible conduct; third, criminal prohibition cannot be retroactive, so that a person can only be punished for actions that were illegal at the time the conduct was undertaken; and fourth, resort to analogy in applying criminal rules is prohibited.⁷⁰

In an attempt to summarize the principle of legality in simple words, consider the following:

Today, the principle will apply to exclude criminality unless it is shown that, at the time at which the act was done, the conduct complained of gave rise to the crime with which the accused stands charged. The fact that the conduct of the accused “would shock or even appal [sic] decent people is not enough to make it unlawful in the absence of a prohibition.”⁷¹

The principle is therefore directed at both legislatures and judicial agents. It calls for legislatures to carefully articulate prohibitions in

⁶⁷ Van Schaack, *supra* note 7.

⁶⁸ J. Benton Heath, *Human Dignity at Trial: Hard Cases and Broad Concepts in International Criminal Law*, 44 GEO. WASH. INT’L L. REV. 317, 348 (2012).

⁶⁹ ANTONIO CASSESE ET AL., *CASSESE’S INTERNATIONAL CRIMINAL LAW* 24 (3d ed. 2013).

⁷⁰ CASSESE ET AL., *supra* note 69, at 23–24.

⁷¹ Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, 2 J. INT’L CRIM. JUST. 1007, 1010 (2004).

order to achieve specificity, and to publish those prohibitions in order for citizens to know which behaviors are prohibited. The principle of legality also demands that judicial agents comply with specific definitions and refrain from analogies or interpretations that amount to judicial law-making, in order to provide defendants with certainty.⁷² In that regard, the principle of legality is considered as strengthening the rule of law by restraining the power of the state over its subjects.⁷³

Most democratic states uphold the principle of legality as a basic principle in their legal system.⁷⁴ In the United States, the U.S. Constitution explicitly prohibits the legislators of both state and federal government from passing *ex post facto* laws.⁷⁵ The Supreme Court of the United States has repeatedly stressed that “fair warning” is part of due process, stating:

Reviewing decisions in which we had held criminal statutes “void for vagueness” under the Due Process Clause, we noted that this Court has often recognized the “basic principle that a criminal statute must give fair warning of the conduct that it makes a crime.” . . . Deprivation of the right to fair warning, we continued, can result both from vague statutory language and from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face.⁷⁶

2. *Legality in International Law and the Doctrine of Substantive Justice*

Unlike in domestic legal systems, the scope of the principle of legality in international criminal law (ICL) is not as clear, and although it was recognized by past tribunals, it was not explicitly formulated until

⁷² See Van Schaack, *supra* note 7, at 173–74 (arguing that the principle of legality is primarily aimed at protecting defendants’ rights, and that international criminal judges who disregard it are trampling on the rights of criminal defendants in their rush to advance international law).

⁷³ Cian C Murphy, *Counter-Terrorism and the Culture of Legality: The Case of Special Advocates*, 24 KING’S L. J. 19, 20 (2013).

⁷⁴ CASSESE ET AL., *supra* note 69, at 23.

⁷⁵ U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1.

⁷⁶ *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001).

the Rome Statute. The approach toward the principle of legality in ICL was based on the doctrine of substantive justice. Under that doctrine, the main goal of the legal system is protecting society from the atrocities of crime, and so it must prohibit and punish any conduct that is potentially dangerous to society, regardless of whether or not that conduct was prohibited by law at that time.⁷⁷ As such, the doctrine of substantive justice is considered to favor society over the individual.⁷⁸

The doctrine of substantive justice was used heavily in the trials of the major war criminals before the IMT, in which legality was the main defense against charges of crimes against the peace.⁷⁹ Although the IMT ruled that the principle of legality “is in general a principle of justice,”⁸⁰ it eventually neutralized it with a series of logical leaps,⁸¹ ruling simply that “it would be unjust if [the aggressor’s] wrong were allowed to go unpunished.”⁸²

The doctrine of substantive justice is also evident in many cases in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Ruanda (ICTR).⁸³ In one case, the ICTY’s Trial Chamber dismissed a motion in which the defense argued that the principle of legality had been violated.⁸⁴ The chamber ruled:

In interpreting the principle of *nullum crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance In order to meet the principle

⁷⁷ CASSESE ET AL., *supra* note 69, at 22.

⁷⁸ *Id.* at 24–26.

⁷⁹ Van Schaack, *supra* note 7, at 126.

⁸⁰ *Nuremberg Judgment*, *supra* note 28, at 217.

⁸¹ Van Schaack, *supra* note 7, at 127–29.

⁸² *Nuremberg Judgment*, *supra* note 28, at 217.

⁸³ *See, e.g.*, Prosecutor v. Kepreškić, Case No. IT-95-16, Judgment, ¶ 563 (Int’l Crim. Trib. For the Former Yugoslavia Jan. 14, 2000); Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, Andre Rwamakuba and Mathieu Ndirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise (Int’l Crim. Trib. For Rwanda May 11, 2004).

⁸⁴ Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction (Int’l Crim. Trib. For the Former Yugoslavia Nov. 12, 2002).

of *nullum crimen sine lege*, it must only be foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable at the time of commission.⁸⁵

This narrow interpretation of the principle of legality requires only that the act will be foreseeably and accessibly criminalized. The various judicial decisions that adopted such narrow interpretation can be attributed to the very nature of ICL. Although ICL is developing and becoming better defined, a great deal of uncertainty is still part of its nature.⁸⁶ This uncertainty conflicts with the principle of legality, and forces judges to limit its scope in order to reach the desired outcome of prohibiting dangerous conduct.

Moreover, until the formation of the ICC, international criminal tribunals were established *ex post*, and therefore could not promote deterrence in the boundaries of their own jurisdiction.⁸⁷ However, other goals of criminal justice that are still present in ICL—such as retribution; the compensation, satisfaction, and rehabilitation of victims; and the public condemnation of injurious behavior—can still be advanced where legality is de-emphasized.⁸⁸ This drove judges to minimize the effects of the principle of legality, and interpret it in a narrow manner so that it will not deny the achievement of those other goals.

3. *Strict Legality and the Rome Statute*

Although dominant in early international criminal tribunals, the doctrine of substantive justice was gradually replaced in ICL with the doctrine of strict legality, which is similar to the one applied in most domestic legal systems.⁸⁹ As part of this shift, international criminal

⁸⁵ *Id.* ¶ 62. It is interesting to note that the International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber refers to the Rome Statute's provision concerning legality as strengthening its interpretation. *Id.*

⁸⁶ Caroline Davidson, *Explaining Inhumanity: The Use of Crime-Definition Experts at International Criminal Courts*, 48 VAND. J. OF TRANSNAT'L L. 359, 363–70 (2015) (stating that the reasons for this uncertainty are (1) the fact that ICL represents a blend of different areas of law; (2) the fact that judges are facing crimes never before prosecuted in an international tribunal; (3) the fact that judges are dealing with cases of unfamiliar cultures and contexts; and (4) the pressure to condemn international crimes).

⁸⁷ *E.g.*, the IMT was established after WWII was over, and its outcome could not prevent the atrocities committed by Nazi Germany. Van Schaack, *supra* note 7, at 147.

⁸⁸ *Id.*

⁸⁹ CASSESE ET AL., *supra* note 69, at 26.

tribunals focused more on the different notions of the principle of legality, e.g., specificity and prohibition on retroactivity. For example, the ICTY ruled in one of its cases:

From the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time.⁹⁰

The shift to strict legality was further promoted by the adoption of the Rome Statute, which explicitly applies the principle in procedural rules before the court. Article 22 of the Rome Statute, titled *nullum crime sine lege*, states:

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted[,] or convicted.⁹¹

The Rome Statute further states that any person convicted by the court can only be punished according to the Statute,⁹² and that no person shall be criminally responsible under the Statute for acts committed prior to the Statute's entry into force.⁹³

The Rome Statute may apply only to procedures before the ICC, and

⁹⁰ Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 193 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 29, 2002).

⁹¹ Rome Statute, *supra* note 1, art. 22.

⁹² *Id.* art. 23.

⁹³ *Id.* art. 24.

it does not formally change the scope of the principle of legality in international law at large. However, as ICL matures and the rate of change in its code slows down, judges will have more clarity and less room to innovate and challenge the principle of legality.⁹⁴ Since the ICC is meant to be the only international criminal tribunal, and with the explicit mention of the principle of legality in the Rome Statute, the Rome Statute will surely have an effect on the way the principle of legality will be interpreted in the future. With the effects of the Rome Statute and other developments in international law, strict legality must be complied with in international criminal tribunals.⁹⁵

B. Analyzing the Definition of Aggression

With the principle of legality in mind, and since the crime of aggression is a relatively new crime, there is no doubt it should be applied using the doctrine of strict legality, albeit with some modifications that are recognized by international law.⁹⁶ This means that the definition of the crime of aggression must be clear and concise, to allow “fair notice” of what conduct is prohibited, and avoid retroactive enforcement of the law. But does the Rome Statute’s definition comply with the notions of the principle of legality? To answer that, one must examine the definition and try to distill its components and elements.

1. *Actus Reus*

As mentioned above, the definition of the crime of aggression is comprised of two major parts; the conduct of the individual and the conduct of the State. In order for an individual to commit a crime of aggression, the State of which he is a national must commit an *act* of aggression.⁹⁷

The conduct of the individual is worded in the Rome Statute as,

[T]he planning, preparation, initiation or execution, by a

⁹⁴ Van Schaack, *supra* note 7, at 190.

⁹⁵ CASSESE ET AL., *supra* note 69, at 27; Glennon, *supra* note 18, at 82–86.

⁹⁶ *See id.* at 27.

⁹⁷ Elements of Crimes, *supra* note 55, elements, ¶ 3 (stating that committing an act of aggression is one of the elements of the crime of aggression).

person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.⁹⁸

As far as the individual conduct, there are three cumulative conditions for the crime of aggression: that the individual prepared, initiated or executed an act of aggression; that the individual is in a position of power;⁹⁹ and the act of aggression is a manifest violation of the UN Charter. The first two conditions, however vague in nature, are relatively defined in a way that allows a court to rule in a specific case whether they were met.¹⁰⁰ On the other hand, the third condition, which calls for a “manifest violation” of the UN Charter, is an unexplained term and the Rome Statute does not provide a way to interpret it.

First, the question of the mere violation of the UN Charter is not an easy one to answer. The UN Charter does not include any provision clarifying what qualifies as a violation of the Charter. Furthermore, different States interpret the UN Charter differently, along with the exceptions to the ban on the use of force. Considering the hundreds of cases in which States have used force since the entry into force of the UN Charter, with only few UNSC resolutions or international tribunal opinions condemning those as violating the UN Charter, there is no objective legal tool to help assess which act is in fact a violation of the UN Charter.¹⁰¹

Second, the term manifest is even vaguer, and is open to disputed interpretations.¹⁰² The term “manifest” is used only once in the Rome Statute with no further explanation. The term was not used before in

⁹⁸ Rome Statute, *supra* note 1, art. 8 *bis*(1).

⁹⁹ The original text calls for the individual to be “in a position effectively to exercise control over or to direct the political or military action of a State.” *Id.* art. 8 *bis*(1). For ease of reference, this article will refer to it as a position of power.

¹⁰⁰ See Noah Weisbord, *The Mens Rea of the Crime of Aggression*, 12 WASH. U. GLOBAL STUD. L. REV. 487, 492–93 (2013). However, even those conditions give rise to numerous ambiguities, as the definition uses general broad terms that are not further defined. Glennon, *supra* note 18, at 98–100.

¹⁰¹ Glennon, *supra* note 18, at 100–01 (arguing that a person of common intelligence would necessarily have to guess whether a use of force by a State violates the UN Charter).

¹⁰² Johan D. van der Vyver, *Prosecuting the Crime of Aggression in the International Criminal Court*, 1 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 1, 28 (2011).

either the UN Charter, UNGA Resolution 3314,¹⁰³ or any other major treaty, so its meaning cannot be learned from another source.

In an attempt to elaborate, the Elements of Crimes states that “the term ‘manifest’ is an objective qualification.”¹⁰⁴ The additional understandings concerning the crime of aggression further define that for a manifest violation to occur “the three components of character, gravity and scale must be sufficient to justify a ‘manifest’ determination. No one component can be significant enough to satisfy the manifest standard by itself.”¹⁰⁵

Those documents do not help in clarifying the term manifest. One can only assume that at least two of the three components listed must be present in order for an act of aggression to be a manifest violation of the UN Charter.¹⁰⁶ However, it is unclear what the standards are by which those components will be measured, as the Rome Statute does not clarify either the term manifest, or the terms “character, gravity and scale” of a violation.¹⁰⁷

By adopting a new, unexplained term, the Rome Statute’s definition allows too much room for interpretation. The prohibited conduct for individuals is unclear, and heads of State cannot use it to fully understand what actions they can take without the risk of being prosecuted. This fully contradicts the doctrine of strict legality.

In fact, since the term manifest violation does not appear in any other major international document, even the doctrine of substantive justice will have trouble justifying its broad and vague nature. One cannot foresee what conduct will fall under the term manifest violation, and no accessible interpretation exists to assist a head of State in planning his steps accordingly. The definition might be easily applicable in cases of extremely blunt violations of the UN Charter, i.e., invading another State in explicit violation of a peace treaty with a clearly visible intent to annex its territory. However, other conduct—even conduct in violation of the UN Charter—does not clearly, or foreseeably, fall within this definition.

¹⁰³ Drew Kostic, *Whose Crime is it Anyway? The International Criminal Court and the Crime of Aggression*, 22 DUKE J. COMP. & INT’L L. 109, 120 (2011).

¹⁰⁴ Elements of Crimes, *supra* note 55, Introduction, ¶ 3.

¹⁰⁵ Kampala Amendments, *supra* note 3, Annex III, ¶ 7.

¹⁰⁶ Kostic, *supra* note 103, at 120.

¹⁰⁷ Glennon, *supra* note 18, at 101.

The conduct of the State is worded in the Rome Statute as:

[T]he use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression[.]¹⁰⁸

The article then lists seven acts of use of force, such as the following: “[t]he invasion or attack by the armed forces of a State of the territory of another State,” “[b]ombardment . . . or the use of any weapons by a State against the territory of another State,” and “[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State.”¹⁰⁹ The Rome Statute defines those acts as acts of aggression while referring to the UNGA Resolution 3314.¹¹⁰

The conduct of the State must meet the following two conditions to constitute an act of aggression: the State must use armed force; and it must direct it against the sovereignty, territorial integrity, or political independence of another State. It is important to note that according to the definition, the use of force is not required to be inconsistent with the UN Charter.¹¹¹ This means that the known exceptions to the ban on use of force that exist in the UN Charter are not recognized in this definition for *act* of aggression.¹¹² The use of armed force by a State in self-defense is therefore considered an act of aggression by the Rome Statute.¹¹³

¹⁰⁸ Rome Statute, *supra* note 1, art. 8 *bis*(2).

¹⁰⁹ *Id.* art. 8 *bis*(2)(a), (b), (d).

¹¹⁰ *Id.* art. 8 *bis*(2).

¹¹¹ This is due to the phrasing “*or* in any other manner inconsistent with the Charter of the United Nations.” *Id.* art. 8 *bis*(2) (emphasis added). *See also* Glennon, *supra* note 18, at 89.

¹¹² Glennon, *supra* note 18, at 88–89 (applying the Rome Statute’s definition of act of aggression to acts by the U.S. government to show its broad approach that is inconsistent with international law).

¹¹³ Although such act of aggression must constitute a manifest violation of the UN Charter in order for it to constitute a crime of aggression. Rome Statute, *supra* note 1, art. 8 *bis*(1).

This makes the language of the definition all the more confusing. The terms used in the definition are general and broad in nature, and are subject to various conflicting interpretations.¹¹⁴ The fact that even a lawful use of force by a State falls under the definition of an act of aggression raises questions regarding the boundaries of those already broad terms. For example, is a legal use of force in self-defense against a State that initiated an armed attack considered a violation of that state's sovereignty? Is an armed attack permitted by the UNSC according to Chapter 7 of the UN Charter against a State a violation of that State's political independence? This lack of clarity creates more questions than it answers.

Another important aspect of the definition of act of aggression is the reference to the UNGA Resolution 3314. This reference immediately raises the question whether the Rome Statute in fact incorporated UNGA Resolution 3314 into the definition of act of aggression.¹¹⁵ The answer to this question is not clear from the words of the definition, and arguments can be made to both possible answers.¹¹⁶

As mentioned above, UNGA Resolution 3314 includes a definition of aggression that is identical to the Rome Statute's definition of act of aggression, but also includes other important provisions.¹¹⁷ Perhaps the most important is Article 2, according to which "[t]he first use of armed force by a state in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression."¹¹⁸ This provision, if incorporated into the Rome Statute's definition, will have a significant effect on future cases of the crime of aggression, because it creates a presumption of aggression that the defendant will have to disprove.

Another important article that could prove relevant to the Rome Statute's definition is Article 5, according to which "[n]o consideration of whatever nature, whether political, economic, military or otherwise,

¹¹⁴ Glennon, *supra* note 18, at 96–97.

¹¹⁵ *Id.* at 97.

¹¹⁶ *Id.* But see van der Vyver, *supra* note 102, at 24–25 (arguing that the UNGA Resolution 3314 is incorporated into the definition); Jennifer Trahan, *A Meaningful Definition of the Crime of Aggression: A Response to Michael Glennon*, 33 U. PA. J. INT'L L. 907, 944 (2012) (arguing that the UNGA Resolution 3314 most likely is not incorporated into the definition).

¹¹⁷ G.A. Res. 2330 (XXII), ¶ 1 (Dec. 18, 1967).

¹¹⁸ *Id.* ¶ 2 (Dec. 18, 1967).

may serve as a justification for aggression.”¹¹⁹ If indeed the resolution was incorporated fully into the Rome Statute’s definition, it contradicts one of the understandings annexed to the Rome Statute’s definition, according to which “a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case.”¹²⁰

Furthermore, such a provision will limit the ability of heads of State who are charged with a crime of aggression to argue that use of force by their State was justified and should not be prosecuted. Since the Rome Statute’s definition for act of aggression does not recognize the exceptions to the ban on use of force, how can a defendant charged with a crime of aggression conduct his legal defense without bringing the circumstances of his State’s actions before the ICC?

Most importantly, UNGA Resolution 3314 in itself is a vague document that does not have the clarity needed to properly define a criminal offense. The resolution was written more than thirty years before the SWGCA chose to rely on it for reference, and “[t]he entire [resolution] was a carefully balanced entity, containing negotiated compromises and deftly obscured clauses which were deemed necessary in the process of reaching a consensus.”¹²¹

It is important to remember that the definition for act of aggression is part of the definition for crime of aggression. While this definition suited the UN’s diplomatic approach, it does not contain any clarity as to what conduct constitutes an act of aggression. Since the two definitions are related, this uncertainty carries over to make the definition of the crime of aggression even more unclear.

2. *Mens Rea*

The Rome Statute includes a specific article that defines the mental element for all the crimes under its jurisdiction. According to the Rome Statute “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the

¹¹⁹ *Id.* ¶ 5(1).

¹²⁰ Kampala Amendments, *supra* note 3, Annex III, ¶ 6.

¹²¹ Ferencz, *supra* note 43, at 709 (explaining also that the Resolution itself was adopted without putting it to vote, and that some States had objections to it).

material elements are committed with intent and knowledge.”¹²² The Rome Statute goes on to explain both intent and knowledge:

For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.¹²³

In order to satisfy the *mens rea* of the crime of aggression, the potential aggressor must fulfill all three conditions: he must intend to engage in the conduct; he must intend to cause its consequences or be aware that they will occur in the normal course of events; and he must be aware of the circumstances.¹²⁴

However, the Rome Statute includes another provision relevant to *mens rea*, dealing with mistakes of fact and of law. The Rome Statute states that a mistake of fact by a defendant that negates his intent or knowledge of a crime will serve as grounds for excluding criminal responsibility.¹²⁵ However, “[a] mistake of law *may* . . . be a ground for excluding criminal responsibility if it negates the mental element required by such a crime.”¹²⁶

The Elements of Crimes document breaks down the mental elements specifically required for the crime of aggression. Some of the elements prescribed in the Elements of Crimes are dealing with the *actus reus*, and

¹²² Rome Statute, *supra* note 1, art. 30.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* art. 32(1).

¹²⁶ *Id.* art. 32(2).

are fairly clear.¹²⁷ However, two of those elements are more intricate:

The perpetrator was aware of the factual circumstances that established that [the] use of armed force [by his State] was inconsistent with the Charter of the United Nations.

...
The perpetrator was aware of the factual circumstances that established [] a manifest violation of the Charter of the United Nations.¹²⁸

The introduction to the elements of the crime of aggression add two additional provisions that affect the *mens rea*. According to those provisions, “[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations . . . [or to] the ‘manifest’ nature of the violation of the Charter of the United Nations.”¹²⁹

Reading these provisions together shows that the required *mens rea* for the crime of aggression is intent and knowledge. However, the question remains: “intent and knowledge as to what?”¹³⁰ To return to the hypothetical example laid out in the introduction, does the Rome Statute require the PM of Malta to know his attack will later be declared an act of aggression? If so, how could he know that?¹³¹ Does it require an intent to violate, manifestly or otherwise, the UN Charter—a document that is somewhat vague itself? What if the PM’s legal advisors concluded that the attack will not violate the UN Charter, or at least will not constitute a manifest violation?¹³² Will action by the Maltese PM constitute a mistake of law that excludes criminal responsibility?

¹²⁷ E.g., “The perpetrator planned, prepared, initiated or executed an act of aggression,” Elements of Crimes, *supra* note 55, elements, ¶ 1 (Sept. 9, 2002). See also Weisbord, *supra* note 100, at 493–95.

¹²⁸ Elements of Crimes, *supra* note 55, elements, ¶¶ 4, 6.

¹²⁹ *Id.* Introduction, ¶¶ 2, 4.

¹³⁰ Roger S. Clark, *Negotiating Provisions Defining the Crime of Aggression, Its Elements and the Condition for ICC Exercise of Jurisdiction Over It*, 20 EUR. J. INT’L L. 1103, 1111 (2009).

¹³¹ See *infra* Section C for a discussion of the process of declaring an act of State an act of aggression.

¹³² See Oscar Solera, *The Definition of the Crime of Aggression: Lessons Not-Learned*, 42 CASE W. RES. J. INT’L L. 801, 815–19 (2010).

In fact, since the Rome Statute defines the *mens rea* so broadly, while indifferent to whether the perpetrator made a legal evaluation of the meaning of his actions, it makes the *actus reus* of the individual meaningless. That is because the *mens rea* only calls for an intent and knowledge of the use of force itself, and its natural consequences. Therefore, whenever an act of aggression is committed by any State, a fact that is not easy to determine as discussed above, and because “[c]rimes against international law are committed by men, not by abstract entities,”¹³³ the head of that State can almost automatically be convicted of a Crime of aggression.

In other words, since Malta’s use of force was surely planned and executed by *someone* in a position of power, and since the *mens rea* calls only for intent to initiate the attack, the PM of Malta is at risk of criminal liability, regardless of his state of mind. Naturally, this makes it very hard for heads of State to understand what conduct is prohibited by the Rome Statute, or understand how they can use force lawfully—in a way that will prevent criminal liability.

C. The Role of the Security Council and the Problem of Progressive Developments

The amendment to the Rome Statute concerning the crime of aggression did not end with merely adding the definition itself. Another important addition to the Rome Statute in that context is Article 15 *bis*, which established a new mechanism for exercising jurisdiction by the ICC on the crime of aggression.

According to Article 15 *bis*, before the prosecutor can proceed with any investigation into allegations of a crime of aggression, she must “first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned.”¹³⁴ The prosecutor must notify the UNSC of the situation before the court, and allow the UNSC a period of six months to make such a determination.¹³⁵ If the UNSC did not make a determination, proceedings can continue only after a pre-trial chamber of the ICC “has authorized the commencement of the investigation in respect of a crime of aggression

¹³³ *Nuremberg Judgment*, *supra* note 28, at 221.

¹³⁴ Rome Statute, *supra* note 1, art. 15 *bis*(6).

¹³⁵ *Id.* art. 15 *bis*(6)–(7).

. . . and the Security Council has not decided otherwise.”¹³⁶ The UNSC, acting under Chapter VII of the UN Charter, can also refer a case in which a crime of aggression “appears to have been committed.”¹³⁷

These provisions allow the UNSC to play a very active role in the process of investigating, and eventually prosecuting, crimes of aggression. No case concerning the crime of aggression can continue without either the UNSC or the ICC’s pre-trial chamber declaring an act of aggression was committed by a State.

Arguably, this active role is consistent with the UNSC’s central position in the UN Charter. According to the UN Charter the UNSC holds “primary responsibility for the maintenance of international peace and security,”¹³⁸ and its decisions are binding on all members of the UN.¹³⁹ The UNSC also has the authority to “determine the existence of any threat to the peace, breach of the peace, or act of aggression and [to] make recommendations, or decide what measures shall be taken.”¹⁴⁰ These provisions of the UN Charter, especially Article 39, suggest that the UNSC has *exclusive* competence to determine the occurrence of an act of aggression outside of the context of the Rome Statute.¹⁴¹

However, this active role is extremely problematic in light of the principle of legality. Although “[a] determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute,”¹⁴² it is difficult to imagine a scenario in which the ICC would make a decision contrary to an explicit determination of the UNSC. Such a determination would be implausible, as the UNSC is the organ primarily responsible—and perhaps

¹³⁶ *Id.* art. 15 *bis*(8).

¹³⁷ *Id.* art. 13(b); U.N. Charter art. 39.

¹³⁸ U.N. Charter art. 24(1).

¹³⁹ *Id.* art. 25.

¹⁴⁰ *Id.* art. 39.

¹⁴¹ Stefan Barriga & Leena Grover, *A Historic Breakthrough on the Crime of Aggression*, 105 AM. J. INT’L L. 517, 527 (2011); Theodor Meron, *Defining Aggression for the International Criminal Court*, 25 SUFFOLK TRANSNAT’L L. REV. 1, 14 (2001). Note that according to the UN Charter, the UNSC’s competence is exclusive, unlike the Rome Statute, which gives competence for the pre-trial chamber to declare an act of aggression in the absence of such a declaration by the UNSC. Rome Statute, *supra* note 1, art. 15 *bis*(6)–(7). Some States argue that Article 15 *bis* therefore stands in contradiction to the UN Charter. Barriga & Grover, *supra*.

¹⁴² Rome Statute, *supra* note 1, art. 15 *bis*(9).

exclusively competent—for determining acts of aggression.¹⁴³

In that case, the criminal process lies in the hands of the UNSC, a political body that is not bound to basic legal principles like the principle of legality. Unlike the prosecutor of the ICC or the pre-trial chamber, who follows legal reasoning in their decisions, the UNSC can declare that an act of aggression has occurred based on strategic reasoning, a political agenda, or domestic public pressure. That determination, in turn, could translate into the conviction of an individual of the most heinous crime in international law.

The UNSC's active role also raises the problem of progressive developments.¹⁴⁴ Naturally, any definition worded with broad, vague terms creates a wide spectrum of possible interpretations, and allows for the adaptation and development of the law in the face of new events. This process is a welcome one for the UNSC, which is charged with the task of maintaining international peace and security. A broad definition of aggression allows the UNSC to consider every use of armed force by a State and apply the definition in the way best-suited to reach international stability and avoid conflicts.

However, “[i]t is necessary . . . to consider how far this development may proceed without collision with the principle of [legality].”¹⁴⁵ If the UNSC pushes the definition of aggression and applies it to more cases to help maintain international peace and security, it could trample defendants' rights in the ICC, who would have to pay the price of those progressive developments. While progressive development in the diplomatic field of the UNSC is encouraged, it can lead to judicial law-makings by the ICC due to the UNSC's active role in the process.

IV. Head of State Immunity

The idea of head of State immunity is widely recognized in international law. In the words of the United Kingdom (UK) House of Lords:

¹⁴³ See Glennon, *supra* note 18, at 105–06.

¹⁴⁴ See generally Shahabuddeen, *supra* note 71 (using the term “progressive developments” to describe the judicial process of “develop[ing] the law by adapting it to changing circumstances . . . provided that the developed law retains the essence of the original crime”). *Id.* at 1012–13.

¹⁴⁵ *Id.* at 1012.

It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability. State immunity probably grew from the historical immunity of the person of the monarch. In any event, such personal immunity of the head of state persists to the present day: the head of state is entitled to the same immunity as the state itself.¹⁴⁶

This type of immunity is used when a head of State is facing proceedings in another State, but may be relevant to international crimes as well. The Rome Statute includes specific provisions dealing with high ranking officials and head of State immunity.¹⁴⁷ However, unlike the principle of legality, the Rome Statute excludes this immunity from proceedings before the ICC.¹⁴⁸

Although the Rome Statute's approach to head of State immunity seems to end the discussion on the subject, the new definition of the crime of aggression raises further questions. In this part, the article will analyze the principle of head of State immunity, and how the definition of the new crime of aggression stands in contradiction to its rationales.

A. Head of State Immunity in International Law

The idea of immunity for heads of States originates from the "sovereignty-oriented tradition of international law and shields the highest-ranking representatives of a State as well as official conduct from scrutiny by foreign States."¹⁴⁹ It is based on the immunity that a State possesses in customary international law, which prevents other States from interfering with its public acts.¹⁵⁰

Generally, the immunity of heads of State can be divided into two

¹⁴⁶ R. v. Bow St. Metro. Stipendiary Magistrate *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (HL) 201–02, [1999] UKHL 17, 1999 WL 250052.

¹⁴⁷ Rome Statute, *supra* note 1, art. 27.

¹⁴⁸ *Id.*

¹⁴⁹ PEDRETTI, *supra* note 7.

¹⁵⁰ Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 409 (2004).

types, each shielding different acts and persons, and each have a different rationale behind it.

1. Immunity Ratione Materiae—*Functional Immunity*

Naturally, a State cannot act on its own, and its actions are made by its organs and representatives.¹⁵¹ However, since “[s]uch officials are mere instruments of a State . . . their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State.”¹⁵² Functional immunity stems from that idea, and bars a State from exercising legal sanctions against a foreign official acting in his official capacity. Functional immunity serves to shift the responsibility from such officials to the State on whose behalf they acted since their actions “were executed under the cloak of State authority.”¹⁵³

This type of immunity focuses on the act itself, and is therefore not limited to heads of State alone, but to all officials of a State acting on its behalf.¹⁵⁴ The immunity is also applicable to cases in which the State official is no longer in office, since it attaches itself to the act itself and not the person.¹⁵⁵

Unlike other claims of immunity, which are often procedural bars for a court to exercise jurisdiction,¹⁵⁶ this type of immunity “gives effect to a substantive [defense], in that it indicates that the individual official is not to be held legally responsible for acts which are, in effect, those of the State.”¹⁵⁷ Therefore, this immunity is considered “a defense for avoiding personal or individual responsibility by ‘hiding’ behind the veil of the State.”¹⁵⁸

It is important to note that functional immunity is more common in

¹⁵¹ See *Nuremberg Judgment*, *supra* note 28, at 221.

¹⁵² Prosecutor v. Blaškić, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 38 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 29, 1997).

¹⁵³ PEDRETTI, *supra* note 7, at 16–17.

¹⁵⁴ Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT’L L. 815, 825 (2010).

¹⁵⁵ *Id.* at 825.

¹⁵⁶ PEDRETTI, *supra* note 7, at 22.

¹⁵⁷ Akande & Shah, *supra* note 154, at 826.

¹⁵⁸ PEDRETTI, *supra* note 7, at 23.

civil than criminal cases. The reason is that most acts of State are performed within its territory, and State officials rarely exercise their State's authority outside their State's borders, and are less exposed to criminal proceedings.¹⁵⁹ Also, the scope of functional immunity, with regards to international crimes, is not fully clear. While functional immunity is considered a rule of customary international law,¹⁶⁰ it is not an absolute defense, and may not preclude legal proceedings against a State official alleged to have committed international crimes.

Those arguing against the application of functional immunity to international crimes claim that such crimes, considered to be *jus cogens*, cannot be considered official acts or in the sovereign authority of a State. Therefore, any State official committing an international crime cannot be shielded by functional immunity, since such an act is outside his official capacity.¹⁶¹ For example, a head of State that orders his soldiers to slaughter civilians in enemy territory cannot be considered as having acted in his official capacity, and therefore will not be immune. Also, "it has been argued that because *jus cogens* norms supersede all other norms they overcome all inconsistent rules of international law providing for immunity."¹⁶² However, the scope of this type of immunity—with regard to international crime—is still debatable.¹⁶³

2. Immunity Ratione Personae—Personal Immunity

Unlike functional immunity that focuses on the act, personal immunity focuses on the individual performing the act. This type of immunity "forms a classic exemption from jurisdiction . . . only conferred on a restricted circle of high-ranking State officials who are the current holders of the respective offices."¹⁶⁴

Personal immunity is granted to high-ranking state officials in order

¹⁵⁹ Akande & Shah, *supra* note 154, at 826.

¹⁶⁰ PEDRETTI, *supra* note 7, at 57–95 (analyzing the status of this type of immunity in customary international law based on State practice and *opinio juris*).

¹⁶¹ See Akande & Shah, *supra* note 154, at 828–32 (outlining the argument against the application of functional immunity to international crimes, and rejecting them for being unpersuasive).

¹⁶² *Id.* at 828, 832–38 (rejecting the argument for being inaccurate and legally incoherent).

¹⁶³ See *id.* at 838–39 (suggesting the International Court of Justice's (ICJ) view is that such immunity is applicable even to acts constituting international crimes).

¹⁶⁴ PEDRETTI, *supra* note 7, at 25.

to allow heads of State “the freedom necessary to engage in negotiations, defend national interests and communicate with other representatives free from any foreign impairment.”¹⁶⁵ Therefore, this type of immunity is limited to acting heads of State only, and does not apply to former heads of State.¹⁶⁶ However, the immunity is applicable to acts committed by the head of State prior to his entry to office.¹⁶⁷ Also, since personal immunity attaches itself to the person rather than the act, it applies to both official and personal acts of a head of State.¹⁶⁸

Since personal immunity is granted in order to allow the smooth conduct of international relations, it is granted to a limited circle of high-ranking State officials only.¹⁶⁹ The ICJ stated that immunity can be attached to “certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs.”¹⁷⁰ Unlike functional immunity, personal immunity is more widely agreed to be applicable to allegations of international crimes.¹⁷¹ This idea is set forth by the ICJ, which ruled:

[The court] has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to [heads of States], where they are suspected of having committed war crimes or crimes against humanity.¹⁷²

¹⁶⁵ *Id.* at 28.

¹⁶⁶ *Id.* at 29–30.

¹⁶⁷ Akande & Shah, *supra* note 154, at 819.

¹⁶⁸ *R. v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (HL) 201–02, [1999] UKHL 17, 1999 WL 250052; PEDRETTI, *supra* note 7, at 25–26.

¹⁶⁹ See Akande & Shah, *supra* note 154, at 818.

¹⁷⁰ Arrest Warrant of Apr. 11, 2000 (Dem. Rep. Congo v. Belgium), Judgment, 2002 I.C.J. Rep. 3, ¶ 51 (Feb. 14) [hereinafter ICJ Arrest Warrant]. See also PEDRETTI, *supra* note 7, at 30–56 (analyzing the scope of State officials entitled to personal immunity based on the ICJ decision).

¹⁷¹ See Akande & Shah, *supra* note 154, at 819–20.

¹⁷² ICJ Arrest Warrant, *supra* note 170, ¶ 58. Note, however, that the ICJ does not limit its conclusion to personal immunity alone, and the same can be said with regard to functional immunity.

B. The Irrelevance of Official Capacity in the Rome Statute

The immunity granted for heads of State, whether functional or personal, is applicable when a head of State faces proceedings in another *State*. However, its applicability in international tribunals is less than obvious. After World War I, when facing the outcomes of the war and the international crimes committed through its course, a commission was established by the allied forces in order to establish guilt in perpetrating the war and bring those found guilty to justice. In its report, the commission stated:

[T]here is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states [Head of State immunity], where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.¹⁷³

This different point of view mentioned in the commission's report was not further developed, because no one was tried after World War I.¹⁷⁴ However, it seemed to pave the road for future international criminal tribunals. The Nuremberg Charter of the IMT included specific provisions, stating, "[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."¹⁷⁵ The statutes of the ICTY and the ICTR included similar provisions excluding head of States immunity from proceedings before

¹⁷³ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference*, 14 AM. J. INT'L L. 95, 116 (1920).

¹⁷⁴ The commission did find that Germany and Austria, along with their allies Turkey and Bulgaria, premeditatedly waged the war. *See id.* at 98–107. However, the German Emperor William II could not be prosecuted because he escaped to the Netherlands, which refused to extradite him to the Allied forces. *See CASSESE ET AL.*, *supra* note 69, at 242.

¹⁷⁵ Nuremberg Charter, *supra* note 16, art. 7.

the tribunals.¹⁷⁶

The Rome Statute followed the same direction by excluding head of State immunity from proceedings before the ICC. Article 27 of the Rome Statute, titled *Irrelevance of Official Capacity*, states:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.¹⁷⁷

It is evident from the wording of the Article that the Rome Statute not only declared the official capacity of potential defendants irrelevant, but specifically excluded any type of head of State immunity from proceedings before the ICC. This is interpreted to exclude both functional immunity and personal immunity.¹⁷⁸

By ratifying the Rome Statute, State parties essentially waived their head of State immunity.¹⁷⁹ Perhaps better described, since every State holds the power to prosecute their own heads of State, the State parties to the Rome Statute are allowing another entity—the ICC—to act on their behalf and prosecute their leaders in their stead. However, the Rome Statute's new definition for the crime of aggression raises several legal issues that make this waiver problematic in a way that undermines State sovereignty.

¹⁷⁶ *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, UNITED NATIONS art. 7(2) (Sept. 2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; *Statute of the International Criminal Tribunal for Rwanda*, UNITED NATIONS art. 6(2) (Jan. 31, 2010), http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf.

¹⁷⁷ Rome Statute, *supra* note 1, art. 27.

¹⁷⁸ See PEDRETTI, *supra* note 7, at 246.

¹⁷⁹ *Id.*

C. Heads of States Immunity and the Crime of Aggression

Upon its face, the drafters of the Rome Statute made it clear that the official capacity of perpetrators will not serve as a defense before the court, and that head of State immunity is excluded from proceedings in the ICC. But the crime of aggression is different from the other crimes of the Rome Statute, and its definition conflicts with the mere exclusion of this immunity.

1. The Unique Nature of the Crime of Aggression

Nothing can testify better to the unique nature of the crime of aggression than the years it took to adopt its definition. However, there is another distinction between the crime of aggression and the other crimes of the Rome Statute, which warrants a different analytical approach. Unlike other crimes, a use of force by a State against another State could be, under certain conditions, lawful.¹⁸⁰

In the context of heads of State immunity, this distinction is important, as it undermines the exclusion of the immunity. Other crimes under the Rome Statute have no justification and no exception; the rape and murder of enemy civilians or the torture of prisoners of war are prohibited under any circumstances.¹⁸¹ Those acts cannot be regarded as official actions for purposes of functional immunity, or as actions needed for free inter-State relations for purposes of personal immunity. The exclusion of head of State immunity from those crimes is reasonable, and even desirable.¹⁸²

The crime of aggression, on the other hand, is essentially a use of force by a State against another State, and therefore could be justified under certain conditions. The Rome Statute attempts to criminalize only those uses of force that constitute a manifest violation of the UN Charter,

¹⁸⁰ Although the Rome Statute consider every use of force by a State against another State as an act of aggression, the use of force pursuant to a UNSC resolution or in self-defense is lawful. U.N. Charter art. 42, 51.

¹⁸¹ Rome Statute, *supra* note 1, art. 7-8.

¹⁸² See Jenny S. Martinez, *Understanding Mens Rea in Command Responsibility*, 5 J. INT'L CRIM. JUST. 638, 639 (2007) (explaining the importance of holding leaders responsible for international crimes that are often carried out by foot-soldiers, but are directed or allowed to occur by those leaders who bear a greater share of moral responsibility).

but this term is ill-defined as discussed above. Because of this justification, one cannot ignore that a crime of aggression may be either an official act of State sovereignty or an action needed as part of inter-State relations, however undesired. Due to its unique nature, the exclusion of head of State immunity from aggression is unreasonable.

To illustrate, had the PM of Malta ordered his troops to execute every Libyan tourist in Malta, or to bomb every mosque in Libya in response to the approaching ship, he could not be considered as having acted in his official capacity or as part of legitimate inter-State relations. In this case, his prosecution would be a desired outcome. However, because use of force by Malta may be justified, it should be considered an official act. To deny the PM of Malta immunity as head of State would limit his ability to exercise his leadership role in a way that contradicts the rationale of the immunity.

2. *Is Official Capacity Really Irrelevant?*

The nature of the crime of aggression is not its only unique characteristic. A crime of aggression can only be committed “by person[s] in a position effectively to exercise control over or direct the political or military action of a State.”¹⁸³ The crime of aggression was defined as “a leadership crime,”¹⁸⁴ and as such, it curtails special responsibility on heads of State and other officials in a position of power for the actions of their State.¹⁸⁵ Since the State is the one committing the actual *act* of aggression, and only a person in a position of power can be held accountable for it, the definition of the crime of aggression serves as recognition that the acts of a State should be attributed to its leaders and vice versa.

The situation in which actions of the State and the actions of its leaders are attributed to one another is unique to the crime of aggression, since no other crime under the Rome Statute demands that the

¹⁸³ Rome Statute, *supra* note 1, art. 8 *bis*(1).

¹⁸⁴ Informal Inter-Sessional Meeting, *supra* note 52, at 15–16; CASSESE ET AL., *supra* note 69, at 140–41.

¹⁸⁵ This responsibility is different from command responsibility. The crime of aggression lists the leadership role as part of the *actus reus*. Rome Statute, *supra* note 1, art. 8 *bis*(1). Command responsibility is a form of criminal liability “on the basis of an *actus reus* that is an omission,” meaning that the leader did not commit any action, but simply allowed his subordinates to act. Martinez, *supra* note 182, at 642.

perpetrator be in a position of power, or involves State conduct. This situation is also the rationale behind functional immunity—because actions of a head of State and other officials are attributed to the State, they should not be held accountable. How can the same situation rationalize both granting immunity to heads of State and criminalizing their behavior?

This double standard is evident in the provisions of the Rome Statute itself. While Article 27 states that the Rome Statute “shall apply equally to all persons without any distinction based on official capacity,” Article 8 *bis* limits its applicability only to “person[s] in a position effectively to exercise control over or direct the political or military action of a State.”¹⁸⁶ There is a direct contradiction between the Rome Statute’s aspiration to apply its provisions equally to all persons and its focus on heads of State as the only possible perpetrators of the crime of aggression.

3. *The Democracy Problem*

Another problem that illustrates the contradiction of excluding head of State immunity from the crime of aggression is what will be referred to in this article as the “democracy problem.” In modern, liberal democracies, the power and control over the State is separated into three different branches—the legislative, executive and judicial—in order to prevent a power-centralized totalitarian regime.¹⁸⁷ The separation of powers creates a political system in which it is hard to attribute an action of the State to only one branch, since their actions are intertwined and their responsibilities are shared.¹⁸⁸ This is different from a dictatorship, in which there is only one leader who controls the State.

The PM of Malta, for example, is not a lone actor in the Maltese political system. A number of ministers, advisors, and military commanders advise the PM; a parliament of legislators is allocating funds to allow the execution of his decisions; and a court system oversees his actions. An official action of the PM, like striking the

¹⁸⁶ Rome Statute, *supra* note 1, art. 8 *bis*(1), 27.

¹⁸⁷ Ron Merkel, *Separation of Power—A Bulwark for Liberty and a Rights Culture*, 69 SASK. L. REV. 129, 129 (2006).

¹⁸⁸ See Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 29–31 (2003).

Libyan ship, cannot be attributed to one individual, or even to a group of individuals. This is the reason State officials are granted functional immunity.

The Rome Statute's definition of the crime of aggression seems to ignore these notions by criminalizing individuals for the conduct of their State in a manner that ignores the rationale for granting them immunity. It may be suitable in this context to prosecute dictators, since every act of their State can be attributed to them personally and exclusively due to their absolute power. However, what good is the crime of aggression if it cannot apply equally to all forms of States and governments? The fact that the definition of the crime of aggression ignores the democratic problem demonstrates that it is flawed.

V. The Right of Self-Defense

The concept of self-defense "has been sanctified in domestic legal systems since time immemorial."¹⁸⁹ Tracing the exact point in time in which the concept of self-defense was created is impossible,¹⁹⁰ and some scholars argue that it originated from natural law.¹⁹¹ States also have a right to act in self-defense,¹⁹² which is deeply connected to the crime of aggression.

In today's legal reality, "[u]nder no circumstances can the actual use of force by both parties to a conflict be lawful simultaneously."¹⁹³ Therefore, if one State is acting in lawful self-defense, the other State must have committed an act of aggression.¹⁹⁴ But the definition of the crime of aggression makes this connection a contradictory one, and threatens to narrow the right of self-defense, deterring States from exercising it.

¹⁸⁹ DINSTEIN, *supra* note 7, at 188.

¹⁹⁰ See generally Eustace Chikere Azubuike, *Probing the Scope of Self Defense in International Law*, 17 ANN. SURV. INT'L & COMP. L. 129 (2011).

¹⁹¹ See generally Major John J. Merriam, *Natural Law and Self-Defense*, 206 MIL. L. REV. 43 (2010) (arguing that the basis of a State's right of self-defense is natural law).

¹⁹² See *id.* at 54–57.

¹⁹³ DINSTEIN, *supra* note 7, at 190.

¹⁹⁴ Recall that the Rome Statute defines an act of aggression as "the use of armed force by a State against . . . another State." Rome Statute, *supra* note 1, art. 8 *bis*(2).

A. Self-Defense in Modern International Law

The concept of self-defense as a justification for a State to use armed force is relatively new, since war was considered a legitimate recourse for any State, such that no justification was needed.¹⁹⁵ For that reason, a State's right of self-defense developed parallel to the prohibition to use force.¹⁹⁶ Although the right of self-defense is considered part of customary international law, the exact circumstances in which a State can act in self-defense is subject to much debate.¹⁹⁷

Today, it is common to view the right of self-defense as “enshrined in Article 51 of the UN Charter.”¹⁹⁸ Article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-[defense] if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-[defense] shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹⁹⁹

An important point in Article 51 is the assertion that the right of self-defense is an inherent right. The UN Charter does not define the scope of the right of self-defense, and does not explain the meaning of “inherent.” However, it is common to view this expression as an acknowledgment that the right of self-defense predates the UN Charter, and is a part of customary international law.²⁰⁰

¹⁹⁵ See DINSTEIN, *supra* note 7, at 188.

¹⁹⁶ See *Report of the international Law Commission on the Work of its thirty Second Session (5 May–25 July 1980)*, II(2) Y.B. INT'L L. COMM'N. 1, 54 (1980).

¹⁹⁷ Amos N. Guiora, *Self-Defense—From the Wild West to 9/11: Who, What, When*, 41 CORNELL INT'L L. J. 631, 638 (2008).

¹⁹⁸ DINSTEIN, *supra* note 7, at 189.

¹⁹⁹ U.N. Charter art. 51.

²⁰⁰ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14 ¶ 176 (June 27).

Another key point is that the right of self-defense can be either individual or collective. A State could exercise its right of self-defense in response to an attack directed at *another* State, because “[t]he security of various States is frequently interlocked.”²⁰¹ Moreover, a State could use force in self-defense in the aid of another State even if there is no treaty between them.²⁰²

B. Conditions for Exercising the Right of Self-Defense

Article 51 of the UN Charter does not define the scope of the right of self-defense, and does not regulate States’ exercise of the right. However, the right of self-defense as an exception to the prohibition on the use of force should be used only when several conditions, recognized in customary international law, are met.²⁰³

If a State’s use of force fails to meet those conditions, “the use of force is not justified under the doctrine of self-defense, and may in fact be unlawfully retaliatory or punitive.”²⁰⁴ The other side of the coin, however, is that once use of force by a State is “properly impressed with the legal stamp of self-defense,” it extends to all measures taken by that State.²⁰⁵ In other words, the conditions for exercising self-defense are a crucial factor, for a State’s use of force—as massive as it is—could be considered lawful self-defense if it meets the conditions; it could also be considered an act of aggression if it does not, even if it is a small-scale use of force.

²⁰¹ DINSTEIN, *supra* note 7, at 278 (outlining four different categories of self-defense: “(i) individual self-defense individually exercised; (ii) individual self-defense collectively exercised; (iii) collective self-defense individually exercised; and (iv) collective self-defense collectively exercised”).

²⁰² Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT’L L. 452, 457 (1991) (referring to the UNSC Resolution 661 that recognized for the first time the right of collective self-defense in a particular situation—the Iraqi invasion of Kuwait).

²⁰³ See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶ 176 (June 27) for the conditions of necessity and proportionality.

²⁰⁴ Katherine Slager, *Legality, Legitimacy and Anticipatory Self-Defense: Considering an Israeli Preemptive Strike on Iran’s Nuclear Program*, 38 N.C. J. INT’L L. & COM. REG. 267, 286 (2012).

²⁰⁵ DINSTEIN, *supra* note 7, at 260.

1. *An Armed Attack as a Condition*

The first condition to the right of self-defense is also the most contested one. Article 51 of the UN Charter states that the right of self-defense exists only “if an armed attack occurs.”²⁰⁶ Many scholars argue that this limitation of the right of self-defense does not exist in customary international law, which recognizes a State’s right to act in non-reactive self-defense, meaning prior to an actual armed attack.²⁰⁷ This notion of relying on self-defense before an armed attack occurs is illustrated by the *Caroline* incident.²⁰⁸ The language of the article raises the question of whether the UN Charter can limit the scope of that right by creating the requirement of an armed attack, and whether an actual armed attack is a condition precedent to the exercise of the right of self-defense.

Those questions generated many answers that “can generally be divided into two camps: restrictionist and expansionist.”²⁰⁹ While the first argue that Article 51 should be read to applying restrictions on the right of self-defense,²¹⁰ the latter argue that the right of self-defense is broader than the confines of Article 51, which cannot restrict or limit it.²¹¹ Although there are indications of recognition for non-reactive self-defense in the international community,²¹² there are no clear answers to those questions. This legal debate creates ambiguity in the law, and makes it impossible to reach a clear conclusion whether non-reactive self-defense is lawful.²¹³

2. *Necessity and Proportionality*

The use of force in self-defense must also be necessary and

²⁰⁶ U.N. Charter art. 51.

²⁰⁷ David A. Sadoff, *A Question of Determinacy: The Legal Status of Anticipatory Self-Defense*, 40 GEO. J. INT’L L. 523, 553–56 (2009) (classifying the two types of self-defense—reactive and non-reactive—and further dividing non-reactive acts of self-defense to interceptive, anticipatory, and preemptive).

²⁰⁸ See generally Martin A. Rogoff & Edwards Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT’L L. 493 (1990).

²⁰⁹ Slager, *supra* note 204, at 277–83 (2012).

²¹⁰ See DINSTEIN, *supra* note 7, at 196–98.

²¹¹ Sadoff, *supra* note 207, at 553–56.

²¹² *Id.* at 557–75.

²¹³ Slager, *supra* note 204, at 321.

proportional.²¹⁴ These two conditions are considered to reflect customary international law.²¹⁵ The condition of necessity could be summarized in simple words: “force should not be considered necessary until peaceful measures have been found wanting or when they clearly would be futile.”²¹⁶ In its essence, necessity calls for the use of armed force to be a last resort rather than a first course of action in the face of an armed attack. Necessity to use force in self-defense could also arise “in the case of an imminent threat.”²¹⁷

The condition of proportionality demands that “[a]cts done in self-defense must not exceed in manner or aim the necessity provoking them.”²¹⁸ Proportionality is often viewed “as a standard of reasonableness in the response to force by counter-force,”²¹⁹ and is applied with some degree of flexibility to different conflicts and their circumstances.²²⁰ This is mainly due to the fact that it is impossible to measure the proportionality of a response before it occurs and the damage can be determined.²²¹

3. Imminency

Many scholars add another condition to the exercise of a State’s right of self-defense—the condition of imminency, or immediacy.²²² This condition states that “there must not be an undue time-lag between the armed attack and the exercise of self-defense in response.”²²³ That is not to say that a State must respond instantly to an armed attack; States are allowed a reasonable time to assess the situation and decide on a course of action.²²⁴

²¹⁴ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶ 176 (June 27).

²¹⁵ *Id.*

²¹⁶ Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635 (1984).

²¹⁷ Schachter, *supra* note 216, at 1634 (presenting the condition of necessity as comprising the condition of imminency). See also Slager, *supra* note 204, at 315–16.

²¹⁸ Schachter, *supra* note 216, at 1637.

²¹⁹ DINSTEIN, *supra* note 7, at 232.

²²⁰ See Schachter, *supra* note 216, at 1637. See also DINSTEIN, *supra* note 7, at 232.

²²¹ DINSTEIN, *supra* note 7, at 262.

²²² *Id.* at 230–31.

²²³ *Id.* at 233.

²²⁴ *Id.* (adding that a reasonable time is also needed if a State wishes to fully comply with the condition of necessity, and consider the possibility of acting in a peaceful manner).

Naturally, this condition conflicts with the concept of non-reactive acts of self-defense that are exercised by the defending State *before* an actual armed attack occurs. However, it is widely recognized that a State can “use armed force in self-defense prior to an actual attack but only where such an attack is imminent ‘leaving no moment for deliberation.’”²²⁵

Even though the condition of immanency seems quite clear, it is said that “the concept of imminence is the most problematic variable It is currently rather unclear when an attack is sufficiently ‘imminent’ to justify military action.”²²⁶ The problematic nature of imminency is demonstrated by the U.S. standing rules of engagement, according to which “imminent does not necessarily mean immediate or instantaneous.”²²⁷

4. Assessing the Fulfillment of the Conditions

Laying out the conditions for exercising self-defense is important, but not enough. A common way of assessing the fulfillment of those conditions, along with an agreed upon standard for every condition, is needed in order to thwart false claims of self-defense. It is sufficient to mention Nazi Germany’s fabricated claim of self-defense in invading Poland to realize that use of force by a State cannot be labeled an act of lawful self-defense simply because that State contended it was.²²⁸

However, in the face of an armed attack or an imminent threat that warrants an act of self-defense, “[t]he State under attack . . . cannot afford the luxury of waiting for any juridical (let alone judicial) scrutiny of the situation to run its course.”²²⁹ In an attempt to balance this dilemma, Article 51 of the UN Charter creates a two-phase rule.²³⁰ The

²²⁵ Schachter, *supra* note 216, at 1635.

²²⁶ Dominika Švarc, *Redefining Imminence: The Use of Force Against Threats and Armed Attacks in the Twenty-First Century*, 13 ILSA J. INT’L & COMP. L. 171, 182 (2006).

²²⁷ CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENTS/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES enclosure A, para. 3, § g. (13 June 2005). See also Major Eric D. Montalvo, *When Did Imminent Stop Meaning Immediate? Jus In Bello Hostile Intent, Imminence, and Self-Defense in Counterinsurgency*, ARMY LAW., Aug. 2013, at 24.

²²⁸ See DINSTEIN, *supra* note 7, at 233 n.1379.

²²⁹ *Id.*

²³⁰ *Id.* at 234–36; U.N. Charter art. 51.

first phase of the assessment remains in the hands of the defending State, which “determines whether the occasion calls for the use of forcible measures in self-defense, and, if so, what specific steps ought to be taken.”²³¹ In the second phase, a State that acted in self-defense must report its action to the UNSC, which is tasked with the “review of self-defense claims made by Member States.”²³²

However, the two-phase rule does not help in answering numerous legal questions that a State who wishes to use force in self-defense faces. For example, in the hypothetical case of the Libyan ship, Malta must determine whether the approaching Libyan ship constitutes an actual armed attack. If not, Malta will have to form an opinion whether self-defense can be exercised in a non-reactive way, and whether the situation constitutes a sufficiently imminent threat to justify the use of force. Malta will also have to determine whether the use of force is necessary, and whether the proposed response—airial bombing—is proportionate. To complicate the matter even more, if Malta has valid information that the Libyan ship is heading to the shores of nearby Italy, the analysis could be entirely different.

The answer to these questions is complex—as is oftentimes the case in international law. Opinions are so diverse that “[r]egrettably, we are left with little more than a soupy complexion and a lot of guesswork.”²³³ Malta will be forced to decide, without a globally agreed-upon standard, whether the conditions to exercise its right of self-defense have been met, and have that decision reviewed by the UNSC should Malta choose to use armed force.²³⁴ The crime of aggression adds to this already complex situation in a way that narrows and limits the right of self-defense.

C. The Crime of Aggression as Narrowing the Right of Self-Defense

The Rome Statute does not mention the right of self-defense; it treats every use of force by a State as an act of aggression, while only those that “constitute[] a manifest violation of the Charter of the United

²³¹ DINSTEIN, *supra* note 7, at 234.

²³² *Id.*

²³³ Sadoff, *supra* note 207, at 582.

²³⁴ *See* DINSTEIN, *supra* note 7, at 234–36.

Nations” is considered . . . a crime of aggression.²³⁵ The Rome Statute also does not mention whether a breach of Article 51 of the UN Charter would constitute a manifest violation. These questions are of extreme importance to a State that contemplates whether to use force in self-defense, since the Rome Statute may consider it as an act of aggression, and potentially as a crime of aggression.

The Rome Statute also gives a very active role to the UNSC. A determination by the UNSC that a State has committed an act of aggression is an initial condition for a proceedings before the ICC.²³⁶ Due to its active role, combined with its authority to review acts of alleged self-defense according to Article 51 of the UN Charter, the UNSC has the power to shape the crime of aggression and affect future cases.

With this in mind, the article now turns to discuss whether the definition of the crime of aggression and the mechanism that gives the UNSC an active role contradicts the right of self-defense.

1. The Standard of Determining Self-Defense

The principle of self-defense is not unique to international law. Most domestic legal systems developed a doctrine of self-defense in their penal code.²³⁷ As a legal principle in domestic criminal law, self-defense has a fairly clear standard by which a person acting in alleged self-defense is measured.²³⁸ Some legal systems adopted a completely subjective standard upon which a person acting in self-defense is measured; other systems adopted an objective “reasonable person” standard to measure behavior.²³⁹

However, international law contains no standard at all, either

²³⁵ Rome Statute, *supra* note 1, art. 8 *bis*(1)-(2).

²³⁶ *Id.* art. 15 *bis*(6)-(8). However, note that although a declaration by the UNSC is a condition, it is possible to proceed with an investigation without such a declaration, pursuant to a decision by the pre-trial chamber. Even in such a case, the UNSC can “decide otherwise”, in which case the investigation cannot continue. *Id.*

²³⁷ See generally Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475 (2006).

²³⁸ See Seth Diamond, *Criminal law: The Justification of Self Defense*, 1987 ANN. SURV. AM. L. 673 (1987).

²³⁹ *Id.* at 675.

subjective or objective. Adopting a subjective standard might be consistent with the inherent nature of the right of self-defense, but it contradicts the role of the UNSC—a third party to any conflict—in reviewing acts of self-defense. An objective standard is no less problematic, since a “reasonable State” is a completely theoretical concept. Many, if not all, of the principles and conditions of the right of self-defense are highly contested, making it impossible to distill a “reasonable State’s” behavior. Needless to say, the Rome Statute provides no standard.

In the diplomatic arena, the ambiguity of the standard is neither problematic nor perhaps even much needed; it gives the UNSC the flexibility it needs to effectively maintain global peace and security by declaring a State’s act as self-defense (or aggression) based on its assessment of the situation as a whole. However, it is highly problematic when criminal proceedings are on the line.

The UNSC is a political body that is not bound by legal principles, and has no clear and uniform standard for self-defense. By relying on the UNSC to declare whether a use of force constitutes lawful self-defense, the Rome Statute fails to create a clear standard for States to follow. If Malta wants to use force against the Libyan ship, it must decide whether the conditions for exercising self-defense were met. The UNSC will review Malta’s decision without any clear standard—an understandable situation in the diplomatic field. However, if the UNSC rejects Malta’s claim of self-defense and declares it an aggressor, Malta faces an uphill battle in arguing otherwise before the ICC, since there is no standard in the Rome Statute.

This makes the UNSC’s role even more central. Naturally, every act of aggression that was committed by a State had a person in a position of power that “plan[ned], prepar[ed], initiat[ed,] or execut[ed] the act.”²⁴⁰ Because of this, a declaration of aggression by the UNSC can easily result in that person’s conviction of a crime of aggression, since the main question—the occurrence of aggression—was already answered by the UNSC, and there is no legal standard in the Rome Statute that would allow a State to contest the UNSC’s declaration. It is doubtful that the drafters of the UN Charter intended to grant the UNSC the power to effectively convict a State’s leader.

²⁴⁰ Rome Statute, *supra* note 1, art. 8 *bis*(1).

Furthermore, the lack of standard in the Rome Statute might cause heads of State to unnecessarily limit the exercise of their right of self-defense, and decide to forfeit that right even in cases that might warrant it in fear of criminal proceedings against them. If in the past, the consequences of holding a legal position different from that of the UNSC were left in the diplomatic field, it could now result in criminal consequences due to the lack of standard for self-defense in the Rome Statute and the active role of the UNSC.

For example, if Malta's analysis that its response was proportional is contrary to the UNSC's future decision, it may have an effect personally on the PM and others in a position of power. The UNSC, after reviewing Malta's actions, can retroactively label the bombing of the ship an illegal use of force, and thus potentially cause for the conviction of Malta's PM. In that regard, the crime of aggression acts as a legal deterrent from exercising self-defense. Due to the inherent nature of the right of self-defense, clearly, the definition of the crime of aggression is flawed.

2. *The UNSC's Inability to Declare (Lack of) Aggression*

The lack of a common standard to measure a State's actions in self-defense is only half of the problem in relying on the UNSC to define acts of aggression as part of the criminal process. The UNSC is a political body, comprised of States with political and moral agendas. Its declarations, to include those concerning acts of aggression, are affected by those agendas.

Moreover, the permanent members of the UNSC hold the right to veto decisions on matters other than procedural.²⁴¹ In the context of aggression, this calls for a majority of members of the UNSC, including *all* five permanent members, to declare an act as aggression. This mechanism may serve as a safeguard from promoting agendas of any one State and as a way to maintain stability. But it also makes it unlikely that acts of aggression will be declared by the UNSC, as such wide agreement on matters of international security is seldom achieved.²⁴²

²⁴¹ U.N. Charter art. 27(3).

²⁴² See, e.g., Dr. Simon Adams, *Failure to Protect: Syria and the UN Security Council*, GLOBAL CENT. RESP. PROTECT (Mar. 2015), http://www.globalr2p.org/media/files/Syria_paper_final.pdf.

It is also highly unlikely that the UNSC will “decide otherwise,”²⁴³ or positively declare that an act is not aggression. This is of great significance, since the Rome Statute allows for the prosecutor to commence with proceedings pursuant to the pre-trial chamber’s decision, unless the UNSC decided otherwise. But due to the political nature of the UNSC and its permanent members’ veto power, such a decision is highly improbable. This leaves the task of declaring an act of aggression in the hands of the ICC, a task it is not authorized to do,²⁴⁴ and does not have the proper tools to do.

To illustrate this problem, assume Malta’s use of force is a legitimate response in self-defense, but Libya alleges that Malta was the aggressor and asks the prosecutor of the ICC to investigate. A lack of declaration of aggression by the UNSC in this case could mean one of two things: one, either the UNSC does not consider Malta’s actions as aggression; or two, the UNSC could not reach the needed majority, perhaps due to a veto by one of the permanent members.²⁴⁵

If one of the permanent members in the UNSC has an interest in assisting Libya, or has a very narrow view of the right of self-defense that is not in line with customary international law that it wishes to promote, the UNSC might not declare Malta’s actions as aggression. But it also will not be able to decide otherwise if the ICC pre-trial chamber decides to proceed with the investigation.

Again, such outcomes might be acceptable in diplomatic relations, but if the Maltese PM faces criminal proceeding by deciding to act in self-defense, the mechanics of the Rome Statute may push him to focus more on the balance of power in the UNSC rather than on the well-being of his State. The Rome Statute’s definition of the crime of aggression makes the exercise of self-defense, especially in contested cases in which the belligerent States blame each other, a question of who has the bigger allies in the UNSC.

3. The Need to Justify Self-Defense

Article 51 of the UN Charter imposes on the UNSC the role of

²⁴³ Rome Statute, *supra* note 1, art. 15 *bis*(8).

²⁴⁴ U.N. Charter art. 39. Meron, *supra* note 141.

²⁴⁵ See Glennon, *supra* note 18, at 107.

reviewing State conduct and taking “such action as it deems necessary in order to maintain or restore international peace and security.”²⁴⁶ Naturally, this means that States acting in self-defense should report and justify their actions to the UNSC in some way.

This procedure is obviously not part of the *inherent* right of self-defense, since clearly it was created by the UN Charter, unlike the right itself.²⁴⁷ However, a State that either fails to report its actions to the UNSC, or fails to justify its actions altogether, could be labeled as an aggressor by the UNSC. This could have significant implications on a State, regardless of any criminal tribunal.²⁴⁸

The new crime of aggression turns this question of State aggression into a step in a criminal process. In the event there is no UNSC declaration of aggression, the ICC—a judicial body—will have to review the State’s actions and decide if it was justified by the right of self-defense, based on valid evidence presented to it. Such evidence may be classified or imperative to the State’s national security, and the State may not be willing or able to present it. The State’s failure to present favorable evidence could be devastating because the consequences of the ICC’s judicial review are not limited to the State, but may have a personal effect on the head of State.

To illustrate, suppose Malta based its actions on an intelligence report that came from an agent aboard the Libyan ship, or from sensitive technology that allows surveillance of suspicious ships in international waters. In the past, Malta could decide what information it should disclose to the UNSC in order to justify its actions. Perhaps Malta would never be asked to justify its actions if it had strong allies in the UNSC. However, in the era of the new crime of aggression, failing to produce evidence might result in the Maltese PM’s conviction for aggression. The PM would face a horrible choice of endangering Malta’s national security by disclosing the information to the ICC, or increasing his personal risk of criminal conviction by failing to disclose the evidence.

But the problem is broader than the dilemma over what evidence to

²⁴⁶ U.N. Charter art. 51.

²⁴⁷ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14 ¶ 235 (June 27).

²⁴⁸ See CASSESE ET AL., *supra* note 69, at 144. Note, however, that the Rome Statute does not state whether a breach of Article 51 of the UN Charter constitutes a manifest violation.

present. Under the new definition of the crime of aggression, the ICC can decide if a State's action is lawful self-defense, although it is clearly not the right forum for such a review. As illustrated above, the scope of the right of self-defense is highly contested, and is ground for an endless legal debate. Unlike other international crimes that have a more factual *mens rea*,²⁴⁹ the legality of the use of force in self-defense is a highly complicated question, that may not have a "right or wrong" answer for a court to adopt. This evidentiary problem illustrates that the ICC is not the right body to determine the legality of a State's use of force.

By turning the process of judging the legitimacy of a State's use of force in self-defense into a step in the criminal process, the Rome Statute transforms the inherent right of self-defense into an evidentiary question before a forum that is ill-suited for the task. Questions of Malta's security and its right of self-defense will be limited by what it can prove in the courtroom, and will be answered by a judicial body that lacks the broader point of view needed for such decisions. This dilemma will serve as deterrence for heads of State from exercising their right of self-defense, at least until valid public evidence could be obtained.

VI. Conclusion

The Rome Statute's definition of the crime of aggression is far from perfect. The definition itself is obscure and vague, and does not provide a potential defendant with clear notice of prohibited conduct. The construction of the crime of aggression is applicable only to individuals in a position of power and contradicts both the Rome Statute's aspiration to apply equally to all people, and the general principle of head of State immunity. Finally, the crime of aggression narrows the inherent right of self-defense by considering all use of force aggression, and by creating a mechanism of judicial scrutiny of a State's conduct.

These problems are not new to the Rome Statute's crime of aggression. The Nuremberg Charter's crimes against peace were the target of similar criticism for being too vague and allowing political

²⁴⁹ See, e.g., Rome Statute, *supra* note 1, art. 6 (defining genocide as committing acts with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, then listing five acts that constitute genocide such as killing or causing bodily harm to a member of the group); *id.* art. 8 (defining war crimes as "[g]rave breaches of the Geneva Conventions of 12 August 1949," or other serious violations out of a list of twenty-two acts that constitute war crimes).

prosecutions.²⁵⁰ It is interesting to note that, when describing the law of the Nuremberg Charter, the IMT felt obliged to state that “[t]he Charter is not an arbitrary exercise of power on the part of the victorious Nations,” as if answering anticipated criticism.²⁵¹

The creation of a criminal charge of “crimes against the peace” in the Nuremberg Charter,²⁵² and the subsequent term “aggression” that was developed in ICL and left undefined to this day, may have been the right thing to do from a moral ground. However, both of those crimes lack a legal basis in either customary international law or any existing treaty. As illustrated by one scholar,

[t]he first question that needs to be addressed is: what is it that is being defined? I have stated elsewhere that efforts should be directed at determining what aggression is, not “wars of aggression,” “acts of aggression,” or similar notions. The reason is that all these concepts—wars, acts, etc.—always refer to or qualify the concept of aggression.²⁵³

The contradictions between the crime of aggression and the basic principles in international law cannot be solved by amending the Kampala Amendments. The scope and quality of those contradictions suggest that perhaps criminal law is not the right tool for preventing aggression. The logical thing to do from a purely legal perspective would be to give up the entire notion of prosecuting individuals for a State’s aggression. It is far better to maintain international peace and security through diplomacy and the balance of power between States than through criminal enforcement.

Such enforcement may be suitable for *relatively* simple and factual crimes like genocide or war crimes. But aggression, or any State’s use of force, is a complex matter that exceeds a simple factual question and involves State conduct, security considerations, diplomacy, and international politics. Such questions are simply not fit to be answered in a criminal court, as competent as it is. The possibility that the fictionalized PM of Malta could be convicted as an aggressor, a

²⁵⁰ See Clark, *supra* note 20, at 527–28.

²⁵¹ *Nuremberg Judgment*, *supra* note 28, at 216.

²⁵² Nuremberg Charter, *supra* note 16, art. 6(a).

²⁵³ Solera, *supra* note 132, at 812.

possibility that is all too real, should worry the entire international community, and not just the PM himself.

**WHAT COMPRISES A “LASCIVIOUS EXHIBITION OF
THE GENITALS OR PUBIC AREA”? THE ANSWER,
MY FRIEND, IS *BLOUIN* IN THE WIND**

MAJOR DANIEL M. GOLDBERG*

*It should not be this hard to plead guilty to possessing
child pornography.¹*

I. Introduction

Child pornography typically hews to Potter Stewart’s tongue-in-cheek litmus test for hard-core material: you know it when you see it.² Simply thinking about a child engaged in a sex act is enough to make most conventionally-wired adults shudder; actually viewing a child so engaged often brings about feelings of revulsion and sorrow.

There is no question that, under the relevant statutory framework, a depiction of a child engaged in a sex act qualifies as child pornography.³ However, the issue becomes cloudier when the child subject is simply

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¹ United States v. Blouin, 74 M.J. 247, 256 (C.A.A.F. 2015) (Baker, C.J., dissenting).

² See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.” The movie in question was *THE LOVERS* (Zenith International Films, 1958). *Id.* at 186.

³ 18 U.S.C. §§ 2256(2)(A)(i)–(iv) (2008) (defining “sexually explicit conduct” as including sexual intercourse, bestiality, masturbation, sadistic or masochistic sexual abuse).

posing or is photographed unawares while taking part in some non-sexual activity. Sometimes, you only think you know it when you see it.

After the Court of Appeals for the Armed Forces' (CAAF) decision in *United States v. Blouin*, it may very well be impossible to convict a servicemember for possessing an image of an actual child whose genitals are lasciviously exhibited, but covered.⁴ Although the CAAF's ruling was not entirely unexpected in light of recent precedent,⁵ it runs counter to every circuit that has considered the issue of whether the genitals must be visible in order for an image to qualify as child pornography.⁶ After *Blouin*, a depiction of a child that would be considered illegal in federal civilian court when prosecuted under 18 U.S.C. § 2256(8)(A) may very well be protected speech in the military.⁷

Congress criminalized a "lascivious exhibition of the genitals or pubic area," with no requirement that a "lascivious exhibition" include nudity.⁸

⁴ *Blouin*, 74 M.J. at 251.

⁵ See, e.g., *United States v. Warner*, 73 M.J. 1, 3–4 (C.A.A.F. 2013) (holding that appellant was not properly on notice before pleading guilty to possession of non-nude child erotica).

⁶ See *United States v. Grimes*, 244 F.3d 375, 380–82 (5th Cir. 2001) (holding that images of naked children with their genitals pixelated can amount to child pornography); *United States v. Price*, 775 F.3d 828, 837–38 n.7 (7th Cir. 2014) (rejecting the argument that a lascivious exhibition of the genitals requires "full exposure without any covering at all, no matter how minimal or transparent"); *United States v. Wallenfang*, 568 F.3d 649, 659 (8th Cir. 2009) (holding that lascivious exhibitions of girls clad in pantyhose constitutes child pornography); *United States v. Helton*, 302 Fed. Appx. 842, 846–47 (10th Cir. 2008) (unpublished) (holding that a lascivious exhibition of an eleven year-old girl wearing underwear constitutes child pornography). See also *DiGiusto v. Farwell*, 291 Fed. Appx. 119 (9th Cir. 2008) (stating that it was reasonable for a jury to conclude that pictures of "scantily clad boys" constitute child pornography); *United States v. Frabizio*, 459 F.3d 80, 88 (1st Cir. 2006) (stating that "other circuits have found that nudity is not required for a lascivious exhibition"); and *United States v. Williams*, 444 F.3d 1286, 1299 n.63 (11th Cir. 2006), *rev'd on other grounds*, 553 U.S. 285 (stating that nudity is not required in other circuits).

⁷ See 18 U.S.C. § 2256(8)(A) (2008),

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct . . .

"Sexually explicit conduct," as referenced in 18 U.S.C. § 2256(8)(A) (2008), is defined in 18 U.S.C. §§ 2256(2)(A)(i)–(iv) (2008).

⁸ 18 U.S.C. § 2256(2)(A)(v) (2008).

This article asserts that because the CAAF disregarded the intent of Congress, *Blouin* was mistakenly decided. In addition, this article further asserts that military courts base their interpretation of the term “lascivious exhibition of the genitals or pubic area” on a Third Circuit case, *United States v. Knox (Knox II)*.⁹ Because the *Knox II* interpretation does not require a nude display of the genitals (or even that the genitals be discernible),¹⁰ the decision is in full accord with Congress’s intent. No federal court has rejected the holding in *Knox II* other than the CAAF in *Blouin*.¹¹

Establishing the outer limit of a “lascivious exhibition” takes on increased importance with the recent promulgation of a specified child pornography offense under Article 134-68b, Uniform Code of Military Justice (UCMJ).¹² Like the corresponding federal civilian law, the term “lascivious exhibition” is used in the *Manual for Courts-Martial* (MCM) to define, in part, “sexually explicit conduct.”¹³ And, also like federal law, the meaning of “lascivious exhibition” is nowhere explained.

This article analyzes Congress’s intent when it legislated the term “lascivious exhibition of the genitals or pubic area,” as well as its predecessor language. After discussing Specialist Blouin’s crime, his subsequent guilty plea, and the opinion rendered by the Army Court of Criminal Appeals (ACCA), this article traces the extensive history of federal child pornography legislation, paying particular attention to the fact that exposure of the genitals has never been required for a lascivious exhibition. In order to keep the analysis in rough chronological order, the legislative history is interspersed with discussions of pertinent federal court rulings, including the *Knox* line of cases. After an examination of the problems associated with the *Blouin* decision, this article concludes by

⁹ *United States v. Knox*, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) [hereinafter *Knox II*].

¹⁰ *Id.* at 746.

¹¹ *United States v. Blouin*, 74 M.J. 247, 250 (C.A.A.F. 2015) (“We decline to accept the [Army Court of Criminal Appeals’] invitation to adopt the *Knox II* standard as controlling precedent in this jurisdiction.”).

¹² Article 134-68b Uniform Code of Military Justice (UCMJ) (2012).

¹³ Compare MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 68b (c)(7)(e) (2012) [hereinafter MCM] (“lascivious exhibition of the genitals or pubic area of any person”), with 18 U.S.C. § 2256(2)(A)(v) (2008). MCM pt. IV, ¶ 68b (c)(7)(a)–(e) (2012) is a verbatim restatement of 18 U.S.C. §§ 2256(2)(A)(i)–(v) (2008). Note that in both the MCM and the federal civilian law the genitals of “any person” must be exposed—not necessarily the child’s. *Id.*

proposing that Article 134-68b define “lascivious exhibition” (as it relates to an actual child) by referencing either *Knox II* or a subsequent declaration of intent passed by Congress.

II. *United States v. Blouin*: The Underlying Facts, Court-Martial, and the ACCA Opinion

A. Underlying Facts

In July of 2011, Specialist Dana P. Blouin was deployed to Torkham, Afghanistan, with the 3d Brigade Combat Team, 25th Infantry Division.¹⁴ Pending an inspection by the command sergeant major, Specialist MW was directed to straighten up a workstation he shared with several other soldiers, including Specialist Blouin.¹⁵ While cleaning, Specialist MW discovered Specialist Blouin’s Sony *PlayStation* (PSP) video game console stashed underneath a helmet. Specialist MW turned on the PSP intending to play with it, but was immediately confronted with what “looked like underage kids dressed in swim suits and posing in sexual poses.”¹⁶ After Specialist MW reported the discovery to his chain of command, the Army Criminal Investigation Command (CID) commenced its inquiry and interviewed Specialist Blouin. Specialist Blouin waived his rights and admitted his PSP contained “questionable” photographs.¹⁷ Specialist Blouin also consented to a search of his electronic media,¹⁸ whereupon a digital forensic examiner recovered 173 images of “likely child pornography as defined by 18 U.S.C. § 2256(8)”:

The majority of these images included young girls, ranging from the age of approximately six . . . to fourteen years of age either nude[,] in sexually suggestive poses[,] or clothed in a manner . . . that was not age appropriate and posed in a sexually suggestive manner with the focal [point] of the image being on the genital or pubic region of the child. At least ten recovered images were on file with the National Center for Missing and Exploited

¹⁴ *United States v. Blouin*, No.20121135, Prosecution Ex. 1, p. 1 of 5 (25th Inf. Div., Schofield Barracks, Haw., Dec. 14, 2012) [hereinafter *Blouin Record*].

¹⁵ *Id.*

¹⁶ *Id.*, p. 2 of 5.

¹⁷ *Id.*

¹⁸ *Id.* (Army Criminal Investigation Command (CID) Report; CID Form 87-R-E).

Children [NCMEC] as depicting known child subjects.¹⁹

B. *United States v. Blouin* (Court-Martial)

Specialist Blouin redeployed to Hawaii sometime after CID completed its investigation. In September 2012, the government charged him under clause one of Article 134 with possessing child pornography as defined in 18 U.S.C. § 2256(8).²⁰ The single specification was referred to a general court-martial.²¹ Eventually, Specialist Blouin agreed to plead guilty in exchange for a ten-month cap at sentencing.²² He signed a stipulation of fact in which he admitted to possessing 173 images of “likely child pornography,” depicting “children . . . under the age of eighteen . . . displaying a lascivious exhibition of the genitals or pubic area.”²³

On December 14, 2012, Specialist Blouin pled guilty to the single charge.²⁴ The military judge advised Specialist Blouin that he was accused of possessing child pornography “as that term is defined in 18 U.S. Code, Section 2256(8).”²⁵ He then elaborated upon the legal definitions of “sexually explicit conduct” and “child pornography.”²⁶ In accordance with the test first announced in *United States v. Dost* and later adopted by the CAAF in *United States v. Roderick*, the military judge also explained

¹⁹ *Id.* (Prosecution Ex. 1, p. 3 of 5). For more information regarding the National Center for Missing and Exploited Children (NCMEC), see *About Us*, NAT’L CENT. FOR MISSING AND EXPLOITED CHILDREN, <http://www.missingkids.com/About> (last visited May 23, 2016).

²⁰ *Id.* (Department of Army (DA) Form 458) (Charge Sheet))

The Charge: Violation of the UCMJ, Article 134; The Specification:
In that Specialist Dana P. Blouin, U.S. Army, did, between on or about
24 May 2011 and 19 July 2011, at or near Forward Operating Base
Torkham, Afghanistan, wrongfully and knowingly possess child
pornography, as defined in 18 U.S.C. § 2256(8), which conduct was
prejudicial to good order and discipline in the armed forces.

Id. “Clause one” refers to conduct that is alleged under the general article to be prejudicial to good order and discipline. UCMJ art. 134 (2012).

²¹ *Id.*

²² *Id.* (App. Ex. III, IV).

²³ *Id.*

²⁴ *Id.* at 14.

²⁵ *Id.* at 22.

²⁶ *Id.* at 22–23. See 18 U.S.C. §§ 2256(2) and (8).

what was meant by a “lascivious exhibition.”²⁷

The military judge asked Specialist Blouin why he was guilty of the crime of possessing child pornography. Specialist Blouin responded that the children in the photos he possessed were engaging in sexually explicit conduct because they were exhibiting their genitals in a lascivious manner.²⁸ He also admitted that the subjects “were underage children between the ages of [twelve] and [seventeen]. They were specifically bringing . . . attention to their genital area. Some of them were wearing provocative clothing, unsuitable for underage kids.”²⁹ Next, after confirming the images in question did not depict sexual intercourse, bestiality, masturbation, or sadomasochistic abuse, the military judge inquired as to whether the images depicted “lascivious exhibitions of the genitals or pubic area.”³⁰ Specialist Blouin explained that they did:

[In] [o]ne of the pictures, [the subject] was bent over with her butt in the air, wearing a G-string. By the way she looked, the development of her physique, she was obviously between [twelve] and [fourteen]. And the way that her butt was in the air, it was obvious[ly] directed to her pubic area.³¹

²⁷ *Blouin Record*, *supra* note 14, at 25–26 (citing *United States v. Roderick*, 62 M.J. 425, 430 (C.A.A.F. 2006), and *United States v. Dost*, 636 F. Supp. 828, 832 (S.D.Cal.1986), *aff’d sub nom. United States v. Weigand*, 812 F.2d 1239 (9th Cir. 1987), cert. denied, 484 U.S. 856 (1987)). The *Dost* Factors are:

(1) [W]hether the focal point of the visual depiction is on the child’s genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Dost, 636 F. Supp. at 832.

²⁸ *Blouin Record*, *supra* note 14, at 27–28 (“[The subjects] were underage and they were in sexual, provocative poses, and the photos are focused on their genital area, and some were not wearing . . . appropriate attire for their age.”).

²⁹ *Id.* at 36.

³⁰ *Id.*; *see supra* notes 3, 8.

³¹ *Blouin Record*, *supra* note 14, at 37–38.

Sensing a problem with Specialist Blouin's admission that the girl in the picture was wearing a G-string, the military judge probed further:

Military Judge [MJ]: In that photograph, could you see her genitals or pubic area?

Accused [ACC]: She was wearing revealing lingerie but you couldn't see it entirely

MJ: But it was clothed? Is that what you're telling me? And Specialist Blouin, I'm not trying to put words in your mouth. I'm just trying to understand what it is you're telling me. Is that accurate?

ACC: Yes, sir.³²

After clarifying that the girl's genitals were covered, Specialist Blouin again admitted that the girl "was bent over with her butt in the air;" that her pose was "sexual, provocative," unnatural, and inappropriate; and that "the photographer intended that pose to elicit some sort of sexual response in somebody who might see it."³³

The military judge then asked Specialist Blouin to "tell [him] about another image." Specialist Blouin responded by describing a second image in which the child subject also was clothed: "[T]he girl is laying [sic] down with her legs displayed open and her shorts are kind of pulled to the side, directing her eyes to her genital area."³⁴ The military judge then questioned Specialist Blouin at length about this particular image.

MJ: Okay. Is her groin area visible?

ACC: Partly.

MJ: Genital and pubic area, are they visible in the photograph?

ACC: Partly.

MJ: And I'm not talking about unclothed. It may be clothed but is her genital area, even though clothed, visible in that photograph?

ACC: Yes, sir.³⁵

Having reached an agreement with Specialist Blouin that the genitals and

³² *Id.* at 38–39.

³³ *Id.* at 39–40.

³⁴ *Id.*

³⁵ *Id.* at 41.

pubic area may be exhibited even if clothed, the military judge confirmed with him that the focus of the image was on “[t]he genital area”; that the pose was unnatural; that the pose was inappropriate for a child between the ages of twelve and fourteen; and that the photographer “intended” a “sexual response out of [the] person viewing [the image].”³⁶ Specialist Blouin also agreed with the military judge that both photographs he described depicted “a lascivious exhibition of the genitals or pubic area”³⁷ He further confirmed that “the other images [he] downloaded . . . [met] the same characteristics [they had] just talked about.”³⁸

The military judge accepted Specialist Blouin’s guilty plea and admitted into evidence Prosecution Exhibit 4, a compact disc containing twelve of the 173 examples of “likely child pornography” referenced in the stipulation of fact.³⁹ However, less than an hour after closing the court to deliberate, the military judge reopened the providence inquiry “based on [his] review of Prosecution Exhibit 4.”⁴⁰ The military judge confirmed with Specialist Blouin that he downloaded the images with the knowledge that they were child pornography “consistent with the definition” given previously.⁴¹ He then announced:

Counsel, having [reviewed] Prosecution Exhibit 4, I only find three images of child pornography The balance of the images on Prosecution Exhibit 4 do not meet that definition. Given further inquiry, I do believe that the accused is guilty of the offense as charged and I stand by my findings. Although as to those three images, I think counsel would be wise to review *Unites* [sic] *States versus Knox*[,] 32 [F. 3d] 733, 3d Circuit 199[4], that it can be a lascivious exhibition even if the genitals and the pubic area are clothed. So, I stand by my findings.⁴²

After finding that the genitals may be exhibited lasciviously even when clothed, the military judge sentenced SPC Blouin to reduction to the grade

³⁶ *Id.* at 41–42; see *supra* note 27 (the *Dost* factors).

³⁷ *Blouin Record*, *supra* note 14, at 42; see *supra* note 8 (18 U.S.C. § 2256(2)(A)(v) (2008)).

³⁸ *Blouin Record*, *supra* note 14, at 42–44.

³⁹ *Id.* at 45–46 (citing Prosecution Ex. 1, at 3 of 5).

⁴⁰ *Id.* at 88.

⁴¹ *Id.* at 89–90.

⁴² *Id.* at 91 (citing *United States v. Knox*, 32 F.3d 733 (3d Cir. 1994)).

of E1, six months' confinement, and a bad-conduct discharge.⁴³

C. *United States v. Blouin*: The ACCA Decision

In a published opinion, the ACCA expressly “endorsed” *Knox II* and held that “nudity is not required to meet the definition of child pornography as it relates to the lascivious exhibition of [the] genitals or pubic area under Title 18 of the United States Code or Article 134, UCMJ (child pornography).”⁴⁴ Although the genitals of the children in the three images were covered, the ACCA agreed with the military judge that the images met several of the *Dost* factors and amounted to child pornography.⁴⁵

The Army Court also explained that its adoption of *Knox II* was unaffected by the CAAF’s previous ruling in *United States v. Warner*. The CAAF in *Warner* ruled that servicemembers were not on notice that it was illegal to possess child erotica (i.e., sexually suggestive images of children that do not amount to child pornography).⁴⁶ To show that *Blouin* and *Warner* were in accord and that child erotica and child pornography are two different concepts, the ACCA in *Blouin* quoted the following passage from *Warner*: “no prohibition against possession of images of minors that are sexually suggestive but do not depict nudity or otherwise reach the federal definition of child pornography exists in any of the potential sources of fair notice.”⁴⁷ By highlighting the CAAF’s use of the disjunctive, the ACCA concluded that child pornography does not require genital exposure; hence, *Knox II* and *Warner* may coexist.⁴⁸

The implication of the CAAF’s subsequent reversal of the ACCA and express rejection of *Knox II* is that nudity is now required to prosecute depictions involving an actual child and a lascivious exhibition of the

⁴³ *Id.*

⁴⁴ *United States v. Blouin*, 73 M.J. 694, 696 (A. Ct. Crim. App. 2014), *review granted* (C.A.A.F. Oct. 23, 2014), and *rev’d*, 74 M.J. 247 (C.A.A.F. 2015) (internal citations omitted).

⁴⁵ *Id.* at 696–98. *See supra* note 27 (the *Dost* factors).

⁴⁶ *Blouin*, 73 M.J. at 698.

⁴⁷ *Id.* (quoting *United States v. Warner*, 73 M.J. 1, 4 (C.A.A.F. 2013)).

⁴⁸ *Id.* (“Nothing in the *Warner* decision repudiates adoption of the *Knox* totality of circumstances test for determining whether images contain a lascivious exhibition of genitals or pubic area . . .”).

genitals.⁴⁹ If this is indeed what the CAAF intended, then the CAAF has thwarted the express will of Congress. However, before examining the CAAF opinion and its defects, it is necessary to analyze the decades-long legislative history of the term “lascivious exhibition of the genitals or pubic area” as it relates to genital exposure.

III. The Protection of Children Against Sexual Exploitation Act of 1977

A. The Impetus for Legislation

On Sunday, May 15, 1977, the following words burst across the entire width of the *Chicago Tribune*'s front page: “Child pornography: Sickness for sale.” The article beneath straightaway delivered upon the headline’s promise of scandal and shame:

The smiling, no-longer-innocent faces of little children look up from the pages of more than 280 pornographic magazines sold in America—children engaged in almost every known sexual perversion For sale also are horror movies such as Hollywood never conceived. The horror is in the celluloid portrayal of children from three to about fifteen years old—some smiling, some bewildered—participating in a variety of sexual perversions with adults and each other.⁵⁰

Just below, in bold, retina-searing typeface was the headline: “[Two] seized in child sex ring; Boys used in film for national sale.” The associated article detailed the arrest of two adult men for producing

⁴⁹ See *United States v. Blouin*, 74 M.J. 247, 250–51, 252 (C.A.A.F. 2015). Note that the CAAF also found Specialist Blouin improvident. *Id.* at 251–52. Specialist Blouin’s improvidence is beyond the scope of this paper.

⁵⁰ Ray Moseley, *Child pornography: Sickness for sale*, CHI. TRIB., May 15, 1977, at A1 (“In Chicago and other cities, adult perverts run boy prostitution rings, luring fuzzy-cheeked youths into street-walking, sending them on cross-country trips to serve a network of customers and selling their young flesh at auction to the highest bidder.”). For an in-depth look at the anti-child pornography hysteria that gripped the United States in 1977, see Philip Jenkins, *Decade of Nightmares: The End of the Sixties and the Making of Eighties America* Chapter 4 (“The Politics of Children: 1977”) (2006) and David Palmer, *Politics Negotiating Sexuality And Child Endangerment in 1977 America* (2007) (unpublished master’s thesis, University of North Carolina at Chapel Hill).

pornographic movies featuring runaway teenaged boys.⁵¹

Thus began a lurid, four-part investigative series exposing “a national ring of greedy, perverted adults” engaged in prostituting children and creating child pornography. The stated purpose of the exposé was to show that “[c]hild pornography is a nationwide, multimillion-dollar racket that is luring thousands of juveniles into lives of prostitution.”⁵²

On Monday, the frenzy continued. “Chicago is center of national child porno ring,” announced the introductory headline. The associated article described the existence of a locally-based interstate child-trafficking network that had been masterminded by “a convicted sodomist” shortly before his incarceration.⁵³ More important, however, was what was printed right in the middle of the front page using the same impossible-to-ignore typeface as the Sunday edition: “[United States] orders hearings on child pornography.”⁵⁴

The *Tribune’s* exposé notwithstanding, the Senate Committee on Human Resources had been discussing the implementation of a federal child pornography law since at least May 6th.⁵⁵ On that day, the Human Resources Committee sent to each member of the Senate Committee on the Judiciary a resolution urging it “[to consider] legislation designed to eliminate the exploitation of children in pornographic materials.”⁵⁶ This resolution would be the impetus for the passage of the Protection of Children Against Sexual Exploitation Act,⁵⁷ discussed later in this section. But the issue of child pornography had been on the Justice Department’s radar screen since at least 1973, when “the first child pornography ring— involving some fourteen adults using boys under age thirteen for sex and

⁵¹ George Bliss & Michael Sneed, 2 *seized in child sex ring; Boys used in film for national sale*, CHI. TRIB., May 15, 1977, at A1. The suspects revealed to an undercover policeman that they intended to create 2000 copies of one movie and then sell each copy for \$50 apiece. *Id.*

⁵² Sidebar, CHI. TRIB., May 15, 1977, at A1.

⁵³ Ray Moseley, *Chicago is center of national child porno ring*, CHI. TRIB., May 16, 1977, at A1.

⁵⁴ Ray Moseley, *U.S. orders hearings on child pornography*, CHI. TRIB., May 16, 1977, at A1.

⁵⁵ S. REP. NO. 95-438, at 3–4 (1977) as reprinted in 1978 U.S.C.C.A.N 41, 49; Pub. L. 95-225, 92 Stat. 7 (1978).

⁵⁶ *Id.*

⁵⁷ *Id.*

production of pornographic materials—was brought into public view.”⁵⁸

Because there was still no federal law criminalizing the production of child pornography, the *Tribune's* investigation gave the issue some measure of urgency.⁵⁹ This was especially true now that the four-part series had been reprinted in over 200 newspapers throughout the country.⁶⁰ On the same day the *Tribune's* investigation debuted, CBS aired a nationally-televised *60 Minutes* segment entitled *Kiddie Porn*. Surveying child pornography production in places as far-flung as Los Angeles, New Orleans, Houston, and rural Tennessee, correspondent Mike Wallace interviewed law enforcement officials, adult bookstore owners, and actual teens used in pornographic films.⁶¹

Faced with media exposure of a nationwide scourge, those who dwelt in the corridors of power would now have to pass something.⁶²

B. The 1977 Act and the Question of Nudity

Although lawmaking is often derided as occurring at a glacial pace, few elected officials even minimally concerned with self-preservation will drag their feet in order to protect the interests of child pornographers. Congress would react swiftly to the media blitz.

1. *The Senate Hearings*

On Friday, May 27, 1977, a scant ten days after the *Tribune* published its fourth and final installment, the Subcommittee to Investigate Juvenile Delinquency convened a fact-finding hearing in Chicago.⁶³ On June 16,

⁵⁸ 1 ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, U.S. DEPT. OF JUSTICE, FINAL REPORT 599, n.398 (1986) [hereinafter *MEESE REPORT*]. For additional discussion regarding the history of child pornography through the passage of the 1977 Act, see Major Kenneth Borgnino, *Out of Focus: Expanding the Definition of Child Pornography in the Military*, 223 MIL. L. REV. 499, 502–05 (2015).

⁵⁹ *Protection of Children Against Sexual Exploitation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary*, 95th Cong. 3 (1977) [hereinafter *1977 S. Subcomm. Hearings*] (statement of Sen. Charles McC. Mathias, Jr., ranking minority member of the subcomm.).

⁶⁰ *Id.* at 56.

⁶¹ *60 Minutes: Kiddie Porn* (CBS television broadcast May 15, 1977).

⁶² *MEESE REPORT*, *supra* note 58, at 600; *1977 S. Subcomm. Hearings*, *supra* note 59, at 5.

⁶³ *1977 S. Subcomm. Hearings*, *supra* note 59, at 1.

the Subcommittee met again back in Washington, D.C., to evaluate draft legislation criminalizing child pornography.⁶⁴

Three bills were now before the Subcommittee: S. 1011, sponsored by Sen. William Roth (R-DE) (the Roth Bill);⁶⁵ S. 1499, sponsored by Sen. Spark Matsunaga (D-HI);⁶⁶ and S. 1585, co-sponsored by Sens. Charles Mathias (R-MD) and John Culver (D-IA) (the Mathias-Culver Bill).⁶⁷ Senators Mathias and Culver had been active participants at the Chicago hearing, with Sen. Culver serving as presiding officer.⁶⁸

The Roth Bill was considered at length by the Subcommittee. On June 14, 1977, Patricia M. Wald, Assistant Attorney General for Legislative Affairs, sent a letter (the Wald Letter) to Senator James O. Eastland, Chairman of the Senate Judiciary Committee, giving an in-depth analysis of the Roth Bill's shortcomings.⁶⁹ Although Ms. Wald found many faults with the Roth Bill, one fault in particular is pertinent to this discussion since it addresses the use of the word "nudity."

In 1977, the landmark Supreme Court decision *Miller v. California* (1973) provided the legal framework for regulating all obscenity, including child pornography.⁷⁰ After reaffirming "that obscene material is unprotected by the First Amendment," *Miller* laid out a three-part test to determine whether a work is obscene as a matter of law:

- (a) Whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
- (b) Whether the work depicts or describes, in a patently

⁶⁴ *Id.* at 71.

⁶⁵ S. 1011, 95th Cong. (1st Sess. 1977) [hereinafter S. 1011].

⁶⁶ S. 1499, 95th Cong. (1st Sess. 1977). Because the Matsunaga Bill "was drafted as an amendment to the Child Abuse Prevention and Treatment Act[,] which is within the jurisdiction of the Human Resources Committee," it was not considered. S. Rep. No. 95-438, at 13 (1977), as reprinted in 1978 U.S.C.C.A.N 40, 50.

⁶⁷ Protection of Children Against Sexual Exploitation Act of 1977, S. 1585, 95th Cong. (1977).

⁶⁸ 1977 S. Subcomm. Hearings, *supra* note 59, at 1.

⁶⁹ *Id.* at 75-79 (statement of Assistant Att'y Gen. Patricia M. Wald). Ms. Wald would later serve as a judge on the D.C. Circuit Court from 1979 to 1999, and chief judge from 1986 to 1991.

⁷⁰ *Miller v. California*, 413 U.S. 15 (1973).

offensive way, sexual conduct specifically defined by the applicable state law; and

(c) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁷¹

Miller also provided two examples “of what a . . . statute could define for regulation under part (b)” of the three-part test:

(1) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated.

(2) Patently offensive representation[s] or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.⁷²

Although *Miller* allows the state to regulate the distribution of obscene materials, the state cannot regulate a patently offensive display or a display that appeals solely to the prurient interest in the event the display possesses serious literary, artistic, political, or scientific value.⁷³ Instead, laws curbing free expression “must be carefully limited,” lest they impermissibly encroach upon the First Amendment.⁷⁴

In 1982, the Supreme Court would rule that even some non-obscene material depicting children could be deemed child pornography.⁷⁵ However, in 1977 the obscenity requirement still applied, meaning that Congress could prohibit only material that met all three prongs of the *Miller* test.⁷⁶

⁷¹ *Id.* at 24 (internal citations omitted).

⁷² *Id.* at 25.

⁷³ *Id.* at 26.

⁷⁴ *Id.* at 23–24.

⁷⁵ *New York v. Ferber*, 458 U.S. 747, 757 (1982).

⁷⁶ See S. REP. NO. 95–438 at 11 (1977), as reprinted in 1978 U.S.C.C.A.N. 40, 49 (explaining the Justice Department’s position as to why the Subcommittee should reject the Roth Bill).

Finally, the Justice Department concluded that since the section of S. 1011 [the Roth Bill] prohibiting the sale or distribution of materials depicting explicit sexual conduct involving children would cover both obscene and non-obscene materials, there was a very strong possibility that the courts would declare this section unconstitutional on its face.

The Roth Bill criminalized the production and distribution of material depicting children engaging in or simulating “a prohibited sexual act.”⁷⁷ The term “prohibited sexual act” included “sexual intercourse, anal intercourse, masturbation, bestiality, sadism, masochism, fellatio, cunnilingus, ‘any other sexual activity,’ and ‘nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.’”⁷⁸

Assistant Attorney General Wald advised that the language of the Roth Bill failed the very first prong of the *Miller* test: “Whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest.”⁷⁹ Because “any individual” is not “the average person,” the Roth Bill’s prohibition was overbroad and would infringe upon constitutionally protected material. Contributing to the overbreadth was the ambiguous “sexual stimulation or gratification” standard, which focused on evaluating “any” viewer’s reaction as opposed to the photographer’s intent.⁸⁰

In order to ensure that any bill passed by the Subcommittee would ban only obscene material, the Wald Letter recommended drafting language patterned after the second of the two definitions for obscenity proposed by *Miller*:

We would suggest as an alternative definition [to the proposed definition for obscenity] “lewd exhibitions of the genitals,” a phrase used by the Chief Justice in *Miller v. California* . . . to describe one of a variety of types of conduct which could be prohibited under state obscenity statutes. Congress could make clear in the legislative history of the bill what types of nude portrayals of children were intended to be encompassed within this definition.⁸¹

Id.

⁷⁷ S. 1011, *supra* note 65 (proposed 18 U.S.C. § 2253(2)).

⁷⁸ *Id.* (emphasis added).

⁷⁹ 1977 S. Subcomm. Hearings, *supra* note 59, at 77 (citing *Miller v. California*, 413 U.S. 15, 24 (1973)).

⁸⁰ *Id.* See also *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (“[W]here conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”).

⁸¹ 1977 S. Subcomm. Hearings, *supra* note 59, at 77–78 (citing *Miller*, 413 U.S. at 25).

The bill that actually passed Congress and was signed into law, the Mathias-Culver Bill, took the Wald Letter's practical advice and used the term "lewd exhibition of the genitals."⁸² This language is the direct ancestor of the term "lascivious exhibition of the genitals," the genesis of which will be discussed, *infra*.⁸³ However, Congress did not take up the Wald Letter's suggestion to describe "what type of nude portrayals of children were intended to be encompassed within [the] definition."⁸⁴ The evidence (or, more precisely, the lack of evidence) indicates that Congress had no intention of limiting the term "lewd exhibition of the genitals" solely to nude exhibitions. Even under the narrower *Miller* standard, which permitted the government to restrict obscene materials only, Congress was signaling that a lewd exhibition need not be nude in order to be obscene.

In fact, additional evidence within the legislative history lends support to the argument that Congress never intended a nudity requirement. Professor Paul Bender of the University of Pennsylvania School of Law testified at the Washington, D.C., hearing.⁸⁵ Like Assistant Attorney General Wald, Professor Bender found fault with the Roth Bill's nudity provision:

Nudity generally, I think, may be a bit overbroad in terms of the purposes of the legislation. I would not want to classify as child abuse anyone who takes a picture of a child without any clothes on. Lots of people do that of their children. They send it to the child's grandparents in interstate commerce. I don't think you would want to cover that. So I think it's right to qualify "nudity." But this qualification strikes me as vague.⁸⁶

The Roth Bill qualified nudity as it pertained to "prohibited sex acts," if only to prevent a police raid after mom and dad snap and send to grandma a photo of a wholly innocent bathtub scene.⁸⁷ However, Professor Bender

⁸² S. 1585, 95th Cong. § 3(a) (1977) (proposed 18 U.S.C. § 2251(c)(2)(E)).

⁸³ See *infra* Part V.C.

⁸⁴ 1977 S. Subcomm. Hearings, *supra* note 59, at 78.

⁸⁵ *Id.* at 101–12.

⁸⁶ *Id.* at 103.

⁸⁷ S. 1011, *supra* note 65 (proposed 18 U.S.C. § 2253(2)(J)). "[N]udity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.").

was critical of the proposed language because it was unclear “whose purpose [the Roth Bill] is talking about and when that has to be the purpose”:

Is the notion of this that the person taking the picture has to take the picture for the purpose of stimulating or gratifying someone else sexually, or is it enough if the picture is simply used that way for that purpose by somebody later even if that was not the purpose of the person who took the picture?⁸⁸

Nudity in itself is not obscene.⁸⁹ The Subcommittee therefore was on uncertain ground by prohibiting nudity, because any such prohibition would depend upon a precise qualifier. What’s more, the concept of “lewdness” does not hinge on nudity; it hinges on the three prongs of the *Miller* test.⁹⁰ It follows that a depiction may be lewd whether or not it features nudity, and a nude depiction may not necessarily be lewd, as with the aforementioned bathtub scene, a medical textbook, or Michelangelo’s David. Overall, the Roth Bill’s nudity and sexual gratification requirements were so sweeping as to be unworkable.

The Roth Bill ultimately died in committee.⁹¹ As explained in the associated Senate Committee Report, one reason for its rejection was the extreme overbreadth of the nudity requirement, which would have criminalized both obscene and non-obscene depictions of minors “engaging in sexually explicit conduct.”⁹²

⁸⁸ 1977 S. Subcomm. Hearings, *supra* note 59, at 103.

⁸⁹ *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (striking down as overbroad a local ordinance prohibiting films depicting nudity from being shown at drive-in theaters; “Clearly all nudity cannot be deemed obscene even as to minors”).

⁹⁰ *Miller v. California*, 413 U.S. 23–24 (1973); *see supra* notes 71–75 and accompanying text.

⁹¹ S. REP. NO. 95-438, at 11–13 (1977), *as reprinted in* 1978 U.S.C.C.A.N 40, 48–51.

⁹² *Id.* at 11 (citing *Roth v. United States*, 354 U.S. 476 (1957), and *Miller*, 413 U.S. 15 (1973)).

Similarly, S. 1011 [the Roth Bill] would prohibit the depiction [of] “nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.” Once again their language is so broad that it could conceivably prohibit such innocent scenes as “skinny dipping” or even nude snapshots of babies that were mailed to grandparents. This is particularly true since the proposed test for offensiveness is the sexual

2. *The Mathias-Culver Bill*

The Mathias-Culver Bill addressed Ms. Wald's concerns with the Roth Bill. "Specifically, the definition of 'sexually explicit conduct' was more tightly drawn so as to include only those activities where the child was engaged in sexually oriented acts."⁹³ By defining "sexually explicit conduct" in terms of depicting sexual abuse as opposed to nudity (or whether the depiction was intended to conjure feelings of "sexual stimulation or gratification"), the drafters were confident their proposed restrictions on child pornography would be sufficiently expansive and yet survive judicial scrutiny.⁹⁴

At the time only the sale, distribution, and importation of obscene materials were regulated by the federal government.⁹⁵ The Mathias-Culver Bill proposed to "add a new section 2251 to Title 18, making it a federal offense for anyone to use children under the age of [sixteen] in the *production* of pornographic materials."⁹⁶ "By favorably reporting [the Mathias-Culver Bill], the committee intends to fill the existing gap in federal law by declaring that the use of children in the production of such materials is a form of child abuse."⁹⁷

The Mathias-Culver Bill prohibited depictions of minors engaged in "sexually explicit conduct," defined as "[a]ctual or simulated sexual

stimulation or gratification of any individual rather than using the standard of the average individual as required by the Supreme Court in *Roth and Miller*.

Id.

⁹³ S. REP. NO. 95-438, at 13 (1977), as reprinted in 1978 U.S.C.C.A.N 40, 51.

⁹⁴ *Id.* at 52.

⁹⁵ *Id.* at 53 ("Current federal laws dealing with pornography focus almost exclusively on the sale, distribution and importation of obscene materials, and do not directly address the abuse of children inherent in their participation in the production of such materials.").

⁹⁶ *Id.* at 52 (emphasis added).

⁹⁷ *Id.* at 53. The Mathias-Culver Bill also sought to amend the Mann Act (18 U.S.C. § 2423) in order to criminalize the transport of boys across state lines for the purposes of prostitution. (S. Rep. 95-435, 16-17 (1977), as reprinted in 1978 U.S.C.C.A.N 40, 53-55). The bill also sought to amend 18 U.S.C. §§ 1461, 1462, and 1465 in order to increase the penalties associated with mailing, importing, or transporting (for sale or distribution) child pornography. *Id.*

intercourse (including genital-to-genital, oral-genital, anal-genital, or oral-anal)[.] whether between persons of the same or opposite sex; bestiality; masturbation; sado-masochistic abuse . . . and the lewd exhibition of the genitals or pubic area.”⁹⁸ Not only did the proposed definition hew to the example set forth in *Miller*,⁹⁹ there is no evidence suggesting Congress required nudity for a “lewd exhibition.”

After passage by both houses of Congress, the Mathias-Culver Bill, now officially known as the Protection of Children Against Sexual Exploitation Act of 1977 (the 1977 Act), was signed into law by President Jimmy Carter on February 6, 1978.¹⁰⁰ The new legislation was inserted into Title 18 of the United States Code as Chapter 110.¹⁰¹ Section 2253 defined key terms.¹⁰² Similar to the Mathias-Culver Bill, “sexually explicit conduct” was, in part, defined in the new 18 U.S.C. §2253(2)(E) as a “lewd exhibition of the genitals or pubic area of any person.”¹⁰³ No nudity requirement was expressed or even implied.

It is also worth noting that in accordance with *Miller*, § 2253(2)(E) expressly referred to genital “exhibition” instead of genital “exposure.”¹⁰⁴ If Congress had meant “lewd exposure” instead of “lewd exhibition,” then it stands to reason Congress would have forbidden precisely that.¹⁰⁵

⁹⁸ S. 1585, 95th Cong. § 3(a) (1977) (proposed 18 U.S.C. §§ 2251(A)–(C)).

⁹⁹ *Miller v. California*, 413 U.S. 23–24 (1973); see *supra* text accompanying note 72.

¹⁰⁰ Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 [hereinafter *1977 Act*].

¹⁰¹ In this article, “Chapter 110” will be used to refer to federal child pornography legislation as a whole.

¹⁰² 18 U.S.C. § 2253(2) (1978) uses the following definition:

(2) “[S]exually explicit conduct” means actual or simulated—(A) sexual intercourse, including genital-genital, oral genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sado-masochistic abuse (for the purpose of sexual stimulation); or (E) lewd exhibition of the genitals or pubic area of any person.

Id. Note that “producing,” as defined in 18 U.S.C. § 2253(3) (1978), required a profit motive (“‘producing’ means producing, directing, manufacturing, issuing, publishing, or advertising, for pecuniary profit” (emphasis added)). Also, a “minor” was defined as a person under the age of sixteen. 18 U.S.C. § 2253(1) (1978).

¹⁰³ 18 U.S.C. § 2253(2)(E) (1978); S. 1585, 95th Cong. § 3(a) (1977) (proposed 18 U.S.C. § 2251(c)(2)(E)).

¹⁰⁴ *Id.*

¹⁰⁵ See 18 U.S.C. §2253(2)(E), and *Miller*, 413 U.S. at 25 (“lewd exhibition of the

IV. *New York v. Ferber* Child Pornography and Obscenity

When the 1977 Act was debated, passed, and signed into law, *Miller* still set the outer perimeter on depictions the government could lawfully restrict. Accordingly, criminal penalties under the 1977 Act would attach only if a sexually explicit depiction of a minor was found to be obscene under the *Miller* three-pronged test.¹⁰⁶

Nevertheless, state legislatures began pushing against the limits of *Miller* by passing child pornography laws that lacked an obscenity requirement. By 1982, “20 [s]tates prohibit[ed] the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene.”¹⁰⁷ One such state was New York.¹⁰⁸

Paul Ferber operated an adult bookstore in Manhattan.¹⁰⁹ After selling to an undercover police officer movies featuring teenaged boys masturbating, he was arrested and charged with two counts of distributing obscene material depicting a child engaged in sexual conduct, and one count of distributing non-obscene material depicting a child engaged in sexual conduct.¹¹⁰ Although a jury acquitted Ferber of the obscenity charges, it convicted him of distributing non-obscene child pornography.¹¹¹ Subsequently, the New York Court of Appeals reversed Ferber’s conviction, finding that the statute in question impermissibly criminalized non-obscene depictions.¹¹²

genitals”).

¹⁰⁶ *Miller*, 413 U.S. at 24. See *supra* note 71 and accompanying text.

¹⁰⁷ *New York v. Ferber*, 458 U.S. 747, 751 (1982).

¹⁰⁸ New York enacted its law in 1977, before the Mathias-Culver Bill was signed into law. *Id.*

¹⁰⁹ *Id.* at 751–52. See also *Protecting Free Speech and Our Children*, WASH. POST, May 19, 1981, at A13, <https://www.washingtonpost.com/archive/politics/1981/05/19/protecting-free-speech-and-our-children/34f43bbe-e1ef-41bb-91e6-8ad90da4ae2b/> (“Paul Ira Ferber owned a bookstore in Times Square. If you have ever been to Times Square, I don’t have to tell you what kind of a bookstore.”).

¹¹⁰ *Ferber*, 458 U.S. at 752. See N.Y. STAT. § 263.15 (1980) (“A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.” Under N.Y. STAT. §263.00(5) (1980), to “promote” means, among other things, to “distribute.”).

¹¹¹ *Ferber*, 458 U.S. at 752.

¹¹² *Id.* at 752, (citing *Ferber v. New York*, 52 N.Y.2d 674, 681 (1981)). See also *Ferber v. New York*, 52 N.Y.2d at 678.

However, in spite of *Miller*, the Supreme Court ruled in *New York v. Ferber* that a legislature may prohibit the distribution of non-obscene child pornography.¹¹³ Because “[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children,” such recordings constitute a “permanent record of abuse” that exacerbates the original trauma.¹¹⁴ The Court held that the state’s interest in protecting children from such trauma is more compelling than permitting unfettered free expression.¹¹⁵ Although a distributor of child pornography like Paul Ferber may not have been the one actually subjecting a child to harm, the distributor’s efforts nevertheless spur greater demand for what is essentially recorded sex abuse.¹¹⁶ “Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work.”¹¹⁷

Because of the potential for lasting harm, the Court also found that a sexually explicit depiction of a child may be criminalized even if the work is not patently offensive; does not appeal to the prurient interest; or even if it contains some measure of serious literary, artistic, political, or

Thus on its face the statute would prohibit the showing of any play or movie in which a child portrays a defined sexual act, real or simulated, in a nonobscene manner. It would also prohibit the sale, showing, or distributing of medical or educational materials containing photographs of such acts. Indeed, by its terms, the statute would prohibit those who oppose such portrayals from providing illustrations of what they oppose. In short, the statute would in many, if not all, cases prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment.

Id.

¹¹³ *Ferber*, 458 U.S. at 759.

¹¹⁴ *Id.*

¹¹⁵ Preventing child endangerment is central to the *Ferber* decision. *See id.* at 756 (“It is evident beyond the need for elaboration that a State’s interest in safeguarding the physical and psychological well-being of a minor is compelling.”); *see also id.* at 757 (“The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”).

¹¹⁶ *Id.* at 759–60 (“Whereas the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution.”).

¹¹⁷ *Id.* at 761.

scientific value.¹¹⁸ Also, since “the material at issue need not be considered as a whole,” even a sliver of child sex in a larger work would render the entire work devoid of constitutional protection.¹¹⁹

After *Ferber*, *Miller* was no longer the final word on sexually explicit depictions of children. Child pornography was now its own category of unprotected speech, subject to even broader prohibitions than adult pornographic material.

V. The Child Protection Act of 1984

A. The 1984 Act, Generally

The *Ferber* decision could not have come at a more opportune time. Not a single person had been convicted under the 1977 Act of producing child pornography, and only a scant few had been prosecuted for distribution.¹²⁰ Congress took the opportunity to shore up existing gaps in the law and explore the enlarged universe created by the Supreme Court.¹²¹

¹¹⁸ *Id.* (citing Memorandum of Assemblyman Lasher in Support of N.Y. STAT. § 253.15) (“It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value.”). See *id.* at 758, n.9, and 766, n.19, wherein the Court cites to the 1977 Senate Subcommittee hearings for evidence as to the deleterious effects of child pornography on children. 1977 S. Subcomm. Hearings, *supra* note 59, at 6.

¹¹⁹ *Ferber*, 458 U.S. 763.

¹²⁰ H.R. REP. NO. 98-536, at 2 (1983), as reprinted in 1984 U.S.C.C.A.N. 492, 493.

The impetus for amended legislation also provided a forum to review the effectiveness of the 1977 law. Since May 1977, only [twenty-eight] persons have been indicted under 18 U.S.C. 2252. Twenty-three defendants were convicted of this violation, two were convicted of other obscenity violations, and the cases of two defendants are still pending. One defendant committed suicide. Convictions under the production offense, 18 U.S.C. 2251 are, to date, nonexistent. Only four individuals have been indicted under 18 U.S.C. 2251. Two pled guilty to other charges under 18 U.S.C. 2252, one pled guilty to a conspiracy charge, and one case is still pending. The few prosecutions under the act indicate that the protection of children against sexual exploitation act requires some modification.

Id.

¹²¹ “The [House] Judiciary Committee noted that the purpose of the 1977 Act had been frustrated by the obscenity requirement because it limited the types of depictions which could be banned under the statute.” Annemarie J. Mazzone, *United States v. Knox*:

In order to secure more child pornography convictions, The Child Protection Act of 1984 (the 1984 Act) made significant changes to the 1977 Act.¹²² In accordance with *Ferber*, the 1984 Act eliminated the obscenity requirement by removing the word “obscene” wherever it appeared in the existing law.¹²³ The 1984 Act also raised the age of minority from sixteen to eighteen, removed the commercial requirement for distribution, criminalized the knowing reproduction of child pornography, and redesignated the statute’s definitions from § 2253 to § 2255.¹²⁴ In 1986, the definitions would move unchanged from § 2255 to § 2256, where they have remained ever since.¹²⁵

The entire purpose of the 1984 Act was to expand the reach of the 1977 Act.¹²⁶ As discussed above, there was no nudity requirement under the 1977 Act, which was based upon the more restrictive *Miller* obscenity standard. It follows that there would be no nudity requirement under the broader, post-*Ferber* 1984 Act.

B. The Question of Nudity

The legislative history of the 1984 Act shows that Congress never intended a nudity requirement.¹²⁷ As with the 1977 Act, the evidence comes from the testimony of a Justice Department attorney regarding a bill that would die in committee.

Congressman Earl Hutto (D-FL) sponsored H.R. 2432 (the Hutto Bill), one of four bills under consideration by the House Subcommittee on Crime.¹²⁸ One change the Hutto Bill proposed was to provide a definition for the word “simulated,” which was used in the 1977 Act though nowhere

Protecting Children from Exploitation Through the Federal Child Pornography Laws, 5 FORDHAM INTELL. PROP., MEDIA AND ENT. L.J. 167, 182 (1994) (citing H.R. Rep. No. 98-536 (1983) at 2, reprinted in 1984 U.S.C.C.A.N. 492, 493).

¹²² Child Protection Act of 1984, Pub. L. No. 98-292, § 4, 98 Stat. 204.

¹²³ *Id.*

¹²⁴ *Id.* §§ 5(a)–(b).

¹²⁵ Child Abuse Victims’ Rights Act of 1986, Pub. L. No. 99-500 § 703(a), 100 Stat. 1783.

¹²⁶ See, e.g., *United States v. Dost*, 636 F. Supp 828, 831 (S.D. Cal. 1986) (“Congress’[s] intent, as evidenced by the change in the subsection [2255](E) terminology and other changes, was to broaden the scope of the existing ‘kiddie porn’ laws.”); see also MAZZONE, *supra* note 121, at 182.

¹²⁷ See generally MAZZONE, *supra* note 121, at 182–86 (discussing passage of the 1984 Act and testimony regarding proposed requirements for nudity).

¹²⁸ See 1977 Act, *supra* note 100.

explained.¹²⁹ The Hutto Bill's proposed definition for "simulated" required genital exposure: "'simulated' means [sexually explicit conduct] which creates the appearance of such conduct *and which exhibits any uncovered portion of the genitals or buttocks.*"¹³⁰

Testifying before the Subcommittee on Crime was Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice. Mr. Richard expressed strong reservations regarding the Hutto Bill's nudity requirement, asserting that it would compromise the statute to such an extent as to render it inert:

Another problematic aspect of [the Hutto Bill] is its definition of the word "simulated," a term which is used but not defined in the current child pornography provisions [i.e., the 1977 Act]. The bill defines this term to mean "the explicit depiction of any ['sexually explicit conduct,' as defined] which creates the appearance of such conduct and which exhibits any uncovered portion of the genitals of buttocks." *We believe that the bill defines the term "simulated" too narrowly and that certain conduct excluded by the definition should be included within the law's proscriptions.* For example, the requirement that the simulated sexual conduct exhibit any uncovered portion of the genitals or buttocks would exclude simulated sexual conduct in which the unclothed portions of the body are simply out of view of the camera. H.R. 2432's definition of "simulated" in our view could prove to be a significant loophole to imaginative pornographers.¹³¹

Although the verbiage pertained only to "simulated" conduct, the stated concern was that an on-screen 'simulation' would be completely

¹²⁹ *Id.*; H.R. 2432, 98th Cong. § 3 (1983) (proposed change to 18 U.S.C. § 2251(3)).

¹³⁰ H.R. 2432, 98th Cong. § 3 (1983) (proposed change to 18 U.S.C. § 2251(3)) (emphasis added).

¹³¹ Protection of Children Against Sexual Exploitation: Hearing Before the Subcomm. On Crime of the Comm. of the Judiciary H. of Rep., 98th Cong. 40 (1983) [hereinafter *1983 H.R. Subcomm Hearing*] (emphasis added). Mr. Richards's remarks were republished in H.R. REP. NO. 98-536, at 13 (1984), as reprinted in 1984 U.S.C.C.A.N 492, 504.

legal despite the very real abuse taking place off-screen.¹³² Mr. Richard suggested that “. . . the term ‘simulated’ should not be defined or that the definition *should not* require the exhibiting of any uncovered portion of the genitals or buttocks.”¹³³ The House signaled its agreement with Mr. Richard by neither defining the term “simulated” nor requiring genital exposure in its final version of the bill.¹³⁴

Senator Arlen Specter (R-PA) sponsored S. 57 (the Specter Bill), the Senate version of the Hutto Bill.¹³⁵ Using virtually the same language as Mr. Richard, Assistant Attorney General Robert McConnell expressed his reservations with the Specter Bill’s equivalent definition for “simulated.”¹³⁶ The Senate, too, signaled its agreement by neither defining the word “simulated” nor requiring genital exposure in its final version of the bill.¹³⁷

Based on the testimony of Messrs. Richard and McConnell, the Justice Department’s position, post *Ferber*, was that a legislature may permissibly ban lewd exhibitions in which the genitals are covered. In accordance with their advice, the bill enacted ultimately left the word “simulated” undefined and jettisoned the proposed nudity requirement.¹³⁸ Once again,

¹³² See MAZZONE, *supra* note 121, at 184-85, 224-25 (discussing Congress’s finding that simulated sex acts can cause significant trauma to exploited minors and the desire to avoid creating a loophole in the law).

¹³³ 1983 H.R. Subcomm Hearing, *supra* note 131, at 40.

¹³⁴ See Bill to Amend Ch. 110 (Relating to Sexual Exploitation of Children) of Title 18 of the United States Code, and for Other Purposes, H.R. 3635, 98th Cong. (1984).

¹³⁵ 1983 H.R. Subcomm Hearing, *supra* note 131, at 21.

¹³⁶ S. REP. NO. 98-169, at 13 (1983), as reprinted in 1984 U.S.C.C.A.N 504. The Senate Judiciary Committee’s final report reprinted a letter dated April 15, 1983, from Assistant Attorney General Robert McConnell to Sen. Strom Thurmond (R. SC), Committee Chairman.

¹³⁷ See Bill to Amend Title 18 of the United States Code Relating to the Sexual Exploitation of Children, S. 1469, 98th Cong. (as introduced in the Senate, June 14, 1983).

¹³⁸ Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204. See also 130th Cong. Rec. 7198 (1984), and the remarks of Sen. Charles Grassley,

The substitute before us *preserves current law* as it relates to simulations of sexual conduct. Hence, sexually explicit conduct is defined as actual or simulated conduct that utilizes any of the prohibited depictions delineated in 18 U.S.C. 2253. This preservation, in our opinion, discourages imaginative pornographers from discovering significant loopholes.

Id. (emphasis added). See also MAZZONE, *supra* note 121, at 184-86, for further analysis of Congress’s decision to leave the word “simulated” undefined.

the legislative history shows that Congress was well aware it could have criminalized only those exhibitions in which the genitals were uncovered, yet instead chose not to.

C. From “Lewd” to “Lascivious”

During the Senate debates on H.R. 3635, the bill upon which the 1984 Act was ultimately based, Senator Specter proposed replacing the word “lewd” with “lascivious”:

[T]his amendment would replace the current law’s prohibition of the “lewd exhibition of the genitals.” “Lewd” has in the past been equated with “obscene”; this change is intended to make it clear that an exhibition of a child’s genitals does not have to meet the obscenity standard to be unlawful.¹³⁹

As discussed above, the *Miller* majority opinion suggested use of the word “lewd.”¹⁴⁰ By recommending that “lewd” be changed to “lascivious,” Senator Specter was further clarifying that the 1984 Act was operating within the expansive new universe created by *Ferber*.¹⁴¹ The recommendation was approved, and “sexually explicit conduct” was now defined, in relevant part, as an actual or simulated “*lascivious* exhibition of the genitals or pubic area of any person.”¹⁴²

VI. *Osborne v. Ohio* and the 1988 and 1990 Acts

In the years following the 1984 Act, several important milestones were reached that continue to influence how child pornography crimes are

¹³⁹ 130 Cong. Rec. 7196 (1984) (remarks of Sen. Arlen Specter).

¹⁴⁰ See *supra* note 72 and accompanying text.

¹⁴¹ See, e.g., *United States v. Dost*, 636 F. Supp. 828, 831 (S.D. Cal. 1986) (“Congress believed that the term ‘lewd’ used in subsection (E) was too restrictive since it had been closely associated with the more stringent standard of obscenity.”). However, Senator Specter’s change may have been more symbolic than anything else. See *id.* n.4 (“In spite of Congress’s perceived significance in the change in terms, ‘lewd’ and ‘lascivious’ have frequently been used interchangeably.” (citations omitted) (emphasis added)).

¹⁴² Compare 18 U.S.C. § 2253(2)(E) (1977) (“lewd”), with 18 U.S.C. § 2255(2)(E) (1984) (“lascivious”) (emphasis added).

prosecuted in civilian federal courts today.¹⁴³ First, in 1988, Congress amended Chapter 110 to include computer transfer under the rubric of distribution or receipt within interstate commerce.¹⁴⁴ Second, in 1990, Congress criminalized simple possession of child pornography.¹⁴⁵ Previously, in 1969, the Supreme Court had ruled in *Stanley v. Georgia* that a state cannot regulate the private possession of obscene materials.¹⁴⁶ However, since child harm replaced obscenity as the key criterion for child pornography, the Supreme Court in *Osborne v. Ohio* (1988) ruled that a state could, in effect, enter one's home by prohibiting the private possession of child pornography.¹⁴⁷ Congress responded to *Osborne* by passing the Child Protection Restoration and Penalties Enhancement Act of 1990, which, in relevant part, criminalized the possession of child pornography.¹⁴⁸ Soon after, the Federal Bureau of Investigation (FBI) would investigate a graduate student named Stephen A. Knox.

VII. The *Knox* Line of Cases and the Question of Nudity

¹⁴³ For an in-depth analysis of *Osborne v. Ohio* and the post-1984 revisions, see generally MAZZONE, *supra* note 121, at 186–91.

¹⁴⁴ Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690 § 7501, 102 Stat. 418. *Id.* at §§ 7511(a)–(b), amending 18 U.S.C. §§ 2251(c), 2252(a). Congress also criminalized the sale of children for the purposes of producing child pornography (§ 7512), and required pornographers to keep detailed records regarding the identity of their models (§ 7513).

¹⁴⁵ Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 323, 104 Stat. 4808; 18 USC §§ 2252(a)(2), (4)(B) (1992) (criminalizing the possession of three or more books, magazines, periodicals, films, video tapes, or other matter transported in interstate commerce) [hereinafter, *the 1990 Act*].

¹⁴⁶ 394 U.S. 557, 565 (1969):

Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Id.

¹⁴⁷ *Osborne v. Ohio*, 495 U.S. 103, 111.

¹⁴⁸ Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 323, 104 Stat. 4808; 18 USC §§ 2252(a)(2), (4)(B) (1992) (criminalizing the possession of three or more books, magazines, periodicals, films, video tapes, or other matter transported in interstate commerce).

A. The Underlying Facts and Trial

In March 1991, Stephen Knox was completing a Ph.D. in History at Penn State.¹⁴⁹ Several years before, as an undergraduate at Temple University, Knox was convicted of receiving child pornography in interstate commerce.¹⁵⁰ Although he was sentenced only to probation, his name and address were placed on an FBI watch list.¹⁵¹ Using the watch list, customs officials “intercepted a mailing to France which contained [an order for] two videos, ‘Little Girl Bottoms (Underside)’ and ‘Little Blondes,’ as well as a check drawn to his account.”¹⁵² Pursuant to a search warrant, both federal and state law enforcement officers searched Knox’s apartment and seized three video tapes.

The tapes contained numerous vignettes of teenage and preteen females, between the ages of ten and seventeen, striking provocative poses for the camera All of the children wore bikini bathing suits, leotards, underwear, or other abbreviated attire while they were being filmed The photographer would zoom in on the children’s pubic and genital area and display a close-up for an extended period of time The films themselves and the [associated] promotional brochures . . . demonstrate that the video tapes clearly were designed to pander to pedophiles.¹⁵³

Nevertheless, “no child in the films was nude, and . . . the genitalia and pubic areas of the young girls were always concealed by an abbreviated article of clothing.”¹⁵⁴ Knox was charged with receiving and possessing materials depicting minors engaging in sexually explicit conduct.¹⁵⁵ The “[s]exually explicit conduct” at issue was a “lascivious exhibition of the genitals or pubic area.”¹⁵⁶

¹⁴⁹ Brief for Petitioner at 4, *United States v. Knox*, 776 F. Supp. 174 (M.D. Pa. 1991) (No. 92-1183).

¹⁵⁰ *See 1990 Act*, *supra* note 145.

¹⁵¹ *Supreme Court to Decide if Child Pornography Includes Clothed Minors*, UNITED PRESS INT’L (June 7, 1993), <http://www.upi.com/Archives/1993/06/07/Supreme-Court-to-decide-if-child-pornography-includes-clothed-minors/9085739425600/>.

¹⁵² *United States v. Knox*, 977 F.2d 815, 817 (3d Cir. 1992) [hereinafter *Knox I*].

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 817.

¹⁵⁵ *Id.* (citing 18 U.S.C. §§ 2252(a)(2), (4) (1988 & 1992)).

¹⁵⁶ *Id.* (citing 18 U.S.C. § 2256(2)(E) (1988 & 1992)).

Knox moved for dismissal. He argued, in part, that the child subjects were not engaging in sexually explicit conduct because the genitals cannot be lasciviously exhibited if they are covered.¹⁵⁷ The district court rejected Knox's assertion. Because § 2256(2)(E) requires an exhibition of the genitals *or* pubic area, the court held that the videos in question could be child pornography because the subjects' pubic areas were exposed.¹⁵⁸ At the ensuing bench trial, Knox was found guilty on both counts.¹⁵⁹ He was sentenced to two five-year terms to run concurrently.¹⁶⁰

B. *United States v. Knox (Knox I)*

On appeal, the Third Circuit upheld Knox's conviction, although it rejected the district court's finding that the inner thigh comprises the pubic area.¹⁶¹ Instead, the court held that the genitals may be lasciviously exhibited even when covered.¹⁶² Knox reasserted his previous argument that the genitals must be exposed in order to constitute a lascivious exhibition. The court looked to the plain text of the law and concluded, "Knox attempts to read a nudity requirement into a statute which has none."¹⁶³

The court also drew support from the legislative history, finding that "Congress failed to articulate anywhere in its extensive legislative history any desire that the statute, as enacted, prohibit only nude portrayals."¹⁶⁴ First, the court looked at Congress's rejection of the Roth Bill, which "would have proscribed 'nudity . . .':"¹⁶⁵

Since Congress considered including nudity as an element
of a criminal depiction, the decision to eliminate this

¹⁵⁷ *United States v. Knox*, 776 F. Supp. 174, 179 (1991).

¹⁵⁸ *Id.* at 180.

¹⁵⁹ *Id.*

¹⁶⁰ *United States v. Knox (Knox I)*, 977 F.2d 815, 818 (3d Cir. 1992).

¹⁶¹ *Id.* at 819 ("The district court's novel definition of the pubic area is anatomically and legally incorrect. The most widely accepted human anatomy treatises make clear that the pubic area is entirely above the genitals and not below or alongside that portion of the anatomy.").

¹⁶² *Id.* at 817, 823.

¹⁶³ *Id.* at 820.

¹⁶⁴ *Id.* at 821. *See also id.* at 820 ("An examination of the relevant legislative history, however, strengthens not undermines our construction of the statutory language.").

¹⁶⁵ *Id.* (citing S. 1011, *supra* note 65 (the Roth Bill)).

requirement must be deemed intentional. When Congress passed the 1977 Act prohibiting a “lewd exhibition of the genitals or pubic area of any person,” it must have desired to criminalize both clothed and unclothed visual images of a child’s genitalia if they were lewd.¹⁶⁶

The court then examined the Wald Letter’s assumption that Congress only sought to ban nude portrayals. “By subsequently eliminating the word ‘nudity,’ Congress appears to have repudiated its earlier intention to confine the statute’s coverage to nude exhibitions.”¹⁶⁷ Also, since the purpose of the statute was to protect children from being sexualized at a vulnerable age and thus enduring a lifetime of trauma, “the rationale underlying the statute’s proscription applies equally to any lascivious exhibition of the genitals or pubic area whether the areas are clad or completely exposed.”¹⁶⁸ The court concluded its analysis by asserting that although nudity alone cannot constitute a lascivious exhibition, it does not follow that nudity is *required* for a lascivious exhibition.¹⁶⁹ Rather, because the Third Circuit had adopted the *Dost* factors, nudity was only one of six criteria a court may consider when evaluating an image.¹⁷⁰ The court also analyzed the definition of the word “exhibition,” concluding that covered genitals may be “exhibited” for the purposes of Chapter 110.¹⁷¹

¹⁶⁶ *Id.* (citing 18 U.S.C. § 2253(2)(E) (1978)). See Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225 § 2a, 92 Stat. 7.

¹⁶⁷ *Knox I*, 977 F.2d at 821. Note that the Wald Letter was written when only the Roth Bill was under consideration by the Subcommittee to Investigate Juvenile Delinquency. See *supra*, Part III.B.1 for a discussion of the Wald Letter and Roth Bill.

¹⁶⁸ *Id.* at 822.

¹⁶⁹ *Id.* at 822–23.

No one seriously could think that a . . . family snapshot of a naked child in the bathtub violates the child pornography laws. Nudity must be coupled with other circumstances that make the visual depiction lascivious or sexually provocative in order to fall within the parameters of the statute.

Id.

¹⁷⁰ *Id.* (citing *United States v. Villard*, 855 F. 2d 117, 122 (3d Cir. 1989), and *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986)).

¹⁷¹ *Id.* at 820.

Exhibit means “to present to view: show, display . . . to show publicly: put on display in order to attract notice to what is interesting or instructive”. . . . The genitals and pubic area of the young girls in [Knox’s] tapes were certainly “on display” as the camera focused for prolonged time intervals on close-up views of these body parts.

After the Third Circuit ruled against him, Stephen Knox filed a writ of certiorari with the Supreme Court. The Court granted his petition on June 7, 1993.¹⁷²

C. Salvos in the Culture War

Responding on behalf of the United States was William C. Bryson, solicitor general under President George H.W. Bush. Because Bill Clinton had only recently been elected president, Bryson was serving as acting solicitor general until President Clinton's nominee, Drew S. Days III, could be approved by the Senate.¹⁷³ Bryson's response (the Bryson Brief) asked the Supreme Court to uphold the Third Circuit's ruling.¹⁷⁴

After his confirmation, Drew Days reviewed the *Knox* casefile. The new solicitor general did not agree with his predecessor or the Third Circuit, believing instead that the genitals could not be lasciviously exhibited if completely covered.¹⁷⁵ As he later recounted, "I went through it very carefully and I just decided that the Third Circuit got it wrong by using the wrong standard in upholding the conviction."¹⁷⁶

Days then took the highly unusual step of "confessing error" and filing a substitute brief (the Days Brief).¹⁷⁷ The Days Brief acknowledged the Third Circuit was correct in rebuffing Knox's argument that the genitals

Additionally, the obvious purpose and inevitable effect of the videotape was to "attract notice" specifically to the genitalia and pubic area. Applying the plain meaning of the word "exhibition" leads to the conclusion that nudity is not a prerequisite for the occurrence of an exhibition.

Id. (internal citations omitted).

¹⁷² *Knox v. United States*, 508 U.S. 959 (1993).

¹⁷³ MAZZONE, *supra* note 121, at 168, 207–08 (discussing the brief filed by Solicitor General William Bryson).

¹⁷⁴ *Id.* At 168, 207.

¹⁷⁵ Rodger D. Cintron, *A Life in the Law: An Interview with Drew Days*, 30 TUORO L. REV. 153, 172 (2014).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* (citing Brief for the United States, *Knox v. United States*, 508 U.S. 959 (1993) (No. 92-1183) 1993 WL 723366 [hereinafter *Days Brief*]). See also David M. Rosenzweig, *Confession of Error in the Supreme Court by the Solicitor General*, 82 Geo. L. J. 2079, 1 (1994) (stating that confessions of error are particularly rare).

must be fully exposed in order to constitute a lascivious exhibition. But while an “exhibition” may not require *full* exposure, it does require that the genitals be “discernable either through or beneath the clothing” since the word “exhibition” implies “at least some substantial degree of genital or pubic visibility.”¹⁷⁸ Days reasoned that Congress intended this requirement due to the nudity assumption made by the Wald Letter.¹⁷⁹ Although Ms. Wald’s assumption was based on language found in the rejected Roth Bill, the Days Brief contended that the term “lascivious [sic, lewd] exhibition of the genitals or pubic area” was “replacement” language for the Roth Bill’s nudity requirement.¹⁸⁰ This must be the case, Days asserted, because “[t]he most natural meaning of that term [i.e., “exhibition”] is that one of those parts of the body—rather than the clothing covering them—must be ‘on exhibit.’”¹⁸¹

The Days Brief’s discernibility standard was something of a middle ground between the opposite poles represented by Stephen Knox and the Third Circuit. Although Days posited that a minor’s genitals may still be lasciviously exhibited if covered by transparent or tight-fitting material, he nevertheless rejected the Third Circuit’s analysis.¹⁸² Images depicting a minor’s genitals entirely covered by an opaque layer could be contraband only in the event the genitals were discernable.¹⁸³ In addition to discernibility, the Days Brief also asserted that “lasciviousness” is contingent upon the conduct in which the child subject is engaged, not the intent of the photographer.¹⁸⁴ Days argued that this interpretation of the statutory language was in accord with *New York v. Ferber*.¹⁸⁵ The Days Brief concluded that Knox’s conviction should be affirmed under a proposed two-element test for a lascivious exhibition: (1) discernibility of the genitals, and (2) “lascivious posing or acting.”¹⁸⁶ The solicitor general also asked the Court to vacate the conviction and remand the case for reconsideration in accordance with the proposed new test.¹⁸⁷

¹⁷⁸ *Days Brief*, *supra* note 177, at 10–11; *see also* MAZZONE, *supra* note 121, at 210.

¹⁷⁹ *Id.*

¹⁸⁰ *Days Brief*, *supra* note 177, at 11; *see also* MAZZONE, *supra* note 121, at 210.

¹⁸¹ *Id.*

¹⁸² *Days Brief*, *supra* note 177, at 12.

¹⁸³ *Id.* at 12, 23, n.7.

¹⁸⁴ *Id.* at 12–13.

¹⁸⁵ *Id.* at 13 (citing *New York v. Ferber*, 458 U.S. 747, 764 (1982) (“[T]he nature of the harm to be combatted requires that the . . . offense be limited to works that visually depict sexual conduct by children . . .”).

¹⁸⁶ *Id.* at 13, 17–21.

¹⁸⁷ *Id.* at 13, 21–23.

The Days Brief was filed on September 17, 1993.¹⁸⁸ The immediate reaction was nothing short of seismic.¹⁸⁹ As Days himself recalled, “There were forty thousand calls to the Justice Department within a week. It shut down the telephone system to the Justice Department. We had to go to a back-up system.”¹⁹⁰ Then “all hell broke loose” beginning on November 1st, when the Supreme Court granted the government’s request for remand and ordered the Third Circuit to reevaluate Knox’s conviction in light of the Solicitor General’s new test.¹⁹¹

The Senate struck back first. A mere three days after the Supreme Court remanded *Knox*, the Senate made it known by a 100-0 vote that nudity was not required for a lascivious exhibition.¹⁹² The Senate declaration, known as the “Confirmation of Intent of Congress in Enacting Sections 2252 and 2256 of Title 18, United States Code” (the Confirmation of Intent), made the following unequivocal pronouncement:

[T]he scope of “exhibition of the genitals or pubic area” in section 2256(2)(E), in the definition of “sexually explicit conduct,” is not limited to nude exhibitions or exhibitions in which the outlines of those areas were discernable through the clothing. . . . It is the sense of the Congress that in filing its brief in *United States v. Knox* [sic, *Knox v. United States*] . . . the Department of Justice did not accurately reflect the intent of Congress in arguing that “the videotapes constitute ‘lascivious exhibition’ of the genitals or pubic area” only if those body parts are visible in the tapes and the minors posed or acted lasciviously.¹⁹³

The Confirmation of Intent was sponsored by Senator Charles Grassley (R-IA) and Senator William Roth, who had sponsored the Roth Bill in

¹⁸⁸ *Id.* at 1.

¹⁸⁹ See generally MAZZONE, *supra* note 121, at 212–14 (discussing public and congressional reaction to the Days Brief).

¹⁹⁰ CINTRON, *supra* note 175, at 173.

¹⁹¹ Drew S. Days III, *When the President Says No: A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. OF APP. PRAC. & PROC. 509, 515 (2001).

¹⁹² 139 Cong. Rec. 27, 493–94 (1993). This was a non-binding resolution. MAZZONE, *supra* note 121, at 212.

¹⁹³ 139th Cong. Rec. 27, 449 (1993) (citing 18 U.S.C. § 2256(2)(E) (1988), and *Days Brief*, *supra* note 177).

1977.¹⁹⁴ Senator Grassley spoke simply and frankly about the role of nudity in a lascivious exhibition of the genitals: “We did not require that those children being used for pornographic purposes be nude Nudity is not required for the material to be child pornography.”¹⁹⁵ Senator Roth followed, declaring the Days Brief “a travesty in that it completely misrepresents congressional intent in passing the Child Protection Act of 1984.”¹⁹⁶ Senator Roth also praised *Knox I*:

What was the pornography involved in this case? The key holding of the third circuit was that, under Federal law, “clothed exhibitions of the genitalia are proscribed” when “a photographer unnaturally focuses on a minor child’s clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles.” That is exactly what the facts show happened in this case.¹⁹⁷

Later that day, while Attorney General Janet Reno was giving testimony before the Senate Committee on Banking, Housing, and Urban Affairs regarding racial discrimination in home mortgage lending, Senator Roth changed the subject and grilled Ms. Reno regarding the Justice Department’s “flip flop” on *Knox*. “I would point out,” said Senator Roth, “that on the floor, both Democrats and Republicans, including the Democratic chairman of the Judiciary Committee, agreed that . . . this act was clearly intended to apply to the situation at hand, where the genitals were clothed.”¹⁹⁸ Attorney General Reno replied that she supported the Solicitor General.¹⁹⁹ She also went so far as to give Senator Roth her phone number, suggesting he call to discuss any similar cases the Justice Department might drop in light of its flip flop.²⁰⁰

Sensing that his attorney general had been too glib, President Clinton

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* Senator Grassley also expressed dismay over the Days Brief’s position that the child must be engaging in lascivious conduct: “So we prohibited materials that used the minor engaging in lascivious displays of their private parts. We did not require that the minor herself intend to act lasciviously. Of course not. No young child even knows what it means to act lasciviously.” *Id.* (citing *Days Brief*, *supra* note 177).

¹⁹⁶ 139th Cong. Rec. 27, 450 (1993).

¹⁹⁷ *Id.* (quoting *United States v. Knox (Knox I)*, 977 F.2d 815, 822 (1992)).

¹⁹⁸ Fair Lending Enforcement and the Data on the 1992 Home Mortgage Disclosure Act, Hearing Before the Comm. on Banking, Housing, and Urban Affairs, United States Senate, 103d Cong. at 32 (1993).

¹⁹⁹ *Id.* at 32–33.

²⁰⁰ *Id.* at 33 (giving her phone number as “514-2001”).

jumped into the fray. On November 10th, he sent a testy letter to Ms. Reno, chiding her for letting the Justice Department drag him into a political battle he could never win.²⁰¹ The president explained in no uncertain terms that he “fully agree[d] with the Senate about what the proper scope of the child pornography law should be.”²⁰² He also admonished his attorney general “to lead aggressively in the attack against the scourge of child pornography.”²⁰³ The White House made the letter public.²⁰⁴

A week later, Senators Roth and Grassley performed a figurative end-zone dance on the Senate floor. Said Senator Roth:

[U]nder the 1984 Child Protection Act, the term “exhibition of the genitals” is not limited to nude exhibitions or exhibitions in which the outline of those areas are discernible through clothing, as the Department of Justice Brief argued *The Senate view of the meaning of the law is also the view of the Third Circuit Court of Appeals*, which affirmed the conviction in the *Knox* case, and the view which President Clinton’s Acting Solicitor General [i.e., William Bryson] took in the brief he filed with the Supreme Court in March 1993. It apparently is also the view of President Clinton²⁰⁵

Interestingly, Senator Grassley voiced his agreement with Senator Roth by citing the rejection of the Roth Bill’s nudity requirement:

In fact, Congress, when it considered the forerunner to the Child Protection Act, in 1977, deleted language that would have required nudity in order to meet the definition of child pornography. *The issue was settled*. The 1984 Act does not require nudity. Yet in the *Knox* case, the Reno Justice Department took just that view. It reversed

²⁰¹ Gerhard Peters & John T. Woolley, *Letter to Attorney General Janet Reno on Child Pornography*, AMER. PRESIDENCY PROJ. (Nov. 10, 1993), <http://www.presidency.ucsb.edu/ws/?pid=46095>.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See, e.g., Aaron Epstein, *Clinton Chastises on Child Porn*, PHIL. INQUIRER, Nov. 12, 1993. The controversy likely cost Drew Days the Supreme Court slot that later went to Justice Steven Breyer. Newsweek Staff, *Uneasy Days in Court*, NEWSWEEK, Oct. 9, 1994.

²⁰⁵ 139th Cong. Rec. 29,569 (1993) (emphasis added).

congressional intent and longstanding [Department of Justice] interpretation of the law.²⁰⁶

Both senators justifiably referenced the unanimous vote and President Clinton's letter in order to validate their argument regarding the law's intent.²⁰⁷

Five months later the House voiced its overwhelming concurrence, voting 425-3 in favor of its own version of the Confirmation of Intent.²⁰⁸ Citing *Knox I*, the House made the following important findings:

(12) Congress specifically repudiated a “nudity” requirement for child pornography statutes (see *United States v. Knox*, 977 F.2d 815, at 820–823 (3rd Cir. 1992));

(13) the “harm Congress attempted to eradicate by enacting child pornography laws is present when a photographer unnaturally focuses on a minor's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles.” (see *Knox* at 822). . . .²⁰⁹

Ultimately, the 525-3 combined vote became § 160003 of the Violent Crime Control and Law Enforcement Act of 1994 (the “1994 Crime Act”), which said in pertinent part,

(a) DECLARATION—The Congress declares that in enacting sections 2252 and 2256 of title 18, United States Code, it was and is the intent of Congress that—

(1) the scope of “exhibition of the genitals or pubic area” in section 2256(2)(E), in the definition of “sexually explicit conduct,” is not limited to nude exhibitions or

²⁰⁶ *Id.* (citing S. 1011, *supra* note 65 (the Roth Bill)). (emphasis added)). Clearly Senator Roth accepted the Wald Letter's critique of his bill, since he had no intention of limiting the law's reach solely to nude depictions. *Id.* For discussion of the Roth Bill's nudity requirement and its subsequent rejection, see *supra* Part III.B.

²⁰⁷ 139th Cong. Rec. 29, 569–70 (1993).

²⁰⁸ 140th Cong. Rec. 7942 (1994). Perhaps the vote would have been 426-3. Said Rep. Cardiss Collins (D-IL), “I rise, Mr. Chairman, because I was in the Cloakroom and did not realize the vote had been completed. Had I been recorded, I would have voted ‘aye’ [on the measure].” *Id.*

²⁰⁹ 140th Cong. Rec. 7940 (1994) (citing *United States v. Knox*, 977 F.2d 815, 820–23) (all citations in the quotations are as published in the original).

exhibitions in which the outlines of these areas were discernible through clothing²¹⁰

It is important to note that in § 160003(a), Congress “declare[d]” its intent. Sections 160003(b) and (c), which, respectively, urged every state to pass child pornography legislation and asserted that the Days Brief did not reflect the intent of Congress, were assigned the heading, “Sense of the Congress.”²¹¹ The difference in terminology may have been a signal that Congress intended its “declaration” to amend Chapter 110. Said the Supreme Court, “a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law.”²¹² A retroactive declaration was preferable to rewriting the statute, as any revision would be a concession that “lascivious exhibition” did not mean what Congress insisted it had always meant.²¹³

Ultimately, Congress would go much further than simply legislating its intent. Two-hundred and thirty-four congresspersons took the bold step of signing onto an amicus brief “urg[ing the Third Circuit] to reaffirm Knox’s conviction on the theory adopted in [its] prior opinion.”²¹⁴ In a final effort to get its point across, the Judiciary Committee haled before it Solicitor General Days, compelling him to admit not only that it was his decision to confess error and withdraw the Bryson Brief, but also that he personally drafted the Days Brief.²¹⁵

²¹⁰ Pub. L. No. 103-322, § 160003(a)(1), 108 Stat. 1796 (1994). Note that Subsection (a)(1) restates the Senate Confirmation of Intent. See *supra* note 193 and accompanying text. Subsection (a)(2) repudiated Solicitor General Days’s stance that the word “lascivious” applies to the child’s conduct rather than the intent of the photographer. *Id.* § 160003(a)(2).

²¹¹ *Id.* § 160003(b)–(c).

²¹² HENRY COHEN, CONG. RESEARCH SERV., CHILD PORNOGRAPHY: CONSTITUTIONAL PRINCIPLES AND FEDERAL STATUTES, 7, n.11 (1999) (quoting *Stockdale v. The Ins. Cos.*, 20 Wall. (87 U.S.) 323, 331 (1874)). Congress “apparently amended the statute.” *Id.*

²¹³ See, e.g., Pub. L. No. 103-322, § 160003(a), 108 Stat. 1796 (1994). Note that shortly after the 100-0 vote, the Senate for this very reason rejected an amendment suggested by Attorney General Reno that would have made genital exposure irrelevant to any prosecution. MAZZONE, *supra* note 121, at 213–14.

²¹⁴ *United States v. Knox (Knox II)*, 32 F.3d 733, 741 (1994); see *id.* at 744 (“Several amici parties, including the amici Members of Congress, support our prior statutory interpretation that no nudity is required.”).

²¹⁵ Hearing Before the S. Comm. on the Judiciary, Examining the Operation and Activities of the Office of the Solicitor Gen. of the Dep’t of Justice, 104th Cong. 13–14 (1995).

D. *United States v. Knox* on Remand (*Knox II*)

With Congress expressing its near-unanimous approval of the holding in *Knox I*, it was unsurprising that in *Knox II* the Third Circuit reaffirmed Stephen Knox's conviction. Once again, the court held that covered genitals may be lasciviously exhibited in accordance with 18 U.S.C. § 2256(2)(E).²¹⁶ In addition, the court rejected the "discernibility" test now advocated by the Justice Department.²¹⁷

As in *Knox I*, the court in *Knox II* examined the text of the statute, noting that "[appellant] attempts to read a nudity requirement into a statute which has none." The court again looked to the ordinary meanings of the words "exhibit" and "lascivious," concluding that neither definition "contain[s] any requirement of nudity"²¹⁸ The court also pointed out that examining the words surrounding "lascivious exhibition of the genitals" reveals the obvious purpose of the statute was to "combat[] 'the use of children as subjects of pornographic material [because it is] harmful to [the] physiological, emotional, and mental health of the child.'"²¹⁹ Accordingly, the trauma that arises from sexualizing children is not

²¹⁶ *Knox II*, 32 F.3d at 751.

[W]e hold that the statutory term "lascivious exhibition of the genitals or pubic area," as used in 18 U.S.C. § 2256(2)(E), does not contain any requirement that the child subject's genitals or pubic area be fully or partially exposed or discernible through his or her opaque clothing. The statutory language is clear and contains no ambiguity.

Id.

²¹⁷ *Id.* at 744. The court also rejected the government's new argument that "lascivious" refers to the behavior of the child subject, as opposed to the intent of the photographer. *Id.* at 747.

²¹⁸ *Id.* 32 F.3d at 744, 745. "Exhibit" means "to display that which is interesting or instructive." *Id.* at 744. If exhibitions of covered genitals were not interesting to pedophiles, there would be no market for the video tapes possessed by Stephen Knox. Said the court:

Hence, as used in the child pornography statute, the ordinary meaning of the phrase "lascivious exhibition" means a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer.

Id. at 745.

²¹⁹ *Id.* at 746, 749–50 (quoting *New York v. Ferber*, 458 U.S. 747, 758 (1982)).

contingent upon whether the genitals are exposed or covered.²²⁰

The court referenced the nudity requirement within the text of the rejected Roth Bill, concluding that “the decision to eliminate this requirement must have been intentional.”²²¹ Congress was aware it could have limited the 1977 Act to include only nude exhibitions, but instead chose not to. However, the court now found that the Wald Letter did not decisively reveal Congress’s intent. Upon reconsideration of Assistant Attorney General Wald’s concerns, Congress very well could have “repudiated its earlier intention to confine the statute’s coverage to nude exhibitions.”²²² Alternately, however, “it is arguably significant that the language suggesting that Congress clarify what types of nude portrayals would be prohibited was contained in the very letter recommending the substitution of the phrase ‘lewd exhibition of the genitals.’”²²³ In any event, since no nudity requirement appeared in the final legislation, the Third Circuit refused to read one into it.²²⁴

The court also ruled that its rejection of a nudity requirement was consistent with the Circuit’s previous adoption of the *Dost* factors.²²⁵ While the question of whether an image “visually exhibits the genitals or pubic area is a threshold determination not necessarily guided by the *Dost* factors,” the fact that nudity is only one of several non-exhaustive considerations is consistent with the court’s rejection of a nudity requirement.²²⁶

After the holding in *Knox II* was handed down, Stephen Knox once again petitioned the Supreme Court for review. This time, however, his petition was denied.²²⁷

VIII. Hurling Toward the 21st Century: The Virtual Child Pornography Conundrum

²²⁰ *Id.* at 750 (“The rationale underlying the statute’s proscription applies equally to any lascivious exhibition of the genitals or pubic area where these areas are clad or completely exposed.”).

²²¹ *Id.* at 748 (citing S. 1011, *supra* note 65 (the Roth Bill)).

²²² *Id.* (citing 1977 S. Subcomm. Hearings, *supra* note 59, at 77–78 (the Wald Letter)).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 751 (citing *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986)).

²²⁶ *Id.*

²²⁷ *Knox v. United States*, 513 U.S. 1109 (1995).

A. The Child Pornography Prevention Act of 1996 (CPPA) and *Ashcroft*

Emboldened by *Knox II*, Congress now sought to stanch the emergence of a “computer-generated loophole” in Chapter 110. By passing the Child Pornography Prevention Act of 1996 (the “CPPA”), Congress sought to prohibit technology-savvy pornographers from producing child pornography by “alter[ing] perfectly innocent pictures or videos of children,” or even “by computer without using . . . actual children.” Although neither paradigm involves child sex abuse, it was feared that such “pseudo child pornography” could be used both to seduce children and to “stimulate the sexual appetites of child molesters and pedophiles.”²²⁸ The threat may not have been direct, but Congress considered it just as pernicious.

Under the CPPA, 18 U.S.C. § 2252 still criminalized producing and possessing depictions of children engaging in sexually explicit conduct.²²⁹ However, the new § 2252A generally outlawed virtual “child pornography,”²³⁰ a term of art that was now defined in four separate subheadings under 18 U.S.C. § 2256(8). The first, § 2256(8)(A), defined “child pornography” using language that had appeared elsewhere in the statute since 1978: “‘child pornography’ means any visual depiction . . . where (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.”²³¹ Although prohibiting child pornography that depicts an actual child was neither controversial nor novel, the new § 2256(8)(B) for the first time criminalized computer-generated (or “virtual”) child pornography, as well as pornographic depictions of adults who appeared to be minors; the new § 2256(8)(C) criminalized “morphing” (i.e., modifying an existing image of an actual child to make it appear as if the child is engaging in sexually explicit conduct); and the new § 2256(8)(D) criminalized the “pandering” or promotion of material as child pornography.²³² The definition of “sexually

²²⁸ *The Child Pornography Prevention Act of 1996: Hearing on S. 1237 Before the Senate Comm. on the Judiciary*, 104th Cong. 1–2 (1996) (statement of Sen. Orrin Hatch, Member, S. Comm. on the Judiciary) [hereinafter *1996 S. CPPA Hearing*].

²²⁹ 18 U.S.C. § 2252 (1996).

²³⁰ Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, sub. 3, 110 Stat. 3009 [hereinafter *CPPA*].

²³¹ See, e.g., 18 U.S.C. § 2252(a)(1)(A) (1978) (prohibiting (for interstate transfer) “the produc[tion] of such visual or print medium [that] involves the use of a minor engaging in sexually explicit conduct”).

²³² *CPPA*, *supra* note 230, § 121, sub. 2 (amending 18 U.S.C. § 2256(8)).

explicit conduct” remained unchanged, as did the term “lascivious exhibition of the genitals or pubic area of any person.”²³³

The CPPA went one step beyond *Ferber* by proscribing non-obscene materials that did not depict an actual child.²³⁴ Because this was a bridge too far, the Supreme Court in *Ashcroft v. Free Speech Coalition* struck down § 2256(8)(B).²³⁵ In accordance with *Miller*, a legislature may restrict obscene depictions; and in accordance with *Ferber*, a legislature may restrict depictions of actual children engaged in sexually explicit conduct regardless of whether the depiction is obscene.²³⁶ However, any restriction falling outside of these categories impermissibly suppresses free speech.²³⁷ It follows that § 2256(8)(B), which banned what “appears to be” child pornography, was unconstitutionally overbroad since it would suppress lawful, non-obscene material. The Court rejected the government’s assertion that such images remain powerful weapons in a pedophile’s quiver, since “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.”²³⁸ Also, the purported harm was too indirect.²³⁹ While convicting child pornographers might be made more difficult with the advent of virtual child pornography, “the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted”²⁴⁰

Despite the Supreme Court’s rejection of § 2256(8)(B), the legislative history of the CPPA offers no evidence that Congress sought to legislatively overrule or limit the holding in *Knox II*. This is unsurprising considering the lengths to which Congress had gone in order to get its point across only months earlier. By breaking from the past and criminalizing child pornography that involved no actual children, Congress sought to

²³³ Compare 18 U.S.C. § 2256(2) (1988), with 18 U.S.C. § 2256(2) (1996).

²³⁴ CPPA, *supra* note 230, § 121, sub. 2.

²³⁵ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002).

²³⁶ *Id.* at 251–52 (citing *California v. Miller*, 413 U.S. 13 (1973), and *Ferber v. New York*, 458 U.S. 747 (1982)).

²³⁷ *Id.*

²³⁸ *Id.* at 252.

²³⁹ *Id.* at 253 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

²⁴⁰ *Id.* at 255 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). *Ashcroft* also declared overbroad the § 2256(8)(D) prohibition on pandering, since “even if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie.” *Id.* at 257.

expand the reach of the existing law. Scaling back simply was not on the agenda. Expressly referencing “the *Knox* case” during a Senate Judiciary Committee hearing, Senator Grassley compared the “loophole” of computer-generated child pornography with “the back-door way of getting around the 1986 [sic] legislation if children were depicted while they were wearing underwear or a bathing suit.”²⁴¹ There is no evidence that in closing off one loophole Congress intended to reopen another.

If anything, additional evidence in the CPPA legislative history shows that Congress had every intention of preserving the holding in *Knox II*. The final committee report accompanying S. 1237, the Senate version of the bill, expressly stated that the Third Circuit’s ruling with regard to the term “lascivious exhibition of the genitals” was still applicable to the proposed new law:

To ensure that the statute, and in particular the classification of a visual depiction which “appears to be” of a minor engaging in sexually explicit conduct as child pornography, is not unconstitutionally overbroad, S. 1237 does not change or expand the existing statutory definition (at 18 U.S.C. 2256(2)) of the term “sexually explicit conduct.” This definition, including the use of the term “lascivious,” has been judicially reviewed and upheld.²⁴²

Although the Supreme Court eventually voided the section of the CPPA criminalizing depictions that “appear to be” child pornography, Congress’s intent remains clear when applied to those sections left untouched by *Ashcroft*. Put simply, “lascivious exhibition” was unchanged by the new law and meant what it had always meant.

Overall, neither *Knox* nor the term “lascivious exhibition of the genitals” was hotly debated, suggesting that Congress was satisfied it had made its intent sufficiently known with the 525-3 combined vote and subsequent passage of § 160003 of the 1994 Crime Act.

²⁴¹ 1996 S. CPPA Hearing, *supra* note 228, at 5 (Statement of Senator Chuck Grassley, Member, S. Comm. on the Judiciary) (citing Child Pornography Prevention Act of 1996, S. 1237, 104th Cong. (1995)). After discussing how Congress helped close the genital coverage loophole, Senator Grassley declared, “S. 1237 is simply a replay of this drama.” *Id.* at 26.

²⁴² S. Rep. No. 104-358, at 20 (1996) (citing *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994); cert denied, 115 S. Ct. 897 (1995)).

B. The PROTECT Act of 2003 and the Bifurcation of “Sexually Explicit Conduct”

Following *Ashcroft*, the Judiciary Committee quickly went back to work and passed the PROTECT Act of 2003.²⁴³ The PROTECT Act was an outgrowth of Senate Bill S. 151, which was sponsored by Senators Orrin Hatch (R-UT) and Patrick Leahy (D-VT).²⁴⁴ Since the definitions for both child pornography using an actual minor and “morphed” child pornography survived *Ashcroft*, the PROTECT Act did nothing to change §§ 2256(8)(A) and (C).²⁴⁵ However, after the Supreme Court declared § 2256(8)(B) overbroad,²⁴⁶ Congress sought to craft a more robust definition for child pornography for which there was no proof an actual minor was used (that is, digital or computer generated child pornography). To this end, Congress made several important revisions to the law.

First, Congress recognized the distinction between obscenity and child pornography by enacting new 18 U.S.C. § 1466A, which criminalized obscene or graphic depictions of a child.²⁴⁷ Despite the use of the disjunctive, the word “graphic” was intended to mean something along the lines of especially obscene or “hardcore.” Senator Hatch described the term as follows:

S. 151 also creates a new obscenity section . . . that applies to sexually explicit depictions of minors. It contains two prongs. The first criminalizes any obscene depiction of a minor engaged in a broad variety of sexually explicit conduct. The second [i.e., the “graphic” prong] is a focused and careful attempt to define a subcategory of “hardcore” child pornography that is per se obscene.²⁴⁸

²⁴³ Prosecutorial Remedies and Other Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 1117 Stat. 650 [hereinafter *PROTECT Act*].

²⁴⁴ PROTECT Act, S. 151, 108th Cong. (2003).

²⁴⁵ Compare 18 U.S.C. §§ 2256(8)(A), (C) (1996), with 18 U.S.C. §§ 2256(8)(A),(C) (2003). For more on “morphing,” see *supra* text accompanying note 232.

²⁴⁶ See *supra* notes 235–41 and accompanying text.

²⁴⁷ 18 U.S.C. § 1466A (2003), “Obscene visual representations of the sexual abuse of children.”

²⁴⁸ S. Rep. No. 108-2, at 10–11 (2003) (remarks of Senator Orrin Hatch). Importantly, because the “[new § 1466A] relies to a large extent on obscenity doctrine, [it is] thus . . .

“Graphic,” as enacted under the new § 1466A obscenity provision, was defined in terms of genital exposure: “the term ‘graphic’ . . . means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted.”²⁴⁹

Second, Congress redrafted § 2256(8)(B) in order to criminalize “digital image[s]” in which the subject is “indistinguishable from . . . that of a minor engaging in sexually explicit conduct.”²⁵⁰ The word “indistinguishable” was defined in terms of whether “an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct.”²⁵¹

Because Congress was attempting once again to criminalize child pornography in which no children were harmed, it bifurcated the § 2256(2) definition of “sexually explicit conduct.” The new § 2256(2)(A), which was simply the old § 2256(2) reorganized under a new subheading,²⁵² defined “sexually explicit conduct” for the entire statute *except* with respect to digital child pornography. The definition for “sexually explicit conduct” as it relates to digital child pornography was now found under the new § 2256(2)(B).²⁵³

The §§ 2256(2)(A) and (B) definitions for “sexually explicit conduct” were nearly identical save for one key difference: the word “graphic” was used as a modifier throughout § 2256(2)(B). For example, digital child pornography prosecuted under § 2256(8)(B) could not simply depict a lascivious exhibition; rather, in order to be prosecutable, an image would

more rooted in the Constitution than other parts of the bill,” including the old § 2256. *Id.* at 21–22 (remarks of Senators Joe Biden, Russ Feingold & Patrick Leahy).

²⁴⁹ 18 U.S.C. § 1466A(f)(3) (2003).

²⁵⁰ 18 U.S.C. § 2256(8)(B) (2003).

²⁵¹ 18 U.S.C. § 2256(11) (2003). To help ensure the new law was not overbroad, Congress expressly stated, “This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.” *Id.* Congress also tightened the § 2252A affirmative defense by eliminating the requirement that the accused show the material was not pandered (i.e., promoted or advertised) as child pornography.²⁵¹ *Compare* 18 U.S.C. § 2252A(C) (1996), *with* 18 U.S.C. § 22(C)(c) (2003).

²⁵² *Compare* 18 U.S.C. § 2256(2) (1996), *with* 18 U.S.C. § 2256(2)(A) (2003). Note that the bifurcation caused the term “lascivious exhibitions of the genitals or pubic area,” when applied to an actual minor, to move from 18 U.S.C. § 2256(2)(E) to 18 U.S.C. § 2256(2)(A)(v).

²⁵³ 18 U.S.C. § 2256(2)(B) (2003).

have to depict a “graphic . . . lascivious exhibition”²⁵⁴ As with the virtually identical § 1466A definition for “graphic,” the § 2256(10) definition required exposed genitals.²⁵⁵

Genital exposure was now required for any child pornography prosecution in which the government could not show an actual minor was used.²⁵⁶ Conversely, genital exposure was *not* required for any child pornography prosecution in which the government *could* show an actual minor was used. Although the inclusion of obscenity verbiage in § 2256(8)(B) muddles what is supposed to be a child pornography law, the alteration was necessary in the wake of *Ashcroft*: if an actual minor is not used, then the image must be obscene in order to be illegal.²⁵⁷ Because a digital image may be entirely computer generated, the obscenity (graphic) requirement was added in order to ensure the revised law was constitutional.²⁵⁸

Since the PROTECT Act’s definition of sexually explicit conduct for depictions involving an actual child had remained static since 1984,²⁵⁹ there is no reason why *Knox II* should not apply to prosecutions under § 2256(8)(A). Nowhere in the PROTECT Act’s legislative history was the holding in *Knox II* renounced or even questioned, and there is nothing to suggest that child pornography involving an actual minor now requires genital exposure.²⁶⁰

²⁵⁴ *Id.* § 2256(2)(B)(iii) (2003). Both the *United States v. Blouin* majority and dissent refer to the 18 U.S.C. § 2256(2)(B)(iii) “‘graphic’ requirement.” See *United States v. Blouin*, 74 M.J. 247, 251 (2015); *Blouin*, 74 M.J. at 253–56 (Baker, C.J. dissenting). However, since § 2256(2)(B)(iii) requires proof of a “graphic *or* simulated lascivious exhibition,” an image need not be “graphic” if it depicts a “simulated” exhibition. *Id.* (emphasis added). Instead, a simulated depiction must only be lascivious in order to be prosecutable. *Id.* The inclusion of the word “simulated” within § 2256(2)(B)(iii) is somewhat confusing, since any computer generated depiction is *per se* simulated. Unless otherwise stated, hereinafter in this article it will be assumed that no lascivious exhibition falling under § 2256(2)(B)(iii) is simulated.

²⁵⁵ Compare 18 U.S.C. § 2256(10) (2003), with 18 U.S.C. § 1466A(f)(3) (2003).

²⁵⁶ *Id.*

²⁵⁷ See *supra* note 234–240 and accompanying text.

²⁵⁸ S. Rep. No. 108-2, at 6–7 (2003); 149 Cong. Rec. 4230 (2003) (containing the remarks of Senator Patrick Leahy).

²⁵⁹ Compare 18 U.S.C. § 2256(2)(A) (2003), with 18 U.S.C. § 2255(2) (1984).

²⁶⁰ The legislative history reveals that the *Knox* line of cases was referenced only once, not surprisingly by Senator Charles Grassley, when he said the following:

Additionally, commercial pornography distributors began selling videotapes of scantily-clad young people. These pornography

If anything, the introduction of a “graphic” requirement for virtual child pornography suggests the opposite is true. In *Ashcroft*, the Supreme Court reasserted that a legislature could permissibly restrict material that was either obscene or depicted harm to an actual child (regardless of whether the depiction was obscene).²⁶¹ Because *Ashcroft* voided the CPPA’s restriction on non-obscene virtual child pornography, Congress responded by inserting the graphic requirement.²⁶² Virtual child pornography now would have to be graphic—obscene—in order to comply with *Ashcroft*.²⁶³ A virtual depiction now required genital exposure where, as before, actual child pornography did not.

Several members of the Judiciary Committee contemplated adding an obscenity requirement for all child pornography: “[W]e could be avoiding these problems were we to take the simple approach of outlawing ‘obscene’ child pornography of all types That approach would produce a law beyond any possible challenge even without any affirmative defense.”²⁶⁴ However, despite the fact that a comprehensive obscenity requirement would have ensured the entire law’s constitutionality, Congress ultimately did not require graphic exposure for images involving an actual child under § 2256(2)(A). Accordingly, non-graphic exhibitions still fell within the law’s reach. Since a graphic depiction necessarily exhibits the exposed genitals, there is no reason why the established interpretation of “lascivious exhibition” should not still apply to non-obscene child pornography. This is especially true in light of the fact that

merchants found what they had believed was a loophole in the Federal child pornography laws, and for a time, the Clinton administration agreed, but many of my colleagues will remember the *Knox* case. Fortunately, Congress did intervene and closed that loophole. Computer imaging technology gave child pornographers yet another way to sidestep Federal law by creating synthetic child pornography, which is virtually indistinguishable from traditional child pornography.

Stopping Child Pornography: Protecting our Children and the Constitution, Hearing Before the S. Comm. on the Judiciary, 107th Cong. 24 (2002) (statement of Sen. Charles Grassley, Member, S. Comm. on the Judiciary).

²⁶¹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 248–52 (2002).

²⁶² See S. Rep. No. 108-2, at 26 (2003) (remarks of Senators Joe Biden, Russ Feingold, & Patrick Leahy, recommending that a graphic requirement be included for prosecutions of “‘virtual child porn[ography]’ . . . to better focus it on hard core conduct . . .”).

²⁶³ See 149 Cong. Rec. 4229 (2003), remarks of Senator Patrick Leahy (“These provisions [i.e., ‘the definition of virtual child pornography’] rely to a large extent on obscenity doctrine . . .”).

²⁶⁴ S. Rep. No. 108-2, at 23 (2003) (suggesting a universal obscenity requirement).

Congress did nothing to renounce its embrace of *Knox I* and *Knox II* less than ten years earlier.

IX: The CAAF's Opinion in *United States v. Blouin*

In its 3-2 decision reversing SPC Blouin's conviction, the CAAF stated unequivocally, "[w]e decline to accept [ACCA's] invitation to adopt the *Knox II* standard as controlling precedent in this jurisdiction."²⁶⁵ By rejecting *Knox II* without adequate clarification, the CAAF may be suggesting that, like a digital image of a person indistinguishable from an actual child, genital exposure is now required when an actual child is depicted. If this is what the CAAF intended, that court has turned the law on its head. There is no reason why *Knox II* does not still apply to a non-graphic, non-obscene lascivious exhibition involving an actual child.²⁶⁶

A. The *Blouin* Majority Fails to Address the Extensive Legislative History

One key reason the majority declined to accept the ACCA's "invitation" is that *Knox II* predates the bifurcation of sexually explicit conduct into graphic and non-graphic prongs.²⁶⁷ However, the fact that Congress chose to bifurcate the definition is, in itself, proof that *Knox II* still applies to non-graphic exhibitions. Otherwise, genital exposure would be required for both graphic and non-graphic exhibitions, a result that is both absurd and contrary to the definition of "graphic" found in § 2256(10). Congress certainly could have required genital exposure for images of an actual child, yet it limited this more stringent requirement to images in which the subject is "indistinguishable" from an actual child.

During the PROTECT Act hearings, some members of the Judiciary Committee suggested adding an obscenity requirement to the entire law.²⁶⁸ Ultimately, Congress added the equivalent graphic requirement only to digital images—images for which there was a possibility no actual minors were used. The text pertaining to actual minors remained unchanged.²⁶⁹

²⁶⁵ *United States v. Blouin*, 74 M.J. 247, 250 (C.A.A.F. 2015).

²⁶⁶ 18 U.S.C. § 2256(2)(A)(v) (2008).

²⁶⁷ *Blouin*, 74 M.J. at 251 (citing *PROTECT Act*, *supra* note 245, § 502(c)).

²⁶⁸ See *supra* note 264 and accompanying text.

²⁶⁹ Compare 18 U.S.C. § 2256(2)(A) (2003), with 18 U.S.C. § 2255(2) (1996).

In his dissent, Chief Judge Baker correctly pointed out that the PROTECT Act simply “reorganized” language in existence at the time *Knox II* was decided.²⁷⁰ Conversely, the majority failed to cite the PROTECT Act’s legislative history in support of its assertion that *Knox II* is now irrelevant. Congress never said as much, which is unsurprising since the entire purpose of the PROTECT Act was to close an emerging loophole, not reopen an old loophole that had been closed after a very public fight.²⁷¹ For that matter, the majority never addressed the contentious legislative history immediately following *Knox I*, including the Senate’s unanimous Confirmation of Intent; the House’s subsequent 425-3 concurrence; or § 160003(a)(1) of the 1994 Crime Act, wherein Congress went so far as to promulgate what constitutes a lascivious exhibition of the genitals.²⁷²

Moreover, the majority failed to address the very origins of the terminology it endeavored to interpret. As discussed above, the Judiciary Committee in 1977 rejected the nudity requirement found in the Roth Bill, the first proposal for federal child pornography legislation. Based on the recommendation made by Assistant Attorney General Wald, lewdness, not nudity, became the standard for a criminal depiction of a child’s genitals.²⁷³ Both the House and Senate Judiciary Committees revisited this issue in 1984, when they considered defining “simulated sexually explicit conduct” in terms of genital exposure.²⁷⁴ The proposal died in committee after two justice department attorneys testified that the suggested verbiage was too limiting and would create unintentional loopholes.²⁷⁵

Congress’s intent with respect to genital exposure remained the same despite the 1984 change from “lewd” to “lascivious.” As explained, *supra*, the purpose of the change was to signal a move away from the narrower

²⁷⁰ *Id.* at 255 (Baker, C.J. dissenting). Assuming for a moment that moving the text of a law to a different subheading nullifies all previous associated legislative history, consider that § 160003(a) of the 1994 Crime Act addresses “the intent of Congress” as it pertains to “sections 2252 and 2256.” Since the term “lascivious exhibition of the genitals or pubic area” still appears in “section[] 2256” of the United States Code, § 160003(a) of the 1994 Crime Act would continue to apply. The text in question simply moved from 18 U.S.C. § 2256(2) (1996) to 18 U.S.C. § 2256(2)(A)(v) (2003). See *supra* note 252 and accompanying text.

²⁷¹ See *supra* note 228–30.

²⁷² See *supra* Part VII.C.

²⁷³ See *supra* text accompanying note 82.

²⁷⁴ See *supra* Part V.B.

²⁷⁵ *Id.*

obscenity standard.²⁷⁶ Years later, Congress reintroduced the obscenity standard only with regard to child pornography in which the subject is indistinguishable from an actual minor, when it expressly linked genital exposure to graphic depictions.²⁷⁷ The pre-*Knox* non-graphic verbiage still applied to actual children.²⁷⁸

Of all things, the majority references the discredited Days Brief when detailing the history of *Knox II*.²⁷⁹ As discussed, the Days Brief represented the short-lived intent of the executive branch, not the legislators who passed Chapter 110 and later went to great lengths to challenge the solicitor general's revised argument.²⁸⁰ The Days Brief also became an orphan within the Justice Department, as Attorney General Reno herself disowned it after succumbing to pressure from the White House.²⁸¹ Moreover, the *Blouin* majority failed to note that 234 members of Congress submitted an amicus brief arguing that the Days Brief misinterpreted the law,²⁸² and that the solicitor general himself later was interrogated by the Senate Judiciary Committee regarding his confession of error.²⁸³

B. The *Blouin* Majority Overlooks and Misinterprets Relevant Judicial Precedent

The majority in *Blouin* explained that “neither [the ACCA] nor the government have cited any case which has adopted the rationale of *Knox II* as applied to 18 U.S.C. § 2256(8)(A)-(C) after its 2003 amendment.”²⁸⁴ However, simply because “neither [the ACCA] nor the government” may have cited any post-bifurcation cases, it does not necessarily follow that no such cases exist. Notwithstanding the majority's misleading assertion,

²⁷⁶ See *supra* Part V.C.

²⁷⁷ See *supra* Part VIII.B.

²⁷⁸ See *supra* note 245 and accompanying text.

²⁷⁹ *United States v. Blouin*, 74 M.J. 247, 251 (C.A.A.F. 2015) (citing *Days Brief*, *supra* note 177).

²⁸⁰ See *supra* Part VII.C.

²⁸¹ Linda Greenhouse, *U.S. Changes Stance in Case on Obscenity*, N.Y. TIMES, Nov. 11, 1994, at A15, available at <http://www.nytimes.com/1994/11/11/us/us-changes-stance-in-case-on-obscenity.html>.

²⁸² See *supra* note 214 and accompanying text.

²⁸³ See *supra* note 215 and accompanying text.

²⁸⁴ *Blouin*, 74 M.J. at 251. Technically, “the rationale of *Knox II*” could never apply to § 2256(8)(B) due to the “graphic” requirement. See *supra* notes 254–58 and accompanying text.

many such cases do in fact exist.²⁸⁵

The majority cited a footnote in an Eleventh Circuit case, *United States v. Williams*, for the proposition that “the requirement that lascivious exhibitions be ‘graphic’ under the PROTECT Act’s amended *obscenity* definition likely eliminates a *Knox* result under the *obscenity* statute.”²⁸⁶ However, this footnote is completely irrelevant to prosecutions under § 2256(8)(A): the graphic (or nudity) requirement applies *only* to the obscenity definition and can never apply to non-obscene child pornography.²⁸⁷ As explained above, Congress intended the word “graphic” to describe “hardcore” obscene depictions.²⁸⁸ The graphic requirement applies only to child pornography as defined under § 2256(8)(B), not § 2256(8)(A), because child pornography in which there is no proof an actual child was harmed must be obscene in order to be prosecutable. No obscenity or graphic requirement is needed if real

²⁸⁵ See *Blouin*, 74 M.J. at 256–57 (Baker, C.J. dissenting) (“Moreover, contrary to the lead opinion’s assertion, several federal circuits have cited *Knox II* favorably since the 2003 amendments, some for the proposition that child pornography includes ‘lascivious’ images of minors with clothed genitals or pubic area.” See *United States v. Franz*, 772 F.3d 134, 157 (3d Cir.2014) (citing *Knox II* favorably); *United States v. Wallenfang*, 568 F.3d 649, 659 (8th Cir.2009) (citing *Knox II* to support its holding that images of children whose genitals were covered by pantyhose still constituted child pornography under the CPPA even though the genitals were technically clothed); *United States v. Helton*, 302 Fed. Appx. 842, 846–47 (10th Cir. 2008) (unpublished) (stating that the CPPA “does not specify the genitals or pubic area must be fully or partially uncovered in order to constitute an exhibition and, like our sister circuits, we decline to read such a requirement into the statute,” in finding that a video of a minor wearing underpants was child pornography (citation omitted)). See also *United States v. Kearns*, 2015 WL 3904061, at *1 (D. Kan. June 25, 2015) (citing *Knox II* favorably); *United States v. Morris*, 2014 WL 4292024, at *2 (N-M. Ct. Crim. App. May 21, 2013) (citing favorably to *Knox II* for the proposition that there is no requirement that the genitals be exposed or discernible); *United States v. Romero*, 558 Fed. Appx. 501, 504–05 (5th Cir. 2014) (Mem. Op.) (“Lascivious exhibition does not require nudity. Nor does it require that the contours of the genitals or pubic area be discernible or otherwise visible through the child subject’s clothing.”) (internal citations omitted); *United States v. Lohse*, 993 F.Supp.2d 947, 955 (N.D. Iowa 2014) (citing *Knox II* for the proposition that nudity is not required for a lascivious exhibition); *United States v. Andersen*, 2010 WL 3938363, *8, n.10 (A. Ct. Crim. App. Sept. 10, 2010) (Mem. Op.) (citing *Knox II* for the proposition that nudity is not required for a lascivious exhibition); *United States v. Hill*, 322 F. Supp.2d 1081, 1086, n.7 (C.D. Cal. 2004) (citing favorably to *Knox II*).

²⁸⁶ *Blouin*, 74 M.J. at 251 (quoting *United States v. Williams*, 444 F.3d 1286, 1299 n.63 (11th Cir. 2006)) (emphasis added). See also *supra* notes 248–55 and accompanying text for an explanation of the “graphic requirement.”

²⁸⁷ Chief Judge Baker said in his dissent, “[T]he majority’s reliance on a footnote in *United States v. Williams* . . . to suggest that *Knox II* is no longer good law is, respectfully, too thin a reed on which to hang a rejection of the application of *Knox II*.” *Id.* at 256, n.4 (Baker, C.J. dissenting) (internal citations omitted).

²⁸⁸ See *supra* note 248 and accompanying text.

children are involved. This was the intent of *Ashcroft* and the ensuing bifurcation of “sexually explicit conduct” into graphic and non-graphic prongs.

Similarly, *Knox II* does not apply to the PROTECT Act’s graphic provisions—that is, the PROTECT Act’s “obscenity definition”—because the definition of “graphic” expressly requires genital exposure.²⁸⁹ Rather, *Knox II* applies to non-graphic, non-obscene depictions prosecuted under § 2256(8)(A). Nowhere in the cited footnote does the *Williams* court explain why *Knox II* should not continue to apply to the PROTECT Act’s non-graphic, non-obscene prong, which has remained static since before *Knox II* was decided.

Note that the 1984 change from “lewd” to “lascivious” was made in order to signal a move *away* from obscenity.²⁹⁰ Moreover, as Chief Judge Baker wrote in his dissent,

[I]n deciding “[w]hat exactly constitutes a forbidden ‘lascivious exhibition of the genitals or pubic area,’” the *Williams* court expressly stated that “the pictures needn’t always be ‘dirty’ or even nude depictions to qualify.” Arguably, then, the *Williams* court accepted *Knox II*’s continuing application to the phrase “lascivious exhibition of the genitals or pubic area,” appearing in subsection 8(A), while still relating in a footnote that *Knox II* “likely” did not apply to subsection 8(B), which contains a “graphic” requirement.²⁹¹

Although the *Williams* court correctly analyzed the PROTECT Act’s graphic and non-graphic provisions, the *Blouin* majority’s interpretation of *Williams* is in error.

The *Blouin* majority also asserts that “despite the [A]CCA’s assertion to the contrary, at least two federal circuits have undermined *Knox II*, including the Third Circuit itself.”²⁹² To this end, the majority cites two decisions, *United States v. Vosburgh* and *United States v. Gourde*, but provides virtually no insight as to how either “undermined” *Knox II*’s

²⁸⁹ 18 U.S.C. § 2256(8)(B), § 2256(10) (2008).

²⁹⁰ See *supra* Part V.C.

²⁹¹ *Blouin*, 74 M.J. at 256, n.4 (Baker, C.J. dissenting) (internal citations omitted).

²⁹² *Id.* at 251.

application to non-graphic child pornography.²⁹³ The appellant in *Vosburgh*, the Third Circuit case, argued on appeal that the trial court judge abused his discretion by allowing the government to introduce images of child erotica in his possession in order to prove he intended to download child pornography.²⁹⁴ The *Blouin* majority implies the Third Circuit disavowed *Knox II* when it confirmed that child erotica is legal to possess.²⁹⁵ The problem, however, is that the *Blouin* majority conflates legal child erotica with illegal, non-graphic child pornography. Just because *Vosburgh* acknowledges in dicta that child erotica is legal to possess, it does not automatically follow that non-graphic child pornography is also legal to possess. Despite the *Blouin* majority's misapplication of *Vosburgh*, the *Vosburgh* court (citing to *Gourde*) properly makes the distinction between child erotica and non-graphic child pornography:

The government distinguishes child pornography from child erotica by defining the latter as material that depicts “young girls as sexual objects or in a sexually suggestive way,” but is not “sufficiently lascivious to meet the legal definition of sexually explicit conduct” under 18 U.S.C. § 2256. *See also United States v. Gourde*, 440 F.3d 1065, 1068 (9th Cir.2006) (*en banc*) (citing FBI affidavit describing child erotica as “images that are not themselves child pornography but still fuel . . . sexual fantasies involving children”).²⁹⁶

Like child pornography, child erotica sexualizes children, though without a lascivious exhibition of the genitals.²⁹⁷ Since a lascivious exhibition is the cutoff for what is legal to possess,²⁹⁸ it follows that child erotica and child pornography are two entirely different concepts. By confusing the two, the *Blouin* majority appears to assert that non-graphic child pornography is no different than legal child erotica, a position that is

²⁹³ *Id.* (citing *United States v. Vosburgh*, 602 F.3d 512, 538 (3d Cir. 2010), and *United States v. Gourde*, 440 F.3d 1065, 1070 (9th Cir. 2006)).

²⁹⁴ *Vosburgh*, 602 F.3d at 538.

²⁹⁵ *Blouin*, 74 M.J. at 293.

²⁹⁶ *Vosburgh*, 602 F.3d at 520, n.7 (citing *Gourde*, 440 F.3d at 1068).

²⁹⁷ *See generally* BORGNO, *supra* note 58, at 501, 532–34. Major Borgnino goes far beyond the scope of this article by advocating for the revision of existing child pornography laws to include child erotica (or “offensive images”). *Id.* at 501–02. Such an expansion of the law would criminalize images that do not depict even covered genitals. *Id.* at 534–35.

²⁹⁸ *See infra* notes 303–04 and accompanying text.

entirely consistent with its ill-advised rejection of *Knox II*. However, by essentially reading § 2256(2)(A) out of the statute, the *Blouin* majority renders the United States military the only federal jurisdiction giving a special dispensation to non-graphic child pornography. If Congress had intended for non-graphic child pornography to be legal, then it would not have retained the long-established definition now found under § 2256(2)(A). It also would have expressly repudiated its fervent, almost unanimous agreement with the Third Circuit that exposure is not required for a lascivious exhibition of the genitals.

To support its position, the majority quotes another CAAF case, *United States v. Warner*:

“[Although] Title 18 of the United States Code addresses at length and in considerable detail the myriad of potential crimes related to child pornography, these sections provide no notice that possession of images of minors that depict no nudity, let alone sexually explicit conduct, could be subject to criminal liability.”²⁹⁹

Although the holding in *Warner* is beyond the scope of this paper, the passage quoted by the *Blouin* majority is flawed. Contrary to the quoted language, material that does not depict nudity may be sufficiently lascivious to fall within the ambit of § 2256(8)(A)—e.g., Stephen Knox’s video collection. Since 1978, the question of whether an exhibition is illegal hinges on lewdness or lasciviousness, not nudity. Adding to the confusion, in a different passage, the *Warner* court *correctly* stated that non-nude child pornography is a different species than child erotica.³⁰⁰ Moreover—and perhaps most important—§ 160003(a)(1) of the 1994 Crime Act provides the “meaningful notice” both the *Warner* and *Blouin* majorities demand.³⁰¹ Congress’s intent is also demonstrated by the 525-3 combined vote following *Knox I*, as well as the myriad favorable references to *Knox I* and *Knox II* throughout the congressional record.

²⁹⁹ *Blouin*, 74 M.J. at 251 (quoting *United States v. Warner*, 73 M.J. 1, 3 (C.A.A.F. 2013)). For an analysis of CAAF’s decision in *Warner*, see BORGNO, *supra* note 58, at 512–13.

³⁰⁰ See *supra* text accompanying note 47.

³⁰¹ *United States v. Vaughan* lists the sources of fair notice: “federal law, state law, military case law, military custom and usage, and military regulations.” *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003). See *supra* notes 211–13 and accompanying text for an explanation as to why § 160003(a) of the 1994 Crime Act may be binding. Whether servicemembers are on notice that child erotica is illegal is beyond the scope of this paper. See BORGNO, *supra* note 58, at 512–13.

C. *Blouin* Conflicts with CAAF Precedent in *United States v. Roderick*

In order to determine whether an exhibition of the genitals is, in fact, lascivious, the CAAF in *United States v. Roderick* adopted an approach that combines an analysis of the six *Dost* factors with an overall consideration of the totality of the circumstances.³⁰² *Roderick* treats the *Dost* factors as non-exhaustive because “there may be other factors that are equally if not more important in determining whether a photograph contains a lascivious exhibition.”³⁰³ Nevertheless, as a “prerequisite to any analysis under *Dost*, the images in question *must* depict the child’s genitals or pubic area.”³⁰⁴ *Roderick* therefore compels an affirmation of the first *Dost* factor, “whether the focal point of the visual depiction is on the child’s genitalia or pubic area.”³⁰⁵ This makes sense, although technically § 2256(2)(A)(v) requires the “lascivious exhibition of the genitals or pubic area of *any person*.”³⁰⁶ However, notwithstanding this one requirement, factfinders are free to weigh each *Dost* factor based on its relative importance to the depiction in question.

Now that *Blouin* seemingly has mandated nudity, the fourth *Dost* factor, “whether the child is fully or partially clothed, or nude,” no longer makes sense. Either the CAAF intended *Blouin* to reduce the amount of latitude factfinders have when analyzing the totality of circumstances, or *Blouin* unintentionally conflicts with well-settled and almost universally-accepted precedent.³⁰⁷ Either way, *Blouin* and *Roderick* cannot logically coexist since *Blouin* strips away the discretion a factfinder has in deciding the extent to which nudity is relevant.

X. Conclusion

³⁰² *United States v. Roderick*, 62 M.J. 425, 430 (C.A.A.F. 2006) (citing *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986)). *Roderick* cites to *Knox II* for support. *Id.* See *supra* note 27 for the *Dost* factors.

³⁰³ *Roderick*, 62 M.J. at 430.

³⁰⁴ *Id.* at 430 (emphasis added).

³⁰⁵ *Dost*, 636 F. Supp. at 832.

³⁰⁶ 18 U.S.C. § 2256(2)(A)(v) (2008) (emphasis added).

³⁰⁷ *Roderick*, 62 M.J. at 430 (noting that “[a]ll of the federal courts to address this question have relied, at least in part, on a set of six factors developed . . . in *United States v. Dost*”) (internal citations omitted).

The CAAF in *Blouin* was wrong to spurn the ACCA's invitation to adopt *Knox II*. Congress has consistently rejected a genital exposure requirement for non-graphic, non-obscene child pornography—first in 1984, and then very publicly following the Supreme Court's remand of *Knox*. The Senate voted 100-0 that genital exposure was not required; the House agreed by a 425-3 margin. So there would never again be any question, Congress declared its intent in an actual piece of legislation, § 160003(a)(1) of the 1994 Crime Bill. At no time since has Congress repudiated or undermined its stated intent. Congress also rejected a nudity requirement in 1977, when the *Miller* obscenity standard still applied.

Moreover, the unique graphic requirement for child pornography prosecuted under § 2256(8)(B) demonstrates an obvious awareness that the same standard is not applicable to child pornography prosecuted under § 2256(8)(A). If it was applicable, then Congress would not have gone through the effort of bifurcating the definition of “sexually explicit conduct.”

Having been decided only recently, *Blouin* likely will not be overruled in the near future. This is problematic since the relevant portions of the recently-promulgated Article 134-68b are lifted verbatim from Chapter 110.³⁰⁸ To ensure that the term “lascivious exhibition of the genitals or pubic area,” as it is found in Article 134-68b, comports with Chapter 110, the UCMJ Code Committee³⁰⁹ could simply state within the explanation accompanying *MCM*, pt. IV, ¶ 68b, that genital exposure is not required for a depiction of an actual minor. Conceivably, the committee may cite directly to *Knox II* or quote § 160003(a)(1) of the 1994 Crime Act, *mutatis mutandis*.

If the Code Committee takes this route, it should also endeavor to define the word “obscene” since it is used in the definition of child pornography.³¹⁰ As discussed during the PROTECT Act hearings, a “graphic” depiction is “per se obscene.”³¹¹ Although Article 134-68b does not bifurcate the definition of “sexually explicit conduct,” like § 2256(8)(B), Article 134-68b adds an obscenity requirement when the

³⁰⁸ See *MCM*, *supra* note 13.

³⁰⁹ See UCMJ art. 146 (2012).

³¹⁰ *MCM*, *supra* note 13, pt. IV, ¶ 68b(c)(1).

³¹¹ See *supra* text accompanying note 248.

government does not or cannot prove an image depicts an actual child.³¹² Accordingly, an “obscene” image should be defined as one that includes a lascivious exhibition of the exposed genitals.

Leaving the matter to the CAAF is an unwise gamble if the intent of Article 134-68b is to track closely with its civilian equivalent. Since the CAAF will not apply *Knox II* to § 2256(8)(A), it may very well insist upon genital exposure for a charge brought under Article 134-68b when an actual child is depicted. The Code Committee must make its intent known; otherwise, images that should be prosecutable under Article 134-68b will remain unpunished.

³¹² MCM, *supra* note 13, pt. IV, ¶ 68b(c)(1). “Child pornography” can either be “obscene” or it can depict “sexually explicit conduct.” *Id.* Although the word “obscene” is not defined, the term “sexually explicit conduct” is. *Id.* pt. IV, ¶ 68b.(c)(7).

**EX PARTE MERRYMAN: MYTH, HISTORY,
AND SCHOLARSHIP**

SETH BARRETT TILLMAN*

I. Introduction

*Ex parte Merryman*¹ is iconic. It is, arguably, the first major American case testing the scope of lawful military authority during war time—not only during a war, but during a civil war. Not only were the civilian (judicial) authorities in conflict with the military authorities, but the Chief Justice of the United States clashed with the President—or, at

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¹ *Ex Parte Merryman* (*Merryman*), 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.); 4 (pt. 1) A COLLECTION OF IN CHAMBERS OPINIONS BY THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 1400–12 (Cynthia Rapp & Ross E. Davies comps., 2004) (reporting *Merryman*), <http://tinyurl.com/judtw8q>. According to most commentators, Taney filed his opinion in *Merryman* on June 1, 1861. See, e.g., *id.* at 1400. But see ALLEN C. GUELZO, FATEFUL LIGHTNING: A NEW HISTORY OF THE CIVIL WAR AND RECONSTRUCTION 224 (2012) (dating the *Merryman* opinion as of June 3, 1861); EMILY HARTZ, FROM THE AMERICAN CIVIL WAR TO THE WAR ON TERROR: THREE MODELS OF EMERGENCY LAW IN THE UNITED STATES SUPREME COURT 16 (2013) (asserting that *Merryman* was decided in “April 1861”); but cf. JEAN H. BAKER, AFFAIRS OF PARTY: THE POLITICAL CULTURE OF NORTHERN DEMOCRATS IN THE MID-NINETEENTH CENTURY 158 (1998) (asserting that *Merryman* was arrested in “June 1861”); Christopher M. Curtis, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War Era*, 64 ANNALS OF IOWA 76, 78 (2005) (book review) (assigning an 1862 date to *Merryman*). But compare Craig R. Smith & Stephanie J. Hurst, *Lincoln and Habeas Corpus*, in SILENCING THE OPPOSITION: HOW THE U.S. GOVERNMENT SUPPRESSED FREEDOM OF EXPRESSION DURING MAJOR CRISES 27, 34 (Craig R. Smith ed., 2d ed. 2011) (asserting that Taney’s “filed opinion . . . responded” to the position put forward by Attorney General Bates in his July 5, 1861 letter memorandum), with *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att’y Gen. 74 (1861) (Bates, A.G.). Because it remains a matter of genuine doubt among sophisticated commentators what court decided *Merryman*, I have, throughout this Article, used “court” rather than “Court,” as the latter is usually reserved for the Supreme Court of the United States.

least, that is the story as it is commonly told.² It is an 1861 case, but the stakes were large and, sadly, the issues remain relevant, if not eternal.³

² See, e.g., *Shirakura v. Royall*, 89 F. Supp. 713, 715 (D.D.C. 1950) (Fee, J.) (“It is assumed there is no desire in some future emergency to re-enact . . . the conflict between the Courts and the President in his military capacity, which marked this period of the War between the States . . .” (citing *Merryman*)); JAMES M. MCPHERSON, *THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR* 213 (2007) (explaining that “the initial order to suspend the writ produced a confrontation between the president and the chief justice of the United States”); MARK E. NEELY JR., *LINCOLN AND THE TRIUMPH OF THE NATION: CONSTITUTIONAL CONFLICT IN THE AMERICAN CIVIL WAR* 64 (2011) (“The chief justice of the U.S. Supreme Court wrote the decision in May 1861, confronting the president of the United States less than two months after the firing on Fort Sumter.”); ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 177 (2007) (“Justice Taney issued the writ of habeas corpus, forcing Lincoln to decide whether to obey the law or not.”); CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 20 (expanded ed. 1976) (“At no other time in all the long history of the Court have a President and a Chief Justice . . . come into such direct conflict over an exercise of presidential power.”); 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY, 1856–1918*, at 90 (1922) (asserting *Merryman* produced “direct conflict”); Arthur T. Downey, *The Conflict between the Chief Justice and the Chief Executive: Ex parte Merryman*, 31(3) J. SUP. CT. HIST. 262, 262 (Nov. 2006) (asserting “the Chief Executive and the Chief Justice confronted each other in a direct fashion”); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 550 (1966) (“[I]n *Ex parte Merryman*, Chief Justice Taney had even gone out of his way to provoke the conflict with the President . . .” (internal citation omitted)); Donald Grier Stephenson, Jr., *The Judicial Bookshelf*, 37(3) J. SUP. CT. HIST. 335, 343 (Nov. 2012) (“With the sixteenth President and fifth Chief Justice, however, there was at least one occasion [i.e., *Ex parte Merryman*] where the conflict may fruitfully be seen as plainly Taney versus Lincoln.”); Jonathan W. White, *The Trial of Jefferson Davis and the Americanization of Treason Law*, in *CONSTITUTIONALISM IN THE APPROACH AND AFTERMATH OF THE CIVIL WAR* 113, 123 (Paul D. Moreno & Johnathan O’Neill eds., 2013) (“[Chief Justice] Taney’s presence made *Ex parte Merryman* . . . a landmark decision.”); see also, e.g., BRUCE A. RAGSDALE, *EX PARTE MERRYMAN AND DEBATES ON CIVIL LIBERTIES DURING THE CIVIL WAR* 11 (Federal Judicial History Office 2007) (“[Taney’s] opinion without a decision was more of a political challenge to the President than a constitutional standoff between two branches of government . . .”), <http://www.fjc.gov/history/docs/merryman.pdf>. But see *Bissonette v. Haig*, 776 F.2d 1384, 1391 (8th Cir. 1985) (Arnold, J.) (“In *Merryman* . . . the result in the case would have been exactly the same had the custody been civilian, because *Merryman* was seized and imprisoned without any judicial process. It was the absence of that process, rather than the military character of *Merryman*’s custodian, that caused the Chief Justice to take the view that the petitioner was unconstitutionally confined.” (emphasis added)); Judge Andrew P. Napolitano, *A Legal History of National Security Law and Individual Rights in the United States: The Unconstitutional Expansion of Executive Power*, 8 N.Y.U. J.L. & LIBERTY 396, 409 (2014) (same).

³ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting) (citing *Merryman*); *Parisi v. Davidson*, 405 U.S. 34, 47 (1972) (Douglas, J., concurring in the result) (same); *Reid v. Covert*, 354 U.S. 1, 31 n.55 (1957) (Black, J., judgment of the Court) (same); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 631 n.1 (1952)

However, the standard restatement of the facts, reasoning, and disposition of *Ex parte Merryman* appearing in many (if not most) law review articles is wrong. Moreover, these mistakes are not unique to academic lawyers; a fair number of judges, historians, and academics in allied fields make the same or very similar mistakes. These repeated errors are somewhat surprising because *Merryman* is, if not a leading case, only one short step removed from the received case law canon. To put it another way, what is frequently written about *Merryman* is a series of myths. This Article seeks to disentangle *Merryman*'s many myths from reality.

II. A Brief Statement of the Undisputed Facts

Following the 1860 election of Abraham Lincoln, the parade of state secession would begin. During April 1861, Fort Sumter had fallen.⁴ Even Washington, the nation's capital, was threatened by Confederate armies, disloyal state militias, and irregular combatants, not to mention disloyal civilians, assassins, and spies.⁵ To secure the capital, President

(Douglas, J., concurring) (same); *id.* at 637 n.3 (Jackson, J., concurring) (same); LOUIS FISHER, CONG. RESEARCH SERV., ORDER CODE RL32458, MILITARY TRIBUNALS: HISTORICAL PATTERNS AND LESSONS CRS-22 to CRS-23 (2004) (same); Memorandum from E.F. Smith, Assistant Attorney General to W.P. Hobby, Governor of Texas, Op. No. 2238, Bk. 53, 1920 Tex. AG LEXIS 34, at *34 (1920) (same); PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 223 (4th ed. 2000) (same). Westlaw reports that *Merryman* is cited in: (i) 18 federal court opinions; (ii) 4 state court opinions; (iii) 397 domestic secondary sources; (iv) 53 appellate court filings (including many filings in recent War on Terror detainee litigation); (v) 9 trial court filings (including several filings in recent War on Terror detainee litigation); and (vi) 3 foreign secondary sources. See Keycite to *Ex parte Merryman* (last visited October 15, 2015). Likewise, Westlaw reports, also as of October 15, 2015, twelve legislative documents citing *Merryman* in the *U.S. Government Accountability Office Federal Legislative Histories* library.

⁴ See BRIAN MCGINTY, THE BODY OF JOHN MERRYMAN: ABRAHAM LINCOLN AND THE SUSPENSION OF HABEAS CORPUS 34 (2011) (explaining that Union troops gave up the defense of Fort Sumter on April 13, 1861); see also JONATHAN W. WHITE, ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR: THE TRIALS OF JOHN MERRYMAN 10 (2011) (noting that Lincoln had "received word on April 14, 1861, that Fort Sumter had fallen into Confederate hands").

⁵ See MCPHERSON, *supra* note 2, at 213 (noting that "Confederates and guerrillas were numerous" in border slave states); MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 66 (2003) (asserting that "Confederate partisans . . . were common in the border states"); JOHN BRADLEY WINSLOW, THE STORY OF A GREAT COURT: BEING A SKETCH HISTORY OF THE SUPREME COURT OF WISCONSIN 189 (1912) (explaining that in March 1861, Lincoln

Lincoln directed Union troops to proceed to Washington through Maryland, a border state.⁶ Mobs in Maryland had attacked Union troops;

found Washington “filled with . . . disunionists and honeycombed with plots”); Sherrill Halbert, *The Suspension of the Writ of Habeas Corpus by President Lincoln*, 2 AM. J. LEGAL HIST. 95, 106 (1958) (“The real problem was to be found in the group of people who, by word and conduct, sought to undermine the war effort and destroy the morale of the people. They were the fifth columnists of their day.”); Dennis J. Hutchinson, *Lincoln the “Dictator,”* 55 S.D. L. REV. 284, 290 (2010) (“Lincoln’s first priority was Washington, D.C. Sandwiched between slave states, the District was vulnerable and honeycombed with disloyalists employed by the government, spies, and fellow travelers.”); Stephen T. Schroth et al., *Lincoln, Abraham (Administration of)*, in 3 THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA 1009, 1011 (Wilbur R. Miller ed., 2012) (noting threat of “independent militias hostile to the Union cause” at the time Lincoln suspended the writ of habeas corpus); see also J.G. HOLLAND, HOLLAND’S LIFE OF ABRAHAM LINCOLN (Bison Books 1998) (Springfield, Mass., Gurdon Bill 1866) (noting that circa 1863, “[n]othing was more notorious than that the country abounded with spies and informers”); cf. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 287 (1988) (“Union officials . . . continued to worry about underground confederate activities in Baltimore.”). *But cf. id.* at 287 (suggesting that Merryman’s arrest was an “overreact[ion]” by U.S. Army officers).

⁶ See MCGINTY, *supra* note 4, at 39 (“Recognizing the [capital] city’s vulnerability, Lincoln wanted to summon volunteers from the state militias to report to the capital.”); *id.* at 48–49 (Lincoln explained that “his sole purpose [for ordering troops through Maryland] was to protect Washington, not to attack Maryland or any of the Southern states.”); *id.* at 83 (same); see also WHITE, *supra* note 4, at 10 (noting that Union reinforcements could only reach the capital through Maryland); *id.* at 17–18 (noting that Lincoln told Massachusetts troops which had arrived through Maryland that they had saved the capital from imminent rebel invasion). Compare Bart Talbert, *Book Review*, 75(1) HIST. 176, 177 (Spring 2013) (reviewing JONATHAN W. WHITE, ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR (2011)) (“[Merryman] was acting under orders of the then-state authorities, who wished to prevent further clashes between *Maryland’s pro-Southern majority* and Northern militia units heading to Washington.” (emphasis added)), with MCPHERSON, BATTLE CRY, *supra* note 5, at 287 (“Unionist candidates won all six seats in a special [Maryland] congressional election on June 13 [1861]. By that time the state had also organized four Union regiments. Marylanders who wanted to fight for the Confederacy had to depart for Virginia to organize Maryland regiments on Confederate soil.”), with WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 18 (1998) (“Maryland teetered both geographically and ideologically between North and South.”), *id.* at 20 (describing a “delicate balance of opinion” in Maryland), *id.* at 24 (explaining that “Governor [Hicks] urged the legislature to preserve its ‘neutral position’ between the North and the South”), and JOHN E. SEMONCHE, KEEPING THE FAITH: A CULTURAL HISTORY OF THE U.S. SUPREME COURT 103 (1998) (characterizing Maryland, at the time of *Merryman*, as “bitterly divided”). Compare CAROL BERKIN ET AL., MAKING AMERICA: A HISTORY OF THE UNITED STATES 333–34 (7th ed. 2008) (“The [Maryland] state legislature . . . met [in 1861] and voted to remain neutral.”), and MCPHERSON, BATTLE CRY, *supra* note 5, at 287–89 (explaining that Lincoln did not order the arrest of disunionist members when the Maryland legislature met in May 1861 and voted for neutrality, but “Lincoln decided to take drastic action” in September 1861—i.e., several months after *Merryman* had been adjudicated—and at this time thirty-one

bridges and railway lines had been destroyed; telegraph wires to the capital had been cut.⁷ Why these attacks?—why all this destruction of infrastructure? No doubt different actors had different motives. But it seems likely that some (perhaps many) sought to slow down or prevent the arrival of loyal troops to secure Washington and, perhaps, to secure federal military installations in Maryland, such as Fort McHenry in Baltimore. (Certainly these were the natural, expected, and probable consequences of the attacks, even if these results were not specifically intended by the actors involved.) Lincoln responded. On April 27, 1861, in order to secure the movement of Union troops through Maryland, President Lincoln issued an order delegating authority to General Winfield Scott to suspend habeas corpus.⁸ Lincoln's order cited no statutory basis for his decision.⁹

John Merryman was from a long-established land-owning politically-connected Maryland family, as was his wife.¹⁰ At the outbreak of the Civil War, he had already been elected to public office as a member and president of the Baltimore County Commission.¹¹ Rightly or not,

secessionist members were arrested by the military), with MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 14–18 (1991) (discussing conflicting historical claims in regard to alleged secessionist members of the Maryland legislature, and explaining that the U.S. military precluded some of those members from attending the state legislature and that the military arrested other members).

⁷ See RAGSDALE, *supra* note 2, at 1; see also *id.* at 8, 27 (discussing Merryman's alleged participation in the destruction of railroad bridges and telegraph wires).

⁸ See 6 *COMPLETE WORKS OF ABRAHAM LINCOLN*, 1860–1861, at 258, 258 (John G. Nicolay & John Hay eds., N.Y., The Lamb Publishing Co. new ed. 1894) (reproducing Lincoln's order); *infra* text accompanying note 116 (same); see also MCGINTY, *supra* note 4, at 57, 82–85; WHITE, *supra* note 4, at 22–23.

⁹ See RAGSDALE, *supra* note 2, at 36; David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 *NOTRE DAME L. REV.* 59, 71 n.48 (2006) (“President Lincoln ordered suspension of the writ during the Civil War . . . and prior to legislative authorization of suspension . . .”).

¹⁰ See Francis B. Culver, *Merryman Family*, 10(2) *MD. HIST. MAG.* 176, 177 (June 1915) (noting that there were records of Merrymans in the colonies as early as 1635); Francis B. Culver, *Merryman Family*, 10(3) *MD. HIST. MAG.* 286, 297 (Sept. 1915) (noting that John Merryman's farm, Hayfields, which was some 560 acres, was originally owned by Colonel Nicholas Merryman Bosley, who was related both to John Merryman and John Merryman's wife); see also MCGINTY, *supra* note 4, at 56 (characterizing Merryman as a “scion of one of the state's oldest and most distinguished families”); *id.* (noting that Merryman's grandfather was “president of the second branch of the first [Baltimore] city council”); *id.* at 57 (characterizing Merryman's wife as an “heir to another of Maryland's old landowning families”); WHITE, *supra* note 4, at 25–26.

¹¹ See MCGINTY, *supra* note 4, at 59–60 (describing Merryman's election to the “Baltimore County Commission” and Merryman's failed 1855 campaign for a state legislative seat); WHITE, *supra* note 4, at 116 (noting that Merryman had been President

military authorities suspected John Merryman of being an officer of a pro-secession militia group which allegedly had conspired to destroy (and did destroy) bridges and railway lines.¹² As a result, at around 2:00

of the “Baltimore County Board of Commissioners” in the “1850s”). *But cf.* 5 CARL B. SWISHER, OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836–64, at 845 (1974) (describing Merryman as a “member of the state legislature” at the time of or prior to his arrest). I have reservations as to Swisher’s claim here, but admittedly, some contemporary commentators have adopted Swisher’s position. *See, e.g.*, HAROLD J. KRENT, PRESIDENTIAL POWERS 146 (2005) (describing Merryman as a “state legislator” at the time of his arrest); LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008, at 118–19 (2009) (same); REHNQUIST, *supra* note 6, at 26 (same); JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT’S WAR POWERS 186 (2006) (asserting that Merryman was a “state legislator,” and stating that Merryman’s home was Cockneysville, Maryland, when it was Cockeyesville, Maryland); Adam R. Pearlman, *Meaningful Review and Process Due: How Guantanamo Detention is Changing the Battlefield*, 6 HARV. NAT’L SEC. J. 255, 264 (2015) (describing Merryman as “a Maryland state legislator”); Paul Finkelman, *Civil Liberties and Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353, 1359 & n.48 (1993) (reviewing MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991)) (“Merryman was a member of the Maryland legislature . . .” (citing SWISHER, *supra* at 844–45)); *cf.* James P. George, *Jurisdictional Implications in the Reduced Funding of Lower Federal Courts*, 25 REV. LITIG. 1, 64 (2006) (asserting that Merryman was a “Congressman”). Swisher also reports that Merryman’s father “and Chief Justice Taney had attended Dickinson College in the *same period*.” SWISHER, *supra* at 845 (emphasis added). Notwithstanding Swisher’s offering no sources in support of his claim, other commentators have repeated and expanded upon it. *See, e.g.*, PAUL BREST ET AL., *supra* note 3, at 223 (“[Merryman’s] father and Chief Justice Taney had attended Dickinson College *together*.” (emphasis added) (citing SWISHER, *supra*)); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 90 n.27 (1993) (“Swisher notes that Merryman’s father and Taney attended Dickinson College *together*.” (emphasis added) (citing SWISHER, *supra* at 845)); John Yoo, *Lincoln and Habeas: of Merryman and Milligan and McCardle*, 12 CHAP. L. REV. 505, 513 (2009) (same). Interestingly, Dickinson College has no record of Merryman’s father, Nicholas Rogers Merryman, attending. *See* WHITE, *supra* note 4, at 130 n.1. In a contemporaneous report, *The New York Times* asserted that Merryman was Taney’s “neighbour” and “personal friend.” *Taney and Cadwal[J]ader*, N.Y. TIMES, May 29, 1861, 4–5, <http://www.nytimes.com/1861/05/29/news/taney-and-cadwallader.html>.

¹² *See* MCGINTY, *supra* note 4, at 62–63, 67–68, 169, 172; Jonathan W. White ed., *Research Notes & Maryland Miscellany, A New Word from Roger B. Taney on the Suspension of Habeas Corpus*, 107(3) MD. HIST. MAG. 359, 359 (Fall 2012); *see also* Chief Justice William H. Rehnquist, *Civil Liberty and the Civil War: The Indianapolis Treason Trials*, 72 IND. L.J. 927, 928–29 (1997) (“Merryman [was] suspected [by the authorities] of being a major actor in the dynamiting [?] of the railroad bridges.”); *cf.* Eric M. Freedman, *Book Review*, 99(3) J. AM. HIST. 929, 929 (Dec. 2012) (reviewing BRIAN MCGINTY, THE BODY OF JOHN MERRYMAN (2011), and JONATHAN W. WHITE, ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR (2011)) (“As Union troops rushed to Washington, D.C., in April 1861, many Southern sympathizers violently opposed their passage.”). According to some, Merryman destroyed the bridges under orders from

A.M., on Saturday, May 25, 1861, federal military authorities arrested Merryman, and they subsequently detained him at Fort McHenry.¹³ The next day—Sunday, May 26, 1861—Merryman’s Maryland counsel, George M. Gill and George H. Williams, presented Merryman’s habeas

Governor Hicks. See HAROLD H. BRUFF, *UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* 134 (2015) (“Both the governor of Maryland and the mayor of Baltimore had authorized burning bridges to keep federal troops out.”); 4 *STATES AT WAR: A REFERENCE GUIDE FOR DELAWARE, MARYLAND, AND NEW JERSEY* 499 n.320 (Richard F. Miller ed., 2015) (“In this capacity [as a state militiaman], under orders (depending on the version, from [Governor] Hicks or someone else), Merryman helped burn railroad bridges”); WHITE, *supra* note 4, at 101 (“Merryman had acted under the orders of Governor Hicks”); see also George W. Liebmann, *The Mayor and the President: A Re-examination of Merryman*, 25(2) *SUPREME COURT HIST. SOC. QUARTERLY* 10, 10 (2013) (asserting that Merryman acted under instructions from the mayor of Baltimore, with Governor Hicks’ acquiescence). But see MCGINTY, *supra* note 4, at 156 (explaining that “Governor Hicks strenuously denied that he had ever given or even approved such orders [approving of the destruction of bridges and telegraph wires]”); but cf. 5 SWISHER, *supra* note 11, at 852 (noting that Merryman acted absent any written orders from Governor Hicks). Was Merryman a rebel? See CHRIS EDELSON, *EMERGENCY PRESIDENTIAL POWER: FROM THE DRAFTING OF THE CONSTITUTION TO THE WAR ON TERROR* 34 (2013) (claiming that Merryman was the “leader of a militia company training to join the rebellion”); CARL BRENT SWISHER, STEPHEN J. FIELD: *CRAFTSMAN OF THE LAW* 112 (1930) (characterizing Merryman as a “Southern agitator”); Steven G. Calabresi, *The Right to buy Health Insurance Across State Lines: Crony Capitalism and the Supreme Court*, 81 *U. CIN. L. REV.* 1447, 1477 (2013) (characterizing Merryman as a “Confederate terrorist”); William D. Pederson, *Abraham Lincoln*, in *THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY* 211, 220 (Ken Gormley ed., 2016) (asserting that “Merryman served in a Confederate militia”); William Schuber & Ronald E. Calissi, *National Security & Liberty: A Delicate Balance*, 15(4) *J. COUNTERTERRORISM & HOMELAND SECURITY INT’L* 22 (Winter 2009) (characterizing Merryman as “serving in the Confederate Cavalry”); Geoffrey R. Stone, *Civil Liberties in Wartime*, 28(3) *J. SUP. CT. HIST.* 215, 220 (Nov. 2003) (characterizing Merryman as a “Confederate cavalryman”). Calabresi’s, Stone’s, and others’ characterizing Merryman as a “Confederate” is not supported. Was Merryman a civilian? Compare *Merryman*, 17 *F. Cas.* 144, 147 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (explaining that “[a] military officer has no right to arrest and detain a person [such as Merryman] *not subject to the rules and articles of war*, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control” (emphasis added)), HARTZ, *supra* note 1, at 6 (characterizing Merryman as a “civilian”), and Lewis S. Ringel, *Freedom Challenged: Due Process of Law During War*, in 4 *WHITE HOUSE STUDIES COMPENDIUM* 207, 210 (Robert W. Watson ed., 2007) (same), with 5 SWISHER, *supra* note 11, at 852 (“[T]he arrest of Merryman was not an instance of prosecution of a harmless civilian. He was a lieutenant in the Maryland [state] militia.”), and Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 *HARV. J.L. & PUB. POL’Y* 667, 726 (2003) (characterizing Merryman as “an officer in the Maryland militia”).

¹³ See WHITE, *supra* note 4, at 29 (noting that the Army seized Merryman at 2:00 A.M. on May 25, 1861); Downey, *supra* note 2, at 262–63 & n.3 (explaining the calendar dates of the key events).

corpus petition to Chief Justice Roger Brooke Taney at Taney's Washington home.¹⁴ Later that day, that is, Sunday, May 26, 1861, the Chief Justice issued an *ex parte* order directing General George Cadwalader, the Army officer having overall command of the military district including the Fort: (i) to appear before Taney the next day—on Monday, May 27, 1861 at 11:00 A.M.—in a court room in Baltimore; (ii) to explain the legal basis for Merryman's detention by military authorities; and (iii) to “produce”¹⁵ the body of John Merryman at that hearing.¹⁶

¹⁴ See *Merryman*, 17 F. Cas. at 145 (“On the 26th May 1861, the following sworn petition was presented to the [C]hief [J]ustice of the United States”); REHNQUIST, *supra* note 6, at 18 (stating that “[t]he petition was presented to Chief Justice Taney on Sunday”); Downey, *supra* note 2, at 262 (explaining that Merryman's petition was presented to “Taney at his home in Washington”); cf. James F. Simon, *Lincoln and Chief Justice Taney*, 35(3) J. SUP. CT. HIST. 225, 236 (Nov. 2010) (noting that the “petition was delivered to Chief Justice Taney on . . . the same day that Merryman was imprisoned” (emphasis added)). *But see* MAROUF HASIAN JR., IN THE NAME OF NECESSITY: MILITARY TRIBUNALS AND THE LOSS OF AMERICAN CIVIL LIBERTIES 91 (2005) (Merryman “had the good fortune of applying for [habeas corpus] at a time when Chief Justice Roger Taney was riding circuit in the area.”); MARK C. MILLER, THE VIEW OF THE COURTS FROM THE HILL: INTERACTIONS BETWEEN CONGRESS AND THE FEDERAL JUDICIARY 57 (2000) (“Merryman filed for a writ of habeas corpus with the U.S. Court of Appeals in Maryland”); JUDGE ANDREW P. NAPOLITANO, SUICIDE PACT 44 (2014) (“Merryman's attorney sought a writ of habeas corpus from the federal court in Baltimore.”); 5 SWISHER, *supra* note 11, at 845 (“[T]he petition was presented for Taney's signature in Baltimore.”); Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus*, 34 U. BALT. L. REV. 11, 17 (2004) (“Merryman's attorney then went to Washington, where he presented a petition for [a] writ of habeas corpus to Chief Justice Taney in chambers at the Supreme Court.” (emphasis added)); *but cf.* Senator Ted Cruz, *The Obama Administration's Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POL'Y 63, 80 (2015) (asserting that Taney was “sitting by designation”); Stone, *supra* note 12, at 220 (“The judge assigned to hear Merryman's petition was Chief Justice Roger B. Taney.” (emphasis added)).

¹⁵ *Merryman*, 17 F. Cas. at 146 (noting that the writ was “[i]ssued 26th May 1861” and it was served “on the same day on which it issued”); *id.* at 145 (illustrating that the petition seeking habeas used “produce” language); *id.* at 146 (reporting Taney's *ex parte* order as directing Cadwalader to “have with you the body” of John Merryman “at eleven o'clock in the morning” on May 27, 1861); *id.* (quoting Taney, at the May 27, 1861 hearing, as stating “General Cadwalader was commanded to produce the body of Mr. Merryman before me”); *id.* (using “produce the body” language in the attachment order which went unserved on Cadwalader). To be clear, Taney's initial writ of habeas corpus to produce Merryman was issued and successfully served on Cadwalader on May 26, 1861, but that document should not be confused with the subsequent attachment order for contempt which went unserved on May 28, 1861. *But see* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 120 n.55 (enlarged ed. 1974) (“The commanding officer rejected service of a writ of habeas corpus and stated that the President had authorized him to suspend the writ at his discretion.”); EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 37 (1924) (explaining that, in *Merryman*, “Chief Justice

Cadwalader did not attend the May 27, 1861 hearing; instead, he sent Colonel R. M. Lee.¹⁷ At the hearing, Colonel Lee presented the court with a signed response from Cadwalader laying out the General's defense, for example, arguing that habeas corpus had been lawfully suspended under presidential authority.¹⁸ Cadwalader's response also

Taney . . . vainly attempt[ed] to serve the writ"); ARTHUR H. GARRISON, SUPREME COURT JURISPRUDENCE IN TIMES OF NATIONAL CRISIS, TERRORISM, AND WAR: A HISTORICAL PERSPECTIVE 51 (2011) (conflating the two judicial orders, asserting that the May 26, 1861 order was not successfully served, and asserting that Merryman was housed in "Fort Henry"); THE LIBRARY OF CONGRESS CIVIL WAR DESK REFERENCE 144 (Margaret E. Wagner et al. eds., 2002) (explaining that Taney "issue[d] a writ of habeas corpus on May 27 for Merryman's release"); ROSS, *supra* note 5, at 67 (dating the ex parte order to produce Merryman as on May 28, 1861); James A. Dueholm, *Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, 29(2) J. ABRAHAM LINCOLN ASS'N 47, 49 (Summer 2008) ("Following a hearing in the matter, Taney ordered delivery of a writ of habeas corpus to General George Cadwal[.]ader directing him to appear before Taney on May 28 with Merryman in tow."). To be clear, unlike Taney's initial May 26, 1861 ex parte order which directed Cadwalader to produce Merryman at the May 27 hearing, Taney's second *Merryman* order—issued on May 27, but which went unserved on the morning of May 28—directed the United States Marshal only to seize *General Cadwalader*, not *John Merryman*. See *infra* notes 74–75. But see I G. EDWARD WHITE, LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR 444 (2012) ("He issued a writ of attachment requiring Cadwalader, with Merryman, to be in court the next day."); Louis Fisher, *Invoking Inherent Powers: A Primer*, 37 PRESIDENTIAL STUD. Q. 1, 3 (2007) ("When Taney attempted to serve a paper to free Merryman, prison officials refused to let Taney's marshal carry out his duty."); Craig S. Lerner, *Saving the Constitution: Lincoln, Secession, and the Price of Union*, 102 MICH. L. REV. 1263, 1288 (2004) (reviewing DANIEL FARBER, *LINCOLN'S CONSTITUTION* (2003)) ("The following day [i.e., on May 26, 1861], and again on May 28, Chief Justice Taney issued writs ordering General George Cadwalader at Fort McHenry to release Merryman. Taney directed that both writs be sent to Lincoln, in order that he might 'fulfill his constitutional obligation, to take care that the laws be faithfully executed; to determine what measures he will take to cause the civil process of the United States to be respected and enforced.' Lincoln refused to comply with Taney's orders." (footnote omitted)).

¹⁶ See *supra* note 15 (collecting authority).

¹⁷ See MCGINTY, *supra* note 4, at 11 (explaining that Cadwalader "had sent his aide, Colonel R. M. Lee"). Compare *The Case of Merriman* [sic], N.Y. TIMES, May 28, 1861 ("Chief Justice—Have you brought with you the body of JOHN MERRYMAN? Col. Lee—I have no instructions except to deliver this response to the Court. Chief Justice—The commanding officer declines to obey the writ."), <http://www.nytimes.com/1861/05/28/news/the-case-of-merriman.html>, with *Affairs in Baltimore*, N.Y. TIMES, May 29, 1861 (failing to mention Colonel Lee, and, instead, reporting that "Major Belger" attended the hearing on May 27, 1861 for Cadwalader, and also reporting that Major Belger read Cadwalader's response to the court), <http://www.nytimes.com/1861/05/29/news/affairs-balimore-habeas-corpus-cask-return-sheriff-action-chief-justice-taney.html>.

¹⁸ See *Merryman*, 17 F. Cas. at 146 (reporting Cadwalader's response and defense, in which he asserted that he had been "duly authorized by the [P]resident of the United States, in such cases, to suspend the writ of habeas corpus, for the public safety"); 27 May

sought a postponement to seek additional direction from the President if the court should determine that Cadwalader's defense was insufficient.¹⁹ Furthermore, Cadwalader did not produce Merryman at the hearing as he was instructed by Taney's ex parte order.²⁰

Because Cadwalader failed to produce Merryman, Taney directed the United States Marshal to serve an attachment for contempt on Cadwalader.²¹ The Marshal sought to serve the attachment on the morning of Tuesday, May 28, 1861 at Fort McHenry, but the Marshal was not admitted.²² *Many at the time, including perhaps Chief Justice Taney and others since, believed, and continue to believe, that this was a Cromwellian civilian-military confrontation.*²³ In other words, the

1861, Letter from General Cadwalader to U.S. Supreme Court Chief Justice Roger B. Taney, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited Apr. 19, 2016), <http://tinyurl.com/jxqem75> (same).

¹⁹ See *Merryman*, 17 F. Cas. at 146 (“[General Cadwalader], therefore, respectfully requests that you will postpone further action upon this case, until he can receive instructions from the [P]resident of the United States, when you shall hear further from him.”).

²⁰ See *id.* (“General Cadwalader was commanded to produce the body of Mr. Merryman before me [i.e., Chief Justice Taney] this morning, that the case might be heard, and the petitioner be either remanded to custody, or set at liberty, if held on insufficient grounds; but he has acted in disobedience to the writ”); see also *supra* note 17.

²¹ See *Merryman*, 17 F. Cas. at 146 (“[Cadwalader] has acted in disobedience to the writ, and I therefore direct that an attachment be at once issued against him, returnable before me here, at twelve o'clock tomorrow [i.e., May 28, 1861].”).

²² See *id.* at 147 (“I [Washington Bonifant, U.S. Marshal for Maryland], proceeded, on this 28th day of May 1861, to Fort McHenry, for the purpose of serving the said writ. I sent in my name at the outer gate; the messenger returned with the reply, ‘that there was no answer to my card,’ and therefore, I could not serve the writ, as I was commanded. I was not permitted to enter the gate.”). The reported case states that Bonifant told the court that he went to the Fort to serve the writ. However, in a colloquy with Taney reported in a contemporaneous newspaper account, Bonifant specified that it was his deputy, Mr. Vance, who went to the Fort to serve the writ. See *The Habeas Corpus Case: Gen. Cadwalader Refuses To Allow The Process Of The Court To Be Served Upon Him*, THE SOUTH, (Evening) May 28, 1861, at 2, <http://tinyurl.com/j7ob5n4>. It is interesting to note that this newspaper's lead article on the front page in the left-most column was by Congressman Clement Vallandigham. *Id.* at 1. See generally *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863) (Wayne, J.). It might be asked, given the facts, as announced by Bonifant and Vance, whether this was a serious attempt to serve the attachment on Cadwalader. See, e.g., Charles Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253, 1280 (1942) (“A token attempt thereupon to attach General Cadwalader for contempt came to naught, of course, at the gate to the fort.”).

²³ See *Merryman*, 17 F. Cas. at 147 (“[T]he chief justice said, that the marshal had the power to summon the posse comitatus to aid him in seizing and bringing before the court, the party [General Cadwalader] named in the attachment, who would, when so brought

military authorities prevailed not as a matter of established legal right as determined by the courts, but because the Army (which was acting under the direction of the President) had greater fire power than the United States Marshal (who was serving the attachment order under instructions from the Chief Justice).²⁴ As a result, the Marshal left the Fort.²⁵ He reached the courthouse prior to noon on May 28, 1861, and he came without Cadwalader or Merryman.²⁶ Chief Justice Taney delivered an oral opinion later that day, which ended live proceedings in court.²⁷ Subsequently, on Saturday, June 1, 1861, he filed an extensive written

in, be liable to punishment by fine and imprisonment; but where, as in this case, the power [of the General and the Army in] refusing obedience was so notoriously superior to any the marshal could command, he held that officer excused from doing anything more than he had done.”); *supra* note 2 (collecting post-*Merryman* authority). Although not appearing in Taney’s *Merryman* opinion as reported in *Federal Cases*, Taney is reported elsewhere to have stated: “it is apparent [the Marshal] will be resisted in the discharge of that duty [involving the *posse comitatus*] by a force notoriously superior to the *posse*, and, this being the case, such a proceeding can result in no good, and is useless.” MCGINTY, *supra* note 4, at 30 & n.46. In other words, based on nothing more than the Marshal’s inability to get past the gate of a military base during a time of war, Taney took “judicial notice” that the military authorities would resist the civil authority. Professor (and New Hampshire Chief Justice) Joel Parker, *Habeas Corpus and Martial Law*, 93 N. AM. REV. 471, 516 (Oct. 1861), <http://tinyurl.com/jewcacq>, <https://catalog.hathitrust.org/Record/100768188>.

²⁴ See *supra* note 23 (collecting authority).

²⁵ See WHITE, *supra* note 4, at 31 (“[The U.S. Marshal] was denied admittance to the fort, so he returned to the court . . .”).

²⁶ See *Merryman*, 17 F. Cas. at 147 (noting that *Merryman* proceedings continued “[a]t twelve o’clock, on the 28th May 1861, [when] the [C]hief [J]ustice again took his seat on the bench, and called for the marshal’s return to the writ of attachment”); *supra* note 25. Bonifant, the U.S. Marshal, and his deputy, Vance, attended these May 28, 1861 proceedings. See *The Habeas Corpus Case*, *supra* note 22, at 2. The attachment (as far as disclosed by the record) never reached Cadwalader, and Cadwalader was not in attendance on May 28, 1861. Merryman remained incarcerated until July 1861. See RAGSDALE, *supra* note 2, at 27.

²⁷ See *Merryman*, 17 F. Cas. at 147 (“[The Chief Justice] concluded [May 28, 1861 proceedings] by saying, that he should cause his opinion, when filed, and all the proceedings, to be laid before the [P]resident . . .”); RAGSDALE, *supra* note 2, at 12; *The Habeas Corpus Case of John Merryman, Esq.*, THE SUN, (Morning) May 29, 1861, at 1 (“Here the Chief Justice concluded his remarks, and the case, as far as the judicial process is concerned, is closed.”), <http://tinyurl.com/zlkwsoc>. But see WHITE, *supra* note 4, at 31 (asserting that Taney delivered his June 1, 1861 opinion to a “crowded” courtroom). I believe Professor White is mistaken here. But even if Taney read his June 1, 1861 opinion out loud to some audience—even an audience in a Baltimore courtroom—there is no reason to believe that this was a *Merryman* judicial proceeding or that any of the parties or their counsel were in attendance. John Merryman, of course, remained in his Fort McHenry prison, and General Cadwalader’s precise location on this date is a mystery.

opinion.²⁸ The written opinion was filed with the United States Circuit Court for the District of Maryland.²⁹

In his opinion, Taney expressed the view that the President had no unilateral power to suspend habeas corpus.³⁰ In other words, under the Constitution, only Congress can suspend habeas corpus.³¹ He also took the position that: “A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control.”³² For those reasons, he concluded: “It is, therefore, very clear that John Merryman, the petitioner, is entitled to be set at liberty and discharged immediately from imprisonment.”³³

Noting that his attachment order “ha[d] been resisted by a force too strong for me to overcome,”³⁴ Taney’s final judicial order did not command Cadwalader or anyone else to release Merryman.³⁵ Instead, Taney’s final order meekly directed the Clerk of the Circuit Court for the District of Maryland merely to transmit a copy of the proceedings and his opinion to President Lincoln, where it would “remain for that high officer, in fulfilment of his constitutional obligation to ‘take care that the laws be faithfully executed,’ to determine what measures he will take to

²⁸ See RAGSDALE, *supra* note 2, at 12; *1 June 1861, Opinion of Justice Taney*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited Apr. 19, 2016), <http://tinyurl.com/hjeg3k4>. Spicer, the clerk of the court, closed the official record on June 3, 1861. See *3 June 1861, Certificate of Clerk*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited Apr. 21, 2016), <http://tinyurl.com/jf9wbv8>.

²⁹ See *Merryman*, 17 F. Cas. at 153; *1 June 1861, Order that opinion be filed and recorded in the Circuit Court of the United States for the District of Maryland, directing the Clerk transmit a copy under seal to the President of the United States*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited Apr. 19, 2016), <http://tinyurl.com/glrh2r>.

³⁰ See *Merryman*, 17 F. Cas. at 148–50.

³¹ See *id.*

³² *Id.* at 147. But see 5 SWISHER, *supra* note 11, at 852 (“Merryman was not an instance of prosecution of a harmless civilian. He was a lieutenant in the Maryland [state] militia.”).

³³ *Merryman*, 17 F. Cas. at 147.

³⁴ *Id.* at 153. It is possible that Taney’s language here also referred to Cadwalader’s failing to produce John Merryman at the initial hearing.

³⁵ See RAGSDALE, *supra* note 2, at 4 (“Taney issued no order to secure the release of John Merryman or to enforce the writs of the court.”); *id.* at 12 (“May 28, 1861. Taney issued an oral opinion stating that Merryman was entitled to be freed . . . but Taney issued no order to release Merryman.”); see also *infra* note 45 (collecting authority).

cause the civil process of the United States to be respected and enforced.”³⁶

Merryman was not released as a consequence of Taney’s decision, nor was he brought before a military tribunal.³⁷ Instead, Merryman remained detained at Fort McHenry until he was transferred to the federal civilian authorities, and then he was indicted for treason in the District Court for Maryland on July 10, 1861.³⁸ He was released on bail on or about July 13, 1861.³⁹ There was considerable procedural wrangling and delay. The treason case—in any one of several different procedural incarnations—stretched into the future, past the end of the war itself.⁴⁰ In 1867, the United States Attorney entered a *nolle prosequi*—as a result, Merryman was never brought to trial.⁴¹ During the

³⁶ *Merryman*, 17 F. Cas. at 153 (quoting United States Constitution Article II, Section 3 (Take Care Clause)); see, e.g., STEPHEN C. NEFF, JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR 36 (2010) (“[Taney’s] opinion concluded in a diplomatic (if not quite conciliatory) vein, with an *invitation* to the President to defuse the crisis. Perhaps, Taney speculated, General Cadwalader had exceeded his instructions, thereby relieving the President of any personal blame.” (emphasis added)). An “invitation” is not an order.

³⁷ See MCGINTY, *supra* note 4, at 150 (“[Taney’s opinion] did not . . . secure John Merryman’s release from Fort McHenry . . .”); *id.* at 154–55 (indicating that between July 10 and 13, 1861, Merryman was indicted, was turned over by the Army to the U.S. Marshal, representing the civil authorities, appeared in federal court as a defendant, and then was released on bail); REHNQUIST, *supra* note 6, at 50 (indicating that military commissions only began trying civilians under Secretary of War Stanton, who was appointed in 1862).

³⁸ See RAGSDALE, *supra* note 2, at 12–13.

³⁹ See MCGINTY, *supra* note 4, at 155.

⁴⁰ See *id.* at 156–59, 168–70; RAGSDALE, *supra* note 2, at 13.

⁴¹ See, e.g., MCGINTY, *supra* note 4, at 168–70 (explaining that Merryman was indicted for treason, but never tried); RAGSDALE, *supra* note 2, at 8–9, 12–13 (describing charges as conspiracy and treason); REHNQUIST, *supra* note 6, at 39 (describing multiple charges, including “conspiracy to commit treason”). But see TOM HEAD & DAVID WOLCOTT, CRIME AND PUNISHMENT IN AMERICA 88 (2010) (“[A]fter seven weeks of imprisonment, Merryman was abruptly released, no charges having ever been filed . . .”); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW 121–22 (2d ed. 1989) (“[Merryman] was not indicted.”); but cf. AMANDA DIPAOLO, ZONES OF TWILIGHT: WARTIME PRESIDENTIAL POWERS AND FEDERAL COURT DECISION MAKING 50 (2010) (asserting that, in *Merryman*, “[a] trial for treason took place”). DiPaolo also reports that prior to Merryman’s arrest, Lincoln “replaced Maryland’s civilian courts with military commissions.” DIPAOLO, *supra* at 50; see also Roger C. Cramton, *Lincoln and Chief Justice Taney*, by James F. Simon, 29(1) J. ABRAHAM LINCOLN ASS’N 76, 77 (Winter 2008) (“Merryman had been convicted by a military court . . .”). But DiPaolo and Cramton offer no support for their factual claims in regard to Merryman’s having been tried or convicted—by military tribunal or otherwise. See, e.g., REHNQUIST, *supra* note 6, at 50 (“[T]his [military commission]

war, Merryman sued General Cadwalader for false imprisonment; however, Merryman's suit was unsuccessful.⁴² After the war, Merryman was elected to the legislature and also to state-wide office.⁴³

procedure came only under [Secretary of War] Stanton [who was appointed in 1862].”). Why was Merryman never tried? Was it because the government feared it could not get a unanimous Maryland jury to convict when as much as half of Maryland was sympathetic to the confederate cause? See DON E. FEHRENBACHER, *LINCOLN IN TEXT AND CONTEXT: COLLECTED ESSAYS* 134–35 (1987) (stating that “it was unlikely that any Maryland jury would have convicted”); MCPHERSON, *BATTLE CRY*, *supra* note 5, at 289 (“[Merryman’s] case never came to trial because the government knew that a Maryland jury would not convict him.”); see also BRUFF, *supra* note 12, at 134 (“Lincoln was unsure that he could rely on the loyalty of any Maryland . . . judges and juries.”); ALLEN C. GUELZO, *LINCOLN’S EMANCIPATION PROCLAMATION: THE END OF SLAVERY IN AMERICA* 51 (2004) (asserting “that [Maryland] proslavery judges would have released Merryman on sight”); cf. WHITE, *supra* note 4, at 5 (suggesting that federal prosecutors were “overwork[ed]” and “possibl[y] neglig[en]t”); Cynthia Nicoletti, *Placing Merryman at the Center of Merryman*, 34(2) *J. ABRAHAM LINCOLN ASS’N* 71, 76, 78 (Summer 2013) (reviewing BRIAN MCGINTY, *THE BODY OF JOHN MERRYMAN* (2011), and JONATHAN W. WHITE, *ABRAHAM LINCOLN AND TREASON IN THE CIVIL WAR* (2011)) (describing northern prosecutors as “tepidly loyal”). Was it because the government had a weak case or Merryman had a good defense? See RAGSDALE, *supra* note 2, at 27 (“In June 1861, the Maryland General Assembly passed an act . . . declar[ing] [Merryman’s] acts as an officer in the [militia] unit to be legal.”); *supra* note 12 (collecting conflicting sources in regard to whether Governor Hicks approved Merryman’s conduct). Was it because the war was over, and it was time to let bygones be bygones? See MCGINTY, *supra* note 4, at 169 (“Neither Lee nor Jefferson Davis was ever tried What would have been the point of trying a relatively minor offender like John Merryman . . . for his offenses?”). Was it—like so much else—all Chief Justice Taney’s doing? Taney, as the senior Maryland circuit court judge, postponed hearing treason proceedings in November 1861, and in April 1862, complaining of illness, he again delayed proceedings until the following November. Taney told Judge Giles—the only other Maryland federal circuit court judge—not to hear such cases alone because treason was a capital offense. See, e.g., MCGINTY, *supra* note 4, at 158 (quoting a letter from Taney, from 1864, the year Taney died, which stated that treason trials cannot move forward because Maryland was under martial law); RAGSDALE, *supra* note 2, at 29 (“As circuit judge, Taney successfully resisted the prosecution of Merryman and other Marylanders indicted for treason.”); SIMON, *supra* note 11, at 197 (noting Taney’s “dilatatory tactics”). Taney’s tactics might explain why Merryman was not prosecuted between 1861 and 1864, the year Taney died. But, if we are to explain why Merryman was not prosecuted thereafter, then we must look to other causes. See WHITE, *supra* note 4, at 59 (explaining that Taney’s successor, Chief Justice Chase, who also had Maryland circuit duty, “postponed [the Baltimore treason cases] from term to term” perhaps because Chase expected Lincoln to issue a general amnesty in the near future); cf. *id.* at 5, 54, 118 (“A conviction for treason might make a martyr of the accused . . .”).

⁴² See MCGINTY, *supra* note 4, at 169–70 (indicating that John Merryman’s lawsuit against Cadwalader was dropped in 1864). Compare WHITE, *supra* note 4, at 92 (describing Merryman’s 1863 suit for “wrongful arrest” against Cadwalader, which was dropped in March 1864), with *id.* at 94 (describing Merryman’s second suit against Cadwalader, instituted in May 1864, and dropped in 1865).

III. Myth: The *Ex Parte Merryman* Order

The first and primary *Merryman* myth is that President Lincoln ignored or defied a judicial *order* from Chief Justice Taney to *release* John Merryman.⁴⁴ However, Taney never ordered anyone to release Merryman. Taney's final order merely stated,

⁴³ See MCGINTY, *supra* note 4, at 169–70 (discussing Merryman's post-Civil War political career); WHITE, *supra* note 4, at 115 (noting that the state legislature elected Merryman state treasurer); *see also* Jonathan W. White ed., *A Letter to Secretary of State William H. Seward Regarding Civil Liberties in Maryland*, 107(2) MD. HIST. MAG. 171, 172 (Summer 2012).

⁴⁴ *See, e.g.*, Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 14 (2006) (Robertson, J.) (“Lincoln ignored Taney’s order . . .”); United States v. Minoru Yasui, 48 F. Supp. 40, 48 & n.18 (D. Or. 1942) (Fee, J.) (“History shows that in such instances [during wars] the power of the courts has been defied.” (citing *Merryman*)), *vacated*, 320 U.S. 115 (1943); Major Christopher M. Ford, *From Nadir to Zenith: The Power to Detain in War*, 207 MIL. L. REV. 203, 222 (2011) (“The Court ruled the suspension unconstitutional and ordered Merryman released.”); Jack Goldsmith, *Reflections on Government Lawyering*, 205 MIL. L. REV. 192, 198 (2010) (“Lincoln decided to ignore Chief Justice Roger B. Taney’s order to release a prisoner because the President lacked authority to suspend the writ of habeas corpus.” (citing *Merryman*)); Colonel Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 108 & n.553 (1998) (“Confronting an unprecedented national crisis, Lincoln took a series of actions wholly without constitutional sanction—[including] blatantly disregarding court orders . . .” (citing *Merryman*)); *see also, e.g.*, Captain Brian C. Baldrate, *The Supreme Court’s Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, and Proposal for Hamdan v. Rumsfeld*, 186 MIL. L. REV. 1, 38 (2005) (“President Lincoln ignored Taney’s order and continued to confine Merryman, eventually indicting him for treason.”); Colonel Gary M. Bowman, *Army Lawyers and the Interagency: An Examination of Army Lawyers’ Experience with Military Commissions and Habeas Corpus*, in THE US ARMY AND THE INTERAGENCY PROCESS: HISTORICAL PERSPECTIVES 339, 343 (Kendall D. Gott & Michael G. Brooks eds., 2008) (“[Taney] issued an order to release Merryman, which went unheeded by the Army . . .”); Major Jon P. Bruinooge, 22 A.F. L. REV. 205, 223 n.89 (1980). The same *Merryman* myth is repeatedly put forward in the leading student-edited law journals and in other fora by judges and leading academics. *See, e.g.*, BRIAN R. DIRCK, WAGING WAR ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS 88 (2003) (“Taney himself issued a writ of habeas corpus to secure Merryman’s release . . .”); Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1430 n.44 (1999) (“Chief Justice Taney’s order that Merryman be released was ignored . . .”); Judge Michael Chertoff, *Judicial Review of the President’s Decisions as Commander in Chief*, 55 RUTGERS L. REV. 1289, 1292 (2003) (“Lincoln ignored Chief Justice Taney’s order to release John Merryman . . .”); Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 3 (“[Taney] ordered that the prisoner Merryman, whose detention Congress had not purported to authorize, must be released President Lincoln chose to defy the Chief Justice’s decision.” (citation omitted)); Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1277 (2008) (asserting that “Chief Justice Taney . . . had issued a writ of

I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the [C]ircuit [C]ourt of the United States for the [D]istrict of Maryland, and direct the clerk to transmit a copy, under seal, to the [P]resident of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to “take care that the laws be faithfully executed,” *to determine what measures he will*

habeas corpus to release an individual held in military custody” (citing *Merryman*)); Amanda L. Tyler, *Is Suspension a Political Question*, 59 STAN. L. REV. 333, 355 n.121 (2006) (“Taney . . . ordered the release of the prisoner; Lincoln, however, did not comply with the order.”); John Yoo, *Judicial Supremacy Has Its Limits*, 20 TEX. REV. LAW & POL. 1, 24 (2015) (“Lincoln . . . ignored Taney’s order *releasing* Merryman.” (internal citation omitted) (emphasis added)); John Yoo, *Merryman and Milligan (and McCordle)*, 34(3) J. SUP. CT. HIST. 243, 244 (Nov. 2009) (noting that “Taney then issued an opinion ordering Merryman’s release” and further noting “outright presidential defiance”); *see also, e.g.*, DANIEL FARBER, *LINCOLN’S CONSTITUTION* 188 (2003) (“Critics point out that *Merryman* is the only known instance where the *president* has actually disobeyed a court order because he disagreed with it.” (emphasis added)); MICHAEL STOKES PAULSEN & LUKE PAULSEN, *THE CONSTITUTION: AN INTRODUCTION* 249 (2015) (“Chief Justice Roger Taney ruled against President Lincoln’s suspension of the writ of habeas corpus in the Civil War in 1861, but Lincoln disregarded *that decree . . .*” (emphasis added)); *id.* (“Abraham Lincoln did not comply with Chief Justice Taney’s order in *Merryman*.”); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1296 (2004) (asserting that “Lincoln defied Chief Justice Taney’s order invalidating Lincoln’s suspension of habeas corpus” without quoting any particular language in Taney’s order); Paulsen, *Lincoln and Judicial Authority*, *supra* at 1285 (expounding upon “Lincoln’s [d]efiance of Taney’s order in *Ex parte Merryman*”); Paulsen, *The Merryman Power*, *supra* note 11, at 89 (“In *Ex parte Merryman*, Lincoln . . . refus[ed] to honor a judicial decree as binding law on the executive, even in that specific case.”); Judge Richard A. Posner, *Desperate Times, Desperate Measures*, N.Y. TIMES, Aug. 24, 2003, § 7, p. 10 (reviewing DANIEL FARBER, *LINCOLN’S CONSTITUTION* (2003)) (asserting that Lincoln “flout[ed] Chief Justice Roger Taney’s order granting habeas corpus” and that “[o]fficials are *obliged* to obey judicial orders even when erroneous” (emphasis added)). Judge Posner’s position is puzzling. Generally, “officials”—like anybody else—are only obliged to obey a judicial order, if issued by a court of competent jurisdiction, if the “officials” are parties served with process, and if the “officials” have an opportunity to be heard. *Cf., e.g.*, RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 273 (2003) (“The propensity to obey judges is unrelated to the textual basis of their decisions. It is a function simply of their jurisdiction, with *Ex parte Merryman* a rare exception.”). How can Posner conclude that Lincoln “flout[ed]” a judicial order without explaining what court issued the order, the basis of the court’s jurisdiction, how and when Lincoln was made a party, and when Lincoln (as opposed to General Cadwalader, the named defendant) had an opportunity to be heard? *But cf.* RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 85–86 (2006) (“[Lincoln] was as *right* to disobey the law in [*Merryman*] as Gandhi and Martin Luther King Jr. were right to do so in their situations.” (emphasis added)).

take to cause the civil process of the United States to be respected and enforced.⁴⁵

⁴⁵ *Merryman*, 17 F. Cas. 144, 153 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (quoting United States Constitution Article II, Section 3 (Take Care Clause)) (emphasis added); BRIAN MCGINTY, *THE BODY OF JOHN MERRYMAN: ABRAHAM LINCOLN AND THE SUSPENSION OF HABEAS CORPUS* (2011) states,

This [situation] was . . . at least *remarkable*. There was no order commanding anybody in the chain of command—Cadwalader, Keim, General in Chief Scott, or even Abraham Lincoln himself—to set John Merryman “at liberty.” There was no court order requiring that he be released from Fort McHenry or restored to freedom. He had not, by court order, been “discharged” from the army’s custody.

Id. at 91–92 (emphasis added); *id.* at 150 (“[Taney’s *Merryman* opinion] . . . explained why [Merryman] was entitled to be set at liberty but [it] did not order Lincoln or Cadwalader (or anybody else) to set him at liberty.”); RAGSDALE, *supra* note 2, at 4 & 12 (same); JACK STARK, *PROHIBITED GOVERNMENT ACTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 48 (2002) (“The disposition is not congruent with the opinion Instead [Taney] made a mere gesture”); Frank I. Michelman, *Living with Judicial Supremacy*, 38 WAKE FOREST L. REV. 579, 595 n.69 (2003) (explaining that after Cadwalader refused to produce Merryman, “Taney ruled Lincoln’s order unconstitutional and void . . . but *he did not issue any direct order for Merryman’s production or release*” (emphasis added)); *see also, e.g., Ex parte McQuillon*, 16 F. Cas. 347, 348 (S.D.N.Y. 1861) (No. 8294) (Betts, J.) (“[Judge Betts] would, however, follow out that case [*Merryman*], but would express no opinion whatever, as it would be indecorous on his part to oppose the [C]hief [J]ustice. *He would therefore decline taking any action on the writ at all.*” (emphasis added)); *In re Kemp*, 16 Wis. 359, 1863 WL 1066, at *8 (1863) (Dixon, C.J.) (“I deem it advisable, *adhering to the precedent set by other courts and judges under like circumstances*, and out of respect to the national authorities, to withhold [granting habeas relief] until they shall have had time to consider what steps they should properly take in the case.” (emphasis added)). As explained above, Major General Keim authorized Merryman’s arrest. The arrest was carried out by Colonel Yohe and Yohe’s subordinates. After doing so, Yohe ordered Adjutant Wittimore and Lieutenant Abel to transfer Merryman to Fort McHenry, at which juncture Merryman fell under General Cadwalader’s authority. *See Merryman*, 17 F. Cas. at 146. *But see* ALLEN C. GUELZO, *ABRAHAM LINCOLN: REDEEMER PRESIDENT* 281 (1999) (“Merryman was arrested on May 25th by General George Cadwalader”); J.G. RANDALL & DAVID DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 301 (2d ed. rev. 1969) (“Merryman . . . was arrested in Maryland . . . by order of General Cadwalader”); *but cf.* REHNQUIST, *supra* note 6, at 26 (describing Colonel Yohe as a “[c]aptain”); 5 SWISHER, *supra* note 11, at 844 (same); *Affairs in Baltimore*, *supra* note 17 (referring to a “Captain Yoe [sic]” as the senior officer who carried out Merryman’s seizure). Interestingly, Merryman’s petition indicated that these events happened on or about May 25, 1861, but Cadwalader’s response indicated that these events happened on or about May 20, 1861. *See Merryman*, 17 F. Cas. at 146 (“The prisoner was brought to this post on the 20th inst[ant]”). Such errors during the fog of war (or, even, during everyday litigation) are hardly surprising. For example, Taney ordered the clerk of the Circuit Court for the District of Maryland, Thomas Spicer, to issue the original writ. *See*

Again, Taney issued no order to release Merryman. It follows, therefore, that Lincoln could not have ignored or defied it, nor could anyone else for that matter.

Even if we assume, counterfactually, that Taney had issued an order releasing Merryman, any such order would have been directed against the named defendant—Merryman’s jailer—General George Cadwalader,⁴⁶ not against Lincoln. Lincoln was not a party in *Merryman*. Lincoln was not served with process in *Merryman*. Because Taney conducted all court proceedings at a lightning pace,⁴⁷ over a mere

id. As ordered, Spicer issued and signed the writ. *See id.* However, Cadwalader believed—in error—that the writ was issued by the clerk of the Supreme Court of the United States. *See id.* (reproducing Cadwalader’s response which described Spicer as “clerk of the [S]upreme [C]ourt of the United States”).

⁴⁶ *See* REHNQUIST, *supra* note 6, at 23 (“The writ [of habeas corpus] was directed to the official who had custody of the prisoner”); *id.* at 33 (“The writ was addressed to General George Cadwalader, commander of the military district in which Fort McHenry lay”); Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391, 400 (2007) (same); *see also* Michelman, *supra* note 45, at 595 n.69 (“On one famous occasion, Lincoln did directly resist a clear, final ruling of a court, *although not a direct judicial order to himself.*” (emphasis added)). *But see* WHITE, *supra* note 15, at 452 (“Lincoln deliberately ignored a legal obligation imposed on him by Taney’s order” (emphasis added)). Apparently, at the time of the *Merryman* litigation, the commander of Fort McHenry was Major W.W. Morris. *See infra* note 89.

⁴⁷ *See* RICHARD J. ELLIS, *THE DEVELOPMENT OF THE AMERICAN PRESIDENCY* 413 (2012) (noting that Taney “rushed to Baltimore to preside at the hearing,” and further characterizing the *Merryman* proceedings as a “rush to judgment”); REHNQUIST, *supra* note 6, at 40–41 (criticizing Taney’s conduct of the proceedings, and characterizing them as “precipitate” and “hasty”); *see also* BRUFF, *supra* note 12, at 135 (explaining that Taney issued his opinion “[w]ithout inviting the executive’s lawyers to argue their side of the case”); REHNQUIST, *supra* note 6, at 40 (noting that Taney decided *Merryman* “without benefit of hearing argument from counsel”); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 172 (2006) (asserting that, in *Merryman*, Taney “[r]efused to allow the government to be heard”). To clarify the chronology, Taney received a habeas petition on Sunday, May 26, 1861; he issued an ex parte order later that same day; i.e., he ordered Cadwalader to appear (and also to produce Merryman) the next day, on Monday at 11:00 A.M., and he concluded all live judicial proceedings the following day, on Tuesday. All these courtroom-related events took place during an ongoing civil war, in circumstances where Cadwalader—the government-defendant—had asked for an adjournment. *See supra* notes 13–29, and accompanying text. Put simply, Taney was not only speeding the *Merryman* litigation along at a lightning pace, but he was working on weekends to do so! *See* REHNQUIST, *supra* note 6, at 40 (“The writ was issued by Taney on [Sunday]—surely not a normal business day for the judiciary—and was made returnable the next morning”); *id.* at 26 (same); *see also* Fed. R. Civ. P. 12(a)(1)(A)(i) (granting a private party defendant twenty-one days to answer a complaint); *id.* 12(a)(2) (granting a United States officer, sued in an official

two days, that is, during May 27 and May 28, 1861, during the fog of (civil) war, *it remains unclear if Lincoln even knew of the existence of the judicial proceedings while they were ongoing.*⁴⁸ In other words, Lincoln

capacity, sixty days to answer); *id.* 12(a)(3) (granting a United States officer, sued in an individual capacity, sixty days to answer); *cf.* Roger Roots, *Unfair Federal Rules of Procedure: Why Does the Government Get More Time?*, 33 AM. J. TRIAL ADVOC. 493, 495 n.12 (2010) (suggesting that federal sixty day rule for the government to answer goes back to the nineteenth century). In effect, Taney did not give Cadwalader, a Pennsylvania native, even *one* full business day either: (i) to consult (much less coordinate) with the United States Attorney for Maryland, with the Attorney General in Washington, and with the Army's law officers; or (ii) to find a private attorney in the Maryland bar to represent his personal interests in high-stakes litigation. See Letter from E.D. Townsend, Assistant Adjutant General, Headquarters of the Army, Washington, to General Cadwalader (May 27, 1861) (acknowledging "receipt, by the hands of a special messenger, of your report *of this date*, with four enclosures, in relation to the arrest of John Merryman" (emphasis added)) (available in the Cadwalader Family collection of the Historical Society of Pennsylvania); *26 May 1861, Return of U.S. Marshall [sic] Washington Bonifant*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited Oct. 22, 2015), <http://tinyurl.com/j42y915> (stating that the U.S. Marshal, Washington Bonifant, made service on Cadwalader "on the 26th day of May 1861 at half past five o'clock p.m."). The Chief Justice ordered Cadwalader, among other things, to put forward a defense in regard to a difficult set of momentous constitutional issues in less than eighteen hours. *But cf.* 5 SWISHER, *supra* note 11, at 845 (noting that General Cadwalader was a lawyer). In such circumstances, it is hardly surprising that the military officer—who was also busy administering a military district during a civil war—would seek further guidance from his superiors and would also seek to shift an explosive political question onto the country's elected leadership. To be fair to the Chief Justice, whether Taney's initial *ex parte* order to produce Merryman was rightly or wrongly granted, because Cadwalader failed to obey that order, any effort by Cadwalader to seek an adjournment may very well have appeared to Taney as lacking merit. Equity's clean hands maxim comes to mind. Moreover, all judges, especially chief justices, are used to being and expect to be obeyed. To put it another way, the sort of jurist who would grant Cadwalader a postponement—i.e., the ponderous and thoughtful jurist who would recognize the practical and legal difficulties the court's initial *ex parte* order imposed on Cadwalader, the government-defendant, by mandating, in effect (i) Cadwalader's finding an attorney, (ii) his coordinating his legal strategy with distant military superiors and government law officers, (iii) his submitting a timely formal legal response, and (iv) his producing John Merryman in less than one day—is the sort of jurist who never would have demanded compliance in the first instance with such tight time constraints during an ongoing civil war. Many commentators recognize that John Merryman's position—i.e., that Merryman's arrest and detention absent judicial process was a denial of due process—had, at least, some merit. One might also fairly ask: Did Taney's *ex parte* order, in effect, deny Cadwalader meaningful due process?

⁴⁸ There appears to be no record indicating that Lincoln had knowledge of *Ex parte Merryman* prior to May 30, 1861. See 3 LINCOLN DAY BY DAY: A CHRONOLOGY, 1861–1865, at 45 (Earl Schenck Miers & C. Percy Powell eds., 1960) ("May 30 [1861]. . . . Maryland district attorney consults with President concerning John Merryman in prison at Fort McHenry, Md., without benefit of writ of habeas corpus."). *But cf.* WHITE, *supra*

never had any meaningful opportunity to be heard. Because Lincoln was not a party, because he was not served with process, and because he had no meaningful opportunity to be heard, Lincoln would not have been bound by any judicial order to release Merryman (even if Taney had issued such an order). That is black letter law.⁴⁹

note 4, at 1 (asserting that “[o]n May 26, [1861,] Taney issued the [ex parte] writ, but President Abraham Lincoln ignored it.”).

⁴⁹ See, e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (Jackson, J.) (“An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (Stone, J.) (“It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”); *Pennoyer v. Neff*, 95 U.S. 714, 729 (1877) (Field, J.) (“[I]t was a familiar rule that countries foreign to our own disregarded a judgment merely against the person, where the defendant had not been served with process nor had a day in court”); *D’Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 176 (1850) (Catron, J.). But see Michael Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 720 (2004) (suggesting that in *Merryman* the “executive and military were *in effect* parties to the case” (emphasis added)); Paulsen, *The Merryman Power*, *supra* note 11, at 89 (“In *Ex parte Merryman*, Lincoln . . . refus[ed] to honor a judicial decree as binding law on the executive, even in that specific case.”). Professor Paulsen’s position is troubling. At the close of the *Merryman* litigation, Taney had the clerk of the Circuit Court transmit a copy of the proceedings and his opinion to Lincoln. Surely, such an after the fact communication cannot be enough to bind anyone—including the President—either legally or in any normative sense connected to now defunct, then-established, or now-prevailing conceptions of fair play or civil procedure. Cf. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (Stone, C.J.) (explaining that the scope of personal jurisdiction rests on considerations relating to “traditional notions of fair play and substantial justice.”). Some otherwise well-informed commentators believe that Cadwalader defied the courts, and that he did so as a result of instructions which he had already received through the military chain of command, but having their ultimate source from President Lincoln. If these views were grounded in unambiguous or even reasonably clear historical fact, then it would be fair to ascribe Cadwalader’s “defiance” to Lincoln (even if, as a formal legal matter, Lincoln was not an actual party to *Merryman*). But these views are not well grounded in historical fact. As explained below, there is little in the historical record to establish that Cadwalader ignored or defied the courts. But even if we adopt the position that Cadwalader’s actions could be fairly characterized as “defying” the courts, there is no good reason—supported by the reported historical record—to tie Cadwalader’s conduct to any purported authorization originating with Lincoln. See *infra* notes 68, 107–33, and accompanying text.

IV. Myth: The *Ex Parte Merryman* Opinion

The second *Merryman* myth is that Lincoln ignored Taney's *opinion*.⁵⁰ That is, Lincoln's post-*Merryman* conduct and his interactions with Executive Branch subordinates failed to properly reflect the law as established by Taney. Simply put, the legal and normative assumptions behind this critique of Lincoln's conduct do not cohere with the basic structure of the American legal system.

In the United States—indeed, across the common law world—the courts establish and clarify law through judicial orders. Orders usually appear with opinions, but the latter are not necessary to resolve a case or controversy. Indeed, a court—even an appellate court—may issue an

⁵⁰ See, e.g., *Parisi v. Davidson*, 405 U.S. 34, 47 (1972) (Douglas, J., concurring in the result) (“Mr. Chief Justice Taney in *Ex parte Merryman* . . . held that the President alone had no authority to suspend the writ, a position that Lincoln did not honor.”); Major Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. REV. 67, 99 n.160 (2000) (“President Lincoln ignored Chief Justice Taney’s opinion and Merryman remained imprisoned.”); Wayne McCormack, *Emergency Powers and Terrorism*, 185 MIL. L. REV. 69, 94 n.116 (2005) (“President Lincoln ignored Chief Justice Taney’s opinion, and Merryman remained imprisoned.”); see also, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 122 (2005) (“Lincoln proceeded to disregard Taney’s solo ruling, thereby challenging Taney’s very jurisdiction over the matter.”); WILLIAM C. BANKS & STEPHEN DYCUS, *SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY* 117 (2016) (“Taney’s opinion was ignored by President Lincoln . . .”); PAUL BREST ET AL., *supra* note 3, at 822 (“Lincoln in effect refused to follow Taney’s opinion . . .”); RICHARD H. FALLON JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE* 26 (2d ed. 2013) (“Lincoln actually defied a ruling by the Chief Justice Roger Taney denying the authority of military officials to hold suspected Confederate sympathizers without bringing them into court and proving them guilty of crimes.”); *id.* at 318 (“[Lincoln] ordered his military officers to ignore Taney’s ruling, and the officers obeyed the President, not the Chief Justice.”); ALBERT BUSHNELL HART, *SALMON PORTLAND CHASE* 327 (Boston, Houghton Mifflin & Co. 1899) (“The President simply ignored Taney’s decision . . .”); SCOTT M. MATHESON, JR., *PRESIDENTIAL CONSTITUTIONALISM IN PERILOUS TIMES* 41 (2009) (“[Lincoln] ignor[ed] Taney’s opinion . . .”); REHNQUIST, *supra* note 6, at 40 (noting the “administration’s disregard of the decision”); DONALD GRIER STEPHENSON, JR., *THE WAITE COURT: JUSTICES, RULINGS, AND LEGACY* 277 (2003) (“[Lincoln] supported his commanders in defying Chief Justice Taney’s [*Merryman*] ruling . . .”); *id.* at 5 (same); WHITE, *supra* note 4, at 75 (“In fact, Lincoln treated the Habeas Corpus Act in the same way that he responded to Chief Justice Taney’s opinion in *Merryman*: he ignored it.”); *id.* at 88 (same); Adam Klein & Benjamin Wittes, *Preventative Detention in American Theory and Practice*, 2 HARV. NAT’L SEC. J. 85, 118 (2011) (“Taney eventually declared Merryman’s detention unlawful and transmitted his opinion to Lincoln, who more or less ignored it . . .”); Jonathan W. White, *The Strangely Insignificant Role of the U.S. Supreme Court in the Civil War*, 3(2) J. CIVIL WAR ERA 211, 218 (June 2013) (“Lincoln simply ignored Taney’s opinion.”).

order absent any opinion.⁵¹ The issuance of opinions by courts is a convention or tradition of the American judicial system, but such opinions are not mandated by the express text of Article III,⁵² by any federal statute, or even by any federal judicial decision.⁵³ In short, in the American judicial system, orders are primary, not opinions.

In the first paragraph of *Cooper v. Aaron*, a unanimous Supreme Court stated, “[This case] necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court *orders* resting on this Court’s considered *interpretation* of

⁵¹ See, e.g., Judge Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 222 (1999) (“The federal system has adopted a number of strategies to deal with this [high] volume [of federal cases], including more staff, with centrally located staff attorneys; a smaller proportion of cases argued orally; less time allotted to those cases that are argued; *decisions by one-line order* or brief memorandum; and, of course, unpublished opinions.” (emphasis added)). *But cf. id.* at 226 (“When a governmental official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and perhaps for no reason other than a change of mind, can the power that is being exercised properly be called ‘judicial’ [and consistent with Article III]?”).

⁵² See U.S. CONST. art. III.

⁵³ See, e.g., Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126 (2000) (“The operative legal act performed by a court is the entry of a judgment; an opinion is simply an explanation of reasons for that judgment.”); Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1161 (2006) (“An opinion cannot be central to dispute resolution because there is no requirement that an *appellate* court issue an opinion, and frequently such courts decide cases without any opinion.” (emphasis added)); see also Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1327 (1996) (“The President’s ordinary obligation to enforce a judgment extends only to the raw judgment itself: the finding of liability or nonliability and the specification of the remedy. That duty does not impose on the President any requirement in future cases to follow the reasoning that led to the court’s judgment or to extend the principles of that judgment beyond the issues and parties encompassed by it.”); *id.* at 1328 (“[T]he issuance of opinions is not an essential aspect of the judicial power.”); cf. Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1187–88 (2012) (“Suppose President Lincoln and President Nixon both believed the courts got the Constitution wrong. Must they nonetheless honor the courts’ decisions? If so, is any obligation limited to complying with specific orders, as Lincoln famously suggested, or must the executive more broadly follow the doctrines laid down by the courts?” (citing Lincoln’s First Inaugural Address) (internal citation omitted)). *But compare* Lawson & Moore, *supra* at 1328 n.284 (suggesting that legal “requirements that judges give reasons for their conclusions . . . are therefore constitutionally questionable”), with Sullivan, *supra* at 1161 n.90 (explaining that under Federal Rule of Civil Procedure 52(a), federal district courts must “explain their decisions when they sit as the trier of fact,” such as when a district court hears a case absent a jury). See generally Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 *passim* (1993).

the United States Constitution.”⁵⁴ In short, even *Cooper*, which is the most forceful and ambitious statement of the scope of federal judicial authority, framed the issue in terms of state officials’ wrongful interference or other noncompliance with extant federal judicial orders, not in terms of noncompliance with mere opinions. Applying the legal standard laid out in *Cooper* to Lincoln during *Merryman* would be quite anachronistic. But, even if the legal standard laid out in *Cooper* ought to apply to Lincoln’s conduct, *Cooper* does not mandate that officials (such as the President) must comply with mere opinions. In short, faulting Lincoln for noncompliance with Taney’s *Merryman* opinion makes little sense as a formal legal matter.

Still, even if obedience to mere opinions is not a strict legal obligation, one might reason that Executive Branch obedience to judicial opinions reflects a valuable rule of law aspirational goal. But, even if in

⁵⁴ *Cooper v. Aaron*, 358 U.S. 1, 4 (1958) (*Cooper*) (authored unanimously) (emphasis added). This language is not unique to the opinion’s first paragraph. Later, the Court stated,

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: “If the legislatures of the several states may, at will, annul the *judgments* of the courts of the United States, and destroy the rights acquired under those judgments, the [C]onstitution itself becomes a solemn mockery” *United States v. Peters*, 5 Cranch 115, 136 [(1809)]. A Governor who asserts a power to nullify a federal court *order* is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, “it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases” *Sterling v. Constantin*, 287 U.S. 378, 397–398 [(1932)].

Cooper, 358 U.S. at 18–19 (emphasis added). The Court insulates “judgments” and “orders,” not opinions, against “interposition” by state officials, nullification, mob violence, and other lawlessness. *Id.* But cf. Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J.L. & LIBERTY 18, 110 & n.143 (2016) (suggesting that in *Cooper* the Supreme Court asserted that its opinions are the law of the land). For those seeking to engage in comparative legal analysis with other common law jurisdictions, beware: “judgement,” as used today in the Common Travel Area, is synonymous with an American judicial opinion, not an order! See BRYAN A. GARNER, GARNER’S MODERN AMERICAN USAGE 490 (Jeff Newman & Tiger Jackson eds., 3d ed. 1980) (defining “judgment” and noting the distinction between American English and British English in the legal context).

general such an abstract aspirational goal were conceded, such aspirations ought not to apply to *Merryman*. Why? First, we do not know which court issued *Merryman*⁵⁵ or whether it had valid jurisdiction.⁵⁶ Those that have studied the case have been, and remain,

⁵⁵ See *supra* note 1 (illustrating that *Merryman* was reported in *Federal Cases* as a circuit court opinion, and in Rapp & Davies as a chambers opinion). Compare MCGINTY, *supra* note 4, at 174 (arguing that *Merryman* was a chambers opinion, not a circuit court decision), with REHNQUIST, *supra* note 6, at 44 (noting that, in *Merryman*, Taney “was speaking only as a member of a circuit court”), Fallon, *supra* note 44, at 3 (“Ruling in his capacity as circuit judge, Chief Justice Roger Taney concluded in *Merryman* that only Congress, not the President, could validly suspend the judicial power and obligation to issue writs of habeas corpus.”), and White, *supra* note 50, at 218 (“Taney was sitting as a circuit justice in the U.S. Circuit Court for the District of Maryland, but he made his opinion appear to be that of a Supreme Court justice ‘at chambers.’”). A few commentators have suggested that Taney issued *Merryman* in his capacity as a purported district court judge. See, e.g., BRIAN R. DIRCK, *THE EXECUTIVE BRANCH OF FEDERAL GOVERNMENT: PEOPLE, PROCESS, AND POLITICS* 99 (2007) (asserting that Taney issued *Merryman* “in his capacity as a federal district court judge”); GEORGE KATEB, *LINCOLN’S POLITICAL THOUGHT* 148 (2015) (“*Ex parte Merryman* . . . [was issued] pursuant to Taney’s role as a district court judge”); Steven G. Calabresi & Justin Braga, *Judge Robert H. Bork and Professor Bruce Ackerman: An Essay on The Tempting of America*, 13 AVE MARIA L. REV. 47, 52 (2015) (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990), and Bruce Ackerman, *Robert Bork’s Grand Inquisition*, 99 YALE L.J. 1419 (1990) (book review)) (“President Lincoln refused to enforce [the] Chief Justice’s district court ruling”). Finally, it has been suggested that *Merryman* was issued by the Supreme Court of the United States. See, e.g., Hedges v. Obama, 890 F. Supp. 2d 424, 458 (S.D.N.Y. 2012) (Forrest, J.) (“In *Ex parte Merryman* . . . the Supreme Court made clear”), vacated, 724 F.3d 170 (2d Cir. 2013); DANIEL R. COQUILLETTE & BRUCE A. KIMBALL, *ON THE BATTLEFIELD OF MERIT: HARVARD LAW SCHOOL, THE FIRST CENTURY* 268 (2015) (describing *Merryman* as a Supreme Court case); DIRCK, *supra* note 44, at 88 (asserting that *Ex parte Merryman* was “issued by the Supreme Court”); HEAD & WOLCOTT, *supra* note 41, at 88 (“When a complaint was filed before the Supreme Court on [Merryman’s] behalf, they ruled in *Ex Parte Merryman*” (emphasis added)); MARK R. LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* 128 (2005) (“In *Ex parte Merryman*, Taney, writing for the Court”); POSNER, *LAW, PRAGMATISM, AND DEMOCRACY*, *supra* note 44, at 272 (asserting that *Merryman* is “one of the few cases in which a Supreme Court decision . . . has been openly defied by one of the other branches”); SAMUEL WALKER, *CIVIL LIBERTIES IN AMERICA* 155 (2004) (explaining that the “Supreme Court overrule[d] President Lincoln in *Ex Parte Merryman*”); Ken Gormley, *Conclusion: An Evolving American Presidency*, in *THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY*, *supra* note 12, at 623, 651 (characterizing *Merryman* as a Supreme Court ruling); Mark E. Neely, Jr., *The Constitution and Civil Liberties Under Lincoln*, in *OUR LINCOLN: NEW PERSPECTIVES ON LINCOLN AND HIS WORLD* 37, 39 (Eric Foner ed., 2008) (“*Ex parte Merryman* . . . stands as one of the most poorly understood of decisions to come from the Supreme Court.”).

⁵⁶ For discussion of the conflicting views relating to what court (if any) decided *Merryman* and also competing views as to the validity of the court’s jurisdiction (if any), see the thorough publications by MCGINTY, *supra* note 4, at 174–76 (noting that Taney’s

unsure and divided what court (if any) issued the decision, that is, the Circuit Court for the District of Maryland or, simply, Chief Justice Taney in chambers, and concomitantly, what was the source (if any) of Taney's jurisdiction to hear and decide the dispute.⁵⁷ Second, although the matter is unsettled, one view is that in-chambers opinions, although (apparently) establishing the law of the case, do not carry controlling precedential weight with regard to other cases,⁵⁸ even those with closely similar facts. Finally, although Taney concluded that Merryman was entitled to be

jurisdiction is disputed), Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 289 (2005) (concluding that "there remains no constitutional impediment to an individual Justice exercising *original* jurisdiction and issuing writs of habeas corpus as they have been empowered to do since 1789"), and Neely, *supra* note 55, at 37, 39–41 (arguing that Taney lacked jurisdiction in *Merryman* because Section 14 of the Judiciary Act of 1789 worked an unconstitutional expansion of the original jurisdiction of the Supreme Court, even if that authority were exercised by a single justice in chambers). See generally FARBER, *supra* note 44, at 190–92 (discussing whether Taney had jurisdiction in *Merryman*); William Baude, *The Judgment Power*, 96 GEO. L.J. 1807 (2008) (collecting authority); Vladeck, *supra* note 46 (same). Ragsdale argues that "Taney realized that his jurisdictional authority in *Ex parte Merryman* was irrelevant, since he was exercising no judicial power apart from the orders to file the records of the proceedings and to send a copy to President Lincoln." RAGSDALE, *supra* note 2, at 11. Evidently, Ragsdale discounts the initial *ex parte* order and subsequent attachment order, both directed to Cadwalader, as exercises of judicial power.

⁵⁷ See *supra* note 55 (discussing which purported court issued *Merryman*); *supra* note 56 (discussing the source of the court's purported jurisdiction in *Merryman*). Compare An Act to Establish the Judicial Courts of the United States, ch. 20, § 14, 1 Stat. 73, 81 (1789) (granting the "courts of the United States . . . [the] power to issue writs of . . . *habeas corpus*"), with *id.* at 82 (granting "[J]ustices of the [S]upreme [C]ourt" and "judges of the district courts . . . [the] power to grant writs of *habeas corpus*").

⁵⁸ See, e.g., Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1010 n.167 (2005) ("Actions by single Justices are generally not considered to have precedential value . . ."); Chief Justice Frank J. Williams & Nicole J. Benjamin, *Military Trials of Terrorists: From the Lincoln Conspirators to the Guantanamo Inmates*, 39 N. KY. L. REV. 609, 615 (2012) ("Unfortunately for Chief Justice Taney, his words carried no precedential value as an in-chambers opinion."); cf., e.g., *Ex parte Walton*, 60 N.C. 350, 1864 WL 4848, at *6 (1864) (Pearson, C.J.) ("The question is, does that decision settle the law or should it be overruled? I am aware that, in the opinion of the Secretary of War [for the Confederacy] and of his Excellency, Gov. Vance, the decision of a single Judge on *habeas corpus* questions is only binding in the *particular case* . . ." (emphasis in the original)), *rev'd on other grounds*, Gatlin v. Walton, 60 N.C. 325, 1864 WL 1053 (1864); *id.* 1864 WL 4848, at *9 (suggesting that "a 'judgment of discharge [by a single judge],' on *habeas corpus*, will, as heretofore, be treated as binding only in the particular case"); MARK E. NEELY JR., SOUTHERN RIGHTS: POLITICAL PRISONERS AND THE MYTH OF CONFEDERATE CONSTITUTIONALISM 64–79 (1999) (discussing Chief Justice Pearson's jurisprudence). But cf. *The Impeachment Trial of President Abraham Lincoln*, 40 ARIZ. L. REV. 351, 367 (1998) (reporting Mark E. Neely, Jr. stating, in mock cross-examination, that "we can consider [*Merryman*] a precedent from the Chief Justice of the Supreme Court").

released, Taney did not order his release. Taney's opinion put forward only advice (or, perhaps, a legal position akin to an Office of Legal Counsel memorandum), not a traditional judicial order. In other words, *Merryman* was effectively an advisory opinion, and given the disparity between Taney's order (which left Merryman in jail) and his opinion (which asserted that Merryman was entitled to be freed), it was perhaps a good deal less.

In these circumstances, where Lincoln did not know which court (if any) issued the opinion, its basis for jurisdiction (if any), or the opinion's precedential weight, Lincoln should not have conformed Executive Branch conduct to Taney's opinion for all the reasons just stated, and also because judicially-issued advisory opinions are inconsistent with Article III and separation of powers norms. Executive Branch compliance with an advisory opinion (unless the President independently agrees with the opinion's rationale) does not reflect comity or aspirational rule of law values, but instead, such compliance would reward judicial aggrandizement. In short, Lincoln had every reason to believe that there was no obligation to obey Taney's opinion.

V. Myth: Appealing *Ex Parte Merryman*

The third *Merryman* myth is that Lincoln could have (and should have) upheld rule of law values by seeking clarity from the courts by appealing Taney's *Merryman* decision to the (full) United States Supreme Court.⁵⁹ However, this was not feasible.⁶⁰ In the context of a

⁵⁹ See, e.g., JUSTICE STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* ch. 1 (2015) (“[Lincoln] did not release John Merryman. Neither did he appeal the ruling, *as he might have done.*” (emphasis added)); BRUFF, *supra* note 12, at 135 (“Lincoln should either have let Merryman go or appealed the order to release him.”); Fallon, *supra* note 44, at 22 (“[T]ake the best-known example . . . Lincoln defied the court in *Merryman* without bothering to appeal . . .” (footnote omitted)); Paulsen, *Lincoln and Judicial Authority*, *supra* note 44, at 1285 (“But defiance it was: [Lincoln] did not obey Taney's order, nor did his administration seek any sort of appeal to the full Supreme Court.”); Paulsen, *The Merryman Power*, *supra* note 11, at 92 (posing the question whether Lincoln was “required [in *Merryman*] either to comply or to seek review and reversal by the full Supreme Court”); see also, e.g., THOMAS J. DILORENZO, *LINCOLN UNMASKED: WHAT YOU'RE NOT SUPPOSED TO KNOW ABOUT DISHONEST ABE* 93 (2006) (“The Lincoln administration could have appealed the chief justice's ruling, but it chose to simply ignore it . . .”). But see Frank W. Dunham, Jr., *Where Moussaoui Meets Hamdi*, 183 MIL. L. REV. 151, 156 (2005) (“Rather than adhere to the ruling, Lincoln appealed it to the full Supreme Court.”). Dunham puts forward no authority for his factual claim regarding a purported *Merryman*

habeas action, if the decision had been in chambers, the prevailing view is that there was no route to appeal to the full Court.⁶¹ Moreover, even if

appeal. Likewise, among modern commentators, there is little substantive agreement in regard to which party would have prevailed had a *Merryman* appeal (or the same issues in another case) been heard by the full Supreme Court under Taney in early 1861. Compare, e.g., FEHRENBACHER, *supra* note 41, at 124 (“There had been six justices forming the majority that declared the Missouri Compromise unconstitutional in the Dred Scott case. Only four of them continued to serve on the Court during the Civil War, and three of those four (including two Southerners) soon proved themselves to be strong Unionists. Taney alone remained unrepentant and unredeemed, as it were, and Taney alone was responsible for *Ex parte Merryman* . . .”), and Mark E. Neely Jr., “*Seeking a Cause of Difficulty with the Government*”: *Reconsidering Freedom of Speech and Judicial Conflict under Lincoln*, in LINCOLN’S LEGACY: ETHICS AND POLITICS 48, 52 (Phillip Shaw Paludan ed., 2008) (“Taney did not have the whole court behind him or any way of getting it behind his [*Merryman*] decision any time soon.”), with Paulsen, *The Merryman Power*, *supra* note 11, at 92 n.38 (“[O]ne would not be optimistic about Lincoln’s chances of prevailing [in a *Merryman* appeal] with the 1861 Taney Court.”), ROSS, *supra* note 5, at 66 (at the time *Merryman* was decided, “the Court’s majority [was] still . . . made up of men unsympathetic to Lincoln and his party”), with HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II, at 93 (5th rev. ed. 2000) (explaining that “the Court was at best a toss-up in terms of its stance on Lincoln’s policies.”), and White, *supra* note 50, at 218 (“An appeal to the [full] Supreme Court, in other words, would have been imprudent.”).

⁶⁰ See REHNQUIST, *supra* note 6, at 44 (noting “significant procedural obstacles to such an appeal as the law then stood”). It goes without saying that Cadwalader, Lincoln, and his administration had no moral, practical, or legal duty to appeal *Merryman* absent the power to take such an appeal. See THE FEDERALIST NO. 63, at 338 (James Madison) (J.R. Pole ed., 2005) (“Responsibility in order to be reasonable must be limited to objects within the power of the responsible party . . .”); ENOCH POWELL, M.P. (for South Down, N.I.), *Christianity and the Curse of Cain*, in WRESTLING WITH THE ANGEL 13 (1977) (“No one can be responsible for what he does not control.”); J. ENOCH POWELL, M.P. (for Wolverhampton, South-West, Eng.), SHADOW SECRETARY OF STATE FOR DEFENCE, *Speech at Wolverhampton* (Dec. 12, 1966), in FREEDOM AND REALITY 197, 199, 260 (John Wood ed., 1969) (“‘[R]esponsibility’ depends upon the prior question of power . . .”); C.H. MCILWAIN, CONSTITUTIONALISM AND THE CHANGING WORLD 282 (1939) (same).

⁶¹ See MCGINTY, *supra* note 4, at 176 (suggesting that no appeal was possible); WHITE, *supra* note 15, at 445 (same); see also *In re Metzger*, 46 U.S. (5 How.) 176, 191 (1847) (McLean, J.) (“This Court can exercise no power in an appellate form over decisions made at his chambers by a *Justice of this Court* or a judge of the district court.” (emphasis added)). Although *Merryman* was a final decision, because it was a non-appealable judgment and, more importantly, because it was brought against a government official, one suspects that other habeas petitioners could not have successfully sought relief against Cadwalader or other government officials via offensive collateral estoppel. See *United States v. Mendoza*, 464 U.S. 154, 162 (1984) (Rehnquist, J.) (“We hold, therefore, that nonmutual offensive collateral estoppel simply does not apply against the government . . .”); *Warner/Elektra/Atl. Corp. v. County of DuPage*, 991 F.2d 1280, 1282 (7th Cir. 1993) (Posner, J.) (explaining that “an unappealable finding does not

the court which heard *Merryman* was the Circuit Court for the District of Maryland, or even if an appeal could be taken to the full Court from an otherwise jurisdictionally sound in-chambers habeas decision, Cadwalader, the government, and Lincoln could have taken no such appeal in *Merryman*. Why? Merryman had brought a habeas corpus proceeding seeking a judicial order compelling Cadwalader to release him.⁶² Taney never issued any such order against Cadwalader (or against anyone else). As such, Merryman was the *nonprevailing* party, and only he was entitled to take an appeal (assuming any such appeal was authorized by statute or otherwise permitted).⁶³ Cadwalader—as odd as it sounds—was the *prevailing* party in *Merryman*, and in the American system of justice, absent special circumstances, only a nonprevailing party, i.e., only a party aggrieved by a judicial *order* (not by an *opinion*) may take an appeal.⁶⁴

collaterally estop”); 18 CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC. JURIS. § 4421 (2d ed. Apr. 2016 update) (“Since appellate review is an integral part of the system, there is strong reason to insist that preclusion should be denied to findings that could not be tested by the appellate procedure ordinarily available, either by appeal or by cross-appeal.” (footnote omitted) (collecting authority)); *see also supra* note 58 (suggesting limited precedential effect of a chambers opinion).

⁶² *See Merryman*, 17 F. Cas. 144, 145 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (“Your petitioner, therefore, prays that the writ of habeas corpus may issue, to be directed to the said George Cadwalader, commanding him to produce your petitioner before you, judge as aforesaid, with the cause, if any, for his arrest and detention, *to the end that* your petitioner be discharged and restored to liberty” (emphasis added)).

⁶³ *Cf.* Paul Finkelman, *Limiting Rights in Times of Crisis: Our Civil War Experience—A History Lesson for a Post 9-11 America*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 25, 39 (2003) (noting that “Merryman did not appeal his incarceration to the full Supreme Court”).

⁶⁴ *See, e.g.,* Erastus Corning v. Troy Iron & Nail Factory, 56 U.S. (15 How.) 451, 465 (1853) (Grier, J.) (expounding on the “aggrieved” party rule); *Atl. Mut. Ins. Co. v. Nw. Airlines, Inc.*, 24 F.3d 958, 961 (7th Cir. 1994) (Easterbrook, J.) (“A litigant dissatisfied with the analysis of an opinion, but not aggrieved by the judgment, may not appeal. . . . Indeed, a debate about [the] language of an opinion is not even a case or controversy within the scope of Article III.”); *see also, e.g.,* Livornese v. Med. Protective Co., 136 Fed. Appx. 473, 481 n.8 (3d Cir. 2005) (Roth, J.) (“As the District Court imposed no actual liability against [the cross-appellant] by the March 7, 2003 . . . order, or by any other order, there is nothing for us to reverse. We construe [the cross-appellant’s] request as an invitation to reverse the legal memorandum or reasoning of the District Court. We review only judgments, not opinions.”); 13 CYCLOPEDIA OF FEDERAL PROCEDURE *Necessity that judgment be adverse* § 58.08 (3d ed. 2015) (“[T]he law does not give a party who is not aggrieved an appeal from a judgment in his or her favor”; *cf., e.g.,* Act to Establish the Judicial Courts of the United States, ch. 20, § 22, 1 Stat. 73, 84–85 (1789) (requiring that in seeking review in the Supreme Court of the United States from federal circuit court decisions “writs of error shall not be brought but within five years after rendering or passing *the judgment or decree complained of*” (emphasis added)). Interestingly, Erastus Corning, a party to the 1853 Supreme Court case discussed above,

VI. Myth: General Cadwalader's Conduct

The fourth *Merryman* myth is an entire constellation of factual and legal claims relating to General Cadwalader's conduct. The claims include:

- A. Cadwalader (as opposed to Lincoln) ignored or defied Chief Justice Taney by not showing up for the first day's hearing on May 27, 1861;⁶⁵
- B. Cadwalader defied Taney by not producing Merryman after Taney granted a writ of habeas corpus directed to Cadwalader to produce (but not release) Merryman;⁶⁶

was the recipient of a famous Civil War era letter from President Lincoln discussing habeas corpus. See Letter from President Lincoln to Erastus Corning and others (June 12, 1863), in 8 COMPLETE WORKS OF ABRAHAM LINCOLN, 1862–1863, at 298, 298–314 (John G. Nicolay & John Hay eds., N.Y., The Tandy-Thomas Co. new ed. 1894) [*hereinafter* Presidential Letter]. Prior to the outbreak of the Civil War, Corning sold cattle to Merryman. See WHITE, *supra* note 4, at 26.

⁶⁵ See, e.g., PAUL BREST ET AL., *supra* note 3, at 223 (stating that Cadwalader “refused either to attend the May 27 hearing . . . or to produce Merryman Cadwalader refused to comply with a second order [to attend a contempt hearing] to be present the following day”); THOMAS J. REED, AVENGING LINCOLN’S DEATH: THE TRIAL OF JOHN WILKES BOOTH’S ACCOMPLICES 17 (2016) (“Cadwalader refused to appear in court This caused the elderly chief justice of the United States to write a scorching opinion”); Finkelman, *supra* note 11, at 1359 (“Cadwalader refused to appear before Taney but sent a subordinate to inform the Chief Justice that Merryman was charged with treason”); Mark F. Leep, *Ex Parte Merryman*, in AMERICAN CIVIL WAR: THE DEFINITIVE ENCYCLOPEDIA AND DOCUMENT COLLECTION 603, 603 (Spencer C. Tucker ed., 2013) (“Cadwalader refused [to attend the May 27, 1861 hearing] and rebuffed a second demand to appear.”); Yoo, *Judicial Supremacy*, *supra* note 44, at 18 (“The General refused to appear”); *infra* notes 69–79, and accompanying text.

⁶⁶ See, e.g., LOUIS FISHER, THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER 323 (2014) (“The commandant, acting under Lincoln’s orders, refused to produce Merryman.”); HARTZ, *supra* note 1, at 16 (“When both Cadwalader and Lincoln himself refused to obey Taney’s [ex parte] order, Justice Taney decided the case against Lincoln”); Hutchinson, *supra* note 5, at 291 (“Notwithstanding Taney’s opinion, the military commander at Ft. McHenry, acting under the commander-in-chief’s orders, declined to produce Merryman.”); Klein & Wittes, *supra* note 50, at 118 (“In response to Merryman’s petition for a writ of habeas corpus, Chief Justice Taney . . . ordered Union General George Cadwalader to produce Merryman in federal court in Maryland. When Cadwalader defied the order”); Neely, *supra* note 59, at 52 (“Taney confronted the army colonel bringing word of General Cadwalader’s defiance.”); *infra* notes 80–104; see also, e.g., CHARLES GROVE HAINES & FOSTER H. SHERWOOD, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1835–1864, at 457 (explaining that the Merryman incident “led to outright executive defiance of judicial authority”); Michal R. Belknap, 89 MIL. L. REV. 59, 82 (1980) (“[W]hen Chief Justice Roger Taney . . . had

- C. When the United States Marshal attempted to serve an attachment order on Cadwalader at the Fort, Cadwalader sent the Marshal away;⁶⁷ and finally,
D. Cadwalader received authorization from President Lincoln to ignore or defy the United States Marshal.⁶⁸

ordered military authorities to deliver up a prisoner during the Civil War, they . . . defied his order . . .”); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2571 (2003) (“[T]he military refused to produce the petitioner.”); Tyler, *supra* note 44, at 343 (“Likewise, [Lincoln] ignored Chief Justice Taney’s command in *Merryman* that a federal prisoner detained pursuant to presidential order be produced.”).

⁶⁷ See, e.g., FRANK L. KLEMENT, *THE LIMITS OF DISSENT: CLEMENT L. VALLANDIGHAM & THE CIVIL WAR* 69 (1998) (affirming, absent any on-point sources, that “Cadwalader refused to accept the writ [of attachment] and denied entrance to Fort McHenry to the marshal seeking to serve it”); DAVID M. SILVER, *LINCOLN’S SUPREME COURT* 29 (2d ed. 1998) (affirming, absent any sources, that the “General resisted Taney’s writ of attachment by directing that the marshal of the court be denied entrance to Fort McHenry”); 4 STATES AT WAR, *supra* note 12, at 313 (same); Douglas W. Kmiec, *The Supreme Court in Times of Hot and Cold War: Learning from the Sounds of Silence for a War on Terrorism*, 28(3) J. SUP. CT. HIST. 270, 273 (Nov. 2003) (noting that “Lincoln’s subordinate commander General Cadwalader barred the Court’s officer from even entering the fort where Merryman was held”); *infra* notes 105–106; see also, e.g., Cole, *supra* note 66, at 2571 (“Justice Taney then issued an attachment for contempt, but the military refused to accept service of that order.”); Rosen, *supra* note 44, at 149 n.704 (“[M]ilitary officers at Fort McHenry, Maryland, acting upon Lincoln’s suspension of habeas corpus, intentionally . . . barred from the fort the marshal who attempted to serve it.”).

⁶⁸ See, e.g., *United States v. Minoru Yasui*, 48 F. Supp. 40, 51 (D. Or. 1942) (Fee, J.) (“No designation need be given to acts which the military sometimes are required to commit under the stress of war and of military necessity, such as . . . the refusal of General Cadwalader under Lincoln’s order to obey the writ of the federal circuit court . . .”), *vacated*, 320 U.S. 115 (1943); *Ex parte Owens*, 258 P. 758, 787 (Crim. Ct. App. Okla.) (Doyle, P.J.) (“The commandant in response to the writ answered that the president had notified him that [the president] had suspended the writ of habeas corpus and instructed [the commandant] not to obey it.”), *quashed by*, *Dancy v. Owens*, 258 P. 879 (Okla. 1927); FISHER, *supra* note 66, at 323 (“The commandant, acting under Lincoln’s orders, refused to produce Merryman.”); ROSS, *supra* note 5, at 67 (“Lincoln . . . ordered the army officer who had arrested Merryman to refuse to accept the writ.”); Hutchinson, *supra* note 5, at 291 (“Notwithstanding Taney’s opinion, the military commander at Ft. McHenry, acting under the commander-in-chief’s orders, declined to produce Merryman. Thus, Abraham Lincoln defied a lawful order of the Chief Justice of the United States.”); *infra* notes 107–133; see also, e.g., GEORGE C. EDWARDS III & STEPHEN J. WAYNE, *PRESIDENTIAL LEADERSHIP: POLITICS AND POLICY MAKING* 415 (8th ed. 2010) (“Taney ordered [Merryman’s] release, but *Lincoln* refused to give him up to the U.S. [M]arshal sent to bring him into court . . .” (emphasis added)); H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* 207 & n.7 (2002) (“The only clear counterexample [of the executive duty to obey judicial orders] is President Lincoln’s instruction to his subordinates to disregard a writ of habeas corpus issued by Chief Justice Taney . . .” (citing *Merryman*)); Barry Friedman, *The*

These factual and legal assertions lack substantial merit.

A. Is it True that Cadwalader (as Opposed to Lincoln) Ignored or Defied Chief Justice Taney by not Showing up for the First Day's Hearing on May 27, 1861?

Anyone who has ever been a law clerk in a court with original jurisdiction over habeas matters knows that jailers who have responsibility over large institutions rarely personally attend habeas hearings, even though such jailers are the named defendants.⁶⁹ As a civil or quasi-civil matter,⁷⁰ jailer-defendants are not obligated to attend

History of the Countermajoritarian Difficulty, Part Four: Law's Politics, 148 U. PA. L. REV. 971, 1032 n.275 (2000) ("Lincoln's instructions to ignore the order in *Ex Parte Merryman* . . . may be the most defiant . . ." (citing Lincoln's July 4, 1861 message to Congress, which took place more than a month after *Merryman*)); Rosen, *supra* note 44, at 149 n.704 ("[M]ilitary officers at Fort McHenry, Maryland, acting upon Lincoln's suspension of habeas corpus, intentionally disobeyed a writ of habeas corpus issued by Chief Justice Taney . . .").

⁶⁹ See, e.g., FREDERICKA SARGENT, ASSISTANT ATTORNEY GENERAL, EVERYTHING YOU EVER WANTED TO KNOW ABOUT FEDERAL HABEAS AND THEN SOME 2 (2014) ("In Texas, the respondent [in a habeas action] is always the Director of the Criminal Institutions Division for the Texas Department of Criminal Justice (TDCJ). According to the Texas Constitution, TDCJ is represented by the Attorney General's Office (OAG)."), <http://tinyurl.com/hotk5vj>. When a prisoner sues a jailer-defendant or government entity in relation to the conditions of the prisoner's confinement, the jailer will sometimes attend the hearing or trial, particularly because he may have relevant information in regard to prison procedures and conditions. Such federal civil rights actions for damages under 42 U.S.C. § 1983 are distinguishable from traditional habeas corpus actions challenging the fact or length of the prisoner's confinement. See Act to Establish the Judicial Courts of the United States, ch. 20, § 14, 1 Stat. 73, 82 (1789) (authorizing "writs of habeas corpus for the purpose of an inquiry into the cause of commitment" (emphasis added)); see also 28 U.S.C. § 2254 (habeas procedures for prisoners in state custody), § 2255 (habeas procedures for prisoners in federal custody). In these latter cases, where the prisoner seeks, not damages, but release (or speedier release), the jailer-defendant will rarely attend because he will rarely have relevant information in regard to the original cause of commitment. See generally Preiser v. Rodriguez, 411 U.S. 475 (1973) (Stewart, J.); Martin A. Schwartz, *The Preiser Puzzle: Continuing Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85 (1988).

⁷⁰ See Browder v. Dir., Dep't of Corrs. of Ill., 434 U.S. 257, 269 (1978) (Powell, J.) ("It is well settled that habeas corpus is a civil proceeding."); Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 AM. J. CRIM. L. 171, 198 (2003) ("Habeas corpus proceedings are usually treated as civil or quasi-civil proceedings . . .").

habeas hearings in person.⁷¹ Customarily, such defendants send a representative (or, an attorney is sent for the named defendants by the government's relevant law department).⁷² Here, Cadwalader sent Colonel Lee.⁷³ This cannot be fairly characterized as defiance. Although Taney would initiate contempt proceedings against Cadwalader, the only justification Taney offered for those contempt proceedings was that Cadwalader failed to produce Merryman.⁷⁴ Taney's attachment order makes no mention of the fact that Cadwalader failed to attend the May 27, 1861 proceedings.⁷⁵

What might defiance by the Army have looked like? If the Army had denied Merryman access to an attorney or had denied him access to his family, perhaps that would have been defiance.⁷⁶ If the Army had

⁷¹ See, e.g., 10 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 104 (2005) ("A party in a civil trial may be represented by counsel or may represent himself A party may, however, choose not to attend the trial and be represented in court solely by an attorney."), <http://tinyurl.com/haxxtch>.

⁷² See, e.g., *supra* note 69.

⁷³ See REHNQUIST, *supra* note 6, at 41 ("Obviously, Colonel Lee [was] present not as legal counsel for the government but as a representative of Merryman's custodian (General Cadwalader)"); see also 4 STATES AT WAR, *supra* note 12, at 312–13 (explaining that Lee was Cadwalader's "ADC," i.e., aide-de-camp, and that Lee reported to the court that Cadwalader was "unavoidably detained"). But see *Affairs in Baltimore*, *supra* note 17 (reporting that Major Belger, not Colonel Lee, appeared for Cadwalader).

⁷⁴ See *Merryman*, 17 F. Cas. 144, 146 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (ordering "an attachment forthwith [to] issue against General George Cadwalader for a contempt, in refusing to produce the body of John Merryman").

⁷⁵ See *id.* But see Stephenson, *supra* note 2, at 344 ("Taney issued an attachment for contempt against Cadwalader for failure to appear in court"). To be clear, Taney's attachment order commanded the Marshal to attach Cadwalader's (not Merryman's) body, i.e., to bring Cadwalader to court where Cadwalader's contempt would be adjudicated. See *27 May 1861, Attachment issued by Clerk, Thomas Spicer*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited Sept. 25, 2015), <http://tinyurl.com/jksfafz>. But see ELLIS, *supra* note 47, at 413 ("[Taney] dispatched the court's marshal to Fort McHenry under orders to bring Merryman to court by noon the next day."); Louis Fisher, *National Security Law: The Judicial Role*, in FREEDOM AND THE RULE OF LAW 203, 210 (Anthony A. Peacock ed., 2010) ("Prison officials, acting under Lincoln's policy, refused to let Taney's marshal serve a document at the prison to release Merryman."); but see also E. THOMAS SULLIVAN & TONI M. MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 112 n.292 (2013) (same) (citing Fisher, *supra* at 210).

⁷⁶ See CHRISTOPHER PETER LATIMER, CIVIL LIBERTIES AND THE STATE 89 (2011) ("Within hours of his detention, Merryman contacted lawyers who drafted a petition for a writ of habeas corpus"); 5 SWISHER, *supra* note 11, at 845 ("Merryman was given immediate access to counsel"); cf. MCGINTY, *supra* note 4, at 153 ("Merryman was treated well during the time he was in Fort McHenry. His family and friends were allowed to visit him and help him make plans for his future"); REHNQUIST, *supra*

arrested Merryman's attorney, before or after the attorney petitioned Taney for a writ of habeas corpus, arguably, that would have been defiance. If the Army had closed the courthouse where the proceedings were being heard, or had seized pamphlets or newspapers publishing Taney's opinion, then that would have constituted defiance. Had the Army seized Taney's papers or Chief Justice Taney himself on his way to or from the courthouse, then that certainly could be fairly characterized as defiance.⁷⁷ Nothing like this happened in *Merryman*.⁷⁸

note 6, at 39 (noting, in relation to the period following the court proceedings, that Merryman "was permitted to see members of his family and numerous friends").

⁷⁷ See PHILLIP SHAW PALUDAN, *THE PRESIDENCY OF ABRAHAM LINCOLN* 76 (1994) ("It was grand drama, but Taney was not in danger."); ROSSITER, *supra* note 2, at 23 (noting that after adjudicating *Merryman*, "Taney returned to Washington unmolested"); see also MCGINTY, *supra* note 4, at 151–53 (discussing persistent rumors that Lincoln considered having Taney arrested, and characterizing such rumors as "strain[ing] credulity"); cf. DILORENZO, *LINCOLN UNMASKED*, *supra* note 59, at 92–94 (arguing that Lincoln signed a warrant to arrest Taney, notwithstanding the author's inability to document or produce any such warrant). Furthermore, federal authorities arrested state judges during the Civil War. See Arthur John Keeffe, *Practicing Lawyer's Guide to the Current Law Magazines*, 48 A.B.A. J. 491, 491 (1962) (noting that Judge Bartol of the Maryland Court of Appeals and Judge Carmichael of the Maryland Circuit Court were arrested by federal authorities during the Civil War).

⁷⁸ See Finkelman, *supra* note 11, stating,

But compared to the trampling of civil liberties in other nations during civil wars, what happened under Lincoln seems almost innocent and naive. . . . Merryman's arrest is astounding because he had access to an attorney. . . . This was a globally unique privilege for a civilian in military custody. That the army allowed Merryman's attorney to travel from Baltimore to Washington in order to appeal directly to Taney, and then allowed Taney to hold court in Baltimore and openly challenge military authority, is in itself remarkable. No one later thought to interfere with Taney when he published his opinion castigating Lincoln. This could hardly happen in very many other places during a civil war.

Id. at 1378 (internal citations omitted) (quotation marks omitted). *But see* Egan v General Macready [1921] 1 IR 265 (O'Connor, M.R.) (granting habeas writ to release prisoner, which was disobeyed by military authorities, then issuing an attachment order for contempt, followed by compliance by the military); Wolfe Tone's Case, 27 How. St. Tr. 613, 625 (1798) (Kilwarden, C.J.) (granting habeas writ to produce prisoner, which was disobeyed by military authorities, then issuing an attachment order for contempt, followed by the death of the prisoner, while still in custody, in consequence of self-harm). Professor Finkelman is engaged in hyperbole here. It is more than likely that a good many people, including Chief Justice Taney and some in the Executive Branch, *thought* about doing precisely these things, particularly because of a well-known precedent which arose in connection with the War of 1812. General Andrew Jackson imposed martial law in New Orleans and arrested Louaillier, a member of the assembly,

Had Cadwalader sought to defy Taney what might he have done? Had he sent no one at all in response to the writ, or had Colonel Lee asserted in open court that the military authorities would not abide by the decision of the court, arguably, that would have constituted defiance, but nothing like that happened. Quite the opposite: Cadwalader and Lee asked for more time to prepare a defense.⁷⁹

who had criticized Jackson in a letter in a newspaper. Judge Dominick A. Hall, a federal district court judge, intended to issue a writ of habeas corpus. See JOHN SPENCER BASSETT, *THE LIFE OF JACKSON* 225 (new ed. 1925) (“[Judge Hall] granted Louaillier’s request, stipulating that Jackson should have notice before the writ was served on him.”). Jackson’s response was a good bit more firm than Cadwalader’s and Lincoln’s—Jackson jailed Judge Hall. See RANDALL & DONALD, *supra* note 45, at 302 (“[Cadwalader] showed no truculence toward the judiciary as did Jackson in the War of 1812 . . .”). But cf. JAMES MACGREGOR BURNS, *PACKING THE COURT: THE RISE OF JUDICIAL POWER AND THE COMING CRISIS OF THE SUPREME COURT* 65 (2009) (characterizing Cadwalader’s response as a “rebuke[.]”). The federal district attorney sought a writ of habeas corpus on behalf of Judge Hall from a state judge, and General Jackson proceeded to jail both the district attorney and the state judge. See BASSETT, *supra* at 226. Once martial law ended, Judge Hall fined Jackson \$1000 for contempt of court. These events from the War of 1812 remained active in the public mind. See, e.g., MATTHEW WARSHAUER, *ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW: NATIONALISM, CIVIL LIBERTIES, AND PARTISANSHIP* 197 (2006) (“Most let the issue of martial law rest [after Jackson died in 1845]. Yet it still remained in the minds of some.”). For example, in 1844, Congress remitted the fine for contempt Jackson had paid, and also paid Jackson interest. See JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 145 & n.10 (1926). “In 1843, Chief Justice Roger Taney privately praised [former President] Jackson for his measures three decades earlier and [Taney] condemned [Judge] Hall’s use of habeas corpus and his fine of [General] Jackson.” See Paul D. Halliday, *Habeas Corpus*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 673, 688 (Mark Tushnet et al. eds., 2015); see Letter from Chief Justice Taney to (former) President Jackson (Apr. 28, 1843), in 6 *CORRESPONDENCE OF ANDREW JACKSON, 1839–1845*, at 216, 217 (John Spencer Bassett ed., 1933) (“Future ages will be amazed that such conduct as that of Judge Hall could find defenders or apologists in the count[r]y, and how there could be any difficulty in stigmatizing the disgraceful proceeding in the manner it deserves.”); see also Letter from Taney to Jackson (Jan. 4, 1844), in 6 *id.* at 250, 251. If, as Professor Finkelman argued, President Lincoln never *thought* about interfering with Chief Justice Taney, then he was a fool, and Lincoln was no fool. See, e.g., Presidential Letter, *supra* note 64, at 298, 311–12 (reporting Lincoln’s discussion of the General Jackson-Judge Hall incident); see also *THE DIARY OF EDWARD BATES, 1859–1866*, at 252 (Howard K. Beale ed., 1933) (noting that in a April 21, 1862 cabinet meeting, the President “talked about arresting the attorneys” who brought civil actions “for [wrongful] sei[z]ure of persons and property” against government officials).

⁷⁹ See *Merryman*, 17 F. Cas. at 146 (reproducing Cadwalader’s signed response which stated that Cadwalader “respectfully requests that you will postpone further action upon this case” until the President can be consulted).

B. Is it True that Cadwalader Defied Taney by not Producing Merryman After Taney Granted a Writ of Habeas Corpus Directed to Cadwalader to Produce (but not Release) Merryman?

Merryman was seized by military authorities at 2:00 A.M. on Saturday, May 25, 1861.⁸⁰ Afterwards, Merryman's attorneys drafted a petition for habeas corpus, and they presented it to Chief Justice Taney on Sunday, May 26, 1861 in his Washington home.⁸¹ Later that day, that is, Sunday, May 26, 1861, Taney granted the petition in part: Taney ordered Cadwalader to produce (but not release) Merryman for a hearing to be held on Monday, May 27, 1861, at 11:00 A.M.⁸² It is true that Cadwalader did not produce Merryman on May 27, as he was required to do by Taney's order.⁸³

All the preliminary proceedings—all the proceedings prior to the May 27, 1861 hearing—were *ex parte*. Merryman's attorneys had been present before Taney, but the government's attorney and Cadwalader's attorney were absent—if only because they had not yet received any notice from a United States Marshal.⁸⁴ Cadwalader and the government were, at the very least, entitled to argue that the status quo should be preserved until they also had an opportunity to be heard and to put forward their defenses *in court*, i.e., asserting that the President's unilateral suspension put Merryman beyond judicial relief, including a grant of a writ of habeas corpus.⁸⁵ Of course, this is not for a moment to

⁸⁰ See *supra* note 13.

⁸¹ See *supra* note 14.

⁸² See *supra* note 15.

⁸³ See *Merryman*, 17 F. Cas. at 146; REHNQUIST, *supra* note 6, at 33–34.

⁸⁴ See *Merryman*, 17 F. Cas. at 146 (noting that the writ was “[i]ssued 26th May 1861” and it was served “on the same day on which it issued”); *26 May 1861, Return of U.S. Marshall [sic] Washington Bonifant*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES): JOHN MERRYMAN (1824–1881) (last visited Oct. 22, 2015), <http://tinyurl.com/j42y915> (stating that the U.S. Marshal, Washington Bonifant, made service on Cadwalader “on the 26th day of May 1861 at half past five o’clock p.m.”). It is precisely because these preliminary issues were decided by Taney in the absence of the government, Cadwalader, and their attorneys that this case was captioned as an “*Ex parte*” matter. See EDELSON, *supra* note 12, at 288 n.50 (“‘*Ex parte*’ means ‘on behalf of one party alone.’ . . . [In an *ex parte* matter.] [t]he court initially considers whether to issue the writ without hearing from the government.”).

⁸⁵ See KRENT, *supra* note 11, at 146 (“Without argument [from Cadwalader], Taney ordered the prisoner brought before him . . .”); cf. ROSEN, *supra* note 47, at 172 (asserting that, in *Merryman*, Taney “[r]efus[ed] to allowed the government to be heard”). If Cadwalader had produced Merryman and also subsequently prevailed on the merits, then even such a favorable decision for Cadwalader and the government would

suggest that *ex parte* judicial orders need not be obeyed.⁸⁶ However, such preliminary *ex parte* orders are qualitatively different from other judicial orders, particularly final judicial orders⁸⁷ issued after notice and

have been little more than dicta in regard to the initial *ex parte* order, particularly if the decision had been fact-dependent and tied to Merryman's specific conduct. In order to test *judicially* the legal validity of Taney's initial *ex parte* order as a precedent for future cases, Cadwalader had to maintain a live adversarial controversy and the status quo. To put it another way, Cadwalader's conduct should only be characterized as "defying" the courts if one assumes that individual jailer-defendants and the government should be denied a substantive opportunity to test judicially the power of the courts to issue *ex parte* habeas orders in the context of purported presidential suspension. Not surprisingly, Cadwalader, the named government-defendant, was unwilling to throw in the towel before he had any opportunity to be heard.

⁸⁶ This Article does not opine on the precise scope of what obedience is due judicial orders, *ex parte* or otherwise, issued by a court with competent jurisdiction. Compare, e.g., POWELL, *supra* note 68, at 207 ("American executive officers must obey judicial orders, at least once affirmed at the highest level [of the judiciary]." (emphasis omitted)), and Dale Carpenter, *Judicial Supremacy and its Discontents*, 20 CONST. COMMENT. 405, 423 (2004) ("[E]ven if Lincoln was defying Chief Justice Taney's order on constitutional grounds, he was not defying an order of the Supreme Court, the judicial body that possesses ultimate judicial authority. . . . If there are degrees of executive defiance of judicial orders, ranging from disobeying a district judge to disobeying an appellate court to disobeying the Supreme Court, Lincoln's defiance was at the lower end of the spectrum."), with Merrill, *supra* note 53, at 59–60 ("The problem . . . to paraphrase Gertrude Stein, is that a court is a court is a court. The Supreme Court, the courts of appeals, and the district courts all exercise the same constitutional power—the judicial power [of Article III]—and all conduct their affairs in fundamentally similar ways. . . . There are a number of practical differences between courts at different levels in the judicial system. . . . But these are at most differences in degree, and would not seem to justify treating the work product of courts at different levels in the judicial hierarchy as imposing a fundamentally different obligation on the executive branch." (citation omitted)). See generally *infra* note 134.

⁸⁷ See, e.g., Paulsen, *Lincoln and Judicial Authority*, *supra* note 44, at 1285 ("Lincoln's denial of judicial supremacy [in *Ex parte Merryman*] extend[ed] . . . even to *final judicial decrees* in a particular case—breaking through the limits that Lincoln himself had declared as a Senate candidate responding to *Dred Scott* in 1857 and 1858, and which he had reaffirmed in his First Inaugural barely a month earlier." (emphasis added)). But cf. STEPHEN M. ENGEL, *AMERICAN POLITICIANS CONFRONT THE COURT: OPPOSITION POLITICS AND CHANGING RESPONSES TO JUDICIAL POWER* 192 (2011) (arguing that Lincoln's position in *Dred Scott*, his First Inaugural, and his response to *Merryman* were consistent in that they "highlighted the unsettled nature of the law on new questions and the plausibility of alternative interpretations, at least until a single interpretation congealed through repetitive announcement and enforcement"). Professor Paulsen's abstract position is entirely correct: a party's resisting a final judicial order issued after adversarial proceedings is far more significant than a party's merely violating a preliminary *ex parte* judicial order. See also *Locks v. Commanding Gen., Sixth Army*, 89 S. Ct. 31, 32 (1968) (Douglas, J., in chambers) ("Article I, s 9, of the Constitution provides that [the] 'privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.' It may be that in

an opportunity to be heard in an adversarial hearing (or trial) on the merits.⁸⁸

Here, Cadwalader could have believed—in good faith—that after a brief hearing, his initial failure to comply should, and would, be

time that provision will justify the issuance of a writ of habeas corpus by an individual Justice. *The point, however, has never been decided . . .*” (emphasis added); cf. Merrill, *supra* note 53, at 70 (noting “consensus . . . that executive actors have a duty to enforce final judicial judgments, even if they disagree with their legal bases” (emphasis added)); *id.* at 43, 46 (same, and again referring exclusively to “final” judgments). Unfortunately, Professor Paulsen nowhere explains how Lincoln (or the administration, or, indeed, anyone) violated or, even, could have violated Taney’s final judicial decree in *Merryman*. See MCGINTY, *supra* note 4, and accompanying text (reproducing Taney’s final order). Indeed, Taney’s language was worded in such general and abstract terms that one might say it was impossible for the President to violate Taney’s order. For example, Taney stated, “It will then remain for that high officer [the President], in fulfilment of his constitutional obligation to ‘take care that the laws be faithfully executed,’ to determine what measures he will take to cause the civil process of the United States to be respected and enforced.” *Merryman*, 17 F. Cas. at 153 (emphasis added). *But see* Paulsen, *Lincoln and Judicial Authority*, *supra* note 44, at 1287–88 (“Taney ordered General Cadwalader’s arrest and further directed that his opinions and orders immediately be transmitted to President Lincoln, with instructions that they be enforced.” (emphasis added)). Professor Paulsen’s characterization is not helpful, because it was the nature of those “instructions” which was, and remains, at issue. What did Taney’s so-called “instructions” specifically command? Were those instructions binding, and against whom or what entities?

⁸⁸ Such a hearing, dealing solely with the merits of Cadwalader’s, i.e., the government-defendant’s, legal argument would be adversarial as long as Merryman’s attorney was present, even if Merryman was not. Likewise, a federal prisoner bringing a modern statutory habeas action has a right to be present if an evidentiary hearing will be held or if facts are disputed. See *Habeas Corpus Procedure*, 83 HARV. L. REV. 1154, 1189–91 (1970). Taney would decide *Merryman* based on well-known principles and precedents of public law, without regard to any specific facts related to John Merryman’s conduct. See, e.g., *Merryman*, 17 F. Cas. at 147 (“I ordered this attachment yesterday, because, upon the face of the return, the detention of the prisoner was unlawful . . .” (emphasis added)). Chief Justice Rehnquist characterized Taney’s ex parte order as a modern order to show cause. See WILLIAM H. REHNQUIST, *THE SUPREME COURT* 66 (rev. ed. 2002). Likewise, Taney’s subsequent attachment order has also been characterized as an order to show cause. See, e.g., *Ex parte Merryman: Proceedings of the Court Day, May 26, 1961*, 56(4) MD. HIST. MAG. 384, 389 (Dec. 1961) (characterizing the “writ of attachment [as] requiring General Cadwalader to appear . . . to show cause why he should not be held in contempt”). In other words, when the attachment was issued, Taney had only decided that Cadwalader had violated his prior ex parte order, but liability for the purported contempt, and Cadwalader’s defenses, had not yet been adjudicated in adversarial proceedings. See *infra* note 89 (discussing Cadwalader’s potential defences in regard to the contempt proceeding). *But see* Yoo, *Judicial Supremacy*, *supra* note 44, at 18 (“Taney held the General in contempt . . .”).

excused.⁸⁹ Indeed, as Chief Justice Taney explained, “I ordered this attachment [against Cadwalader] yesterday, *because*, upon the face of the return [i.e., Cadwalader’s response], the detention of the prisoner was unlawful”⁹⁰ In other words, Cadwalader’s failure to obey the original *ex parte* order was only potentially sanctionable *because* his substantive defense had failed. Had Cadwalader’s defense succeeded, there would have been no possibility of contempt, notwithstanding his failure to obey Taney’s *ex parte* order.

Like many litigants faced with an *ex parte* temporary restraining order or preliminary injunction, Cadwalader was caught between a rock and a hard place: he could waive a potentially meritorious defense by obeying the court order (i.e., by producing the prisoner), or he could preserve the status quo by putting forward a good faith defense on the merits. The latter strategy necessitated that he disobey the court’s *ex parte* order and that he refuse to produce the prisoner until the merits of *his* position had been judicially heard and determined. Such a strategy poses the risk of sanctions should it fail, but even if it fails, characterizing such a litigant or his strategy as “defying” the courts is grossly simplistic. This is true not merely because the context of *Merryman* was civil war, but because *all* *ex parte* orders pose very basic

⁸⁹ See *Woods v. Jianas*, 92 F. Supp. 102, 104 (W.D. Mo. 1950) (Reeves, C.J.) (“If, however, it shall be made to appear that the defendant is unable to comply with the order, then he should be discharged.”); Comment, *The Application of the Law of Contempt to the Uphaus Case*, 61 COLUM. L. REV. 725, 732 (1961) (“Inability to obey a court order is a good defense in all contempt proceedings.”). Cadwalader could have pled something akin to *force majeure*. See, e.g., 1 W. F. BAILEY, A TREATISE ON THE LAW OF HABEAS CORPUS AND SPECIAL REMEDIES 458 (1913) (noting that at the time *Merryman* was adjudicated, “the situation was peculiar. Many of the states were actually in armed rebellion against the general government. Maryland, while it had not in fact seceded, was in a partial state of insurrection.”); REHNQUIST, *supra* note 88, at 66 (“[Union] [t]roops moving through [Baltimore] were stoned”); WHITE, *supra* note 4, at 30 (“The northern press reported that 150 men, ‘armed to the teeth,’ had lined the courtroom to force Merryman’s release if he was brought into court.”); see also, e.g., 1 THE REBELLION RECORD: A DIARY OF AMERICAN EVENTS 239 (Frank Moore ed., N.Y., G.P. Putnam 1861) (reproducing a May 14, 1861, letter from Major W.W. Morris, Commanding Fort McHenry, to Judge Giles, United States District Court for the District of Maryland, explaining the reasons for his inability to comply with the court’s writ of habeas corpus, including “[t]he ferocious spirit exhibited [in Maryland] toward the United States [A]rmy would render me very averse from appearing publicly and *unprotected* in the city of Baltimore to defend the interest of the body to which I belong” (emphasis added)).

⁹⁰ *Merryman*, 17 F. Cas. at 147 (emphasis added).

challenges to principles, policies, and values relating to due process, traditional notions of justice and fair play, and natural justice.⁹¹

⁹¹ See, e.g., *Anton Piller KG v. Mfg. Processes Ltd.*, [1976] Ch. 55, 60 (Eng. C.A.) (Lord Denning, M.R.) finding,

[T]he [ex parte] order sought in this case is not a search warrant. It does not authorise the plaintiffs' solicitors or anyone else to enter the defendants' premises against their will. It does not authorise the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises entry and inspection by the permission of the defendants. The plaintiffs must get the defendants' permission. But it does do this: It brings pressure on the defendants to give permission. It does more. *It actually orders them to give permission*—with, I suppose, the result that if they do not give permission, they are guilty of contempt of court.

(emphasis added)); *id.* at 62 (Ormrod, L.J.) stating,

The form of the [ex parte] order makes it plain that the court is not ordering or granting anything equivalent to a search warrant. The order is an order on the defendant *in personam* to permit inspection. *It is therefore open to him to refuse to comply with such an order*, but at his peril either of further proceedings for contempt of court—in which case, of course, the court will have the widest discretion as to how to deal with it, *and if* [in adversarial proceedings on the merits] *it turns out that the order was made improperly in the first place, the [subsequent] contempt* [against the party initially seeking the ex parte order] *will be dealt with accordingly*

(emphasis added)); *supra* note 49 (collecting authority). Would any rational person characterize a litigant, who refuses to obey an ex parte Anton Piller order, as having “defied” the courts? If not, then there is little reason to characterize Cadwalader—who made a difficult legal decision, with less than one day’s notice, in the middle of an ongoing civil war—in such a manner. Reasonable judges and commentators in the context of adjudicating contempt(s) (as in other contexts) have always distinguished between those who err in good faith (even assuming Cadwalader erred) from those who actively choose to defy court orders. *Cf., e.g., Hallmark Cards Inc. v. Image Arts Ltd.*, [1977] F.S.R. 150, 153 (Eng. C.A.) (Buckley, L.J.) (“[I]f the [defendant] party against whom the [ex parte] order is made were to succeed [in subsequent adversarial proceedings] in getting the order discharged, *I cannot conceive* that that party would be liable to any penalties for any breach of the order of which he may have been guilty while it subsisted, for if the order is discharged upon the footing that it ought not to have been made, then the contempt is in truth no contempt, although technically no doubt there is contempt because the order, until discharged, is an operative order and the party who refuses access is acting in disobedience of the order.” (emphasis added)); HILARY BIEHLER, *EQUITY AND THE LAW OF TRUSTS IN IRELAND* 703–04 (6th ed. 2016) (noting conflicting English authority, but concluding that: “[w]hile it cannot be disputed that failure to comply with the terms of an [ex parte] Anton Piller order in any circumstances technically amounts to contempt of court and should not be condoned, it is submitted that

To put it another way, Cadwalader could have believed that he was in possession of legal arguments unknown to Taney, i.e., unknown to Taney at the time he granted the initial *ex parte* order after having heard only Merryman's side of the dispute. The factual basis of this claim is not unsupported. Cadwalader's response explained to the court that the President gave military officers discretion to suspend habeas corpus.⁹² Taney, in his written opinion, filed some days later, stated, "No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the [P]resident claimed this power [to suspend habeas], and had exercised it in the manner stated in the return [i.e., Cadwalader's response]."⁹³

the courts should be slow to impose penalties where the order is subsequently set aside [in adversarial proceedings]").

⁹² See *Merryman*, 17 F. Cas. at 146.

⁹³ *Id.* at 148; Thomas F. Carroll, *Freedom of Speech and of the Press during the Civil War*, 9 VA. L. REV. 516, 530 (1923) (explaining that "[n]o [public Executive Branch] proclamation was issued" concurrently with Lincoln's military orders suspending habeas); Jonathan W. White, *The Civil War Disloyalty Trial of John O'Connell*, 9(1) OHIO VALLEY HIST. 3, 4 (Spring 2009) (noting "Lincoln privately informed General-in-Chief Winfield Scott that he could suspend the writ . . ."); Yoo, *Merryman and Milligan (and McCordle)*, *supra* note 44, at 247 (same); see also *Ex parte Field*, 9 F. Cas. 1, 9 (C.C.D. Vt. 1862) (No. 4761) (Smalley, J.) (noting, with respect to *Merryman*, that "[t]he president had not then proclaimed martial law"). But see DIRCK, THE EXECUTIVE BRANCH OF FEDERAL GOVERNMENT, *supra* note 55, at 99 (characterizing Lincoln's suspension of habeas corpus as a "proclamation"); REHNQUIST, *supra* note 6, at 26 (characterizing Lincoln's April 27, 1861 order to General Scott as a "proclamation"). An alternative possibility is that even absent a presidential proclamation, Taney was aware, in general terms, of Lincoln's suspension order, but is complaining only of not having received "official" notice, including the specific scope of the suspension, and an explanation of the constitutional or statutory basis for the President's action. See *Merryman*, 17 F. Cas. at 148 (explaining that "[n]o official notice ha[d] been given to the courts"). Compare ROSSITER, *supra* note 2, at 21 (explaining that Taney went from Baltimore to Washington to adjudicate *Merryman* "in full knowledge of the President's [prior] order of April 27" authorizing General Scott to suspend habeas corpus), with NAPOLITANO, *supra* note 14, at 44 ("This order was not made public; rather, it was confined to executive secrecy."), NEELY, *supra* note 6, at 9 ("No one informed the courts or the other civil authorities [in regard to the April 27, 1861 order]."), REHNQUIST, *supra* note 6, at 41 ("Taney's hasty decision is all the more remarkable because he had only learned at the Monday session [May 27, 1861] of the Court of the existence of the presidential proclamation [purporting to suspend habeas corpus]."), White, *A New Word*, *supra* note 12, at 359 (stating that Taney, as of May 26, 1861, was "[u]naware that Lincoln had suspended the writ"), and Yoo, *Merryman and Milligan (and McCordle)*, *supra* note 44, at 247 ("Neither Lincoln nor [General] Scott publicized the [April 27, 1861 presidential] order, nor did they issue it as a public proclamation, nor was it sent to the courts or Congress at the time."), with BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION 75-76 (2012) ("Few people in Maryland—even local judges—were aware of what Lincoln had done."), and JOSEPH L. ESPOSITO, PRAGMATISM, POLITICS, AND

Ultimately, Taney would reject Cadwalader's defense on the merits.⁹⁴ But the failure of a defense does not establish that Cadwalader acted in bad faith or that he sought to ignore the court—nor does the failure of a defense establish that Cadwalader intended to defy court orders, nor does it establish that Cadwalader believed that he was authorized by Lincoln (or by anyone else) to ignore or defy actual court orders. To suggest otherwise, to suggest that Cadwalader sought to ignore or defy court orders, based on nothing more than the extant meager record of the decision in *Merryman*, is to engage in myth-making.

What about May 28, 1861? Taney had rejected Cadwalader's defense on May 27, 1861.⁹⁵ One can fairly assume that this was known to Cadwalader because Cadwalader's representative, Colonel Lee, had attended the May 27, 1861 hearing, and also because, at that hearing, Taney ordered the Marshal to serve the attachment against Cadwalader.⁹⁶ (The Marshal attempted—unsuccessfully—to serve the attachment the next morning.⁹⁷) Should Cadwalader have produced Merryman the next day, on May 28, 1861 or thereafter? The answer here is surprisingly

PERVRSITY: DEMOCRACY AND THE AMERICAN PARTY BATTLE 220 (2012) (explaining that when Cadwalader's response was read in open court, "Lincoln's habeas corpus suspension . . . became widely known for the first time"). See generally *infra* notes 116–17 (noting competing views with regard to martial law in Maryland as early as April 1861, including a contemporaneous *New York Times* article).

⁹⁴ See *Merryman*, 17 F. Cas. at 147 (concluding that "John Merryman, the petitioner, is entitled to be set at liberty and discharged immediately from imprisonment" because "upon the face of [Cadwalader's] return, the detention of the prisoner was unlawful").

⁹⁵ See *id.* ("I [Taney] ordered this attachment yesterday [May 27, 1861], because, upon the face of [Cadwalader's] return, the detention of the prisoner was unlawful, upon the grounds: 1. That the [P]resident, under the [C]onstitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. 2. A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control . . ."). But see 5 SWISHER, *supra* note 11, at 852 ("Merryman was not an instance of prosecution of a harmless civilian. He was a lieutenant in the Maryland [state] militia.").

⁹⁶ See *Merryman*, 17 F. Cas. at 146–47. However, one report of the *Merryman* litigation indicates that Colonel Lee had left the May 27, 1861 hearing prior to Taney's announcing (from the bench) that he intended to order the attachment against Cadwalader. See *The Case of Merriman* [sic], *supra* note 17. So, it is just possible that Cadwalader did not have timely information about Taney's attachment.

⁹⁷ See *Merryman*, 17 F. Cas. at 147 (reproducing Bonifant's return which stated "by virtue of the . . . writ of attachment, to me directed, on the 27th day of May 1861, I proceeded, on this 28th day of May 1861, to Fort McHenry, for the purpose of serving the said writ"); *supra* notes 22, 26.

murky (even assuming Cadwalader had a duty to obey court orders in circumstances, such as here, where the President had already purportedly unilaterally authorized the suspension of habeas corpus). On May 27, 1861, after Cadwalader failed to comply with the original writ of habeas corpus to produce Merryman, Taney indicated that he would issue an attachment against Cadwalader.⁹⁸ *The attachment only ordered the Marshal to attach the body of General Cadwalader.*⁹⁹ *But Taney's attachment order did not direct Cadwalader (or Lee, the Army, the President, or anyone else) to comply with the prior writ to produce Merryman.*¹⁰⁰ At that point, the focus of the litigation shifted from the lawfulness of Merryman's incarceration to Cadwalader's purported contempt. Indeed, the courtroom drama of May 28, 1861 was about the United States Marshal's inability to serve the attachment, not the underlying merits of Cadwalader's (or the government's) position.

Apparently, the attachment was issued as a remedial order to correct Cadwalader's initial failure to produce Merryman. Cadwalader could have stopped that remedial process by complying or at least offering to comply with the original writ, or he could have opposed the attachment on the merits. What defense or defenses Cadwalader might have put forward (if any) are impossible to know because: (i) the Marshal was unable to serve the attachment the next day, May 28, 1861; (ii) federal law officers (who should have advised and represented Cadwalader) at the start of a new administration and amidst a civil war were "disorganized;"¹⁰¹ and (iii) Taney terminated the judicial proceedings the very same day¹⁰² (without granting Cadwalader a sought-after adjournment).

⁹⁸ See *Merryman*, 17 F. Cas. at 144–47.

⁹⁹ See *id.* at 146 (“[Cadwalader] has acted in disobedience to the [ex parte] writ, and I therefore direct that an attachment be at once issued against *him*, returnable before me here, at twelve o'clock tomorrow [i.e., May 28, 1861].” (emphasis added)).

¹⁰⁰ See *id.* at 146–47; Michelman, *supra* note 45, at 595 n.69 (explaining that after Cadwalader refused to produce Merryman, “Taney ruled Lincoln’s order unconstitutional and void . . . but *he did not issue any direct order for Merryman’s production or release*” (emphasis added)).

¹⁰¹ REHNQUIST, *supra* note 6, at 40–41.

¹⁰² See *supra* note 27; see also *United States Court, Important Proceedings, The Case of John Merryman, Esq.*, THE SUN, (Morning) May 28, 1861, at 1, <http://tinyurl.com/h3wehll>.

By May 29, 1861, with the termination of live, in-court judicial proceedings, the attachment became a nullity,¹⁰³ and any further compliance by Cadwalader with the original ex parte writ was not feasible.¹⁰⁴ Cadwalader's defiance—if it is properly so characterized—lasted all of *one* day—May 28, 1861—during a civil war. Is there really anything of consequence to be learned from this event? One also wonders why so many are willing to ascribe Cadwalader's one-day's noncompliance to President Lincoln?

C. Is it True that Cadwalader Sent the Marshal away from the Fort?

The United States Marshal in *Merryman*, who attempted to serve the court's attachment order on Cadwalader, reported, "I sent in my name at the outer gate [of the Fort]; the messenger returned with the reply, 'that there was no answer to my card,' and therefore, I could not serve the writ, as I was commanded. I was not permitted to enter the gate."¹⁰⁵ Neither the Marshal's affidavit, nor the standard histories of the case support any inference that Cadwalader gave the order to send the Marshal away. We do not know where Cadwalader was on the morning of Tuesday, May 28, 1861, when the Marshal attempted to serve the attachment order. We do not know who received the Marshal's card from the guards at the gate, nor do we know why that person failed to respond to the card, nor do we know why the Marshal was not admitted. Many have guessed, and undoubtedly, Cadwalader may have been involved, if not in control of these events.¹⁰⁶ But no one has put forward

¹⁰³ See Philip A. Hostak, Note, *International Union, United Mine Workers v. Bagwell: A Paradigm Shift in the Distinction Between Civil and Criminal Contempt*, 81 CORNELL L. REV. 181, 185 & n.26 (1995) ("[I]f the underlying controversy giving rise to a civil contempt action is settled or is otherwise terminated, the contempt proceeding becomes moot, and the sanctions must end." (citing *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 452 (1911) (Lamar, J.))).

¹⁰⁴ See, e.g., ROSSITER, *supra* note 2, at 23 (noting that after adjudicating *Merryman*, "Taney returned to Washington unmolested").

¹⁰⁵ *Merryman*, 17 F. Cas. at 147. See generally note 22 (collecting authority).

¹⁰⁶ See *supra* note 67 (collecting authority); see also, e.g., BURNS, *supra* note 78, at 65 ("The chief justice said *his* marshal might well have ordered a posse" (emphasis added)); ELLIS, *supra* note 47, at 413 (describing the U.S. Marshal as the "court's" marshal); PALUDAN, *supra* note 77, at 76 (describing Bonifant as "the court's marshal"); Kmiec, *supra* note 67, at 273 (noting that "Cadwalader barred the Court's officer from even entering the fort"); cf., e.g., 1 A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL.D. 240 n.1 (Benjamin R. Curtis ed., Boston, Little, Brown, and Co. 1879) (asserting that "the writ of the Chief Justice . . . was refused entrance into the fort, upon the excuse that the President had suspended the writ of *habeas corpus*"); Fisher, *supra* note 75, at 210

any document or record supporting the inference that it was Cadwalader who was responsible. Perhaps Chief Justice Taney believed Cadwalader was responsible; perhaps Taney genuinely believed that this moment was a defining Cromwellian civilian-military confrontation. But, if Taney and Taney's intellectual successors would also have us believe this, then they must proffer some evidence to support their position. Precisely what is that evidence?

D. Is it True that Cadwalader had Received Authorization from President Lincoln to Ignore or Defy the U.S. Marshal?

There are commentators who argue that Cadwalader received authorization from Lincoln to defy the United States Marshal and, by implication, to defy the courts.¹⁰⁷ These commentators point to three instances where Lincoln spoke to this subject or, at least, so they believe. They point: (i) to Lincoln's April 27, 1861 order granting military authorities discretion to suspend habeas corpus;¹⁰⁸ (ii) to a May 28, 1861 order from E.D. Townsend, Assistant Adjutant General, directing Cadwalader to hold prisoners without regard to court orders;¹⁰⁹ and (iii)

("Prison officials, acting under Lincoln's policy, refused to let Taney's marshal serve a document at the prison to release Merryman."). *See generally supra* note 23 (discussing whether the incident at the gate of the Fort was a Cromwellian civilian-military confrontation). Note how these commentators describe the U.S. Marshal as the "court's" or "Taney's" functionary. *Cf.* Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1154-55 (2009) (hypothesizing that in the context of contempt proceedings arising in connection with Executive Branch disobedience to the judiciary, a "stand-off" could arise between "judicial marshals" and "executive branch law enforcement officials"). *But see infra* note 112 (explaining that U.S. marshals are better characterized as Executive Branch functionaries, albeit whose regular duties include, among others, the enforcement of judicial orders).

¹⁰⁷ *See supra* note 68 (collecting authority).

¹⁰⁸ *See id.*; *see also, e.g., Ex parte Owens*, 258 P. 758, 787 (Crim. Ct. App. Okla.) (Doyle, P.J.) ("The commandant in response to the writ answered that the president had notified him that [the president] had suspended the writ of habeas corpus and instructed [the commandant] not to obey it."), *quashed by*, *Dancy v. Owens*, 258 P. 879 (Okla. 1927).

¹⁰⁹ *See supra* note 68 (collecting authority); *see, e.g., Andrew Hyman, Declining to Enforce Court Orders Was All in a Day's Work for Abraham Lincoln*, THE ORIGINALISM BLOG (July 1, 2015, 9:10 AM), <http://tinyurl.com/pyjfw8t> ("There is plentiful evidence that Cadwalader's refusal to comply with Taney's orders was authorized by Lincoln, even putting aside Lincoln's speech of July 4. For example, on May 28, [1861.] Cadwalader received an order from the Assistant Adjutant General at Army headquarters acknowledging the writ of habeas corpus for Merryman, and adding: 'The general-in-chief [Winfield Scott] directs me to say under authority conferred upon him by the

to Lincoln's July 4, 1861 message to Congress,¹¹⁰ which, among other subjects, addressed the issue of habeas corpus.

It must be noted at the outset that the common problem with each of these three positions is that they make little sense. Both the United States Marshal and General Cadwalader worked for President Lincoln: both were subordinate Executive Branch officers.¹¹¹ Both men held their positions at the pleasure of the President.¹¹² The Marshal was a civilian

President of the United States and fully transferred to you that you will hold in secure confinement' the prisoner John Merryman. Thus, there is no doubt that President Lincoln believed he could legally authorize his subordinates to ignore or defy judicial orders, in the *Merryman* case.”)

¹¹⁰ See *supra* note 68 (collecting authority); see, e.g., Friedman, *supra* note 68, at 1032 n.275 (“Lincoln’s instructions to ignore the order in *Ex Parte Merryman* . . . may be the most defiant . . .” (citing Lincoln’s July 4, 1861 message to Congress, which took place more than a month after *Merryman*)).

¹¹¹ See U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States . . .”); *infra* note 112 (collecting sources explaining that the President has the power to appoint and remove U.S. marshals). But see *supra* note 106 (listing sources suggesting that U.S. marshals are functionaries of the courts).

¹¹² See Act to Establish the Judicial Courts of the United States, ch. 20, § 27, 1 Stat. 73, 87 (1789) (providing “[t]hat a marshal shall be appointed in and for each district for the term of four years, but shall be removable from office at pleasure”); *United States v. Lee*, 106 U.S. 196, 223 (1882) (Miller, J.) (“Dependent as its courts are for the enforcement of their judgments upon officers appointed by the executive, and removable at his pleasure . . .”); THE FEDERALIST NO. 78, *supra* note 60, at 412 (Alexander Hamilton) (“It may truly be said [that the courts] have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”); see also Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-five Years*, 83 MINN. L. REV. 1337, 1342 (1999) (arguing “contra *United States v. Nixon*[,] [418 U.S. 683 (1974) (Burger, C.J.)], that the President of the United States must have the final say as to all matters concerning the execution of the laws of the United States by officers of the executive branch”); *id.* at 1390–97 (same). See generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008). The Judiciary Act does not expressly state who has the power to appoint and to remove marshals. However, the Act was passed on September 24, 1789, and, on that very day, President Washington sent eleven nominations for marshal to the United States Senate. See 1 S. EXEC. J., 1st Cong., 1st Sess. 28–29 (1789) (Washington, Duff Green 1828) (reproducing President Washington’s September 24, 1789 nominations for multiple positions created under the Judiciary Act); see also 4 STATES AT WAR, *supra* note 12, at 500 n.331 (explaining that the United States Marshal who attempted to serve the attachment, Washington Bonifant, was appointed to the Marshal’s office by Lincoln in 1861). Indeed, Bonifant was appointed to the Marshal’s office by Lincoln twice in 1861: first, in April 1861, as a recess appointment, and then again, after *Merryman*, with Senate confirmation. See 11 S. EXEC. J., 37th Cong., 1st Sess. 441 (July 13, 1861) (indicating prior recess appointment along with a nomination to the post); *id.* at 474–75 (indicating July 22, 1861 confirmation). Bonifant has been described as a “leader” or “founder” of the Republican

officer, and Cadwalader was a military officer. In these circumstances, if Lincoln wanted to avoid friction between the Marshal and Cadwalader, if Lincoln wanted to stop the Marshal from serving the attachment, and if Lincoln wanted to insulate Cadwalader from Taney's judicial orders, then all Lincoln had to do was direct the Marshal not to serve the attachment. Moreover, if the Marshal refused to accede to Lincoln's instructions, then Lincoln also had the additional option of removing the Marshal.

The idea that Lincoln would have knowingly engineered this purported civilian-military confrontation, between two officers responsible to him, seems fairly odd.¹¹³ Why would Lincoln have authorized Cadwalader to ignore an otherwise lawful court order, when he had open to him the much easier path of controlling or removing the officer—the United States Marshal—whose actions were necessary to give that judicial order lawful effect (through service of process)? Moreover, given that Lincoln did not use his supervisory¹¹⁴ or removal power over the Marshal to arrest the process of the courts,¹¹⁵ should not

party in Maryland. See 4 STATES AT WAR, *supra* note 12, at 500 n.331 (describing Bonifant as a “leader” of the Republican party in Maryland); WARTIME WASHINGTON: THE CIVIL WAR LETTERS OF ELIZABETH BLAIR LEE 50 n.16 (Virginia Jeans Laas ed., 1999) (characterizing Bonifant as a “founder” of the Republican party in Maryland).

¹¹³ See, e.g., *Merryman, John, of Hayfields*, in THE BIOGRAPHICAL CYCLOPEDIA OF REPRESENTATIVE MEN OF MARYLAND AND DISTRICT OF COLUMBIA 312, 313 (Baltimore, National Biographical Publishing Company 1879) (“Th[e] [Chief Justice’s] order was not executed, for the reason that the President of the United States instructed the General to resist the [M]arshal.”).

¹¹⁴ See, e.g., Presidential Letter, *supra* note 64, at 298, 313 (“And yet, let me say that, in my own discretion, I do not know whether I would have ordered the arrest of Mr. Vallandigham [sic]. While I cannot shift the responsibility from myself, I hold that, as a general rule, the commander in the field is the better judge of the necessity in any particular case. Of course I must practise [sic] a general directory and revisory power in the matter.”). The error in spelling—“Vallandingham” should be “Vallandigham”—appears to be made by Nicolay & Hay, the *Complete Works*’ editors, not by Lincoln. The same might also be said for the editors’ use of “practise” rather than “practice.” See *Abraham Lincoln to Erastus Corning and Others, [June] 1863*, AMERICAN MEMORY: THE ABRAHAM LINCOLN PAPERS AT THE LIBRARY OF CONGRESS (last visited July 30, 2015) (displaying Lincoln’s original letter), <http://tinyurl.com/nrs4ho6> (copy #1), and <http://tinyurl.com/p7oa57j> (copy #2).

¹¹⁵ See also United States *ex rel. Murphy v. Porter*, 27 F. Cas. 599 (C.C.D.C. 1861) (No. 16,074a) (Dunlop, C.J.) (describing a situation where a deputy United States marshal was instructed by other Executive Branch officials not to serve a judicial attachment order on a military officer); RANDALL, *supra* note 78, at 162–63 (discussing *Murphy*); cf. 1 LETTERS OF JOHN HAY AND EXTRACTS FROM DIARY 46, 47 (1908) (reporting diary entry of October 22, 1861). Even in *Murphy*, complex and unresolved questions remain as to the scope of precisely what authority the Executive Branch claimed to validly exercise.

these commentators, instead of asserting that Lincoln threatened the rule of law as embodied by the normal conventions of judicial process and traditional inter-branch comity, take the position that Lincoln's conduct—on this occasion—left the courts both free to exercise decisional independence, and also free to issue and serve court orders?

1. *President Lincoln's April 27, 1861 Suspension of Habeas Corpus*

Lincoln issued an order to General Scott. The order stated,

You are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of the military line which is now or which shall be used between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of *habeas corpus* for the public safety, you personally, or through the officer in command at the point at which resistance occurs, are authorized to suspend the writ.¹¹⁶

In *Murphy*, the Executive Branch arrested the process of the Circuit Court. However, an Executive Branch decision to arrest the process of the courts—without more—is not coterminous with an Executive Branch decision to oust (or, to ignore, or to defy) the courts from adjudicating the validity of the (arguably, logically prior) Executive Branch decision not to serve judicial process in a particular case. As in *Merryman*, *Murphy* left this issue unresolved.

¹¹⁶ 6 COMPLETE WORKS OF ABRAHAM LINCOLN, *supra* note 8, at 258 (reproducing Lincoln's April 27, 1861 order to General Scott delegating authority to suspend habeas between Philadelphia and Washington). *But see* Schroth et al., *supra* note 5, at 1011 ("Lincoln told General Winfield Scott . . . that the writ of habeas corpus was suspended . . ." (emphasis added)). Arguably, Lincoln gave Scott authority to suspend habeas as early as April 25, 1861. *See* 6 COMPLETE WORKS OF ABRAHAM LINCOLN, *supra* note 8, at 255, 256 (reporting Lincoln's April 25, 1861 order to General Scott). *See generally id.* at 295–96 (reproducing Lincoln's July 2, 1861 order to General Scott delegating authority to suspend habeas between New York and Washington). Professor Stone has argued that: "On April 27, to restore order in Baltimore and to enable Union forces to protect Washington, Lincoln suspended the writ of *habeas corpus* and declared martial law in Maryland." Stone, *supra* note 12, at 220; *see also* BERKIN ET AL., *supra* note 6, at 333 ("Lincoln and General Scott ordered the military occupation of Baltimore and declared martial law . . ." (bold omitted)); BURNS, *supra* note 78, at 66 (explaining that after *Merryman* was announced "Lincoln continued to impose martial law"); Fallon, *supra* note 44, at 2 ("At stake in *Merryman* was the constitutional authority of the President to declare martial law . . ."); Jan Ellen Lewis, *Defining the Nation: 1790 to 1898*, in SECURITY V. LIBERTY: CONFLICTS BETWEEN CIVIL LIBERTIES AND NATIONAL SECURITY IN AMERICAN HISTORY 117, 147–48 (Daniel Farber ed., 2008) ("[Lincoln]

Lincoln's order meant, at least, that the military had authority to arrest, seize, and detain individuals suspected of treasonous activity, and if the detained person brought judicial proceedings in regard to the arrest, etc., then the military personnel could put in a good faith defense, or otherwise plead valid authorization by the President under the Suspension Clause.¹¹⁷ Did Lincoln *also* intend that his order was a

imposed martial law in Maryland to protect troop movements . . ."); *cf.* MCPHERSON, BATTLE CRY, *supra* note 5, at 287 (noting that martial law was declared in Baltimore on May 13, 1861); Calabresi, *supra* note 2, at 1478 ("[A]t most Lincoln thought that the State of Maryland where John Merryman was arrested was in a state of martial law in the spring of 1861 . . ."); *Affairs in Maryland: Martial Law Enforced in Baltimore*, N.Y. TIMES, Apr. 25, 1861, at 1 ("A system of martial law exists in both [Washington and Baltimore], but it was not officially proclaimed."), <http://www.nytimes.com/1861/04/25/news/affairs-in-maryland-martial-law-enforced-in-baltimore.html>. See generally NEFF, *supra* note 36, at 40–44 (expounding on similarities and differences between the suspension of habeas and martial law); Saikrishna Bangalore Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337, 1370 n.241 (2015) (distinguishing martial law from the suspension of habeas corpus); Stone, *supra* note 12, at 220 n.22 (same). The basis for Professor Stone's position, i.e., that Lincoln's April 27, 1861 order "declared martial law," is obscure. Professor Fallon's position—that martial law was at issue in *Merryman*—is difficult to square with the fact that "martial law" is not expressly discussed anywhere in Taney's opinion. See *Ex parte Field*, 9 F. Cas. 1, 9 (C.C.D. Vt. 1862) (No. 4761) (Smalley, J.) (noting, with respect to *Merryman*, that "[t]he president had not then proclaimed martial law"). But *cf.* WHITE, *supra* note 4, at 31 ("[Taney] censured Lincoln for never declaring martial law . . .").

¹¹⁷ See, e.g., Marcus McArthur, *Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman* by Jonathan W. White, 3(4) J. CIVIL WAR ERA 589, 590 (Dec. 2013) stating,

While the danger of such [arbitrary] arrests [made by the military] to civilians is obvious, White explains that federal officials faced numerous civil suits toward the end of the war and into Reconstruction by civilians seeking damages for their alleged wrongful arrests. According to White, the broader significance of the *Merryman* case is that "government officials, both in their official capacity and as private citizens, needed protection from civil suits for actions they had taken while in office or the military service".

(citation omitted); see also *Ex parte Benedict*, 3 F. Cas. 159, 174 (N.D.N.Y. 1862) (No. 1292) (Hall, J.) finding,

Such a suspension may prevent the prisoner's discharge; but it leaves untouched the question of the illegality of his arrest, imprisonment, and deportation. If these are unlawful, the marshal and others engaged in these arrests are liable in damages in a *civil prosecution*; such damages to be assessed by a jury of the country. Besides this civil liability, the parties engaged in making this arrest, and carrying the prisoner out of the state, and beyond the protection of its officers and tribunals, may, perhaps, be subject to *criminal punishment*.

direction to military commanders to ignore or defy judicial orders granting habeas should the courts hear and determine that Lincoln had no authority to suspend habeas?

These two issues—authority to suspend habeas and authorization to ignore or defy judicial orders—are related, but they are not the same.¹¹⁸

Id. (emphasis added); WHITE, *supra* note 4, at 106 (“*Merryman’s* larger significance was that government officials . . . needed protection from civil suits . . .”); *cf.* MAJOR GENERAL SIR ERNEST DUNLOP SWINTON (*nom de plume* OLE LUK-OIE), *An Eddy of War, in THE GREEN CURVE AND OTHER STORIES* 213, 236 (1909), who stated,

[A] war has not taken place in England since—the Lord knows when, and our population, even the best intentioned, are so ignorant about what it really means, that our troops have been severely handicapped *Why, I have heard that during the first few days [of the invasion] the soldiers were chary of trespassing, and that it took a lot of persuading to make them enter any preserved woods* But we are learning: and now that martial law has been declared—only after a hot debate, mind you, even though the enemy was in England—people are realising what ‘War’ is.

Id. (emphasis added); Elbridge Colby, *Book Review*, 31 COLUM. L. REV. 917, 918 (1931) (reviewing CHARLES FAIRMAN, *THE LAW OF MARTIAL RULE* (1930)) (“[M]ilitary men are as uncertain as the civilians are fearful, what are the real powers under ‘martial law.’”). *But compare* FARBER, *supra* note 44, at 192 (“The law of the time did not recognize any good-faith defense to a damage action based on an illegal official act.”), with James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1928 (2010) (explaining that during the antebellum period “Congress provided relatively routine indemnification for officers acting in good faith [and within the scope of their agency relationship, contract, or instructions]”).

¹¹⁸ See *Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.), stating,

I understand that the [P]resident *not only* claims the right to suspend the writ of habeas corpus himself, at his discretion, *but* to delegate that discretionary power to a military officer, and *to leave it to him to determine whether he will or will not obey judicial process that may be served upon him.*

Id. (emphasis added)); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 130–31 (1866) (Davis, J.) (“The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.”); Richard A. Posner, *supra* note 44, § 7, p. 10 (“Farber slides too easily from the question of whether Lincoln was authorized to suspend habeas corpus to whether he was authorized to flout Chief Justice Roger Taney’s order granting habeas corpus, as he

Commentators who point to the President's order as evidence that Lincoln authorized Cadwalader to defy the courts do not meaningfully grapple with this ambiguous language. Moreover, in his response, Cadwalader presented a defense on the merits; he never hinted that the President's suspension order stripped the courts of jurisdiction to hear habeas actions or that military officers were not obliged to obey the courts. Indeed, Cadwalader sought an adjournment in order to get further guidance as to his defense.¹¹⁹ Why would Cadwalader have told Taney that he would seek further guidance, and why seek further guidance, if he already believed Lincoln's order stripped the courts of the

did."); *see also supra* note 117 (quoting *Ex parte Benedict*); *cf.* Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74, 90 (1861) (Bates, A.G.),

If by the phrase *the suspension of the privilege of the writ of habeas corpus*, we must understand a repeal of all power to issue the writ, then I freely admit that none but Congress can do it. *But* if we are at liberty to understand the phrase to mean, that, in case of a great and dangerous rebellion . . . the public safety requires the arrest and confinement of persons implicated in that rebellion, I as freely declare the opinion, that the President has lawful power to *suspend the privilege* of persons arrested under such circumstances.

(second emphasis added)); REHNQUIST, *supra* note 6, at 37 ("But *habeas corpus* does not speak at all to the sort of justifications that a court will deem sufficient to remand the prisoner to custody, rather than to order him discharged."). *But see* STEPHANIE COOPER BLUM, THE NECESSARY EVIL OF PREVENTATIVE DETENTION IN THE WAR ON TERROR: A PLAN FOR A MORE MODERATE AND SUSTAINABLE SOLUTION 92 (2008) ("By eliminating the writ, detainees could not challenge the legality of their respective detentions."); DAVID HERBERT DONALD, LINCOLN 299 (1995) (explaining that Lincoln's April 27, 1861 order meant that "[s]uch persons [who were arrested] could be detained indefinitely without judicial hearing and without indictment, and the arresting officer was not obliged to release them when a judge issued a writ of habeas corpus"); EDELSON, *supra* note 12, at 34 ("Scott was authorized to arrest and indefinitely detain people he deemed dangerous without permitting them access to a court to challenge their detention."); *but cf.* Stone, *supra* note 12, at 220 n.22 ("[A]n individual held unlawfully can file a petition for a writ of *habeas corpus* asking a court to determine whether the detention is lawful. Suspension of the writ of *habeas corpus* disables courts from intervening in this process."); Frank J. Williams, *Abraham Lincoln and Civil Liberties: Then and Now*, in LINCOLN REVISITED: NEW INSIGHTS FROM THE LINCOLN FORUM 251, 254 (John Y. Simon et al. eds., 2007) ("With suspension of the writ, this immediate judicial review [i.e., habeas corpus] becomes unavailable."). Chief Justice Taney and Judge Richard Posner are entirely correct to distinguish the two issues: lawful authority to suspend habeas corpus, and lawful authority to exclude judicial review in regard to habeas corpus after such a purported suspension. Still, how Chief Justice Taney concluded that Lincoln authorized anyone to defy the courts is unexplained. Likewise, how Judge Posner concluded that Lincoln disobeyed, much less "flout[ed]," any order issued by Taney is unclear.

¹¹⁹ *See Merryman*, 17 F. Cas. at 146.

power to lawfully compel obedience in habeas actions? Similarly, Taney wrote, “It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions [from the President], and exceeded the authority intended to be given him.”¹²⁰ Thus, it appears that even Taney was somewhat unsure what the intended scope of Lincoln’s order was.

One is faced with two possible interpretations of Lincoln’s order. The first interpretation gives the order a limited scope, going to initial arrest and extending a defense to military officers carrying out those arrests. The second interpretation is far more ambitious, and suggests that Lincoln intended to exclude judicial review of Executive Branch determinations in the habeas context. One would think that any adoption of the second view would require a reasonably strong basis in fact, but Lincoln’s statement is ambiguous. It is not clearly supported by either Cadwalader’s conduct or Taney’s opinion. As a matter of judicial construction, when faced with an ambiguous Executive Branch order, one which would exclude the courts and another which would not, the latter interpretation should be favored. For example, in *Ex parte Beck*, the court explained,

Respondent [the United States] suggests, somewhat significantly, the court is bound to say, that his superior officers order him to hold petitioner, and that to disobey may subject him to punishment, even that of death; that, if this court grants habeas corpus ordering him to release petitioner, respondent will be very embarrassed, in that obedience to either will be disobedience to the other. *It is not understood that the orders to respondent are other than general, to imprison all deserters.* It is not understood any order to respondent even hints to him to disobey a decree of any court of the United States—a decree that within its jurisdiction is the law of the land, therein to be held inviolate, to be executed and obeyed by military and civilians alike, so long as it is unreversed.¹²¹

¹²⁰ *Id.* at 153; *see, e.g.*, NEFF, *supra* note 36, at 36 (“Perhaps, Taney speculated, General Cadwalader had exceeded his instructions, thereby relieving the President of any personal blame.”). *But see supra* note 118 (quoting Chief Justice Taney’s *Merryman* opinion, which laid the blame on Lincoln).

¹²¹ *Ex Parte Beck*, 245 F. 967, 972 (D. Mont. 1917) (Bourquin, J.) (emphasis added); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A*

The same reasoning ought to apply to *Merryman*. Because Lincoln's order does not squarely address the issue of whether he intended to exclude the courts, it is unreasonable to suggest he intended to do so—particularly where contemporaneous coordinate evidence does not clearly support the conclusion that he attempted to do so.

2. *Assistant Adjutant General E.D. Townsend's May 28, 1861 Order*

Townsend, writing from Army Headquarters in Washington, sent Cadwalader an order that stated,

The [G]eneral-in-[C]hief [Winfield Scott] directs me to say under authority conferred upon him by the President of the United States and fully transferred to you that you will hold in secure confinement all persons implicated in treasonable practices unless you should become satisfied that the arrest in any particular case was made without sufficient evidence of guilt.

In returns to writs of habeas corpus by whomsoever issued you will most respectfully decline for the time to produce the prisoners but will say that when the present unhappy difficulties are at an end you will duly respond to the writs in question.¹²²

Constitutional History, 121 HARV. L. REV. 941, 999 (2008) (“At the limit, [Lincoln’s] suspension orders even supplied a basis for refusing to produce detainees when ordered to do so by courts.” (emphasis added)); see also *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (Stevens, J.) (“We begin with the strong presumption that Congress intends judicial review of administrative action.”). See generally Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014); Phillip Shaw Paludan, “Dictator Lincoln”: *Surveying Lincoln and the Constitution*, 21(1) OAH MAG. OF HIST. 8, 10 (Jan. 2007) (“With all this discretion what strikes modern historians is how respectful Lincoln was of constitutional limitations on the extent of his power.”).

¹²² Letter from E.D. Townsend, Assistant Adjutant General, Headquarters of the Army, Washington, to Major General G. Cadwalader (May 28, 1861), in 1 (series 2) THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 576–77 (Wash., GPO 1883), <http://tinyurl.com/j9kl6sm>. There is an earlier May 16, 1861 letter from Townsend to Cadwalader. Townsend states,

I have already by the direction of the [G]eneral-in-[C]hief addressed to you a letter and a telegram of yesterday's date and have received your acknowledgment of the letter. Herewith you will receive a power to arrest persons under certain circumstances and to hold them

This order was dated May 28, 1861.¹²³ This was the second and final day on which public hearings were conducted in *Merryman*, and also the day on which the Marshal unsuccessfully sought to serve the attachment order on Cadwalader at the Fort sometime prior to noon.¹²⁴

No one has put forward any document or record establishing that Cadwalader was in receipt of Townsend's May 28, 1861 order prior to the time the Marshal had been sent away from the Fort. Townsend's order may have been drafted after noon, or the order may only have arrived in Cadwalader's hands (assuming it ever arrived) after the Marshal had already left the Fort. Indeed, telegraph lines to Washington had been cut.¹²⁵ Absent further evidence, there is no good reason to suggest that Cadwalader, or anyone else, relied on this order in regard to any decision to send the Marshal away from the Fort. Indeed, there is some good reason to believe that this order was not in Cadwalader's hands at the time the Marshal was sent away from the Fort. The order expressly directed Cadwalader to "most respectfully decline for the time to produce the prisoners" and also to "say that when the present unhappy difficulties are at an end you will duly respond to the writs in question." Here, the Marshal was sent away from the Fort without any answer; this

prisoners though they should be demanded by writs of habeas corpus. This is a high and delicate trust and as you cannot fail to perceive to be executed with judgment and discretion. Nevertheless in times of civil strife errors if any should be on the side of safety to the country. *This is the language of the general-in-chief himself*, who desires an early report from you on the subject of the number of troops deemed necessary for your department.

Id. at 571–72 (emphasis added) (editor's mark omitted). Townsend's order originates with General Scott, not with Lincoln.

¹²³ See Letter from E.D. Townsend, Assistant Adjutant General, Headquarters of the Army, Washington, to Major General G. Cadwalader, *supra* note 122, at 576 (quoting from a letter dated May 28, 1861).

¹²⁴ See *supra* notes 21–26 (collecting sources explaining the timing of these events).

¹²⁵ See MCGINTY, *supra* note 4, at 67 ("Merryman ordered his men to cut the telegraph lines . . ."); REHNQUIST, *supra* note 6, at 22 ("Not only were no [U.S.] troops arriving [in Washington], but the telegraph lines had been cut and mail deliveries from the north were irregular."); cf. Stone, *supra* note 12, at 220 ("Union soldiers seized John Merryman, a cavalryman who had allegedly burned bridges and destroyed telephone [sic] wires during the April riots."). Our records of this time are incomplete. It is true that telegraph lines to Washington had been cut, but not every such line may have been cut. Telegraph lines between Washington and Baltimore (or the Fort itself) may have been intact on May 28, 1861; likewise, some telegraph lines which had been cut by Merryman and others may have been repaired by that date.

(in)action¹²⁶ by the military authorities at the Fort is not consistent with Townsend's order.

The more important point is: there is no reasonable way to connect President Lincoln to the order Townsend issued on May 28, 1861, and this is the core issue. Lincoln gave the Army discretion to suspend habeas, but he did not clarify if he intended to deny such detainees the opportunity to judicially contest the legality of the suspension itself. It is hardly surprising that—faced with an emergency—the Army interpreted Lincoln's ambiguous order in a maximalist fashion, but that tells us little about what Lincoln intended or meant to achieve by giving the Army discretion to suspend habeas. Simply put, what a military subordinate (i.e., Townsend) thinks or believes, even when acting under higher military authority (i.e., General Scott), as here, does not establish what President Lincoln intended or meant.¹²⁷ Of course, as a political matter, Lincoln remained responsible for what his Executive Branch

¹²⁶ Inaction is not best authority, but it may count as some authority. *See, e.g.*, Paulsen, *Lincoln and Judicial Authority*, *supra* note 44, at 1290 (“[Lincoln’s] position, as expressed by his (in)action, was that the President was not bound to obey and enforce judicial decrees that he believed were incorrect . . .”); *cf., e.g.*, Aaron-Andrew P. Bruhl, Response, *Against Mix-and-Match Lawmaking*, 16 CORNELL J.L. & PUB. POL’Y 349, 362 (2007) (“Absence of evidence is sometimes evidence . . . notably when the evidence is expected.”).

¹²⁷ *See, e.g.*, *Ex parte Field*, 9 F. Cas. 1, 5 (C.C.D. Vt. 1862) (No. 4761) (Smalley, J.) (ascribing an order directing the United States Marshal to resist court orders to the “war department,” and not to the President, and further concluding that “[a] more flagrant disregard of the [C]onstitution of the United States can hardly be conceived”); *Ex parte Benedict*, 3 F. Cas. 159, 161–62 (N.D.N.Y. 1862) (No. 1292) (Hall, J.) states,

My personal confidence in the integrity, patriotism, and good sense of the [P]resident, as well as the respect due to the high office he holds, compels me to *require the most conclusive evidence upon the point* before adopting the conclusion that he has ever deliberately sanctioned so palpable a violation of the constitutional rights of the citizens of the loyal states *as the order of the war department*, thus construed, would justify and require.

Id. (emphasis added). Notice that both Judge Smalley and Judge Hall construe the disputed orders as war department orders, as opposed to assuming—absent on-point evidence—that the orders were directly authorized by the President. *See also infra* note 129 (distinguishing the President’s legal and moral responsibility in regard to disputed conduct by subordinate Executive Branch officers from the administration’s responsibility); *cf. supra* note 60 (discussing the President’s purported legal and moral duty to have sought an appeal in *Merryman*).

subordinates did.¹²⁸ But that abstract political responsibility under the Take Care Clause¹²⁹ is worlds apart from establishing that Lincoln actually, specifically, and directly authorized his subordinates, through the military chain of command, to ignore or defy court orders.¹³⁰

¹²⁸ Compare WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 38–39 (1998) (“The *administration* continued to confine Merryman at Fort McHenry . . .” (emphasis added)), and Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 117 (1998) (noting that “the Lincoln *administration* had defied Chief Justice Taney in *Ex parte Merryman*” (emphasis added)), with Judge Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 1605, 1614 (2004) (“Although the court issued the writ, in a true show of presidential hubris Lincoln simply ignored the decision, keeping Merryman detained in Fort McHenry until he was subsequently indicted for conspiracy to commit treason.” (citing REHNQUIST, *supra* at 38–39)), Captain Robert G. Bracknell, *All The Laws But One: Civil Liberties in Wartime*, 47 NAVAL L. REV. 208, 213 & n.19 (2000) (reviewing REHNQUIST, *supra*) (“Lincoln ordered Merryman’s continued imprisonment at Fort McHenry.” (citing REHNQUIST, *supra* at 38)), and Eric L. Muller, *All The Themes But One*, 66 U. CHI. L. REV. 1395, 1399 (1999) (reviewing REHNQUIST, *supra*) (“Rehnquist notes that Lincoln ignored Taney’s order and [he] refused to release Merryman . . .” (citing REHNQUIST, *supra* at 38)). Notice how Chief Justice Rehnquist diffuses responsibility to the “administration,” but the reviewers argue that Rehnquist laid responsibility for Merryman’s continued detention directly at Lincoln’s door. See also *supra* note 127 (distinguishing the “war department” from the President, and also expounding on the evidentiary standard necessary before finding the President responsible for the war department’s conduct).

¹²⁹ See, e.g., U.S. CONST. art. II, § 3 (Take Care Clause); BRUFF, *supra* note 12, at 135 (“When the military refused to deliver up Merryman, the frustrated Taney sent the record to Lincoln, who bore ultimate responsibility for the refusal.”); *supra* note 114 (discussing presidential supervisory authority). If Professor Bruff meant only that Lincoln was politically responsible for his military subordinates, as the President is responsible for the conduct of all his subordinates, such a claim is both obviously true and largely unimportant. But if, instead, Professor Bruff meant that Lincoln was legally or morally responsible for Cadwalader’s failure to comply with Taney’s *ex parte* order or subsequent opinion, or that Lincoln specifically or directly authorized Cadwalader’s noncompliance, then among other things, Bruff would have to make both a factual and a legal showing. Bruff would have to show that Lincoln had actual knowledge of Taney’s order prior to the end of the litigation, or Bruff would have to show that Taney’s *ex parte* order or attachment had continuing legal effect after the close of litigation, or Bruff would have to show that Lincoln’s orders were intended to preclude or, fairly construed, precluded meaningful (if not all) judicial review in the habeas context.

¹³⁰ But see, e.g., Hutchinson, *supra* note 5, at 291 (“Notwithstanding Taney’s opinion, the military commander at Ft. McHenry, acting under the commander-in-chief’s orders, declined to produce Merryman. Thus, Abraham Lincoln defied a lawful order of the Chief Justice of the United States.” (emphasis added)). Even assuming that the Chief Justice was acting here for a court with jurisdiction, a matter actively contested to this day, there is no good reason to ascribe Cadwalader’s purported lawlessness to Lincoln unless there is some showing that Lincoln’s orders were intended to authorize or, fairly construed, authorized Cadwalader to ignore or defy court orders. Where in the extant literature is this evidence put forward?

3. *President Lincoln's July 4, 1861 Message*

In his July 4, 1861 message to Congress, Lincoln stated,

Soon after the first call for militia, it was considered a duty to authorize the commanding general in proper cases, according to his discretion, to suspend the privilege of the writ of *habeas corpus*, or, in other words, to arrest and detain, without resort to the ordinary processes and forms of law, such individuals as he might deem dangerous to the public safety.¹³¹

¹³¹ 6 COMPLETE WORKS OF ABRAHAM LINCOLN, *supra* note 8, at 297, 308–09 (reproducing Lincoln's July 4, 1861 message to Congress in special session). Because Lincoln's July 4, 1861 message post-dated Cadwalader's conduct, it makes little sense to suggest that Cadwalader relied upon Lincoln's message. For the same reason, it makes little sense to suggest that Cadwalader actually relied upon federal statutes which post-dated *Merryman* proceedings. *See, e.g.*, Habeas Corpus Suspension Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 (granting, subject to limitations, the President power to suspend habeas corpus); Act of Aug. 6, 1861, ch. 63, 12 Stat. 326 (ratifying, after the fact, prior presidential actions). A general discussion of the scope of Congress' post-*Merryman* statutes relating to habeas is beyond the scope of this Article. The literature on this subject is quite uneven. *Compare, e.g.*, CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 230 (1948) ("Congress, faced by a *fait accompli* that was in its nature irrevocable [in respect to President Lincoln and his administration's pre-July 4, 1861 actions], registered approval of 'all the acts, proclamations, and orders of the President respecting the [A]rmy and [N]avy of the United States and calling out or relating to the militia or volunteers from the United States' in an act of August 6, 1861."), with Nasser Hussain & Austin Sarat, Introduction, *Responding to Government Lawlessness: What Does the Rule of Law Require*, in WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION 1, 15 (Austin Sarat & Nasser Hussain eds., 2010) ("Congress, faced with a *fait accompli*, could *only* register its retroactive approval of the proclamations and orders of the president." (citing ROSSITER, *supra*) (emphasis added)). Hussain and Sarat's use of "only" seems woefully unsupported: congressional silence was also a possibility. Likewise, Taney could have issued an order mandating *Merryman*'s release; Taney chose not to do so. *See also* Vladeck, *supra* note 46, at 391 (characterizing Taney's *Merryman* opinion as "infamous"); *cf.* Stephen I. Vladeck, *Justice Jackson, the Memory of Internment, and the Rule of Law after the Bush Administration*, in WHEN GOVERNMENTS BREAK THE LAW, *supra* at 183, 193 & n.65 ("Even if it [the Supreme Court] lacked the physical force to end the abuse [by the President in relation to the exercise of purported war powers], its declaration at least would absolve loyal people from the legal or moral duty of obedience to its decree." (quoting Justice Jackson's draft opinion in *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Jackson, J., dissenting))); Ingrid Brunk Wuerth, *International Law as Interpretive Norm*, in PROCEEDINGS OF THE 99TH ANNUAL MEETING AMERICAN SOCIETY OF INTERNATIONAL LAW 192, 195 (2005) ("Even if a court's decision is ignored by the President, it serves a valuable function by forcing him to justify his actions politically in

It is difficult to understand how Lincoln's message to Congress authorized (or, even functionally authorized) Cadwalader's ignoring or defying the courts in relation to *Merryman* proceedings. First, responsible civilian officers in the American system of government do not customarily find, seek, or justify their official actions based on political speeches, communications, or messages. *A fortiori*, Cadwalader—an experienced military officer during an actual rebellion—would not have relied on Lincoln's message here, nor would he have relied on any other such political communication.

Second, *Merryman* judicial proceedings in open court ended on Tuesday, May 28, 1861, although the formal opinion was not filed until Saturday, June 1, 1861.¹³² Lincoln's July 4, 1861 message to Congress post-dated the *Merryman* opinion by more than a month.¹³³ So, in fact, Cadwalader could not have relied on Lincoln's message to Congress during the actual litigation. At best, Lincoln's message might have ratified Cadwalader's conduct after the fact, assuming Lincoln spoke with the requisite degree of clarity in regard to the precise issue.

But Lincoln did not speak with the requisite degree of clarity. Lincoln's message only argues that the President had the power to suspend habeas corpus and to arrest and detain persons without use of "ordinary" judicial processes. Lincoln does not clarify whether he also intended for subordinate Executive Branch officers to ignore or defy courts, should the courts decide that the suspension itself was unconstitutional. Like his prior orders to General Scott, Lincoln's message to Congress lacked the requisite degree of clarity with respect to the core issue which most interests us. Simply put, we do not know what Lincoln intended, what he meant, how he was understood by actors at the time, or how a reasonable person at the time would have understood him. At best, we can make educated guesses, but in doing so, we veer from established fact and history into myth-making.

the face of a judicial decision to the contrary."). *But see* ROBERT COVER, NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 162 n.165 (Martha Minow et al. eds., 1993) (characterizing Taney's "insistence upon jurisdiction" in *Merryman* as "courageous"); *id.* at 161 (analogizing "Taney's resistance to Lincoln" to "Lord Coke's resistance to King James"); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 189, 211 (1945) (characterizing Taney's actions in *Merryman* as "heroic").

¹³² See *supra* notes 26–28 (collecting sources explaining the dates of these two events).

¹³³ Compare *supra* note 28 (noting June 1, 1861 date on which the *Merryman* opinion was filed with the Circuit Court for the District of Maryland), with *supra* note 131 (noting July 4, 1861 date for Lincoln's message to Congress).

VII. Conclusion

Lest there be any confusion . . . some have argued that the President—in certain circumstances—has an independent power to interpret the Constitution, and a concomitant power to ignore or defy court orders if the President comes to a good faith conclusion that the courts have erred.¹³⁴ This Article has *not* opined on the correctness of

¹³⁴ See, e.g., Paulsen, *Lincoln and Judicial Authority*, *supra* note 44, at 1290, stating,

Lincoln's position was not, and could not be, limited to the stance that the President could refuse to implement judicial decisions in cases of "clear" judicial error, or "clear" disregard for the Constitution, or of "atrocious" decisions, in legal or moral terms. His position, as expressed by his (in)action, was that the President was not bound to obey and enforce judicial decrees that he believed were incorrect, whenever circumstances suggested complying with the decision would be in some meaningful way harmful to important national interests.

Id.; Paulsen, *The Merryman Power*, *supra* note 11 *passim*; see also, e.g., Calabresi, *supra* note 44, at 1434–35 ("The President is obligated to execute all court judgments absent a clear mistake, even those that concern the scope of his constitutionally rooted executive privilege."). Absent a statute clearly mandating that the President enforce court orders, the President has no duty to execute court judgments, i.e., no duty beyond the abstract duty imposed by the Constitution's Take Care Clause to supervise his Executive Branch subordinates. See U.S. CONST. art. II, § 3; *Merryman*, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) ("[The President] is *not* authorized to execute the[] [laws] himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution . . ." (emphasis added)); see also *Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982) (Powell, J.) (requiring an "explicit" statement from Congress before applying statute to President); Memorandum from William H. Rehnquist, Asst. Att'y Gen., for the Honorable Egil Krogh, Staff Assistant to the Counsel to the President, Office of Legal Counsel, Re: Closing of Government Offices in Memory of Former President Eisenhower 3 (Apr. 1, 1969) (on file with author) ("[S]tatutes which refer to 'officers' or 'officials' of the United States are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive."). Given the truly enormous scope of the Executive Branch, particularly during war time, and the many competing demands on the President's time, his responsibility to control any one of his many subordinates must be quite attenuated. Generally, the President's war-time duty to control subordinates under the Take Care Clause is notional, or aspirational, and only subject to control via regular elections and impeachment, i.e., political controls. There may be some limited and extreme cases where a war-time President's duty to control subordinates under the Take Care Clause is properly subject to judicial oversight, e.g., knowingly accepting an actual bribe in regard to official duties from a foreign government and other clearly established bad faith, knowingly violating an established legal duty, or asserting a regal power to suspend the law. Cf. David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 173 (2002) ("[T]he delegates . . . stripped [the President] of the

this departmentalist view. This view may be the best or the correct understanding of the original public meaning of the Constitution, or it may not.

Instead, this Article makes the more limited claim that *Merryman* and what we currently know about Cadwalader's and Lincoln's actions in connection with the *Merryman* litigation, what preceded it, and its aftermath—all are too ambiguous to lend support to a strong departmentalist view of the Constitution. It may be that there is support for a *Merryman* power,¹³⁵ but wherever that support may be, it is not to be had in *Ex parte Merryman*.

That said, Civil War documents may be newly unearthed or rediscovered. If tomorrow a military record were discovered establishing that Cadwalader gave the command to turn the United States Marshal away from Fort McHenry and that he gave that command after having received Townsend's order, there would be no reason to be surprised. Alternatively, if tomorrow a military record establishing just the opposite were discovered, there would be no reason to be surprised either. Likewise, if tomorrow a letter or other document were found from Lincoln disavowing any intent to defy judicial orders in the habeas

monarch's dispensing and suspending powers, powers which were utterly discordant with the president's duties under the Take Care Clause."); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63(1 & 2) LAW & CONTEMP. PROBS. 7, 16 (Winter/Spring 2000) ("Its history and purpose confirm that the Take Care Clause denies the President any dispensing or suspending power . . ."); Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 694 (1989) ("The Framers were well aware of the abuse of regal authority and at the Constitutional Convention [they] expressly rejected any presidential power to suspend acts of Congress, binding the President instead to obedience with the [Take Care] Clause."). However, if the President is an actual party in a litigation, then additional or different considerations may apply depending on the circumstances. There is nothing simple about these questions, which touch on issues relating to political obedience at the root of our (and indeed of any) legal system. See generally *supra* note 86. Still, there is no good reason to conflate, on the one hand, the President's limited aspirational duty to supervise his Executive Branch subordinates who have direct statutory responsibility to enforce court orders against *third parties*, with, on the other hand, the President's concrete personal duty to obey court orders when he is an actual named party—either in an official capacity or in an individual capacity—in litigation. Cf. *Merryman*, 17 F. Cas. at 153 ("It will then remain for [the President], in fulfilment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced." (quoting Take Care Clause)).

¹³⁵ See Paulsen, *The Merryman Power*, *supra* note 11 *passim*.

context, it should not be a cause for surprise. And, if tomorrow a letter or other document were found from Lincoln robustly authorizing just such defiance,¹³⁶ there would be no cause for surprise either.

The historical record we have today lacks the requisite clarity necessary to reach a considered judgment regarding what Lincoln intended, and how he was understood by his subordinates and the wider public when he gave the Army discretion to suspend habeas corpus. One reason the record may lack such clarity is that, during the *Merryman* litigation and in its immediate aftermath, President Lincoln might never have given this specific legal question any thought at all.¹³⁷ Of course, the other reason we lack clarity is that Chief Justice Taney never ordered Lincoln, or anyone else, to release John Merryman.

¹³⁶ When President Lincoln wished to break with constitutional norms and expectations, he did so openly. See, e.g., BANKS & DYCUS, *supra* note 50, at 117 (explaining that in *Merryman*, “[Lincoln] acted openly, unlike some of his successors, and he stood ready to suffer the political consequences”). For example, Lincoln once directed a U.S. Treasury official to withhold an Article III judge’s pay. Compare, e.g., U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts . . . shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.”), with Letter from William H. Seward, Secretary of State, to Elisha Whittlesey, Esq., First Comptroller of the Treasury (Oct. 21, 1861), in 2 (series 2) THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 1022, 1022 (Wash., GPO 1897) (reproducing Seward’s directive to Whittlesey, per Lincoln’s instructions, that Judge William M. Merrick’s salary should not be paid). At this time, Merrick was suspected of treason. See *id.* at 1021–23 (recording Merrick-related correspondence). See generally Jonathan W. White, ‘Sweltering with Treason’: *The Civil War Trials of William Matthew Merrick*, 39(2) PROLOGUE 26 (Summer 2007).

¹³⁷ Cf. REHNQUIST, *supra* note 6, at 48–49 (discussing *Murphy v. Porter*). *Murphy v. Porter* concluded on October 31, 1861: this was some five months after Taney had filed his *Ex parte Merryman* opinion. See *supra* notes 1, 27–28, 115, and accompanying text.

**PROPOSING A NEW STRATEGY FOR
ARMY ETHICS TRAINING**

MAJOR JENIFFER G. H. COX*

I felt that the only remaining great decision to be faced before D-Day was that of fixing, definitely, the day and hour of the assault. However, the old question of the wisdom of the airborne operation into the Cherbourg peninsula was not yet fully settled It would be difficult to conceive of a more soul racking problem. If my technical expert was correct, then the planned operation was worse than stubborn folly, because even at the enormous cost predicted we could not gain the principal object of the drop To protect him in case his advice was disregarded, I instructed the air commander to put his recommendations in a letter and informed him he would have my answer within a few hours I went to my tent alone and sat down to think . . . I realized, of course, that if I deliberately disregarded the advice of my technical expert . . . and his predictions should prove accurate, then I would carry to my grave the unbearable burden of a conscience justly accusing me of the stupid, blind sacrifice of thousands of the flower of our youth.¹

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I. Introduction

Battlefields demand decisions; decisions without complete information, decisions without time to deliberate, and decisions without the opportunity to discuss and debate the “right” course of action. While battlefields demand decisions, the Army demands that decisions be ethical, and in-line with Army Values.² The decision-maker must often feel his way forward absent a clear picture of the ethical terrain ahead, relying only on experience and the training the Army provides.³ Too often, Army training fails decision-makers by not showing them how to make decisions when conflicts arise between the values they have been taught, and the situation on the ground. They may not even recognize the ethical dimensions of their decisions. The Army must train decision-makers to make decisions by recognizing and applying values and rules.

Ethics is a broad category of study encompassing overarching moral principles and standards of conduct.⁴ This article discusses both facets. For clarity, the term “values” will be used to reference moral principles, and the term “rules” will be used to reference standards of conduct.⁵ “Ethical decision-making” refers to the use of values and rules to make decisions. Ethics training can be divided into two categories, knowledge-based training and application-based training. Knowledge-based training

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¹ DWIGHT D. EISENHOWER, CRUSADE IN EUROPE 246–47 (1948).

² U.S. DEP’T OF ARMY, REG 600-100, ARMY LEADERSHIP para. 1-4 (8 Mar. 2007) [hereinafter AR 600-100].

³ *Id.* para. 1-4(c).

⁴ *Ethics Definition*, OXFORD DICT., http://www.oxforddictionaries.com/us/definition/american_english/ethics?q=ethicist#ethics__7 (last visited Aug. 1, 2016) (defining ethics as “[m]oral principles that govern a person’s or group’s behavior” or “[t]he moral correctness of specified conduct”).

⁵ U.S. GOV’T ACCOUNTABILITY OFF., GAO 15-711, MILITARY PERSONNEL: ADDITIONAL STEPS ARE NEEDED TO STRENGTHEN DOD’S OVERSIGHT OF ETHICS AND PROFESSIONALISM ISSUES (Sept. 2015) [hereinafter GAO Report on Military Ethics] (distinguishing between compliance-based and values-based ethics programs).

focuses on teaching values and rules.⁶ Application-based training focuses on teaching individuals to apply their knowledge of values and rules.⁷

Currently, the Army emphasizes knowledge-based training for rules and values.⁸ Soldiers receive annual refresher training on the rules.⁹ Soldiers may receive some training on values, and may even receive some training on the application of values to specific situations.¹⁰ However, the Army places little emphasis specifically on ethical decision-making training.¹¹ Failure to emphasize ethical decision-making creates an application gap when decision-makers encounter complex situations where values conflict with the rules or when one value conflicts with another.

Knowledge-based training alone does not provide decision-makers, with the skills necessary to make ethical decisions in complex or morally ambiguous situations.¹² Soldiers receive training on what choice is the

⁶ Leslie E. Sekerka, ETHICS TRAINING IN ACTION: AN EXAMINATION OF ISSUES TECHNIQUES, AND DEVELOPMENT 317 (2013); Sscott, *Knowledge based curriculum vs skills based curriculum*, TARGET MAPS (MAY 15, 2015), <http://targetmaps.co.uk/knowledge-based-curriculum-vs-skills-based-curriculum/>. “Knowledge based learning . . . aims to build upon the knowledge that the pupil already has.” *Id.*

⁷ Sscott, *supra* note 6. “Skills based learning centers around developing and applying specific skills that can then be used to obtain the required knowledge.” *Id.* This article uses the term application-based, rather than skills-based, but both refer to the same technique.

⁸ U.S. DEP’T OF ARMY, REG 350-1, ARMY TRAINING AND LEADER DEVELOPMENT table G-1 (RAR 4 Aug. 2011) [hereinafter AR 350-1] (containing a mandatory training matrix).

⁹ *Id.* para. G-18 (discussing ethics and laws of war).

¹⁰ AR 600-100, *supra* note 2, para. 1-5(a); *see also* U.S. DEP’T OF ARMY, REG 165-1, ARMY CHAPLAIN CORPS ACTIVITIES para. 9-10 (23 June 2015) [hereinafter AR 165-1]. “The commander uses [Moral Leadership Training] to promote unit readiness, good order and discipline, warrior ethos, spiritual fitness, positive moral choices and[s]oldier and [f]amily care.” *Id.* The Army vests the determination of what should be included in the moral leadership training program on the Commander. *Id.*

¹¹ Robert Roetzel, *The Need for Discretion in Resilient Soldiering*, MIL REV. Sept. 2010, at 80, 83 (arguing that achieving the capacity for discretionary judgment requires intentional development). Select Army institutional training programs cover decision-making, but they are not specifically targeted at teaching ethical decision-making. For examples, *see* AR 350-1 *supra* note 8 at para. 3-36 (Warrant Officer Intermediate Level Education) and para. 3-46 (describing General Officer Training professional development programs).

¹² Amber Levanson Seligson & Laurie Choi, *Critical Elements of an Organizational Ethical Culture*, ETHICS RESOURCE CENT. 3 (2006), <http://crawfordcpas.com/critical-elements.df> (telling employees what to do is less successful than addressing employee behaviors influencing the ethical culture of the organization).

right choice, and what actions violate the rules.¹³ Knowledge-based training does not teach why decisions are the right choice or how to make decisions that comply with the rules and fit within the Army's organizational values.¹⁴ Specific training on ethical decision-making throughout an Army career will influence crucial individual actions, helping to achieve overall mission-accomplishment.¹⁵ Individual actions require decision-makers to have the acumen that comes from developing ethical decision-making skills and relying on those skills to make ethical decisions.¹⁶ "Such moral reasoning involves more than an understanding of fundamental values. Values are indeed essential building blocks for ethical reasoning, but a [s]oldier who is capable of discretion must also learn how to apply values within a disciplined framework of ethical analysis."¹⁷ The Army's current ethics training paradigm lacks clear focus and emphasis on ethical decision-making.

Ethical decision-making is an essential part of a successful ethics training program and must be emphasized in the Army's training regimen. In Section I, this article explains the application gap and proposes a revised strategy for Army ethics training to develop decision-makers' ability to make ethical decisions in complex or morally ambiguous situations. It proposes training decision-makers to recognize and analyze ethical dilemmas using a progressive,¹⁸ reflective,¹⁹ integrated,²⁰ comprehensive,²¹ and experiential²² (PRICE) strategy to enhance ethical decision-making skills. Implementation of this strategy requires a qualitative shift in the way ethics training is presented, not a quantitative increase in the number of hours spent on ethics training.

Section II describes the current Army ethics training paradigm. It explains the limits of knowledge-based values and rules training. Section III highlights one situation exemplifying the need for application-based

¹³ Roetzel, *supra* note 11, at 84.

¹⁴ *Id.* at 81.

¹⁵ U.S. DEP'T OF ARMY, DOCTRINE REF. PUB 7-0, TRAINING UNITS AND DEVELOPING LEADERS para. 1-6 (Aug. 2012) [hereinafter ADRP 7-0]. "Training and education prepare individuals to perform assigned tasks to standard, accomplish their mission and duties, and survive on the battlefield." *Id.*

¹⁶ Roetzel, *supra* note 11, at 81.

¹⁷ *Id.*

¹⁸ See *infra* Part V (proposing the PRICE strategy for ethics training).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

ethical decision-making training. Section IV describes the framework used to analyze the Army's current ethics training program. It describes the optimal end-state and sets out three goals to help achieve the end-state. Section V proposes revisions to the current ethics training program using the PRICE strategy. This section shows how the PRICE strategy would work in conjunction with current knowledge-based initiatives aimed toward enhancing the Army Ethic.²³ It also discusses how the PRICE strategy fits within the Army's leader development model²⁴ and supports the mission command philosophy.²⁵

II. The Army's Current Ethics Training Program

A. Defining the problem

The current Army ethics training paradigm focuses on expanding knowledge of values²⁶ and explaining applicable rules and consequences.²⁷ Chaplains teach values and advise commanders on moral leadership issues.²⁸ Judge advocates (JAs) advise commanders on actions to take against offenders for committing ethical violations.²⁹ Judge advocates also train Army personnel on specific ethics rules.³⁰ Commanders maintain overall responsibility for training³¹ and the ethical climate within the unit.³² Together the chaplain, JA, and commander must

²³ CENTER FOR THE ARMY PROFESSION AND ETHIC, *Army Ethic White Paper* (11 July 2014) <http://cape.army.mil/repository/white-papers/Army-Ethic-White-Paper.pdf> [hereinafter *Army Ethic White Paper*].

²⁴ ADRP 7-0, *supra* note 15, fig. 1-1.

²⁵ U.S. DEP'T OF ARMY, DOCTRINE REF. PUB. 6-0, MISSION COMMAND paras. 1-12, 1-13 (May 2012) [hereinafter ADRP 6-0].

²⁶ AR 165-1, *supra* note 10, para. 9-10.

²⁷ AR 350-1, *supra* note 8, tbl. G-1.

²⁸ U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP paras. 20-21 (Aug. 2012) [hereinafter ADP 6-22]; *see also* AR 350-1, *supra* note 8, paras. 2-16-2-17 (defining responsibilities for providing both types of training); AR 165-1, *supra* note 10, para. 9-10 (designating the chaplain as the primary staff officer responsible for moral leadership training). U.S. DEP'T OF ARMY REG 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 2-2(z) (RAR 13 Sept. 2011) [hereinafter AR 27-1] (detailing responsibility for the Army Ethics Program).

²⁹ AR 27-1, *supra* note 28.

³⁰ *Id.*

³¹ ADRP 7-0, *supra* note 15, para. 2-2

³² ADRP 6-22, *supra* note 28, para. 2-1.

teach, train, and mentor soldiers to make decisions, ensuring mission accomplishment in a moral, legal, and ethical fashion.³³

Increasingly, under the mission command philosophy,³⁴ the Army places the burden of decision-making at lower levels and expects decision-makers to comport with its organizational values.³⁵ However, expecting individuals to make ethical decisions without first providing training and opportunities to exercise ethical decision-making could be a recipe for failure. Consider former President Ronald Reagan's thoughts:

[T]he character that takes command in moments of crucial choices has already been determined. It has been determined by a thousand other choices made earlier in seemingly unimportant moments. It has been determined by all the little choices of years past—by all those times when the voice of conscience was at war with the voice of temptation—whispering the lie that it really doesn't matter. It has been determined by all the day-to-day decisions made when life seemed easy and crises seemed far away—the decisions that, piece by piece, bit by bit, developed habits of discipline or of laziness, habits of self-sacrifice or of self-indulgence, habits of duty and honor and integrity—or dishonor and shame. Because

³³ See U.S. DEP'T OF ARMY, DOCTRINE REF. PUB. 6-22 preface (Aug. 2012) [hereinafter ADRP 6-22] "Commanders, staffs, and subordinates ensure their decisions and actions comply with applicable United States, international, and, in some cases, host-nation laws and regulations. Commanders at all levels ensure their [s]oldiers operate in accordance with the law of war and the rules of engagement." *Id.* See also U.S. DEP'T OF ARMY, TRADOC PAM. 525-3-0, U.S. ARMY CAPSTONE CONCEPT para. 4-6(b) (19 Dec. 2012) [hereinafter 33 525-3-0] (suggesting that Army forces need to "think independently and act decisively, morally, and ethically").

³⁴ U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-0, MISSION COMMAND para. 22 (May 2012) [hereinafter ADP 6-0].

³⁵ TRADOC PAM. 525-3-0, *supra* note 33, para. 4-6(b).

To facilitate the necessary level of adaptation, Army forces empower increasingly lower echelons of command with the capabilities, capacities, authorities, and responsibilities needed to think independently and act decisively, morally, and ethically. Decentralized execution guided by the tenets of mission command places increased responsibility on [s]oldiers to make decisions with strategic, operational, and tactical implications.

Id.

when life does get tough, and the crisis is undeniably at hand—when we must, in an instant look inward for strength of character to see us through—we will find nothing inside ourselves that we have not already put there.³⁶

In other words, the Army cannot wait until its decision-makers are on the battlefield to train and empower them to make ethical decisions. As the Army instills trust in its leaders and decision-makers to make the right decisions, it also has a responsibility to provide the necessary training to empower them to do so.³⁷

Increasing the amount of time that individuals spend receiving knowledge-based training and ignoring application-based ethical decision-making training may backfire and cause more ethical failures.³⁸ Leaders at the tactical level already complain that training schedules overwhelm the unit and result in officers lying about compliance with training requirements.³⁹ Deciding to report compliance in order to prioritize other mission requirements is one example where rules (required training and reporting) meet values (duty to accomplish mission, loyalty to the command, etc.) in a morally ambiguous way. Decision-makers must choose between falsely reporting that training is complete so that the unit

³⁶ Ronald Wilson Reagan, *40th President of the United States, Commencement Address at Citadel*, The Military College of South Carolina (May 15, 1993), <http://www3.citadel.edu/pao/addresses/reagan.htm>.

³⁷ AR 600-100, *supra* note 2, para. 1-4 “The Army’s strategic objectives clearly state the Army’s purpose . . . train and equip [s]oldiers to serve as warriors and grow as adaptive leaders . . . and provide infrastructure and support to enable the force to fulfill its strategic roles and missions.” *Id.*

³⁸ See George Reed et al., *Mapping the Route of Leadership Education: Caution Ahead*, 34 U.S. ARMY WAR COLL. 46, 48 (2004).

The paradox is that more is actually less. The more we try to describe and prescribe a list of defined, specific competencies, the more we lead away from the agile, adaptive, self-aware leader we want. The danger of prescriptive lists is that they create the impression that success can be assured by mastering specific competencies.

Id.

³⁹ LEONARD WONG & STEPHEN J. GERRAS, LYING TO OURSELVES: DISHONESTY IN THE ARMY PROFESSION, 6 STRATEGIC STUD. INST & U.S. ARMY WAR COLLEGE PRESS (Feb. 17, 2015). “If units and individuals are literally unable to complete the tasks placed upon them, then reports submitted upward by leaders must be either admitting noncompliance, or they must be intentionally inaccurate.” *Id.*

can complete other missions; sacrificing other missions to complete the training;⁴⁰ or accurately reporting that training is not complete, opening themselves up to career-impacting criticism.⁴¹ Leaders confront similar circumstances in the motor pool,⁴² complying with requirements to regularly inspect unit equipment and report deficiencies.⁴³ Leaders also confront these circumstances while deployed.⁴⁴

Dishonesty becomes routine when the quantity of training, or other administrative requirements, interferes with a unit's ability to accomplish its regular mission.⁴⁵ When decision-makers choose to make false reports, both the individual decision-makers and the institutional Army recognize and accept that the reported information is inaccurate.⁴⁶ Then, individuals realize that the Army will accept the inaccurate report and most likely take no action against the individual for submitting the false report.⁴⁷

In these situations, individuals not only fail to tell the truth, they fail to recognize that they are lying.⁴⁸ "Ethical fading allows us to convince ourselves that considerations of right or wrong are not applicable to decisions that in any other circumstances would be ethical dilemmas."⁴⁹ Small decisions build on themselves and harden into thoughtless habit until senior leaders feel justified violating rules and values.⁵⁰ A quick

⁴⁰ *Id.* at 5–6.

⁴¹ *Id.* at 5, 26.

⁴² *Id.* at 9 (reporting vehicles at 100% availability for use, knowing report was inaccurate).

⁴³ *Id.* (reporting inaccurate property accountability).

⁴⁴ *Id.* at 13–16 (ignoring standards to ensure the correct number of individuals deployed; manipulating supply accountability; failing to report enemy contact; and failing to request permission to use indirect fire).

⁴⁵ *Id.* at 17–18. "[M]any officers even go as far as to insist that lying to the system can better be described as prioritizing, accepting prudent risk, or simply good leadership." *Id.*

⁴⁶ *Id.* at 12.

⁴⁷ *Id.* at 12–13.

⁴⁸ *Id.* at 17.

⁴⁹ *Id.*

⁵⁰ *Id.* at 30.

Overconfidence can leave officers—especially those at the senior level—vulnerable to the belief that they are unimpaired by the temptations and snares found at the common level of life. The ease of fudging on a [temporary duty] voucher, the enticement of improper gifts, and the allure of an illicit relationship are minimized and discounted as concerns faced by lesser mortals.

Id. See also Dean C. Ludwig & Clinton O. Longenecker, *The Bathsheba Syndrome: The Ethical Failure of Successful Leaders*, 12 J. BUS. ETHICS 265, 270–71 (1993) (asserting

glance at news reports over the last several years shows allegations of sexual misconduct, misuse of government resources, and maltreatment of subordinates by senior leaders empowered to lead and train Army forces.⁵¹ Investigations substantiated these allegations and resulted in administrative sanctions, including reprimands and demotions.⁵² In 2012, the *Washington Post* reported “[t]he Defense Department’s inspector general reviewed [thirty-eight] cases of alleged wrongdoing by senior officials in 2011, and substantiated the accusations in nearly [forty] percent of the them[sic], up from [twenty-one] percent in 2007.”⁵³

Poor ethical choices by Army leaders reflect negatively on the entire organization.⁵⁴ Ethical failures erode public trust and subject the Army to additional scrutiny.⁵⁵ Conversely, ethical behavior by Army decision-makers enhances the public trust and strengthens the Army’s ability to complete the mission.⁵⁶ The Army’s legitimacy stems from the public

that organizational autonomy combined with an inflated sense of self can cause successful leaders to make unethical choices).

⁵¹ Ernesto Londoño, *Accusations Against General Cast a Long Shadow Over Army*, WASH. POST (Oct. 27, 2012), http://www.washingtonpost.com/world/national-security/2012/10/27/a43bf66a-1f8e-11e2-ba31-3083ca97c314_story.html (referencing generals accused of sexual misconduct, financial mismanagement, accepting inappropriate gifts, assigning staff personal tasks, and verbal abuse of subordinates).

⁵² See, e.g., Inspector Gen., U.S. Dep’t of Def., *Report of Investigation on Major General William E. Ward, U.S. Army, Commander, U.S. AFRICOM* (26 June 2012), http://www.dodig.mil/foia/ERR/WardROI_Redacted.pdf; Inspector Gen., U.S. Dep’t of Def., *Report of Investigation on Lieutenant General Patrick J. O’Reilly, U.S. Army, Director, Missile Defense Agency* (2 May 2012), <http://www.dodig.mil/foia/ERR/O’ReillyROI.pdf>; Inspector Gen., U.S. Dep’t of Def., *Report of Investigation on Lieutenant General David H. Huntoon, U.S. Army, Superintendent, United States Military Academy* (1 May, 2012), <http://www.dodig.mil/foia/ERR/H11L120171242.pdf>; Inspector Gen., U.S. Dep’t of Def., *Report of Investigation on Major General Joseph F. Fil, U.S. Army, Former Commanding General, Eighth United States Army and Chief of Staff, United Nations Command/Combined Forces Command/United States Forces Korea* (23 Jan. 2012), <http://www.dodig.mil/foia/ERR/H11-120936321.pdf> (investigating officer unnamed).

⁵³ Londoño, *supra* note 51.

⁵⁴ WONG & GERRAS, *supra* note 39, at 1–2.

⁵⁵ *Id.* (describing how scandals erode internal and external trust critical to the institution of the military). See also U.S. DEPT. OF ARMY, DOCTRINE REF. PUB. 1, THE ARMY PROFESSION para. 3-2 (Jun. 2015) [hereinafter ADRP 1]. “The Army has been successful in keeping the high regard and sacred trust of the American people as a military profession. However, this trust relationship is fragile and easily damaged if we do not understand who we are, who we serve, and why we serve.” *Id.*

⁵⁶ Memorandum from The Secretary of Defense, to Secretaries of the Military Departments et al., subject: Ethics, Integrity, and Accountability (2 May 2012) [hereinafter EIA Memo]. See also ARMY ETHIC WHITE PAPER, *supra* note 23, at i (discussing how performance of duty according to the Army Ethic reinforces trust).

trust.⁵⁷ The Army must recognize the application gap in its ethics training paradigm and implement a strategy to remedy the problem before further erosion occurs. An ethics training program including knowledge-based values and rules training, but with increasing focus on ethical decision-making will enhance public trust and contribute to mission accomplishment.⁵⁸

B. Recognizing the Limits of Knowledge-based Values Training

Values training, the primary domain of the chaplain acting on behalf of the commander, includes training on the Army Values and overarching moral principles.⁵⁹ The Army expects members to uphold and emulate seven primary values: loyalty, duty, respect, selfless service, honor, integrity, and personal courage.⁶⁰ These values derive from the U.S.

⁵⁷ “External trust is the confidence and faith that the American people have in the Army to serve the Nation ethically, effectively, and efficiently. It is the bedrock of our relationship with society.” ADRP 1, *supra* note 55, para. 3-1.

⁵⁸ ARMY ETHIC WHITE PAPER, *supra* note 23, at 3 (“[T]here can be no tension between mission accomplishment and professional ethics.”). *See also* ADRP 6-22, *supra* note 28, para. 1-9 (stating the “Army and its leadership requirements are based on the nation’s democratic foundations, defined values, and standards of excellence”).

⁵⁹ AR 165-1, *supra* note 10.

⁶⁰ AR 600-100, *supra* note 2, para. 1-5. The Army Values are further defined:

Loyalty. Bear true faith and allegiance to the U.S. Constitution, the Army, your unit, and other [s]oldiers Duty. Fulfill your obligations. Duty is the legal and moral obligation to do what should be done without being told. Respect. Treat people as they should be treated. . . . Selfless Service. Put the welfare of the Nation, the Army, and subordinates before your own Honor. Live up to the Army Values. This implies always following your moral compass in any circumstance. Integrity. Do what’s right—legally and morally It means honesty, uprightness, the avoidance of deception, and steadfast adherence to the standards of behavior. Personal Courage. Face fear, danger, or adversity (physical or moral). This means being brave under all circumstances (physical or moral).

Id. Some critics argue that by including definitions of these terms, “[o]ur current Army [v]alues approach implicitly acknowledges that a value alone is insufficient to guide action This effort to provide meaning to the values reflects the insufficiency of values by themselves to adequately guide action and educate practitioners.” Brian Imiola & Danny Cazier, *On the Road to Articulating Our Professional Ethic*, MIL. REV. Sept. 2010, at 11, 15. The Army utilized this article in the development of the Army Ethic. ARMY ETHIC WHITE PAPER, *supra* note 23. Note that the author of this article was discussing Field Manual 6-22, which has since been replaced by Army Doctrine Reference Publication 6-

Constitution and Declaration of Independence⁶¹ and together with those documents “characterize the Army’s professionalism and culture, and describe the ethical standards expected of all Army leaders.”⁶² The Chief of Chaplains “[d]evelop[s] and provide[s] training at selected Army schools on topics to include ethics, world religions, moral leadership . . . [and] [e]xercise[s] [Headquarters, Department of the Army] responsibility for moral leadership training in the Army.”⁶³ Individual chaplains work with commanders to determine the content of unit training programs.⁶⁴ The prior edition of Army Regulation (AR) 165-1 mentioned “moral dimensions of decision making”⁶⁵ as a potential topic for the chaplain’s moral leadership program, but did not make it a mandatory training requirement.⁶⁶ The current version of AR 165-1 does not provide a list of training topics, stating only that moral leadership training is a commander’s program, not a religious program, and the training should be nested with AR 350-1 and Department of Army Pamphlet (DA Pam) 165-16.⁶⁷ Thus, individual decision-makers may receive little or no ethical decision-making training in the current knowledge-based values training program.

Values training is, and can only ever be, a single component of a successful ethics training program. Focusing solely on training broad values provides basic knowledge of abstract principles, but fails to train individual decision-makers to apply that knowledge to making ethical decisions.⁶⁸ Individuals faced with morally ambiguous situations may

22. The definitions of the Army values were not changed. See ADRP 6-22, *supra* note 28, paras. 3-4–3-16.

⁶¹ AR 600-100, *supra* note 2, para. 1-5a.

⁶² *Id.*

⁶³ AR 350-1, *supra* note 8, para. 2-17.

⁶⁴ AR 165-1 para. 9-15.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* para. 9–10.

⁶⁸ Imiola & Cazier, *supra* note 60, at 15.

Given their vagueness, [s]oldiers can interpret values in ways that could generate irreconcilable conflict as they attempt to use them as a foundation for decisions To illustrate this point, consider the values of personal courage and loyalty. These seem appropriate values, but they can easily be hijacked in pursuit of immoral ends. Courage, for example, makes a bank robber even more dangerous to society than he would otherwise be. Loyalty makes organized crime a more insidious threat than if its members were disloyal to a gang or mob. Even those engaged in illicit ends find courage and loyalty

rationalize “white lies.”⁶⁹ They may even view these lies as beneficial for the organization.⁷⁰ These individuals may disengage from their moral framework by taking action in opposition to their values.⁷¹ Moral disengagement happens when individuals examine their behaviors differently, by using different words to describe their behavior; by comparing it to other, worse behavior in order to justify their own unethical conduct; or by shifting responsibility for their actions to others’ actions.⁷² The Army attempts to remedy these types of problems by codifying its organizational values⁷³ and providing concrete rules for individuals to comply with. Judge advocates primarily focus on these rules in the training they provide.⁷⁴

C. Recognizing the Limitations of Knowledge-based Rules Training

Rules training focuses on encouraging behavior to be in compliance with the rules.⁷⁵ It does so by informing individuals of the negative consequences resulting from a failure to comply. In Army doctrine, compliance is a leadership method most “appropriate for short-term, immediate requirements and for situations with little risk tolerance.”⁷⁶ However, examples of rules and regulations abound in the Army. “The law of land warfare, the Uniform Code of Military Justice, and the standards of conduct structure the discipline imperative to which leaders must adhere.”⁷⁷ The Joint Ethics Regulation (JER) regulates conflicts of

useful. And their conduct is all the more immoral for having harnessed these values.

Id.

⁶⁹ WONG & GERRAS, *supra* note 39, at 17.

⁷⁰ *Id.* at 18

⁷¹ Christopher M. Barnes & Keith Leavitt, *Moral Disengagements: When Will Good Soldiers Do Bad Things?*, MIL. REV., Sept. 2010, at 46, 47–48 (describing moral disengagement by “re-construing conduct through framing, . . . re-construing conduct through the use of euphemistic language, . . . re-construing conduct through advantageous comparison, . . . obscuring responsibility via displacement, . . . [and] obscuring responsibility via diffusion”).

⁷² *Id.*

⁷³ AR 600-100, *supra* note 2, para. 1–5.

⁷⁴ AR 350-1, *supra* note 8, para. 2–16, G-18

⁷⁵ ADRP 6-22, *supra* note 33, para. 6-3. Compliance is “the act of conforming to a requirement or demand.” *Id.*

⁷⁶ *Id.*

⁷⁷ AR 600-100, *supra* note 2, para. 1-5a.

interest, appearances of impropriety, and contains prohibitions on the receipt of gifts from subordinates and contractors.⁷⁸ Joint Travel Regulations govern how, where, when, and with whom military members may travel.⁷⁹ Taken together, the rules and regulations provide the structure for ethical behavior in numerous common and recurrent military situations. Those who fail to comply with the rules subject themselves to negative consequences and enforcement actions. Consequences range from administrative sanctions to civil and criminal liability. When made public, these breaches undermine and erode public trust, especially when the public, or other soldiers, perceive that the consequence is not sufficient for the underlying offense.⁸⁰

Rules-based training is traditionally—and by regulation—a responsibility of the The Judge Advocate General’s Corps. The Judge Advocate General (TJAG), “[a]dvise[s] . . . during the development of training and training support products for the Army including training programs mandated by domestic and international law obligations” and “[e]xercises [Headquarters, Department of the Army] responsibility for training on the law of war.”⁸¹ Army Regulation 350-1 does not mention values training as a specific task for TJAG.⁸² Judge advocates provide JER training, mandatory annual refresher training on the laws of armed conflict, and Standards of Conduct training.⁸³ Joint Ethics Regulation

Discipline reflects the self-control necessary to do the hard right over the easy wrong in the face of temptation, obstacles, and adversity. Pride reflects the commitment to master the military-technical, moral-ethical, political-cultural, and leader/human development knowledge and skills that define Army professionals as experts. Army professionals, who perform under stressful conditions including the chaos and danger of combat, require the highest level of discipline and pride.

ADRP 1, *supra* note 55, paras. 5–11.

⁷⁸ U.S. DEP’T OF DEF., 5500.7-R, JOINT ETHICS REG. (30 Aug. 1993) [hereinafter JER].

⁷⁹ See U.S. DEP’T OF DEF., JOINT TRAVEL REGULATIONS, UNIFORMED SERVICE MEMBERS AND DOD CIVILIAN EMPLOYEES (1 Oct. 14). The Joint Federal Travel Regulation and Joint Travel Regulations were consolidated into one publication as of October 1, 2014. *Id.*

⁸⁰ See, e.g., Richard Sandza, *Colonel’s Sentence in Bigamy Case Draws Outrage*, ARMY TIMES (July 1, 2012, 10:00 AM), <http://www.armytimes.com/article/20120701/NEWS/207010309/Colonel-s-sentence-bigamy-case-draws-outrage>. “In one swift decision, the board made a mockery of justice and allowed a bigamist and a thief to retire with honor.” *Id.*

⁸¹ AR 350-1, *supra* note 8, para. 2-16.

⁸² *Id.*

⁸³ *Id.*

training is mandatory for servicemembers upon initial entry, and required annually for those who must file financial disclosure forms.⁸⁴

Knowledge-based rules training, on its own, is insufficient to provide decision-makers with the skills necessary to solve the kinds of complex problems soldiers encounter regularly.⁸⁵ The Army requires creative thinking and problem-solving.⁸⁶ Organizations use rules to constrain behavior.⁸⁷ When presented with rules without knowing why the rules are in place, individuals may be tempted to believe that “what is not forbidden is allowed.”⁸⁸ Decision-makers may justify the use of whatever means necessary to stay just to the left of the legal boundary.⁸⁹ Decision-makers may choose to ignore minor ethical discretions for the perceived greater good of the organization.⁹⁰ Alternatively, individuals may robotically

⁸⁴ *Id.* tbl. G-1, para. G-18. Required initial ethics training must take place within ninety days and may consist only of written materials. *Id.* para. G-18. Thereafter, annual training is required for financial disclosure filers and must be conducted face-to-face by a qualified instructor or via other means if a qualified instructor is available for questions. *Id.* Financial disclosure filers are generally senior leaders. *Id.*

⁸⁵ ADRP 7-0, *supra* note 15, para. 2-26.

⁸⁶ *Id.* “Effective leaders comfortably make decisions with only partial information.” *Id.* They “are open-minded and consider alternative, sometimes nonconformist, solutions and the second- and third-order effects of those solutions.” *Id.* Effective leaders “[c]ollaborate with others” and “[a]re adept at honestly assessing their own strengths and weaknesses and determining ways to sustain strengths and overcome weaknesses.” *Id.*

⁸⁷ Gedeon J. Rossouw & Leon J. van Vuuren, *Modes of Managing Morality: A Descriptive Model of Strategies for Managing Ethics*, 46 J. BUS. ETHICS 389, 397 (2003).

[A] comprehensive and diligent attempt to enforce ethical compliance . . . may assume bureaucratic proportions over time. This can lead to a proliferation of ethical rules and guidelines These rules can grow so numerous that it becomes difficult to keep track of them. Should this happen, it is almost impossible to recall all the directives, and for that reason they may have little impact on actual corporate behavior.

Id.

⁸⁸ *Id.* at 397; *see also* Imiola & Cazier, *supra* note 60, at 15.

[N]o list of rules could ever be long enough to capture all the things that we should and should not do . . . any list of rules . . . really just approximates another legal code. It invites legalistic interpretation and gaming [I]f not enforced, rules are impotent.

Id.

⁸⁹ Rossouw & van Vuuren, *supra* note 87, at 397.

⁹⁰ Imiola & Cazier, *supra* note 60, at 15; *see also* WONG & GERRAS, *supra* note 39, at 20. “[D]ishonesty is often necessary because the directed task, the data requested, or the

follow the prescribed rules without applying any discretionary thought.⁹¹ Any of these processes can lead to unethical decisions.⁹² Knowledge-based rules training gives the framework for compliance, but does not explain how the rules should be applied,⁹³ or provide the skills necessary to allow the individual to exercise independent discretion.⁹⁴ Moreover, when individuals receive only knowledge-based training, an application gap develops in which decision-makers may lack the skills necessary to apply that knowledge in a complex and morally ambiguous war zone.⁹⁵

III. Evidence of the Application Gap

[A]s his junior officers briefed him in January about what happened to two Iraqis his men detained that night by the Tigris, the straight lines and rigid hierarchy of the Army that created him seemed, like so many other American ideas brought to this murky land, no longer particularly relevant. More important . . . were his own men There would be a fuss if his superiors discovered what his men had done that night And so Sassaman . . . decided to flout his [nineteen] years in the Army and his straight-and-narrow upbringing. He turned to one of his company commanders . . . and told him what to do. "Tell them about everything . . . except the water."⁹⁶

reporting requirement is unreasonable or 'dumb'. . . . Officers convince themselves that instead of being unethical, that are really restoring a sense of balance and sanity to the Army." *Id.*

⁹¹ Roetzel, *supra* note 11, at 84 (using non-discretionary reasoning, soldiers respond robotically and respond to unexpected circumstances by simply applying the guidance that is most similar, without exercising independent reasoning); *see also* Rossouw & van Vuuren, *supra* note 87, at 397 (describing how under a rules-based system, members of an organization "can rely merely on the existing rules for moral guidance" without applying independent thought).

⁹² WONG & GERRAS, *supra* note 39, at 20. "With ethical fading serving to bolster the self-deception that problematic moral decisions are ethics-neutral, any remaining ethical doubts can be overcome by justifications and rationalizations." *Id.*

⁹³ ADRP 1, *supra* note 55, para. 1-17 "Simple or strict compliance with laws and regulations rarely generate a deeper understanding of why a prescribed behavior is right and good." *Id.*

⁹⁴ Rossouw & van Vuuren, *supra* note 87, at 397.

⁹⁵ Roetzel, *supra* note 11, at 83.

⁹⁶ Dexter Filkins, *The Fall of the Warrior King*, N.Y. TIMES (Oct. 23, 2005), http://www.nytimes.com/2005/10/23/magazine/23sassaman.html?pagewanted=all&_r=0.

Lieutenant Colonel (LTC) Nathan Sassaman commanded a unit in Iraq in 2004.⁹⁷ The unit faced constant fire and pressure to perform.⁹⁸ His subordinates caught several Iraqi males out after curfew driving the same type of vehicle used by insurgents in the area.⁹⁹ Americans assumed that curfew-breakers were guerrillas and normally detained them.¹⁰⁰ If the curfew breakers became aggressive, they would be killed.¹⁰¹ On that night, the soldiers detained the individuals, released them with a warning, and then detained them again, on the order of their lieutenant.¹⁰²

The soldiers then drove the Iraqis to the bank of the Tigris River, at a point roughly seventy feet above the water.¹⁰³ The patrol intended to force the detainees into the river so that they would have to walk home, soaking wet, as punishment for breaking curfew, as opposed to detaining them according to normal procedures.¹⁰⁴ One soldier balked at the seventy foot drop and refused to participate because he knew his peers were not following correct curfew enforcement procedures.¹⁰⁵ He knew that by refusing, he was subject to punishment.¹⁰⁶ This was not the first time he had concerns with the tactics being used.¹⁰⁷ The other soldiers considered him an “oddball”¹⁰⁸ for his concerns and forced him to stand guard.¹⁰⁹ Then the soldiers moved to a lower point on the riverbank, approximately ten feet from the water, and they told the men to jump.¹¹⁰ When the men

⁹⁷ *Id.*

⁹⁸ *Id.* See also Thomas Ricks, ‘*It Looked Weird and Felt Wrong*’, WASH. POST (Jul. 24, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/07/23/AR2006072300495_pf.html.

⁹⁹ Filkins, *supra* note 96.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* “At the time, the American soldiers were under strict instructions to detain anyone out after curfew, but they usually allowed themselves a little leeway.” *Id.* The platoon guide later testified that the unit was seeking revenge, “I understood that he was directing me and my subordinates to kill certain Iraqis we were seeking that night who were suspected of killing the company commander in our unit’ . . . [n]or was he to take prisoners” Ricks, *supra* note 98.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Filkins, *supra* note 96.

¹¹⁰ *Id.* “At first, the soldiers insisted to Army investigators that they had released the men—without mentioning that they had ‘released’ them into the river. Pressed, they subsequently said that they’d seen both men swim to shore and emerge. That was a lie, Saville later testified.” Ricks, *supra* note 98.

begged not to, one was pushed in, the other jumped.¹¹¹ Days later, Iraqi search crews found a body downriver from where the men were forced to jump.¹¹² This was not the first time the soldiers had forced civilians into the river for breaking curfew, but it was the first time that someone died from the tactic.¹¹³

Lieutenant Colonel Sassaman found out about the incident several days later and “decided that that throwing the Iraqis into the Tigris was wrong, but not criminal and that publicizing it could whip up anti-American feeling.”¹¹⁴ Instead of immediately reporting the incident and taking responsibility for the actions of his subordinates, LTC Sassaman decided to treat his soldiers’ crimes as simple mistakes.¹¹⁵ He attempted to deceive his superiors about his knowledge of the events,

I really didn’t lie to anybody . . . I just didn’t come out and say exactly what happened. I didn’t have anything to gain by ordering a cover-up. There was no way I was going to let them court-martial [sic] my men, not after all they had been through.¹¹⁶

Lieutenant Colonel Sassaman committed several ethical failures. He tacitly condoned the unauthorized use of curfew punishments.¹¹⁷ He failed to identify the actions of his subordinates as potentially illegal and requiring investigation.¹¹⁸ He failed to immediately report the incident

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* (discussing putting people in the water as within the scope of non-lethal punishments).

¹¹⁸ *Id.* See also Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 87, June 8, 1977, 1125 U.N.T.S. 3.

The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

Id.

and actively covered up the crimes by directing subordinates to lie.¹¹⁹ Ultimately, LTC Sassaman rationalized his own dishonest behavior as loyalty to his men.¹²⁰ Loyalty to his comrades is an admirable value, one the Army actively encourages.¹²¹ However, LTC Sassaman's application of loyalty to this situation was decidedly less than admirable, resulting in the loss of his command, the prosecution of his soldiers, a black eye for the Army,¹²² and the death of an innocent civilian.¹²³ One individual exhibited personal courage¹²⁴ by defying his superiors, arguably applying more ethical values and rules under stressful circumstances. He ended up being ostracized by his peers after the incident, and left the Army.¹²⁵

This incident illustrates the difficulty decision-makers have applying the Army's organizational values and rules to morally ambiguous situations. Lieutenant Colonel Sassaman was a nineteen-year veteran and graduate of West Point.¹²⁶ According to AR 350-1, every individual involved should have received annual training and pre-deployment training on the rules of engagement, standards of conduct, and Army

¹¹⁹ Filkins, *supra* note 96.

¹²⁰ *Id.*

If I were to do it all over again, I would do the exact same thing, and I've thought about this long and hard, Sassaman testified. I was taught in the Army to win, and I was trying to win all the way, and I just disagreed—deeply disagreed—with my superior commanders on the actions that they thought should be taken with these individuals [charged in the Tigris bridge case]. And you have to understand, the legal community, my senior commanders, were not fighting in the streets of Samarra. They were living in a palace in Tikrit.

Ricks, *supra* note 98.

¹²¹ See AR 600-100, *supra* note 2, sec. II. Glossary. "Loyalty. Bear true faith and allegiance to the U.S. Constitution, the Army, your unit, and other [s]oldiers. This means supporting the military and civilian chain of command, as well as devoting oneself to the welfare of others." *Id.*

¹²² Filkins, *supra* note 96.

¹²³ *Id.* Lieutenant Colonel (LTC) Nathan Sassaman and two others received a General Officer Memorandums of Reprimand, effectively ending their careers. *Id.* Lieutenant Colonel Sassaman retired. The two soldiers who put the men in the water were convicted of assault and sent to prison. *Id.*

¹²⁴ See AR 600-100, *supra* note 2, glossary, sec. II. "Personal Courage. Face fear, danger, or adversity (physical or moral). This means being brave under all circumstances (physical or moral)." *Id.*

¹²⁵ Filkins, *supra* note 96.

¹²⁶ *Id.*

Values.¹²⁷ They received the knowledge-based training, but when presented with a morally ambiguous situation, they did not have the skills to apply the knowledge.

When values conflict with other values, or when values conflict with rules, decision-makers need to have the ethical decision-making skills to analyze the situation. After analysis individuals must decide which course of action is the ethical choice. Decision-makers need application-based training to make that determination. Knowledge-based training alone is insufficient.

IV. Formulating the Objectives for Successful Ethics Training

A. Framework for Analysis

Addressing the application gap requires analyzing the current Army ethics training program and developing new solutions to close the gap. As an organization, the Army would benefit from using scholarship involving ethical decision-making in external organizations to examine problems with ethical decision-making internally.¹²⁸ Similar to decision-making in a corporate setting, military decision-making relies on a group of individuals from diverse backgrounds to work together to make joint decisions within particular organizational structures.¹²⁹ Researchers

¹²⁷ AR 350-1, *supra* note 8, tbl. G-1.

¹²⁸ Army leadership recognizes the similarities between military organizations and corporations, and leverages those similarities to review processes and practices. *See* U.S. DEP'T OF ARMY, DIR. 2016-16, CHANGING MANAGEMENT BEHAVIOR: EVERY DOLLAR COUNTS 1 (15 Apr. 2016). The Government Accountability Office (GAO) conducted a performance audit of DoD ethics programs in 2014–2015. During that audit, the GAO interviewed representatives from the military services and “foreign military officials, defense industry organizations, and commercial firm” and reviewed literature from both the military and corporate sectors. GAO Report on Military Ethics, *supra* note 5.

¹²⁹ Rossouw & van Vuuren, *supra* note 87, at 390.

Decisions and actions are the outcomes of complicated group dynamic processes in which individual members of the organization participate. The decisions and actions therefore do not emanate from a collective personality, or a collective mind, or a collective moral state of development, but from a group dynamic process in which individuals with different personalities, minds, and levels of moral development participate.

developed an analytical model to evaluate the methods used by organizations to manage morality.¹³⁰ Applying this model allows for an analysis of the Army ethics training using external criteria. It also provides an opportunity for the Army to address the current application gap by further developing its ethical decision-making training, and nesting the training within current Army doctrine and tradition.

The model uses four criteria to categorize organizations' "modes of managing morality."¹³¹ The criteria used are: (1) the nature of the conduct within the organization; (2) the purpose of ethics in the organization; (3) the organization's management strategy; and (4) challenges experienced by the organization.¹³² The five modes of managing morality are: "immorality, reactivity, compliance, integrity and total alignment."¹³³ The model places the modes on an evolutionary continuum to explain changes within organizations.¹³⁴

In the compliance mode, the organization commits to "manage and monitor ethics performance."¹³⁵ The organization codifies the rules and punishes violators to prevent unethical behavior.¹³⁶ The organization's goal is to maintain a good ethical reputation.¹³⁷ In the integrity mode, individuals within the organization internalize the organization's ethical values and standards.¹³⁸ The organization attempts to "raise the level of corporate ethical performance"¹³⁹ by "proactive[ly] promot[ing] . . . ethical behavior."¹⁴⁰ The leadership of the organization recognizes the strategic importance of ethical behavior.¹⁴¹ In a totally aligned organization, ethics are seamlessly integrated into an organization's

Id. The study uses the British spellings; for consistency, this paper will use American English spellings (e.g. organisation vs. organization) throughout. *See also* U.S. DEP'T OF ARMY, DOCTRINE PUB. 5-0, THE OPERATIONS PROCESS para. 32 (17 May 2012) [hereinafter ADP 5-0] (describing the military decision-making process (MDMP)).

¹³⁰ Rossouw & van Vuuren, *supra* note 87, at 389.

¹³¹ *Id.* at 391. "A mode can be described as the predominant (preferred) strategy of an organization to manage its ethics at a given point in time." *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 392. "[C]hallenges that arise within each mode provide an explanation for the change in mode of managing ethic that typically occur within organizations over time." *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

“purpose, strategy, and operations.”¹⁴² In this mode, ethics are an integral part of the “discourse and decision-making,” not a separate checklist.¹⁴³ Each individual is responsible for managing ethics within the organization.¹⁴⁴

The above model provides the framework used in this article to analyze the Army’s current ethics training program and for the proposed new strategy. The compliance mode and integrity mode apply most proximately to the Army’s methods for managing ethics.¹⁴⁵ Using the modes above, the Army is a compliance organization, but needs to transform into an integrity organization to close the application gap and foster ethical decision-making. A revised strategy for Army ethics training will aid the transformation from the compliance to the integrity mode.

B. The Path from Compliance to Integrity

Arguably, the Army today is a compliance organization, but is making strides to transform into an integrity organization. Currently, the Army recognizes, manages, and monitors ethics performance by punishing unethical behavior and codifying the rules and values.¹⁴⁶ The Army’s knowledge-based ethics training program “display[s] a commitment to eradicate unethical behavior,”¹⁴⁷ but emphasizes compliance in exchange for the withholding of punishment rather than encouraging individuals to internalize the organization’s values.¹⁴⁸

An ethics training program in a compliance organization focuses more on bureaucracy than effectiveness. That is, it compares the number of individuals trained to the number sanctioned, and focuses more on whether training was completed rather than whether it was successful.¹⁴⁹ Neither

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 396–99. Total alignment is difficult to achieve in an organization as large as the Army, with a rapidly changing population, but is available as a goal to strive toward. *Id.* at 399–401.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 396.

¹⁴⁸ *Id.* at 397.

¹⁴⁹ JAMES Q. WILSON, BUREAUCRACY 163–64 (1991) (asserting that how operators do the job is more important than whether doing the job produces the required outcome). *See also* James H. Toner, *Mistakes in Teaching Ethics*, AIR POWER J. 45, 49 (1998). “A major problem with ethics education is that it cannot be crammed into neat compartments and

ethics training nor ethical behavior lend themselves to that type of objective measurement.¹⁵⁰ Focusing on objective metrics may create short-term gains, but in the long-term it may lead to an increase in unethical behavior.

An overly-detailed, list-based approach could result in professional military education that is contrary to that which is actually needed. It could restrict what is taught to only that which is on the list . . . [and it could] become self-perpetuating, not subject to continuous review, and therefore become detached from what is needed in the field.¹⁵¹

Ethical decision-making is a skill to be honed, not a checklist to be satisfied.¹⁵² The Army needs to be wary of creating ethical checklists or other similar methodologies that aim toward “measurable outcomes,”¹⁵³ but “undermine personal moral autonomy and responsibility.”¹⁵⁴ When the Army imposes and enforces rules on the individual, the individual has a minimal personal stake in any outcome.¹⁵⁵ If the individual “checks the block”¹⁵⁶ by completing the absolute minimum requirement without positive reinforcement or negative consequence, the individual has no reason to commit to doing any more.¹⁵⁷ Efficiency at accomplishing the mission does not necessarily mean that the individuals performing the mission acted ethically.¹⁵⁸ Decision-makers who meet all the training requirements and accomplish the mission, but fail to integrate values and

nice sounding, desired learning outcomes We must teach moral reasoning, not just ‘core values’ or ‘ethical checklists.’” *Id.*

¹⁵⁰ Toner, *supra* note 149, at 51.

¹⁵¹ *Id.* See also Reed, *supra* note 38, at 53, 55 (focusing on “how to think” not “what to think”).

¹⁵² Imiola & Cazier, *supra* note 60, at 15–16.

¹⁵³ Wilson, *supra* note 149, at 161, 164.

¹⁵⁴ Rossouw & van Vuuren, *supra* note 87, at 397.

¹⁵⁵ *Id.*

¹⁵⁶ WONG & GERRAS, *supra* note 39, at 19.

¹⁵⁷ Rossouw & van Vuuren, *supra* note 87, at 397.

¹⁵⁸ Imiola & Cazier, *supra* note 60, at 12; see also ADRP 1, *supra* note 55, para. 1-5. “Professions earn and maintain the trust of society through ethical, effective, and efficient application of their expertise on society’s behalf If a profession violates its ethic and loses trust with the society it serves, it becomes subject to increased oversight and control.” *Id.*

rules into their decisions, may still make ethically questionable decisions.¹⁵⁹

As decision-making shifts from higher echelons to lower echelons,¹⁶⁰ the Army should implement a new strategy to close the application gap by moving away from the compliance mode and shifting to the integrity mode. By implementing a new strategy for ethics training focused on application, the Army will encourage individual internalization of the Army's values and rules,¹⁶¹ will foster commitment to using internalized values and rules to make decisions,¹⁶² and will develop organizational incentives for ethical behavior.¹⁶³ Decision-makers will then have the skills to make ethical decisions in complex, morally ambiguous situations.

1. *Internalization of Organizational Values*

The difference between the Army being a bureaucracy and a profession lies in its ability to encourage the exercise of individual judgment through the application of organizational values.¹⁶⁴ To move beyond the compliance mode, the Army must first strive for its members to internalize—not merely memorize—the organizational values.¹⁶⁵ Internalization happens when “members of the profession will genuinely believe that these principles are morally correct and just.”¹⁶⁶ And believing

¹⁵⁹ ADRP 1, *supra* note 55, para. 1-7. “The professional must routinely make discretionary judgments and take appropriate action. *Id.* para. 1-8.

¹⁶⁰ TRADOC PAM. 525-3-0, *supra* note 33, para. 4-6(b).

¹⁶¹ Rossouw & van Vuuren, *supra* note 87, at 397. “[T]he integrity approach is marked by the internalization of ethical values and standards.” *Id.*

¹⁶² *Id.* at 397. “[I]t seeks to obtain the commitment of individual members of the organization to a set of shared corporate values.” *Id.* See also ADRP 1, *supra* note 55, para. 1-28 (describing success as a profession when individuals commit to the essential characteristics of the profession).

¹⁶³ Rossouw & van Vuuren, *supra* note 87, at 397.

¹⁶⁴ Imiola & Cazier, *supra* note 60, at 16 (asserting that principles promote discretionary judgment while rules obviate judgment); see also Reed et al., *supra* note 38, at 48.

At the heart of any profession is a body of expertise and abstract knowledge that its members are expected to apply within its granted jurisdiction. Those who learn and employ that knowledge in unique contexts are rightly described as professionals; in them lies the heart and soul of the profession.

Id.

¹⁶⁵ Imiola & Cazier, *supra* note 60, at 17.

¹⁶⁶ *Id.*

these principles just, they will seek to better understand them and conform their actions to them.”¹⁶⁷

Complex or morally ambiguous circumstances require decision-makers with highly developed ethical decision-making skills¹⁶⁸ who have also internalized organizational values.

Sometimes there are difficult decisions to be made. In those circumstances, I do not want simply rules or simply considerations of outcomes or simply examination of pressing circumstances or simply patterns of thought; I want all of them, considered as prudentially as possible by a man or woman who has learned to reason wisely and well.¹⁶⁹

Internalization of Army organizational values, combined with the exercise of ethical decision-making, increases the soldiers’ “operational adaptability”¹⁷⁰ in pursuit of mission success.¹⁷¹

In the compliance mode, rote memorization and adherence to the organization’s standards of conduct was sufficient, because the individual shared no responsibility for upholding the organizations’ ethics.¹⁷² In the integrity mode, however, each individual must internalize the Army’s organizational values independently.¹⁷³ Once the individuals have done so, the Army as an organization must encourage commitment to making ethical decisions by training them to exercise ethical decision-making.¹⁷⁴ Ethical decision-making contributes to the Army’s mission,¹⁷⁵ and should

¹⁶⁷ *Id.* Army doctrine describes the internalization process through the development of a professional identity. ADRP 1, *supra* note 55, para. 3-25; *see also* Wilson, *supra* note 149, at 175. (“The most successful agencies of this type are those that develop among their workers a sense of mission, a commitment to craftsmanship, or a belief in professional norms that will keep unobserved workers from abusing their discretion.”).

¹⁶⁸ ADRP 7-0, *supra* note 15, paras. 2-25–2-26 (providing training to develop adaptive leaders who can think critically and creatively).

¹⁶⁹ Toner, *supra* note 149, at 45.

¹⁷⁰ Operational adaptability is “[t]he ability to shape conditions and respond effectively to changing threats and situations with appropriate, flexible, and timely actions.” TRADOC PAM. 525-3-0, *supra* note 33, glossary, sec. III.

¹⁷¹ Chris Case et al., *Owning Our Army Ethic*, MIL. REV., Sept. 2010 at 3, 7–8.

¹⁷² Rossouw & van Vuuren, *supra* note 87, at 397.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ ADRP 1, *supra* note 55, para. 5-1. “Military expertise is the ethical design, generation, support, and application of land-power, primarily in unified land operations, and all

consist of more than “procedural constraints.”¹⁷⁶ Members of the Army must internalize the organization’s values—and commit to applying those values—in the execution of their duties.

2. *Commitment to Ethical Decision-Making*

Commitment is “[t]he resolve of Army professionals to contribute honorable service to the Nation, to perform their duties with discipline and to standard, and to strive to successfully and ethically accomplish the mission despite adversity, obstacles, and challenges.”¹⁷⁷ In 2012, the Secretary of Defense highlighted the need for personal responsibility for ethics within the DoD by stating, “[e]very DoD employee, civilian and military, bears a portion of the responsibility in this regard. I count on your personal engagement to shape our environment to ensure we work in an ethical culture.”¹⁷⁸ Committed individuals take initiative, exercise critical thinking, and become personally involved in the decision-making process.¹⁷⁹

To transform from a compliance organization to an integrity organization, the Army must recognize the strategic importance of ethical performance.¹⁸⁰ It must also relax control over individuals, and rely instead on individual discernment rooted in the organization’s values.¹⁸¹ Doctrinally, the Army recognizes the need for decision-makers who are: (1) properly trained; (2) committed to the organization; (3) adapt well to changing circumstances; and (4) exercise independent decision-making.¹⁸²

supporting capabilities essential to accomplish the mission in defense of the American people.” *Id.*

¹⁷⁶ Wilson, *supra* note 149, at 164; *see also* Army Ethic White Paper, *supra* note 23, at 13 n.23 (self-policing).

¹⁷⁷ ADRP 1, *supra* note 55, para. 3-18; *see also* ADRP 6-22, *supra* note 33, para. 3-27 (asserting that internalization of values leads to a desire to do the right thing).

¹⁷⁸ EIA Memo, *supra* note 56.

¹⁷⁹ ADRP 6-22, *supra* note 33, para. 6-4.

¹⁸⁰ Rossouw & van Vuuren, *supra* note 87, at 398.

¹⁸¹ *Id.*

¹⁸² ADP 6-0, *supra* note 34, para. 5.

The exercise of mission command is based on mutual trust, shared understanding, and purpose. Commanders understand that some decisions must be made quickly at the point of action. Therefore, they concentrate on the objectives of an operation, not how to achieve it. Commanders provide subordinates with their intent, the purpose of the operation, the key tasks, the desired end state, and resources.

This kind of decision-maker is a force-multiplier and increases the operational capability of the unit.¹⁸³ Commitment to the Army's organizational values fosters trust between unit members and supports the Army's intent to distribute decision-making responsibility at lower levels, with less guidance and supervision.¹⁸⁴ In order to achieve full transformation to an integrity organization, however, the Army must also incentivize ethical behavior.

3. *Organizational Incentives for Ethical Decision-Makers*

How the Army deals with violations of rules and values either incentivizes ethical conduct or underwrites unethical conduct by focusing on bureaucratic requirements.¹⁸⁵ In the compliance mode, the focus is on enforcement, not on commitment to the organization's underlying values.¹⁸⁶ Punishment of non-compliant behavior disempowers employees who take action in "blind adherence to the code of conduct."¹⁸⁷ All actions must comply with the rules, or negative consequences occur—with little room for the exercise of independent judgment or decision-making.¹⁸⁸ Individuals within this mode feel that they have little control over situations or decision-making.¹⁸⁹ They are "less likely to hold their

Subordinates then exercise disciplined initiative to respond to unanticipated problems. Every [s]oldier must be prepared to assume responsibility, maintain unity of effort, take prudent action, and act resourcefully within the commander's intent.

Id.

¹⁸³ Case et al., *supra* note 171, at 8. "The fundamental characteristic of the Army necessary to provide decisive landpower is operational adaptability—the ability of Army leaders, [s]oldiers, and civilians to shape conditions and respond effectively to a broad range of missions and changing threats and situations with appropriate, flexible, and responsive capabilities." TRADOC PAM. 525-3-0, *supra* note 33, para. 3-3.

¹⁸⁴ ADRP 1, *supra* note 55, para. 2-6.

¹⁸⁵ WONG & GERRAS, *supra* note 39, at 11–12.

¹⁸⁶ Rossouw & van Vuuren, *supra* note 87, at 397.

¹⁸⁷ *Id.*

¹⁸⁸ Wilson, *supra* note 149, at 175.

¹⁸⁹ For example, reporting motor-pool readiness one officer stated,

I sat in a log synch and they're like, "what's your vehicle percentage?" I said, "I'm at 90%." [But] if [anyone] told me to move them tomorrow, [I knew] they would all break. For months and months and months we reported up "90%, [g]ood-to-go on vehicles!"—knowing

behavior to their own moral standards,” and may rationalize behavior that violates the organizational values.¹⁹⁰ In this type of situation, the organization may perform very efficiently, but there is little commitment to using organizational values to make decisions.¹⁹¹

In the integrity mode, the organization cedes some measure of control over individual action, and some enforcement of ethical behavior to the individual.¹⁹² The integrity mode relies heavily on the independent judgment of individual actors.¹⁹³ It necessitates that individuals receive qualitative decision-making training and rewards ethical behavior.¹⁹⁴ The organization places less emphasis on punishment or monitoring for compliance, but retains a compliance framework as a safety-net.¹⁹⁵

In order to move from the compliance mode to the integrity mode, the Army needs to incentivize ethical behavior by incorporating ethical decision-making as a key component in performance evaluations, and holding individuals who make ethical decisions out as exemplars.¹⁹⁶ In the integrity mode, the Army will need to provide external guidance through professional development and on-going training, rather than simply subjecting individuals to external control.¹⁹⁷ The Army wants decision-makers to strive to make ethical decisions by applying values and

that it didn't matter because it carried no weight. It literally was just filling a box on a slide.

WONG & GERRAS, *supra* note 39, at 9.

¹⁹⁰ Barnes & Leavitt, *supra* note 71, at 46. One example is officers lying about the completion of mandatory training. “Eventually words and phrases such as ‘hand waving, fudging, massaging, or checking the box’ would surface to sugarcoat the hard reality that in order to satisfy compliance with the surfeit of directed requirements from above, officers resort to evasion and deception.” WONG & GERRAS, *supra* note 39, at 8.

¹⁹¹ Imiola & Cazier, *supra* note 60, at 12. “Any code whose underlying function is merely effectiveness will work equally well for the unjust warrior as for the just warrior Our professional military ethic must truly point toward ethical conduct and not mere expediency.” *Id.*

¹⁹² Rossouw & van Vuuren, *supra* note 87, at 398.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 389.

¹⁹⁶ *Id.* (stating that the integrity approach requires systems for evaluating and rewarding ethical performance); *see also* Case et al., *supra* note 171, at 10. “[T]he Army must be self-regulating and that falls on the shoulders of leaders at all levels. If the Army fails to self-regulate its ethic, it is quite justifiable that those external to the profession must do so on its behalf, which degrades the autonomy and legitimacy of the profession.” *Id.*

¹⁹⁷ Rossouw & van Vuuren, *supra* note 87, at 398.

rules to the information available at the time, and to exercise independent judgment.¹⁹⁸

Leaders who emphasize compliance with rules over the exercise of ethical judgment take opportunities for ethical decision-making away from individuals, and increase resentment.¹⁹⁹ Leaders who fail to tolerate some level of imperfection inhibit soldiers from taking action.²⁰⁰ Overemphasis on compliance decreases individual motivation and inclination to creatively tackle problems,²⁰¹ and may impair the operational adaptability of the individual and the overall morale of the unit.²⁰² Alternately, emphasizing commitment to organizational values encourages ethical decision-making and increases the overall morale and operational adaptability of the unit.²⁰³

A successful ethics training program in the integrity mode emphasizes internalization of the organization's values and rules and focuses on developing the individual's commitment to them.²⁰⁴ Members of the organization need guidance and training to develop the skills necessary to make ethical decisions.²⁰⁵ The Army adopted doctrinal changes to facilitate transformation from a compliance organization to an integrity organization. Now, the Army must undertake a qualitative review and revision of its current ethics training paradigm to complete the transformation.

¹⁹⁸ ADP 6-0, *supra* note 34, para. 6.

¹⁹⁹ ADRP 6-22, *supra* note 33, para. 6-6.

²⁰⁰ James A. McGrath & Gustaf E. Anderson III, *Recent Work on the American Professional Military Ethic: An Introduction and Survey*, 30 AM. PHIL. Q. 187, 196-97 (1993); *see also* Roetzel, *supra* note 11, at 84.

[W]hen the capacity and freedom to exercise professional discretion are absent, a false dichotomy can arise in the [s]oldier's mind between doing what is "right" and doing what is "legal." This can lead [s]oldiers to assume a "survival mentality," which asserts "I'm not going to risk doing what I think is right, and end up going to jail for it. If I follow the rules, they can't hold me responsible for what goes wrong."

Id.

²⁰¹ ADRP 6-22, *supra* note 33, para. 6-6.

²⁰² *Id.*

²⁰³ ADP 6-0, *supra* note 34, para. 12.

²⁰⁴ Rossouw & van Vuuren, *supra* note 87, at 398.

²⁰⁵ *Id.*

V. Proposing a New Strategy to Improve the Success of Ethics Training

A. Moving in the Right Direction.

Transitioning from the compliance mode to the integrity mode usually begins with “a comprehensive and deep diagnosis of the corporate ethical culture and current state of ethical behavior.”²⁰⁶ In 2010, the Secretary of the Army and the Chief of Staff of the Army ordered Training and Doctrine (TRADOC) Command to review the impact years of protracted warfare has had on members of the Army profession.²⁰⁷ The review resulted in the publication of new doctrine and the development of a professional education and training program entitled *America’s Army—Our Profession* (otherwise known as the AAOP training program).²⁰⁸ This knowledge-based training program targeted all members of the Army profession. Subsequent calendar year training included *America’s Army—Our Profession—Stand Strong*²⁰⁹ in 2014, and currently, for fiscal year 2015–2016, includes *America’s Army—Our Profession—Living the Army Ethic*.²¹⁰ In June 2015, the Army published the *Army Ethic*,²¹¹ which

define[d] the moral principles that guide us in the conduct of our missions, performance of duty, and all aspects of life. Our ethic is reflected in law, Army [v]alues, creeds oaths, ethos, and shared beliefs embedded within Army culture. It inspires and motivates all of us to make right decisions and to take right actions at all times.²¹²

This updated doctrine emphasizes the importance of ethical decision-making at all stages of career development.²¹³ Development and distribution of the Army Ethic and the new training program reflect the Army’s interest in moving beyond compliance management and into an integrity mode of managing ethics.

²⁰⁶ *Id.*

²⁰⁷ All Army Activities Message, 189/2014/291040Z July 14, U.S. Dep’t of Army, subject: ALARACT Announcement of the Army’s Fiscal Year 2015–2016 America’s Army—Our Profession Theme “Living the Army Ethic” [hereinafter ALARACT 189/2014].

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Army Ethic White Paper, *supra* note 23, at 11. The Army Ethic was incorporated into the newest version of ADRP 1, not published as a stand-alone document. ADRP 1, *supra* note 55.

²¹² Army Ethic White Paper, *supra* note 23, at 11.

²¹³ *Id.*

The AAOP training program requires each unit to hold a professional development session annually, following the specific theme for that calendar year.²¹⁴ In 2016, training focuses on specific sections of the Army Ethic.²¹⁵ The Center for the Army Profession and Ethic (CAPE) leads the ongoing efforts to modify Army doctrine to focus more heavily on adhering to our profession's moral obligations.²¹⁶ This new, holistic approach to teaching ethics encourages all Army professionals to "seek to discover the truth, decide what is right, and to demonstrate the character, competence, and commitment to act accordingly"²¹⁷

The Center for the Army Profession and Ethic provides some training material for the implementation of the program, but recognizes the insufficiency of annual training alone by stating that the material "will enhance planning and conduct of professional development activities in support of this program"²¹⁸ This language implies that the provided material should not be the entirety of the program.²¹⁹ Implementation instructions require commands to foster positive command climates and to develop their own professional development programs that "integrate Army Profession Doctrine throughout education training, operations, after-action reviews, and in coaching, counseling, and mentoring."²²⁰

A requirement for measurable/quantifiable impact is notably absent from the implementation instructions.²²¹ Instead of a measuring success by focusing on the quantity of soldiers who receive the training, the focus is instead on the qualitative goal "to generate shared understanding of the central role of the Army Ethic in explaining, inspiring, and motivating why and how we serve."²²² The desired outcome is for Army professionals to act "consistent[ly] with the Army Ethic, reflecting a shared understanding for why and how we serve in defense of the American people. As trustworthy Army professionals, we are honorable servants, military

²¹⁴ ALARACT 189/2014, *supra* note 207.

²¹⁵ *Id.*

²¹⁶ ARMY ETHIC WHITE PAPER, *supra* note 23, at 12.

²¹⁷ ALARACT 189/2014, *supra* note 207.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* Shared understanding is a mission command concept. "Shared understanding and purpose form the basis for unity of effort and trust. Commanders and staffs actively build and maintain shared understanding within the force and with unified action partners by continual collaboration throughout the operations process (planning, preparation, execution, and assessment)." ADRP 6-0, *supra* note 25, para. 2-9.

experts, and stewards of the people and resources entrusted to our care.”²²³ The Army Ethic moves beyond a simple list of values towards an integrated doctrinal publication emphasizing the strategic importance of ethical behavior and ethical decision-making.²²⁴

The development, distribution, and training on the Army Ethic increases the ethical knowledge-base of the decision-makers in the Army. However, in order to complete the shift from a compliance mode organization to an integrity mode organization the Army must address the application gap. Addressing the application gap requires an application-based training strategy designed to develop decision-makers who internalize and commit themselves to the Army’s organizational values, as represented in the Army Ethic.

B. Defining the PRICE Strategy for Ethics Training

The PRICE strategy specifically targets the gap existing between knowledge of values and rules and the application of that knowledge to complex and morally ambiguous situations. This strategy proposes

²²³ ALARACT 189/2014, *supra* note 207.

²²⁴ ARMY ETHIC WHITE PAPER, *supra* note 23, at 3. Specifically, the drafters note:

Failure to publish and promulgate the Army Ethic in doctrine; Neglects the explicit inclusion of moral and ethical reasoning informing Army [v]alues-based decisions and actions under Mission-Command; Fails to inspire our shared identity as Trustworthy Army Professionals and our Duty to uphold ethical standards; Compromises our ability to develop and certify the Character of Army Professionals, essential to Trust; Continues misunderstanding among the Army Profession cohorts concerning the vital role that each plays in ethical conduct of Mission Command; Concedes that legalistic, rules-based, and consequential reasoning dominate Soldier and Army Civilian decisions; and Permits the continuation of dissonance between our professed ethic and nonconforming institutional policies and practices.

Id. Drafters further noted, “The Army Ethic is an integrated and coherent whole. It may be discussed in segments or in part for instructional purposes, but altogether it applies to what an Army [p]rofessional is and does, everywhere, always.” ADRP 1, *supra* note 55, para 3-9. The DoD and the Army also utilize other existing tools to assess ethical issues, such as the Center for Army Leadership’s Annual Survey, Annual Survey of the Army Profession, Army’s Peer and Advisory Survey, Army’s Leadership Behavioral Scale, Tailored Adaptive Personality Assessment System, and 360 degree assessments. None of these tools are designed specifically to assess ethical behavior or decision-making. GAO Report on Military Ethics, *supra* note 5 at 15.

improving the quality of ethics training in the U.S. Army, while rejecting any notion that simply increasing the number of hours devoted to ethics training will resolve the application gap.²²⁵ It requires an acknowledgement by the institutional Army that the current ethics training program fails to fully address the needs of the Army.²²⁶ Meaningful reform will require revision and adaptation of the training regime at all levels, from strategic to tactical. Once the Army acknowledges the existence of an application gap, then implementation of the PRICE strategy can effectively address the problem.

Each of the five prongs of the PRICE strategy deal with particular elements of ethics training. *Progressive* training represents the strategy's temporal element. Training on ethical decision-making should begin when soldiers enter the military, and should continue throughout military service.²²⁷ Training over the course of a career encourages constant internalization of, and commitment to, the Army Values;²²⁸ it prepares individuals to make crucial, ethical decisions.²²⁹ *Reflective* training is a method that gives decision-makers opportunities to review ethical decisions and develop a "bank" of experiences to draw from when facing ethical dilemmas.²³⁰ Decision-makers review and reflect not only on their own decision, but also on decisions made by peers, seniors, and subordinates.²³¹ Soldiers make grave decisions requiring a depth of understanding only achievable through *Integrated* training. This training

²²⁵ GAO Report on Military Ethics, *supra* note 5 at 15. "Our work on human capital states that agencies should strategically target training to optimize employee and organizational performance by considering whether expected costs associated with proposed training are worth the anticipated benefits over the short and long terms." *Id.*

²²⁶ When discussing the overall DoD ethics program, the GAO found that by failing to provide targeted training, or assessing the feasibility of training the entire force, the agency "may be missing opportunities to promote and enhance DoD employees' familiarity with values-based ethical decision-making." *Id.*

²²⁷ ADRP 7-0, *supra* note 15, para. 1-5 (discussing overall training).

²²⁸ "[C]haracter doesn't just develop in the heat of battle or a time of crisis. It develops from the consistent application of moral values and ethical behavior throughout one's military career." EDGAR F. PURYEAR, JR., *AMERICAN GENERALSHIP* 360 (2000).

²²⁹ ADRP 7-0, *supra* note 15, para. 2-26.

²³⁰ "Reflection involves a person (or group) thinking about, writing about, and discussing in detail an experience, idea, value, or new knowledge." Joe Doty & Walter Sowden, *Competency vs. Character? It Must Be Both!*, *MIL. REV.* Nov.–Dec. 2009, at 38; *see also* Jan L. Jacobwitz & Scott Rogers, *Mindful Ethics—A Pedagogical and Practical Approach to Teaching Legal Ethics, Developing Professional Identity, and Encouraging Civility*, 4 *ST. MARY'S J. LEGAL MALPRACTICE & ETHICS* 198, 213 (2014) (finding that memories help to make sense of data and allow individuals to make decisions).

²³¹ ADRP 7-0, *supra* note 15, para. 3-73.

incorporates organizational values, rules appropriate to the soldiers' rank and position, and develops decision-making processes.²³² Decision-makers learn to make ethical decisions in regularly recurring military ethical dilemmas. The *Comprehensive* prong of the strategy redefines the scope of training. Comprehensive training incorporates ethical decision-making processes into everyday life and teaches decision-makers how to make ethical choices the norm. This prong gives decision-makers opportunities to develop stronger ethical reasoning skills for more ethically complex situations as they progress through the ranks. *Experiential* training takes soldiers out of the classroom vacuum and forces them to make ethical decisions in real-world scenarios.²³³ In order to reflect on ethical decisions, decision-makers must be given the opportunity to experience ethical dilemmas.²³⁴ Through experience and reflection, decision-makers develop increasingly sophisticated ethical reasoning skills.²³⁵

The objective of the PRICE strategy for ethics training is to close the application gap by developing decision-makers who internalize the Army Ethic, commit themselves to using those values and rules to make ethical decisions, and possess the ethical reasoning skills to make ethical decisions in morally ambiguous and complex situations. Ultimately, this strategy supports the Army's transformation from the compliance mode of managing ethics to the integrity mode. This strategy will increase both individual and organizational operational adaptability to fight and win the nations wars.²³⁶

²³² *Id.* para. 2-21.

²³³ John R. Schafer, *Making Ethical Decisions*, FBI LAW ENFORCEMENT BULLETIN, May 2002, at 14. "Contrived scenarios in the classroom differ significantly from real-life ethical dilemmas." *Id.* See also Jacobowitz & Rogers, *supra* note 230, at 198, 214.

²³⁴ ADRP 7-0, *supra* note 15, paras. 2-21–2-25.

²³⁵ Jacobowitz & Rogers, *supra* note 230, at 214 n.55.

²³⁶ TRADOC PAM.525-3-0, *supra* note 33, para. 5(b).

The Army must maintain a credible, robust capacity to win decisively This places a premium on operational adaptability Operational adaptability requires resilient [s]oldiers and cohesive teams that are able to overcome the psychological and moral challenges of combat, proficient in the fundamentals, masters of the operational art, and cognizant of the human aspects of conflict and war.

Id.

C. *Progressive Training*

Progressive decision-making training should build on the individual's knowledge and experience level. "[L]eader development and education programs must account for prior knowledge and experience by assessing competencies and tailoring instruction to [s]oldiers' existing experience levels.²³⁷ These programs must also adjust to take advantage of changes in leader and [s]oldier experiences over time."²³⁸ As soldiers mature, their judgment will also mature.²³⁹ Training must also evolve.²⁴⁰ Decision-makers need greater exposure to complex and morally ambiguous situations as they progress through their careers.²⁴¹ The situations decision-makers encounter today will not be the same as those they will encounter in ten years.²⁴² The Army requires soldiers who can adapt to changing situations and continue to make ethical decisions in ever-changing operational environments.²⁴³

²³⁷ *Id.* para. 4-6(c)

²³⁸ *Id.*

²³⁹ Imiola & Cazier, *supra* note 60, at 16.

²⁴⁰ Martin L. Cook, *Moral Reasoning as a Strategic Leader Competency*, AIR UNIVERSITY, http://www.au.af.mil/au/awc/awcgate/army-usawc/moral_dev.pdf (last visited June 28, 2016).

²⁴¹ *Id.*

For the direct leader of troops, it may be adequate if one maintains one's integrity and tells the truth. And, more importantly, it may be perfectly clear in most or all circumstances which courses of action are morally right in the more defined areas or direct and even organizational leadership. In the more complex and multifaceted environment of strategic leadership, in contrast, moral decision making is far more complex.

Id. See also Ludwig & Longenecker, *supra* note 50 ("[E]ven successful leaders need both the input, direction, and support of a governing body to be prevented from falling into the dark side of success.").

²⁴² TRADOC PAM. 525-3-0, *supra* note 33, para. 2-1(b).

²⁴³ Case et al., *supra* note 171, at 3. "With ongoing change in the world balance of power and rapid advances in technology, the Army [p]rofession's practice of warfare continuously evolves. However, the moral principles of the Army Ethic . . . are timeless and enduring." ADRP 1, *supra* note 55, para. 3-17.

Operational adaptability requires every professional [s]oldier to understand his or her situation in depth and context. In the midst of complexity and uncertainty, the character of warfare may change, yet the fundamental duty of the Army and its [s]oldiers to employ force with competence and character in defense of the Nation and its interest does not change. The duty of the Army endures across all contexts along the spectrum of conflict.

To increase decision-makers ability to adapt to changing circumstances, commanders must provide opportunities to participate in formal and informal training events focused on ethical decision-making.²⁴⁴ Commanders must develop strong command programs emphasizing ethical decision-making.²⁴⁵ Commanders should rely on the expertise of the judge advocate and chaplain to tailor training programs to the audience. All three should work together to improve training and to communicate the importance and practicality. Senior members of the unit should train on more complex and morally ambiguous scenarios than do junior soldiers.²⁴⁶ Commanders should take every available opportunity to recognize individuals for ethical decision-making, encourage further training, and promote personal development in ethical decision-making. Highlighting good ethical behavior incentivizes others to act in similar ways.²⁴⁷

Progressive training aids in the Army's transition toward the integrity mode by recognizing the need for "ongoing communication and induction of new employees."²⁴⁸ The Army faces unique challenge because of the significant number of new trainees joining each year, and because those who leave take the institutional memory with them.²⁴⁹ Additionally, progressive training allows leaders to mitigate this challenge by providing opportunities for each new recruit to begin internalization of and commitment to the Army's organizational values immediately.²⁵⁰

The Army should develop a career progression model for ethical decision-making training incorporating operational, institutional, and self-development training.²⁵¹ Progressive training focusing on application of

Id.

²⁴⁴ ADRP 7-0, *supra* note 15, para. 1-10.

²⁴⁵ *Id.* para.3-4.

²⁴⁶ Cook, *supra* note 240 (describing how at the strategic level "moral reasoning operates at various levels and moral issues arise at new levels of complexity).

²⁴⁷ Rossouw & van Vuuren, *supra* note 87, at 398.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* "An integrity mode of ethics management has transformational proportions—as such deep cultural organizational change is effected over time." *Id.*

²⁵¹ AR 350-1, *supra* note 8, para. 1-10. Army training occurs on three levels, operational, institutional, and self-development, all requiring synchronization. *Id.* "Training builds confidence and competence while providing essential skills and knowledge." *Id.* "Leader development is the deliberate, continuous, sequential, and progressive process—grounded in Army values—that develops [s]oldiers and Army civilians into competent and confident leaders capable of decisive action, mission accomplishment, and taking care of [s]oldiers

ethical decision-making processes works in conjunction with knowledge-based training holistically to develop ethical decision-makers. Constant and consistent development of decision-makers requires institutional patience and reflective examination of ethical dilemmas on the individual and organizational levels.

D. Reflective Training

The Reflective prong of the PRICE strategy provides a method to develop ethical decision-making skills. Individuals must make ethical decisions and then be given the opportunity to reflect on all aspects of the decision-making process.²⁵² This reflective training method will lead to internalization of and commitment to organizational values.²⁵³ Reflective training gives soldiers a “bank” of experiences to draw from when making decisions.²⁵⁴ “The moral insight necessary to render sound moral judgment requires considerable study,” and that study must include conversations and reflection on the moral principles that govern the

and their [f]amilies.” *Id.* Ethical decision-making needs to be incorporated into both training and leadership development.

²⁵² Jacobowitz & Rogers, *supra* note 230, at 219.

[O]nce armed with knowledge, the path to practical wisdom or professional judgment and effective decision-making involves not only knowledge and experience, but also an awareness of the thoughts, feelings, and bodily sensations influencing your thinking By pausing to gain insight into what is influencing your thought process, you may be able to reflect and more consciously deliberate to thoughtfully decide upon a response rather than quickly react in a regrettable manner.

Id.

²⁵³ Rossouw & van Vuuren, *supra* note 87, at 398.

²⁵⁴ *Id.* at 215. In the field of legal ethics, the University of Miami School of Law developed an experiential professional ethics program. *Id.* It is a full semester long and involves a combination of reading, discussions, role-playing, and mindful reflective exercises. *Id.* The students in the program are:

[E]ngaged in grappling with real-world ethical dilemmas designed to create a frame of reference or set of emotional memories that the students may be able to intuitively access in the future. In other words, the goal is implicit, internalized learning resulting from experience as opposed to the explicit rote memorization of rules that often remains barely long enough to take an exam.

Id. at 233.

military profession.²⁵⁵ Reflection forces individuals to examine actions from multiple perspectives, removes them from their comfort zones, and forces them to discuss things that they would rather not.²⁵⁶ Breaking away from normal experiences and forcing discussion and reflection on ethical dilemmas leads to individual transformation.²⁵⁷ Reflective exercises encourage growth through experience.²⁵⁸

Decision-makers who complete reflective exercises will remain engaged in the ethical decision-making process.²⁵⁹ Participation in reflective training will help to prevent moral disengagement that can lead to unethical behavior.²⁶⁰ Individuals given the opportunity to reflect on prior ethical decisions are better equipped to avoid moral disengagement when presented with morally ambiguous situations.²⁶¹ Commanders must remain actively engaged in the reflective process.²⁶² It is not enough for the commander to emphasize the importance of ethics once a year.

Leaders must recognize that values can change during significant emotional events, and assess small unit

²⁵⁵ Imiola & Cazier, *supra* note 60, at 17.

²⁵⁶ Doty & Sowden, *supra* note 230, at 41.

²⁵⁷ *Id.* (asserting that reflection causes cognitive dissonance, challenging beliefs and leading to change).

²⁵⁸ Jacobwitz & Rogers, *supra* note 230, at 214 n.55.

²⁵⁹ Barnes & Leavitt, *supra* note 71, at 50.

²⁶⁰ *Id.* (moral disengagement); *see also* WONG & GERRAS, *supra* note 39, at 17 (describing ethical fading which “allows Army officers to transform morally wrong behavior into socially acceptable conduct by dimming the glare and guilt of the ethical spotlight”).

²⁶¹ Barnes & Leavitt, *supra* note 71, at 50.

²⁶² ADRP 7-0, *supra* note 15, para. 1-16. The Army already archives and requires units to submit “lessons learned” to a centralized clearinghouse. U.S. DEP’T OF ARMY, REG., ARMY LESSONS LEARNED PROGRAM para. 2-8 (1 Apr. 2016). The Army Lessons Learned Program (ALLP):

Supports a fully integrated lessons sharing culture. The integration of lessons and best practices from training and operations is part of the Army culture and an accepted practice throughout the force. The systemic and continuous implementation of organizational requirements outlined in this regulation is critical to the success of the program. The ALLP supports rapid adaptation of leaders and units throughout the operations process (plan, prepare, execute, and assess). ACOMs, units, and organizations at all levels share their lessons and best practices continuously to improve performance and efficiency and to save lives across the force.

Id. para. 1-6(g) (emphasis added).

cohesiveness and the underlying values present in such groups. Commanders make a mistake assuming that once inculcated, every unit forever retains good organizational values. Values need constant reinforcement, and commanders must monitor the values of small groups in their organizations to determine if they meet the standards of their institution.²⁶³

Encouraging leaders to constantly assess ethical decisions made by decision-makers in the organization encourages rapid adaptation, which is a force multiplier in the current climate.²⁶⁴ Decision-makers who participate in reflective ethics training develop “practical wisdom”²⁶⁵ and “[t]he person possessing ‘practical wisdom may evaluate a situation and agilely apply general principles to particular facts to discern all of the relevant considerations and thereby develop a strategic solution.’”²⁶⁶

Reflective discussion should occur regularly in both peer-to-peer groups and in senior-subordinate mentor relationships.²⁶⁷ Training should also emphasize the importance of individual reflection.²⁶⁸ Both commanders and the Army’s TRADOC should rely on the expertise of JAs and chaplains to develop reflective ethical decision-making training throughout the training domains.

Participation in reflective training will increase individual internalization of the Army’s organizational values by encouraging examination of action in light of organizational values. Once the individual internalizes and commits to the organizations’ values, the Army needs individuals to engage in ethical decision-making.²⁶⁹ Reflective training empowers decision-makers to evaluate and compare the intended action with all the available courses of action using ethical decision-making tools.²⁷⁰ Continuous exposure to, and reflection on, ethical

²⁶³ Robert Rielly, *The Inclination for War Crimes*, MIL. REV. May–June 2009, at 52, 58.

²⁶⁴ Reed et al., *supra* note 38, at 58. See also Imiola & Cazier, *supra* note 60, at 16 (describing how principles require the use of discretionary judgment).

²⁶⁵ Jacobowitz & Rogers, *supra* note 230, at 205.

²⁶⁶ *Id.*

²⁶⁷ ADRP 7-0, *supra* note 15, para. 2-8.

²⁶⁸ Roetzel, *supra* note 11, at 81–82.

²⁶⁹ Rossouw & van Vuuren, *supra* note 87, at 392.

²⁷⁰ ADRP 7-0, *supra* note 15, para. 2-26.

dilemmas throughout their careers provides decision-makers concrete opportunities to develop ethical reasoning skills for future use.²⁷¹

E. *Integrated Training*

The *Integrated* prong provides the depth element of the PRICE strategy. Integrated training incorporates the Army's organizational values, rules applicable to the decision-makers rank and position, and decision-making processes into non-classroom training environments.²⁷² Integrated training that references situations decision-makers encounter at their rank and experience level will prepare them for future promotion and leadership positions.²⁷³ "The Army must develop its capacity for accelerated learning that extends from organizational levels to the individual [s]oldier, and tests their knowledge, skills, and abilities in the most unforgiving environments."²⁷⁴ Traditional garrison operations provided the luxury of time and resources to allot to training.²⁷⁵ Today's operational tempo is much quicker, requires action in a variety of environments, and necessitates training that maximizes training opportunities with limited resources.²⁷⁶ Integrated training will decrease the application gap by teaching members to apply organizational values

²⁷¹ TRADOC PAM. 525-3-0, *supra* note 33, App. B-8. "The future Army requires the capability to provide leaders at all echelons who are critical and creative thinkers with highly refined problem solving skills that can process data and information into usable knowledge to develop strategic thinkers in decisive action in support of unified land operations." *Id.*

²⁷² ADRP 7-0, *supra* note 15, para. 2-6, 2-8 (training as you fight and training while operating).

²⁷³ ALARACT 189/2014, *supra* note 207.

²⁷⁴ TRADOC PAM. 525-3-0, *supra* note 33, para.4-6(a).

²⁷⁵ For example, an article about the Robin Sage training exercise for Special Forces states,

[I]n the pre-9/11 days, Robin Sage was as much of a training event for the conventional Army as it was for the Special Forces students. The conventional [s]oldiers would be red-cycled—tasked to play the enemy and some of the guerilla forces—so they were able to train in their tactics, techniques, and procedures at the same time. With the current operations tempo, there are fewer G-forces, but the training is as intensive.

Janice Burton, *World's Foremost Unconventional Warfare Exercise Turns 35*, SPECIAL WARFARE, Mar.-Apr. 2009, at 14, 17.

²⁷⁶ ADRP 7-0, *supra* note 15, para. 1-4. Units are encouraged to develop concurrent training involving more than one echelon or involving tasks not directly related to the exercise in order to maximize the use of resources. *Id.* para. 2-16–2-17.

and rules within their particular Military Occupational Specialty (MOS) training.²⁷⁷ Further, integrated training will increase the soldiers understanding of the effects their decisions have on other individuals and on the organization as a whole. Discussion should include topics such as the deleterious effects on the organization when individuals rationalize unethical behavior.²⁷⁸

Failure to incorporate and integrate ethical decision-making into all phases of training and operations deemphasizes its importance²⁷⁹ and “provides a fertile environment for cutting corners to the easier wrong instead of taking time to do the harder right. These ‘paths of least resistance’ can force people to act unethically in order to achieve milestones or meet operational requirements.”²⁸⁰ The qualitative shift to integrate ethical decision-making into training scenarios and operations, instead of focusing on checklists of rules, will enhance decision-makers ability to adapt to complex situations. Including this integrated ethical decision-making training should not increase already burdensome quantitative training.²⁸¹

Proactive integration of ethical decision-making into all training and operations will “raise the ethical performance”²⁸² of the Army and move it along the continuum to become an integrity organization. Army decision-makers, like corporate employees, “need to get into the habit of discussing the ethical dimension of their work. No decision should be considered complete unless the ethical dimension thereof has been

²⁷⁷ TRADOC PAM. 525-3-0, *supra* note 33, App. B-8.

Future Army forces require the capability to train and educate leaders, [s]oldiers, and civilians using a continuous adaptive learning model that develops the initial, functional and professional skills, knowledge and attributes to provide the fundamental technical and tactical competence necessary to conduct decisive action in support of unified land operations.

Id. See also ADRP 7-0, *supra* note 15, para. 1-6.

²⁷⁸ WONG & GERRAS, *supra* note 39, at 33.

²⁷⁹ Doty & Sowden, *supra* note 230, at 43.

²⁸⁰ Mark S. Patterson & Janet E. Phipps, Ethics: Redirecting the Army’s Moral Compass at 13 (Apr. 24, 2002) (unpublished Senior Service College Fellowship Research Paper) (on file with the Army War College).

²⁸¹ WONG & GERRAS, *supra* note 39, at 30 (urging restraint when issuing mandatory training directives).

²⁸² *Id.*

contemplated.”²⁸³ Integrating ethical decision-making into all training and operations will encourage decision-makers to internalize and commit to Army organizational values, and will move the organization toward the integrity mode.

F. *Comprehensive* Training

The *Comprehensive* prong of the PRICE strategy describes the breadth of the scope of ethical decision-making training. Comprehensive training incorporates ethical decision-making processes at all decision points. Army decision-makers encounter situations where they must make ethical decisions on a regular basis.²⁸⁴ Therefore, regular training in ethical decision-making is necessary to develop ethical decision-making skills.

Regulatory guidance specifically prescribes formal institutional training and unit level training requirements and requires training to be conducted to particular standards.²⁸⁵ In the ethics realm, formal training includes annual Law of Armed Conflict, Standards of Conduct, and JER briefings as prescribed by AR 350-1.²⁸⁶ Outside of the formal institutional training, leaders have significant opportunity to develop creative training in ethical decision-making.²⁸⁷ Annual ethics reviews with attendance limited to senior leaders is insufficient to develop ethical decision-makers throughout the Army. Commanders, chaplains, and judge advocates, retain primary responsibility for ethics training,²⁸⁸ but every soldier makes decisions and every soldier contributes valuable insight to the ongoing ethics dialogue.²⁸⁹ Commanders can leverage the experience and expertise of all unit personnel to expand and enhance ethical decision-making training opportunities outside of those prescribed in regulatory guidance.

²⁸³ Rossouw & van Vuuren, *supra* note 87, at 398.

²⁸⁴ TRADOC PAM. 525-3-0, *supra* note 33, para. 4-6(b) “[A]rmy forces empower increasingly lower echelons of command with the capabilities, capacities, authorities, and responsibilities needed to think independently and act decisively, morally, and ethically. Decentralized execution guided by the tenets of mission command places increased responsibility on [s]oldiers to make decisions with strategic, operational, and tactical implications.” *Id.*

²⁸⁵ AR 350-1, *supra* note 8, tbl. G-1.

²⁸⁶ *Id.* para. G-4.

²⁸⁷ See also ADRP 7-0, *supra* note 15, para. 1-6 (empowering subordinates to develop training at lower levels).

²⁸⁸ See AR 27-1, *supra* note 25 (describing responsibilities for ethics training).

²⁸⁹ Doty & Sowden, *supra* note 230, at 44 (claiming that peer interaction is an effective developmental tool).

In the absence of formal guidance, unit commanders, other leaders, judge advocates, and chaplains can expand professional development programs by incorporating ethical decision-making into daily missions.²⁹⁰ Command emphasis imparts significant importance to the training.²⁹¹ Commanders emphasize the importance of ethical decision-making by modeling ethical behavior and incorporating ethical decision-making into the training and operations process. Modeling helps other decision-makers internalize organizational values by seeing the values in practice.²⁹²

Opportunities abound to incorporate ethics training during routine mission accomplishment. For example, during operations briefings, leaders can encourage subordinates to identify the commander's intent and the implied missions. "This provides an opportunity to explore how one goes about the process of recognizing considerations that are not explicitly stated and why an understanding of the commander's overall intent is important for correctly carrying out specific tasks."²⁹³

Comprehensive training can also be incorporated in operations planning when the staff must plan, prepare, and execute the commander's intent, while constantly performing assessments.²⁹⁴ Utilizing the military decision-making process (MDMP), staff officers can incorporate ethics concerns.²⁹⁵ The MDMP consists of seven steps, normally completed sequentially, but which may be revised as necessary as new information becomes available.²⁹⁶ The steps are: (1) receipt of mission; (2) mission analysis; (3) course of action development; (4) course of action analysis; (5) course of action comparison; (6) course of action approval; and (7) orders production, dissemination, and transition.²⁹⁷ Similarly, an ethical decision-making model in the JER provides ten steps to making an ethical decision:

²⁹⁰ *Id.* para. 2-6-2-8.

²⁹¹ *Id.* para. 1-15.

²⁹² Rielly, *supra* note 263, at 54. "The lesson for leaders at all levels is to ensure the quality of the training matches the subject's importance and that they constantly conduct, integrate, and reinforce it." *Id.*

²⁹³ Roetzel, *supra* note 11, at 82.

²⁹⁴ ADP 5-0, *supra* note 129, para. 34.

²⁹⁵ *Id.* The MDMP is "an iterative planning methodology to understand the situation and mission, develop a course of action, and produce an operation plan or order." *Id.* para. 32.

²⁹⁶ *Id.* para. 34.

²⁹⁷ *Id.* para. 32.

1. Define the problem.
2. Identify the goals.
3. List appropriate laws or regulations.
4. List the ethical values at stake.
5. Name all the stakeholders.
6. Gather additional information.
7. State all feasible solutions.
8. Eliminate unethical options.
9. Rank the remaining options according to how close they bring you to your goal, and solve the problem.
10. Commit to and implement the best ethical solution.²⁹⁸

The first two steps in the JER model already exist in the receipt of mission and mission analysis portions of the MDMP. Specific inclusion of the remainder of the JER model into the mission analysis and course of action development would provide staff officers the opportunity to recognize and analyze ethical issues and to develop ethical solutions drawing on the expertise and experience of the entire group.

One way of incorporating an ethical decision-making model into the MDMP would be to examine the “moral value of the goal of the operation[,]. . . [the] threat posed by the enemy in a given operation[,]. . . [the] permissible moral cost . . . in pursuit of the operation . . . [and a] developed view of how the operation is going to achieve a better state of peace”²⁹⁹ during the planning, execution and assessment of all operations. Eliminating unethical solutions during the planning process should decrease the likelihood of unethical decisions by individual decision-makers. It should also clarify application of the organizational values and rules to the given situation and emphasizes the importance of ethical conduct. Each operation, or training exercise, is an opportunity to discuss ethical decision-making.

Informal discussions between leadership and subordinates about decision-making emphasize the importance of both values and rules in everyday conduct of operations.³⁰⁰ Peer-to-peer discussions encourage collaboration and build upon the available knowledge bank for future decisions.³⁰¹ Judge advocates should involve themselves early in the

²⁹⁸ JER, *supra* note 78, para. 12-501.

²⁹⁹ Case et al., *supra* note 171, at 8.

³⁰⁰ Roetzel, *supra* note 11, at 82–83.

³⁰¹ *Id.*

planning process and utilize their own critical reasoning and ethical decision-making skills to interject when ethical concerns arise, or provide insight as to what risks for ethical dilemmas may arise with particular courses of action.

After each training session or operation is concluded, ethical decisions should be analyzed during an after action review (AAR) at each level of command.³⁰² An AAR should specifically address situations where decision-makers encountered decision-points requiring application of organizational values and rules. Special attention should be given to how the decision was made; whether the decision was appropriate based on the organizational values; and if not, what information or training would have been necessary to make an appropriate decision. Squad-leaders and commanders alike have the opportunity to influence future ethical decision-making by taking the time to incorporate ethical decision-making into all operations and reflecting on the decisions afterward.³⁰³

While the Army does not expect perfection, accountability for ethically-flawed decisions is necessary. Leaders must be exemplars of ethical behavior.³⁰⁴ They must also consistently act on unethical behavior, and encourage subordinates to report and discuss ethical issues with the command.³⁰⁵ They must investigate unethical behavior to determine not only what happened, but why it happened.³⁰⁶ After the investigation, they must take appropriate action, including determining consequences for unethical actions, and must praise ethical behavior.³⁰⁷ At each of these points, leaders have the opportunity to review and address ethical decisions and ethical compromises with their peers and subordinates.³⁰⁸

Comprehensive training would incorporate ethical decision-making at all levels, from individual self-development, through formal training at the Army's institutional schools. Additionally, comprehensive training requires a "concerted effort in which all members of the organization take

³⁰² ADRP 7-0, *supra* note 15, para. 3-73.

³⁰³ Doty & Sowden, *supra* note 230, at 43. "We can and should make subjects such as honesty and integrity a common part of the conversation in motor pools, forward operating bases, training areas, orderly rooms, and athletic fields." *Id.*

³⁰⁴ 10 U.S.C. § 3583 (1987).

³⁰⁵ *Id.* Christopher M. Barnes & Joseph Doty, *What Does Contemporary Science Say About Ethical Leadership?*, MIL. REV., Sept. 2010, 91.

³⁰⁶ *Id.* at 92.

³⁰⁷ *Id.* at 93.

³⁰⁸ ADRP 7-0, *supra* note 15, at 2-8.

joint responsibility for the ethics performance”³⁰⁹ It will result in an organization that moves past compliance based ethics management, into integrity based management of ethics. Comprehensive training includes both reflective and experiential training methods.

G. *Experiential* Training

Experiential training provides context for ethical decision-making. It encourages soldiers to make ethical decisions in situations where they are likely to encounter ethical dilemmas.³¹⁰ Soldiers need this context for ethical decision-making and they need practical experience making ethical decisions in morally ambiguous situations.³¹¹ A one-hour *PowerPoint* presentation per year satisfies the regulatory training requirement, but does not give the decision-maker the capability to make ethical decisions in future complex situations.³¹² Integrating ethical decision-making experiences into training scenarios can be as simple as including moral vignettes in normal training scenarios.³¹³ Vignettes force decision-makers to confront morally intense scenarios that have definite consequences, but may not have an easily identifiable right answer.³¹⁴ Soldiering, by its very nature, exposes soldiers to situations that non-soldiers may never confront—soldiers must confront issues of torture, killing, dealing with foreigners, both friend and foe, and with different value systems and organizational beliefs.³¹⁵

Exposure to issues alone is not sufficient. Decision-makers must actively confront ethical dilemmas, make decisions, and then reflect on those decisions.³¹⁶ “No amount of discretionary capacity will be of any

³⁰⁹ Rossouw & van Vuuren, *supra* note 87, at 398.

³¹⁰ ADRP 7-0, *supra* note 15, paras. 2-6–2-7; *see also* Schafer, *supra* note 233, at 14 (describing limits to classroom training); Jacobowitz & Rogers, *supra* note 230, at 214–15 (describing how experiential learning builds the memory bank for future decisions).

³¹¹ Doty & Sowden, *supra* note 230, at 42.

³¹² *Id.* at 39. *See also* TRADOC PAM. 525-3-0, *supra* note 35, App. B-8. “The future Army requires the capability to train units in a tough realistic environment, adapting training as the mission, threat, or operational environment changes, [and] to provide trained and ready forces capable of conducting missions across the range of military operations in support of unified land operations.” *Id.*

³¹³ Doty & Sowden, *supra* note 230, at 42.

³¹⁴ *Id.*

³¹⁵ *Id.* at 44 (setting the conditions and creating opportunities for soldiers to discuss difficult issues aids in character development).

³¹⁶ *Id.*

use unless there is a freedom to act upon it. Military leaders must therefore empower [s]oldiers to exercise their capacity for discretionary judgment.”³¹⁷ Facets of the U.S. Army already complete this type of training. Before graduating and receiving their green beret, special forces soldiers must complete the Robin-Sage unconventional warfare exercise.³¹⁸

The exercise “tests a [s]oldier’s ability to put into practice all of the training he has received”³¹⁹ The month-long exercise takes place outside of the schoolhouse and scenarios change regularly to keep pace (or get in front of) the operational environment in which the special forces operate.³²⁰ The special forces must confront a variety of ethical dilemmas, including situation, such as the following:

[T]alking guerillas out of committing war crimes For the guerillas, killing a captured prisoner wasn’t a big deal, but the [special forces] students had to get them to understand that it was. These are the kinds of things they run into all the time in the real world.³²¹

This extensive training scenario is unrealistic for conventional forces, but provides a valuable example of methods that commanders can use to incorporate experiential ethics decision-making into their training arsenal.

Compartmentalized, classroom based ethics training limits soldiers’ ability to apply organizational values, rules, and ethical decision-making concepts in real-world situations.³²² Experiential training, however, exposes soldiers to ethical dilemmas and forces them to confront morally ambiguous or complex situations head-on. Discussion of values and rules should be a part of the natural and ongoing workplace conversation, not limited to the unit auditorium during an annual training brief.³²³

³¹⁷ Roetzel, *supra* note 11, at 80.

³¹⁸ Burton, *supra* note 275, at 14.

³¹⁹ *Id.* at 16.

³²⁰ *Id.* at 20.

³²¹ *Id.*

³²² Toner, *supra* note 149, at 45.

³²³ Doty & Sowden, *supra* note 230, at 43.

VI. Conclusion

The proposed PRICE strategy of progressive, reflective, integrated, comprehensive, and experiential training fits the Army training and leader model as well as current Army doctrine it also dovetails with the spirit and intent of the AAOP training program. Commanders, JAs, and chaplains each retain responsibility for ethics training in particular realms, but coordinated effort, utilizing the PRICE strategy will operationalize ethical decision-making training and help the Army take the next step in its move from the compliance to the integrity mode of managing ethics.

Command emphasis on ethical decision-making promotes internalization of, and commitment to, organizational values. Conversely, failure to include ethical topics into the course of daily life signals that ethical issues are less important than other pressing issues.³²⁴ Inclusion of moral ambiguities into training scenarios and recognition of ethical experiences in daily existence, however, will allow individuals to develop more sophisticated, ethical decision-making skills. Through continuous exposure to progressively more complex ethical scenarios, decision-makers experience the difficulties that arise when situations pit one value against another, or values against rules. Following these opportunities with reflective exercises builds a stronger framework for future ethical decisions. The entire process facilitates further internalization of—and commitment to—organizational values, and creates the crucial building-blocks to move the Army from a compliance organization to an integrity organization.

Some argue that individual character or morality cannot be trained, but must be developed, and that character development is more important than competency based ethics training.³²⁵ The argument holds that removing knowledge-based ethics training and focusing instead solely on character development will save resources, and that the “Army will have transformed into a profession where character and competence training, education, and development occur simultaneously—with the outcome being [s]oldiers who understand and have internalized what it means to be an American [s]oldier.”³²⁶

³²⁴ *Id.*

³²⁵ Doty & Sowden, *supra* note 230, at 41. “Character must be developed, not taught. Training results in a skill, education results in a changed person. Therefore our Army needs to develop character and to undergo development, people must undergo a transformation that fundamentally alters how they think, feel, and behave.” *Id.*

³²⁶ *Id.* at 44.

Internalization of organizational values alone, however, is insufficient to prepare individuals to make ethical decisions. Individuals need both knowledge-based training in rules and values and application-based training in ethical decision-making. Decision-makers need to commit to using internalized values and rules to analyze ethical dilemmas, and training to apply the rules and values to the dilemma. Instead of wholesale repeal of ethics training, or simply increasing the quantity of knowledge-based ethics training,³²⁷ the Army should undertake qualitative revisions to its strategy for teaching ethical decision-making. Recent doctrinal changes make it easier for soldiers to internalize and commit to the Army's organizational values. Now the Army must make qualitative changes to its ethics training paradigm to implement the doctrinal adjustments. Ethical decision-making must be emphasized in training if the Army wants to complete the transformation from a compliance organization to an integrity organization.³²⁸

“Over time, with reinforcement and correction by the profession, our [s]oldiers will make these principles such a habit that they routinely perform the actions the principles dictate.”³²⁹ Internalization of ethics and implementation of ethical decision-making will not occur overnight; it requires repetition.³³⁰ Repetition leads to internalization, and internalization results in commitment. In order to make conduct habitual, soldiers must experience ethical dilemmas and work through them, developing a bank of experiences to draw from for future decision-making. “Aristotle spoke of virtue and ethics as practical wisdom, which one may develop by acquiring knowledge and engaging in habituation—an individual gains wisdom only after he combines his knowledge with personal experience.”³³¹

³²⁷ “[T]he Army required face-to-face annual ethics training for all employees from approximately 2002 through 2006[, it] subsequently eliminated the requirement because of the resource burden and the concern that the training was not needed for most enlisted personnel and junior officers.” GAO Report on Military Ethics, *supra* note 5, at 15. This training focused on knowledge based training on the financial ethics rule, not on ethical decision-making. *Id.* at 14. During this period, the Army increased the quantity of the training, but did not make qualitative adjustments to target training to specifically address decision-making in the situations the individuals were facing, or preparing to face. *Id.* at 15.

³²⁸ In the integrity mode, “[t]raining on moral decision-making becomes much more prominent as there is an increased reliance on the moral discretion of employees” Rossouw & van Vuuren, *supra* note 87, at 398.

³²⁹ Imiola & Cazier, *supra* note 60, at 17.

³³⁰ ADRP 7-0, *supra* note 15, para. 2-10.

³³¹ THE ETHICS OF ARISTOTLE 10–11 (Jim Manis ed., J.A. Smith trans., 2004).

President Obama recently said, “[l]eading—always—with the example of our values. That [is] what makes us exceptional. That [is] what keeps us strong. And that [is] why we must keep striving to hold ourselves to the highest of standards—our own.”³³² Secretary of Defense Ash Carter also recently emphasized the need for “Leader-Led, Values-Based Ethics Engagement.”³³³

I expect leaders at every level of the Department to engage personally with the subordinates in both formal and informal discussions about values-based decision-making. Our personnel, at all levels, should carefully consider the Department’s primary ethical values set forth in Chapter 12 of the Joint Ethics Regulation [T]his engagement must begin with top leaders and cascade down Leaders at all levels must foster a culture of ethics within their organizations by setting the example in their own conduct and by making values-based decision-making central to all aspects of the Department’s activities This should be viewed as a continuing engagement rather than a one-time effort.³³⁴

The Army is leaning forward to accept this mission. The Army needs ethical leaders and soldiers committed its organizational values. It recognizes the need for members whose conduct is governed by skilled ethical decision-making. The PRICE strategy for ethical decision-making training can accomplish that mission.

³³² Barack Obama, President of the United States, State of the Union Address (Jan. 20, 2015).

³³³ Memorandum from The Secretary of Defense, to Secretaries of the Military Departments et al., subject: Leader-Led, Values-Based Ethics Engagement (12 Feb. 2016).

³³⁴ *Id.*

BOOK REVIEW
THE LAW OF ARMED CONFLICT¹

REVIEWED BY FRED L. BORCH III*

This book is a masterpiece of scholarship. Not only does it cover all the legal issues that undergraduate and graduate students, and lawyers and academics would expect to see in a text, but it addresses legal issues in the Law of Armed Conflict (LOAC) that are still evolving. No other book adequately examines the legality of autonomous weapons, drones, or the targeted killing of U.S. civilians overseas. No other work comparably discusses cross-border counter-attacks, the concept of “continuous combat function” developed by the International Committee of the Red Cross (ICRC), or examines the legal basis for “security detention.” Well-written and superbly organized, this new edition of *The Law of Armed Conflict* will see wide use in the classroom. It also belongs on the shelf of every judge advocate and anyone interested in the LOAC.

Author Gary D. Solis, a retired U.S. marine who spent two combat tours as an armor officer in Vietnam, served as a lawyer in the Marine Corps, taught law for seven years at the United States Military Academy, and is now an adjunct professor at Georgetown University.² He is ideally

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Fred Borch is the author of a number of books and articles on legal and non-legal topics, including *JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI* (2001); *JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA* (2004); *FOR MILITARY MERIT: RECIPIENTS OF THE PURPLE HEART* (2010); and *MEDALS FOR SOLDIERS AND AIRMEN* (2013).

¹ GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* (2d ed. 2016). (Full disclosure: Solis and I have known each other for many years and I am thanked in the acknowledgements).

² Gary D. Solis, *GEORGETOWN LAW*, <http://www.law.georgetown.edu/faculty/solis-gary-d.cfm#> (last visited May 16, 2016).

suitied to write about the law of war because he has experienced combat firsthand and, as a lawyer and academic, has a thorough knowledge of the nuances of the laws regulating armed hostilities.³

The real value of *The Law of Armed Conflict* is that it is a book for both the generalist and the specialist. Since it is written in the format of a standard teaching text, and intended for use by undergraduate, graduate, and law students, an individual with little knowledge of LOAC will find it easy to use. Solis begins by examining the history of the law in warfare. He then looks at nation-state practice, conventions and treaties, and declarations and regulations before discussing a wide variety of issues and concepts. These concepts include the following: the legal status of prisoners of war and Taliban and al-Qaeda fighters; the principles of distinction, military necessity, unnecessary suffering, proportionality; obedience to orders and command responsibility; targeting and rules of engagement; and ruses and perfidy.⁴

As he did in the first edition of this book, Solis devotes considerable space to a discussion of war crimes,⁵ including an examination of the practice of “double-tapping” used by some U.S. soldiers and marines in Afghanistan and Iraq.⁶ Double-tapping, also known as a dead check, is the “shooting of wounded or apparently dead insurgents to ensure that they are dead.”⁷ *The Law of Armed Conflict* explains that, while it is a war crime to *indiscriminately* shoot a wounded or apparently dead enemy combatant—because this is simply murder on the battlefield—it is lawful to shoot a wounded insurgent who appears to be reaching for a weapon.⁸ The value of this book, however, is that it illuminates the issue of double-tapping and other thorny subjects. Using the following poem reportedly written by an enlisted soldier in the 101st Airborne Division, the author demonstrates how some soldiers feel about these topics:

You media pansies may squeal and squirm
But a fighting man knows that the way to confirm
That some jihadist bastard is finally dead

³ SOLIS *supra* note 1, at i.

⁴ *Id.* at 268–309.

⁵ *Id.* at 328–62.

⁶ *Id.* at 358–61.

⁷ *Id.* at 358.

⁸ See generally *The Means and Methods of Warfare*, LIBRARY OF CONGRESS ch. 9 (2015), http://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Deskbook-2015_Ch9.pdf (discussing *hors de combat* and the loss of protection therefrom).

Is a brain-tappin' round fired into his head
To hell with you wimps from your Ivy League schools
Sitting far from the war telling me about rules
And preaching to me your wrong-headed contention
That I should observe the Geneva Convention.”⁹

As this poetry makes clear, not all soldiers are accepting of the laws of war, and Solis is to be commended for using this real-world example to underscore this reality.

Perhaps more importantly, Solis's exploration of double-tapping demonstrates why *The Law of Armed Conflict* also is a book for the specialist: double-tapping, like the legality of drones in combat, the targeting of enemy commanders, and the lawfulness of cross-border counter-attacks, are all real-world issues that practitioners today must address. In exploring these and other issues that are still evolving in the LOAC, Solis's book provides much needed guidance that will be found in no other book.

The new edition of *The Law of Armed Conflict* has new chapters that bring the law of war coverage up to date. There is a new chapter on cyber warfare, and an insightful discussion of what constitutes a “cyber-attack.”¹⁰ As Solis explains, there is nothing inherently unlawful about a cyber-attack.¹¹ On the contrary, it is simply a weapon and, provided the cyber-attack is on a lawful target in an on-going armed conflict, is permitted under LOAC.¹² The more interesting issue is deciding what would be a lawful response to a cyber-attack that resulted in death and destruction on the magnitude of the Japanese attack on Pearl Harbor in December 1941.¹³ Solis suggests a reprisal, and looks to U.S. presidential directives and the law of reprisal as limited in the 1949 Geneva Conventions.¹⁴

There also is a chapter on security detention.¹⁵ Nothing could be timelier for practitioners, especially as it appears that as many as fifty

⁹ SOLIS *supra* note 1, at 368–69.

¹⁰ *Id.* at 673–709.

¹¹ *Id.* at 674.

¹² *Id.*

¹³ Jennifer Rosenberg, *Pearl Harbor*, ABOUT EDUCATION, <http://history1900s.about.com/od/worldwarii/a/Attack-Pearl-Harbor.htm> (last visited May 16, 2016).

¹⁴ SOLIS *supra* note 1, at 701–02.

¹⁵ *Id.* at 817–41.

detainees now held by the United States at Guantánamo Bay will not be released in the foreseeable future. *The Law of Armed Conflict* explains that this type of internment, also referred to as “administrative detention” or “preventive detention,” is a long-recognized aspect of armed conflict.¹⁶ Solis discusses how Geneva Convention IV permits security detention as long as there is an on-going armed conflict, and as long as other specified requirements are satisfied.¹⁷ When that conflict ends, however, the legal authority for continued security detention must be found in domestic law. For U.S. practitioners, this is Executive Order (EO) 13567, “Periodic Review of Individuals Detained at Guantánamo Bay Naval Station,” which President Obama signed in 2011.¹⁸ This EO outlines standards for the initial detention, and *continued* detention, of Guantánamo detainees, sets requirements for ongoing periodic reviews of continued detention, and specifies procedures to be followed in the reviews.¹⁹ It lays out a standard for confinement of indefinite duration: “Continued law of war detention is warranted for a detainee . . . if it is necessary to protect against a significant threat to the security of the United States.”²⁰

As *The Law of Armed Conflict* shows, an additional legal basis for security detention is to be found in the 2012 National Defense Authorization Act, which codifies U.S. security detention authority, essentially repeating the standards announced in EO 13567, and broadening the category of potential detainees to include not only Guantánamo detainees, but anyone who “was a part of or substantially supported” al Qaeda, the Taliban, or associated forces.²¹ Few Americans, much less judge advocates, know that there is both an EO and statutory authority for security detention, and yet this book contains a chapter that discusses these provisions and their role in what is certain to be an evolving issue in LOAC.²²

¹⁶ *Id.* at 820–23.

¹⁷ *Geneva Convention IV*, LAW IN.ORG (Aug. 2012), <http://lawin.org/geneva-convention-iv/> (last visited May 16, 2016).

¹⁸ *Executive Order 13567*, WHITE HOUSE, <https://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-13567-periodic-review-individuals-detained-guant-namo-ba> (last visited May 16, 2016).

¹⁹ *Id.*

²⁰ SOLIS *supra* note 1, at 826.

²¹ *Id.* at 828.

²² *Id.* at 817–41.

The lawfulness of cross-border counter-attacks is dealt with in another new chapter.²³ Today, enemy fighters who are members of non-state armed opposition groups routinely attack U.S. and Allied forces, and then retreat into neighboring states that either cannot or will not control the unlawful activities of these fighters sheltering within their borders.²⁴ *The Law of Armed Conflict* argues that cross-border counter-attacks against these enemy fighters, which the United States and its close Allies have been employing for several years in Pakistan and other places, are lawful.²⁵

A related issue is the lawfulness of attacking enemy operational commanders in a non-international armed conflict. Assume this scenario:

American soldiers are on patrol in a small village in Afghanistan. They recognize a Taliban leader, whom they know exercises operational command authority over subordinate enemy fighters, buying fruit at the village market. He sees them and starts to run. It is not possible to capture this leader but they have a clean shot at him. May they kill him, even though he is not directly taking part in hostilities at the moment?

As *The Law of Armed Conflict* explains, the LOAC concept of “continuous combat function” addresses this very practical situation.²⁶ Developed by the ICRC, and arguably now part of customary international law, the idea is that if an individual exercises “operational command,” then he has a “continuous combat function” and may be targeted.²⁷ In this regard, the fact that the individual is not directly participating in hostilities at the moment of targeting is no longer relevant.²⁸ Consequently, in the scenario, the Taliban leader may be killed because he has been positively identified as an enemy operational

²³ *Id.* at 589–602.

²⁴ Frontline, *Return of the Taliban*, PUB. BROADCASTING SERV. (Oct. 3, 2006), <http://www.pbs.org/wgbh/pages/frontline/taliban/etc/synopsis.html> (discussing Taliban retreat into Pakistan as a method of avoidance early in the conflict).

²⁵ SOLIS *supra* note 1, at 589–602.

²⁶ *Id.* at 584–86.

²⁷ *Direct participation in hostilities: questions & answers*, INT’L COMM. RED CROSS (Feb. 6, 2009), <https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm> (answering questions concerning “direct participation in hostilities” and the International Committee of the Red Cross’s (ICRC) Interpretive Guidance).

²⁸ SOLIS *supra* note 1, at 584.

commander.²⁹ The real world example? The targeting of Nasser Al-Aulaqi in Yemen.³⁰ Since the Yemenis were either unwilling or unable to exercise control over Al-Aulaqi's activities, it was lawful for the United States to attack him, even though Al-Aulaqi was not participating in hostilities at the time.³¹ But, as Solis makes clear in his book, state sovereignty sometimes may trump the "continuous combat function" rule: if Al-Aulaqi had been present in France, the United States could not lawfully kill him on sight because France has a functioning system of police, arrest, trial and extradition.³² Again, *The Law of Armed Conflict's* discussion of this evolving issue in LOAC is what makes the book so valuable.³³

Finally, Solis does not shy away from controversy. In a chapter on military commissions, he examines the lawfulness of using such military tribunals to prosecute non-state actors for war crimes.³⁴ The continuing employment of military commissions by the United States has been a contentious topic among both policy makers and lawyers, and Solis's analysis of tribunals' place in LOAC is important. Some readers will take issue with his conclusion that using military commissions to try al Qaeda terrorists may ultimately fail, but his reasoning is thought-provoking.³⁵

The first edition of *The Law of Armed Conflict* was 660 pages. This new edition is 890 pages and not only has new chapters (some of which have been discussed in this review) but an expanded "Table of Cases" and "Table of Treaties."³⁶ As a resource, Solis's book is unrivaled because it has more than two thousand footnotes, an extensive bibliography, and a superb index. The work deserves to reach a wide

²⁹ *Id.* at 585–86.

³⁰ Charlie Savage, *Court Releases Large Parts of Memo Approving Killing of American in Yemen*, N.Y. TIMES (June 23, 2014), <http://www.nytimes.com/2014/06/24/us/justice-department-found-it-lawful-to-target-anwar-al-awlaki.html> (linking to the Justice Department memo deeming it "lawful to target Anwar al-Awlaki, an American-born Muslim cleric accused of becoming a terrorist").

³¹ SOLIS *supra* note 1, at 598–602.

³² *Id.* at 598.

³³ *Id.* at 599–601. Solis' view has been confirmed by the D.C. Circuit Court of Appeals in *Nasser Al-Aulaqi v. Leon C. Panetta, et al.*, Civil Action No. 12-1192 (RMC), U.S. District Court for D.C. (Apr. 4, 2014).

³⁴ *Id.* at 793–806.

³⁵ *Id.*

³⁶ *Id.* at x–xiv.

audience, if for no other reason than it is tomorrow's LOAC in today's textbook.

By Order of the Secretary of the Army:

Official:

MARK A. MILLEY
General, United States Army
Chief of Staff

A handwritten signature in black ink, appearing to read "Gerald B. O'Keefe". The signature is written in a cursive style with a large initial "G" and a distinct "B" and "O'Keefe" following.

GERALD B. O'KEEFE
Administrative Assistant to the
Secretary of the Army
1631303

